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I am proud to present this new edition of *The Corporate Governance Review* to you.

In this ninth edition, we can see that corporate governance is becoming a more vital and all-encompassing topic with each year that passes. We all realise that the modern corporation is one of the most ingenious concepts ever devised. Our lives are dominated by corporations. We eat and breathe through them, we travel with them, we are entertained by them, most of us work for them. Most corporations aim to add value to society, and they very often do. Some, however, are exploiting, polluting, poisoning and impoverishing us. A lot depends on the commitment, direction and aims of a corporation’s founders, shareholders, boards and management, and employees. Do they show commitment to all stakeholders and to long-term shareholders, or mainly to short-term shareholders? There are many variations on the structure of corporations and boards within each country and between countries. All will agree that much depends on the personalities and commitment of the persons of influence in the corporation.

We see that everyone wants to be involved in better corporate governance: parliaments, governments, the European Commission, the US Securities and Exchange Commission (SEC), the Organisation for Economic Co-operation and Development (OECD), the UN’s Ruggie reports, the media, supervising national banks, more and more shareholder activists and other stakeholders. The business world is getting more complex and overregulated, and there are more black swans, while good strategies can quite quickly become outdated. Most directors are working diligently, many with even more diligence. Nevertheless, there have been failures in some sectors, so trust has to be regained. How can directors do all their increasingly complex work and communicate with all the parties mentioned above?

What should executive directors know? What should non-executive directors know? What systems should they set up for better enterprise risk management? How can chairs create a balance against imperial CEOs? Can lead or senior directors create sufficient balance? Should most non-executive directors understand the business? How much time should they spend on their function? How independent must they be? What about diversity? Should their pay be lower? What are the stewardship responsibilities of shareholders? What are the pros and cons of shareholder rights plans and takeover defences?

Governments, the European Commission and the SEC are all pressing for more formal inflexible legislative acts, especially in the area of remuneration. Acts set minimum standards, while codes of best practice set aspirational standards. We see a large influence on norms by codes and influential investor groups.

More international investors, voting advisory associations and shareholder activists want to be involved in dialogue with boards about strategy, succession and income. Indeed, far-sighted boards have ‘selected engagements’ with stewardship shareholders to create trust.
What more can they do to show all stakeholders that they are improving their enterprises other than through setting a better tone from the top? Should they put big signs on their buildings emphasising integrity, stewardship and respect?

Interest in corporate governance has been increasing since 1992, when shareholder activists forced out the CEO at General Motors and the first corporate governance code – the Cadbury Code – was written. The OECD produced a model code, and many countries produced national versions along the lines of the Cadbury comply or explain model. This has generally led to more transparency, accountability, fairness and responsibility. However, there have been instances where CEOs have gradually amassed too much power, or companies have not developed new strategies and have produced bad results – and sometimes even failure. More are failing since the global financial crisis than previously, hence the increased outside interest in legislation, further supervision and new corporate governance codes for boards, and stewardship codes for shareholders and shareholder activists. The European Commission is developing a regulation for this area as well. Recently, we see that governments want to involve themselves in defending national companies against takeovers by foreign enterprises. We also see a strong movement of green investors, which often is well appreciated by directors. There is a move to corporate citizenship.

This all implies that executive and non-executive directors should work harder and more as a team on long-term policy, strategy, entrepreneurship and investment in R&D. More money is lost through lax or poor directorship than through mistakes. On the other hand, corporate risk management with new risks entering such as a digitalised world and cybercrime is an essential part of directors’ responsibilities, as is the tone from the top. How can directors do their important work well without being petrified of attacks from shareholders, regulations and the press?

Each country has its own measures; however, the chapters of this book also show a convergence. Understanding differences leads to harmony. The concept underlying the book is of a one-volume text containing a series of reasonably short, but sufficiently detailed, jurisdictional overviews that permit convenient comparisons, where a quick first look at key issues would be helpful to general counsel and their clients.

My aim as editor has been to achieve a high quality of content so that *The Corporate Governance Review* will be seen as an essential reference work in our field. To meet the all-important content quality objective, it was a condition *sine qua non* to attract as contributors colleagues who are among the recognised leaders in the field of corporate governance law from each jurisdiction.

I thank all the contributors who helped with this project. I hope that this book will give the reader food for thought; you always learn about your own law and best practice by reading about the laws and practices of others. Further editions of this work will obviously benefit from the thoughts and suggestions of our readers. We will be extremely grateful to receive comments and proposals on how we might improve the next edition.

**Willem J L Calkoen**

NautaDutilh

Rotterdam

March 2019
I OVERVIEW OF GOVERNANCE REGIME

Austrian listed companies are incorporated in the form of a joint-stock corporation (JSC) or – less frequently – a European company, the Societas Europaea (SE). The most relevant sources of law for listed companies are:

- the Stock Corporation Act or the Societas Europaea Act and the SE Regulation, which set forth the organisational framework for the company;
- the Stock Exchange Act, which regulates disclosure obligations, as well as the rules on insider trading, market manipulation and directors’ dealings;
- the Takeover Act, which sets forth the framework for public takeover bids;
- the Commercial Code, which contains the applicable Austrian accounting rules;
- the Accounting Control Act, which is aimed at ensuring that financial and other information published by listed companies complies with national and international accounting standards;
- the (non-binding) Corporate Governance Code, which contains best practice rules and recommendations for listed companies; and
- regulations and circulars by the Austrian Financial Market Authority.

As regards the Corporate Governance Code, it is principally non-binding and only applies to listed JSCs or SEs that have committed themselves to complying with the Corporate Governance Code; however, such a commitment is a prerequisite for entry to the prime market of the Vienna Stock Exchange.

Listed companies are subject to the supervision of the Financial Market Authority (in particular regarding insider trading, market manipulation and directors’ dealings), the Takeover Commission (regarding takeover bids) and the Austrian Financial Reporting Audit Panel (for audits pursuant to the Accounting Control Act, unless the audits are made by the Financial Market Authority).

II CORPORATE LEADERSHIP

Most Austrian-based listed companies have a two-tier board structure (consisting of a management board and a supervisory board), even though the two-tier structure is only
mandatory for JSCs – SEs may choose between a one-tier or two-tier structure. As there are only a few companies that have opted for a one-tier structure, the following overview will focus only on the two-tier structure.

i    Board structure and practices

Management board

Role
The management board is responsible for managing the operations of the company, taking into account (as the Stock Corporation Act provides) the interests of the shareholders and the employees, and the public good. In performing its function, the management board is not subject to instructions by the supervisory board or the shareholders; however, certain decisions (such as the determination of business principles and the establishment or closure of business lines or production branches) and transactions (such as the sale or acquisition of shares or real estate, the granting and taking up of loans exceeding certain thresholds, investment above certain thresholds) are subject to the consent of the supervisory board. These consent requirements are based on the Stock Corporation Act, but can (and typically are) made more specific or be expanded in the rules of procedure for the management board or – less frequently for listed companies – in the articles of association. Certain transactions and decisions (e.g., acquisition of treasury stock, issuance of new shares or bonds, mergers, spin-offs or dissolution) require the prior consent of the shareholders’ meeting. Further, the management board may decide, or be required (see Section V.i), to ask the shareholders’ meeting for instructions on or approval of certain transactions.

Composition
According to the law, the management board can have one or more members. For certain regulated businesses (such as financial institutions or insurance companies), at least two members need to be appointed. In practice, listed JSCs have more than two members.

As a general rule, any two management board members together can represent the company, except if the articles of association allow for single signing authority and the appointment resolution bestows such single signing authority on a board member.

The signing authority of each board member is published in the Companies Register; in business dealings, third parties can rely on this information in the Companies Register (if acting in good faith), even if the management board members fail to comply with internal restrictions on their representation powers.

Chairperson
If two or more management board members are appointed, the supervisory board typically also appoints the CEO of the company as the chairperson of the management board. In the event of a tied vote, the chairperson has the deciding vote, except if the articles of association provide for otherwise. In addition to the specific tasks delegated to him or her by (typically) the by-laws, the chairperson of the management board also is responsible for the preparation, convocation and documentation of the meetings of the management board. However, the chairperson is not entitled to give instructions to the other board members.
Delegation of tasks and committees

Even though the Stock Corporation Act provides that the operations of a JSC are managed by the members of the management board collectively, it is customary (and recommended by the Corporate Governance Code) that the various members of the management board have specific areas of responsibility (i.e., they would each be responsible for certain departments). This allocation is established either in the articles of association or the by-laws of the management board (which are adopted by the supervisory board) or by the management board itself.

Even when certain management tasks are allocated exclusively to certain management board members, the other management board members are still responsible for proper supervision of the due performance of these tasks. Certain tasks cannot be delegated to individual board members (such as decisions on the fundamental business policy of the company or the convocation of general meetings where the company’s equity is equal to or lower than its stated capital). It is not customary for the management board to establish committees. It has to be noted that the allocation of tasks among the members of the management board does not dispense the management board members from keeping themselves informed of (and obtaining information about) developments and activities in areas allocated to other management board members or from acting if they perceive any deficits.

Supervisory board

Role

The supervisory board is tasked with the control and monitoring of the management board. In performing its functions, the supervisory board is not bound to instructions by the management board or the shareholders. The supervisory board can request reports of the management board and can inspect the books and records of the company. The supervisory board needs to hold a meeting at least every calendar quarter.

Composition

According to law, the supervisory board must have at least three and no more than 20 members elected or nominated by the shareholders. For listed companies, the Corporate Governance Code recommends a maximum of 10 supervisory board members elected or nominated by the shareholders.

Representation of the company

Neither the supervisory board nor any of its members are entitled to represent the company, except in connection with the conclusion, amendment or termination of directors’ agreements and legal proceedings of the company against the members of the management board. In such cases, the supervisory board is represented by its chairperson.

Chairperson

The supervisory board is required to elect from its members a chairperson and (at least one) vice chairperson. Even though this means that a representative delegated by the employees’ council could also be so elected, in practice these positions are predominately taken up by supervisory board members elected or nominated by the shareholders. Besides certain administrative duties (such as the convocation of the supervisory board meetings, the preparation of the agenda), the chairperson of the supervisory board also takes the chair
of the (annual or extraordinary) general meeting, is entitled to demand a report from the management board even without the support of other supervisory board members, and is required to sign certain applications of the company with the Companies Register.

**Delegation of tasks and committees**

The Stock Corporation Act allows for (and in one case mandates), and the Corporate Governance Code recommends, the establishment of committees of the supervisory board. Each committee established must have at least three members. For listed companies, the establishment of an audit committee is mandatory; in addition, the Corporate Governance Code recommends the creation of a nomination and compensation committee. The mandatory audit committee is basically responsible for the monitoring of the company’s accounting process, the internal control systems and the audit of the financial statements (and related documents), including the preparation for their approval. The audit committee is also tasked with proposing the auditor of the company to the general meeting and monitoring the independence of the appointed auditor. One member of the audit committee must be a person with special knowledge and practical experience in finance and accounting and reporting. If established, a remuneration and nomination committee is responsible for negotiating and approving directors’ agreements, determining general policies for the remuneration of the management board, and preparing nominations for the appointment of new management board members (including successor planning) as well as for the appointment of new supervisory board members.

**Remuneration of the management board**

As mentioned above, the remuneration of the members of the management board is decided by the supervisory board (or the compensation committee, if any).

In determining the compensation for a management board member (which includes payments, bonuses, stock options or benefits in kind), several aspects have to be taken into account. The compensation should be appropriate both for the tasks allocated to the board member and the overall economic situation of the company. The compensation should include a fixed and variable component; as regards the criteria for the variable component, they should be chosen so as not to incentivise inappropriate risks, and should not exclusively be based on financial figures. If management board members receive stock options, the vesting period must not be less than three years, and vesting should be based on long-term, measurable and sustainable criteria. There should be contractual safeguards implemented in the directors’ agreements to claw back variable payments in the event a pay-out decision was based on obviously false data. Finally, a management board member should not be entitled to redundancy payments if his or her director’s agreement is terminated on important grounds; in addition, redundancy payments should in any case be no more than two years’ salary. The same principles also apply to senior management.

The remuneration of the management board has to be published both in the annual financial statements (on an aggregate basis) as well as the annual corporate governance report (on an individual basis, including the split between fixed and variable remuneration). The annual financial statements also have to disclose the number of stock options granted to management board members.
**Remuneration of the supervisory board**

The remuneration of the members of the supervisory board is either determined in the articles of association of the company or (more frequently) by a decision of the general meeting. Remuneration for supervisory board members in Austria is relatively low compared with other countries (although a certain recent trend to raise remuneration can be reported), and usually comprises a base remuneration (which is typically higher for the chairperson, vice chairperson and committee members) and a meeting fee (which will only be paid to members attending a meeting). The remuneration of each supervisory board member is published annually in the corporate governance report of listed companies. While it is possible for supervisory board members to participate in stock option programmes, the Corporate Governance Code does not recommend such participation.

**Board and company practice in takeovers**

When faced with a takeover offer, the boards of the target company are bound by the objectivity principle set forth in the Takeover Act. This means that they are barred from taking any measures that would prevent the shareholders from taking a free and duly informed decision about the offer.

Both boards of a JSC are required to publish a reasoned statement regarding the offer, which is subject to a mandatory review by an independent expert. The statement has to contain, inter alia, an assessment of:

a) the consideration offered by the bidder;

b) the expected consequences of a successful takeover for the company, its employees (in particular the terms and conditions of employment and working conditions) and creditors;

c) the strategic goals pursued by the bidder; and

d) information on whether the members of the management board and the supervisory board recommend shareholders to accept the offer.

If such a recommendation is deemed by the boards to be inappropriate, they are obliged to state arguments both for and against the acceptance of the offer.

**ii Directors**

**Management board**

**Appointment**

Members of the management board are appointed by the supervisory board for a period of up to five years. It is possible (and customary) to renew an appointment, with the renewed term again being subject to the five-year limit. According to the Corporate Governance Code, the supervisory board is required to define profiles for the respective management board members and an appointment procedure as a basis for the appointment decision. Since 1 January 2018, supervisory boards of listed companies and unlisted companies with more than 1,000 employees have to have at least 30 per cent female members (subject to certain exceptions). Supervisory board members may not be appointed management board members of the same company; for certain regulated industries, candidates for the management board need to fulfil additional criteria or pass a fit and proper test before they can be appointed.
Dismissal

Members of the management board can be dismissed by the supervisory board before the end of a term only on important grounds, in particular, if a board member has materially breached his or her duties, the board member is unable to properly carry out his or her duties (both for health reasons or lack of required skills or knowledge) or the shareholders adopt a vote of no-confidence (except if the vote was adopted for obviously inappropriate reasons).

Duties

As a general matter, the members of the management board of an Austrian company owe to the company (not the shareholders or any other constituents) the following duties:

a) the duty of care, requiring members to exercise the level of care of a proper and diligent person in similar circumstances (which includes an obligation to be reasonably informed about areas allocated to other board members and articulate any concerns they may have);

b) the duty of loyalty, requiring members to act in the best interest of the corporation (taking into account the interest of its shareholders and employees as well as the public good) and not in their own interest;

c) the duty of confidentiality; and

d) a duty not to compete.

Liability

Wilful or negligent failure to comply with these duties results in the personal liability of the responsible board members, unless the general meeting has lawfully approved a measure resulting in damage. As regards the duty of care, not every decision or transaction that results in a loss for the company is automatically deemed a breach. Based on the business judgement rule, which was recently included in statutory law, management board members are allowed to assume risks provided that those risks are not outside normal business practice or inappropriate given the economic situation of the company. A JSC may waive or settle its damages claims with an affirmative shareholder vote of 80 per cent after five years, or even before that with an affirmative vote of all shareholders.

Conflicts of interest

As a general rule, management board members shall take their decisions without being influenced by their own interests or the interests of controlling shareholders. If a management board member has a material personal interest in transactions of the company (or its subsidiaries) or other conflicts of interest, he or she has to inform the supervisory board and the other management board members without delay. Any transactions of the company with a management board member (or its related persons or entities) need to be on arm’s-length terms, have to meet industry standards and have to be approved by the supervisory board. For other conflicts of interest not involving such transactions, the management board member should not participate in any discussions of the management board concerning the topic, and should be excluded from any information flow in this respect. There are also statutory provisions and recommendations in place aimed at preventing (or limiting) potential conflicts of interest: The aforementioned non-compete duty prohibits management board members from operating other businesses, becoming supervisory board members in non-affiliated companies, becoming general partners of (entrepreneurial) partnerships or engaging in
business transactions in the company’s field of business, except – in each case – with the consent of the supervisory board. The Corporate Governance Code also recommends that management board members should not sit on more than four (or chair more than two) supervisory boards of non-affiliated companies, even with the supervisory board’s approval. The Corporate Governance Code also recommends implementing similar restrictions for senior management. Finally, management board members are prohibited from becoming supervisory board members of the same company for a period of two years following the end of their term on the management board, unless they were nominated by shareholders holding more than 25 per cent of the total voting rights of the company.

Conflicts of interest may also arise in connection with any dealings by a management board member (or its related persons or entities) in the stock of the company (director’s dealings). In this respect, management board members are required to report such trades to the Financial Market Authority within five banking days; the Financial Market Authority maintains a publicly accessible database for the reported trades. Additionally, listed companies are required to issue internal compliance guidelines that deal with the handling of, and the monitoring of access to, potential insider information. These internal compliance guidelines and their implementation are monitored by the Financial Market Authority.

**Supervisory board**

**Appointment**

Members of the supervisory board are elected by the shareholders’ meeting, usually at an annual general meeting; the articles of association can also bestow nomination rights to shareholders (for up to one-third of the total number of supervisory board members). Supervisory board members are elected for a limited term, which has to expire – by law – at the latest with the completion of the fifth annual general meeting after their election. Re-elections are permissible. No term limitations are mandated for nominated supervisory board members. The Stock Corporation Act provides that shareholders should consider the following aspects when electing supervisory board members:

- the professional and personal qualifications of the candidates;
- whether the composition of the supervisory board (and the respective professional qualifications of its members) adequately accounts for the structure and business of the company; and
- diversity, appropriate age structure and internationality as well as the appropriate representation of women on the supervisory board.

Persons already holding multiple supervisory board positions (i.e., 10 positions in non-listed companies or eight positions in listed companies (with positions as chairperson counting as double), or a combination thereof) may not run for further supervisory board positions in listed companies. In addition, persons holding managerial functions in the JSC or any of its affiliated companies may not be elected to the supervisory board.

The employees’ council (if established) of a listed JSC is entitled to delegate employee representatives to the supervisory board. For every two supervisory board members elected or nominated by the shareholders, the employees’ council can delegate one representative. If the number of supervisory board members elected or nominated by the shareholders is uneven, the number of representatives to be delegated by the employees’ council is calculated based on the next highest even number (e.g., if there are seven supervisory board members elected or nominated by the shareholders, the employees’ council can delegate four representatives).
**Dismissal**

Members of the supervisory board can be removed from office during their term of appointment by a shareholders’ resolution that requires a 75 per cent majority of the votes cast, unless the articles of association provide otherwise. Members of the supervisory board delegated by the employees’ council can be recalled at any time by the employees’ council.

**Duties**

Members of the supervisory board are in principle subject to the same duties as members of the management board, which are scaled down to reflect that fact that the supervisory board members are mainly tasked with the monitoring and review of the conduct of the management board. One exception is that supervisory board members are not explicitly prohibited from competing with the company. Any actual competition will, however, always be scrutinised under the duty of loyalty to the company.

**Liability**

The liability standards applicable to management board members also apply to supervisory board members.

**Conflicts of interest**

In principle, the provisions regarding conflicts of interest of management board members also apply to supervisory board members, except that supervisory board members are not subject to a statutory non-compete obligation. In this respect, the Corporate Governance Code recommends supervisory board members not to assume functions on the boards of competing companies. As a precautionary measure, candidates running for a position on a supervisory board have to present to the general meeting information on all positions they hold and all other circumstances that could give rise to potential conflicts of interest. Supervisory board members are also subject to the same directors’ dealing requirements as members of the management board, and are typically also covered by the internal compliance guidelines of the company.

**III  Disclosure**

Listed companies are required to prepare (consolidated) annual financial statements and half-yearly financial reports. In most cases, listed companies also prepare quarterly reports. The financial statements and reports have to be prepared in accordance with IFRS. In addition, listed companies also have to prepare stand-alone annual reports in accordance with Austrian GAAP.

The annual financial statements need to be audited by an independent auditor or auditing firm appointed by the general meeting based on a recommendation of the audit committee. Any auditor or auditing firm proposed as the annual auditor has to provide a statement to the general meeting confirming that neither of the statutory exclusion reasons apply, and disclosing its business dealings with the company during the past business year.

Listed companies also have to publish a corporate governance report together with the annual financial statements. Besides certain information on the organisation, composition and remuneration of the boards of the company, and on the measures to promote appropriate representation of women on the management board, the supervisory board and in executive
positions, the report in particular has to include a corporate governance statement. This statement has to include information whether – and if so, in what form – the company deviates from any comply or explain rules of the Corporate Governance Code.

Additionally, listed companies and their directors are subject to various disclosure requirements under the Stock Exchange Act, such as publication of directors’ dealings and ad hoc disclosure. Ad hoc disclosure is aimed at preventing insider trading, and requires listed companies to publish without undue delay any non-public information relating to the issuer that could have a material impact on the market price of the securities of the company. Shareholders of listed companies are faced with a statutory obligation to notify the company, the Stock Exchange and the Financial Market Authority if their shareholdings (whether direct or indirect) exceed certain thresholds (starting at 4 per cent, unless the articles of association lower the threshold to 3 per cent). Finally, the Beneficial Owner Register Act, which entered into force on 15 January 2018, requires listed and non-listed companies to maintain a register of its ultimate beneficial owners, and report the identity of its ultimate beneficial owners electronically to a newly established corporate service portal overseen by the Federal Ministry of Finance. This register is accessible for:

- public authorities;
- credit and financial institutions, attorneys, auditors, tax advisers, as well as certain other professionals for the purpose of performing know your customer checks; and
- any other person or entity that can prove a legitimate interest in connection with the prevention of money laundering or terrorist financing.

IV CORPORATE RESPONSIBILITY

Corporate responsibility and compliance have become important topics in recent years, in particular in connection with corruption scandals and highly publicised criminal proceedings against management board members regarding anticompetitive practices. As a consequence, listed companies have introduced compliance codes and installed compliance officers. These compliance codes materially influence the daily corporate life and usually emphasise the tone from the top principle. Many companies have also established whistle-blowing hotlines. Since the entry into force of the EU General Data Protection Regulation and the implementing legislation in May 2018, the establishment of such hotline no longer requires the consent of the Data Protection Authority; however, its implementation and operation require the conclusion of a shop agreement with the employees’ council.

V SHAREHOLDERS

i Shareholder rights and powers

Shares in JSCs have – except for limited exceptions provided by law – equal rights (i.e., equal voting, dividend and information rights). The Stock Corporation Act expressly prohibits golden shares (i.e., shares with multiple or disproportionately higher voting rights). However, it is permissible for the articles of association to introduce maximum voting rights or staggered voting rights. In addition, a JSC may issue non-voting preferred shares based on a shareholder resolution, whereas the nominal amount of such non-voting shares may not exceed one-third of the aggregate stated capital of the JSC.
Shareholders in listed companies have no direct influence on the management board and are not permitted to issue instructions or otherwise direct the management board. Their influence is limited to certain reserved decisions, which fall into the following three categories:

a certain decisions (such as changes in the articles of association, appointment of supervisory board members, appropriation of distributable profit, acquisition of treasury stock, issuance of new shares or bonds, mergers, spin-offs or dissolution) require a shareholder resolution by operation of law;

b the management board or the supervisory board may put certain decisions to the shareholders if no agreement can be reached among the boards; and

c there is an obligation to put certain fundamental business decisions to a vote by the shareholders; this requirement is not based on a statutory obligation, but on a doctrine developed by the German Supreme Court, which was also followed by the Austrian Supreme Court.

Other rights of the shareholders include the right to demand a convocation of a shareholders’ meeting and the right to put certain matters on the agenda of a convened meeting (which requires the requesting shareholders to hold at least 5 per cent of the stated capital, unless the articles of association provide for a lower threshold) and the right to demand a special audit of the company (which requires the requesting shareholders to hold at least 10 per cent of the stated capital). All shareholders are entitled to request information on all items on the agenda in a shareholders’ meeting, and are furthermore entitled to request that any of their statements (and the responses thereto) are recorded verbatim in the meeting minutes.

Dissenting shareholders are entitled to object to resolutions passed at a shareholders’ meeting and can (if an objection was made) file for annulment or rescission of a resolution with the competent court in limited circumstances.

ii Shareholders’ duties and responsibilities
Shareholders of a JSC (both controlling and minority) are subject to a fiduciary duty requiring them not to directly cause harm to the company in the exercise of their shareholder right. Shareholders’ resolutions breaching fiduciary duties may be contested and may give rise to damages claims against the JSC and its shareholders. Shareholders breaching this fiduciary duty may also be subject to damages claims by the company.

There are no specific duties for institutional investors above the general duties applicable to all shareholders. There is also no code of best practice for shareholders of Austrian listed companies.

iii Shareholder activism
Shareholder activism has traditionally not played an important role in Austria (unlike Germany). More recently, Austrian activist shareholders as well as the Austrian Shareholder Association have taken a more active role in representing free float shareholders.

Proxy battles do occur, but not very frequently. The most recent example was an (initially unsuccessful) proxy battle at the general meeting of Conwert SE, where minority shareholders tried to have two candidates elected to the board. This attempt was initially thwarted as the chair of the meeting decided to suspend the voting rights of certain shareholders owing to alleged violations of the Takeover Act, which led to the election of two
candidates proposed by the board. The minority shareholders then initiated legal proceedings aiming at the annulment of this election. Ultimately, the minority shareholders prevailed, as Conwert decided not to continue its objection against the legal proceedings.

As previously mentioned, shareholders in Austrian listed companies have no direct say as regards the remuneration of the directors, with the exception of stock option or transfer schemes, the introduction of which requires a vote of the shareholders. This regime is, however, expected to change once the amendment of the EU Shareholder Directive is finally passed, following the political agreement announced in December 2016.

iv Takeover defences

Listed companies have several options to implement general takeover defences prior to the launch of a hostile takeover bid, such as including provisions in the articles of association limiting the maximum voting rights per shareholder, introducing transfer restrictions (to the extent possible) as well as the staggered appointment of supervisory board members. The shareholders’ meeting can, however, also decide to install a provision in the articles of association that provides for the non-applicability of such defence provisions upon the formal announcement of a takeover bid. Furthermore, the articles of association can also provide for a reduction of the threshold for mandatory offers to less than 30 per cent, which can also act as a deterrent.

If a hostile takeover is expected, but not yet announced, additional measures can be employed, such as capital increases, purchase of treasury stock and reorganisations. The Takeover Act limits potential defence measures by the corporate bodies of listed companies once the listed company becomes aware of a hostile takeover bid. From this point on, the corporate bodies may only take measures aimed at preventing the success of the hostile takeover bid with the prior approval of the shareholders’ meeting (except for the search of a white knight). However, any defence actions by corporate bodies have to be in line with the standard duty of care applicable to them; otherwise they can be held liable for any damage incurred.

v Contact with shareholders

Under Austrian law, listed companies are in general required to treat all shareholders in an equal manner. Therefore, as a matter of principle, any direct communication with shareholders is a sensitive matter and is only possible if an objective justification exists. Such an objective justification may exist, for example, if a listed company intends to acquire a business owned by one of its shareholders. In such cases, it is standard market practice to insist on a comprehensive secrecy agreement (which sometimes includes standstill covenants). In such cases, listed companies typically impose internal restrictions so that only a limited number of persons (usually the management board, selected senior managers) have access to such information. If the transaction requires the consent of the supervisory board, the matter is sometimes delegated to a committee of the supervisory board to ensure confidentiality.

Selective meetings with individual shareholders usually take place during corporate roadshows or capital market days. Additionally, several Austrian listed companies do schedule investors’ calls, typically around the publication of financial information by the company. To avoid allegations of unequal treatment of shareholders, the presentations given during such events and recordings of investor calls are made publicly available on the website of the company.
VI OUTLOOK

On a general level, it has to be noted that business decisions of the management boards of listed companies continue to be scrutinised more and more under criminal law aspects. Recent judgments of the Austrian Supreme Court have resulted in a high degree of uncertainty about whether certain business decisions could constitute fraud or embezzlement, and further clarifications by the courts would be welcome. On the other hand, the inclusion of the business judgement rule gives management boards more robust grounds for defence.

A recurring topic of discussion is the lack of say on pay statutory provisions for listed companies in Austria. Current expectations are that Austria will wait for the adoption of the German implementation legislation for the EU Shareholder Directive, and then install similar rules.
Chapter 2

BELGIUM

Elke Janssens

I OVERVIEW OF GOVERNANCE REGIME

Belgian corporate governance practices for listed companies have been partially codified in the Belgian Company Code (BCC). The BCC contains mandatory provisions on, for example, the establishment of an audit committee and a remuneration committee, requirements with respect to the determination and disclosure of executive remuneration, requirements for independent directors and the issuance of a corporate governance statement. Compliance with these mandatory provisions is ensured, for the most part, by the listed company’s auditor and the Financial Services and Markets Authority (FSMA).

In addition, other financial and ad hoc disclosure requirements for listed companies are laid down in the Royal Decree of 14 November 2007 on the obligations of issuers whose financial instruments are admitted for trading on a regulated market. Listed companies must also disclose the transparency notices they receive from their shareholders pursuant to the Act of 2 May 2007 and the Royal Decree of 14 February 2008.

The other main source of guidance with respect to corporate governance for Belgian listed companies is the Corporate Governance Code 2009 (2009 Code), published on 12 March 2009 and also known as the Daems Code. The 2009 Code is an initiative of the non-governmental Corporate Governance Committee, composed of representatives from bodies such as the FSMA (formerly the CBFA), the Federation of Belgian Enterprises, Euronext Brussels, the Belgian Institute of Chartered Accountants and the Central Economic Council. The 2009 Code replaced the Corporate Governance Code 2004 (Lippens Code). The FSMA monitors compliance by listed companies with the comply or explain principle applicable under the 2009 Code. The 2009 Code is intended to apply to Belgian companies whose securities are listed on a regulated market.3

In 2010, the 2009 Code was named the mandatorily applicable corporate governance code for certain listed Belgian companies, more specifically those whose shares are listed on a regulated market (in Belgium or another Member State of the European Economic Area (EEA)) or whose shares are traded on a multilateral trading facility (MTF) (i.e., in Belgium, mainly the Vrije Markt/Marché Libre and Alternext),4 provided they have other securities

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1 Elke Janssens is a partner at NautaDutilh in Brussels.
2 See www.corporategovernancecommittee.be.
3 There is an inconsistency between the Dutch version of the 2009 Code, on the one hand, and the French and English versions, on the other; the latter only refer to ‘companies whose shares are listed on a regulated market’.
4 Publieke Veilingen/Ventes Publiques, Trading Facility and Easynext, organised by Euronext Brussels, and MTS Belgium, MTS Denmark and MTS Finland, organised by MTS Associated Markets SA, are also MTFs but are rarely used.
listed on a regulated market (e.g., in Belgium, Euronext Brussels or the market for derivatives of Euronext Brussels). The BCC obliges such companies to adhere to the provisions of the 2009 Code or to explain in their corporate governance statement, which forms part of the annual report, why they have not done so, assuming of course that the provisions in question are not of mandatory application. This means that listed companies that fail to explain why they have not abided by certain provisions of the 2009 Code will be deemed to be in violation of Belgian law. In other words, listed companies are not required by law to comply with the 2009 Code, but they are required to explain why they have not done so. In addition, compliance is highly recommended since it gives credibility and authority to listed companies. Non-compliance can indeed adversely affect public opinion about a company.

The Belgian corporate governance rules have thus evolved over the past few years from soft law (the Lippens Code and the 2009 Code) to hard law (BCC), and the process is ongoing. The 2009 Code has been reviewed from time to time and will be thoroughly reviewed in 2020. The Corporate Governance Committee wishes to update the 2009 Code and incorporate the changes in the BCC. European legislation is often the driving force behind Belgian legislative proposals.

This chapter, however, focuses only on the corporate governance rules applicable to listed companies.

II CORPORATE LEADERSHIP

i Board structure and practices

In Belgium, listed companies usually take the form of a limited company (NV/SA). Companies with other corporate forms can be listed if their shares are freely transferable.

The basic governance structure of an NV/SA is a one-tier model, whereby the board of directors holds all powers except those specifically reserved by law or the articles of association to the general meeting of shareholders. Limitations on the powers of the board of directors set out in the articles of association are not enforceable against third parties and have internal effect only. The board of directors should be composed of at least three directors (or two if there are only two shareholders in the company and the articles of association so provide).

The BCC allows the board of directors to delegate the daily management of the company, and the external representation of the company in that respect, to another person, who may also be a director. Limitations on the powers of the daily manager, either set out in the articles of association or adopted by the board of directors, are not enforceable against third parties and have internal effect only. This person is generally known as the CEO, managing director or general manager. The board of directors still has authority to take decisions with respect to the delegated powers.

The BCC allows companies to adopt a two-tier governance model if their articles of association provide for this possibility. In this model, the board of directors delegates (some

5 An important reform of the BCC is scheduled to take place during the course of 2019. The Minister of Justice established a non-profit organisation composed of corporate law experts with an academic background four years ago, and this non-profit organisation worked on the new draft of the BCC. The new BCC should have been voted before the end of 2018, but unfortunately the federal government collapsed. It is uncertain whether the new BCC will still be voted before the elections in May 2019.

6 Since most listed companies in Belgium take the form of an NV/SA, the governance structures of other corporate forms are not discussed in this chapter.
Belgium

of) its powers to a management committee, except those reserved to it by law and general corporate policy. Limitations on the powers to be delegated can either be set out in the articles of association or adopted by the board of directors. Again, such limitations are not enforceable against third parties and have internal effect only. If the board of directors thus delegates all of its powers except those reserved to it by law and general policy, it becomes in fact a supervisory board and can no longer take management decisions. Very few listed companies have adopted a two-tier governance model.

The most common governance model in listed companies, and the basis for the 2009 Code, is the one-tier model, whereby the board of directors delegates daily management to the CEO, who is assisted by a number of executive managers (who may or may not be directors), for example, the chief operating officer, the chief financial officer or the chief legal officer. Together, they constitute the company’s executive management. The powers of the executive managers, other than the CEO, to represent the company for the purposes of certain acts, derive from a special authorisation granted by the board of directors or the CEO.

In addition to representation by the CEO (for matters of daily management) and other executive managers (within the limits of their specific powers), the company can also be represented externally by a majority of its directors acting jointly, or by a person appointed to this end in the articles of association (often two directors acting jointly, the chair, the CEO, etc.). The company will be bound by any acts taken or obligations incurred by these individuals, even if the internal decision was not taken by the correct corporate organ (unless the counterparty acted in bad faith). Quantitative limitations (e.g., representation for transactions with a value of up to €100,000) on the external representation powers of the CEO or the persons appointed in the articles of association to represent the company are not enforceable against third parties and have internal effect only.

In the above model, the board of directors still has all powers to manage the company, but daily management is mostly handled by executive management. The board of directors, in actuality, mainly supervises the management of the company. The 2009 Code indicates that the board of directors is responsible for determining the company’s values and strategy, its risk appetite and key policies. As a guideline, the board of directors should ensure that the necessary leadership and human and financial resources are available for the company to meet its objectives. In translating values and strategies into key policies, the board should pay attention to corporate social responsibility, gender diversity and diversity in general. In addition to general corporate policy, the board of directors should at least, in the context of its supervisory role:

- review the performance of executive management and the realisation of the company’s strategy;
- monitor and review the effectiveness of the board’s committees;
- take all necessary measures to ensure the integrity and timely disclosure of the company’s financial statements and other material financial and non-financial information disclosed to shareholders and potential shareholders;
- approve the internal control and risk management mechanisms proposed by executive management;
- review the implementation of these mechanisms, taking into account the review made by the audit committee;
- supervise the performance of the statutory auditor;
- supervise the internal audit function, taking into account the review made by the audit committee; and
describe the main features of the company’s internal control and risk management systems (disclosed in the corporate governance statement).

The 2009 Code states that the board of directors should take decisions in close consultation with the CEO regarding the structure of executive management and should determine the powers and duties of the executive managers. A mention to this effect should be included in the terms of reference of the board and of executive management. The board should ensure that executive management is able to perform its responsibilities and duties. In view of the company’s values, risk appetite and key policies, executive management should have sufficient latitude to propose and implement corporate strategy. Executive management should at least:

- be entrusted with the running of the company;
- put internal controls in place (i.e., systems to identify, assess, manage and monitor financial and other risks) without prejudice to the board’s supervisory role that are based on a framework approved by the board;
- present to the board complete, timely, reliable and accurate financial statements, in accordance with the applicable accounting standards and company policies;
- prepare the company’s disclosure of financial statements and other material financial and non-financial information;
- present the board with a balanced and comprehensible assessment of the company’s financial situation;
- provide the board in due time with all information necessary for the latter to carry out its duties; and
- be responsible and accountable to the board for the discharge of its responsibilities.

The 2009 Code states that the board of directors should be composed of both non-executive directors, who do not participate in the company’s daily activities, and executive directors, who belong to executive management and thus participate in the company’s daily activities. At least half the board should be made up of non-executive directors, at least three of whom are independent based on the criteria set out in Article 526 ter BCC. The board’s composition should ensure that decisions are taken in the company’s interest and should reflect gender diversity and diversity in general, as well as complementary skills, experience and knowledge. No individual or group of directors should dominate the board’s decision-making process, and no individual should wield excessive decision-making powers. In January 2011, the Corporate Governance Committee, which issued the 2009 Code, issued an additional recommendation providing that within seven years, at least 30 per cent of board members should be women.

The Act of 28 July 2011 introduced Article 518 bis into the BCC, which stipulates that at least one-third (rounded to the nearest whole number) of the board of directors of companies whose securities are listed on a regulated market should be of a different gender to the other members. If the required number of directors of the less-represented gender is not met, the next appointed director should be of that gender. If not, the appointment shall be deemed null and void. The same holds true if an appointment would cause the number of directors of the other gender to drop below the required minimum. This requirement and sanction are applicable as from the first day of the sixth financial year that starts to run after
14 September 2011. For listed companies whose free float\(^7\) amounts to less than 50 per cent and for small listed companies,\(^8\) this requirement and sanction are applicable as from the first day of the eighth financial year beginning after 14 September 2011.

For companies whose securities are admitted to trading on a regulated market for the first time, the requirement should be met as from the first day of the sixth financial year after the admission.\(^9\)

If the required quota is not met, a board that meets the quota should be composed at the next general meeting. Otherwise, any financial or other benefit to which the directors are entitled by virtue of their office shall be suspended. These benefits will be reintroduced once the board meets the gender diversity requirement.\(^10\)

The 2009 Code assigns a clear role to the chairperson of the board of directors. The chair and the CEO should not be the same person, and there should be a clear division between duties related to the running of the board (chair) and the management of the company's business (CEO). This division of responsibilities should be clearly established, set out in writing and ratified by the board. The chair should cultivate a close relationship with the CEO, providing support and advice while fully respecting the CEO's executive responsibilities. As a guideline, the chair should stimulate effective interaction between the board and executive management. The chair is responsible for leading the board of directors and can be entrusted by the board with specific responsibilities. The chair should take the necessary measures to foster a climate of trust within the board, contribute to open discussion, allow constructive dissent and ensure support for the board's decisions. The chair determines the agenda for board meetings, after consultation with the CEO, and ensures that procedures relating to preparations for board meetings, deliberations, the adoption of resolutions and the implementation of decisions are properly followed. The chair is responsible for ensuring that the directors receive accurate, timely and clear information before the meetings and, where necessary, between meetings. All directors should receive the same information.

The BCC obliges companies\(^11\) whose shares are listed on a regulated market to set up a remuneration committee composed of non-executive directors, a majority of whom should

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\(^7\) There is an inconsistency between the French and Dutch text of Article 518 bis BCC. The French version refers to the free float, while the Dutch version refers to the value of freely negotiable shares. In our opinion, the French version is correct, since it appears that the Dutch text has not been fully updated following an amendment to extend the scope of the act from listed shares to listed securities.

\(^8\) Listed companies that meet at least two of the following three requirements on a consolidated basis: fewer than 250 employees on average during the financial year, a balance sheet total of less than €43 million and net annual turnover of no more than €50 million.

\(^9\) Applicable as from the first day of the first financial year starting after 14 September 2011.

\(^10\) This sanction is applicable as from the first day of the seventh financial year commencing after 14 September 2011. For listed companies whose free float amounts to less than 50 per cent and for small listed companies, this sanction is applicable as from the first day of the ninth financial year commencing after 14 September 2011.

\(^11\) There is an exception for small listed companies that meet the criteria set out in Article 526 quater Section 4 BCC. In that case, no remuneration committee need be set up. Rather, the board of directors will perform the duties of the remuneration committee and should have at least one independent member. If the chairperson of the board is an executive director, he or she cannot chair board meetings when the board is acting as the remuneration committee. There is also an exception for public undertakings for collective investment with variable capital, within the meaning of Article 10 of the Act of 20 July 2004 on certain forms of collective management of investment portfolios, and for companies whose business is the issuance of asset-backed securities, as defined in Article 2(5) of Commission Regulation (EC) No. 809/2004.
The members of the remuneration committee must possess the requisite level of expertise in the area of remuneration policy. The chair of the board of directors or another non-executive director should head the remuneration committee. The remuneration committee should meet at least twice a year and whenever it deems necessary to carry out its duties. The remuneration committee should report regularly to the board of directors on the exercise of its duties. The CEO should attend meetings of the remuneration committee when the committee is discussing the remuneration of executive management. The remuneration committee should submit proposals to the board of directors on the company’s remuneration policy and on the individual remuneration of directors and executive managers and, where appropriate, on proposals to be submitted by the board of directors to the general meeting of shareholders (i.e., proposals on the remuneration of directors). The remuneration committee also prepares the remuneration report that forms part of the annual report and provides explanations on this report at the annual general meeting of shareholders.

The 2009 Code provides for practically the same requirements with respect to the remuneration committee. The 2009 Code further specifies, however, that the remuneration committee should have at least three members and should submit proposals to the general meeting of shareholders on the remuneration of directors and executive managers, including proposals on variable remuneration and long-term incentives, such as the grant of stock options or other financial instruments and arrangements for premature termination. The remuneration committee should review (at least every two to three years) its terms of reference and its own effectiveness and recommend necessary changes, if any, to the board.

In addition to a remuneration committee, the BCC obliges companies whose securities are listed on a regulated market to set up an audit committee composed of non-executive directors. At least one member should be independent, and must possess the requisite level of expertise in the area of accountancy and audits. The audit committee should report regularly to the board of directors on the exercise of its duties and in any case when the board draws up the annual accounts, consolidated annual accounts and short-form financial statement (intended for publication). The audit committee should:

- monitor the financial reporting process;
- monitor the effectiveness of the company’s internal control and risk management systems;
- monitor the internal audit (if any) and its effectiveness;
- monitor the audit of the annual and consolidated accounts, including the follow-up of any questions and recommendations by the statutory auditor; and
- review and monitor the independence of the statutory auditor, in particular with respect to the provision of additional services to the company.

12 In accordance with the requirements set out in Article 526 ter BCC.

13 There is an exception for small listed companies that meet the criteria set out in Article 526 bis Section 3 BCC. In that case, no audit committee need be set up. Rather, the board of directors will perform the tasks of the audit committee and should have at least one independent member. If the chairperson of the board is an executive director, he or she cannot chair board meetings at which the board is acting as the audit committee. There is also an exception for public undertakings for collective investment with variable capital, within the meaning of Article 10 of the Act of 20 July 2004 on certain forms of collective management of investment portfolios, and for companies whose business is the issuance of asset-backed securities, as defined in Article 2(5) of Commission Regulation (EC) No. 809/2004.

14 In accordance with the requirements set out in Article 526 ter BCC.
The statutory auditor should report to the audit committee on key matters arising from the audit of the annual accounts, in particular on material deficiencies in the internal control of the financial reporting process. The statutory auditor shall confirm to the audit committee annually, in writing, its independence from the company, inform the audit committee on an annual basis of any additional services provided to the company, and examine, together with the audit committee, the risks to its independence and the safeguards to be implemented to minimise these risks. The audit committee should make a proposal on the appointment or reappointment of the statutory auditor or external auditor, which should be placed on the agenda of the general meeting.

The requirements of the 2009 Code with respect to the tasks and duties of the audit committee are much more detailed and give further guidance as to what should be done to fulfil the mandatory tasks set out above. The 2009 Code also indicates, inter alia, that the audit committee should have at least three members; at least half of the audit committee’s members (versus one in the BCC) should be independent; and the chairperson of the board of directors cannot also chair the audit committee.

The audit committee should meet at least four times a year and review (at least every two to three years) its terms of reference and its own effectiveness and recommend any necessary changes to the board. The committee should meet with the external and internal auditors at least twice a year to discuss the audit process. An independent internal audit function should be established, or at least once a year it should be considered whether this is necessary. In June 2012, the Corporate Governance Committee issued additional advice in relation to the audit committee’s proposal regarding the appointment or reappointment of the statutory auditor or external auditor. The Committee advised that when appointing an auditor, the audit committee should solicit offers on the basis of predetermined selection criteria (e.g., technical skill, price, financial and economic expertise). The audit committee should also review the work of the statutory or external auditor every three years with a view to the submission of a proposal to the board of directors on the reappointment of the auditor. The board in turn will forward the proposal to shareholders and, if applicable, the works council.

The 2009 Code introduced a third committee, namely the nomination committee, whose duties may also be exercised by the remuneration committee, in which case it shall be known as the remuneration and nomination committee. The nomination committee should have at least three members, a majority of whom should be independent non-executive directors. The chair of the board of directors or another non-executive director shall chair the nomination committee. The chair cannot preside over meetings of the nomination committee when the committee is discussing the appointment of the chair’s successor. The nomination committee should make recommendations to the board with regard to the appointment of directors, the CEO and other executive managers, and should consider proposals made by relevant parties, including management and shareholders. It should meet at least twice a year and review (at least every two to three years) its terms of reference and its own effectiveness and recommend any necessary changes to the board.

The 2008 financial crisis led to an animated debate on the (at times excessive) remuneration of directors and executive managers of Belgian companies. In an attempt to rein in the remuneration of directors and executive managers, several new provisions were adopted in 2010 and codified in the BCC.

As a general rule, the general meeting of shareholders has exclusive power to determine the remuneration of directors. The board of directors, in turn, determines the remuneration
of executive management, unless the company’s articles of association provide otherwise. In listed companies, the articles of association sometimes provide that the shareholders’ general meeting determines the overall remuneration for the board of directors as a whole, while the board itself decides how to distribute this total amount among its members.

The BCC stipulates that the remuneration of individual directors and executive managers shall be determined further to a proposal by the remuneration committee. The remuneration committee should also submit proposals on the company’s remuneration policy, which must be explained in the remuneration report that forms part of the board’s annual report. The general meeting of shareholders need not approve the remuneration policy per se, but does have the power to vote on the remuneration report in which the remuneration policy is described. There are no consequences, however, if the general meeting rejects the remuneration report. The remuneration report should also be provided to the works council or, in the absence thereof, the employee representatives on the committee for prevention and protection at work or, if there is no such committee, the trade union representatives.

If an executive manager receives variable remuneration (i.e., remuneration linked to performance), the criteria used to determine the remuneration should be set out in the contractual or other provisions governing the company’s relationship with the manager, and payment can only take place if these criteria have been met within the specified time period. If this is not the case, the executive’s variable remuneration cannot be taken into account to determine his or her severance package.

If the variable remuneration of an executive manager of a listed company makes up more than one-quarter of his or her annual remuneration, at least 25 per cent of the variable remuneration should be based on previously established and objectively verifiable performance criteria measured over a period of at least two years, and at least another 25 per cent should be based on previously established and objectively verifiable performance criteria measured over a period of at least three years, unless the articles of association provide otherwise or the general meeting of shareholders expressly consents to deviate from this rule.

Unless the articles of association provide otherwise or the general meeting of shareholders expressly agrees, shares shall only be finally acquired, and share options or any other rights to acquire shares shall only be exercisable, by a director or executive manager of a listed company after a holding period of at least three years is satisfied.

The general meeting of shareholders should also approve in advance any severance package agreed by the company with an executive manager if the severance pay amounts to more than 12 months’ remuneration, as well as any variable remuneration granted to an independent or non-executive director. If the severance package represents more than 18 months’ remuneration, a reasoned opinion from the remuneration committee is also required. Any such contractual provision that has not been approved by the general meeting shall be deemed null and void. The proposal should also be notified to the works council or, if there is none, the employee representatives on the committee for prevention and protection at work or, in the absence thereof, the union representatives.

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15 This rule applies to any agreements entered into or renewed as from 3 May 2010.
16 For non-executive dependent directors, this rule applies to any agreements entered into or renewed after 3 December 2011.
The aforementioned provisions of the BCC are supplemented by the 2009 Code principles and best practices with regard to the level and structure of executive remuneration, including the following:

a. the level of remuneration should be sufficient to attract, retain and motivate executive managers who meet the profile determined by the board;

b. the level and structure of the remuneration of executive managers should be such that qualified and expert professionals can be recruited, retained and motivated, taking into account the nature and scope of their individual responsibilities;

c. an appropriate percentage of an executive manager’s remuneration should be linked to the company’s and the individual’s performance; and

d. severance pay should not exceed 12 months’ fixed and variable remuneration.

Further to a special recommendation of the remuneration committee, the severance package can amount to 18 months’ fixed and variable remuneration. In any case, the severance package should not take into account variable remuneration or exceed 12 months’ fixed remuneration if the departing CEO or executive manager did not meet the agreed performance criteria. The 2009 Code also adds that the prior approval of the general meeting of shareholders is required for schemes that provide for the remuneration of executive managers with shares, options or any other right to acquire shares.

The 2009 Code further provides that the remuneration of non-executive directors should take into account not only their role as ordinary board members but also any specific positions they may hold, such as chair of the board, or chair or member of a board committee, as well as their resulting responsibilities and commitments in terms of time, and that non-executive directors should not be entitled to performance-based remuneration such as bonuses, long-term stock-based incentive schemes, or fringe or pension benefits.

ii Directors

The 2009 Code indicates that both executive and non-executive directors, regardless of whether the latter are independent or not, should exercise independence of judgement in their decisions. Directors should make sure they receive detailed and accurate information and should study this information carefully so as to acquire and maintain a clear understanding of the key issues relevant to the company’s business. They should seek clarification whenever they deem it necessary to do so.

While executive and non-executive directors are part of the same body (namely, the board of directors), they play complementary roles on the board. The 2009 Code stipulates, as a guideline, that executive directors should provide all relevant business and financial information needed for the board to function effectively. Non-executive directors should constructively challenge and help develop strategy and key policies proposed by executive management. They should also scrutinise the performance of executive management in meeting agreed goals.

Non-executive directors should be made aware of the extent of their duties at the time of their appointment, in particular the time commitment involved. They should not consider taking on more than five directorships in listed companies. Changes to commitments and the assumption of new commitments outside the company should be reported to the chairperson of the board as they arise.

Pursuant to the BCC, a director can be either a natural person or a legal entity. In the latter case, a permanent representative should be appointed from among the entity’s
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shareholders, directors, members of executive management or personnel who is solely responsible for performing this office in the name and on behalf of the legal entity. The representative shall be liable for the performance of this office as if he or she had been appointed in his or her own name, notwithstanding the joint liability of the legal entity that is represented. The directors of autonomous governmental companies, public institutions and any legal entities over which the state exerts direct or indirect influence\(^{17}\) must be natural persons if they are remunerated for the directorship.\(^{18}\) Any payment to a legal entity, acting as director, in this case will be deemed null and void. A listed company that falls into any of the aforementioned categories (e.g., Proximus Group NV) must ensure that its remunerated directors are natural persons.

Directors cannot use the information obtained in their capacity as directors for purposes other than the exercise of their functions. They have an obligation to treat confidential information received in their capacity as directors with care.

Each member of the board should arrange his or her personal and business affairs so as to avoid direct and indirect conflicts of interest with the company. Transactions between the company and its board members should take place at arm’s length. The board should establish a policy for transactions or other contractual relationships between the company, including its related companies, and its board members, which are not covered by the statutory provisions on conflicts of interest. This policy should be disclosed in the company’s corporate governance charter. Comments on the application of this policy should be included in the corporate governance statement (which forms part of the annual report). The BCC indicates a specific procedure to be followed when directors have a pecuniary conflict of interest with the company. In listed companies, a director with a conflict of interest of a financial nature cannot participate in the deliberations or vote on the decision in question.

The board should also take all necessary and useful measures to ensure effective and efficient execution of the Belgian rules on market abuse. It should draw up a set of rules (the dealing code) regulating transactions (and the disclosure thereof) in shares of the company or in derivatives or other financial instruments linked to shares carried out for their own account by directors or other persons with managerial authority.

Directors can be held liable for shortcomings in the performance of their official duties in accordance with the applicable statutory provisions. For a violation of the law or the company’s articles of association, directors can be held jointly and severally liable (unless they were not personally involved in the violation and brought it to the attention of the company’s shareholders at the first general meeting after becoming aware of it). In addition, directors can be held liable in a number of specific circumstances (e.g., in the event of bankruptcy, a conflict of interest or tax liability).

Although the term of office of a director in an NV/SA cannot exceed six years by law, the 2009 Code advises setting the maximum term of directors at four years. The 2009 Code indicates that the board of directors should establish nomination procedures and

\(^{17}\) Holding directly or indirectly a majority of the share capital or voting rights, or having the power to appoint a majority of the members of the governing or executive body or to appoint a person entrusted with governmental supervision including by means of a contract.

\(^{18}\) Act of 19 December 2012 on the remuneration of employees and office holders in institutions of public utility, autonomous governmental companies and legal entities over which the state exerts, directly or indirectly, a preponderant influence, published in the Belgian State Gazette on 28 January 2013, entered into force on 1 August 2013.
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selection criteria for its members, including specific rules for executive and non-executive directors where appropriate. The chair of the board (or another non-executive director) leads the procedure, while the nomination committee makes proposals regarding the candidates. For any new appointment to the board, the skills, knowledge and experience of existing board members and those needed on the board should be evaluated and, in the light of that assessment, a description of the role and skills, experience and knowledge should be prepared. For a director to qualify as independent, a number of criteria should be met.19

III DISCLOSURE

Companies whose securities are listed on a regulated market20 must publish annually and biannually21 a financial report. These listed companies are also obliged to publish ad hoc information if the information in question can be considered inside information. The annual financial report must contain:

a the annual accounts and consolidated annual accounts;
b the board’s annual report (including the BCC requirements, such as the corporate governance statement and remuneration report);
c a number of specific items that could have consequences in the event of a takeover22 (e.g., shareholder agreements or limitations on the transferability of shares and securities);
d the statutory auditor’s report; and
e a declaration by the issuer on the faithful nature of the accounts and report.

If the issuer decides to publish a communication between the end of the financial year and the publication of the annual financial report, this communication should meet certain criteria. The biannual financial report should contain interim financial statements and an interim report, information on external control and a declaration by the issuer regarding the faithful nature of the statements and report.

Listed companies are subject to other disclosure requirements with respect to any changes in the conditions, rights and guarantees linked to their securities, special reports of the board of directors and draft amendments to the articles of association. Listed companies should also disclose the transparency notices they receive from their shareholders in accordance with the Act of 2 May 2007 and the Royal Decree of 14 February 2008.

In addition to the disclosures set out above, the 2009 Code indicates that the company should draw up a corporate governance charter describing the main aspects of its corporate governance policy and containing the minimum information set out in the 2009 Code. The charter should be updated as often as necessary to reflect the company’s corporate governance at all times. It should be made available on the company’s website and should specify the date of its most recent update.

The corporate governance charter should include at least:
a a description of the company’s governance structure and the terms of reference of its board of directors;

19 Article 526 ter BCC.
20 Some of the provisions also apply to companies whose securities or shares are listed on certain MTFs.
21 The latter is applicable to companies whose shares or debt instruments are listed.
22 Act of 1 April 2007 on public takeover bids.
b the policy established by the board for transactions and other contractual relationships between the company, including related companies, and board members and executive managers, to the extent not covered by the statutory provisions on conflicts of interest;

c the measures taken by the company to comply with the Belgian rules on market abuse;

d the terms of reference of each board committee;

e the terms of reference of executive management;

f the identity of major shareholders, with a description of their voting rights and special control rights, and, if they act in concert, a description of the key elements of existing shareholders’ agreements;

g any other direct and indirect relationships between the company and its major shareholders; and

h a statement that the company has adopted the 2009 Code as its reference code.

The board of directors should also include a corporate governance statement in its annual report, describing all relevant corporate governance events that have taken place in the past year. This statement should be included in a specific section of the annual report and should contain the minimum information set out in the 2009 Code. If the company has not complied fully with one or more provisions of the Code, it should explain its reasons for not doing so in its corporate governance statement (the comply or explain principle). The BCC has made a corporate governance statement mandatory.

Pursuant to the BCC, the following items should be disclosed in the corporate governance statement in the company's annual report: 23

a a statement that the company has adopted the 2009 Code as its reference code and the place where the 2009 Code can be consulted, as well as relevant information on the corporate governance practices applicable in addition to the 2009 Code and the place where these can be consulted;

b if the company does not fully comply with the 2009 Code, an indication of the provisions of the 2009 Code that were not complied with during the year and an explanation for the non-compliance;

c a description of the main features of the company’s internal control and risk management systems in relation to financial reporting;

d the shareholder structure on the closing date of the financial year as it appears from the notifications the company received;

e the holders of securities to whom special control rights have been granted and a description of these rights;

f any limitations on voting rights provided for by law or the company’s articles;

g the rules for the appointment of directors and amendments to the company’s articles of association;

h the powers of the board of directors, specifically the possibility to issue or purchase own shares;

23 These requirements are applicable to companies whose shares are listed on a regulated market. The requirements under (a), (b) and (i) are also applicable to companies whose securities, other than shares, are listed on a regulated market when their shares are listed on an MTF. The requirement set out under (c) is also applicable to companies whose securities are listed on a regulated market.
a description of the composition and running of the board of directors and its committees. The 2009 Code adds that this description should include at least:

- a list of all board members, indicating which are independent;
- information on any directors who have ceased to meet the requirements for independence;
- an activity report on board and board committee meetings, indicating the number of board committees;
- information on meetings and the individual attendance records of directors;
- a list of all members of board committees;
- if applicable, an explanation as to why the appointment of the former CEO as chair is in the best interests of the company; and
- a list of all members of executive management; and

an overview of the efforts taken to ensure that at least one-third of the members of the board of directors are of a different gender than the other members.

The 2009 Code adds that the following should be set out in the corporate governance statement:

- comments on the application of the policy established by the board for transactions and other contractual relationships between the company, including related companies, and its board members and executive managers, to the extent not covered by the statutory provisions on conflicts of interest;
- information on the main features of the process for evaluating the board, its committees and individual directors;
- key features of any incentives granted in the form of shares, options or any other right to acquire shares as approved by, or submitted to, the general meeting of shareholders; and
- a general description of the main features of the company’s internal control and risk management systems.

As mentioned above, the BCC indicates that the corporate governance statement should also include a remuneration report, prepared by the board of directors further to a proposal of the remuneration committee.

The following information should be disclosed in the remuneration report pursuant to the BCC:

- a description of the company’s internal procedure to develop a remuneration policy for directors and executive managers and set the level of individual remuneration for directors and executive managers;
- the remuneration policy for directors and executive managers containing at least the following items of information:
  - the principles on which remuneration is based, including the relationship between remuneration and performance;
  - the importance of the various components of remuneration;
  - the characteristics of performance-based bonuses in the form of shares, share options or other rights to acquire shares; and
  - information on the remuneration policy for the next two years. Furthermore, any significant changes to the remuneration policy since the end of the financial year should be expressly mentioned;
c the individual remuneration and other benefits granted directly or indirectly by the company, or another company that falls within the same scope of consolidation, to non-executive directors;

d the remuneration granted to executive managers who are also directors, but in that case only the remuneration received in their capacity as directors. It is unclear whether this information should be disclosed on an individual or collective basis;

e if the executive managers receive variable remuneration linked to the performance of the company, a company that falls within the same scope of consolidation as the company or a business unit of the company or their own performance, the criteria used to evaluate the achievement of the specified goals, the evaluation period and a description of the methods applied to verify whether the performance criteria are met. This information should be disclosed in such a way as to prevent the disclosure of confidential information about the company’s strategy;

f the remuneration and other benefits granted directly or indirectly to the CEO by the company or a company that falls within the same scope of consolidation, indicating:
• base remuneration;
• variable remuneration: for all incentives, the form in which the variable remuneration is paid;
• pension benefits: the amounts paid or the value of services provided during the financial year, per pension scheme, with an explanation of the applicable pension schemes; and
• other components of remuneration, such as the cost or monetary value of insurance coverage and fringe benefits, with an explanation of the details of the main components.

Moreover, any significant changes to the remuneration policy since the end of the financial year should be expressly mentioned;

g on a collective basis, the remuneration and other benefits granted directly or indirectly to other members of executive management (excluding the CEO) by the company or a company that falls within the same scope of consolidation, with a breakdown between:
• base remuneration;
• variable remuneration: for all incentives, the form in which the variable remuneration is paid;
• pension benefits: the amounts paid or the value of the services granted during the financial year, per pension scheme, with an explanation of the applicable pension schemes; and
• other components of remuneration, such as the cost or monetary value of insurance coverage and fringe benefits, with an explanation of the details of the main components.

In addition, any significant changes to the remuneration policy since the end of the financial year should be expressly mentioned;

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24 The term CEO can refer here to the main representative of the executive directors, the chairperson of the management committee, the main representative of ‘other leaders’ or the main representative of the persons entrusted with daily management of the company.
for each executive manager (including the CEO):

- the number and key features of shares, share options or any other rights to acquire shares granted, exercised or expired during the financial year;
- the provisions on severance pay; and
- whether the company has the right to recover any variable remuneration granted on the basis of incorrect financial data; and

if an executive manager (including the CEO) leaves the company, the decision of the board of directors, further to a proposal of the remuneration committee, on whether the person is eligible to receive a severance package and the method used to calculate the severance pay.

The 2009 Code adds that the remuneration report should also explain whether, with respect to the disclosure of the remuneration of the CEO and other executive managers, the company has materially deviated from its remuneration policy during the financial year. If, on or after 1 July 2009, the contract of the CEO or any other executive manager provides for a severance package in excess of 12 months’ (but less than 18 months’) base and variable remuneration, the remuneration report should indicate the circumstances under which the severance package can be paid, and a justification for the payment, on an individual basis.

In 2012, the FSMA conducted its third annual study on compliance with the 2009 Code and found that significant progress has been made over the past three years. The main improvements related to the remuneration report, in that no company found it necessary to explain non-compliance in its 2011 annual report. Many of the recommendations set out in the first two studies have been taken into consideration by Belgian listed companies. The FSMA points out, however, that its recommendation to specifically mention when a provision is not applicable, which would further increase transparency, is not yet being followed by all companies. It also specifically points to the requirement to mention the following with respect to each executive manager (including the CEO) in the annual report (on the basis of the BCC): provisions on severance pay and whether the company has the right to recover any variable remuneration granted on the basis of incorrect financial data. These requirements are not set out in the 2009 Code, only in the BCC.

The FSMA makes some further recommendations to companies to improve the quality of their corporate governance disclosures.

One-on-one contacts between directors and majority or institutional shareholders are common in listed companies; such contacts should comply with the rules set out in Section V.iv.

In February 2015, the FSMA published a study on the disclosure by listed companies of relations and transactions with related parties. As a follow-up, the Corporate Governance Committee issued in February 2016 an additional explanatory note on how listed companies should report on their related-party transactions. The explanatory note is structured around three main lines: the legal framework, practical considerations and a number of explanatory annexes.

In 2016, the Corporate Governance Committee made a comparative study of the quality of the explain principle applied in the different EU Member States. They came to the conclusion that in Belgium, the quality of the application of the principle was insufficient...
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(too formal and superficial explanations) compared with the United Kingdom and Sweden (because their governance codes contain stricter guidelines on high-quality explanations). In May 2016, the Corporate Governance Committee issued guidelines to increase the quality required of the explanations.

In 2018, the Corporate Governance Committee launched a public consultation on the proposal for a 2020 Belgian Code on Corporate Governance. The 2020 Code is closely linked to the revised Code on Companies and Associations. Since the revised Code on Companies and Associations has not yet been voted by the Belgian Parliament, the publication of the 2020 Code was postponed. If the new Code on Companies and Associations will not be voted, the Corporate Governance Committee will have to revise the proposed 2020 Code.

IV CORPORATE RESPONSIBILITY

The Belgian corporate governance rules do not specifically cover corporate responsibility, with the exception of Article 518 bis, which was inserted in the BCC in 2011 and provides that at least one-third (rounded to the nearest whole number) of the board members of companies whose securities are listed on a regulated market should be of a different gender. Most listed companies should meet this target as from 2017. The 2009 Code moreover mentions that ‘in translating values and strategies into key policies, the board should pay attention to corporate social responsibility, gender diversity and diversity in general’. In January 2011, the Corporate Governance Committee, which issued the 2009 Code, issued an additional recommendation, stating that within seven years, at least 30 per cent of board members should be women.  

The report on the main differences between the 2009 Code and the Lippens Code notes that corporate social responsibility and diversity have become increasingly relevant topics over the past few years. However, the objective of the 2009 Code is to issue broad recommendations on how companies should be directed, managed and controlled, without going into each and every aspect of corporate responsibility. In view of the importance of issues such as corporate social responsibility and diversity, however, it was deemed appropriate to insert a supplementary guideline in the 2009 Code and indicate that people governance is another area of concern that was raised during the public consultation on the 2009 Code.

Unlike financial institutions, which have specific rules on compliance policies and risk management, there are currently few specific rules on compliance and risk management for listed companies. The only provision in the 2009 Code is that an independent internal audit function should be established, with resources and skills adapted to the company’s nature, size and complexity, and that if the company does not have such a position, the need for one should be reviewed at least annually. The effectiveness of the internal control and risk management systems set up by executive management should be monitored by the audit committee at least once a year, with a view to ensuring that the main risks (including those relating to fraud and compliance with existing legislation and regulations) are properly identified, managed and disclosed in accordance with the procedures approved by the board. The 2009 Code further indicates that the audit committee should review the specific arrangements in place that staff may use to raise, in confidence, concerns about possible improprieties in financial reporting or other matters. If deemed necessary, arrangements

26 This recommendation has not yet been incorporated into the 2009 Code; nor has the BCC made this recommendation part of the reference corporate governance code (i.e., the 2009 Code).
should be made for the proportionate and independent investigation of such matters, appropriate follow-up actions and schemes whereby staff can inform the chairperson of the audit committee directly. It should be noted that the rules on personal data protection should of course be respected when establishing a whistle-blowing scheme.

On 18 December 2014, the Institute of Internal Auditors Belgium and the Institute of Company Auditors, together with the Belgian Association of Listed Companies, issued further practical guidelines for an effective relationship between the audit committee, the internal auditor and the external auditor. These guidelines are supported by the Corporate Governance Committee.

V SHAREHOLDERS

i Shareholder rights and powers

The basic rule is that each share of the same value carries one vote. If the shares do not have the same value or if there is no value mentioned, the shares carry voting rights in proportion to the capital they represent, with the share with the lowest value carrying one vote. Fractions of votes are not taken into account.27

Controlling shareholders often have the right to appoint a majority of the company’s directors, so that they de facto influence the management of the company.

Any powers not granted by law or the company’s articles of association to the general meeting of shareholders are reserved to the board of directors. A number of decisions are reserved by law to the general meeting and cannot be delegated28 to the board of directors, such as approval of the annual accounts and discharge of the directors and statutory auditor, the final appointment of directors and the statutory auditor, the initiation of claims by the company against the directors, dissolution of the company, or a merger or a division. In 2010, a number of decisions relating to the remuneration of executive managers and directors were also made subject to the approval of the general meeting (see above).

In general, a validly adopted decision of the general meeting of shareholders is, by law, binding on dissenting shareholders or shareholders who did not attend the meeting. Any party that can prove standing, including a shareholder, may, however, seek to invalidate a decision of the general meeting on account of:

a a formal irregularity, provided this irregularity could have influenced the decision;
b a violation of the procedural rules of the general meeting or the passage of a resolution on an item that was not on the agenda, provided there is fraudulent intent;
c an ultra vires act or abuse of power;
d the exercise of suspended voting rights, if this influenced the adoption of the decision; or
e any other reason set out in the BCC.

In addition, dispute resolution procedures are available to shareholders pursuant to which they can be obliged to sell their shares or purchase the shares of other shareholders in the event of a serious conflict among them (Articles 635 to 644 BCC), or the involuntary dissolution of the company can be requested as a last resort (Article 645 BCC).

27 Except as mentioned in Article 560 BCC.
28 It is generally accepted that, in certain cases, some powers can be delegated.
One or more shareholders who, individually or collectively, hold one-fifth of the share capital can also request the board of directors and the statutory auditor to call a general meeting. It is generally accepted that these shareholders also have the possibility to determine the agenda for the meeting. In accordance with Article 533 ter of the BCC, shareholders holding at least 3 per cent of the share capital of a listed company have the right to submit proposals regarding items on the agenda and propose resolutions (this does not apply to meetings held on second call: i.e., meetings called because the required quorum was not met at the first meeting).

Shareholders also have the right to ask the directors (and the statutory auditor) questions during general meetings or in writing before the meeting (to be answered at the meeting). The directors or the statutory auditor, as the case may be, have a duty to answer these questions. There is, however, an exception to this rule: directors and the statutory auditor can refuse to answer a question if doing so would cause harm to the business of the company or violate their or the company’s duty of confidentiality. Questions should relate to items on the agenda or to a report prepared by the board of directors or the statutory auditor. Questions on the same topic may be consolidated and answered together.

One or more shareholders owning at least 95 per cent of the securities to which voting rights are attached can initiate a squeeze-out to obtain 100 per cent of all voting securities or securities that allow their holders to acquire voting securities.

ii Shareholders’ duties and responsibilities

The 2009 Code stipulates that, in companies with one or more controlling shareholders, the board should endeavour to have the controlling shareholders make considered use of their position and respect the rights and interests of minority shareholders. The board should encourage the controlling shareholders to respect the 2009 Code.

Aside from this reference, there are no specific duties or best practices in the corporate governance rules pertaining to controlling shareholders and institutional investors. The general rule of law that minority shareholders can seek to invalidate a resolution of the general meeting on the grounds of abuse of majority still applies, of course. Such a request must be made within six months of the time the resolution became enforceable against the shareholder or was notified to the shareholder. Pursuant to this principle, a resolution can be invalidated if the voting rights were not exercised in the company’s interest or the voter abused his or her rights, meaning the voting rights were exercised in an obviously unreasonable manner.

iii Shareholder activism

As indicated above, the general meeting of shareholders normally determines the remuneration of directors, but not of executive managers (except for the approval of severance pay in certain cases), so it does not have a complete say on pay. The general meeting of shareholders has the power to vote separately on the remuneration report in which the remuneration policy is described, but there are no consequences if it rejects the report.

If one or more shareholders do not agree with the board’s management of the company, there is judicial relief available to them.

The BCC does not contain express rules on the invalidation of resolutions by the governing body (i.e., the board of directors); however, based on general rules of law, the courts tend to accept that resolutions of the board of directors can be declared null and void at the request of any interested party (including a shareholder).
In general, the grounds for invalidating resolutions of the board of directors are the following:

a violation of the convocation formalities or procedural requirements for the meeting;
b violation of rules of law or the articles of association (e.g., an ultra vires act);
c resolutions that are obviously in violation of the company’s interests; and

d resolutions adopted fraudulently.

Directors can be held liable, in accordance with the BCC, for shortcomings in their management of the company, breach of rules of law or the articles of association and, in certain cases, violation of their general duty of care (the relevant standard is how a reasonably prudent director would have acted under the same circumstances). The general meeting of shareholders has the power to initiate proceedings on behalf of the company against one or more directors on the above-mentioned grounds. Such a decision should be approved by a majority of votes cast. No action can be taken if the general meeting has already discharged the directors. There is also a possibility for minority shareholders to initiate the same proceedings on behalf of the company if they represent at least 1 per cent of the voting securities or hold at least €1.25 million of the company’s capital on the day the general meeting voted to discharge the directors. Minority shareholders that validly approved the discharge cannot bring such proceedings.

At the request of one or more shareholders holding at least 1 per cent of the total voting rights or securities that represent at least €1.25 million of the company’s capital, the court may also appoint, if there are indications that the interests of the company are seriously jeopardised or could be jeopardised, one or more experts to verify the company’s books and accounts and the actions of its corporate bodies.

In certain cases, one or more shareholders can also request the appointment of a temporary administrator to manage the company in lieu of the board of directors.

The BCC provides for the possibility to solicit proxies for certain shareholder meetings. This solicitation should, however, comply with the requirements of the BCC. A public solicitation of proxies (i.e., when advertisements or intermediaries are used or if more than 50 shareholders are targeted) should be approved by the FSMA and a number of requirements should be met. Proxy solicitation is mostly done by associations that defend (minority) shareholders’ rights.

Several associations that defend (minority) shareholders have campaigned to involve as many shareholders as possible in certain proceedings (e.g., the Fortis case in 2008, the case against the National Bank of Belgium in 2010, the Lernout & Hauspie case, the Madoff case and the Lehman Brothers case).

Pursuant to the Act of 28 March 2014, class actions are now possible in Belgium. However, certain limitations apply. A class action may only be brought against a company, by a consumer, and for breach of a contractual obligations or a specific law. Thus, shareholders who would like to introduce a claim against (current or former) directors cannot bring a class action under Belgian law. Therefore, only investors that take part in the proceedings against a company have the right to claim damages.

29 Article 548 BCC.
30 Article 549 BCC.
31 Act of 28 March 2014 on class actions, Belgian State Gazette, 29 April 2014.
iv Takeover defences

In general, the following measures can be taken by the target company to frustrate a takeover bid:

a Capital increase with the issuance of new shares: in principle, only the general meeting of shareholders is entitled to increase the company’s share capital, unless the board of directors has been authorised to do so (pursuant to the BCC). However, such an authorisation is not valid in the context of a takeover bid, during which the board, in principle, cannot increase the share capital by means of a contribution in kind or in cash with the cancellation or restriction of the shareholders’ pre-emptive right. The general meeting may, however, authorise the board of directors to increase the share capital during the offer period by means of a contribution in kind or in cash with cancellation or restriction of the shareholders’ pre-emptive right, provided:

• the board has been specifically authorised to do so within the past three years;
• the newly issued shares are fully paid up;
• the number of new shares does not exceed 10 per cent of the number of existing shares; and
• the subscription price is at least equal to the offer price.

b Acquisition of own shares by the company: in principle, the general meeting of shareholders must authorise the acquisition of own shares by the company unless the board of directors has been authorised to do so (pursuant to the BCC). However, such an authorisation is not valid during a takeover bid, as from the time the company is notified of the bid by the FSMA. As an exception to this rule, the board may acquire own shares to avoid serious, imminent harm to the company, provided the articles of association so allow (for a maximum period of three years). In this case, other conditions governing the acquisition of own shares also apply (e.g., the acquisition may not exceed 20 per cent of the issued share capital).

c Poison pill: in general, certain advance measures are available to protect companies against potential takeover bids. However, pursuant to Article 556 of the BCC, only the general meeting of shareholders (thus not the board) can grant rights to third parties liable to affect the company’s assets or give rise to a debt or obligation on behalf of the company, when the exercise of the rights depends on the launch of a takeover bid or a change in control. To be valid, the resolution to this effect should be filed with the clerk’s office (of the competent court) prior to the FSMA’s notification of the bid to the company. During the offer period, only the target company’s (general meeting of) shareholders can take decisions or execute transactions that could have a significant impact on the composition of the company’s assets or liabilities or enter into transactions without effective compensation. Such decisions and transactions cannot, in any case, be made subject to the outcome of the bid. Decisions that have been sufficiently implemented prior to receipt of the FSMA’s notification can be further executed by the board; however, the FSMA and the bidder should be immediately notified of any such decisions, which should also be made public.

d Issuance of convertible bonds or subscription rights (warrants): these instruments may be issued by the general meeting of shareholders and may, for example, be convertible or exercisable upon the launch of a takeover bid. It is also possible to create a pyramidal ownership structure or issue share certificates.
As a general rule, in keeping with the Takeover Directive, the target company's board of directors must act in the company's interest. It may therefore seek out an alternative bidder (or white knight). Belgian law specifically provides that the target company need not inform the FSMA of the fact that it is searching for an alternative bidder (while it should inform the bidder and the FSMA of any decision in relation to the issuance of shares or that is liable to frustrate the bid).

Belgium has opted out of the provisions of the Takeover Directive aimed at restricting the use of defensive measures by the board of directors. Nevertheless, companies with their registered office in Belgium whose shares are (at least partially) listed on a regulated market may voluntarily include such restrictions in their articles of association (i.e., opt in).

In this regard, a company may provide in its articles of association that:

a during the offer period, the board of directors (or the body to whom the relevant powers have been delegated) may not take any action (other than seeking alternative bids) liable to result in frustration of the bid without the prior consent of the general meeting of shareholders;

b any decisions taken prior to the offer period that are not yet fully implemented and that could frustrate the bid can only be further implemented with the prior consent of the general meeting of shareholders (except for those taken in the ordinary course of business);

c restrictions on share transfers expressed in the articles of association or a shareholders’ agreement shall not apply to the bidder during the acceptance period or after the bid if the bidder holds at least 75 per cent of the target’s share capital;

d restrictions on voting rights expressed in either the articles of association or a shareholders’ agreement shall not apply at a general meeting held during the offer period for the purpose of adopting measures to frustrate the bid or after the offer if, as a result of the offer, the bidder holds at least 75 per cent of the target’s capital; and

e provisions of the articles allowing a shareholder to appoint or remove a director shall not apply at the first general meeting called by the bidder after the offer, provided the bidder holds at least 75 per cent of the target’s capital as a result of its bid.

If the rights set out in (c) to (e) cannot be exercised, reasonable compensation should be paid to their holders.

The company may also stipulate in its articles of association that such provisions shall only apply to the extent the bidder or the company controlling the bidder is subject to the same restrictions on the application of defensive measures (the reciprocity rule).

The use of staggered boards as a takeover defence is not relevant in Belgium, as a director of a public limited company can always be removed at will by the general meeting of shareholders.

v Contact with shareholders

The basic rule is that the company should treat all similarly situated shareholders equally.

The Royal Decree of 24 November 2007\textsuperscript{32} regulates periodic (annual and semi-annual) and occasional information (i.e., inside information) to be disclosed by listed companies, in addition to the mandatory disclosures set out in the BCC (e.g., annual accounts and annual

\textsuperscript{32} Royal Decree of 24 November 2007 on the obligations of issuers of financial instruments traded on a regulated market, Belgian State Gazette, 3 December 2007.

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Periodic information should be disclosed quickly and on a non-discriminatory basis so that it can reach as many people as possible, and disclosure should take place, insofar as possible, simultaneously in Belgium and other Member States of the EEA. The company should use media that are expected to ensure disclosure in all Member States of the EEA. Any inside information should be disclosed as simultaneously as possible to all categories of investors in the Member States where the company has requested or agreed to trade its financial instruments on a regulated market.

The 2009 Code stipulates that companies should design a disclosure and communications policy that promotes effective dialogue with shareholders and potential shareholders. Individual meetings with institutional investors are also encouraged to receive explanations on their voting behaviour. It is indeed common practice for companies to hold individual meetings with their controlling shareholders, institutional shareholders, or both. However, the information disclosed in these meetings should be information that is already public or that is made public at the same time, to avoid the unequal treatment of shareholders.

Each director has a duty to keep information about the company confidential unless required to disclose it pursuant to a statutory or ethical duty. This duty also extends to companies’ shareholders. Some scholars argue, however, that directors representing a controlling shareholder can consult with that shareholder on decisions to be taken by the board of directors and the position the director will adopt in future deliberations, unless the board of directors specifically decides otherwise. This does not mean that the directors can inform the person they represent of information he or she can then use for his or her own purposes (e.g., to determine whether to sell or purchase shares).

In addition to this general duty of confidentiality, it is also forbidden for anyone in possession of inside information (e.g., directors) to, inter alia, disclose such information to anyone else except in the normal course of business or in the performance of his or her professional duties.

The general rule is that inside information should be immediately disclosed. However, a company can decide, at its own risk, to postpone the disclosure of inside information if the disclosure could harm the company’s legitimate interests, provided that the delay in disclosure does not mislead the public and confidentiality can be guaranteed. If inside information is disclosed in the normal exercise of the discloser’s profession, function or work, the information should simultaneously be made public unless the person to whom the inside information is disclosed is bound by a duty of confidentiality (e.g., the printer or the communications department). If the disclosure of inside information is postponed, the company should take the necessary measures to, inter alia, bar access to this information to all persons who do not need it to exercise their functions.

Based on the foregoing, in our opinion, directors cannot disclose inside information to a shareholder further to a confidentiality agreement. The only exception to this rule is if a third party or a shareholder requests information from the company to determine, for example, the appropriateness of making a public offer, in which case the board of directors can grant access to the information in question if it enters into a confidentiality agreement that includes a standstill clause (i.e., no transactions in the company’s shares until the information has been made public) and provided disclosure is in the company’s interest.
VI OUTLOOK

The Belgian legislature is currently investigating and discussing a thorough modernisation of the BCC, including corporate governance-related areas such as the corporate organs (e.g., the one-tier two-tier principle) of a public limited company, the abolition of certain corporate forms (such as the partnership limited by shares) and changes to the definition of listed company, which could impact the corporate governance of listed companies and result in a need to update the Corporate Governance Code. The draft bill was filed with the Belgian Parliament and was supposed to be voted before the end of 2018. Unfortunately, the federal government collapsed, and it is uncertain whether the new BCC will be voted before the election in May 2019 or will be supported by the next federal government.

The revision and modernisation of the Belgian Corporate Governance Code depends on whether the new BCC will be voted. Following a public consultation, the Corporate Governance Committee drew up a 2020 Code. The 2020 Code takes into account the changes that will be made to the new BCC. However, since it remains uncertain that the new BCC will be voted, the new 2020 Code has not yet been made public. The level of implementation of corporate governance legalisation and whether companies comply with the rules is being closely monitored in Belgium. Several studies are being carried out (e.g., by the FSMA, VBO and GUBERNA), and the Corporate Governance Committee continues to follow up on the progress of and compliance with the corporate governance rules, issuing advice where necessary.
Chapter 3

BRAZIL

Marcelo Viveiros de Moura and Marcos Saldanha Proença

I  OVERVIEW OF GOVERNANCE REGIME

The corporate governance regime applicable to Brazilian listed companies is basically established by the Brazilian Corporation Law, the rulings issued by the Brazilian Securities Commission (CVM) and the listing rules issued by the Brazilian Stock Exchange (B3) to each of its listing segments.

Among the Law and rules mentioned above, it is important to highlight that CVM enacted a new ruling in June 2017 – Ruling No. 586 – establishing the obligation for listed companies to disclose, on an annual basis, ‘Brazilian Corporate Governance Code: Listed Companies Information’, whereby companies shall indicate, in relation to each recommendation of the Corporate Governance Code, whether the company was compliant, and if not, provide an explanation for the non-compliance (i.e., a comply or explain approach). The Corporate Governance Code for listed companies was elaborated by GT Interagentes (the Interagents Working Group, which comprises 11 of the most important agencies concerned with the Brazilian capital markets) and issued on 16 November 2016.

Of the B3 listing segments, the Novo Mercado has the highest standards of corporate governance rules, followed by Level 2 and Level 1. There is also the BOVESPA MAIS, an organised over-the-counter market managed by B3 and created as a way for small and medium-sized companies to access the capital markets. It falls under the authority of CVM, a federal independent agency reporting to the Ministry of Finance that supervises and enforces listed companies’ compliance with the Corporation Law and the rules issued by CVM. This enforcement can result in the imposition of fines and restrictions on companies and their administrators.

B3 is responsible for supervising compliance with its listing rules and has the authority to impose on companies and their administrators contractual fines and other sanctions, such as suspension and exclusion from trading in shares in the B3 environment.

Most Brazilian listed companies do not have widely held stock, but in recent years there has been a trend for CVM to stimulate the participation of minority shareholders

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2 Federal Law No. 6,404, of 15 December 1976, as amended.
3 B3 SA – Brasil, Bolsa, Balcão is the current corporate denomination of the Brazilian Stock Exchange, which was formerly denominated BM&FBOVESPA SA – Bolsa de Valores, Mercadorias e Futuros until 10 May 2017.
4 The Brazilian Corporate Governance Code: Listed Companies Information must be disclosed within seven months of the end of each fiscal year.
in the governance of companies through the creation of a mechanism that enables all the shareholders to send their votes electronically prior to any shareholders’ meeting. In 2017, implementation of this mechanism was only mandatory for the main companies listed on B3; however, as from 2018 it became mandatory for all companies.

CVM has also enacted rules in recent years to improve the quality and amount of information that a listed company must disclose to its investors, including Ruling No. 480, published at the end of 2009, which created the reference form, a document containing very detailed information about the company that must be updated at least once a year; and Ruling No. 481 (published simultaneously with Ruling No. 480), which sets forth the mandatory information that must be disclosed by listed companies on an ordinary basis and prior to each shareholders’ meeting. Both these rules have already been adjusted to incorporate improvements that CVM considered necessary.

Furthermore, B3 launched the State-Owned Enterprise Governance Programme in September 2015 in response to the recent scandals and political use of state-owned companies by the government. The Programme aims to restore investor confidence in state-owned companies (which are significant elements of the Brazilian capital markets) by enhancing the corporate governance rules of these companies in the following ways:

a. through more clear disclosure of the company’s objectives;
b. through the creation of mechanisms to remove administrators who divert company activities from the stated objective;
c. through the establishment of detailed nomination criteria encompassing the qualifications and expertise of the administrators; and
d. through the commitment of the public controlling shareholder to comply with corporate governance best practice.

2018 was a unique year for corporate governance in Brazil, since in this year we saw:
a. the publication of the first Corporate Governance Code: Listed Companies Information, which will be required from the companies whose shares are part of the IBOVESPA index or the IBrX-100 index;
b. the application of some of the changes in the Novo Mercado Listing Rules that became effective as from 2 January 2018 (other changes will become effective in 2021), such as the disclosure of material facts and earnings releases in Portuguese and English, disclosure of the resignation or removal of board members and officers through material fact or announcement to the market within the business day following the resignation or removal, and the mandatory statement of the board of directors regarding tender offers; and
c. implementation of the proxy voting system for all the listed companies on B3. We expect that in 2019 the companies will keep improving their corporate governance disclosure, as a result of the recent changes implemented in 2018 described above, and to have new companies accessing the capital markets due to the favourable economic environment that we expect in Brazil as a consequence of the election of a new president with a clear pro-business agenda in the economy.
II CORPORATE LEADERSHIP

i Board structure and practices

Brazilian listed companies are managed by a board of directors and by an executive office. Brazilian companies can also install a fiscal board, which does not have the nature of a managerial body but rather of a supervisory body.

Board of directors

The board of directors is a decision-making body with authority to:

- establish the company's business policy in general;
- elect and dismiss officers;
- set the duties and monitor the day-to-day managerial actions of officers;
- express an opinion on any matters to be submitted to the shareholders; and
- approve the implementation by the executive office of specific matters prescribed by law or under the company by-laws.

The authority of the board of directors established by the Corporation Law cannot be delegated to other bodies.

The Corporation Law sets out that the board of directors shall be composed of at least three members, who are not required to be Brazilian residents.

In the case of the companies currently listed on the Novo Mercado, considering the changes approved in its Listing Rules in 2017, they must observe the following rules:

- until the ordinary shareholders’ meeting that shall approve the financial statements related to the fiscal year of 2020, the board must be composed of at least five members, and at least 20 per cent of the members must be considered to be independent; and
- as from the ordinary shareholders’ meeting that shall approve the financial statements related to the fiscal year of 2020, the board must be composed of at least three members, and at least two or 20 per cent of the members, whichever is greater, must be considered to be independent.

Companies that became listed on the Novo Mercado as from 2 January 2018 shall apply the rule provided in item (b) above, as from its listing.

In the case of the companies currently listed in the Level 2 segment, the board must be composed of at least five members and at least 20 per cent of the members must be considered to be independent.

The requirements for appointment to occupy a position on a board of directors are established in the Corporation Law. Generally speaking, a director must be someone with an unblemished reputation who has not been convicted in an administrative or judicial procedure in relation to corporate crimes or irregularities.

The board of directors can create specific committees (e.g., compensation, related-party transactions and audit) to assist it in the management of the company. For the companies currently listed in the Novo Mercado segment, it will be mandatory to install an audit committee, statutory or not, as from the ordinary shareholders’ meeting that shall approve the financial statements related to the fiscal year 2020.

5 Closely held companies are not required to have a board of directors.
Listed companies must rotate their independent auditor every five years and must wait at least three years before rehiring the same auditor. However, if the listed company has installed a statutory audit committee, rotation can occur every 10 years instead of five.

In the event of a tender offer for the acquisition of the control of a listed company (Takeover TO), in principle, the board of directors of the listed companies is not under an obligation to make a statement as to whether or not it agrees with the terms and conditions of the Takeover TO.

If, however, the board of directors decides to make a statement on the Takeover TO, the statement must be disclosed to the market and must address such issues as provision of information on all aspects necessary to allow an informed decision by the investor, especially with regard to the price being offered; and any material changes in the company's financial condition since the date of the most recent financial statements or quarterly reports disclosed to the market.

In the case of companies listed on the Novo Mercado and Level 2 listing segments, the board of directors is required to prepare and disclose a reasoned opinion on the Takeover TO – in favour or against it – and to address the following topics:

a. the suitability of and opportunities presented by the Takeover TO;
b. the impact of the Takeover TO on the interests of the company;
c. the offeror’s stated strategic plans for the company; and
d. any other point of consideration the board may deem relevant.

**Executive board**

The executive board shall be composed of at least two officers. The officers of Brazilian listed companies can be elected and removed at any time by the board of directors.

Up to one-third of the board members may be elected for executive board positions held concurrently. Pursuant to the rules of the Novo Mercado, Level 2 and Level 1 listing segments, the offices of chair of the board of directors and CEO cannot be held by the same individual. However, the holding of these positions concurrently is allowed on an exceptional basis:

a. in the case of the companies listed in the Level 2 and Level 1 listing segments, for a maximum period of three years from the date that the company's shares start to be traded on the special listing segment; and
b. in the case of the companies listed in the Novo Mercado listing segment, in the case of vacancy for a maximum period of one year, within such period the company shall disclose the accumulation of positions owing to vacancy not later than the business day following its occurrence, and disclose within 60 days of the vacancy the measures taken to end the accumulation of positions.

Among other duties, the executive board represents the company in dealings with third parties. The by-laws may establish that certain managerial decisions should be taken in executive board meetings only.

The by-laws will establish the number of officers permitted, the manner of their replacement, their term of office, and the assignments and powers of each officer. Officers will perform their duties separately, according to their assignments and powers, but in keeping with the other officers, and will not be held liable for any obligations assumed on behalf of the company as regards routine acts necessary for the company's management.
If the by-laws are silent or there is no resolution adopted by the board of directors prescribing the officers’ duties, any officer may represent the company and take the actions necessary for its routine operations.

**Compensation of the members of the board of directors and executive board**

The shareholders’ meeting shall prescribe the aggregate or individual compensation of the members of the board of directors and executive board, including benefits of any kind and representation allowances, taking into consideration their responsibilities, the time devoted to their duties, their skills and professional standing, and the market value of their services. If the shareholders’ meeting approves the aggregate compensation to be paid to the company’s directors and officers, it will fall under the authority of the board of directors to approve the allocation of the compensation between the company’s directors and officers.

If the company’s by-laws set forth a compulsory dividend equal to or above 25 per cent of the net profits, it may establish a share in the company’s profits to the benefit of the company’s directors and officers, provided that the total amount thereof does not exceed the annual compensation of the directors and officers, or one-tenth of the profits, whichever is the lower. Nevertheless, directors and officers shall only be entitled to a share in the profits in a financial year for which the compulsory dividend is paid to the shareholders.

Detailed information on the compensation paid to the company’s directors and officers, including, but not limited to, the breakdown of the compensation (e.g., fixed and variable compensation), and the minimum, lowest and average compensation paid, must be disclosed in the company’s reference form. In addition, the companies listed in the Novo Mercado segment must have and disclose their compensation policies.

**Fiscal board**

The fiscal board is a supervisory body responsible for supervising the company’s directors and officers and providing information in this respect to the shareholders.

The fiscal board is a compulsory body, but need not operate on a standing basis. A non-permanent fiscal board must be instated upon the request of shareholders representing at least 10 per cent of the voting stock or 5 per cent of the non-voting stock.

The fiscal board is composed of three to five members and a like number of alternates. The conditions for election and impairment of fiscal board members (who must be Brazilian residents) are prescribed by law.

The fiscal board has the authority to, among other things:

- **a** monitor the actions of the company’s officers and directors and verify their compliance with their legal and statutory duties;
- **b** review and give an opinion on the board of directors’ annual report;
- **c** review and give an opinion on proposals of the management to the shareholders’ meeting relating to changes in capital, the issuance of debentures or warrants, investment plans or capital budgets, dividend distributions and certain corporate reorganisations;
- **d** report any error, fraud or criminal act, and suggest measures useful to the company to any officer or member of another administrative body, and, if these fail to take any necessary steps, to act to protect the corporation’s interest and report to the shareholders’ meeting;
- **e** review the balance sheet and other financial statements periodically prepared by the company; and
- **f** examine the financial statements for the fiscal year and give an opinion about them.
The fiscal board’s authorities can be neither delegated nor attributed to any other body of the company.

ii Directors

As mentioned above, the board of directors is a decision-making body of the company, but the daily routine of administration of the company shall fall to the executive board. All the members of the board of directors, including the outside or independent members, must receive in advance of the meetings of the board of directors information about the matters that will be discussed and put to the vote.

Brazilian legislation does not expressly state that the directors have the right to visit the company’s facilities and its subsidiaries, or that the directors should have free access to the lower management of the company. However, considering that among the duties provided for the board of directors in the Corporation Law, it is established that the board of directors shall ‘supervise the performance of the officers, examine the books and records of the company at any time, request information on contracts signed or about to be signed, and take all other necessary action’, it is expected that the directors shall have free access to the company, its subsidiaries and its lower management.

Pursuant to the Corporation Law, the directors have the following duties and obligations:

a a duty of diligence, employing the same care and diligence that every diligent and honest person employs in his or her own business;
b to act within the scope of their duties without misuse of power, refraining from the performance of gratuitous or non-authorised acts and from the receipt of personal advantage by reason of the performance of their duties;
c even if elected by a certain group or class of shareholders, they have the same duty to the company as everyone else, and must not, even in the defence of the interests of those who elected them, fail to fulfil these duties;
d a duty of loyalty;
e to act without conflict of interest, not intervening in any transaction where they have an interest conflicting with that of the company; and
f a duty of information.

As regards the liability of the directors, directors shall not be held personally liable for the obligations assumed on behalf of the company as a result of a regular act of management. However, directors shall be held liable in civil lawsuits for losses that they cause owing to acts of negligence or fraudulent intent and in violation of the law or the company’s by-laws.

Note that the directors shall not be liable for unlawful acts performed by other directors, unless they are involved with these directors or they neglect to perceive them, or if, having knowledge of them, they fail to act to prevent their performance. However, directors are held jointly liable in the case of decisions taken by the board of directors.

In this particular, we note that each of its members is personally liable for any act of omission or negligence of the board of directors, and a dissident director shall express his or her disagreement regarding the resolutions taken through the clear and written register in the minutes of the meeting of the competent administration body, to release him or herself from any eventual civil liability. Any director who agrees with the performance of acts that violate the law or the company’s by-laws shall be held jointly liable for the losses resulting from said act.
The members of the board of directors are elected by the shareholders, who can dismiss them at any time. The shareholders representing at least one-tenth of the voting capital may request that a multiple voting procedure be adopted to entitle each share to as many votes as there are board members, and to give each shareholder the right to vote cumulatively for only one candidate or to distribute his or her votes among several candidates.

The term of office of the directors must be defined in the by-laws, but cannot exceed three years, although re-election is permitted. In the case of companies listed in the Novo Mercado, Level 2, Level 1 and BOVESPA MAIS listing segments, the term of office cannot exceed two years, although again re-election is permitted.

The requirements for appointment to occupy a position on the board of directors are established in the Corporation Law. Generally speaking, a director must be someone with unblemished reputation, who has not been convicted in an administrative or judicial procedure in relation to corporate crimes or irregularities. Furthermore, unless waived in a shareholders’ meeting, individuals who hold positions in companies that may be regarded as market competitors of the company, or who have any interests that conflict with those of the company, cannot be elected as a board member.

As regards conflicts of interest, a director shall not take part in any corporate transaction in which he or she has an interest that conflicts with an interest of the company, or take part in the decisions made by the other directors on the matter. He or she shall disclose his or her disqualification to the other directors, and shall cause the nature and extent of his or her interest to be recorded in the minutes of the meeting of the board of directors.

Notwithstanding compliance with the conflict of interest provision, a director may only contract with the company at arm’s length. Any business contracted other than on an arm’s-length basis is voidable, and the director concerned shall be compelled to transfer to the company all benefits that he or she obtains through such business.

III DISCLOSURE

The Corporation Law has adopted the principle of full disclosure when it comes to acts or facts related to a company that may be considered relevant. The disclosure of material events is a duty of the company’s investor relations officer, who may be held personally liable for damage arising as a result of non-disclosure.

CVM Ruling No. 358/2002, which sets forth the general disclosure rules for listed companies, defines material event broadly as:

a any decision arising from a controlling shareholder, a general shareholders’ meeting or a management body of a publicly held corporation, or any other act or event of a policy, management, technical, business, economic or financial nature in connection with its business that could considerably influence the trading price of the securities issued by or related to the company;

b the decision by investors to buy, sell or keep those securities; and

c the decision by investors to exercise any rights they have as holders of securities issued by or related to the company.

The companies listed in the Novo Mercado segment are required to disclose their material facts in Portuguese and English, concurrently.

At the end of 2009, CVM enacted CVM Rulings Nos. 480/2009 and 481/2009, modifying, respectively, the rules regarding the disclosure of information by publicly held
companies and the presentation of documents and information before meetings are held. The main change in disclosure issues was the introduction of the reference form, which basically compiles corporate, contractual, financial or economic, governance and human resources information about the company. The reference form must be updated at least once a year, or in a shorter period upon the occurrence of certain events that demand an update of the information provided in the reference form.

As to financial reporting, listed companies must disclose their financial statements, together with the management report, the independent auditors’ report and the opinion of the fiscal board, if installed, at least one month in advance of the ordinary shareholders’ meeting.6

Listed companies must also disclose the standard form of financial statements (DFP) within the first three months of the end of each fiscal year. The DFP is an electronic form created in CVM’s electronic system that must be completed using information obtained from the annual financial statement.

Listed companies shall also disclose, on a quarterly basis, the quarterly information form, which is also an electronic form and which must be completed using the company’s quarterly financial information. It must contain the report of the special review issued by the independent auditor.

In addition to disclosing their financial statements in Portuguese, companies listed in the Level 2 listing segment must also disclose them in English.

Regarding one-on-one meetings, companies listed in the Novo Mercado must hold a public presentation on the information disclosed in their quarterly earnings results or financial statements within five business days of their release. Such public presentation may be conducted face-to-face or via teleconference, videoconference or any other means that enables stakeholders to participate remotely. On the other hand, the companies listed in the Level 2 and Level 1 listing segments are required to hold, at least once a year, a public meeting with analysts and other third parties to disclose information about their financial and economic situation, projects and expectations.

IV CORPORATE RESPONSIBILITY

Pursuant to the Corporation Law, all publicly held companies must prepare on an annual basis, within their financial statement, a value-added statement, which could be considered as the balance statement of the company’s ‘social account’. This statement provides information on the overall wealth produced by the company, on the allocation of resources to those areas of the company that contributed to the generation of that wealth (such as employees, financiers, shareholders, the government and others) and on the unallocated portion of that wealth. In addition, some companies seek certification from institutes such as the Ethos Institute, the Brazilian Institute of Social and Economic Analysis and the Global Reporting Initiative, but such certification is not mandatory for listed companies.

Another aspect of this social accounting is evidenced in the code published by the Brazilian Financial and Capital Markets Association (ANBIMA) regarding public offerings, which sets forth that companies must include in their reference form information on social

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6 The ordinary shareholders’ meeting must be held within the first four months of the end of each fiscal year.
responsibility and cultural incentives, and on any projects in those areas implemented by the company. Thus, although the ANBIMA code does not require their existence, if the company has any social responsibility policies in place, these should be disclosed in the reference form.

Furthermore, a new anticorruption law has been in place since 29 January 2014, and this introduced administrative and civil liability of legal entities for illicit acts committed in relation to local and foreign public officials. However, there is as yet no whistle-blowing legislation in force in Brazil.

V SHAREHOLDERS

i Shareholder rights and powers

Each common share shall have the right to one vote in shareholders’ meetings, and it is not possible to have shares with multiple voting rights. Brazilian companies can, however, issue preferred shares, which can be issued without voting rights (although companies listed in the Novo Mercado are required to issue only common shares).

In addition, the Corporation Law sets forth that it is possible to include in the company’s by-laws a provision restricting the number of votes by each shareholder. Nevertheless, the companies listed in the Novo Mercado and Level 2 listing segments are not permitted to include in their by-laws any provision restricting the number of votes of shareholders to a percentage below 5 per cent of the stock capital, except in a few cases provided in the listing rules.

In theory, shareholders should not have the ability to influence directors’ decision-making. In this regard, a specific article of the Corporation Law sets forth that a director shall use his or her powers to achieve the company objectives and to support its best interests, even if these interests are contrary to those of the shareholder, or a group of shareholders, who have elected or indicated him or her.

Nevertheless, the Corporation Law also contains a provision stating that the votes of directors can be bound by a shareholders’ agreement. Therefore, the Corporation Law recognises that the directors can receive instructions from the shareholders on how to vote in board meetings.

The shareholders’ meeting has exclusive authority to:

- amend the by-laws;
- elect or discharge the company’s senior management and fiscal board members;
- receive the annual accounts of the senior management and resolve on the financial statements presented by them;
- suspend the exercise of rights by a shareholder;
- resolve on the appraisal of assets contributed by any shareholder to the company’s capital;
- authorise the issuance of participation certificates;
- resolve on the transformation, merger, consolidation, spin-off, winding-up and liquidation of the company, elect and dismiss liquidators, and examine the liquidators’ accounts; and
- authorise the senior managers to admit bankruptcy of the company and to file for debt rehabilitation.
As for the rights of dissenting shareholders, certain fundamental changes in the company entitle the shareholders who have not voted in favour of the resolution to withdraw, by refund of their shares, under the circumstances below:

- **a** in the case of the creation of preferred shares or an increase of an existing class without maintaining its ratio in relation to the other classes, and change of a preference, a privilege or a condition of redemption or amortisation conferred upon one or more classes of preferred shares, or creation of a new and more favoured class;
- **b** the spin-off of the company only triggers the right to withdraw if it results in a change in the corporate purposes – except when the spun-off company is transferred to a corporation with a main line of business that coincides with the line of business of the spun-off company – a reduction in the mandatory dividend or participation in a group of corporations;
- **c** the reduction of the compulsory dividend in any specific fiscal year, change of corporate purpose and insertion of an arbitration clause in the by-laws;
- **d** the approval of the merger of shares entitles shareholders of both companies involved to withdraw; and
- **e** a shareholder who has not voted in favour of the acquisition by the listed company of which he or she is a shareholder of the control of a business corporation is entitled to withdraw if the purchase price exceeds 1.5 times the greatest of:
  - the average quotation of the shares on the stock exchange during the 90 days prior to the contracting date;
  - the net value of each share or quota, the assets and liabilities having been valued at market prices (liquidation value); and
  - the net profit of each share or quota, which may not exceed 15 times the annual net profit per share during the past two fiscal years, monetarily adjusted.

**ii Shareholders’ duties and responsibilities**

The controlling shareholder has the duty to use its controlling power to make the company accomplish its purpose and perform its social role, and shall have duties and responsibilities towards the other shareholders of the company, those who work for the company and the community in which it operates, the rights and interests of which the controlling shareholder must loyally respect and heed.

The controlling shareholder shall be liable for any damage caused by acts performed in abuse of its power. The Corporation Law lists some examples of what would be considered an abuse of power, which include, among others, the following:

- **a** guiding a company towards an objective other than in accordance with its stated objects, or that is harmful to national interests, or induce it to favour another Brazilian or foreign concern to the detriment of the minority shareholders’ interests in the profits or assets of the company or of the Brazilian economy; and
- **b** arranging for liquidation of a viable company or for the transformation, merger or division of a company to obtain, for itself or for a third party, any undue advantage to the detriment of the other shareholders, of those working for the company or of investors in the company.

There are no specific duties provided in Brazilian legislation for institutional investors, and there is no code of best practice for shareholders.
iii Shareholder activism

Shareholder activism is not well developed in Brazil. Recent years, however, have seen a growing amount of shareholder activism, especially by some fund managers, but shareholder activism is still not part of the culture of the Brazilian capital markets.

The Brazilian companies most exposed to shareholder activism are those that have issued American depository receipts in the US market. A good example would be Petrobras, the Brazilian oil and gas company, which faced securities class actions filed with the New York courts by US investors owing to losses stemming from money-laundering and corruption schemes that have become public in the past few years; Petrobras announced in January 2018 that it has signed an agreement to settle such class action in an amount of US$2.95 billion. Owing to this settlement, some minority shareholders have filed lawsuits in Brazil asking for a similar indemnification in Brazil, but it is unlikely that they will receive an indemnification from Petrobras in such amount, since the Brazilian legislation and judicial environment do not provide minority shareholders the ability to receive indemnifications in such proportion.

iv Takeover defences

Shareholder and voting rights plans, and similar measures

The Corporation Law and CVM Ruling No. 361 require as a condition for the effectiveness of the direct or indirect disposal of a controlling interest in a listed company that the acquirer make a mandatory public tender offer (tag-along TO) for the acquisition of all the voting shares that are not part of the controlling block.

The tag-along TO must ensure minority shareholders the receipt of at least 80 per cent of the value paid per voting share included in the controlling block. For companies listed on the Novo Mercado listing segment, the amount to be paid in the tag-along TO shall correspond to 100 per cent of the value paid per voting share included in the controlling block.

Another defence to be considered is the use of poison pills, which Brazilian legislation does not prevent companies from putting in place, and they are used in some listed companies. The typical Brazilian poison pill requires the acquirer of an equity interest above a given threshold to make a tender offer to all shareholders for a punitive price. The use of poison pills must, however, be established in the by-laws of the company. As a consequence, only the shareholders’ meeting, which has exclusive authority to amend the by-laws, is empowered to put poison pills in place.

CVM has already pronounced against provisions that penalise or prevent shareholders from voting against the exclusion of poison pills on a case-by-case basis in a definitive manner. Furthermore, the rules of Novo Mercado listing do not allow companies that want to trade their shares on the Novo Mercado to have poison pills in their by-laws.

v Contact with shareholders

Mandatory and best practice reporting to all shareholders

Companies must disclose to all of their shareholders, through their websites, as well as on the CVM and B3 websites, certain ordinary and extraordinary reports or information, such as the reference form, financial statements, minutes of the shareholders’ meetings and documents necessary for review by shareholders to be able to exercise their voting right in shareholders’ meetings.
It is a common practice in listed companies to hold a conference call with investors right after the release of the annual or quarterly financial statement to discuss a company’s results. It is also usual for these companies to hold meetings or calls with analysts to discuss the company to enable the analysts to issue their reports on the company. In the case of the companies listed in the Novo Mercado segment, as already mentioned above, they must hold a public presentation on the information disclosed in their quarterly earnings results or financial statements within five business days of their release.

Whenever the company holds a meeting with a specific shareholder to discuss a material fact that has not been disclosed, it is usual to have this shareholder sign a non-disclosure agreement, and the shareholder would be subject to a blackout period during which it would be unable to trade in the company’s shares, until the material information is disclosed to the market.

Call notices for the shareholders’ meetings of publicly held companies must be published at least three times, with the first call notice being published, as a general rule, at least 15 days in advance.7

Publicly held companies are required to disclose on the same day as the first publication of the call notice the manual of the shareholders’ meeting, which contains detailed information about the matters to be discussed and the management proposal for each of the matters that will be voted on.

The supporting documentation for the ordinary shareholders’ meeting (e.g., financial statements, management report, independent auditor’s report and opinion of the fiscal board) must be disclosed to the shareholders 30 days in advance of the date of the meeting.

In 2015, CVM enacted a ruling on attendance and distance voting at shareholders’ meetings of publicly held companies, whereby shareholders would be able to present proposals of deliberations to be voted on, and to vote on the deliberations of the shareholders’ meeting, subject to certain requirements. Implementation of this proxy voting system was mandatory for the major companies listed on B3 as from 2017, and has been mandatory for all listed companies as from 2018.

VI OUTLOOK

We expect that the biggest trends in the next few years in Brazil will be the escalation of proxy voting and the battle over the implementation by listed companies of the practices provided in the Corporate Governance Code. Besides, considering the increase in the number of IPOs and follow-ons in the pipeline, we expect that it will be important for companies to pursue the highest level in terms of corporate governance rules in order to be evaluated well by investors and, consequently, be successful in their offerings.

7 For some specific matters, the call notice must be published 30 days in advance.
I OVERVIEW OF GOVERNANCE REGIME

Canada’s system of corporate governance is derived from the British common law model and strongly influenced by developments in the United States. While corporate governance practices in the United Kingdom and the United States are similar in many respects, where there are differences, Canadian practice usually falls somewhere in between. For example, a Canadian corporation is more likely than a US corporation to have a chair who is not the CEO, and typically has fewer executives on the board than a UK corporation.²

Under Canada’s Constitution, provincial governments have exclusive power over property and civil rights within the province. As a result, corporations may choose to incorporate under federal corporate law or under the corporate laws of any of the 10 provinces in Canada. In addition, securities law in Canada is regulated by securities administrators in Canada’s 10 provinces and three territories. However, the federal governments and five provincial governments are collaborating on a cooperative capital markets regulatory system.³

Corporate governance practices in Canada are shaped by legal rules and best practices promoted by institutional shareholder groups, the media and professional director associations such as the Institute of Corporate Directors. Sources of legal rules include provincial corporate statutes, securities laws and rules, stock exchange requirements and common law, as well as a wide variety of other regulatory statutes, regulations and policies. The 10 provincial securities commissions are very active in corporate governance matters, which often overlap corporate law areas of concern.

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1 Andrew MacDougall and John Valley are partners at Osler, Hoskin & Harcourt LLP.
2 According to reports by Spencer Stuart, in Canada 86 per cent of corporations have a chair who is not the CEO and 81 per cent of directors are independent; in the United Kingdom the CEO rarely serves as chair but only 64.9 per cent of the directors (excluding the chair) are non-executives (of whom 94.4 per cent, or 61.3 per cent of all directors, are independent); and in the United States only 50 per cent of corporations have a chair who is not the current CEO, but 85 per cent of directors are independent. See the 2018 Canadian Spencer Stuart Board Index, the Spencer Stuart 2018 UK Board Index and the 2018 Spencer Stuart Board Index.
3 The cooperative capital markets regulatory system would involve uniform provincial capital markets legislation of participating provinces and complementary federal legislation. The participating provinces and territories are Ontario, British Columbia, Saskatchewan, New Brunswick, Prince Edward Island and Yukon, with Nova Scotia having also announced its intention to participate. The Supreme Court of Canada dismissed a constitutional challenge to the proposal in late 2018, but no public timeline for the system becoming operational has been provided.
Canadian corporate governance has also been influenced by the high proportion of public corporations in Canada that have a dominant or controlling shareholder, either through equity ownership or the ownership of multiple voting rights.

Canadian institutional investors have a profound influence on Canadian corporate governance practices, including through a national institutional investor organisation formed to promote good governance practices in corporations whose shares its members own. This organisation, the Canadian Coalition for Good Governance, comprises approximately 50 members, including many of Canada’s largest institutional investors, collectively managing almost C$4 trillion in assets, and has pursued an organised programme of articulating its views and encouraging best practices generally without resorting to proxy battles.

Recent developments

Climate change

In April 2018, the Canadian Securities Administrators (CSA) issued a staff notice outlining the CSA’s findings in connection with its Climate Change-Related Disclosure Project following a year-long review of issuer disclosure practices and investor needs. The CSA found that there is a broad consensus among those who make use of climate change information disclosed by companies that the quality, clarity, consistency and comparability of disclosure needs to improve. Issuers emphasised the importance of mandating disclosure only of information determined to be material under securities laws, while encouraging voluntary disclosure of additional information on climate change matters, most of which they viewed as being non-material. Additional developments in this area are likely given investor demand for enhanced disclosure of this type.

Diversity

The representation of women on boards and in executive officer positions continues to be of interest to regulators, investors and the media. Canadian comply or explain diversity disclosure requirements for issuers listed on the Toronto Stock Exchange (TSX) have been in effect under Canadian securities laws since 31 December 2014. Progress in increasing the number of women on boards continued in 2018, but the progress was incremental. Women now hold 16.4 per cent of all board seats among TSX-listed companies, with over two-thirds of TSX-listed companies having at least one woman director and one-third having two or more. A majority of TSX-listed issuers have adopted board diversity policies. However, there has been almost no growth in the average number of women executive officers, and relatively few issuers adopt targets for the representation of women on their board or in executive officer positions.

In September 2018, the CSA issued its Report on Fourth Staff Review of Disclosure regarding Women on Boards and in Executive Officer Positions. CSA staff stated that, having consulted with a variety of stakeholders, the CSA is considering whether to make changes to the diversity disclosure requirement.

Within the next year, certain Canadian public companies will be required to provide board and executive diversity disclosure that encompasses diversity characteristics in addition to gender. Amendments to the Canada Business Corporations Act (CBCA) approved in May 2018 (but not yet in force), and proposed regulations under that Act, will introduce a new diversity disclosure requirement applicable to all publicly traded CBCA companies, including
venture issuers. Such companies would be required to provide disclosure regarding the representation on the board and in executive officer positions of ‘designated group members’, including women, visible minorities, Canadian Aboriginal people and disabled persons.

II CORPORATE LEADERSHIP

i Board structure and practices

Responsibility for the governance of a corporation is vested in the corporation’s board of directors (board). In Canada, the board is a single-tier body elected by the shareholders that is responsible for supervising the management of the corporation. If shareholders are not satisfied with the performance of the board, they may remove the directors or refuse to re-elect them.

The role of directors is one of stewardship and oversight. Directors have complete discretion to exercise their powers as they deem appropriate, subject to the constraints imposed by law. The board discharges its responsibilities through majority approval of the directors at board meetings.

Directors are neither required nor expected to devote their full time and attention to the corporation’s affairs. Instead, responsibility for the day-to-day management of a corporation’s affairs is typically delegated to the CEO and other senior executives who are responsible to, and report back to, the board. Appointing these senior executives and evaluating their performance are among the most important functions of the board. Notwithstanding such delegation, the board retains the ability to intervene in management’s decisions and must exercise final judgement on matters that are material to the corporation. National Policy 58-201 Corporate Governance Guidelines (NP 58-201), issued by the CSA, recommends that a board adopt a written mandate in which it acknowledges responsibility for stewardship of the corporation.

Committees

The board may delegate a number of its responsibilities to committees of directors. However, certain responsibilities may not be delegated to such a committee, including (under the CBCA):

a making changes to the by-laws;

b approving the annual financial statements, a management proxy circular, a takeover bid circular or a directors’ circular;

c issuing securities (except on terms already approved by the board);

d declaring dividends; and

e purchasing or redeeming shares of the corporation.

In practice, the committees of many boards do not formally approve the matters before them but return the matter to the full board with their recommendation.

All public corporations are required by statute to have an audit committee. Private corporations frequently choose to have an audit committee as a matter of good practice. Most public corporations also have separate committees to deal with compensation matters and director nominations and corporate governance. Corporations with larger boards may also have an executive committee. Boards also strike ad hoc or special committees from time to time to address specific issues or transactions.
Under the corporate statutes, the audit committee of a public corporation must be composed of at least three directors, a majority of whom must not be employees of the corporation or any of its affiliates. However, National Instrument 52-110 Audit Committees (NI 52-110) of the CSA requires that public corporation audit committees be composed of at least three members, all of whom must be independent directors, as defined in that instrument. NI 52-110 also requires that all members of the audit committee be financially literate – that is, that they have the ability to read and understand a set of financial statements that present a breadth and level of complexity of accounting issues that are generally comparable to the breadth and complexity of the issues that can reasonably be expected to be raised by the corporation’s financial statements. Furthermore, corporations must disclose the education and experience of each audit committee member that is relevant to the performance of his or her responsibilities as an audit committee member.

Public corporations are required to disclose publicly on an annual basis the processes by which a board determines compensation for a corporation’s directors and officers, including the responsibilities, powers, experience and operation of the compensation committee of the board, if any, and the identity, mandate and compensation paid to any advisers retained by the committee in the past financial year. The overwhelming majority of Canadian public corporations establish a board committee that has responsibility for overseeing compensation matters. NP 58-201 recommends that a board appoint a compensation committee composed entirely of independent directors with responsibilities for oversight of the compensation payable to senior executives. The members of the compensation committee are not required to be independent or to have any particular expertise. However, if the compensation committee is not comprised solely of independent directors as defined in Section 1.4 of NI 52-110, the corporation must disclose what steps the board takes to ensure an objective process for determining executive compensation.

Most Canadian public corporations also have a board committee that has responsibility for overseeing the process for nominating directors for election by shareholders. NP 58-201 recommends that, before an individual is nominated as a director, the board, with advice and input from the nominating committee, should consider:

- **the competencies and skills that the board, as a whole, should possess;**
- **the competencies and skills of each existing director and of each new nominee; and**
- **whether the new nominee can devote sufficient time and resources to serving as a director.**

Public corporations are required to disclose publicly on an annual basis the process by which the board identifies new candidates for nomination, and the responsibilities, powers and operation of the nominating committee. The members of the nominating committee are not required to be independent or to have any particular expertise. However, if the nomination committee is not comprised solely of independent directors as defined in Section 1.4 of NI 52-110, the corporation must disclose what steps the board takes to ensure an objective nominating process.

