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**Corporate Governance Codes and their  
Implementation**

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**Abstract**

*Good governance – both by public institutions and by private business – is considered one of the building blocks upon which economic success is based. Hence the efforts undertaken by many international and national organisations and bodies to improve governance, especially by enacting rules, standards or recommendations, have to be respected and serve as models against which directors of these institutions or business firms can measure their conduct.*

*Corporate governance is a subject that is notoriously difficult to define in one sentence. Some view corporate governance in the narrow sense, dealing with the structure and functioning of the boards of directors, and their relationship to management. This narrow definition is the one often found in corporate governance codes. A broader definition includes a company's relationships with shareholders, especially in organisations with concentrated ownership. Finally, academic studies dealing with governance broaden the definition to all internal relationships within a business, including the issues raised by the conduct of shareholders, especially institutional investors, the functioning of the general meeting and the company's relationship with the financial markets. As this article relates to the implementation of corporate governance codes and not to their substance, the narrow definition will be followed*

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## *Corporate governance codes and their implementation*

*Eddy Wymeersch<sup>o</sup>*

Good governance – both by public institutions and by private business – is considered one of the building blocks upon which economic success is based. Hence the efforts undertaken by many international<sup>1</sup> and national organisations and bodies to improve governance, especially by enacting rules, standards or recommendations, have to be respected and serve as models against which directors of these institutions or business firms can measure their conduct.

Corporate governance is a subject that is notoriously difficult to define in one sentence. Some view corporate governance in the narrow sense, dealing with the structure and functioning of the boards of directors, and their relationship to management. This narrow definition is the one often found in corporate governance codes. A broader definition includes a company's relationships with shareholders, especially in organisations with concentrated ownership. Finally, academic studies dealing with governance broaden the definition to all internal relationships within a business, including the issues raised by the conduct of shareholders, especially institutional investors, the functioning of the general meeting and the company's relationship with the financial markets. As this article relates to the implementation of corporate governance codes and not to their substance, the narrow definition will be followed.<sup>2</sup>

### *Regulating corporate governance*

#### *Company law versus governance codes*

Rules relating to corporate governance are usually mixed in nature: the basic rules are laid down in statutory instruments, usually company laws. Legislation covering more complex topics, like the rules on takeover bids, also contain crucially important elements of corporate governance.<sup>3</sup> Securities regulation contains the basis for the disclosure rules, which are often used for enforcing corporate governance codes.

In addition to the statutory rules, governance rules and practices are often imposed by the stock exchange on which the shares of the company are traded. The articles of association of the company, as well as the internal rules of the board of directors, may also contain

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<sup>1</sup> OECD Principles of Corporate Governance 2004: <http://www.oecd.org/dataoecd/32/18/31557724.pdf>. The OECD principles have served as a direct and explicitly mentioned source for some of the national codes, for example the Czech Corporate Governance Code 2004: [http://www.sec.cz/export/EN-/Publications/get\\_dms\\_file.do?FileId=1253](http://www.sec.cz/export/EN-/Publications/get_dms_file.do?FileId=1253).

<sup>2</sup> See also E Wymeersch (2006), "Enforcing Corporate Governance Codes", ECGI - Law Working Paper No. 46/2005, Social Science Research Network and Journal of Corporate Law Studies: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=759364](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=759364)

<sup>3</sup> For example, Articles 9 and 11 of the Takeover Directive, 2004/25 of 21 April 2004, OJ L 142/12 of 30 April 2004.



governance provisions. Traditions and good practice in a given jurisdiction should not remain unmentioned.

Recently, there has been a move to streamline and coordinate these more informal sources of corporate governance into “codes”.<sup>4</sup> These codes should not be considered equivalent to law or contractual provisions relating to governance.

### *A short typology of corporate governance codes*

Looking at the different “codes” that have been drawn up in Europe, it is clear that these vary considerably in terms of content, legal status and origin. In addition, their implementation is often founded on different techniques. As to their scope, corporate governance codes mostly relate to listed companies only.<sup>5</sup> As to the origin and legal status of the codes, several models can be distinguished.