**Board chair**

Boards appoint a chair from among the directors with responsibility to provide leadership to the board to enhance board effectiveness. The chair is responsible for, among other things,
managing the board, setting the agenda, ensuring that directors are kept informed, presiding at director and shareholder meetings, and acting as a key liaison between the board and senior management.

Canadian boards typically do not appoint the CEO as board chair. Concerns about board accountability and process and the desire to provide independent leadership to the board have led most larger public corporation boards in Canada to appoint an independent director as board chair. NP 58-201 recommends that the chair of the board should be an independent director and, where this is not appropriate, an independent director be appointed as lead director. Public corporations are required to disclose whether the chair is an independent director and, if not, to disclose whether the board has a lead director. If there is no independent chair or independent lead director, a corporation must then disclose what the board does to provide leadership for its independent directors.

ii Directors

Directors are fiduciaries of the corporation they serve. This obligation and duty arises under common law, and is codified in the corporate statutes in the requirement that directors act honestly and in good faith with a view to the best interests of the corporation, and must exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. This fiduciary relationship requires a strict standard of conduct that includes loyalty and good faith, and requires directors to avoid putting themselves in a position where their duty to act in the best interests of the corporation conflicts with their other obligations.

Directors are required by corporate statutes to discharge their fiduciary duty ‘with a view to the best interests of the corporation’. The Supreme Court of Canada has stated that the best interests of the corporation must not be confused with the interests of the corporation’s shareholders or any other particular stakeholders of the corporation.

Director qualifications

Canadian corporate statutes impose minimal qualifications for directors. Any individual who is 18 or over and of sound mind and who is not bankrupt may serve as a director. Some Canadian corporate statutes also require that a certain percentage of directors of the board and committees be resident Canadians.

The ability of the board to exercise independent judgement is of fundamental importance to the governance of public corporations. As a result, most public corporation boards have a number of independent directors. Independent directors and the role they play in ensuring the board is able to exercise independent judgement have been a focus for those concerned with accountability in corporate governance. Rules for the determination of who may be considered to be an independent director are set out in both corporate and securities legislation in Canada. In addition, some Canadian institutional shareholders set their own standards for assessing director independence.

The corporate statutes define an independent director as any director who is not employed by the corporation or one of its affiliates. Under this definition, recently retired employees of the corporation and representatives of a controlling shareholder of the corporation would qualify as independent. Further, as the term affiliates involves the concept of control, directors or employees of a major, but not controlling, shareholder are technically independent under the corporate statutes.
The TSX requires a listed corporation to have at least two independent directors. For this purpose, an independent director is a person who:

a is not a member of management, and is free from any interest and any business or other relationship that could reasonably be perceived to materially interfere with the director’s ability to act in the best interest of the corporation; and

b is a beneficial holder, directly or indirectly, or is a nominee or associate of a beneficial holder, collectively of 10 per cent or less of the votes attaching to all issued and outstanding securities of the corporation.

However, the TSX does not consider a person to be independent if within the past three years they have served as an employee or service provider to the listed corporation or its affiliates, or they currently serve as an employee or controlling shareholder of a corporation that has a material business relationship with the listed corporation.

For publicly traded corporations, there is yet another definition of independent director. The definition is set out in Section 1.4 of NI 52-110 of the CSA, and requires the board to consider whether there is a material relationship between the director and the corporation that could, in the board’s view, be reasonably expected to interfere with the exercise of that director’s independent judgement. In making its determination, the board must consider all direct and indirect relationships between a director and the corporation – past, present and anticipated – both individually and collectively. The board’s determination is subject to certain bright-line tests that are similar to the director independence tests under the New York Stock Exchange’s corporate governance listing requirements. Under these tests, recently retired employees and employees of a parent of the corporation are not independent. Public corporations are required to disclose annually which of the directors on the board are independent and which are not, and describe the basis for determining that a director was not independent. For audit committee purposes, there are additional bright-line director independence tests set out in Section 1.5 of NI 52-110 that correspond to requirements under the Securities Exchange Act of 1934 in the United States.

Election and term

Directors are usually elected by shareholders at the corporation’s annual meeting. Most Canadian corporations provide shareholders with the opportunity to vote on each director individually, instead of en bloc for a slate of directors. Slate voting for directors is rare in Canada since the TSX senior exchange requires all its listed companies to provide for individual voting for directors. Currently, shareholders may vote for directors or withhold their vote, but cannot vote against a director. However, once the amendments to the CBCA, which were approved in May 2018, are proclaimed in force, shareholders will be able to vote against a director at a shareholder meeting where the number of director nominees is equal to the number of positions to be filled. A corporation’s articles may provide for cumulative voting for directors, whereby each shareholder may cast one vote for each share held multiplied by the number of directors to be elected. However, this is very rarely seen in practice. The articles of a corporation may also permit a particular class of security holders, such as preferred shareholders, to elect one or more directors, or may permit a particular class of security holders to hold multiple voting rights, such as 10 votes per share.

Since 30 June 2014, companies listed on the TSX, other than those that are majority controlled, have been required to have adopted majority voting for the election of directors, either as a board policy or as an amendment to their constating documents. Under this
majority voting framework, if in an uncontested election more votes are withheld from the election of a director than are voted in favour of the director’s election, the director must immediately tender a resignation for consideration by the board. The board must accept the resignation absent exceptional circumstances, and it must make its determination as to whether to accept the resignation within 90 days and announce it via a press release promptly thereafter. A copy of this press release must also be provided to the TSX. When the CBCA Amendments are proclaimed into force, boards of publicly traded CBCA corporations will be elected under a majority voting standard when the election of directors is uncontested, meaning that a director of such a company who receives more against votes than for votes will not be validly elected, although they may continue in office for a period of up to 90 days.

Directors are generally elected annually. Although corporate statutes permit directors to be elected for terms of up to three years and on a staggered basis, such practices are rare since most Canadian corporate statutes permit shareholders to remove one or more directors from office mid-term and elect their replacements. In addition, the TSX senior exchange requires all its listed companies to elect directors annually.

**Board diversity requirements**

Virtually all Canadian issuers subject to public reporting requirements in Canada, other than venture issuers and investment funds, are subject to disclosure requirements respecting the representation of women on the board and in senior management, and respecting board renewal mechanisms. All provinces and territories other than British Columbia, Yukon and Prince Edward Island have implemented amendments to a national instrument on disclosure of corporate governance practices that require issuers to disclose annually in the proxy circular for the annual meeting (or the annual information form if the issuer does not send a proxy circular to its investors) the number and percentage of women directors and women who are executive officers. Such issuers must disclose whether:

a. the issuer has adopted term limits for board service or other mechanisms for board renewal, and if so to describe them and, if not, to explain why;
b. the issuer has a written policy for the identification and nomination of women directors and, if not, to explain why;
c. the board considers the level of representation of women on the board in identifying and nominating candidates for director and how it does so, and if it does not, to explain why;
d. the issuer considers the level of representation of women in executive officer positions when making executive officer appointments and how it does so, and if it does not, to explain why; and
e. the issuer has adopted targets respecting the number or percentage of women on the board and in executive officer positions, and if not, to explain why.

If an issuer has adopted a written policy for the identification and nomination of women directors, the issuer must summarise the policy and its objectives, the measures taken to implement it, the annual and cumulative progress made on achieving the objectives and whether, and if so how, the board or nominating committee measures the policy’s effectiveness. If targets regarding women on the board or in executive officer positions have been adopted, the issuer must disclose the annual and cumulative progress made on achieving the targets.
Once the amendments to the CBCA are proclaimed into force, the diversity disclosure requirements under that statute will apply to all publicly traded companies (including venture issuers) incorporated under the CBCA.

III  DISCLOSURE

All Canadian corporations are subject to periodic reporting to shareholders. In the case of a private corporation, periodic reporting may consist solely of the delivery of annual financial statements and a notice of an annual shareholder meeting. Public corporations are also subject to continuous disclosure reporting requirements under Canadian securities laws.

Periodic disclosure requirements require public corporations to file publicly certain documents on the System for Electronic Document Analysis and Retrieval (SEDAR), including annual and quarterly financial statements, and related management's discussion and analysis; an annual information form describing the corporation and its business; and information circulars in respect of shareholder meetings, including disclosure respecting compensation paid or payable to the directors and certain named executive officers.

Canadian public corporations are also subject to timely disclosure obligations. Under Canadian securities laws, public corporations must issue and file on SEDAR a press release as soon as there has been a material change in the business, operations or capital of the corporation that would reasonably be expected to have a significant effect on the market price or value of any of the corporation’s securities. They must also file a material-change report on SEDAR within 10 days of the date of the material change. TSX rules also require listed corporations to promptly disclose by press release any fact that would reasonably be expected to have a significant effect on the market price or value of any of the corporation’s securities.

Failure to comply with periodic filing requirements and timely disclosure obligations may lead to enforcement proceedings by securities administrators. In addition, investors in most jurisdictions in Canada may have a statutory right of action against the corporation and its directors and officers for damages in the event that written or oral disclosure by the corporation is misleading or untimely. Although there are statutory limits on such liability, class action proceedings alleging misleading or untimely disclosure are becoming increasingly prevalent in Canada.

Directors, certain officers, 10 per cent shareholders and certain others are required to file on the System for Electronic Disclosure by Insiders insider reports detailing their holdings of securities and related financial instruments, including equity-based compensation holdings and other arrangements involving, directly or indirectly, a security of the public corporation or related financial instrument. Persons acquiring more than 10 per cent of any class of securities of a public corporation are required to issue a press release and file a report disclosing their holdings.

TSX-listed issuers must post the following on their websites:

\[\begin{align*}
a & \quad \text{their articles or other constating documents and by-laws;} \\
b & \quad \text{their majority voting policy;} \\
c & \quad \text{their advance notice policy for director nominations;} \\
d & \quad \text{a position description for the chair of the board and the lead director (if applicable);} \\
e & \quad \text{their board mandate and board committee charters.}
\end{align*}\]
Public corporation websites typically also include links to documents filed on SEDAR and press releases issued by the corporation, as well as supplemental information provided to analysts, recordings or transcripts of analyst or investor calls, and key corporate governance documents.

IV CORPORATE RESPONSIBILITY

Directors are permitted to consider various stakeholder interests in determining whether they are acting in the best interests of the corporation. In the Supreme Court of Canada’s decision in *BCE Inc v. 1976 Debentureholders*, the Court stated that where there are conflicting stakeholder interests, it falls to the directors to resolve them in accordance with their fiduciary duty to act in the best interests of the corporation viewed as a ‘good corporate citizen’. By this reference, together with the Court’s focus on what is in the corporation’s best interests, the Supreme Court of Canada has rejected a purely shareholder-centric understanding of the duties of a board. Rather, there is recognition that corporations have a responsibility to consider the community in which they operate, and boards have to balance many competing factors and interests when making decisions.

Many Canadian corporations seek to enhance stakeholder trust, including through voluntary participation in initiatives such as the Global Reporting Initiative’s Sustainability Reporting Guidelines.

Boards are responsible for setting the tone at the top by approving codes of conduct for employees and directors that set out the board’s expectations regarding compliance with laws, handling of conflicts of interest and use of resources and stakeholder relations. NP 58-201 states that the board is responsible for satisfying itself as to the integrity of the CEO and other executive officers of the corporation, and that the CEO and other executive officers create a culture of integrity throughout the organisation. The audit committee is required under NI 52-110 to establish procedures for the receipt, retention and treatment of complaints received by the corporation regarding accounting, internal accounting controls or auditing matters, and the confidential, anonymous submission by employees of the corporation of concerns regarding questionable accounting or auditing matters. Most corporations satisfy this requirement by adopting a whistle-blowing policy that addresses not only the reporting of such matters, but also the reporting of potential violations of the corporation’s code of conduct.

V SHAREHOLDERS

Although directors owe a duty to the corporation and not its individual shareholders, shareholders are accorded a special role in the governance of Canadian corporations. Increasingly, shareholders in Canada are taking steps to make their views known to the board, and are exercising their rights when the board’s response or corporate performance is not satisfactory.

i Shareholder rights and powers

Under Canadian corporate statutes, shareholders elect the directors and appoint the external auditors of the corporation. Certain matters of fundamental importance are also required to be approved by shareholders, including:

- changes to the articles and by-laws;
- amalgamations;
reorganisations;
the sale of all or substantially all of the corporation’s assets; and
the continuance of the corporation to the laws of another jurisdiction.

In addition, TSX rules require listed corporations to obtain shareholder approval of certain dilutive transactions and for share-based compensation arrangements involving new issuances of shares.

If a shareholder believes that the actions of the corporation have been unfairly prejudicial to his or her interests, the corporate statutes provide several ways for the shareholder to take action against directors. First, a shareholder may apply to the court for an order compelling the directors to comply with the corporation’s articles, by-laws or governing statute. Secondly, a shareholder can pursue a derivative action, which allows the shareholder to require the corporation to take action against the directors in the name and on behalf of the corporation. Thirdly, a shareholder may take advantage of the oppression remedy. The oppression remedy is a very broad remedy available to a complainant where the corporation, the board or the corporation’s affiliate has acted in a manner that was oppressive or unfairly prejudicial to or that, under certain statutes, unfairly disregarded, the complainant’s interests. The remedy gives a court ‘broad, equitable jurisdiction to enforce not just what is legal but what is fair’ to protect the reasonable expectations of the shareholders.

In addition, shareholders have available to them a range of tools in Canada to exert pressure on corporations they feel are underperforming, all of which are intended to force a reluctant management or board to engage in a dialogue.

Canadian corporate statutes allow shareholders holding at least 5 per cent of the issued shares of a corporation to require directors to convene a shareholder meeting for a broad range of purposes relating to the business of the corporation so long as they respect certain prescribed criteria.

The corporate statutes also permit a shareholder to circulate a proposal to shareholders with a supporting paragraph containing not more than 500 words describing the topic the shareholder wishes to raise at an upcoming shareholder meeting. If the proposal meets time parameters and certain other limited criteria, it must be included in the management information circular sent to shareholders of the corporation. A shareholder proposal submitted by shareholders representing more than 5 per cent of the outstanding shares may include proposed director nominees. Although there continues to be considerable debate regarding proxy access in the United States, the ability of shareholders to submit a shareholder proposal, including director nominees, has been a long-standing provision of Canadian corporate law.

Once a shareholder meeting has been called, any shareholder can solicit proxies either for or against any matter properly before the meeting, including the election of one or more directors, by providing a dissident proxy circular containing prescribed information to the person solicited prior to or contemporaneously with the solicitation. However, certain activities are expressly excluded from the definition of solicitation, and shareholders are entitled to certain exemptions from the proxy solicitation rules. For example, Canadian securities laws now allow a shareholder to solicit proxies by way of public broadcast or speech, or by way of publication, without having to incur the costs associated with preparing and mailing a dissident proxy circular, provided certain conditions are met.
Shareholder activism

Shareholders of Canadian corporations are prepared to exercise voting rights and submit shareholder proposals as a means of encouraging change at corporations. In the past, this has reflected the influence of well-capitalised US-based funds. For example, some Canadian corporations have engaged in contests with Carl Icahn (Fairmont Hotels, Lions Gate Entertainment, Talisman Energy), Crescendo Partners (Cott Corporation), Jana Partners (Agrium), Mason Capital Management (TELUS Corp) and Pershing Capital (CP Rail). In addition, although Canadian fund managers have historically been more than comfortable making their views known to corporate boards and the public, they have periodically demonstrated an increased appetite for formally opposing corporate activity. In 2010, the Canada Pension Plan Investment Board and the Ontario Teachers’ Pension Plan Board were highly vocal opponents of the terms on which Magna International proposed to eliminate its dual-class share structure (and launched an ultimately unsuccessful court challenge).

The Canadian environment can be more favourable to shareholder activists than that of the US because:

- the use of staggered boards is ineffective, as most Canadian corporations’ directors may be removed at any time by a simple majority vote of shareholders, and the TSX listing requirements require the annual election of all board members;
- there are clear rights to requisition meetings with a 5 per cent ownership interest and a clear entitlement to a shareholder list;
- it is easier for shareholders to include proposals on the election of directors in management proxy circulars;
- the threshold for giving notice that a shareholder has accumulated a significant ownership position is higher at 10 per cent, and the reporting regime after hitting that threshold is less onerous; and
- the TSX requires any listed issuer adopting a shareholder rights plan (i.e., poison pill) to obtain shareholder approval of the plan within six months of its adoption, which gives institutional shareholders the ability to influence the terms of these plans.

Shareholder activism has prompted a large number of Canadian corporations to amend their by-laws to require advance notice in respect of nominations for director. Corporations have also looked at adopting shareholder rights plans that may be triggered by shareholders entering into voting agreements or conducting a proxy solicitation, although such provisions are controversial.

Although shareholders are free to vote in their own self-interest, including in pursuit of short-term interests, directors are required at all times to act in the best interests of the corporation. In determining what is in the corporation’s best interests, directors are permitted to consider the interests of all of the corporation’s stakeholders, not just its shareholders. Where there are conflicting stakeholder interests, it falls to the directors to resolve these conflicts fairly in accordance with their fiduciary duty to act in the best interests of the corporation viewed as a good corporate citizen. Canadian corporate law recognises that boards may have to balance many competing factors and interests when making decisions, which can include consideration of the long-term best interests of the corporation.

Takeover defences

The takeover-bid regime in Canada affords a target company up to 105 days to respond to a hostile bid. Although shorter periods may apply in the event the target company’s board
of directors agrees, or in the event an alternative transaction is entered into by the target company, the amendments afford a target company significantly more time to respond to the bid than was typically provided prior to May 2016 to companies that had adopted a shareholder rights plan (typically 50 to 70 days).

While there have not yet been any specific decisions on the issue, in the absence of unusual circumstances, it is expected that shareholder rights plans will not be permitted to remain in effect after the expiry of the 105-day period afforded under Canada’s current takeover bid regime.

Although the 105-day mandatory minimum bid period may have decreased the incentive for issuers to adopt shareholder rights plans either strategically at their annual general meetings or tactically in the face of a hostile bid, there continues to be a role for shareholder rights plans in protecting a target company from a ‘creeping bid’ made through normal course purchases and private agreement exemptions, and to prevent hard lock-up agreements, and for tactical voting pills in the context of proxy contests (to stop a dissident group from representing more than a given percentage (e.g., 20 per cent) of the outstanding shares).

The takeover bid regime also affects the structure of white-knight transactions in Canada. Although initial hostile bids are required to remain open for at least 105 days, this period may be shortened if the target company enters into a white-knight transaction. If the white-knight transaction is structured as a takeover bid, the hostile bid will be entitled to the same bid period as the white knight. However, if the white-knight transaction is structured in another fashion, such as an arrangement or amalgamation transaction, the hostile bid may be shortened to a minimum of 35 days from the original commencement date of the hostile bid. As this would leave the white knight at a timing disadvantage, there may be some incentive for white-knight transactions to be structured as bids rather than alternative transactions.

The takeover bid rules also mandate a minimum tender requirement of more than 50 per cent of the outstanding securities that are the subject of the takeover bid (other than those owned, or over which control or direction is exercised, by the bidder and any joint actors). Among other things, it is not possible to make any-or-all takeover bids in Canada, and takeover bids for target companies with significant minority shareholders are more difficult to complete than prior to May 2016.

iv Contact with shareholders

Shareholder communication is a fundamental and long-standing aspect of boards’ fiduciary oversight responsibility. Boards must take shareholder interests into consideration, and so they have an interest in understanding shareholder views about a corporation, its governance and its operations. Accordingly, Canadian corporations have a long-standing practice of consulting with their principal shareholders on matters that may be of interest to them. The importance of shareholder communications is recognised in NP 58-201, which states that the board is responsible for adopting a communication policy for the corporation.

All Canadian corporations have some form of shareholder communications programme through which they communicate material information to shareholders. Typically, a corporation’s disclosure practices are summarised in a disclosure policy, and a management disclosure committee is tasked with responsibility for ensuring compliance with the disclosure policy and the corporation’s disclosure controls and procedures.

However, traditional shareholder communication and investor relations practices no longer satisfy shareholder demands for increased transparency, more frequent communications
and more opportunities to express their views on how a corporation should be run, as evidenced by shareholder-led initiatives on majority voting for directors and say on pay. Some investors have actively sought the opportunity to meet with directors in addition to, or in lieu of, management. The Canadian Coalition for Good Governance has a regular annual programme through which its representatives meet with directors of almost 50 Canadian corporations each year to share perspectives on corporation strategies, performance and management. Generally, management is not present for these meetings.

VI OUTLOOK

Issues such as diversity on boards and in executive officer positions, and investor interest in a range of disclosure matters, will require companies to actively monitor changes in these and consider how their existing disclosure measures up as both legal requirements and market expectations continue to evolve over the coming year.
I OVERVIEW OF GOVERNANCE REGIME

There is one regulated market in Denmark where a public limited liability company can have its shares admitted to trading: Nasdaq Copenhagen.

In past years, the governance regime in Denmark has been subject to further regulation and changes, both in terms of soft and hard law. The entry into force of the Danish Companies Act (DCA) in 2010 with subsequent amendments has played a major role as the regulation of governance has become more intensive and specific. More recently, the entry into force of the Market Abuse Regulation (MAR) on 3 July 2016 has introduced new rules on, inter alia, insider lists, delay of disclosure of inside information and notifications from persons discharging managerial responsibilities. The replacement of the Danish Securities Trading Act with the Danish Capital Markets Act on 3 January 2018 entails, inter alia, that more financial instruments and operators have become subject to the rules, and that the rules on the preparation of small prospectuses are removed. As regards soft law, in November 2017 the Danish Committee on Corporate Governance adopted a set of new corporate governance recommendations.

i Sources of law and other regulations

In Denmark, the DCA is the primary act with regard to corporate governance. However, governance regulation is also covered in the Danish Financial Statements Act (DFSA) and the Danish Capital Markets Act (DCMA) and the MAR, and is furthermore supplemented by a number of executive orders.

These regulations can be described as the sources of hard law on corporate governance in Denmark.

Nasdaq Copenhagen has a separate set of rules called ‘Rules for issuers of shares’, which must be observed by listed companies. These rules have been issued on the basis of Section 75 of the DCMA, which requires the operator of a regulated market to establish clear and transparent rules.

1 Jacob Christensen is a partner and Nicholas William Boe Stenderup is an attorney at Plesner Advokatpartnerselskab.
3 Act No. 650 of 8 June 2017
With the entry into force of the DCA in 2010, the revised sections regulating governance provided management with more flexibility but also obligations to make ongoing assessments to determine whether decision-making is established on a proper basis or whether external assistance is needed.

As mentioned above, the Danish Committee on Corporate Governance adopted a set of new corporate governance recommendations in November 2017 that are applicable to financial years commencing on 1 January 2018 or later. These recommendations replaced the recommendations of 2014, and the focus of the Committee was to bring the recommendations up to date, especially in relation to companies’ value creation, management evaluation, board committees and remuneration policy. The recommendations provide guidance for best practice on corporate governance in listed companies; they are solely recommendations, and do not constitute rules of law. The purpose of the recommendations is to ensure through transparency that investors and other relevant parties are given the opportunity to assess the circumstances of a specific company. Although they are only recommendations, they are anchored in the DFSA, which requires listed companies to submit a statement on how they apply the principles of corporate governance (the comply-or-explain principle).

ii Enforcement
Enforcement of the corporate governance regulations depends on whether the specific regulation is legislation or rules set out by the regulated market.

As regards legislation, the rules regulating corporate governance in the DCA are mainly rules on liability. If the management of a company does not act in accordance with the specific sections regulating its responsibilities, the members may become liable to the company, and to the shareholders or the creditors, or both, if losses occur. Disputes on such matters are settled by the Danish courts.

The Danish Business Authority can impose fines on the management for failing to meet, in a timely manner, its obligations towards the Danish Business Authority under the DCA or the DFSA, or both (e.g., mandatory registrations, or preparation and publication of annual reports).

As regards the rules set out by the regulated market, if a company fails to comply with these rules, the operator may give a reprimand or impose a fine.

II CORPORATE LEADERSHIP
i Governance structures
Under Danish company law, a limited liability company may choose between two different types of governance structures.

A Danish limited liability company may choose the traditional Danish governance structure where the company is managed by a board of directors responsible for the overall and strategic management. The board of directors must appoint an executive board consisting of one or more persons to be responsible for the day-to-day management. In public limited companies, the majority of the members of the board of directors and the board’s chair and vice chair may not be members of the executive board.

Alternatively, limited liability companies may choose a governance structure where the company is managed solely by an executive board. This executive board must be appointed
by a supervisory board that oversees it, and thus the supervisory board has no responsibility for the overall and strategic management. A member of the executive board must not also be a member of the supervisory board.

The board of directors or the supervisory board of a public limited company must have at least three members.

In addition to these two governance structures, a private limited liability company has the further option of being managed solely by an executive board.

Where a limited liability company has employed an average of at least 35 employees during the previous three years, the employees of the company are entitled to elect among themselves a number of employee representative board members, to be appointed on the same conditions as those applying to members elected by the shareholders. Private limited companies in which the employees exercise their right to elect members must have a board of directors or a supervisory board.

The majority of Danish companies have the traditional management structure, namely a board of directors and an executive board, and the following paragraphs are, therefore, based on Danish limited liability companies with this governance structure.

ii Board structure and practices

Gender equality

In 2012, the Danish parliament adopted a bill with the aim of creating a more equal ratio of men to women on the boards of directors of Danish companies.

The bill introduced new provisions in the DCA\(^5\) and the DFSA,\(^6\) pursuant to which certain types of companies are required to set target ratios and to implement a policy for gender equality to increase the share of the under-represented gender in the company’s management levels in general. The companies must also report on the status of progress towards satisfying these requirements in their annual reports. However, the new rules do not impose any mandatory quotas to be met in terms of ratios of men to women on the boards of directors.

The rules are, inter alia, applicable to state-owned public companies, listed companies,\(^7\) large commercial enterprises,\(^8\) large commercial foundations and a number of financial sector entities.

Where an entity already has an equal gender ratio in its management – pursuant to the explanatory notes to the bill, this means at least 40 to 60 per cent of each gender – the entity is not required to set target ratios or implement a policy. Information in this respect must, however, be included in the annual report of the entity. Furthermore, there is a de

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4 The Danish Committee on Corporate Governance recommends that listed companies are organised in accordance with the traditional management structure.
5 Section 139a.
6 Section 99b.
7 Enterprises with other securities than shares (for instance, bonds) admitted to trading on a regulated market in an EU or EEA country will also be subject to the new rules. This applies regardless of the size of an enterprise.
8 Enterprises in accounting class C that exceed two of the following three thresholds of the DFSA in two consecutive financial years: a balance sheet total of 156 million kroner; a net turnover of 313 million kroner; and an average of 250 full-time employees.

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minimis threshold regarding the requirement to implement a policy of gender equality. Thus, companies with fewer than 50 employees are not subject to the requirement of implementing this policy.

Failure by a company to observe the obligation to set target ratios, prepare a policy for gender equality or reporting in the annual report may result in a fine, but the fact that a company does not achieve the target figures will not in itself give rise to a fine.

The Danish Business Authority has prepared guidelines enabling companies to fulfil the requirements.

The new rules entered into force on 1 April 2013.

**Liability of directors**

The management of a Danish limited liability company owes a duty of loyalty to the company and its shareholders, and must at all times act in their best interests.

A management member who, by wilful misconduct or negligence, causes damage to the company or the company’s shareholders, creditors or any third party can be held liable for damages under the culpa standard.9

The culpa assessment is made by comparing the act or omission in question to a normal standard of care (i.e., what can reasonably be expected from a diligent person (*bonus pater familias*) in similar circumstances). In this respect, it may be of significant importance if a specific rule or duty to act has been contravened: for example, rules or duties contained in the DCA, the company’s articles of association or any other regulations or guidelines applicable to management members.

Under Danish company law there is a business judgement rule, which prescribes that, as a main rule, the management will not be held liable when exercising a rational business judgement, even if an error in that judgement leads to financial losses. The decision must have been taken on a well-informed and qualified basis.

In Danish case law, the board of directors has generally not been found liable in financial distress cases where a business judgement has resulted in financial losses, provided that the chances of overcoming the financial difficulties were not unrealistic at the time the business judgement was made.

In general, Danish courts have been reluctant to render management members liable for the exercise or lack of exercise of their powers and duties unless clear, specific duties have been breached. This may, however, be changing, since the trend is probably towards stricter liability for management members.

In recent years, Danish company law has provided company management with a greater degree of freedom of choice; for example, certain legal requirements and documents may be waived in connection with mergers if the management considers such a decision to be prudent and justifiable. This tendency leads to an intensified focus on the potential liability of the management, especially when these requirements have been waived and losses occur.

## III DISCLOSURE

All Danish companies are required to fulfil certain obligations as regards disclosure of information.

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9 Section 361 of the DCA.
Unlisted limited liability companies

Most Danish limited liability companies are subject to audit obligations, and the general meeting must therefore elect one or more approved auditors.\(^\text{10}\)

The management must provide the auditor with any information that is likely to influence the assessment of the company. Additionally, the management must provide the auditor with information, assistance and access to make whatever investigations are deemed necessary to complete the audit work; where the company is a subsidiary of a group of companies, the management owes a similar duty to the auditor of the parent company.\(^\text{11}\) Moreover, the auditor may request that members of the company’s management provide any information that is deemed to be of importance to the assessment of the company and, if the company is a parent company, its group.

In general, the executive board must ensure an appropriate review process for the company’s auditor, and ultimately present the annual report with specifications and audit reports to the board of directors in good time for the annual report to be adopted at the company’s annual general meeting.

The management must present the annual report for shareholders’ approval in a timely manner. It is the responsibility of each individual member of the management to ensure that the annual report is prepared, audited and approved by the management and the shareholders, and that it is submitted to the Danish Business Authority within five months\(^\text{12}\) of the end of the financial year and in accordance with all requirements. As of 1 January 2014, it has been possible for companies to prepare and submit annual reports in English only provided that the company’s general meeting passes a resolution in this respect and the resolution is incorporated into the company’s articles of association.

In December 2014, the Public Register of Shareholders was introduced to create more openness and transparency about the ownership of Danish companies for the purpose of discouraging money laundering, creating more confidence in companies and improving the public authorities’ investigative tools in connection with white-collar crime. The entry into force of the Register has made it mandatory for Danish limited liability companies to have significant shareholdings and voting rights registered and made public in the IT system of the Danish Business Authority.

As of June 2017, it has been mandatory for Danish unlisted limited liability companies to register and make public the company’s ultimate beneficial owners via the IT system of the Danish Business Authority. An ultimate beneficial owner is defined as the natural person who ultimately directly or indirectly holds or exercises control over a sufficient amount of the shares or voting rights (as a rule of thumb, a sufficient amount is more than 25 per cent of the shares or voting rights) or who exercises control by other means (e.g., via a shareholders’ agreement). The rules on ultimate beneficial owners have been introduced to create more transparency for the purpose of preventing owners from hiding behind various company structures.

\(^{10}\) Section 144 of the DCA.
\(^{11}\) Section 133 of the DCA.
\(^{12}\) Section 138(1) of the DFSA.
Listed companies

Companies whose shares are admitted to trading on a regulated market in Denmark are required to disclose certain information pertaining to, inter alia, inside information, financial statements and compliance with corporate governance recommendations:

Inside information

Companies whose shares are admitted to trading on a regulated market in Denmark must, as soon as possible, disclose inside information if this information pertains directly to the company’s activities. Significant changes concerning already disclosed inside information must be disclosed immediately after the changes occur, and through the same channels as used for any previous disclosures.

Inside information disclosed to a third party in the normal exercise of his or her profession must simultaneously be disclosed in a complete and effective manner, unless the third party is subject to a duty of confidentiality.

The company is obliged to have established disclosure procedures ensuring that relevant information is disclosed in compliance with the applicable law. In connection with the disclosure of information, the company must ensure that inside information is disclosed in a manner that enables fast access and a complete, correct and timely assessment of the information by the public. The company must, as far as possible, ensure that the information is disclosed simultaneously to all categories of investors in all Member States of the European Union or countries with which the EU has entered into an agreement for the financial area or where the company has requested or received approval of securities.

The company may delay the disclosure of inside information to protect legitimate interests (e.g., ongoing sensitive negotiations) provided that the delay will not mislead the public and provided that the information can be handled confidentially; however, the decision to delay the disclosure is at the company’s own risk. If the company learns or ought to have learned that the inside information no longer remains confidential (i.e., if the information has been leaked), the company must disclose this inside information as soon as possible.

Simultaneously with the disclosure of the aforementioned information, the company must submit the information to the Danish Financial Supervisory Authority (FSA). Where an issuer has delayed the disclosure of inside information, it shall inform the FSA that disclosure of the information was delayed and shall, upon request, provide a written explanation of how the conditions for delay were met.

Financial statements

A listed company must, no later than three weeks prior to the annual general meeting, but no later than four months after the end of the financial year, publish the annual report approved by the board of directors. Without undue delay, after the annual report has been approved by the annual general meeting, the company must then submit the report to the Danish Business Authority.

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13 Article 17 of the MAR and Chapters 5 and 6 of the DCMA.
14 Article 17(1) of the MAR.
The company must also publish approved interim financial statements for the first six months of the financial year as soon as possible and within two months of expiry of the six-month period. Additionally, the Danish Committee on Corporate Governance recommends that listed companies publish quarterly reports.

**Recommendations on corporate governance**

The Danish recommendations on corporate governance\(^{15}\) comply with Danish and EU company law and recognised best practice, and they are aimed primarily at Danish companies whose shares are admitted to trading on a regulated market.\(^{16}\) The objective behind the recommendations is above all to promote productive and responsible management of listed companies for their long-term benefit. These recommendations are intended to increase public confidence in the companies via timely disclosure and transparency.

The soft law recommendations enable listed companies to organise their governance optimally in accordance with the comply-or-explain principle.\(^{17}\) This principle allows each company to decide whether and to what extent it wishes to comply with the recommendations. If a company fails to comply with a recommendation, it must explain why and specify its chosen approach, and this voluntary element aims to ensure adequate flexibility for each company.

Pursuant to Section 107b of the Financial Statements Act, information on how companies apply the principles of corporate governance must be included either in the management commentary in the annual report or published via the company’s website\(^{18}\) together with an exact reference thereto in the management commentary.

**IV CORPORATE RESPONSIBILITY**

While the executive board is responsible for the day-to-day management of a company, the board of directors is in charge of its overall and strategic management, and of ensuring a proper organisation of the company’s business. Additionally, the board must ensure that:

\(a\) the executive board performs its duties properly and as directed by the board of directors;
\(b\) the bookkeeping and financial reporting procedures are satisfactory;
\(c\) adequate risk management and internal control procedures have been established;
\(d\) the board of directors receives ongoing information as necessary for the board of directors to assess the limited liability company’s financial position; and
\(e\) the financial resources of the limited liability company are adequate at all times, and that the company has sufficient liquidity to meet its current and future liabilities as they fall due.

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15 www.corporategovernance.dk.
16 However, the recommendations may also provide guidance for non-publicly traded companies.
17 According to Section 107b of the Financial Statements Act and Nasdaq’s rules, listed companies must adopt the comply-or-explain principle when reporting.
18 The Committee on Corporate Governance states that publication on the company’s website together with a precise reference thereto in the management commentary in the annual report will create the most transparency.
In the event of a capital loss, if it is established that the equity of a limited liability company represents less than half of the subscribed capital, the management of the company must ensure that a general meeting is held within six months of the actual date on which the loss is established.19

At the general meeting, the board of directors must report on the financial position of the company and, if necessary, submit a proposal for measures that should be taken (e.g., a proposal for injection of additional funds or a proposal for dissolution of the company). If the general meeting does not vote in favour of the proposal, and the board of directors is of the opinion that it would not be justifiable to keep the company in operation, the board of directors should resign.

The failure to realise an evident loss and, consequently, the failure to respond in a situation where a reaction is required, may often trigger liability. However, non-compliance does not automatically entail liability for the board of directors.

The objective behind the provision is to motivate the management to take an active part in overseeing the company’s financial development, so that relevant measures can be implemented.

V SHAREHOLDERS

i Shareholder rights and powers

The general meeting is the forum where shareholders exercise their rights,20 and since access to and participation in the general meeting is a fundamental shareholder right, the DCA contains various rules regarding general meetings.

The general meeting has the supreme authority in all matters relating to the company. Accordingly, the management must comply with all resolutions adopted by the general meeting.21

At the annual general meeting, the board of directors presents its report on the activities of the company in the preceding year, and the shareholders adopt the annual report, including the appropriation of profits or covering of losses in accordance with the adopted annual report. Additionally, the shareholders elect the board of directors and the auditor.

Under Danish company law, there are a number of matters only the general meeting can resolve upon (e.g., amendments to the articles of association or election of a majority of the board of directors). There are also a number of matters where the general meeting’s decision-making authority may be delegated to the board of directors, for instance, the authority to decide on a capital increase if a provision to this effect is included in the articles of association.

Generally, the general meeting may not pass a resolution if it is obvious that the resolution is clearly likely to give certain shareholders or other parties an undue advantage to the detriment of other shareholders or of the company.22

19 Section 119 of the DCA.
20 Section 76 of the DCA.
21 Provided that the Danish company law does not prescribe that the specific resolution is to be adopted by the management.
22 Section 108 of the DCA.
As the main rule, all business transacted at general meetings is decided by a simple majority of votes. However, to restrict the powers of the majority shareholders and thereby to protect minority shareholders, the DCA stipulates qualified majority in certain cases:

- any proposed resolution to amend the articles of association must be passed by at least two-thirds of the votes cast as well as at least two-thirds of the share capital represented at the general meeting;
- certain amendments to the articles of association must be passed by at least nine-tenths of the votes cast as well as at least nine-tenths of the share capital represented at the general meeting: for example, if shareholder rights to exercise voting rights in respect of their own or other shareholders’ shares is restricted to a specific part of the votes or the voting share capital; and
- amendments to the articles of association, whereby the shareholder obligations towards the company are increased, require unanimity.

The DCA also provides minority shareholders with other minority rights, including under certain conditions the right to compulsory redemption, the right to appoint an additional auditor or the right to submit a proposal for special investigation.

### ii Shareholders’ duties and responsibilities

Under Danish company law, shareholders do not have any specific duties as to the performance and operations of the company, and thus shareholders have the right to be passive investors.

If, however, a shareholder decides to attend the company's general meetings, the shareholder may not contribute to the passing of resolutions where those resolutions clearly are likely to give certain shareholders or others an undue advantage to the detriment of other shareholders or the company.

Shareholders may only be held liable for losses that they inflict intentionally or with gross negligence on the company, other shareholders or third parties.

### iii Shareholder activism

In recent years, the role of shareholders in Danish listed companies has attracted a lot of attention. Generally, Danish listed companies have dispersed ownership, and thus the dialogue between the management of companies and their shareholders can be complicated, even though the DCA has made it possible to use electronic media as a means for conducting general meetings.

To promote positive interaction between management and shareholders, the Danish recommendations on corporate governance call upon companies to promote active ownership, including shareholders’ attendance at general meetings.

Danish company law is based on the premise that a company’s communication with its shareholders primarily takes place at the general meeting.

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23 Section 105 of the DCA.
24 Section 107 of the DCA.
25 Section 73 of the DCA.
26 Section 144 of the DCA.
27 Section 150 of the DCA.
28 Section 362 of the DCA.
29 Section 1.2.1 of the Danish recommendations on corporate governance.
In November 2016, the Danish Committee on Corporate Governance published a Stewardship Code for institutional investors (aimed at Danish institutional investors that have equity investments in Danish listed companies) to encourage the kind of stewardship in Danish listed companies that is beneficial to their value creation. The Code recommends that institutional investors publish an active ownership policy containing, among other things, a voting policy, and that they publish whether or how they cast votes at general meetings in the listed companies.

As is the case for the corporate governance recommendations, the seven stewardship principles are soft law to be applied on a comply-or-explain basis. The Stewardship Code entered into force on 1 January 2017, and consequently, institutional investors with the calendar year as their financial year had to report in accordance with the Code for the first time in the spring of 2018.

iv Takeover defences

Hostile tender offers are permitted under Danish law, but they are not very common.

As a general rule, the board of directors is allowed to use defensive measures if it believes that the transaction is not in the best interests of the company. In public tender offers under Danish law, the acceptance period is four to 10 weeks, except when regulatory approvals are necessary. Within the first half of this offer period, the target’s board of directors must issue a statement to the shareholders in the company. The statement must include the board of directors’ opinion of the offer, including its opinion of the consequences of the offer for all the company’s interests, particularly for the employees, and the offeror’s strategic plans for the company. Usually, the statement will include a recommendation to accept or reject the offer. According to the Danish corporate governance recommendations, the board of directors – from the moment it obtains knowledge that a takeover bid will be submitted – should not, without the acceptance of the general meeting, attempt to counter the takeover bid by making decisions that in reality prevent the shareholders from deciding on the takeover bid themselves: for example, acquiring treasury shares, selling prime assets or obtaining loans to scare off the potential hostile buyers.

Traditionally, the most common defensive measures in Danish companies have been structural and often implemented in connection with the formation of the company or in relation to transfers of ownership to foundations or other successions. Some companies have divided their shares into two share classes with different voting rights (high-vote A shares and low-vote B shares, typically in a ratio of 1:10) to protect the company from a takeover. Some companies have adopted rules capping the shareholder’s maximum holding of voting rights, a practice that is often seen in financial institutions. If a shareholder holds more than the maximum number of shares, the excess voting rights will be treated as non-voting shares at the general meetings. Some companies also have provisions in their articles of association that prohibit employees from competing companies being elected to the board of directors. In addition, many companies have authorised the board of directors to acquire the company’s own shares, typically up to 10 per cent of the issued shares and voting rights, which theoretically allow for greenmail-based defences. Further, the ability to use shareholder rights plans (poison pills, designed to allow existing shareholders to purchase shares at substantial discount) or the introduction of contractual change of control-based initiatives to deter potential acquirers in connection with a takeover, is very limited in Denmark, and there is no tradition of applying these defensive measures. Moreover, the board of directors may not increase the company’s share capital or carry out other transactions solely as defensive measures. Further, equal treatment protection is generally afforded to minority shareholders.
The board of directors will not be in conflict with the Danish corporate governance recommendations by seeking competing takeover bids. When directors realise that their company might be subject to a takeover, they may seek out as many interested buyers as possible. The process often leads to a non-public auction including several potential buyers. The board of directors may take into account a variety of factors, when assessing public bids, with price typically being the most important factor.

The breakthrough rule and the anti-frustration rule introduced in the Takeover Directive are not mandatory for Danish companies, but in accordance with the Directive, companies have the option to adopt the rules in their articles of association (also known as opt-in).

Directors are allowed to express their opinion on whether they believe that the shareholders should accept an offer, but in the end it is up to the shareholders whether they wish to tender their shares to an offeror. However, if the board of directors tries to hinder a serious tender offer, publicly or non-publicly, without the approval of the shareholders, the board of directors may incur a civil liability towards the shareholders if it does not act in the best overall interest of the company and the shareholders.

Contact with shareholders

As a general rule, confidential information must not be disclosed to the shareholders of a limited liability company because members of the board of directors are bound by secrecy. Further, if the company has its shares admitted to trading on a regulated market, privileged information often constitutes inside information and is therefore covered by the pertinent regulations in the MAR30 governing the safeguarding and disclosure of inside information.

Thus, whether or not the company is listed, the main rule is that confidential information must not be disclosed by the board of directors to the company’s shareholders; however, certain circumstances may allow for exceptions to the company and securities law regulations.

Some Danish corporate law commentators assume that a member of the board of directors may disclose information to the shareholder who has appointed him or her if the disclosure concerns limited and specific information, and if the disclosure is in the interests of the company. This understanding is especially substantiated where the member of the board of directors is a representative for the shareholder.

According to other Danish corporate law commentators, such a disclosure should be approved by the board of directors. The company’s articles of association or the rules of procedure for the board of directors may stipulate such a right to disclose information.

In the event of such a disclosure, the shareholder is obliged to keep the received information confidential and not pass the information to any third party.

With respect to a company’s disclosure of information to a shareholder, the board of directors may, depending on the specific circumstances, be entitled to disclose confidential information to a shareholder (including, on a case-by-case, need-to-know basis, inside information) subject to the following criteria:

- the disclosure is in the interests of the company;
- the disclosure concerns specific, limited information and is limited as much as possible;
- the board of directors of the company approves the disclosure;

30 Danish antitrust law may also limit the board of directors’ ability to disclose confidential information.
the disclosure forms part of the normal business conduct of the board;

- the shareholder is notified of the fact that the information constitutes inside information;

- and

- the shareholder undertakes to keep the information confidential and not to pass the information to any third party, and will not trade or instigate trading in the company’s shares until the information has been made public.

As previously mentioned, any disclosure of information must be in the short or long-term financial interests of the company. Thus, the company cannot disclose information to the shareholder merely on the grounds of political interests, regardless of whether these interests are shared by the management of the company.

It also follows from the foregoing that the board of directors may not continually (particularly not automatically) disclose information to a shareholder. Information may be disclosed on an ad hoc basis only, if and when the board of directors finds it to be in the interests of the company. Any disclosure of information to a shareholder is subject to a principle of proportionality whereby the disclosure of information is kept to a minimum and where the company’s benefits in disclosing this information outweigh the drawbacks of the disclosure.

Therefore, a scheme of periodic disclosure of information to certain shareholders is generally considered problematic, as it would contradict the criterion of only disclosing specific and limited information; however, certain specific circumstances may arise whereby periodic disclosures may take place.

Disclosure of information may, as an example, typically take place if the company requires the shareholder to make a decision in a non-published matter where the position of the shareholder is significant. An example of such a disclosure may be major strategic measures that would depend on the approval of certain major shareholders, and where the company would not want to publish information without having secured prior approval.

In practice, it is advisable to document by written statement the decision of the board of directors to disclose any information as well as the shareholder's obligation to keep the received information confidential.

Disclosure of information by the company is subject to the basic legal principle of equality in company law whereby shareholders in comparable situations – for example, if the shareholders all hold approximately the same number of shares in the company – as the main rule shall be treated on equal terms. Thus, when disclosing information, shareholders in comparable situations must be treated equally and be granted the same access to company information.

**VI OUTLOOK**

New EU rules on shareholders’ rights are on the way. Amendments to the Directive on shareholders’ rights were adopted at EU level on 9 June 2017, and the amendments must be incorporated in Danish law before the implementation deadline on 10 June 2019. The object of the amendments to the Directive on shareholders’ rights is to encourage corporate governance in listed companies by making it easier for shareholders to exercise active ownership and to make share trading more transparent.

31 Directive 2007/36 EC.
The amendments entail, inter alia, that the shareholders in listed companies are given a right to a say on the remuneration policy with respect to the remuneration of the company management. Companies are to draw up and publish a policy on the remuneration of members of the board of directors and the executive board that lays down the detailed rules on fixed and variable remuneration of members of management. Shareholders will be given a right to vote on the remuneration policy at the general meeting. Afterwards, the remuneration must comply with the adopted remuneration policy. At this point in time, the rules on drawing up a remuneration policy are only included in the Danish recommendations on corporate governance. Accordingly, Danish listed companies have not yet been subject to a statutory obligation to draw up a remuneration policy (because of the comply-or-explain principle of the recommendations, where reasons are to be given for any non-compliance).

The amendments also mean that companies must present a remuneration report that is to contain information about the individual remuneration of members of management. The shareholders will be given a right to participate in a guiding vote on the remuneration report at the company’s general meeting. It means that the report is not binding on the company, but gives the management an insight into the shareholders’ position on the remuneration.

These new rules are currently in the process of being implemented in the Danish Companies Act, however, at this stage only in the form of a draft bill. According to the draft bill, the mandatory requirement for the preparation and disclosure of a remuneration policy and remuneration report will enter into force and be applicable to Danish listed companies as of the first annual general meeting held after 10 June 2019 as regards to the policy, and as of the following annual general meeting as regards to the remuneration report. This means that for listed companies having the calendar year as their financial year, the new rules on remuneration policies and remuneration reports will apply as of the annual general meeting in 2020 and as of the annual general meeting in 2021, respectively.
I OVERVIEW OF GOVERNANCE REGIME

Finnish corporate governance is based primarily on the Finnish Companies Act. The Companies Act regulates the governance of companies, such as the role of the board of directors, the managing director and the shareholders, as well as their duties and responsibilities. The Finnish Securities Markets Act also plays an important role, governing for example disclosure and transparency issues of listed companies. Listed companies must also comply with the rules of Nasdaq Helsinki Ltd (the Helsinki Stock Exchange) as well as with the regulations and guidelines issued by the Finnish Financial Supervisory Authority (FIN-FSA).

In addition to national laws, directly applicable EU legislation has an increasingly important role in regulating the governance of listed companies. The European Securities and Markets Authority (ESMA) also issues guidelines and technical standards for listed entities.

In addition, self-regulation is central to Finnish corporate governance. The Finnish Corporate Governance Code of 2015 (Code), issued by the Finnish Securities Market Association and applicable as of 1 January 2016, is the main regulation in this respect, together with the Helsinki Takeover Code (applicable as of 1 January 2014). Both codes are applied on a comply or explain basis.

Enforcement of regulations applicable to listed companies may be carried out by the FIN-FSA or the Helsinki Stock Exchange through disciplinary procedures. In addition, the law may be enforced through actions in local courts.

II CORPORATE LEADERSHIP

i Board structure and practices

Structure alternatives

A company can choose between having both a board of directors and a supervisory board, or just a board of directors. If the company has a supervisory board, this organ supervises the administration of the company, which in turn is the responsibility of the board of directors and the managing director. In early 2019, less than 4 per cent of Finnish listed companies featured supervisory boards. Boards of listed companies typically consist of five to 10 members.
Legal responsibilities of the board

The board is responsible for the overall management of a company’s affairs and the appropriate organisation of its operations. The board is also responsible for ensuring adequate surveillance of the company’s accounts and finances, as well as for several administrative decisions specified in the Companies Act. A key task of the board is the appointment and dismissal of the managing director (the chief executive), who in turn is responsible for the executive management of the day-to-day operations and financial matters. Board members and the managing director have a general duty to act with due care and in the interest of the company in all matters.

The chair of the board is responsible for convening the board, but does not otherwise have specific statutory duties beyond those of ordinary board members.

Decision-making and representation

The board shall take all the major decisions affecting the company. The specific limits of the board’s general competence in relation to the authority of the managing director can depend on the size of the company and its established governance practices. In addition, the board has certain administrative responsibilities that cannot be delegated, such as in relation to the registration of new shares.

In individual cases, the board may make a decision in a matter falling under the competence of the managing director. The board may also submit a matter falling under its general competence to the general meeting to decide. In listed companies, the latter option has at times been used when approving significant acquisitions or divestments.

The board takes all its decisions as a whole, and its decision-making power may not be delegated to the managing director or board subcommittees. The board can, however, authorise the executive management or another party to, for example, negotiate, finalise and execute within set parameters the final decision concerning a particular matter. Typically, such authorisations are in force only for a limited period.

A distinction is made in the Companies Act between decision-making authority and the right to represent a company. By law, the board as a whole is entitled to represent the company in all matters. In practice, the articles typically provide that, for example, the managing director or the chair, each alone, as well as two board members or other designated representatives together, can represent the company.

Board committees

Efficient organisation of the board’s work may require the establishment of board committees to handle certain matters. The Code includes a description and division of tasks for audit, compensation and nomination committees. Following the implementation of the Audit Directive and Regulation, the Companies Act explicitly recognises the preparatory role of the audit committee in listed companies. However, the board as a whole is responsible for the eventual decisions even when the board has delegated preparatory responsibilities to committees.

The board of a listed company is required to monitor the company’s financial reporting process as well as the effectiveness of its internal control, audit and risk management systems.

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The board is also responsible for the proposal of the selection of a statutory auditor and adequate rotation of audit firms and responsible auditors. In addition, the board must review and monitor the independence of the auditor and, particularly, the provision of non-audit services to the audited entity. The preparatory work for discharging these responsibilities can be delegated to the board’s audit committee. The Companies Act requires that the audit committee of a listed company consists of non-executive board members, and that at least one member of the audit committee has competence in accounting or auditing. Another board committee may be tasked with the aforementioned duties provided that its composition meets the qualification requirements set for the audit committee.

Remuneration of directors and executive management

The remuneration of board members and the basis for its determination are set by the annual general meeting. The Code recommends that non-executive directors should not participate in share-based incentive schemes. The remuneration for the executive management is set by the board. The board may establish a remuneration committee to prepare matters pertaining to management and employee remuneration.

According to the Code, a company shall issue on its website a regularly updated remuneration statement containing a description of remuneration within the company. The statement describes the financial benefits granted to the board and the managing director, and contains information on the decision-making process and key principles for determining remuneration.

Board and company practice in takeovers (takeover defences, share issuance and repurchase, etc.)

As in all other matters, the board has a general duty in takeover situations to act with due care in the interest of the shareholders. According to the Securities Markets Act, a listed company must directly or indirectly belong to a body that has issued a recommendation on takeover situations. For this purpose, the Finnish Securities Market Association has issued the Helsinki Takeover Code, which is based on the comply or explain principle and contains recommendations on the actions of the target board and the bidder. With regard to defensive measures adopted in relation to a proposed takeover, the Securities Markets Act requires that a share issue or any other measure by the target company that may prevent or materially hamper the completion of the bid must, as a general rule, be resolved upon by the general meeting.

The articles of association of some listed Finnish companies feature provisions that may act as a priori takeover defences, such as differentiated shares classes or vote cutters that limit the number of votes that any one shareholder can cast. Some listed companies also feature in their articles a Finnish version of a poison pill, which provides for a mandatory redemption by the bidder of the other shares upon exceeding a set threshold (typically one-third or half of all shares or votes) at a price determined as specified in the articles.

ii Directors

Appointment, nomination and term of office

The annual general meeting typically elects all the directors. However, fewer than half of the board members can be appointed in some other manner if so specified in the articles. In listed companies, the term of a director generally ends with the conclusion of the next annual
general meeting following appointment. The party eligible to appoint a director also has the power to dismiss that director during his or her term of office. The prevailing practice, as recommended by the Code, is to have all board seats up for election each year. The number of a director’s terms has not been limited by legislation or in the Code.

The nomination of director candidates is often handled by the board, with the board’s nomination committee undertaking the preparatory work. However, in recent years the establishment of an external nomination board has become more commonplace. A nomination board typically consists of representatives of the largest shareholders and often includes the chair of the board as an expert member. In early 2019, around 37 per cent of listed companies had established a nomination board.

In addition to the above-mentioned formalised nomination procedures, any shareholder can present a competing proposal on director nomination in the general meeting.

**Competency and diversity**

The Companies Act provides the minimum requirements that all board members must fulfil: a director must be an adult natural person who is not bankrupt or under guardianship and whose legal competency has not been restricted. The Code recommends that a majority of the directors shall be independent of the company, and that out of this majority at least two directors shall be independent of significant shareholders. The Code recommends that the managing director should not be elected the chair of the board. There is no statutory duty to include employee representatives in the board, and such representatives are very rare in listed companies.

The Code recommends that both genders should be represented on the board. According to a survey published in 2018, 98 per cent of the boards of Finnish listed companies featured both genders, with women constituting 29 per cent of all directors.

**Legal duties and right to information**

The boards of Finnish listed companies are typically composed of non-executive directors. In some companies the managing director is also a board member, but other executive directors are rare. Finnish corporate law does not generally make a distinction between executive and non-executive directors in terms of their rights, duties or liability.

According to the Code, the company shall provide the board with sufficient information for the board to discharge its duties. The board has generally broad authority to require executive management to compile and prepare information to form a basis for the board’s decision-making and the discharging of its supervisory duties. Executive and non-executive directors have the same right to information. It is considered good practice to ensure that in particular the chair of the board is always kept well informed of any new developments, as the chair is responsible for convening the board when necessary.

Although the board has the authority to request information from the management and employees in relation to its supervisory role, it is considered good practice to organise such information gathering in a formalised and coordinated fashion.

**Conflicts of interest**

The Companies Act prohibits a director from participating in the consideration pertaining to a contract, a transaction or legal proceedings between that director and the company. Such participation is also prohibited in a matter between the company and a third party if the
Each director must in all matters independently evaluate whether a conflict of interests is at hand. Directors should also provide the board with the relevant information to assess the situation if the director in question ultimately deems himself or herself as not conflicted despite factors that can generally indicate a possible conflict of interest. In practice, directors sometimes excuse themselves from participating in relation to matters where an outside influence or interest could be perceived to exist regardless of whether it would meet the statutory definition of a conflict.

**Liability**

The Companies Act provides for remedies when a board member has failed to fulfil his or her duties or tasks, including the general duty of care. A director is liable for damages for any loss that he or she has negligently caused to a company in violation of the general duty of care. A director is also liable to a company, a shareholder or a third party for damage caused either deliberately or negligently in violation of the provisions of the Companies Act (other than just the duty of care) or the company’s articles of association.

Generally, the burden of proof lies on the person claiming a breach and loss. However, there is a presumption of negligence in cases of a violation of a detailed provision of the Companies Act (i.e., other than the general principles) or of the articles of association, as well as in relation to an act to the benefit of a related party, in which case the director in question must prove that he or she acted with due care.

The provision of directors and officers (D&O) insurance paid by a company to cover non-criminal liability of board members or executive officers is allowed. D&O insurance is commonly used in listed companies.

The Companies Act also provides criminal sanctions for the violation of certain of its provisions, such as concerning the distribution of funds and with regard to voting limitations. Actions of directors in this capacity may also result in criminal liability under, for example, the Finnish Penal Code.5

### III DISCLOSURE

#### i General

The EU Market Abuse Regulation (MAR)6 sets out the principal rules for issuers’ disclosure requirements, administration of inside information and managers’ transactions, among other things.

The MAR requires issuers to publicly disclose inside information concerning them as soon as possible. Under the MAR, information is deemed to be inside information if it is of a precise nature and has not been made public; it relates, directly or indirectly, to one

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5 Finnish Penal Code (39/1889).

or more issuers or to one or more financial instruments; and were it to be made public, the information would be likely to have a significant effect on the prices of those financial instruments, or on the price of related derivative instruments.

Information is precise in nature if it is specific enough to enable a conclusion as to the possible effect of the event or circumstance on the price of the relevant financial instrument. In a lengthy process such as negotiations or corporate investments, information concerning intermediate steps in the process, such as the stage of negotiations, may also be deemed precise information and constitute inside information.

The MAR allows issuers to delay the disclosure of inside information if immediate disclosure is likely to prejudice the legitimate interests of the company, the delay is not likely to mislead the public and the company is able to ensure the confidentiality of the information. Issuers are required to record reasons for delaying the disclosure and, upon the disclosure of the inside information, to notify the FIN-FSA that the disclosure was delayed.

The Securities Markets Act and related government decrees set out requirements for listed companies’ disclosure obligations in relation to regular financial reporting and the disclosure of non-financial information. To promote consistency in disclosures, listed companies are recommended to prepare a written disclosure policy, specifying the company’s guidelines and procedures applied in communicating with the capital markets and investors. Further regulations related to disclosure obligations are set forth in the rules of the Helsinki Stock Exchange and the regulations and guidelines of the FIN-FSA and ESMA.

Pursuant to the MAR, listed companies have an obligation to maintain insider registers of persons having access to inside information. Unlawful disclosure of inside information is prohibited. Engaging or attempting to engage in insider dealing, recommending that another person engage in insider dealing, and inducing another person to engage in insider dealing, are also prohibited. Unlawful disclosure of inside information (such as tipping) is criminalised in the Penal Code and may result in imprisonment for up to two years. The Helsinki Stock Exchange has issued guidelines regarding the management of insider issues, as well as the procedures regarding disclosure requirements applicable to insiders and the trading of securities by insiders.

The MAR requires transactions by issuer’s managers and persons closely associated with them to be notified promptly (and no later than three business days after the date of the transaction) to the issuer and the FIN-FSA. The issuer shall then make the information public. The threshold for the notification is €5,000 within a calendar year for each person. Once the threshold has been reached, all further transactions in the issuer’s financial instruments must be notified and published.

The Securities Markets Act requires that listed companies disclose a yearly corporate governance statement in which the company shall present information on its governance framework and corporate bodies, and state its compliance with the Code. If the company chooses to deviate from a certain provision of the Code, it must state its reasons for doing so (the comply or explain principle). Moreover, the company shall keep available a remuneration statement with full disclosure at the individual level of the remuneration of the board members and the managing director. With regard to other executives, disclosure of the main principles for remuneration and the related decision-making process is sufficient.

Both the Companies Act and the Securities Markets Act require that certain disclosed information is kept available on a company’s website. The Code also includes more detailed guidance on publishing the information in an easy-to-find, investor-friendly manner. All information published under the regulatory disclosure requirements shall be disseminated to
the media and the release storage of the stock exchange, and kept available on the company’s website for at least five years. However, the financial statements, half-yearly financial reports and corporate governance statements shall be kept available on the website for at least 10 years.

ii Financial reporting and accountability

Listed companies shall prepare annual financial statements and reports by the board of directors as well as an interim report for the first six months of the financial year. The consolidated financial statements shall be prepared in compliance with international financial reporting standards (IFRS). Pursuant to the amended Transparency Directive,7 implemented in Finnish legislation in November 2015, listed companies are not required to publish quarterly financial information for the first three and nine months of the financial year. However, most listed companies have continued publishing financial information on a quarterly basis.

Financial statements must be published within four months of the end of the financial year and at the latest three weeks before the annual general meeting. In addition, a financial statement release, as required by the rules of the Helsinki Stock Exchange, must be published within three months of the end of the financial year. The financial statement release shall contain the material contents of the financial statements.

Listed companies are required to publish their future prospects in a report by the board of directors once a year. However, most Finnish listed companies have also chosen to include their future prospects in the interim reports and the financial statement release. The FIN-FSA has emphasised that future prospects should be presented together with relevant analysis and linked to risks and uncertainties that may prevent these prospects from being realised. The description of risks and uncertainties should cover company-specific issues associated in particular with a company’s business, industry and operating environment. If it becomes likely that a company’s financial performance will differ materially from its previously disclosed future prospects, a profit warning shall be issued without undue delay.

According to the Securities Markets Act, the FIN-FSA may impose a penalty payment for any failure to comply with the ongoing disclosure obligation, disclosure of periodic information and publication and storage of regulated information. A breach of the disclosure obligations set forth in the Securities Markets Act may also result in criminal sanctions under the Penal Code.

iii Auditors

Listed companies must appoint at least one auditor or an audit firm approved by the Finnish Patent and Registration Office. The length of an engagement of a particular auditor or audit firm may not exceed 10 years. As an exception, the engagement may last longer provided a public tender process for the statutory audit is conducted in compliance with the Audit Regulation.8 In addition to the auditor’s report, an auditor of a listed company shall submit annually to the company’s audit committee an additional report including confirmation of his or her independence and a notification regarding engagements other than the statutory audit performed for the company. The additional report shall also include detailed information on the audit process and measures applied.

Provision of non-audit services for listed companies by their auditors and audit firms is restricted; for example, the provision of services that involve the management or decision-making body of the audited entity, or bookkeeping and the preparation of accounting records and financial statements for the audited entity, are prohibited. Furthermore, the total fees for non-audit services by the auditor or the audit firm are limited to no more than 70 per cent of the average of the fees paid for the statutory audits of the audited entity in the most recent three consecutive financial years. According to the Code, the company shall disclose the fees paid to the auditor during the financial year, separating fees paid for non-audit services.

IV CORPORATE RESPONSIBILITY

The Code sets out the main responsibilities of the board of directors relating to internal control and risk management. According to the Code, the board shall ensure that the company defines the operating principles of internal control and shall monitor the functioning of that control. The Code further provides that the company shall disclose the major risks and uncertainties that the board is aware of and the principles along which the risk management of the company is organised. The company shall also disclose the manner in which the internal audit function of the company is organised.

In addition to audit committees, it is also becoming more common to have separate compliance functions in listed companies. In recent years, some listed companies have also established responsibility and ethics committees.

Corporate social responsibility reporting is relatively common, and many Finnish companies use report formats such as those of the Global Reporting Initiative, an international independent standards organisation. Pursuant to the EU Directive on non-financial reporting, large listed companies are required to disclose their policies, risks and actions with regard to, for example, environmental matters, social and employee-related aspects, human rights matters, and anticorruption and bribery issues. The corporate governance statement of a listed company must include a description of the applicable policies regarding diversity, including gender balance and the educational background of board members.

Furthermore, the MAR requires that listed companies set up appropriate whistle-blowing procedures in line with existing rules applicable to financial institutions.

V SHAREHOLDERS

Shareholder rights and powers

Shareholders exercise their decision-making powers and participate in the supervision and control of the company through general meetings. The most significant share-related rights include the right to vote in a general meeting, the right to submit a matter to the general meeting and the right to ask questions at a general meeting.

Usually, the general meeting convenes once a year in the annual general meeting. An extraordinary general meeting may be convened if the board of directors deems it necessary, if shareholders with at least 10 per cent of the shares so demand in writing, or if this is otherwise required by law.

Finnish law does not provide for special rights for long-term shareholders, such as extra votes or extra dividend rights.

The transposition of the Second Shareholders’ Rights Directive (SHRD II)\(^{10}\) into national law will bring about major amendments to the existing corporate law regime regarding shareholders’ rights. The legislative changes relating to SHRD II are pending in the Finnish Parliament as of February 2019, and the final form of the national rules is still uncertain.

**Matters to be brought to the general meeting**

The general meeting decides on matters falling within its competence pursuant to the Companies Act and the company’s articles of association. Unanimous shareholders may also make decisions on matters falling within the competence of the board of directors or the managing director of the company unless otherwise explicitly specified in the Companies Act.

Matters that, according to the applicable law, shall be decided upon by the general meeting include the election of board members and determining their compensation, the election of the auditor of the company and the amendment of the company’s articles of association. In addition, all decisions relating to the shares or share capital of the company shall be approved by the general meeting, including share repurchases, share issues and issues of rights entitling the holder to shares. However, the general meeting may authorise the board of directors to decide on a share issue, a repurchase of the company’s own shares or an issue of special rights entitling the holder to shares. Such an authorisation must specify the maximum number of shares that may be issued and, in the case of share repurchases, the price range for the repurchase. The board of directors may be authorised to decide upon all the other conditions. Dividend distributions shall also be decided upon by the general meeting, the dividend distribution being limited to the proposal made by the board of directors. However, shareholders holding at least 10 per cent of the shares in the company may request the payment of a minimum dividend corresponding to half of the profits of the financial year but not more than 8 per cent of the equity of the company. The general meeting shall also resolve upon certain corporate restructurings, such as mergers and demergers as well as the dissolution of the company.

**Decision-making at the general meeting**

Each shareholder has the right to participate in a general meeting and to cast votes at the meeting provided they have complied with the applicable prior registration proceedings as instructed in the meeting notice. Shares with multiple voting rights or differing dividend rights are permitted, as are shares that do not have any voting rights. Some Finnish listed companies have share classes with multiple voting rights.

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Resolutions by a general meeting usually require a majority of the votes cast. However, certain resolutions require a qualified majority of at least two thirds of votes cast and shares represented at the meeting.

Decisions requiring a qualified majority in a listed company include:

- amendment of the articles of association;
- directed share issues;
- issuing option rights and other special rights entitling to shares;
- acquisition and redemption of own shares;
- mergers and demergers; and
- a decision to enter into liquidation or terminate a liquidation procedure.

Foreign shareholders commonly use proxy voting to participate in general meetings of Finnish listed companies, and the recommendations given by proxy advisers have during recent years become more relevant for listed companies with a large number of foreign shareholders.

**Dissenting shareholders**

Dissenting shareholders may require that a vote be passed on a matter under consideration by the general meeting. The key rights of a shareholder include the right to have matters submitted to the general meeting and the right to ask questions at the general meeting.

**Objecting to a decision by the general meeting**

Shareholders may object to a decision by the general meeting by bringing an action against the company if a procedural provision of the Companies Act or the articles of association has been breached. Furthermore, the breach would need to have had an effect on the contents of the decision or the rights of a shareholder, or otherwise be contrary to the Companies Act or the articles of association. An action based on the breach must be brought within three months of the decision.

In addition, a decision by the general meeting may be deemed void irrespective of time limits if there has been a grave breach of the law. Examples include situations where provisions regarding the notice to a general meeting have been materially breached or where adopted decisions are clearly in breach of the principle of equal treatment of shareholders.

Board decisions are not subject to shareholder approval. However, the board may transfer matters in its decision-making power for resolution by the general meeting. A shareholder cannot contest a board decision unless the decision is based on an authorisation by the general meeting, such as with regard to a share issue.

**ii Shareholders’ duties and responsibilities**

**Protection of minority rights**

The principle of equal treatment prohibits any corporate body, including the general meeting, from making decisions giving an undue advantage to some shareholders or other persons at the expense of other shareholders or the company. The minority may also force certain decisions, such as requiring the distribution of a minimum dividend out of the company’s recorded profits.
Controlling shareholders and institutional investors

Traditionally, neither Finnish legislation nor self-regulation specifically regulate controlling shareholders or institutional investors, or establish any particular duties for them. However, there is a general obligation to launch a takeover bid when a shareholder’s ownership exceeds certain levels (30 or 50 per cent of the voting rights in the company). There is also an obligation to redeem all the minority shares when a shareholder holds more than 90 per cent of all the shares and voting rights in the company. SHRD II introduces certain transparency requirements for institutional investors and asset managers regarding, for example, their investment strategies and engagement policies. The transposition of SHRD II is currently under preparation in Finland, and will have to be completed by June 2019.

A shareholder of a Finnish company is liable for damages only if he or she has through a wilful or negligent act or omission violated the Companies Act or the articles of association.

Say on pay

The general meeting decides on the remuneration payable for the board and committee work as well as on the basis for its determination. The board of directors decides on the remuneration and other compensation payable to the managing director.

SHRD II will introduce a say-on-pay framework consisting of two principal elements: the remuneration policy and the remuneration report. The remuneration policy will describe the general remuneration principles regarding directors and officers, provide details of the different forms of remuneration and explain how the policy contributes to the company’s strategy. The remuneration policy will be subject to a shareholder vote (either binding or advisory, as adopted by each Member State) regarding any material amendment and, in any case, at least every four years. The remuneration policy will be binding except in unusual circumstances, provided the remuneration policy specifies the limits and procedures for any deviation therefrom. The remuneration report will provide information on remuneration during the most recently ended financial year, and will also be subject to a shareholder vote (either binding or advisory, as adopted by each Member State).

iii Shareholder activism

Shareholder activism has been fairly moderate in Finland. However, there is a growing tendency, especially among institutional investors, to take a more active role. SHRD II will require institutional investors to publish their engagement policies and report on their implementation, as well as to publish the main elements of their equity investment strategies.

Except for the statutory provisions relating to shareholder liability, shareholders are not per se governed by any code or other corresponding regulation.

iv Takeover defences

Shareholder and voting rights plans

In Finland, a company may have different share classes that may grant different voting rights in the general meeting. The general meeting of the company may resolve to amend the company’s articles of association and set up dual-class stock. However, such resolutions are usually made before the admission of the company’s shares to public trading because of applicable qualified majority requirements.
**White-knight defence**

The board has a general duty to act in the best interest of the company and its shareholders. According to the preparatory works of the Companies Act, in a takeover bid situation, seeking the best possible outcome for the shareholders means that the board shall undertake the measures needed to achieve as good a bid as possible.

Pursuant to the Helsinki Takeover Code, if the board of a target company is contacted with the purpose of proposing a takeover bid and the board considers the contact serious, the board shall evaluate which measures may be required to secure the interests of the shareholders.

The board of the target company may also seek competing bids, and this may, in certain situations, reflect required prudence in a takeover situation. There is, however, no specific obligation to seek a competing bid. If a potential alternative offeror is known to the board, it would, for example, be justified for the board to consider whether it would be in the interest of the shareholders to approach that other party.

**Staggered boards**

In a Finnish listed company, the term of a board member usually ends with the conclusion of the next annual general meeting following his or her appointment. The general meeting may also dismiss board members elected by the shareholders at any time during their term of office.

Staggered boards are generally deemed to have limited use in Finland. Pursuant to the Companies Act, it is possible to stipulate in a company’s articles of association that board members have longer terms than are set forth in the default rule under the Companies Act. The Code recommends that the board shall be elected annually at the annual general meeting.

**Contact with shareholders**

As described in Section III, Finnish listed companies are subject to, among others, MAR’s disclosure requirements. Shareholders also receive information on all matters proposed to be decided upon by the general meeting. The notice to a general meeting shall include information on the decisions proposed to be taken. Shareholders also have the right to ask questions at the general meeting, and in practice often do so.

The company may generally contact individual shareholders as long as the contact is in the interest of the company and in accordance with the principle of equal treatment. Such situations may include planned share issues or other corporate restructurings. In such instances, the company would have to have adequate confidentiality arrangements and market sounding practices in place.

Large shareholders acting together will have to observe the rules relating to acting in concert that may trigger an obligation to launch a public takeover bid if the joint holding of shareholders acting in concert would exceed 30 or 50 per cent of all votes.

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11 The white-knight defence relates to a situation where a third party (the white knight) acquires a target company that is being taken over by a party deemed hostile by the target company management.
VI OUTLOOK

There is an increasing focus on corporate governance in Finland and an interest in complying with best practices. Efforts have been made to develop uniform corporate governance practices for listed companies through self-regulation. The Code, which is being reviewed in 2019 for various reasons, including the transposition of SHRD II, and the Helsinki Takeover Code also provide a framework for best practices in corporate governance in general.

The ownership structure of many Finnish listed companies remains relatively concentrated. The transposition of SHRD II in 2019 will introduce additional requirements regarding corporate decisions on related-party transactions. While the implementation is not expected to alter the current allocation of corporate powers between the general meeting and the board of directors, additional rules to control conflicts of interests in decision-making will be introduced for listed companies.
I OVERVIEW OF GOVERNANCE REGIME

Corporate governance rules are mainly set out in statutory provisions contained in the French Commercial Code and in recommendations contained in corporate governance codes (such as the French Association of Private Enterprises (AFEP) – Movement of French Enterprises (MEDEF) Code) or in positions expressed by various professional bodies and associations.

The AFEP-MEDEF Code has become a reference in matters of corporate governance. Besides compulsory rules, the implementation of corporate governance principles is also monitored by the French Financial Markets Authority (AMF), which publishes an annual report assessing corporate governance practices and executive directors’ compensation in listed companies.

Even if corporate governance codes and the positions expressed by professional bodies or associations do not have any legal authority and are considered to be soft law, these rules are generally applied by companies. This can be explained by market pressure, since compliance with these rules is a criterion used by proxy advisers in their recommendations on how to vote on shareholders’ resolutions. Almost all large listed companies have selected to use the AFEP-MEDEF Code and, since its first amendment in June 2013, the application of the AFEP-MEDEF Code’s provisions is monitored by a high committee on corporate governance, which issued its first report in October 2014 and a guide on the application of the AFEP-MEDEF Code in December 2014. The revised AFEP-MEDEF Code of June 2018 has further strengthened the enforcement powers of the high committee on corporate governance by enhancing its ability to use the name and shame policy.

Corporate governance in France has changed considerably during the past two decades as a result of the increased number of foreign shareholders in CAC 40-listed companies.

With respect to executive compensation, much greater scrutiny has been introduced in France, which now stands as one of the European countries with the most extensive range of requirements. The level of disclosure has continued to increase in recent years under the pressure of shareholders and proxy advisers, and after several controversies concerning executive compensation and severance packages. Regulations have also been used to address market failures and restore public confidence, especially after the turmoil created in 2016.
by the lack of reaction from the boards of directors of two companies after the shareholders rejected the executives’ compensation. This caused the legislator to introduce, in December 2016, a say-on-pay procedure that is both mandatory and binding.

Another notable trend is the preference among listed companies for the one-tier governance structure.\(^4\) Companies with a one-tier board tend to combine the positions of chair of the board and CEO. As recommended by the AMF\(^5\) and the AFEP-MEDEF Code,\(^6\) a significant number (61.9 per cent) of CAC 40-listed companies have appointed a lead director in order notably to counterbalance the concentration of power in the CEO’s hands (when he or she is also the chair of the board).\(^7\) The AFEP-MEDEF Code provides that lead directors should be independent directors.\(^8\)

In other areas, such as director independence, diversity of the board composition and board committees, the French corporate governance regime continues to converge with existing best practice.

There has also been increased focus on corporate and social responsibility in recent years. The practice of extra-financial analyses and rating has developed considerably to enable investors to include the extra-financial performance of companies in their investment criteria, and both law and soft law have been amended to increase the level of disclosure made with respect to environmental, social and governance issues.

All these recent trends are reflected in the revised AFEP-MEDEF Code of June 2018, which includes provisions aimed at:

\(a\) reinforcing the role of the board to promote corporate social responsibility (CSR), long-term value creation and risk prevention, and introducing one or more CSR criteria into executives’ compensation;
\(b\) restricting the conclusion of non-compete agreements with executives;
\(c\) encouraging shareholders to dialogue with the board;
\(d\) strengthening directors’ ethics regarding conflicts of interest;
\(e\) increasing the number of directors representing employees; and
\(f\) extending the requirement for the board to ensure the implementation of a policy of non-discrimination and diversity, notably with regard to the balanced representation of men and women in governing bodies (and not only at the board level).\(^9\)

Further developments should be expected in 2019 with the Loi PACTE: that is, the Law for an Action Plan for the Growth and Transformation of Businesses (Action Plan), which was adopted by the French National Assembly on 9 October 2018 and is now under review by the Senate. The Action Plan aims to simplify the obligations imposed on small and medium-sized enterprises and to promote value-sharing and companies’ social and

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\(^4\) High Committee on Corporate Governance 2018 Annual Report (85.3 per cent of the CAC 40-listed companies have such one-tier structure).
\(^5\) 2016 AMF report on corporate governance and executive compensation.
\(^6\) Paragraph 3.2 of the AFEP-MEDEF Code.
\(^7\) Prerogatives commonly attributed to the lead independent director include communications with shareholders of the company not represented on the board, prevention of conflicts of interest, evaluation of directors’ performance and remuneration, coordination of independent directors’ activities and coordination of the work of board committees.
\(^8\) Paragraph 3.2 of the AFEP-MEDEF Code.
\(^9\) Paragraph 1.7 of the AFEP-MEDEF Code.

II CORPORATE LEADERSHIP

i Board structure and practices

Structure

Listed companies in France may have either a one-tier governance structure comprising a board of directors in charge of the company's general management together with a CEO (who may or may not be a director) who is the legal representative of the company; or a two-tier structure comprising a management board, whose chair is the legal representative of the company, and a supervisory board that supervises the management board and must not interfere in the management of the company.

Composition of the board

Under the one-tier system, the board of directors is composed of a minimum of three and a maximum of 18 members. Under the two-tier system (i.e., with a management board and a supervisory board), the supervisory board is also composed of between three and 18 members.

As a statutory requirement to have no less than 40 per cent of women10 (or men) on boards of directors or on supervisory boards as from 1 January 2017, the percentage of women on the boards of CAC 40-listed companies has continued to rise from 44.1 per cent in December 2017 to 46 per cent in 2018.

While French law does not provide for specific details concerning the presence of independent directors, corporate governance codes strongly recommend the appointment of a certain proportion of independent members. According to the AFEP-MEDEF Code, independent directors should account for half of the members of the board in widely held corporations that do not have controlling shareholders. In other corporations, at least one-third of the board should be composed of independent directors.11

Election of board members representing employee shareholders is an obligation in state-controlled companies, in listed companies where the employees hold more than 3 per cent of the share capital and in companies that employ, jointly with their subsidiaries, more than 1,000 employees in France or more than 5,000 employees worldwide, except for those that already have employee representatives on their board. There should be one employee shareholder representative on any board with fewer than 12 members and two on boards with more than 12 members. The Action Plan intends to reduce this threshold to eight members in order to increase the role of employee shareholder representation. The revised AFEP-MEDEF Code also provides that the directors representing employees within a group must sit on the board of the company that takes strategic decisions for the group.

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10 Except for boards composed of more than eight members, for which the gap between the number of men and women should not exceed two.

11 Paragraph 8.3 of the AFEP-MEDEF Code.
Representation and management of the company

In companies with a one-tier structure, the board of directors decides whether the management of the company is carried out by the chair of the board or by a separate CEO. The CEO has the broadest powers to represent the company and act on its behalf in all circumstances. Limitations on the CEO’s powers can be set out in the articles of association or decided by the board, but are not enforceable against third parties.

In companies with a two-tier structure, the management board is vested with the broadest powers to act in any circumstances on behalf of the company, which is represented by the chair of the management board.

Legal responsibilities of the board

In companies with a one-tier structure, the board of directors is responsible for determining the corporate strategy and supervising its implementation. It is also responsible for controlling the management of the company, for appointing and removing the chair, CEO and deputy CEOs and determining their remuneration, and for convening the shareholders’ meetings.

In companies with a two-tier structure, the supervisory board supervises the management board and carries out the verifications and inspections it considers appropriate. The supervisory board also has specific attributions, which are similar to those attributed to the board of directors.

Delegation of board responsibilities

Decisions taken by the board of directors are collective decisions and cannot be delegated to one or more specific directors or to third parties.

The board of directors or supervisory board may give specific mandates to certain members to study identified issues.

Separation of roles of CEO and chair

The chair organises the work of the board of directors and chairs the meetings. He or she also ensures that the different decision-making bodies of the company operate properly. Although it is not expressly specified as being one of his or her responsibilities, the chair can communicate directly with shareholders but will remain bound by an absolute duty of confidentiality and is thus prohibited from disclosing privileged information.

Remuneration of directors and senior management

Non-executive directors’ remuneration consists exclusively of attendance fees. Any other remuneration is prohibited, except that resulting from either an employment contract non-executive directors may otherwise have with the company for separate functions, or a special temporary assignment. The shareholders’ meeting decides the total amount of the attendance fees, but the board determines the amount allocated to each director. In accordance with the duty of care imposed on board members, which requires assiduity and involvement, such fees usually include a variable portion that depends on attendance at board meetings and, as the case may be, committee meetings. Non-executive members may not be granted shares or share options free of charge.

Executives’ remuneration generally includes fixed and variable components, and stock options or performance shares, or both. The AFEP-MEDEF Code provides that variable remuneration must be capped at a specific percentage of the fixed part, and that the
non-executive chair of the board should not receive any variable remuneration, stock options or performance shares.\textsuperscript{12} The board must ensure that executives’ compensation aims to improve the medium and long-term performance and competitiveness of the company, in particular by incorporating one or more criteria related to social and environmental responsibility.\textsuperscript{13}

When determining the overall compensation of an executive, the board of directors takes into account all components such as bonuses, stock options, performance shares, directors’ attendance fees and pension schemes.

While it is recommended that the fixed part of the remuneration is reassessed only every three years, variable remuneration and stock options or free share awards should reward both short-term and medium-term performance. Quantitative performance criteria must be simple, objective, measurable and coherent with the corporate strategy and not solely determined by stock price. Four main categories of quantitative criteria can be identified: financial ratios (notably return on capital employed), revenue growth (as well as free cash flow, operating profit, and earnings before interest, tax, depreciation and amortisation growth), increases in the share price and performance in comparison with the company’s main competitors. It also provides that quantitative performance criteria do not necessarily have to be financial criteria.\textsuperscript{14} Furthermore, the AFEP-MEDEF Code recommends that a specific cap be set for qualitative criteria.

Benchmarking with other companies operating in the same market is common, although proxy advisers tend to consider that it is not a sufficient justification.

Executives’ remuneration is decided by the board of directors or supervisory board on the recommendation of the remuneration committee. Shareholders vote on such remuneration (see Section V.iii).

Any commitment by a listed company to pay a termination fee to a director in the event that he or she ceases to be a director and top-hat pension plans are subject to the procedure for related-party transactions and are subject to shareholder approval upon renewal of the relevant directors’ terms of office. In addition, the pension amounts paid out must be linked to performance conditions, and the increase in the amount of the beneficiaries’ rights must be capped. The revised AFEP-MEDEF Code now provides that any amount paid out pursuant to a supplementary pension scheme must also be subject to performance conditions, it being further specified that any form of compensation paid for pension purposes (e.g., a cash payment) and not only the supplementary pension scheme per se must be subject to performance conditions.\textsuperscript{15} The Commercial Code also prohibits remuneration, indemnities and any other kind of benefits to be paid in the event of termination of a director’s term of office, if they are not subject to conditions based on performance.

The AFEP-MEDEF Code recommends capping termination fees at a maximum of two years’ annual fixed and variable compensation, taking into account the non-compete compensation and any potential severance payment due as a result of the termination of the employment agreement, if any.\textsuperscript{16}

\textsuperscript{12} Paragraph 24.2 of the AFEP-MEDEF Code.
\textsuperscript{13} Paragraph 24.1.1 of the AFEP-MEDEF Code.
\textsuperscript{14} Paragraph 24.3.2 of the AFEP-MEDEF Code.
\textsuperscript{15} Paragraph 24.6.1 of the AFEP-MEDEF Code.
\textsuperscript{16} Paragraph 24.5.1 of the AFEP-MEDEF Code. Pursuant to a decree dated 27 July 2012, public sector executives’ remuneration was capped at €450,000 per year (i.e., 20 times the average of the lowest wages in public sector companies).
The revised AFEP-MEDEF Code recommends prohibiting any payment pursuant to a non-compete undertaking when an executive is over 65 years old, or when the executive claims his or her pension rights. The Code also recommends that a non-compete undertaking should not be entered into at the time the executive leaves when no such clause had previously been stipulated.

**Committees**

An audit committee is compulsory in listed companies, the powers of which have been reinforced since the European reform of audit quality. The AFEP-MEDEF Code also recommends the creation of a remuneration committee (headed by an independent director, and with one member being an employee representative) and a nomination committee (the two may be combined). Members of committees should be non-executives, and a majority of such members should be independent (two-thirds in an audit committee, which must include a member with accounting and finance skills). Most companies also have other specialised committees dedicated to strategy, internal control, CSR, ethics, science and technology, and risks.

**Board and company practice in takeovers**

During a takeover bid, the board of directors may adopt any provisions to thwart the takeover, without shareholder approval, subject to the powers expressly granted to general meetings and with due regard to the company’s corporate interests. However, companies may amend their articles of association (with the shareholders’ approval) to opt out of the ability to adopt anti-takeover measures without shareholders’ prior approval.

**Directors**

**Role and involvement of outside directors**

The AFEP-MEDEF Code emphasises the importance of having a significant proportion of outside directors (or independent directors) on the board to improve the quality of proceedings. Outside directors have the same rights as other directors, but they are encouraged to play an active role and protect themselves against possible liability.

**Legal duties and best practice**

Directors principally have the legal duty to act in the best interests of the company and to be diligent. Pursuant to case law, other specific duties, such as the duty of loyalty and the duty of care, are also incumbent upon directors.

**Civil liability**

In companies with a one-tier structure, the chair of the board, CEO and members of the board of directors can be held liable in relation to the company, shareholders or third parties for any breach of laws, regulations or the company’s articles of association, as well as wrongful acts of management by directors in carrying out their duties. Breach of the duty of loyalty is also recognised by case law.

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17 Paragraph 23.4 of the AFEP-MEDEF Code.
18 Paragraph 23.5 of the AFEP-MEDEF Code.
19 Paragraph 17 of the AFEP-MEDEF Code.
If a wrongful act is committed, the CEO and directors may only be held liable if it can be proved that a loss has been suffered, and that there is a direct causal link between such loss and the wrongful conduct. This civil action may be brought:

a by the company, either directly acting through its legal representatives, or through a derivative action called an *ut singuli* action, which is exercised by a shareholder acting on behalf of the company; or

b by a third party (e.g., creditors or employees) or shareholders (who are distinct from third parties) if the loss suffered is distinct from that suffered by the company. Whereas actions brought by third parties require that the wrongful act be deemed to be unrelated to the directors’ duties (traditionally defined as wilful misconduct that is particularly serious and incompatible with the normal exercise of duties), actions brought by shareholders do not require, following a decision of the French Supreme Court, that such a condition be met.

In the case of insolvency of a company, directors who have committed acts of mismanagement can be held liable for all or part of the company’s debts.

In companies with a two-tier structure, the same rules apply to members of the management board. While members of the supervisory board cannot be held liable for mismanagement, they can be held liable for negligent or tortious acts committed in the performance of their duties, and may be held civilly liable for criminal offences committed by members of the management board if, although aware of such offences, they did not report them to the general meeting.

**Criminal liability**

The chair of the board, CEO, members of the board of directors, or members of the management board and the supervisory board, can be sentenced to five years’ imprisonment, ordered to pay a fine of €375,000, or both, for having:

a distributed sham dividends in the absence or on the basis of false inventories;

b published or presented to the shareholders annual accounts not providing, for each financial year, a fair representation of the results of the operations; or

c directly or indirectly used the company’s assets, in bad faith, in a way that they know is contrary to the interests of the company, for personal purposes.

**Appointment and term of office of directors**

Members of the board of directors or supervisory board are appointed by the ordinary general meeting of the shareholders. Under certain circumstances, the board of directors may appoint new members by co-optation, subject to the shareholders’ meeting subsequently ratifying such appointments.

Directors are appointed for a term set out in the articles of association, up to a maximum of six years (four years in the two-tier system). In practice, due to the influence of the AFEP-MEDEF Code, the four-year term of office is prevalent. Re-election is possible, and 93.3 per cent of the companies listed on the SBF-120 Index rotate renewal of the terms.
of office to avoid replacement of all directors at the same time. The office of members of the board of directors can in any event be terminated upon a decision by a shareholders’ meeting at any time, without specific reason (ad nutum).

Specific requirements include the following:

- **a** in the absence of an express provision in the articles of association, directors over 70 may not represent more than one-third of the members of the board;
- **b** employees may be appointed as board directors only if their employment contract corresponds to actual duties performed for the company and for as long as the employee-director remains in a position of subordination in relation to the company. The number of directors with an employment contract cannot exceed one-third of the entire board; and
- **c** to guarantee the availability of directors, French law prohibits members of boards of directors or supervisory boards of listed companies from simultaneously holding more than five directorships. The AFEP-MEDEF Code now recommends setting this limit at three directorships for executive directors. Furthermore, executives of credit institutions and investment companies cannot hold more than three offices as executive director and more than four offices as board member.

Members of boards of directors are no longer required to hold a specific number of shares, unless such a condition is provided for in a company’s articles of association. The AFEP-MEDEF Code, however, provides that directors should be shareholders and hold a fairly significant number of shares fixed by the articles of association or the board’s internal rules.

**Conflicts of interest of directors**

French law and corporate governance codes require that directors must inform the board of directors of any conflicts of interest, whether actual or potential, and should abstain from participating in the discussions and voting on such matters.

Under French law there are also some prohibitions or specific procedures for related-party transactions, which can create a conflict of interest: directors are prohibited from contracting loans from the company or arranging for the company to act as guarantor in respect of their obligations. In addition, to be valid, any significant transaction between the company and one of its executives or directors, a direct or indirect shareholder holding more than 10 per cent, or another company having executives or directors in common, must receive prior authorisation from the board (without the directors concerned voting), while grounds for approving related-party transactions must be detailed and reassessed annually. Related-party transactions entered into between a parent company and a wholly owned subsidiary are no longer subject to the authorisation procedure. Finally, specific information must be given to shareholders regarding agreements entered into between a subsidiary of a company and a director or major shareholder of this company. The AFEP-MEDEF Code provides that the internal rules of the board should set out provisions on the prevention and

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21 The 2018 AFEP-MEDEF Code provides that an executive director should not hold more than two other directorships in listed corporations, including foreign corporations, not affiliated with his or her group. He or she must also seek the opinion of the board before accepting a new directorship in a listed corporation. Furthermore, a non-exclusive director should not hold more than four other directorships in listed corporations, including foreign corporations, not affiliated with his or her group.
management of conflicts of interest. In accordance with the new Directive on shareholders’ rights, the Action Plan, which has not yet been adopted, provides that information regarding transactions with related parties must be publicly disclosed on listed companies’ websites at the latest on the day of their conclusion, and the related party must not participate in the board’s discussions or take part in the vote on the relevant resolutions.

The auditors present a report on the authorised transactions to the shareholders’ meeting, and the shareholders vote on them. If a transaction is not approved by the shareholders, the interested party and the directors can be held liable for any adverse consequences of that transaction for the company.

III DISCLOSURE

i Financial reporting and accountability

Reporting of financial information required by French law for listed companies is subject to regulations that distinguish between periodic information and ongoing information.

Periodic information is information provided by listed companies at regular intervals. Most notably, this includes the requirement to disclose an annual financial report, a half-yearly report and quarterly financial information.

Ongoing information is information published by listed companies to notify the public without delay of all information likely to have a material impact on the share price. It also includes disclosures related to the crossing of thresholds or share transactions carried out by an issuer’s executives or board members.

Executive Order No. 2017-1162 dated 12 July 2017 reorganised the reporting obligations regarding financial information, internal control and corporate governance, requiring that the information previously contained in the management report should be divided between a new corporate governance report and the management report.

ii Auditors’ role, authority and independence

External auditors are required to audit the company’s accounting documents and check whether the accounting principles applied in the company comply with the applicable accounting standards. They certify that the annual or consolidated accounts give a true and fair view of the financial situation of the company. They draft a general report on the accounts, as well as special reports on specific corporate transactions (share capital increases, contributions in kind, related-party transactions, etc.), which are presented to the annual general meeting of the shareholders.

Although many listed companies used to ask their auditors to prepare specific reports on CSR matters, auditors are now required to check whether the new non-financial statement has been provided (see Sections III.iii and IV.iii).

The reform regarding auditing, which transposed Directive 2014/56/EU, was adopted in France on 17 June 2016. It features mandatory statutory auditor rotation and enhanced transparency and reporting requirements by audit firms (including a detailed report to shareholders, a report intended for the audit committee and a report for the authorities.

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22 Paragraph 19 of the AFEP-MEDEF Code.
on any irregularities). It also establishes a list of non-audit services that cannot be provided by the statutory auditor or audit firm to the audited entity, imposes limitations on the fees charged for non-audit services\(^{24}\) and enhances the role of the audit committee.

### iii Corporate social and environmental responsibility

Over the past few years, corporate social and environmental responsibility has been increasingly taken into account in the corporate governance of listed companies.\(^{25}\) As no reference guide exists regarding this matter, in 2014 the MEDEF issued the first guide on CSR initiatives to support the sharing of best practices.\(^{26}\) Furthermore, the government issued a report on CSR,\(^{27}\) providing advice to reinforce the involvement of companies in CSR issues, and launched a CSR Platform, a think-tank supervised by the Prime Minister. Directive 2014/95/EU of the European Parliament dated 22 October 2015 (transposed into French law by executive order No. 2017-1180 dated 19 July 2017) introduced an obligation to disclose non-financial and diversity information for large companies (the non-financial statement). Henceforth, large companies have to explain the environmental and social risks related to their activities and how they intend to manage such risks through a statement on the non-financial performance to be included in the annual management report.

French Law No. 2017-399 dated 27 March 2017 also introduced the obligation for companies employing at least 5,000 employees in France or at least 10,000 employees worldwide to develop and enact annual vigilance plans detailing steps taken to detect risks and prevent serious violations with respect to human rights and fundamental freedoms, and the health and safety of persons and the environment, which result from activities of the company and of its subsidiaries, suppliers and subcontractors.

### IV CORPORATE RESPONSIBILITY

#### i Risk management

French listed companies must set up a special risk committee, known as the audit and risks committee, which is responsible for issues relating to internal control and risk management.

#### ii Compliance policies and whistle-blowing

The Sapin II Law has introduced legal protection for whistle-blowers, in both public and private organisations, for any alerts in any field when there is a threat to the public interest.\(^{28}\) Whistle-blowers are granted immunity from criminal liability under certain conditions.\(^{29}\)

Several rules also provide for alert procedures in, for example, the fields of labour law (in cases of discrimination or harassment) and banking (in cases of money laundering suspicions). External auditors are also required to inform the board of any irregularities found during their audit.

\(^{24}\) Non-audit services are capped at 70 per cent of annual fees.

\(^{25}\) For example, CSR committees have been created.


\(^{27}\) See the report entitled ‘Organisations’ responsibility and performance’ dated 13 June 2013.

\(^{28}\) Except for medical secrecy, legal privilege, and intelligence and national security secrets.

\(^{29}\) Article 122-9 of the French Criminal Code.
iii Corporate social responsibility

CSR has been progressively taken into account under French law.\textsuperscript{30} In particular, French listed companies are obliged to publish data in the statement on non-financial performance to be included in their management reports. Information on how they take into account the social and environmental consequences of their activity, as well as, for some companies, the effects of this activity with respect to human rights and the fight against corruption and tax evasion, must be provided in this report.\textsuperscript{31} The AFEP-MEDEF Code also provides that the board should ensure that measures are implemented to prevent and detect corruption and influence peddling.\textsuperscript{32}

The AMF also recommends\textsuperscript{33} that issuers draw up a list of the types of industrial and environmental risks, and provide a description of material risks to which they are exposed as a result of their business activities and characteristics.

The revised AFEP-MEDEF Code now provides that the board of directors should endeavour to promote long-term value creation by the company by considering the social and environmental aspects of the company's activities.\textsuperscript{34} Accordingly, the board should be informed of the main CSR issues,\textsuperscript{35} and should review financial, legal, operational, social and environmental risks as well as the measures taken to reduce such risks.\textsuperscript{36} Shareholders and investors should be informed of the significant non-financial issues for the company.\textsuperscript{37}

The Action Plan also focuses on the sharing of value within companies and on companies’ social commitment. It is notably being contemplated that the legal definition of ‘corporate interest’ should be broadened and specify that corporations must be managed in the interests of all stakeholders by considering the social and environmental concerns of its activity. Companies will also be able to define in their articles of association the principles that guide their business policy and strategic decisions. The Action Plan also introduces a new type of company, called a 'company with a mission', the corporate purpose of which will be defined in the articles of association as the pursuit of social and environmental objectives.

V SHAREHOLDERS

i Shareholder rights and powers

Equality of voting rights

The Commercial Code lays down a principle of proportionality of voting rights, according to which voting rights attached to capital or dividend shares must be in proportion to the share of the capital they represent. However, it provides for the following exceptions:

\begin{itemize}
  \item[a] shares that are fully paid up and that have been registered in the name of the same shareholder for at least two years are automatically granted double voting rights, unless
\end{itemize}

\textsuperscript{32} Paragraph 1.6 of the AFEP-MEDEF Code.
\textsuperscript{33} See AMF Recommendation on risk factors, dated 29 October 2009.
\textsuperscript{34} Paragraph 1.1 of the AFEP-MEDEF Code.
\textsuperscript{35} Paragraph 1.4 of the AFEP-MEDEF Code.
\textsuperscript{36} Paragraph 1.5 of the AFEP-MEDEF Code.
\textsuperscript{37} Paragraph 4.3 of the AFEP-MEDEF Code.
the articles of association provide otherwise following a shareholder decision. It appears that a large number of companies have opted out and maintained the one share, one vote principle, in accordance with proxy advisers’ recommendations;

b the voting rights attached to preference shares can be suspended or cancelled;

c limitation of voting rights: for example, a potential target’s articles of association may include a provision limiting the number of votes that may be exercised by a single shareholder, regardless of the number of shares held. Under AMF rules, however, these voting right limitations will be inoperative where a party acquires two-thirds or more of a target’s outstanding share capital or voting rights through an offer; and

d the Action Plan, which has not yet been adopted, provides that unlisted companies will be able to issue preference shares with multiple voting rights.

Powers of shareholders to influence the board

Shareholders’ rights regarding corporate governance remain limited, although it can be noted that they have been an increasing influence in France through the introduction of the mandatory say-on-pay. Their only means of action is in exercising their voting rights at shareholders’ meetings on the appointment or dismissal of board directors on related-party transactions and on rejecting say-on-pay resolutions, which will result in the company being prohibited from paying the relevant corporate officers the variable and exceptional component of their compensation.

When they represent a certain percentage of the share capital, shareholders can propose their own candidates to the shareholders’ meeting. In addition, the shareholders’ meeting can decide at any time to replace the board. Shareholders may also put questions to the board on corporate governance matters, which the board must answer at the shareholders’ meeting, or request, in court, the appointment of an expert who will present a report on a specific transaction. Finally, decisions or actions of the company violating mandatory provisions relating to remuneration and related-party transactions may be cancelled at the request of a shareholder.

Decisions reserved to shareholders

Decisions reserved to shareholders are those that fall within the ambit of the ordinary or extraordinary general meetings of shareholders. Ordinary general meetings of shareholders may notably decide on, inter alia, the approval of the annual accounts, appointment and dismissal of directors or members of the supervisory board, appointment of auditors and approval of related-party transactions. Extraordinary general meetings of shareholders can amend the articles of association of the company and decide, inter alia, to increase or reduce the share capital.

Rights of dissenting shareholders

Dissenting minority shareholders may bring a claim arguing that majority shareholders have committed an abuse of majority, which, if successful, could result in cancellation of a decision and the award of damages. This cause of action requires that two cumulative conditions be met: the decision must have been taken with the sole purpose of favouring the members of the majority to the detriment of minority shareholders, and it must be contrary to the company’s corporate interests.
**Benefits for long-term shareholders**

Besides automatic double voting rights, which are only granted to shareholders evidencing that they have held their registered shares for at least two years, listed companies may grant loyal shareholders increased dividends, also known as loyalty dividends. French law provides that payment of such loyalty dividends also requires that the shares have been held for more than two years. In addition, such dividends may not be more than 10 per cent higher than ordinary dividends, and the relevant shares must represent, for a particular shareholder, no more than 0.5 per cent of the company's capital.

**Board decisions subject to shareholder approval**

Related-party agreements are subject to shareholder approval, as are all decisions that fall within the scope of the ordinary or extraordinary general meetings of the shareholders.

The AMF also recommends that listed companies organise a consultative vote of the shareholders prior to making any disposal of a significant asset. In addition, to better supervise all major asset disposals, the AMF requests more detailed reporting from shareholders and recommends that best practices be followed to demonstrate that the transactions are in accordance with the corporate interest.

**ii Shareholders’ duties and responsibilities**

**Controlling shareholders’ duties and liability**

Pursuant to the AFEP-MEDEF Code, controlling shareholders must take particular care to avoid possible conflicts of interest, ensure transparency of the information provided to the market and equitably take all interests into account. They may be held personally liable if they use their votes in their own interest to the detriment of other shareholders and the company (majority abuse).

**Institutional investors’ duties and best practice**

The AFEP-MEDEF Code does not specifically address the issue of institutional investors. There is a separate governance code for asset managers containing recommendations on voting at shareholders’ meetings of the companies in which the funds are invested, and reporting on such voting. In addition, the AMF has required that asset management companies report to shareholders and unit holders of collective investment schemes about their practices as regards exercising voting rights in the sole interest of shareholders and to provide an explanation if they do not exercise these rights.

The Action Plan aims to transpose the Directive as regards the encouragement of long-term shareholder engagement, and provides that institutional investors and asset managers will have to disclose their engagement policy describing how they integrate shareholder engagement into their investment strategy, and disclose key information about the performance of their mandates. It also provides that proxy advisers must:

- explain any instances of non-compliance with their code of conduct;
- provide key information on the preparation of their research, advice, voting recommendations, and the prevention and management of any actual or potential conflicts of interest or business relationships that may influence their activities; and
- disclose any such information as the case may be.
iii Shareholder activism

Say on pay

In response to recent corporate scandals, the Sapin II Law has implemented a mandatory and binding regime for the say-on-pay procedure.\(^{38}\)

Shareholders are required to approve \textit{ex ante}, annually, the compensation policy, namely the principles and criteria for setting, allocating and granting the fixed, variable and exceptional components of the total compensation and benefits of any kind attributable to the chair of the board and to executive officers.\(^{39}\) If the shareholders’ meeting does not approve the compensation policy for a given year, the principles and criteria previously approved shall continue to apply, and the board must submit a new proposal at the next shareholders’ meeting. In addition to the approval of the compensation policy \textit{ex ante}, the law also provides for a binding vote \textit{ex post} on the remuneration granted (binding say-on-pay).\(^{40}\) Payment of variable or exceptional compensation shall be made conditional upon approval by the shareholders’ meeting, and no payment may take place prior to the shareholders’ approval.

Proxy battles

Shareholders of French listed companies can appoint any person as proxy, thus giving rise to an increase in the use of professional proxy solicitors.

Professional proxy solicitors must disclose their voting policy. On 18 March 2011, the AMF published a specific recommendation,\(^{41}\) which notably urges proxy advisers to issue voting policies in a transparent manner, communicate with listed companies, submit draft reports to the relevant company for review and take measures to avoid conflicts of interest.

Since a report issued on 19 February 2010, the European Securities and Markets Authority also recommends that proxy advisers issue a code of conduct regarding conflicts of interest, transparency and communication with the shareholders. In March 2014, six proxy advisers made public their Best Practice Principles for Shareholder Voting Research and Analysis.\(^{42}\) In October 2017, the Best Practice Principles Group undertook a stakeholder consultation to evaluate the effectiveness of such principles and to consider what actions are needed to ensure that these are fully compatible with the requirements of the revised European shareholders’ rights directive.

Long-term shareholder value

Directive 2017/828 on shareholders’ rights aims to encourage long-term shareholder engagement, in particular by facilitating the identification of shareholders. It enables companies to communicate with their shareholders with a view to facilitating the exercise of shareholder rights. The Action Plan intends to transpose this set of measures and to adapt the

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\(^{38}\) Articles L 225-37-2 and L 225-100 of the French Commercial Code.


\(^{40}\) Article L 225-100 of the French Commercial Code.

\(^{41}\) See AMF recommendation on risk factors, dated 29 October 2009.

\(^{42}\) Glass, Lewis & Co, Institutional Shareholder Services Inc, Manifest Information Services Ltd, PIRC Ltd and Proxinvest and IVOX GmbH, which has been acquired by Glass, Lewis & Co.
French regime with regard to shareholder identification. In October 2018, the AMF issued seven new recommendations to:

- better identify shareholders;
- improve information provided to shareholders on votes processing;
- encourage their effective participation in general meetings; and
- promote the modernisation of voting processes.\(^{43}\)

In addition, the measures set forth in the Directive with respect to the lack of transparency of institutional investors, asset managers and proxy advisers regarding their investment strategies, their engagement policy and the implementation thereof should be transposed into French law by the Action Plan at the end of the first quarter of 2019, and should result in the public disclosure of such information.

### iv Takeover defences

**Shareholder and voting rights plans, and similar measures**

A French company may first try to identify its shareholding by providing in its articles of association an obligation to disclose any interests over 0.5 per cent in its share capital or a right to request certain information from the central securities depository (Euroclear France) as to the identity of its shareholders and the size of their shareholdings.

In addition, articles of association may include a provision limiting the number of votes that may be exercised by a single shareholder. Such limitation will, however, be suspended for the duration of the first shareholders’ meeting following completion of the offer, provided that the offeror has acquired at least two-thirds of the target’s shares in the offer.

The directors also have the right to take measures to frustrate an unsolicited offer, provided that such measures are not against the corporate interests of the target company. As a consequence, the target’s board is not required to obtain the prior authorisation of the shareholders before implementing a sale or acquisition of strategic assets, the sale of a block of treasury stocks to a white knight or arranging a counter-offer.

By way of derogation, the company’s articles of association may impose an obligation of neutrality on the management of the target during offer periods.

It can be noted that proxy advisers and institutional investors recommend voting for the implementation of statutory limitations preventing the board from putting defensive measures in place, and against financial authorisations that are not suspended in cases where an offer is filed.

French law also permits equity warrants to be issued during an offer period. The warrants may be issued free of charge to all shareholders of the target prior to closing of the offer and may entitle the holders to subscribe for new shares on preferential terms.

Such issuance can be authorised by the shareholders:

- either during the offer to allow the target to defend a hostile bid (in which case the shareholders’ authorisation only requires a simple majority of votes cast at a shareholder meeting, whereas an authority to issue equity securities directly usually requires a two-thirds majority vote of the votes cast, and only a quorum of 20 per cent on first call and no minimum on second call (instead of 25 and 20 per cent, respectively, in a normal extraordinary general meeting)); or

\(^{43}\) AMF report on shareholders’ rights and voting at general meetings, published on 5 October 2018.
in advance, in view of a potential offer, by way of delegation given by the shareholders to the board of directors that can be used during an offer period.

White-knight defence

There should be no legal objection to a target board seeking a third party (a white knight) to make a competing offer for the target. Theoretically, a target could alternatively issue new shares to a third-party ‘friendly’ shareholder. However, such an issue would generally require specific shareholder approval, and therefore such a tactic would, in practice, be unusual.

When arranging for a white-knight defence, the target’s board of directors must comply with the company’s interest and ensure that it does not infringe the principle of free interplay of bids and counterbids and maintains a level playing field.

Staggered boards

The AFEP-MEDEF Code recommends avoiding replacement of the board as a whole to enhance a smooth replacement of directors. As a result, French companies commonly use staggered boards.

The efficiency of staggered boards as a takeover defence under French law is limited, as the general meeting of the shareholders may dismiss directors at any time and without cause.

Contact with shareholders

Mandatory and best-practice reporting to all shareholders

Listed companies have developed various communication practices that differ for individual shareholders or financial investors.

Financial communication tools (specific sections of the company’s website, financial publicity, publication of a shareholders’ letter, shareholders’ guides and even custodial services) and club and advisory committees are generally used to maintain contact with individual shareholders. To assist listed companies, notably in the use of social media as a means of sharing information, the AMF has published several recommendations and created briefing sheets covering usage and best practices in different areas, ranging from online and social media strategies to shareholder guides and consultative committees.

Telephone or individual meetings, roadshows, conferences organised by brokerage firms, analysts’ and investors’ days, and on-site visits are used to communicate with institutional and financial investors.

Selective meetings and communications, circumstances of meetings with individual shareholders

It is customary for investor relations services to organise meetings or conference calls with large shareholders prior to shareholders’ meetings. This same approach may be taken with proxy advisers, who also often seek meetings with the chair of the remuneration committee. These meetings allow shareholders to be fully informed before voting. The AFEP-MEDEF

44 Paragraph 13 of the AFEP-MEDEF Code.

45 AMF Recommendation 2014-15 for listed companies on communication using their websites and social media, now included in the AMF Guide on ongoing information 2016-08, AMF Recommendation 2015-09 on communication by companies aimed at promoting their securities among individual investors, and AMF study on communication practices among listed companies December 2015.
Code provides that the chair of the board or the lead director, if one has been appointed, will be responsible for the board’s relations with the shareholders, particularly with regard to corporate governance aspects.46

Individual meetings may also be organised regularly between senior executives, investor relations departments and analysts and investors. For investors, one-on-one meetings provide an opportunity to assess, inter alia, the vision that senior managers have for their company, their analysis of the competitive environment and market trends.

Executives should of course be especially careful not to disclose privileged information, in particular in view of the entry into force on 3 July 2016 of Regulation (EU) 596/2014 on market abuse, which, among other things, widens the scope of regulation regarding market soundings and raises the amount of the penalties.

Listed companies generally have quiet periods preceding the release of their annual, half-yearly and quarterly financial information during which they must refrain from any contact with analysts and investors.

**Information received by shareholders before shareholders’ meetings**

Shareholders are informed of the date of a meeting 35 days in advance. Companies make certain documents available on their websites at least 21 days before the meeting. Such documents must include, inter alia, a summary statement of the company’s situation and its annual financial statements, and draft resolutions.

**VI OUTLOOK**

Over the past few years, investors have gained some traction in their ability to influence companies and push for more disclosure and diversification. The development of these trends has become apparent in French corporate governance regulation. Based on the various reforms expected in 2019, such trends will no doubt continue.

With respect to diversity, whereas listed companies now comply with the legal provision requiring that they have no less than 40 per cent of women (or men) on their boards of directors or supervisory boards, the AMF47 now notes that a gap remains between the feminisation of boards and their presence as executives (CEO, chair, deputy CEO, senior positions). Evolution has already stated, as the revised AFEP-MEDEF Code now recommends that executive officers implement a policy of non-discrimination and diversity in the governing bodies,48 and further developments may be expected on this point.

With respect to executives’ compensation and say-on-pay approval, even though the draft Action Plan will give power to the government to transpose the Directive relating to the long-term engagement of shareholders, it is anticipated that the new system will continue to provide for a double binding vote (*ex ante* and *ex post*) even though this is not required by the Directive. Increased transparency should also be expected with the introduction of a requirement to disclose a pay ratio comparing executive compensation with the average salary of the employees.

In addition, it seems that investors will pay more attention to the ability of directors to spend sufficient time on their duties and the number of board seats that they hold in publicly

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46 Paragraph 4.4 of the AFEP-MEDEF Code.
48 Paragraph 1.7 of the AFEP-MEDEF Code.
listed companies, which could lead them to vote against ‘overboarded’ directors. If there is too low a percentage of independent board members, investors may also consider voting against the re-election of members of the nomination committee or of the chair.

Finally, political pressure has bolstered the debate around the sharing of values within companies and on companies’ societal commitment. Looking ahead, the Action Plan aims to introduce an obligation for companies to take into account the social and environmental concerns of their activities, and ultimately that companies are more accountable to their stakeholders.
Chapter 8

GERMANY

Carsten van de Sande and Sven H Schneider

I OVERVIEW OF GOVERNANCE REGIME

Germany has one of the most solid corporate governance systems in the world owing to its well-balanced control mechanisms, capital preservation and market transparency rules as well as equal opportunities for women and men.

The German stock corporation is the common legal form among listed companies in Germany. Its corporate governance regime is determined by the following statutory provisions and non-binding best practice rules:

a the Stock Corporation Act, which sets out the – largely mandatory – framework for the organisation of a stock corporation as well as the rights and duties of corporate bodies, management boards, supervisory boards and shareholders’ meetings, as well as shareholders, and which will be amended not later than 10 June 2019 by an implementing act that transposes the revised Shareholder Rights Directive (SRD II) into German law;
b the EU Market Abuse Regulation (MAR), which governs market abuse and market manipulation, disclosure of non-public information and directors’ dealings;
c the Securities Trading Act, containing provisions on the enforcement of violations of the MAR under German law;
d the Securities Acquisition and Takeover Act, which provides for rules on mandatory and voluntary takeover offers and defensive measures;
e the Co-Determination Act and the One-Third Participation Act, granting employees co-determination rights at the supervisory board level;
f the Commercial Code, which stipulates the general accounting rules for German companies, and which was amended in March 2017 by the German implementation of the Corporate Social Responsibility Directive; the new rules require the disclosure of non-financial information that is deemed to be vital for a change towards a sustainable global economy by combining long-term profitability with social justice and environmental protection; and
g non-binding guidelines on non-financial reporting, which were published by the European Commission in June 2017.
In addition, the German Corporate Governance Code, a collection of best practice rules and non-binding recommendations for the corporate governance of stock corporations, has growing influence on how corporate governance is practised in Germany. It has been revised several times, most recently on 7 February 2017. A draft of an amended Corporate Governance Code was published on 25 October 2018. The most important proposed modifications concern remuneration of management board and supervisory board members as well as the independence of supervisory board members and how to assess it. The planned changes to the Corporate Governance Code with regard to remuneration are accompanied by changes to the German Stock Corporation Act, brought about by SRD II. Finally, the Corporate Governance Code requires that the chair of the supervisory board should be available – within reasonable limits – to discuss supervisory board-related issues with investors.

Although the rules and recommendations set out in the Corporate Governance Code are not legally binding, the management board and the supervisory board must declare annually whether and to what extent the company complies with the Corporate Governance Code. To the extent it decides not to comply, the company must explain the reasons for the non-compliance (the comply or explain principle). A deviation from a recommendation may be justified, for example, as being in the interests of good corporate governance. The proposed amendments of the Corporate Governance Code include a number of principles reflecting both significant legal requirements and fundamental standards of good and responsible governance. With respect to these principles, the comply or explain principle is to be supplemented by an apply and explain approach. The management board and the supervisory board must explain how they apply these principles to enable shareholders and other stakeholders to assess the corporation's governance structure and culture.

II CORPORATE LEADERSHIP

i Board structure and practices

Mandatory two-tier structure

The two-tiered board structure of German stock corporations must have a management board and a supervisory board.

Composition of the management board

The management board must have one or more members that must be natural persons. If the registered share capital of the stock corporation amounts to more than €3 million, or where the Co-Determination Act requires that the management board must include a labour director, the management board must consist of at least two members.

Members of the management board are appointed by the supervisory board. The Corporate Governance Code requires that, when appointing management board members, the supervisory board must pay attention to diversity and shall, in particular, aim for an appropriate representation of women on the management board.

Members of the management board may not be appointed for a period exceeding five years. For first-time appointments, the Corporate Governance Code recommends that an appointment for a full period of five years should not be the rule. The appointment may be renewed or the term of office may be extended, provided that the term of each such renewal or extension does not exceed five years. In the draft amended Corporate Governance Code,
the recommendation is made that the initial appointment of members of the management board should be for a maximum of three years. A management board member’s term of office may be renewed or extended, at the earliest, one year before the expiration of the term. However, it is feasible and common practice to dismiss and immediately reappoint a management board member for a new term of office. The Federal Court of Justice held that this practice does not constitute a violation of the statutory prohibition.

The supervisory board may only dismiss members of the management board for good cause. Good cause is, in particular, deemed to exist in the event of material breaches of duty: for example, a management board member’s inability to properly discharge his or her duties (e.g., owing to long-lasting illness or a lack of required skills or knowledge), or where the general meeting has adopted a vote of no confidence and provided that the vote has not been adopted for apparently inappropriate reasons.

Composition of the supervisory board
The supervisory board must consist of at least three members. The maximum number of supervisory board members permitted by law increases depending on the amount of the stock corporation’s registered share capital to a maximum of nine members for stock corporations with a registered share capital of up to €1.5 million, to a maximum of 21 members for stock corporations with a registered share capital of more than €10 million. In any event, the total number of supervisory board members must be divisible by three.

Members of the supervisory board are generally elected by the shareholders’ meeting. The articles of incorporation may provide that certain shareholders or the respective holders of certain shares shall have a right to designate members of the supervisory board. Such designation rights may only be granted in respect of up to one-third of the number of members of the supervisory board to be elected by the shareholders.

On 9 October 2018, the Federal Court of Justice ruled that a resolution of the supervisory board on the nomination of a candidate for the board and its announcement in advance of a general meeting does not become void if the candidate nominated by the supervisory board does not comply with the recommendations of the Corporate Governance Code regarding membership in multiple boards. Since the Corporate Governance Code is not a binding statute, a deviation from its recommendations has no effect on the validity of the candidate’s nomination or eventual election in the general meeting. The Court also held that there is no legal obligation to inform shareholders about the fact that a nominee does not comply with the recommendations of the Corporate Governance Code.

Where a stock corporation generally has more than 500 employees, one-third of the supervisory board members must be employee representatives. In companies with more than 2,000 employees, half of the supervisory board members must be employee representatives. At least 30 per cent of the supervisory board members of listed companies with more than 2,000 employees must be women. In addition, companies with more than 500 employees must adopt certain target ratios regarding the representation of female members on their supervisory and management boards as well as in their senior management.

According to the Corporate Governance Code, the supervisory board should be composed in such a way that its members jointly have the knowledge, ability and experience to properly carry out its tasks and shall include an adequate number of independent members. The new Corporate Governance Code recommends that, except in cases where the supervisory board only consists of three members, at least two representatives of the shareholders shall be independent from the controlling shareholder.
The Corporate Governance Code defines an independent member as a person who has no business or personal relations with the stock corporation, its executive bodies (which include the management board and the supervisory board), or any controlling shareholder or enterprise associated with the latter that could cause a substantial and material conflict of interests. The draft amended Corporate Governance Code foresees a catalogue of criteria for assessing independence. In particular, it ought to be taken into account whether the supervisory board member (or a person having a close family relationship with him or her):

a) was a member of the company’s management board in the two years prior to his or her appointment;

b) currently is maintaining (or has maintained) a material business relationship with the company or one of the entities controlled by the company (e.g., as a customer, supplier, lender or adviser) in the year prior to the appointment, directly or as a shareholder, or in a leading position of a third-party entity;

c) along with the remuneration as a member of the supervisory board, receives other material variable remuneration from the company, or one of the entities controlled by the company;

d) is in a close relationship with a member of the management board;

e) is a controlling shareholder or a member of the executive governing body of the controlling shareholder, or maintains a personal or business relationship with a controlling shareholder; and

f) has been a member of the supervisory board for more than 12 years.

The Corporate Governance Code recommends that the supervisory board should inform the general meeting about conflicts of interest and how they have been dealt with. Such report to the general meeting must mention the relevant supervisory board members, the topics of the supervisory board’s agenda to which the respective conflict is related and how the conflict was dealt with.

Supervisory board members should not hold directorships or similar positions or advisory roles for important competitors of the stock corporation, and should not have any personal relationship with a significant competitor. Moreover, not more than two former members of the stock corporation’s management board should be members of the supervisory board at any time.

Former members of the management board of a listed company may not be elected to the company’s supervisory board for two years following their resignation or dismissal as members of the management board. In addition, it is not permitted for anyone to be a member of the supervisory boards of more than 10 companies at the same time.

In practice, the term of office of supervisory board members is about five years. Renewed appointments are permissible.

ii Legal responsibilities and representation

Management board

The management board is responsible for managing the business of the stock corporation and legally represents the corporation in relation to third parties. Under the statutory concept, all members of the management board manage and represent the corporation jointly. However, in practice, the rule is that the corporation is represented by each member of the management board acting individually or by two members of the management board acting jointly.
In managing the business of the corporation, the members of the management board must apply the care of a prudent and diligent businessperson. Failure by a member of the management board to meet this standard of care will render him or her personally liable for damages incurred by the corporation as a result.

The fiduciary duties that they owe to the stock corporation require members of the management board to give the stock corporation's interests priority over their own when concluding transactions with the corporation. Failure to do so may lead to a management board member's personal liability for any damages suffered by the corporation in connection with the transaction.

A member of the management board cannot be held personally liable if, in making an entrepreneurial decision, he or she had adequate information and believed he or she was acting in the best interests of the stock corporation. This business judgement rule applies in the context of decisions that are not predetermined by the law, the articles of association or resolutions of the shareholders' meeting. The management board is considered to have had adequate information for making a decision if it has consulted all sources of factual and legal information reasonably available to it in the specific situation, and on that basis has weighed the advantages and disadvantages of its decision against each other. However, it is not required that all conceivable information is obtained and every conceivable impact is quantified before making a decision. The necessary depth of information is determined by parameters such as the potential risk to the company, the cost of obtaining information and the period of time available for decision-making.

The management board is subject to a duty of legality. This means that the management board may not itself commit, and may not order third parties to commit on behalf of the company, any violations of the law. In an unclear legal situation, the board members may also obtain the advice of a third-party expert. The members of the management board may rely on the third-party expert's advice if they have provided the expert with the necessary documents and a comprehensive description of the facts to be examined; the expert is independent and professionally qualified to advise on the issue; and they carry out a careful plausibility check of the advice provided by the expert.

The management board must ensure that all employees of the company, when acting within the scope of their operational activities, act in compliance with the law. This presumes that the management board must establish an appropriate system of organisation and control to prevent violations of law from within the company.

While compliance with the law itself is not subject to the management board's discretion, the management board is entitled to wide discretion when designing and implementing the organisation and control measures intended to ensure compliance. On 23 April 2018, the European Commission published its proposal for a directive on the protection of persons who report violations of EU law. According to this proposal, legal entities will be obliged to set up suitable reporting systems.

The management board is obligated to manage the stock corporation independently. It is not subject to instructions by the supervisory board or the general meeting. However, the shareholders may determine in the stock corporation's articles of incorporation that certain transactions require the prior consent of the supervisory board. Where the articles of incorporation do not contain a catalogue of transactions requiring supervisory board consent, the supervisory board may set forth such catalogue in the by-laws of the management board. In addition, the management board is obligated to obtain the general meeting's approval.
where the proposed transaction is of outstanding importance and could substantially affect the shareholders’ rights: for example, a spin-off of the most valuable part of a company’s business.

Further, one of the principles set out in the draft amended Corporate Governance Code stipulates that material transactions with related parties are subject to the prior approval of the supervisory board.

**Supervisory board**

The supervisory board is responsible for supervising and controlling the management of the stock corporation’s business by the management board. To this end, the supervisory board is entitled to inspect the corporation’s books and records and may, at any time, request the management board to report to it about the corporation’s affairs. The right to request reports from the management board extends to the corporation’s legal and business relationships with affiliated companies as well as to the affairs of the corporation’s affiliates if they could have a significant impact on the corporation.

Like members of the management board, members of the supervisory board must act in the best interests of the stock corporation and must demonstrate the care of a prudent and diligent businessperson. One of the notable responsibilities of the supervisory board is enforcing damage claims of the stock corporation against members of the management board. As a general rule, the supervisory board is obligated to assess the existence and enforceability of possible claims against members of the management board and, if its assessment reaches the conclusion that they exist and are enforceable, to pursue the claims. The supervisory board may only refrain from doing so in exceptional cases where pursuing the claims would entail significant disadvantages for the corporation that outweigh the possibility of recovering the corporation’s damages from the management board members. In particular in the wake of the global financial and economic crisis of 2008, this has led to a significant increase in the number of lawsuits brought by corporations against former members of management boards.

Members of the supervisory board are obligated to keep confidential any non-public information that they receive in their capacity as supervisory board members. This obligation prohibits the disclosure of information to any person who is not a member of the supervisory board or management board. For example, the knowledge that a person acquires in his or her capacity as a supervisory board member of a bank must not be disclosed to the supervisory board member’s employer. Moreover, the obligation may not be waived by the general meeting or the supervisory board in advance. As a consequence, knowledge acquired by a person in his or her capacity as a supervisory board member may not be attributed to that person’s employer.

The supervisory board’s responsibility to supervise the management imposes a duty on the members of the supervisory board to avert actions by the management that may be detrimental to the company and that do not fall within the ambit of the business judgement rule. A supervisory board member may even be subject to criminal liability if, by consenting to certain transactions, the supervisory board member allows behaviour of the management that is not covered by the business judgement rule.

iii  **Delegation of board responsibilities**

All members of the management board manage the stock corporation collectively and are collectively responsible for their actions.
In practice, responsibility for the management of certain business divisions or certain functions (e.g., finances, accounting, controlling, human resources, tax, legal, compliance) is delegated to individual members of the management board. The effect of this delegation is that the respective member of the management board is excluded from the management of the other divisions or functions and becomes primarily responsible for the delegated tasks.

However, delegation does not fully relieve the other members of the management board from all responsibilities with respect to the delegated tasks. They remain responsible for monitoring and controlling the performance of the delegated tasks by the delegate. The extent of specific monitoring measures is at the discretion of the individual management board member. In general, it is deemed to be sufficient to carefully, continuously and appropriately observe developments in the delegated divisions or functions and the performance by the other management board members of their duties. A general mistrust of other members of the management board is neither appropriate nor necessary.

iv Roles of the chair of the management board and the chair of the supervisory board

Where the management board consists of more than one person, the supervisory board may appoint one of them as chair. The chair is responsible for administrative tasks relating to the work of the management board, such as preparing and chairing meetings and keeping minutes, as well as for coordinating and supervising the work of the management board. He or she typically is in charge of liaising with the supervisory board and represents the management board in public, and thus has a prominent position among the other members of the management board. The manner in which many chairs of management boards discharge these responsibilities in practice has given rise to the perception that the position is comparable to that of the chief executive officer of a US corporation. However, from a legal perspective, this is not the case. In particular, the chair has no right to give instructions to other management board members, and is not entitled to decide matters against a majority of the other members of the management board.

The members of the supervisory board must elect a chair and a deputy chair. The chair of the supervisory board is a largely administrative role that is not endowed with any particular powers. The chair calls, prepares and leads meetings of the supervisory board. Typically, the articles of incorporation provide that the chair of the supervisory board also chairs the general meeting.

In a German stock corporation, it is not possible for the chair of the management board to also be chair of the supervisory board. With few exceptions, membership of both the supervisory board and the management board of the same corporation is incompatible.

v Compensation of members of the management board and the supervisory board

The total compensation of each member of the management board (e.g., fixed salary, variable salary components and pensions) as well as each of its individual components must be reasonable in light of the duties and responsibilities and the individual performance of that management board member, as well as the situation of the company. In listed companies, the compensation must be geared towards a sustainable development of the company. This means, in particular, that the basis of assessment for variable components must be a period of several years. In this context, short-term elements of variable remuneration must be distinguished from long-term elements. The short-term variable remuneration shall be disbursed in cash, whereas the draft amended Corporate Governance Code recommends for long-term variable
remuneration to be granted in the form of shares in the company that may not be sold for a period of at least four years. The proposed amendments to the Stock Corporation Act and the Corporate Governance Code will likely require changes to currently employed remuneration systems for the management board and the supervisory board. The compensation of members of the management board is determined by the full body of the supervisory board, usually following a recommendation by a committee established for that purpose. In the absence of any particular circumstances, the compensation may not exceed usual compensation levels. When determining the compensation of a member of the management board, the supervisory board must therefore compare the proposed compensation both with the compensation structure of peer companies (horizontal comparison) and with the company’s own compensation structure (vertical comparison). Under the Corporate Governance Code, the supervisory board should also consider the relationship between the compensation of the management board and that of senior managers with the total staff, including the development of the compensation over time. The supervisory board should also place caps on compensation in terms of the aggregate amount and in terms of individual components.

If, after the compensation has been determined, the situation of the company changes for the worse because of circumstances that can be attributed to the management board, and continuing to pay the compensation as originally determined would be unreasonable, the supervisory board is not only entitled but, absent any particular circumstances, also obligated, to reduce the compensation (including pensions) to an appropriate level.

The Corporate Governance Code recommends that severance payments to members of the management board should not exceed an amount of two times the annual compensation, and that severance payments in the event of a change of control of the company should not exceed 150 per cent of that amount.

Supervisory board members’ compensation is determined in the articles of incorporation or by the general meeting. Like the management board members’ compensation, it must bear a reasonable relationship to the duties of the supervisory board members and to the condition of the company. Supervisory board members’ compensation may also comprise variable components. The Corporate Governance Code recommends that variable components should be based on the corporation’s long-term performance.

Contracts between a member of the supervisory board and the stock corporation relating to services outside the scope of the supervisory board member’s statutory duties require the consent of the supervisory board. The management board will act in breach of its duties if payments are made to a supervisory board member without the supervisory board’s prior consent to the contract. Although the supervisory board may approve the contract and the payments owed to the supervisory board member thereunder after the services have been performed, the management board will breach its duties if payments are made in mere anticipation of the approval. Absent such prior consent by the supervisory board, the contract gives rise to a conflict of interest of the supervisory board member.

Stock corporations must disclose the aggregate remuneration granted to members of the management board and the supervisory board, respectively, in their financial statements. Listed companies must also disclose the remuneration of each individual member of the management board. According to the Corporate Governance Code, the information to be disclosed with respect to each member of the management board should, among other things, set out the benefits (including fringe benefits) actually achieved by the management board member in the relevant financial year, as well as the maximum and minimum amounts of the variable compensation that would have been achievable in that year. The general meeting
may opt out of these disclosure requirements for a period of not more than five years by passing a resolution with a majority of 75 per cent of the capital represented. To improve the ease of comparison over time and with other companies, the Corporate Governance Code recommends that important facts and figures regarding the management board’s compensation should be prepared and presented using a standardised table format, the template for which is set out in an annex to the Corporate Governance Code.

vi Committees

The supervisory board is not required to, but may, form committees, in particular for the purpose of preparing its deliberations and supervising the execution of its resolutions.

Where the supervisory board is composed of both shareholder and employee representatives, the supervisory board must form a reconciliation committee composed of the chair of the supervisory board, his or her deputy and one member of the supervisory board elected by the shareholder and the employees, respectively.

The supervisory board may establish an audit committee to deal with matters relating to the preparation of the corporation’s financial statements, the effectiveness of the internal audit and risk management systems as well as the conduct of audits and ensuring the auditor’s independence. The audit committee is responsible for monitoring the accounting process and the efficacy of the internal control system, the risk management system and the internal audit system as well as additional services provided by the stock corporation’s auditor. Where the supervisory board of a corporation whose securities are traded or that has applied for its securities to be admitted to trading in an organised market has elected to form an audit committee, at least one member of the committee must have expertise in the areas of accounting and auditing. However, the Corporate Governance Code recommends that the chair of the audit committee should have specialist knowledge and expertise in the application of accounting principles and internal control processes. Additionally, the chair shall be independent and may not have been a member of the company’s management board in the past two years. The chair of the supervisory board should not at the same time be the chair of the audit committee.

Moreover, the draft amended Corporate Governance Code recommends that the supervisory board reports on how many meetings of the supervisory board, and of the committees, individual members attended.

The Corporate Governance Code further recommends forming a nomination committee that is composed exclusively of shareholder representatives and that is tasked with proposing suitable candidates that the supervisory board may recommend to the general meeting for election to the supervisory board.

vii Board and company practice in takeovers

In the event a company becomes the target of a takeover offer, the management board and the supervisory board must publish a reasoned statement regarding the offer on the internet. The statement is intended to enable the shareholders to make an informed decision on the offer and must, in particular, contain the management board and the supervisory board’s assessment of the consideration offered by the bidder, the expected consequences of a successful takeover offer for the company, its employees, the employee representatives (i.e., the works council), the terms and conditions of employment and the company’s production and other sites, the goals pursued by the bidder, and information on whether the members of the management board and the supervisory board intend to accept the offer.
III DISCLOSURE

i Regular reporting and disclosure requirements

The management board and the supervisory board of a listed company must publish annually a statement on the company's website regarding the company's compliance with the recommendations of the Corporate Governance Code. In relation to this, the draft amended Corporate Governance Code newly introduces the apply and explain concept, which is already practiced in many other countries. Accordingly, the supervisory board and the management board must explain in which way they apply the principles set out in the Corporate Governance Code. They have to disclose specifically how the Corporate Governance Code is applied and implemented within the company, or give specific reasons for not doing so. If the company's statement turns out to be incorrect, this will only give rise to a shareholder's right to challenge the general meeting's vote approving the management board's and the supervisory board's conduct of the company's affairs where the incorrectness of the statement amounts to more than a mere formality because it is significant in the circumstances of the individual case and a reasonable shareholder would have required the correct information to appropriately exercise his or her rights.

Stock corporations must disclose their annual financial statements (consisting of the corporation's balance sheet and profit and loss statement as well as the notes thereto) by publishing them electronically in the German Federal Gazette.

Together with the annual financial statements, the management report of listed stock corporations, and stock corporations that have only issued securities other than shares for trading in an organised market and whose shares are traded in a multilateral trading system, must contain a corporate governance statement. This includes the following:

a a statement by the management board and the supervisory board regarding compliance with the Corporate Governance Code;

b information regarding any practices and standards applied by the corporation in addition to statutory requirements, such as codes of conduct or codes of ethics, as well as information on where these practices and standards have been made publicly available; and

c information regarding the composition of the corporation's management board, supervisory board and any committees formed by them as well as the manner in which they conduct their affairs, for example by summarising the content of or referring to the by-laws of the management board or supervisory board.

In addition, as of the fiscal year 2017, the corporate governance statement must describe the concept of diversity that is pursued with regard to the composition of the management and the supervisory board. The description must address specific aspects such as age, gender, educational or professional background, as well as the objectives of the diversity concept, the manner in which it is implemented and the results achieved during the financial year.

As part of the management report, large capital market-oriented corporations as well as certain credit institutions and insurance companies are also obligated to submit a non-financial declaration. This includes information on the approach adopted by the company to improve environmental, employee and social issues, respect for human rights and the fight against corruption, as well as information on the result of the measures taken to date. If no particular approach is pursued for one of these matters, this is to be justified in sense of the comply or explain principle.
Companies are free to decide whether to integrate the non-financial statement into the (group) management report or whether to prepare a separate non-financial (group) report. Exemptions from the reporting obligation exist, among other things, for those companies that are included in the consolidated financial statements of a parent company.

The supervisory board must review and monitor the compliance with these reporting obligations within the framework of standard publicity.

Within the first three months of each financial year, the management board of a stock corporation on which another enterprise can exercise a dominating influence must prepare a report on the corporation’s relations with affiliated companies. This report must specify all transactions the corporation has conducted with its dominating enterprise or with companies affiliated with the dominating enterprise; any consideration given or received in connection with such transactions; and any acts taken or not taken by the reporting corporation on the instructions or in the interests of the dominating enterprise or its affiliated companies and, if any such acts or omissions were disadvantageous to the reporting corporation, whether it has received compensation for any disadvantage caused by the acts or omissions.

**Disclosure of inside information**

As a general rule, any issuer of securities that are admitted or requested for admission to trading on an organised market or multilateral trading facility in Germany must disclose, without undue delay, any information directly relating to the issuer that is not publicly known if the information could have a material impact on the market price of the relevant securities. As of 3 January 2018, these disclosure requirements also apply to organised trading facilities as well as participants in the emissions certificates market.

Disclosure of this information must be made in the German language in at least one mandatory stock exchange newspaper of nationwide circulation or through a system for the electronic dissemination of information, as well as on the issuer’s website. Prior to disclosing it to the public, the issuer must inform the management of each stock exchange on which the securities or derivatives thereof are traded and the Federal Financial Supervisory Authority of the information.

An issuer may, on its own responsibility, delay disclosure of inside information if disclosure is likely to prejudice the issuer’s legitimate interests, for example during ongoing contract negotiations concerning material assets of the company or in restructuring situations; the delay is not likely to mislead the public; and the issuer ensures the confidentiality of the inside information. Upon disclosure, the issuer must inform the Federal Financial Supervisory Authority of this, and of why disclosure was delayed.

**Directors’ dealings**

Members of the management board and the supervisory board of an issuer as well as all other senior executives with regular access to inside information are obligated to notify both the issuer and the Federal Financial Supervisory Authority, within three business days, about transactions conducted on their own account relating to shares or debt instruments of the issuer that are traded on the financial markets, or financial instruments linked thereto (e.g., derivatives). The disclosure obligation also relates to transactions for the account of legal entities, trusts or persons closely associated with the issuer’s board members or senior executives, such as spouses, registered partners or dependent children. Relevant transactions
include the purchase and sale, as well as the pledging and lending, of the relevant financial instruments. Disclosure must be made in writing and must contain, with respect to each transaction:

a the names of the issuer and of the person for whose account the transaction was conducted;
b the reason for the disclosure;
c the nature of the transaction;
d the designation and identification number of the financial instruments;
e the date of the conclusion of the transaction; and
f the price, number and nominal value of the financial instruments.

The disclosure obligation does not apply if the total value of all transactions conducted by a single person within a calendar year does not exceed €5,000.

The issuer is responsible for ensuring that information regarding the transactions that are subject to the disclosure requirement is published without delay, at the latest three days after the transaction, in media suitable for its dissemination throughout the European Union. In addition, the issuer is required to submit the published information to the German company register.

During a closed period of 30 days before the public announcement of an interim or year-end report, transactions by or for the account of a person with access to inside information are prohibited. However, the issuer may exempt the person for individual transactions under exceptional circumstances, such as severe financial difficulty, or for transactions under employee share or saving schemes and similar transactions.

### Disclosure of shareholdings in listed companies

Any person whose shareholdings in shares of a company with its corporate seat in Germany admitted to trading on the organised market on a stock exchange of a Member State of the European Union reach, exceed or fall below the thresholds of 3, 5, 10, 15, 20, 25, 30, 50 or 75 per cent of the voting rights in the company, by way of an acquisition, a disposal or otherwise, is obligated to disclose this circumstance to the Federal Financial Supervisory Authority and to the company without undue delay, but in no event later than four trading days thereafter. The company must then pass on the information without undue delay, namely within three trading days, to a combination of media for Europe-wide dissemination as well as to the German company register.

For the purpose of calculating the relevant threshold amounts, voting rights arising from shares held by a third party may be attributed to the person obligated to disclose the shareholding. Voting rights will, for example, be attributed if the third party is a subsidiary of the person obligated to disclose the shareholding, or if the person obligated to disclose the shareholding by other means has a controlling influence on the exercising of the voting rights arising from the shares. The same holds true for shares held by third parties who act in concert with the person obligated to disclose the shareholding. The person obligated to disclose the shareholding and a third party are considered to be acting in concert if together they strive to effect a fundamental and sustained change of the strategic direction of the company. By contrast, agreements by shareholders on individual matters do not constitute acting in concert. In 2018, the Federal Court of Justice ruled that formal aspects determine whether the shareholders’ coordination is considered to only relate to an individual case, and thus not to constitute acting in concert. Accordingly, coordination with respect to an
individual vote (such as the re-election of supervisory board members) in the general meeting will not be regarded as acting in concert even if the vote may have fundamental or sustained consequences for the strategic direction of the company. As a result of the broad attribution of voting rights, and because a direct shareholding in a listed company is not a prerequisite for triggering the disclosure obligation, indirect holders of relevant shareholdings may also be subject to these disclosure requirements. The disclosure obligation may, therefore, apply even to remote indirect holders whose relevant shareholding results only from the attribution of shares held by third parties.

IV CORPORATE RESPONSIBILITY

All publicly listed companies and other German companies have adopted modern compliance programmes and created a compliance organisation that is headed by a chief compliance office or a member of the management board to whom responsibility for compliance has been delegated.

Nearly all compliance programmes emphasise the importance of the tone from the top for a corporation’s compliance culture, and measures are taken to ensure compliance manuals are distributed and employees are trained with respect to compliance-related issues. Many companies have established whistle-blowing hotlines where employees can report misconduct anonymously.

The compliance framework in Germany is decisively influenced by case law: on 9 May 2017, the Federal Court of Justice ruled that for the purpose of determining the amount of a fine imposed on a company for violations of law committed from within the company, the effectiveness and efficiency of the company’s compliance management system must be taken into account. The amount of the fine also depends on whether the company has improved its compliance management system as a response to the administrative or criminal proceedings against it, and whether it has revised its internal policies and procedures in such a way that comparable violations will become less likely in the future. The Court’s decision, thus, encourages management boards to investigate indications of wrongdoing and to eliminate systematic deficits as quickly as possible. Conversely, the decision leads to an increased liability risk for members of the management board in cases where they fail to take appropriate compliance measures.

The significance of corporate compliance has also led to an increase in measures taken by companies to address and sanction non-compliance. Where a suspicion of non-compliance arises, companies conduct internal investigations, often with the assistance of external lawyers or auditors, to determine the nature and magnitude of the non-compliance. Most recently, the focus of the discussion on corporate compliance has, therefore, moved from the framework for establishing compliance management systems to the legal framework for, and boundaries of, the conduct of internal investigations. Conflicts arise, in particular, with respect to employee data protection, the statutory protection against self-incrimination afforded the accused in investigations by state authorities as well as the scope of attorney–client privilege.

Since 25 May 2018, employers conducting internal investigations must observe the data protection principles set out in the General Data Protection Regulation (GDPR) such as data minimisation, purpose limitation, integrity, confidentiality and the requirement to process personal data lawfully, fairly and in a transparent manner in relation to the data.

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subject. Employers have to take the GDPR and the Federal Data Protection Act into account, for example, when conducting internal investigations. The GDPR requires companies to inform shareholders about the processing of their personal data that occurs in connection with the preparation or the holding of the general meeting.

V SHAREHOLDERS

i Shareholder rights and powers

As a general rule, all shares in a German stock corporation provide for equal rights, including equal voting rights, rights to receive dividends and information rights.

Voting rights are usually exercised per share or in proportion to the par value of the shares. The Stock Corporation Act prohibits the creation of shares with multiple voting rights. The articles of incorporation of non-listed stock corporations may provide for limitations on a shareholder’s voting rights by way of maximum voting rights or staggered voting rights. With the approval of the general meeting, a stock corporation may issue non-voting preferred shares in a nominal amount of up to half of its registered share capital.

The shareholders of a stock corporation, unlike shareholders of German limited companies, have no direct influence on the management board. They have no right to give instructions to the management board or to otherwise direct the management of corporations. Their influence is limited to electing the members of the supervisory board, who in turn appoint and remove the members of the management board.

Since a shareholder representing a majority of the voting rights or the share capital of a corporation may de facto have a controlling influence on the stock corporation’s management because of its ability to elect and dismiss the shareholder representatives on the corporation’s supervisory board, the Stock Corporation Act provides for a set of rules regarding the influence of controlling shareholders on a stock corporation’s management and business: a controlling shareholder must compensate any disadvantage suffered by the corporation as a result of any exercises by the controlling shareholder of its influence. Any such disadvantage must be compensated, at the latest, by the end of the fiscal year during which it was caused.

The controlling shareholder may legalise its influence on the stock corporation by concluding a domination agreement with the stock corporation. Once a domination agreement has been concluded, the Stock Corporation Act recognises the shareholder’s right to give instructions to the management board. To become effective, the domination agreement – which for tax reasons is often concluded together with a profit transfer agreement under which the corporation must transfer all of its annual profits to the dominating shareholder – must be approved by the corporation’s general meeting with a supermajority of at least 75 per cent of the share capital represented at the meeting. The controlling shareholder is obligated to compensate any loss incurred by the controlled company during the term of the domination agreement and to acquire, at a minority shareholder’s request, that shareholder’s shares against adequate compensation.

Certain decisions are reserved for the shareholders’ meeting by statutory law. This includes the appointment of members of the supervisory board, the appropriation of distributable profits, the appointment of the auditor, the amendment of the articles of association, measures to increase or reduce the share capital, or obligations to transfer significant assets of the company.

In addition, the shareholders’ meeting must approve management decisions that could fundamentally affect the shareholders’ rights and economic position, such as the sale or the
hive-down of a business division into a subsidiary if the division contributes a significant portion of the corporation's revenue. Apart from these exceptional cases, the management board can make business decisions autonomously without the shareholders’ consent. Accordingly, the Federal Court of Justice ruled that the management board can decide to delist a company from the stock exchange without the consent of the general meeting.

Any shareholder who was present during a shareholders’ meeting and objected to a resolution adopted at that meeting is entitled to file an action against the shareholders’ resolution in court with the intention to have it declared void. The plaintiff shareholder must have been a shareholder of the corporation on the date on which the agenda of the shareholders’ meeting was published and must have entered his or her objection into the record of the shareholders’ meeting.

Shareholders representing at least 5 per cent of the stock corporation's registered share capital are entitled to request that the management board call a shareholders’ meeting, and shareholders representing at least 5 per cent or €500,000 of the corporation's registered share capital are entitled to request that topics are put on the agenda of the shareholders’ meeting.

ii Shareholders’ duties and responsibilities

All shareholders are subject to the duty of loyalty in relation to the company and other shareholders. In particular, shareholders are prohibited from causing harm to the company.

In principle, the duty of loyalty is defined by the articles of association and the company's purpose. However, in exceptional circumstances, a shareholder may even be obligated to exercise his or her voting rights in favour of a specific measure that is deemed to be necessary for the avoidance of the collapse of the company.

The Federal Court of Justice ruled on 9 October 2018 that allowing shareholders to participate in a general meeting and to exercise their voting right violates the principle of equal treatment if they did not register within the registration period provided for in the invitation to the general meeting. In the case decided by the Court, the votes of a shareholder who did not register in time were taken into account in the election of a new supervisory board member. Because it could not be ruled out that these votes had an influence on the outcome of the election, the Federal Court of Justice nullified the election.

iii Shareholder activism

Germany has experienced several waves of shareholder activism. Owing to recent changes of the law and restrictive court decisions, the practice of ‘greenmailing’ companies through lawsuits by individual minority shareholders seeking to set aside shareholder resolutions or to delay corporate transactions is largely a thing of the past. Nowadays, activist shareholders are often hedge funds that seek to influence the strategy and the share price of a company even though they only hold a minority stake in the company. They typically do this through the exercise of minority rights, for example the right of a 5 per cent minority to request the appointment of a special auditor or the dismissal of a supervisory board member, or to convene a shareholders’ meeting, or through informal means, such as discussions with the company's management. Often, these attempts are accompanied by aggressive publicity and media campaigns designed to pressure the company's management into adopting the measures proposed by the activist shareholder. Another means for activist minority shareholders to exercise a disproportionate influence on a company is through proxy fights. Foreign and institutional investors especially increasingly follow the voting recommendations
of proxy advisers. If an activist shareholder succeeds in persuading a proxy adviser to favour the measures proposed by the activist shareholder, this will result in a significant increase in the activist shareholder’s factual voting power.

A much publicised recent example of shareholder activism in Germany was the STADA Arzneimittel AG case. The activist shareholder Active Ownership Capital (AOC) acquired more than 5 per cent of the voting rights in STADA, a publicly listed pharmaceutical company. When this was made public pursuant to the Securities Trading Act, AOC used the public attention to promote its own agenda, which included the replacement of nearly the entire supervisory board of STADA. A proxy fight ensued between the management of STADA and AOC. As a result, among other things, the chair of the supervisory board was dismissed in a heated shareholders’ meeting, resolutions of the supervisory board were judicially contested and the chair of the management board resigned.

iv Takeover defences

Once a bidder has published its decision to make a takeover offer, the management board may no longer take any actions that could prevent the success of the offer. There are, however, some statutory exceptions to this prohibition of frustrating action. The management board remains entitled to solicit competing offers from third parties (white knights) and to take actions approved by the supervisory board. Moreover, the management board may take such actions that would also have been taken by the prudent and diligent managers of a company that is not the subject of a takeover offer. This means that the management board continues to be entitled to take all measures that are in the ordinary course of the company’s business or that are intended to implement a business strategy that the company has embarked on before the publication of the takeover offer.

The management board may also take defensive measures that are authorised by the general meeting before the takeover offer was announced and approved by the supervisory board. These include:

a repurchasing shares equalling up to 10 per cent of the registered share capital;
b establishing increased majority requirements for shareholder votes;
c electing shareholder representatives in the supervisory board at different points in time to create a staggered board, and at the same time increasing the majority requirements for their dismissal;
d selling important assets of the corporation; or
e acquiring a direct competitor of the bidder.

The shareholders’ approval authorising defensive measures requires a supermajority of at least 75 per cent of the share capital represented at the shareholder meeting. The authorisation to take defensive measures may not be granted for a period of more than 18 months. Under the Corporate Governance Code, a shareholders’ meeting should be convened whenever the company is faced with a takeover offer.

v Contact with shareholders

Each shareholder may request the management board to provide information regarding the affairs of the company. The shareholders’ information right may, however, only be exercised during a shareholders’ meeting, and is limited to information that is reasonably required by the shareholders to appropriately assess the topics on the agenda of the shareholders’ meeting. The management board may refuse to provide the requested information only for a limited
number of reasons enumerated in the Stock Corporation Act, in particular if providing the information would, in the assessment of a reasonable businessperson, be harmful to the company. To the extent the management board proactively communicates with shareholders, it must observe the principle of equal treatment of shareholders as well as the rules regarding disclosure of inside information. Some authors argue that the principle of equal treatment requires that the management board inform the other shareholders at the annual shareholders’ meeting about their previous communications with individual shareholders.

While fostering investor relations and communication with (potential) investors and other stakeholders of the company generally falls within the remit of the management board, the supervisory board, and particularly its chair, may, within certain boundaries, also communicate with the company’s stakeholders. As of 2017, the Corporate Governance Code even requires that the chair of the supervisory board should be available – within reasonable limits – to discuss supervisory board-related issues with investors.

The Corporate Governance Code does not limit discussions to those with shareholders, so that especially the chair of the supervisory board can exchange views with other stakeholders, including representatives of politics and the press. However, investor communication by the (chair of the) supervisory board is limited to issues that fall within the remit of the supervisory board. These do not, in particular, include issues of corporate strategy and the management of the company, which are the sole responsibility of the management board.

Despite some uncertainties regarding the allocation and scope of the competencies for communication with shareholders, investor communication is now common practice in many listed companies, and the promotion of transparent investor communication is firmly supported at a European level by the Shareholders’ Rights Directive.

VI OUTLOOK

SRD II aims to further improve the corporate governance of companies listed on Europe’s stock exchanges and to promote the long-term participation of shareholders. Member States are required to transpose SRD II into national law by 10 June 2019. This will significantly change the corporate governance framework for listed companies in the European Union. In order to transpose SRD II into German national law, the Federal Ministry of Justice and Consumer Protection presented a draft law on 11 October 2018. The draft law will amend and supplement existing German statutes. In practice, the following key elements of the new law are of particular importance:

a SRD II provides for more intensive monitoring of the remuneration policy by shareholders (say on pay): a general meeting must vote on the remuneration system for all a listed company’s directors. Due to the two-tiered board structure of German stock corporations, the draft German implementing law provides for different rules for the determination of the remuneration of management board members on the one hand (which must be decided by the supervisory board based on the remuneration policy adopted by the general meeting) and supervisory board members on the other (which will be determined by the general meeting). The general meeting must vote on the company’s remuneration policy at least once every four years and, in addition, in the event of a material change. To preserve the supervisory board’s power to determine management board members’ remuneration, the draft implementing law provides that the general meetings’ say on pay does not create any rights or obligations.
To ensure the corporate transparency and accountability of directors regarding the implementation of the remuneration policy, the draft implementing law foresees that the supervisory board and the management board are jointly obligated to annually draw up a clear and understandable remuneration report providing a comprehensive overview of the remuneration of individual directors. The general meeting is entitled to annually pass a (non-binding) resolution on the company’s remuneration report. The draft implementing law provides for penalties in the event of a violation of the duty to publish the remuneration report and to make it accessible.

Material transactions with related parties are to be approved by the supervisory board or, if the supervisory board refuses to grant its approval, by the general meeting. Whether a transaction is deemed to be material is determined by the following aspects: the influence that the information about the transaction may have on the economic decisions of shareholders; the risks associated with the transaction; and the financial position, revenues, assets and capitalisation of the company. SRD II obliges every Member State to further define, within the framework of the Directive, what constitutes a material related-party transaction. The German draft implementing law provides that a transaction constitutes a material related-party transaction if its economic value is at least 2.5 per cent of the total of the company’s fixed and current assets. No approval is required for transactions that are concluded in the ordinary course of business and on customary market terms. In addition, the implementing law provides for exceptions from the approval requirement, for example for transactions with directly or indirectly wholly owned subsidiaries, or transactions that, for other reasons, require the consent of the general meeting or that are entered into pursuant to an authorisation by the general meeting. Companies must publicly announce related-party transactions at the latest when the transaction is concluded, namely when the transaction documents are signed.

SRD II aims to increase transparency by providing for an obligation of institutional investors and asset managers to once a year declare their participation policy, including their policy regarding the supervision of companies and the exercise of voting rights and other shareholders’ rights. Voting rights advisers (proxy advisers) are to perform their activities on the basis of a code of conduct and to disclose, inter alia, essential features of methods used and main sources of information.

To increase the transparency regarding shareholder participation, SRD II provides for a corporation’s right to identify its shareholders (know your shareholder). Financial intermediaries will be obligated to provide, at the request of the company, the information that is necessary to identify the shareholders, including names and contact details. Under the draft implementing law, in particular, securities firms, financial institutions and central securities depositories will be considered to be financial intermediaries. Intermediaries who violate their duties can be fined. In addition, they may be sanctioned under the GDPR if they do not comply with an individual person’s right to correct their personal data. The implementing law does not make use of the option contemplated in SRD II to stipulate that the right of identification shall apply only to shareholders whose holdings exceed a certain percentage (a maximum of 0.5 per cent) of the total shares or voting rights. Companies may determine themselves whether they want to exercise their information right only with respect to shareholders whose holdings exceed a certain threshold.
Once implemented, SRD II will provide for significant changes to the German corporate governance framework, in particular regarding the statutory allocation of powers between the shareholders and the supervisory board of a German stock corporation. The draft implementing law aims to implement SRD II into German national law in a non-bureaucratic and systematic fashion. If the legislative process proceeds as anticipated, the new provisions will enter into effect on 10 June 2019 as planned.

ii The Company Law Package


The first set of proposals concerns the use of digital tools and processes in company law. The main goals of these amendments are to allow the establishment of a company online and online communication with the commercial register. The proposal aims to digitise the entire communication between the commercial register, a company and all its legal business partners. If implemented, the proposals would make it possible to establish new companies completely online. Moreover, companies will be able to communicate with the commercial register online for the whole period of their existence.

The second proposal concerns amendments in relation to cross-border changes of a company’s legal form, mergers and divisions. The proposals aim at improving the transnational mobility of companies, and to provide a foundation for cross-border mergers, divisions and changes in legal form.

iii EU whistle-blower protection

A further draft, presented by the European Commission on 23 April 2018, is a proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law. The proposal aims to better protect whistle-blowers as well as improve law enforcement and the protection of the freedom of speech and freedom of information.

The Directive is designed to not only protect Union citizens, but also nationals of third countries. Furthermore, the draft Directive not only includes a company’s employees in the ambit of the protections envisaged by it, but also other persons who have a relation to the company, such as suppliers, interns and applicants. The draft Directive will protect reports of serious concerns regarding unlawful actions, abuses of law as well as potential breaches of law.

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Chapter 9

GHANA

NanaAma Botchway, Akosua Achiaa Akobour Debrah and Nana Abena Henewaa Busumtwi

I OVERVIEW OF GOVERNANCE REGIME

The principal legislation affecting the governance of listed companies is the Companies Act, 1963 (Act 179). The Companies Act includes general provisions relating to the organisational framework of all companies, both public and private, as well as special provisions for public companies only, relating to invitations to the public for the acquisition or disposal of listed securities, standards for financial reporting, procedures for appointing directors, etcetera. Apart from the Companies Act, other relevant legislation that affects the governance of listed companies includes the Securities Industry Act, 2016 (Act 929) and the Securities and Exchange Commission Regulations, 2003 (LI 1728), which regulate public invitations for and trading in listed securities, as well as disclosure obligations and financial reporting standards for listed companies.

The Listing Rules of the Ghana Stock Exchange (Listing Rules), the Code on Takeovers and Mergers (Takeover Code) issued by the Securities and Exchange Commission (SEC) and the SEC’s Code of Best Practices on Corporate Governance (Corporate Governance Code) are also key to the governance regime of listed companies. The Listing Rules is a comprehensive rulebook that sets out various rules and guidelines on the governance of companies listed on the Ghana Stock Exchange (GSE). It prescribes mandatory disclosure obligations for issuers of listed securities, rules on board governance, and practices and protections in respect of shareholders’ rights. The Takeover Code regulates takeovers and mergers by, between or affecting public companies. The Corporate Governance Code contains principles, guidelines and recommendations for ensuring the effective governance of listed companies. Sector-specific legislation, such as the Banks and Specialised Deposit Taking Institutions Act, 2016 (Act 930), the Insurance Act, 2006 (Act 724) and their respective regulations, also contain important provisions that affect listed companies operating within the relevant sectors, particularly in relation to board composition and governance.

The SEC, together with the GSE and the Registrar of Companies, bear the primary responsibility for overseeing the listed company regime in Ghana. However, there are other supervisory bodies (such as the Bank of Ghana for the banking sector and the National Insurance Commission for the insurance industry) that regulate listed companies operating in specific sectors of the economy. The SEC is empowered under its enabling law to impose administrative penalties for non-compliance with its codes, directives, guidelines and

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With respect to instances of non-compliance that also constitute criminal offences, prosecutorial powers are administered by the Attorney General, who may authorise the SEC to prosecute such offences on his or her behalf.

The GSE enforces compliance with its rules through sanctions such as the suspension or delisting of listed companies. A listed company may be suspended from the exchange or its securities delisted for non-compliance with the GSE’s rules on disclosure and its policy on quality management of listed companies. Where a listed company has disposed of its principal assets or discontinued a significant portion of its operations without shareholder approval, or persistently failed to comply with GSE and SEC rules and directives, it could also be suspended or delisted. The Registrar of Companies is also authorised, under the Companies Act, to impose penalties on companies in respect of breaches of the mandatory provisions of the Companies Act, and by so doing ensure compliance with the Companies Act. The Registrar of Companies may also go to court to compel compliance with the requirements of the Companies Act.

The corporate governance regime for listed companies in Ghana is essentially a combination of statutory law, subsidiary legislation and regulatory guidelines and directives. The Corporate Governance Code does not have the force of law, and is merely used as a benchmark for assessing the governance practices of listed companies and companies that operate within the securities industry. However, some regulators in the financial services sector have developed detailed mandatory guidelines on governance structures and control systems for regulated companies, non-compliance with which could have adverse implications on their licences. For instance, the National Insurance Commission has developed governance and risk management guidelines for both life and non-life insurers. The detailed framework provides the minimum standards for the corporate governance structures and internal control systems that insurers must comply with. This includes board composition, mandatory board committees and their composition, their mandate and responsibilities, and audit and risk control functions. Another sector that has seen steady development in corporate governance practices is the banking sector. The Bank of Ghana (BoG) issues notices and directives on governance structures and control systems for banks and specialised deposit-taking institutions in line with the corporate governance principles of the Basel Committee on Banking Supervision. Following the collapse of a number of banks, in December 2018 the BoG released a comprehensive corporate governance code (BoG Directive) for the banking industry, specifically banks, savings and loans companies, finance houses and financial holding companies licensed or registered under the Banks and Specialised Deposit Taking Institutions Act, 2016 (regulated financial institutions). Unlike the Corporate Governance Code, compliance with the BoG Directive is mandatory, and in some cases it provides deadlines for its implementation.

In addition to the BoG Directive, compliance with the various laws and regulations relevant to listed companies is strictly compulsory, subject to certain special circumstances when waivers in respect of some specific provisions or requirements may be granted by the appropriate supervisory body under conditions imposed by the supervisory body. Compliance with the Corporate Governance Code is entirely voluntary, and listed companies are not obliged to explain their reasons for not complying with the best practices identified therein.

Increasing multinational interests in Ghanaian companies have led to a growing advocacy for the adoption of international standards and best practices in the governance of Ghanaian companies. Companies with foreign shareholders, particularly institutional investors with significant or controlling shareholding, are greatly influenced by the corporate governance
practices of these investors. Government-led efforts aimed at developing mandatory corporate governance rules for Ghanaian companies are largely sector or industry-driven, and this has resulted in regulators developing sector-specific corporate governance guidelines or manuals. A national corporate social responsibility (CSR) policy, which seeks to change the traditional focus of CSR activities on charity, was also launched in 2016.

II CORPORATE LEADERSHIP

i Board structure and practices

Ghanaian boards do not have a two-tier structure. The normal practice is for a single-tier board, made up of executive and non-executive directors, to collectively manage the business of the company.

The company’s regulations may prescribe a minimum or maximum number of directors, subject to the requirement under the Companies Act for every company to have at least two directors and for at least one director to be present in Ghana at all times. Public companies, whose regulations authorise cumulative voting in the appointment of directors, are required to have a minimum of three directors on their board. In addition to any other disqualifications specified under the regulations of a company, infants, body corporates, persons of unsound mind, fraudulent persons and undischarged bankrupts are disqualified from being appointed to the board. Non-executive directors must make up at least 50 per cent of the board of a listed company; in addition, there shall be at least two independent directors, or independent directors shall constitute approximately 25 per cent of the board. Sector-specific legislation and regulations may also specify additional requirements relating to the competencies and qualifications of members of the board, as well as representation of non-executive or independent directors on the board. The Corporate Governance Code recommends a board of between eight to 16 members that has a balanced representation of executive and non-executive directors, and that at least one-third be independent. The BoG Directive requires that the board of regulated financial institutions have a minimum of five and a maximum of 13 members, with the majority being non-executive directors who are ordinarily resident in Ghana. In addition, regulated financial institutions boards must be composed of 30 per cent Ghanaian nationals who are ordinarily resident in Ghana, and independent directors must also make up at least 30 per cent of these boards.

An act of the board of directors or the managing director of the company while carrying on the usual business of the company is regarded as an act of the company itself, and the company shall bear civil and criminal liability for that act unless it can be shown that the person with whom the board or managing director was dealing with had actual or constructive knowledge at the time of the transaction that the managing director or the board did not have the power to act in the transaction. A single director, other than the managing director, can only represent the company with the board’s express or implicit approval.

The board is responsible for directing and administering the business of the company. In managing the business of the company, the board may not exceed the powers granted to it under the Companies Act or the company’s regulations, or exercise those powers for a purpose different from that for which they were granted, whether or not it may be in the best interests of the company to do so. The board has a legal duty to not act on the directions or instructions of any other person, and to ensure that the affairs of the company are being managed in accordance with law and the company’s regulations. In filling a casual vacancy
on the board, the directors have a duty to satisfy themselves that any person they intend appointing to the vacant office is suitable and has the requisite integrity to be a director of the company.

Unless otherwise specified by the company’s regulations, the board may elect one of their number to act as chair at their meetings for a specified period. The BoG Directive, however, makes specific requirements for the board chair: that is, the position must be occupied by an independent director who is also ordinarily resident in Ghana, and the term of office is restricted to three years renewable for only one additional term. Subject to a contrary provision in the regulations of the company, the chair has a casting vote in the event of an equality of votes during the decision-making process of the board, and also presides at meetings of shareholders. The chair is required to sign minutes of board and shareholders’ meetings at the end of the meeting or on the next adjourned date, and if duly signed, such minutes are *prima facie* deemed to be a true record of the proceedings at the meeting. Audited accounts and balance sheets of companies may be signed by any two directors with the approval of the board. Regulatory filings may also be signed by the company secretary and any director of the company.

The board of directors may delegate any of their powers to a committee consisting of one or more of their number. The board may also appoint one or more directors to the office of managing director and entrust any of the powers exercisable by the board to the managing director or managing directors, subject to any restrictions or conditions that they deem fit. The delegation of its responsibilities to a committee or managing director does not absolve the remaining directors of any liability that may arise in the performance of the delegated duties by the committee or managing director. Directors must, therefore, ensure that they have proper oversight over their delegated responsibilities.

The Companies Act provides for the executive office of managing director of the company. The managing director is appointed from among the board, and may exercise all or any of the powers of the board that the board may confer. There is no requirement under the Companies Act that the role of board chair and managing director be separately performed by two different directors. However, the Corporate Governance Code recommends a separation of the two roles, and it is standard practice for the two positions to be occupied by different people. For regulated financial institutions, and per the BoG Directive, the separation of these roles is a requirement and not a recommendation. Further, the position of managing director can only be held for a maximum of 12 years, split into three terms with each term not exceeding four years. The chair’s traditional role is to act as leader of the board and to chair board and shareholder meetings. Outside general meetings of the company, direct communications by directors (the chair included) with shareholders are not common, although not prohibited under the Companies Act.

Fees and other remuneration payable to directors in their capacity as directors may only be determined by the ordinary resolution of members. The remuneration of executive directors in respect of the executive positions that they hold at the company may be fixed by the board as part of the board’s terms of employment; however, these terms must be approved by ordinary resolution of the members of the company prior to any payments being made. Unless the company’s regulations provide otherwise, the board has the power to determine the remuneration of senior management. Directors’ remuneration may not be paid free of income tax; nor can it be calculated by reference to or varying with the amount of income tax payable by directors.
The board may exercise any of its powers through committees consisting of one or more of its number. The Corporate Governance Code recommends the constitution of at least an audit committee and a remuneration committee composed of a majority of non-executive directors. It also advocates the inclusion of executives who are not directors of the company on whatever committees that the board considers appropriate to effectively discharge their functions so long as the responsibility for decision making remains with the directors on the committees. The BoG Directive on the other hand makes it a requirement for regulated financial institutions to have at least two board committees, an audit committee and a risk committee, which must be chaired by independent directors.

Directors of a listed company are guided by the tenets of the SEC’s Takeover Code. The board of a target company is required to make a recommendation to shareholders on the acceptance or rejection of any takeover offers made by third parties. The board must appoint an independent adviser upon receipt of a takeover offer, who shall advise the board and the company on all relevant issues and information relating to the takeover for the purpose of enabling shareholders to make an informed assessment of the takeover offer.

ii Directors

Under the Companies Act, no distinction is made between executive or non-executive directors of the company with respect to their duties and liabilities. Directors’ duties and liabilities are the same irrespective of whether they are non-executive directors or otherwise. In addition, directors may exercise any power that has not been reserved for the members under the Companies Act or the company’s regulations. Further, to the extent that a person is described as a director, with or without a qualifying title, that person is deemed to be a director, whose role and involvement is expected to be the same as all other directors of the company.

Companies are required to circulate information to all directors, including non-executive directors, at the same time. Non-executive directors are not prohibited from conducting on-site visits of subsidiaries of the company. They are also at liberty to freely interact with lower management. In practice, it is usual, especially at the board committee level, for directors to work directly with the relevant management team to achieve their mandate. For example, directors on a risk subcommittee of the board may freely interact with the head of finance or another relevant department of the company, and may make enquiries with respect to reports or other information submitted to the board or board committee.

The generally applicable legal duties and best practice for directors in Ghana are summed up in Sections 203 to 208 of the Companies Act. Essentially, a director of a company is deemed to stand in a fiduciary relationship towards the company, and must at all times observe the utmost good faith towards the company whether in a transaction on behalf of the company or with it. Further, the actions of a director must at all times be what he or she believes is in the best interests of the company in order to preserve its assets and further its business, and the purpose for which it was formed. Directors must act in the faithful, diligent and careful manner in which an ordinarily skilful director would be expected to act. They may not place themselves in any position in which their duty to the company conflicts with their personal interests.

A director is liable to compensate the company for any loss that it suffers as a result of a breach of the director’s duties to the company. Directors must also account to the company
for any profits they make from transactions involving a breach of their duties to the company. Contracts entered into between the company and a director who acts in breach of his or her duty to the company are subject to rescission.

Directors are appointed by ordinary resolution of members. The regulations of a company may validly provide for the appointment of one or more directors by a class of shareholders, debenture holders, creditors, employees or any other person. The board may also appoint a director to fill a casual vacancy on the board. A director of a private company shall continue in office until he or she vacates the office or is removed in accordance with the law and the company's regulations. Directors of public companies, except the managing director, are subject to retirement by rotation – usually one-third of the board must retire every year. There are formal processes and default rules regulating the appointment and removal of directors of both private and public companies. With respect to public companies limited by shares, a resolution for the appointment of two or more directors shall not be moved as a single resolution except with unanimous approval of the shareholders. Nonetheless, the company's regulations may authorise cumulative voting for appointing directors.

Directors are prohibited from putting themselves in situations where a conflict arises between their duty to the company and their own personal interests or the interests of other persons. In very limited circumstances, the company may consent to a conflict situation following full disclosure of all relevant information to the board or members in general meeting. These include instances where a director is directly or indirectly personally interested in a transaction entered into by the company or in a competing business with that of the company, or intends to use for personal advantage money or property belonging to the company or confidential information obtained in his or her capacity as a director of the company. Sector-specific laws may also require directors to disclose conflict situations to the company. For instance, directors of banks, specialised deposit-taking institutions or financial holding companies must declare on an annual basis any personal interests and business or investment interests that they may have in the company, and notify their board in the event of any changes to that declaration.

There are no provisions regulating the manner of interaction between executive and non-executive directors. In practice, directors cooperate fully with each other for the purpose of ensuring the effective management of the company.

### III DISCLOSURE

Comprehensive disclosure obligations, both periodic and event-driven, are imposed on listed companies especially under the Companies Act, the GSE Listing Rules and the SEC Act and Regulations, and the BoG Directive in the case of regulated financial institutions. Shareholders and directors of listed companies also have significant disclosure obligations.

#### i Disclosure by the company

Generally, companies are required to file, with the Registrar of Companies, annual and other periodic returns of particulars of the company, including when there is a change in the board of directors, of the company secretary or of the auditors. Annual returns must state the current position of the company with regard to such information as its name, address, authorised business, directors and secretary, subsidiaries and shareholding structure, and are required to be filed within 42 days of the day on which the company's financial statements, accounts and reports are circulated to members and debenture holders.
Under the GSE’s rules, the disclosure obligations require that a listed company makes full and timely disclosure to the public of all information necessary to enable an investor make informed investment decisions, and information that is likely to have a material effect on the market activity and price of its listed securities. Disclosure of significant corporate events and price-sensitive information cannot be made on a selective basis. Corporate disclosure covers:

- periodic financial reporting and prompt announcements of changes in management;
- control or capital investment plans of the company;
- labour or contractor disputes;
- insolvency events;
- issuance of additional securities;
- restructuring of the company;
- default on loans;
- imposition of fines or sanctions by regulators;
- profit or revenue-related matters; and
- acquisition of significant interests in another company.

If considered material by the board, a listed company shall also immediately disclose:

- the acquisition or loss of a contract;
- borrowing of funds by the company;
- the purchase or sale of an asset;
- changes in the corporate purpose;
- judicial and quasi-judicial actions initiated by or against the company; and
- other material events.

Disclosure of material information may be withheld by the company in very limited circumstances, such as where immediate disclosure would be prejudicial to the company’s ability to pursue its corporate objectives, where the facts requiring disclosure are in a state of flux and a more appropriate moment for disclosure is imminent, and where negotiations regarding the subject matter for disclosure are ongoing and an agreement in principle has not yet been reached. A listed company that withholds the disclosure of material information must ensure that strict confidentiality is maintained, and the company shall immediately disclose the relevant facts where rumours about the withheld information surface.

### Disclosure by shareholders

Shareholders of listed companies are required to disclose to the public the acquisition or disposal of any interest in the company that causes the shareholder’s stake in the company to attain, exceed or fall below each 5 per cent threshold starting from 10 per cent up to 50 per cent plus one share. This announcement must be made within 48 hours of the transaction, and shall indicate the number of shares sold or purchased and the percentage of the share capital and votes in the company held by the shareholder after the transaction.

### Disclosure by directors

A director of a listed company has a duty to disclose to the members of the company the terms of any payment made or proposed to be made to that director in connection with a takeover bid by any person. The nature and extent of the holdings of a director in respect of
the company’s securities or the securities of an associated company must also be disclosed to
the company and recorded in a register to be produced at the company’s general meetings and
made available for inspection by members.

iv  Financial reporting and accountability
Listed companies must provide quarterly reports to the GSE at least 48 hours before they are
published in the newspapers. Companies are required to also circulate annual reports to their
members comprising statements of their profit and loss accounts and balance sheets, together
with the reports of directors and auditors on the same, prepared in strict compliance with
the requirements of the Companies Act and internationally accepted accounting standards
adopted by the Institute of Chartered Accountants Ghana. A company’s annual report must
be laid before the company at an annual general meeting held by the company within three
months of the annual report being circulated, and must include or indicate:

- a statement of each director’s holdings in the issued shares of the company;
- particulars of material contracts in which directors are interested;
- the aggregate number of directors’ emoluments;
- the aggregate amount of directors’ or past directors’ pensions;
- the aggregate amount of compensation to directors or past directors in respect of loss of
  office; and
- the aggregate amount of monies due to the company or an associated company from its
  officers at the end of the financial year, as well as the maximum amount that was due it
  from officers at any time during the financial year.

Regulated financial institutions are, in addition, required to include a certification in their
annual reports as to their compliance or otherwise with the contents of the BoG Directive.

v  Auditors’ role, authority and independence
Auditors play a fundamental role in ensuring the accountability of listed companies. They
are not regarded as officers or agents of the company, but stand in a fiduciary relationship
to the members of the company. Hence, they are required to act with due care, skill and
diligence, and may incur liability for a breach of their duties to the company. To safeguard the
independence of auditors, a person does not qualify to be an auditor of a listed company if
that person is an officer of the company or an associated company, or is a partner of or in the
employment of an officer of the company or an associated company. The appointment of a
person as an auditor of a listed company must also be approved by the SEC. Duly appointed
auditors may serve a maximum term of six years and shall only be re-eligible for appointment
following a cooling-off period of at least five years. Auditors are entitled to attend general
meetings of the company, receive notices and other communication relating to a general
meeting, and be heard at a general meeting on any part of the business of that meeting that
concerns them in their role as auditors of the company. Auditors of a company are guaranteed
a right of access at all times to the books and accounts of the company and may require any
information that they deem necessary from officers of the company in order to fully carry
out their functions.

vi  The comply or explain model and mandatory disclosure
In the area of corporate disclosure, Ghana operates a prescriptive regulatory model. Therefore,
all disclosure obligations under the Listing Rules, the Takeover Code, the BoG Directive and
the Companies Act are mandatory. Where, on very limited and specific grounds, a listed company wishes to be exempt from the application of a particular obligation, it must seek and be granted a waiver from the appropriate regulator before taking any action that would result in non-compliance with a specific obligation.

vii One-on-one meetings of directors with shareholders

One-on-one meetings between directors and shareholders are not common.

IV CORPORATE RESPONSIBILITY

It is normal practice in the financial services industry to have a risk subcommittee of the board of directors, as well as a risk department with a functional head. In other sectors, the appointment of a special risk officer or constitution of a risk committee may be necessary depending on the business of the company and its exposure to various risks in the sector. The risk management culture of the company is usually dictated by its risk policy and the general attitude and practices of top-level management.

Companies whose activities require anti-money laundering (AML) monitoring are required to formulate AML policies and train, and to monitor their employees for compliance with the internal AML policy and the applicable AML laws. Under the AML Act and Regulations, a designated AML compliance officer must be appointed to report suspicious transactions to regulatory authorities. Companies also adopt appropriate policies on bribery and corruption, data protection and other areas of risk relevant to their operations. In addition, the Corporate Governance Code recommends the adoption of a code of ethics and statement of business practices.

Legally, the board's overriding obligation to always act in the best interests of the company as a whole may impose an implicit obligation on directors to consider other factors beyond the maximisation of shareholder value. The Companies Act provides that in deciding whether a particular transaction or course of action is in the best interests of the company as a whole, the directors may consider the interests of not just shareholders, but also employees and creditors. Beyond employees and creditors, there is no legal obligation, express or implied, to consider the interests of any other stakeholders. A national CSR policy was launched in 2016. Compliance with the policy, which focuses on, inter alia, human rights, employee welfare, the environment, safety, accountability and transparency, and ethical practices, is entirely voluntary. In practice, however, CSR activities of Ghanaian companies and multinationals tend to focus on philanthropy and charity. In this regard, shareholder approval must be obtained by the directors of a company before any voluntary contributions to charitable or other funds in excess of 2 per cent of the income surplus can be made.

V SHAREHOLDERS

i Shareholder rights and powers

Regulations may also provide for different classes of shares by attaching special rights, including voting rights, to those shares. Each equity share in a company carries the right to one vote for each share, notwithstanding any contrary provision in the regulations of the company. Preference shares shall also carry the right to one vote per share, except that, in certain circumstances relating to a variation of the rights of their holders, winding up of the
company or replacement of the auditors etcetera, preference shares may carry the right to more than one vote for each share. The regulations of a company may validly provide for the suspension of a shareholder’s voting rights in respect of shares on which there are unpaid calls.

Directors, collectively and individually, have a duty to act in accordance with what they believe to be in the best interests of the company and are not bound to follow the directions or recommendations of shareholders. This restricts the power of shareholders to influence the board, other than in respect of the holding of extraordinary general meetings – directors must proceed to hold a meeting upon the requisition by shareholders holding at least 5 per cent of the total voting rights in a public company or 10 per cent of the total voting rights in a private company.

The regulations of a company may reserve certain decisions for shareholders’ action only. Under the Companies Act, only shareholders have the power to:

- appoint and remove auditors;
- appoint directors (other than in respect of a casual vacancy) and remove them;
- determine the remuneration of directors;
- declare dividends; and
- decide to wind up the company.

Shareholders may also act in matters that fall within the powers of the board, such as where there is a deadlock, and as such the directors cannot act; commencing legal action in the name of the company where the directors have failed to do so; and acting for the purpose of ratification of acts of the directors.

Shareholders take decisions by voting in general meeting and then passing resolutions to give effect to their decisions. In spite of this, a dissenting shareholder has the right to pursue an action in court if he or she is of the opinion that any decision, action or transaction of the company is illegal, irregular, *ultra vires* or contravenes the provisions of the regulations of the company.

There is no legal mechanism that expressly permits the implementation of loyalty programmes for long-term shareholders. Given the underlying principle of one share, one vote in Ghanaian company law, equity shareholders cannot be granted additional votes for their existing equity shares without a corresponding and proportionate increase in the number of equity shares that they hold in the company. However, it would be possible to issue preference shares and attach additional voting rights to those shares.

Directors have very broad powers with respect to the management of the company’s business. However, these powers are limited when shareholder approval is required before any action can be taken in the following instances:

- the selling, leasing or disposal of substantially the whole of the undertaking or assets of the company;
- issuance of new or unissued shares other than treasury shares, unless these have been offered on the same terms to all existing shareholders or class of shareholders;
- making voluntary contributions to charity of an amount exceeding 2 per cent of the income surplus of the company recorded for the immediately preceding financial year;
- borrowing money or charging the company’s assets as security for any loan, where the amount to be borrowed together with the outstanding balance of any existing loans will exceed the stated capital of the company; and
- allotment of shares to executive directors as part of an employee share scheme.
ii Shareholders’ duties and responsibilities

Controlling shareholders do not have any special responsibilities to the company, other than the duty shared by all shareholders to pay any outstanding liability on shares in the event of a call being made and on the winding-up of the company.

Institutional investors also do not owe any obligations to the company, although owing to recent advocacy for improved corporate governance methods, institutional investors are encouraged to increase their level of engagement with, and monitoring of, the board and management.

There is no code of best practice for shareholders.

iii Shareholder activism

Shareholders must approve the amount of remuneration payable to directors in their capacities as directors or as executive officers of the company.

Shareholders are mandated to commence legal action in the name of the company if the directors refuse or neglect to do so. A shareholder may bring an action against a third party or against a director who acts in breach of his or her duty to the company. Actions brought by a shareholder to enforce an obligation owed under the regulations of the company to that shareholder and any other shareholders, that shareholder shall sue in a representative capacity for himself or herself and on behalf of any others affected by the act complained about, and the shareholder is not required to seek the consent and approval of any other affected shareholder before doing so.

Shareholders are not prohibited from soliciting proxy votes prior to a general meeting of the company. Proxy battles are, however, not very common in Ghana.

The Companies Act allows a shareholder to propose a resolution on any matter and to provide to the company a statement on the proposed resolution for circulation to persons entitled to attend and vote at meetings. Shareholders are also permitted to provide statements on any issue already on the agenda of a proposed meeting for circulation to all shareholders prior to the holding of the meeting. These provisions allow shareholders to engage the board on issues that directors may for various reasons want to avoid discussing. They encourage shareholders to be proactive, and to monitor and hold management accountable.

iv Takeover defences

The provisions of the Companies Act, the Listing Rules and the Takeover Code are generally non-facilitative of the use of most defensive mechanisms that a company may use to protect itself from a hostile takeover. Under the Takeover Code, the target company in a takeover is precluded from issuing new shares or granting options over unissued shares upon receipt of a takeover offer or if the board has reason to believe that a takeover of the company is imminent. This prevents a target company from embarking on a shareholder rights plan as a means of thwarting a hostile takeover. The use of voting rights plans are also precluded because although preferential shareholders may be issued with special voting rights that entitle them to more than one vote per share, these rights are exercisable in very limited circumstances prescribed under the Companies Act, and voting against a hostile takeover is not one of those circumstances. The use of staggered boards as a takeover defence is also not effective as under the Companies Act, the shareholders of a company may remove directors from the board at any time, and hence a person that gains control of a company through a hostile takeover is at liberty to change the entire board upon completion of the takeover. On the other hand,
the Takeover Code permits a competing offer to be made during the pendency of a takeover offer by another person, thus permitting the use of the white-knight defence by a board in the event of a hostile takeover.

v  Contact with shareholders

The reporting obligations of the company relate mainly to periodic financial reporting and event-driven announcements, which must be made to all shareholders within certain timelines or on the occurrence of certain events discussed above.

Selective disclosure of price-sensitive information to shareholders, individually or collectively, is not permitted under the Listing Rules. Listed companies must ensure that shareholders and the general investing public have simultaneous and equal access to the same information. Meetings and communications with individual shareholders following the public disclosure of price-sensitive information is not prohibited. Thus, it is possible for the board to approach and engage particularly influential shareholders to obtain their views and court their approval on certain key issues that are in the public domain before proposing resolutions on them at shareholders’ meetings.

All shareholders are entitled to receive the same information at the same time. The disclosure of price-sensitive information to any person prior to its release to the public automatically precludes that person from dealing in any securities of a listed company.

Standstill agreements are purely contractual and may be made between the company and its controlling shareholders, particularly in respect of the disposal of large blocks of control shares to outsiders. As long as they do not contain any unlawful provisions, they are enforceable.

Shareholders are entitled to receive information at least 21 days before shareholders’ meetings. The regulations of the company may provide for longer notice periods.

Proxy solicitation is permitted, although it is not widely used in practice.

To some extent, shareholders are able to give their views in advance of meetings. The Companies Act permits shareholders to send statements to the company for circulation to shareholders on any business to be dealt with at a proposed meeting. This is usually circulated with the notice of the meeting, or soon thereafter, at the shareholder’s cost.

There are no relevant issues regarding large blocks of shareholders.

VI  OUTLOOK

The Ghanaian corporate governance space is in a burgeoning state. The existence of mandatory rules on certain corporate governance issues ensures that minimum standards are met by companies. However, owing to the voluntary nature of the Corporate Governance Code, compliance with other important governance practices in accordance with widely recognised international standards has been slow. With the failure of a number of Ghanaian indigenous banks, the shutdown by regulators of some microfinance institutions and the hostile takeover of the country’s premier mortgage finance institution by a Caribbean banking conglomerate, interest in the adoption of policies that protect wider stakeholder interests in Ghanaian companies has been generated. The banking sector has been, understandably, particularly responsive on the subject. With the laissez faire attitudes of most individual shareholders, the active engagement and involvement of institutional investors is critical in shaping the
governance culture of local companies. The current BoG Directive reflects the changing attitude towards the importance of corporate governance in sustaining various sectors of the Ghanaian economy.
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OVERVIEW OF GOVERNANCE REGIME

Corporate governance is an increasingly important issue in the Indian economy. The past decade has seen a number of scandals and shareholder disputes, all of which indicate lacunae, if not lapses, in governance.

Regulators have responded to these challenges by amending and, in some cases, introducing new legislation, and shareholders are resorting to activist intervention in companies to secure their rights. This, coupled with the closely held shareholding of Indian companies, as well as the several factors that contribute to India’s ranking on the Transparency Index, keep corporate governance on the radar.

The Indian corporate governance framework focuses on:

- protection of minority shareholders;
- accountability of the board of directors and management of the company;
- timely reporting and adequate disclosures to shareholders; and
- corporate social responsibility.

The regime emphasises transparency through disclosures and a mandatory minimum proportion of independent directors on the board of each company.

However, as is common in India, the corporate governance regulatory framework is composed of statutes and regulations that require supervision by multiple regulators:

- the Securities and Exchange Board of India (SEBI) is the principal regulator for listed companies;
- the Ministry of Corporate Affairs (MCA) and the registrar of companies (Registrar) administer the Companies Act 2013 and the relevant rules that apply to all companies, including listed companies; and

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1 Justin Bharucha is a partner and Mita Sood is an associate at Bharucha & Partners.


3 Most recently in the Tata group. Also see, for example, https://www.livemint.com/Companies/6kicwU0vBIndbusq9Up9PN/2017-The-year-of-the-minority-shareholder.html.

4 See, inter alia, Securities and Exchange Board of India, ‘Report of the Takeover Regulations Advisory Committee’, dated 19 July 2010; and Umakanth Varottil, ‘The Advent of Shareholder Activism in India’, Journal on Governance, Vol. 1, No. 6 (2012). Also note that in 2010, a new requirement was introduced for all listed companies (and those seeking to list) to maintain a minimum level of public shareholding of 25 per cent.

5 See Section II.i on independent directors.
Additionally, sector-specific regulation also applies, and this can have a significant impact on the governance regime.6

Perhaps the most significant issue that Indian regulators must address is ensuring that independent directors can fulfil their obligations in the closely held and controlled world of Indian corporates.

II CORPORATE LEADERSHIP

i Board structure and practices

Indian law prescribes a one-tier board,7 with additional stipulations as to the constitution of the board depending on whether or not the company is listed and, for unlisted companies, the quantum of paid-up share capital.

Private companies must have a minimum of two directors and unlisted public8 companies must have at least three directors. In each case, at least one director must be a person who stays in India for a total period of not less than 182 days during the relevant financial year.

All listed companies, as well as all unlisted public companies having paid-up share capital of 1,000 million rupees or more or a turnover of 3,000 million rupees or more, must have at least one female director.9

Additionally, for listed companies:10

a a minimum of one-third of the directors of all listed companies are to be independent directors;11

b there should be a mix of executive and non-executive directors, with at least half the board composed of non-executive directors;

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6 For example, the Insurance Regulatory and Development Authority, which regulates companies in the insurance sector, promulgated a discussion paper on 11 August 2016 proposing mandatory listing for insurance companies. Presently, there is no such obligation on insurance companies.
7 However, see below regarding committees of the board.
8 Under Indian law, a public company may list its securities on a stock exchange or continue as an unlisted entity. The principle distinction between a private company and an unlisted public company is that no private company may have more than 200 shareholders and there is no cap on the number of shareholders of a public company (whether or not that public company is listed). There are other distinctions, including in relation to compliance.
9 Who may or may not be an independent director; see following subsections.
10 For the top 2000 listed companies, the board of directors must comprise at least six directors: this requirement comes into effect on 1 April 2019 for the top 1,000 listed companies and on 1 April 2020 for the top 2,000 listed companies. Further, the top 500 listed companies that have an identifiable promoter must ensure that the chairperson of the board is a non-executive director and not related, as defined in the Companies Act, 2013, with the managing director or the chief executive officer. The top 500, 1,000 and 2,000 listed companies are determined on the basis of market capitalisation as at the end of the previous financial year.
11 The board of directors of the top 1,000 listed companies are required to have at least one independent female director. This requirement comes into effect from 1 April 2019 for the top 500 listed companies and 1 April 2020 for the top 1,000 listed companies. The top 500 and 1,000 listed companies are determined on the basis of market capitalisation as at the end of the previous financial year.
at least one-third of the board should be composed of independent directors if the chair is a non-executive director who is also neither a promoter nor a relative of a promoter of the company, failing which (i.e., if the chair is an executive director) at least half the board must be composed of independent directors; and

where the non-executive chair is a promoter of the company or is related to any promoter or person occupying management positions at the level of the board of directors or at one level below the board of directors, at least half the board of directors of the listed company must consist of independent directors.

Disqualifications from appointment as director

A person does not qualify for appointment if that person:

a. is of unsound mind, an undischarged insolvent;

b. has been sentenced to imprisonment for at least six months, and less than five years has lapsed from the end of that sentence;

c. has been convicted of an offence concerning related-party transactions; or

d. has not paid call money on shares of the company.

A company may prescribe additional disqualifications in its articles of association.

Every director must submit a list of entities in which he or she has an interest when taking office, and update that list when necessary and at least annually.

Independent directors

Listed companies and unlisted public companies with paid-up share capital of 100 million rupees or more, or a turnover of 1 billion rupees or more, or an aggregate of outstanding loans, debentures and deposits exceeding 500 million rupees, must appoint at least two independent directors.

An independent director is a non-executive director who:

a. is not and should not have been a promoter;  

b. does not and should not have had, directly or through a relative, any pecuniary relationship with the company during the immediately preceding two financial years where the transactions exceed the lower of 2 per cent or more of the company’s gross turnover or total income or 5 million rupees; and

12 Includes directorships and shareholding interests.

13 Or its holding, subsidiary or associate companies. Additionally independent directors of listed companies cannot be members of the promoter group of the listed company or be non-independent directors of another company on the board of which any non-independent director of the relevant listed company is an independent director.

14 A relative means any person who is related to another, inter alia, by way of husband; wife; father; mother; son; son’s wife; daughter; daughter’s husband; brother; sister; or members of a Hindu undivided family.

15 A pecuniary relationship does not include receipt of remuneration as such director or transactions that do not exceed 10 per cent of the total income of the director.

16 Or its holding, subsidiary or associate companies, or their promoters or directors.
India

individually, or with relatives:
• does not hold 2 per cent or more of the total voting power of the company;
• does not hold or has not held a key managerial personnel position, nor is or has been an employee of the company\textsuperscript{17} in the immediately preceding three financial years;
• is not nor has been an employee, proprietor or partner, in any of the three immediately preceding financial years, of a firm of auditors or company secretaries in practice or cost auditors of the company\textsuperscript{18} or any legal or consulting firm that has or had any transaction with the company\textsuperscript{19} amounting to 10 per cent or more of the gross turnover of the firm; or
• is not a chief executive or director, by whatever name called, of any non-profit organisation that receives 25 per cent or more of its receipts from the company, any of its promoters, directors, or its holding, subsidiary or associate companies, or that holds 2 per cent or more of the total voting power of the company.

Generally, an independent director is a person who has significant expertise relevant\textsuperscript{20} to the company.

Indian legislators and regulators have emphasised the requirement for, and role of, independent directors as a significant factor contributing towards good corporate governance.\textsuperscript{21} While there is no doubt that reducing promoter nominees on the board necessarily reduces direct promoter control of the board, there is reason to continue to monitor the real impact of independent directors given the concentration of promoter control in the Indian economy.\textsuperscript{22}

The fact that shareholders retain the ultimate authority to appoint and remove a director is not uncommon, but poses unique challenges in India.\textsuperscript{23}

Who can represent companies?
The board of directors is entitled to perform all acts and things that the company itself is authorised to do, provided the acts of the board of directors shall always be subject to:
\begin{enumerate}
\item[a] the Companies Act 2013;
\item[b] the memorandum and articles of association of the company;
\end{enumerate}

\textsuperscript{17} Or its holding, subsidiary or associate companies.
\textsuperscript{18} Or its holding, subsidiary or associate companies.
\textsuperscript{19} Or its holding, subsidiary or associate companies.
\textsuperscript{20} For example, with reference to finance, law, management, sales, marketing, administration, research, corporate governance and technical operations.
\textsuperscript{21} The regulatory discourse on independent directors suggests that ensuring the appointment of independent directors is an end in itself. While not incorrect, the efficacy of independent directors is subject to scrutiny and question in the Indian context and, arguably, practice must evolve to allow for increased freedom of action by independent directors.
\textsuperscript{23} See Section V.vi on the Tata dispute.
restrictions and conditions that may follow from resolutions passed in a general meeting; and
applicable law.

Of course, no director may act on behalf of the company unless duly authorised by a resolution of the board.\(^24\)

The Companies Act 2013 sets out a list of matters that mandatorily require shareholder approval. These include, inter alia:

- the sale, lease out or disposal of the whole or substantially the whole of the undertaking of the company, or, where the company owns more than one undertaking, of the whole or substantially the whole of any of the undertakings;
- investing otherwise in trust securities the amount of compensation received by the undertaking as a result of any merger or amalgamation; and
- borrowing money, where the money to be borrowed, together with the money already borrowed by the company, will exceed the aggregate of its paid-up share capital and free reserves and securities premium, apart from temporary loans obtained from the company’s bankers in the ordinary course of business.

Note also that for listed companies, the SEBI (Listing Obligations and Disclosure Requirements), 2015 (Listing Regulations) set out specific responsibilities for the boards of listed companies including, inter alia, selecting, monitoring, compensating and replacing key managerial personnel to run the affairs of the company; ensuring the integrity of the accounting and financial reporting systems of the company; and monitoring and managing potential conflicts of interest.

Subject to these requirements and any additional stipulations set out in a company’s articles of association, the board may delegate its responsibilities to a committee of the board, an individual director, a key managerial person or such other person as the board deems fit.

Typically, officers of the company are authorised to execute routine operational matters,\(^25\) and the board may also issue a standing authority to a director or senior managerial personnel, inter alia, to execute contracts. It is paramount only that where the subject matter of the authority is expressly stated to be subject to shareholder approval, then that approval must be sought before the authority is exercised.

**Chair’s control of the board**

Indian companies may designate a chair of the board who holds office for the duration of the appointment, or not make such a designation, in which event any director must be appointed chair for the purpose of each meeting.\(^26\)

A designated chair may or may not exercise a casting vote: the determination must be set out in each company’s articles of association.

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\(^{24}\) In *Dale and Carrington Invt (P) Ltd and Anr v. P K Prashapan and Ors* AIR 2005 SC 1624, the Supreme Court held that directors are agents of the company to the extent they have been authorised to perform certain acts on behalf of the company and that no director may act independently of that authority.

\(^{25}\) This may include the operation of bank accounts.

\(^{26}\) Of the board as well as general meetings.
A chair presides over the meetings of the board and the shareholders. The Companies Act 2013 provides the chair with the discretion to finalise the contents of the minutes of the meetings of the board and the shareholders, and to finally determine any disputes relating to the contents of the minutes.27

The effective executive responsibility vests with a managing director28 or an executive director.29 A chief executive officer (CEO) is a recognised designation, but a CEO need not necessarily be a director.

No person can hold office30 as chair and managing director or chief executive officer of the company, except when the articles of association of the company provide otherwise; or the company does not carry on multiple businesses.

Generally, a designated chair is accorded significant respect as the leader of the board but, subject always to the determination of each company, does not necessarily exercise significant authority.

**Remuneration of directors**

Private limited companies have no cap on the remuneration that may be paid to directors and senior management. However, the Companies Act 2013 prescribes the following conditions with respect to the remuneration that may be paid by public companies to their directors and managers:

- the total managerial remuneration payable by a public company to its directors, including the managing director and whole-time (i.e., full-time) director, and its manager in respect of any financial year shall not exceed 11 per cent of the net profits of that company for that financial year. However, this limit may be exceeded if the excess is approved by the shareholders;

- further, unless authorised by the shareholders in a general meeting via a special resolution:
  - the remuneration payable to any one managing director, or whole-time director or manager, cannot exceed 5 per cent of the net profits of the company and, if there is more than one such director, remuneration shall not exceed 10 per cent of the net profits to all such directors and managers taken together; and
  - the remuneration payable to directors who are neither managing directors nor whole-time directors shall not exceed 1 per cent of the net profits of the company if there is a managing or whole-time director or manager; and 3 per cent of the net profits in any other case; and

- directors may also receive sitting fees subject to prescribed caps.

Note that the remuneration paid to a director is deemed to include the consideration paid to the director for any services that a director provides to the company, save and except where

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27 Of course, a challenge alleging oppression of minorities will likely impugn this determination by the chair.

28 A managing director is a director who, by virtue of the articles of a company or an agreement with the company or a resolution passed in its general meeting or by its board of directors, is entrusted with substantial powers of management of the affairs of the company, and includes a director occupying the position of managing director, by whatever name called.

29 An executive director is a director who is also working for the company in an executive capacity.

30 Nor be reappointed.
those services are professional services and the consideration paid is the fee for the services. Remuneration payable to the directors of listed companies is further regulated, requiring, inter alia, the remuneration to be approved by the shareholders.

Directors drawing remuneration above the limits prescribed by the Companies Act 2013 are required to refund the excess remuneration to the company.

Remuneration of independent directors

Independent directors of listed entities are not entitled to any stock option in the company, and independent directors may receive remuneration by way of a fee for attending meetings, reimbursement of expenses incurred for participation in meetings and profit-related commissions as approved by the shareholders.

Code of conduct

Independent directors are required, inter alia, to:

a. uphold ethical standards of integrity and probity;

b. act objectively and constructively;

c. devote sufficient time and attention to the company;

d. not abuse office as a director to the detriment of the company; and

e. refrain from any action that would lead to the loss of independence.

Roles and functions of independent directors

The duties of independent directors include, inter alia:

a. undertaking the appropriate induction of and regularly updating directors’ skills, knowledge and familiarity with the company and the environment in which the company operates;

b. seeking appropriate clarification or amplification of information and, where necessary, take external expert advice at the cost of the company;

c. striving to attend all board meetings of the company;

d. ensuring that their concerns are addressed by the board or at least recorded in the minutes of the relevant board meetings;

e. participating constructively and actively in the committees of the board in which they are chairpersons or members;

f. ensuring that related-party transactions are in the interests of the company;

g. ascertaining and ensuring that the company has adequate and functional vigil mechanisms that do not prejudice a person who uses those mechanisms; and

h. reporting concerns about unethical behaviour, actual or suspected fraud or violation of the companies.

In the ongoing management dispute at Tata Sons Limited, the holding company of the Tata Group, an independent director was removed by the shareholders following comments he made in favour of Cyrus Mistry. This has invited significant comment on the role of independent directors and their capacity to genuinely influence governance.

31 Nusli Wadia.
32 The former chair of Tata Sons Limited, who was removed from office.
33 See footnote 25.
**Committees of the board**

Indian law mandates committees for companies that meet specified criteria:

- a **audit committee**: every listed company must have an audit committee. The audit committee must consist of a minimum of three directors, with independent directors forming a majority of this committee. The audit committee must, inter alia, confirm all related-party transactions for public listed companies;

- b **nomination and remuneration committee**: every listed company must have a nomination and remuneration committee comprising three or more non-executive directors, of which not less than half should be independent directors;

- c **stakeholders relationship committee**: every company that has more than 1,000 shareholders, deposit holders or holders of other securities must have a stakeholders’ relationship committee to consider and resolve the grievances of security holders of the company. The chair of this committee must be a non-executive director; and

- d **risk management committee**: pursuant to the Listing Regulations, every listed company must have a risk management committee, the specific duties of which are defined by the board.

**Takeovers**

The board of a target company must act in compliance with the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011 and the fiduciary duty each director owes the company. Where the board believes that a takeover is not necessarily in the best interests of the company, it may seek a counter-offer from a white knight or otherwise act within the scope of the law to better protect the company.

**i Directors**

Independent directors play an increasingly important role in India. While their engagement is in the ordinary course limited to board meetings, they have the right to call for all documents and records, and also to visit company premises and interact with the executives other than simply at board meetings. While all directors are treated on equal terms, an executive director will necessarily be more aware of management proposals and initiatives even while those proposals and initiatives are at nascent stages, whereas independent directors will generally receive notice of these matters only when the management seeks board approval in respect of the proposals and initiatives.

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34 Additionally, the following public companies, not being joint ventures, wholly owned subsidiaries or dormant companies, are also required to set up an audit committee and a nomination and remuneration committee: companies having paid-up capital of 100 million rupees or more; companies having turnover of 1 billion rupees or more; and companies having, in aggregate, outstanding loans or borrowings or debentures or deposits exceeding 500 million rupees or more.

35 Ibid.

36 See Section II.ii on liabilities and duties of directors.
**Appointment, term and succession**

Directors are appointed by shareholders. The board may appoint a director subject to that appointment being approved by the shareholders in due course. Of course, every person being appointed as director must qualify as such.

While it is possible for private limited companies to appoint permanent directors, two-thirds of the directors in public companies must mandatorily retire by rotation annually. Independent directors may be appointed for a term not exceeding five consecutive years, which can be extended for a further five-year period. Thereafter, reappointment is possible only after three years during which the independent director must not associate with the company.

**Liabilities and duties of directors**

Indian law is clear that every director is a fiduciary and is principally obliged to protect the interests of the company. A director nominated by a shareholder or a lender must nonetheless act in the best interests of the company.

Indian jurisprudence is clear that a director of the company is liable for the acts of the company only to the extent that the director was actively involved in the relevant act. However, increasingly Indian regulators and investigating agencies follow the principle that the burden of proof lies on each director to demonstrate the absence of responsibility, and this principle also finds place in the Companies Act 2013. It is, therefore, imperative that each director fully discharges the duty of care that the law imposes, and ensures that dissent, if any, is appropriately recorded.

**III  DISCLOSURE**

All companies must make periodic filings with the Registrar with respect to changes in directors, audited financial statements and shareholding patterns.

Listed companies are subject to the following significant disclosure requirements, which are event-based and periodic:

- **a** outcomes of board meetings must be disclosed within 30 minutes of the closure of the meeting where the meeting was held to consider, inter alia, fundraising, financial results, buy-back of securities, voluntary delisting and other such prescribed matters. In other circumstances, all material information must be disclosed within 24 hours of the occurrence of the relevant event;
- **b** specified transactions must be disclosed irrespective of any threshold or materiality;
- **c** other transactions that are material in terms of the policy adopted by the board must be disclosed;

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37  In the event that a director is appointed by the board, his or her appointment must be regularised and approved by the shareholders on or before the final date for holding the following annual general meeting, either at the annual general meeting or at a separate extraordinary general meeting.

38  See Section II.i on disqualifications from appointment as director.


40  Quarterly.

41  For example, M&A activity including joint ventures.
related-party transactions must be approved by the audit committee, and any omnibus approval granted must be limited to one year. Additionally, all material related-party transactions require shareholder approval and the related party, if a shareholder, must not vote on that resolution;

e the annual report must set out, inter alia, a corporate governance report;

promoters, key managerial personnel, directors and employees of every listed company must disclose to that company the number of securities acquired or disposed of by that promoter, key managerial person, director or employee, as the case may be, if the value of the securities traded over any calendar quarter aggregates to a traded value in excess of 1 million rupees; and

substantial acquisitions of shares or voting rights\(^{42}\) of a listed company must be reported to the relevant company as well as to the stock exchange. Further, any change in shareholding or voting rights of any person who, together with persons acting in concert, holds shares entitling them to 5 per cent or more of the shares or voting rights in a company must also be disclosed.\(^{43}\)

\(i\) Auditor’s responsibility

The Companies Act 2013 casts an obligation on statutory auditors to report any instances of fraud noticed by them during the course of their audit that have been or are being committed against a company by its officers or employees. Where the fraud involves or is expected to involve an amount of 10 million rupees or more, the auditor must report this to the MCA, and where it involves a lesser amount, the auditor must report this to the audit committee.

In 2009, SEBI issued a show cause notice to 11 Indian partnership firms (the PWC auditing entities)\(^ {44}\) affiliated with Price Waterhouse as to why an action under the Securities and Exchange Board of India Act 1992 and the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations 2003 should not be taken against them with respect to their involvement, as statutory auditors of Satyam Computer Services Limited, in the Satyam scam.\(^ {45}\)

This show cause notice was appealed before the Bombay High Court, which remanded the matter back to SEBI. On 10 January 2018, SEBI released its order holding the PWC auditing entities guilty of gross negligence and fraudulent misrepresentation. SEBI ruled that these firms failed to abide by the standards and guidelines issued by the parent body of chartered accountants in India, the Institute of Chartered Accountants of India, and also failed to follow the minimum standards of diligence expected from statutory auditors.

SEBI’s order reiterated the position that auditors have a duty towards their clients as well as a larger duty to the public, which relies on the reports of the auditors in making investments.

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\(^{42}\) Acquisition of 5 per cent or more of the shares or voting rights.

\(^{43}\) The obligation to disclose arises even if the change results in that person’s shareholding or voting rights falling below 5 per cent.

\(^{44}\) Indian law precludes a foreign firm of chartered accountants from conducting an audit of an Indian company. Consequently, foreign firms establish relationships with Indian firms of chartered accountants to conduct such audits. This is permitted at Indian law and is common practice.

\(^{45}\) The Satyam scandal of 2008 remains one of the biggest scandals in India. Satyam, an IT company, manipulated its books of accounts for a period of eight years to the extent that it reported an operating margin of 24 per cent as opposed to its actual operating margin of 3 per cent for the quarter ending in September 2008.
SEBI, inter alia, prohibited the PWC auditing entities from issuing audit certificates for listed companies and imposed a penalty of about 130 million rupees. While this matter is presently pending appeal before the appellate authority, it marks a watershed in terms of imposing professional liability on professionals, not part of a company, who have contributed to lapses in governance. Understandably, the order has caused significant alarm among capital market players and audit professionals.46

IV CORPORATE RESPONSIBILITY

i Risk management

Each company must formulate a risk management policy with respect to risks, if any, that threaten the existence of the company.

Of course, the requirements are more robust for listed companies, especially the top 500 listed companies determined on the basis of extant market capitalisation. These companies must mandatorily constitute a risk management committee whose role and responsibilities are set by the board.

ii Vigil mechanism

Listed companies47 must establish a vigil mechanism to facilitate whistle-blowing. The vigil mechanism is supervised by the audit committee48 and must operate to preclude prejudice to whistle-blowers. Equally, frivolous complaints will not be entertained, and complainants may be censured.

iii Corporate social responsibility

Companies meeting specified criteria49 must establish a corporate social responsibility (CSR) committee comprising at least three directors, of which at least one must be an independent director if the company is required to appoint one, and two or more directors if the company is not required to appoint an independent director (CSR Committee). The CSR Committee formulates and monitors the CSR policy, and ensures that the company spends at least 2 per cent of the average net profit for the three immediately preceding financial years on CSR activities.

46 See, for example, http://www.livemint.com/Money/ofhvmX2wE8bMnE8YqOkDMOO/A-double-whammy-for-PwC-and-a-wakeup-call-for-all-auditors.html; and http://www.firstpost.com/business/sebi-bans-pwc-for-2-years-it-is-unprecedented-but-a-wake-up-call-for-auditors-others-associated-with-capital-markets-4301175.html.
47 The Companies Act 2013 also requires companies that accept deposits from the public, and that have borrowed money from banks and financial institutions in excess of 500 million rupees, to establish a vigil mechanism.
48 In cases where the company does not have an audit committee, the board of directors shall nominate a director to perform the role of the audit committee for the purpose of the vigil mechanism.
49 Companies having a net worth of 5 billion rupees or more, or a turnover of 10 billion rupees or more, or a net profit of 50 million rupees or more during the immediately preceding financial year.
V SHAREHOLDERS

i Shareholder rights and powers

Indian law recognises equality of voting rights subject to contract between shareholders. It is not uncommon for certain identified matters to require an affirmative vote from identified shareholders or a class of shareholders.

Indian law also recognises preference shares (which are common) and equity shares with differential rights (which are not as prevalent). Preference shareholders are entitled to vote only on matters that affect their rights or, on all matters, if a dividend due is not paid to them. Equity shares with differential rights are entitled to vote in accordance with their terms; for example, non-voting shares do not carry a vote.

Indian law requires mandatory shareholder approval for certain matters. A company’s articles may stipulate additional matters that require shareholder approval. Additionally, dissenting minority shareholders may seek redress from the National Company Law Tribunal if the majority shareholders are mismanaging the company or oppressing the minority. Necessarily, each petition is evaluated on facts. The MCA may also prefer the petition, but as a matter of fact will exercise this power only in unique circumstances.

ii Shareholders’ duties and responsibilities

Indian law does not prescribe any legal duties or responsibilities for shareholders, as the board of directors is primarily responsible for managing the affairs of the company. Shareholders are held liable for acts done by the company only where circumstances warrant piercing the corporate veil: for example, in closely held companies where the actions of a company are effectively determined by one person or a small collective of persons. Courts may pierce the corporate veil and impose personal liability if it can be proved that the relevant persons have formed the company solely to conduct an unlawful activity and to avoid personal liability, or where circumstances indicate, inter alia, fraud or tax evasion.

iii Shareholder activism

Shareholder activism is still a relatively underdeveloped concept in the Indian corporate sector partly because most of India’s large corporates remain closely held. Derivative actions, while not expressly provided for at law, are seen in few cases, and Indian courts have held that a shareholder will be allowed to sue on behalf of a company if he or she is bringing the action bona fide for the benefit of the company for wrongs to the company for which no other remedy is available. A derivative action is not maintainable if the plaintiff has an ulterior motive in bringing the action as it cannot then be regarded as bona fide in the interest of the company. It has also been held that derivative actions may be entertained, provided there exists valid cause of action.

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50 There are no separate rights available to long-term shareholders: tenure of shareholding is not the basis for determining the extent of rights of a shareholder.

51 See Section II.i on who can represent the company.


iv Takeover defences
The primary defence available to Indian companies is the white knight defence, where the board invites counter-offers. Other takeover defences include embedded defences such as conferring rights to promoters under the articles of the company. The crown jewel strategy is not viable in the Indian context as a target entity cannot alienate or transfer its assets during the offer period unless such alienation or transfer is approved by the shareholders via a special resolution. The golden parachute strategy may also not prove fully adequate, as formal compensation for loss of office is available only to managing directors, whole-time directors or managers.

Given the prevalence of concentrated shareholding in Indian companies, hostile takeovers are rare.

v Contact with shareholders
Communication with shareholders is ordinarily conducted at the general meetings of the company. The Companies Act 2013 requires all companies to have a minimum of one general shareholders’ meeting in each financial year. Several significant items of business, including the appointment or reappointment, as the case may be, of statutory auditors or directors and the approval of financial matters, are transacted at this meeting. Shareholders of the company are also entitled to call for extraordinary general meetings of the company. While it is uncommon, direct communication from the top management to shareholders, by way of letters and press releases, is also seen.

Generally, there is no direct contact between directors and shareholders, and while a shareholder may address correspondence to the company and the board, generally direct contact between directors and shareholders is limited to their interaction at a general meeting. On the rare occasion that there is direct contact, this usually occurs in circumstances where a company is addressing a specific issue.

vi Recent developments

The Tata dispute
Corporate governance regularly features in Indian public discourse, most recently with reference to the dispute at the Tata Group. Tata Sons Ltd is the principal holding company of the Tata Group, and the Tata Trusts and the Pallonji Group are the majority shareholders in Tata Sons. While that seems to have abated, it reiterated a number of issues such as the constraints under which independent directors must function and the relative silence of regulators and institutional investors. The Tata Dispute has been appealed before the National Company Law Appellate Tribunal.

54 Regulation 26(2)(a) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011.
55 Section 202 of the Companies Act 2013.
56 For example, Cyrus Mistry’s open letter; see below regarding the Tata dispute.
57 For details, see the India Chapter in the 2017 edition of The Corporate Governance Review.
Kotak Committee report

In June 2017, SEBI constituted the Kotak Committee to recommend amendments to the Listing Regulations with the intent to enhance fairness, transparency and standards of governance. The Committee submitted its report on 5 October 2017.\(^58\)

The report has received significant criticism from market players\(^59\) as well as the MCA — the latter alleging that, should the recommendations be implemented, SEBI will make it more difficult to do business in India, and that this is contrary to a significant policy objective of the government.

SEBI has accepted several recommendations of the Kotak Committee and made consequent changes to relevant regulations, including, inter alia:

\(a\) an enhanced role for the audit committee, nomination and remuneration committee, and risk management committee;  
\(b\) additional disclosures relating to the utilisation of funds from preferential issues and expertise of directors; and  
\(c\) enhanced obligations on listed companies with respect to subsidiaries. Certain other recommendations have been accepted with some modifications, and consequent changes have been made to relevant regulations.

The report has reignited the debate around governance in the Indian context. The paradigm that governance derogates from business efficiency is, arguably, not unique to India, but in our view, India could easily absorb a more robust governance framework without derogating from any material business concerns. The apprehension to the contrary, perhaps, speaks to the systemic issues that the Kotak Committee sought to address.

VI OUTLOOK

The biggest challenge to implementing a sound corporate governance regime in India is the fact that a large number of Indian listed companies continue to remain significantly controlled by promoters who exercise suzerainty in no small measure.

Despite this, the ‘meta’ is changing, and India is slowly moving to adopt and, more importantly, implement standards of governance that address the issues unique to our jurisdiction.

\(^{58}\) For details, see the India chapter in the 2018 edition of *The Corporate Governance Review*.

I OVERVIEW OF GOVERNANCE REGIME

Indonesia is a civil law jurisdiction, and as such does not have a doctrine of precedents similar to a common law system, which means Indonesian courts are not bound by previous court decisions.

Law No. 40 of 2007 on Limited Liability Companies (Company Law) governs limited liability companies in Indonesia. The Company Law provides the general roles of shareholders, boards of directors, boards of commissioners and stakeholders of a company such as employees, business partners and the public. Further, a company’s articles of association are the general governance document of the company, for example, limitation on the authority of the board of directors and the mechanism on how decisions are made at board of directors meetings, board of commissioners meetings and general meetings of shareholders. In addition, in practice, normally companies also prepare their own good corporate governance manual as a reference for the companies’ ethics and business practices.

The general principle under the Company Law is that the management and its supervisors (the board of directors and board of commissioners, respectively) represent the company and not the shareholders. Under the Company Law, the board of directors is defined as the company organ with the authority and full responsibility for managing the company in the interests of the company, in accordance with the purposes and objectives of the company, and is the organ that represents the company inside and outside the courts in accordance with the provisions of its articles of association. The board of commissioners is defined as the company organ with the duty to conduct general and special supervision of, and provide advice to, the board of directors.

Further, for public companies (companies with at least 300 shareholders or listed on the Indonesia Stock Exchange (IDX)), the members of the board of directors and the board of commissioners are also subject to capital market regulations, including Law No. 8 of 1995 on Capital Markets. Public companies are also supervised by the Financial Services Authority (OJK) and the IDX. Therefore, the conduct of public companies must also comply with the regulations issued by the OJK and the IDX, which are more detailed and provide more clarity on how good corporate governance should be implemented: for example, the requirement to establish certain committees, such as an audit committee and a remuneration committee, and to have a non-affiliated director and independent commissioners.

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1 Daniel Pardede is a partner and Syafrullah Hamdi is an associate at Hadiputranto, Hadinoto & Partners (HHP Law Firm), a member of Baker & McKenzie International.
Meanwhile, private foreign investment companies and private local companies (that obtain domestic investment company (PMDN) status from the Capital Investment Coordinating Board (BKPM)) are subject to the regulations regarding the field of capital investment. Other specific sectors may also have laws and regulations governing how entities engaged in the relevant sectors conduct their corporate governance, for example banks and non-bank financial institutions, and have guidance on compliance with good corporate governance.

In relation to licensing, the government is currently moving all licensing systems into one large national investment licensing platform, the Online Single Submission (OSS) system, as regulated in Government Regulation No. 24 of 2018 on Electronic Integrated Business Licensing Services. The OSS system is now operated by BKPM (initially, the Coordinating Minister of Economic Affairs took the lead in operating the OSS system when it was launched in July 2018). Companies no longer need to obtain licences from several authorities: they can now get all the licences they require through the OSS system.

Every business entity (including companies) needs to register with the OSS system. Upon registration, a business identity number (NIB), a business licence and a commercial licence (as relevant) will be issued. The NIB serves as an identity card for companies, and remains valid as long as the company operates. Sectoral ministries or government authorities (e.g., the Ministry of Trade, the Ministry of Communication and Informatics, the Ministry of Agrarian Affairs and Spatial Planning, the National Land Office) determine the business licences or commercial licences required for lines of business under their authority, and the commitments or conditions required to be fulfilled to make the business licences or commercial licences become effective. These sectoral ministries or government authorities could also determine that no commitments or conditions are required. If commitments or conditions exist, they will be mentioned in the business or commercial licences, or both, issued by the OSS system. Business licences and commercial licences will only become effective after a licence owner completes the required commitments or conditions.

II CORPORATE LEADERSHIP

i Board structure and practices

Limited liability companies in Indonesia use a two-tier management structure. The executive functions are managed by the board of directors, which is supervised by the board of commissioners. The board of commissioners does not have an executive function or authority, except in the absence of all members of the board of directors or if all members of the board of directors have conflicting interests with the company. Companies with a shariah-related business activity should have a shariah supervisory board.

The board of directors or the board of commissioners may consist of one or more members. If the board of directors consists of two or more members, the liability is joint and several for each member. A company must have at least two members on the board of directors and two members on the board of commissioners if the company is a public company or if it is collecting or managing public funds or issuing acknowledgements of indebtedness to the public.

If the board of directors consists of more than one member, any member of the board of directors has the authority to act for and on behalf of the board of directors and to represent the company unless the company’s articles of association specify otherwise. In practice, there
are a variety of structures used by shareholders and inserted into the articles of association to limit the authority of the members of the board of directors to represent the company, including the following:

1. The articles of association require two directors to act for and on behalf of the board of directors and the company;
2. The articles of association require the president director together with one other director to act for and on behalf of the board of directors and the company;
3. The articles of association require that in the absence of the president director, one other director may only act for and on behalf of the company if he or she has first received a written appointment from the president director; and
4. The articles of association require the board of directors to obtain approval from the board of commissioners or the general shareholders’ meeting before proceeding with a corporate action.

The above depend on how the shareholders want a company to run its daily activities.

If a director is a party to a court dispute with the company or has a conflict of interest with the company, that director cannot represent the company. In this case, the company must be represented by any of the following:

1. Another director or other directors who do not have a conflict of interest with the company;
2. The board of commissioners in the event that all members of the board of directors have conflicts of interests with the company; and
3. Another party appointed by a general shareholders’ meeting if all members of the board of directors and the board of commissioners have conflicts of interests with the company.

Unlike the board of directors, if the board of commissioners has more than one member, no member may act alone in representing the board of commissioners unless it is based on resolutions of the board of commissioners.

The board of directors must act only in the best interests of the company and in accordance with the company’s purpose and objectives. Every director is obligated to fulfill his or her tasks in good faith and with full responsibility. Each director will be personally liable if he or she is wilfully negligent and does not execute his or her tasks as mentioned above unless the director can prove all of the following (as relevant):

1. The bankruptcy of the company was not caused by his or her fault or negligence;
2. He or she has conducted the management of the company in good faith and with prudence;
3. He or she does not have a personal interest, directly or indirectly, in the management act that caused the bankruptcy; and
4. He or she has taken steps to prevent the bankruptcy from occurring.

Under the Company Law, similar to the board of directors, each member of the board of commissioners must undertake his or her duties in good faith and with full responsibility in the interests of the company, in accordance with the purposes and objectives of the company. The main duties of the members of the board of commissioners are to supervise the board of directors’ management policy and to give it advice. The members of the board of commissioners are obliged to fulfill their tasks in good faith and with full responsibility in the company’s interests.
The distribution of the tasks and authorities of the board of directors is determined by a general shareholders’ meeting, or by the board of directors itself if the general shareholders’ meeting does not do so. No law restricts a director from delegating certain responsibilities to other parties, but the director shall continue to be liable for all actions taken by the delegate.

ii Directors
The Company Law does not recognise chair or CEO positions: it only acknowledges the position of members of the board of directors (or board of commissioners in the absence of a board of directors) who may act for and on behalf of the company. In practice, some companies include persons in senior positions, such as a chair or CEO, as members of the board of directors, who are appointed through a general shareholders’ meeting, with the following reasons under the Company Law: only the board of directors can act for and on behalf of a company; and only members of the board of directors have rights to attend and vote in board of directors meetings. Therefore, if a CEO or chair is not a member of board of directors, they cannot act for and on behalf of the company (e.g., represent the company and sign any agreements or documents on behalf of the company) unless they are given the authority to act by the board of directors under powers of attorney. Further, a CEO or chair who are not members of the board of directors also do not have rights to attend and vote in board of directors meetings, and the employment relationship between the CEO or chair and the company would merely be an employee–employer relationship.

Under the Company Law, the remuneration of directors is usually determined by the shareholders (unless such determination is delegated to the board of commissioners) through a general shareholders’ meeting, and the remuneration of the commissioners is determined by the shareholders through a general shareholders’ meeting. Further, the Company Law does not stipulate the remuneration of senior management who are not members of the board of directors. Therefore, the senior management would likely be treated as employees of the company, and their remuneration would be determined by the board of directors or the remuneration policy that has been implemented in the company.

iii Takeover
Takeovers and acquisitions are legal actions taken by a legal entity or an individual to acquire shares in a company that result in a change of control in the company. Although there is no clear definition of control under the Company Law, the common view is that a transfer or acquisition that results in the acquirer holding a majority of the shares or more than 50 per cent of the shares in a company is a takeover that results in a change of control. Another trigger for a change of control is an action that results in the ability to nominate directors and commissioners, and to stipulate management policies shifting to the acquiring entity, but this is more relevant to the takeover of a public company.

The Company Law requires several actions to be conducted by the boards of directors of the acquiring and target companies in relation to protecting any party having interests in the target company: for example, creditors and employees of the target company.

The boards of directors of the acquiring and target companies should announce the abridged acquisition plan in one national newspaper, and in writing to the employees of the target company, at the latest 30 days before the calling of the general shareholders’ meeting. The newspaper announcement must include a notice that interested parties can obtain copies of the acquisition plan from the companies’ offices from the date of the newspaper announcement until the date of the general shareholders’ meeting. The creditors of the target
company have 14 days after the date of the announcement to file their objections to the plan of the acquisition. If no creditors’ objections are filed within this period, the creditors will be deemed to have approved the acquisition. If objections are filed by creditors, the board of directors of the target company must first settle the objections. If any objections remain unsettled on the date of the general shareholders’ meeting, these objections must be presented at the general shareholders’ meeting to be settled. If any objections remain unsettled after the general shareholders’ meeting, the acquisition cannot be continued.

In addition to the above, the board of directors of the target company should also announce the change of ownership due to the acquisition to its employees in accordance with Law No. 13 of 2003 on Labour (Labour Law). The target company’s employees may choose to not continue their employment and be paid with the applicable termination payments for the change of ownership in the target company under the Labour Law).

III DISCLOSURE

i Financial reporting
The Company Law obliges every company to make an annual report. The board of directors must submit the annual report to the general shareholders’ meeting after it has been reviewed by the board of commissioners, no later than six months after the end of the company’s financial year. The annual report must contain at least:

a financial statements;
b a report on the company’s activities;
c a report on the implementation of social and environmental responsibility;
d details of issues during the financial year that affect the company’s activities;
e a report on the supervisory duty that has been performed by the board of commissioners during the previous financial year;
f the names of the members of the board of directors and board of commissioners; and
g the remuneration for the members of the board of directors, and the remuneration and compensation for the members of the board of commissioners for the previous year.

ii Audited annual report
Under the Company Law, a company’s annual report should be audited if:

a the activities of the company are to collect or to manage funds from the public;
b the company issues a debt acknowledgement letter to the public;
c the company is a public company;
d the company is a state-owned company;
e the company has assets or business turnover worth at least 50 billion rupiah; or
f it is required pursuant to the prevailing regulation.

If the company fulfils one of the above conditions, but the annual report is not audited, the general shareholders’ meeting must not approve the financial statements. After the general shareholders’ meeting approves the annual report, balance sheet, and profit and loss statement of the company, the following information must be published in a newspaper: that the company’s activities are to collect or to manage funds from the public; that the company issues a debt acknowledgement letter to the public; or that the company is a public company.

The purpose of this publication is so that the company is transparent and accountable to the public.
Further, the Company Law also requires financial statements of a company to be filed with the Minister of Trade. There are concerns from private companies about confidentiality, and as a consequence the level of compliance is low.

### iii  Mandatory disclosure

The Company Law does not contain extensive stipulations about the mandatory disclosure obligation or a comply and explain model for the implementation of corporate governance by private companies. Meanwhile, the capital market regulations specifically govern those matters, which are applicable for public companies.

With respect to mandatory disclosure, public companies are required to make a disclosure (whether periodical or incidental) under the prevailing capital market rules. For example:

- disclosure of quarterly, semi-annual and annual reports;
- disclosure of the occurrence of any material information or facts;
- disclosure of certain transactions (e.g., affiliated party or material transactions);
- disclosure of certain corporate actions (e.g., rights issues and non-preemptive rights);
- and
- disclosure for the purpose of convening a general shareholders’ meeting.

The Company Law regulates the mandatory disclosure (in the form of a newspaper announcement or notification to the employees, or both) for private companies that would like to conduct the following corporate actions (among others):

- acquisitions, mergers, consolidations and spin-offs;
- capital reduction;
- nullification of the appointment of members of the board of directors who fail to meet the requirements according to the Company Law;
- nullification of the appointment of members of the board of commissioners who fail to meet the requirements according to the Company Law;
- remittance of shares in the form of immovable goods; and
- dissolution and liquidation.

Moreover, the Company Law does not adopt the comply or explain model. Nevertheless, OJK Regulation No. 21 /POJK.04/2015 on the Corporate Governance Implementation for Public Companies allows public companies to apply corporate governance through a comply or explain approach, where public companies may either comply with the prescribed guideline by the OJK, or explain why they have not complied and what steps they are taking to comply in the future. The OJK uses this approach to promote the implementation of good corporate governance for public companies, because not every aspect of corporate governance could be implemented equally for all public companies, due to differences in the business sector, type of industry, size and complexity of each company.

### iv  Shareholders’ meetings with the board of directors

The Company Law does not regulate one-on-one meetings of directors with shareholders. Normally, shareholders will have a meeting and discussion with the directors through a general shareholders’ meeting. There are two types of general shareholders’ meeting: an annual general shareholders’ meeting that is conducted annually, and an extraordinary general shareholders’ meeting that may be held at any time pursuant to the needs and interests of a company.
The general shareholders’ meeting may adopt resolutions if they meet the quorum and voting criteria as stipulated under the Company Law and articles of association. Consequently, any discussion between the shareholders and directors outside of the meeting should not bind the directors in running the company’s activities.

IV CORPORATE RESPONSIBILITY

i Risk management committee
A non-financial services company is not required by the Company Law to have a risk management committee within its management structure. Nevertheless, the OJK regulations require financial services companies (e.g., banks and insurance companies) to have a risk management plan, including having a special officer or committee responsible for all risk management issues (e.g., liquidity, financial compliance). In practice, some non-financial services companies may have established risk management committees, as this may indicate good corporate governance to mitigate or control risks within their companies.

In the absence of a risk management committee, the board of directors is responsible for managing the risks, as the board of directors must act only in consideration of the best interests of the company and in accordance with the company’s purpose and objectives.

ii Compliance
The Company Law provides general requirements regarding a company’s compliance. Meanwhile, Law No. 25 of 2007 on Investment (Investment Law) provides more extensive compliance requirements as follows:

a implementing the principles of good corporate governance;

b carrying out corporate social responsibility (CSR) programmes;

c submitting investment activities reports to the BKPM;

d complying with all applicable laws and regulations; and

e respecting cultural traditions of communities living around the business locations of investments.

iii Whistle-blowing
The Labour Law provides protections for employees who have knowledge of criminal acts of their employers (e.g., corruption, bribery) and have reported those criminal acts to the relevant government authority. This means that Indonesian law gives protection to whistle-blowers.

The implementation of whistle-blower protections arose following practices and scandals, including but not limited to corruption and fraud, involving companies with government institutions and government officials. Whistle-blowing has now become a trend, and one of the main goals of the government is to eradicate corruption in Indonesia.

iv Corporate social responsibility
Under the Company Law, a company that operates in the natural resources field or is related to natural resources is obliged to conduct CSR. A CSR plan must be inserted into a company’s annual report to be approved by the board of commissioners or the general shareholders’ meeting. Nevertheless, the Company Law is silent on the sanctions that will be imposed on a company if the board of commissioners or shareholders do not approve a CSR plan so that it cannot be conducted or implemented.
The Investment Law, which is currently only applicable for private foreign investment companies and private local companies, provides sanctions for the failure to conduct CSR as follows:

\( a \) a written warning;

\( b \) a limitation of business activities;

\( c \) the temporary suspension of business activities or capital investment facilities, or both; and

\( d \) the revocation of business activities or capital investment facilities, or both.

Moreover, there are no provisions that set out a CSR threshold that companies must meet. Without a threshold, companies may not implement a CSR plan effectively; therefore, this can be deemed to be allowing companies to perform their CSR commitments in any manner they choose as long this fulfils their CSR obligations.

The concept of CSR in Indonesia has been widened by numerous companies, covering, inter alia, employee, consumer and social aspects. Although CSR obligations are not mandatory for companies, some companies have adopted this approach to ensure that the welfare of their employees, consumers and society are accommodated in various forms. Examples of CSR include leadership training for employees and consumer complaints hotlines. By adopting a CSR concept that covers numerous aspects (i.e., not limited to the environment and social wellbeing), companies may enjoy a good corporate image and reputation.

## V SHAREHOLDERS

### i Shareholder rights and powers

**Shareholders’ voting rights**

Each of a company’s shares gives a right of one vote to its holder, unless the articles of association determine otherwise. The articles of association may determine the classification of each share issued by the company. Under the Company Law, the classification of shares includes, among others, shares:

\( a \) with or without voting rights;

\( b \) with special rights to nominate members of the board of directors and the board of commissioners;

\( c \) that after a certain period are withdrawn or exchanged for other shares classifications;

\( d \) that entitle their holders the priority to receive dividends before the holders of shares with another classification in the allocation of dividends cumulatively or non-cumulatively; and

\( e \) that entitle their holders the priority to receive allocations of the remainder of the company’s assets in liquidation.

As described above, a company may issue shares without voting rights. Although the shares were issued with voting rights, a voting right does not apply to the shares if the company’s shares are controlled by the company itself, or (either directly or indirectly) by another company whose shares are directly or indirectly owned by the company.

In addition, holders of a fraction of a nominal value of shares (fraction) do not have individual voting rights. As an exception, the holders will have voting rights if, individually or jointly with other holders, they hold a fraction belonging to the same classification of shares with a nominal value that is as much as one nominal share of the classification.
For shares with voting rights, even though the voting rights of shares are encumbered by pledge or fiduciary, the holder of the shares still has the right to cast a vote in the general shareholders’ meeting for those encumbered shares.

**The powers of shareholders to influence the board of directors**

The Company Law regulates that the authority of the board of directors to act for and on behalf of the company is unlimited and unconditional unless stipulated otherwise by the Company Law, the articles of association or the approval of the general shareholders’ meeting. Therefore, it is clear that shareholders may influence the board of directors through the approval of the general shareholders’ meeting. For instance, before starting the next financial year, the board of directors shall prepare an annual action plan to be approved by the shareholders at the general shareholders’ meeting. In practice, to get the approval of the shareholders, the board of directors will prepare an annual action plan that is relevant to the objective and purpose of the company and the vision of shareholders. The company’s articles of association may also require the board of directors to first obtain the approval of the general shareholders’ meeting for certain corporate actions before proceeding. Below are the quorum and voting rights required under the Company Law for a company to take certain corporate actions:

<table>
<thead>
<tr>
<th>General shareholders’ meeting</th>
<th>Quorum</th>
<th>Votes required to adopt a resolution</th>
</tr>
</thead>
</table>
| 1 General shareholders’ meeting to adopt a resolution to:  
  a approve the business plan,* annual report, † the appointment or change of members of the board of directors and board of commissioners, and the increase of the issued and paid up capital;  
  and  
  b determine the use of net profits and the amount of reserved fund‡ | More than half | More than half of the votes |
| If the quorum of the first general shareholders’ meeting is not satisfied, a second general shareholders’ meeting may be held  
  If the quorum of the second general shareholders’ meeting is not satisfied, upon the company's request, the quorum will be determined by the chief justice of the district court where the company is domiciled | At least one-third | More than half of the votes |
| 2 General shareholders’ meeting to adopt a resolution to:  
  a amend the company’s articles of association; and  
  b approve the increase of the authorised capital and the reduction of the capital | At least two-thirds | At least two-thirds of the votes |
| If the quorum of the first general shareholders’ meeting is not satisfied, a second general shareholders’ meeting may be held | At least three-fifths | At least two-thirds of the votes |
| 3 General shareholders’ meeting to adopt a resolution to approve the merger, consolidation, acquisition or bankruptcy application of the company, extension of the term of the company and dissolution of the company | At least three-quarters | At least three-quarters of the votes |
| If the quorum of the first general shareholders’ meeting is not satisfied, a second general shareholders’ meeting may be held | At least two-thirds | At least three-quarters of the votes |
| 4 General shareholders’ meeting to adopt a resolution to transfer or place as security the entire or a substantial part of the company’s assets | At least three-quarters | At least three-quarters of the votes |
| If the quorum of the first general shareholders’ meeting is not satisfied, a second general shareholders’ meeting may be held | At least two-thirds | At least three-quarters of the votes |
| 5 General shareholders’ meeting to adopt a resolution to repurchase the company's shares | At least two-thirds | At least two-thirds of the votes |
| If the quorum of the first general shareholders’ meeting is not satisfied, a second general shareholders’ meeting may be held | At least three-fifths | At least two-thirds of the votes |

* The approval can be delegated to the board of commissioners  
† Note that an annual report is approved in an annual general shareholders’ meeting  
‡ Note that the use of net profits and the amount of reserved fund is determined in an annual general shareholders’ meeting
A company’s articles of association may stipulate different quorum and voting requirements for a general shareholders’ meeting required to pass resolutions. However, the articles of association may only stipulate higher (not lower) quorum and voting requirements from those provided under the Company Law.