Codes developed as private initiatives, often originated from academia<sup>6</sup> or from a leading association of business firms.<sup>7</sup> These “recommendations” essentially have a mere moral value, presenting the way governance should be dealt with but without any technically binding force. This does not mean, however, that these instruments have no value: they serve as an example to the business community, and violation of its precepts would be stigmatised as a violation of the code. Strikingly, the “comply or explain” technique is usually not found in this type of governance recommendations. One could qualify this model as “voluntary”.

The second type of governance codes are directly linked with the securities markets. In a mild form, these codes have been drawn up under the aegis of the stock exchange,<sup>8</sup> or by a committee mandated by the exchange. In the stronger form, the codes are mentioned as a listing condition, allowing the exchange to refuse non-complying companies. It does not necessarily, however, allow it to impose the provisions on already listed companies. In this instance, non-compliant companies have to explain the reasons for non-compliance.

The third type of code is linked with the public authorities. This link is very diverse: in some cases the initiative to draw up the code was made with the participation of the ministries of finance or justice. Alternatively, the drafting committee was appointed by the ministry, or with its participation, or sometimes also with that of the market supervisor. Although this type

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<sup>4</sup> Most of the codes that have been released worldwide can be found on the web site of the European Corporate Governance Institute: [http://www.ecgi.org/codes/all\\_codes.php](http://www.ecgi.org/codes/all_codes.php)

<sup>5</sup> There are codes addressed to unlisted, especially family owned companies, for example the so-called Buisse Code in Belgium: [http://www.unizo.be/images/res109906\\_5.pdf](http://www.unizo.be/images/res109906_5.pdf). In addition, some codes make reference to unlisted companies to which the principles of the code is declared of use: see the Czech Code: [http://www.sec.cz/export/EN/Publications/get\\_dms\\_file.do?FileId=1253](http://www.sec.cz/export/EN/Publications/get_dms_file.do?FileId=1253)

<sup>6</sup> In Germany a group of academics published the first corporate governance code: Corporate Governance Grundssätze, a Frankfurt Initiative, Der Betrieb 2000, 238 and Berliner Initiativkreis, Der Betrieb, 2000, 1573. See M Lutter.

<sup>7</sup> Deutscher Corporate Governance Codex in Hommelhoff, Hopt von Werder (Eds) Handbuch Corporate Governance, 737. See for example, the Principles for Corporate Governance, October 2003, amalgamating the 1995 and 1999 Viénot and 2002 Bouton Reports containing recommendations for France and the Swiss code.

<sup>8</sup> See the 2004 Corporate Governance Recommendation prepared by the Budapest Stock Exchange: <http://www.bse.hu/gfx/download.arg?ptype=FILE&id=10013558&uio=4LONG1GAN3B42006801J127Z20I31326KBX6SEZ05guest>; in the Slovak Republic the 2002 Code is the product of a cooperation between the Stock Exchange and the associations of company directors and managers. See: <http://www.cecga.org/core.php?sid=0&lang=2&f=pages&p=showpage&s=docs>



of code has no legal standing on itself, it draws its authority from the support of the public authorities and the quality of its draftsmen. Publication in the official journal contributes to the authority of the code, but does not change its legal standing as a non-mandatory instrument.<sup>9</sup>

In a further model, a more explicit link is established with the legislation. In Germany and in the Netherlands, company law contains an express reference to the governance code, whereby companies are legally obliged to adhere to the code, and can only derogate by stating their reasons. The business community, especially the institutional investors, attach importance to these codes. They help investors assess the issuer's shares, and hence their willingness to invest in these shares. This type of code is sometimes referred to as "self-regulatory", but the term is rather ambiguous, as the degree of involvement of the regulated firms varies.

The final type of code is referred to in law and supervised by a government body, more specifically the securities market supervisor. Although the practice is not clear, this seems to be the approach followed in Spain. Depending on the way the supervision is exercised, it may come close to traditional statutory law. The full statutory approach is the one followed in the US with the Sarbanes Oxley Act. The rigidity of this regulation has often been regretted.

The dividing line between soft regulation and hard law is a shifting one. There is a relatively large variety: in the original EU member states, codes focus on the functioning of the board, leaving company law questions aside. In the new member states, the codes broaden to issues of company law in general.