**ii Shareholders’ duties and responsibilities**

In general, the Company Law does not put the obligation for corporate governance to the shareholders. However, in some highly regulated sectors – for example, insurance – the controlling shareholders may be required to declare that they are the parties responsible for the insurance company.

**iii Shareholder activism**

If a shareholder disagrees about actions of the company that are causing harm to that shareholder or to the company itself, that shareholder has a right to sell its shares to the company at a reasonable price in the form of one of the following an amendment to the articles of association of the company, a transfer and encumbrance of more than 50 per cent of the net assets of the company; and a consolidation, merger, acquisition or spin-off of the company.

In the above situation, the shares are to be purchased or repurchased by the company. In the event that such temporary ownership of shares by the company exceeds the threshold allowed under the Company Law, then the company must find a third party to buy those shares. Concerning the threshold, the buyback must not cause the net assets of the company to be lower than the aggregate of the subscribed capital and the statutory reserves of the company; and the total nominal value of the shares that are owned by the company or its subsidiaries (including those held under security) must not exceed 10 per cent of the nominal value of the issued shares in the company).

Further, if the shareholder is harmed by an action of the company that he or she considers to be unfair and unreasonable as a result of resolutions of the general shareholders’ meeting, board of directors or board of commissioners, the shareholder has a right to lodge an action against the company before the relevant district court.

The Company Law also allows shareholders that hold at least 10 per cent of the issued voting shares in a company to lodge an examination of the company to the district court on the basis that the company has suffered losses as a result of illegal activity or negligence by the members of the board of directors and board of commissioners.

**iv Takeover defences**

As mentioned above (see Section V.i), certain decisions may not be taken by the board of directors without shareholder approval. For example:

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</tr>
</thead>
<tbody>
<tr>
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<td>At least two-thirds</td>
<td>At least two-thirds of the votes</td>
</tr>
<tr>
<td>If the quorum of the first general shareholders’ meeting is not satisfied, a second general shareholders’ meeting may be held</td>
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<td>General shareholders’ meeting</td>
<td>Quorum</td>
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</tr>
<tr>
<td>------------------------------------------------------------------------------------------------</td>
<td>-------------------</td>
<td>--------------------------------------</td>
</tr>
<tr>
<td>2 General shareholders’ meeting to adopt a resolution to approve the merger, consolidation, acquisition or bankruptcy application of the company, extension of the term of the company and dissolution of the company</td>
<td>At least three-quarters</td>
<td>At least three-quarters of the votes</td>
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<td>At least three-quarters of the votes</td>
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<td>At least three-quarters of the votes</td>
</tr>
<tr>
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<td>At least three-quarters of the votes</td>
</tr>
</tbody>
</table>

Further, the Company Law also allows shareholders to include additional provisions in the articles of association to limit the board of directors’ authority to conduct certain corporate actions (e.g., requiring approval from the board of commissioners or the shareholders, or both).
I OVERVIEW OF GOVERNANCE REGIME

In Ireland, the corporate governance of business organisations is derived from a combination of corporate law, statutory regulations and codes (for the most part non-binding). In addition, for privately owned corporations, while the governance architecture is explicitly dealt with in the constitutional documents and by-laws (known as the constitution or articles of association), it is also often addressed as a matter of contract between the shareholders in a shareholders’ agreement.

For the purposes of this chapter, we will focus on corporate governance in public or listed companies.

Corporate governance requirements for listed companies

In Ireland, companies listed on the principal Irish securities market, Euronext Dublin, are required to comply with both the UK Corporate Governance Code (Corporate Governance Code) and the Irish Corporate Governance Annex.

The terms of the recently updated Corporate Governance Code are dealt with elsewhere in this publication, and it is not proposed that those terms be restated here. An important basis or feature of the Corporate Governance Code is the comply or explain approach to compliance. Under the Irish Stock Exchange Listing Rules (Listing Rules), companies listed on Euronext Dublin are expected to comply with the Corporate Governance Code or set out an explanation for any deviation from its provisions in their annual report to shareholders.

The Irish Corporate Governance Annex asks for meaningful, evidence-based descriptions in the annual report of how the Code is applied rather than ‘recycling’ descriptions that replicate the wording of the Code.

The Irish Annex identifies the following key recommendations for inclusion in the annual report:

a. an explanation as to why the number of non-executive directors is regarded as sufficient;

b. a description of the skills, expertise and experience of each director – including government appointees;

c. the process followed in selecting and appointing new directors;

1 Paul White is a partner at A&L Goodbody.
2 A mixture of primary legislation and common law.
3 The updated Corporate Governance Code applies to accounting periods beginning on or after 1 January 2019.
4 See the United Kingdom chapter.
d the methodology in the annual evaluations of the directors individually and collectively;
e the factors taken into account when determining a director's independence;
f a description of the work carried out by the audit committee generally, and in relation
to risk oversight more specifically; and

g a description of the remuneration policy, how performance elements are deferred and
any clawback arrangements.

Furthermore, companies listed on the smaller Irish securities market, Euronext Growth, are
also encouraged to adopt a corporate governance code on admission to that market, and are
required to publish details of the corporate governance code it has chosen to apply and how
it complies with that code, or a statement that it has not adopted any code if that is the case.
In practice, a number of them adhere to the Principles of Corporate Governance issued by
the UK Quoted Companies Alliance.

ii Banks and other financial institutions

Banks and insurers in Ireland follow, on a statutory and mandatory basis, separate corporate
governance requirements issued by the Central Bank of Ireland in 2016. Banks are required
to follow the Corporate Governance Requirements for Credit Institutions 2015 (Credit
Institutions Requirements) and insurance undertakings follow the Corporate Governance
Requirements for Insurance Undertakings 2015 (Insurance Undertakings Requirements).
Captive insurance and reinsurance undertakings are required to follow the Corporate
Governance Requirements for Captive Insurance and Captive Reinsurance Undertakings
2015.

The significance of the Credit Institutions Requirements and the Insurance Undertakings
Requirements (together, the CBI Requirements) is that they are mandatory; in other words,
the comply or explain approach to compliance does not apply.

The CBI Requirements include the following:

a boards must have a minimum of seven directors in major institutions and a minimum
of five in all others;
b requirements on the role and number of independent non-executive directors (including
internal and external evaluation, training and professional support);
c criteria for director independence and consideration of conflicts of interest;
d limits on the number of directorships that directors may hold in financial and
non-financial companies to ensure they can comply with the expected demands of
board membership of a credit institution or insurance company;
e clear separation of the roles of chair and chief executive officer;
f a prohibition on an individual who has been a chief executive officer, director or senior
manager of an institution during the previous five years from becoming chair of that
institution;
g a requirement that board membership is reviewed at a minimum every three years;
h a requirement that boards set the risk appetite for the institution and monitor adherence
to this on an ongoing basis;
i minimum requirements for board committees, including audit and risk committees;
j prescriptive measures around how and when board meetings must be held, and
attendance by directors;
k a requirement for an annual confirmation of compliance to be submitted to the Central
Bank;
the use of videoconferencing where a director cannot attend a meeting; and

the audit committee as a whole must have relevant financial experience, and one
member must have an appropriate qualification.

Corporate governance themes such as diversity and risk are also reflected in the CBI Requirements. For example, the Credit Institutions Requirements provide that a chief risk officer must be appointed to oversee the institution’s risk management function, and that a risk committee must be established. The chair of this committee must be a non-executive director and the committee must be composed of a majority of non-executive directors. The audit and risk committees must have a minimum of three members.

The board or nomination committee is also required to establish a written diversity policy for consideration in future board appointments.

II CORPORATE LEADERSHIP

The principal leadership role for any company is played by the board of directors. The role of the director is governed principally by the Companies Act,5 the primary source of corporate law in Ireland, and by principles established by case law (in this regard, it is worth noting that English case law is generally regarded as having persuasive authority in Ireland). This body of law is further supplemented by a growing suite of statutory regulations, codes and guidelines, many of which have been mentioned elsewhere throughout this chapter. Below is a brief (and non-exhaustive) discourse on some of the more significant aspects of the law surrounding directors and the structures and practices of boards in Ireland.

i Board structure and practices

One-tier structure

Generally, the board of directors of an Irish company is structured as a one-tier body (usually comprising both executive directors and non-executive directors), unlike in other jurisdictions where two-tier structures are more common. Irish law does not prohibit the two-tier board, but it does not arise in practice: were it to do so, directors would be likely to face the same liability regardless of their position within a two-tier board system.

Composition of the board

Every Irish public company must currently have at least two directors, but the articles of association of the company (i.e., its constitution) may provide for a greater minimum number (as may any applicable corporate governance code that applies to the company). Since the Companies Act, private companies limited by shares are permitted to have a sole director, but they must also have a separate company secretary. A body corporate is prohibited from becoming a director of an Irish company. As in other jurisdictions, a public company or a large private company will generally have a combination of executive and non-executive directors on its board, whereas a small private company will generally have all executive directors.

5 The Companies Act 2014.
Authority of the directors to represent the company

A director can only enter into a proposed contract on behalf of a company where it is within his or her permitted delegated authority to do so, unless that contract or commitment has been approved by the board. The authority of the director may be actual or ostensible. Actual authority is usually rooted in the service contract between a company and the director. It can also be implied, for example, by the ordinary course of the business of the office that the director holds, such as managing director or chief executive officer. However, even where no actual authority exists, the company may still be bound by the director’s actions when he or she acts within his or her ostensible or apparent authority (i.e., where he or she is held out by the company as having the authority, for example, of a particular office holder such as managing director or chief executive officer). In grappling with the principles surrounding actual and ostensible authority, it is also necessary to bear in mind the internal management principles, which mean that, if a third party is dealing with a company, he or she is not obliged to enquire into the regularity of its internal proceedings. However, this rule is not absolute, and there are limits to its scope and operation. The board of directors and individuals authorised by the company are entitled to bind it. Persons authorised may be registered on a register maintained in the public Companies Registration Office as being entitled to bind the company, although this is not a mandatory requirement.

Legal responsibilities of the board

The root source of all corporate authority lies with the shareholders. However, as in other jurisdictions, shareholders generally delegate the management of the company to the board of directors and allow them to exercise all the powers of the company except a specific number of matters that must, under statute, be exercised by the shareholders.

Chair

While the chair of a company has specific roles (and, to an extent, responsibilities), including chairing the board of directors and shareholder meetings, he or she does so as a director. As a director, he or she is subject to the same duties and has the same authority as that of any other board member. Where a company adopts a standard constitution or articles of association, the chair will enjoy an additional vote in the event of an equal number of votes being cast in respect of any matter at board level.

Significantly, for companies listed on Euronext Dublin, the Corporate Governance Code contains a number of provisions relating to the role of chair. The chair has responsibility:

- to ensure that a culture of openness and debate prevails;
- to ensure that directors receive accurate, timely and clear information;
- to ensure that all directors are made aware of shareholders’ views: in particular, the chair must seek regular engagement with major shareholders on matters such as governance and performance against strategy;
- to consider a regular externally facilitated board evaluation; and
- subject to limited exceptions, not to remain in the post for a term of longer than nine years.

Delegation of board responsibilities

In general, the board of directors may delegate its authority to an individual director, to employees or to committees established by the board. Having delegated powers, the directors
are not absolved from all responsibility in relation to the delegated actions, as the directors will continue to be under a duty to investigate the operations of the company diligently and with skill.

It is also open to a director, subject to the constitution or articles of association of the company, to appoint an alternate to fulfil his or her duties on his or her behalf, generally in relation to a specific action or time period. Whereas the alternate is personally liable for his or her own actions, the appointing director again is not absolved and can be held responsible along with the alternate.

**Chief executive officer**

Irish law is not particularly prescriptive in relation to the role of managing director or chief executive officer. In general, the powers of the chief executive officer are not fixed by law, but depend instead upon the terms of the service agreement agreed from time to time between the board and the chief executive.

To ensure that there is a clear division of responsibilities between the running of the board and the running of the company’s business, the Corporate Governance Code and CBI Requirements (among others) recommend that the role of chair and chief executive officer should not be fulfilled by the same individual. The Corporate Governance Code also suggests that no former chief executive officer should become chair of the same company, and that the division of responsibilities between the chair and the chief executive officer be clearly established, set out in writing and agreed by the board.

**Committees of the board**

As previously mentioned, Irish companies commonly delegate certain matters to committees established by the board. Under Irish company law, public limited companies are required to establish an audit committee. The Listing Rules require that certain listed companies are further required to constitute certain other governance committees. Credit institutions, insurance or reinsurance undertakings and other regulated entities are subject to separate requirements under applicable authorisation regimes.

**Board and company practice in takeovers**

The two principal sources of responsibility imposed upon directors of a company in the course of a takeover offer are common law and the Rules of the Irish Takeover Panel (Takeover Rules), which have the force of law in Ireland. Two other important sources of duties and obligations are the Listing Rules and the Companies Act.

The Takeover Rules, in particular, cover a wide range of matters relating to takeovers, and it is the responsibility of each company director, whether executive or non-executive, to ensure, so far as he or she is reasonably able, that the Takeover Rules are complied with during offer periods. In essence, the Takeover Rules prohibit a company from taking any action that might frustrate the making or implementation of an offer for the company, or depriving the shareholders of the opportunity of considering the merits of such an offer at any time during the course of the offer or at any earlier time at which the board has reason to believe that the making of such an offer may be imminent.

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6 See Section III.i for further information.
ii Directors

Non-executive or outside directors

Under Irish law, no distinction is drawn between the non-executive director and any other director, so non-executive directors owe the same duties as other directors to the company, its creditors and employees.

Where non-executive directors are appointed on the nomination of a third party, most commonly a shareholder, the nominee is entitled to have regard to the appointer’s interests, but only to the extent that they are not incompatible with his or her duty to act in the interests of the company.

The non-executive director role has attracted much attention recently in terms of the importance of the role as an independent watchdog. The Corporate Governance Code, for example, requires the non-executive directors of listed companies to constructively challenge board strategy. In addition, it recommends that the board should appoint one independent non-executive director to be the senior independent director to provide a sounding board for the chair, and that the board should not agree to a full-time executive director taking on more than one non-executive directorship or the chair in a FTSE 100 company or equivalent Irish company (FTSE 350 equivalent). There are some recent sources of guidance for non-executive directors on care, skill and due diligence, which are available to Irish non-executive directors.

Duties of directors

The duties of directors in Ireland are grounded in case law, legislation and related rules and codes. These duties, predictably, echo those in other jurisdictions.

Since 1 June 2015, a codified set of principal directors’ duties has been in force in Ireland, under the Companies Act. The list of eight codified duties has its origins in the common law historically developed by the courts in Ireland and the United Kingdom.

The principal fiduciary duties of directors that have been enumerated in the Act are as follows:

a the duty to act in good faith in what the director considers to be in the interests of the company;
b the duty to act honestly and responsibly in relation to the conduct of the company’s affairs;
c the duty to act in accordance with the company’s constitution and exercise his or her powers only for the purposes allowed by law;
d the duty to not use the company’s property, information or opportunities for his or her own or anyone else’s benefit unless this is expressly permitted by the constitution or approved by resolution of the members in a general meeting;
e the duty to not agree to restrict the director’s power to exercise an independent judgement, unless this is expressly permitted by the company’s constitution, or the director believes in good faith that it is in the interests of the company for a transaction or arrangement to be entered into for him or her to fetter his or her discretion in the future by agreeing to act in a particular way to achieve this, or the directors agreeing to this has been approved by resolution of the members in general meeting;
f the duty to avoid any conflict between the director’s duties to the company and his or her other (including personal) interests unless the director is released from this duty in accordance with the constitution, or by a resolution of the members in general meeting;
the duty to exercise the care, skill and diligence that would be exercised in the same circumstances by a reasonable person having both the knowledge and experience that may reasonably be expected of a person in the same position as the director; and the knowledge and experience that the director has; and

the duty to have regard to the interests of the company’s employees in general and of its members.

These duties are owed to the company and are enforceable by the company in the same way as any other statutory duties owed by the director to the company. The Act provides that these principles are based in common law and equitable principles, and that the new statutory duties must be interpreted and applied as such.

Directors’ compliance statement

As a result of an obligation introduced by the Companies Act, public limited companies are required to include a compliance statement in the directors’ annual report accompanying their company’s financial statements. This requirement applies in respect of financial years commencing on or after 1 June 2015.

Directors must acknowledge that they are responsible for securing their company’s compliance with its relevant obligations (which includes obligations under tax law, and some of the more serious capital maintenance and financial disclosure and reporting obligations).

Directors must also, on a comply or explain basis, confirm:

a. that they have drawn up a compliance policy statement appropriate to their company setting out the company’s policies regarding compliance;

b. that appropriate arrangements or structures are in place that are, in the director’s opinion, designed to secure material compliance with its relevant obligations; and

c. that they have reviewed, during the financial year, the arrangements or structures that have been put in place to secure this material compliance.

If these statements, confirmations and reviews have not been made or carried out, the directors must specify in their directors’ report the reasons why not.

Statutory audit confirmation

The Companies Act introduced a new statutory obligation on the directors of all companies to include a statement in their directors’ report that so far as each director is aware, there is no relevant audit information of which the company’s auditors are unaware, and each director has taken all the steps that he or she ought to have taken as a director to make himself or herself aware of any relevant audit information, and to establish that the company’s auditors are aware of that information. This is similar to the obligation that has existed in the United Kingdom since 2006.

Liability of directors

Directors are not liable for the commitments and obligations of the companies they serve.

Directors can be held personally liable or subject to fines and, in very serious circumstances, imprisonment for breaches of various statutory provisions such as those relating to company law, environmental law and health and safety law. Examples under the Companies Act include where the director engages in insider dealing or where the director makes false or misleading statements in certain circumstances.
Under the Companies Act, a new streamlined summary approval procedure (SAP) has been created to enable companies to carry out certain activities that would otherwise be prohibited (such as financial assistance, capital reductions and repayments, mergers). The SAP is only available to public limited companies for a members’ voluntary winding up, the prohibition on pre-acquisition profits or losses being treated in a holding company’s financial statements as profits available for distribution, and the prohibition on entering into loans or quasi-loans to directors or other connected persons.

Under the SAP rules, a directors’ declaration of solvency and shareholder approval is required, and in some cases a confirmatory auditors’ report is also required. The SAP rules provide that a court may declare a director personally responsible, without any limitation of liability, for all or any liabilities of the company where a declaration is made without having reasonable grounds for the opinion on the solvency of the company as set out in the declaration.

In the context of entering a contract on behalf of a company, a director can be made personally liable where he or she commits a tort or fraud on behalf of the company (or induces the company to do so), where he or she gives a personal guarantee, or where he or she fails to make the other party aware that he or she is acting as an agent for the company.

In the context of insolvency, directors may also face personal liability in a limited number of circumstances: for example, where they engage in fraudulent or reckless trading, misapply company assets or make an incorrect declaration of solvency in the context of a voluntary liquidation. On insolvency, a director may also face restriction for five years or disqualification for up to five years or such other period as the courts think fit.

**Appointment, term of office, removal**

The appointment and removal of directors is generally governed by the company’s constitution or articles of association. The right to elect directors is generally reserved to shareholders save where a casual vacancy arises. The directors usually have the right to fill a casual vacancy, by a resolution of the directors passed at a board meeting or by unanimous written resolution of the directors, but this appointment might then, particularly with public companies, be subject to shareholders’ confirmation at the next annual general meeting (AGM) after such an election. Under the Companies Act, the directors of a public limited company are required to retire by rotation unless the company’s constitution provides otherwise. For listed companies to which the Corporate Governance Code applies, all of the directors must be reappointed annually.

Apart from the terms of the constitution or articles of association, shareholders also have a statutory right to remove directors by way of resolution passed by simple majority, subject to the director’s right to attend the shareholders’ meeting in question and to make representations.

**Conflicts of interest of directors**

The area of directors’ conflicts of interest has been the subject of a number of judicial decisions over a number of years, and an extensive body of case law has developed around it. The key principles are, as mentioned, that a director should not place himself or herself in a position where his or her duty to the company conflicts with his or her own personal interests, and that a director should not gain from his or her fiduciary position. Added to this common law is a host of statutory provisions setting out different checks and balances primarily aimed at the protection of shareholders and creditors.
III DISCLOSURE

i Financial reporting and accountability

Companies are required to disclose details of their accounts at their AGM and in their annual return, which is filed in and publicly available at the Companies Registration Office. Since May 2017, a long-standing non-filing exemption enjoyed by unlimited companies with a particular non-EU/EEA shareholding structure has been removed, by virtue of the Companies (Accounting) Act 2017. Under the Companies Act, related party transactions that are material and have not been concluded under normal market conditions are required to be disclosed in the notes to the company’s accounts.

Company accounts must be audited by a qualified auditor, and the auditor’s report is distributed to shareholders and included in the annual return.

Companies with securities admitted to trading on a regulated market (in Ireland, this is Euronext Dublin) must disclose financial and other information to shareholders on a regular basis. The Transparency Regulations 2007 (as amended, most recently twice in 2015 and once in 2017) (Transparency Regulations) and related rules issued by the Central Bank of Ireland (which implement the EU Transparency Directive7) require the publication of annual and half-yearly financial reports. They also require companies to publish information that is disclosed to them by persons who have acquired or disposed of voting rights in the company.

The Companies Act provides a definition of a traded company for the first time in Irish law. A traded company includes a public limited company that has shares or debentures admitted to trading on a regulated market in an EEA state.

Traded companies are required to include, in the directors’ report, a corporate governance statement in respect of the financial year concerned. This statement must be included as a specific section of the directors’ report and must include the following information:

a a reference to the corporate governance code to which the company is subject, including all relevant information concerning corporate governance practices applied in respect of the company, which are additional to any statutory requirement, and details of where the text of the relevant corporate governance code is publicly available. If the company departs from the corporate governance code, details of this, and of the reasons for the departure, should be included;

b a description of the main features of the company’s internal control and risk management systems in relation to the financial reporting process;

c information already required by the European Communities (Takeover Bids (Directive 2004/25/EC)) Regulations 2006 relating to the company’s share and control structures (where the company is subject to this Directive);

d the operation of the shareholders’ meeting and its key powers, and a description of shareholders’ rights and how they can be exercised; and

e the composition and operation of the board and its committees.

The company’s auditors, when preparing their report to the members to be read at the AGM, must establish that the corporate governance statement addresses the information required under the Companies Act, and provide an opinion on certain aspects of the report. Companies that comply with the CBI Requirements are also required to submit an annual compliance statement to the Central Bank of Ireland.

7 Directive 2004/109/EC.
In June 2016, the European Union (Statutory Audits) Regulations 2016 (2016 Regulations) came into effect in Ireland. The 2016 Regulations give effect to the Statutory Audit Directive, which amended the original Statutory Audit Directive in various ways. The new regime was designed to enhance the independence of statutory auditors, and the quality and credibility of statutory audits, across the EEA.

Public listed companies are regarded as public interest entities (PIEs) for the purposes of the legislation, and the following provisions apply to them:

- PIEs are obliged to rotate their auditor firm after a maximum of 10 years (from date of initial appointment);
- there are tighter restrictions on the provision of non-audit services by auditors to PIEs;
- the selection and appointment of the statutory auditors must adhere to specified procedures, which must be established by a PIE; and
- there are detailed requirements regarding the establishment of audit committees in PIEs; however, new legislation has introduced certain exemptions from this obligation in small and medium-sized PIEs. These are discussed in further detail below.

## Audit committees

The requirement for PIEs to establish an audit committee has been in place in Ireland since the European Communities (Statutory Audits) (Directive 2006/43/EC) Regulations 2010 (2010 Regulations) were published, giving effect to Directive 2006/43/EC on statutory audits.

Under the Companies Act, PIEs are defined as companies whose transferable securities are admitted to trading on a regulated market of any Member State; credit institutions; and insurance and reinsurance undertakings. The Companies Act provides that the directors of a PIE, with a number of exceptions, must establish an audit committee. The majority of members of the audit committee must be non-executive directors, who must have the requisite level of independence to enable them to contribute effectively to the committee’s functions. Irish law provides for an exemption to this obligation for PIEs that are small or medium-sized enterprises and companies listed on an EU regulated market (such as Euronext Dublin) with an average market capitalisation of less than €100 million for the previous three years.

The responsibilities of the audit committee include:

- informing the directors of the entity of the outcome of the statutory audit and explaining how the statutory audit contributed to the integrity of the financial reporting;
- monitoring the financial reporting process;
- monitoring the effectiveness of the company's systems of internal control, internal audit and risk management; and
- monitoring the statutory audit of the annual and consolidated accounts.

The Companies Act contains provisions on many aspects of auditing that were carried over from the 2016 Regulations (and the 2010 Regulations before that), including:

- the approval of statutory auditors and audit firms;
- the educational standards of auditors;

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8 Directive 2014/56/EU.
9 Directive 2006/43/EC.
10 This latter exemption does not apply to any captive insurance or reinsurance undertaking owned by a credit institution or with securities admitted to trading on a regulated market.
the establishment of a public register of auditors;
the independence of auditors; and
arrangements regarding third-country auditors.

A notable provision is that statutory auditors or audit firms may only be dismissed where there are proper grounds. Divergences of opinions on accounting treatments or audit procedures are not considered to be proper grounds for dismissal.

Under the Companies Act, large private companies that meet certain financial thresholds are required to have an audit committee on a comply or explain basis.

Listed companies following the UK Corporate Governance Code must additionally comply with the relevant provisions relating to audit committees, or explain why not.

Financial institutions and insurance undertakings must also comply with the relevant provisions on audit committees contained within the CBI Requirements, which operate on a statutory basis rather than a comply or explain basis.

iii Market disclosure

Listed companies must also comply with certain disclosure requirements contained in the Listing Rules, the EU Market Abuse Regulation (MAR) (as implemented in July 2016) and the Takeover Rules. Pursuant to MAR, Irish listed companies are required to release inside information to the market without delay (except where limited circumstances exist for deferring such information). Under the MAR, companies are required to put systems in place to ensure both their initial and their ongoing compliance with market abuse legislation. The MAR also introduces more significant record-keeping and reporting obligations where market disclosure has been delayed.

iv Disclosure of share interests

Under the Companies Act, directors, shadow directors and company secretaries must disclose to the company, in writing, interests they have in shares and debentures in the company, its subsidiary or holding company. Specifically, they must disclose the subsistence of their interest, the number of shares of each class and the amount of debentures of each class of the company, subsidiary or holding company. Under the Companies Act, the threshold at and above which that interest in a public company must be disclosed has been reduced to 3 per cent. The Act also provides that certain transactions and arrangements between directors and persons connected to them, and the company or its subsidiary, must be disclosed in the company’s accounts.

In addition, persons discharging managerial responsibilities are obliged to disclose their interests and that of close family members in shares of companies whose shares are admitted to trading on a regulated market, under the MAR. Under the Transparency Regulations and related Central Bank Transparency Rules, major shareholders in issuers whose shares are admitted to trading on a regulated market in Ireland must disclose the voting rights held by them.

v Beneficial ownership

In 2016, the European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2016 came into operation. All corporate and other legal entities, but excluding companies listed on an EU regulated market, must comply with the Regulations.
The Regulations require entities incorporated in the state to hold adequate, accurate and current information on the controllers and beneficial owners of more than 25 per cent of their entity.

Listed companies are not required to comply with the Regulations, as they are subject to disclosure requirements that are consistent with this law.

**vi Disclosure of non-financial and diversity information**

In July 2017, EU Directive 2014/95/EU on disclosure of non-financial and diversity information by certain large undertakings and groups was implemented in Ireland by means of the European Union (Disclosure of non-financial and diversity information by certain large undertakings and groups) Regulations 2017.

The Directive amended the Fourth and Seventh Accounting Directives on Annual and Consolidated Accounts\(^\text{11}\) by including new provisions on the disclosure of non-financial information, and new provisions on boardroom diversity.

The Regulations provide for two separate reporting requirements as follows:

- the directors of companies that are categorised as public interest entities and large, and that have more than 500 employees, and companies that are ineligible entities (companies that do not qualify for audit exemptions) must include a statement containing specific non-financial information in the company’s directors’ report. The non-financial statement must include information on environmental, social and employee matters, respect for human rights and bribery and corruption. Where a company does not have policies in any of these areas, it must explain why not; and

- large traded companies must include a diversity report in their company’s corporate governance statement. The report must include a description of the company’s diversity policy, and must contain information on the age, gender or educational and professional backgrounds of board members. Where a company does not have a diversity policy, it must explain why not.

The Regulations came into effect in August 2017 and apply to financial years beginning on or after 1 August 2017.

**IV CORPORATE RESPONSIBILITY**

There are no specific legal requirements or guidance in Ireland regulating corporate social responsibility. However, Irish companies are increasingly aware of corporate social responsibility issues. Most public listed companies acknowledge the need for and benefits of providing information to shareholders and the public on corporate social responsibility.

Legislation exists in Ireland that is designed to protect whistle-blowers. The Protected Disclosures Act 2014 aims to ensure workers are protected from reprisal where, in good faith and in the public interest, they disclose information relating to wrongdoing in the workplace. Employers are required to publish and put in place policies and procedures to deal with whistle-blowing. The Act protects workers in all sectors. For employees who believe that they have been unfairly treated as a result of disclosing company malpractice, there are also remedies under employment law, and in particular unfair dismissals legislation.

\(^{11}\) Directives 78/660/EEC and 83/349/EEC, respectively.
V SHAREHOLDERS

Recent years have seen a move internationally towards enhanced rights for shareholders. A significant development in shareholders rights, and one that Ireland shares with its EU neighbours, is the Shareholders Rights Directive,12 implemented in Ireland by the Shareholders’ Rights (Directive 2007/36/EC) Regulations 2009.

An amending Directive, (EU) 2017/828 amending Directive 2007/36/EC, which introduces new provisions in the Shareholder Rights Directive aimed at improving engagement with shareholders, was agreed in May 2017. The basic provisions of the Directive must be implemented into domestic law in Member States by 10 June 2019. Among the provisions of note are the right for companies to be able to identify their shareholders, the transmission of information between companies and shareholders, and provisions relating to remuneration policies of directors. These new provisions substantially reflect current practice in the Irish market, such practice having developed as a result of Irish listed companies that are also listed on the London Stock Exchange opting to comply with the position in the UK on a number of these issues.

i Shareholder rights and powers

Equality of voting rights

Every registered shareholder entitled to attend meetings of an Irish company is also entitled to vote on any shareholder matter, unless the company’s constitution or articles of association or the terms of issue of the shares dictate otherwise. Many private companies in Ireland have only one class of ordinary shares in issue, with each share carrying equal rights in relation to voting and dividends, and on a winding-up. However, it is also quite common for an Irish company to introduce different classes of shares, for example voting and non-voting, or a share class that might attach weighted voting rights either generally or on a particular matter.

Rights accrue only to those persons who are registered in the register of members of the company and not to beneficial holders. There is some suggestion that in future direct and indirect holders of shares may be given equal rights, but this has yet to materialise in Ireland.

Other rights of shareholders

Shareholders in Irish companies enjoy all the usual rights associated with membership of a company, for example the right to receive copies of financial information, pre-emption rights and the right to wind up the company.

Shareholders of some Irish listed companies also enjoy certain additional and enhanced rights. For example, under the Companies Act, a general meeting can be called by members representing only 5 per cent of the voting capital of a company listed on Euronext Dublin (10 per cent for companies listed on the smaller Euronext Growth). In addition, members holding 3 per cent of the issued capital of a company listed on Euronext Dublin, representing at least 3 per cent of its total voting rights, have the new right to put items on the agenda and table draft resolutions to be adopted at AGMs. Listed companies are allowed to offer members participation in and voting at general meetings by electronic means (although there is likely to be debate about exactly what this means) and will also be allowed to offer the possibility of voting by correspondence in advance. However, neither of the latter provisions is mandatory, and companies are merely permitted to provide these facilities.

12 Directive 2007/36/EC.
Decisions reserved to shareholders

Generally, shareholders do not have a role in deciding or approving operational matters, regardless of size or materiality. An exception to this principle arises under the Listing Rules in relation to large transactions.

Under Irish law, there is a list of structural matters that are reserved to be decided by the shareholders by ordinary resolution (or a simple majority) of those who vote. Examples include the consolidation or subdivision of shares, the payment of compensation to former directors and the purchase ‘on market’ of the company’s own shares. Certain other actions are also reserved but require a special resolution (or 75 per cent of the votes). Examples of these matters include the alteration of the memorandum and articles of association of the company, the giving of financial assistance in connection with the purchase of the company’s own shares and the reduction of share capital.

Rights of dissenting shareholders

A number of remedies are open to disgruntled shareholders under Irish law. Perhaps the remedy that is most often talked about is the statutory right of minority shareholders to seek potentially far-reaching redress on the grounds of majority shareholder oppression, where shareholders can also apply to court to have a forced sale of the company or to have the company wound up on just and equitable grounds. Here it must be shown that the act or measure complained of has as its primary motive the advancement of the interests of the majority shareholders as opposed to the interests of the company as a whole. Mere dissent by a minority is insufficient to support a claim for redress. The Companies Act permits the courts to award a wide range of remedies, including forced sale, winding up and/or compensation for any loss or damage as a result of oppressive conduct.

Shareholders’ duties and responsibilities

Controlling shareholders

The Irish company is legally separate from its shareholders, even its controlling shareholder. The powers, rights, duties and responsibilities of the controlling shareholder, like any other shareholder, will be determined by the terms of issue of the shares, the constitution or articles of association of the company and any applicable shareholders’ agreement. However, the actions of a controlling shareholder should always be measured in the context of the various remedies open to minority shareholders.

Institutional investors

Corporate governance is currently a key concern for institutional investors, along with so many other interested parties. The UK Stewardship Code sets out good practice for institutional investors when engaging with UK listed companies and will be relevant to how those institutional investors engage with Irish listed companies. Although there are currently no plans to introduce a similar code in Ireland, it is likely that Irish institutional investors will view this code as a standard of market practice in the area.

Shareholder activism and shareholder remedies

Shareholder activism is relatively underdeveloped in Ireland. However, there are a number of signs of change.
Shareholders can bring proceedings where the directors are exercising their powers or conducting the affairs of the company in a manner oppressive to the shareholders or in disregard of their interests. As indicated above, courts can grant relief where it can be proved by a member that the affairs of the company have been conducted in an oppressive manner against him or her or any of the members of the company, including members who are directors themselves.

Aggrieved members may also take a derivative action (i.e., an action in the name of the company itself) where the company has been wronged, with one shareholder representing the body of shareholders. This typically arises in circumstances where the directors of a company are responsible for taking actions in the company’s name and refuse to take that action. Derivative actions will be permitted where an ultra vires or illegal act has been perpetrated against the company, where more than a bare majority is required to ratify the wrong in question, where members’ personal rights have been infringed or where fraud has been committed on a minority of members.

iv Takeover defences

Certain takeover defence mechanisms may risk conflicting with the Irish Takeover Panel Rules. As a rule, in any defensive action it is imperative that boards ensure that their actions do not amount to frustrating actions, and that a level playing field is afforded to all potential bidders.

A company that has received a bid is not prevented from seeking alternative bids elsewhere (although this may possibly be subject to any inter-party agreement). The offer of the third party may be announced at any time except where the Takeover Panel directs that the third-party white knight make its intentions clear. In general terms, the directors must provide equality of information to all parties.

v Contact with shareholders

Mandatory and best practice reporting to all shareholders

Under the Transparency Regulations, companies whose securities are admitted to trading on a regulated market are required to publish annual and half-yearly financial reports. The annual report contains audited financial statements, a management report and responsibility statements. The half-yearly report contains a condensed set of financial statements, an interim management report and responsibility statements. Responsibility statements contain certain confirmations, including that the financial statements represent a fair and true view of the financial status of the company.

Members also enjoy the right to access certain information from the company, including the company memorandum and articles of association, resolutions and minutes of general meetings, company registers and the annual financial statements, directors’ reports and auditors’ reports.

Listed companies follow the Corporate Governance Code, which sets out the best practice guidelines for corporate governance. Listed companies must comply with the Code or explain any deviations to shareholders. In addition, the Irish Corporate Governance Annex to the Listing Rules encourages Irish listed companies to provide more detailed explanations of their actions, and in particular any deviation from certain aspects of the Corporate Governance Code to promote dialogue with shareholders.

Twenty-one clear days’ notice must be given for an AGM. Extraordinary general meetings (EGMs) of listed companies may be held on 14 days’ notice, but only where the
company offers all members the facility to vote by electronic means at general meetings and
the company has passed a special resolution approving the holding of EGMs on 14 days’
notice, at its immediately preceding AGM or at a general meeting held since that meeting.
However, if it is proposed to pass a special resolution at the EGM of the listed company, then
21 days’ notice must be given.

Notwithstanding the minimum statutory period, for listed companies, 20 business
days is the minimum period recommended under the Corporate Governance Code.

VI OUTLOOK

i New legislation in the pipeline

New prospectus and public offer regime
A phased implementation of the new EU Prospectus Regulation was commenced in July 2017
and shall extend to July 2019. While certain of the changes that the Regulation will introduce
to Irish prospectus law came into effect over the course of 2018 with the remainder due to
come in effect in July 2019, the Regulation technically entered into force on 20 July 2017,
and from that date, companies admitted to trading on Euronext Dublin (or on any other EU
regulated market) can issue and admit to trading up to a maximum of less than 20 per cent
(up from the existing maximum of less than 10 per cent) of their share capital or debentures
that are already admitted to trading (calculated over 12 months), without being obliged to
publish a prospectus.

In addition, from 20 July 2017 there has been an exemption from having to publish
a prospectus where the company wishes to admit to trading on the regulated market shares
resulting from conversion or exchange of other securities or rights where those shares are
of the same class as shares already admitted to trading on the same regulated market, and
provided that (unless some exceptions apply) the resulting shares are less than 20 per cent of
the shares of the same class already admitted to trading on that market.

Annual returns and financial statements
The Companies (Amendment) Bill 2019 proposes to amend the provisions of the Companies
Act by extending the time period permitted for the filing of annual returns from 28 days to
56 days from the date of the company’s annual return. The Bill is expected to be passed into
law in early 2019. It is anticipated that, on or soon after the enactment of the Bill, the not
yet commenced provisions of the Companies (Statutory Audits) Act 2018, including those
relating to the introduction of a single step approach for companies when filing their annual
return and financial statements, will also be commenced.

Beneficial ownership central register
As outlined earlier, Article 30 of the Fourth EU Anti-Money Laundering Directive (as
amended by the Fifth Anti-Money Laundering Directive) requires all EU Member States
to implement provisions around beneficial ownership information for corporate and legal
entities. The first element of this requirement is already in place, as outlined previously. The
second element of this requirement is that corporate and legal entities will be required to file
information about their beneficial owners with a central beneficial ownership register. The
central register is in the process of being established in Ireland, and it will be maintained by
the Companies Registration Office. The implementing legislation is expected to be passed
into law during the first quarter of 2019, following which it is anticipated that there will be a grace period of approximately six months for the first filing of information once the register is operational.

**Brexit**

At the time of writing, the status of the UK’s exit from the European Union remains unclear. A capital markets consequence is that, subject to the continuation of the current system over any transition period, shares of Irish listed companies will no longer be capable of being settled through the London-based CREST system. In the absence of a continuation of CREST post-Brexit, an alternative settlement arrangement to CREST will need to be made available and approved under the EU Central Securities Depositories Regulation.
I OVERVIEW OF GOVERNANCE REGIME

i Sources of law and enforcement

Companies in Japan are generally regulated by the Companies Act. Further, listed companies in Japan are also regulated by the Financial Instruments and Exchange Law (FIEL) and the Securities Listing Regulations published by each securities exchange in Japan (SLRs). As the securities exchanges in Japan, in publishing their SLRs, generally follow the SLRs published by the Tokyo Stock Exchange (TSE), which is the largest securities exchange in Japan, the information we provide hereafter focuses on the SLRs published by the TSE, and references to ‘SLRs’ are to the SLRs published by the TSE.

In the event that a company violates the Companies Act, depending on the specific provision that is violated, shareholders or creditors of a company are generally entitled to bring a lawsuit against the company. The Financial Services Agency of Japan is responsible for enforcing the FIEL and, depending on the specific provision that is violated, may levy monetary fines, prison sentences, or even both, in connection with certain violations thereof. SLRs are enforced by the specific securities exchange that published the applicable SLR. Violations of the SLRs generally lead to the securities exchange requiring that company to submit an improvement plan. In extreme cases, securities exchanges may even delist the shares of the company.

ii Nature and recent developments in the corporate governance regime

The Companies Act, which has been in effect since 2006, allows a company some flexibility with its governance organisation, such as whether to have a board of directors and whether to have a corporate auditor. Revisions to the SLRs on 30 December 2009, however, require a listed company to have one or more independent directors or corporate auditors (i.e., outside directors or corporate auditors (as defined below) who are not likely to have a conflict of interest with the company’s shareholders). If an independent director or corporate auditor has business or other relationships with the company (e.g., if the director or corporate auditor is a main business partner, consultant or a major shareholder of the company), this relationship must be disclosed, and the reasons the person was appointed as an independent director or corporate auditor must also be provided in the company’s corporate governance reports under the SLRs. Further, the Companies Act reform bill was enacted on 1 May 2015, and

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1 Mitsuhiro Harada and Tatsuya Nakayama are partners at Nishimura & Asahi.
3 Act No. 25 of 13 April 1948.
the Reform Act of 2015 states that if a large public company that is required under the FIEL to submit a securities report does not have an outside director, it must explain the reason for this in its business report and upon its annual shareholders’ meeting. On 5 February 2014, the TSE announced a revision to the SLRs requesting that listed companies make efforts to elect at least one independent director because, in practice, most listed companies had elected an independent corporate auditor. In addition, the TSE released Japan’s Corporate Governance Code (Code) on 1 June 2015 which was most recently revised on 1 June 2018.4 The Code, which is applicable to all companies listed on securities exchanges in Japan, establishes fundamental principles for effective corporate governance, including a structure for transparent, fair, timely and decisive decision-making by companies, which pay due attention to the needs and perspectives of shareholders and also customers, employees and local communities. The Code stipulates that listed companies should appoint at least two independent directors, and that listed companies should examine whether the purpose of cross-shareholdings is appropriate, and whether the benefits and risks from each holding cover the company’s cost of capital.

In Japan, roughly speaking, there were two types of governance systems prior to enactment of the Reform Act of 2015: a company with a corporate auditor and a company with committees.5 In a company with a corporate auditor, the corporate auditor is an organisation that audits the directors’ execution of their duties. This type of organisation is the primary type of company in Japan. On the other hand, in a company with committees (without a corporate auditor), three stipulated committees perform auditing and monitoring functions: a nominating committee that decides on the agenda of nominating or dismissing directors at shareholders’ meetings; an audit committee that audits the execution of duties of executive officers and directors; and a compensation committee that determines compensation for each executive officer and director.

A majority of each of these committees must consist of outside directors. In a company with committees, because a board may delegate substantial parts of its decision-making authority over the management of the company to the executive officers, the board is expected to monitor the execution of the executive officers’ duties rather than to make decisions (although a director can serve concurrently as an executive officer). This type of organisation was first introduced in 2003 and is used only by a limited number of large companies in Japan.

The Reform Act of 2015 further introduced another type of governance structure – a company with an audit committee – anticipating that this structure makes it easier for Japanese companies to select a monitoring model involving outside directors. A reduction of costs for selecting the monitoring model is achieved by decreasing the number of outsiders. A company with an audit committee is not required to possess a nominating committee or compensation committee. The audit committee must have more than three directors as members, and the majority of them must be outside directors.

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5 Following enactment of the Reform Act of 2015, companies with committees are now called companies with nominating committee, etc., but the meaning of the term is unchanged. As a matter of convenience, we hereinafter refer to this type of company as a ‘company with committees’.
The number of companies with an audit committee has reached around 900, which is almost equal to one-quarter of the total number of listed companies in Japan. This is because, as previously discussed, being a company with an audit committee makes it possible for a listed company with a board of corporate auditors to decrease the number of outsiders. While the Code stipulates that a listed company should appoint at least two independent directors, if a listed company has a board of corporate auditors, half or more of the company auditors need to be outside company auditors under the Companies Act. If a company with a board of corporate auditors transforms into a company with an audit committee, such requirement to retain outside company auditors would not be applicable.

II CORPORATE LEADERSHIP

i Board structure and practices

Structure and composition of the board

Japanese companies generally use a one-tier board structure. Under the Companies Act, although a company may choose not to have a board of directors, the typical form of management structure is a company with a board of directors, where the board has decision-making authority. In a company without a board of directors, while there is no board, unless otherwise provided in the company’s articles of incorporation (articles), a majority of the directors will decide business matters on behalf of the company. As compared with a company with a board of directors, however, shareholders of a company without a board have broader decision-making authority, such as the ability to approve certain competitive activities or to approve activities that result in conflicts of interest of directors.

A company with a board of directors is required to have three or more directors. A company without a board, on the other hand, is required to have only one or more directors. A company with committees must also have a board, and therefore it is required to have three or more directors. A company with an audit committee is required to have a board as well, and therefore to have three or more directors. In addition, in a company with an audit committee, the audit committee must have more than three directors as members, and the majority of them must be outside directors. In Japan, no director is required to be a representative of the employees of the company.

Legal responsibilities of the board

Except for a company with committees, a company with a board of directors generally must have a corporate auditor. In a company with a corporate auditor and a board of directors, the board has decision-making authority over the management of the company, and representative directors and other executive directors are responsible for executing the company management decisions. The corporate auditor generally audits the execution of duties by directors, with a view to compliance with law.

In a company with committees, while the board may have decision-making authority over the management of the company, it usually delegates substantial portions of this authority to executive officers, and representative executive officers are responsible for executing the company management decisions. Accordingly, for example, executive officers may be delegated the authority to decide on the acquisition of important assets, incurrence of significant debt, appointment of important employees and establishment of important organisational changes, while those are items that would be determined by a board of directors in a company with a corporate auditor. The board of a company with committees
would then, inter alia, determine the agendas of shareholders’ meetings, approve competitive activities and activities that result in conflicts of interests of directors, and appoint committee members. The audit committee audits the execution of duties by directors with a view not only to compliance with the applicable laws, but also the appropriate performance of their duties.

In a company with an audit committee, the core role of the board of directors is to set the basic management policy, develop the internal control system, and supervise the execution of business by other directors, including representative directors and other executive directors. Although important business decisions, such as disposing of or acquiring important assets, are required to be made by the board of directors, its shareholders can, through the company’s articles, enable the board to delegate these decisions to representative directors or other executive directors. In addition, if the majority of the board is held by outside directors, the board can delegate these decisions to representative directors or other executive directors.

**Delegation of responsibilities**

In a company with a corporate auditor and a board of directors (which is typical of Japanese companies), the board often delegates decisions on certain matters regarding day-to-day operations to individual directors, such as representative directors or other executive directors. However, the board may not delegate certain important company matters to individual directors, including:

- disposing of or acquiring important assets;
- incurring significant debts;
- electing or dismissing important employees, including managers;
- issuing shares at a fair price; and
- approving audited financial statements.

In a company with committees, the nominating, audit and compensation committees each have their own authority under the Companies Act and cannot further delegate substantial parts of their responsibilities. Apart from the committees’ responsibilities, the board has sole decision-making authority over the management of the company with respect to certain matters, which include basic management policy; matters necessary for the execution of the audit committee’s duties; and if there are two or more executive officers, matters relating to the interrelationship between executive officers.

Similarly, in a company with an audit committee, the audit committee has its own authority and cannot further delegate a substantial part of its responsibility. Apart from the audit committee’s responsibility, the board has sole decision-making authority over the management of the company with respect to certain matters, which include basic management policy; and matters necessary for the execution of the audit committee’s duties.

A board of directors in a company with committees often delegates decision-making authority over the management of the company to the executive officers (as described above). The board may not, however, delegate certain important matters (in addition to the above-mentioned matters) to executive officers (or to individual directors, because each individual director in a company with committees generally does not have decision-making authority), including:

- approval of share transfers (if the company is a closed company);
- holding of shareholders’ meetings;
- appointment or removal of committee members;
d) election or dismissal of executive officers; and

e) determining the contents of agreements for mergers, demergers or share exchanges.

As stated above, in a company with an audit committee, although important business decisions such as disposing of or acquiring important assets are required to be made by the board of directors, its shareholders can, through the articles, enable the board to delegate these decisions to representative directors or other executive directors. If the majority of the board is held by outside directors, the board can also delegate these decisions to representative directors or other executive directors.

In Japan, normally the board appoints the CEO or its equivalent from among its representative directors (in the cases of a company with a corporate auditor and a board of directors, and a company with an audit committee) or representative executive officers (in the case of a company with committees). Generally, the CEO will chair the board meeting, and will perform the role of chair of the board in this sense.

Remuneration of directors

In a company with a corporate auditor and a board of directors, the aggregate amount of remuneration of all directors is determined at a shareholders’ meeting (if not provided in the articles), and the board determines the remuneration of each director within the parameters of this aggregate amount. The same would apply to a company with an audit committee. In addition, in a company with an audit committee, the audit committee is given the power to express its view on the election, dismissal, resignation and compensation of other directors at the shareholders’ meeting so that the shareholders can make an informed decision on these matters.

On the other hand, in a company with committees, the compensation committee determines the remuneration of each director in accordance with the remuneration policy prescribed by the committee (therefore, shareholders’ approval is not required).

An open company (i.e., a company, typically listed, whose articles do not require, as a feature of all or part of its shares, the company’s approval for any transfer of those shares, whether it is a company with a corporate auditor, a company with an audit committee or a company with committees) must disclose the aggregate remuneration of all of its directors, corporate auditors and executive officers to its shareholders in its business report. In addition, a listed company must disclose the following information in its securities report: the amount of remuneration and a breakdown by type of payment (e.g., salary, bonus, stock option or retirement payment) for each director, corporate auditor and executive officer if his or her remuneration for the relevant fiscal year is ¥100 million or more (out of 2,421 companies listed as of 3 July 2018, there were 538 directors, corporate auditors or executive officers who received ¥100 million or more as remuneration for the fiscal year ending March 2018); and an explanation of the company’s policies for remuneration of directors, corporate auditors and executive officers, and how remuneration is determined if these policies are put in place (e.g., as set forth above, ‘remuneration for a director consists of fixed compensation and a bonus, with the fixed portion determined based on the position of the individual and the bonus determined based on the performance of the company and the individual’).

The Code stipulates that, in addition to making information disclosure in compliance with relevant laws and regulations, listed companies should disclose and proactively provide
information regarding their boards’ policies and procedures for determining the remuneration of senior management and directors to enhance transparency and fairness in decision-making and ensure effective corporate governance.

**Board and company practice in takeovers**

Listed companies in Japan generally use a ‘precaution-type anti-takeover measure’,6 whereby a company announces a takeover process rule but does not issue any securities at first. Although there are many variations of this measure, generally a company announces in advance a certain takeover process rule to the effect that a takeover bidder must provide sufficient information to a board of directors about the bidder and the terms of its bid before the beginning of its takeover, and the bidder refrains from purchasing the shares of the company unless the board of the company completes its analysis of the terms of the bid (but the analysis by the board must be completed within a certain period, such as 60 days). If these procedures are respected by the bidder, the board will not implement anti-takeover measures, but where the board decides that the value of the company would be damaged, or maximising value would be difficult under the takeover (including if the bidder does not comply with the procedures), usually based on analysis by a third-party committee, certain anti-takeover measures may be implemented, typically the issuance of share purchase warrants free of charge to all shareholders that cannot be exercised by the bidder.

In Japan, the *Bull-Dog Sauce* case 7 was the first case where actual share purchase warrants were issued to shareholders as an anti-takeover measure. In this case, the Supreme Court of Japan found that the decision regarding whether control by a specific shareholder would harm the value of the company or damage the common interests of shareholders should be ultimately determined by the shareholders who hold its corporate value, and that if, at a shareholders’ meeting, the shareholders decide that the takeover would harm the value of the company or damage the common interests of the shareholders, that decision should be respected. In this case, because the issuance of share purchase warrants was approved by more than 80 per cent of the voting rights, the Supreme Court found that the issuance was valid.

Since this case, we have seen fewer attempts at hostile acquisition.8 In addition, a tender offer regulation under the FIEL was amended in 2007 to the effect that the offeror must disclose more information prior to the tender offer, and that the target company has the right to issue a questionnaire to the offeror. As a result, the total number of listed companies that have adopted anti-takeover measures has slightly decreased for 10 consecutive years (from 570 companies at the end of July 2008 to 387 companies at the end of November 2018).

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6 The Code stipulates that anti-takeover measures must not have any objective associated with entrenchment of the management or the board.
7 Supreme Court, 7 August 2007.
8 For example, in November 2012, PGM Holdings commenced a hostile takeover bid against Accordia Golf, but the tender offer failed to acquire 20 per cent of the shares. In March 2013, Cerberus Capital Management, LP (Cerberus) commenced a hostile takeover bid against Seibu Holdings Inc, but Cerberus only acquired 3.26 per cent (originally it held 32.22 per cent and ended up holding 35.48 per cent) through the tender offer. In December 2014, Prospect Co, Ltd commenced a hostile takeover bid against Yutaka Shoji Co, Ltd, but the tender offer failed to acquire 51 per cent of the shares. In April 2018, Japan Asia Group Limited commenced a hostile takeover bid against Sanyo Homes Corporation, but Japan Asia Group Limited only acquired 8.76 per cent (originally it held 4 per cent and ended up holding 12.76 per cent) through the tender offer.
ii Directors

Appointment, nomination, term of office

Directors are elected by a resolution at a shareholders’ meeting. In a company with a corporate auditor and a board of directors, the board generally nominates directors to two-year terms of office (maximum; however, in a closed company, the term of office may be extended until the conclusion of the annual shareholders’ meeting for the past fiscal year, which ends 10 years after the time of its election). On the other hand, in a company with committees, the nominating committee nominates directors with one-year terms of office (maximum). Further, in a company with an audit committee, a director who is a member of the audit committee must be nominated separately from the other directors, and the statutory maximum term of office for a director who is a member of an audit committee is two years, while for other directors it is one year.

Directors can be dismissed at any time by a resolution at a shareholders’ meeting. Directors can seek damages for dismissal from the company if they are dismissed without justifiable grounds.

Liability of directors

Generally, directors must perform their duties with the duty of care of a prudent manager in compliance with all laws and regulations, and the articles and resolutions of shareholders’ meetings, in a loyal manner.

In addition to the foregoing, in Japan the business judgement rule is applied when considering whether a certain decision of a director complies with the director’s duty of care as a prudent manager to the company. Under the business judgement rule in Japan, even if a director has made a certain decision that has resulted in damage to the company, the director is, in principle, deemed to have complied with his or her duty of care of a prudent manager, unless the director made important and careless mistakes in the recognition of facts, or the process and content of the director’s decision-making is particularly unreasonable or improper as determined by a management expert. Nevertheless, Japanese courts are not likely to apply the business judgement rule in cases where it can be shown that the director has a conflict of interest.

Recently, in the Apamanshop case,9 the business judgement rule was affirmed by the Supreme Court. In this case, Apamanshop Holdings bought out the subsidiary’s minority shareholders at a price per share higher than that set forth in the valuation report to make the subsidiary its wholly owned subsidiary. The Court cited the business judgement rule in finding that the directors of Apamanshop Holdings did not breach their duty of care, because a smooth purchase of the minority shareholders’ shares was beneficial in maintaining good relationships with Apamanshop’s member shops who were shareholders of Apamanshop, the corporate value of the subsidiary after the restructuring was expected to increase and the decision-making process employed by Apamanshop’s directors (i.e., the management committee convened to discuss the purchase and a legal opinion was obtained) was not found to be unreasonable.

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9 Supreme Court, 15 July 2010.
Role and involvement of outside directors

Outside directors are defined under the Companies Act as directors who are not serving and who have not previously (generally for the past 10 years) served as executive directors, executive officers or employees (including managers) of the relevant company or any of its subsidiaries, its parent companies or its sibling companies. In a company with committees, a majority of the members of each committee must be outside directors, with each committee required to consist of at least three members. In a company with an audit committee, the audit committee must have more than three directors as members, and the majority of them must be outside directors. On the other hand, in a company with a corporate auditor and a board of directors, there are no such outside director requirements concerning board composition.

The TSE requires listed companies to have one or more independent directors or corporate auditors (see Section I). Therefore, it is considered that, for example, persons who work for a company's parent company or its business partner, or consultants who receive significant fees from a company, cannot be independent directors or corporate auditors of the company. Further, on 5 February 2014, after submission of the Company Act reform bill (which states that if a large public company that is required under the FIEL to submit a securities report does not have an outside director, it must explain the reason why in its business report and at its annual shareholders’ meeting), the TSE announced a revision to the SLRs that requests that listed companies make efforts to elect at least one independent director (see Section I).

The Code stipulates that if the organisational structure of a company is either that of a company with a corporate auditor and a board of directors, or a company with an audit committee, and independent directors do not constitute a majority of the board, to strengthen the independence, objectivity and accountability of board functions in matters of nomination and remuneration of the senior management and directors, the company should seek appropriate involvement and advice from independent directors in the consideration of such important matters as nominations and remuneration by establishing independent advisory committees under the board, such as an optional nomination committee and an optional remuneration committee, to which independent directors make significant contributions.

Legal duties and best practice for directors

The legal duties of outside directors are generally the same as those of other directors or executive officers. Where provided for in a company’s articles, however, the company may contractually limit the liability (to the company) of its outside directors who are not aware of the wrongdoing and not grossly negligent in performing their duties to the extent of the larger of both an amount determined in advance, within the range provided in the articles, and an amount equal to double his or her annual remuneration.

Outside directors generally should review the performance of management, conflict of interest issues, the process and propriety of management decisions and general compliance, and work to improve the corporate culture. Although other directors should take on these roles as well, outside directors are expected to do so more effectively because of their objective position.

Recently, many companies in Japan have organised third-party committees to audit or review conflict of interest issues, such as management buyout transactions, internal investigations and anti-takeover measures, and an outside director is often included as a member of the committee.
In a company with a corporate auditor and a board of directors, a company with committees or a company with an audit committee, if a director intends to carry out any transactions involving a conflict of interest, approval must be obtained at a board meeting in which that director may not participate. At the board meeting, the potentially conflicted director must disclose material facts about the transaction. After the transaction, the director must also report material facts about the transaction to the board without delay.

In addition, in a company with an audit committee, an \textit{ex ante} approval by the audit committee of a self-dealing transaction between a director and the company has the effect of switching the burden of proof regarding the violation of a director’s duty from the director to the plaintiff shareholders.

### Auditors

In a company with a corporate auditor, the corporate auditor audits the execution of the directors’ duties, including preparation of financial statements. If a company has a board of corporate auditors, the company is required to have three or more company auditors, and half or more of them must be outside company auditors. To ensure the independence of the corporate auditor, its term of office must continue until the conclusion of the annual shareholders’ meeting for the last fiscal year, which ends within four years of the time of its election (in a closed company, the term of office may be extended until the conclusion of the annual shareholders’ meeting for the last fiscal year, which ends within 10 years of the time of its election). On the other hand, a company with committees does not have a corporate auditor. Instead, the audit committee, which consists of directors whose terms of office are one year (maximum), audits the execution of directors’ duties, including preparation of financial statements (see Section II). Similarly, a company with an audit committee does not have a corporate auditor. In a company with an audit committee, which consists of directors whose terms of office are two years (maximum), the audit committee is responsible for auditing the execution of directors’ duties, including preparation of financial statements.

In addition, a large company (i.e., a company with either stated capital in the balance sheet at the end of the most recent fiscal year of ¥500 million or more, or total liabilities as of the end of its most recent fiscal year of ¥20 billion or more) and a company with committees are required to have an accounting auditor, which must be either a certified public accountant or an audit firm. An accounting auditor’s terms of office must continue until the conclusion of the annual shareholders’ meeting for the last fiscal year, which ends within one year of the time of their election.

To ensure the independence of corporate auditors, the following are given the power to determine the contents of proposals regarding the election and dismissal of accounting auditors to be submitted to a shareholders’ meeting: a corporate auditor or a board of corporate auditors in a company with a corporate auditor, an audit committee in a company with committees, and an audit committee in a company with an audit committee.

### DISCLOSURE

#### i Financial reporting and accountability

A representative director or representative executive officer must prepare a financial statement within three months of the end of each business year. A large company that is required to file a securities report under the FIEL (e.g., a listed company or a company with at least 1,000 shareholders as of the end of any fiscal year within the past five years is required to file a
securities report) must prepare a consolidated financial statement under the Companies Act. However, the FIEL requires all listed companies to prepare a securities report that includes consolidated financial statements (unless they do not have any subsidiaries to be consolidated under the FIEL), as well as a quarterly report. In addition, a representative director or representative executive officer of a listed company must submit a confirmation letter as an attachment to its securities report or other reports, in which he or she confirms that the description of the report is written properly in accordance with the FIEL.

A company with a board of directors must attach financial statements and business reports to the convocation notice of its annual shareholders’ meeting. The company must also keep those documents at its head office for five years, beginning two weeks (one week, in the case of a company without a board) prior to the date of the shareholders’ meeting. Under the FIEL, a listed company is required to submit its securities report within three months of the end of its fiscal year.

ii Communications with shareholders

Under the Companies Act, directors, corporate auditors and executive officers must sufficiently explain the specific issues related to the agenda of the shareholders’ meeting if an enquiry is made by a shareholder. In addition, to improve investor relations, Q&A sessions during shareholders’ meetings are now actively encouraged in Japan. Furthermore, Japanese listed companies often hold informal meetings with investors about financial statements and related issues.10

IV CORPORATE RESPONSIBILITY

e Internal control

Boards of large companies must develop internal control systems that ensure that directors comply with the laws and the company articles, and that company operations are appropriate. On the other hand, there is no legal requirement for internal control systems for companies that are not categorised as large companies or companies that do not have a board of directors.

Additionally, in a company with committees, regardless of its size, the board must develop internal control systems that ensure that executive officers comply with the laws and the articles, and that company operations are appropriate. A listed company must submit internal control reports that describe the systems that are in place to ensure that the financial reports of the company are properly made in compliance with the laws.

Similarly, in a company with an audit committee, regardless of its size, the board must develop internal control systems that ensure that directors comply with laws and the company articles, and that company operations are appropriate.

Specific contents of internal control systems may be decided at the discretion of companies. In its internal control rules, a company often provides general matters related to the control of information and documents; crisis management systems; necessary internal rules and organisations; and compliance programmes, etcetera.

10 The Code stipulates that listed companies should, proactively and to the extent reasonable, respond to requests from shareholders to engage in dialogue so as to support sustainable growth and increase corporate value over the mid to long term, and that the board should establish, approve and disclose policies concerning the measures and organisational structures aimed at promoting constructive dialogue with shareholders.
Under the Whistle-blower Protection Act, the employer of a whistle-blower is prohibited from treating the whistle-blower in any disadvantageous manner, such as by demotion or reducing his or her salary, if this is in response to the employee’s whistle-blowing.  

ii Corporate social responsibility to employees and wider society
In Japan, a company is required to hire a certain number of persons with a disability and to take measures to continue to employ elderly persons under affirmative action-related laws. Activities related to corporate social responsibility by some companies involve actions to be taken in the interests of their stakeholders, such as preserving the environment, supporting volunteer work and creating jobs, although these are not generally required by law.

V SHAREHOLDERS
i Shareholder rights and powers

Voting rights
In general, a company must treat its shareholders equally depending on the class and number of shares owned, and therefore each voting share has the same voting right. The Companies Act does, however, allow for the following exceptions: certain minority shareholders’ rights, such as rights to propose an agenda for a shareholders’ meeting, to inspect accounting books and to apply to a court for dissolution of the company; and different treatment for each shareholder in closed companies in terms of rights to dividends or distribution of residual assets, or voting rights at shareholders’ meetings pursuant to the articles.

In a company with a board of directors, matters provided for in the company’s articles and the Companies Act may be resolved at a shareholders’ meeting. In the sense that each director must observe resolutions passed at shareholders’ meetings, shareholders have an influence on the board.

Under the Companies Act, shareholders’ approval is required for certain matters, including the following:

a amending the articles;
b mergers, corporate demergers, statutory share exchanges, statutory share transfers, assignment of business and reduction of stated capital;
c election or dismissal of directors and corporate auditors; and
d decisions regarding dividends of surplus (if a company has an accounting auditor and a board of corporate auditors or committees, however, and the term of office of its directors is no more than one year, the authority to determine the distribution of dividends of surplus can be delegated to the board by the articles).

Rights of dissenting shareholders
Shareholders who object to the proposed agenda specifically listed under the Companies Act, such as certain amendments to the articles and certain mergers and acquisitions, may demand that the company purchase their shares at a fair price. This price will be determined

11 The Code stipulates that as a part of establishing a framework for whistle-blowing, companies should establish a point of contact that is independent of the management, and that internal rules should be established to ensure the confidentiality of the information provider and prohibit any disadvantageous treatment.

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through negotiation between the parties (i.e., the company and the dissenting shareholder) or by court decision. If a demand is made and the parties are able to come to an agreement on the share price, the company must make the payment to the dissenting shareholder within 60 days of the effective date of the transaction contemplated in the proposed agenda to which the dissenting shareholder objected. If the parties are unable to reach an agreement with regards to the share price within 30 days of the effective date, either the dissenting shareholder or the company may file a petition to a court for a determination of a fair price within 30 days of the expiration of that initial 30-day period.

In the *Tecmo* case,\(^\text{12}\) the Supreme Court presented a framework for determining a fair price under appraisal proceedings in cases where a joint share transfer (where two or more companies form a new holding company under the Companies Act) creates synergies. In this decision, the court found that:

\( a \) a fair price should, in general, be the value that the share should have had on the date on which the shareholder made a demand to the company for the repurchase of the share, on the assumption that the share transfer ratio designated in the share transfer plan is fair; and

\( b \) if a share transfer comes into effect through procedures that are generally recognised as fair, the share transfer ratio should be seen as fair unless special circumstances existed that hindered the shareholders’ ability to make reasonable decisions in the shareholders’ meeting.

**ii  Shareholders’ duties and responsibilities**

**Major shareholders’ duties and practice**

Under the Companies Act, shareholders do not owe duties to the company other than paying the required share capital contribution for the shares to which they have subscribed. However, under the SLRs, if a listed company conducts certain transactions with its controlling shareholder, such as issuing shares or conducting mergers or business alliances, the company must obtain an opinion from a third party who is independent from its controlling shareholder that the transaction would not undermine the interests of minority shareholders of the company.

There are no specific duties of controlling shareholders to the company or other minority shareholders under the Companies Act. In an extreme case where a controlling shareholder abuses the company or other minority shareholders (e.g., a transaction with the company involving extremely unfair consideration or a squeeze-out of minority shareholders at an extremely low price), it may be liable for the abusive acts under the Civil Code or other laws, although there are no clear-cut standards for such cases.

**iii  Shareholder activism**

**Derivative actions**

Under the Companies Act, a shareholder can demand that the company file an action to pursue, inter alia, directors or corporate auditors for their liabilities to the company if the shareholder has held shares of the company for the preceding six consecutive months or more. If the company does not file an action within 60 days of receipt of the demand from the relevant shareholder, the shareholder can file an action on behalf of the company.

\(^{12}\) Supreme Court, 29 February 2012.
Further, multiple derivative actions are allowed, subject to certain conditions, where, inter alia, a director or corporate auditor of a company might be sued by a shareholder of the company’s ultimate wholly owning parent company as long as, inter alia, the shareholder owns 1 per cent or more of the total voting rights or outstanding shares of the ultimate parent company, and the book value of the shares of the company constitutes more than 20 per cent of the total assets of the ultimate parent company as of the date of occurrence of the underlying events that gave rise to relevant obligations of the director or corporate auditor.

**Proxy battles**

The FIEL stipulates the rules for proxy fights in listed companies. Under the FIEL, a shareholder or the company that solicits a proxy must provide the other shareholders with a certain set of documents (including a proxy and reference materials that set forth the agenda). It is generally considered to be difficult for a shareholder to embark on and succeed in such a proxy fight, mainly because the shareholder does not know the agenda of the shareholders’ meeting until the convocation notice is sent by the company. In the past, because the Companies Act could be interpreted as allowing companies to refuse to provide the names, addresses and other information of other shareholders to a shareholder who wishes to solicit the proxy if the bidder is or works for a competitor of the company, the bidder could encounter even more difficulties. However, under the current Companies Act, even if the bidder is a competitor of the company, the company may not refuse to provide the information about other shareholders for that reason. In this sense, one of the hurdles to a shareholder embarking on a proxy fight would be alleviated.

**iv Takeover defences**

As described above, listed companies in Japan generally use a precaution-type anti-takeover measure. However, since the *Bull-Dog Sauce* case in August 2007, we have seen fewer attempts at hostile acquisition. In addition, the tender offer regulations under the FIEL were amended so that an offeror must now disclose more information prior to a tender offer and a target company has the right to issue a questionnaire to the offeror. In consequence, the number of listed companies that adopt anti-takeover measures has slightly decreased for 10 consecutive years.

**v Contact with shareholders**

Under the Companies Act, directors, corporate auditors and executive officers must sufficiently explain the specific issues related to the agenda of the shareholders’ meeting if an enquiry is made by a shareholder. In addition, to improve investor relations, Q&A sessions during shareholders’ meetings are now actively encouraged in Japan. Furthermore, Japanese listed companies often hold informal meetings with investors about financial statements and related issues.

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13 The company that directly or indirectly owns 100 per cent of the shares of the ‘subsidiary’ company, but that is itself not a wholly owned subsidiary of any other company.

14 The Code stipulates that listed companies should, proactively and to the extent reasonable, respond to requests from shareholders to engage in dialogue so as to support sustainable growth and increase corporate value over the mid to long term, and that the board should establish, approve and disclose policies concerning the measures and organisational structures aimed at promoting constructive dialogue with shareholders.
VI OUTLOOK

The Reform Act enacted in May 2015 has improved corporate governance (e.g., the comply or explain rule for the appointment of outside directors), and regulates the relationship between parent companies and their subsidiaries (e.g., clarifying the liabilities and rights of parent companies with respect to their subsidiaries (including derivative actions by shareholders of a parent company against the directors of its subsidiary)). In addition, the TSE formulated the Code in June 2015, which was revised in June 2018. The Code has established fundamental principles for effective corporate governance, including a structure for transparent, fair, timely and decisive decision-making by companies, which pays due attention to the needs and perspectives of shareholders and also customers, employees and local communities.

Furthermore, a reform of the Companies Act is currently being discussed to stipulate that a company with a board of corporate auditors that is an open company (i.e., a company, typically listed, whose articles do not require as a feature of all or part of its shares the company’s approval for any transfer of those shares, whether it is a company with a corporate auditor, a company with an audit committee or a company with committees) or a large company (i.e., a company with either stated capital in the balance sheet at the end of the most recent fiscal year of ¥500 million or more, or total liabilities as of the end of its most recent fiscal year of ¥20 billion or more), and is required under the FIEL to submit a securities report, needs to adopt an outside director. Corporate governance will continue to be a hot issue in Japan.
I OVERVIEW OF GOVERNANCE REGIME

i Sources of law and enforcement
The Korean Commercial Code (KCC) is the basic law on corporate governance in Korea. Additional matters regarding the governance of listed companies are stipulated in the Listing Rules on the Securities Market, the Listing Rules on the KOSDAQ Market and other rules set forth by the Korea Exchange (KRX), which have been established by the Financial Investment Services and Capital Markets Act (FSCMA) and the special rules for listed companies set forth in the KCC.

The Act on Corporate Governance of Financial Companies (Corporate Governance Act) shall apply in preference to the KCC with respect to the corporate governance of financial companies.

Although they are not related to corporate governance, the FSCMA sets forth separate rules for matters related to finance such as the issuing of new shares of a listed company or restructuring (including mergers and spin-offs), as well as various disclosures such as the registration statement.

The Ministry of Justice (MOJ) is responsible for the issuance of ex ante rulings under the KCC, and for the ex post facto imposition of fines or other sanctions for any breach of the KCC.

The Financial Services Commission (FSC), and the Financial Supervisory Service (FSS), which has been delegated with certain authorities of the FSC, are responsible for the issuance of rulings under the Corporate Governance Act and the enforcement thereof (including sanctions).

The KRX also manages and regulates listed companies through the examination and management of listings.

ii Nature and recent development of the corporate governance regime
In terms of corporate governance, under the KCC, joint-stock companies and limited companies, which are the most common corporate entity forms in Korea, have four corporate governance bodies:

a the general shareholders’ meeting;
b a board of directors composed of registered directors of the company;

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1 Hyeon-Deog Cho and Min-Yung Hong are senior attorneys and Jung-Chull Lee is a foreign attorney at Kim & Chang.
Among these bodies, the general shareholders’ meeting is the supreme decision-making body, and it determines fundamental matters pursuant to the KCC and the articles of incorporation of the company. The board of directors makes decisions on important operational matters that are not specially reserved for the resolution of the general shareholders’ meeting by the KCC and the articles of incorporation. Boards of directors consist of executive directors, outside directors, and non-executive, non-outside directors. Given that executive directors generally become members of the management, the management and the board of directors are not always clearly distinguished. The representative director has the authority to perform matters resolved by the board of directors, and to decide and perform ordinary management activities. The statutory auditor or the audit committee supervises the management of the company’s business and audits the company’s financials and accounts.

Amendments to the KCC in 2012 introduced the executive officers governance structure, consisting of officers who are not registered directors but who are responsible for carrying out the company’s daily operations and implementing decisions of the board of directors, and decisions of the general shareholders’ meeting under the supervision of the board of directors. If a company decides to have executive officers under its articles of incorporation, there will be no representative director. Accordingly, the company will be able to clearly distinguish the management and the board of directors by separating the executive functions from the board of directors; however, there have not been many cases where such structure has been actually used in Korea.

Following the recent introduction of a stewardship code, which is accepted by the National Pension Service and other institutional investors, and the increased role of proxy advisory organisations, demands for the improvement of the governance regime, including management transparency, board diversity and the expertise of outside directors, has been growing. Accordingly, there has been an increase in the number of women, foreigners and professional managers being appointed as outside directors, and increased emphasis has been placed on the qualification of the independence of outside directors and audit committee members.

In particular, seeking board-focused management, the Corporate Governance Act stipulates that the chief operating officer, who is in charge of strategic planning, financial management, risk management and other major issues, shall be appointed or dismissed by a resolution of the board of directors.

II CORPORATE LEADERSHIP

i Board structure and practices

Under Korean law, boards of directors shall have a single-tier structure. Except with regard to small companies, a board of directors may not be replaced, as it is an essential body that is required under the KCC.

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2 Articles 408-2 to 408-9.
3 In Korea, discussions continue regarding using governance restructuring to reinforce the independence of boards of directors and statutory auditors (and audit committees) from controlling shareholders.
However, the KCC adopts a committee within the board of directors system, whereby a committee established within the board of directors may be delegated with certain authorities of the board of directors and resolve on relevant matters.\(^4\) Under the KCC, the board of directors may decide whether to establish any committee at its own discretion pursuant to the company's articles of incorporation.

A listed company with total assets equal to or greater than 2 trillion won as of the end of the latest fiscal year (thus being a large listed company) must establish an audit committee and a committee to recommend outside director candidates.\(^5\)

Financial companies are obliged to establish:

- a committee in charge of recommending candidates for outside directors, representative directors and audit committee members;
- an audit committee;
- a remuneration committee; and
- a risk management committee.\(^6\)

The independence of the audit committee has been strengthened: at least two-thirds of the audit committee of a financial company or a large listed company is required to be composed of outside directors.

In addition to these legally required committees, listed companies are increasingly requiring the professional examination of a separate committee: for example, an internal transaction committee that examines the fairness of transactions between affiliates and specially related parties, or a remuneration committee that examines the remuneration system for directors and officers.

**Composition of the board**

The board of directors shall be composed of at least three directors, and there is no limit on the maximum number of board members. However, a company whose paid-in capital is less than 1 billion won may elect not to establish a board of directors.\(^7\)

At least one-quarter of the total number of directors appointed in listed companies shall be outside directors, and a large listed company shall have at least three outside directors who will constitute a majority of the total number of directors.\(^8\)

**Company representatives**

In principle, the representative director represents the company externally, and has the authority to undertake matters resolved by the board of directors, and to decide on and perform ordinary management activities internally. The board of directors has the authority to make material decisions regarding the company (e.g., the disposal or transfer of its material assets and the borrowing of large-scale property).\(^9\)

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\(^4\) Article 393-2 of the KCC.

\(^5\) Articles 542-8 and 542-11 of the KCC.

\(^6\) Article 16 of the Corporate Governance Act.

\(^7\) Article 383 of the KCC.

\(^8\) Article 542-8 of the KCC.

\(^9\) Article 393 of the KCC.
In addition, Korean courts consider that a resolution of the board of directors shall be required for important matters that have not been generally and specifically delegated to the representative director by the board of directors and that do not fall under ordinary day-to-day operations.10

Directors participate in the decision-making processes of the board of directors, and exercise a supervisory role over the operations of the representative director or representative executive officer. However, in principle, a director may not represent a company without a delegation of the board of directors, the representative director, or both.

Legal responsibilities of the board
Directors shall be jointly and severally liable for damage suffered by the company if they have violated any law or the articles of incorporation due to their wilful misconduct or negligence, or if they have neglected their duties. If the foregoing acts have been conducted in accordance with a resolution of the board of directors, the directors who have consented to such resolution shall assume the same liability against the company.11

Directors may be exempt from the foregoing liabilities pursuant to unanimous shareholders’ consent (this is highly unlikely for listed companies). The 2012 amendments to the KCC also provide that a director’s liability that exceeds six times his or her annual salary (or three times, in the case of outside directors) may be exempt if the company has set forth relevant matters regarding this in the articles of incorporation in advance.12 However, such limits on liability shall not apply in certain cases, such as damage caused by a director’s wilful misconduct or gross negligence, or by his or her violation of certain regulations regarding self-dealing (see below) provided under the KCC.

Directors may be liable under the Criminal Act for breach of fiduciary duty if they have breached their duty of care as bona fide managers or their fiduciary obligation to the company, and if the company has suffered damage due to such breach and such director or third party profited therefrom.13

Control of the board
In principle, meetings of the board of directors may be convened by any director. However, the articles of incorporation typically provide that the representative director is authorised to convene meetings of the board of directors. Any director may convene meetings of the board of directors if he or she is authorised to convene such meetings by a resolution of the board of directors.14

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10 The courts view that, if a representative director acts for and on behalf of a company at his or her own discretion without obtaining a resolution of the board of directors, even when such act an requires the resolution of the board of directors, the relevant transactional activity shall be effective unless the counterparty knew or was able to know that the resolution of the board of directors had not been obtained. In such case, the company asserting that the counterparty knew or was able to know that the resolution of the board of directors had not been obtained shall assume the responsibility to verify such fact.
11 Article 399 of the KCC.
12 Article 400 of the KCC.
13 Article 355, Paragraph (2) of the Criminal Act.
14 Article 390 of the KCC.
Usually, the representative director concurrently holds the position as chair of the board of directors, and has the authority to convene board meetings. Accordingly, in most cases the representative director, who doubles as chief executive officer and chair of the board, also leads the board of directors and management.

In principle, a financial company shall appoint an outside director as the chair of the board of directors. If a financial company appoints a person who is not an outside director as chair, a representative of the outside directors shall be appointed separately.\(^{15}\)

Generally, although they are not legally obliged to do so, listed companies are increasingly appointing an outside director as the chair of the board of directors to ensure the objectiveness and independence of the board’s examination procedures.

**Delegation of board responsibilities**

As the representative director represents the company, the general practice is to affix the seal of the company and attach the certificate of the corporate seal impression issued by the court on him or her so that he or she can carry out the company’s external activities (including the execution of agreements).

In principle, the board of directors has the authority to make material company decisions, and to delegate certain authorities to committees within the board of directors.\(^{16}\)

The board of directors may also delegate certain duties (except for matters requiring a resolution of the board of directors or any committee) to the representative director. Generally, a company’s internal regulations stipulated by a resolution of the board of directors determine the matters on which the representative director is authorised to make decision at his or her own discretion without obtaining a resolution of the board of directors.

**Separation of the roles of CEO and chair**

There is no express provision on the authority or responsibility of the chair of a board of directors under the KCC. However, it is usually provided in the articles of incorporation that the representative director shall concurrently hold the position of chair of the board of directors. The chair shall assume the same responsibilities as other directors.

The representative director has the authority to perform business on behalf of the company, and the chair has the authority to convene and proceed with meetings of the board of directors.

**Direct communication with shareholders**

There is no law or regulation restricting the representative director or the chair from directly communicating with shareholders.

However, as the regulations on fair public disclosure apply to listed companies, and the FSCMA sets forth regulations on insider trading, a listed company’s communications with its shareholders are subject to the limits set forth therein.

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\(^{15}\) Article 13 of the Corporate Governance Act.

\(^{16}\) Article 393-2 of the KCC.
Remuneration of directors and senior management

The general practice is to have a cap on remuneration for all directors resolved at the general shareholders’ meeting, and the amount of remuneration for respective directors resolved by a resolution of the board of directors. 17

For financial companies, matters regarding the methods for the determination and payment of the remuneration of officers (excluding outside directors, non-standing directors, audit committee members, compliance officers and risk management officers) need to be resolved by the remuneration committee, which is a committee established within the board of directors.18

There is no special provision on the amount of remuneration of non-registered officers (senior management). The general practice is to determine such amount at the representative director’s own discretion or under regulations on officer remuneration resolved by the board of directors.

Committees

As discussed above, the board of directors may establish internal committees under the board, such as an audit committee.19

Large listed companies must establish an audit committee and a committee to recommend outside director candidates.20 Financial companies are also required to establish an officer candidate recommendation committee, audit committee, remuneration committee and risk management committee.21

Matters resolved by the committees (excluding the audit committee) may be resolved again by the board of directors.22

Board and company practice in takeovers

In the case of a hostile takeover, it may be possible for a board of directors to use defence tactics such as the acquisition of treasury shares or the issuance of new shares to friendly third parties, including specific shareholders. To issue new shares to friendly third parties, however, express grounds should be given in the articles of incorporation, and other regulatory issues exist (e.g., the issuance price will be restricted under the FSCMA). Furthermore, in a dispute over management control, the issuance of new shares to friendly shareholders for the purpose of defending against such dispute is likely to be invalidated by court.

A listed company may acquire treasury shares by a resolution of the board of directors in an amount up to its distributable profits, and may use methods such as tender offers or purchases on exchange.23

To defend against a hostile takeover, the articles of incorporation can stipulate the supermajority voting system for certain agendas of the general shareholders’ meeting.

17 Article 388 of the KCC.
18 Article 22 of the Corporate Governance Act.
19 Article 393-2 of the KCC.
20 Articles 542-8 and 542-11 of the KCC.
21 Article 16 of the Corporate Governance Act.
22 Article 393-2 of the KCC.
23 Article 165-3 of the FSCMA.
including the dismissal of directors, or the golden parachute system, which requires the payment of a substantial amount of severance pay upon the dismissal of directors; however, it remains controversial whether these systems are permitted under the KCC.

ii Directors

Under Korean law, there is no difference between outside directors and executive directors in terms of their authority, obligations and responsibilities.24 Due to their independent status, there has been a lot of criticism about outside directors, with the contention being that they merely act as a rubber stamp without assuming actual roles in supervising the management of companies. However, outside directors have recently been expanding the scope of their actual participation in board of director decision-making processes by raising their opposition to specific agenda items or requesting additional examination.

In principle, notice shall be given to directors and statutory auditors no later than one week prior to a meeting of the board of directors in order to convene the meeting of the board of directors. This period may be shortened by the articles of incorporation, and the meeting may be held without convocation upon unanimous consent of all the directors and statutory auditors.25

There is no express statutory provision on whether outside directors are allowed or obligated to directly visit a subsidiary of the relevant company or engage in direct communication with lower management or employees. However, it would be difficult for outside directors to force such visits or communication without the permission of the management of a subsidiary, since the independence of an entity cannot be denied even for subsidiaries.

Legal duties and best practice

In terms of legal duties, there is no distinction between executive (inside) directors and outside directors. Both are obliged to perform their duties for the company in good faith in accordance with their duty of care as bona fide managers, and in accordance with the law and the articles of incorporation.26

Liability of directors

A director shall be liable for damage suffered by the company if he or she has violated any law or the articles of incorporation due to his or her wilful misconduct or negligence, or has neglected his or her duties.27 If the foregoing acts were performed in accordance with a resolution of the board of directors, the directors who have consented to such resolution shall assume joint and several liability against the company.

Directors may be exempted from the foregoing liabilities pursuant to unanimous shareholders’ consent (which is highly unlikely for listed companies). As previously

24 There can be an actual difference, however, in the accessibility to a company’s information between executive directors who are engaged in the ordinary business affairs of the company and who are members of the company’s management; and outside directors who have limited involvement in the management of the company.
25 Article 390 of the KCC.
26 Article 382, Paragraph (2) and Article 382-3 of the KCC, and Article 681 of the Civil Code.
27 Article 399 of the KCC.
mentioned, if a director’s liability exceeds six times his or her annual salary (three times, in
the case of an outside director), it may be exempted if the company has set forth relevant
matters in this regard in the articles of incorporation in advance.\textsuperscript{28,29}

If a company fails to do so, shareholders may file a lawsuit against the directors on
behalf of the company based on the directors’ breach of their duties.\textsuperscript{30} Recently, there have
been discussions about expanding the scope of derivative actions and introducing a multi-step
derivative action system: that is, a system whereby the shareholders of a parent company may
institute a derivative action against the directors of a subsidiary if those directors have caused
damage to the subsidiary due to their negligence in the performing of their duties.

Directors may be liable under the Criminal Act for breach of fiduciary duty if they have
breached their duty of care as a \textit{bona fide} manager or a fiduciary obligation to the company,
and the company has suffered damage due to such breach and such director or third party
profited therefrom.\textsuperscript{31}

Directors are appointed by a resolution of the general shareholders’ meeting. When
appointing two or more directors, use of a cumulative voting system may be requested,
although most companies restrict such system through their articles of incorporation.\textsuperscript{32,33}

If a listed company convokes a general shareholders’ meeting to appoint directors, it
shall provide certain information about the candidates to the shareholders. Directors may be
appointed only from the candidates notified as above.\textsuperscript{34}

Large listed companies shall appoint outside directors from those candidates
recommended by the committee formed to recommend outside director candidates.\textsuperscript{35}

For financial companies, candidates for outside directors, representative directors
and audit committee members are recommended by the committee to recommend officer
director candidates.\textsuperscript{36}

The term of office of directors shall not exceed three years; however, such period may
be extended by the articles of incorporation until the adjournment of an annual general
shareholders’ meeting convened with respect to the last fiscal year during a term of office.\textsuperscript{37}

Although there is no special qualification requirement for executive directors, outside
directors should satisfy certain qualification requirements that are mainly related to their
independence.\textsuperscript{38}

\begin{itemize}
\item \textsuperscript{28} Article 400 of the KCC.
\item \textsuperscript{29} However, such limit on liability shall not apply in certain cases, e.g., damages caused by a director’s willful
misconduct, or gross negligence or violation of certain regulations, such as self-dealing, provided under the KCC.
\item \textsuperscript{30} Article 403 of the KCC.
\item \textsuperscript{31} Article 355, Paragraph (2) of the Criminal Act.
\item \textsuperscript{32} Articles 382 and 382-2 of the KCC.
\item \textsuperscript{33} Recently there have been discussions about amending the KCC to make the cumulative voting system
mandatory for listed companies of a certain minimum size.
\item \textsuperscript{34} Articles 542-4 and 542-5 of the KCC.
\item \textsuperscript{35} Article 542-8 of the KCC.
\item \textsuperscript{36} Article 17 of the Corporate Governance Act.
\item \textsuperscript{37} Article 383 of the KCC.
\item \textsuperscript{38} Article 382, Paragraph (3) and Article 542-8 of the KCC.
\end{itemize}
For large listed companies, at least one member of the audit committee should be an expert in accounting or finance.\textsuperscript{39} As for financial companies, certain qualification requirements are specified for the executive and outside directors.\textsuperscript{40}

\textbf{Conflicts of interest}

To prevent a conflict of interest between a company and a director, when a director, or any of his or her relatives and entities he or she controls, intends to engage in a transaction with the company (self-dealing), the relevant party shall disclose the material facts regarding such self-dealing to the board of directors in advance, and obtain approval therefor by an affirmative vote of at least two-thirds of the total number of the directors. Any self-dealing shall be fair in terms of its conditions and procedures.\textsuperscript{41}

According to the 2012 amendment to the KCC, a director shall also obtain the approval of the board of directors by an affirmative vote of at least two-thirds of the total directors to exploit business opportunities that are likely to present current or future profits to the company for his or her own benefit or that of a third party.\textsuperscript{42}

Since outside directors cannot engage in the regular business of a company,\textsuperscript{43} they are not able to directly engage in the performance of a company’s business. However, they shall monitor the management as members of the board of directors by, inter alia, reviewing and examining matters reserved to the board of directors, participating in the board of directors, engaging in discussions or exercising voting rights.

\textbf{III DISCLOSURE}

Companies of a certain minimum size (including listed companies) are subject to an external auditor’s audit. Under the Act on External Audit of Stock Companies, which has lately been restated:

\begin{itemize}
  \item[a] the independence of external auditors has been strengthened by requiring the FSS to designate an external auditor for a period of three years after a listed company’s appointment of an external auditor for six years at its own discretion; and
  \item[b] the external audit system has been reinforced by stipulating the obligation to submit internal accounting management systems to an external audit.\textsuperscript{44}
\end{itemize}

All external audit reports shall be publicly disclosed under the applicable laws.

Listed companies and some other companies are required to publicly disclose certain matters, including audit reports, on a quarterly basis, and are also required to publicly disclose them in accordance with the FSCMA. The public disclosure regulations of the KRX are applicable to listed companies, including certain disclosure requirements in the event of any major decision such as the issuance of new shares, the acquisition of treasury shares, a merger

\begin{itemize}
  \item[39] Article 542-11.
  \item[40] Articles 5 and 6 of the Corporate Governance Act.
  \item[41] Article 398 of the KCC.
  \item[42] Article 397-2 of the KCC.
  \item[43] Article 382, Paragraph (3) of the KCC.
  \item[44] Articles 11 and 8 of the Act on External Audit of Stock Companies.
\end{itemize}
or spin-off, and the transfer of a material business or asset.\textsuperscript{45} In addition, listed companies are obliged to make public disclosures in a fair manner so as to prevent any information gap due to the selective provision of important information to certain persons.\textsuperscript{46}

Most public disclosures are mandatory, and the comply or explain model has been introduced for certain financial companies. Starting from 2019, under the recently amended KRX regulations, large listed companies are required to publicly disclose their corporate governance reports setting forth, inter alia, the current status of the protection of shareholders’ rights, the independence of boards of directors, fairness in the course of the appointment of the directors, and the expertise of a company’s internal and external audit organisations.

Communication between management and shareholders usually takes place through investor relations activities, and shareholders are increasingly requesting meetings with management, including directors.

\textbf{IV CORPORATE RESPONSIBILITY}

Financial companies are required to organise a risk management committee and appoint a compliance officer and a risk management officer.\textsuperscript{47}

A listed company with total assets equal to or greater than 500 billion won should establish compliance guidelines, and appoint a compliance officer who is responsible for ensuring officers and employees comply with the compliance guidelines.\textsuperscript{48}

Recently, the MOJ has been making efforts to facilitate the internal control processes by announcing the Standard Compliance Guidelines for Listed Companies to enhance the effectiveness of the compliance system. The Guidelines provide that:
\begin{enumerate}
  \item an internal reporting system for whistle-blowing may be established;
  \item personal information about whistle-blowers and details of related internal reports shall be kept confidential;
  \item extenuating circumstances shall be taken into consideration in cases where a whistle-blower reports a tort or illegal act in which he or she has been involved; and
  \item no whistle-blowers shall be subject to any disadvantages due to their whistle-blowing.
\end{enumerate}

In addition, as corporate social responsibility has emerged as an important issue, there is growing interest in the ethical management of companies, and companies are increasingly disclosing their internal policies related to such issues.

With an increased emphasis on the importance of the ethics of owners or officers of large enterprises, their abuse of authority against employees often becomes a social issue. There are cases where officers have not only resigned but have also been held criminally responsible for committing abusive acts.

\begin{enumerate}
  \item Articles 159 and 161 of the FSCMA, and Article 7 of the Regulations on Public Disclosure on the Securities Market.
  \item Article 15 of the Regulations on Public Disclosure on the Securities Market.
  \item Articles 16, 21, 25 and 28 of the Corporate Governance Act.
  \item Article 542-13 of the KCC.
\end{enumerate}
V SHAREHOLDERS

i Shareholder rights and powers

Every shareholder shall have one vote for each share held, and no extra vote or dividend shall be acknowledged for the reason that the shareholder has been holding shares for a long period of time. However, a company may issue shares without voting rights in accordance with the articles of incorporation. Because the appointment or dismissal of directors is a matter reserved to the general shareholders’ meeting, shareholders have an indirect influence on the board of directors. Among other things, the following matters require a resolution of the board of directors as well as a special resolution of the general shareholders’ meeting:

- Amendments to the articles of incorporation;
- Reductions in paid-in capital;
- Mergers or spin-offs of the company;
- The transfer of all or material parts of the business; and
- Comprehensive share transfers and share exchanges.

However, not all matters reserved to the board of directors need to be approved by the shareholders. Minority shareholders holding a certain equity interest have certain rights depending on their shareholding, including:

- Shareholder proposal rights;
- The right to call a general shareholders’ meeting;
- The right to request a cumulative vote with regard to the appointment of directors;
- The right to request an injunction (suspension) for a violation by the directors; and
- The right to institute a derivative action and the right to inspect accounting books.

ii Shareholders’ duties and responsibilities

A shareholder of a listed company is required to publicly disclose his or her equity interest with regard to certain matters if the equity interest constitutes at least 5 or 10 per cent, but shall not assume any other special legal obligations or responsibilities. However, any person who instructs a director to perform business by using his or her influence over the company shall assume the same responsibility as that director with regard to such instructed or performed business. It is possible that the foregoing responsibilities would be recognised for the controlling shareholder.

In cases of self-dealing, the relevant party shall disclose the material facts regarding the self-dealing to the board of directors in advance, and obtain the approval of the board by an

49 Article 369 of the KCC.
50 Articles 382 and 385 of the KCC.
51 Articles 374, 434, 438, 522 and 530-3 of the KCC.
52 The appraisal rights of dissenting shareholders are acknowledged for some matters requiring the approval of the general shareholders’ meeting as described above (e.g., merger and comprehensive share transfer).
53 Articles 363-2, 366, 382-2, 402, 403, 466 and 542-6.
54 Requirements for the exercise of minority shareholders’ rights shall be relaxed for listed companies with certain restrictions on holding periods (Articles 363-2, 366, 382-2, 402, 403, 466 and 542-6).
55 Articles 147 and 173 of the FSCMA.
56 Article 401-2 of the KCC.
affirmative vote of at least two-thirds of the total number of the directors to prevent a conflict of interest between the company and the major shareholder. Any self-dealing shall be fair in terms of its conditions and procedures.\footnote{57}{Article 398 of the KCC.} In addition, no listed company shall grant certain credit or provide debt guarantees to major shareholders and their specially related parties.\footnote{58}{Article 542-9 of the KCC.}

Although there have been theoretical discussions on the responsibilities assumed by a controlling party against minority shareholders, there is currently no legislation in this regard.

**Institutional investors’ duties and best practice**

Although no special statutory provision of any special legal obligations or responsibilities is available with regard to the exercise of shareholders’ voting rights, institutional investors have recently been introducing a stewardship code; accordingly, the role of proxy advisory organisations, which provide advice on the details of exercising voting rights based on their analysis of the agenda of the general shareholders’ meeting, has been reinforced.

To secure trust in the expertise of proxy advisory organisations, an amendment to the FSCMA has been proposed, and the introduction of a declaration system for proxy advisory organisations has been discussed, granting rights to request the submission of information to the FSC and to prohibit unsound business activities of proxy advisory organisations.

**iii  Shareholder activism**

Shareholder activism is increasing in Korea, and proxy battles frequently take place. One activist recently carried out a campaign to publicly oppose the agenda for the restructuring of a large listed company, and the relevant agenda was not adopted.

There seem to be conflicting views about shareholder activism: on the one hand, such activity is not optimal for long-term corporate value, as it is merely seeks short-term profits; however, on the other hand, shareholder activism should be understood as a reasonable aim to protect minority shareholders and improve corporate governance.

Any person intending to solicit another person to exercise his or her voting rights by proxy for listed companies should public disclose this in advance and deliver the power of attorney or reference documents.\footnote{59}{Article 152 of the FSCMA.}

**iv  Takeover defences**

Given that every shareholder has one vote per share,\footnote{60}{Article 369 of the KCC.} dual class share systems are not an appropriate defence in Korea against a hostile takeover.

In the case of a hostile takeover, it may be possible for the board of directors to use defence tactics such as the acquisition of treasury shares or the issuance of new shares to friendly third parties, including specific shareholders. As previously mentioned, express grounds must be included in the articles of incorporation to issue new shares to friendly third parties, and other regulatory issues exist. Furthermore, in a dispute over management control, the issuance of new shares to friendly shareholders to defend against a takeover is
likely to be invalidated at court. Listed companies may acquire treasury shares by a resolution of the board of directors in an amount up to their distributable profits, and may use methods such as tender offers or purchases on exchange.\footnote{Article 165-3 of the FSCMA.}

Another possible measure is selling treasury shares to friendly third parties, given that the disposal of treasury shares is also a matter reserved to the board of directors and is not subject to regulations on the issuance of new shares. Such practice, however, is generally perceived in a negative light.

The staggered board system is not prohibited under the applicable laws and regulations, and some listed companies operate this system.

As previously mentioned, in defending against a hostile takeover, the articles of incorporation can stipulate a supermajority voting system for certain general shareholders’ meeting agendas, including the dismissal of directors or the golden parachute system; however, whether these systems are permitted under the KCC remains controversial.

\section*{v Contact with shareholders}

Contact with shareholders usually takes place through investor relations activities, and shareholders are increasingly keen to meet with management, including directors. In some cases, management will hold individual meetings with major shareholders. Although holding individual meetings with a shareholder or certain shareholders is not prohibited, the selective provision of internal information only to some shareholders is not permitted. In such case, a company has an obligation to make fair public disclosures; provided, however, that selective provision of information would be exceptionally permitted if the receiving party signs an agreement that it will keep such information confidential and not engage in share transactions by using the relevant information.

Notice on the convocation of a general shareholders’ meeting shall be given to shareholders at least two weeks prior to the date set for such meeting,\footnote{Article 363 of the KCC.} provided that if a company has made a public disclosure of the convocation of the general shareholders’ meeting, it may elect not to give notice thereon to shareholders with an equity interest representing less than 1 per cent.\footnote{Article 542-4 of the KCC.}

For listed companies, the system of soliciting a person to exercise a shareholder’s voting rights by proxy is generally used. To this end, the person intending to do so should make public disclosure of this in advance, and deliver a power of attorney or reference document regarding this.\footnote{Article 152 of the FSCMA.}

Usually, shareholders do not expressly state whether they agree or disagree with the agenda submitted to the general shareholders’ meeting. However, the National Pension Service has recently begun announcing how it would vote on certain agendas to the extent specific conditions are met.

\section*{VI OUTLOOK}

In 2018, the state-run National Pension Service, which is the world’s third-largest pension fund, adopted a stewardship code, and due to certain highly publicised cases of misbehaviour
by owners recently, there is growing public opinion in Korea that shareholders should actively exercise their shareholder rights. Furthermore, shareholder activism has been on the rise in Korea, with an increasing number of domestic and overseas activist investors seeking to influence the management of large Korean conglomerates. We anticipate that the growth of activism will lead to increased attention being paid to corporate governance, especially regarding issues such as the re-election of owners as executive directors, concurrent directorships, and the independence and diversity of outside directors.
OVERVIEW OF GOVERNANCE REGIME

Statutory framework

Luxembourg’s main statutes on corporate governance include the Companies Act, the EU Market Abuse Regulation and the Securitisation Act. The Companies Act was revamped in 2016 to modernise Luxembourg corporate law, and a consolidated version of the Act was published in December 2017, following the renumbering of its articles.

Other notable statutory instruments regulating corporate governance in Luxembourg include:

a. the Act of 13 July 2007 on Markets in Financial Instruments, as amended, introducing specific provisions on transparency for shares and transaction reporting to be applied from 3 January 2018, together with the EU Regulation on Markets in Financial Instruments (MiFIR);

b. the Takeover Bid Act, providing for minority shareholder protection, rules of mandatory offers and disclosure requirements for companies whose shares are admitted to trading on a regulated market in a Member State of the EU;

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c  the Prospectus Act,\(^9\) which requires the publication of prospectuses from companies intending to admit their shares to trading on a regulated market or to make a public offer;

d  the Transparency Act of 11 January 2008,\(^10\) as amended; and

e  the Shareholder Act of 24 May 2011,\(^11\) setting out a number of shareholders’ rights and aiming to increase shareholder activism, which remains subject to further amendment as a result of the transposition into Luxembourg law (expected mid-2019) of the Second Shareholders’ Rights Directive.\(^12\)

Furthermore, the Act of 21 July 2012\(^13\) introduced a squeeze-out right in favour of dominant shareholders and a sell-out right in favour of minority shareholders in companies whose shares are admitted to trading on a regulated market,\(^14\) and a year later, the Act of 6 April 2013 introduced a legal regime for dematerialised securities, and the Act of 12 July 2013,\(^15\) as amended, introduced into Luxembourg law a new structure: the special limited partnership. In 2013 and 2015, the accounting standards commission was reformed and certain rules regarding the annual accounts and consolidated accounts of companies were modified.\(^16\) Furthermore, in 2014, the Act on the Immobilisation of Bearer Shares\(^17\) instituted the requirement to deposit bearer shares with a recognised depositary and allowed access by judicial and tax authorities to information on the identity of bearer shares holders.

Also worth mentioning is the Act of 10 March 2014\(^18\) providing for the possibility of forming a European Cooperative Society in conformity with the provisions of Council Regulation (EC) No. 1435/2003 of 22 July 2003. As a supplement to the general statutory law, the Luxembourg Stock Exchange (LuxSE) 10 Principles of Corporate Governance

\(^9\) Act of 10 July 2005 on prospectuses for securities, as last amended by the Act of 10 May 2016.


\(^13\) Act of 21 July 2012 on Mandatory Squeeze-Out and Sell-Out of Securities of companies currently admitted or previously admitted to trading on a regulated market or having been offered to the public.


\(^16\) Act of 30 July 2013 reforming the commission of accounting principles and modifying certain rules regarding the annual accounts and consolidated accounts of companies and Act of 18 December 2015 modifying several Acts in view of the transposition of Directive 2013/34/EU. The main modifications introduced by this Act is discussed in Section III.


\(^18\) Act of 10 March 2014 amending the Act of 10 August 1915 on Commercial Companies.
(LuxSE Principles)\(^\text{19}\) provide general principles, recommendations and guidelines on best practices relating to general corporate governance issues for all companies listed on the LuxSE and all Luxembourg companies whose shares are admitted to trading on a regulated market operated by the LuxSE.\(^\text{20}\)

### ii Regulatory authorities

In Luxembourg listed companies are often controlled by one or more major shareholders, rendering it impossible to rely solely on market monitoring to ensure that listed companies comply with the LuxSE Principles. Therefore, a system of monitoring involving the shareholders, the board and the LuxSE, at a minimum, is required to ensure proper observance of the principles of corporate governance.

The other main regulatory authority is the Luxembourg Supervisory Commission of the Financial Sector (CSSF),\(^\text{21}\) which is in charge of promoting transparency, simplicity and fairness on the markets of financial products and services. The CSSF has jurisdiction regarding matters for which the laws or regulations in force require disclosure, whether or not the information is dealt with in the LuxSE Principles, and also has the authority to impose sanctions. The LuxSE’s role in the external monitoring of compliance with the principles of corporate governance does not affect the CSSF’s legal responsibility as a regulator.

As an operationally independent body, the CSSF has sufficient powers to conduct effective supervision and regulation of the Luxembourg securities market. It is funded by taxes levied from entities under its supervision. To conduct its tasks effectively, the CSSF has broad powers, including the authority to attend meetings of LuxSE entities, suspend rulings, or suspend market intermediaries’ decision-makers if they fail to observe legal, regulatory or statutory provisions.

Other professionals in the financial sector and private sector companies also have an indirect regulatory role through their consultative participation with the government and the legislator in the field of regulation.

### II CORPORATE LEADERSHIP

#### i Board structure and practices

**Structure**

Although the Act of 25 August 2006 introduced the possibility for public limited liability companies to choose a two-tier board structure,\(^\text{22}\) the one-tier board structure\(^\text{23}\) remains by far the preferred option in Luxembourg, with a company being managed exclusively by a board invested with the broadest powers to act in the name and on behalf of the company.

In a two-tier system, a company is managed by two bodies: the management board, charged with the day-to-day management of the company, and a supervisory board. The

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19 Available at www.bourse.lu/corporate-governance.
20 As an exception, the 10 Principles do not apply to regulated investment companies with variable capital and funds, to which specific regulations apply. The fourth version of the LuxSE Principles entered into effect on 1 January 2018, and applies to annual reports for financial years as from that date. The main provisions of the LuxSE Principles are discussed in Section IV.
22 Article 442-1 of the Companies Act.
23 Articles 441-1 to 441-13 of the Companies Act.
supervisory board's responsibilities include the appointment and permanent supervision of the management board members, as well as the right to inspect all company transactions.\textsuperscript{24} No person may at the same time be a member of both the management board and the supervisory board.\textsuperscript{25} Members of the supervisory board are liable towards the company and any third party in accordance with general law.\textsuperscript{26} However, there is no specific guidance relating to the exercise by members of the supervisory board of their duties.

**Composition of the board**

The board is composed of appointed members (the company’s directors). The Companies Act requires a minimum of three directors;\textsuperscript{27} the maximum number of directors is undefined (the LuxSE Principles advise 16 directors as a reasonable limit).\textsuperscript{28} While the directors are appointed by the shareholders of the company,\textsuperscript{29} the directors choose a chair from among their members.\textsuperscript{30} The Companies Act does not provide any specific powers to the chair of the board, although companies may choose, for example, to grant a power of representation to the chair in the articles of association. However, unlike in other civil law jurisdictions, the chair of the board does not act on behalf of the company in his or her position as chair, but rather on the basis of his or her position as director of the company.

The Companies Act provides that where a legal entity is appointed as director of a public limited liability company, it shall designate a permanent representative to exercise that duty in the name and for the account of the legal entity.\textsuperscript{31} This provision technically only applies to public limited liability companies. However, in an interlocutory decision delivered in 2013, the District Court of Luxembourg recognised the applicability of this provision to a partnership limited by shares.\textsuperscript{32} In particular, the Court concluded that the obligation to appoint a permanent representative of a legal person to a board of a public limited liability company also applies to the legal person of a general partner of a partnership limited by shares. This decision was implicitly upheld in a judgment of the District Court pronounced in 2015.\textsuperscript{33}

As for the representation of the company, most articles of association provide that any two directors can represent the company without evidence of a board resolution (although in practice, the board may ratify actions taken previously by directors acting individually).

In this respect, the Companies Act provides for three mechanisms: the board can adopt a decision and give specific mandates (limited in time and scope) to one or more of its members, or other individuals, to act on its behalf;\textsuperscript{34} the articles of association may entitle one or more directors to represent the company for the purposes of any instrument or in any legal proceedings, either individually or jointly;\textsuperscript{35} or the board may designate a director as a

\begin{itemize}
\item \textsuperscript{24} Article 442-1 et seq. of the Companies Act, in particular, Articles 442-2, Paragraph 3, 442-3, Paragraph 1, 442-7, Paragraph 1, and Articles 442-11 to 442-16.
\item \textsuperscript{25} Article 442-17, Paragraph 1 of the Companies Act.
\item \textsuperscript{26} Article 442-16 of the Companies Act.
\item \textsuperscript{27} Article 441-2, Paragraph 1 of the Companies Act.
\item \textsuperscript{28} LuxSE Principle 3, Guideline to Recommendation 3.3.
\item \textsuperscript{29} Article 441-2, Paragraph 3 of the Companies Act.
\item \textsuperscript{30} Article 444-3, Paragraph 2 of the Companies Act.
\item \textsuperscript{31} Article 441-3 of the Companies Act.
\item \textsuperscript{32} Luxembourg District Court, 21 December 2013.
\item \textsuperscript{33} Luxembourg District Court, 23 December 2015, Nos. 145 724 and 145 725.
\item \textsuperscript{34} Article 1984 et seq. of the Luxembourg Civil Code.
\item \textsuperscript{35} Article 441-5, Paragraph 4 of the Companies Act.
\end{itemize}
general representative of the company charged with its day-to-day business (the day-to-day manager), and representing the company, individually or jointly, towards third parties for that business.\textsuperscript{36}

Under the third option, power may be delegated to one or more directors, managers or other agents, who may but are not required to be shareholders, acting either individually or jointly.\textsuperscript{37} While their appointment, removal from office and powers may be specified, limited or extended by the articles of association or the competent corporate body, the Companies Act states that no restrictions to their representative powers may be validly opposed in relation to third parties, even if their appointment is published.\textsuperscript{38} The liability of the day-to-day manager is based on the general rules relating to mandates.\textsuperscript{39} When a member of the board is appointed as the day-to-day manager, the Companies Act requires the board to report annually to the shareholders on the salary, fees and any benefits granted to that director.\textsuperscript{40}

A company will generally be bound by the acts of its directors or by the person entrusted with its day-to-day management, even if those acts exceed the company's corporate object, unless the company proves that the third party knew that the relevant acts exceeded the company's corporate object or could not, in view of the circumstances, have been unaware of it. The publication of a restriction to a director's powers in the company's articles of association is deemed insufficient to constitute such proof.\textsuperscript{41}

Regarding listed companies, the LuxSE Principles distinguish between executive and non-executive managers: executive managers are defined as senior managers who are not board directors but who are members of a body of executives charged with the day-to-day management of the company.\textsuperscript{42} There is no other distinction under Luxembourg law, with all board members having the same rights and obligations. A more permanent division of tasks and responsibilities between board members is possible (e.g., by providing for different classes of directors), but any such division is purely internal and is unenforceable towards third parties. It is, however, possible for the board to delegate certain specific powers to individual board members or non-board members in the framework of a specific delegation of power.\textsuperscript{43}

Finally, the European Commission has proposed legislation with the objective of attaining a 40 per cent presence of women among non-executive board member positions in publicly listed companies.\textsuperscript{44} Luxembourg is currently reported as having an average of less than one in 10 female board members, with over half of the largest companies having no women on their boards at all.\textsuperscript{45}

\textsuperscript{36} Article 441-10 of the Companies Act.
\textsuperscript{37} Article 441-10, Paragraph 1 of the Companies Act.
\textsuperscript{38} Article 441-10, Paragraph 2 of the Companies Act.
\textsuperscript{39} Article 441-10, Paragraph 5 of the Companies Act.
\textsuperscript{40} Article 441-10, Paragraph 4 the Companies Act.
\textsuperscript{41} Article 441-10, Paragraph 2 of the Companies Act.
\textsuperscript{42} LuxSE Principle 4.
\textsuperscript{43} European Commission, Proposal for a Directive on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, COM/2012/0614 final – 2012/0299 (COD). The Directive would be based on Article 157(3) TFEU, which ensures the application of the principle of gender equality in employment and occupation.
\textsuperscript{44} At the same time, the European Business School’s Women on Boards Initiative published its Global Board Ready Women list online, which contains 8,000 board-ready young graduate women: http://europa.eu/rapid/press-release_IP-12-1358_en.htm.
\textsuperscript{45} European Commission, The gender pay gap situation in the EU.
Separation of CEO and chair roles: chair’s role and responsibilities

While the roles of CEO and chair tend to be separated in practice, there are no legal provisions or guidelines pertaining to a separation of roles or responsibilities.

For listed companies, the LuxSE Principles requires that the chair prepares the board meeting agendas after consulting the CEO, and ensures that the procedures for preparing meetings, deliberations, decision-making and the implementation of decisions are correctly applied. Under this non-compulsory guideline, the chair should ensure the proper application of the rules of governance and provide advice to the board.

Luxembourg law does currently not provide for a specific procedure for direct communication between the CEO or the chair and the shareholders.

For listed companies, according to the LuxSE Principles, companies should ‘establish a policy of active communication with the shareholders’ and allow shareholder dialogue with the board and the executive management.

Remuneration of directors and senior management

Directors are not employees of the company as such, and their remuneration falls under the general rules on mandates and corporate law. Generally, and unless otherwise provided by the articles of association, services rendered by the company directors are considered to be provided remuneration-free. If the articles of association authorise remuneration, the global amount to be paid to the directors will be fixed by the general meeting of shareholders, and the board will allocate that amount between board members as it deems fit. The rules on conflicts of interest forbid directors from taking part in or voting on resolutions relating to their own remuneration.

Senior managers are generally employees of the company, and the Luxembourg Labour Code will be applicable as regards their relationship with the company.

Concerning listed companies, the LuxSE Principles recommend establishing a remuneration committee to deal with these issues. The LuxSE Principles state that the company must ‘secure the services of qualified directors and executive managers by means of a fair remuneration policy that is compatible with the long-term interests of the company’, thereby introducing a sustainable aspect rather than concentrating on short-term gains.

Committees

The company’s articles of association may allow for the creation of committees appointed by the board to ensure that the directors’ obligations are fulfilled. The LuxSE Principles advise listed companies to establish, from among the board’s members, inter alia:

- a committee to assist the board in relation to corporate policies, internal controls, financial and regulatory reporting, and risk management;
- an audit committee;
- a nomination committee to nominate suitable candidates as directors; and

46 LuxSE Principle 2, Recommendation 2.4.
47 LuxSE Principle 10.
48 Article 442-19, Paragraph 1 of the Companies Act.
49 LuxSE Principle 7.
50 Should the company not have an audit committee, LuxSE Principle 8, Recommendation 8.1 requires that the board reassess the need to create an audit committee regularly.
d a corporate governance committee to ensure compliance with corporate governance practice.

The articles of association will outline the number of members of each committee, their function and the scope of their powers, and the committees themselves will be appointed by and under the supervision of the board.

The LuxSE Principles require listed companies and their boards to establish such committees as are necessary for the proper performance of the company’s tasks. The Principles also recommend that the board appoint as many special committees as are needed to examine specific topics and to advise the board. The board itself shall remain responsible for decision-taking.

ii Directors

Although no general legal obligations are in place, the LuxSE Principles require that listed companies’ boards have a sufficient number of independent directors (the number depends on the nature of the company’s activities and share ownership structure), defining independent directors as not having ‘any significant business relationship with the company, close family relationship with any executive, or any other relationship with the company, its controlling shareholders or executive managers which is liable to impair the independence of the director’s judgement’. While there are no specific legal provisions regarding independent directors, it is generally understood that all directors, including independent directors, should be provided with timely information for the proper performance of their duties.

Liability of directors

The directors’ duties are owed to the company, and as such they may be held liable towards the company both on civil and criminal grounds. They are jointly and severally liable in accordance with the general provisions on civil liability and the provisions of the Companies Act, both towards the company and towards all third parties, for any damage resulting from a violation of the Companies Act or of the articles of association of the company.

Directors must act in the best corporate interests of the company, and are obliged to comply with the Companies Act and with the company’s articles of association. This includes the obligation to act as reasonably prudent businesspersons. They must manage the company’s business in good faith, with reasonable care, in a competent, prudent and active manner, at all times in the company’s best interests, and must refrain from doing anything that does not fall within the scope of the company’s corporate objectives. The Companies Act also imposes certain general duties on directors, including the general management of the company, representation of the company towards third parties and upholding their duty to avoid any conflicts of interest.

The Luxembourg legislator has remained silent on what should be considered a company’s best corporate interest. In a judgment delivered in 2015, the Luxembourg

52 LuxSE Principle 3, Recommendation 3.5.
53 Articles 1382 and 1383 of the Luxembourg Civil Code.
54 Article 441-9 of the Companies Act.
55 Articles 441-7 and 441-12 of the Companies Act.
56 Luxembourg District Court, 23 December 2015, Nos. 145 724 and 145 725.
District Court made some observations on this notion. It explained that it is an adaptable concept, the exact interpretation of which depends on the company concerned and the nature of its activities. For some companies, the corporate interest is aligned to the interests of a company's shareholders. For other companies, it includes the interest of the legal entity as a whole, including the interests of shareholders but also those of employees and creditors. The Court remarked that for companies that are used for purposes of financing and pure holding companies, the interest of the company's shareholders will be of overriding importance as the focus of the company's activities is on the rate of return of its investments.

However, it should be noted that directors of listed companies are held to a number of more specific duties under the Transparency Act and the Market Abuse Regulation, in addition to the LuxSE regulations and principles. According to the LuxSE Principles, the board of a listed company is bound by a fiduciary duty to its company and shareholders, and 'shall act in the corporate interest, and shall serve all the shareholders by ensuring the long-term success of the company'\(^57\).

In the event of misconduct, according to prevailing doctrine and case law, the shareholders’ meeting must decide whether to make any claim against a director in connection with faults committed by the director in the performance of his or her functions. Creditors of a company may, under certain circumstances, institute action on behalf of the company if the latter fails to do so and if that failure harms the company's creditors\(^58\).

Directors’ liability towards the company is exonerated further to cover the discharge granted to the board by the annual shareholders’ meeting approving the annual accounts. This discharge is valid for the period covered by the accounts presented to and approved by the general meeting of shareholders, provided that they do not contain any omission or false statement of a material fact. Although a discharge given by the general meeting of shareholders extinguishes the board members’ liability towards the company, it is important to note that proceedings initiated by third parties are not affected by such a discharge.

The company as well as third parties (including any shareholder or creditor with a legitimate interest) may bring an action against a director. Shareholders may, however, only seek compensation for a prejudice that is distinct from the company’s collective damage, and that can be defined as an individual and personal damage. The possibility for a (minority) shareholder to sue a director has recently been given an explicit legal basis in Luxembourg law\(^59\).

If the shareholders have suffered collective damage, it is up to the shareholders’ meeting to demand compensation, in which case an action must be brought by the shareholders’ meeting on behalf of the company (an action initiated by a single shareholder will be dismissed). The legal basis for the action differs depending on whether the proceedings are invoked by the company or by third parties.

Any action by the company has a contractual basis, whereas an action by third parties will be brought on the grounds of tort liability. Whereas, under contractual liability, only reasonably foreseeable damage is to be repaired (except in cases of fraud), under tort liability all damage caused by the misconduct must be repaired. To elude collective liability, a director must prove that he or she has not taken part in the breach of the Companies Act or of the

\(^{57}\) LuxSE Principle 2.  
\(^{58}\) Article 1166 of the Civil Code.  
\(^{59}\) See Section V.
articles of association of the company, that no misconduct is attributable to him or her, and that he or she reported the breach at the first shareholders’ meeting following his or her discovery or knowledge of the breach.

For listed companies, the LuxSE rules and regulations provide a series of sanctions in the event its rules are breached, including fines or compensation for damage caused to the stock market.

The directors of a public limited liability company are appointed for a period that cannot exceed six years, although they can be re-elected if the company’s articles of association do not provide otherwise. They may at any time be removed from office by the general meeting of shareholders without cause, by simple majority. It is also possible to provide for stricter conditions in the articles of association via a supermajority vote to appoint or revoke the directors. Another possibility is to authorise each category of shareholders to nominate candidates, among which the general meeting of shareholders will elect the directors.

Conflicts of interest of directors

Regarding the rules relating to conflicts of interest, any director who has, either directly or indirectly, a financial interest that is contrary to that of the company in a transaction submitted for approval to the board is obliged to inform the board of his or her conflict, refrain from taking part in the deliberations, abstain from voting and record his or her statement in the minutes of the meeting. A special report regarding the transactions in which one of the directors had a (potential) conflict of interest is then to be prepared and submitted at the next general meeting before voting on any resolutions. If, because of a conflict of interest, the number that is required by virtue of a company’s articles of association to deliberate and vote on a certain matter is not reached, the board of directors can – unless otherwise provided by the company’s articles of association – decide to defer the decision to the company’s general meeting of shareholders. The above-mentioned obligations do not apply when a decision to be taken by the board relates to the company’s normal course of business and is taken under normal conditions.

For listed companies, the LuxSE Principles require directors to show integrity and commitment. It is recommended that directors of LuxSE-listed companies:

a) inform the board of any possible conflict of interest and any other directorship, office or responsibility, including executive positions taken up outside the company during the term of the directorship;
b) take decisions in the best interests of the company;
c) warn the board of possible conflicts between their direct or indirect personal interests and those of the company or an entity controlled by it; and
d) refrain from taking part in any deliberation or decision involving such a conflict (unless they relate to current operations concluded under normal conditions).

60 Article 441-2, Paragraph 4, of the Companies Act.
61 Article 2004 of the Luxembourg Civil Code.
62 Article 441-7 of the Companies Act. The same conflict of interest regime applies, in addition to directors, members of the management board and supervisory board of public limited companies, to managers of private limited companies, delegates entrusted with day-to-day management, members of executive committees and liquidators of public limited liability companies.
63 LuxSE Principle 5, Recommendations 5.1 and 5.2. For further recommendations, see Recommendations 5.3 to 5.8.
III DISCLOSURE

i The ultimate beneficial owner register

On 15 January 2019, the law establishing a Luxembourg register of beneficial owners (RBE Act), transposing Article 30 of the 4th AML Directive was published. The RBE Act entered into force on 1 March 2019. Entities that fall within its scope have six months (i.e., until 1 September 2019) to comply with the Act’s provisions. The RBE Act applies to entities registered with the Luxembourg Trade and Companies Register, including civil and commercial companies, branches of foreign companies, Luxembourg common investment funds, and other types of investment funds such as the UCITS, SICAR, RAIF and SIF. There is, nevertheless, an exception for companies whose securities are admitted to trading on a qualifying regulated market (qualifying listed entities). The information to be provided includes the ultimate beneficial owner’s first and last name, nationality, date and place of birth, country of residence and national identification or registration number, and the nature and scope of the interest held in the entity. Qualifying listed entities are only required to provide the name of the market on which their securities are traded.

On 15 February 2019, a Grand Ducal Regulation on registration requirements, administrative fees and access to information in the Luxembourg register of beneficial owners (RBE Regulation) was adopted. The RBE Regulation entered into force on 1 March 2019. Entities registered with the Luxembourg Trade and Companies Register that fall within the scope of the RBE Act must register their ultimate beneficial owners (UBO) information via an online platform managed by the Luxembourg Business Registers in French, German or Luxembourgish. A substantiated request to restrict access to UBO information on file can be submitted at the same time or, under certain conditions, at a later stage.

Financial reporting and accountability

Every company must file all company accounts annually under the Companies Act, which imposes consolidated accounting for all Luxembourg-based companies where the company has a majority of the shareholding or voting rights in another entity; is a shareholder or member in another entity and has the right to approve or appoint a majority of the members to the administrative, management or supervisory body of the entity; or is a shareholder or member of another entity and solely controls a majority of shareholders’ or members’ voting rights in the entity, further to a shareholder or member agreement.

On 18 December 2015, Parliament passed an act implementing Directive 2013/34/EU. This act made various changes to the preparation of the annual accounts of Luxembourg companies. Among other things, it changed the rules that are used to determine the size of a company. Depending on whether a company can be categorised as small, medium or large, various financial reporting obligations apply to it, such as the obligation to draw up consolidated annual accounts or the obligation to use a certain structure of balance sheet and profit and loss account. In addition, the disclosure requirements for small companies was changed, and a principle of materiality was introduced, as a result of which information that is considered immaterial may be omitted from the annual accounts.

65 Article 1711-1 of the Companies Act.
The LuxSE Principles additionally require that a set of rules be drawn up to regulate the behaviour and the notification obligations relating to transactions of a company’s securities, and to specify which transaction information should be made public. These rules should also place the appointment of a compliance officer, charged with monitoring compliance to the rules, under the responsibility of the board. Principle 8 requires directors to ‘establish strict rules, designed to protect the company’s interests, in the areas of financial reporting, internal control and risk management’. This includes creating, where relevant, an audit committee to discharge the board from its responsibilities of risk management, internal control and financial reporting. The effectiveness of the company’s financial reporting, internal control and risk management system must also undergo regular scrutiny.

LuxSE-listed and Euro MTF-traded companies are additionally subject to the internal LuxSE rules and regulations, which contain a number of disclosure rules primarily derived from the Transparency Act as well as the Market Abuse Regulation. Legal obligations do not specifically include impacts outside the jurisdiction, unless the impacts influence the financial reporting obligations, in which case they must be reported.

The CSSF is responsible for verifying LuxSE-listed companies’ reports and may issue administrative and criminal sanctions in cases of failure to report or misrepresentation, in particular under the Transparency Act. The company’s corporate governance charter should also be made available on its website. In practice, companies publish press releases and past information in addition to regulated information.67

However, since reporting on non-listed companies’ social impacts remains on a soft-law basis, there are few legal consequences in cases of misrepresentation or failure to report. Some companies have put internal procedures in place to address complaints that an employee failed to comply with an internal code of conduct.68 It cannot be excluded that a violation of a CSR obligation may potentially be alleged by a third party if a company does not respect one of its CSR engagements, the publication of which is now mandatory under the LuxSE Principles.69 However, so far there is no case law or doctrine in the field, and such a claim would depend on the third party being able to prove its personal interest or damage in the claim.

Auditors’ role and authority, and independence

The Audit Act70 and Luxembourg legislation exclusively reserve statutory audits to statutory auditors and to audit firms that have been approved by the CSSF. Access to the auditing profession is regulated by the Audit Act, and the titles ‘auditor’ and ‘audit firm’ are exclusively granted by the CSSF to applicants upon fulfilment of certain criteria.71 The CSSF also administers a database of statutory auditors, approved statutory auditors, audit firms, approved audit firms, trainee statutory auditors and candidates to the audit profession, including third-country auditors and audit entities registered pursuant to Article 12 of the Audit Act. Registered auditors and registered auditing firms must also be members of the

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67 See Section I.ii.
68 See, for example, PricewaterhouseCoopers’ corporate governance procedure at www.pwc.lu.
69 LuxSE Principle 9.
70 Act of 23 July 2008 on the Auditing Profession.
71 Article 7 of the Act of 23 July 2008 on the Auditing Profession.
Luxembourg national auditing organisation, the Institute of Registered Auditors, which is charged with enforcing the strict application of the rules of the auditing profession and members’ respect of their professional obligations.72

The question and definition of the independence of auditors remain unresolved. Under the Luxembourg definition, the requirement for registered auditors and registered auditing firms to be independent from the entity they are reviewing translates as auditors being prevented from being directly or indirectly associated with the decision-making process of the entity reviewed. The auditor is also prevented from auditing the accounts if there is any form of direct or indirect relationship, be it financial, business, employment or other, including the provision of additional services other than audit, between the registered auditor, the registered auditing firm or its network and the entity under review.73

The comply or explain model and mandatory disclosure

The comply or explain approach, recommended by the Organisation for Economic Co-operation and Development and the European Commission, is favourably received by company boards and investors.

In Luxembourg, the LuxSE Principles were drafted to be highly flexible and adaptable to the size, structure, exposure to risks and specific activities of each company. The LuxSE Principles consist of three sets of rules: general principles (comply), recommendations (comply or explain) and guidelines. The general principles form the structure upon which good corporate governance should be based and are drafted in a sufficiently broad manner to enable all companies to be able to adhere to them, whatever their particular features. Without exception, all Luxembourg-based listed companies must apply the principles.

At the same time, the comply or explain system allows companies to deviate from the recommendations when justified by companies’ specific circumstances, provided that adequate explanation is provided. Given this flexible comply or explain approach, shareholders, and in particular institutional investors, have a paramount role in the thorough evaluation of a company’s corporate governance. They should carefully examine the reasons provided by a company whenever it is found to have departed from the recommendations or failed to comply with them, and make a reasoned judgement in each case.

The possibility of one-on-one meetings of directors with shareholders is not regulated by Luxembourg legislation. While possible, in practice, such meetings will depend on, inter alia, the size of the company, its structure, and the number and geographic location of shareholders and directors.

IV CORPORATE RESPONSIBILITY

While the majority of CSR is still soft-law based, there are several codified rules on this matter, which are mainly applicable to listed companies.

Most importantly, when publishing its revised LuxSE Principles in December 2017, the LuxSE added a new Principle on CSR to this document, introducing mandatory disclosure of companies’ CSR commitments.74 This new LuxSE Principle forces companies to define their

72 Articles 61 to 87 of the Act of 23 July 2008 on the Auditing Profession.
73 Articles 19 to 20 of the Act of 23 July 2008 on the Auditing Profession.
74 See LuxSE Principle 9. This fourth version of the LuxSE’s Principles entered into effect on 1 January 2018, and applies to annual reports for financial years as from that date.
policy on CSR aspects. It specifies the measures for the implementation of policies and how to give them adequate publicity. In particular, companies will have to integrate CSR aspects into their long-term value creation strategy and describe how the CSR approach contributes to this goal. In this regard, companies are to present the CSR-related information in a report that assesses the sustainability of the activities and that provides clear and transparent non-financial information in support thereof. Moreover, the board of directors will have to regularly address and review the non-financial risks of companies, including social and environmental risks.

Besides the LuxSE Principles, the Act of 5 December 2007 implementing, among others, the Directive on annual and consolidated accounts,\(^75\) includes a provision on corporate governance practices that listed insurance companies should apply.\(^76\) This provision requires listed companies in the insurance field to dedicate a specific section in their management report to their obligatory and voluntary adhesion to corporate governance codes, as well as all other information purporting to their corporate governance practice.

Moreover, the Transparency Act requires listed companies to publish information regarding their share capital and all regulated information (including financial reporting and shareholding) on their websites, and the Market Abuse Regulation stipulates that complete and effective public disclosure of any inside information must be published on both the company’s and the LuxSE’s websites.\(^77\) Listed companies must also publish their corporate governance charters on their websites. In practice, listed companies tend to publish not only regulated information, but also all past and present press releases and corporate information.

In addition, the implementation of Directive 2007/36/EC into Luxembourg law by the Shareholder Act marked an important step in Luxembourg CSR legislation.\(^78\) The Shareholder Act goes beyond the Directive’s requirements, and aims to increase shareholders’ active participation in their companies by enabling them to exercise their voting rights, ensuring their right to place items on shareholders’ meetings’ agendas and to ask questions.\(^79\)

While CSR commitments displayed on participating companies’ websites have no legal basis and are, therefore, not subject to legal enforcement, the unique nature and size of the Luxembourg marketplace has increased the effect of peer pressure on companies. The importance of CSR is gathering momentum, as demonstrated by the increasing number of companies opting to follow institutional CSR recommendations or drawing up and publishing their own guidelines.

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76 Article 85-1 et seq. of the Companies Act of 5 December 2007.
77 This means whenever an issuer, or a person acting on its behalf, discloses any inside information to a third party in the normal exercise of business (simultaneously in the event of intentional disclosure, promptly in the event of unintentional disclosure).
78 The Shareholder Act applies to companies that have their registered office in Luxembourg and whose shares are admitted to trading on a regulated market in a Member State of the European Union, as well as to Luxembourg companies whose shares are traded on a regulated market outside the European Union if those companies have elected to opt in to the rules of the Shareholder Act.
79 See Section V.i.
Compliance policies and whistle-blowing

The CPND, Luxembourg’s national commission for data protection published guidelines on the rules to be respected by Luxembourg entities putting a whistle-blowing policy in place.\(^{80}\) This guideline is largely based on the Article 29 Group’s Opinion 1/2006 on the application of EU data protection rules to internal whistle-blowing schemes in the fields of accounting, internal accounting controls, auditing matters, the fight against bribery, and banking and financial crime.\(^{81}\) Notably, a company must notify the CNPD of the implementation of a whistle-blowing policy further to Articles 12 and 13 of the Act of 2 August 2002 on the Protection of Persons with Regard to the Processing of Personal Data.\(^{82}\) The CNPD provides guidelines to ensure that the whistle-blowing policy is perceived to support rather than replace efficient management and CSR.

In addition, in 2011, the Labour Code was amended to encourage whistle-blowing. The Labour Code now provides that no disciplinary action may be taken against employees on the mere grounds of their protest against or refusal of something that they consider in good faith to constitute an unlawful taking of interest, corruption or undue influence as defined under the Luxembourg Criminal Code,\(^{83}\) whether committed by their employer, any other person senior in rank to them, their colleagues or any third party in relation to the employer.\(^{84}\)

CSR for other stakeholders and employees

Non-shareholders

Under Luxembourg law, directors are neither legally required to take the company’s impact on non-shareholders into account; nor are they prevented from doing so. One of the guidelines in the LuxSE Principles suggests that the board draws up a code of business ethics and defines the values of the company.\(^{85}\) It is also recommended for a company to show its CSR performance indicators in the form of a comparison over time. For example, the significant indicators could include subcontracting and relations with suppliers.\(^{86}\)

In practice, an increasing number of private companies are taking social criteria into account in their decision-making and disclosing such information to the marketplace (e.g., the CSR commitments published on the websites of several major Luxembourg-established companies, such as SES and ArcelorMittal, which publicly declare that they will take the social and environmental impacts of their operations into account, both on a national and international level). This consideration may extend to other companies or business partners, but on a voluntary basis only.

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81 Opinion 1/2006 on the application of EU data protection rules to internal whistleblowing schemes in the fields of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime.
82 Act of 2 August 2002 on the Protection of Persons with Regard to the Processing of Personal Data, as last amended by the Act of 23 July 2016.
83 Articles 245 to 252, 310 and 310-1 of the Luxembourg Criminal Code.
85 LuxSE Principle 2, Guideline 3 to Recommendation 2.3.
86 LuxSE Principle 9, Guideline to Recommendation 9.4.
Employees

The Labour Code\(^{87}\) introduced a legal requirement for employee representatives on certain company boards. This legal obligation is limited to public limited liability companies fulfilling two criteria: all companies established in Luxembourg and employing over 1,000 employees over a three-year period; and all companies established in Luxembourg in which the state retains a financial participation of over 25 per cent, or that exercise a state-awarded concession.

Despite the lack of a more general legal requirement concerning representation on company boards, it should be noted that employees in Luxembourg workplaces with more than 15 employees have a legal right to representation at work.\(^{88}\) The central element of workplace representation is the workers’ representatives concerned with workers’ everyday concerns and directly elected by all employees. As a result of the adoption of the Act of 23 July 2015,\(^{89}\) workers’ representatives saw their duties increased and were given a larger say in certain decision-making processes. The scope of their right to information was also enlarged.

In larger companies employing an average of 150 or more workers over a three-year period, the Labour Code provides for a joint company committee, a joint employer–employee body, aimed at improving industrial relations in the workplace.\(^{90}\) The law requires the company’s managing director to inform and consult the joint committee at least once a year on the company’s current and prospective staffing needs and on any training, refresher training or retraining implications for employees. The law authorises the joint committee to deliver an opinion on economic and financial decisions that could have a serious effect on the structure of the company or on employment levels. The committee also has the right to take part in joint decisions on a number of issues concerning human rights, such as:

- \(a\) the introduction or running of technical equipment intended to monitor the behaviour and performance of employees at work;
- \(b\) the introduction of, and alterations to, measures relating to occupational health and safety and the prevention of workplace accidents;
- \(c\) the drawing up of, and amendments to, general criteria affecting the selection of staff for promotion, transfer and dismissal, and at the recruitment stage; and
- \(d\) the drawing up of, and amendments to, general criteria used in staff assessments.\(^{91}\)

Unlike in some other European countries, there is no legally backed trade union workplace presence in Luxembourg, although trade unions have a substantial range of rights in the election and operation of employee delegations. Unions also have important rights in joint company committees, and to our knowledge the majority of employee representatives are union members.

Despite an increasing number of non-discrimination laws, including a new equal treatment chapter in the Labour Code\(^{92}\) implementing Directive 2000/78/EC, there is no binding anti-discrimination legislation currently in place specifically targeting non-discrimination on company boards.

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\(^{87}\) Article L426-12 of the Labour Code.

\(^{88}\) Article L411-1 of the Labour Code.


\(^{90}\) Article L421-1 et seq. of the Labour Code.

\(^{91}\) Article L423-1 of the Labour Code.

\(^{92}\) Chapter V (equal treatment), Articles L241-1 to L254-1 of the Labour Code.
V SHAREHOLDERS

i Shareholder rights and powers

Equality of voting rights

The Shareholder Act came into force on 1 July 2011 aiming, inter alia, at strengthening the exercise of minority shareholders’ voting rights in listed companies to improve the corporate governance of such companies. The Shareholder Act explicitly refers to a principle of equal treatment of shareholders.93 This principle is limited to the participation of shareholders at the general meeting of shareholders and the exercise of their voting rights at that meeting.94 The Shareholder Act has amended the previous rule that one vote is in principle attached to one share, henceforth allowing the company to provide for different voting rights for different shares.

In addition, the LuxSE Principles provide that ‘the company shall respect the rights of its shareholders and shall ensure that they receive equal treatment. The company shall define a policy of active communication with its shareholders and shall establish a related structured set of practices’.95

The powers of shareholders to influence the board

The Companies Act reserves the management of a company to its board.96 Should a shareholder be directly involved in the management of the company, he or she may be deemed a de facto director and face civil or criminal liability, or both, and generally be liable under the same circumstances as the appointed directors.

Shareholders do, however, control the appointment of the board (and, therefore, its composition) via a majority decision of over 50 per cent to appoint a new director.97 In addition, shareholders representing 10 per cent of a company’s share capital may force the board to postpone a general meeting of shareholders for a period of up to four weeks.98

In addition, the Shareholders Act acknowledges the right of any shareholder or group of shareholders holding at least 5 per cent of the capital to ask for items to be included in the agenda for the general meeting, and to lodge draft resolutions concerning the items on the agenda of the meeting.99

Furthermore, during the annual general meeting, the shareholders can question the board on all aspects of a company’s management, accounting and so forth throughout the year, and may withhold the granting of discharge. The right of shareholders to ask questions during the meeting and to receive answers to their questions is legally enshrined.100

Under the Shareholder Act, in addition to the right to ask questions orally during a meeting, shareholders may have the right to pose written questions about the items on the agenda before the meeting is held. If provided for in a company’s articles of association,

93 Article 2 of the Shareholder Act.
94 Article 2 of the Shareholder Act.
95 LuxSE Principles, Principle 10.
96 Article 441-5 of the Companies Act.
97 Article 441-2, Paragraph 3 of the Companies Act.
98 Article 450-1(6) of the Companies Act.
99 Article 4 of the Shareholder Act.
100 Article 7 of the Shareholder Act.
questions may be asked as soon as the convening notice for the general meeting is published. The company’s articles of association will furthermore provide the cut-off time by which the company should have received the written questions.101

Apart from several specific circumstances (e.g., in the case of confidential information), the company must answer any questions addressed to it. Should several questions relate to the same topic, the company may publish a detailed questions and answers document on its website, in which case the chair should draw the shareholders’ attention to the publication.

The Companies Act also allows shareholders to submit questions to management outside a meeting.102 Any shareholder representing at least 10 per cent of the company’s share capital or voting rights, or both, can ask the board of directors or management body questions about the management and operations of the company or one of its affiliates, without the need for extraordinary circumstances. If the company’s board or management body fails to answer these questions within one month, the shareholders may petition, as in summary proceedings, the president of the district court responsible for commercial matters to appoint one or more independent experts to draw up a report on the issues to which the questions relate.103

Certain matters must also be reported to the shareholders, such as any director’s conflict of interest relating to voting on a resolution.104

Furthermore, if a minority shareholder of a public limited liability company finds that directors and members of its management and supervisory boards are negligent or simply not diligent in the performance of their duties, it may sue them. Such an action may be brought by one or more shareholders, the holders of founders’ shares, or both, representing 10 per cent or more of the company’s voting rights.105

Decisions reserved to shareholders

The Companies Act provides that a company’s management board has the most extensive powers to perform all actions necessary or appropriate to fulfil the company’s corporate objective,106 with the exception of the actions specifically reserved by law to the shareholders’ meeting. Such actions include, inter alia, any amendments to the company’s articles of association, the approval of annual accounts and the allocation of the company’s results, which are reserved to the company’s shareholders.

Rights of dissenting shareholders

The Companies Act currently recognises only a few rights of action on behalf of the company in favour of individual shareholders.

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101 Article 3(2) of the Shareholder Act.
102 Article 1400-3 of the Companies Act. This new management evaluation procedure, inspired by French law, was introduced to the Companies Act by the Act of 10 August 2016.
103 Luxembourg District Court, 18 November 2016, No. 1809/2016. This judgment clarified the scope of application of this provisions, and, in particular, the questions that can be asked by the shareholders, and the answers provided by the management that are to be considered satisfactory.
104 Article 441-7, Paragraph 2 of the Companies Act.
105 Article 444-2 of the Companies Act.
106 Article 441-5 of the Companies Act.
Seeking invalidation of a shareholder decision by dissenting shareholders is only possible on the basis of five grounds specified in the Companies Act:

- a procedural irregularity that influenced or could have influenced the outcome of the decision;
- a violation with fraudulent intent of the rules governing general meetings;
- an ultra vires act or abuse of power affecting the decision;
- the exercise at a general meeting of voting rights that have been suspended by legislation other than the Companies Act, provided the quorum or majority required to adopt the decision would not have been met but for the unlawful exercise of these voting rights; and
- any other cause provided for by the Companies Act.  

In addition, minority shareholders enjoy a sell-out right under certain conditions. According to the Squeeze-out Act, in the event of an individual or legal entity acquiring at least 95 per cent of the share capital of the company and subject to certain conditions, the remaining minority shareholders are entitled to exercise a sell-out right within three months of the required notification and publication of the acquisition.

Nevertheless, the extension of the protection of minority shareholders by stipulating provisions in the company's articles of association (e.g., the right of a minority coalition to propose directors, provisions for a more stringent majority for certain decisions, approval clauses or share transfer restrictions) is well recognised insofar as the arrangement does not conflict with Luxembourg's public order rules. Providing such additional protection in favour of minority shareholders, whether in the articles of association or otherwise, is common in Luxembourg, particularly among international joint ventures and groupings that use a Luxembourg company structure to promote mutual business activities.

In this respect, the use of shareholders' voting agreements of a purely contractual nature is far more common than providing for relevant provisions in the articles of association. Since the amendment of the Companies Act in 2016, the use of shareholders' agreements has been explicitly recognised in Luxembourg law. The Companies Act does not state that these type of arrangements need to be limited in time. However, it does set out three types of voting arrangements that are null and void: a shareholders' agreement that violates the provisions of the Companies Act or that is contrary to a company's corporate interest; an undertaking by a shareholder to vote in accordance with instructions given by the company itself, a subsidiary or any corporate organ of those entities; and an undertaking by a shareholder to those same companies or corporate organs to approve proposals made by the company's corporate bodies. If votes are cast at a general meeting of shareholders pursuant to an invalid voting arrangement, the votes shall be considered null and void along with any resolutions taken, unless the votes did not affect the final outcome. While the use of shareholders' agreements does allow for discretion and flexibility, any compulsory implementation of this type of arrangement remains at risk.

107 Article 100-22 of the Companies Act.
108 Article 5 of the Squeeze-out Act.
109 For further analysis on minority shareholders rights, see also Marc Elvinger, 'Les minorités en droit des affaires: rapport luxembourgeois', Annales du droit luxembourgeois, No. 15 (2005).
110 Article 450-2(1) of the Companies Act.
111 Article 450-2(2) of the Companies Act.
**Benefits for long-term shareholders**

The Companies Act does not provide for any specific benefits (e.g., extra votes or dividends) for long-term shareholders, although such facilities may be agreed upon in a shareholders’ agreement or incorporated into the articles of association, or both.

**Shareholder approval of board decisions**

While the Companies Act does not set out any specific areas in which board decisions must be approved by the shareholders, the articles of association of a company may provide that all or certain board decisions must be ratified by the shareholders.

**ii Shareholders’ duties and responsibilities**

**Controlling shareholders’ duties and liability**

All shareholders have certain obligations by law, including the payment of shares, a proportional contribution to any losses suffered by the company and an obligation of loyalty.

In addition, the controlling shareholders are notably prevented from dictating or imposing an increase of the other shareholders’ obligations without their prior consent, although this principle has been considerably attenuated by the Squeeze-out Act, which grants the right to force the acquisition of shares held by minority shareholders by shareholders controlling at least 95 per cent of the share capital.112

**Institutional investors’ duties and best practice**

While institutional investors must bear in mind potential reputational repercussions relating to their investments, there are no particular duties imposed specifically on institutional investors and no requirement for institutional investors to specifically consider third-party impacts in their investment decisions. However, a number of Luxembourg-based investors have signed the United Nations-supported Principles for Responsible Investment.113 The first of these six principles is to incorporate environmental, social and corporate governance considerations into investment analysis and decision-making processes. Furthermore, a growing number of investors – while not being signatories to the Principles for Responsible Investment – are taking the private initiative to take such risks into account.

**Code of best practice for shareholders**

Luxembourg has no official code of best practice for shareholders, although companies may draw up internal codes of best practice for their shareholders.

**iii Shareholder activism**

Shareholder activism is not a defined notion under Luxembourg law, and neither derivative actions nor proxy battles are common practice in Luxembourg.

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112 Article 5 of the Squeeze-out Act.
113 For further information, see www.unpri.org. The principles are an investor initiative in partnership with the United Nations Environmental Programme Finance Initiative and the United Nations Global Compact.
iv  Takeover defences

Takeover bids are covered by the Luxembourg Takeover Bid Act.\textsuperscript{114} The scope of this Act is limited to companies whose shares are traded on a regulated market in one or more Member State of the European Union. Although Luxembourg law admits the principle of defensive measures, there has been no case law specifically covering this question as yet. In implementing any defensive measures, the board has an obligation to act in good faith with respect to the shareholders’ interest.

In the absence of a specific provision in a company’s articles of association requiring shareholder approval, the board may adopt defensive measures (e.g., issuing new shares within the limits of authorised capital or selling key assets) without the approval of the shareholders, provided that these measures are taken in the best interests of the company. The board may not prohibit the shareholders from accepting an offer. It should be noted, however, that measures aimed at frustrating bids in the long term are not generally deemed to be admissible under Luxembourg legislation. It would, therefore, not be possible to repeat defensive measures whenever the bid is repeated or to take defensive measures that have a long-term effect.

Shareholder and voting rights plans, and similar measures

As a general rule, any increase of a Luxembourg company’s share capital is decided upon by the general meeting of shareholders. However, the articles of association of a Luxembourg public limited liability company may authorise the board of directors to increase the share capital up to a designated amount in one or more instalments.\textsuperscript{115} The authorisation to do so is only valid for a period of five years, but may be renewed by the general meeting of shareholders.\textsuperscript{116} As an inducement for an existing shareholder to purchase more shares, it may be decided to abandon any payment of share premium. Beyond that, there is no possibility for a company to offer a discount on the par value of shares to be issued.

White-knight defence

In Luxembourg practice, the board of any company that is the subject of a takeover bid may seek out a third party with the purpose of the third party making a counter-offer that is more favourable to the company. It can do so without the need for approval by the company’s shareholders.

Staggered boards

Directors of a Luxembourg public limited liability company shall be appointed for a term of office that may not exceed six years. However, directors may be removed from office by


\textsuperscript{115} As a result of the entry into force of the Luxembourg Act of 10 August 2016, the articles of association of Luxembourg private limited liability companies may now also include an authorisation to the board of managers to issue shares, provided that the shares so issued are either issued to existing shareholders or to a third party that has been approved in accordance with the law.

\textsuperscript{116} Article 420-22 of the Companies Act.
the general meeting of shareholders at any time and without stating reasons. As a result, a staggered board does not constitute a major obstacle for a hostile acquirer holding sufficient shares to make changes to the composition of the board.

v Contact with shareholders

Pursuant to the Shareholder Act, listed companies must give at least 30 calendar days’ notice before holding a meeting (notwithstanding particular requirements under the Takeover Bid Act). By doing so, Luxembourg’s Parliament has imposed a longer notice period than the 21-day notice period required under Directive 2007/36/EC. Should the quorum not be met at the first meeting, a second meeting must be convened at least 17 calendar days before the meeting is held. The convening notice must be published in the electronic compendium of companies and associations, a Luxembourg newspaper and other media in a manner that ensures the effective distribution of the information to the public throughout the European Economic Area. In the event that all the shares are registered, convening notices may be sent by registered letter to the shareholders, members of the board (or the management board and the supervisory board) and the statutory auditors. The Shareholder Act requires that, in addition to the agenda, date and place of the general meeting to be held, convening notices must also include:

a a clear description of the shareholders’ rights to put items on the agenda and to table draft resolutions, the procedure for voting by proxy and a form to be used for that purpose and, if provided for in the company’s article of association, the procedure to vote by electronic means;
b postal and email addresses that can be used to obtain documents in relation to the meeting;
c where applicable, a copy of the record date as defined by the Shareholder Act (i.e., the date by which shareholders must register their shares to participate and vote at the general meeting). The date for listed companies is set at midnight Central European Time on the 14th calendar day before the meeting. The shareholder must notify the company at the latest by this date of its intention to participate in the meeting; and
d the company’s website address, which must contain all of the above information, as well as a full copy of the draft resolutions.

The Shareholder Act allows distance voting by shareholders in advance of the meeting, provided that the company has expressly recognised this possibility and has outlined the related requirements in its articles of association. The Shareholder Act details the content of the ballot paper, which must include, inter alia, the full identity of the shareholder, the content of the vote cast in advance, the agenda of the meeting and the deadline before which the ballot paper must be received.

117 Article 441-2, Paragraph 4 of the Companies Act.
118 Article 3(1) of the Shareholder Act.
119 Article 3(1), Paragraph 2 of the Shareholder Act.
120 Article 3(1), Paragraph 2 of the Shareholder Act.
121 Article 3(3) of the Shareholder Act.
122 Article 6 of the Shareholder Act.
The Shareholder Act requires proxy voting to be offered to shareholders under certain conditions, with the proxy holder having the same rights as the shareholder. The company has no obligation to verify that the proxy holder votes in accordance with the shareholders’ instructions.\textsuperscript{123}

VI OUTLOOK

While corporate governance is currently in general voluntary, a growing number of institutional guidelines and codes are being developed, and the government is working towards promoting corporate governance on a national level.

Luxembourg is attempting to deal with the potential consequences of a Brexit scenario without any agreement. On 31 January 2019, the Finance Minister introduced Bill No. 7401 on measures to be taken in relation to the financial sector in the event the United Kingdom leaves the European Union without reaching an agreement on the final terms of its withdrawal. The Bill is currently pending before the Finance and Budget Committee of the Luxembourg Parliament. In the event of a no deal scenario, it would enter into force on 29 March 2019.

Furthermore, along with the other Member States, Luxembourg will have to implement the Second Shareholders’ Rights Directive\textsuperscript{124} by mid-2019, which includes various amendments to the initial Shareholders’ Rights Directive. On 4 February 2019, the Justice Minister introduced Bill No. 7402 to amend the current Shareholder Act by transposing the Second Shareholders’ Rights Directive. The main purpose is to enhance and harmonise the corporate governance of listed companies across the EU. The new measures will have a particular focus on encouraging a long-termist view among shareholders and increasing transparency.

\textsuperscript{123} Article 8 of the Shareholder Act.

Chapter 16

NAMIBIA

Meyer van den Berg and Stefan van Zijl

I OVERVIEW OF GOVERNANCE REGIME

German colonial rule was established in Namibia (then South-West Africa) in 1884 and continued until 1915, when South African forces, on instructions of the British government, invaded South-West Africa and took control of the capital, Windhoek. In 1919, South-West Africa became a mandate of South Africa and, in terms of Section 1(1) of Proclamation 21 of 1919, Roman-Dutch law was made applicable in South-West Africa, as in South Africa. South Africa remained in control of South-West Africa until 1990, when Namibia finally gained independence from South Africa.

As a result of the mandate that South Africa had over Namibia for almost a century, the Namibian legal system is closely linked with the South African legal system, and for many years was subject to it. The two countries share a common law (Roman-Dutch law, influenced to some extent by English law), and all pre-independence case law and statutes of South Africa are binding in Namibia unless they have been specifically revoked. Furthermore, post-independence case law and legal scholarship in South Africa is still considered persuasive authority in Namibia.

The Companies Act 61 of 1973, enacted in South Africa while South Africa held a mandate over Namibia, was applicable in Namibia as well. It remained in operation until 1 November 2010, when Namibia’s own Companies Act of 2004\(^2\) (Companies Act) came into operation. The Companies Act of 2004 repeals the Companies Act of 1973 and is the primary legislative instrument that deals with companies in Namibia. On 16 January 2017, the Business and Intellectual Property Act\(^3\) also came into operation. This Act establishes the Business and Intellectual Property Authority (BIPA) and sets out its powers and functions. BIPA is responsible for the administration and protection of business and intellectual property in Namibia.

As with the old Companies Act of 1973, the South African Stock Exchanges Control Act\(^4\) (SECA) was also made applicable in Namibia and has not been repealed to date. This Act regulates stock exchanges, stockbrokers and loans made against securities. In a drive to establish a more independent economy, however, the Namibian Stock Exchange (NSX) was established in 1992. The Rules of the NSX, together with the SECA, regulate all companies listed on the NSX.

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1 Meyer van den Berg is a partner and Stefan van Zijl is an associate at Koep & Partners.
Until recently, the King III corporate governance code of South Africa (King III) was used in Namibia as well. However, in 2014, Namibia introduced the Corporate Governance Code for Namibia (NamCode), which was prepared by the NSX with the support of FNB Namibia Holdings Limited. The NamCode applies to all entities incorporated by statute, under or in terms of the Companies Act or any other legislation applicable in Namibia. Compliance with the NamCode is voluntary.

II CORPORATE LEADERSHIP

In line with international practice, companies in Namibia are represented by two bodies, namely the shareholders, who ultimately own the company, and the board of directors, which is responsible for managing the company. The relationship between the company, its shareholders and the board of directors is determined by common law, the Companies Act and the articles of association of the company. Often, the shareholders of a company will also enter into a shareholders’ agreement, which amplifies the roles and responsibilities of shareholders and directors in respect of the company.

i Board structure and practices

In Namibia, companies usually have a one-tier structure. The Companies Act does not make provision for a two-tier structure. Nor does it deal with the powers and functions of the chairperson (even though it refers to a chairperson of the board); these are usually dealt with in the articles of association of each company. The Companies Act does not refer specifically to chief executive officers, although most companies in Namibia have one.

The NamCode recognises what happens in practice and states that each board should elect a chairperson, who should be a non-executive director. Furthermore, each board must appoint a CEO and establish a framework for the delegation of authority. The CEO may not be the chairperson. The NamCode sets out in detail the responsibilities of the chairperson and the CEO, and states that the board must consist of a majority of independent, non-executive directors.

The legal position of directors in relation to the company is not settled under Namibian law. Directors have been referred to as agents of the company, trustees and managing partners. The better view, however, is that the directors stand in a unique or sui generis relationship to the company and should not be forced into a specific role or position (although they do reflect various characteristics of each of these roles). Each director, as an individual member of the board, has certain rights and responsibilities. These rights and responsibilities are set out in the Companies Act, common law, the articles of association of the company and, where applicable, the shareholders’ agreement.

5 Principle C2-16 of the NamCode.
6 Principle C2-17 of the NamCode.
7 Principle C2-16 of the NamCode.
8 Principles C2-16 and C2-17 of the NamCode.
9 Principle C2-18 of the NamCode.
11 See, for example, S J Naude, Die Regposisie van die Maatskappydirekteur (Durban: Butterworths, 1970), pp. 42–45.
The board of directors acts primarily in the interest of the company and then in the interest of individual shareholders, in keeping with the duty of good faith that each director owes towards the company. Although directors are appointed by the shareholders or a class of shareholders, directors should not place the interests of the shareholder or class of shareholders who appointed them above the interests of the company. This is confirmed in the NamCode as well.

The Companies Act does not provide for delegation of authority to committees established by the board, although the articles of association normally provide for the establishment of committees and delegation of authority to committees. The NamCode also obliges the board to delegate certain functions to well-structured committees without abdicating its own responsibilities.

Under the NamCode, the board, its committees and individual directors should be subject to annual performance evaluations. Induction of directors as well as ongoing training and development must be conducted through formal processes.

Remuneration of board members is not dealt with in the Companies Act, and often also not under the articles of association. There is no indication in law that a person who acts as a director is entitled to remuneration. Remuneration must be provided for in the articles of association or authorised by the shareholders in general meeting. The board of the company cannot authorise payment of remuneration to board members. Typically, the articles of companies will state that board members are entitled to such remuneration as may be authorised by the shareholders in general meeting. The NamCode provides certain guidelines as to the remuneration of board members and senior executives. The NamCode also states that companies must disclose the remuneration of each individual director. Shareholders must approve the company’s remuneration policy.

**ii Directors**

Section 1 of the Companies Act defines a director as ‘[including] any person occupying the position of director or alternate director of a company, by whatever name that person may be designated’. The importance of this definition is that a person will, for purposes of the Companies Act, be a director if, objectively speaking, that person occupies the position of director, regardless of what title he or she has.

In general, two types of director may be distinguished: executive and non-executive directors. Executive directors are employees or members of the management team of a company who are appointed to positions on the board. They therefore come from within the company and are involved in the day-to-day running of the company. Non-executive directors have no vested interest in the company as they are not involved in the day-to-day running of the company.
running of the company; nor are they employed by the company. They are independent and serve as impartial arbiters.\textsuperscript{22} A distinction is often also made between non-executive directors and independent non-executive directors: while neither come from within the company or have any vested interest in the company, an independent non-executive director has no existing or prior business, employment, consultancy or other relationship with the company.\textsuperscript{23}

The rights of directors are derived from various sources, including the Companies Act, common law, the company’s memorandum and articles of association, and agreements concluded between the company and the director (such as service or employment agreements). Sometimes, the rights of directors are also contained in agreements entered into between shareholders.

Under the Companies Act, every public company must have at least two directors and every private company must have at least one director.\textsuperscript{24} Until directors are appointed, every subscriber to the memorandum of incorporation of a company is deemed to be a director of the company.\textsuperscript{25} The majority of the subscribers may, in writing and subject to the articles of association of the company, determine the number of directors and the appointment of the first directors.\textsuperscript{26} After every change in the board of directors, the company must lodge Form CM29 with the Registrar of Companies. Any person who is appointed as a director or officer of a company at any time after the company has become entitled to commence business must, within 28 days of the date of that appointment or within a further period that the Registrar may allow if a good reason is provided and on payment of the prescribed fee, lodge with the company his or her written consent to that appointment on the prescribed form (Form CM27).\textsuperscript{27} This does not apply to the reappointment of a retiring director. The acts of a director of a company are valid notwithstanding any defect that may afterwards be discovered in his or her appointment or qualification.\textsuperscript{28}

\textsuperscript{22} Id.

\textsuperscript{23} Paragraph 18.6 of Principle C2-18 of the NamCode sets out the following characteristics of an independent non-executive director: an independent non-executive director is a non-executive director who (1) is not a representative of a shareholder who has the ability to control or significantly influence management or the board; (2) does not have a direct or indirect interest in the company (including any parent or subsidiary in a consolidated group with the company) that exceeds 5 per cent of the group’s total number of shares in issue; (3) does not have a direct or indirect interest in the company that is less than 5 per cent of the group’s total number of shares in issue, but is material to his or her personal wealth; (4) has not been employed by the company or the group of which it currently forms part in any executive capacity, or a partner in the group’s external audit firm or a senior legal adviser for the preceding three financial years; (5) is not a member of the immediate family of an individual who is, or has during the preceding three financial years, been employed by the company or the group in an executive capacity; (6) is not a professional adviser to the company or the group, other than as a director; (7) is free from any business or other relationship (contractual or statutory) that could be seen by an objective outsider to interfere materially with the individual’s capacity to act in an independent manner, such as being a director of a material customer of or supplier to the company; or (8) does not receive remuneration contingent upon the performance of the company.

\textsuperscript{24} Section 216(1) of the Companies Act.

\textsuperscript{25} Section 216(2) of the Companies Act.

\textsuperscript{26} Section 217 of the Companies Act.

\textsuperscript{27} Section 219(3) of the Companies Act.

\textsuperscript{28} Section 222 of the Companies Act.
The Companies Act disqualifies certain persons from being appointed or acting as a director of a company, and no person falling within this category may assume the position of a director within the Republic of Namibia. Furthermore, the Companies Act also provides for the disqualification of directors by an order of the High Court. Any person disqualified from being appointed or acting as a director of a company, and who purports to act as a director or directly or indirectly takes part in or is concerned with the management of any company, is committing an offence and is liable to a fine of up to N$8,000 or to be imprisoned for a period not exceeding two years, or both. The statutory disqualifications do not prohibit a company from providing in its articles of association for any further disqualifications for the appointment of, or the retention of office by, any person as a director of that company. Furthermore, the High Court of Namibia may make an order directing that, for any period specified in the order, a person, director or officer must not, under certain circumstances, without the leave of the Court be a director of a company or in any way, whether directly or indirectly, be concerned or take part in the management of any company.

Every company must keep a register of directors, officers and corporate secretaries at its registered office. The register must be kept in English and must contain the information prescribed by the Companies Act. Except when closed under the Companies Act and subject to any reasonable restrictions that the company may impose in a general meeting, so that not less than two hours in each day is allowed for inspection during business hours, the register of directors of a company must be open to inspection by any person upon payment for each inspection of the prescribed amount or any lesser amount that the company may determine. Any company that fails to keep a register is committing an offence, and is liable to a fine of up to N$2,000, and an additional fine that cannot exceed N$40 for every day the offence continues.

The shareholders of a company may, at a general meeting and notwithstanding anything in its memorandum or articles of association, or in any agreement between it and any director, remove a director by ordinary resolution before the expiry of his or her period of office. Special notice must be lodged with the company of any proposed resolution to remove a director under this Section, or to appoint any person in the place of a director so removed at the meeting at which he or she is removed, and, on receipt of notice of the proposed resolution, the company must, as soon as is reasonably possible, deliver a copy of the notice to the director concerned who is, whether or not he or she is a member of the company, entitled to be heard on the proposed resolution at the meeting. Special notice means that notice of the intention to move the resolution must be given at least 28 days before the meeting at which it is moved. If special notice is given, and the director concerned makes written representations (which should not exceed a reasonable length) to the company and requests their notification to members of the company, the company must,
unless the representations are received by it too late for it to do so, in any notice of the resolution given to members of the company state that representations have been made and send a copy of the representations to every member of the company to whom notice of the meeting is sent, whether that notice is sent before or after receipt of the representations by the company. 39 If a copy of the representations is not sent because it was received too late or because of the company’s failure to do so, the director concerned may, without prejudice to his or her right to be heard orally, require that the representations be read at the meeting. 40 A copy of the representations must not be sent out and the representations need not be read out at any meeting if, on the application of the company or of any other person who claims to be aggrieved, the court is satisfied that the rights conferred by this Section are being abused to secure needless publicity for defamatory matter. 41 None of the above, however, is to be construed as depriving a person removed from office of compensation or damages that may be payable to him or her in respect of the termination of his or her appointment as director. For example, if the removal of the person as director amounted to a breach of contract, the person so removed may separately claim damages for the breach. The former director may also claim damages as a result of the termination of any other appointment he or she held that terminated with the appointment as director. Furthermore, none of these provisions should be read as derogating from any power to remove a director that may otherwise exist. 42

iii Rights of directors

The rights of directors are derived from various sources. These may include the Companies Act, common law, the company’s articles of association and any agreement entered into with the director, such as employment or service agreements.

A director has the right to exercise the powers of his or her office. Each director therefore has the right to be given notice of and attend board meetings, the right to vote at such meetings and the right to take part in the management of the company. Included in the right to be given notice of board meetings is the right to all information required for the director to make an informed decision, 43 as well as the right to be given time to consider the information. 44 Other directors may not exclude a director from exercising his or her functions (e.g., by holding meetings without notifying a director). 45

Every director has, under common law, a personal right to inspect the accounting records of the company. This enables the director to make informed decisions and to act for the benefit of the shareholders. 46 The right of a director to inspect the accounting records is also contained in the Companies Act. 47 To exercise this right, the director has the right to

39 Section 228(4) of the Companies Act.
40 Section 228(5) of the Companies Act.
41 Section 228(6) of the Companies Act.
42 Section 228(8) of the Companies Act.
44 Robinson v. Imroth and Others 1917 WLD 159 at 171.
45 Pulbrook v. Richmond Consolidated Mining Co (1878) 9 ChD 610 at 612; Robinson v. Imroth and Others 1917 WLD 159 at 170.
46 Id, pp. 91–94.
47 To this effect, Section 292(3) of the Companies Act states as follows: “The accounting records must be kept at the registered office of the company or at any other place which the directors consider proper and must, at all times, be open to inspection by the directors and if those records are kept at a place outside
procure the assistance of an accountant, provided that the company may, if good cause exists, object to the use of an accountant or demand an undertaking from the accountant that he or she will not disclose any information gained in the process. A director is not required to give reasons for wanting to exercise his or her right to inspect the records of the company. Furthermore, although they have a right to inspect the accounting records, they are not obliged to do so. A managing director, however, is required to examine the correctness of the more important entries in the books of the company.

Directors are not legally entitled to directors’ fees, unless the fees are authorised by the company’s articles of association or by the shareholders in general meeting. A director’s remuneration may take one of two forms. First, it can be consideration for services rendered as a director, in which case it is referred to as a director’s fees. Secondly, it can take the form of consideration for services as an employee, in which case it is referred to as a director’s salary.

iv Powers of directors

As with the rights of directors, the powers of directors may be found in various sources, including common law, the Companies Act, the articles of association and any agreement entered into with the director. Certain powers are reserved for the members, who exercise these powers at general meetings of the company. Other powers may be exercised by the members or the board of directors, depending on the division of powers in the company’s articles of association and the provisions of the Companies Act. Where powers are vested in the board of directors, the directors alone can exercise these powers. A director may not place him or herself in such a position that his or her personal interests conflict or may possibly conflict with his or her duty to act in the best interests of the company.

Under common law, directors are empowered to do whatever is reasonably incidental to the management of the company’s business. This may include the power to enter into contracts, appoint employees and even cease business operations. The articles of association of

Namibia, there must be sent to and kept at a place in Namibia, and be at all times open to inspection by the directors, financial statements and returns with respect to the business dealt with in those records as will disclose with reasonable accuracy the financial position of that business at intervals not exceeding 12 months, subject to Section 293, and will enable the company’s annual financial statements to be prepared in accordance with this Act.’


51 Brown v. Nanco (Pty) Ltd 1976 (3) SA 832 (W) at 834.


53 [1935] 2 KB 113 (CA) at 134.

a company usually provide for the specific powers of the directors. The articles of association may also impose restrictions on the powers of directors. The powers of the board of directors are exercised by means of resolutions passed at meetings of directors.\footnote{J L van Dorsten, \textit{The Law of Company Directors in South Africa} (2nd edition, Sandton: Obiter Publishers CC, 1999), p. 141.}

Under Section 39 of the Companies Act, where the objects of a company are stated in its memorandum, there must be included in those objects unlimited objects ancillary to those stated objects. For example, the memorandum for a company whose object is investing in property must state ‘Investing in property and all objects ancillary thereto’. A company has, unless limited by the Companies Act, plenary powers to enable it to realise its objects and ancillary objects, except those specific powers that are expressly excluded from or qualified in its memorandum.\footnote{Section 39(2) of the Companies Act.} These plenary powers are set out in Schedule 2 to the Companies Act.

The Companies Act places various restrictions on the powers of directors. These restrictions apply notwithstanding anything to the contrary contained in the memorandum and articles of association of the company. For example, the directors of a company have no power to allot or issue shares of the company without the prior approval of the company in a general meeting.\footnote{Section 229(1) of the Companies Act.} Any director of a company who knowingly takes part in the allotment or issue of any shares in contravention of this Section is liable to compensate the company for any loss, damages or costs that the company may have sustained or incurred thereby, but proceedings to recover any such loss or those damages or costs must be commenced no later than two years from the date of the allotment or issue.\footnote{Section 229(4) of the Companies Act.}

Another example of where a director’s powers are limited relates to share option plans in which the director is interested. An option or a right given directly or indirectly to any director or future director\footnote{‘Future director’ does not include a person who becomes a director of the company after the lapse of six months from the date on which the option or right is acquired by that person. See Section 231(2) of the Companies Act.} of a company in terms of any scheme or plan, to subscribe for any shares of that company or to take up any debentures convertible into shares of that company on any basis, is not valid unless authorised in terms of a special resolution of that company.\footnote{Section 231(1) of the Companies Act.} This, however, does not apply where those shares or debentures are allotted or issued in proportion to existing holdings, on the same terms and conditions as have been offered to all the members or debenture holders of the company, or to all the holders of the shares or debentures of the class or classes being allotted or issued.\footnote{Section 231(1) and 230(1)(c) of the Companies Act.} An option or right is not invalid in terms of this Section if that director or future director of the company holds salaried employment or office in the company and is given that option or right in his or her capacity as an employee.\footnote{Section 231(3) of the Companies Act.}

A director of a company who purchases a right to make delivery or call for delivery at a specified price, within a specified time, of a specified number of shares or a specified amount of debentures listed by a stock exchange, is committing an offence and is liable to a fine of up to N\$4,000 or imprisonment for up to one year, or both.\footnote{Section 232(1) of the Companies Act.} This restriction should not be
taken as penalising a person who buys a right to subscribe for shares or debentures of a body corporate or buys debentures of a body corporate that confer on the holder of the right a right to subscribe for shares of that body corporate, or to convert the debentures in whole or in part into shares of that body corporate.  

The directors of a company have no power, save with the approval of a general meeting of the company, to dispose of the whole or substantially the whole of the undertaking of the company or the whole or the greater part of the assets of the company. A resolution of the company approving such a disposal has no effect unless it authorises or ratifies the terms of the specific transaction.

v Personal liability of directors

Section 56 sets out instances where, in respect of company names, a director acting on behalf of the company commits an offence. Where the offence concerns a bill of exchange, promissory note, cheque or order for money or goods and the offence leads to the default of payment in that document, the person who committed the offence is liable for the amount stated on the document. The first of these offences involving a company’s name is where the director uses or authorises the use of any seal purporting to be the seal of a company where the name of the company is not engraved on that seal in legible characters. The second offence is where a director issues or authorises the issue of any notice or other official publication of the company, or signs or authorises the signing on behalf of the company of any bill of exchange, promissory note, endorsement, cheque or order for money or goods where the name of the company and registration number is not in legible character on the document. The third offence is where a director issues or authorises the issue of any letter, delivery note, invoice, receipt or letter of credit of the company where the name and registration number of the company is not on these documents in legible characters.

Under Section 430, if it appears (whether in a winding-up procedure, judicial management procedure or otherwise) that any business of the company was or is being carried on recklessly, or with the intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court may, on the application of the master, the liquidator, the judicial manager, any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in that manner is personally responsible, without any limitation of liability, for any or all of the debts or other liabilities of the company as the court may direct. Without prejudice to any other criminal liability incurred, where any business of a company is carried on recklessly or with the aforementioned intent, every person who was knowingly a party to the carrying on of the business in that manner is committing an offence and is liable to a fine of up to N$8,000 or imprisonment for up to two years, or both.

64 Section 232(2) of the Companies Act.
65 Section 236(1) of the Companies Act.
66 Section 236(2) of the Companies Act.
67 Section 56(5) of the Companies Act.
68 Section 56(3)(a) of the Companies Act.
69 Section 56(3)(b) of the Companies Act.
70 Section 56(3)(c) of the Companies Act.
71 Section 430(1) of the Companies Act.
72 Section 430(3) of the Companies Act.
III DISCLOSURE

The Companies Act contains numerous provisions in terms whereof directors and auditors are required to make certain disclosures regarding the company, its transactions, its directors and its financial matters. The first disclosure requirements set out by the Act relate to the interests of directors of a company in contracts to which the company is a party.73 In terms of the Companies Act, any director ‘who is in any way, whether directly or indirectly, materially interested in a contract or proposed contract’, and where this contract or proposed contract is significant to the business of the company and is entered into or to be entered into following a resolution of directors taken at a meeting of the directors, or by one or more directors or officers of that company, in accordance with authorisation by the remaining directors of the company, is required to disclose his or her interests therein to the company.74 The director should disclose the full particulars of his or her interest, regardless of whether that director’s interest exists at the time at which the contract was entered into or arises at any time thereafter.75 The disclosure should be made at the meeting of the directors ‘at which the question of confirming or entering into the contract is first taken into consideration’ or, if this is not possible, at the next directors’ meeting, on which date reasons for late disclosure should be provided and, if brought by way of a written notice, should be read out at the meeting or signed by all other directors present to confirm that each of them has read the written notice.76 General notice of a director’s interest in another company or business is acceptable for disclosure purposes if compliant with the relevant notice requirements and brought within the prescribed time.77

The failure to disclose as required has consequences for both the director, who will have committed an offence and is liable to a fine not exceeding N$4,000 or imprisonment for up to one year, or both, and for the company, because of the invalidity of all resolutions taken by the company regarding contracts or proposed contracts where the provisions relating to disclosure have not been complied with.78 The disclosed interests should be reflected in the minutes of the directors’ meetings, and a register should be kept stipulating all interests of directors and officers as disclosed. The auditor of the company is responsible for ensuring that these minutes and registers are accurately kept.79

Auditors are appointed by the members of a company at the annual general meeting, following the initial appointment of auditors by the members or directors of the company upon incorporation, or as otherwise provided for in the Companies Act.80 The Companies Act stipulates that the duty of an auditor of a company is to ‘report to its members in any manner and on any matters which are prescribed by th[e] Act and carry out all other duties imposed on him or her by th[e] Act or any other law’.81 The auditor of a company has a right to access all books, documents and accounting records of a company, and may require directors and officers of the company to provide any information and explanation that

73 Chapter 8, Part 6 of the Companies Act.
74 Sections 242(1) and 242(2) of the Companies Act.
75 Section 242(1) of the Companies Act.
76 Section 243(1) of the Companies Act.
77 Section 242(3) of the Companies Act.
78 Sections 242(5) and 244 of the Companies Act.
79 Sections 247 to 249 of the Companies Act.
80 Section 277 of the Companies Act.
81 Section 290 of the Companies Act.
the auditor deems necessary for the completion of his or her duties, including all financial information, past and present, of a subsidiary where that company is a holding company.\textsuperscript{82} The appointed auditors are also permitted to attend general meetings of the company, and should receive all notices and information relating thereto that would usually be provided to members of the company.\textsuperscript{83} The powers and duties of auditors are dealt with in more detail in the Public Accountants’ and Auditors’ Act.\textsuperscript{84} The auditor is not an officer of the company, and indeed officers of the company do not qualify for appointment as auditors.\textsuperscript{85} An auditor is to maintain independence during the performance of his or her duties, which should be performed without taking instructions from directors, shareholders or creditors.\textsuperscript{86}

The Companies Act provides extensively for financial reporting and accountability, and each company must keep accounting records to fairly present the financial position of the company, its transactions and all other relevant details.\textsuperscript{87} The directors are responsible for ensuring that annual financial statements, compliant with generally accepted accounting practice and including reports by the directors and auditors, are made out every year and presented at the annual general meeting.\textsuperscript{88} Specific information must be disclosed in the financial statements, as stipulated by the Companies Act, including loans and securities benefiting directors and managers, and emoluments and pensions of directors.\textsuperscript{89} The annual financial statements, with the exception of the auditors’ report, must be approved and signed by the directors, and thereafter sent to members and the Registrar.\textsuperscript{90} Members and debenture holders, as well as other individuals as provided for in the Companies Act, must be provided with copies of the annual financial statements without charge and upon demand. Failure to provide them within seven days of a request constitutes an offence, the consequence of which is a fine for each day of non-compliance.\textsuperscript{91} Details regarding what the annual financial statements should contain and disclose are fully set out in Schedule 4 to the Companies Act.

The NamCode, as discussed above, provides the standards regarding corporate governance, and while companies are not statutorily obligated to comply therewith, the intention is for companies to apply or explain, and that any case of non-compliance with the recommended practices must be explained fully by directors to shareholders and other stakeholders.\textsuperscript{92}

\textsuperscript{82} Section 289(a) and (b) of the Companies Act.
\textsuperscript{83} Section 289(c) of the Companies Act.
\textsuperscript{84} Public Accountants’ and Auditors’ Act No. 51 of 1951.
\textsuperscript{85} Section 283 of the Companies Act, and the definition of officer at Section 1; see also Baker and Others v. McHardy and Others 1957 (4) SA 541 (N) at 545.
\textsuperscript{87} Section 292 of the Companies Act.
\textsuperscript{88} Sections 294, 307 and 309 of the Companies Act.
\textsuperscript{89} Sections 302 to 304 of the Companies Act.
\textsuperscript{90} Sections 305 and 306 of the Companies Act.
\textsuperscript{91} Section 316 of the Companies Act.
\textsuperscript{92} www2.deloitte.com/content/dam/Deloitte/na/Documents/risk/za_Deloitte_NamCode_Brochure.pdf accessed on 1 and 2 February 2015 at p. 3.
IV CORPORATE RESPONSIBILITY

Namibian law does not have an overall law or policy dealing with corporate responsibility. Until recently, companies have generally relied on the King III or industry self-regulation to promote corporate responsibility. The NamCode, however, contains various provisions relating to corporate responsibility. For example, it states that the board is primarily responsible for the governance of risk.93 The board must ensure that there is an effective risk-based internal audit.94 The board must further be assisted by a risk committee in carrying out its risk responsibilities95 and must delegate to management the responsibility to design, implement and monitor the risk management plan.96 The board must ensure that risk assessments are performed on a continual basis,97 and that frameworks and methodologies are implemented to increase the probability of anticipating predictable risks.98 The board must ensure that management considers and implements appropriate risk responses,99 and must also ensure continual risk monitoring by management.100 The board must receive assurance regarding the effectiveness of the risk management process,101 and must ensure that there are processes in place enabling complete, timely, relevant, accurate and accessible risk disclosure to stakeholders.102 Compliance risk must form an integral part of the company’s risk management process,103 and the board must delegate to the management the implementation of an effective compliance framework and processes.104

The board of each company must, in terms of the NamCode, ensure that the company complies with applicable laws, and must consider adherence to non-binding rules, codes and standards.105 This will ensure further social responsibility, and also ensures protection of employees and other interested parties. Other legislation such as the Labour Act No. 11 of 2007, and policies such as the Minerals Policy and Energy White Paper, contain provisions relating to corporate responsibility and, by ensuring that a board is obliged, or at least motivated, to have knowledge of these measures, will promote corporate responsibility.

The NamCode states that a board must appreciate that stakeholders’ perceptions affect a company’s reputation.106 Transparent and effective communication with stakeholders is essential for building and maintaining their trust and confidence.107 The board must,
therefore, instruct management to deal proactively with stakeholder relationships\textsuperscript{108} and strive to achieve the appropriate balance between its various stakeholder groupings in the best interests of the company.\textsuperscript{109}

V SHAREHOLDERS

i Shareholder rights and powers

According to the Companies Act, every subscriber to the memorandum of association of a company is deemed to be a member on incorporation.\textsuperscript{110} Members are thus shareholders whose names are included in the register of members. In terms of the Companies Act, there is little distinction between members and shareholders, and the two terms are largely interchangeable.

The Companies Act stipulates that, subject to its provisions, each member holding a share has a voting right in respect of each share held.\textsuperscript{111} Similarly, members of companies that are limited by guarantee, and thus have no share capital, each have one vote.\textsuperscript{112} The articles of association of private companies must stipulate the voting rights that attach to shares and various classes thereof,\textsuperscript{113} and often preference shares are issued without voting rights or with voting rights applicable only in limited circumstances.\textsuperscript{114}

The influence that shareholders can exercise over the board is limited to the appointment of directors\textsuperscript{115} for a specific term and the right to remove directors. The removal of a director, in terms of the Companies Act, is done by way of ordinary resolution, for which special notice must be given to the company, and the director sought to be removed should be notified thereof and allowed to make representations, as discussed above.\textsuperscript{116}

Certain decisions regarding the company can only be taken with shareholder input, such as the issue and allotment of shares, which require approval by the shareholders at a general meeting.\textsuperscript{117} The approval can be general approval given to directors, or specific approval, and this requirement cannot be amended or removed by way of the articles of association.\textsuperscript{118} Further restrictions exist regarding the issue and allotment of shares, or debentures convertible to shares, to directors, their nominees, bodies corporate they are involved in as stipulated or any subsidiaries thereof, in which instances specific approval must be granted at a general meeting, and other requirements must similarly be met.\textsuperscript{119} The rights of dissenting or minority shareholders are addressed below, where the recourse available to them is discussed.

The varying of rights attached to various classes of shares cannot be done without the consent of three-quarters of the holders of that class of shares, or by the passing of a resolution

\textsuperscript{108} Principle C8-2 of the NamCode.
\textsuperscript{109} Principle C8-3 of the NamCode.
\textsuperscript{110} Section 110 of the Companies Act.
\textsuperscript{111} Section 201 of the Companies Act.
\textsuperscript{112} Id.
\textsuperscript{113} Section 203 of the Companies Act.
\textsuperscript{114} Section 202 of the Companies Act.
\textsuperscript{115} Section 218 of the Companies Act.
\textsuperscript{116} Section 228 of the Companies Act.
\textsuperscript{117} Section 229 of the Companies Act.
\textsuperscript{118} Id.
\textsuperscript{119} Section 230 of the Companies Act.
at a meeting of those shareholders, which is to be regarded as a special resolution, and all necessary provisions are to be complied with accordingly. According to the standard articles of association, a special resolution, and thus shareholder approval, is also required for:

a. the conversion of any or all paid-up shares to stock;
b. changing the share capital by way of consolidation or division, or by an increase in issued shares without an increase of share capital;
c. the subdivision of existing shares;
d. the conversion of ordinary or preference par value shares into no par value shares, and vice versa;
e. the cancellation of shares not taken up on the date of the resolution;
f. a reduction of share capital and stated capital;
g. the capital redemption fund of share premium accounts, subject to the necessary consent and authorisation required by law; and
h. the conversion of preference shares into redeemable shares.

Other decisions that require a special resolution by the shareholders include:

a. changing the name of the company; 120
b. amending the memorandum and articles of association; 121
c. converting a public company to a private company; 122
d. altering the company’s share capital; 123
e. acquisition by a company of its own shares; 124
f. converting shares into stock; 125
g. resolving that a company’s affairs be investigated by an inspector appointed by the Minister of Trade;
h. industrialisation and small and medium-sized enterprise development; 126 and
i. resolving that the company be wound up by the court. 127

An ordinary resolution is required to authorise the disposal of the whole or substantially the whole of the undertaking of the company, or the whole or greater part of the assets of the company. 128

ii. Shareholders’ duties and responsibilities

In terms of the Companies Act, shareholders have no specific duties, either between themselves or regarding the relationship between themselves and the company. Shareholders’ agreements – optional agreements concluded between shareholders and the company in which they hold shares, and which govern the relationship between the company and its shareholders and shareholders’ relationships with one another – could create duties, which would thus be

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120 Section 50 of the Companies Act.
121 Section 62 and Section 67 of the Companies Act.
122 Section 24 of the Companies Act.
123 Section 81 of the Companies Act.
124 Section 89 of the Companies Act.
125 Section 106 of the Companies Act.
126 Section 266 of the Companies Act.
127 Section 349 of the Companies Act.
128 Section 236 of the Companies Act.
binding in terms of the agreement. As companies are separate legal entities, shareholders cannot be held liable for any acts or omissions of the company. No code exists in Namibia governing best practices for shareholders.

iii Shareholder activism

As stated above, the standard articles of association stipulate that the remuneration of directors is to be determined from time to time in a general meeting. The consequence of this is that the shareholders must take a vote regarding the remuneration of directors, and a simple majority is required to approve the suggested remuneration. Further provision is made in the articles of association for circumstances where directors are required to perform beyond what is ordinarily required of them in their service for the benefit of the company; for example, by travelling abroad. In such circumstances, the company may remunerate the directors for their extra services by way of a fixed amount or a percentage of the profits, and this remuneration can be in addition to or in place of existing remuneration. The same simple majority at a general meeting would be required for the approval of any additional remuneration.

Provision is made in the Companies Act for shareholders to have recourse in the event of their dissatisfaction with the way in which the business of the company is being conducted, and several remedies are available to shareholders. Where members believe that the conduct of the company, either in a specific situation, or generally, is 'unreasonably prejudicial, unjust or inequitable', the members may approach a court for relief, and in some instances relief must be sought within a stipulated time period. The Companies Act provides for various orders that the High Court may make in such instances, including amendment of the memorandum and articles of association, as well as consequences for companies that fail to comply with these orders. Extensive provision is made in the Companies Act for the appointment of inspectors by the Minister of Trade and Industry (Minister), upon application by a stipulated minimum number of members, as well as the inspections conducted by these inspectors. The Minister is also entitled to initiate such investigations when they are found to be reasonably necessary, and any company to be investigated in this manner should receive prior written notice from the Minister, informing it of the complaint and the pending investigation and allowing a reasonable opportunity for response thereto, unless the Minister is of the opinion that the notice would defeat the object of the intended investigation. These investigations can be initiated by other means, including the passing of a special resolution or an order of court. Upon finalisation of the inspection, a written report is to be compiled and presented to the Minister, following which the Minister has various options, including approaching a court to start winding-up proceedings, or directing the Registrar to take one or more steps.

Derivative action is provided for in the Companies Act in circumstances where 'a company has suffered damages or loss or has been deprived of any benefit as a result of any wrong, breach of trust or breach of duty committed by any director or officer of that company or by any past director or officer while a director or officer of that company.'

129 Section 260 of the Companies Act.
130 Sections 262 to 270 of the Companies Act.
131 Section 262 of the Companies Act.
132 Section 265(3) of the Companies Act.
133 Section 266(1) of the Companies Act.
134 Sections 269 and 270 of the Companies Act.
135 Section 274 of the Companies Act.
Where, in such circumstances, the company has not instituted proceedings against that
director or officer, past or present, to recover the resultant damages or loss of benefit, any
member may initiate such proceedings on the company’s behalf as are provided for in the
Companies Act. This can be done regardless of any ratification or condonation by the
company in respect of the director or officer’s actions, but only after notice has been served on
the company calling for the initiation of proceedings within one month of the date of service
of the notice, failing which legal proceedings will be instituted. The member may then
apply to the High Court for the appointment of a curator, to act on the company’s behalf
for the purposes of initiating and bringing to finalisation the necessary proceedings. If the
High Court grants the application, in light of the specific provisions of the Companies Act,
it may make a provisional order allowing for an investigation by the appointed curator into
the affairs of the business, and upon submission of the curator’s report, the appointment and
court order can be confirmed.

Members are entitled to nominate proxies to serve on their behalf at meetings, and
the notices for meetings of companies with a share capital should include a proxy form (an
example of which is contained in the standard articles of association) indicating that a proxy
may appear for a member, and may also speak and vote as instructed by the member.
Namibian legislation is silent on proxy battles and shareholder campaigns, but both occur
regularly within the course of business of Namibian companies.

iv Takeover defences
Takeover offers are dealt with in terms of the Companies Act. Depending on the value of the
takeover and whether it amounts in fact to the acquisition of one entity over the whole or
part of the business of another entity, the Namibian Competition Commission would also
need to approve the takeover.

Takeovers in Namibia may occur in a number of ways. Where companies have few
shareholders, it is possible to approach each shareholder individually and buy out that
shareholder. Where a company has one major shareholder, the easiest way to achieve a takeover
would be to approach the major shareholder with the intention of buying this shareholder
out. This is the most common method of achieving a takeover. It is also possible to issue
a takeover offer to shareholders in terms of the Companies Act. The Companies Act sets
out the procedure that must then be followed, the content of the takeover statements, and
liability and offences in respect of takeover offers. The Companies Act also sets out the
circumstances under which the shares of the minority under a takeover scheme may be
acquired.
There are a certain number of ways in terms whereof a company may reduce the risk of takeovers. Since any potential offeror would need to know who the shareholders are and where to approach them, limiting access to the share register is advisable. However, in Namibia a company's share register is available to the public, and failure to provide access is a criminal offence. Another possible deterrent would be to include change in control provisions in loan agreements in terms whereof the loan repayment is accelerated in events of change in control; any entity taking over the company would then be stuck with this accelerated debt.

It is also possible for a company to avoid a takeover by introducing a shareholder rights plan in terms whereof existing shareholders may purchase additional shares at a discount, if a certain trigger event occurs (e.g., one shareholder obtains more than 10 per cent of the shares). The plan would have to comply with the Companies Act, which places various restrictions on the issue of shares at a discount. First, the issue must be authorised by a special resolution of the company, which must state the maximum rate of discount at which the shares are to be issued. Secondly, the company must have been in business for more than one year. Thirdly, the issue must be sanctioned by the High Court. Finally, the shares must be issued within one month after sanction by the Court.

A white-knight defence is not common parlance in Namibia, but what it entails (a friendly takeover, usually in cooperation with the target) is generally allowed in Namibia, provided that the provisions of the Companies Act are complied with. If the transaction amounts to a merger and does not fall within the merger thresholds, Competition Commission approval would also need to be obtained.

As with the white-knight defence, the term staggered board (where groups of directors are appointed at different times for multi-year periods) is not a common phrase in Namibia, but boards are often constituted this way. In fact, the NamCode encourages a staggered board and proposes that one-third of the board retires each year. The NamCode also discourages terms of longer than nine years.

v Contact with shareholders

Under the Companies Act, a report may be published following a meeting of the company that sets out the details of that meeting, on the condition that it accurately sets out a summary of all questions and comments regarding any topics that arose at the meeting. Anything addressed at the meeting that could be found to be defamatory to any person, or otherwise detrimental to the company, need not be included, and the report may be circulated and advertised at the expense of the company. As stated above, reporting by the auditor on the prescribed matters is a requirement of the Companies Act. The directors must also compile a report, to be published in the annual financial statements. The report should be in respect of the company's state of affairs, including business and profit and loss of the company,

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147 Section 120 of the Companies Act.
148 Section 87 of the Companies Act.
149 Principle C2-18 of the NamCode.
150 Principle C2-18 of the NamCode.
151 Section 215 of the Companies Act.
152 Id.
153 Sections 290 and 309 of the Companies Act.
154 Section 294 of the Companies Act.
along with other topics stipulated in the Companies Act, specifically Schedule 4 thereof, and should be presented to the members at the annual general meeting. Failure to comply therewith constitutes an offence, with possible fines or a period of imprisonment, or both.

Additional reporting is required for public companies, for which interim reports and provisional annual financial statements must be prepared, as set out in the Companies Act. Members have a right to a copy of the most recent audited financial statements, and any interim reports and provisional annual financial statements where applicable. These copies should be provided on demand and without charge, and may also be requested by debenture holders and judgment creditors, as provided for in the Companies Act.

Meetings between individual shareholders and directors are not addressed in the Companies Act, and are thus not prohibited, and they are not uncommon within Namibia. Directors are often appointed by a specific group of shareholders with a view to having those shareholders represented at board level. It would thus be expected for that director to meet with the shareholders he or she represents, to report on the affairs of the company and to receive guidance with regards to how to vote or get ideas from the shareholders to be presented to the board. However, insider trading is prohibited, and as such any communication that would amount to insider trading, or is made with a view to bring unlawful benefit to any party, is prohibited.

Secrecy agreements and similar agreements regulating the conduct of shareholders between themselves are not specifically addressed in the Companies Act. Where companies or shareholders, or both, find it necessary to regulate their relationship specifically in this regard, the issue of secrecy and similar issues are typically addressed in shareholders’ agreements. A shareholders’ agreement binds all existing shareholders and governs the relationships of shareholders between themselves. Such agreements can be prepared to be binding on future shareholders, to ensure that newcomers are similarly required to conduct themselves as stipulated. Alternatively, companies may choose to include specific provisions relating to secrecy or other topics in their articles of association. This would automatically be binding on shareholders, both current and future, as well as on the company in respect of its dealings with its shareholders.

Notice periods regarding any general meeting to be held can be stipulated in the articles of association of a company, but if not provided for, 14 days’ written notice should be given in the case of general meetings, with 21 days’ written notice to be given where the meeting is being held to pass a special resolution. Provision is made for the waiving of these periods, either by members holding a minimum of 95 per cent of the shares approving the shorter notice period prior to the meeting being held, or by written notice of all members to be given before or at the meeting. Notice should be given in the manner prescribed in the articles of association, but should set out details of what is to be discussed at the meeting and what votes are to be taken, if any. As stated above, proxy forms are included to allow for the appointment of proxies for purposes of attending the meeting, and these forms stipulate

155 Section 307 of the Companies Act.
156 Section 307(3) of the Companies Act.
157 Sections 310 and 311 of the Companies Act.
158 Section 316 of the Companies Act.
159 Id.
160 Section 194 of the Companies Act.
161 Id.
162 Section 195 of the Companies Act.
how that member wishes to vote on each issue to be addressed. Proxy solicitation is not addressed in the Companies Act, and it occurs within the ordinary course of business between shareholders in Namibia. The primary concern of large blocks of shareholders typically has to do with the voting rights of whatever class of shares they hold, as discussed above.

**VI OUTLOOK**

The legislative framework dealing with companies has limited provisions promoting good governance. Until recently, the principles of corporate governance applied in Namibia were borrowed from South Africa and international practices. With the introduction of the NamCode and the concomitant support and motivation by the NSX for listed companies to comply with the NamCode, Namibia is fast on its way to establishing a proper, settled framework for the corporate governance of Namibian companies and companies listed on the NSX. What is absent, however, is continuous training and information-sharing sessions to ensure that directors, shareholders, stakeholders and other persons are informed and updated on the development of corporate governance in Namibia.
I OVERVIEW OF GOVERNANCE REGIME

Legal framework: laws and self-regulation

In the Netherlands, the general rules of civil law relating to the governance of companies and listed companies are laid down in Book 2 of the Dutch Civil Code (DCC). This sets out the duties and powers of the various corporate bodies, as well as rules on representation, conflicts of interest and the liability of management board members. The DCC also contains rules regarding financial reporting and disclosure. Compliance with the rules in the DCC can, if necessary, be forced through the courts. In this context, it should be mentioned that a right of inquiry was introduced in Book 2 of the DCC in 1994: shareholders with a specific capital interest (in some cases, even former shareholders)² may request a court specially designated for this purpose – the Enterprise Chamber of the Amsterdam Court of Appeal (Enterprise Chamber) – to initiate an inquiry into the company’s policy and affairs. Upon a showing of mismanagement, the Enterprise Chamber can intervene by, inter alia, suspending or nullifying a management board decision, suspending or removing management or supervisory board members, and appointing temporary board members. In practice, inquiry proceedings have played an important role in the development of law in the area of corporate governance, for example with regard to the issue of the respective roles of the management board and the shareholders in determining the strategy of the relevant company.

In addition, the Netherlands has rules on the supervision of the business conduct of listed companies, laid down in Chapter 5 of the Financial Supervision Act (FSA). The FSA contains rules on, inter alia, the disclosure of major holdings, financial reporting, the prevention of market abuse and the obligations of institutional investors. Supervision of compliance with these rules is carried out by a specially designated body, the Authority for the Financial Markets (AFM).

Alongside these statutory rules is a system of self-regulation consisting of codes of conduct containing principles and best-practice provisions drawn up by the sector itself. The first Dutch Corporate Governance Code containing governance rules for listed companies entered into effect in 2004. In December 2016, a revised version of the Corporate Governance Code was published, with more attention being paid to long-term value creation, culture, reporting of misconduct, risk management and how to apply the Corporate Governance Code in a company with a one-tier board.

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1 Geert Raaijmakers is a partner and Suzanne Rutten is a professional support lawyer at NautaDutilh NV.
2 SNS Reaal, 4 November 2016.
Since the introduction of the first Corporate Governance Code, several sectors have set up their own specific codes, such as the Code of the Dutch Pension Funds and the Housing Corporations Code. In 2010, the Banking Code was introduced to govern Dutch banks. This mirrors the Corporate Governance Code in many respects, but also contains rules specifically targeted at banks (specific expertise of certain committee or board members, the treatment and interests of clients). The Banking Code (updated in 2015) applies to both listed and unlisted banks. Listed banks fall under the Corporate Governance Code, as well as the Banking Code.

Both codes adopt a comply or explain system: companies must state on their websites how they applied the principles and best-practice provisions and, if applicable, provide a reasoned explanation of why a provision has not been applied. For both codes, there is a separate monitoring committee that annually reports on the extent to which each code has been complied with, and on any problem areas that have emerged in this regard.

ii General: corporate governance developments

In October 2017, the new government presented several intended legislative changes as part of its coalition agreement. One of the measures announced relates to the protection of companies (in general, as well as in specific vital sectors). To this end, draft legislation was published on 7 December 2018 aimed at promoting a careful decision-making process in cases of shareholder activism or a hostile takeover. If enacted in its current form, the proposal would introduce a statutory cooling-off period of up to 250 days during which the shareholders’ meeting would not be able to dismiss, suspend or appoint board members of a listed Dutch company under attack. The proposal was announced in 2017 together with a separate proposal to protect companies operating in vital sectors. Regarding the latter, so far only a draft proposal to protect the telecom sector has been published (in 2017). In August 2018, the Council of State commissioned its advisory report regarding this draft bill, but this has not been published to date. The announced proposal concerning selected companies working in (other) vital sectors to only be eligible for takeover after careful analysis of the risks to national security and following explicit approval (or by means of other suitable guarantees) has also not yet been published. Further, the announced investigation into whether such protection is likewise necessary for agricultural land and certain regional infrastructure works, in addition to the current list of vital sectors, has also not been published to date. Except for the additional measures audit firms bill, which entered into force on 1 July 2018, none of the legislation announced for 2018 entered into force that year. The bill introduced new measures for improving the quality of statutory audits and to strengthen the role of the AFM. The current status and planning of all other proposed legislation is discussed in Section VI.

The first Dutch Stewardship Code entered into force in January 2019, which is a form of self-regulation that does not have a statutory basis. Pension funds, insurers and asset managers have developed the Stewardship Code to emphasise the increasing importance of engaged and responsible share ownership and the role that institutional investors play in promoting long-term value creation at Dutch listed companies. In addition, the principles of the Stewardship Code offer pension funds, insurers and asset managers the opportunity to inform their beneficiaries and clients about how they have used their shareholder rights. All institutional investors holding shares in Dutch listed companies are expected to aim for the meaningful implementation of the principles of the Stewardship Code. They are also expected to report on compliance with the Stewardship Code from financial year 2019 onwards.
With regard to the implementation of the mandatory register of beneficial owners, in accordance with the Fourth Anti-Money Laundering Directive, the Netherlands is one many countries that did not meet the deadline of June 2017. Initially, the government announced it would have the register operational by the summer of 2018, but because of amendments in the Directive (resulting in the Fifth Anti-Money Laundering Directive) this target has not been met. The Fifth Anti-Money Laundering Directive was adopted in 2018 and has to be implemented no later than 10 January 2020. The government now plans to submit the bill establishing a register of beneficial owners to the Lower House of Parliament in early 2019.

Within the same scope of combating tax evasion, fraud and the financing of terrorism, a private member’s bill for the introduction of a central shareholders’ register is still before Parliament. The register will contain information on shares in and shareholders of private limited liability companies (BVs) and unlisted public limited liability companies (NVs), and will be accessible by civil law notaries, governmental authorities and other designated bodies in connection with customer due diligence investigations, and monitoring, supervisory and enforcement duties. Despite the negative response of the Council of State, the bill has not been withdrawn because its proposers still believe in its purpose; further, in view of the growing focus on transparency and the developments relating to the ultimate beneficial owner register, the bill may still have a chance of crossing the finishing line. In this context, the bill to dematerialise bearer shares in all public limited liability companies (NVs) is also still before Parliament, and a new draft bill was published at the end of 2018 requiring social organisations to publish the receipt of large donations. This draft bill also proposes requiring foundations to publish their balance sheet with a list of their assets (transparency of social organisations).

In short, the subject of corporate governance remains on the agenda in the Netherlands. Overall, protection of businesses, but also the protection of the public from fraudulent businesses, remains an important area of attention, and an actual change in culture and behaviour is expected of companies generally and of the banking sector in particular, with legislative action being taken where self-regulation fails to deliver the desired result.

II CORPORATE LEADERSHIP

i Board structure and practices

Dutch corporate law has traditionally provided for a two-tier board structure consisting of a management board and a separate supervisory board (each of which is governed by different statutory provisions); however, the institution of a supervisory board is only mandatory for companies subject to the structure regime. A company is subject to this regime if, for a period of three consecutive years, its issued capital and reserves amount to not less than €16 million; it has a works council instituted pursuant to a statutory requirement; and it regularly employs at least 100 employees in the Netherlands.

Since 2013, Dutch corporate law has also provided a statutory basis for the one-tier board structure. However, through the influence of international developments, the one-tier board structure had made its way into Dutch corporate practice prior to this legislation. Therefore, the Corporate Governance Code of 2008 already contained provisions relating

3 Book 2, Title 4, Part 6 of the DCC.
to listed companies with a one-tier board structure. In 2016, the new Code clarified how companies with a one-tier board must apply the Code by, inter alia, specifying that the current rules for supervisory board members also apply to non-executive directors.

The reasons for companies to opt for the one-tier model vary greatly. Generally, the model is considered to be suited to:

a. companies in a highly dynamic environment such as the technology sector;
b. complex companies that need to act quickly in crisis situations;
c. companies that are in the process of being listed and in which a major shareholder is closely involved in the company’s management or supervision (family businesses); and
d. companies that form part of an international group or that have an international group of shareholders.4

In practice, the one-tier model and the two-tier model appear to be growing closer to one another: in companies with a two-tier board structure, the supervisory board is now expected to play a more active role, while in those with a one-tier structure it is often required that the majority of board members consist of independent non-executives. According to the new Code, the latter is also mandatory. For this reason, some commentators speak of a convergence towards a 1.5-tier structure.5

**Management board**

The management board is charged by law with the duty to manage the company, subject to restrictions imposed in the articles of association.6 It is generally accepted that management in any event includes directing the company’s day-to-day affairs and setting out its strategy. It should be borne in mind that in accordance with the Dutch stakeholder model, the board must take into account various interests, not only those of the enterprise and shareholders, but also those of other interested parties, such as employees and creditors.

In recent years, the average size of the boards of Dutch listed companies has declined; a significant number of companies even have two-member boards. The rise of this CEO–CFO model can be explained by a number of factors, one of which is the popularity of the executive committee, in which board members as well as senior managers have seats; in these setups, a larger management board makes less sense. Although clearly desirable in terms of efficiency, executive committees also raise several governance issues that require due consideration. The new Corporate Governance Code Committee does embrace the executive committee; however, it requires companies to render account of governance issues, such as how the interaction between the executive committee and the supervisory board will be structured. Furthermore, the executive committee’s role, duties and composition must be set out in the management report.

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4 See Rients Abma (in Dutch), ‘Naar de one-tier board’, *Goed Bestuur*, 2012/3.
6 Article 2:129 of the DCC.
**Supervisory board**

The function of the supervisory board is to supervise and advise the management board and oversee the general state of affairs within the company. Like the management board, the supervisory board must take into account the interests of the company and its enterprise, as well as those of all other stakeholders.

The supervisory board of a structure-regime company has a number of important rights, including the right to appoint, suspend and remove management board members, and the right to approve (or refuse to approve) certain management board decisions, such as a decision to issue shares, enter into a joint venture, make a major acquisition or large investment, amend the articles of association or dissolve the company.

To enable the supervisory board to perform its supervisory duties, the DCC requires the management board to provide the supervisory board at least once a year with information about the company’s strategic policy, its general and financial risks and its internal control system. The Corporate Governance Code expands upon the supervisory duties: if the supervisory board consists of more than four members, it must appoint from among its members an audit committee, a remuneration committee and a selection and appointment committee, whose duties are also specified.

**ii Directors (both management and supervisory board)**

**Appointment and removal**

As previously stated, management board members of structure-regime companies are appointed and removed by the supervisory board. In companies not governed by this regime, the general meeting of shareholders has this power. Under the present Corporate Governance Code, management board members are in principle appointed for a maximum term of four years, but reappointment for successive four-year terms is permitted.

With regard to their removal, it should be noted that management board members have both a corporate and an employment relationship with their company. For a long time, it was unclear whether the removal of a management board member by the supervisory board or general meeting of shareholders terminated both of these relationships, or only the corporate one. In a decision rendered in April 2005, however, the Supreme Court ruled that removal also terminates the employment relationship. Every management board member having been employed for two years or more is entitled to claim a transition payment when the contract is terminated by the employer, dissolved in court at the employer's request or has ended by operation of law. Only in exceptional circumstances, such as in the event of any seriously culpable act or omission on the employer's part, or other extraordinary circumstances, could the board member be eligible for additional severance pay, referred to as fair compensation.

Under the Corporate Governance Code, the remuneration of a management board member in the event of dismissal in principle may not exceed one year's salary (fixed remuneration component). According to the reports of the Corporate Governance Code

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7 Article 2:140(2) of the DCC.
8 Article 2:164 of the DCC.
9 As a result of recently adopted EU legislation the responsibilities of the audit committee will increase in the future; see Section III.ii.
Monitoring Committee, however, compliance with this provision in particular has been limited since the Code took effect in 2004. The reason usually given for this is the need to respect existing agreements. In its report published in December 2012, the Monitoring Committee urged that employment contracts be amended on this point; however, as follows from its latest compliance report (2015, published December 2016), non-compliance remains relatively high. The new Code of 2016 introduced the best practice that no remuneration is justified if a board member ended a contract on his or her own initiative or in the case of seriously culpable or imputable acts.11

Supervisory board members of structure-regime companies are appointed by the general meeting of shareholders based on a nomination by the supervisory board.12 The general meeting of shareholders may, however, overrule such a nomination. The general meeting of shareholders and the works council may recommend persons for nomination. An individual supervisory board member of a structure-regime company may only be removed by the Enterprise Chamber at the request of the company, the general meeting of shareholders or the works council.13 However, the general meeting of shareholders may pass a vote of no confidence in the supervisory board as a whole, which results in the immediate removal of all board members. This has been attempted only once; in the Stork case (2007), the Enterprise Chamber ordered a standstill by freezing both the removal of the board scheduled by two dissenting hedge funds and the anti-takeover measures enacted by the company.14

**Independence and expertise**

The DCC and the codes contain several provisions intended to safeguard the independence of supervisory board members, such as the absence of family ties and business interests.15 The Dutch Central Bank (DNB), in its capacity as the regulator of banks and insurance companies, attaches great value to the independence of supervisory board members for the purpose of good corporate governance, and in 2012, further to the provisions of the code, developed its own policy rules. It requires that supervisory board members are independent in mind (independent with respect to partial interests), in state (formal independence) and in appearance (no conflicts of interest).

A great deal of attention is being paid to the expertise of supervisory board members. For example, under the Banking Code supervisory board members are expected to have knowledge of the risks of the banking business and of a bank’s public functions. Moreover, banks are expected to introduce a permanent education programme, while legislation has also been enacted: since 1 July 2012, management and supervisory board members of financial institutions have been subjected to a stricter fit and proper test, to be applied by the AFM or the DNB. In 2016, an external assessment of this process of testing was conducted by the Ottow Committee.16 The Committee concluded in its report that the AFM and DNB “adequately fulfil their statutory duties” in assessing members of management and supervisory boards. Nevertheless, the Committee has put forward several proposals aimed at improving

11 Best Practice 3.2.3 of the Corporate Governance Code 2016.
12 Article 2:158 of the DCC.
13 Article 2:161 of the DCC.
16 Named after the chairperson, Professor Annetje Ottow. The Committee also comprised Professor Janka Stoker and Jan Hommen.
and fine-tuning fit and proper assessments to allow the two supervisory authorities to fulfil their statutory mandates even better, such as communicating more transparently about their assessment procedures. The report also contains recommendations for preserving and better safeguarding careful decision-making, fostering diversity in the financial sector, and making assessment procedures more efficient and effective. The AFM and DNB reacted to the report with a list of internal follow-up actions, which correspond with the recommendations of the Committee. In 2018, the DNB started to carry out some of these follow-up actions, such as the start of a one-year pilot with the AFM relating to the involvement of external experts when assessing members of management.

In this context, European harmonisation is intensifying and will have an important impact on national legislation. This is evidenced by the 2017 guidelines on suitability assessments of the European Banking Authority (EBA) and the European Securities and Markets Authority (ESMA), and the ECB’s 2017 guide to assessments of board members. The AFM and DNB support this development. As shown in 2015 by the EBA Peer Review Report on suitability, Dutch assessment procedures are considered good practice, and the proposed European assessment procedures are largely in line with the current Dutch take on assessments.

**Caps on the holding of multiple supervisory board memberships**

In the Netherlands, no fewer than four different regimes apply governing maximum numbers of board positions held, depending on legal form and business activity. Notwithstanding these rules, overboarding is also under close scrutiny, by investors as well as regulators.

The number of supervisory positions a management board member or supervisory board member is allowed to hold at large legal entities is limited by the DCC. In principle, a management board member may hold a maximum of two positions as a supervisory board member in addition to his or her management board position; for a supervisory board member, the limit is a total of five supervisory positions, with a position as a management board or supervisory board chair counting double. The purpose of this is not only to improve the quality of supervision, but also to eradicate the old boy network.

For listed companies, the Corporate Governance Code also contains specific anti-overboarding provisions. A management board member may not hold more than two directorships at listed companies; for a director, the maximum number of directorships at listed companies is five. Under the new Code, the approval of the supervisory board is required for a management board member of the company intending to accept a supervisory board membership elsewhere.

For banks and certain types of investment firms, the CRD IV Directive has introduced limitations for significant institutions (a concept that is elaborated upon at national level under guidance of the EBA). As a rule, a management board member is limited to two

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17 This detailed letter, named ‘Eindrapport commissie Ottow’, of 13 January 2017, can be found on www.dnb.nl (in Dutch only).
19 Best Practice 2.4.2 of the Corporate Governance Code 2016.
20 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms.
directorships, while a director can hold a maximum of four directorships (in total), or one management board position combined with one other directorship. The Dutch implementing rules, which stay very close to the CRD IV regime, entered into force in August 2014.21

**Diversity**

Over and above these measures to improve the quality of management and supervision, rules to promote gender diversity within the management boards and supervisory boards of large companies have applied in the Netherlands since 1 January 2013, the target being a division within the board of at least 30 per cent females and 30 per cent males. The rules are of a comply or explain nature: if the target is not met this will not lead to the imposition of sanctions, but an explanation must be given in the management report as to why the target was not met and what steps will be taken towards meeting it. At the end of 2015 it was announced that these rules, which were originally meant to be abolished as of 1 January 2016, will be extended to 2019. In April 2017, the rules were formally adopted again.

At EU level, negotiations are still ongoing between the European Parliament and the Council on a draft directive promoting gender diversity within the management of large listed companies.22 Pursuant to the draft directive, by 2020 at least 40 per cent of the non-executive directors of such companies must be women, and heavy sanctions will apply in the event of non-compliance. However, there are strong objections on the part of a number of EU Member States, including the Netherlands, and it therefore remains to be seen in what form the directive will cross the finish line.

Finally, narrower in scope but still relevant, EU Directive 2014/95 requires large companies to have a description of the diversity policy applied in relation to the undertaking’s administrative, management and supervisory bodies.23 This Directive was implemented in Dutch law in December 2016 and entered into force on 1 January 2017.24 Diversity under this Directive has a wider significance than gender alone, but also includes, inter alia, background, expertise, nationality and experience.

**Collective responsibility**

Under Dutch corporate law, the management of a company is in principle the responsibility of the board members collectively as well as of each board member individually. The company’s articles of association or internal rules may, to some extent, assign certain specific duties to individual board members, but the board as a whole remains responsible. The Management and Supervision Act, which has created a basis for the one-tier board model, expressly authorises the allocation of duties between one or more non-executive members.

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24 Directive 2014/95/EU amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.
and one or more executive members of a one-tier board. In this case, too, however, the board as a whole remains responsible for the company’s management, including the non-executive members (see below).

**Representation**

The power to manage the company entails, inter alia, the power to represent it in transactions with third parties. 25 Under the DCC, both the management board as a whole and each board member individually have this power. The articles of association may, however, limit or exclude the individual representative power of one or more board members. For example, the articles may provide that the company may only be represented by the board as a whole or by the chair and the financial director acting together.

**Conflicts of interest**

Neither a management board member nor a supervisory board member will be permitted to take part in any discussion or decision-making that involves a subject or transaction in relation to which he or she has a conflict of interest. The DCC provides subsequently that if the board member nevertheless does take part, he or she may be liable towards the company, but the transaction with the third party will in principle remain valid.

**Internal liability**

A management board member who has performed his or her duties improperly may be held personally liable to the company. The same liability rules also apply to supervisory board members. In principle, each board member is liable for the company’s general affairs and for the entire damage resulting from mismanagement by any other board member (under the principle of collective responsibility). A board member may, however, avoid liability by proving that he or she cannot be blamed for the mismanagement. The allocation of duties between the board member and his or her fellow board members is one of the relevant factors in that respect. With respect to the one-tier board model, the explanatory memorandum to the Management and Supervision Act specifically states that an internal allocation of duties among the board members is permitted, but that this does not change the directors’ collective responsibility for the company’s management. The non-executive board members (i.e., those not charged with attending to the company’s day-to-day affairs) may therefore be held liable for the mismanagement of an executive board member. For that reason, it is advisable that board members keep each other informed of their actions and actively inform each other, sometimes also referred to as a monitoring duty.

Personal liability of directors (in particular of non-executive directors) is not established easily. It is a well-established concept of Dutch law that personal liability should only arise in situations of apparent mistakes or negligence. In this context, the concepts of, for example, severe fault and apparent mismanagement are developed in case law or are part of statutory provisions. Recent case law, however, reminds us that this does not imply immunity. 26

The Supreme Court has held that only the company, or a bankruptcy trustee in cases of insolvency, may sue a board member for mismanagement under Article 2:9 of the DCC;

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25 Article 2:130 of the DCC.
26 *Fairstar*, 30 September 2015.
there is no shareholder derivative action under Dutch law. However, in certain situations directors may incur personal liability as regards third parties, such as shareholders or creditors of the company on account of tort or on account of specific provisions in the law, such as in the case of insolvency caused by apparent mismanagement.

**External liability**

As a general rule, management board members will not be personally liable for the company’s debts or other obligations as regards creditors or other third parties. Liability might only ensue if that board member can be seriously blamed for having conducted a wrongful act on the company’s behalf towards a third party; is subject to liability pursuant to certain specific statutory grounds; or is penalised pursuant to criminal or administrative law. A parent company or its directors may, under certain circumstances, also be liable for the debts of a subsidiary. In an important case at the end of 2015 concerning a takeover of a listed company, both the management board members and the supervisory board members were held liable, the latter for inadequate supervision.

If a company is declared bankrupt, special rules – including certain evidentiary presumptions – apply. Under these rules, each management board member is personally liable for debts that cannot be satisfied from the assets of the bankruptcy estate if the management board was guilty of clear mismanagement during the three-year period preceding the bankruptcy and it is likely that this was an important cause of the bankruptcy. Under Article 2:138(2) of the DCC, the failure of the management board to comply with its accounting obligations and its obligation to file the annual accounts constitutes an instance of clear mismanagement and a presumption that the mismanagement was an important cause of the bankruptcy. Persons who have co-determined the company’s policy can also be held liable under these rules. Beyond the situations described above, clear mismanagement constitutes conduct that is seriously irresponsible, reckless or rash; the trustee in bankruptcy must show that no reasonably thinking board member would have acted in this way under the same circumstances. Supervisory board members are not immune in this respect. In two major bankruptcies of listed companies in 2013, both the management board members and the supervisory board members were held liable, the latter for inadequate supervision. Subsequently, in another large bankruptcy in 2015, the Enterprise Division of the Amsterdam Court of Appeal also held the management board members and supervisory board members liable, ruling that they were responsible for mismanagement.

In an important ruling in 2016, the Dutch Supreme Court ruled that if, in the light of what is generally accepted in society, a tortious act committed by the founder of a private foundation (stichting particulier fonds: a specific variant of the legal form of a foundation) is to be considered an act of the private foundation, the private foundation can be held liable for the act, resulting in a tort liability of the private foundation.

**Standardisation of rules for all legal entities**

As of 2014, draft legislation had been drawn up with the aim of standardising the rules on the responsibilities of management board members and supervisory board members for all

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28 Dockwise/Fairstar, September 2015.
29 Landis, 19 June 2013, Van der Moolen, 15 February 2013 and Meavita, November 2015.
30 Resort of the World/Maple Leaf, 7 October 2016.
the different types of legal entities. This also applies to the rules on conflicts of interest and on liability. The new legislation will not result in any substantive changes for companies with a share capital. A draft bill was presented to Parliament in 2016 and was expected to be implemented no later than July 2017. However, after a number of critical questions of Parliament, the draft bill was amended to a considerable extent, which has slowed down the process. A new date of entry into force is unknown.

III DISCLOSURE

Listed companies are subject to various disclosure obligations. The general rules on financial reporting can be found in Book 2 of the DCC, while the FSA contains additional rules applicable to listed companies. The Corporate Governance Code also lays down several specific financial disclosure obligations for listed companies.

The DCC contains rules with regard to the composition of the annual accounts and management report, the auditor’s opinion (see below), the adoption of the annual accounts and the publication requirement. Listed companies are required to send their annual accounts to the AFM after adoption. If the AFM believes that the annual accounts do not comply with the relevant rules, it may initiate special annual accounts proceedings before the Enterprise Chamber. Shareholders and employees may also initiate such proceedings. In these proceedings, the Court may order the company to amend the annual accounts and management report in accordance with its instructions.

The transparency requirements can, in general terms, be divided into two categories: ad hoc disclosure obligations and periodic disclosure obligations.

i Ad hoc

The main example in this first category is the obligation to disclose as soon as possible inside information that directly concerns the issuer. Disclosure may be delayed if the following conditions are met:

a the immediate disclosure is likely to prejudice the legitimate interests of the issuer or emission allowance market participant;

b the delay of disclosure is not likely to mislead the public; and

c the issuer or emission allowance market participant is able to ensure the confidentiality of that information.

When the issuer or emission allowance market participant has delayed the disclosure of inside information it shall, immediately after the information is disclosed to the public, (1) inform the competent authority that the disclosure of the information was delayed, and (2) provide a written explanation of how the conditions set out above were met. Member States may stipulate that the written explanation under (2) is to be provided only upon request of the competent authority. The Netherlands has opted in for the requirement of a written explanation to be given only upon request of a competent authority. An issuer that is a financial institution or credit institution have additional grounds for delaying public disclosure of

inside information where disclosure would risk undermining the financial stability of the issuer and of the financial system, the delay is in the public interest, confidentiality can be ensured, and the competent authority consents.32

ii Periodic

The periodic disclosure obligations consist mainly of the annual and half-yearly financial reporting requirements.33

In addition, shareholders of listed companies are required to notify the AFM if their holdings of voting rights or capital in listed companies reach, exceed or fall below particular thresholds.34 Gross short positions in excess of a certain threshold (3 per cent) must also be disclosed; this obligation is intended to give an insight into the shareholder’s true economic interest and, at the same time, to shed light on empty voting.35 Moreover, since 1 January 2013 shareholders have been obliged to disclose the loss or acquisition of predominant control (30 per cent shareholding or voting rights), as a result of the mandatory bid regime arising from European legislation. The issuer is required to disclose certain information as well, such as changes in its issued capital or in the number of voting rights on its shares. Management and supervisory board members of listed companies are also required to notify the AFM of their holdings of shares or voting rights in the company and of any transactions in these shares or changes in the voting rights.

With regard to the auditing of financial disclosure, there is a new European development that entered into force with effect from 1 January 2017: statutory auditors are required to enact an extensive, supplementary control statement for the audit committee of the board of directors.36 This forms part of a shift in responsibilities to the audit committee. Audit committees have to explain how the audit contributed to the integrity of the financial reporting and what the audit committee’s role has been in the process, and bear responsibility for the selection procedure regarding the auditor.

The Corporate Governance Code also contains provisions on the auditing of the financial reports and the position of the internal audit function and the external auditor. These provisions cover subjects such as the role, appointment, remuneration and assessment of the functioning of the external auditor, as well as the relationship and communication of the external auditor with the management board, supervisory board and audit committee. As from 1 January 2018, the revised Code is enshrined with the entering into force of the Decree on the content of financial reports. This Decree also clarified the way the auditor has to check the corporate governance statement of the company’s financial reports. Instead of merely verifying the information is present, for years commencing on or after 1 January 2017, the auditor has to make sure the statement is consistent with the financial reports and does not contain any errors of material importance.

32 Section 17(5) MAR.
33 Section 5:25c et seq. of the FSA.
34 Section 5:38-44 of the FSA. The Netherlands used the Member State option to maintain a lower threshold (3 per cent as opposed to 5 per cent in the Directive); see previous footnote.
35 The absence of any economic interest with the party legally entitled to exercise the voting right at the general meeting of shareholders.
36 Audit Firms (Supervision) Decree.
IV CORPORATE RESPONSIBILITY

The Netherlands has traditionally followed the stakeholder model, under which management and supervisory board members are required to take into account the interests of all stakeholders when making decisions and performing their duties. According to its preamble, the Corporate Governance Code is based on the principle that a company is a long-term alliance between the various parties involved in the company, such as employees, shareholders and other investors, suppliers, customers, the public sector and public interest groups. The new Dutch Stewardship Code, which entered into force on 1 January 2019, also confirms the duty of asset owners and asset managers to take the interests of stakeholders such as banks, creditors, customers, suppliers, the works council and non-governmental organisations into account. With regard to the scope of the responsibility, the Stewardship Code states that in assessing Dutch listed investee companies' long-term value creation opportunities, risks, strategies and performance, it is critical to consider environmental (including climate change risks and opportunities), social and governance information (including board composition and diversity) in addition to financial information. This is in line with the views of the Corporate Governance Code Monitoring Committee. In the consultation for the Corporate Governance Code of 2016, the Committee explained that corporate social responsibility is not an isolated goal, but rather forms an integral part of companies' strategies regarding long-term value creation, which is a matter for management board members and supervisory board members collectively. In addition to the focus on carefully weighing up the interests of all stakeholders, this also includes a focus on non-financial issues that are relevant to the enterprise. This is also reflected in the ‘in-control’ statement, which concerns more than financial reporting risks, and is also in line with the current trend towards integrated reporting. The Code requires management boards to draw up a strategy on long-term value creation setting out, inter alia, any aspects relevant to a company, such as the environment, social and employee-related matters, the chain within which the enterprise operates, respect for human rights, and fighting corruption and bribery. The management board must engage the supervisory board early on in formulating the strategy. Thereafter, the supervisory board must supervise the manner in which the management board implements the long-term value creation strategy. A more detailed explanation of its view on long-term value creation and the strategy for its realisation, as well as a description of which contributions were made to long-term value creation in the past financial year, must be published in the management report. It should report on both short-term and long-term developments.

In light of the call for action on climate change, corporate responsibility is climbing the agenda of governments all over the world, as well as the agenda of regulatory authorities such as the DNB. In their Supervision Outlook 2019, the DNB states that, consistent with international, European and national trends, one priority for 2019 will be emphasising future orientation and sustainability. For example, in 2018 it developed an assessment framework for the management of climate-related risks by financial institutions. Several institutions were evaluated based on this assessment framework. In 2019, the DNB will continue to devote itself to increasing the financial system’s role in managing climate-related risks and funding sustainable investments.

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37 Best Practice 1.1.1 of the Corporate Governance Code 2016.
38 Supervision Outlook 2019 of 29 November 2018, on the website of DNB: www.dnb.nl.
On an international level, large public interest entities (in short, listed companies, banks and insurers) are required to include in their management reports a non-financial statement containing certain corporate social responsibility-related information. Based on the 2018 sustainable finance action plan, a draft proposal for a regulation was published in May 2018 on disclosures relating to sustainable investments and sustainability risks as well as a proposal for a regulation on the establishment of a framework to facilitate sustainable investment.39

We maintain that where socially responsible entrepreneurship initially appeared to be restricted to a small group of idealists, companies now seem to be increasingly aware of its importance also for commercial considerations.

i Risk management

Unsurprisingly, post-crisis governance reforms focus on risk management. In the revised 2015 Basel Committee Corporate Governance Principles for banks this is evident, but these are part of a broader trend towards an increased focus on risk and risk governance within financial institutions. Risk governance is also one of the pillars of CRR/CRD IV, the European project that as at 1 January 2014 raised the Basel III agreements to the level of legislation. In October 2017, the Basel Committee on Banking Supervision published the guidelines on identification and management of step-in risk as part of the G20 initiative to strengthen the oversight and regulation of the shadow banking system to mitigate systemic risks, in particular risks arising because of banks’ interactions with shadow banking entities. In the Netherlands, this subject is also prominent on the political and public agenda even apart from the implementation of the European rules just mentioned, as follows from the 2015 Dutch Banking Code.

As a result of the financial crisis, risk management has also gained prominence in the Corporate Governance Code. Moreover, the new Code contains several best practices to further strengthen risk management and disclosure related to risk. The position of the internal auditor and the role of the audit committee regarding staffing, work planning and the functioning of the internal auditor are strengthened. Furthermore, the chief financial officer, the internal auditor and the external auditor should attend the audit committee meetings, unless the audit committee determines otherwise. Regarding risk disclosure, the scope of the in-control statement is widened to the functioning of internal risk control in general (not only regarding financial reporting risks), and to require the management board to state that in the 12-month period ahead the continuity of the company is safeguarded.

In practice, the Code also turns out to have a knock-on effect on other sectors. Often the rules of the Code are used by non-listed companies, serving as a model for codes of conduct in all sorts of sectors, including semi-public sectors such as healthcare and education. In addition, Article 2:391 of the DCC requires the management board to describe in the

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management report the main risks to which the enterprise is exposed. If necessary, to properly understand the results or position of the company and its group companies, the management report should also contain an analysis of both financial and non-financial performance indicators, including environmental and employment-related issues.

ii Client focus

The client focus principle forms part of the Banking Code and is regarded as a necessary precondition for the continuity of an undertaking. While with respect to 2010 the Banking Code Monitoring Committee was still reporting that banks were wrestling with how to put the client focus principle into practice and bring about the related changes in the culture, later it sounded a more optimistic note. In its latest report (January 2017), it credits the sector for improving internal processes and listing themes such as the customers’ interests as being central, and for having developed a trust monitor that enables effective communication on progress relating to client focus towards society. Complementary to the Banking Code 2015, the Dutch Banking Association introduced a social statute setting out the sector's core values, a banking oath and disciplinary measures, in which the importance of client focus is stressed.

Alongside the efforts of the sector itself, both the DNB and the AFM, within their respective areas of competence, continuously monitor progress on client focus and press for further change.

iii Remuneration

According to the Corporate Governance Code, the purpose of the remuneration structure should be to focus on long-term value creation for the company and its affiliated enterprise. The remuneration must ‘not encourage management board members to act in their own interests nor to take risks that are not in keeping with the strategy formulated and the risk appetite that has been established’. The Banking Code also contains a section on remuneration policies. Many of the detailed provisions regarding both fixed and variable remuneration components have been omitted in the latest version of both codes. However, three important new provisions have been added to the new Corporate Governance Code to provide further substance to the guidelines regarding remuneration policy. Management board members must give the remuneration committee input regarding their own remuneration. In addition, the remuneration of supervisory board members must be in line with time spent. Finally, severance pay is limited to one year’s salary, and may not be awarded if the management board member terminates the agreement early or is guilty of seriously culpable or negligent conduct.

Both codes, and particularly the Corporate Governance Code, had extensive and complex remuneration provisions. Since various new pieces of legislation regarding remuneration have been introduced in the past few years, the monitoring committees of both codes no longer saw the need for such detailed provisions. In this regard, the legislator adopted the former Banking Code standard in relation to the variable remuneration of management board members of banks (a maximum of 100 per cent of the fixed salary) and subjected it to stricter conditions: if breached, the rate of a newly introduced bank tax will be increased by 10 per cent. The government, moreover, as of February 2015 introduced a maximum

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41 Banking Tax Act (Bulletin of Acts and Decrees 2012, 325); the Act entered into force on 1 October 2012.
variable remuneration within the whole of the financial sector of 20 per cent of the fixed salary. This regime was intended as a transitional arrangement awaiting implementation of the CRD IV Directive, in which as a rule bonuses are subject to a cap of 100 per cent of the fixed annual salary. As of 1 January 2016, the rules implementing CRD IV entered into force. For financial companies as well as Dutch public limited companies, legislation providing for the power to claw back bonuses from management board members entered into force on 1 January 2014. This power had already formed part of the codes of conduct, but its scope was narrower. The relevant Act was the subject of extensive parliamentary debate because of a controversial provision requiring listed companies in merger and takeover situations to deduct from a management board member’s salary any increase in the value of the company’s shares following the merger or takeover. As such, management board members with shares in the company were therefore precluded from profiting from the transaction. The (understandable) rationale behind this provision was to eliminate personal gain as the driving force behind decision-making in such situations.

This skimming off rule expired, pursuant to a sunset clause, on 1 July 2017. Although the Minister of Finance endorses the aim of the clawback and skimming off rules, he believes they are too complex and should be replaced. To this end, he announced the drawing up of a draft bill for consultation purposes. On 20 December 2018, he sent a letter to Parliament with regard to proposed measures for the modernisation of the corporate law. Both the skimming off and clawback rules are considered as possible new legislation for 2019. The Minister is considering giving the supervisory board an additional clawback power whenever a bonus is unacceptable within the standards of reasonableness and fairness, as well as additional clawback powers in connection with major corporate events such as a takeover. Furthermore, say on pay has been at issue, partly in the context of the revision of the Shareholders Directive (see Section V.i) and partly following the adoption of a law that introduced a say on pay right for works councils as of January 2019. Although the discussion specifically focuses on remuneration, in fact it is general behavioural and cultural changes that are expected. Political expectations are also high in this respect regarding the moral and ethical declaration contained in the Banking Code, which was enacted in 2013. Initially, the oath concerned management board members and supervisory board members, but as of 1 April 2015, a larger group is subject to the oath by law.

V SHAREHOLDERS

i Shareholder rights and powers

The general meeting of shareholders has important powers within the company, such as the power to amend the articles of association, dissolve the company, approve a merger, adopt the annual accounts and appoint supervisory board members. In addition to these specific powers, Article 2:107 of the DCC assigns all residual powers (i.e., those not assigned to the management board or other corporate bodies) to the general meeting of shareholders. The general meeting of shareholders of a Dutch public limited liability company (NV) is not, however, entitled to give the management board binding instructions regarding the manner

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42 Bulletin of Acts and Decrees 2015, 45.
43 The Clawback Act (Bulletin of Acts and Decrees 2013, 563).
44 Act amending the Works Councils Act regarding the competences of the Works Council on directors’ remuneration, Stb 2018, 221.
in which the board carries out its duties. Under the influence of the corporate governance debate, the position of shareholders was strengthened in the early years of this century. Since 2004, management board decisions resulting in an important change in the company's identity or character have required the approval of the general meeting of shareholders. This applies, for example, to decisions to transfer the enterprise or almost the entire enterprise, enter into or terminate a significant long-term cooperation, or acquire or divest a significant holding. In 2007, the Supreme Court rendered a judgment interpreting Article 2:107a of the DCC restrictively. The Court held that this provision only applies to decisions that are so fundamental that they change the nature of share ownership, in the sense that the shareholder will, as a result of the decision, in effect have provided capital to, and hold an interest in, a substantially different enterprise.

Another important shareholder right introduced in 2004 is the right to have items placed on the agenda of a general meeting. Originally the threshold was 1 per cent; with effect from 1 July 2013 it was raised to 3 per cent. With the implementation of the first Shareholder Rights Directive in July 2010, this right has been strengthened. Until then, the company could refuse such a request on the basis of a compelling interest. The consequences in practice of the right to have an item placed on the agenda of a general meeting are discussed further in Section V.iv.

At the European level as well, at the turn of the century the focus was on promoting greater shareholder participation in corporate governance. This was expressed in the first Shareholder Rights Directive, which grants shareholders in listed companies various rights aimed at facilitating voting (including cross-border), such as e-voting and proxy voting, which under Dutch law mostly existed already. The Directive also provides for the system – meanwhile mandatory in listed companies – of record dates, under which only shareholders registered on a particular date (approximately four weeks) before the general meeting are entitled to vote at that meeting. Most importantly, the introduction of a record date eliminates the need for share blocking, which discourages institutional investors from voting because it requires them to suspend their investment activity in respect of the blocked shares during the relevant period. As Eumedion, the interest group representing institutional investors, already concluded, this, in connection with the extended period for convening general meetings of shareholders (42 days), seems to have contributed to increased shareholder participation.

On 20 May 2017, the revised Shareholders’ Rights Directive entered into force. Some of the rules are new to the Netherlands; others already apply under Dutch law, although these are generally the ones that have attracted the most media attention. For example, listed companies throughout the EU will have the right to identify their shareholders; in the Netherlands, this is possible under the Securities Book-Entry Transfers

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45 Article 2:107a of the DCC.
46 ABN-AMRO, 13 July 2007.
47 Article 2:114a of the DCC was introduced by means of the Corporate Governance Act; see Section V.iv.
48 Directive 2007/36/EC.
49 Article 2:119(2) of the DCC.
Act. Similarly, the ‘new’ right for shareholders to vote on the remuneration policy is already laid down in Section 2:135(1) of the Dutch Civil Code. Specific objectives of the revised Directive are to:

- increase the level and quality of engagement of asset owners and asset managers with their investee companies;
- create a better link between pay and the performance of company directors;
- enhance transparency and shareholder oversight on related-party transactions;
- ensure the reliability and quality of advice of proxy advisers; and
- facilitate the transmission of cross-border information (including voting) across the investment chain, in particular through shareholder identification.

The deadline for EU Member States to implement the Directive in national law is 10 June 2019. The bill implementing the revised Shareholders’ Rights Directive was presented to the Lower House of Parliament in October 2018.

ii Equality of voting rights

The most fundamental right of a shareholder is the right to vote at meetings. In principle, Dutch corporate law adheres to the principle of equality of voting rights: all shares carry equal rights and obligations in proportion to their nominal value, and all shareholders whose circumstances are equal must be treated in the same manner. The articles of association may, however, provide otherwise. The principle of one share, one vote also applies. There are, however, important exceptions to these principles, a few of which are mentioned below.

The first exception is the use of loyalty shares to which extra voting rights or extra dividends are attached as a reward for long-term shareholders. The Supreme Court has held that the distribution of loyalty dividends is permitted. In the political arena, there have been various calls for the enactment of statutory rules on loyalty shares. In 2012, after consulting with experts and interested parties, the government decided to refrain from proposing new legislation for the time being. It concluded that the advantages of these shares are too uncertain, and that their limited marketability is a definite drawback. Legal commentators have also pointed out that a long-term shareholder is not necessarily an involved shareholder participating actively in the company’s governance. Such shareholder would nevertheless profit from the extra dividends or voting rights. An important merger in terms of the corporate practice of two companies – Fiat Industrial and CNH Global – into a Dutch NV indicates that an enactment of the statutory rules on this issue is unnecessary. Based on the French model, the NV introduced loyalty shares with extra voting rights. In the context of the phased IPO of the nationalised bank ABN-AMRO (in November 2015), loyalty shares were contemplated, but for a number of reasons, including the fact that this would have been the first IPO to include such shares, the government decided against this.

A second exception to the principle of equality of voting rights is the issuance of protective preference shares: listed companies may protect themselves against hostile takeovers or shareholder activism by issuing preference shares to an independent foundation set up in advance for this purpose (see Section V.v).

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51 Article 2:92 of the DCC.
52 Article 2:118(2) of the DCC.
A third exception to the principle of equality of voting rights is financial preference shares, which are used as a financing instrument. There is a disproportionate relationship between the voting rights acquired and the capital invested in respect of these shares, too. With respect to the issuance of financing preference shares, the Corporate Governance Code provides that the voting rights attached to such shares must be based on the fair value of the capital contribution.\(^{54}\) This represents an attempt to return to the one share, one vote principle.