Most of the time, countries have "advancing juridification", whereby the principle is laid down in the law, while the detailed rules of functioning are left to internal, soft laws. Independent directors and audit committees, for example, are recommended in most codes. The former have been the subject of an EU recommendation, while the principle of having an audit committee or a similar function is laid down in the fourth amendment to the company law directive. Further details are left to the companies themselves.

### ***"Comply or explain"***

One of the essential differences between corporate governance codes and traditional company law is that even if the code is binding as a requirement – which is rarely the case – it is not binding as to substance. This feature lies at the basis of the famous "comply or explain" principle.<sup>10</sup> Firms subject to the code are invited or obliged to adhere to the code: in practice, they cannot "just say no". However, they are not bound to follow the provisions of the code on any given item.

If a company deems it preferable to set aside a specific provision of the code, it may do so provided they state their reasons. This is the "explain" alternative. According to the "comply" principle, by stating the objectives that a company wants to achieve, codes introduce significant flexibility in the system, and allow them to take account of the myriad of individual situations.

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<sup>9</sup> This is the case for the Slovenian code: <http://www.ljse.si/cgi-bin/jve.cgi?att=3313&sid=> . Also the German code was published in the official gazette, but the reference is part of the German Companies Act.

<sup>10</sup> The principle is expressly mentioned in the Belgium, Hungarian and Polish codes. It is part of the companies act in Germany and in the Netherlands.



Codes are an incentive for companies to grow towards better governance practices, without having to revolutionise their internal structures and procedures. This dynamic function should not be underestimated: often it is said that “corporate governance” is more about method, than about substance.

“Comply or explain” has one obvious drawback. If a company is free to set aside provisions of the code, provided they publish some sort of explanation, will this explanation be true and reliable? Will companies be able to shirk from the detailed requirements of the code by giving a general, boilerplate explanation? In other words, should codes be made legally mandatory and should the truth of explanations be verified?

### ***The role of disclosure***

In most corporate governance codes, disclosure plays a central role: companies disclose, in their annual report, how they deal with corporate governance issues. This information should conform to the code’s provisions. Disclosure therefore is a key element in all code driven governance systems, while conversely markets will strongly influence the governance practices.

## ***Enforcing corporate governance codes***

As almost all existing corporate governance codes are of a non-statutory nature, their binding force cannot be based on the usual legal techniques, for example liabilities, injunctions, fines, imprisonment. Generally soft law rules have to rely on the voluntary behaviour of their addressees. However, although voluntary in essence, this does not mean there are no strong incentives for companies to comply with the codes. The sanctions are essentially economical or financial, not legal. The extent to which these incentives ensure effective implementation of the codes is often doubted, but difficult to affirm or deny for lack of empirical data.

In many jurisdictions, there are sophisticated data about the formal implementation of the code’s provisions. This data include the number of companies which have designated independent directors or appointed audit committees. However, whether these directors are effectively independent, or whether the audit committee adequately performs the tasks expected of it, is much more difficult to verify.

In some EU member states the debate has taken a political turn with the legislator requiring that the code be formally adopted. In others, there have been discussions as to whether the securities supervisor should be involved. Only in Spain, the securities commission is mandated to check compliance with the code.

There are numerous instruments and techniques that support the voluntary implementation of corporate governance rules. Most of these create incentives for companies to abide by the code’s provisions. Market pressure and the fear of reputational damage often suffice for business leaders to adhere to the code.

Although not part of the law, corporate governance codes do not function in a legal vacuum. The relationship with the existing legal system needs to be clarified. In some EU member



states, a formal link with company law has been introduced. The extent to which these obligations can be supervised by securities supervisors has also been examined.

### ***Incentives for complying with corporate governance codes***

It is initially the responsibility of the board of directors to ensure that – within the applicable legal framework – the company’s corporate governance is well balanced and in accordance with the code. The board should also pay sufficient attention to its own functioning and evaluate its governance by introducing mechanisms that ensure these objectives. Such mechanisms include self assessment, appointing a separate corporate governance committee or calling on external expertise.

The board should report on its governance. This “governance statement” is set to become mandatory by European Directive. Disclosing the report increases the board’s external responsibility to both shareholders and to the market in general. Apart from reputation risk, directors may become civilly liable if the statement contains untrue facts, or is likely to mislead. It may also trigger the intervention of the securities supervisor.

The extent to which shareholders should be involved in producing the governance statement differs considerably between codes. In most codes, shareholders are informed about the governance statement, but do not approve it, at least not formally. The supervisory board – but not the general meeting – usually approves the statement. However, shareholders are more directly involved, for example, in the election of independent directors to the board at the general meeting.

Involvement of the shareholders in the corporate governance statement is usually considered interference in the board’s functioning. It is also seen as incompatible with the structural model of the company. However, boards can be fired if the general meeting considers the statement – differently from the actual governance practices – unsatisfactory. The statement can have a negative influence on the share price.

Involvement of the auditor in verifying the corporate governance statement is controversial. In many jurisdictions, the auditor has intimate knowledge of the company’s functioning. In some EU member states, an auditor’s intervention is considered part of the verification process, leading to the annual accounts and report. In others, it is stated that the auditor should limit its role to verifying the figures that are mentioned in the governance report. Intervention can only be formal and confirm whether the required disclosures are made in accordance with the provisions of the code, but not whether the information is true or accurate.

By imposing disclosure, the codes expose a company and its board to justification, outside criticism and most importantly to market assessment. In general, board members can be expected to protect their reputational capital and will voluntarily adhere to good governance practices, even in the absence of formal codes. The media have become more alert to these issues and regularly expose blatant shortcomings.

Pressure from peers should not be underestimated, as weak governance practices on one board may spill over to damage the reputation of other boards. More important, however, is the pressure of the markets. This includes all actors intervening in the capital markets: stock





exchanges, rating agencies, investment bankers, organisations, activist investors and their advisers, the media, the public.<sup>11</sup>

The most direct impact of weak governance practices will be on the company's rating. Rating agencies have recently begun including governance in their rating criteria and are developing specialised ratings specifically addressing a company's governance. Investment bankers, consultants and lawyers in general will advocate compliance with the applicable governance code. These professional parties will not jeopardise their highly valued reputations by associating with companies with poor corporate governance.

The effect of good governance on price formation is controversial in the sense that it is empirically difficult to prove that good governance has a positive impact on share price. It is much more evident, however, that "bad" governance has a negative impact, undermining the market's confidence in a company.<sup>12</sup> In the same sense, the publication of incomplete, or worse untrue, facts in the governance report is likely to severely damage a company's reputation, and affect its share price.

The impact of institutional investors should also be mentioned. These investors are often obliged to vote at the general meeting and take a public stand on governance issues. Institutional investors will hesitate to acquire shares in issuers whose practices do not abide by usual governance standards. When some issues are voted on – for example, measures entrenching management – these investors will generally instruct a proxy organisation to vote against the proposals. At this point in time, European investors have yet to employ the abrasive techniques practised by US institutionals in putting the worst governed companies on a black list. That being said, institutionals in Europe are increasingly putting boards under pressure regarding governance issues.

Often corporate governance codes are linked to the stock exchange. The exchange has a clear interest in ensuring companies it has admitted for trading comply with good governance standards and hence deserve their high quality label. As a result, governance conditions are often found in listing rules.<sup>13</sup> Upon access, the exchange will usually be able to enforce these rules. To maintain abeyance to the rules, or to impose them on already listed companies, is more difficult.

Apart from "name and shame", the exchange could delist the company's shares. In practice, however, delisting is not an option due to the damage it may inflict on investors. Therefore some exchanges follow a softer approach and motivate companies to adhere to its code. Some

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<sup>11</sup> This is the case for the Italian, French, Belgian, Swedish and Swiss codes.