### iii Shareholders’ duties and responsibilities

Under Dutch law, shareholders – unlike management and supervisory boards – are in principle not required to be guided by the interests of the company and its affiliated enterprise. Shareholders may, therefore, in principle give priority to their own interests, with due regard for the principles of reasonableness and fairness. Based on these principles, however, larger shareholders are considered to have a certain responsibility towards other parties. The Corporate Governance Code’s preamble states: ‘The greater the interest which the shareholder has in a company, the greater is his or her responsibility to the company, the minority shareholders and other stakeholders.’ Institutional investors in particular are therefore being called upon to accept greater responsibility.

In this regard, the Corporate Governance Code seeks to increase the transparency of voting behaviour. Institutional investors must publish their voting policy on their website and report annually on how that policy has been executed in the preceding year. They must also report quarterly to the general meeting of shareholders on how they have exercised their voting rights.\(^{55}\) Furthermore, Eumedion adopted a set of Best Practices for Engaged Share-ownership in June 2011, which, inter alia, call on institutional investors to inform clients of conflicts of interest if, in relation to a particular matter, the investors have divergent roles that could affect their voting behaviour. According to its latest monitoring report regarding compliance with the Best Practices (December 2016), the concept of responsible and engaged share ownership has become common practice. A large majority of institutional investors applies a voting and engagement policy and reports on this (93 per cent). Compliance with the best practice of identifying conflicts of interest is improving (from 41 per cent in 2013 to 70 per cent).

At the European level, similar developments are taking place. In December 2012, the European Commission adopted the Corporate Governance Action Plan, which contains various initiatives to increase the engagement of shareholders with the corporate governance of undertakings. In this regard, the ESMA updated its guidelines in 2014 on acting in concert in the Directive on Takeover Bids (see Section V.v).\(^{56}\) In addition, the European Commission is of the opinion that institutional investors should be more transparent about their voting policies, as this would lead to better investment decisions and could also facilitate dialogue with the relevant company. In this context, the unclear role of proxy advisers is seen as a problem area. These issues are dealt with in the proposed revision of the Shareholders Directive (see Section V.i).

\(^{54}\) Best Practice 4.3.4 of the Corporate Governance Code 2016.

\(^{55}\) Best Practice 4.3.6 of the Corporate Governance Code 2016.

\(^{56}\) This statement was updated in June 2014.
Shareholder activism

In practice, the shareholder rights described in Section V.i have also been actively exercised by hedge funds, most notably the right to have an item placed on the agenda of a general meeting. Although the aim of the new rights was to increase shareholder participation and strengthen the monitoring of management boards, the actions of hedge funds have also revealed a dark side to participation. In particular, the focus on short-term profits has had adverse effects in some cases. The most notable example of this was the role of the Children’s Investment Fund (TCI), a hedge fund, in the acquisition of ABN-AMRO, one of the largest banks in the Netherlands (2007). TCI, which held only about 2 per cent of the shares, pressed ABN-AMRO management to sell all or part of the bank and distribute the proceeds as a bonus dividend. TCI managed to have this proposal placed on the agenda of the general meeting, and it was ultimately adopted. In the end, this led to the acquisition of ABN-AMRO by three foreign banks.

This transaction, in connection with a number of situations in which activist investors targeted companies with similar proposals, caused both government and Parliament to reconsider the desirability of shareholder activism. In May 2007, the Corporate Governance Code Monitoring Committee recommended certain legislative changes intended to counteract the short-term orientation of activist shareholders. To achieve a sustainable relationship between a company and its shareholders, the Monitoring Committee felt that shareholder conduct ought to become more transparent and that dialogue between the parties ought to be encouraged. The Corporate Governance Act, which entered into force on 1 July 2013, reflects this train of thought. The idea behind the Act is to enable the management board, through the introduction of disclosure obligations, to learn the identity and intentions of its shareholders at an early stage, so that it can enter into a dialogue with them. The minimum threshold for the obligation to disclose substantial holdings of capital or voting rights in listed companies has therefore been reduced from 5 to 3 per cent. In addition, the threshold for the right of shareholders to have items placed on the agenda for a general meeting has been substantially raised, from a capital interest of 1 per cent to a capital interest of 3 per cent; the alternative threshold in the case of an interest of €50 million for listed companies has been cancelled. Finally, the Act contains a mechanism enabling a listed company to identify its ultimate investors.

The issues of empty voting or securities lending, both of which have appeared to be important instruments for activists, have not been directly provided for in the Act. Hedge funds can use these devices to influence decision-making in the general meeting of shareholders without bearing any economic risk. The system of record dates provided for in the Shareholder Rights Directive (see Section V.i) is intended to discourage this practice. Furthermore, shareholders of listed companies are not only obliged to disclose their long positions in excess of a certain threshold, but also their gross short positions (see Section III), and should, when exercising the right to place an item on the agenda, disclose their full economic interests (both long and short). As a result, the shareholder’s true motives for placing an item on the agenda should be revealed, which is supposed to discourage the practice of empty voting as well.

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57 To put things into perspective, Eumedion estimates that in the Netherlands between 2005 and 2011, in total 40 shareholder proposals (not just hedge funds) were submitted, against around 7,500 management proposals.
58 See Section III.
In limiting the right to have items placed on the agenda, the Corporate Governance Code goes further than the Act. The Code provides that a shareholder of a listed company may exercise this right only after having consulted the management board about this. If the item to be placed on the agenda may possibly result in a change in the company’s strategy, the management board must be given a period of a maximum of 180 days to respond (the response time). The management board should use this period to confer with the relevant shareholder. The statutory period for such requests, however, is 60 days before the meeting – even for items relating to the company’s strategy – and may, therefore, clash with the response time. A couple of years ago, the Enterprise Chamber issued an important ruling on the relationship between the code provision and the statutory provision. The court held that the response time is an elaboration of the statutory principles of reasonableness and fairness that shareholders are required to adhere to in their relations with the company, and must, therefore, be respected by an activist large shareholder. According to the court, the response time may only be disregarded on compelling grounds.

The trend towards limiting shareholder rights can also be discerned in Dutch case law. For example, the Supreme Court, in the summer of 2010, held that it is up to the management board to determine corporate strategy. Decisions of this nature need not be submitted to the shareholders for approval or consultation – not even on the grounds of reasonableness and fairness or non-statutory governance rules. This judgment limits the possibility for shareholders to demand strategic changes. This is echoed in a more recent judgment in which a large investor was denied the right to add a strategic item to the agenda.

v Takeover defences and other protective measures

In Dutch practice, various (structural and ad hoc) defensive measures have been developed against, inter alia, the threat of hostile takeovers and shareholder activism, including the following:

- the incorporation of a protective foundation with a call option to acquire preferred shares;
- a binding nomination right for the company’s board or another body regarding the appointment of directors;
- a proposal right for the board or another body in respect of certain resolutions of the general meeting of shareholders;
- imposing an ownership limitation on shareholders; and
- listing of depositary receipts instead of shares.

The most common takeover defence is the incorporation of a protective foundation with a call option to acquire preferred shares. The shares, which are issued when a threat materialises, change the balance of control within the general meeting of shareholders and make it possible to pass certain resolutions desired by management, or in some cases block certain undesired resolutions. Because preference shares are purchased for an amount less than their real value, the foundation acquires substantial control for little invested capital. The Supreme Court permits the issuance of protective preference shares provided they are necessary with a view

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59 Best Practices 4.1.5 and 4.1.6 of the Corporate Governance Code 2016.
60 Cryo-Save, 6 September 2013.
61 ASMI, 9 July 2010.
62 Boskalis/Fugro, 12 January 2018.
to the continuity of the enterprise, and are adequate and proportional. The construction must be temporary in nature and intended to promote further dialogue.\textsuperscript{63} In the autumn of 2013, Dutch telecom company KPN successfully staved off a hostile takeover bid by Mexican company América Móvil with the help of such a foundation. In the wake of the bid, politicians again considered the question of whether the Netherlands is not too liberal and whether there should not be more possibilities for government intervention in takeovers of companies that serve a strategic public interest. A draft bill introducing the requirement for a declaration of non-objection for takeovers in the (vital) telecom sector was presented for online consultation in February 2017. So far, no bill has been presented to the Lower House of Parliament. Meanwhile, Research and Documentation Centre researchers under the Ministry of Justice investigated the way shareholdership, whether foreign or not, may have national security implications. In their research report of April 2017, they advocate a sector-specific check, such as currently exists for the energy and financial sectors, which is also proposed in the present draft bill regarding the telecoms sector. In this regard there has also been a new European development. In September 2017, the European Commission published a proposal for a regulation establishing a framework for the screening of foreign direct investments into the European Union, while allowing Member States to take into account their individual situations and national circumstances.\textsuperscript{64} Our government aspires to maintain an open investment environment, and suspects that the proposal will interfere with this objective. It believes that the proposal goes beyond what is necessary, and that guidelines would be more suitable than a regulation. As mentioned earlier, in late 2018 the government published draft legislation aimed at promoting a careful decision-making process in cases of shareholder activism or a hostile takeover. If enacted in its current form, the proposal would introduce a statutory cooling-off period of up to 250 days during which the shareholders’ meeting would not be able to dismiss, suspend or appoint board members of a listed Dutch company under attack (see Section I.ii).

\textit{Shareholder and voting rights plans, and similar measures}

As previously mentioned, Dutch law accepts a number of deviations from the one share, one vote principle (see Section V.ii). Instruments that are typically used as a defensive tool are dual-class structures, ownership limitations and – to a lesser extent – loyalty shares. The listing of depositary receipts instead of the shares themselves is not allowed as a defensive measure under the Corporate Governance Code,\textsuperscript{65} and its use by listed companies is slowly declining; it is expected that the relisting of ABN-AMRO (see above), where the government opted for this form of protection mainly because of complications connected with the more customary preference shares structure, will remain an exception.

\textit{White-knight defence}

White-knight defences only occur occasionally in the Netherlands, probably because of the availability of preferable alternatives.

\textsuperscript{63} RNA, 18 April 2003.


\textsuperscript{65} Principle 4.4 of the Corporate Governance Code 2016.
Staggered boards

Directors are typically appointed and reappointed on the basis of a rotation scheme, as required under the Corporate Governance Code. The concept of staggered boards, as far as we are aware, is not applied by Dutch listed companies.

vi Contact with shareholders

To avoid confrontations with the general meeting of shareholders, management boards may try to somewhat align corporate policy with the desires of shareholders and to seek out their opinions in advance. Although the general meeting has a statutory right to obtain information, based on which it is accepted that shareholders have the right to ask questions at the meeting, it is unclear from the relevant DCC provisions whether the management board can itself take the initiative to discuss its intentions with individual shareholders outside a meeting. In practice, such one-on-one meetings do take place. According to the Corporate Governance Code’s best practice provision 4.2.2, companies should formulate a policy on bilateral contacts with shareholders and publish this policy on its website. It is important that particular shareholders are not favoured and given more information than others, however, as this would violate the principle that shareholders in the same circumstances must be treated equally. Price-sensitive information may not be disclosed. The fear of violating the market abuse rules causes some shareholders and companies to be hesitant about participating in one-on-one meetings.

Shareholders among themselves may in addition be afraid of being regarded as parties acting in concert, because under the provisions of the Directive on Takeover Bids such parties are obliged to make an offer for the listed shares of a company if they collectively acquire dominant control (30 per cent or more of the voting rights in that company’s general meeting of shareholders). What exactly is meant by acting in concert is not very clear in practice, and may represent an obstacle in the path of cooperation among shareholders. For this reason, at the end of 2013 ESMA drew up a white list of activities on which shareholders can cooperate without being presumed to be acting in concert, which was updated in 2014 and again in 2019. However, if shareholders engaging in an activity on the white list in fact turn out to be cooperating with the aim of acquiring control over a company, they will be regarded as persons acting in concert and may have to make a mandatory bid. The sensitive subject of cooperation with regard to board appointments has been acknowledged, but was nevertheless left off the white list.

VI OUTLOOK

Several legislative plans are currently at the forefront of corporate governance in the Netherlands, some of which originated before 2017. For different reasons, many of these plans were delayed last year. For example, it was initially announced that a proposal for new legislation regarding partnerships would be presented in 2017, but this has not been published yet. The consultation is now scheduled for the beginning of 2019. Other bills

66 Best Practice 2.2.4 of the Corporate Governance Code 2016.
67 Directive 2004/25/EC.
containing corporate legislation have been at a standstill for most of 2018, such as the previously mentioned bill for the introduction of a central shareholders’ register and the Management and Supervision Legal Entities Bill.

Looking at the 2019 legislative programme, the modernisation and simplification of corporate law, together with transparency and the prevention of malpractice, are still key. The modernisation of partnership legislation and of the rules governing public limited liability companies also continues, with proposals including a statutory cooling-off period for listed companies, the implementation of the Shareholders’ Rights Directive and the dematerialisation of bearer shares. The Minister of Finance also announced in a letter to Parliament of 20 December 2018 his intention to organise a stakeholder meeting in the first quarter of 2019 to gauge the extent to which new tools, such as shares without nominal value and clawback arrangements, are needed. Other topics, such as the modification of the rights of depositary receipt holders, the introduction of non-voting shares and shares without dividend rights, and the shortening of the notice period for general meetings, may also be addressed.

Regarding transparency, a new draft bill published at the end of 2018 requires social organisations to publish the receipt of any large donations. This draft bill also proposes to require foundations to publish their balance sheet with a list of assets. By making such cash flows transparent, the government wishes to prevent financial and economic crime as well as the exertion of undesirable influence from abroad through cash donations to political, social and religious organisations.

Also with regard to the prevention of malpractice, the Management and Supervision Legal Entities Bill, as previously mentioned, is still before the Lower House of Parliament, although it was planned that it would enter into effect on 1 January 2018. The bill’s purpose, in brief, is to harmonise a number of rules for all of the different types of legal entities so that they are in line with the rules currently applicable to private and public limited liability companies (BVs and NVs). This is to further strengthen public sector governance. In the same context of strengthening the governance of a specific sector, the Additional Measures Audit Firms Act was adopted in July 2018. The law introduced new measures for improving the quality of statutory audits and to strengthen the role of the AFM.

As mentioned before, new legislation is also on the horizon regarding additional scrutiny of takeovers of companies operating in vital sectors; and protection against improper shareholder activism, and hostile or risky (or both) takeovers (Sections I.ii and V.v). Protection against shareholder activism stems from the ongoing discussion concerning the position of shareholders, which previously led to the revised Shareholders’ Rights Directive. Although the 2016 Corporate Governance Code requires companies to pay more attention to long-term value creation, no material changes were made to the new Code to alter the position of shareholders. Following the implementation of the revised Shareholders’ Rights Directive and the proposed legislation regarding improper shareholder activism, the discussion about the position of shareholders will continue in 2019.

With regard to the financial sector, the Minister of Finance announced in a letter to Parliament a number of statutory measures to tighten up the remuneration policy in the financial sector in December 2018. The Minister announced the following legal measures:

- the obligation for (management) board members and employees of financial undertakings to hold shares and (certain) other components of their fixed remuneration for a period of five years;
b the obligation for each financial undertaking to describe in its remuneration policy the manner in which it renders an account of the relationship between the remuneration of its (management) board members and employees to the undertaking’s function in the financial sector and its position in society; and
c the limitation of exceptions to the bonus cap for persons that fall outside of a collective labour agreement.

The Minister is further considering a statutory obligation to reclaim part of the fixed remuneration of board members of systemically important banks in the event of them requiring state aid (also referred to as clawback). Also within the financial sector, as previously stated, the DNB announced in its Supervision Outlook 2019 that, consistent with international, European and national trends, one of their top three priorities of 2019 will be emphasising future orientation and sustainability.

With this in mind, it seems clear that corporate governance remains a hot topic in the Netherlands. The goal is to create a proper balance between the interests of the various stakeholders within an enterprise without losing sight of the interests of society as a whole. In the end, a model will have to be found whereby risky conduct is discouraged and public confidence in the management boards of banks and companies is restored.
I OVERVIEW OF GOVERNANCE REGIME

i Legal and institutional framework

The Nigerian corporate governance regime is characterised by a combination of a statutory framework and subsidiary legislation enacted by the relevant regulatory authorities. These laws can be divided into two categories: general laws and sector-specific laws. While the general laws govern every entity incorporated in Nigeria, the sector-specific laws govern only companies that operate within their specific sector or industry.

The general laws are:

a the Companies and Allied Matters Act (CAMA):² the regulatory authority charged with the responsibility of administering the CAMA is the Corporate Affairs Commission (CAC);³

b the Investments and Securities Act 2007 (ISA), which also established the Securities and Exchange Commission (SEC) as its regulatory authority; and


The sector-specific laws include, among others, the Banks and Other Financial Institutions Act (BOFIA) and the Insurance Act (IA).⁵

The CAMA is the main statute delimiting the general framework for the Nigerian corporate governance regime. It lays out the various types and forms of entities that can be incorporated, including private companies, which may be limited by shares or by guarantee, unlimited companies and public companies limited by shares. The CAMA also outlines the structure, powers and duties of the various organs of a corporate entity as well as the systems of governance and management of the company, and management qualifications. On the other hand, the ISA sets out the statutory framework for the regulation and operation of the Nigerian securities market. It outlines, among other things, the operational rules for securities market operators, participants and stakeholders, and liquidity requirements.

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1 Olayimika Phillips is a partner, Michael Amadi is a senior associate and Similoluwa Somuyiwa and Oludare Onakoya are associates at Olaniwun Ajayi LP.
3 Notably, however, the CAMA is at present undergoing an amendment process; this chapter also examines some of the key proposed amendments to the CAMA.
4 No. 6, 2011.
The BOFIA is the principal statute that regulates the banking sector. It recognises the supervisory role of the Central Bank of Nigeria as enumerated under the Central Bank of Nigeria Act 2007. It states the conditions for the grant of a banking licence, and for the revocation or variation of the same. Furthermore, the principal pieces of legislation governing insurance activities are the National Insurance Commission Act and the IA. The National Insurance Commission is empowered to make regulations and issue guidelines to insurance companies from time to time, while the IA applies to insurance businesses and regulates insurers, with the exception of insurance businesses carried on by friendly societies, and by companies, bodies or persons established outside Nigeria, engaged solely in reinsurance transactions with an insurer authorised under the IA.

The Nigerian corporate governance space has a number of corporate governance codes applicable to publicly listed companies and for sector-specific companies. Of particular import in this regard is the recently published Nigeria Code of Corporate Governance 2018 (NCCG Code). The NCCG Code was published by the FRCN on 15 January 2019, and seeks to promote public awareness of essential corporate values and ethical practices by recommending practices and principles that affected companies are to adhere to. The NCCG Code generally applies to all public companies as well as regulated private companies, and to private companies that are the holding companies of public companies.

It is interesting to note that the NCCG Code does not abolish the previously existing corporate governance codes; nor does it contain a superiority provision for circumstances where there is a conflict between the NCCG Code and the existing codes. It thus seems that companies would be required to comply with all applicable codes as necessary. The resultant effect of this is that in certain instances there is over-regulation, depending on the industry in which a company operates.

For the purpose of this review, the focus is mainly on:

- the NCCG Code;
- the Securities and Exchange Commission Code of Corporate Governance for Public Companies 2011 (SEC Code); and

However, there are also a number of corporate governance codes applicable to other sectors of the economy. These are:

- the Nigerian Communications Commission Code of Corporate Governance for the Telecommunications Industry 2014, which applies to the telecommunications industry;
- the National Insurance Commission Code of Good Corporate Governance for the Insurance Industry 2009, which applies to the insurance industry; and
- the Pension Commission Code of Corporate Governance for Licensed Pension Operators 2008, which applies to the pension industry.

For corporate governance practitioners, the growth and advancement of Nigeria’s corporate governance has been slow but steady. Following the corporate scandals in 2008 and 2009,
which practically brought the banking sector to a halt, the regulators seem to perceive corporate governance as the single most important solution to bring sanity in all areas of commerce and capitalism.

II CORPORATE LEADERSHIP

The Nigerian corporate governance structure is bipartite, such that a company acts through the members in the general meeting and the board of directors. The board is primarily charged with the responsibility of managing the company, with further powers being reserved for the members in general meeting. The interface between the board structure and practice and the role of directors is described in detail below.

i Board structure and practices

Nigerian companies operate a one-tier board structure, where all the directors sit and make decisions as a single organ except when the functions of the board have been delegated to a committee of the board or to the managing director.

Under the provisions of the CAMA, every company is required to have a minimum of two directors on its board and, where at any time the number of directors falls below two, the company is mandated to appoint another director within one month of the reduction in the statutory number of directors or refrain from carrying on business after the expiration of this period. International best practices dictate that the board should be of a sufficient size relative to the scale and complexity of the company's operations and composed in such a way as to ensure diversity of experience without compromising the independence, compatibility, integrity and availability of members to attend meetings.

In addition, the NCCG Code provides that the board should have an appropriate mix of executive, non-executive and independent directors, with majority of the board being made up of non-executive directors, and it is desirable for most of the non-executive directors to be independent; and the SEC Code provides that there should be, at the minimum, an independent director on the board whose shareholding, directly or indirectly, does not exceed 0.1 per cent of the company's paid-up capital and who should be free of any relationship with the company or its management that may impair, or appear to impair, the director's ability to make independent judgements. The Bank Code provides that banks should have at least two independent directors, while discount houses should have at least one independent director.

Legal responsibility of the board

Generally, the primary responsibility of ensuring good corporate governance in the company rests with the board, as it sets the tone at the top on governance issues. The board is mandated to ensure that the company carries on its business in accordance with its articles and memorandum of association, in conformity with the law and in observance of the highest ethical standards.

The board is also accountable and responsible for the performance and affairs of the company; it defines its strategic goals and ensures that its human and financial resources are effectively deployed to attain those goals. The principal objective of the board is to ensure that the company is properly managed to protect and enhance shareholder value, as well
as to meet the company’s obligations to its other constituencies (i.e., employees, suppliers, customers and stakeholders). The board may exercise any of its functions through board committees consisting of such members of the board as it deems fit or, from time to time, appoint one or more of its number to the office of managing director, and may delegate any of its powers to the appointed committee or managing director.\(^8\)

**Chairperson’s control of the board**

The chairperson’s primary responsibility is to ensure the effective operation of the board such that it works towards achieving the company’s strategic objectives. The chairperson should not be involved in the day-to-day operations of the company. The day-to-day running of the company should be the primary responsibility of the managing director (MD) or chief executive officer (CEO) and the management team. Under the provisions of the NCCG Code, the positions of chairperson of the board and MD or CEO are mandatorily required to be separated and held by different individuals. The purpose of this is to avoid an over-concentration of powers in one individual that may rob the board of the required checks and balances in the discharge of its duties.

**ii Directors**

Although the law requires a mixture of both non-executive and executive directors, the number of non-executive directors is expected to be higher than the number of executive directors, with the NCCG Code going further to state that it as desirable that a majority of the non-executive directors be independent non-executive directors. There is, however, no division in the performance of their functions on the board: non-executive directors are expected to be key members of the board, as they are required to bring independent judgement as well as scrutiny to the proposals and actions of the management and executive directors, especially on issues of strategy, performance evaluation and key appointments. Executive directors are employees of the company who typically report for duty at the company’s offices, earn salaries and usually have a contract of employment regulating their powers and functions. On the other hand, non-executive directors are not employees of the company, as they do not earn salaries and do not have a contract of employment regulating their functions and powers. They are appointed pursuant to the provisions of the CAMA. The executive directors give regular reports on the affairs of the company to the non-executive directors and act upon the mandate given by the board at board meetings.

**Duties of directors**

Directors are regarded as trustees of the company, and thus stand in a fiduciary position in relation to the company. By virtue of their position, they are to exercise their powers and discharge their duties in good faith. They are required to:

\[\begin{align*}
& a \quad \text{act in the best interests of the company as a whole, including the interests of employees of the company;} \\
& b \quad \text{exercise their powers strictly for the purpose specified and not for a collateral advantage;} \\
& c \quad \text{prevent the fetter of their discretion; and} \\
& d \quad \text{avoid conflicts of interest.}
\end{align*}\]

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\(^8\) *Hastons v. ACB Plc* [2002] 12 NWLR (Pt. 782) 623.
Appointment, nomination and term of office of directors

When a company is newly incorporated, the first directors are typically appointed by the promoters of the company. Subsequently, shareholders are vested with the power to appoint directors at general meetings of the company. The CAMA regulates the term of office of directors by providing for the retirement and rotation of directors, and this rule applies in the absence of any provision in the articles excluding its application. All directors are to retire at the first annual general meeting (AGM) of the company, and subsequently one-third of the directors shall retire yearly. In determining the retiring directors, the rule is first in, first out, under which the directors who have been longest in office will be made to retire. However, a director may be appointed as a life director, in which case the rule of retirement and rotation will not apply.

The Bank Code provides that the CEO of banks and discount houses shall have a maximum tenure of 10 years, and that the CEO shall not be eligible for reappointment in that bank or any of its subsidiaries. Similarly, the NCCG Code provides that the tenure of independent non-executive directors should not exceed three terms of three years for each.9

Conflicts of interest of directors

Directors are under a duty to avoid conflict between their personal interests and their duties as directors. A director should not make secret profit or use corporate information to gain an advantage. This responsibility continues even after the director has resigned or been removed by the company. In instances where a director’s duty may conflict with his or her personal interest, this can be managed by disclosing a possible conflict to the board, or by abstaining from voting or taking decisions on such matters.10 In the event of uncertainty, the SEC Code provides that the concerned director should discuss the matter with the chairperson of the board, or the company secretary, to get advice and guidance.11 On this matter, the NCCG Code as best practice also recommends the development of a conflicts of interest policy to prescribe the manner in which to deal with any potential conflicts of interest. Furthermore, all directors are required to declare any conflicts of interest annually, and any potential conflicts of interest should be disclosed to the board at the first possible opportunity.12

Proceedings of directors

Although the CAMA does not stipulate the number of times directors of a company may meet for the purpose of dispatching their business, the SEC Code provides that directors should meet a minimum of four times a year. Similarly, the NCCG Code also requires that the board meets at least once every quarter, with every director encouraged to attend all board meetings.13 Attendance is a prerequisite for the renomination of a director unless there are cogent reasons for non-attendance, of which the board must notify the shareholders at the AGM. Board meetings are presided over by the chairperson, and if he or she is not present within five minutes of the time appointed for the meeting, the directors shall elect one of their number to be chairperson of that meeting.14

9 Principle 12.10 of the NCCG Code.
10 Section 280 of the CAMA.
11 This is also provided in Principle 25.2.3 of the NCCG Code.
12 Principle 25.2.7 of the NCCG Code.
13 Principle 10 of the NCCG Code.
14 Section 263(4) of the CAMA.
III DISCLOSURE

i Disclosure by the company

Financial reporting and disclosure obligations in Nigeria are principally governed by the CAMA, which is the primary legislation, and other subsidiary pieces of legislation, typically sectoral corporate governance codes. In addition, public companies and companies listed on the Nigerian Stock Exchange (NSE) have to comply with the SEC Code and the NSE Rulebook 2015 (NSE Rules). Every company is required by the CAMA to prepare annual financial statements, and has a duty to present the same before the company in general meeting. This may be within 18 months of the incorporation of the company, and then yearly subsequently.\(^{15}\)

By law, a copy of the company’s financial statements must be sent to every member of the company (whether or not entitled to receive notice of the general meeting), every debenture holder of the company (whether or not so entitled), and all other persons other than members and debenture holders, being persons so entitled, not less than 21 days before the date of the meeting at which they are to be presented. The financial statements must comply with the form provided by the CAMA and the FRCN Act. There are certain key sections that the financial statement must include:

- a statement of accounting policies;
- the balance sheet as at the last day of the year;
- a profit and loss account;\(^{16}\)
- notes of the accounts;
- the auditors’ reports;
- the directors’ report;
- a statement of the source and application of funds;
- a value-added statement for the year;
- a five-year financial summary; and
- in the case of a holding company, the group financial statements.

As seen above, the directors’ report is among the matters to be contained in the financial statement, and it must provide, among other things, a fair view of the development of the business of the company and its subsidiaries during the year; the names of directors; and the financial activities of the company and its subsidiaries. In the past few years, companies have started reporting on their corporate governance activities in the annual report. It should also be noted that the NCCG Code requires the submission of annual reports containing, among other things, a statement by the board on the level of application of the NCCG Code.\(^{17}\)

Under the SEC Code, the obligation to disclose goes beyond financial disclosure and extends to social disclosure. The board is enjoined to report annually on the nature and extent of its corporate social responsibility (CSR), social, ethical, safety and anticorruption policies, and its health and environmental policies and practices. This obligation includes disclosure of:

- the company’s business principles and its efforts towards the implementation of the same;

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15 See Section 345(1) of the CAMA.
16 In the case of a company not trading for profit, an income and expenditure account for the year.
17 Principle 28.5 of the NCCG Code.
b the nature and extent of employment equity and gender policies and practices;
c information on the number and diversity of staff, training initiatives, employee
development and the associated financial investment;
d the conditions and opportunities created for physically challenged persons or
disadvantaged individuals; and
e the company’s policies on corruption and related issues.

ii Disclosure by the directors and shareholders

Under the provisions of the NCCG Code, the conflicts of interest policy should be
communicated, supported and monitored to provide reasonable assurance that all potential
conflict of interest situations will be disclosed. All directors are thus required to promptly
disclose any real or potential conflict of interest that they may have by virtue of their
appointment.18

Directors also have obligations to disclose their interests in a company, including
their interest in shares or debentures, and in contracts and conflicts of interest. The SEC
Code requires companies to disclose in their annual report details of shares held directly or
indirectly by a director.

A shareholder who holds 10 per cent of the voting rights in a company has an
obligation to disclose the same to the company within 14 days of his or her becoming aware
of the fact. Such a shareholder also has a corresponding duty to the company when he or she
ceases to be a substantial shareholder. However, this all turns on his or her knowledge. By
virtue of Rule 397 of the Securities and Exchange Commission Rules and Regulations 2013,
the registrar of a publicly listed company is under an obligation to provide the SEC with
information on any transaction that brings the beneficial ownership of shares in a company
to 5 per cent or more. The NSE Rules also require the prior approval of the NSE to effect
a transfer of a controlling block of shares (generally referred to as a block divestment) in a
listed company.19 Under the NSE Rules, a trade shall be treated as a block divestment where
it involves:

a a transfer of shares amounting to 30 per cent or more of the shares of a publicly listed
company, and the transferee shareholder intends to take control of the listed company;
b the acquisition of additional shares by a shareholder of a publicly listed company that
would result in an increase in the shareholder’s total holdings to 30 per cent or more
of the company’s total listed shares, and the shareholder intends to take control of the
listed company; or
c less than 30 per cent of a company’s total listed shares where this will lead to a material
change in the board or management, or both, of a listed company.

IV CORPORATE RESPONSIBILITY

There has been an interesting movement in the corporate responsibility sphere in Nigeria,
driven mostly by regulation. A number of corporate governance codes have provisions that
require companies to report on their CSR activities to employees, stakeholders and the
wider society. Interestingly, some companies carry out their charitable activities under the
umbrella of CSR, while other companies are strategically evolving and crafting their CSR

18 Principle 25.2.1 of the NCCG Code.
19 Rule 15.31 of the NSE Rulebook (as amended) 2015.
policy as a strategic aspect of business, leading to the development of their host communities and ultimately economic growth and development. The NCCG Code recommends that companies engage in sustainability policies and programmes covering social issues such as corruption, community service, environmental protection and serious diseases, and matters of general environmental, social and governance initiatives; and that the same should be included in the company’s annual report.\textsuperscript{20}

The SEC Code similarly provides that a company’s annual report should contain a corporate governance report that includes the company’s sustainability policies and programmes covering issues such as corruption, community service, environmental protection, HIV/AIDS and general CSR issues. The Bank Code also provides that banks shall demonstrate a good sense of CSR to their stakeholders.

\textbf{i Whistle-blowing}

The NCCG Code recommends the development and review of adequate whistle-blowing policies and procedures, and that any issues reported through the whistle-blowing mechanism are summarised and presented to the board.\textsuperscript{21} The board is also required to ensure the existence of a whistle-blowing mechanism that is reliable and accessible, and that guarantees the anonymity of whistle-blowers; and that all disclosures resulting from whistle-blowing, as well as the identities of whistle-blowers, are treated in a confidential manner.\textsuperscript{22}

Similarly, the SEC Code provides that companies should have a whistle-blowing policy that should be known to employees, shareholders, contractors and the general public. The board has the responsibility of implementing this policy. The company’s whistle-blowing mechanism should ensure whistle-blower protection and should include a means of communication that can be used to anonymously report unethical practices. Companies should also to have a designated senior-level officer assigned with the task of reviewing reported cases, and with providing the chairperson of the audit committee with a summary of reported cases, cases investigated, the process of investigations and the results of the investigations.\textsuperscript{23,24}

Compared with the NCCG Code and the SEC Code, the Bank Code, which is applicable to banks and other financial institutions, covers a broader spectrum on the scope and procedure for whistle-blowing, and for the protection of whistle-blowers. It tasks the head of internal audit with a supervisory role over the policy, and with duties to review reported cases and recommend appropriate action to the MD or CEO and, where issues affect executive management, refer the issues to the board; and provide the chairperson of the board audit committee with a summary of cases reported and the results of the investigations.

This development has had a profound effect as a considerable number of Nigerian companies now have a whistle-blowing policy in place.

\textsuperscript{20} Principle 28.2.1 of the NCCG Code.
\textsuperscript{21} Principle 11.6.7.7 of the NCCG Code.
\textsuperscript{22} Principle 19.2 of the NCCG Code.
\textsuperscript{23} Principle 19.4 of the NCCG Code.
\textsuperscript{24} Article 32.4 of the SEC Code of Corporate Governance for Public Companies.
V SHAREHOLDERS

i Shareholder rights and powers

The rights of shareholders in a company include:

a the right to receive annual reports and accounts;
b the right to attend and vote at general meetings;
c the right to share profits;
d the right to propose a resolution to be voted on at the AGM if the shareholders hold at least 10 per cent of the company’s voting share capital; and
e the right to require the directors of the company to call an extraordinary general meeting if the shareholders hold at least 10 per cent of the paid-up voting share capital.

The NCCG Code and the SEC Code further prescribe that the rights of shareholders of a company should be protected, and specifically provides that the board should ensure that all shareholders are treated equally. In furtherance of this, no shareholder, however large his or her shareholding, should be given preferential treatment or superior access to information or other materials. The board is also charged with the responsibility of ensuring that minority shareholders are treated fairly at all times and equally protected from abusive actions of controlling shareholders. Despite the foregoing, shareholders with dominant or large shareholdings still have the propensity to influence the board by virtue of their shareholding regardless of whether the company is private or public.\(^\text{25}\)

A number of decisions are statutorily reserved for shareholders, including:

a the appointment and removal of subsequent auditors;
b the appointment and removal of directors;
c the appointment of liquidators in a voluntary winding up;
d the declaration of a dividend upon the recommendation of the board (however, in this case, the shareholders at a general meeting can decrease but not increase the dividend);
e the fixing of the remuneration of directors; and
f the power to requisition an extraordinary general meeting.

Shareholders also have the power to appoint, remove and reappoint directors in a general meeting. This power is exclusive to the shareholders in general meeting. This gives dominant shareholders some level of control over the company, as, with the cooperation of management, they are able to sponsor their directors. However, these directors would need to pass regulatory scrutiny if their companies operate in heavily regulated sectors (e.g., banks and insurance companies in the finance sector), as well as the SEC if they are publicly listed companies.

Under the ISA, following a takeover bid, a dissenting shareholder may apply to the court to fix a fair value for his or her shares. Thereafter, he or she is bound by the order of the court. In reaching an assessment as to the fair value of the shares, the court has the discretion to appoint one or more independent valuers to assist the court in reaching a decision.

Under Nigerian law, there is no special treatment for long-term shareholders, such as extra votes or extra dividends. However, shareholders may, under their shareholders’ agreement, enter into a private contract to regulate their affairs on such issues as voting,

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\(^{25}\) Principle 23.1 of the NCCG Code.
dividends and the number of directors each shareholder may have on the board. However, except where a new shareholder enters into a deed of adherence or a similar agreement, such special treatment would not be binding on the new shareholder.

ii Shareholders’ duties and responsibilities

Although shareholders of a company generally look out for their interests and are concerned with getting the highest return on their investment in the company, the SEC Code emphasises that shareholders of public companies should play a key role in good corporate governance, and states that institutional shareholders and other shareholders with large holdings should demand compliance with the principles and provisions of the SEC Code.

It appears that Nigerian institutional investors are typically not as aggressive as their global counterparts in their engagement with the management of companies and the regulators.26 In a perceived bid to bridge this gap, the NCCG Code recommends that a policy be developed by the board to ensure appropriate engagement with shareholders. The chairperson is also encouraged to interact with shareholders in order to develop a balanced understanding of shareholder issues and ensure that their views are communicated to the board.27 It is hoped that this would have the desired effect of improving shareholder engagement.

VI OUTLOOK

Two major events impacted the Nigerian corporate governance space in 2018 and early 2019: the release of the NCCG Code and the passage of the Companies and Allied Matters (Repeal and Re-enactment) Bill 2018 (CAMA Bill) through the National Assembly.

The NCCG Code adopts a principles-based approach in setting the minimum standards of practice that organisations should adopt in order to comply. It consists of 28 principles that cover matters such as boards of directors, business conduct and ethics, sustainability and transparency, and relationships with shareholders. Companies are to adopt an apply and explain approach in the adoption of the NCCG Code to prevent blind compliance: companies are to comply with the NCCG Code as much as possible, and explain why certain of its recommendations could not be complied with.

The implementation of the NCCG Code by the FRCN empowers sectoral regulators and registered exchanges to impose appropriate sanctions for failure to comply with the NCCG Code. Furthermore, the NCCG Code provides that guidelines for implementation will be issued subsequently by the FRCN in consonance with the sectoral regulators. While not derogating from the powers of the FRCN to directly monitor the implementation of the NCCG Code, the NCCG Code also envisages monitoring by sectoral regulators.

The existence of several codes of corporate governance has been identified as a possible cause of friction among agencies with respect to applicability and enforcement; however, stakeholders are enthusiastic, and are hopeful for a better expression of corporate governance in Nigeria.

Relatedly, the passage of the CAMA Bill through the National Assembly (although awaiting presidential assent) is seen as a further step in the right direction in the Nigerian

27 Principle 22 of the NCCG Code.
corporate governance space. There are several provisions that would seek to impact the country’s corporate governance regime, such as the fact that the obligation to disclose substantial shareholding in a public company has been amended to relate to the holders of 5 per cent of the shares, as opposed to the earlier provision of a 10 per cent shareholding.\(^\text{28}\) Furthermore, public companies are also required to publish their audited accounts on their websites to ensure the public is kept informed, a requirement that should significantly improve shareholder engagement in the affairs of public companies.

There is little doubt that 2019 promises to see significant improvements in the Nigerian corporate governance space.

\(^{28}\) Section 121 of the CAMA Bill.
I OVERVIEW OF GOVERNANCE REGIME

i Sources of law and other regulations
Norwegian public limited companies are governed by the Public Companies Act, which is, on important areas (e.g., information requirements, investor protection and accounting), supplemented by other mandatory laws such as the Securities Trading Act, the Stock Exchange Act and the Accounting Act. Companies listed in Oslo are also subject to the continuing obligations of listed companies as adopted by the Oslo Stock Exchange.

In addition, important guidelines for corporate governance in listed companies have been established in the Norwegian Code of Practice for Corporate Governance (NCCG). The NCCG provides Norwegian listed companies with guidelines for governing the relationship between shareholders, boards of directors and executive management more comprehensively than the applicable legislation. The NCCG consists of 15 recommended principles of corporate governance, each of which is coupled with explanatory commentaries.

Several provisions of the Public Companies Act have been introduced or amended owing to EU regulations, including Directive 2007/36/EC on shareholder rights. This Directive was implemented in Norway in 2009 and applies to listed companies only. The purpose of the Directive is generally to improve shareholders’ opportunities to exercise influence in listed companies.

ii Enforcement
A shareholder who believes that a resolution by the general meeting violates mandatory law or the company’s articles of association can take legal action to have the resolution rendered void. An illegally adopted resolution or other forms of non-compliance with mandatory laws can also give rise to claims for compensation.

The NCCG is, on the other side, not directly legally binding. Nevertheless, the NCCG has to some extent gained legal anchoring through the Accounting Act, which requires that listed companies account for their principles and practice of corporate governance in their annual directors’ report on a comply or explain basis. This requirement is also established in the continuing obligations of listed companies published by the Oslo Stock Exchange. In addition, companies applying for listing on the Oslo Stock Exchange must report on their corporate governance principles in their listing application. By connecting the NCCG to mandatory legislation and stock exchange regulations, the NCCG has been established as guidance with which companies are generally expected to comply.
II CORPORATE LEADERSHIP

i Governance regime

The Norwegian governance regime draws a fundamental line between a company’s management and its owners. The shareholders exercise the highest authority in the company through the general meeting and may, through the general meeting, decide on any matter provided that it has not expressly been made subject to the exclusive authority of another corporate body (e.g., the board of directors).

A company’s management is divided into two corporate bodies: a board of directors (consisting in practice only of non-executive directors) having the overall responsibility for the management of the company, and a CEO who is in charge of day-to-day management.

A special feature of the Norwegian governance model is the obligation to appoint a corporate assembly in companies with more than 200 employees. The principal tasks of the corporate assembly consist of board elections and, following a recommendation from the board of directors, to resolve on matters regarding significant investments in relation to the company’s resources, and any rationalisation or alteration of the company’s operations that may cause extensive changes or a reallocation of the company’s workforce. The Public Companies Act does, however, allow a company to agree with a majority of its employees (or unions representing two-thirds of the employees) that a corporate assembly should not be established in exchange for extended employee representation on the company’s board of directors (see below). It is common practice to enter into such agreements.

Another fundamental characteristic of the Norwegian governance regime is the rules in Norwegian companies’ legislation that grant a company’s employees the right to elect members to the board of directors and the corporate assembly. The main rule regarding employee representation is that one-third of the members of the board of directors or one-third of the members of the corporate assembly, or both, are elected by and among the employees. The employee representatives act as ordinary members of the board or corporate assembly, and have the same authority and responsibility as the members elected by the general meeting.

ii Board structure and practices

Size and composition of the board of directors

The board of directors must consist of at least three members (five in companies with a corporate assembly). In practice, the boards of Norwegian listed companies tend to consist of between six and 10 directors, of which one-third is elected by and among the employees.

As regards the composition of the board of directors, at least half of the directors must be resident within the EEA and citizens of an EEA country. Since 2006, the legislation pertaining to Norwegian companies has also contained requirements relating to gender representation on the boards of directors of public limited companies. These rules provide that each gender must, at a minimum, be represented by approximately 40 per cent of the total number of directors elected by the general meeting. According to the Public Companies Act, the CEO cannot be a director.

The Oslo Stock Exchange Listing Rules contain further requirements for listed companies. Pursuant to these rules, at least two of the shareholder-elected directors must be independent of the company’s executive management, material business contacts and the company’s larger shareholders (meaning shareholders who own more than 10 per cent of the company’s voting capital or share capital). No members of executive management may
be represented on the board, unless warranted by special circumstances. Finally, all directors must be fit and proper and have satisfactory knowledge of the rules applicable to listed companies on the Oslo Stock Exchange.

Further guidelines and recommendations regarding the composition of the board of directors are set out in the NCCG relating to, inter alia, independence and expertise of the directors.

The chair of the board of directors
The chair of the board is the leader of the board of directors and carries a particular responsibility for ensuring that the work of the board is well organised and that it functions effectively. The chair normally has the casting vote in the event of a parity of votes on the board. The chair shall ensure that matters of current interest are presented to the board. This rule indirectly implies that the chair has a duty to keep him or herself continuously up to date on material matters regarding the company.

Responsibilities of the board
The board of directors has the principal responsibility for the management of the company, and for supervising the company's day-to-day management and activities in general. This includes ensuring that the company's activities are soundly organised, drawing up plans and budgets for the activities of the company, staying informed of the company's financial position, and ensuring that its activities, accounts and asset management are subject to adequate control.

The principal task of the board of directors, as well as of the other managing corporate bodies (i.e., the CEO and the corporate assembly), is to promote the company's commercial interest, facilitate value creation and, as a consequence thereof, safeguard the shareholders' general interest in gains and dividends on the capital invested in the company. However, the managing bodies of a Norwegian company are also entitled – and sometimes obliged – to consider non-shareholder interests (e.g., the interests of the company's employees, creditors and contract parties), as well as the company's obligations towards society and the environment. The common view is that the boards of directors of Norwegian companies must to some extent have a broader perspective than the sole economic interest of the shareholders. This particular point is reflected in the NCCG, which recommends that the board of directors 'should define the company's basic corporate values and formulate ethical guidelines and guidelines for corporate social responsibility in accordance with these values'.

The liability of directors is several and not joint, meaning that each individual director may be held responsible for his or her actions or inactions as a director on the board.

Board committees
The Public Companies Act requires that listed companies of a certain size appoint an audit committee (Section III). Apart from this requirement, the Public Companies Act neither requires nor prohibits the establishment of specialised board committees.

The NCCG further recommends that the board of directors of listed companies consider appointing a remuneration committee consisting of independent directors to help ensure thorough and independent preparation of matters relating to executive compensation. Many listed companies also choose to appoint other specialised board committees dealing with particular matters of interest (e.g., corporate social responsibility and social responsibility, human resources and workplace environment issues).
However, it should be noted that, to the extent board committees are established, such committees cannot be granted authority that is vested in specified corporate bodies according to law. Thus, the principal responsibility for tasks delegated by the board of directors to a board committee will always remain with the board and its individual directors. The work being carried out by a board committee must therefore only be viewed as preparatory or advisory for the board’s discussions.

**Remuneration of directors and the CEO**

Except in cases where the company has a corporate assembly, the remuneration of directors shall be determined by the general meeting. The Public Companies Act does not contain rules or guidelines with respect to the size of the remuneration of the directors, but further guidelines are provided in the NCCG, which states that the ‘remuneration of the board of directors should reflect the board’s responsibility, expertise, time commitment and the complexity of the company’s activities’, and that the ‘remuneration . . . should not be linked to the company’s performance’. The NCCG also states that share options should not be granted to directors. The size of the remuneration paid to directors in Norwegian companies varies in practice, but historically has been seen as modest when compared with other industrial countries.

The remuneration of the CEO is determined by the board of directors. The board of directors is obligated to produce an annual statement setting out guidelines for the determination of salaries and other remuneration to the company’s executive personnel, including the CEO, for the next financial year. This statement is subject to the consideration of the annual general meeting each year.

### iii Directors

**Election of directors**

Directors are elected by the general meeting, which also determines whether deputy directors shall be elected. In companies with a corporate assembly, this body is responsible for electing the directors. A decision to remove directors may be taken by the same corporate body authorised to elect the directors, which means that the removal of directors is normally resolved by the general meeting. A characteristic feature of Norwegian corporate law is that a majority of the shareholders, acting through the general meeting, may replace one or several directors at any time during their term without cause. This grants the majority shareholders authority to determine and alter the composition of the board of directors at any time. Staggered boards, where directors cannot be removed until the end of their term, are not permitted according to Norwegian law. An important caveat is that directors who are elected by employees cannot be removed by the general meeting, but may only be replaced pursuant to a decision by the employees.

The NCCG recommends that the task of proposing eligible candidates for the board of directors, as well as proposing the directors’ remuneration, is prepared by a nomination committee. This recommendation is followed by a majority of Norwegian listed companies, even though there is no legal requirement to appoint a nomination committee. Whether a company shall have a nomination committee is usually (but not necessarily) governed by the company’s articles of association.
The starting point of the Public Companies Act is that directors are elected for a period of two years, provided a company’s articles of association do not state otherwise. The term cannot, however, exceed four years. The NCCG recommends that directors are not elected for a period of more than two years.

**CEO**

All Norwegian public limited companies must have one or several CEOs. In practice, Norwegian listed companies have only one CEO. The CEO is normally appointed and dismissed by the board of directors.

The CEO is in charge of the day-to-day operations of the company and responsible for executing the board’s resolutions and addressing external relations. The authority of the CEO is generally limited with respect to matters of an unusual nature or major importance to the company. The CEO is subordinate and reports to the board of directors, while the board, in turn, has a duty to supervise the CEO. The board of directors may also instruct the CEO on the day-to-day operations of the company.

### III DISCLOSURE

#### i Internal control and financial reporting

The Public Companies Act requires that listed companies of a certain size appoint an audit committee to advise on and prepare certain matters for the board of directors. At least one of the members of the audit committee must be independent of the company’s operations and have accounting or auditing qualifications.

Listed companies are subject to a financial reporting scheme as set out in the Securities Trading Act, the Securities Trading Regulation and the Continuing Obligations of the Oslo Stock Exchange. This entails, among other things, that all listed companies must publish semi-annual and annual financial reports to the market within certain deadlines. The financial reports must be prepared in accordance with recognised accounting standards, such as IFRS or US GAAP. The company must ensure that no unauthorised persons gain access to accounting information before any such financial report is published.

#### ii Reporting on corporate governance

The NCCG is based on a principle of comply or explain, and is thus not directly legally binding upon its target companies. However, pursuant to the Accounting Act, listed companies are required to account for their principles and practice of corporate governance in their annual directors’ report. This requirement is also established in the continuing obligations of listed companies. In addition, companies applying for listing on the Oslo Stock Exchange must report on the company’s corporate governance principles in their listing application or in an appendix to this.

#### iii Audit

All public limited companies are required to appoint an authorised auditor. The auditor is elected by the general meeting and serves as auditor until replaced.
The primary task of the auditor is to verify that the company’s annual report, including its annual accounts, are in accordance with the applicable legislation. The auditor shall also verify that the company has undertaken satisfactory management of its assets and that proper control mechanisms are in place.

The auditor shall have at least one annual meeting with the board of directors without the CEO being present. In listed companies, the auditor shall liaise with the audit committee, and give the committee a description of the main elements of the audit.

The audit is an important part of the shareholders’ monitoring of the board of directors’ management of the company. The auditor shall present a report concerning the audit to the general meeting. In the event the auditor finds circumstances that may give rise to liability on the part of a member of the board of directors, a member of the corporate assembly or the CEO, the auditor must make a note of this in the report.

The auditor shall attend any general meeting where the matters to be dealt with are of such a character that the auditor’s attendance is deemed necessary. Otherwise, the auditor has, according to law, a right (but no obligation) to be present at the general meeting. However, the NCCG recommends that the auditor attends all general meetings of the company.

IV CORPORATE RESPONSIBILITY

As mentioned above, the Public Companies Act confers the ultimate responsibility for the management of the company on the board of directors. The board shall also keep itself informed on the company’s financial position, and ensure that the operations, accounts and asset management are subject to adequate control. In performing its duties, the board shall initiate such investigations as it finds necessary, as well as those investigations that may be required by one or more of the directors.

The responsibility of the board of directors is also addressed in the NCCG, which makes it clear that it is also the board’s responsibility to define and perform internal controls with respect to the company’s corporate values, ethical guidelines and guidelines for corporate social responsibility. It is common for listed companies to appoint a special risk committee to the board of directors to monitor risks and report any issues on an ongoing basis.

V SHAREHOLDERS

i Shareholder rights and powers

Norwegian companies’ legislation is based on a majority principle that grants controlling influence to the shareholders controlling the majority of votes at the general meeting. This majority principle provides for a secure and flexible governance system in which an important element is the majority shareholder’s control over the company’s board of directors. However, an important feature of the Norwegian governance model is the balancing of the majority principle against a set of rules relating to minority protection. These rules limit the majority’s authority over individual shareholders (or minority groups of shareholders) and equip the minority shareholders with legal tools to enforce the limitations to the majority’s authority.
Shareholders’ duties and responsibilities

General
The shareholders exercise supreme authority in the company through the general meeting in which they can instruct and control other corporate bodies, including the board of directors and its composition. The general meeting can also, as a main rule, reverse resolutions adopted by other corporate bodies and directly resolve on all company matters to the extent there are no third parties (e.g., contracting parties) who have rights as regards the company that prevent the general meeting from making decisions.

The general meeting is obliged to resolve on matters that are expressly made subject to its authority pursuant to the Public Companies Act, such as adoption of the annual accounts, approval of the board’s statement on remuneration to executive personnel and election of directors to the board. Matters concerning the company's capital are also generally subject to the general meeting's authority (i.e., increases and reductions in share capital, mergers, demergers and dividend distributions).

Protection of minority rights
The Public Companies Act has several provisions that balance the majority principle against the interests of the minority shareholders. These minority-protection provisions reflect the fundamental principle of equality in Norwegian company legislation.

The minority-protection rules consist of provisions of a various nature, such as general provisions concerning, among other things, abuse of authority, conflicts of interest and related-party transactions, as well as provisions regarding majority requirements and procedural requirements for certain resolutions made by the general meeting.

General provision against abuse of authority
The main material limitation on the majority's authority over the other shareholders is set out in the general anti-abuse provisions in Sections 5-21 and 6-28 of the Public Companies Act. These provisions prohibit the shareholders, the directors and the CEO from adopting any resolution that may provide certain shareholders or others with an unreasonable advantage at the expense of the other shareholders or the company. Further, these provisions prohibit the board of directors and the CEO from effecting resolutions made by superior corporate bodies that would violate mandatory laws or the company’s articles of association.

For listed companies, the anti-abuse provision in the Public Companies Act is supplemented by a provision on equal treatment in the Securities Trading Act and in the Continuing Obligations of the Oslo Stock Exchange.

The anti-abuse provisions are limited in scope to unreasonable abuse of majority power that results in unequal treatment. This implies that unequal treatment per se is not prohibited, and that majority shareholders as well as the board and the CEO can pass resolutions that provide for de facto unequal treatment as long as there is a good and valid reason for passing such a resolution.

Shareholder activism
The Public Companies Act opens up for various methods of exercising shareholder activism in Norwegian companies, such as:

a a right for shareholders holding more than 5 per cent of the share capital of the company to demand that an extraordinary general meeting is held to discuss any specific matter;
a right to request that the district court initiates an investigation of the company if a proposal to investigate the company’s ‘establishment, management or certain specified matters regarding the management or the accounts’ is supported by at least 10 per cent of the share capital represented at the general meeting;

c a right for shareholders who own at least 5 per cent of the share capital to request that the district court resolves a dividend that is higher than that approved by the general meeting, thus giving minority shareholders a protection against being ‘starved out’ of the company by a dominant shareholder who is keeping the dividend distributions unreasonably low;

d an unconditional right for all shareholders to be present (either personally or by proxy) at the company’s general meetings; and

e a right for all shareholders to have specified matters addressed by the general meeting.

The Public Companies Act also provides each shareholder with a right to information, including a right to receive the annual accounts, the board’s statement, the auditors’ statement and the statement from the corporate assembly. At the general meeting, each shareholder can also demand information regarding circumstances that may be significant for the approval of the annual accounts and the annual report, matters that are presented to the general meeting and information on the company’s economic situation. The shareholders’ right to information is far-reaching, and can only be denied to the extent the information demanded cannot be provided without disproportionate harm to the company.

Proxy advisers

With respect to the actual voting at the general meeting, the practice of using proxy advisers has been increasingly adopted during the past decade, most commonly by institutional shareholders. Proxy advisers are professional analysts who provide advice on how shareholders should exercise their voting powers at the general meeting. The advice can either be provided based on the shareholders’ expressed ownership principles, or be of a more general nature. Proxy advisers help shareholders stay up to date on their investments by taking on the task of analysing the consequences of the matters that are presented to the general meeting. However, critics are concerned that extensive use of proxy advisers causes unwanted harmonisation of the governance of Norwegian companies, which does not always take into consideration the specific needs of a company’s business and operations.

Proxy battles, shareholder campaigns, etcetera

Prominent proxy battles and shareholder campaigns in relation to Norwegian companies listed on the Oslo Stock Exchange are rarely seen. Occasionally, such campaigns and battles ensue in the context of a hostile takeover bid, or more recently in relation to companies in financial distress, where creditors of a distressed company may try to influence shareholders and management to agree to a particular proposal for the financial restructuring of the company.

Takeover defences

Takeover defences in the form of poison pills and similar measures are rarely seen in the Norwegian market.

As a starting point, the Securities Trading Act, the NCCG and the Listing Rules of the Oslo Stock Exchange builds on a principle that the shares of a listed company should
be freely transferable and carry equal rights in the company, and that it should be up to the shareholders – not the board of directors – to consider any bid made for the shares of the company by a third party. Consequently, Section 6-17 of the Securities Trading Act restricts a board’s ability to take defensive measures against a third-party tender offer for a company’s shares, including by issuing new shares, selling or buying significant assets, purchasing own shares and resolving mergers. These prohibitions can, however, be set aside by a vote of the shareholders in a general meeting.

The NCCG goes even further and states, among other things, that the board of directors should publicly announce how it will act in the event of a tender offer for the company’s shares, and that the company should not take any measures to prevent such an offer from being made. In the event that the board has been authorised by the shareholders to take defensive measures in such a situation, the NCCG recommends that the authorisation should only be acted on if it has been given after the relevant offer has become publicly known.

Hostile takeovers are rare in the Norwegian market, but there have been examples of such transactions in recent years where the board of the target company has implemented a variety of defensive measures to secure a more competitive offer.

As an alternative to active, defensive measures against tender offers, it is possible to implement structural defences in the form of voting restrictions, multiple share classes and similar means. The Oslo Stock Exchange has historically been reluctant to accept the listing of companies with such structural defence mechanisms, but there have been several examples in recent years of companies with restrictions on voting rights or dual share classes having been accepted for listing. It is difficult to say whether these cases are rare exceptions to the main rule or if they can be seen as precedents and indications of a less restrictive approach being taken by the Oslo Stock Exchange in recent years and going forward.

v Contact with shareholders

Outside the general meeting, shareholders do not have formal authority to govern a company or to instruct the board of directors or to influence the company affairs. This does not, however, prevent shareholders and management from having contact outside the general meeting when it comes to matters unrelated to the exercise of the shareholders’ legal authority. Oppositely, such contact is rather common in companies with one dominant shareholder, and is often also seen in companies with dispersed ownership, as the main shareholder or main shareholders will have a need to be kept informed and up-to-date on important matters related to the company’s operations and development. In addition, main shareholders may also wish to give their input regarding the company’s operations to management, and management may need to discuss matters with the main shareholder or main shareholders to avoid falling out of step with them on important matters regarding the company. In matters in respect of which the general meeting has the final authority, such as resolutions on share issues, share buy-backs, mergers and demergers, the management will usually have discussed the matter with the main shareholder or main shareholders before a reasoned proposal is presented to all shareholders (which needs to occur at least 21 days before the general meeting is held).

The extent and substance of the contact between management and the shareholders vary to a great extent from one company to another. In any case, it is important that informal contact between management and the company’s shareholders is kept within certain limits to make clear that it is the company’s management, namely its board of directors and CEO,
which has the responsibility and authority to manage the company’s operations. Contact with the shareholders should thus principally be of an informative nature and with the company’s best interests in mind. To the extent shareholders present comments or proposals to the management outside of the general meeting, such comments or proposals cannot be of an instructive character. It is also important to ensure that the contact between management and the main shareholders does not violate the other shareholders’ rights in the company, and that the contact is kept within the framework of, among other things, the principle of equal treatment of shareholders. To this end, the board and management must be particularly cautious not to disclose information to the main or dominant shareholders without providing the same to the minority shareholders.

The NCCG recommends that boards of directors of listed companies establish guidelines for a company’s contact with shareholders other than through general meetings. Such guidelines will typically specify how the company communicates to its shareholders and stakeholders in the public domain (for instance, by hosting webcasts or telephone conferences in connection with the publication of annual or interim accounts), the frequency of such communications, and the person or persons responsible for the communications (for instance, an investor relations manager).

It is not per se unlawful for a listed company to disclose confidential inside information to one or a select few of its shareholders outside of a general meeting. Depending on the circumstances, there may be good and valid reasons for sharing inside information with a major shareholder, for instance in cases of financial distress. It is, however, important to note that if a shareholder receives inside information, the shareholder will become an insider pursuant to the Securities Trading Act. This means, among other things, that the shareholder will be prohibited from trading in the shares and will be obliged not to disclose the information. A shareholder with inside information must be added to the company’s list of insiders, and the company must inform the shareholder of this fact as well as the consequences of receiving inside information.

VI OUTLOOK

The Norwegian corporate governance structure has been fairly stable for some time, and legislative amendments that will materially affect the corporate governance regime are not expected.

As a general remark, the Norwegian governance model is broadly drafted and rather flexible, thus catering for many different ownership models. This means that it can be suitable for both companies with a dominant shareholder and companies with dispersed ownership.

In recent years, the actions of directors and management of publicly listed companies in Norway have become subject to increased scrutiny by regulators and the general public, in particular as allegations of corruption and unlawful business practices have been made against several large Norwegian corporations. Statistics also show that director liability lawsuits by aggrieved shareholders and third parties have increased in recent years, prompting an increased focus on directors’ responsibilities and potential liability in general.
OVERVIEW OF GOVERNANCE REGIME

Legal framework: sources of law

In Poland, general corporate governance rules applicable to companies, including listed companies, are laid down in the Commercial Companies Code of 2000 (CCC), which replaced the former Commercial Code of 1934. The CCC sets out the general duties and powers of the various corporate bodies, as well as rules on representation, conflicts of interest and the liability of management board members.

As regards listed companies, further rules are contained in the following acts:

- the Act on Public Offering and Conditions for Introducing Financial Instruments to the Organised Trading System and Public Companies, which includes rules regarding takeover offers and general duties of listed companies;
- the Act on Trading in Financial Instruments, which contains provisions on disclosure of non-public information that could affect the market in respect of a listed company’s shares and a prohibition on insider trading;
- the Accounting Act, which contains rules regarding financial reporting and disclosure; and
- the National Court Register Act, which contains rules on filings with the public register of companies.

Compliance with the above rules can, if necessary, be enforced through the courts and, with respect to the capital market regulations, by the Financial Supervision Authority. The significant role of registry courts in respect of the National Court Register goes far beyond the mere authority to maintain the public registers. Under certain circumstances, the registry courts may decide to dissolve a company (although this is very rare in practice). Companies with state participation fall additionally under special regime introduced by the Act on the Management of State Property, which entered into force on 1 January 2017.

Legal framework: best practice relating to the governance of listed companies

Alongside the above statutory rules, companies listed on the Warsaw Stock Exchange (WSE) are also expected to follow corporate governance rules adopted by the WSE. The first formal document containing these rules was adopted by the WSE in early 2000 and entered into force in 2002. Since then, it has been revised regularly and adapted to the needs of the
growing Polish capital market. The most recently adopted Best Practice of WSE Listed Companies 2016 (Best Practice Code) came into force on 1 January 2016. These rules apply on a voluntary basis (i.e., as soft law).

In contrast to the version that was in force in from 2008 to 2015, the latest Best Practice Code uses a legislative approach adopted in the UK Corporate Governance Code (formerly the Combined Code) and repeated in the EU model of corporate governance rules, consisting of general principles followed by detailed guidelines. The absence of such general principles in the earlier Best Practice Code was heavily criticised. In particular, it was emphasised that without general principles, the Best Practice Code was essentially just a manual providing a set of technical rules. Apart from seeking to protect shareholders’ interests, the current version permits the rules to be better understood and properly applied, which serves the interests of all members of a company’s governing bodies.2

Compliance with the Best Practice Code is monitored by the WSE, and listed companies have certain disclosure obligations in this regard based on the comply or explain model.

There are separate best practice rules that apply to companies listed on New Connect, a stock exchange for smaller companies that is generally subject to less stringent rules and oversight.

Financial institutions are also obliged to implement the current Corporate Governance Rules for Supervised Institutions issued by the Financial Supervision Authority, which have been in force since 2014.

II CORPORATE LEADERSHIP

In Poland, only joint-stock companies can be listed. The relevant regulations of the CCC provide for a mandatory two-tier board structure for joint-stock companies that consists of a management board and a supervisory board.

i Board structure and practices

Composition, appointment and dismissal

Management board

The management board of a company must have at least one member (with no applicable maximum number of members unless otherwise specified in the articles of association). Only individuals can be members. In particular, another company may not be appointed to the management board.

If a fixed or a minimum number of management board members is provided in the articles of association and that number of members is not appointed, even temporarily, then the ability of the management board to validly represent the company may be compromised. To avoid any such issues, most companies have articles of association specifying that the management board consists of one or more members.

The competence to appoint, remove or suspend a management board member is vested in the supervisory board, unless the articles of association of the relevant company provide otherwise (e.g., by stipulating that the management board members are appointed

by way of a shareholders’ resolution or by conferring rights on a certain shareholder to make nominations. Management board members may always be removed or suspended by the shareholders at a general meeting.

Following the amendment of the CCC, which entered into force on 1 January 2017, the articles of association or a resolution of a general meeting may stipulate certain criteria that should be met by a management board candidate, or may provide a detailed qualification procedure.

There is the possibility to temporarily appoint one member of the supervisory board to the management board. Such an appointment (which is an exception to the general division of functions between company bodies and the non-compatibility rule described below) is only allowed for up to three months and is only used in exceptional circumstances (e.g., after the resignation of a management board member and before the appointment of a new candidate).

The Best Practice Code provides that management board members should be of high quality and experienced, and the overall composition of the board should ensure diversity as regards matters such as gender, age, education and professional background.

Generally, no minimum term applies to the appointment of management board members, although a single term of office cannot exceed five years. Reappointment for a subsequent term cannot be made earlier than one year before the end of the current term of office. If the articles of association do not provide any specific term of office, the mandate of a management board member automatically expires, at the latest, on the date of the general meeting approving the financial statements for the final full financial year of service of the relevant management board member. Similarly, if a term of office is specified in the articles of association, the mandate of a management board member expires upon approval of the financial statements for the final full financial year of that term. In 2016, the Supreme Court ruled that, for these purposes, the final full financial year is the final financial year that commenced during the term of office.3 The ruling brought an end to debate in the legal doctrine with regard to that aspect of the interpretation of the regulation. This is an important development, because miscalculation of the expiry of mandates of management board members could have significant consequences. In particular, a management board member without a valid mandate cannot validly represent the company, and as such, the effectiveness of any acts undertaken by a management board member after the expiry of the mandate could potentially be brought into question, sometimes years later. Following the amendment of the Civil Code adopted in 2018, from 1 March 2019 onwards it will be possible for a company to confirm legal acts undertaken by the member or members of its management board without a valid mandate (similar to acts of a falsus procurator). This brings an end to a discussion regarding the controversies regarding whether such a possibility exists with respect to acts undertaken by a company’s organs.

The articles of association may provide for a joint term of office of the management board members. In such cases, the mandates of all members generally expire at the same time, even if a particular management board member was appointed during the term of office.

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3 Resolution of the Supreme Court dated 24 November 2016, III CZP 72/16; although it concerns members of the supervisory board, the ruling is also relevant to management board members because of the similar statutory regulations in respect of the terms of office.
A management board member may generally be removed without reason at the discretion of the general meeting or other nominating body. However, the articles of association may limit this right to circumstances in which there are valid reasons for removal.

**Supervisory board**

The supervisory board of a listed company must consist of at least five members, and there is no maximum unless otherwise specified in the articles of association. Because of the division of functions between the management board and the supervisory board, it is not possible for a management board member to be a supervisory board member at the same time. The same restrictions apply to a commercial proxy, a liquidator, a manager of a branch office of the company and certain other persons employed by the company.

Members of the supervisory board are generally appointed and dismissed by way of resolutions at a general meeting. Irrespective of the appointment rules specified in the articles of association, the regulations of the CCC provide a special appointment procedure designed to protect the interests of minority shareholders. Shareholders representing at least one-fifth of the share capital may request that the election of the supervisory board at a general meeting take place by voting in separate groups. Shareholders may create groups by division of the total number of shares represented at the general meeting by the number of supervisory board members to be appointed. Each group may then elect one supervisory board member.

The recommendations of the Best Practice Code regarding the composition of the management board and diversity are equally applicable to the supervisory board. Additionally, at least two members have to fulfil the independence criteria described in the Commission Recommendation on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board.⁴ Neither an employee of the company, a subsidiary or an affiliated company, nor a person holding at least 5 per cent of the shares in the company, can be regarded as independent for these purposes. The new Act on auditors and auditors’ firms that entered into force 2017⁵ introduced further criteria for part of the supervisory board members in listed companies. Under this Act, an audit committee appointed by the supervisory board from its own members is obligatory in such companies. The audit committee members (there must be at least three of them), being supervisory board members at the same time, apart from fulfilment of the independence criteria must have knowledge and skills in the scope of the industry in which the company is operating, whereby at least one of them must have knowledge and skills in the scope of accounting or examination of financial statements.⁶

The rules regarding the term of office and expiry of the mandate of a supervisory board member are the same as for the management board members as described above.

**Legal responsibilities and representation**

**Management board**

The competence to represent a company in relation to third parties generally lies with the company’s management board. Specifically, management board members are entitled to

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⁴ 2005/162/EC.
⁵ Act on Statutory Auditors, Audit Firms and Public Oversight of 11 May 2017.
⁶ Articles 128 Section 1 and 129 Sections 1,3 and 5 of the Act on Statutory Auditors, Audit Firms and Public Oversight of 11 May 2017.
represent the company in relation to third parties in all judicial and extrajudicial matters. The representation rules specified in the articles of association may provide for either joint or individual representation. The rules on joint representation may provide that the company can be represented by a management board member acting jointly with a commercial proxy. The notion of commercial proxy in Poland is similar to that of Prokura in Germany.

As a general rule, each management board member is responsible for the day-to-day management of the company.

The competence of the management board to manage the company’s business may, to a certain extent, be limited. In particular, it may be subject to a list of reserved matters for which the consent of the supervisory board or the shareholders by way of resolution at a general meeting is required. In such situations, the supervisory board role is strengthened or the shareholders in general meeting are more involved in crucial decisions concerning the management of the company. However, exceptionally detailed or exhaustive catalogues of reserved matters for the supervisory board may not be permissible because, in practice, the need for the approval of the supervisory board may be tantamount to it giving binding instructions to the management board, which is prohibited.

In the course of performing their duties, the management board members are obliged to act with due care necessitated by the professional nature of their activity. In 2012, the Court of Appeal in Poznan emphasised7 that a management board decision can be made based on analyses prepared by the company’s employees or opinions of external persons who have the required special knowledge. However, simply entrusting other persons with an issue is not on its own sufficient to fulfil the obligations of due care of a management board member. In particular, the responsibility for decision-making cannot be shifted to a subordinate.

The management board members have fiduciary duties towards the company and are obliged to act in the interests of the company. Following a resolution of the Supreme Court in 2009, it is clear that the interests of the company are not independent and abstract from the interests of the shareholders, but the interests of the shareholders should be taken as a whole.8

Supervisory board

The supervisory board exercises ongoing supervision of all the company’s activities. For that purpose, the supervisory board members may inspect all the company’s documentation and request information from the management board and the company’s employees.

The specific responsibilities of the supervisory board include, in particular, evaluating annual financial statements, annual management board reports and motions from management concerning decisions on the company’s profits or losses. The supervisory board provides the shareholders with an annual written report on the results of the evaluation. The basic scope of supervisory board responsibilities may be extended and include, among other things, reserved matters for which management is obliged to get supervisory board approval.

The powers of the supervisory board also include suspending (but only for significant reasons) an individual or all management board members from their duties and temporarily appointing supervisory board members to the management board (for a period no longer than three months) to perform the duties of management board members who were dismissed, who resigned or who are incapable of performing their duties for other reasons. The supervisory board

7 Judgment of the Court of Appeal in Poznan – I Civil Division dated 11 October 2012, I ACa 336/12.
8 Resolution of the Supreme Court – Civil Chamber dated 22 October 2009, III CZP 63/09.
board is not entitled to issue binding instructions to a management board member and the supervisory board members cannot represent the company in relation to third parties, except in relation to agreements or disputes with the management board members.

**Supervisory board and management board**

**Delegation of board responsibilities**

The supervisory board members generally act jointly. Indeed, the regulations of the CCC explicitly apply a collectivity principle to the activities of the supervisory board. In accordance with this principle, a supervisory board member cannot act individually without the prior authorisation of the entire supervisory board. However, the supervisory board may delegate an individual supervisory board member to undertake certain specific supervision activities.

As a general rule, and unlike the supervisory board members, each management board member is responsible for the day-to-day management of the company. The management board is entitled to issue its own by-laws regulating its internal operation, unless the authority to issue the by-laws is granted under the articles of association to the supervisory board or to the shareholders in a general meeting.

The by-laws may provide for the delegation of certain areas of the company's operations to individual management board members. However, the delegation of functions within the management board does not relieve the other management board members of their responsibility for those functions. Management board members are obliged to control each other and prevent a negative outcome for the company (horizontal control). According to the Best Practice Code, such an internal division of responsibilities should be clear and unambiguous and published on companies' websites.

**Roles of the chair**

There is the possibility to appoint one of the management board members as the president of the management board. However, unless provided otherwise in any management board by-laws or the articles of association, no particular duties or powers apply to the president. As such, this function is not necessarily the same as or comparable to the position of a CEO or president of a US corporation.

In the case of a supervisory board, there is often a chair and a deputy chair. Unless explicitly granted additional powers (e.g., a decisive vote if there is no majority on a supervisory board decision), the main power of the chair is basically to open general meetings. Usually, the chair has administrative functions with respect to the supervisory board, such as preparing agendas for and chairing its meetings.

**Remuneration**

The shareholders should determine the general remuneration policy of the company including, among other things, caps and remuneration systems, as well as any rights of the management board members to participate in the company's profits. However, the specific remuneration of the management board members is usually determined by the supervisory board.

According to the Best Practice Code, the level of remuneration of management and supervisory board members and key managers of the company should be sufficient for the acquisition, retention and motivation of persons with the qualities and range of competences generally required by the company, as well as being adequate with regard to the specific tasks and any additional functions discharged by the relevant individual.
III DISCLOSURE

According to accounting rules, a listed company is obliged to include a separate statement on corporate governance in its annual management board report. These statements are subject to review by an external auditor. Matters referred to in the Best Practice Code and marked with ‘R’ are recommendations for disclosure in these statements. Instances of non-compliance with matters marked with ‘Z’ fall under the comply or explain principle. Specifically, a listed company has to report cases of non-compliance with matters marked with ‘Z’, whether permanent or incidental, including information on the reasons for non-compliance and the steps to be undertaken to ensure future compliance. The report has to be published on the company’s websites, as well as by the same method employed for ongoing reporting and disclosure. The report has to be published immediately after the non-compliance occurred. Similarly, a report has to be published immediately if the company decides not to apply a relevant recommendation. The Best Practice Code requires that a company explicitly explain the reasons for any non-compliance.

As emphasised by commentators, it cannot be excluded that in certain cases a failure to report non-compliance with a particular recommendation of the Best Practice Code may infringe the obligation to disclose confidential information provided in Article 17 of the Market Abuse Regulation (MAR), which means that such an infringement may potentially be subject to criminal, administrative and civil liability. A failure to report non-compliance with the recommendation to disclose transactions with a shareholder representing 5 per cent of the votes in the company or an affiliated company without supervisory board consent is an example of a situation in which such liability might apply.

IV CORPORATE RESPONSIBILITY

i Risk management and compliance

Polish listed companies are not obliged to adopt any risk management regulations, or to appoint a risk officer or establish a risk committee. Polish law is quite traditional in this respect, making management board members liable for their decisions that exceed the permitted risk doctrine. Responsibilities are usually divided among management board members. According to the Best Practice Code, which is not binding, the internal division of responsibilities for individual areas of a company’s activity among management board members should be clear and transparent, and a chart describing that division should be available on the company’s website.

However, at the same time, according to the Best Practice Code, a company should maintain efficient internal control, risk management and compliance systems, and an efficient internal audit function adequate for the size of the company and the type and scale of its activity. Responsibility for the implementation and maintenance of the above rests with the management board. The staff working in particular units responsible for risk management,
internal audit and compliance should report directly to the president or another member of the management board, and should be allowed to report directly to the supervisory board or the audit committee. A supervisory board, which is obligatory in joint-stock companies, is generally responsible for exercising supervision over a company’s activity. However, listed companies are also required to appoint an audit committee. The audit committee should consist of at least three members appointed by the supervisory board to monitor, among other things:

- the financial reporting process;
- the effectiveness of internal control systems, internal audit systems and risk management;
- the performance of financial audits; and
- the independence of the auditor and the entity authorised to audit financial statements.13

Polish law does not provide for any specific whistle-blowing regulations for listed companies (although provisions regarding whistle-blowing procedures mitigating anti-bribery risks are currently subject to parliamentary works). Obviously, auditors responsible for examining a company’s financial statements and books play an important gatekeeping role. Nonetheless, there is a general trend towards implementing internal whistle-blowing systems in line with the compliance regulations introduced by corporations internally. At present, almost every listed company has such internal procedures in place, or is in the process of adopting the same.

The implementation of internal compliance and risk management regulations is also becoming increasingly common in the market because of new laws that allow the imposition of very high penalties on corporations and their managers, while at the same time extending their corporate liability. For instance, EU Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data allows corporations to be penalised for infringements with administrative fines of up to €20 million, or, in the case of an undertaking, up to 4 per cent of the total worldwide annual turnover of the preceding financial year, whichever is higher;14 and the MAR,15 which, in certain circumstances described therein, allows the imposition on legal persons of a penalty of €15 million or 15 per cent of the total annual turnover of the legal person according to the most recent available accounts approved by the management body. In certain cases, EU regulations are transposed into Polish law, for example, in relation to liability in cases of unintentional infringement of competition and consumer protection law, which may be penalised with an administrative fine of up to 10 per cent of the turnover achieved in the financial year preceding the year in which the fine is imposed.16

The visible practice of the implementation of risk management and internal compliance regulations is a sign that the tone from the top (i.e., ethical business standards set by top

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13 See Article 130 Section 7 of the Act on Statutory Auditors, Audit Firms and Public Oversight of 11 May 2017.
15 See footnote 8.
management) is slowly but steadily breaking through to Polish corporate society. However, as usual, reality is different from theory, since it is created by managers who are not always appointed as a result of a contest.

ii Corporate social responsibility
We observe a general tendency for higher expectations among corporations: increasingly, more businesses and their top management focus not only on gaining financial profit, but also on supporting values and goals promoted and supported worldwide. An example of these values and goals is described in the UN 2030 Agenda for Sustainable Development, raising such issues as affordable, decent work and economic growth, and partnerships between governments, the private sector and civil society. A more detailed example of cooperation between the private and public sectors and their joint cooperation is the Paris Agreement on climate change adopted during the UN conference held in 2015 in Paris.

These trends are also visible from the Polish perspective, and Polish corporations are expected to live up to a set of general social, economic and climate expectations. However, no general corporate responsibility rules are implemented in this respect, especially in corporate law. What is being introduced internally for all company’s employees, managers and members of supervisory boards are certain ethical and business conduct standards.

V SHAREHOLDERS
i Shareholder rights and powers
Equality of voting rights
A company may issue either registered or bearer shares.\(^\text{17}\) By definition, a listed company is a company in which at least one share is dematerialised.\(^\text{18}\) Only bearer shares may be dematerialised. Except for silent shares (non-voting shares), only registered shares may be preference shares.

As a rule, the preference may concern in particular the voting right the right to dividends; or the distribution of a company’s assets in the event of its liquidation.

A single share may carry no more than two votes. In the event that such a share is changed into a bearer share or disposed of in breach of certain reserved conditions, the privilege expires. While the voting preference does not apply to listed companies,\(^\text{19}\) before the CCC was adopted listed companies were also allowed to issue preference shares, and therefore they may still exist in the Polish market.

The powers of shareholders to influence the board
The general meeting and the supervisory board may not give binding instructions to the management board concerning the running of the company’s affairs.\(^\text{20}\) (This regulation is

\(^\text{17}\) Article 334 Section 1 of the CCC.
\(^\text{19}\) Article 351 Section 2 of the CCC.
\(^\text{20}\) Article 3751 of the CCC.
limited only to internal relations within the company since, from the point of view of outside relationships, the right of management board members to represent the company may not be restricted with a legal effect with respect to third parties.²¹

The above reflects the principles governing joint-stock companies, such as the principle of separation of capital from management and the principle of the presumption of competence of the management board. This also supports the principle that liability is related to those who make decisions.²² The discussed regulation does not preclude the right of the general meeting or the supervisory board to give non-binding guidelines and advice (i.e., suggestions on taking a position or other recommendations). However, a board’s failure to comply with such guidelines does not render board members liable for damages and should not constitute a valid reason to dismiss a board member if the articles of association limit the right of dismissal only to valid reasons.²³ In practice, articles of association rarely make such provision, and therefore board members must take into account that they can be dismissed in such cases. Furthermore, there is a general rule that, in relationships with the company, members of the management board shall be subject to restrictions set forth in the CCC, articles of association, management board by-laws, and resolutions of the supervisory board and the general meeting.²⁴ Thus, the general meeting may actually influence the management board if competence for this is included in the articles of association.

It is noted, however, that the above-mentioned right is reserved for the shareholders’ meeting and not individual shareholders. The rights of individual shareholders are limited to the right to information, and not the right to influence the board.

**Decisions reserved to shareholders and subject to shareholder approval**

Pursuant to the CCC, the shareholders’ consent is required for the following:

a  examination and approval of a management board report on the company’s operations, financial statements for the previous financial year, and granting a vote of approval to members of the company’s bodies for the discharge of their duties;

b  decisions concerning claims for redressing damage inflicted upon the formation of the company or exercising management or supervision;

c  disposal or lease of the enterprise or an organised part thereof, and establishment of a limited right in rem thereon;

d  acquisition and disposal of real property, perpetual usufruct or an interest in real property, unless the articles of association provide otherwise;

e  issue of convertible bonds or senior bonds and issue of subscription warrants;

f  acquisition of own shares and authorisation to acquire the same under the circumstances set forth in the CCC; and

g  conclusion of a management contract between the company and its subsidiary.²⁵

The following also require a resolution of the general meeting: contracts for the acquisition of any assets for the benefit of the company (including the acquisition of property from the

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²¹ Article 372 Section 2 of the CCC.
²³ Ibidem.
²⁴ Article 375 of the CCC.
²⁵ Article 393 Section 1 of the CCC.
controlling company or from a subsidiary company or cooperative), for a price higher than one-tenth of the paid-up share capital, from the company’s founder or shareholder, or for a subsidiary company or cooperative from the company’s founder or shareholder, executed prior to the lapse of two years from the company registration.

The foregoing does not apply to the acquisition of assets on the basis of the provisions of law concerning public procurement, liquidation, bankruptcy and execution proceedings, and to the acquisition of securities and commodities on the regulated market.26

The articles of association may specify other matters reserved to the competence of the shareholders’ meeting. While the absence of a shareholders’ resolution required by the articles of association does not make a particular action invalid, neither does it preclude the liability of members of the management board towards the company for violation of the articles of association. Furthermore, the absence of a shareholders’ resolution required by the provisions of the CCC (which may be granted two months after the action at the latest) does entail the invalidity of an action.

Rights of dissenting shareholders

The CCC and other regulations applicable to listed companies provide for the principle of majority rule. Nonetheless, minority shareholders are to some extent protected and are vested with rights aimed at guaranteeing them a certain influence in company matters.

For instance, at the request of a shareholder or shareholders in a public company holding at least 5 per cent of the total vote, the general meeting may resolve to mandate an expert to review, at the company’s expense, a specific issue relating to the company’s incorporation or the conduct of its business (a special-purpose auditor). To this end, the shareholders may request that an extraordinary general meeting be convened or that the adoption of such a resolution be placed on the agenda of the next general meeting. The management board and the supervisory board of the public company shall provide the special-purpose auditor with the documents specified in the resolution of the general meeting or in the court’s decision to appoint the special-purpose auditor, and shall also provide all the explanations necessary for the performance of the review.27

Furthermore, minority shareholders have the right to appoint members of the supervisory board by a vote in separate groups, which may be executed at the request of shareholders representing at least one-fifth of the share capital, even if the company’s articles of association provide for a different manner of appointing the supervisory board.28 As a result of the aforementioned regulation, the minority shareholders representing at least 20 per cent of votes may have their representative appointed to the supervisory board.

Facilities for long-term shareholders

Polish law does not provide for any specific facilities (such as extra votes or extra dividends) for long-term shareholders, except for the option to obtain preference shares incorporating a right to a dividend on advantageous terms compared with other shareholders. For example, shares carrying special dividend rights may entitle the holder to a dividend that exceeds by

26 Article 394 Section 1, 2 and 4 of the CCC.
28 Article 385 Section 3 and 9 of the CCC.
no more than one-half the dividend to be distributed to holders of non-preference shares. Shares carrying special dividend rights do not enjoy priority of satisfaction over other shares and may be deprived of voting rights (non-voting shares).29

ii Shareholders’ duties and responsibilities

Controlling shareholders’ duties and liability

Polish law does not impose any special requirements on controlling shareholders apart from the obligation (which applies to all shareholders) to notify the Financial Supervision Authority and the company about reaching or exceeding a particular percentage of the total votes in a company or a change in the share of votes held in excess of 10 per cent of the total votes by at least:

- a) 2 per cent of the total votes in a public company, the shares of which have been admitted to trading on the official stock exchange listings; and
- b) 5 per cent of the total votes in a public company, the shares of which are admitted to trading on another regulated market, or a change in the share of votes held in excess of 33 per cent of the total votes by at least 1 per cent of the total votes.

Furthermore, the majority shareholder is obliged to purchase shares of the minority shareholders under the buyout procedure.30 A shareholder or shareholders representing not more than 5 per cent of the share capital may demand that the agenda of the next general meeting include the issue of adoption of a resolution on the compulsory buyout of their shares by no more than five shareholders holding, in aggregate, no less than 95 per cent of the share capital, where each of them holds no less than 5 per cent of the share capital (majority shareholders).

Institutional investors’ duties and best practice

Neither the CCC nor the Act on Public Offering and Conditions for Introducing Financial Instruments to the Organised Trading System and Public Companies provide for any regulation specifically relating to institutional investors; nor is there any specific best practice code for such investors or other shareholders besides the Best Practice Code.

According to the Best Practice Code, the general meeting should deliberate with respect to the rights of shareholders and make sure that the resolutions do not infringe upon legitimate interests of various groups of shareholders. Moreover, the shareholders participating in the general meeting are obliged to exercise their powers in a manner not prejudicial to good practice.

iii Shareholder activism

Say on pay

There is no general rule that a company’s shareholders have the right to vote on the remuneration of executives. Save as otherwise provided in the company’s articles of association, according to the general rules provided in the CCC, the supervisory board sets the remuneration of management board members employed under employment contracts or other contracts, and the general meeting may authorise the supervisory board to establish

29 Article 353 Section 1-3 of the CCC.
30 Article 418(1) of the CCC.
that the remuneration of members of the management board shall also include the right to participate, in a specified manner, in the company’s annual profit allocated for distribution among the shareholders. Obviously, the company’s articles of association may provide that the rules of the remuneration are determined by the shareholders.

The Best Practice Code specifies only that companies have a remuneration policy at least for management board members and key managers. The remuneration policy should specify, in particular, the form, structure and method of determining the remuneration of members of a company’s bodies and its key managers.

**Derivative actions**

Under Polish law, if a company fails to file a statement of claim for redressing damage within one year of the disclosure of the act resulting in the damage caused to the company, each shareholder or person otherwise entitled to participate in profit or in distribution of assets may file a statement of claim for redressing the damage suffered by the company (*actio pro socio*).31

Furthermore, a shareholder has the right to file a statement of claim to repeal or declare a resolution of the general meeting invalid if:

a. the shareholder voted against the resolution and, upon the adoption thereof, requested that his or her objection be recorded in the minutes. The voting requirement does not apply to shareholders holding a non-voting share;

b. the shareholder was prevented from participating in the general meeting without a sound reason; and

b. the shareholder was absent from the general meeting, only in the event of a defective convening of the general meeting or adoption of a resolution on a matter not included in the agenda.

Any resolution of the general meeting that is in conflict with the provisions of the articles of association or good practice and detrimental to the company’s interest or aimed at harming a shareholder may be appealed against by filing a statement of claim against the company to repeal the resolution. A statement of claim against the company to declare a resolution of the general meeting invalid may be filed if the resolution was adopted in breach of the law. Both proceedings may only be commenced within statutory periods.

**Proxy battles**

Polish law does not set out any regulations that would prohibit shareholders from joining forces and gathering enough shareholder proxies to win a corporate vote. It is a strategy that often accompanies takeovers.

Formally, the right to appoint a proxy at the general meeting and the number of proxies cannot be limited. A proxy exercises all rights of the shareholder at the general meeting unless the power of attorney provides otherwise. A proxy may grant a further power of attorney if the power of attorney so provides. A proxy may represent more than one shareholder and vote differently under the shares held by each shareholder. A shareholder holding shares registered on a collective account may appoint separate proxies to exercise the rights attached

31 Article 486 Section 1 of the CCC.
to the shares registered on this account. A shareholder holding shares registered on multiple securities accounts may appoint separate proxies to exercise the rights attached to the shares registered on each account.

The provisions on the exercise of a voting right by proxy apply to the exercise of a voting right through another representative.32

**Shareholder campaigns**

There are no regulations or established market practice regarding shareholder campaigns.

**iv Takeover defences**

**Shareholder and voting rights plans, white-knight defences and other measures**

The Takeover Directive33 has not been fully transposed into Polish national legislation, and therefore there are no explicit provisions governing the admissibility of reactive defensive measures that could be undertaken by the management board. It is clear that the shareholders taking over a company are guided exclusively by their own interests rather than the interests of the company, which might be better judged by its management board, representing the next shareholders’ interests, as well as the interests of other persons associated with it (i.e., company stakeholders such as banks, creditors, employees and the state).

Members of the management board generally do not support takeovers since they are likely to lose their positions in the aftermath of a takeover. Therefore, through the prism of their own interests, they opt for taking defensive measures ad hoc. Unfortunately, Polish law does not regulate (neither authorises, nor prohibits, nor requires) the admissibility of reactive defensive measures by the management without the authorisation of the general meeting. Consequently, in principle, and if they are not prohibited by law, defensive measures are allowed, and their exercise depends on the will of the management board members and the actual position of the management board in the company. From a broader perspective, however, it seems that the taking of defensive measures by the management board, and thus exerting influence on the shareholding structure, does not fall within the competence of the management board under the CCC at all.

The regulation aimed at protecting companies against takeovers stipulates an obligation to announce a takeover bid for the sale or exchange of shares. The purpose of the announcement is to allow other shareholders to exit the company or to reduce their involvement therein, and consequently to have one of the investors acquire a stake resulting in the acquisition (change) of control of the company. If the shareholder taking over the company fails to make the announcement and, at the same time, exceeds a certain threshold of the total votes in the company, that shareholder cannot exercise the voting rights attached to the shares. Furthermore, the Financial Supervision Authority may impose a penalty of up to 10 million zlotys on the entity that failed to make the announcement.34

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32 Article 412 Section 1-7 of the CCC.
33 2004/25/EC.
34 Article 97 Section 1 Item (5) and (5a) of the Act on Public Offering and Conditions for Introducing Financial Instruments to Organised Trading, and Public Companies.
Staggered boards

The rules for the appointment and dismissal of members of the company’s bodies should be described in the articles of association subject to the provisions of the CCC. In the absence of any statutory provision, it would seem that the company’s articles of association may provide for staggered boards. However, according to the statutory rule, members of a company’s bodies may always be revoked by the general meeting. Therefore, staggered boards are not a sufficient solution for takeover defences under Polish law.

v Contact with shareholders

Mandatory and best practice reporting to all shareholders

The mandatory provisions applicable under Polish law focus on the shareholders’ right to information. Compared with the right to information in limited liability companies, this right is limited in joint-stock companies since, together with the right of supervision, it is vested with the supervisory board, which should be appointed within the company.

The main source of information for shareholders is reports, which the company is obliged to publish immediately, or at least no later than 24 hours after the occurrence of or upon becoming aware of a reportable event. Furthermore, pursuant to the provisions of the CCC, in the course of the general meeting, the management board is obliged to provide a shareholder, at the latter’s request, with information concerning the company, if this is justified for the purpose of evaluating an issue included in the agenda. The management board may refuse to provide information if it could inflict damage on the company, an affiliate company or a subsidiary company or cooperative, in particular through the disclosure of technical, commercial or organisational secrets of the business enterprise. A management board member may refuse to provide information if providing it could constitute grounds for criminal, civil or administrative liability of the member. A reply is deemed given if relevant information is available on the company’s website in a place designated for replies to shareholders’ questions.

For important reasons, the management board may provide information in writing outside a general meeting. The management board is obliged to provide information within no more than two weeks of a request being submitted during a general meeting. If a shareholder submits a request for information concerning the company outside a general meeting, the management board may provide the information to the shareholder in writing. In the documents submitted to the next general meeting, the management board is obliged to disclose in writing information provided to a shareholder outside a general meeting together with the date on which the information was provided and the person to whom it was provided. Information submitted to the next general meeting does not have to include information made public and provided during a general meeting.

A shareholder refused requested information in the course of a general meeting who has requested that his or her objection be recorded in the minutes may apply to the registration court requesting that the management board be obliged to provide the information.35

According to the Best Practice Code, companies should ensure adequate communications with investors and analysts by pursuing a transparent and effective disclosure policy. To this end, they should ensure easy and non-discriminatory access to disclosed information using diverse tools of communication. The Best Practice Code specifies all the information

35 Articles 428 and 429 of the CCC.
that should be published on a company’s website. Furthermore, if a shareholder requests information concerning the company, the company’s management is obliged to respond to the shareholder no later than within 30 days, or notify him or her of its refusal to provide the information, if the management board made this decision on the basis of Article 428 Section 2 and Section 3 of the CCC. All responses should be published on the company’s website.

Selective meetings and communications: circumstances in which meetings can take place with individual shareholders

The Best Practice Code recommends that companies should allow investors and analysts to ask questions and receive explanations – subject to prohibitions defined in the applicable legislation – on topics of their interests. This recommendation may be implemented through open meetings with investors and analysts, or in any other format allowed by a company.

It must be underlined that the principle of equality of shareholders should be observed with respect to meetings and the provision of information to shareholders. Issuers of securities admitted to trading on the regulated market are obliged to ensure equal treatment of the holders of securities of the same type in the same circumstances. The foregoing shall not prevent the issuer from redeeming debt securities earlier, pursuant to the legislation of the country where the issuer’s registered office is established, in cases where derogation from the original conditions of issue is necessary in accordance with social priorities.

Issue of information to shareholders in advance of shareholders’ meetings

Companies should use best efforts, including taking all steps well in advance as necessary to prepare a periodic report, to allow investors to review their financial results as soon as possible after the end of a reporting period.

Resolutions of the general meeting should allow for a sufficient period between decisions causing specific corporate events and the date of determination of the rights of shareholders pursuant to the corresponding events.

As a rule, a periodic report should be published at least 26 days before the general meeting.

VI OUTLOOK

With the Polish national economy constantly growing, it is clear that the public market will evolve. However, because of changes in the law, and particularly the adoption of the MAR, it is quite possible that we will see more delistings than IPOs. The main barriers

37 See the chapter on mandatory and best practice reporting to all shareholders.
42 Principle No. IV.Z.14.
43 Section 100.3 of the Ordinance of the Minister of Finance on current and periodic information provided by issuers of securities and conditions for recognising as equivalent information required under the law of a non-Member State.
to the development of the Polish capital market are a limited inflow of capital, a lack of understanding of the market, risk aversion and the choosing of banks for savings. These are the reasons why stock market specialists and advisers underline how important it is to strive for the support and education of listed companies, and to tighten the requirements for small stock companies (i.e., New Connect, small companies stock; and Catalyst, bonds stock).

The corporate market and the listed companies market will also probably be influenced by a substantial change to Polish corporate law planned for a few years (i.e., the introduction of the Polish simplified joint-stock company, which is supposed to be similar to the French société par actions simplifiée or the Slovak jednoduchá spoločnosť na akcie). The initiative for this regulation came from the idea of creating a new simplified and inexpensive tool for start-up investments. However, even at this stage of work on the new regulation, it is emphasised that it must not be the only goal of the new company structure, which is also supposed to serve other, larger enterprises. The advantages offered by the simplified functioning of the simplified joint-stock company and its financing might attract more investors than the public stock market, where companies and their managers may be penalised with huge administrative fines, such as those provided for in the MAR.

Nonetheless, regardless of the above, we have recently seen a trend for an increasing number of IPOs.
Chapter 21

PORTUGAL

Paulo Olavo Cunha and Cristina Melo Miranda

I OVERVIEW OF GOVERNANCE REGIME

This chapter refers only to the regulations concerning sociedades anónimas, public companies limited by shares, one of the various forms companies can take under Portuguese law, since this is the most common one among listed companies and medium to large companies.

The Portuguese legal framework regarding corporate governance rules is generally provided for in the Companies Code (PCC) and in the Securities Code (PSC), with sector-specific legislation being also of relevance, namely for financial institutions and state-owned companies.

Alongside these provisions, there are several other soft law instruments, the most relevant ones being the recommendations issued by the Securities Commission (CMVM), which are applicable to listed companies but are also used as best practice guidance for other companies, and the recommendations issued by the Portuguese Central Bank (BdP) concerning governance of financial institutions.

In January 2018, the Corporate Governance Code (CGC) issued by the Portuguese Institute of Corporate Governance became applicable to companies under the supervision of CMVM, in a move towards self-regulation that is being promoted by CMVM and aligned with best international practices on this matter, but still on a comply or explain basis.

Another recent trend in Portugal concerns equal gender representation at board level, namely for listed companies and state-owned companies.

II CORPORATE LEADERSHIP

i Board structure and practices

Shareholders may choose one of three mandatory governance models, depending on the structure adopted for its management and auditing bodies:

Classic model

The classic model (also known as the Latin model) establishes a single management body corresponding to a sole director (only admissible for companies with a share capital not exceeding €200,000) or a board of directors, with a variable number of members (a minimum of two) as freely defined by the by-laws. Therefore, this model is considered a one-tier structure.

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Regarding the auditing body, the PCC foresees the existence of a simple structure or a reinforced structure, depending on the appointment of a sole auditor (which must be a chartered accountant) or of a supervisory board (with a minimum of three members, one of which needs to be a chartered accountant) for the simple structure, or of a supervisory board plus a chartered accountant for the reinforced structure.

The reinforced structure is mandatory for:

a) public limited liability companies, if they exceed, for two consecutive years, two of the following thresholds:
   - a total balance sheet of €20 million;
   - a total net turnover of €40 million; and
   - an average of 250 employees during each fiscal year (i.e., large public companies); and

b) companies that are issuers of securities admitted to trading on a regulated market.

**Anglo-Saxon model**

The Anglo-Saxon model establishes a single management body, a board of directors, which includes an audit committee. No sole director is admissible in this model.

Regarding the auditing body, the audit committee is composed of at least three directors with non-executive powers who are responsible for supervising the activities of the executive committee (i.e., the members of the audit committee perform similar functions to the ones exercised by the supervisory board under the classic model described above). In this model, the auditing body also includes an external chartered accountant.

In view of the above, the Anglo-Saxon model has the characteristics of a one-tier structure.

**German model**

Under the German model, the management of the company is entrusted to a board of directors composed of a variable number of executive directors only, in accordance with the by-laws, or to a sole director (only admissible for companies with a share capital that does not exceed €200,000). The directors may be appointed by the general and supervisory board or by the shareholders’ general meeting, if provided by the by-laws.

The general and supervisory board combines typical competences of the supervisory board and of the shareholders’ general meeting. Even though it does not have management powers, there are certain categories of management acts to be adopted by the board of directors that can be subject under the by-laws of the company to the prior consent of the general and supervisory board. Therefore, this model is a two-tier structure. The number of members of the general and supervisory board is set out in the by-laws, and shall be higher than the number of directors.

In this model, the auditing body also includes an external chartered accountant.

In the case of listed companies and large public companies, the creation by the general and supervisory board of a committee for financial affairs is mandatory.

Although the classic model is predominant in the Portuguese corporate landscape, listed companies and large public companies are adapting their corporate structures to the Anglo-Saxon model, which is perceived to better address the corporate governance guidelines issued and enforced by CMVM and by the BdP.
**Board of directors structure and practices**

The board of directors is responsible for managing the activities of the company. However, and as previously discussed, members of the audit committee in the Anglo-Saxon model are legally prevented from carrying out executive tasks.

The company’s by-laws may authorise the board of directors to delegate the day-to-day management of the company to one or more directors (executive directors) or to an executive committee (in the classic model and Anglo-Saxon model only), the latter being recommended under the CGC.

Moreover, the board of directors may also grant powers to a specific director or several directors to deal with certain aspects of the management of the company, unless the by-laws prohibit this scenario.

Also very common, namely in large stock companies and listed companies, and in accordance with the CGC, is the creation of special committees by the management body, with or without the participation of its members, and with duties to assist on specific matters.

The chair of the board of directors, to be appointed by the board of directors unless the by-laws attribute such choice to the shareholders’ general meeting, may be entitled with the casting vote whenever the board is composed of an even number of directors or if provided by the by-laws. The chair is also responsible for convening board of directors’ meetings and chairing them. Although under the PCC there is no requirement for the roles of CEO and chair to be attributed to different persons, the CGC recommends that, if the chair is an executive director, then mechanisms for the coordination of the non-executive directors are effectively put in place.

Representation of the company is also legally attributed to the board, which can, nonetheless, attribute powers to certain directors to execute specific management decisions. However, powers to bind the company are freely defined in the company’s by-laws, rendering any act that is taken by those persons entitled under the by-laws to bind the company without a prior decision of the board of directors to be valid and binding on the company.

**ii Directors**

**Appointment and dismissal**

In the classic and Anglo-Saxon models, directors are appointed and dismissed by the shareholders’ general meeting, with the supervisory board or the audit committee, respectively, being entitled to suspend directors that are temporarily unable to duly perform their mandate. In the German model, the general and supervisory board is responsible for the appointment, suspension and dismissal of directors, unless the by-laws entrust such powers to the shareholders’ general meeting. However, in any case, listed companies are also required to include in their by-laws a mechanism enabling at least one director to be appointed by the minority shareholders under certain conditions.

Terms of office can run for up to four years, as defined in the company’s by-laws and being freely renewed; however, directors remain in office after the lapse of such term until the date on which new directors are appointed, or until the end of the month subsequent to the month in which the director delivered his or her resignation to the company, whichever occurs first.

Directors are required to be natural persons. If a legal person is appointed as a director, it is required to appoint a natural person to act as director for its own name and account, with the legal person being jointly responsible with the natural person for the performance by the second of its director duties.
Independence requirements are only imposed by the PCC in respect of the audit committee. It is required that for listed companies and large public companies, at least one of its members has higher education adequate for the performance of its duties and is knowledgeable in auditing or accounting, and, for listed companies, that most of its members are independent directors (e.g., that they are not associated with any specific set of interests in the company, and that are not in any situation that may hinder the directors’ analysis and decision capacity). In addition, the members of the audit committee are subject to incompatibility provisions, requiring that, among others, they are not members of the management bodies of companies that are in a group relationship with the company where they serve as members of the audit committee.

Under the German model, directors are subject to specific incompatibility requirements, namely being required to not be a member of the general and supervisory board.

However, the CGC recommends that each company should include as non-executive directors an adequate number of independent directors.

In addition, Law No. 62/2017, of 1 August imposes a requirement that listed companies shall have in their management (and supervisory) bodies, as from the first elective shareholders’ general meeting after 1 January 2018, women representing at least 20 per cent of the total members of such bodies and, as from the first elective shareholders’ general meeting after 1 January 2020, women representing at least 33.3 per cent of the total members of such bodies. This was a measure already recommended by the CGC.

**Duties**

Directors (both executive and non-executive or inside and outside directors) are required to comply with certain legal duties, including a duty of care (availability for the performance of the position, technical skills and knowledge of the company’s activity) and a duty of loyalty (performance according to the company’s interest, to the shareholders’ long-term interests and to the interests of the remaining stakeholders).

Non-executive directors are also subject to a special duty of vigilance in respect of the performance of the executive directors.

As such, all directors (both executive and non-executive) are entitled to the same level of information, at the same time, and can request any information from the company as they deem necessary to the adequate performance of those duties.

Other legal duties of directors include an obligation:

a to preserve the share capital and avoid and react to thin capitalisation (loss of more than half of the company’s share capital), upon which directors are legally required to call a shareholders’ general meeting;

b to not compete (the director may not pursue, by himself or herself or through entities, activities that are in competition with the activity of the company, unless so authorised by the relevant corporate body);

c to prevent any conflict of interests (a director is required to avoid situations in which he or she has or could have an interest that conflicts with the company’s interests, to declare such conflict or potential conflict to the other directors, and is also prohibited from taking part in the relevant decisions that could be affected by such conflict or potential conflict of interests); and

d to ensure conformity between actions and respective records and publications.
Compliance with these duties implies that the directors shall not accept a mandate in cases where there is a lack of appropriate personal and professional conditions to carry out the mandate in adequate form (e.g., lack of time or necessary knowledge and preparation to take on a position); and that they must be duly informed when making decisions, for which directors shall request all necessary information and endeavour to obtain the same, including expert advice.

Moreover, directors must be always mindful of the confidentiality obligation that they owe to the company as directors, and also of their duty to review board documentation and to raise any points of concern, making sure that any points are duly reflected in the minutes of the meeting and ensuring that they vote against any decisions in breach of their duties.

A special assessment should be exercised in transactions entered into between the company and another director or a shareholder of the company (or persons or entities related with them), and also when the company grants any loans or guarantees to persons or entities related to a director or a shareholder.

**Remuneration**

The PCC provides that the corporate body responsible for determining the remuneration of directors varies depending on the corporate governance model of the company, as follows:

a. one-tier management structure models (classic and Anglo-Saxon models): the remuneration of directors is determined by the shareholders’ general meeting or a remuneration committee appointed by the latter; and

b. two-tier management structure model (German model): the remuneration of directors is determined by the general and supervisory board or by its remuneration committee, except if the company’s by-laws specifically attribute such competence to the shareholders’ general meeting or to a remuneration committee appointed by the latter.

In all three governance models, the remuneration of the members of the management body may comprise a fixed and a variable component, the latter including profit-sharing, being the maximum percentage of profits to be attributed to directors, which shall be specifically authorised in the by-laws. However, audit committee members are only entitled to a fixed remuneration (such rule being recommended under the CGC to apply to all non-executive directors).

Law No. 28/2009, 19 June, imposes on public interest entities (as defined in Article 3 of the Annex to Law No. 148/2015, 9 September) disclosure obligations regarding the remuneration policy of the members of the management (and supervisory) body, implementing a say on pay rule.

Under the CGC, further recommendations have been issued with a view to ensure that the remuneration scheme of the company:

a. adequately remunerates directors for the responsibilities that they undertake and the competencies they use for the company’s benefit; is aligned with the company’s long-term interests; and rewards performance;

b. is aligned with the company’s long-term interests; and

c. rewards performance.
**Liability**

Breach of their duties by directors gives cause for civil liability, which shall arise from a court’s decision, and which cannot be limited or excluded by agreement.

Liability of directors is always joint, the law establishing an assumption of fault by directors that may, nevertheless, be warded off if the directors:

- prove their actions were fault-free;
- prove that their actions were performed on an informed basis, free of any personal interest and according to a business judgement criterion;
- were not part of the resolution, or voted against it, having expressly recorded in the minutes of the meeting their disagreement; or
- based their actions on a shareholders’ resolution.

Directors are required to guarantee their liability by delivering a bond or taking on an insurance policy with a minimum coverage of €50,000 (or €250,000 for listed companies and large public companies); however, such guarantee is legally waived for non-executive directors that are not remunerated as such, and may be waived by the shareholders’ general meeting to other directors (excepted for listed companies and large public companies).

Directors are also subject to tax-related liability (civil or criminal liability), liability over administrative offences, criminal liability and civil liability within the context of insolvency and environmental affairs.

### iii Auditing bodies

Company auditing bodies and their tasks vary from corporate model to corporate model, as previously discussed. However, broadly speaking, auditing bodies are responsible for the ongoing supervision of a company’s activity, especially financially and accounting-wise, but this is not absolute: for instance, any agreement to be entered into between the company and its directors, if lawful, must be preceded by an opinion of the company’s auditing body.

In addition, the members of the auditing bodies are subject to the same duties of care and diligence as directors in the performance of their mandate, and can likewise be liable towards the company and its stakeholders for breach of such duties.

Considering the tasks vested on the auditing bodies, it is understandable that their members are subject to independence requirements and to incompatibilities (as previously discussed when addressing the audit committee), while the auditors must be certified chartered accountants registered with the Chartered Accountants Association. Such requirements were increased with Law No. 148/2015, of 9 September.

### III DISCLOSURE

Directors are required to annually produce and disclose to the shareholders, which approve the same, the accounting documentation of the company, which includes the submission by the board of directors to the shareholders’ general meeting of the annual accounts, the attachments to the annual accounts (where the directors are required to disclose, if the company’s accounts do not follow IFRS rules, all transactions with related parties) and the annual management report (where the directors are required to disclose, among others, the authorisations granted to transactions between the company and its directors, and the financial risk coverage policy of the company).
However, directors are also required to disclose to shareholders other situations, such as if the company is under thin capitalisation (loss of more than half of the company's share capital), upon which the directors are legally required to call an shareholders’ general meeting. This information needs to be made available to shareholders at the company’s head office and website at least 15 days (21 days for listed companies) before the date of the shareholders’ general meeting, and afterwards needs to be mailed to the shareholders representing at least 1 per cent of the share capital. During the shareholders’ general meeting, the shareholders are also entitled to request information deemed necessary to duly decide.

In addition, shareholders are generally entitled to obtain relevant information concerning the company from the directors if holding, by themselves, at least 1 per cent of the share capital or, together with other shareholders, at least 10 per cent of the share capital. This information is afterwards required to be available to the other shareholders in the company. Failure to provide the information required entitles the shareholders to judicial relief.

For listed companies, further disclosure obligations towards the market are imposed on the company and its directors, including information of an accounting nature (disclosed on a different timely basis) and also any information that may have an impact on the value of the securities being traded (immediately disclosed). There are, however, certain situations that may legitimise a delay in the disclosure of this information to the market.

Notwithstanding CMVM being responsible for organising and making available to the market the information disclosed by the listed companies, such information shall also be included on the company’s website and, preferably, also made available in English.

The PSC also requires that listed companies include in their annual management report:

a a chapter concerning the company’s corporate governance structure and practices, detailing, among other things, the share capital structure;
b a chapter identifying limitations on transfers and special rights attributed to shareholders;
c a chapter outlining the voting rights limitations (even those arising from shareholders’ agreements of which the company is aware);
d a chapter regarding any relevant agreements entered into by the company and its employees or the members of the corporate bodies; and
e a chapter identifying the matters included in the CGC with which the company is not complying (including a justification of such non-compliance).

This comply or explain model is of relevance in the assessment of the implementation of the best practices foreseen in the CGC.

Moreover, under the CGC, companies are also urged to put in place a permanent contact with the shareholders, its investors and other market stakeholders in general, and to implement adequate systems to ensure that the relevant information is produced and disclosed in a timely manner to the relevant stakeholders.

IV CORPORATE RESPONSIBILITY

As already discussed, the directors are responsible for disclosing to the shareholders in the annual accounting documentation the financial risk coverage policy of the company, together with a detailed description in the management report of the risks and uncertainties that the company faces or may face, assessing not only financial risks but also other non-financial
matters, such as of a labour or environmental nature, which can affect the company’s situation. Therefore, albeit indirectly, directors are always responsible and accountable for risk management, with the auditing bodies also being responsible for the supervision of risk.

Sector-specific legislation requires companies to create risk management mechanisms. For instance, risk management committees are mandatory for credit institutions with a significative dimension, internal organisation and nature, and with a significative scope and complexity of their activities, which are composed of non-executive directors with specific knowledge adequate to fully understand and monitor the risk strategy of the company. For other credit institutions, the tasks of the risk management committee are carried out by their auditing bodies.

The CGC also requires that companies undertake adequate risk management and internal auditing systems suitable to the dimension and complexity of the risks associated with their activity.

Furthermore, directors are required to perform their mandate to achieve the company’s interest, which results from an assessment of not only the shareholders’ interests, but also the interests of other relevant stakeholders, such as the company’s creditors and employees.

Moreover, and especially regarding listed companies and other large public companies, there is a move towards the implementation of corporate social responsibility programmes with the aim of involving companies in the social concerns of the community.

In addition, concerns about integrity and ethical behaviour in the workplace led to the enactment of Law No. 73/2017, of 16 August, pursuant to which companies with at least seven employees are required to put in place a code of good practice to prevent and combat harassment in the workplace.

V SHAREHOLDERS

i Shareholder rights and powers

The shareholders’ general meeting is composed of all the shareholders with voting rights and to which the more structural decisions concerning the company are attributed (e.g., amendments to the by-laws of the company and distribution of profits). The shareholders’ general meeting may adopt resolutions on matters that are specially assigned to it in the law or in the by-laws and that do not fall within the scope of powers of the other corporate bodies.

The shareholders’ general meeting may also deliberate on matters relating to the management of the company when requested to do so by the board of directors.

Each share carries one vote, unless the by-laws foresee either that one vote is attributed only to a certain number of shares if it encompasses all shares of the company and if at least €1,000 of capital is equivalent to one vote; or votes issued above a certain threshold are not considered when issued by a sole shareholder when acting by itself or as a representative of other shareholders. Nevertheless, in the latter case, the CGC recommends that the by-laws foresee the obligation to review such voting rights limitation at least within every consecutive five-year period.

Multiple-vote shares (i.e., shares that grant more voting rights to their shareholders than other shares that also grant voting rights) are not admissible under the law, although certain authors have recently challenged the applicability of this limitation to listed companies, namely if such limitation was eschewed for loyalty-type securities. There is, however, little market practice in the granting of special rights (including rights to privileged dividends) to long-term shareholders.
Shareholders are legally required to vote or abstain using all the shares they hold in the company, and cannot split their voting rights to issue different votes in respect of the same issue.

Dissenting shareholders have the right to exit the company against the payment of a monetary consideration in certain legally defined situations, such as:

a. when the shareholder votes against the transfer of the corporate seat to another country;

or

b. if the shareholder voted against a merger, demerger, transformation or return to operation of a company after winding-up proceedings are initiated, and such exit right is provided for in law or in the company by-laws.

The inclusion of other exit rights in the by-laws, for which dissenting shareholders would need to rely on mechanisms agreed in a shareholders’ agreement, is not accepted by some scholars.

ii Shareholders’ duties and responsibilities

Shareholders are required to not take part in any decision when, among others, it pertains to any:

a. waiver of any obligation of the shareholder, whether as a shareholder or a member of other corporate bodies;

b. dispute between the company and the shareholder;

c. dismissal, for just cause, of a shareholder as member of a corporate body; or

d. any relationship between the company and the shareholder outside the corporate relationship.

Other than the foregoing, and without prejudice to a general duty to act in good-faith, shareholders are not subject to any specific duty of loyalty or diligence towards the company or its stakeholders. There is also no code of best practice for shareholders.

Notwithstanding, shareholders are not entitled to influence the board of directors (unless a decision by the shareholders on managerial matters is requested by the board), and any shareholders exerting such influence (i.e., shareholders that by themselves or under a shareholders’ agreement have the right to dismiss a director and have determined such person to act or not act in a certain way) will be, with the influenced director, jointly liable towards the company, its shareholders and its creditors for such influence if a decision detrimental to the company’s own interests is adopted. This also applies to the influence of the shareholders over members of the auditing bodies.

Shareholders are also subject to joint liability with the persons they appoint (when able to determine such appointment by themselves or under a shareholders’ agreement) as directors or members of the auditing bodies when the same are not fit for the performance of such mandate.

iii Shareholder activism

Among other rights, under the PCC shareholders are entitled to bring actions on behalf of the company against those members of the corporate bodies that have breached their duties if the company fails to initiate such actions.

However, possibly because of the existence of controlling shareholders in most Portuguese listed companies and the legal powers attributed to shareholders under Portuguese
law (namely, having a direct or indirect say on the remuneration of the corporate bodies), shareholder activism is limited, and usually reveals itself only at the annual shareholders’ general meeting. As such, proxy battles and shareholder campaigns are not common.

Moreover, as the power to appoint (and dismiss) the directors is with the shareholders, directors are more likely to align themselves with the (controlling) shareholders, or at least to heavily consider the shareholders’ interests in the way they manage the company.

iv Takeover defences
Companies usually include defensive mechanisms in their by-laws against takeovers, such as the granting of pre-emption rights to the existing shareholders, the requirement for the company’s consent to a transfer of shares and limitations to voting rights.

For listed companies, the PSC provides for a type of board neutrality rule pursuant to which, as from the moment the board of directors is aware of a decision to launch a takeover bid over more than one-third of a specific category of the company’s share capital, and until the conclusion or prior to the ending of the takeover process, the board of directors cannot take any decisions outside the normal management of the company that may significantly impact the purposes of the bidder. This rule can, however, be bypassed by a decision of the shareholders’ general meeting expressly convened with the purpose to decide on such actions and approved by two-thirds of votes issued. More importantly, this rule is not applicable to Portuguese companies if an offer is made by a company from a foreign country where such board neutrality rule is not in force.

Breakthrough rules of sorts also exist, allowing Portuguese companies to choose to provide in their by-laws that restrictions (whether arising from the by-laws or shareholders’ agreements) applicable to the transfer of securities and to the exercise of voting rights in the company are suspended regarding a takeover bid, and that if the bidder acquires more than 75 per cent of the company’s share capital with voting rights following the takeover, any of those limitations to the transfer of securities and the exercise of voting rights cease to apply to the bidder. These limitations, if adopted, are valid for an 18-month period and need to be subsequently renewed by a decision of the shareholders’ general meeting. Failure to adopt this provision ensures that the by-laws of companies cannot require that any decision to change or eliminate restrictions to the sale of securities or the exercise of voting rights must be approved by a majority of more than 75 per cent of issued votes.

With Decree-Law No. 20/2016, of 20 April, financial institutions (other than savings banks and mutual agricultural credit banks) are required to decide on the maintenance of any voting rights limitations included in their by-laws every five years, the decision to be made by simple majority if proposed by the board of directors. Failure to take that decision until the end of each five-year period renders the limitation null and void.