<sup>12</sup> A positive correlation is shown in P Coombes and M Watson (2000), "Three surveys on corporate governance" *The McKinsey Quarterly*, Issue 4, p. 74. and E Nowak, R Rott and TG Mahr (2005), "Wer den Kodex nicht einhält, den bestraft der Kapitalmarkt?", *Zeitschrift für Unternehmens und Gesellschaftsrecht*, ZGR 252. The largely non-existent effect of the Sarbanes-Oxley Act, however, was shown in R Romano, "The Sarbanes-Oxley Act and the making of quack corporate governance", NYU, Law and Econ Research Paper 04-032. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=596101](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=596101)

<sup>13</sup> This is the case with the Governance Code of the Budapest Stock Exchange and the Slovak Corporate Governance Code. In the UK, the governance codes are part of the listing conditions and include important rules dealing with, among others, significant and controlling shareholders and conflicts of interest.





even organise education and training of directors and investor relation specialists.<sup>14</sup> Here the carrot will win over the stick.

In some instances, external monitoring may document the degree of implementation. Comparative reports on monitoring illustrate good practice and stimulate other companies to adopt similar conduct. Here again peer pressure and pressure from the media is important. This monitoring is undertaken spontaneously, for example by academics,<sup>15</sup> by associations of listed companies<sup>16</sup> or by consultancy firms.<sup>17</sup>

In some EU member states, the monitoring is undertaken by essentially an official body. The role of these committees is not to verify the individual compliance by individual companies, but to screen the overall practice in a given jurisdiction. The committee publishes its assessment, usually anonymously. It can also recommend changes to the code. This type of monitoring committee has been introduced in France<sup>18</sup>, in the Netherlands, in Switzerland and in a different form, in the UK.<sup>19</sup>

It is unlikely a monitoring committee would use the “name and shame” technique with respect to companies that refuse to comply with the code. The rules on libel or slander would most of the time prevent this approach. Official review panels could take a stronger stand, provided the publication of names be allowed by the law.

Little analysis has been undertaken on the use of governance criteria in connection with loan conditions. Sometimes the loan documentation will contain explicit clauses that can be classified under the governance heading. This includes requirements relating to the number of independent directors on the board or the existence of a formal audit committee. These covenants may therefore be considered as another monitoring device.

The effectiveness of these enforcement instruments cannot be clearly established. While the empirical studies indicate whether the separate provisions of the codes have been addressed, they do not yield reliable information as to the substance of implementation. If implementation has been formally compliant, but is substantively unsatisfactory, ultimately only the board of directors would be able to identify the shortcomings and to impose corrective action.

### ***Legal rules specifically ensuring compliance with corporate governance codes***

Although corporate governance codes generally are not legally binding, being either voluntary or self-regulatory, there is little doubt that they have legal relevance. In case law, judges are likely to make reference to the codes when looking for guidance. It prevents them from

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<sup>14</sup> See the Polish Code: <http://www.gpw.com.pl/zrodla/gpw/pdf/Best2005.pdf>

<sup>15</sup> See A von Werder (2005), “Die Akzeptanz der Empfehlungen und Anregungen des Deutschen Corporate Governance Kodex”, *Der Betrieb*, 2005, 841.

<sup>16</sup> See Assonime, *Analisi dello stato di attuazione del Codice di Autodisciplina delle società quotate* (Anno 2005), study 25, December 2005:

[http://www2.assonime.it:81/assonime/corpgov/ca.nsf/103/BCF1B71A987DC34FC12570DD005E68B4/\\$File/testo+e+appendice+analisi+2005.pdf?OpenElement](http://www2.assonime.it:81/assonime/corpgov/ca.nsf/103/BCF1B71A987DC34FC12570DD005E68B4/$File/testo+e+appendice+analisi+2005.pdf?OpenElement)

<sup>17</sup> See Deminor: <http://www.deminor.be/articles.do?id=3491>

<sup>18</sup> For France: Rapport de l'AMF sur le gouvernement d'entreprise et les procédures de contrôle interne, 13 January 2005, Revue AMF: <http://www.cbfa.be/nl/publications/stu/stu.asp>

<sup>19</sup> The Financial Reporting Council, an independent regulator for corporate reporting and governance, was created on 1 April 2004. It acts in the field of corporate governance without an explicit statutory base, although reference is made to the rules on listing on the exchange, which require compliance with the code.



having to determine themselves what is widely accepted business behaviour or “good practice”.