In addition, the PSC also requires that any shareholder agreement in respect of listed companies that aims to ensure or prevent the success of a takeover bid is disclosed to CMVM – failure to do so renders any decision approved with the votes issued in execution of such agreements null and void.

Moreover, the PSC also requires that the board of directors issues a report (to be made available to the public) upon receiving a takeover bid stating the board of directors’ assessment (duly justified and impartial) of such offer, including information about any negative votes in said report, but does not limit the board of directors from searching for another investor (in fact, it expressly acknowledges such).
Staggered boards (i.e., boards where the directors are appointed to different terms of office) are not common, since the board of directors is generally appointed as whole and, for some scholars, directors cannot be appointed to a term exceeding the term of the board of directors, and shareholders have full control over the possibility to dismiss at all time the members of the board of directors.

v Contact with shareholders
As discussed above, primary contact between the board of directors and the shareholders occurs at the annual shareholders’ general meeting, in which directors usually take part. Other formal contact opportunities may arise from the exercise, by the shareholders, of their right to information.

VI OUTLOOK
Corporate governance will continue to be a significant concern for companies and their stakeholders in the future, both for listed and non-listed companies, especially regarding risk management, transparency and remuneration schemes. It is foreseeable that the impact of entities such as CMVM and the BdP will continue to be of significance in the setting of new roads ahead on corporate governance in Portugal.
I OVERVIEW OF GOVERNANCE REGIME

i Legal and institutional framework

The core statute setting forth the general framework for the Russian governance regime is the Russian Civil Code (RCC). The RCC outlines the basic available corporate forms, including the most commonly used forms: the limited liability company (LLC) and the joint-stock company (JSC); the structure and powers of the various corporate bodies; the rules on representation; the statutory duties and the matters of civil liability of a company’s management and controlling persons; and the procedure for bringing derivative actions.

The JSC Law and the LLC Law each expand upon and supplement the RCC provisions. Importantly, the JSC Law also specifies takeover procedures in respect of public JSCs. The provisions of those laws are primarily enforced by shareholders through Russian commercial (or arbitrazh) courts.

Another statutory framework is the Securities Market Law. This lays out the operational rules for all securities market participants in relation to the offering of securities, the marketing of financial products and the disclosure of information. Regulatory and interpretative acts of Russian regulatory and enforcement agencies (such as the Standards for Issuance of Securities and the Disclosure Rules) expand upon and supplement the provisions of the Securities Market Law.

Both public and non-public corporations active in certain highly regulated sectors of the Russian economy (such as banks, insurers, non-state pension funds and professional securities market participants) are bound by industry-specific legislation. This legislation specifies management qualification and reputation requirements, liquidity and financial stability standards, risk management and compliance procedures, and, in certain cases,
specific requirements in relation to the structure of the governing bodies of the regulated companies. Industry-specific legislation is primarily enforced by Russian regulators. The Russian Central Bank (CBR) is the key regulator: it is in charge of the listed companies’ regime, and is generally responsible for the prudential regulation and supervision of Russia’s financial services industry.

Best practice provisions for listed companies are set out in the Corporate Governance Code (CGC) and the listing rules of licensed stock exchanges. Listed companies are expected to comply with the CGC or disclose and explain non-compliance in their annual reports. Companies must comply with the listing rules requirements to obtain and maintain premium or standard listings (rather than mere quotations) at the stock exchange. Best practice provisions for certain regulated companies are determined and enforced by self-regulatory organisations (SROs) in each sector. For example, the law on self-regulation of financial markets requires the SROs for professional security markets participants to agree with the CBR the corporate governance standards for their members, which will then be mandatory.

ii Corporate governance regime: latest developments

Virtually non-existent in the early 1990s following Russia’s abrupt transition to a market economy and privatisation, corporate governance standards have gained more significance over the years and became one of the top policy issues in 2010, when the government launched an initiative to transform Moscow into an international financial centre and channel investments in Russian assets from foreign jurisdictions onshore.

Of all the steps taken to achieve this ambitious goal, those intended to improve the quality of capital markets’ infrastructure and financial services’ regulatory framework were the most successful. For example, the government has successfully completed reforms of netting and clearing arrangements on organised markets, stock exchanges and custodian activities; self-regulation of financial markets; facilitated the access of foreign investors to Russian markets through international clearing systems; and implemented measures against the abuse of inside information and market manipulation. In a further attempt to improve its stability, the government has begun to regulate the financial services industry more closely. Since concentrating the regulatory functions for that sector under the auspices of the CBR in 2013, the CBR has been waging a large-scale campaign against financial institutions and their management involved in bad faith or suspicious transactions or practices detrimental to their clients (e.g., money laundering, asset dissipation and write-offs, misstatements of financial reports, excessive risk assumption). According to the CBR’s official statistics, as at 1 July 2018 there were around 100 cases pending before Russian courts regarding the personal liability of the management and controlling persons of insolvent credit organisations. The CBR’s continued efforts to remove financially unstable and non-compliant participants from the financial services market have enjoyed continued public support from the highest-level Russian officials.

As part of broader reforms of Russian civil law, in 2014 the RCC was amended to distinguish between public and non-public companies (with non-public companies having

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10 Each stock exchange develops a set of rules for access to public trading in securities that in turn are based on the benchmark approved by the regulators.
significantly greater flexibility in their governance arrangements). A company is deemed to be public if it has a registered prospectus in respect of its shares or instruments convertible into shares and has entered into a listing agreement with a licensed stock exchange.

In further corporate governance reforms, the government concentrated on the two principal conflict areas common in virtually any corporate governance regime: conflicts between the interests of the majority and minority shareholders, and the shareholders in general and the management of the company. In assessing how regulation of the first of those conflict areas was addressed, it is important to remember that the Russian economy is characterised by a high concentration of ownership and control, in both public and non-public companies, and a very significant government footprint (with the government holding controlling stakes in key players in the banking, energy, transport, machinery, telecoms and various other sectors). The majority shareholders are often perceived by Russian policymakers as being in the business for the long run, and taking a strategic interest in its development. While recognising the importance of attracting financial investors into Russian businesses, policymakers often see financial investors as having a more speculative interest in obtaining a short-term return on their investment. The key concern of Russian policymakers in respect of minority shareholder protection matters was, therefore, to avoid the overextension of the powers of minority shareholders, and so prevent a significant rise in shareholder activism by short-term speculative investors (or their nominees to the supervisory board, now that they are entitled to bring derivative actions) to the detriment of the company’s long-term stability and development. To try to find the balance between the various conflicting interests in this area, the government retained very low thresholds for shareholders to bring derivative actions (1 per cent for derivative actions concerning management liability or to challenge some ultra vires transactions of management). At the same time, to limit the room for potential abuse of the right to bring derivative actions, a more complicated procedure for bringing those actions was introduced to the JSC Law. This procedure requires the claimant shareholder or the claimant supervisory board member to notify all the shareholders in the company of his or her intention to bring a derivative action (by submitting the notice to the company, which then forwards it to the shareholders), and contemplates a cut-off time for all shareholders to join derivative actions initiated by a shareholder or by a supervisory board member. Shareholders who do not join the action lose their right to bring any action in connection with the same matter in the future. On the other hand, Russian corporate law has been supplemented with a concept of liability of controlling persons of the corporation to enhance both the accountability of such controlling persons and the protection of minority shareholders against controlling persons’ bad-faith actions.

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13 This definition was introduced in 2015. However, immediately following the 2014 reform of the RCC, a different definition of a public company applied, which allowed a company simply to opt to acquire public status without arranging for the public trading of its shares. Simultaneously with the introduction of new requirements for acquiring public status, for those companies that had previously opted in favour of public status but do not satisfy the new criteria, the law established a transition period up to 2020, during which those companies should either apply for termination of their public status or register a prospectus for their shares or securities convertible into shares.


15 A controlling person of a company is a person having actual ability to determine how the affairs of the company are run (in particular by giving instructions to the members of the governing bodies of the company).
In addressing the second set of conflicting interests of various stakeholders in a corporation, the government concentrated on closing the previous regulatory loopholes, which, until recently, provided very limited legal instruments for shareholder and supervisory board oversight of the exercise by management of their widely formulated powers.

To enhance the accountability of the management of both public and non-public companies, the RCC expressly sets out an overriding duty of the members of governing bodies of companies and their controlling persons: to act in the company’s best interests reasonably and in good faith, subject to an obligation to indemnify the company for damage resulting from a breach of that duty. To improve the quality of board oversight, the government has significantly expanded the powers and information rights of supervisory boards and, therefore, their independence from management. Most importantly, supervisory board members have been given the power to bring derivative actions.

The government is continuing its efforts to find an appropriate degree of balance between the interests of various stakeholders in Russian corporations. There are a number of legislative initiatives proposed by Russian ministries seeking to address sensitive issues such as the information rights of supervisory board members, the takeover rules in relation to public companies, derivative actions and the liability of controlling persons. These proposed amendments are now mostly at the consultative stage of the legislative process.

II CORPORATE LEADERSHIP

i Board structure and practices

Russian law provides for a two-tier board structure in public companies, including a supervisory board (also referred to as the board of directors) and the executive bodies. The two-tier structure is also mandatory for non-public companies that have more than 50 shareholders or that are subject to a specific regulatory regime (e.g., credit institutions).

The executive bodies of a company include the CEO (or several joint CEOs) and the management board. The formation of a management board is optional, except for those companies that are subject to special regulatory regimes (such as credit institutions).

Supervisory board and management board

Functions and formation

The functions of the supervisory and management boards are to supervise and advise CEOs (or joint CEOs) and limit their discretion on matters that are crucial for the stability and sustainable development of the company. The supervisory and management boards are not responsible for the day-to-day management of the company, and therefore do not have authority to enter binding contracts with third parties on behalf of the company.

The supervisory board is responsible for determining the company’s long-term strategy and deciding on matters that affect key aspects of that strategy (e.g., the acquisition or disposal of major assets or the entry into a joint venture). Supervisory board members are usually nominated by the shareholders and rarely include representatives of the company’s management – in particular, there is a statutory limitation on the representation of members.
of the management board on the supervisory board. Additionally, the CEO, if elected to the supervisory board, may not serve as its chair. The supervisory board may not delegate matters within its competence to the management board or the CEO (or joint CEOs).

The information rights granted to the supervisory board were reinforced in 2014. Despite these improvements, the scope of information rights is not broad enough to ensure an appropriate level of transparency. For example, some Russian listed companies are only holding companies, while the key assets of the group are held by their operational subsidiaries. Russian law views these subsidiaries as separate legal entities (rather than as part of a single economic unit); therefore, supervisory board members and shareholders of the holding company are not entitled to request information about the activities of key subsidiaries bypassing the management of the holding company (however, an obligation of the management of the holding company to request and share information on the key subsidiaries if requested by the shareholders or supervisory board members of the holding company may be set out in the company's internal regulations). However, as mentioned above, a draft law was proposed in 2016 to fill in this gap and to grant supervisory board members access to the documents, books and records of the company on whose board they serve and its subsidiaries. The draft law also proposes to subject the management of the company to administrative liability for failure to provide this information upon the supervisory board members’ request. The draft law has not been introduced to the Parliament and is still under discussion.

The management board usually includes the company's senior management and is subordinate to the supervisory board. Its primary function is to advise the CEO on the implementation of the strategy approved by the supervisory board and the most important matters of the company's day-to-day activities. The CEO is vested with the office of the chair of the management board by operation of law.

The minimum competence of the supervisory board is specified by the RCC and the JSC Law. The competence of the management board is determined wholly by the company’s charter.17

Decision-making procedures
With few exceptions, the law does not regulate the decision-making procedures of the supervisory board or the management board, so that shareholders are free to specify the relevant procedures in the charter. The CGC urges the procedures for the supervisory board to be set out in a way that allows the supervisory board members to have appropriate time to prepare for meetings of the supervisory board and to engage in meaningful discussions on the matters in question. The CGC also recommends that important matters are decided by supermajority or unanimous voting.

Committees
Until recently, the formation of supervisory board committees was generally discretionary. However, from July 2018 public corporations are required to form an audit committee in

16 The members of the management board may not fill more than 25 per cent of the seats on the supervisory board.
17 The charter is the analogue of the memorandum and articles in Western jurisdictions.
their supervisory boards and implement risk management and internal control functions in
general (July 2018 Amendments). There is no such statutory requirement for non-public
companies.

A recommendation that such committees be formed was historically included in the
CGC, which specifically refers to an audit committee (the formation of which has now been
put on a statutory footing), compensation committee and human resources (HR) committee.
The CGC urges that each of these committees, either entirely (audit and compensation)
or predominantly (HR), comprise independent directors. The supervisory board is urged
to form other committees that are necessary based on the scale of the company's business
(e.g., a strategy committee, corporate governance committee or ethics committee may be
appropriate). Those recommendations continue to apply following the adoption of the July
2018 Amendments.

Additional requirements regarding the formation of supervisory board committees
are included in the stock exchange rules. Compliance with such additional requirements is
often a condition for a company to be included in certain quotation lists. For example, the
MOEX Rules require that companies with securities included in the first quotation level
have audit, compensation and HR committees, and that companies with securities included
in the second quotation level have an audit committee.

**CEO (or joint CEOs)**
The CEO (or joint CEOs) (referred to in law as the sole executive body) has the duty of
managing the company (with assistance from, and supervision by, the supervisory and
management boards). The CEO is held accountable by Russian law for the company's overall
compliance with the applicable law. The CEO is vested with the power to enter binding
contracts with third parties on behalf of the company. Additionally, the CEO may issue
powers of attorney to other individuals or legal entities to allow them to represent the
company.

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18 There is no statutory definition of an independent director. However, the regulations on related-party
transactions in effect from 1 January 2017 provide a number of additional criteria that members of
the supervisory board of a public company need to satisfy to be able to participate in the approval of
company related-party transactions. While the law does not expressly use the term independent directors
when setting out those criteria, they aim to enhance the independence of the supervisory board members
approving potentially sensitive transactions in which management or the controlling persons of the
company have a personal interest. Namely, the supervisory board member in question shall not be, and
shall not have been within one year prior to the date the related-related party transaction is approved by the
supervisory board: the CEO of the company or a member of the management board, or otherwise involved
in the management of the activities of the company; related to a person holding a managerial position in
the company; or a de facto controlling person of the company.

In accordance with the CGC, an independent director should mean any person who has the required
professional skills and expertise and is sufficiently able to have his or her own position and make objective
and bona fide judgements, free from the influence of the company's executive bodies, any individual group
of its shareholders or other stakeholders. It should be noted that, under normal circumstances, a candidate
(or an elected director) may not be deemed to be independent if he or she is associated with the company,
any of its substantial shareholders, material trading partners or competitors, or the government.

19 Listing Rules of Public Joint-Stock Company 'Moscow Exchange MICEX-RTS' adopted by the board
of directors on 10 September 2018 and registered by the CBR on 2 February 2018 (http://fs.moex.com/
files/257).
The scope of powers of each of the joint CEOs may differ depending on the provisions of a company’s charter. The powers vested in the office of the CEO by the applicable law and the charter (in particular, the representative powers) may be performed by each of them individually and independently from each other or by all (or some) of them acting jointly. The functions of the CEO may alternatively be performed by a specialised management company on the basis of a management services agreement with the company.

Any action of the CEOs that is taken without due authorisation from the supervisory board, the management board and, in certain cases, the general shareholders’ meeting, may be open to challenge by shareholders or supervisory board members, and be a basis for the CEOs to be liable to the company.

ii Directors

Appointment and removal

Supervisory board

Supervisory board members of a public JSC are elected annually by the general shareholders’ meeting\(^\text{20}\) (meaning that the maximum term is one year). Members may be re-elected for an unlimited number of terms. The supervisory board in a public JSC is elected by cumulative voting. Each shareholder receives a number of votes equal to the product of the number of shares held by the shareholder by the number of seats on the supervisory board, and may distribute these votes among the nominees as desired. The supervisory board is then composed of the candidates who receive the largest number of votes. Cumulative voting is an important element of the minority protection system in Russia, allowing minority shareholders to be represented on the supervisory board, which would not have been possible had those matters been decided upon by simple or qualified majority of votes.

As a general rule, the general shareholders’ meeting may dismiss the supervisory board (as a group rather than any member individually) at any time prior to the expiration of its term of office.

Management board and the CEO (or joint CEOs)

Statute does not prescribe the term or procedure for the appointment of members of the executive bodies. In view of this, the matter is governed by the company’s charter.

Independence, expertise and reputation

The professional suitability of supervisory board members and executive body members is becoming increasingly important in Russia. Under Russian law, no person disqualified by a court for an administrative or criminal offence (e.g., the falsification of financial and accounting reports, money laundering or insider trading) can serve as a CEO or a member of the management or supervisory boards of a public or non-public company for the term of their disqualification.

There are further reputational and qualification requirements for supervisory board members and executive body members of regulated companies. For example, a CEO of a

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\(^{20}\) Since July 2018, the competence of the supervisory board has been broadened, empowering its members to propose candidates for the CEO (or joint CEOs), the supervisory board itself and the audit committee at their own discretion; however, the number of such candidates shall not exceed the overall number of board members.
Russia

A bank must have a higher education degree and relevant managerial experience of at least two years. Similarly, a person who heads a financial organisation during a period in which its licence is withdrawn cannot serve as the CEO of an insurance company for three years from the date the licence was withdrawn.

In the absence of limitations in the charter, supervisory board members are generally free to simultaneously hold managerial and supervisory positions in other companies. The approach is entirely different for executive body members, which require an express authorisation from the supervisory board to be able to combine more than one office. Additionally, there are certain specific restrictions for regulated companies. For example, the CEO of a bank cannot simultaneously hold the CEO or chief accountant position in another bank, insurance company, non-state pension fund and certain other financial organisations (or their affiliates).

Remuneration of directors and senior management

Membership of the supervisory board does not result in employment by the company per se. In view of this, the basic position is that membership of the supervisory board is unpaid. However, the general shareholders’ meeting may decide to remunerate or compensate the supervisory board members.

Executive body members are company employees and their salary is stipulated in their employment contracts. The CEO is responsible for implementing the company’s employment policies by operation of law and, therefore, whether the executive bodies’ compensation package (or that of any other key employees) requires special approval from the supervisory board or the general shareholders’ meeting depends on the provisions of the charter. In practice, the compensation of key managers is usually made subject to the consent of the supervisory board.

In accordance with Russian employment law, there is no upper limit on the amount of severance payments to the CEO of a non-state-owned company – it all depends on the terms of the CEO’s employment agreed with the company. However, following a high-profile case in 2013 where courts invalidated a multimillion dollar severance payment to the former CEO of a state-controlled and significantly leveraged telecoms major, the severance payments to CEOs of state-controlled companies were capped at the level of three months’ salary.

Conflicts of interest

Russian law contains the principle that supervisory board members and executive body members should act in the absence of conflicts of interest. To enforce this principle, supervisory board members and executive body members are required to provide to the company the information necessary to determine whether a transaction undertaken by the company qualifies as a related-party transaction – that is, a transaction in which an executive body member or supervisory board member or a controlling person of the company is interested personally or through companies under their control or their respective relatives.

With effect from 1 January 2017, related-party transactions are not subject to mandatory

21 The definition of a controlling person for the purposes of related-party transactions includes the persons holding, directly or indirectly, a controlling stake in the capital of the company, the persons vested with power to appoint its CEO or to elect more than 50 per cent of supervisory board members, or both.

22 The information undertakings imposed on those persons by the JSC Law are expanded and supplemented by the regulations of the CBR.
prior approval by the supervisory board or the general shareholders’ meeting. Instead, the management of the company is under an obligation to notify the supervisory board and, in certain circumstances, the shareholders of the intention to proceed with a related-party transaction. The supervisory board members and more than 1 per cent of shareholders in the company are then entitled to request that the transaction be postponed until the approval of a competent management body of the company is obtained. If no such request is made, the management is free to proceed with the transaction. The management may request an approval from the competent bodies of the company even in the absence of a request from the supervisory board members or the shareholders (e.g., to enhance the legitimacy of the transaction). At the same time, as clarified by the Supreme Court of the Russian Federation,23 even if the corporate approval of a transaction is in place, the transaction can nevertheless be invalidated if it is clearly detrimental to the company and the other side has been or should have been aware of that.

A transaction made or approved in the presence of a conflict of interest (unless it was properly disclosed and the interested persons refrained from participating in the approval process) or resulting in a loss to the company, or both, may trigger an obligation for the conflicted persons to indemnify the company for the loss. This obligation can be enforced through a derivative action by the supervisory board members or shareholders.

Following a number of high-profile cases involving major credit institutions becoming insolvent as a result of significant financing having been extended to persons connected with management and major shareholders, the CBR has sought to put an end to such practices. In particular, the CBR has introduced and continues consistently to enforce more rigid standards on the level of risk that can be assumed by a bank with respect to a single borrower and its affiliates and on the value of transactions with the bank’s connected persons. Another example of the regulation aimed at elimination of a conflict of interest is a statutory prohibition on a non-state pension fund to become a shareholder of the management company that manages its assets.

**Liability**

**Internal liability**

In the event that a supervisory board members or executive body, or a company’s controlling persons, are in breach of their duties to the company, they are under an obligation to indemnify the company (rather than its shareholders) for the damage (both direct loss and loss of profit) resulting from the breach. There is a statutory restriction on the ability to limit management’s liability in relation to bad faith (all companies) and unreasonable conduct (public companies), and the liability of controlling persons. There are several exemptions from liability: for example, if the action in question, although detrimental to the company, qualifies as a reasonable commercial risk.

The CEO is not exculpated from liability merely because he or she obtained all requisite corporate approvals for an action – if the action caused damage to the company and none of the exemptions from liability apply, all persons who voted in favour of that action (or abstained from participation in the voting in bad faith) may be held jointly and severally liable. In assessing the scope of liability of the members of the supervisory board and the

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23 Paragraph 24 of the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 27 dated 26 June 2018 ‘On challenging major transactions and interested party transactions’.
management board, courts will take into account the scope of their information rights and, in certain cases, their dependency on the CEO in terms of the information required for their decision making.

As executive body members are in an employment relationship with a company, they can be sanctioned in accordance with employment law for any breach of their duties to the company.

**External liability**

The general position under Russian law is that executive body members, supervisory board members and a company’s controlling persons are not liable to parties who contract with the company for the company’s debts. However, there are several exemptions to this principle.

One exception is that management and the controlling persons are liable in the event that the company is declared insolvent. The controlling persons of the company are subject to secondary liability to the company’s creditors if the insolvency is the result of their actions or omissions. In the case of the controlling persons, there is a presumption in favour of liability if the creditors’ interests have been prejudiced as a result of a transaction made by, in favour of or with the approval of the controlling person. In the case of the CEO, the presumption also applies if the accounting documents are misleading, omitted or missing, which complicates the course of the insolvency proceedings.

Another exception is set out in the Securities Market Law, which provides that any person who has signed or approved a prospectus (i.e., the CEO, the chief accountant and the supervisory board members) is subject to secondary liability for losses caused to investors as a result of inaccurate, misleading or incomplete information being contained in the prospectus.

### III DISCLOSURE

The JSC Law and the Securities Market Law are the key statutes establishing disclosure obligations. The JSC Law requires all public companies (including those public companies that have not arranged for the registration of a prospectus or listing of their securities) to disclose annual reports, annual accounts (including an auditor’s opinion), lists of affiliates and corporate documents. The composition of the annual accounts is set out in the Accounting Law and the requirements for the auditor’s opinion are set out in the Auditors Law. In general, the auditor is required to be independent from the company and its major shareholders. Annual reports and annual accounts are subject to review and approval by the internal audit commission, the supervisory board and the external auditor before they are submitted to the general shareholders’ meeting for approval. The Securities Market Law sets out wider disclosure obligations that are triggered by the company registering a prospectus of its securities. The registration of a prospectus is not tantamount to the admission of securities to trading on an organised market. The prospectus requirements apply in most cases where

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24 The definition of a controlling person for the purposes of insolvency laws, includes the CEO (or joint CEOs), the persons holding a controlling stake in the capital of the company, the persons vested with representative authority on behalf of the company and the persons exercising de facto control over its activities. The definition and criteria of a controlling person have been summarised in Resolution of the Plenum of the Supreme Court of the Russian Federation No. 53 dated 21 December 2017.


securities are issued to a large number of subscribers through an open subscription (even without the involvement of stock exchange infrastructure). As a result, the disclosure obligations apply to public companies (other than those that only opted for public status without offering their securities to the public). The disclosure obligations may also apply to non-public companies (such as LLCs and non-public JSCs) that have issued securities (such as bonds) to the public and that were required to register a prospectus. The Disclosure Rules provide further detail to supplement the Securities Market Law.

The Securities Market Law disclosure requirements can be classified as periodic and one-off disclosure obligations. The periodic disclosure obligations include the publication of quarterly reports, which primarily include quarterly financial statements. One-off disclosures relate to material facts. Material facts are price-sensitive information concerning the reporting company, which may, for example, include information about meetings of the supervisory board or the general shareholders’ meeting; changes of control of the company; or information on the acquisition by a single shareholder or a group of shareholders of a stake exceeding 5, 10, 15, 20, 25, 30, 50, 75 or 95 per cent of voting shares in the company.

A complex procedure applies if a reporting company wishes to terminate (or become exempt) from its disclosure obligations. This procedure involves a super-majority vote by the shareholders and a special authorisation from the CBR. The reporting company is primarily liable to its shareholders for damage caused by untimely, incomplete or misleading disclosure. The management of the reporting company may be subject to administrative or criminal sanctions for any failure to comply with the disclosure regime.

Additional disclosure obligations may apply to regulated companies. Credit institutions are subject to the highest level of transparency. In particular, banks are required to disclose information on their ownership structure and the qualification and reputation of their management. Credit institutions are also subject to numerous reporting requirements to the CBR (and in particular are required to disclose to the CBR their annual and quarterly accounts, details of their risk management and risk assessment systems, and an outline of the level of risk they have assumed). The CBR encourages banks to agree that part of the information submitted to the CBR to be disclosed on its official website for the public, and in practice, a large number of banks follow this recommendation.

In light of the continuing geopolitical unrest and the ongoing ‘war of sanctions’, amendments to the JSC Law and the Securities Market Law were introduced in December 2018 to empower the government to determine instances where a company may become exempt from some of the disclosure requirements that would otherwise have been applicable to it. Those instances include, in particular, major or related-party transactions made in connection with the performance of government defence orders or made with companies that are subject to sanctions imposed by foreign states.

IV CORPORATE RESPONSIBILITY

i General

The CGC defines corporate governance as ‘a system of relationships between the executive bodies of a company, its board of directors, its shareholders and other stakeholders’. The CGC
recommends that supervisory boards take into account both financial and non-financial risks affecting a company's activities (including ethical, social, ecological and operational risks), the interests of all external stakeholders (including employees), and applicable social and ecological standards. The CGC also recommends that the annual report contain a section on human resources and social policy, healthcare and protection, workplace safety and social policy.

The obligation of the management to take into account the interests of all of the company's stakeholders is not expressly set out in a specific piece of legislation, but is rather derived from a range of general legislative provisions. Thus, the obligation to act in the best interests of the company makes it the managers' responsibility to build and maintain an efficient interaction system with key contributors to and stakeholders in the company. Additionally, CEOs are held personally responsible by the government for ensuring companies' compliance with the applicable laws. Some of those laws establish minimum statutory comfort for the various stakeholders in the company (e.g., its employees, creditors and clients).

The government has been promoting the idea of companies engaging in corporate social responsibility beyond the minimum benchmark standards for some time now. However, it has failed to provide an appropriate regulatory framework to incentivise companies to engage in charitable activities or other additional social responsibility measures. Despite this, many major companies tend to assume broad social responsibility undertakings in implementing their internal ethics codes and, on certain occasions, as part of their government-relations strategy.

ii Employees

All Russian companies are subject to social obligations, such as ensuring minimum salary levels for employees, making contributions to social and pension funds for employees, conducting assessments of workplace conditions, and introducing additional benefits and regimes if necessary based on these assessments. Companies with a significant number of employees must also employ a minimum percentage of disabled people. Separate benefit regimes are also established for different categories of employees (such as women with family responsibilities and rotational system employees). Breaches of these obligations can result in fines and other kinds of liability for a company.

However, the above is only a benchmark level of comfort for employees. In practice, companies tend to assume a wider range of social responsibilities and reflect them either in their internal regulations or in agreements with their employees or trade unions. Those documents usually address issues such as: increases to the minimum amount of salary and the period of annual leave, additional allowances for employees under certain circumstances, additional medical and life insurance, employees' discounts for certain services, compensation of travelling costs during employees' holidays, and protection and additional support to former employees and retired employees.

iii Small and medium-sized businesses

The government is seeking to support Russian small and medium-sized businesses (SME). Given the significant footprint that the government has on the Russian economy, one of the support measures it has proposed is ensuring SMEs' access to the government and state company procurement systems.
Russian law sets mandatory provisions for state agencies and state-owned companies to purchase a specified amount of goods and services from SMEs. The general rule is that companies that are within the scope of the Procurement Law28 must procure at least 18 per cent (as measured in terms of value) of the total amount of their contracts from SMEs.

To increase the transparency of procurement processes, companies must disclose information about their procurement policy, procurement plans and information on tenders in a publicly available information system.

iv Anticorruption

In an effort to improve the investment climate in Russia and to advance its transition to an international financial centre, the government has launched a number of anti-bribery and corruption initiatives. Commercial bribery is a criminal offence under Russian law, and an offender can be sentenced to a period of imprisonment. Although Russian anticorruption legislation is mainly focused on governmental authorities and state-owned companies, there are still some broadly stated rules requiring companies with no state participation to take measures to prevent corruption. These measures may include adopting a corporate ethics code and anti-bribery policies, procedures preventing conflicts of interest, or appointing an officer with controlling powers in this area. Internal anti-bribery policies and codes have become common in large Russian companies but remain rare for smaller privately held companies. Companies with significant foreign participation tend to follow the anticorruption standards applicable to their overseas parent undertakings (e.g., the UK Bribery Act or US Foreign Corrupt Practices Act).

v Currency control and anti-money laundering

Russian financial institutions have a number of supervisory functions in relation to currency control and anti-money laundering (AML). Russian residents are required to collect all foreign currency export proceeds in their bank accounts in Russia (mandatory repatriation of currency proceeds). The purpose of this regulation is to prevent capital flight from Russia. Controlling functions are mainly delegated to Russian banks. Until 28 February 2018, when making overseas contracts, Russian residents were required to report this to their bank and open a transaction passport outlining basic information about the contract, including the amount and time frames for delivery and payments. Subsequently all payments under the relevant transaction should be made through the passport bank (unless the passport bank is replaced, in which case payments should be made through the new passport bank). The requirement to open and maintain a transaction passport was replaced with a requirement to register the relevant contract with an authorised bank with effect from 1 March 2018.

The AML laws require that companies operating with money – banks and other credit institutions, securities market participants, insurance companies, investment fund management companies, realtors, pawnshops and others – to monitor and, if necessary, report their clients’ transactions the value of which exceeds the threshold set out in law. Reporting obligations are triggered irrespective of the value of the transaction if it qualifies

as a suspicious transaction. Suspicious transactions include extraordinary transactions with no clear commercial purpose, transactions not consistent with a client’s business, and other transactions that raise a reasonable suspicion of money laundering or financing of terrorism.

vi Compliance
To ensure their stability and protect their clients, credit institutions and professional participants of securities markets are required to maintain an internal compliance function. Other companies are not required to organise a compliance function (although, as mentioned above, the implementation of risk management and internal control mechanisms generally is now mandatory for public corporations). Nevertheless, even where there is no specific legislative requirement regarding the maintenance of a compliance function, in practice, this function is usually fulfilled by various departments within the relevant company’s corporate structure.

The requirement for credit institutions and professional participants to organise a compliance function is enforced predominantly by the CBR. Credit institutions should also refer to the principles of the Basel Committee on Banking Supervision’s ‘Compliance and the compliance function in banks’ of 2005.

Russian law requires that the internal compliance policies of credit institutions and professional securities market participants specify, inter alia, the structure of the compliance function, its activities, main responsibilities, allocation of duties and internal compliance procedures (such as compliance risk assessment and coordination). The compliance function in these institutions must be carried out on a regular basis.

V SHAREHOLDERS
i Shareholder rights and powers
Russian policymakers have adopted a restrictive approach towards the powers of the general shareholders’ meeting in public companies. The scope of these powers is determined by the JSC Law only and may not be extended (but, conversely, may be further limited in favour of the supervisory board) by the charter. Unlike some jurisdictions, where residual powers falling outside the competence of other governing bodies are attributed to the general shareholders’ meeting, in Russia those residual powers would be assumed by the CEO or CEOs. It is, therefore, the supervisory board (and not the general shareholders’ meeting) that plays a key role in the system of oversight over the managerial activities of a public company.

The general shareholders’ meeting is still vested with important powers within the company (in particular, the power to amend its charter, to elect the supervisory board members, to approve dissolution or reorganisation of the company, its exemption from the disclosure obligations, and major acquisitions or disposals involving more than 50 per cent of the balance sheet value of its assets). The matters attributed to the competence of the general shareholders’ meeting by the JSC Law, are, therefore, limited to those that are likely to result in a fundamental change to the nature of the business of the company or the composition of its assets, and the balance of powers between the various governing bodies set out in the charter.

29 See Section III.
As stated above, the regulation is more flexible for non-public companies (i.e., non-public JSCs and LLCs). For example, the competence of the general shareholders’ meeting in a non-public company may be extended compared to the one set forth by the statute (making, in the absence of a statutory requirement, the formation of the supervisory board and the management board redundant).

The key statutory rights of the shareholders include:

a) their rights on participation in the management of the company (i.e., voting rights, information rights and rights to put items on the agenda of the general shareholders’ meeting);

b) their economic rights (i.e., rights to receive dividends and other distributions from the company);

c) the rights to protect the interests of the company (i.e., the right to bring derivative actions); and

d) the rights to protect the shareholders’ own interests (in particular, the rights for a dissenting shareholder to put its shares to the company in a limited number of circumstances).

The rights of the holders of the preference shares are determined either by the charter or the preference shares issuance documents.

Russian law establishes the following ownership thresholds for the exercise of the management rights by the shareholders of public companies: the right to request the convocation of the general shareholders’ meeting is granted to shareholders individually or collectively holding at least 10 per cent of voting shares in the company, and the right to put an item on the agenda to holders of at least 2 per cent of the voting shares. The list of shareholders entitled to vote at the general shareholders’ meeting is set up as at the record date (which, subject to a few exceptions, may not be more than 25 days prior to the date of the general shareholders’ meeting). In the event of the transfer of the shares following the record date, the shareholder appearing on the register will have to grant a voting power of attorney to the transferee or vote at the general shareholders’ meeting in accordance with the instructions of the transferee.

**Equality of voting rights**

Russian law establishes the principle of equality of voting rights: all ordinary shares and all preference shares of a single issue provide equal rights in proportion to their nominal value. For the ordinary shares, the JSC Law sets forth the one share-one vote principle. The voting rights are usually carried by ordinary shares only. The preference shares in public JSCs become voting shares in certain exceptional circumstances only (most commonly in the event of non-payment of dividends in respect of the non-voting, non-cumulative preference shares or if the general shareholders’ meeting is considering winding up the company). Non-public JSCs may issue voting preference shares granting voting rights on all or some of the matters on the agenda of the general shareholders’ meeting. LLCs do not issue shares, and as a general rule provide a percentage of votes determined as the ratio between the nominal value of the participatory interests held by the shareholder and the aggregate amount of the charter capital of the LLC. Disproportionate voting arrangements may be set out in the charter of an LLC or a non-public JSC (but not a public JSC).
**Rights of dissenting shareholders**

Apart from the general protections available to all shareholders, the law contains specific protections for shareholders who attended a general shareholders’ meeting and voted against a resolution or did not participate in the relevant general shareholders’ meeting (dissenting shareholders).

A dissenting shareholder can challenge such a resolution of the general shareholders’ meeting. If, pursuant to the resolution, the company entered into a transaction, the dissenting shareholder can also challenge the transaction. For the resolution or transaction to be invalidated, the dissenting shareholder needs to establish grounds for its invalidity (most commonly, the transaction having been made without proper authorisation from the competent governing bodies of the company, the lack of proper authorisation having been known to the other party and the transaction in question being prejudicial to the interests of the company).

Additionally, the law permits dissenting shareholders of JSCs to request that the company buys out all or a part of their shareholding, if the resolution in question concerns the following fundamental matters:

1. reorganisation of the company;
2. approval of a major transaction of the company with a value exceeding 50 per cent of the company’s asset value;
3. the introduction of amendments to the company’s charter that restrict the rights of the dissenting shareholders; or
4. delisting of the company’s shares.

**ii Shareholders’ duties and responsibilities**

The most important statutory obligations of shareholders include:

1. the obligation to participate in the formation of the capital and assets of the company (by way of paying up their share in the charter capital in the course of the company’s incorporation and, if explicitly provided by the charter, by making other mandatory contributions to the capital or assets of the company (or both));
2. the obligation to refrain from disclosing confidential information relating to the activities of the company;
3. the obligation to participate in the adoption of decisions required for the company to continue to exist (where such participation is necessary); and
4. the obligation to refrain from knowingly causing damage to the company, and otherwise significantly complicating or rendering impossible the pursuit of the company’s fundamental goals.

Subject to the above obligations, shareholders are generally free to act in their own discretion and in their own interests. A higher standard of conduct is set forth for the controlling persons of a company. As stated above, the RCC imposes on them a duty to act reasonably and in good faith in the best interests of the company. Therefore, as is the case with managers, controlling persons who cause damage to the company may be liable to reimburse the company for the damage.
iii Shareholder activism

Say on pay

The general shareholders’ meeting is the competent body to decide on the timing and amount of the distribution of dividends to shareholders. However, the supervisory board, assessing the results of the company’s activity for the relevant period and its financial status, may issue a recommendation to the general shareholders’ meeting on the amount of dividends (in which case the general shareholders’ meeting cannot decide to distribute a larger amount) or a recommendation not to distribute the dividends at all (in which case the general shareholders’ meeting cannot decide otherwise).

As best practice, the CGC recommends that companies adopt an internal dividend policy, and that they explain to shareholders the reasons for any change to, or deviation from, that policy.

Derivative actions

Shareholders can sue members of the executive bodies and the supervisory board, as well as persons exercising de facto control over the company, for damage caused to the company by those persons. Guidance for assessing the unreasonable and bad faith behaviour of managers is provided in Resolution of the Supreme Commercial Court of the Russian Federation No. 62 of 30 July 2013 (Resolution).30

The Resolution clarifies that the obligation to act reasonably and in good faith shall be construed to mean that managers must take necessary and sufficient actions for the achievement of a company’s objectives, including due performance by the company of any public liabilities imposed by the applicable law (such as the payment of taxes). The Resolution gives a number of examples of when managers are presumed to be acting in bad faith and unreasonably, and when transactions are considered to be evidently unfavourable to the company.

The Resolution was passed prior to the RCC being amended to impose the duty to act in the interests of the company reasonably and in good faith. It is sensible to assume that the guidance in the Resolution is equally applicable to the liability of controlling persons.

Proxy battles and proxy solicitation

As noted in Section I, the share capital of Russian companies, including listed companies, is typically concentrated in the hands of one or a few large shareholders, who can procure decisions at the general shareholders’ meeting. Therefore, unlike in some Western jurisdictions, the issues of proxy fights and proxy solicitation are not typical in Russia. In view of this, there are no special regulations in this respect.

Shareholder campaigns

Large shareholder campaigns are not very common in Russia; however, there have been some notable cases. Recent examples of shareholder activism include the campaigns of Alexey Navalny, a minority shareholder in 20 Russian companies, including the state-owned Rosneft, Gazprom, Transneft and VTB. Navalny has filed numerous lawsuits and petitions.

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30 The Supreme Commercial Court was abolished and merged with the Supreme Court in 2014. Upon completion of the merger, the Supreme Commercial Court’s previous guidance was expressly said to continue to stand until the Supreme Court has expressly ruled otherwise on the relevant subject.
to regulatory authorities in relation to non-transparent transaction structures, suspicious expenses and failure to provide information to him as a shareholder. Some of the institutional minority investors (particularly portfolio companies) in Russian public corporations have been increasingly active in bringing derivative actions against controlling shareholders in the public corporations for losses caused by their actions.

**Long-term shareholder value**

Simply put, traditionally the shareholder value denotes the increase of wealth in the hands of the company’s owners in a number of ways, in particular through an increase of its market capitalisation, the paying of dividends or ensuring that the company generates returns higher than the cost of capital employed by the company to generate them.

In assessing the application of the shareholder value concept in the context of Russian corporations, it is worth always taking into account the fact that, while the creation of additional wealth for a company’s owners may be, as a matter of practice, the key motivating factor of the company’s management and a decisive factor in determining their compensation package and the set of the relevant key performance indicators, the management is under no legal obligation to manage the company for the benefit of its ultimate owners. Their legal obligation is to act reasonably and in good faith to ensure that the company continues as a going concern with a view to profit. As discussed above, any failure on the part of the management to comply with that overriding obligation exposes them to liability to the company (rather than its shareholders).

The way the policymakers have formulated the key obligation of the management of Russian companies corresponds with the concept of the shareholder value in its proper sense. The premise here is that if the company is properly managed with sufficient regard to the interest of its key stakeholders and with an appropriate allocation of resources, it would be able to generate a sufficient level of return on capital and have sufficient funds to declare and pay dividends. Insofar as public corporations are concerned, the market capitalisation would, in those circumstances (in the absence of extraordinary black swan-type events), necessarily go up.

The management is, therefore, encouraged by the Russian legislators to try to work towards an increase of the shareholder value long-term. Recognising that in certain circumstances the management may be tempted or pressured to prioritise short-term (and sometimes speculative) goals by some of the shareholders (particularly controlling shareholders), a number of checks and balances to enable the management to follow a proper course of action have been put in place in Russian legislative acts. In addition to the overall obligation to act in the best interests of the company itself, the law prohibits all security market participants from engineering any short-term price increases in the company’s stock (market manipulation) and reserves (at least for public companies) – a key role in deciding whether a public company should declare dividends to the management and the supervisory board members (with shareholders being unable to circumvent the relevant decision). Insofar as dividends are concerned, there are a number of other statutory restrictions on their payment that target instances where the payment of dividends would jeopardise the stability of a company as a going concern (e.g., in relation to the amount of net assets of the company, or if the company may become insolvent as a result of any such payment).
iv Takeover defences

Takeover Rules

Russian law does not generally prohibit acquisitions of significant stakes in public JSCs on the basis of private bilateral deals between the purchaser and the selling shareholder or shareholders. That said, as mentioned above, the JSC Law contains a number of provisions addressing the procedure for acquisition of more than 30 per cent stake in public JSCs (Takeover Rules).

The Takeover Rules:

a require a shareholder (that on its own or together with such shareholder’s affiliates) consolidated a more than 30, 50 or 75 per cent of voting shares in a public JSC to submit an offer to the remaining shareholders in the target company allowing them to exit the target by putting their shareholdings to the bidder at a specified price: a mandatory tender offer (MTO);  
b allow a shareholder (that on its own or together with such shareholder’s affiliates) intends to consolidate a more than 30 per cent stake voluntarily to submit an offer to all other shareholders to sell their shares to the bidder at a specified price: a voluntary tender offer (VTO); and  
c where a shareholder (on its own or together with its affiliates) has consolidated more than 95 per cent of voting shares in a public JSC:

- require such shareholder to notify the remaining minorities of their right to put their shares to such shareholder (minority put notice); and
- provided that at least 10 per cent of the shares have been purchased on the basis of an MTO or a VTO, allow such shareholder to call the shares of the remaining minorities thereby consolidating 100 per cent of voting shares in the target company (minority call notice).

The Takeover Rules provide for an eventuality of two competing MTOs or VTOs being submitted in relation to the same target at the same time.

The target company is required to disclose the information on the MTO, the VTO, the minority put notice and the minority call notice to the public. The board is required to issue a recommendation to the shareholders on whether it deems that the MTO or the VTO should be accepted by the shareholders.

Defence strategies

Unlike many Western jurisdictions, the Takeover Rules provide little (or no) specific regulation on defence strategies against hostile takeovers.

Arguably, the main reason behind this is the high degree of capital concentration in the economy, including in public and listed companies. Therefore, takeovers in respect of Russian public targets are more often than not negotiated by a purchaser with key controlling shareholders of the target. The procedures contemplated by the Takeover Rules are usually

31 There are several exceptions to this requirement. For example, the requirement to submit an MTO does not apply where the relevant shareholding thresholds are reached as a result of transfers between affiliated entities or as a result of redemption by the company of certain of its shares leading to the general increase in the stakes of the shareholders and in a handful of other cases.
triggered after the deal of the purchaser with the key shareholders has been completed (e.g., the purchaser might be required to submit an MTO if, as a result of its prior deal with the key existing shareholders, it has consolidated a stake of more than 30 per cent in the target).

The Takeover Rules are therefore primarily focused on granting a certain degree of protection to the minority shareholders in Russian public targets upon the occurrence of a change of control, rather than regulating in detail the ways in which existing shareholders may defend against a takeover bid. Ultimately, in the view of Russian policymakers, shareholders always have a defence instrument by simply declining to accept an offer if they are not happy with its terms.

**Key decisions taken by shareholders**

It must be taken into account that where an MTO or a VTO procedure contemplated by the Takeover Rules is triggered, the decision-making powers in the company are redistributed between the main governance bodies in favour of the general shareholders’ meeting. In particular, only the general shareholders’ meeting will be entitled to approve any related-party transactions of the target, any transactions with the value exceeding 10 per cent of the target’s assets’ aggregate book value, and the issuance of any additional voting shares or instruments convertible into voting shares. This is an illustrative deviation from the generally restrictive approach that Russian policymakers have chosen in relation to the decision-making powers of the general shareholders’ meeting. The underlying principle of the Takeover Rules is that a change of control over a public company is a matter for the shareholders in that company to decide, ultimately, through accepting or declining to accept a takeover bid. The CEO, the management and the supervisory boards are, therefore, limited in their ability to influence that decision (or the takeover process as a whole) other than through issuing a recommendation to the shareholders to accept or decline to accept the relevant offer (e.g., through implementing a crown jewel defence).

In addition, the Takeover Rules do not disapply the overriding statutory duty of the management and members of the governing bodies of the target company, or the duty of its controlling persons to act reasonably and in good faith in the best interests of the company.

Obviously, the CEO, the supervisory board and the management board are not able to influence or block private sales of shares by the company’s shareholders that are not affected within the framework of one of the procedures contemplated by the Takeover Rules.

**Staggered board**

Russian corporate governance rules contemplate that the supervisory board is re-elected by the general shareholders’ meeting annually in full. There are no instruments under Russian law to appoint a supervisory board in a public JSC, the members of which are classified into different categories, each with an individual rotation cycle.

There may be delays in the purchaser nominating its candidates to the supervisory board or the position of the CEO after it has acquired its stake in the target. These delays result from mandatory notification periods for convocation of an extraordinary general shareholders’ meeting (which can be around 50 days if the agenda of the relevant general shareholders’ meeting includes the matter of the re-election of the supervisory board). The delay may be even longer if the incumbent supervisory board, which is responsible for convocation of the general shareholders’ meeting by operation of law, is not cooperative and refuses to decide on such convocation. In such scenario, the purchaser may be forced to seek to convoke the general shareholders’ meeting through court.
The CEO (or joint CEOs) who are responsible for the day-to-day management of Russian companies may be appointed by either the supervisory board or the general shareholders’ meeting (depending on the provisions of the charter). Where the CEO is appointed by the general shareholders’ meeting, the position in terms of potential delays in such appointment is substantially the same as with the election of the new supervisory board. Where a CEO is appointed by the supervisory board, there will be an additional step after the purchaser has nominated its representatives to the supervisory board, of having the new supervisory board pass a resolution appointing the new CEO.

Given that in a majority of cases takeovers of Russian public targets are carried through private bilateral deals between the purchaser and the key existing shareholders, the parties tend to address those matters in the relevant transaction documents to avoid such delays and limit the possibility of the purchaser having to resort to the support of the courts to effect the requisite appointments.

**Poison pill defences**

Poison-pill defences are usually structured through issuance of convertible instruments, voting preferred shares, emergency issuance of additional shares to all existing shareholders other than the purchaser and analogous measures.

Russian law does not expressly prohibit those kinds of arrangements (unlike some Western jurisdictions), which makes those types of arrangements theoretically possible. However, the regulation of the instruments customarily involved in structuring poison pill-type defences makes the implementation of any such defence in practice very challenging.

**Voting preference shares**

As a general rule, preference shares in Russian public companies are non-voting shares and only become voting shares in a limited number of cases (most often, where the dividends due on those shares are not paid out by the company in time). The aggregate par value of all preference shares issued by the company may not be more than 25 per cent of the aggregate par value of the ordinary voting shares. Where the preference shares have become voting shares prior to an MTO or a VTO procedure having been triggered pursuant to the Takeover Rules, those shares may be acquired by the purchaser on the basis of an MTO or a VTO.

Russian law contemplates the concept of voting preference shares that grant voting rights on all or some of the matters within the competence of the general shareholders’ meeting permanently or upon occurrence of certain specified circumstances. However, such instrument is available to non-public companies only, which are outside the scope of the Takeover Rules.

**Convertible instruments**

Russian law allows issuing instruments convertible into voting shares in a company (such instruments include convertible bonds, convertible preference shares and options). 32

It must be taken into account that after an MTO or a VTO procedure pursuant to the Takeover Rules has been triggered, the issuance of convertible securities is only possible by resolution of the general shareholders’ meeting. Any conversion of such convertible securities

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32 An option is a security issued by a Russian issuer allowing the security holder to convert the option into other securities of the relevant issuer.
will require the issuance of additional shares by the company, which after an MTO or a VTO procedure has been triggered is also only possible by resolution of the general shareholders’ meeting. Prior issued convertible securities may become exercisable after a takeover bid is submitted. However, it is important to remember that such conversion is not automatic and will require the issuance of additional shares (again subject to the consent of the general shareholders’ meeting).

Where, after the procedures in the Takeover Rules have been triggered, any step requiring the general shareholders’ meeting consent is effected without such consent, it can be invalidated and unwound through court. Bidders for the acquisition of shares in public companies have standing to claim such invalidation.

**White knight**

As mentioned before, there is a concept of a competing offer factored into the Takeover Rules; however, it is very rarely used in practice given the practical considerations outlined above.

v  **Contact with shareholders**

*Mandatory and best practice reporting to all shareholders*

Shareholders have a general right to access information and documents concerning the company’s activities. Both the JSC Law and the LLC Law list the information that is available to all shareholders and set out the procedure for accessing this information. Access to certain documents of JSCs, such as a company’s accounts and the minutes of its management board, is open only to a shareholder or shareholders collectively holding not less than 25 per cent of voting shares. A set of legislative amendments has recently come into force imposing a number of restrictions on the information rights of minority shareholders. The rationale behind the amendments is to protect companies against the risk of greenmailing by minority shareholders. Most importantly, the amendments have increased the minimum ownership threshold for requesting documents and information that the company is not required to disclose to the public by operation of law, and have granted companies a right to deny the provision of particularly commercially sensitive information in the absence of an appropriate justification for a request for documents and information. Significant minority shareholders (holding more than 10 and 25 per cent of voting shares) are exempt from some of those restrictions. Moreover, as mentioned above, the JSC Law and LLC Law have recently been supplemented with a new provision empowering the government to release certain companies from the statutory obligations to provide information on interested-party and major transactions to their stakeholders).

The CGC recommends that companies develop and implement an information policy enabling them to efficiently exchange information with shareholders, investors and other stakeholders. The interaction with shareholders should be facilitated by setting up a company website and posting useful information there, and organising regular presentations and meetings with management.

The current JSC Law requires that shareholders be provided with physical access to documents and information relating to the agenda of the forthcoming general shareholders’ meeting at least 21 days before the date of the general shareholders’ meeting (certain specific matters require more advanced notice). Shareholders can also request copies of the relevant documents. The company has seven business days to prepare the copies or a longer period if
the shareholder requests a substantial amount of information (more than 10 documents or more than 200 pages). The relevant material may be published on the company’s website only if this is expressly permitted by the charter.

There is room for improvement of the information provision policies of many large companies, including state-controlled companies. In practice, shareholders may face problems obtaining a comprehensive set of materials for the general shareholders’ meeting within a reasonable time frame. This is especially relevant for foreign shareholders controlling shares in Russian companies through a long chain of depositaries.

The CGC states that companies should provide shareholders with an opportunity to coordinate their actions in relation to the general shareholders’ meeting. In the past, no specific steps have ordinarily been taken to ensure that shareholders can share their views on the agenda before the general shareholders’ meeting; however, in December 2017 the CBR introduced draft rules on joint demands and propositions of shareholders, enabling them to cooperate on and propose items to the agenda jointly by means of signing one document only (instead of each shareholder submitting a separate set of documents to the company).

VI OUTLOOK

Since 2010, the government programme to transform Moscow into an international financial centre has been the key driving force behind corporate governance reforms in Russia. One key idea behind that initiative was to make the Russian jurisdiction more attractive to international financial investors and give a boost to domestic capital markets. In parallel, the government intended the non-state pension funds to play an important role in increasing the liquidity levels of domestic markets by channelling the monies under their management to Russian publicly traded companies.

However, following the political crisis in Ukraine, Russia becoming subject to an EU and US sanctions regime significantly reduced the interest of international investors in the Russian market and in Russian assets in general. The government’s plans concerning the role of pension funds as a key liquidity source on the Russian market were significantly revised because of the resulting budgetary difficulties and the consequent changes to the basic elements of the Russian pensions system.

Despite these unfortunate developments, corporate governance remains one of the most important policy issues. Key discussion platforms on the subject (e.g., the OECD Russia Corporate Governance Roundtable) also remain operational, not least because Russian policymakers and companies themselves have realised the importance of good corporate governance, irrespective of the level of interest of foreign investors in the Russian jurisdiction.

The key area of focus for Russian legislators remains balancing the contrasting interests of various internal stakeholders. While the Russian governance system is characterised by highly concentrated ownership, which is usually associated with higher levels of oversight and control over the actions of management, this oversight and control, while indeed exercised by controlling shareholders, was not backed by appropriate legal instruments until recently.

33 Alexander Shevchuk, ‘The main problems of corporate governance in Russia and the possibility of resolving such problems through the application of the Corporate Governance Code and associated regulatory mechanisms’ in ‘OECD Russia Corporate Governance Roundtable: Meeting Documents’ (May 2013), pp. 9–10.

34 The revised draft was introduced in October 2018.
Russian policymakers continue their work on further enhancing management accountability. One of the suggested innovations (which have not yet been approved by the Parliament) relates to the treatment of quasi-treasury shares. While treasury shares owned by a company itself are non-voting and are not counted towards a quorum, there is no similar limitation for shares in the company held by its subsidiaries. Therefore, as has been the case in numerous high-profile shareholders’ conflicts surrounding prominent Russian companies, the control by management of a significant quasi-treasury stake results in an excessive entrenchment of the management.

The concepts of accountability of management and controlling persons remain of even greater importance in the financial services sector. With the general trend for clearing the sector of corrupt and bad-faith participants, suitability criteria for management and its liability for actions detrimental to the clients of financial services firms may be expected to remain one of the key matters of public concern.

Protection of minority shareholders in the process of takeovers is another hot topic. The debate over legislative amendments concerning takeover regimes is still ongoing. One of the key proposed changes to the takeover regime concerns the indirect change of control over public companies. The takeover rules at this stage are triggered only through the change of ownership of a significant stake in the company itself. The change of control over a significant shareholder does not trigger the takeover rules and has on numerous occasions been used to avoid the implementation of the minority protection measures contemplated by the law.

In summary, the government is continuing its work on improving the Russian governance regime with a view to reaching a balance of interests between the various interested parties, despite the unfavourable political and economic circumstances. Hopefully, those efforts will receive an additional boost if and when the international sanctions against Russia are lifted.
Chapter 23

SINGAPORE

Andrew M Lim, Richard Young and Lee Kee Yeng

I OVERVIEW OF GOVERNANCE REGIME

The Singapore corporate governance regulatory framework is contained in certain mandatory rules, comprising mainly of the Companies Act (CA), the Securities and Futures Act (SFA) and, in respect of companies listed on the Singapore Exchange (SGX), the Listing Manual, and best practice recommendations as primarily set out in the form of the Code of Corporate Governance (Code) and the accompanying Practice Guidance issued by the Monetary Authority of Singapore (MAS).

The CA is the principal piece of legislation that applies to all companies (both private and public) incorporated in Singapore and, in some limited instances, to foreign corporations with business operations in Singapore.

Entities listed on the SGX are also subject to continuing obligations in the form of listing rules in the Listing Manual. Such rules include requirements on the manner in which securities are to be offered, regulate transactions with interested persons and prescribe the disclosure obligations of listed issuers. The principal function of these rules is to provide a fair, orderly and transparent market for the trading of securities.

The SFA enforces the disclosure requirements of the Listing Manual by making it an offence for a listed company to intentionally or recklessly fail to meet its disclosure obligations under the Listing Manual. In the case of a negligent failure, a listed company may be subject to civil penalties and liabilities pursuant to the SFA.

In addition, in the case of companies listed on the SGX, the SFA empowers the SGX to apply to the courts for a court order to enforce compliance with the listing rules. The SFA also prescribes the statutory prospectus requirements and the disclosure obligations of directors, chief executive officers (CEOs) and substantial shareholders of a listed company in relation to their interests in securities.

The listings and enforcement framework for listed companies has been further enhanced since 2015 with SGX’s establishment of three independent committees (namely the Listings Advisory Committee, the Listings Disciplinary Committee and the Listings Appeals Committee), and amendments to the Listing Manual to empower the SGX to impose a greater range of sanctions. Under the enhanced enforcement framework, the SGX has the authority to impose sanctions, such as issuing fines to a listed company of an amount not exceeding S$250,000 per contravention (subject to a maximum of S$1 million per

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1 Andrew M Lim, Richard Young and Lee Kee Yeng are partners at Allen & Gledhill.
2 Section 203 of the SFA.
3 Sections 232 and 234 of the SFA.
4 Section 25 of the SFA.

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The Code provides principles and provisions designed to support compliance with the said principles to listed companies and their boards with the aim of encouraging a high standard of corporate governance. Under the latest iteration of the Code’s comply or explain approach, listed companies are expected to comply with the provisions in the Code, and variations from the provisions are acceptable to the extent that companies explicitly state and explain how their practices are consistent with the aim and philosophy of the relevant principle underlying such provision. Under the Listing Manual, a listed company must comply with the principles of the Code. Where a listed company’s practices vary from any provisions of the Code, it must explicitly state, in its annual report, the provision from which it has varied, explain the reason for variation and explain how the practices it has adopted are consistent with the intent of the relevant principle. The MAS has also issued accompanying Practice Guidance that complements the Code by providing guidance on the application of the principles and provisions and setting out best practices for companies. Adoption of the Practice Guidance is voluntary.

The revised 2018 Code applies with effect to annual reports covering financial years commencing from 1 January 2019.

This chapter explores the key features of these rules and regulations from a corporate governance perspective. Financial institutions such as banks, insurers and finance holding companies have their own sets of corporate governance guidelines issued by the MAS, which are not addressed in this chapter.

II CORPORATE LEADERSHIP

i Board structure and practices

Singapore companies have a single-tier board of directors where the role of the board is governed by the constitutional documents of the company and by statute. In particular, Section 157A of the CA provides that the business of a company shall be managed by, or be under the direction or supervision of, the directors; and that the directors may exercise all the powers of a company, except for any power that the CA or the constitution of the company requires the company to exercise at a general meeting of shareholders.

The Practice Guidance provides that the board’s role is to:

a provide entrepreneurial leadership, and set strategic objectives, which should include appropriate focus on value creation, innovation and sustainability;

b ensure that the necessary resources are in place for the company to meet its strategic objectives;

c establish and maintain a sound risk management framework to effectively monitor and manage risks, and to achieve an appropriate balance between risks and company performance;

d constructively challenge management and review its performance;

5 Rule 1417 of the Listing Manual.
instil an ethical corporate culture, and ensure that the company’s values, standards, policies and practices are consistent with that culture; and

ensure transparency and accountability to key stakeholder groups.\(^6\)

The Listing Manual requires a listed company’s board to have at least two non-executive directors who are independent and free of any material business and financial connection with the listed company.\(^7\) In addition, the latest iteration of the Code provides that non-executive directors are to make up a majority of the board,\(^8\) and independent directors should make up at least one-third of the board.\(^9\) Where the chairperson is not an independent director, the independent directors are to make up the majority of the board.\(^10\) The Code defines an independent director as one who is independent in conduct, character and judgement, and has no relationship with the company, its related corporations, its substantial shareholders\(^11\) or its officers that could interfere, or be reasonably perceived to interfere, with the exercise of the director’s independent business judgement in the best interests of the company.\(^12\)

The chairperson and the CEO are to be separate persons to ensure an appropriate balance of power, increased accountability and greater capacity of the board for independent decision-making.\(^13\) The relationship between the chairperson and the CEO of a listed company must be disclosed if they are immediate family members.\(^14\)

The Practice Guidance provides that the chairperson’s overall role is to lead and ensure the effectiveness of the board, which includes\(^15\) promoting a culture of openness and debate at the board; facilitating the effective contribution of all directors; and promoting high standards of corporate governance.

Externally, the chairperson is the face of the board, and should ensure effective communication with shareholders and stakeholders. Within the company, the chairperson should ensure appropriate relations within the board, and between the board and management, in particular between the board and the CEO. In the boardroom, the chairperson’s responsibilities range from setting the board agenda and conducting effective board meetings to ensuring that the culture in the boardroom promotes open interaction and contributions by all.\(^16\)

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\(^6\) Practice Guidance 1.
\(^7\) Rule 210(5)(c) of the Listing Manual.
\(^8\) Provision 2.3 of the Code.
\(^9\) Guideline 2.1 of the 2012 Code. Rule 210(5)(c) of the Listing Manual, which requires independent directors to make up at least one-third of the board will come into effect on 1 January 2022. A longer transition period of three years was provided for changes in the SGX Listing Rules relating to board composition, to provide companies with more time to make board composition changes.
\(^10\) Provision 2.2 of the Code.
\(^11\) The Code defines a substantial shareholder as a shareholder who has an interest or interests in one or more voting shares (excluding treasury shares) in a company and the total votes attached to that share, or those shares, is not less than 5 per cent of the total votes attached to all voting shares (excluding treasury shares) in the company, in line with the definition set out in Section 2 of the SFA.
\(^12\) Provision 2.1 of the Code.
\(^13\) Provision 3.1 of the Code.
\(^14\) Rule 1207(10A) of the Listing Manual.
\(^15\) Practice Guidance 3 of the Code.
\(^16\) Practice Guidance 3 of the Code.
It should be noted that the definition of a director in the CA includes ‘a person in accordance with whose directions or instructions the directors or the majority of the directors of a corporation are accustomed to act’: that is, a shadow director.

**Committees to be established by the board**

The Listing Manual requires that a listed company establish one or more committees as may be necessary to perform the functions of an audit committee, a nominating committee and a remuneration committee, with written terms of reference that clearly set out the authority and duties of the committees. The Code provides that:

\[ a \]

the duties of the audit committee include, among other things:

- reviewing significant financial reporting issues and judgements so as to ensure the integrity of the financial statements of the company and any announcements relating to the company’s financial performance;
- reviewing the adequacy and effectiveness of the company’s internal controls and risk management systems;
- reviewing the assurance from the CEO and the chief financial officer on the financial records and financial statements;
- making recommendations to the board on proposals to the shareholders on the appointment and removal of the external auditors, and the remuneration and terms of engagement of the external auditors; and
- reviewing the adequacy, effectiveness, independence, scope and results of the external audit and the company’s internal audit function.

The importance of the audit committee is emphasised by the inclusion of provisions not just in the Code, but also in the CA and the Listing Manual. For example, Section 201B of the CA stipulates the composition and functions of the audit committee. Rule 704(8) of the Listing Manual provides that in the event of any retirement or resignation that renders the audit committee unable to meet the minimum number (not less than three), the listed company should endeavour to fill the vacancy within two months, but in any case not later than three months. Rule 1207(10C) of the Listing Manual requires the audit committee to comment on whether the listed company’s internal audit function is independent, effective and adequately resourced;

\[ b \]

the role of the nominating committee is to, among other things:

- make recommendations on the reappointment of each director;
- determine annually if a director is independent; and
- recommend for the board’s approval the objective performance criteria and process for the evaluation of the effectiveness of the board as a whole, and of each board committee separately, as well as the contribution by the chairperson and each individual director to the board.

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18 Provision 10.1 of the Code.
19 Provision 4.1 of the Code.
20 Provision 4.4 of the Code.
21 Provision 5.1 of the Code.
The Practice Guidance also provides that the nominating committee should take into account the number of directorships and principal commitments of each director in assessing whether he or she is able to or has been adequately carried out his or her duties, and the role of the remuneration committee is to review and make recommendations to the board on a framework of remuneration for the board and key management personnel, and the specific remuneration packages for each director, the CEO and other key management personnel.

Remuneration

The Code provides that the level and structure of remuneration of the board and key management personnel are to be appropriate and proportionate to the sustained performance and value creation of the company, taking into account the strategic objectives of the company. A significant and appropriate proportion of executive directors' and key management personnel's remuneration is to be structured so as to link rewards to corporate and individual performance. Performance-related remuneration is to be aligned with the interests of shareholders and promote the long-term success of the company. Remuneration is to be appropriate to attract, retain and motivate directors to provide good stewardship of the company and key management personnel to successfully manage the company for the long term.

In addition, every company is to be transparent on its remuneration policies, level and mix of remuneration, the procedure for setting remuneration, and the relationships between remuneration, performance and value creation.

For Singapore-incorporated companies, Section 169 of the CA provides that emoluments for a director in respect of his or her office must be approved by a resolution that is not related to other matters.

ii Directors

Singaporean law does not impose an all-embracing code of conduct on directors. In practice, a company's constitution prescribes the ambit of the directors' powers. The duties and responsibilities of directors of Singapore-incorporated companies arise under common law and the CA, and for directors of listed companies, the SFA, the Listing Manual and the Code.

There are two broad categories of directors' duties under common law and statute. They are the duty of good faith (which encompasses specific obligations arising out of the fiduciary obligations of directors) and the duties of care and skill. These duties are owed to the company alone, and not to individual shareholders or groups of shareholders or other members of the company's group.

In relation to the duty of good faith, Section 157(1) of the CA provides, among other things, that a director shall at all times act honestly in the discharge of the duties of his or her office. Section 157(2) of the CA prohibits, among other things, a director from making...
improper use of his or her position as an officer or agent of the company or any information acquired by virtue of his or her position as an officer or agent of the company to gain, directly or indirectly, an advantage for him or herself or for any other person, or to cause detriment to the company. Section 158 of the CA, however, allows nominee directors to disclose information to their nominating shareholders if authorised by the board of directors by general or specific mandate, provided that such disclosure is not likely to prejudice the company.

In relation to the duties of care and skill, Section 157(1) of the CA also provides that a director must use reasonable diligence in the discharge of the duties of his or her office. Directors have a continuing duty to acquire and maintain a sufficient understanding of the company’s business to enable the proper discharge of their duties. However, Section 157C of the CA allows directors to rely on information and advice prepared or supplied by employees, professionals and experts with respect to matters within their respective areas of competence. This statutory protection only applies if the director acts in good faith, makes proper inquiry where the need for inquiry is indicated by the circumstances and if the director has no knowledge that such reliance is unwarranted.

A director’s breach of duties may result in the following consequences:

a. statutory liabilities: Section 157(3) of the CA provides that a director who breaches his or her statutory duties to act honestly and use reasonable diligence in the discharge of his or her duties, or makes improper use of his or her position as an officer or agent of the company or any information acquired by virtue of his or her position, will attract both civil and criminal liabilities. A director who is in breach of any of these statutory duties shall be liable to the company for any profit made by him or her or for any damage suffered by the company as a result of the breach. If he or she is guilty of an offence, he or she is also liable on conviction to a fine or imprisonment. Further, Section 331 of the SFA provides that where an offence under the SFA is committed by a listed company with the consent or connivance of, or is attributable to any neglect on the part of, a director, the director as well as the listed company will be guilty of the offence and liable to be proceeded against;

b. liabilities under common law: breaches of common law duties also enable the company to take action against a director and sue for its loss;

c. disqualification and debarment: in certain circumstances, a director may also be disqualified either automatically, or by a disqualification order made by the court against him or her, or be the subject of a debarment order. Such a director will be prohibited from taking part in the management of companies, whether directly or indirectly, during the period of the disqualification or disqualification order; and

d. sanctions under the Listing Manual: under the Listing Manual, a director is required to immediately resign from the board of directors of a listed company if he or she is disqualified from acting as a director in any jurisdiction for reasons other than on technical grounds. Further, where the SGX-ST is of the opinion that a director or executive officer of a listed company has wilfully contravened any relevant laws, rules and regulations, or refused to extend cooperation to the SGX-ST or other regulatory agencies on regulatory matters, the SGX-ST may take action, including objecting to his or her appointment as an individual director or executive officer in any issuer for a period not exceeding three years. The SGX-ST may refer any contravention of the listing rules to the Disciplinary Committee and also refer possible breaches of directors’ duties to other relevant authorities.
A listed company’s shareholders need to be satisfied regarding the independence and integrity of its directors. The CA and the SFA lay down the statutory framework governing directors’ dealings with the company and securities of the company and its related corporations, and require that certain personal interests be disclosed and approved.

Under the SFA, the interests and any changes in interests of a director or any of his or her family members in securities of a listed company or any of its related corporations must be promptly disclosed to the listed company within two business days.28

As fiduciaries, directors must not allow themselves to get into a position where there is a conflict between what they ought to do for the company and what they might do for themselves. An area in which conflicts of interest often arise is the entering into of transactions between the company and a director. Under the CA, a director who is in any way, whether directly or indirectly, interested in a transaction or proposed transaction with the company must, as soon as he or she is aware of the relevant facts, either declare the nature of his or her interest at a board of directors’ meeting, or send a written notice to the company containing details on the nature, character and extent of his or her interest in the transaction or proposed transaction with the company. However, this disclosure requirement is not applicable if the interest of the director consists only of being a member or creditor of a company that is interested in a transaction or proposed transaction with the first-mentioned company, if the interest of the director may properly be regarded as not being a material interest.29

In addition to the above, subject to limited exemptions, the Listing Manual considers transactions between a listed company and any of its directors (and their respective associates) to be interested person transactions and, therefore, subject to the enhanced disclosure and approval requirements for such transactions.

III DISCLOSURE

The Listing Manual imposes a continuing obligation on a listed company to announce material information and period reports. In particular, a listed company must announce any information known to it concerning it or any of its subsidiaries or associated companies that is necessary to avoid the establishment of a false market in the company’s securities or would be likely to materially affect the price or value of its securities. The requirement does not apply to information that is confidential as a matter of law or where such particular information meets all of the following criteria:

- a reasonable person would not expect the information to be disclosed;
- the information is confidential; and
- the information:
  - concerns an incomplete proposal or negotiation;
  - comprises matters of supposition or is insufficiently definite to warrant disclosure;
  - is generated for the internal management purposes of the entity; or
  - is a trade secret.

A listed company must also observe the corporate disclosure policy set out in Appendix 7.1 of the Listing Manual, which prohibits a listed company from selective disclosure of information to certain parties without a legitimate corporate objective and also provides,

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28 Section 133 of the SFA.
29 Section 156 of the CA.
among other things, illustrations of events that are likely to require immediate disclosure, stipulations on the clarification or confirmation of rumours or reports, and the content and preparation of public announcements.

Material information must be disclosed when it arises, even if during trading hours. The SGX will expect the issuer to request a trading halt to facilitate the dissemination of the material information during trading hours. As a guide, a trading halt requested for dissemination of material information will last at least half an hour after the release of the material information, or such other period as the exchange considers appropriate.

Listed companies must also announce their financial statements semi-annually or quarterly, depending on their market capitalisation. In the case of interim financial statements (quarterly or half yearly, as the case may be, but excluding full year financial statements), a listed company’s directors must provide a confirmation that, to the best of their knowledge, nothing has come to the attention of the board of directors that may render the interim financial statements false or misleading in any material aspect.30

Apart from the general obligation on material information and the periodic reporting requirements above, the Listing Manual also imposes a higher threshold of disclosure for transactions between the listed company and its interested persons, and material transactions exceeding a specified threshold.

An interested person, in relation to a listed company, means a director, CEO or controlling shareholder, or an associate of any such director, CEO or controlling shareholder. 31

An immediate announcement is required for any interested person transaction (IPT) of a value equal to or more than 3 per cent of the listed company’s latest audited consolidated net tangible assets (NTAs). If the aggregate value of all transactions (excluding transactions below S$100,000) entered into with the same interested person during the same financial year amounts to 3 per cent or more of the listed company’s latest audited consolidated NTAs, the listed company must make an immediate announcement of the latest transaction and all future transactions entered into with that same interested person during that financial year.32

Shareholders’ approval is required for any IPT of a value equal to or more than 5 per cent of the group’s latest audited consolidated NTAs, or 5 per cent of its latest audited consolidated NTAs, when aggregated with other transactions entered into with the same interested person during the same financial year (excluding transactions below S$100,000).33

Chapter 10 of the Listing Manual regulates acquisitions and realisations by a listed company or its subsidiary (which is not listed on the SGX-ST or an approved exchange). Transactions that fall within the purview of Chapter 10 include an option to acquire or dispose of assets, but exclude an acquisition or disposal that is in the ordinary course of its business or of a revenue nature. Transactions are categorised as non-disclosable transactions, disclosable transactions, major transactions, and very substantial acquisitions or reverse takeovers, depending on the relative figures as computed on the bases set out in Rule 1006 (which formulates bases to assess the size of the transaction based on factors such as the net asset value, net profits and consideration for the transaction). The announcement and shareholder approval requirements depend on the relative size of the transaction as regards the listed issuer. Disclosable transactions have to be immediately announced, and the

31 Rule 904(4) of the Listing Manual.
announced must contain the specific information prescribed under Chapter 10. Major transactions and very substantial acquisitions or reverse takeovers must, in addition to an immediate announcement, be made subject to shareholder approval.

IV CORPORATE RESPONSIBILITY

i Whistle-blowing
The Code provides that the audit committee is to review the policy and arrangements for concerns about possible improprieties in financial reporting or other matters to be safely raised, independently investigated and appropriately followed up on. Companies are to publicly disclose, and clearly communicate to employees, the existence of a whistle-blowing policy and procedures for raising such concerns.34

ii Sustainability reporting
The Listing Manual also requires listed companies to produce annual sustainability reports on a comply or explain basis.

Issuers have to publish a sustainability report at least once a year, and the sustainability report should describe the sustainability practices with reference to five primary components: material environmental, social and governance factors; policies, practices and performance; targets; sustainability reporting framework; and the board statement. Where the issuer cannot report on any primary component, it must state so, and explain what it does instead and the reasons for doing so.

Under the practice note issued by the SGX, the SGX does not advocate a particular sustainability reporting framework, but issuers are advised to carefully select an appropriate framework for their business model and industry. External assurance by independent professional bodies is not mandatory; however, issuers that have been reporting for several years may find it useful to undertake external assurance, which may increase stakeholder confidence in the accuracy and completeness of the sustainability information disclosed.

V SHAREHOLDERS

i Shareholder rights and powers
As mentioned earlier, Section 157A of the CA provides that the business of a company shall be managed by or under the direction of the directors. Nonetheless, there are certain matters that require shareholder approval. Under the CA, these include:

- an alteration of or addition to the constitution of a company, subject to any entrenching provision in the constitution;
- the disposal of the whole or substantially the whole of a company’s undertaking or property;
- the issue of shares by directors;
- the provision or improvement of directors’ emoluments; and
- the removal of a company’s auditor at a general meeting.

34 Provision 10.1 of the Code.
The following matters as prescribed under the Listing Manual also require shareholder approval:

- the issue of securities to transfer a controlling interest;
- share buy-backs;
- interested person transactions exceeding a certain threshold; and
- major transactions, very substantial acquisitions and reverse takeovers.

### ii Takeover defences

Transactions involving potential takeovers would also be governed by the principles under the Singapore Code on Take-overs and Mergers (Takeover Code), which is issued by the MAS and administered and enforced by the Securities Industry Council. Its primary objective is fair and equal treatment of all shareholders in a takeover or merger situation. When a target company’s board has been notified of a *bona fide* offer, or after the target’s board has reason to believe that a *bona fide* offer is imminent, the board cannot, without shareholders’ approval, take any steps that could effectively result in either the offer being frustrated, or denial of the target shareholders’ opportunity to decide on the merits of the offer. The target company’s board of directors must also obtain competent independent advice when it receives an offer or is approached with a view to an offer being made, and must subsequently inform the shareholders of the substance of this advice.

### iii Contact with shareholders

The Code provides that companies are to have in place an investor relations policy that allows for an ongoing exchange of views so as to actively engage and promote regular, effective and fair communication with shareholders. The company’s investor relations policy is to set out the mechanism through which shareholders may contact the company with questions and through which the company may respond to such questions. The Code provides that companies are to treat all shareholders fairly and equitably in order to enable them to exercise shareholders’ rights and have the opportunity to communicate their views on matters affecting the company. Companies are to give shareholders a balanced and understandable assessment of the company’s performance, position and prospects. Companies are to provide shareholders with the opportunity to participate effectively in and vote at general meetings of shareholders and inform them of the rules governing general meetings of shareholders. The Code also provides that companies are to communicate regularly with shareholders and facilitate the participation of shareholders during general meetings and other dialogues to allow shareholders to communicate their views on various matters affecting the company.

All directors are to attend general meetings of shareholders. Under the CA, shareholders have a right to inspect certain company documents. For instance, shareholders have a right to inspect or obtain from the Registrar of Companies copies of the registers of directors, CEOs, secretaries and auditors. Shareholders also have

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35 Rule 5 of the Takeover Code.
36 Rule 7.1 of the Takeover Code.
37 Principle 11 of the Code.
38 Provision 11.1 of the Code.
40 Provision 11.3 of the Code.
41 Section 12 of the CA.
a right to be furnished with minutes of all proceedings of general meetings, and copies of financial statements. In cases where a shareholder has appointed a nominee to the board, the nominee director may also disclose company information to the shareholder provided that the disclosure is not likely to prejudice the company and is made with the authorisation of the board.

iv Shareholder activism
There are statutory remedies that allow minority shareholders seeking redress for a wrong committed against a company to commence action or arbitration in the name of the company pursuant to a derivative action, or for remedies on the grounds of minority oppression.

Members are also given the right to requisition or call for a general meeting, subject to minimum shareholding requirements. In addition, members representing not less than 5 per cent of the total voting rights may make a requisition for a resolution to be proposed at an AGM.

VI OUTLOOK
i Proposed amendments to the Listing Manual to enhance disclosure obligations
The SGX had proposed amendments to Listing Manual aimed at recalibrating issuers’ disclosure requirements. In a consultation paper released on 7 December 2017, the SGX sought feedback on proposed amendments, including:

a removing the S$100,000 de minimis threshold for IPTs;
b requiring issuers to disclose the nature of the relationship of the issuer with interested persons in its annual report; and
c requiring shareholders to be notified of transactions relating to the provision of financial assistance by the issuer and, if required by the Listing Manual, have the opportunity to vote on the proposed financial assistance.

The SGX is in the process of reviewing the responses it has received.

ii Proposed amendments to the voluntary delisting regime
In November 2018, the SGX issued a consultation paper proposing amendments to the voluntary delisting regime to enhance the protection for minority shareholders. Under the current regime, an SGX listed company can opt to be voluntarily delisted if:

a the company passes a shareholder resolution that is approved by at least 75 per cent of the issued shares present and voting at the meeting in favour of the same, and not more than 10 per cent of the issued shares present and voting at the meeting object to the resolution; and

42 Sections 189 and 203 of the CA.
43 Section 158 of the CA.
44 Sections 176 and 177 of the CA.
45 Section 183 of the CA.
b an exit alternative that is reasonable and normally in cash is presented to shareholders. All shareholders are entitled to vote on the resolution.\textsuperscript{47}

Under the proposed amendments, the SGX sought feedback on the proposed amendments, including:

a amending the approval threshold for the delisting resolution such that it must be approved by a majority of independent shareholders present and voting on the resolution, and persons who are the offeror or its concert party shall not be permitted to vote on the resolution; and

b amending the requirement for an exit alternative such that it must be both fair and reasonable.

The SGX is currently reviewing the feedback it has received.

\textsuperscript{47} Rule 1309 of the Listing Manual.
I OVERVIEW OF GOVERNANCE REGIME

Corporate governance in Swedish companies whose shares are admitted to trading on a regulated market (listed companies) is regulated by a combination of written rules and generally accepted practices. The framework includes the Swedish Companies Act and the Swedish Annual Accounts Act, supported by the Swedish Corporate Governance Code (Code) and the rules of the regulated markets on which shares are admitted to trading, as well as recommendations and statements from the Swedish Financial Reporting Board and statements by the Swedish Securities Council on what constitutes good practice in the Swedish securities market.

Enforcement of regulations applicable to listed companies – the Swedish Stock Exchange’s Issuer Rules, the Code (under the comply or explain regime), and statements from the Swedish Financial Reporting Board and the Swedish Securities Council – may be carried out by the Stock Exchange through disciplinary procedures. In addition, the law may be enforced through actions in local courts.

Ownership structure on the Swedish stock market differs significantly from the structure in countries such as the United Kingdom and the United States. While the majority of listed companies in those countries have a very diverse ownership structure, ownership in Sweden is often concentrated to a single or small numbers of major shareholders, as is the case in many other continental European countries. In around half of the listed companies, these shareholders strengthen their positions further through holdings of shares with greater voting rights. They often play an active ownership role and take particular responsibility for the company, for example by sitting on the board of directors. A particular characteristic of Swedish corporate governance is the engagement of shareholders in the nomination process for boards of directors and auditors, which they exercise through their participation in companies’ nomination committees. Nomination committees are not regulated by the Companies Act, but by the Code. A Swedish nomination committee is not a sub-committee of the board, but a body of the general meeting of shareholders made up of members who are appointed by the company’s owners.

Swedish society takes a positive view of major shareholders taking particular responsibility for companies by using seats on boards of directors to actively influence governance. At the same time, major holdings in companies must not be misused to the
detriment of the company or the other shareholders. The Companies Act therefore contains a number of provisions that offer protection to minority shareholders, such as requiring qualified majorities for a range of decisions at general meetings of shareholders.

International institutional investors have requested individual voting on boards of directors, even though such a procedure is normally superfluous and time-consuming in a Swedish setting with the Swedish nomination committee system.

II CORPORATE LEADERSHIP

i Board structure and practices

Structure

A Swedish limited liability company is organised as a unitary structure in line with the Anglo-Saxon one-tier model. The general meeting of shareholders, acting as the company’s supreme decision-making body, inter alia elects a board that appoints a managing director. The general meeting, the board and the managing director together with the auditors comprise the four corporate bodies recognised by the Companies Act and the first three are, in descending order, subordinated in relation to each other. The auditors, whose main responsibility is to keep the accounts in order, are, however, independent in relation to the others. Thus, under the Swedish corporate governance structure, there is no two-tier model with a supervisory board overseeing the administration of the company as traditionally can be found in continental Europe.

Composition of the board

In general, the board in Swedish listed companies includes five to 10 members and primarily consists of non-executive directors. According to the Code, a majority of the directors of the board elected by the general meeting must be independent from the company and its executive management. A minimum of two of these directors must also be independent from the company’s major shareholders. In addition to this, the Code stipulates that no more than one board member elected by the general meeting may be part of the executive management of the company or of a subsidiary to the company. Thus, boards of listed companies normally consist of non-executive directors only. The managing director of the company may not be the chair of the board, but may however be a board member.

Recurrently, the low percentage of female board members has come under review, and within the public debate there are those who argue that legislation is required to balance the gender ratio between female and male board directors. Under the Code, the board shall have a composition appropriate to the company’s operations, its phase of development and other relevant circumstances. The board members elected by the general meeting shall collectively exhibit diversity and breadth of qualifications, experience and background. Moreover, the company must also strive for gender balance on the board.

In 2006, the Ministry of Justice introduced a proposal for a provision, under which at least 40 per cent of boards of listed companies would be required to comprise female directors, and in 2015, the Minister stated that the parliament may be required to amend the law to reach the goal of more gender-balanced boards. It was further stated by the secretary that a bill would be presented to the parliament within a year in the event that companies did not have female representation of at least 40 per cent before that point in time, and in 2016, the government presented a legislative proposal to this effect. However, the proposal
did not have sufficient support in parliament, and no new proposal has been put forward since. Thus, at this time, there is no legal requirement as regards female representation on boards of directors.

**Representation**

In general, under the Companies Act, the right to represent and sign on behalf of the company in all matters is vested in the board as a whole. If a managing director has been appointed, he or she has the right to sign on behalf of the company as regards the day-to-day operations. In addition to this, the board may authorise a board member, the managing director or any other person to represent the company by way of special company signature. The managing director or the chair, each alone, as well as two board members or another special signatory, are typically entitled to represent and sign on behalf of the company.

**Legal responsibilities of the board and the chair of the board**

According to the Companies Act, the principal duties of the board comprise the responsibility for the organisation of the company and the management of the company’s affairs. Furthermore, the board is also to ensure that the company’s organisation is structured in such a manner that accounting, management of funds and the company’s finances in general are monitored in a satisfactory manner. In addition to this, board members as well as the managing director have an overall duty in all matters to act in accordance with the interests of the company. The chair of the board has no specific duties or powers other than a responsibility for convening the board and leading the work of the board.

Another key task of the board is to appoint and dismiss the managing director. Whereas the board is responsible for the overall management of the company’s affairs, the managing director shall attend to the management of the day-to-day operations pursuant to guidelines and instructions issued by the board.

Thus, boards in Swedish companies have an extensive decision-making authority, but also their limitations, primarily by way of the legal provisions giving the general meeting exclusive powers as regards specific matters (e.g., share issues, amendments to the articles of association, and the election of board members and auditors).

**Remuneration of directors and compensation from shareholders**

The board remuneration is resolved upon by the annual general meeting, and the board decides the remuneration for the executive management. All share and share price-related incentive schemes for the executive management shall, however, be resolved upon by the general meeting. According to the Code, the remuneration and other terms of employment are to be designed with the aim of ensuring that the company has access to the competencies required at a cost appropriate to the company, and that they have the intended effects for the company’s operation.

The basic rule is that directors receive their remuneration from the company concerned. There are, however, no rules directly prohibiting a director from also accepting compensation from a shareholder who has nominated him or her. In practice, the director may, for example, be employed by the nominating shareholder. In some cases, a director being employed by the nominating shareholder waives his or her remuneration from the company. Such arrangements should be factored in when determining whether the rules regarding disqualification of a
director to decide on specific matters involving such a nominating shareholder are applicable. If a board member receives compensation from a shareholder, he or she is not deemed independent from that shareholder.

ii Directors

Legal duties

Board members have a fiduciary duty to act in good faith and in the best interests of the company, which entails a duty to act in the interest of all shareholders. For that reason, the board may for instance not consider an activist proposal under any different standard of care compared to other board decisions, and individual shareholders may not be given an unfair advantage compared to the other shareholders in the company. However, the board may cooperate with an activist as long as the board does not breach the duty of equal treatment of all shareholders.

Provided that it is not in conflict with the Companies Act or the applicable articles of association, the board is also obliged to follow any specific instruction decided upon by the general meeting.

Liability of directors

According to the Companies Act, a board member as well as a managing director may be liable for damages to the company, the shareholders or third parties (e.g., creditors). If, in the performance of his or her duties, he or she intentionally or negligently causes damage to the company, he or she shall compensate the damage. Liability towards a shareholder or a third party may, however, only arise when damage is caused as a consequence of a violation of the Companies Act, which includes provisions on fiduciary duties, the applicable annual reports legislation and the articles of association. The board may delegate specific tasks to individual members or other employees, but is not able to avoid liability for the company’s organisation or the duty to ensure satisfactory control of the finances of the company.

Further, members of the board and the managing director may also be held liable under general principles on tort and, if applicable, the Swedish Tort Liability Act. As for the board, there is no collective liability per se, and an in casu judgement must be made as regards each claim and each director. Moreover, a Swedish company is not itself capable of committing a crime, which implies that it is the natural person who commits the crime who ultimately will be held responsible.

Appointment, nomination and term of office

Under the Companies Act, the board is elected by the general meeting. In listed companies, director nomination is done by the nomination committee, which in Sweden is not a board committee, but rather a committee set up by the general meeting that includes the largest shareholders. The Code stipulates that a company shall have a nomination committee that, inter alia, shall nominate candidates to the board. The general meeting elects the members of the nomination committee, and thus large shareholders generally have great influence over the composition of the committee. However, at least one of the members shall be independent in relation to either the company’s largest shareholder or group of shareholders that cooperate regarding the management of the company.

Any shareholder may, however, nominate directors for election to the board and have the nomination included in the notice to attend the general meeting, as long as the
The primary rules relating to communications made by listed companies concern disclosure duties and equal treatment of shareholders. Transparency and disclosure are key aspects of Swedish corporate governance in listed companies. The EU Market Abuse Regulation (MAR), the Swedish Securities Markets Act and the Stock Exchange’s Rule Book for Issuers (Rule Book) set forth the basis for listed companies’ disclosure obligations. Under MAR, listed companies are obliged to, as soon as possible, publish all information of a precise nature that has not been made public, relating, directly or indirectly, to the issuer’s financial instruments and that, if it were made public, would be likely to have a significant effect on those financial instruments or on the price of related derivative financial instruments (i.e., inside information). Additionally and in accordance with the Securities Markets Act and the Rule Book, listed companies are obliged to disclose information related to financial reports, issues of securities, changes in the board, management and auditors, share-based incentive programmes, closely related party transactions, and business acquisitions and divestitures, irrespective of whether the information constitutes inside information. The purpose of the disclosure obligations is to provide sufficiently comprehensive, relevant, clear and non-misleading information to the market. To promote proper disclosures, listed companies are recommended to prepare a written disclosure policy in which the guidelines and procedures applied in the company’s communications with the capital markets and investors are specified.

As a general rule, inside information shall be disclosed as soon as possible although companies, provided that certain conditions are fulfilled, may delay the disclosure. To be allowed to delay the disclosure of inside information to the public, the following conditions must be met according to MAR: immediate disclosure is likely to prejudice the legitimate interests of the company, the delay of disclosure is not likely to mislead the public and the company is able to ensure the confidentiality of that information. When this information is subsequently publicly disclosed, the company must submit a written explanation to the Swedish Financial Supervisory Authority (SFSA) specifying that the disclosed information was delayed and explain how the aforementioned conditions were met.

Generally, selective disclosure of inside information constitutes a violation of MAR, which will result in sanctions for the company. Such disclosure may also constitute a criminal
offence for the person making the disclosure under MAR and the EU Market Abuse Directive, which has been implemented in Sweden through the Act on Penalties for Market Abuse on the Securities Market. However, in certain special situations – for example, ahead of a rights issue where a company wants to secure commitments from its largest shareholders – selective disclosure pursuant to the market-sounding rules of MAR may be permitted. When delaying disclosure, listed companies are under the obligation to maintain insider registers of directors, employees and other persons with access to inside information as well as of other parties and advisers in separate projects that involve inside information.

MAR contains a requirement that all disclosed inside information is made public on the company’s website and stored there for at least five years. The same applies, according to the Rule Book, to all information communicated by the company to the market. There are no other rules governing the media platform to be used as distribution channels; however, social media platforms are rarely used for shareholder activity-related matters. In addition, since the purpose of the disclosure duties is to make sure that the information is disclosed to the market simultaneously on a non-discriminatory basis, in practice, companies must use an information distributor for this purpose.

In accordance with the Annual Accounts Act and the Code, listed companies shall disclose a yearly corporate governance statement in which the company shall present information on its corporate governance functions and state its compliance with the Code. If the company chooses to deviate from a certain provision of the Code, it must state its reasons for doing so (the comply or explain principle). Moreover, a corporate governance report shall include a description on internal controls and risk management regarding the financial reporting, and how the yearly evaluation of the board has been conducted and reported.

Further, all Swedish companies, associations and other legal entities are obliged to register their ultimate beneficial owner or owners with the Swedish Companies Registration Office. There are a few exceptions to this obligation, including governmental bodies and listed companies and their subsidiaries. The ultimate beneficial owner is the natural person or persons who ultimately own or control a legal entity. A natural person is presumed to exercise such control if he or she holds or controls more than 25 per cent of the votes, or holds or controls the right to appoint or remove a majority of the board of directors. Moreover, a legal entity may not have any beneficial owner or may, under certain conditions, be relieved from the obligation to report its beneficial owner due to complex ownership structures as investigation obligations are limited.

Financial reporting and accountability

Listed companies shall prepare annual financial statements and, as a general rule, interim reports for the first three, six and nine months of the financial year. The consolidated financial statements shall be prepared in compliance with IFRS. Companies are entitled to disclose a lighter-form interim management statement instead of an interim report for the first three and nine months of the financial year. According to the amended Transparency Directive,2 published in November 2013, listed companies are no longer obliged to publish quarterly financial information. However, Member States may require greater disclosure on certain conditions, and in Sweden the obligation to publish quarterly information remains. The Stock Exchange has set out guidance for preparing interim management statements.

A company may, however, deviate from the guidance completely or on certain points if it discloses the reporting or statement format that it has chosen instead, and its reasons for doing so, on its website.

Annual financial statements shall be published within four months of the end of the financial year and three weeks before the annual general meeting. Quarterly reports or interim management statements shall be published within two months of the end of the reporting period.

According to the Securities Markets Act and the Rule Book, the SFSA may impose independently of the Stock Exchange a penalty payment for any failure to comply with the ongoing disclosure obligation, the obligation to disclose periodic information, and the obligation to publish and store regulated information. All financial reports shall be made available on the company’s website for a minimum of 10 years.

**Auditors**

Listed companies must appoint at least one authorised auditor or audit firm. Listed companies may not appoint the same main responsible auditor for more than seven consecutive years or the same audit firm for more than 10 consecutive years. Provided that a renewal process in accordance with the EU Audit Regulation\(^3\) takes place, listed non-financial companies may, however, appoint the same audit firm for another 10-year-period (i.e., for a total of 20 years). The company's statutory auditor is appointed by the general meeting to examine the company's annual accounts and accounting practices, and to review the board's and the managing director's management of the company. Auditors of Swedish companies are therefore given their assignment by, and are obliged to report to, the owners, and they must not allow their work to be governed or influenced by the board or the executive management. Auditors present their reports to the owners at the annual general meeting in the annual audit report.

Furthermore, the Companies Act sets out that companies, as a rule, shall establish an audit committee. The audit committee shall, without affecting the responsibilities of the board:

- monitor the financial reporting of the company;
- monitor the efficiency of the company's internal controls, internal auditing and risk management;
- keep abreast of the audit of the annual accounts and consolidated accounts;
- review and monitor the impartiality and independence of the auditor; and
- pay close attention if the auditor provides the company with services besides audit services, and assist in the preparation of proposals for the decision of the general meeting on the election of auditors.

**IV CORPORATE RESPONSIBILITY**

**i Framework and recent development**

Under the Code, which outlines the main responsibilities of the board in relation to internal control and risk management, one of the principal tasks of the board is to ensure that there is an appropriate system for follow-up and control of the company's operation and the risks

\(^3\) Regulation (EU) No. 537/2014 of 16 April 2014.
to the company that are associated with its operations. The Code further stipulates that the board is also to ensure that there is a satisfactory process for monitoring the company’s compliance with laws and other regulations relevant to the company’s operations, as well as the application of internal guidelines.

Following numerous corporate scandals in Sweden and abroad in recent years, the media as well as the public and authorities are, to a somewhat increasing extent, scrutinising corporations and their management and directors. In particular, different incentive programmes for senior executives, bonuses, other benefits and so forth, but also questionable risk management, have been subject to increased focus, which has led to public debate. In recent years, there have been a few high-profile criminal proceedings against company officials. Most of them have been brought against the executive management, but there a few example of cases where members of a board of directors also have been charged.

In December 2016, amendments were made to the Annual Accounts Act, as a result of the implementation in Sweden of the EU Directive on non-financial reporting. The amendments entail that certain larger companies, companies that are of public interest and parent companies of large groups shall draw up a sustainability report that shall include information necessary to understand the company’s development, performance and position and the consequences of its business, including information related to the environment, social matters, staff, respect for human rights and work counteracting corruption. These companies must also report on the diversity policy that applies to the composition of the board of directors.

**Recent high-profile cases**

One of the most discussed cases in recent years was the criminal and parallel civil damages procedures involving HQ Bank and its top executive management, as well as its listed parent holding company HQ AB and a number of its board directors. According to the claimant, HQ AB, the boards of both HQ Bank and HQ AB had been aware of a systematic overvaluation of the trading portfolio but neglected to act accordingly. Further, the respondents were said, inter alia, to have neglected their duty to ensure that the bank had appropriate risk management, staffing and organisation measures in place.

At the end of 2016, all criminal charges were dismissed by the court, and in December 2017 the civil suit brought against, inter alia, several of the directors of HQ AB and HQ Bank was tried by the Stockholm District Court. In certain aspects the civil court did find the executive management and certain board directors of HQ Bank in negligent breach of their respective duties. However, the court did not, inter alia due to deficient causality between the shown negligence and alleged damages (in part with reference to the fact that the relevant sufficiently shown breaches primarily encompassed certain actions and omissions in good faith after the key loss-bringing circumstances were already at hand), hold the executive management or the board directors liable for any of the claims pursued by HQ AB (other than for reimbursement of a fine of 480,000 kronor that HQ Bank previously had been obliged to pay to Nasdaq Stockholm). The damages claims amounted in total (including interest) to approximately 5 billion kronor. Following the court rulings, matters relating to the parties’ legal expenses were subject to further litigation and appeals. Although this attracted certain media coverage, these latter matters are not of any particular interest from a legal corporate governance standpoint.
V SHAREHOLDERS

i Shareholder rights and powers
Shareholders exercise their rights and powers by participating in general meetings. Shareholders’ most significant rights include voting rights in general meetings, the right to have a matter dealt with by a general meeting and the right to ask questions at a general meeting.

The annual general meeting convenes once a year, within six months of the end of the financial year. In between the annual general meetings, extraordinary general meetings may be convened either by the board, if deemed necessary, or by shareholders holding at least 10 per cent of the outstanding shares in the company. Under Swedish law, there are no special facilities for long-term shareholders.

Matters to be brought by the general meeting
Any shareholder who wishes to have a matter addressed at a general meeting may submit a written request thereof to the board. The matter must be addressed at the general meeting if the request from the shareholder is received by the board no later than seven weeks prior to the general meeting, or at a later date if the request is submitted in due time for the matter to be included in the notice to attend the general meeting. The proposed matter must concern an issue relevant to the company, which falls within the competence of the general meeting.

There are certain matters that fall under the exclusive competence of the general meeting. The Companies Act and companies’ articles of association regulate this. Matters falling within the competence of the board or the managing director of a company may be decided upon by the general meeting if the shareholders unanimously support the matter and the Companies Act does not prescribe otherwise.

Matters that fall under the exclusive competence of the general meeting include the election of board members and determining their remuneration, the election of the auditor of the company and any amendments to the company’s articles of association, as well as decisions relating to the shares or share capital of the company and certain corporate restructuring matters, such as mergers and demergers. Share repurchases or share issues shall be brought about by the general meeting; however, the general meeting may authorise the board to decide on a repurchase of the company’s own shares or share issue. The authorisation regarding share repurchases must specify the price range for a repurchase and, with regard to a share issue, the maximum number of shares to be issued. Decisions regarding dividend distributions are also reserved for shareholders; however, the dividend distribution may not exceed the proposal made by the board, except where such an obligation exists in accordance with the articles of association or where the distribution was resolved upon at the request of a minority holding at least 10 per cent of the shares in a company. Shareholders holding at least 10 per cent of the shares in a company are always entitled to request the payment of a dividend corresponding to half of the profits of the financial year, although not more than 5 per cent of the equity of the company.

Decision-making at the general meeting
Each shareholder has the right to participate in a general meeting. The articles of association may prescribe that, to participate at a general meeting, a shareholder must notify the company...
thereof not later than the date specified in the notice to attend the general meeting. The main rule is that all shares carry equal rights; however, the articles of association may prescribe otherwise.

Resolutions at a general meeting usually require a simple majority to be passed. There are, however, certain matters that require a qualified majority of both the votes cast and represented at the general meeting. A majority is purported as qualified if it is supported by at least two-thirds of the votes cast and shares represented at the meeting.

Below is an enumeration of certain matters that require a qualified majority vote:

- amendment of the articles of association;
- directed share issue;
- issuing option rights and other special rights entitling to shares;
- acquisition and redemption of own shares;
- directed acquisitions of own shares;
- mergers and demergers; and
- a decision to enter into liquidation or terminate a liquidation procedure.

Sweden does not have a proxy voting system (or similar system). Instead, all voting is done at the general meeting (either by the shareholder in person or by anyone with a written power of attorney).

**Objection to a decision by the general meeting**

In the event that a resolution of a general meeting has not been adopted in due order or otherwise contravenes the Companies Act, the applicable annual reports legislation or the articles of association, a shareholder, the board, a member of the board or the managing director may bring proceedings against a company before a court of general jurisdiction to set aside or amend the resolution. Such proceedings may also be brought by a person whom the board has unduly refused to enter as a shareholder in the share register.

An action to have a general meeting’s resolution declared void must be commenced within three months of the date of the resolution. Where proceedings are not commenced within that period, the right to commence proceedings shall be forfeited. Proceedings may commence at a later time provided that the resolution is such that it cannot be adopted without the unanimous consent of all shareholders, consent to the resolution is required of all or certain shareholders and no such consent has been granted, or notice to attend the general meeting has not been given or significant parts of the provisions governing notice to attend the general meeting have not been complied with.

**Shareholders’ duties and responsibilities**

**Protection of minority rights**

An important protection mechanism for the minority shareholders of a company is the principle of equal treatment. The principle is established in the Companies Act, and is thus applicable to both listed and unlisted companies. The principle entails that shares of the same class have the same rights, unless otherwise specified in the articles of association. A dividend that results in a difference in the payout per share is therefore in conflict with the principle of equal treatment. The same would apply to any other asset transfers that differentiate between shareholders of the same class of shares. In cases where a minority shareholder is unfairly treated in relation to a majority shareholder (e.g., if the company enters into an unfavourable agreement with a majority shareholder), the minority shareholder will not be able to rely on
the principle of equal treatment to invalidate the transaction, because in that situation all shareholders are affected equally. However, in such cases minority shareholders are protected by other provisions of the Companies Act. For example, the Companies Act states that the general meeting may not adopt any resolution that is likely to provide an undue advantage to a shareholder or another person to the disadvantage of the company or another shareholder. The board, or any other representative of the company, is also prohibited from performing any legal acts or other measures that are likely to provide an undue advantage to a shareholder or another person to the disadvantage of the company or any other shareholder. If a minority shareholder manages to show that it has been unfairly treated, the transaction may be invalidated and the minority shareholder may receive damages. The transaction will not be regarded as unfair should the majority shareholder be able to show that the transaction was entered into in the normal course of business.

Some important minority shareholders’ rights include the possibility for owners of not less than 10 per cent of all shares in the company (owned by one shareholder alone or by a number of shareholders in conjunction) to demand in writing that the company’s board convene an extraordinary general meeting to address a specified matter. If the request is correctly made, the board is obliged to convene the meeting and must issue a notice to attend the meeting within two weeks of receipt of the demand. A specified matter is an issue relevant to the company that can be decided upon at the extraordinary general meeting. For that reason, it is not possible for minority shareholders to demand that an extraordinary general meeting is convened just for the opportunity to ask questions of the members of the board or the management. However, a minority that needs to ask questions of the board could initiate its right to appoint an extra auditor or a special examiner and demand that an extraordinary general meeting is held to decide on a matter. During the meeting, the right to ask questions can be utilised as a first step to meet the information requests of the minority. If the board satisfies the minority’s needs in this regard, the need to appoint an extra auditor or special examiner may no longer be necessary.

A minority shareholder may also propose that an extra auditor appointed by the Swedish Companies Registration Office shall participate in the audit of the company together with the company’s ordinary auditors. The proposal shall be submitted to a general meeting at which the election of auditors is to take place or at which a proposal set forth in the notice to attend the general meeting is to be addressed. If the proposal is supported by owners of at least 10 per cent of all shares in the company or at least one-third of the shares represented at the meeting, and a shareholder then submits a request to the Companies Registration Office, the Companies Registration Office shall appoint an extra auditor. As a general rule, it is the person whom the minority has proposed as an extra auditor who shall be appointed.

The extra auditor has the same privileges and obligations as the company’s ordinary auditor and shall participate in the auditing of the company together with the ordinary auditor. Thus, the extra auditor shall examine the company’s annual report and the company’s bookkeeping, as well as the board’s and the managing director’s management of the company. Both the ordinary auditor and the extra auditor shall perform their function independent of the company and its management.

It should be noted that the ordinary auditor, as well as the extra auditor, have a duty of confidentiality and may not, without due authorisation, disclose to an individual shareholder or any third party any information concerning the company’s affairs learned by the auditor in the performance of his or her duties, if the disclosure could damage the company. It is therefore mainly through the disclosure of the auditor’s report and other accounting documents in
close proximity to the annual general meeting that the minority shareholders of the company receive information concerning the company’s financial situation. The auditor report shall be presented to the company’s board no later than three weeks prior to the annual general meeting. In listed companies, accounting documents and the auditor’s report shall then be made available for the shareholders during a period of not less than three weeks immediately prior to the annual general meeting.

Further, a minority shareholder may submit a proposal for an examination through a special examiner. A special examiner’s assignment is to review the company’s management and accounts during a specific period in the past or certain measures or circumstances within the company. A proposal for an examination through a special examiner shall be submitted at an ordinary general meeting or at the general meeting at which the matter is to be addressed. Where the proposal is supported by owners of at least 10 per cent of all shares in the company or at least one-third of the shares represented at the general meeting, the Swedish Companies Registration Office shall, upon request by a shareholder, appoint one or more special examiners. The special examiner shall submit a report regarding his or her examination. The report shall be made available and sent to the shareholders.

Controlling shareholders and institutional investors

In many Swedish listed companies, there is a controlling shareholder (or shareholders) who often has retained control through shares with greater voting power, such as certain family or privately controlled investment companies. Together, Swedish institutional shareholders have large stakes in many listed Swedish companies. In specific cases, they try to team up and then exert great influence.

There are no particular duties for controlling shareholders or institutional investors in Swedish legislation and self-regulation, except for the general obligation to launch a takeover bid when a shareholder’s ownership exceeds a certain level (30 or 50 per cent of the voting rights in the company) and the obligation to redeem the remaining outstanding shares when the shareholding exceeds 90 per cent of all the shares and voting rights in the company.

A shareholder does not owe the same fiduciary duties towards the company as the board, and is not required to act positively in the interest of the company. However, a shareholder should compensate for damage that he or she causes to the company, a shareholder or another person as a consequence of participating intentionally or through gross negligence, in any violation of the Companies Act, the applicable annual reports legislation or the company’s articles of association.

Shareholder activism

Shareholder activism has been fairly moderate in Sweden. However, in the past couple of years shareholder activism has increased in companies that are subject to a takeover offer, wherein the activist is calling for a higher price to be paid by the bidder after an offer is completed. This is done by the bidder taking a stake in the target during the offer period and thereafter taking advantage of the strong minority protection contained in the Companies Act. There is also a growing tendency, especially among institutional investors, to take a more active role. Swedish institutional shareholders play an important role in Swedish listed companies. Together, they have large stakes in many listed Swedish companies. In specific cases, they try to team up and then exert great influence. In their daily activism, they try to exert influence through direct dialogue with the board and by taking part in nomination committees.
Activist shareholders normally gain a position through the acquisition of a corner in a company (in many cases together with foreign activist find). However, we have seen very few activist investors in Swedish companies.

**Say on pay**

The Code stipulates that a company shall have a nomination committee that, inter alia, shall nominate candidates to the board and propose the remuneration payable to the board and committee work. The proposal shall be put forth at the annual general meeting. In addition, the Companies Act require the annual general meeting to resolve on principles for remuneration to management, to which the board must adhere when setting the remuneration for the CEO and other management staff.

**Derivative action**

Derivative actions on behalf of the company may be brought where a minority of owners of not less than 10 per cent of all shares in the company have, at a general meeting, supported a resolution to bring such a claim or, with respect to a member of the board or the managing director, have voted against a resolution regarding discharge from liability. If shareholders holding at least 10 per cent of the shares in the company vote against a resolution regarding discharge of liability, a claim of damages may be brought against the board and the managing director despite the fact that the rest of the shareholders have voted for discharge.

Where the general meeting has adopted a resolution to grant discharge from liability or not to commence an action for damages (without 10 per cent of the shareholders having voted against the resolution), or the period for the commencement of an action has expired, an action may nevertheless be brought where, in the annual report or the auditor’s report or otherwise, from a material aspect correct and complete information was not provided to the general meeting regarding the resolution or the measure on which the proceedings were based.

**iv Takeover defences**

The Swedish corporate governance framework is significantly guided by the principle of equal treatment and a strong requirement on the board to always act in the best interest of the company and its shareholders. The board may not promote shareholders’ initiatives that conflict with these rules and principles. For that reason, unless the general meeting of shareholders has resolved upon it, target boards are prevented from taking defensive measures, and, thus, the Swedish takeover rules are rather takeover-friendly in that sense. The board may however at all times seek alternative bids (i.e., white knights).

Staggered boards do not exist (each board member is elected annually, and there is no way of preventing a new owner from making an immediate board replacement). Poison pills and stitching, etcetera, are not allowed under Swedish law.

**v Contact with shareholders**

As set out in Section III, Swedish companies have a duty to disclose all inside information as soon as possible. Shareholders also receive information on all matters proposed to be decided upon by the general meeting. The notice to a general meeting shall be published and made available to the shareholders no later than three or four weeks (depending on the type of general meeting) prior to the general meeting and shall include information on the decisions.
proposed to be taken. Shareholders also have the right to ask questions at the general meeting, and in practice often do so in connection with the managing director’s presentation of the results of the company.

The company may generally contact individual shareholders as long as the contact is in the interests of the company and in accordance with the principle of the equal treatment of all shareholders (i.e., the contact may not be aimed at giving one shareholder undue benefit at the expense of other shareholders or the company). Certain situations where the company engages in discussions with a major shareholder can be in the interests of all shareholders; these may include, for example, planned share issues or other corporate restructurings. In such instances, the rules regarding market soundings in the MAR are applicable, and the company would have to have met all the conditions stipulated in the MAR (e.g., confidentiality arrangements would have to be duly put in place, and the shareholder in question would be prevented from trading in the securities of the company upon receiving inside information). However, it is generally considered acceptable to share information that does not constitute inside information with a certain shareholder.

Large shareholders acting together will have to observe the rules relating to acting in concert, which may trigger an obligation to launch a mandatory takeover bid if the joint holding of shareholders acting in concert were to exceed 30 per cent of the votes.

VI OUTLOOK

The updated Shareholders Rights Directive will necessitate changes to legislation and the Code, but these changes will probably not have any major impact on the Swedish corporate governance system as a whole. Among other things, the implementation of the Directive will restrict listed companies’ flexibility in relation to remuneration to the executive management and lead to stricter transparency requirements in this regard.
I OVERVIEW OF GOVERNANCE REGIME

The statutory corporate law set out in the Swiss Code of Obligations (CO) is the main source of Swiss corporate governance regulation. The CO applies to private and public companies. As regards corporate governance, the provisions of the CO focus on transparency, shareholder rights and the principle of parity between the company’s corporate bodies. The current governance rules of the CO are rather liberal and provide companies with considerable flexibility as regards the setup of their governance structure. Note that a pending revision of the CO will increase governance regulation, mainly by increasing shareholder rights. In this context, the Swiss Ordinance against Excessive Compensation in Listed Companies (OaEC), which came into force in 2014, will be incorporated into the CO. The OaEC introduced restrictions on several remuneration practices and gives shareholders a binding say on pay as well as the right to elect the chair of the board of directors, the members of the compensation committee and the independent proxy. The stock market law incorporated in the Swiss Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (FMIA) and its accompanying ordinances also contain governance rules, in particular the shareholders’ duty to disclose significant participations as well as general rules on public takeovers.

The SIX Swiss Exchange (SIX) issued the Listing Rules (SIX-LR) and various implementing directives and circulars. These regulations set the ground for good governance with binding rules on periodic financial reporting and, in particular, ad hoc disclosure rules applicable to all SIX-listed companies. The SIX-LR are complemented by the Directive on Information in relation to Corporate Governance (SIX-DCG) and the Directive on the Disclosure of Management Transactions (SIX-DMT). The SIX-DCG requires listed companies to include a chapter on corporate governance in their annual report. The SIX Exchange Regulation, the independent regulatory body within the SIX organisation, issues

1 Hans-Jakob Diem and Tino Gaberthüel are partners at Lenz & Staehelin in Zurich, Switzerland. The authors would like to thank Rebecca Schmid for her contribution to this chapter.
2 See Section VI.
3 SIX Swiss Exchange is the main stock exchange in Switzerland.
focus review letters indicating the topics on which SIX’s assessment will focus in the relevant reporting period. The SIX-DMT requires companies to disclose transactions in its shares and related instruments by members of the board of directors or the management board. SIX is empowered to enforce its regulation through the SIX Exchange Regulation and the Sanctions Commission, which investigate violations and may impose sanctions. Their decisions and sanctions can be appealed to the independent Appeals Panel and, ultimately, to the SIX Arbitration Court.

Further, economiesuisse issued the Swiss Code of Best Practice for Corporate Governance (Code) primarily for public corporations. The Code contains non-binding recommendations and guidelines with a special focus on the rights and duties of shareholders and the board of directors. The core objectives are ensuring transparency as well as checks and balances between management and control by the means of comply or explain.

Independent proxy advisers (such as Ethos and zRating) regularly issue voting guidelines and corporate governance principles on which they base their proxy voting services and recommendations. Corporate governance is a key focus area of those regulations. Despite such regulations being non-binding, they have a significant influence on shareholders’ voting and public perception.

Besides the regulation applicable to listed companies in general, there are specific rules on corporate governance applicable to banks, investment companies and insurance companies. The circulars on corporate governance, risk management and internal controls at banks and insurance companies, respectively, and the circular on remuneration schemes of financial institutions issued by the Swiss Financial Market Supervisory Authority, are most relevant in this context.

II CORPORATE LEADERSHIP

i Board structure and practices

Swiss companies limited by shares are governed by the general meeting of shareholders and the board of directors. The board of directors and the shareholders’ meeting each have their respective duties and competences. This reflects the principle of parity. On a day-to-day basis, the board of directors represents the company in relation to third parties and conducts the business within the limits of the corporate purpose. The board of directors is thus the company’s responsible executive body that may represent the company and manage any matter not reserved to the shareholders’ meeting by law or the articles of incorporation. However, Swiss company law allows flexible, individual governance structures. In reality, the management of the day-to-day business (except for the non-transferable and inalienable duties of the board) is regularly delegated. In listed companies, the management is usually delegated to the chief executive officer (CEO) or an executive board, resulting in a two-tier structure. Such two-tier structure is mandatory for banks and security dealers.

Any matters that have not been allocated to the shareholders’ meeting by law or the articles of incorporation are the responsibility of the board of directors. Except for

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8 economiesuisse is the largest umbrella organisation representing the Swiss economy.
the non-transferable duties, the board of directors may delegate its responsibilities to individual members of the board of directors or to third parties (the executive board). The non-transferable responsibilities of the board are:

\[\begin{align*}
& a \quad \text{the overall management of the company and the issuing of all necessary directives;} \\
& b \quad \text{the determination of the company’s organisation;} \\
& c \quad \text{the organisation of the accounting, financial control and financial planning systems as required for the management of the company;} \\
& d \quad \text{the appointment and dismissal of persons entrusted with managing and representing the company;} \\
& e \quad \text{the overall supervision of the persons entrusted with managing the company, in particular with regard to compliance with the law, articles of association, operational regulations and directives;} \\
& f \quad \text{compilation of the annual report, preparation for the general meetings and the implementation of its resolutions;} \\
& g \quad \text{the notification of the court in the event that the company is over-indebted;} \text{ and} \\
& h \quad \text{for listed companies, the preparation of the compensation report as requested by the OaEC.}
\end{align*}\]

The board of directors may establish special committees. The Code recommends the establishment of an audit committee and a compensation and nomination committee. The audit committee’s members should have specific expertise in the area of finance and audit. Moreover, the OaEC requires listed companies to establish a compensation committee whose members must also be members of the board of directors and who are elected by the general meeting of shareholders. The articles of incorporation must set out the basic rules of the activities of the compensation committee. Further, the audit as well as the nomination and compensation committee should mainly be composed of independent, non-executive members. While the board of directors is ultimately responsible for the succession of the CEO as well as its members, the nomination committee establishes principles for and prepares the succession process.

The main rules regarding the remuneration of the board of directors and the management board of listed companies are set out in the OaEC (and will be transferred into the CO once the pending revision will have been completed and approved by the legislator. For more information on the status of this revision, see Section VI). The shareholders’ meeting has a binding vote on the remuneration of the board of directors and the executive board. The basis for this is the compensation report, which must be prepared by the board of directors and which is subject to a consultative vote by the general meeting of shareholders. Moreover, pursuant to the OaEC, certain forms of remuneration are prohibited, such as severance and similar payments (golden parachutes), advance compensation payments, and payments linked to the purchase or sale of companies.