Outside the field of liability of directors, the same criterion might also be used, for example to apply remedies related to wrongful trading, or according to some laws, to decide upon a judicial enquiry.<sup>20</sup> This phenomenon of absorption of soft law rules by the legal system has been witnessed in several fields. It acts as a technique for filling in blank norms in the legal system.

“Good faith”, liability for violating the duty of care and general principles like the Dutch “reasonable and equitable conduct” (“*redelijkheid en billijkheid*”) are the usual entry points through which the legal order absorbs elements drawn from soft law. These elements include professional “conduct of business” rules, “state of the art” techniques, model contracts and other rules grown out of business practice. Now that the corporate governance rules have been written down, “codified” and are supported by leading businessmen, by the stock exchanges and the securities commissions, it is obvious that the judge will refer to them rather than apply rules of his own determination.

In both Germany and the Netherlands, company law contains an express provision which states listed companies must publish an annual declaration, making express reference to the corporate governance code. Companies must declare that they have respected the code, while indicating which recommendations have not been followed. Both systems adhere to the “comply or explain” philosophy, and do not declare the substantive rules of the code applicable at law.

Companies that do not adhere to the codes would hence violate company law and face the sanctions provided under that law.<sup>21</sup> Companies might, however, simply state that they adhere to the code without giving any further information. The information should not be untrue or false, as this would trigger the liability of the members of these bodies. However with respect to the substance of the information, company law contains no express provision: this is the sole responsibility of the board. The Dutch corporate governance code – but not the company law – states that the governance statement should be submitted to the general meeting and that significant changes should be discussed.

A difficult question relates to the consequences of deficient corporate governance statements. When a board adheres to the code and publishes reasons for not complying, the motivation disclosed may be deficient in several respects. This could be because the disclosed reason may be futile, or boilerplate, it may be untrue or incomplete, or the information may be misleading or even false.

If the information the company publishes merely amounts to a formal explanation, but is intrinsically insufficient to justify its non-compliance with the code, there is no direct sanction applicable. However, if the information is mandated by other provisions, for example company law, or published according to a financial regulation, there may be a

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<sup>20</sup> On the basis of Article 2:345 of the Dutch civil code, the court can mandate an investigation (“*enquête*”) about the “management and state of affairs” (“*beleid en gang van zaken*”) of any company, allowing the court to take measures in case of “mismanagement” (“*wanbeleid*”).

<sup>21</sup> It runs contrary to the law if the board “just said no”.



sanction (see for example the obligation to publish price-sensitive information).<sup>22</sup> When untrue, incomplete or even misleading information is published, the rules on board liability for disclosure usually apply.<sup>23</sup>

In some jurisdictions, the question has been debated to what extent a securities supervisor should be involved in monitoring the implementation of the corporate governance codes. Indeed securities supervisors have privileged contact with listed companies. They already review some of the company's disclosures. As the governance statements often form part of the annual reports, it seems logical to charge securities supervisors with this competence.

Some jurisdictions, especially the Netherlands, believe the securities supervisor should only be involved in checking that the corporate governance statement conforms with the code. The supervisor should not be involved in checking the content. The content should be entirely left to the board of directors who are in charge and take responsibility for running the company.

Making governance codes part of the law should be avoided as it eliminates the flexibility originally intended for. The role of the external monitors – securities commissions, review panels, etc – should remain defined within the limits of “external review”. This would not prevent the securities supervisors from exercising their other legal competences, for example verifying whether the factual elements in the annual report – such as directors' remuneration – are true. This check would occur irrespective of whether these elements are part of the corporate governance statement or not.

In one jurisdiction (Spain), the securities supervisor is set to be in charge of verifying whether the governance statement conforms with the law, for example whether the legal criteria for deeming a director independent have effectively been respected. It is unclear what the results of this approach will be.

By writing the governance rules into the law, one destroys the typical advantages of the soft law codes: adaptability and flexibility to develop better solutions. However, with respect to specific items, if it appears that the code provisions have not been effective, and that the business community refuses to abide by it, the law should step in. This is the lesson drawn from the German experience. The refusal by a large part of the business community to publish data on director's remuneration has led to a formal law, imposing such disclosure.

### ***Corporate governance codes in central Europe***

In the new EU member states considerable attention has been paid to the subject of corporate governance. In most states elaborate codes have been produced, mainly under the aegis of the stock exchange and often with strong support of the public authorities. The explanation for this strong interest can be found in factors that are linked to the transition phase of their economies.

Stock exchanges need codes to support the reputation of their listed shares. Codes are needed as part of the drive of local boards and management to adhere to good practice. The presence

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<sup>22</sup> See Article 6 of the Market Abuse Directive 2003/6 of 28 January 2003, OJ L 96/16 of 12 April 2003.

<sup>23</sup> For an extensive study of these subjects, see Hopt and Voigt (eds) (2005), *Prospekt-und Kapitalmarktinformatiionshaftung*, Mohr Siebeck, Tübingen.



of controlling shareholders, and especially of the state, require countervailing forces. In other cases, the codes are expected to supplement company law.

The effectiveness of the codes is difficult to assess. Critical voices<sup>24</sup> have stated that the codes do not efficiently deal with the dominant influence of major shareholders, including the state. A similar observation was made in the original EU member states, in the early years after the codes were enacted. There the criticism has subsided as pressure of the independent press, international investors and their supporting organisations, and in critical cases, from an active securities supervisor has been quite powerful. The influence of the state remains a specific concern, particularly the negative share premium which exists due to state participation. Here too, the code at least serves as a reference point.

### ***The amendments to the 4<sup>th</sup> and 7<sup>th</sup> directive.***

Recently the EU adopted a proposal to amend the 4<sup>th</sup> and 7<sup>th</sup> company law directives. These amendments stated that listed companies should publish a “corporate governance statement”, whether as part of their annual reports, or in a separate report.<sup>25</sup> The statement should include:

- a) a reference to the mandatory corporate governance code; however a reference to a voluntary code may be allowed by company law. In addition, the statement should contain “all necessary information about the corporate governance practices applied beyond the requirements under national law”
- b) the “comply or explain rule” for departures from the corporate governance code: this relates not only to specific provisions but to the code as a whole
- c) Further information on internal controls and risk management systems.

The directive further calls for members of the board to be liable for the corporate governance statement. It states that there should be penalties for infringing the implementation of national provisions. Administrative sanctioning is not mentioned, but is likely to constitute an effective enforcement instrument, provided it is clarified who will be entitled to impose the fines.

### ***Conclusion***

The enforcement of corporate governance codes is a complex matter. Compliance is insured first and foremost by internal mechanisms: the board of directors and the management have to take responsibility for applying the code, under the overall guidance of the shareholders. The market will provide the environment in which developments will thrive.

Outside monitoring - the auditor, the supervisor, the regulated market, a review panel – may also be envisaged. However, their remit is generally restricted to formal assessment. Judicial enforcement is not generally favoured as seen by existing statutory governance rules.

As stated by the European Corporate Governance Forum, the role of shareholders and of the general meeting deserve to be strengthened. This will contribute to better management of the company and accountability of the board. By establishing a stronger link between market-led enforcement and internal governance instruments, the

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<sup>24</sup> N. Cankar (2005), “Transition economies and corporate governance codes : can self-regulation of corporate governance really work?”, JCLS 285

<sup>25</sup> See proposed Article 46 a, compromise proposal dated 22 April 2005: [http://www.focusifrs.com/content/FichiersFocusIfrs/ACTUALITE/actu\\_divers/Propos\\_modif\\_4-7\\_directive\\_04-2005.pdf](http://www.focusifrs.com/content/FichiersFocusIfrs/ACTUALITE/actu_divers/Propos_modif_4-7_directive_04-2005.pdf)



overall governance system is likely to be strengthened. This will be more successful than imposing formal legal or administrative requirements. Inspiration can be sought in the recent initiatives of the European Commission on shareholder rights.<sup>26</sup>

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<sup>26</sup> See “Fostering an Appropriate Regime for Shareholders”, 13 May 2005, second consultation.

# Financial Law Institute

The **Financial Law Institute** is a research and teaching unit within the Law School of the University of Ghent, Belgium. The research activities undertaken within the Institute focus on various issues of company and financial law, including private and public law of banking, capital markets regulation, company law and corporate governance.

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