**ii Directors**

The board of directors may consist of one or several members. If a company has issued different share classes, each share class may elect at least one representative to the board of directors. In practice, the board of directors consists of several members. The Code recommends that

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10 Article 733 Draft CO.
the composition of the board be diverse as regards expertise and gender. The revised draft CO provides for a gender quota for listed companies exceeding certain thresholds.\textsuperscript{11} In contrast to other jurisdictions, the Swiss approach is rather soft. It is envisaged that each gender shall make up at least 30 per cent in the board of directors and at least 20 per cent in the executive board.\textsuperscript{12} If the quotas are not met, the report on compensation must specify the reasons for missing the quotas as well as the planned measures to reach the quotas in the future. It is contemplated that companies will have five years to establish the quota in the board of directors and 10 years to do so in the executive board.\textsuperscript{13}

Further, the Code stresses the importance of having a majority of independent, non-executive members in the board of directors. All board members have the same rights and duties. To ensure efficiency, the Code recommends that the board of directors shall not be too big. Pursuant to the revised draft CO, the appointment of a secretary by the board of directors will no longer be required.\textsuperscript{14} Pursuant to the CO, the term of office is generally three years unless the articles of incorporation state differently. However, for listed companies, the OaEC limits the term to one year. Re-election is possible. The members of the board of directors are elected by the shareholders’ meeting. In listed companies, the chair must also be elected by the shareholders’ meeting. In addition, the OaEC requires that the company’s articles of incorporation limit the maximum number of activities that a member of the board of directors, the executive board or an advisory board may carry out in other legal entities or other organisations registered in the Commercial Register (or a similar register abroad).

Any member of the board of directors may request information on all matters relating to the company. Any member of the board of directors and the executive board is required to provide information during a board meeting. Outside of board meetings, members of the board of directors may ask members of the executive board about the general business performance and, upon special request, about individual transactions. Inspection of files and records is only possible as far as it is necessary for a member of the board of directors to fulfil his or her duties.

Under the CO, unless the articles of incorporation state otherwise, each member of the board of directors can represent the corporation towards third parties. In practice, signing authority is regularly limited to joint signing authority. Moreover, at least one representative with individual signing power or two representatives with joint signing power must reside in Switzerland.

In the case of a two-tier structure, the relationship between the board of directors and the management board must be governed in the organisational regulations. The Code recommends having a two-tier structure with a majority of non-executive board members, and a separation of the functions of chair and CEO. If the company decides that the same

\textsuperscript{11} Article 734f Draft CO; the vote on the introduction of a gender quota was won with 95 to 94 votes in the 2018 summer session of the National Council.

\textsuperscript{12} A minority of the National Council was in favour of a higher quota, i.e. a representation of each gender of at least 40 per cent in the board of directors and at least 30 per cent in the executive board.

\textsuperscript{13} The commission of the National Council deviated from the draft bill of the Federal Council and intended to abolish Article 734f 10 years after the entering in force of the new legislation. The National Council, however, rejected such proposal with 97 to 94 votes.

\textsuperscript{14} This is, in essence, because the function of the secretary was rarely used in practice and could, therefore, be dispensed of in the view of the Federal Council (Dispatch of the Federal Council on the partial revision of the CO, BBl 2017 399, 567). The National Council did not deviate from this proposed amendment.
person shall act as chair and CEO, the board of directors should establish certain control mechanisms to ensure appropriate checks and balances. For instance, an independent lead director who can independently convene and lead a board meeting should be appointed.

The board of directors must act in the best interest of the company as mandated by the duty of care and loyalty. Shareholders must be treated equally in like circumstances. According to the general view, the company’s interest encompasses the interests of the shareholders as well as the other stakeholders, with the sustainable growth of the company being the underlying principle and goal. There are no (strict) rules as to how the board should weigh the interests of the different stakeholders against each other: ultimately, this weighing and other business decisions are a matter for the board’s own diligent judgement. In various decisions of the Federal Supreme Court, the applicability of the business judgement rule has been confirmed. The prerequisites for the applicability of the business judgement rule are a diligent review or assessment process that is based on adequate information and documents and that is free of conflicts of interest. If these prerequisites are met, the Court will only assess whether the board’s decision was justifiable. If any of the prerequisites are not met, the Court will conduct a full assessment. However, a board decision based on a conflict of interest is not per se a violation of the board’s duty of care.

Under Swiss corporate law, a conflict of interest is deemed to exist if a board member has individual interests that are opposed to the interests of the company or, more frequently, if he or she has a duty (based on law, contract or otherwise) to pursue third-party interests that are opposed to the company’s interests. If a board member suffers from a potential conflict, he or she has an obligation to disclose such information to the chair or the entire board. It is then up to the board, without the potentially conflicted member, to assess the situation and resolve upon and implement appropriate measures as required to ensure that the conflict does not negatively affect the company. Such measures include an abstention of the conflicted member from the decision and, depending on the circumstances, also from the deliberations, or the establishment of an independent committee consisting of the disinterested board members. If required to address a more serious and detrimental conflict, the board may also decide to shield the conflicted member from any critical information. The draft CO set forth a specific provision dealing with conflicts of interest of board members. However, the commission of the National Council found the provision to be too broad with regard to the fact that conflicts of interest can have a wide range of nuances. The National Council followed this reasoning and voted against the introduction of the new provision with 143 to 53 votes.

III DISCLOSURE

SIX requires listed companies to publish audited annual financial statements and non-audited half-year accounts in accordance with common reporting standards, such as the IFRS or US GAAP. Listed companies must include a corporate governance report in their annual reports. The information to be published in the corporate governance report is set out in the SIX-DCG and includes, among other things, information on the group and capital structure, shareholders, change of control provisions and defence measures as well as information on the members of the board of directors and executive board, basic rules of compensation and share and option plans. Pursuant to the OaEC, the board of directors is required to prepare a compensation report. The remuneration paid directly or indirectly to current or former

15 Article 717a Draft CO.
members of the board of directors or the executive board must be listed in the compensation report. For the board of directors, the compensation of each individual must be disclosed, while for the executive board, only the aggregate amount and the highest salary paid have to be disclosed.

The external auditors must audit the annual financial statements as well as the compensation report. Auditors must comply with strict independence requirements. They must be independent of the board of directors, the executive board and major shareholders. Auditors may not conduct business for or engage in other ways with the company outside the audit work if such activities were to endanger their independence. Auditors cannot audit their own work or the work of persons close to them. Moreover, auditors are not allowed to audit companies in which they hold a direct or significant indirect participation or against which they have a substantial claim or debt. The lead auditor of an audit mandate must be changed every seven years. In addition, auditors must meet the qualification requirements of the Federal Act on the Admission and Supervision of Auditors. The qualification requirements concern professional education and the auditor’s good standing.

Listed companies have to publish price-sensitive information occurring in the sphere of the company (under ad hoc publicity rules) as well as management transactions. The Code recommends publishing the articles of incorporation on the company’s website and making the organisational regulations available to shareholders.16

Shareholders have disclosure duties, too. If a person (acting alone or in concert with others) directly or indirectly acquires or disposes of shares of a listed company, and reaches or crosses any of the thresholds of 3, 5, 10, 15, 20, 25, 33.33, 50 or 66.66 per cent of the voting rights of the company, such person is obliged to make a disclosure to the company and SIX. Separate disclosure duties exist for long positions (shares, long call, short put, etc.) and short positions (short call, long put, etc.). Netting of long and short positions is not permitted. Such disclosures are published on the website of SIX.

As regards non-listed companies, an acquirer of bearer shares must report his or her name, date of birth, nationality and address to the company. In addition, an acquirer or a group of acquirers of registered or bearer shares representing 25 per cent or more of the share capital or voting rights must report the name and address of its ultimate beneficial owner to the company. The company is required to keep a register of the holders of bearer shares and the ultimate beneficial owners of shareholders holding 25 per cent or more of the share capital or voting rights. The notifications must be stored for 10 years. The register is not open to the public.

IV CORPORATE RESPONSIBILITY

The board of directors is responsible for the executive management of the company and must act in the company’s best interests. Establishing adequate risk and compliance management is considered to be inherent to this duty and part of good corporate governance. A requirement of the board to establish a risk committee is, however, only mandatory for certain financial institutions. Most Swiss companies allocate the responsibility at board level to the audit committee or determine risk-owners for different risk categories. The CO and the Code oblige the board of directors to establish an internal control system. To complement the Code,

16 Also see Section V.1 for more details on the shareholders’ right of inspection.
economiesuisse issued the Principles on Effective Compliance Management (Compliance Principles).\(^\text{17}\) The core of these principles is that the board of directors and the executive board must set the tone from the top to implement effective compliance structures.

The Swiss perspective on whistle-blowing is rather cautious. The Compliance Principles state that a whistle-blowing system forms part of effective compliance management,\(^\text{18}\) while Swiss company law does not yet address whistle-blowing explicitly. However, the board of directors has an inalienable duty to ensure effective supervision over the company, wherein whistle-blowing structures should be included. In addition, Swiss employment law implicitly protects whistle-blowers from being dismissed or otherwise discriminated against as long as the act of blowing the whistle was proportionate. Along with the pending revision of the CO, these implicit protective measures shall be implemented in Swiss employment law by explicitly determining when and how a whistle-blower can report a misconduct under any laws or regulations in a legally protected and authorised way.\(^\text{19}\)

The board of directors’ duty of care also covers aspects of corporate social responsibility (CSR), as acts against societal values may harm the company and may pose financial, operational and reputational risks. The Code specifically states that the board of directors must avoid such risks. Swiss company law allows the board of directors and the executive board to take into account interests of stakeholders other than the shareholders. Employment law, the Gender Equality Act and any legislation regarding environmental protection cover certain CSR aspects must be observed by companies in general.

Under the SIX-DCG, companies may opt in on the duty to publish a sustainability report. If a company chooses to do so, SIX will publish the opting in on its website. In the case of opting in, companies are required to prepare a sustainability report in accordance with internationally recognised standards selected by SIX.\(^\text{20}\)

In 2016, a popular initiative of the Swiss Coalition for Corporate Justice (SCCJ) aimed at increasing corporations’ human rights and environmental protection efforts was submitted, and it will be put to a Swiss people’s vote some time in the future. The initiative proposes that companies should be required to conduct due diligence on human rights and environmental sustainability for their businesses in Switzerland and abroad. Otherwise, they should become liable for violations of national and international human rights and environmental standards taking place in their business activities in Switzerland and abroad.\(^\text{21}\) The Federal Council, as well as several political parties, have rejected the initiative.

\(^{17}\) Available at https://www.economiesuisse.ch/en/node/32263.
\(^{18}\) Compliance Principles, p. 10.
\(^{19}\) In this regard, the Federal Council published an additional dispatch and a revised draft bill on 21 September 2018, which was a reaction to the fact that parliament, due to its lack of comprehensibility and structure, had rejected the original draft in 2015. However, the main focus of the amended draft remains the same.
\(^{20}\) A list of companies who opted in as well as the list of accepted international standards are available at https://www.six-swiss-exchange.com/shares/companies/sustainability_reporting_en.html.
\(^{21}\) The SCCJ’s arguments and the submitted initiative are available at http://konzern-initiative.ch/?lang=en.
V SHAREHOLDERS

i Shareholder rights and powers

Shareholders of Swiss companies have financial as well as non-financial rights. Financial rights entail the right to receive dividends that have been resolved by the shareholders’ meeting. Dividends can only be distributed from free reserves. Free reserves include disposable balance sheet profits and specifically dedicated reserves. In the event of the liquidation of a company, shareholders have a right to receive liquidation proceeds.

Non-financial rights include protection and participation rights. The main aspect of shareholders’ protection rights is the relative requirement of the equal treatment of shareholders. In principle, one share means one vote, and every shareholder has at least one vote. Swiss law does not grant any special rights (super-voting or special dividend rights) to long-term shareholders. A company may issue different share classes and allocate different voting power to such shares. This special voting power does not apply to a number of resolutions, such as the election of the auditors or a special audit. Certain resolutions of the shareholders’ meeting require a higher quorum than the regular majority vote (e.g., change of corporate purpose, limitation or exclusion of subscription rights, limitation of transferability of shares). Another protective right is the subscription right of existing shareholders in the event of a capital increase. The subscription right may be limited or excluded for important reasons by a qualified shareholders’ resolution. The action for liability, and the right to challenge shareholder resolutions that violate the law or the articles of incorporation or to claim their annulment, are further mechanisms to protect shareholders’ rights.

Participation rights entail certain information and supervision rights. Shareholders have to be provided with the annual financial statements and, if applicable, the auditor’s report. In addition, shareholders may demand further information regarding the business of the company and the audit process. Shareholders may also request to inspect the company’s books and correspondence as far as such inspection does not harm business secrets or other shareholders’ interests. Shareholders may demand the performance of a special audit.

Shareholders who, alone or as a group, hold 10 per cent or more of the share capital or a participation of at least 1 million Swiss francs have the right to request the convening of a shareholders’ meeting. In addition, shareholders holding, alone or as a group, 10 per cent or more of the share capital or a participation of at least 1 million Swiss francs can request that additional items are put on the agenda of a shareholders’ meeting. Any shareholder, regardless of the size of his or her shareholding, can bring a proposal to any agenda item of a shareholders’ meeting. The pending revision of the CO envisages lowering the mentioned thresholds to facilitate the performance of these rights. Under the revised draft CO, it is currently contemplated that, for listed companies, shareholders holding at least 5 per cent of the share capital shall be permitted to request the convening of a shareholders’ meeting and shareholders holding at least 0.5 per cent of the share capital shall be permitted to request that an item be put on the agenda of a shareholders’ meeting.

The convocation to a general meeting of shareholders (including agenda items and proposals of the board of directors) must be made public at least 20 calendar days prior to the shareholders’ meeting. At the shareholders’ meeting, any shareholder has the right to express his or her view on any agenda item.

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22 The National Council voted for an increase of the threshold to put items on the agenda from 0.5 to 3 per cent.
ii Shareholders’ duties and responsibilities

Under Swiss corporate law, shareholders of a company traditionally only have the duty to pay the issue price of the subscribed shares. It is the general prevailing view that shareholders of a company do not have a duty of loyalty in relation to the company, and that they are not liable for the company’s obligations. In listed companies, shareholders must disclose their participation when crossing the thresholds of 3, 5, 10, 15, 20, 25, 33.33, 50 or 66.66 per cent of the voting rights (see Section III).

There is no general code of best practice or guideline for shareholders in Switzerland. However, economiesuisse issued the ‘guidelines for institutional investors governing the exercise of participation rights in public limited companies’ (Investors’ Code) in 2013.23 The Investors’ Code sets out five principles governing how institutional investors should exercise their participation rights in public companies. The main goal is that institutional investors take seriously their responsibility towards clients with regard to ensuring long-term, effective corporate governance of the companies in which they are invested. According to the Investors’ Code, institutional investors should systematically exercise their participation rights, and do so in the best interest of their clients. Furthermore, institutional investors shall communicate how they exercise their participation rights, including the underlying reasoning. Following the comply or explain approach, all investors who have agreed to implement the Investors’ Code have to publish a statement of accountability wherein they explain any deviation from the Investors’ Code.

The binding OaEC requires pension funds to exercise their voting rights in the election of the board members, the chair, the members of the compensation committee and the independent proxy, as well as regarding further items such as compensation. Pension funds must additionally disclose to their clients on an annual basis how they have exercised their voting rights.

iii Shareholder activism

Shareholder activism in Switzerland has increased considerably over the past few years. Most recent activist campaigns include Cevian Capital’s campaign against Panalpina’s chair, who as a result had to resign from office. Cevian Capital further played an important role in the sale of a majority stake of ABB’s power grids division to Hitachi, which was the largest Swiss M&A transaction in 2018. A further recurring name on the list of activist shareholders is Daniel Loeb, who, through his investment company Third Point, repeatedly raises demands to Nestlé, including the desire to sell Nestlé’s stake in L’Oréal.

In Switzerland, the demands of most activists target the composition of the board of directors and executive board (in particular the CEO) as well as their compensation, a review of and change in strategy, or corporate restructurings. Proxy advisers such as ISS, Glass Lewis and Ethos are also active in the Swiss market. For instance, in connection with Credit Suisse’s annual general meeting of 2017, Ethos campaigned for and proposed the rejection of the compensation of the board of directors, as well as of the re-election of the chair. Even though Ethos was not successful and shareholders followed the board’s recommendations, the campaign led to extensive discussions regarding the performance of Credit Suisse.

Swiss law does not provide for special provisions applicable to shareholder activists. In particular, shareholders are not allowed to inspect the share register. Moreover, the board of

Switzerland

directors is not required to distribute to the company's shareholders any statements made by activist shareholders. As a consequence, the board of directors entertains private conversations and settlement discussions with the activist and, if such discussions are not successful, a public proxy fight between the board and the activist is started. In proxy fights it is not uncommon for the company to engage a proxy adviser to identify shareholders, to explain the board's position and arguments, and to convince shareholders to exercise their voting rights at the shareholders' meeting. Activist shareholders may challenge shareholder resolutions. Moreover, as an interim measure, activists may request the blocking of the commercial register to prevent or at least delay the registration of a merger or capital increase. In the context of the pending revision of the CO, it was discussed whether shareholders should be granted a right to inspect the share register. In the end, such right has not been incorporated in the revised draft CO.

iv  Takeover defences

The Swiss takeover rules prevent the board of directors and management of the target company from taking frustrating actions without shareholders' approval after a tender offer has been formally announced. Frustrating actions are defined as those that significantly alter the assets or liabilities of the target company (e.g., the sale or acquisition of any target company's assets at a value or price representing more than 10 per cent of the total consolidated balance sheet or contributing more than 10 per cent to the profitability of the target company; the conclusion of contracts with members of the board of directors or senior management providing for unusually high severance payments). The target board is also prohibited from acquiring or disposing of treasury shares or respective derivatives, and from issuing any conversion or option rights, unless such transactions are made in the context of pre-existing employee share programmes or obligations under pre-existing instruments (such as pre-existing convertible bonds). In addition, the Swiss Takeover Board has the authority to object to defensive measures that manifestly violate company law.

However, the board may still take other steps to counter an unsolicited informal approach or formal offer, including seeking a white knight, running a PR campaign or bringing legal action against the bidder, especially on the basis that the bidder has not complied with its disclosure obligations, or if the terms of its offer are not in line with the takeover rules. The board could also call an extraordinary shareholders' meeting and propose more effective defence measures, such as the sale of a material part of the business or the issuance of new shares. Apart from specific defence measures in response to a specific bid, the articles of a number of listed Swiss companies contain preventive clauses, particularly transfer and voting rights restrictions, which an offeror will normally seek to have removed from the articles as a condition to closing. Under such circumstances, the board is generally perceived to have more leverage in discussions with a bidder, especially in relation to the financial terms of a proposed offer. Since the OaEC came into effect, listed companies are no longer permitted to have staggered boards, as board members may only be elected for one year.

v  Contact with shareholders

The main means of contact between a company and its shareholders is the annual general meeting of shareholders. In addition, as described above, shareholders may request special information from the company. Listed companies are required to make ad hoc notifications of price-sensitive facts arising within the sphere of the company.
It is quite common for listed companies to entertain regular contact with its major shareholders and proxy advisers to explain the company’s long-term strategy and to better understand shareholder concerns. However, the principle of equal treatment of shareholders, ad hoc publicity and insider regulations in principle require the board to not disclose non-public price-sensitive information to selected shareholders. Any such contacts must be in the interest of the company. These contacts are often entertained by the chair, the lead director and investor relations.

The pending revision of the CO also intends to improve communication with shareholders by facilitating the use of technology. For instance, listed companies shall be required to offer shareholders the possibility to request registration in the share register by electronic means (e.g., email).\textsuperscript{24} In addition, it is contemplated that shareholders shall have the possibility of electronic remote voting.\textsuperscript{25} Under the OaEC, listed companies are already required to provide shareholders the opportunity to grant electronic proxies to the independent proxy.

Institutional investors and proxy advisers have gained relevance over the past few years. In this context, the Investors’ Code introduced the duty for institutional investors to inform their shareholders about how they exercise their voting rights. The OaEC follows the same principle, and requires pension funds to actually exercise their voting rights as regards certain agenda items, such as the election and compensation of board members. In addition, pension funds must disclose on an annual basis to their clients how they have exercised their voting rights.

VI OUTLOOK

As mentioned above, Swiss corporate law is undergoing significant revision.\textsuperscript{26} The key amendments will be the following:

a creating more liberal provisions for the establishment of corporations as well as provisions regarding the capital structure (for instance, the introduction of capital bands to create more flexibility for capital increases and decreases);

b improving corporate governance and shareholder rights;

c modernising shareholders’ meetings by the increased use of electronic and digital means;

d transferring the rules of the OaEC into the CO;

e implementing gender quotas;

f further smaller adaptations, for instance as regards provisions on corporate restructuring, reserves and own shares; and

g implementing transparency provisions for companies active in commodity trading similar to the newly adopted EU regulations.

\textsuperscript{24} Article 686b Draft CO. The National Council decided to include said provision in Article 686 Paragraph 2 bis.

\textsuperscript{25} Article 701c et seqq. Draft CO.

\textsuperscript{26} After the revised Draft CO had been debated by the National Council in the summer of 2018, the Council of States was supposed to debate the Draft CO in the winter of 2018. However, its preparatory commission for legal affairs amended the draft in many ways (e.g., it eliminated the possibility for capital bands and went beyond the requirements stipulated in the OaEC in various respects). As a result, the Council of States rejected to debate the Draft CO, and instead sent it back to the commission for legal affairs, which will have to come up with new proposals now.
I OVERVIEW OF GOVERNANCE REGIME

The United Kingdom (UK) system of corporate governance is generally seen as an effective model that has influenced many other jurisdictions in Europe and Asia. This helps to attract international companies wishing to gain access to a wide pool of investors, who are reassured by the governance obligations placed on issuers regardless of where their key business operations are located. In this chapter we focus on UK-incorporated companies with a premium listing on the Main Market of the London Stock Exchange. Requirements are relaxed, to a degree, for companies that are only able (or only choose) to obtain a standard listing, or that are not UK-incorporated companies.

The UK corporate governance system comprises laws, codes of practice and market guidance. Mandatory and default (i.e., opt-in or opt-out) rules and legal standards derive from common law, from statute (notably the Companies Act 2006 (Companies Act)) and from regulation (notably the Listing Rules and the Disclosure Guidance and Transparency Rules published by the Financial Conduct Authority (FCA), which is a statutory body). Some of these laws and regulations derive from EU law, but some are specific to the UK. The City Code on Takeovers and Mergers (Takeover Code) also has an important role to play in control-seeking transactions, and has statutory force. Each company’s constitution, which will also impose governance requirements, has legal effect as a statutory contract between the company and its members.

The most important code of practice is the UK Corporate Governance Code (Code), which is published and updated periodically by the Financial Reporting Council (FRC), which is also a statutory body. The current edition of the Code was published in 2018 and applies to accounting periods commencing on or after 1 January 2019. In 2010, the FRC first published the UK Stewardship Code (Stewardship Code), which applies to the institutional investor community and not to companies directly. The FRC intends to review and update the Stewardship Code during 2019 to ensure it continues to drive best practice in enhancing the quality of engagement between investors and companies. Finally, guidelines from the institutional investor community supplement these laws, regulations and codes of practice.

Despite not being of relevance to the companies we are considering here, it is worth noting that a new set of corporate governance principles for large private companies was published in December 2018. The Wates Principles are designed to assist large private companies to comply with the new statutory requirement for all companies of a significant...
size, which were not previously required to provide a corporate governance statement, to
disclose their corporate governance arrangements. The Wates Principles introduce a more
flexible approach to good corporate governance than the Code.

The bedrock of best practice corporate governance in the UK is a unitary board
collectively responsible for the long-term success of that company. Core provisions include:

a. a separate chair and CEO;
b. a balance of executive and independent non-executive directors;
c. strong, independent audit, nomination and remuneration committees;
d. transparency on appointments and remuneration; and
e. effective rights for shareholders (including a binding say on pay and without-cause
removal rights), who are encouraged to engage with the companies in which they
invest.

One defining feature of the Code is the comply or explain approach: rules for companies with
a stock exchange listing (Listing Rules) require all companies either to comply with the Code
or to explain why they do not. The Code is issued with an acknowledgement of flexibility; this
is in recognition of the principle that no single governance regime would be appropriate, in
its entirety, for all companies. This approach does, however, rely on shareholder engagement
to challenge non-compliance where appropriate. Nevertheless, in December 2017, the FRC
noted that 95 per cent of all FTSE 350 companies (the 350 largest UK-listed companies by
market capitalisation) reported full compliance with the Code, or full compliance with all
but one or two provisions. In many cases, non-compliance is due to circumstances rather
than deliberate choice. This confirms that the provisions of the Code are widely adopted by
companies despite the comply or explain philosophy.

The Code states that an explanation for non-compliance should set out the background,
provide a clear rationale for the action being taken and explain the impact that action has
had. Where non-compliance is intended to be limited in time, companies are required to
indicate when they expect to conform to the relevant provision of the Code.

For the past few years, the UK system of corporate governance has been the subject
of political and media scrutiny. Much focus has been on the responsibilities of business to a
wider set of stakeholders in the context of some high-profile scandals and business failures.
The recently revised Code reflects some of this debate; it envisages more companies becoming
subject to its standards, removes certain exemptions for public companies outside the FTSE
350 and extends certain governance principles to large private companies.

Finally, it is worth noting that, in December 2018, an independent, root-and-branch
review of the FRC – the Kingman Review – was published by the government’s Department
for Business, Energy and Industrial Strategy. The Kingman Review was announced following
certain high-profile corporate failures. It recommended, among 82 other recommendations,
that the FRC be replaced as soon as possible with a new, independent regulator to be called
the Audit, Reporting and Governance Authority. The Kingman Review also noted that the
Stewardship Code is not effective in practice, and that if it cannot be revised to enhance
excellence in stewardship then serious consideration should be given to its abolition.
II CORPORATE LEADERSHIP

i Board structure and practices

The UK system features a unitary board. There is no two-tier structure: executive directors and independent, non-executive directors instead act together as one board. The company’s powers are exercised by its board acting collectively, with a small number of decisions requiring shareholder approval. In practice, substantial managerial authority is delegated by the board to the company’s executives; the board appoints the executives and exercises an oversight function by approving decisions that do not require shareholder approval and that have not been fully delegated. Standing committees of the board typically include at least a nomination committee, audit committee and remuneration committee, but the creation of other standing committees, or ad hoc committees to exercise delegated powers, is permitted.

There is currently no co-determination principle in the UK requiring seats on the board to be reserved for employee representatives. However, as its most significant new proposal, the Code seeks to amplify the voice of workers in the boardroom. Companies can choose from three options: a director appointed from the workforce, a formal workforce advisory panel or a designated non-executive director with specific responsibility for ensuring that the views of the workforce are represented to the board. A poll undertaken by the Institute of Chartered Secretaries and Administrators (ICSA) suggested that, as of October 2018, 91 per cent of companies surveyed were not considering having workers on their board. Instead, 48 per cent of those surveyed were considering the designated non-executive director approach, while 37 per cent were considering either a combination or an alternative approach to workforce engagement.

The Code recommends that the board and its committees should have an appropriate balance of skills, experience, independence and knowledge of the company to enable them to discharge their respective duties and responsibilities effectively. At least half of the board, excluding the chairperson, is required to comprise individuals determined by the board to be independent. This way, no individual or small group of individuals can dominate the board’s decision-making. It is the CEO, however, who is responsible for delivering the agreed strategy and for the day-to-day running of the company’s business.

The criteria for determining whether a director may be regarded as independent are set out in the Code. A director will not be regarded as independent if that director:

a has been an employee of the company or its group within the past five years;
b has, or has had within the past three years, a material business relationship with the company;
c has received or receives additional remuneration from the company apart from a director’s fee, participates in the company’s share option or a performance-related pay scheme, or is a member of the company’s pension scheme;
d has close family ties with any of the company’s advisers, directors or senior employees;
e holds cross-directorships or has significant links with other directors through involvement in other companies or bodies;
f represents a significant shareholder; or
g has served on the board for more than nine years from the date of his or her first election.

The Code requires that the board constitute a nomination committee, an audit committee and a remuneration committee. The strength and independence of these committees – whose particular duties are addressed in the Code and in recommended terms of reference published
by ICSA – is a key factor in ensuring effective corporate governance, although ultimate responsibility for areas addressed by these committees remains with the board collectively. Some boards also constitute a risk committee that is separate from the audit committee, and has responsibility for overseeing risk exposure and future risk strategy.

The Code recommends that the audit committee should comprise at least three directors, all of whom are independent and one of whom should have recent and relevant financial experience. The chairperson of the board should not be a member of the audit committee. FTSE 350 companies are required to put their audit engagement out to competitive tender at least every 10 years, and the audit committee oversees this process. In December 2018, the Competition and Markets Authority concluded an investigation into whether the audit sector is competitive and resilient enough following much public criticism of statutory audits. Among other things, legislation to separate audit from consulting services has been proposed and this has the backing of the majority of the largest four accountancy firms in the UK.

The nomination committee should comprise a majority of independent directors. The chairperson of the board can be a member of (and chair) the nomination committee. The remuneration committee should comprise at least three independent directors. The chairperson of the board may sit on (but not chair) the remuneration committee, provided he or she was independent on appointment. Before appointment as chair of the remuneration committee, the appointee should have served on a remuneration committee for at least 12 months.

The separation of chairperson and CEO is one of the key checks and balances of the UK system. It has been recognised for some time that combining the roles increases the likelihood of one individual having unfettered decision-making powers. The Code recommends splitting the role of chairperson and CEO, and that the division of responsibilities between the two positions should be clearly established. If the roles of chairperson and CEO are combined (or if the CEO succeeds as chairperson), this must be publicly justified in accordance with the comply or explain principle, and the company should consult with major shareholders ahead of appointment, from whom it should expect close questioning.

**Executive pay**

The Code states that executive remuneration should be aligned to the company’s purpose and values. A significant proportion of executive directors’ remuneration should be structured to link rewards to the successful delivery of the company’s long-term strategy (but pay for non-executive directors should not include performance-related elements).

Levels of executive remuneration have been heavily criticised by the public and in the media in recent years. In December 2017, the CEO of a house-building firm was awarded a bonus of more than £100 million under his long-term incentive plan (LTIP), which was widely criticised in the media and by politicians, and led to the chairperson and chair of the remuneration committee resigning over the design of the bonus scheme, shortly followed by the CEO himself. The Code now contains enhanced governance requirements in respect of LTIPs, namely a requirement for a five-year combined holding period between award and the participant receiving any economic benefit, and a requirement for companies to have a formal post-employment shareholder policy as well as clawback powers. For financial years commencing on or after 1 January 2019, there is a statutory requirement to disclose the impact of the company’s share price on executive remuneration.

The Code also requires additional disclosures to be made by the remuneration committee, for example on why the remuneration package is appropriate, how factors such
as risk (behavioural and reputational) have been considered, and whether any discretion has been applied to the remuneration outcomes. The remuneration committee is also required to engage with shareholders and the workforce in setting executive remuneration, and to report on this engagement and its outcomes.

Shareholders of UK-incorporated, listed companies have a binding vote on companies’ directors’ remuneration policy. In broad terms, shareholders are required to approve, at least every three years, a policy setting limits and conditions for directors’ remuneration. If payments and awards made by the company to its directors are not consistent with the shareholder-approved policy, they are recoverable from the director in question, and the directors responsible for approving the unauthorised payment or award are liable to compensate the company. Shareholders have, in addition, an annual advisory (i.e., non-binding) vote on the implementation of the approved policy during the previous year. Companies are also obliged to publish a report on directors’ remuneration in their annual report, including the remuneration policy in the years it is being put forward for approval. This regime does not apply to employees or consultants who are not directors.

Where a company has 250 or more employees, it is also required to publish statutory calculations each year showing the size of the pay gap between male and female employees. For financial years commencing on or after 1 January 2019, companies of that size are also required to report on the ratio of the CEO’s pay to the average pay for its employees.

**ii Directors**

The role of the independent director is seen as essential in providing a balance on the boards of listed companies, and the Code and related guidance emphasise the need for independent directors to be suitably experienced, committed and prepared to challenge the executive directors. The Code emphasises the need for the board to promote the long-term sustainable success of the company, generating value for shareholders and contributing to wider society. It is the board’s responsibility to establish the company’s purpose, values and strategy, aligning each with the culture of the company. The concept of purpose is a novel and much-discussed requirement of the Code and there is little in the way of guidance as to how a company should establish, articulate, monitor and report against a statement of purpose (to the extent it does not do those things already). Statements of purpose are necessarily unique to each company, but it is anticipated that they will focus on the stakeholder considerations necessary to ensure the long-term sustainable success of that company (i.e., the derivative generation of economic value for shareholders).

The primary function of independent directors, according to the Code, is to scrutinise the performance of management and monitor the reporting of performance. The board should appoint an independent director to be the senior independent director to provide a sounding board for the chairperson and to serve as an intermediary for the other directors when necessary. The senior independent director should be available to shareholders if they have concerns that contact through the normal channels of chairperson, CEO or other executive directors has failed to resolve, or for which such contact is inappropriate. The FRC’s Guidance on Board Effectiveness (2018) further emphasises the critical role of the senior independent director to help resolve significant issues when the board is under periods of stress. Independent directors should hold meetings without the executives being present both with the chairperson and, at least annually, without the chairperson (led by the senior independent director) to evaluate the chairperson’s performance.
In practice, independent directors generally meet with the other directors for board meetings at least eight times per year in addition to attending committee meetings. They should (and often do) have direct access to all staff below board level and all advisers and operations, and receive information at an early stage (before executive directors have made key decisions). The Code provides that, as part of their role as members of a unitary board, independent directors should constructively challenge and help develop proposals on strategy. On the other hand, a conscientious and independent standard of judgement, free of involvement in the daily affairs of the company, is seen as an independent director’s key contribution to the boardroom. In this regard, the board is required to determine annually whether a director is independent in character and judgement and whether there are relationships or circumstances that are likely to affect the director’s judgement.

Independent directors should also monitor the performance of management in meeting agreed performance objectives. They should satisfy themselves on the integrity of financial information and that financial controls and systems of risk management are robust and defensible. They are responsible for determining appropriate levels of remuneration of executive directors, and have a prime role in appointing and, where necessary, removing, executive directors, and in succession planning.

**Directors’ duties**

All directors, both executive and non-executive, owe the same fiduciary duties and a duty of care and skill to the company. These duties are derived from common law but have now been largely codified under the Companies Act. These statutory duties are:

- to act within their powers (i.e., in accordance with the company’s constitution);
- to exercise their powers in good faith in the manner they consider most likely to promote the success of the company for the benefit of its shareholders;
- to exercise independent judgement;
- to exercise reasonable care, skill and diligence;
- to avoid conflicts of interest;
- not to accept benefits from third parties; and
- to declare any interest in a proposed transaction or arrangement with the company.

These statutory duties must still, however, be interpreted and applied in accordance with the pre-existing common law duties. Indeed, in respect of some directors’ duties that have not been codified under the Companies Act, the common law rules remain the only relevant law. These include the duties not to fetter their discretion, not to make unauthorised profits by reason of their office and to keep the affairs of the company confidential.

UK law has adopted the enlightened shareholder approach to the orientation of its directors’ duties. The Companies Act requires directors, when deciding how to exercise the powers of the company, to have regard to:

the likely consequences of any decision in the long term, the interests of the company’s employees, the need to foster the company’s business relationships with suppliers, customers and others, the impact of the company’s operations on the community and the environment, the desirability of the company maintaining a reputation for high standards of business conduct, and the need to act fairly as between members of the company.
Much recent discussion of corporate governance reform has centred on the duties companies owe to stakeholders. The Code now seeks to ensure that companies are more open and accountable to their stakeholders, and particularly their workforce. Recent legislation also requires large companies to report on how directors have discharged their duty to consider the above-mentioned stakeholders. None of these developments will authorise directors to prefer the interests of other stakeholders to those of the shareholders; nor will it give other stakeholders any ability to hold directors legally accountable for their decisions. However, the recent trajectory of enhanced disclosures opens companies up to a new regime of public censure on such matters.

UK law takes a relatively strict approach to the enforcement of directors’ duties. For example, unauthorised self-dealing is not reviewed *ex post* against an entire fairness standard, as it might be in Delaware; rather, the transaction is in principle voidable at the instigation of the company without any inquiry into its fairness. Breach of duty is in principle actionable only by the company to which the duty is owed, and not by its shareholders or creditors. While a shareholder may bring a derivative action on behalf of the company in relation to actual or threatened breaches of duty, the UK legal system is not well suited to private enforcement of directors’ duties outside formal insolvency proceedings, so litigation by shareholders of a listed company alleging breach of duty by its directors is extremely rare.

In relation to control-seeking transactions (i.e., any proposed acquisition of 30 per cent or more of the voting rights), the Takeover Code requires shareholder approval for any proposed action by the directors that may result in any offer (or expected offer) for the company being frustrated, or in shareholders being denied the opportunity to accept or reject the offer on its merits. Shareholders are protected by the substantive and procedural rules regulating control transactions.

It would be extremely difficult for the board of a UK company unilaterally to adopt anything equivalent to a shareholder rights plan, or to issue shares to a white-knight bidder to block a hostile takeover. For better or worse, takeover regulation in the UK strongly favours the short-term interests of shareholders by depriving the board of anything other than the power to persuade shareholders to reject an unwanted offer. Changes to the Takeover Code from early 2018 do, however, give the board additional time for such persuasion, and require bidders to provide additional disclosures regarding their intentions for the target business (against which they can be held accountable after the takeover).

Other legislation imposes criminal and civil liability on directors, including health and workplace safety laws, environmental laws and competition and securities laws.

**Appointment, nomination, term of office and succession**

The Code provides that there should be a formal, rigorous and transparent procedure for the appointment of new directors to the board. The search for candidates should be conducted, and appointments made, on merit, against objective criteria and within that context should promote diversity of gender, social and ethnic backgrounds, cognitive and personal strengths. A nomination committee should lead the process for board appointments and make recommendations to the board. Independent directors should be appointed for specified terms subject to annual re-election. The Code prohibits the chairperson from remaining in post beyond nine years from the date of their first joining the board; however, this can be extended, where necessary and with explanation, to facilitate effective succession and the development of a diverse board.
The Code states that all directors should be re-elected annually by shareholders. Each director's election is voted on separately, with statute requiring majority rather than plurality voting (i.e., an ordinary majority of shareholders can vote against – and hence block – a director's election). In theory, an ordinary majority of shareholders also has a statutory right to remove a director at any time and without cause, but annual re-election renders this right largely irrelevant in practice. Consequently, there is no concept of a staggered board under UK law.

The board should satisfy itself that plans are in place for the orderly succession of appointments to the board and to senior management with a suitably diverse pipeline, so as to maintain an appropriate balance of skills and experience within the company and on the board and to ensure progressive refreshing of the board.

Diversity
The Hampton-Alexander Review (2016 and 2017) and the Parker Review (2017) have both made a series of recommendations for companies to further gender and ethnic diversity, respectively, at board level.

The Parker Review recommended that all FTSE 100 boards should have at least one director from an ethnic minority background by 2021, and the same for FTSE 250 boards by 2024. The Hampton-Alexander Review set a target of 33 per cent women on FTSE 350 boards and 33 per cent women in FTSE 100 executive leadership teams by 2020. Both also make a number of recommendations to facilitate attainment of those targets.

Recent additions to the Code seek to reflect these recommendations in asking boards to intensify their efforts. Nomination committees will be required to ensure a diverse pipeline for succession, and annual reports will be required to explain actions taken to increase diversity and inclusion, as well as their outcomes. The Code also recognises a wider concept of diversity, which covers gender, social and ethnic backgrounds, cognitive and personal diversity. The Listing Rules already require that companies’ annual reports include a description of their diversity policy, how it is being implemented and the results.

As of November 2018, the number of women on FTSE 100 boards exceeded 30 per cent (up from 12.5 per cent in 2011), but within the FTSE 350 there were still five all-male boards and 75 companies with only one woman on their board, with women still underrepresented in chair and CEO roles. Despite the seemingly modest target, representation of ethnic minorities on FTSE 100 boards actually fell in 2018 from 85 to 84 of the 1,048 total directorships.

III DISCLOSURE
Listed companies are subject to a wide range of periodic, ad hoc and event-driven disclosure obligations, many of which derive from, or have been harmonised under, EU law, and relate to the following key areas:

a financial and operating results of the company, together with certain elements of narrative reporting;
b share capital and voting rights;
c members of the board and key executives;
d directors’ remuneration;
e price-sensitive information (inside information);
f share dealing by insiders and significant shareholders;

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governance structure and policies (comply or explain);

significant transactions; and

transactions with related parties.

Companies are required to prepare and publish audited annual financial statements (prepared in accordance with EU-adopted international financial reporting standards) and to make these available to shareholders within four months of the financial year end and in time for the annual general meeting. These form part of the company's annual report, which must include elements of narrative reporting along with the audited financial statements. The annual report must include a strategic report in addition to the directors’ report, the purpose of which is ‘to inform [shareholders] and help them assess how the directors have performed their duty’ to promote the success of the company. In addition to ‘a balanced and comprehensive analysis of both the development and the performance of the company’s business during the financial year, and the position of the company’s business at the end of that year’, the strategic report must contain a description of the principal risks and uncertainties affecting the company’s business, information about the gender split of its directors, managers and employees, trend information and disclosure about certain environmental matters.

The Listing Rules require the publication of a half-year report within three months of the end of the relevant six-month period containing a condensed set of (unaudited) financial statements and an interim management report. The interim management report must include details of any important events in the relevant period, the principal risks and uncertainties for the remaining six months and details of related-party transactions.

Companies are required to disclose promptly all dealings in their securities (including non-voting securities) by persons discharging managerial responsibilities (PDMRs) and certain connected persons. Companies are also required to take all reasonable steps to ensure that their PDMRs and persons connected with them comply with the Market Abuse Regulation on dealings in securities. In general, this prohibits all dealings during defined close periods (in the 30 days prior to the publication of certain interim or any annual reports) and at any time when a company is in possession of price-sensitive information, subject to certain exceptions. Even when not absolutely prohibited, dealings by PDMRs and their connected persons above a de minimis threshold must be notified to the company and the FCA.

A person acquiring 3 per cent of the voting rights in a company must notify the company, which is in turn required to make prompt disclosure to the market. Disclosure is also required thereafter whenever that person reaches, exceeds or falls below each additional 1 per cent threshold.

The Listing Rules require significant transactions by a listed company to be disclosed to shareholders. Moreover, Class 1 transactions (i.e., large (measured by reference to profits) assets, gross capital or consideration) require not only disclosure but also shareholder approval by simple majority resolution.

In addition to certain shareholder approval requirements under the Companies Act, the Listing Rules require independent shareholder approval by simple majority resolution for related-party transactions unless they fall within certain exceptions (e.g., small related-party transactions). Related parties include PDMRs and shareholders holding more than 10 per cent of the voting rights, and persons connected with them. The Listing Rules also require a proposal for approval of a related-party transaction to be accompanied by an independent fair and reasonable opinion, typically from an investment bank.
IV CORPORATE RESPONSIBILITY

From an internal company perspective, effective corporate responsibility means high standards of risk management, disclosure and transparency, compliance with best practice and effective monitoring. In the UK, a key principle of the Code requires a board to maintain sound systems for managing risk and internal control. It suggests that the board should review these systems at least annually, and consider how much risk the company can (and should) take. The FRC has published its Guidance on Risk Management, Internal Control and Related Financial and Business Reporting, which aims to:

- bring together elements of best practice for risk management;
- prompt boards to consider how to discharge their responsibilities in relation to the existing and emerging principal risks faced by companies;
- reflect sound business practice, whereby risk management and internal controls are embedded in the business process by which a company pursues its objectives; and
- highlight related reporting responsibilities.

At the same time, the Code was amended to require an explicit statement in the financial statements about whether the going concern basis of accounting has been adopted, and whether there are any material uncertainties about the company’s ability to continue to do so in future. Moreover, companies are also required to include in their annual report a broader statement about the board’s reasonable expectation as to the company’s viability, based on a robust assessment of the company’s principal risks and current position. This information should give investors a clear and broad view of solvency, liquidity, risk management and viability. The Investment Association advises that directors should consider, for example, the sustainability of dividends and how risks are prioritised. Auditing standards impose obligations on auditors to review and challenge these statements. It is worth noting that the Kingman Review considers viability statements insufficiently effective and, if they cannot be made more effective, proposes giving serious consideration to abolishing them.

V SHAREHOLDERS

i Shareholder rights and powers

Under the Companies Act, shareholders have the power to challenge a board in several ways. As few as 100 shareholders or shareholders holding as little as 5 per cent of the voting rights (whichever is less) can requisition a meeting, and add any item to the agenda or add any item to the agenda for the company’s AGM; moreover, there is no minimum holding period to qualify. In practice, however, boards are relatively responsive to shareholder concerns, and such requisitions are rare because each director must submit to annual re-election, and because directors are in any event required to obtain shareholder approval for a number of matters, requiring relatively frequent engagement with the company’s main shareholders.

Under the Companies Act, shareholders must approve secondary share offerings by simple majority resolution, and in any event, shareholders enjoy statutory pre-emption rights on all secondary share offerings for cash, although they can approve the disapplication of these pre-emption rights by special resolution (i.e., 75 per cent of shares voted). In practice, shareholders typically give directors general authority to issue further shares for cash and on a non-pre-emptive basis within certain guidelines published by institutional investors (e.g., no more than 5 per cent of the company’s share capital in any year, and no more than 7.5 per cent on a rolling three-year basis (or an additional 5 per cent in connection with an
acquisition or specified capital investment), and then subject to restrictions on the price at which the shares may be issued). Authority to issue further shares is typically renewed at each AGM or sought in relation to a specific transaction where equity funding is required.

Shareholders are also required to approve the terms of share incentive plans and Class 1 transactions such as major acquisitions or disposals (in each case by simple majority), related-party transactions (by simple majority of independent shareholders), as well as any changes to the company’s constitution or the rights attaching to their shares (by special resolution). Any proposal to acquire control (defined as 30 per cent or more of the voting rights) of a company subject to the Takeover Code requires an offer to be made to all shareholders on the same terms. Finally, shareholder approval (by way of simple majority) is required under the Companies Act for loans and other credit transactions, and for substantial property transactions, with directors and their connected persons (although in practice the provisions of the Listing Rules cover many more such related-party transactions).

When more than 20 per cent of votes have been cast against any board-recommended resolution or any such resolution has been withdrawn, the Code will require companies to announce what actions it intends to take to consult with shareholders in order to understand the reasons behind the result. There is then a requirement for the company to provide an update on the consultation and any remedial actions within six months of the vote, with a final summary included in the annual report. The Investment Association has also launched its Public Register to aggregate publicly available information regarding meetings of any FTSE all-share company following significant shareholder opposition to a proposed resolution.

A general shareholder equality principle pervades both UK company law and the Listing Rules. There is a one share, one vote norm, and distributions to shareholders (dividends, share repurchases, etc.) are required to be made anonymously on market and on tightly regulated terms unless shareholders waive these requirements. In principle, information must be made available simultaneously to all shareholders, although in practice it is possible to inform key shareholders of significant proposals in order to take soundings on a confidential basis, although this precludes shareholders from dealing in a company’s securities until the information has been made public or ceases to be price-sensitive.

## Shareholders’ duties and responsibilities

English law imposes little in the way of active duties or liabilities on shareholders. A majority shareholder does not owe any fiduciary duty to the company or to the other shareholders and is free to exercise its voting rights to advance its own interests, except where it is barred from doing so because of its interest in a proposed transaction or where, in relation to a proposed change to the company’s constitution, it is not voting bona fide in the interests of the company.

Certain non-binding expectations are placed on investors by institutional guidelines, the Code and the Stewardship Code. The Stewardship Code for institutional investors encourages them to be more proactive in their role as shareholders. Under the Stewardship Code, institutional investors are required to exercise their votes in respect of all the shares they hold and not to support the board automatically. Institutional investors are expected to disclose on their websites how they have applied the Stewardship Code or, if they have not, to explain why not. Large investors such as BlackRock and State Street are vocally increasing their engagement with portfolio companies on their environmental, social and governance criteria, recognising the growing responsibilities of asset managers to foster long-term value, and the need for companies to develop their purpose and focus on creating stakeholder value.
The Listing Rules contain the concept of a controlling shareholder, who (either alone or together with others acting in concert with it) is able to control 30 per cent or more of the voting rights. Affected companies must enter into a relationship agreement with their controlling shareholder containing certain mandatory terms intended to ensure that the board will remain independent of improper influence by the controlling shareholder. Companies with a controlling shareholder are also subject to additional disclosure requirements, and certain matters require the approval of shareholders independent of the controlling shareholder.

iii Shareholder activism

While institutional investors have traditionally been reluctant to police the corporate governance regime, an increasing number have recently become more vocal. Where institutional investors do have criticisms, they are more likely to engage in private dialogue with the directors. In recent years, however, they have been increasingly involved in activist campaigns, alongside traditional activists such as hedge funds. What distinguishes shareholder activists is that they are prepared to air issues publicly to achieve change. Much activism is still concerned with securing board representation, encouraging M&A activity or building stakes; however, executive remuneration and perceived corporate governance failings are also increasingly focuses. Related-party arrangements, the independence of directors, failures to address shareholder concerns and overly generous bonus or exit remuneration packages have also been addressed by activists in recent years. As a result of investor pressure, Royal Dutch Shell recently announced plans to link executive remuneration to carbon emissions targets, a move which follows increasing support for shareholder-introduced resolutions demanding tougher carbon emissions targets. In the context of stranded assets, this is evidently shareholder activism targeted at preserving long-term shareholder value.

iv Contact with shareholders

A company’s relations with its shareholders are also specifically addressed in the Code. Regular engagement with major shareholders in order to understand their views on governance and performance against strategy is encouraged. The Code also requires the chairperson to ensure that the board as a whole has a clear understanding of the views of shareholders. The board should keep in touch with shareholder opinion in whatever ways are most practical and efficient, using the AGM to communicate with investors and encourage their participation alongside more informal consultation throughout the year.

VI OUTLOOK

Against a background of certain high-profile business failures and governance being found wanting, businesses in the UK remain under pressure to actively demonstrate their social licence to operate. Political and media scrutiny remains intense, and the trajectory of enhanced disclosures suggests that these democratic pillars, coupled with enhanced shareholder engagement, will continue to police corporate behaviour. How businesses develop their statements of purpose and the extent to which stakeholders are given prominence therein will be interesting to watch. Any predictions of a slowdown in the generation of new legislation and regulation on corporate governance may well be disappointed by the replacement of the FRC and the wider implementation of the Kingman Review.
I OVERVIEW OF GOVERNANCE REGIME

i Sources of Delaware law

The position of Delaware law is illustrated by the fact that more than half of US public companies (including more than 66 per cent of the Fortune 500) are incorporated in the state. Delaware's corporate governance regime draws from two bodies of law. The first is the General Corporation Law of the State of Delaware (DGCL), a statutory framework adopted by the Delaware legislature in 1899, substantially revised in 1967 and regularly amended to date. Updates and revisions are made each year by the Delaware legislature based on the recommendations of the Council of the Corporation Law Section of the Delaware State Bar Association. As a result, the DGCL is constantly under review by the most knowledgeable members of the Delaware Bar.

Judicial decisions comprise the second source of corporate governance law in Delaware. The state's Court of Chancery (Chancery Court) is largely regarded as the nation's premier business court. The Chancery Court is a court of equity, which consists of five expert judges chosen to adjudicate corporate and commercial disputes. Appeals from the Chancery Court are heard by the Delaware Supreme Court.

ii Enforcement of Delaware's corporate governance regime

Derivative, direct, and class actions each provide a method for shareholders to seek redress against corporations and their directors and officers for alleged wrongdoing. Class actions are essentially an aggregation of direct claims being prosecuted by one or more persons as representatives of a group of shareholders. Direct claims involve an injury to the suing shareholder individually, as opposed to the corporation. Where there is an actual injury to the corporation to which any relief would flow, the cause of action must be brought by the corporation or by the shareholders derivatively if the corporation fails to act. In practice, the classification of a particular claim as derivative or direct may be challenging.

The classification of a claim is significant because a shareholder plaintiff may not proceed against a corporation with a derivative claim without first making a demand on the corporation to pursue the claim itself, unless the making of a demand would be futile. The Chancery Court will excuse the failure to make a demand based on futility if the complaint creates a reasonable doubt that the corporation's directors are disinterested and independent or the challenged action was otherwise the product of valid business judgement. Under
the first prong of the well-known *Aronson* test, a director is interested if he or she sits on both sides of a transaction or derives a benefit from a transaction that is not shared by the corporation or all shareholders generally. Independence is lacking if the director’s decision is based on extraneous influences rather than the merits. When addressing *Aronson*’s second prong, the plaintiff must create a reasonable doubt that either the action was taken honestly and in good faith, or the board was adequately informed in making the decision. Demand also may be excused under the second prong of *Aronson* if a plaintiff properly pleads a waste claim.3

iii Nature of the corporate governance regime and recent developments

Delaware’s corporate governance regime is founded on the fundamental principle set forth in Section 141(a) of the DGCL that, unless otherwise provided in a corporation’s certificate of incorporation, the business and affairs of a corporation must be managed by or under the direction of its board of directors. Delaware decisional law reflects a constant tension between directors and shareholders over the shareholders’ desire to exert influence over corporate management and potentially usurp the board’s decision-making authority. Aside from the corporate electoral process and the reservation of the shareholders’ right to vote on various fundamental corporate actions,4 the board’s power is limited only by certain well established fiduciary obligations. Notably, in 2016, the Delaware Supreme Court determined that the statutory basis for finding jurisdiction over Delaware directors and officers was more expansive than it has been interpreted to be by Delaware courts for over 30 years.5 Now, non-resident officers and directors of Delaware corporations are deemed to have consented to personal jurisdiction not only in any action against that director or officer for violation of a duty in that capacity, but also in all civil actions brought in Delaware by, on behalf of or against a Delaware corporation, in which the director or officer is a necessary or proper party.

II CORPORATE LEADERSHIP

i Board structure and practices

The board of directors must consist of at least one member, and all members must be natural persons.

**Term of office**

Under Section 141(b) of the DGCL, each director holds office until the director’s successor is elected and qualified, or until the director’s earlier resignation or removal. Typically, the term of each director is one year unless the board has been structured as classified. Pursuant to Section 141(d) of the DGCL, the certificate of incorporation, the initial by-laws of the company or a by-law adopted by the shareholders may divide the board into a maximum of three classes of directors who serve staggered terms. If three classes of directors are created, then only one class of directors stands for election each year.

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3 See footnote 7.

4 These matters include amendments to the certificate of incorporation, certain mergers, sales of substantially all or all of the corporation’s assets and dissolution.

5 *Hazout v. Tsang Mun Ting*, 134 A.3d 274 (Del. 2016).
Qualifications
The DGCL does not specify any qualifications for directors other than that they be natural persons. However, pursuant to Section 141(b) of the DGCL and the common law, the certificate of incorporation and by-laws may prescribe reasonable director qualifications. The Delaware courts are likely to enforce qualifications that are reasonably related to the corporation's business. Valid qualifications might include a minimum ownership requirement or experience in a certain field of business.

Board action
Directors act collectively, and all directors possess equivalent voting rights unless the certificate of incorporation otherwise provides. Any action may be taken by vote of a majority of the directors present at a meeting at which a quorum is present unless the certificate of incorporation or by-laws provide for a supermajority vote. Unless directors are restricted by the certificate of incorporation or by-laws, directors may act without a meeting by unanimous written or electronic consent, including email transmissions.

Committees
Certain managerial duties may be delegated by the board of directors to committees of the board consisting of one or more directors. Generally, a properly constituted board committee may exercise the full powers of the board of directors in the management of the business and affairs of the corporation with two significant exceptions:

a. a board committee cannot approve, adopt or recommend to shareholders any action or matter expressly required by the DGCL to be submitted to shareholders for a vote (other than the election or removal of directors); and
b. a board committee cannot adopt, amend or repeal any by-law.

Advisory committees of the corporation may include members who are not directors, but any such committee's function must be purely advisory in nature.

Officers
Corporations must have such officers as established by the by-laws or by resolution of the board of directors. A court will generally uphold a delegation of authority to officers by a corporation's board of directors unless the delegation is of a task specifically assigned by the DGCL to the board. However, if the delegation conflicts with some overriding public policy or provision of a corporation's certificate of incorporation, it will not be upheld. Unauthorised acts of officers may be validated by ratification by the board of directors unless the acts are beyond the authority of the corporation.

Compensation
The board of directors may fix director compensation in the absence of restrictions in the certificate of incorporation or by-laws. The directors’ self-interested decision will be entitled to the protection afforded by the business judgement rule if the compensation plan has been approved by the corporation's shareholders and contains well-defined, specific limits on potential self-dealing. Otherwise, if challenged, the board will have to show that the compensation arrangements are fair to the corporation by demonstrating that services of value are actually being rendered, and that the level of compensation for these services is similar.
to either industry standards or compensation at corporations of similar size and profitability. Shareholders’ approval may not guarantee judicial deference to business judgement when the shareholders only approve an upper limit and the directors are given discretion to determine compensation up to that limit. The board should also approve the compensation of executive officers of the corporation. As a matter of customary practice, most corporations delegate the responsibility for fixing executive compensation to outside directors. At a minimum, directors do not participate in the discussion of, or vote upon, their own compensation as officers or employees to minimise the appearance of self-dealing. Executive compensation decisions made by disinterested directors are generally upheld in the absence of waste.

**Takeover practice**

The responsibility for responding to takeovers is generally held to reside with the board of directors pursuant to the managerial authority provided in Section 141(a) of the DGCL. The board of directors has a fiduciary responsibility to advance the best interests of the corporation’s shareholders in responding to takeovers.

### Directors

**Fiduciary duties**

All directors of a Delaware corporation owe fiduciary duties of care and loyalty to the corporation and its shareholders. The courts have also recognised that directors have fiduciary duties of disclosure and good faith, which are not separate duties, but rather specific applications of the fiduciary duties of care and loyalty. These duties are owed by all directors to the corporation and shareholder body as a whole without regard to whether any director is an inside or outside director or was elected by a particular class of shareholders.

**Duty of care**

The duty of care requires that directors inform themselves using all material information reasonably available to them before making a business decision. This duty extends to the board’s delegation functions. However, directors are not expected to oversee every detail of day-to-day corporate activities, and may rely in good faith upon the records of the corporation and upon information, reports, opinions and statements of corporate officers and employees.

**Duty of loyalty**

Directors also owe a duty of loyalty to the corporation. The duty of loyalty mandates that a director cannot consider or represent interests other than the best interests of the corporation and its shareholders in making a business decision. Where a director has an interest in a decision that is different from or in addition to the interests of the corporation

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6  *In re Investors Bancorp, Inc Stockholder Litig*, 177 A.3d 1208, 1211 (Del. 2017) ("[W]hen stockholders have approved an equity incentive plan that gives the directors discretion to grant themselves awards within general parameters, and a stockholder properly alleges that the directors inequitably exercised that discretion, then the ratification defence is unavailable to dismiss the suit, and the directors will be required to prove the fairness of the awards to the corporation.")

7  See *Calma on Behalf of Citrix Systems, Inc. v. Templeton*, 114 A.3d 563, 590 (Del. Ch. 2015) ("To state a claim for waste, it must be reasonably conceivable that the directors authorize[d] an exchange that [was] so one sided that no business person of ordinary, sound judgement could conclude that the corporation has received adequate consideration.") (internal quotations and citations omitted).
and shareholders generally, the director is said to be an interested director. Interested directors should disclose the interest to the other members of the board and, if the interest is material, consider abstaining from any board vote on the matter.

The duty of loyalty also encompasses cases where the director fails to act in good faith.\textsuperscript{8} Bad faith may be shown where the director's conduct is motivated by an actual intent to do harm, or where the director intentionally acts with a purpose other than that of advancing the best interests of the corporation or with the intent to violate applicable law. Bad faith is also demonstrated where the director intentionally fails to act in the face of a known duty to act, thereby demonstrating a conscious disregard for his or her duties.

**Liability of directors**

Directors may be found to be personally liable for monetary damages if they breach their fiduciary duties of loyalty and care. Directors may be exculpated from paying monetary damages for liability arising from breach of the fiduciary duty of care if the corporation's certificate of incorporation contains an exculpatory provision authorised by Section 102(b)(7) of the DGCL. Whether a director will be found liable for breach of fiduciary duty depends largely on the standard of review applicable to the challenged action or decision of the director. However, the Delaware Supreme Court recently clarified that regardless of what standard of review applies, a plaintiff seeking only monetary damages against a director protected by an exculpatory provision must plead claims for breach of the duty of loyalty to survive a motion to dismiss.\textsuperscript{9}

**Standards of review**

Delaware has three standards of review for evaluating director decision-making: the business judgement rule, entire fairness and intermediate scrutiny.

**The business judgement rule**

The business judgement rule is the default standard of review. In general, the business judgement rule is a presumption that, in making a business decision on behalf of the corporation, the directors acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.\textsuperscript{10} When a court finds that the business judgement rule applies, the business decisions of disinterested directors will not be disturbed if they can be attributed to any rational business purpose.

**Entire fairness**

If the business judgement rule's presumption is rebutted, the burden generally shifts to the defendant directors to show the entire fairness of the transaction. The entire fairness standard is the most exacting standard of review applied by Delaware courts when reviewing a challenged transaction and has two elements: fair price and fair dealing.\textsuperscript{11} Fair price relates

\begin{itemize}
\item \textsuperscript{8} Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006).
\item \textsuperscript{9} See In re Cornerstone Therapeutics Inc. Stockholder Litig, 115 A.3d 1173 (Del. 2015).
\item \textsuperscript{10} In re MFW S'holders Litig, 67 A.3d 496 (Del. Ch. 2013), aff'd sub nom., Kahn v. M&F Worldwide Corp, 88 A.3d 635 (Del. 2014).
\item \textsuperscript{11} In re Riverstone Nat, Inc Stockholder Litig, 2016 WL 4045411, at *15 (Del. Ch. 28 July 2016).
\end{itemize}
to the economic and financial considerations of a transaction. Fair dealing requires a review of when the transaction was timed, how it was initiated, structured, negotiated and disclosed to the directors, and how the approvals of the directors and the shareholders were obtained.

**Intermediate scrutiny**

**Unocal**

A Delaware court will apply an intermediate level of scrutiny in reviewing a board's responses to takeovers that are defensive in nature under the *Unocal* enhanced scrutiny test. 12 If this test applies, directors must show that they had 'reasonable grounds for believing that a danger to corporate policy and effectiveness existed'13 and that their action was 'reasonable in relation to the threat posed'.14 If the defensive action was neither preclusive nor coercive, the court will determine whether the directors have met their burden of showing that the response was within a range of reasonableness considering the threat posed.

**Revlon**

Intermediate scrutiny will also be applied to review a board's actions in the context of transactions involving a change in control or a break-up of the corporation under *Revlon*.15 To meet this standard, the directors must focus on one primary objective – to secure the best value reasonably available for the shareholders. The Delaware courts have recognised that there is no single blueprint to follow in reaching the ultimate goal of maximising shareholder value. Thus, under *Revlon*, directors are generally free to select the path to value maximisation so long as they choose a reasonable route. For example, in *C&J Energy Services, Inc. v. City of Miami General Employees*, the Delaware Supreme Court reversed a Chancery Court decision that held that a board must conduct a pre-signing active solicitation process to satisfy its duties under *Revlon*.16 The Court found that so long as any bidder interested in paying more for the target company had a reasonable opportunity to do so, the company was not required to actively shop itself.17

**Procedural protections may modify the standard of review**

In certain situations, the use of specific procedural protections will warrant the application of a more deferential standard of review. For example, transactions involving a conflicted controlling shareholder are generally subject to entire fairness. However, the business judgement standard of review will apply to such a transaction if, and only if, the transaction is conditioned on the approval of both an independent special committee of the board and a minority shareholder vote, and:

a. the special committee is empowered to freely select its own advisers and to say no definitively;

b. the special committee meets its duty of care in negotiating a fair price;

13 Id. at 954.
14 Id. at 955.
16 107 A.3d 1049, 1067-69 (Del. 2014).
17 Id. at 1069.
Additionally, the business judgement standard of review will irrebuttably apply to a post-closing challenge of a transaction generally subject to enhanced scrutiny if a majority of disinterested, uncoerced and fully informed shareholders approved the transaction. Similarly, a transaction that involves a conflicted board of directors that would generally be subject to entire fairness will be subject to the irrebuttable application of the business judgement standard of review if a majority of disinterested, uncoerced and fully informed shareholders approved the transaction. If the challenged transaction involves a conflicted controlling shareholder, however, the shareholder vote will not result in the irrebuttable application of the business judgement standard of review. In transactions involving a conflicted controlling shareholder, the shareholder vote will merely shift the burden of persuasion from the controlling shareholder to the minority shareholders.

**Indemnification**

Under Section 145 of the DGCL, a director may be indemnified for expenses incurred in defending derivative claims, and for expenses, judgements, fines and amounts paid in settlement incurred in connection with defending direct actions. However, if the director has been successful on the merits or otherwise in the defence of the proceeding, he or she is entitled to mandatory indemnification for expenses actually and reasonably incurred. To be indemnified in criminal actions or proceedings, the director must also have had no reason to believe that the challenged conduct was unlawful. Advancement of expenses to a director prior to the final disposition is also permitted if the director executes an undertaking to repay the monies advanced if it is ultimately determined that he or she is not entitled to indemnification. These rights cannot be eliminated by a corporation after a director's period of service ends unless the individual knows at the time he or she chooses to serve that his or her rights will terminate or can be eliminated at a later time. Notably, indemnification and advancement rights apply only where the director has been sued 'by reason of the fact' that the director is or was a director of the corporation. This standard cannot be modified by contract.

**Election of directors**

An annual meeting of shareholders of a Delaware corporation is mandated to elect directors. To permit an orderly period of solicitation of shareholder nominations prior to a meeting,
many corporations have adopted provisions in their certificates of incorporation or by-laws to provide for advance notice of the nomination of directors by shareholders. Such provisions typically require that the shareholder making the nomination be a shareholder of record. The nominating shareholder must also submit specific information within a specified window to the corporation about himself or herself; the beneficial owner, if any, on whose behalf the nomination is being made; and about each of his or her director nominees. The information required typically includes all information about the nominee that would be required to be disclosed under federal securities laws and whether the nominating shareholder or the beneficial owner, if any, intends to solicit proxies from other shareholders. By-law provisions requiring advance notice of nominations have been found inequitable in specific factual circumstances.  

III DISCLOSURE

Under Delaware law, obligations relating to corporate disclosure are derived from common law fiduciary duties, not the DGCL. The duty of disclosure is a component of a director's fiduciary duties of care and loyalty, and its scope and requirements depend on context. Corporate fiduciaries can breach their duty of disclosure by making a materially false statement, by omitting a material fact or by making a partial disclosure that is materially misleading. The duty of disclosure applies in a number of situations, including when directors seek shareholder action such as the ratification of director compensation.

IV CORPORATE RESPONSIBILITY

In contrast to US federal law, Delaware does not have a statutory regime addressing risk management, compliance policies, whistle-blowing or other issues of corporate responsibility. Rather, Delaware relies on fiduciary duty law to encourage and enforce ethical behaviour by directors and officers of Delaware corporations.

A claim of breach of fiduciary duty that seeks to hold directors of a Delaware corporation liable for either knowingly causing the corporation to violate the law or for failing to establish an effective system for monitoring the corporation's compliance with the law is rarely successful. Plaintiffs are faced with the difficult burden of establishing the necessary linkage between illegal conduct and a conscious board decision. If plaintiffs cannot point to a particular board decision demonstrating the board's conscious decision to violate the law, the plaintiff must plead that the board deliberately failed to act after learning about incidents or occasions of possible illegality. Alternatively, plaintiffs could establish that the illegality occurred because the board abrogated its oversight function by failing to ensure that the corporation possessed an adequate compliance system. For example, a plaintiff might be successful if the board did not form an audit or other compliance committee.

26 See, e.g., JANA Master Fund, Ltd v. CNET Networks, Inc, 954 A.2d 335 (Del. Ch. 2008).
27 The failure to disclose material information in this context will negate any effect a shareholder vote otherwise might have on the validity of the transaction or the applicable standard of review.
28 This type of claim is known colloquially as a Caremark claim, after the seminal decision by the Chancery Court in In re Caremark International Inc. See In re Caremark Int’l Inc Derivative Litig, 698 A.2d 959 (Del. Ch. 1996).
Section 204 and Section 205 of the DGCL, which were adopted in 2014 and amended in 2015, act as powerful tools for current boards of Delaware corporations. These provisions grant boards the power to ratify, and the Chancery Court authority to validate, defective corporate acts that failed to comply with the DGCL or the corporation’s organisational documents. The Section 204 ratification procedure involves adopting resolutions, obtaining shareholder approval if such approval is legally required, and filing a certificate of validation in accordance with Section 103 of the DGCL. Under Section 205, the Chancery Court can determine the validity of any defective corporate act that has not been ratified or has been ratified effectively under Section 204, regardless of whether the defective corporate act would have been capable of ratification pursuant to Section 204.

V SHAREHOLDERS

i Shareholder rights and powers

Equality of voting rights

Unless otherwise provided in the certificate of incorporation, shareholders are entitled to one vote for each share of capital stock held by the shareholders pursuant to Section 212 of the DGCL. A common type of variation from the one vote per share rule is the creation of preferred stock with contingent voting rights. Generally, all holders of the same class or series of stock must have equivalent voting, dividend and other rights under the common law doctrine of equal treatment. However, the Chancery Court has upheld scaled and tenured voting patterns where specifically authorised by the certificate of incorporation, as well as other types of discrimination among holders of the same class or series of stock where the discrimination was not inequitable.29

Shareholders’ ability to influence the board

Generally, the shareholders’ ability to influence the board is limited to the power to elect and remove directors, with or without cause,30 and to approve or disapprove certain actions as required by the DGCL or as may be provided in the corporation’s certificate of incorporation. Shareholders may also exercise influence by dissolving the corporation without board approval if the written consent of all shareholders is obtained. A shareholder who owns 90 per cent or more of the outstanding shares of each class of capital stock of a Delaware corporation may force a short-form merger of the corporation without board or other shareholder approval under Section 253 of the DGCL. The only other significant power that shareholders may exercise without prior board action is the amendment of the corporation’s by-laws pursuant to Section 109 of the DGCL. The board may be given concurrent power to amend the by-laws in the corporation’s certificate of incorporation, and the certificate of incorporation or by-laws may impose supermajority voting requirements for shareholder amendments to the by-laws. However, in no case may the ability of the shareholders to amend the by-laws be completely eliminated.

30 Unless the corporation’s certificate of incorporation otherwise provides, in the case of a corporation whose board is classified, shareholders may effect such a removal only for cause.
Rights of dissenting shareholders

Aside from the right to an appraisal of the fair value of their shares by the Chancery Court in connection with certain types of mergers, shareholders do not enjoy dissenters’ rights under the DGCL. Generally, appraisal rights are triggered in connection with the merger of a listed company incorporated in Delaware if the shareholders of the corporation are required to accept in the merger consideration other than stock in the surviving corporation or publicly traded stock in another corporation. If the Chancery Court finds that the fair value of the shares is higher than the merger consideration and the petitioning shareholders have properly asserted their appraisal rights, then the shareholders are entitled to receive the difference between the merger price and the price determined by the Chancery Court to constitute fair value, plus interest.

In the past, Delaware courts have generally adopted the merger consideration as the best evidence of fair value of an entity’s shares. However, in the Chancery Court’s 2016 *In re Appraisal of Dell Inc* decision, appraisal petitioners of Dell Inc were awarded fair value for their shares that was significantly higher than the merger consideration paid to the other public shareholders in the merger. This rare decision can most likely be attributed to the unique set of facts presented to the court, which included:

- the transaction at issue was a management buyout;
- extensive and compelling evidence of a ‘valuation gap between the market’s perception and the target company’s operative reality’;
- limited pre-signing competition for the target company;
- the only active bidders were financial, rather than strategic, buyers; and
- the special committee that negotiated the deal did not consider fair value – instead, it focused on the market price of the company’s common stock, and ‘negotiated without determining the value of its best alternative to a negotiated acquisition’.

Nevertheless, this decision makes clear that Delaware courts have broad discretion to determine share value based on the facts and circumstances of each individual appraisal action before deferring to the merger consideration as the best evidence of fair value. Consistent with earlier decisions, the Delaware Supreme Court reversed the Court of Chancery decision given, according to the Supreme Court, the Court of Chancery’s reasons for ignoring the deal price did not agree with the Supreme Court’s findings. As a result, but for situations where there is significant evidence to support a finding to the effect that there were defects in the market that justify a departure from deal price, it is still very relevant.

ii Shareholders’ duties and responsibilities

A controlling shareholder owes fiduciary duties to the shareholders of the corporation he or she controls. A controlling shareholder may not exercise control over the management and affairs of the corporation to his or her benefit and to the detriment of the corporation and the minority shareholders. Indeed, whenever a corporation enters into a transaction with, or at the behest of, its controlling shareholder, the applicable standard of review is normally entire
fairness, placing the burden of proof on the defendant to demonstrate the fair value and process of the transaction. This burden of proof is shifted to the plaintiffs if the controlling shareholder transaction is approved either by an independent and well-functioning special committee or by a majority of the minority shareholders.

### iii Shareholder activism

Shareholder activism has increased significantly over the past decade, and Delaware has not been immune to its expanding influence. A Delaware corporation will often regulate shareholder activism by including defensive provisions in its certificate of incorporation and by-laws. These include advance notice by-laws, staggered board provisions, supermajority requirements for by-law amendments, and prohibitions on the shareholders’ ability to act by written consent and to fill vacancies on the board. These defences, often used in combination, allow corporations to effectively prevent or defeat hostile tender offers.

### iv Takeover defences

See Section V.iii.

### v Contact with shareholders

Communications between the board and the shareholders mainly occur in connection with the solicitation of the shareholders’ vote on matters in which the shareholders are required to act.

Under Delaware law, when directors communicate with shareholders outside the context of seeking shareholder action, the directors’ fiduciary duty of disclosure still applies but on a more limited basis. In such circumstances, the directors must communicate with honesty. For example, if a director speaks ‘through public statements made to the market, statements informing shareholders about the affairs of the corporation, or public filings required by the federal securities laws, he or she must not knowingly disseminate false information that results in injury to a shareholder’.

### VI OUTLOOK

The ongoing and active involvement of the members of the Delaware Bar in maintaining and recommending amendments to the DGCL, as well as the quality of Delaware’s courts and Office of the Secretary of State, are likely to ensure that Delaware remains the jurisdiction of choice for incorporation and adjudication of business disputes in the United States.

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34 Id.
36 In some cases, a board will employ a white-knight defence, which entails management of the target company recruiting a rival bidder that will save them from an initial, unfriendly offer or by offering a more attractive deal.
37 In re Wayport, Inc Litig, 76 A.3d 296, 315 (Del. Ch. 2013) (quotations and citations omitted).
I OVERVIEW OF GOVERNANCE REGIME

The sources of corporate governance law and regulation in the United States are varied and interrelated. There are four key sources: state corporate law (predominantly Delaware, in which over half of all US publicly traded corporations are incorporated); the federal 1933 Securities Act and 1934 Securities Exchange Act, and the regulations of the Securities and Exchange Commission (SEC) under those Acts; stock exchange listing rules (predominantly the New York Stock Exchange (NYSE) and the NASDAQ); and federal statutes in regard to particular areas of corporate practice (e.g., regulations promulgated by the Federal Reserve and other federal and state agencies with respect to banks and other financial institutions, and by other similar regulatory bodies in respect of communications, transportation and other regulated fields). Because of the federal system of US law, different sources of law are not always harmonised, and corporations are often subject to different obligations to federal and state governments, regulators at each level of government and demands of other relevant bodies, such as the applicable stock exchange. This mosaic of rules and regulations, and the mechanisms by which they are implemented and enforced, make for an environment of frequent change and evolution.

In addition, of increasing importance to the US corporate governance regime are the proxy advisory firms (predominantly Institutional Shareholder Services (ISS) and, with lower market share, Glass, Lewis & Co (Glass Lewis)) and the influence those proxy advisers have on the institutional investor community, and the related prevailing and evolving views of the institutional investor community. That community’s views have become particularly influential as the shareholder base of the vast majority of US publicly traded corporations consists of an overwhelming majority of institutional shareholders, including index funds, pension funds and mutual funds. As a result, major institutional investors are increasingly developing their own independent views on preferred governance practices.

Securities laws and regulations are civilly enforced by the SEC, and the SEC must also grant clearance to certain important corporate disclosure documents (such as proxy statements and certain securities registration statements). Larger and older corporations with a history of securities law compliance are subject to fewer such pre-clearance requirements and may in certain cases file abbreviated forms of disclosure. Private investors may also bring

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1 Adam O Emmerich, William Savitt and Sebastian V Niles are partners and S Iliana Ongun is an associate at Wachtell, Lipton, Rosen & Katz.
actions under many provisions of the securities laws to recover damages for misstatements or omissions in public statements and in certain other circumstances. The Department of Justice prosecutes criminal violations of federal securities laws and SEC rules.

State law fiduciary duties of directors and officers are predominantly enforced by private actions led by plaintiffs’ lawyers. These private actions generally fall into one of two categories: class-action suits on behalf of a particular group of the corporation’s shareholders (typically all shareholders who bought or sold during a particular period or all unaffiliated shareholders), and derivative suits purportedly on behalf of the corporation itself. Putative class-action suits must satisfy the criteria under the Federal Rules of Civil Procedure or analogous provisions of state law before being permitted to proceed as a class action, including the numerosity of the class members, the commonality of legal and factual issues among members of the class, the typicality of the claims or defences of the representative parties to the class, and the fairness and adequacy of the representative parties’ protection of the class interests. Derivative suits, creatures of state corporate law, provide a mechanism by which shareholder plaintiffs can in theory represent the corporation in suing the corporation’s own board of directors or management, sometimes after complying with a ‘demand’ procedure in which the plaintiff must request that the corporation file suit and be rebuffed. In certain circumstances, especially when it can be shown that the board of directors is for some reason conflicted with respect to the alleged breach of duty, this demand requirement is excused and the shareholder will be permitted to pursue a claim in the corporation’s name without further enquiry.

The two primary US stock exchanges, the NYSE and the NASDAQ, each make rules with which corporations must comply as a condition to being listed on these exchanges. These listing rules address all aspects of corporate governance, including topics such as director independence, the composition of various board committees, requirements to submit certain matters to a vote of shareholders, regulation of dual-class stock structures and other special voting rights, publication of and topics covered by corporate governance guidelines, and even requirements related to the corporation’s public website. These rules are enforced by the threat of public reprimand from the exchanges, temporary suspension of trading for repeat offences and permanent delisting for perennially or egregiously non-compliant companies.

While proxy advisory firms are not a source of law, their guidelines figure significantly in the corporate governance landscape. ISS has been estimated to control approximately 61 per cent of the proxy advisory market, with Glass Lewis estimated to control approximately 36 per cent. These advisory firms exert pressure on corporations to conform to governance standards they promulgate by issuing director election voting recommendations to each publicly traded corporation’s shareholders based on the corporation’s compliance with the advisory firm’s published standards. Perhaps because of the problem of rational apathy – that is, because an individual shareholder bears all of the costs of becoming an informed voter but shares the benefits with all other shareholders, shareholders have little incentive to inform themselves – proxy advisory firms wield outsized influence on corporate elections, especially among institutional investors such as pension funds. One study found that a recommendation from ISS to withhold a favourable vote in an uncontested director election correlates with a 20.9 per cent decline in favourable voting. In addition, a 2013 study sponsored by Stanford

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University found that companies were altering their compensation programmes to comply with proxy advisory firms’ ever-evolving policies.4 The US Congress, the US Department of Labor and the SEC have raised questions regarding fiduciary responsibility in the context of the outsourcing of proxy voting decisions to proxy advisory firms. Significantly, certain major institutional investors, such as BlackRock Inc (which invests over US$6.3 trillion in client assets) and the Vanguard Group (which invests over US$5.1 trillion in client assets) have stated that they reach proxy voting decisions on the basis of their own internally developed guidelines, independent of proxy advisory firms, and have sought to engage directly and pragmatically with companies. These major institutions are uniquely positioned to use their influence to recalibrate the system to reduce reliance on proxy advisory firms.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), signed into law in July 2010, was passed in response to corporate governance practices perceived by some to have contributed to the 2008–2010 economic crisis. The Dodd-Frank Act requires additional disclosure in corporate proxies and non-binding shareholder votes on various questions of corporate governance (notably, related to executive compensation), and contemplates greater access for shareholder-proposed director nominees to the company proxy. More recently, in response to increasing company compliance costs, in 2018 the SEC adopted rule amendments to streamline disclosure requirements and reduce duplicative or overlapping disclosure obligations.

II CORPORATE LEADERSHIP

Under Delaware law, ‘The business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors’.5 The corporation law of all other US states similarly assigns corporate managerial power to the board of directors.

i Board structure and practices

Boards of directors customarily organise committees to carry out specific functions without the presence of the entire board. State law generally permits most of the functions of the board of directors to be delegated to committees,6 and generally permits directors to rely on information, opinions, reports or statements presented to the board by its committees.7 Boards are specifically required by federal securities law to have an audit committee with certain prescribed functions relating to the retention, compensation and oversight of the company’s independent auditor. Federal securities law and NYSE and NASDAQ listing rules also require listed companies to maintain compensation and nominating or corporate governance committees. Boards will often voluntarily establish additional committees: for example, a company in the technology sector might establish a technology committee comprising directors with the most applicable expertise to stay abreast of technological developments, and a company that has important relationships with labour unions might choose to establish a labour relations committee. By custom, many companies have established a risk committee.

5 Delaware General Corporation Law, Section 141(a).
6 See, e.g., Delaware General Corporation Law, Section 141(c)(2).
7 See, e.g., Delaware General Corporation Law, Section 141(e).
(actually required of certain financial institutions by the Dodd-Frank Act), an executive committee, a finance committee, a public policy committee, or some subset thereof. Boards may also establish *ad hoc* committees in response to discrete or emergent developments.

A panoply of regulations and disclosure requirements affect the composition of boards of directors. Federal securities laws require all directors who serve on audit, compensation and nominating committees to be independent from the management of the company, and NYSE and NASDAQ listing rules require a majority of the board of directors to be independent. In addition, in 2018 California passed a law mandating female representation on the boards of publicly held companies based in the state. Companies are required by federal securities laws to disclose the experience, qualifications or skills of each director nominee that led the board to nominate that person to serve as a director. A company must also disclose whether and how its nominating committee considers diversity in identifying director nominees, and must make extensive disclosure about the nominating committee and how it functions.

Just under half of large corporations in the United States have a common CEO and chair of the board of directors. Companies that have one person serving as both chair and CEO typically have a lead director with additional rights, responsibilities and compensation. In 2018, about 52 per cent of companies listed on the S&P 500 Index had separate chairs and CEOs, up from 29 per cent in 2005. ISS generally recommends a vote in favour of shareholder proposals requiring an independent chair, taking into consideration the company’s current board leadership structure (including whether the company maintains a strong lead director position), governance structure and practices (including overall board independence) and the company’s performance. In 2018, shareholders brought proposals at 48 companies to require an independent chair. These proposals enjoyed an average level of support of 32 per cent. Companies are also required to describe in their annual meeting proxy statements the leadership structure of their board of directors, such as whether the same person serves as chair and CEO, and to explain why the company has determined that its leadership structure is appropriate. To date, the governance trend is towards ensuring an independent board leadership structure through a lead independent director, as opposed to separating the CEO and chair functions in all companies.

Corporations are generally permitted by state corporate law to have classified, or staggered, boards of directors, in which roughly one-third of the directors are elected each year for three-year terms; however, classified boards have become substantially less common in recent years. With a classified board, shareholders can replace a majority of the directors only in two election cycles, so a classified board can promote the continuity and stability of a corporation’s long-term strategy, reduce a corporation’s vulnerability to abusive takeover tactics, and ensure that the institutional experience of the board of directors will not be swept away in a single lopsided election. On the other hand, classified boards historically have not halted well-priced, all-cash takeover bids. The percentage of S&P 500 companies with staggered boards has declined, to approximately 11 per cent in 2018, down from approximately 57 per cent in 2003. Shareholder proposals to declassify boards of directors enjoy strong support from shareholders: shareholders voted on such proposals at seven companies in 2018, and the proposals averaged approximately 86 per cent shareholder support. (Shareholders voted on 46 management-initiated proposals to declassify boards in 2018, and these averaged 99 per cent shareholder support.) However, corporations are more likely to implement a classified board in connection with an initial public offering (IPO). Despite an ISS policy of recommending a withhold vote for directors at the first public company annual meeting of a corporation that implements a classified board in connection with an IPO, in recent years more than half of
IPO corporations implemented a classified board in connection with the offering, although some companies provide that the classified board will be declassified within several years of the IPO. Notwithstanding the trend towards removing classified boards, a 2013 empirical study confirmed that classified boards can enhance shareholder value.

Delaware law currently permits corporations to choose whether and how to afford insurgent director nominees access to a company’s proxy statement, but rules implemented by the SEC enhance the ability of shareholders to propose providing groups of shareholders without control intent to nominate up to a certain portion (typically 25 per cent) of the company’s entire board, known as proxy access. The interest in proxy access as a democratisation of corporate governance and voting has garnered increased strength. In late 2014, a group of pension funds announced a broad campaign to install proxy access at over 75 US publicly traded companies of diverse market capitalisations and across a variety of industry sectors. In 2018, shareholders at 41 companies voted on shareholder-initiated proposals to grant shareholders proxy access, and the proposals averaged 32 per cent support. These shareholder proxy access proposals typically seek to permit shareholders to nominate between 20 and 25 per cent of a company’s entire board. Many companies are also either proactively revising by-laws to permit proxy access or submitting management-initiated proxy access proposals for shareholder consideration. Although shareholder proxy access is becoming more prevalent, it remains to be seen to what extent shareholders will seek to exercise proxy access rights.

Historically, brokers holding stock of a corporation on behalf of clients have voted that stock at their discretion when their clients do not provide specific voting instructions. However, the NYSE listing rules now prohibit broker discretionary voting for listed companies on certain topics including governance-related proposals, and the Dodd-Frank Act eliminated broker discretionary voting in elections related to the election of directors, executive compensation and any other significant matter as determined by the SEC. As a result, directors in uncontested elections have more difficulty achieving majority votes. Lack of broker discretionary voting also increases the influence of activist shareholders and the power of proxy advisory firms such as ISS. Further concentrating voting power in the hands of activists is the problem of empty voting, in which an activist uses derivatives and similar arrangements to purchase voting power without taking on commensurate economic exposure to the corporation’s stock – for example, by simultaneously purchasing and short-selling a stock, resulting in no net economic exposure or investment costs aside from transaction fees.

In uncontested elections, directors were historically selected by plurality vote, but in recent years, majority voting policies have been adopted by approximately 90 per cent of companies included in the S&P 500 Index. Under a majority voting policy, directors in uncontested elections must receive a majority of the votes cast, rather than the plurality required by Delaware law, and if they do not must tender their resignation, although Delaware courts will generally defer to a board’s business judgement on whether to accept or reject a resignation from a director in such circumstances. Because directors must win a plurality of votes regardless of a corporation’s majority voting policies, these policies have


relatively less effect in the context of contested elections; their primary effect is to increase the power of withhold recommendations from ISS against incumbent directors running in uncontested elections.

**ii Directors**

Directors’ most basic and important responsibility is to exercise their business judgement in a manner they reasonably believe to be in the best interest of a corporation and its shareholders. In Delaware and 32 other states and the District of Columbia, where legislation approving a new corporate form – the benefit corporation – has been passed, directors of such corporations have an expanded fiduciary obligation to consider other stakeholders in addition to shareholders, including their overall impact on society, their workers, the communities in which they operate and the environment.

In most situations, directors do not and should not manage the day-to-day operations of the corporation, but instead exercise oversight in reasonable reliance on the advice of management, outside consultants hired by the corporation and their own understanding of the corporation’s business. The courts will generally defer to decisions that boards make, granting them the ‘presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company’ – a presumption referred to as the business judgement rule.10 The business judgement rule applies to most decisions that a board of directors makes. When a shareholder challenges a board’s business judgement, ‘the court merely looks to see whether the business decision made was rational in the sense of being one logical approach to advancing the corporation’s objectives’.11 To obtain the protection of the business judgement rule, directors must satisfy their duty of care, which entails reviewing the available material facts, and their duty of loyalty, which requires the disinterest and independence of the directors. In practice, the business judgement rule will protect directors when the corporate records reflect that they reviewed and considered the facts available to them and the advice of their advisers and when the directors did not have a conflict of interest in the decision.

The board of directors should work with management to set an appropriate ‘tone at the top’ of the corporation to encourage conscientiousness, transparency, ethical behaviour and cooperation throughout the organisation. It should approve the company’s annual operating plan and guide its long-term strategy, and should monitor and periodically assess the corporation’s performance in terms of these goals. The board should monitor and evaluate its own performance as well, noting any deficiencies in its expertise and composition with an eye towards rectifying them with future director nominations. It should monitor the organisation’s risk management practices, as well as compliance with applicable law and best practices, set standards for corporate social responsibility, and oversee relations with regulators and the corporation’s various constituencies, which increasingly includes engaging directly in director-level dialogue with shareholders. It should evaluate the corporation’s CEO and senior management, and ensure that a succession plan is in place for the CEO and senior management, an issue that has received heightened focus in light of increased turnover rates and visible succession crises. When a company receives a proposal for a large transaction that creates a conflict – or the appearance of a conflict – between the interests of the corporation’s

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11 *In re Dollar Thrifty Shareholder Litigation* (Del. Ch. 8 September 2010).
shareholders and its management, the board should take care to place itself at the centre of the transaction, and should consider the merits of a special committee of independent directors to oversee the company’s response to the proposal.

Directors enjoy substantial protection against personal liability for failures of board oversight. Under Delaware law, directors can be held personally liable for a failure to monitor only where there is ‘sustained or systemic failure of the board to exercise oversight – such as an utter failure to attempt to assure a reasonable information and reporting system exists’, which is a ‘demanding test’.12 Delaware courts have repeatedly emphasised that they will not impose liability under this standard unless directors have intentionally failed to implement any reporting system or controls or, having implemented such a system, intentionally refused to monitor the system or ignored any red flags that it raised. Proxy advisory firms and institutional investors have also been increasingly willing to wield the threat of withhold vote recommendations in response to perceived risk oversight failures or missteps.

III DISCLOSURE

Public corporations are subject to a disclosure regime that generally requires annual and quarterly reports, as well as current reports, to be filed following the occurrence of certain events, such as entry into material agreements, completion of significant acquisitions or dispositions of assets, and changes in officers or directors and amendments to the corporation’s charter or by-laws. Public disclosure is also required of certain transactions in the corporation’s securities by corporate insiders, such as officers and directors, and of material non-public information that a corporate insider has disclosed to certain individuals, such as stock analysts or shareholders. Additionally, the corporation must make significant disclosure whenever it solicits proxies for the votes of shareholders, as it must in connection with the election of directors or significant transactions, such as mergers or the sale of substantially all corporate assets.

Securities regulations require substantial annual disclosure of compensation awarded to the five named executive officers (NEOs) of a corporation, which are the CEO, CFO and the three other most highly compensated executive officers. The disclosure must describe all material elements of the NEOs’ compensation, including the overall objectives of the compensation programmes, the process for determining the amount of each element of compensation and the rationale underlying that process. Federal securities laws also require disclosure regarding the relationship between executive compensation and the company’s financial performance, the company’s policies governing hedging transactions of the company’s stock by employees and directors, and the ratio of the total compensation of the CEO to the median compensation of the company’s employees. In furtherance of the Dodd-Frank Act requirements, in 2015 the SEC adopted a rule requiring companies to disclose in registration statements, proxy statements and annual reports the ratio of CEO compensation to the median compensation of the company’s employees. The methodology for identifying the median employee compensation is not set forth in the rule, but is instead determined by each company.

IV CORPORATE RESPONSIBILITY
The board of directors should ensure that the corporation has a healthy and balanced attitude towards risk – keeping in mind that there is danger in excessive risk aversion, just as there is danger in excessive risk taking – and it should set standards for corporate risk management. When the corporation’s risk management functions raise a red flag, the board of directors should investigate the occurrence and see that the corporation takes measures appropriate to remedy any problems that it uncovers. The board should periodically review the effectiveness of the corporation’s risk management reporting functions (including how risks are identified and reported upward, how management responsibility for risk management is allocated and whether risk managers have access to the board of directors and senior management) and repair any deficiencies that it uncovers. In the United States, recent cybersecurity-related intrusions have brought heightened attention and scrutiny to questions of risk oversight and effective risk mitigation practices.

Some corporations have a dedicated board-level risk management committee, which the Dodd-Frank Act requires of certain publicly traded bank holding companies and non-bank financial holding companies, but most boards situate the risk management function at the audit committee, in response to a listing rule of the NYSE that requires the audit committee to discuss risk assessment and risk management policies. Companies are required to disclose in their annual proxy statement the extent of the board’s role in risk oversight activities and how the board administers its oversight function. The SEC has also issued specific guidance addressing when and how cybersecurity risks should be publicly disclosed. The reputational damage to boards and companies that fail to properly manage risk is a major threat, and ISS now includes specific reference to risk oversight as part of its criteria for choosing when to recommend withholding votes in uncontested director elections.

V SHAREHOLDERS

i Shareholder rights and powers
Shareholders are permitted to vote at annual and special meetings. State corporation law typically entitles shareholders to vote on matters including elections of directors, amendments to the corporation’s charter, transactions in which the corporation is acquired and sales of substantially all of the corporation’s assets. The NYSE requires a shareholder vote prior to the issuance of stock that will exceed 20 per cent of the voting power or common stock outstanding after the issuance. In addition, Rule 14a-8 under the federal Securities Exchange Act permits shareholders to propose and vote on additional non-binding resolutions, which typically concern issues of social justice or corporate responsibility. In 2018, shareholders voted on 171 proposals concerning social and environmental issues (with 29 proposals focused specifically on climate change and 49 focused on lobbying and political spending). Environmental and social issues are becoming increasingly important to shareholders, with large institutional investors announcing a heightened focus on socially responsible investing and certain activist investors launching new funds with the same focus.

Corporations must also conduct a non-binding shareholder vote at least every three years to approve the compensation of their NEOs – votes that ISS policy also encourages – and an additional non-binding shareholder vote at least every six years to determine the
frequency of these ‘say on pay’ votes. Non-binding advisory votes are also now required with respect to golden parachute compensation arrangements triggered by a merger or acquisition transaction. However, the Jumpstart Our Business Startups Act, or JOBS Act, signed into law in January 2012, exempts newly public ‘emerging growth companies’ from say on pay votes and certain other requirements for the earlier of five years or until the company meets specified size thresholds.

ii Shareholders’ duties and responsibilities

Under Regulation 13D of the Securities Exchange Act, shareholders or groups of shareholders acting in concert who acquire over 5 per cent of a company’s stock must publicly disclose their ownership stake within the next 10 days. Schedule 13D requires disclosure of the shareholder’s or group’s investment purposes, including any plans or proposals relating to significant transactions involving the company. The disclosure statement must also be amended promptly to reflect any material changes to information previously disclosed. Passive investors acquiring over 5 per cent of a company’s stock who certify that the securities were not acquired, and are not held, with the purpose or effect of changing or influencing control of the issuer may instead disclose ownership on a short-form Schedule 13G, the disclosure requirements of which are less onerous than those of the long-form Schedule 13D.

iii Shareholder activism

Hostile takeovers and shareholder activism – the capture of corporate control or influence over corporate policy by discrete groups of shareholders, typically to subjugate a corporation’s long-term strategy in pursuit of short-term profits or the return of capital to shareholders – are a significant threat to US corporations. In addition to cultivating strong relationships with its long-term institutional shareholder base, dealing with unsolicited offers and pressure from shareholder activists is more art than science.

iv Takeover defences

A critically important tool for enabling boards of directors to discharge their fiduciary duties in the face of the threat of hostile takeovers and shareholder activism under current law remains the shareholder rights plan, or ‘poison pill’.

The shareholder rights plan entails a dividend of special rights to each of the corporation’s shareholders. In the event that a shareholder amasses equity ownership in excess of a predetermined threshold – often 10 to 15 per cent (with perhaps a higher threshold used for passive institutional investors) – without the approval of the board of directors, the rights held by every other shareholder trigger and convert into the right to purchase stock of


the corporation at a price substantially below the current market value. Alternatively, most rights plans provide that the board of directors may instead choose to exchange one share of common stock for each right held by shareholders other than the hostile bidder or activist shareholder. Either way, the result of this conversion or exchange is that the ownership position of the triggering shareholder is substantially diluted.

The rights plan is the only structural takeover defence that allows a board to resist a hostile takeover attempt, and it has also been deployed in numerous activism situations. While it does not provide complete immunity from a takeover, it allows the board to control the process and provides the corporation with leverage to bargain for a higher acquisition price and the power to reject underpriced or otherwise inappropriate bids. It is also implemented exclusively by the board of directors and does not require shareholder approval, so it can be put in place in very short order.

The principal disadvantage of the rights plan is that ISS will typically recommend a withhold vote for all directors after the adoption of a rights plan that the company does not subject to shareholder ratification within a year of adoption. As a result, and because a rights plan can be adopted quickly, most corporations adopt a rights plan only after a takeover threat appears – and prior to that time, the plan is ‘kept on the shelf’.

Keeping a rights plan on the shelf offers almost all of the protection of an active rights plan without any risk from an adverse ISS recommendation, but it can leave a corporation vulnerable to stealth acquisitions, in which an activist shareholder purchases just under 5 per cent of a company’s stock, and then buys as much as possible on the open market within the next 10 days. Because Regulation 13D under the Securities Exchange Act gives shareholders 10 days after acquiring over 5 per cent of a company’s stock to publicly disclose their ownership stake, this technique can result in an acquisition of a substantial portion of a company’s equity before it is ever disclosed.\(^{16}\) Similarly, Regulation 13D patrols a narrow beat with regard to derivatives. While all interests must be disclosed after a shareholder crosses the 5 per cent threshold, only some derivative interests are counted towards that threshold – generally, only those that are settled in kind (for stock of the corporation rather than for cash from the derivatives counterparty), and only those that can be exercised within the next 60 days.\(^{17}\) However, because an activist may accumulate its position in a corporation, without public disclosure, the board of directors may not have any warning of the activist’s behaviour, and there is thus some risk that a company may not be able to adopt a rights plan in time to avoid a significant accumulation of stock in unfriendly and opportunistic hands.

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17 Regulation 13D discourages shareholders from employing contracts or arrangements that divest beneficial ownership of a security as part of a plan or scheme to evade the reporting requirements of Section 13(d) of the Securities Exchange Act by counting the securities towards the 5 per cent threshold (Securities Exchange Act Rule 13d-3(b)). One court applied this provision to impute beneficial ownership to a shareholder of securities in which the shareholder had acquired derivative interests: CSX Corp v. Children’s Inv Fund Management, 562 F. Supp. 2d 511 (S.D.N.Y. 2008). Still, no bright-line rule has emerged to determine when a shareholder’s use of derivative instruments is suspicious enough to constitute such a plan or scheme to evade the reporting requirements, so the case offers only marginal protection from raiders and activist shareholders.
Other defences against activist shareholders include a classified board of directors, limiting shareholders’ ability to call a special meeting, adopting an advance notice by-law that requires rigorous disclosure of a shareholder’s holdings and other interests in a corporation to nominate a director candidate or propose other items of business at a special or annual meeting, and limiting shareholders’ ability to act by written consent (70 per cent of S&P 500 companies prohibit shareholder action by written consent).

Overall, the availability of takeover defences has been steadily eroded over the years, predominantly as a result of shareholder activism led by ISS, union and public pension funds and academics. Today, only 1 per cent of S&P 500 companies have a rights plan in effect, down from 45 per cent in 2005 and 60 per cent in 2000. In 2018, shareholders at 67 companies voted on proposals to grant shareholders the right to call special meetings or to decrease the requirements to call a special meeting, with an average level of support of 41 per cent, and shareholders at 40 companies voted on proposals to grant shareholders the right to act by written consent or to decrease the requirements to act by written consent, with an average level of support of 43 per cent.

v Contact with shareholders

Shareholder relations have become increasingly complicated as a result of activist trends and have required greater attention at the board level, prompting a renewed focus on the proper role of direct dialogue between boards and shareholders, as well as the benefits and disadvantages of more open, regular lines of communication. Shareholder engagement is increasing, as both companies and institutional investors have sought to engage in more regular dialogue on corporate governance matters. A report by the EY Center for Board Matters at Ernst & Young LLP suggests that approximately 77 per cent of S&P 500 companies included disclosures about their shareholder engagement efforts in their 2018 proxy statements, compared with approximately 56 per cent in 2015. Recent disclosure reform efforts have also sought to require institutional shareholders to report their share positions on a more current basis as of the end of each quarter than is now the case, as well as suggesting more frequent reporting. Management generally serves as the primary caretaker of shareholder relationships, with the board providing oversight as to the presence of an effective shareholder relations programme. However, institutional investors are increasingly voicing their expectation that companies should provide access to independent directors. Some activists have also been seeking direct dialogue generally with companies in which they invest, independent of whether operational or other performance issues exist. In 2016, a group of large public companies and investors jointly developed and endorsed a set of principles on corporate governance that, among other things, called for active engagement with shareholders on key issues. Similarly, in 2018, BlackRock called for a new model of shareholder engagement based on year-round discussions among management, the board and shareholders about long-term value creation and long-term corporate contribution to society at large. Where shareholders request direct communications with the board, it may be desirable for directors, in appropriate circumstances and following consultation with management, to accommodate those requests. The policies and arrangements best suited for any given company will depend on, among other things, the preferences of directors, the

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nature and extent of existing relationships with major shareholders, the expressed preferences of those shareholders, and the structure and staffing of the company’s existing shareholder relations programme.

In 2000, the SEC promulgated Regulation FD to prevent companies from selectively disclosing material and non-public information to large investors and analysts. Under Regulation FD, certain employees of a company – including directors, officers, public relations or investor relations professionals, and others with similar responsibilities or who regularly communicate with market professionals or shareholders – may intentionally disclose material non-public information about a company only if the material is simultaneously disclosed to the public. If they disclose the information unintentionally, the same information must promptly be disclosed publicly. Disclosures made to the press and disclosures made in the ordinary course of business (e.g., customary communications with distributors or customers) are exempted. Intentional disclosures include disclosures in which the employee was reckless in not knowing that the information is material and non-public.

Information is considered material if there is a substantial likelihood that a reasonable investor would consider the information important when making investment decisions, and if the information adds significantly to the total mix of information available. Even if information is quantitatively insignificant, it may still be considered qualitatively material, and information is more likely to be deemed material in hindsight in light of subsequent reaction by the market. The SEC has issued guidance that certain categories of information are particularly likely to be considered material – among them, information related to earnings; corporate events such as mergers, bankruptcy, tender offers or changes in control; and products, discoveries and developments with respect to material contracts, customers or suppliers. And while purported clarifications to previously announced information can themselves be considered material and non-public, ‘Regulation FD does not require that corporate officials only utter verbatim statements that were previously publicly made’, 19

Regulation FD makes unscripted dialogues between company officials and individual analysts and shareholders risky. 20 While it is unusual for companies to prohibit such meetings altogether, they should be approached carefully and by professional spokespeople only. Boards of directors should adopt corporate governance guidelines that ensure that the company’s media strategy is executed only through approved channels, and with the understanding that analysts and shareholders will often engage in such private dialogues with the hope of ferreting out exactly the sort of information that Regulation FD forbids company officials from disclosing in such a forum.

VI OUTLOOK

Corporate governance in the United States has changed dramatically over the past 30 years, and will undoubtedly continue to evolve in significant ways in the coming years. In particular, the SEC has increased its focus on ‘proxy plumbing’, including with respect to the accuracy, transparency and efficiency of the voting process; shareholder communications and retail participation in the voting process; and misalignment of voting power and economic interests (including through empty voting strategies involving purchasing voting securities

The SEC has indicated that it is continuing to review the role of proxy advisory firms such as ISS and Glass Lewis in the voting process, which, in light of ISS’s substantial influence in the evolution of corporate governance norms over the past several decades, may have long-term and far-reaching implications. The SEC has also received many proposals for the reform of the Regulation 13D reporting regime, including to encompass additional forms of economic interests and to close the 10-day reporting window that raiders have used in recent years to facilitate stealth acquisitions of control blocks without paying a premium. Similarly, in 2016, legislation was introduced in the Senate seeking amendments to Regulation 13D that would require greater transparency from investors accumulating large positions in public securities.

At the state level, the courts of Delaware have been refining the fiduciary duty rules applicable to conflict transactions and the review of merger and acquisition proposals in recent years, often to increase the scrutiny directors will face in connection with such transactions and, more generally, to recalibrate the relative power of shareholders and directors. Spurred on by the accounting scandals of the early 2000s and the financial crisis at the end of the past decade, the political and public appetite for ever more corporate governance remains strong. However, we have recently seen a heightened awareness of short-termist pressures in the markets and their impact on boards of directors charged with guiding a company’s strategy to achieve long-term value creation, including an increased focus on the extent to which new corporate governance reforms may exacerbate, rather than ameliorate, short-termist pressures. Shareholder engagement practices have significantly evolved as well, with the frequency and depth of engagement increasing alongside a more fundamental rethinking of the nature of relationships with shareholders and the role that these relationships play in supporting – or undermining – board efforts to take long-term perspectives. A central aspect of the continuing debate is whether initiatives styled as governance reforms operate to shift the locus of control over the corporate enterprise from those with direct knowledge, involvement in and fiduciary responsibilities for the enterprise towards entities lacking those attributes, and whether imposing some form of duties, regulations or mandated best practices on such entities is needed.

In many respects, the relentless drive to adopt corporate governance mandates seems to have reached a plateau in the United States, with essentially all of the prescribed best practices – including say on pay, the dismantling of takeover defences, majority voting in the election of directors and the declassification of board structures – having been codified in rules and regulations or voluntarily adopted by a majority of S&P 500 companies. Whether this portends a new era of more nuanced corporate governance debates, where the focus has shifted from ‘check the box’ policies to more complex questions such as striking the right balance in recruiting directors with complementary skill sets and diverse perspectives, and tailoring the board’s role in overseeing risk management to the specific needs of the company, remains to be seen.

Continued debate over, and the evolution of, US governance rules thus appear likely.
Appendix 1

ABOUT THE AUTHORS

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Martin Abram is a founding partner of Schindler Attorneys. Before establishing the firm, he spent 15 years at Wolf Theiss, where he became a partner in 2002. Mr Abram's practice focuses on corporate, real estate and financing work, with a particular focus on corporate and real estate mergers and acquisitions, corporate reorganisations as well as project and real estate financing. Furthermore, he is also active in equity capital market transactions and commercial and residential leasing transactions. Mr Abram has published articles regarding corporate and energy law and is an author and co-editor of a book on the general meeting of Austrian stock corporations.

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Michael Amadi is a senior associate and head of the firm’s enterprise practice group. Michael has vast litigation and arbitration experience in oil and gas, real estate, shareholder disputes, banking and finance, financial crime investigation and prosecution, asset tracing and recoveries. He has previously served as special assistant to the chief executive officer of the Nigerian Investment Promotion Commission, where he coordinated the Commission’s legal, regulatory and compliance portfolio. He also served as a member of the Ministerial Committee on the review of the Pioneer Status Administration in Nigeria.

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NanaAma Botchway is the founder of n dowuona & company. Her areas of focus are corporate and commercial, property and construction, and energy and infrastructure.
She has advised on numerous significant investments and divestments in Ghana and in other parts of Africa. She advised on the US$200 million sale of Fan Milk International (a regional West African diary product company whose Ghanaian subsidiary is listed on the Ghana Stock Exchange) by the founding Danish private equity investors to the Abraaj Group. She advised Kingdom Hotel Investments on their acquisition and development of the US$100 million multipurpose property development in Ghana from the inception of the project. She also recently advised Leapfrog Strategic African Investments on their US$180 million investment in the Enterprise Insurance Group; on an acquisition by Cellulant, an African-focused impact fund, on the sale of a significant stake in Cal Bank; and on the proposed sale of a large telecoms tower company’s Ghana business.

She has advised on noteworthy public–private partnership (PPP) and infrastructure projects such as the national identification card PPP, a PPP for the development of a floating dry dock, the Volta Lake Transport Company’s US$300 million Eastern Corridor multi-modal transport project as well as on the proposed construction of a new LPG pipeline from the port of Tema to the Tema Oil Refinery. She is experienced in advising on various aspects of construction projects, including planning, permitting and finance, and has advised local and international developers on the construction of significant real estate projects in Ghana, including the Mövenpick Ambassador Hotel, the first mixed-use hotel project of its kind in Ghana, and One Airport Square, the first certified green office building in Ghana.

In the energy and oil and gas space, she has advised on various matters. Recently, she has advised on the establishment of off-grid solar energy companies in Ghana, and on the pre-feasibility study of private sector participation in the Electricity Company of Ghana, which is the largest electricity distribution company in Ghana. She currently advises Puma Energy (an affiliate of Trafigura), one of the largest bulk distributors of petroleum products in Ghana, on a range of commercial matters, as well as other local and international oil and gas sector players involved in bunkering and other activities.

NanaAma is a member of the Ghana Bar Association and the Ghana Association of Restructuring and Insolvency Advisors, and serves on the boards of a few large Ghanaian companies. She is a graduate of Princeton University’s Woodrow Wilson School undergraduate programme, New York University’s Stern School of Business, where she received an MBA in finance and accounting, and Columbia University School of Law, where she received a JD and was named a James Kent scholar, the highest honour awarded in recognition of excellent academic performance.

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Nana Abena Henewaa Busumtwi is an associate at n dowuona & company. Her areas of focus are corporate and commercial law and real estate.

Prior to joining the firm, Nana Abena worked for five years as a freelance company secretary. Over this period, she worked with the boards of various multinational organisations, including a hospitality company, an oil company and an international financial services company, focusing on life insurance, pension trusts and health insurance. Nana Abena has also managed due diligence processes and coordinated compliance requirements on complex transactions such as a multimillion-dollar public–private partnership between a private sector identity company and the government for a national biometric identification project.
Nana Abena holds an LLB from the Ghana Institute of Management and Public Administration. She is a member of the Ghana Bar Association and the Institute of Chartered Secretaries and Administrators, UK.

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Willem Calkoen has worked for many years in mergers and acquisitions – both public offers and private transactions – and in securities law, and now specialises in corporate governance. He graduated from Utrecht University in 1970 and served as a naval reserve officer until 1972, when he joined NautaDutilh. He became a partner in 1980. He was chair of the Corporate M&A Committee of the Section on Business Law (SBL) of the International Bar Association from 1988 to 1992; an officer of the SBL from 1993 to 1998; and chair of the SBL from 1997 to 1998.

Mr Calkoen publishes regularly on topics such as joint ventures and corporate governance. He has been highly recommended in _Pritchard's European Legal 500_ and listed in _Who's Who Legal_ for the Netherlands under M&A and corporate governance. He is acknowledged by European Legal Experts as a corporate and commercial expert.

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Hyeon-Deog Cho is an attorney at Kim & Chang. Mr Cho leads the corporate governance team of the firm, and his practice focuses on governance reform, corporate transformations (including spin-offs and split-offs), holding companies, takeover defences, planning for and defending against shareholder activism, M&A, capital markets and corporate financing, restructurings and insolvencies, and white colour crime defence. He has also represented most of top tier big business groups in Korea.

Prior to joining the firm in 2004, Mr Cho lectured in international business strategy and multinational business administration at Seoul National University. Further, he worked as the head of the Business Case Centre and as the vice president of the Institute for Industrial Policy Studies under the Ministry of Commerce, Industry and Energy.

Mr Cho earned a BA (1990), MBA (1992) and PhD (1999) in business administration (with a specialisation in international business and business strategy) from Seoul National University, and received his LLM from Boston University School of Law in 2009. He also completed an international lawyer programme at Cleary Gottlieb Steen & Hamilton LLP’s New York office in 2009 and 2010.

He was admitted to the Korean Bar in 2004.

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Jacob Christensen primarily works with company law and securities law issues, corporate governance, legal risk management and compliance. He also provides advice on general contract law and commercial law issues to a number of regular clients.
Mr Christensen is a member of the expert committee for company and securities law experts of the General Council of the Danish Bar and Law Society.

Mr Christensen graduated with a master’s degree in law from the University of Copenhagen in 1991, joined Plesner Law Firm the same year and became a partner in 2001. He is a member of a number of boards of directors, including the board of directors of the Doctors’ Pension Investment Association, and a former member of the board of directors of Plesner Law Firm.

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Paulo Olavo Cunha joined VdA in 2005 and is the head partner of the corporate and governance practice. Specialised in company law, he has been responsible for major projects, transactions and group restructuring operations. Paulo has been actively providing advice to corporate bodies of some of the major Portuguese companies in strategic and complex corporate-related aspects and has been providing highly specialised legal assistance to (listed) public companies in dealing with their shareholder relations and disputes.

In his advisory role to large companies, Paulo was a member of their corporate governance and corporate sustainability and ethics committees as an expert, and prepared several legal opinions for management and supervisory bodies. Paulo is also a member of the corporate bodies of several Portuguese companies.

Paulo has concomitantly maintained a strong academic career, achieving his PhD in commercial law in 1986 and being professor of law at the Portuguese Catholic University of Lisbon, responsible for lecturing in and coordinating courses on commercial and corporate law, mainly at the Catholic University of Portugal (Lisbon and Oporto). Paulo is also an author of a vast bibliography on commercial, insolvency and corporate law, and has been a participant in numerous conferences, seminars and round tables in his areas of expertise.

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Akosua Achiaa Akobour Debrah is an associate at n dowuona & company. Her areas of focus are corporate and commercial, banking and finance and dispute resolution. Achiaa routinely advises corporate clients on various matters involving corporate law and governance, commercial law, property law, tax and regulatory compliance. Her recent work with the firm includes advising on the structuring of an asset purchase acquisition of a multinational manufacturing and distribution chain, and advising an international consortium of contractors on the structuring of an investment vehicle for tendering for certain public infrastructure works in Ghana. She has also recently advised on the sale of significant stakes in companies listed on the Ghana Stock Exchange, and on the implementation of security arrangements between a local energy company and its clients.

Prior to joining the firm, Achiaa practised with Ghartey & Ghartey as a trainee solicitor in the private client and dispute resolution teams. Her training experience involved advising on commercial and real estate contracts, intellectual property rights, corporate insolvency and debt restructuring, and regulatory compliance.

Achiaa obtained her LLB from the Kwame Nkrumah University of Science and Technology and also holds an LLM (with distinction) in international corporate governance and financial regulation from the University of Warwick. She is admitted to practise law in Ghana.

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Hans-Jakob Diem is a corporate partner at Lenz & Staehelin. He heads the firm’s corporate and M&A practice group and is the co-head of the capital markets practice group in Zurich. He has extensive experience in representing clients in a variety of corporate transactions, concentrating on mergers and acquisitions, capital market transactions, bank financings and corporate governance matters. Hans-Jakob Diem is regarded as a leading corporate practitioner in Switzerland and is regularly involved in high-profile transactions in the Swiss market, both domestic and cross-border. He has represented, among others, Monsanto in its proposed business combination with Syngenta, Deutsche Börse in its acquisition of STOXX and Indexium, HNA Group in its acquisition of Swissport Group, The Chubb Corporation in its merger with ACE Limited, Sunrise in its IPO and bond financings, BTG Pactual in the acquisition and the sale of BSI, Nationale Suisse in connection with Helvetia’s public tender offer, and Holcim’s principal shareholder in the merger between Holcim and Lafarge. He also serves as principal outside counsel for a number of clients on stock exchange and securities trading law and corporate governance matters. Besides his corporate practice, Hans-Jakob Diem lectures corporate and M&A law at the universities of Basel and Zurich, and is a regular speaker at conferences, an author of various legal textbooks and a regular contributor to law journals.

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Adam O Emmerich focuses primarily on mergers and acquisitions, securities law matters and corporate governance. His practice has included a broad and varied representation of...
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Tino Gaberthüel is a corporate partner at Lenz & Staehelin. He regularly advises corporates and individuals on all matters of Swiss business law. He is specialised in domestic and cross-border mergers and acquisitions, including public tender offers, private equity transactions as well as securities and capital markets law. He is admitted as an expert to SIX Swiss Exchange for Listing Purposes.


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Danil is a Russian-qualified lawyer and advocate who advises on a variety of disciplines including corporate and dispute work. His experience covers M&A transactions, general corporate matters and a variety of disputes, including regulatory, corporate and shareholder disputes.

Danil graduated from the international law department of the Moscow State Institute of International Relations (MGIMO) and joined the firm in 2007.

ELLISA O HABBART
The Delaware Counsel Group LLC
Ms Habbart leads The Delaware Counsel Group and assists lawyers globally on transactions and governance issues with a Delaware connection. Outside counsel and in-house counsel
of Fortune 100 companies, major financial institutions and private equity firms worldwide rely on Ms Habbart as their guide on Delaware law. A significant portion of Ms Habbart’s representations involve cross-border transactions. Typical representations include fund formations, mergers and acquisitions, joint ventures, recapitalisations, financings and new equity issuances. In addition to helping to implement such transactions and rendering legal opinions, Ms Habbart regularly advises management on governance issues relating to significant transactions and issues that arise during the life of a business entity.

Ms Habbart is top ranked in Chambers USA as one of America’s leading business lawyers in the Delaware corporate and mergers and acquisitions law section, and by Who’s Who Legal: Corporate Governance. According to Chambers, clients report that she ‘has expert knowledge in the field but is still commercially sensitive to what the client aims to achieve’, and is ‘very plugged in to Delaware legal developments’. She is also rated ‘AV’ by Martindale-Hubbell.

Ms Habbart is one of only 26 lawyers appointed to the Council of the Section of Corporation Law of the Delaware State Bar Association, the group responsible for monitoring and recommending amendments to the Delaware General Corporation Law. She is also the Corporate and M&A Law Committee’s representative on the Economic Sanctions working group of the International Bar Association’s Legal Policy and Research Unit, which develops and implements innovative strategies and initiatives relevant to business and the law, the global legal profession and the broader global community. She is the former vice chair of the Corporate and M&A Committee Corporate Governance Subcommittee and holds significant leadership positions in the American Bar Association.

Ms Habbart’s publications include a chapter on Delaware law in the Partnerships, Joint Ventures and Strategic Alliances; Delaware Limited Liability Company Forms and Practice Manual, which is updated annually; the US chapter of the Treasury Shares Guide; the Delaware chapter in Private Fund Dispute Resolution; the IBA’s Directors and Officers Checklist; and the first in-depth analysis of the Uniform Law Commission Uniform Statutory Trust Act in the American Bar Association publication The Business Lawyer.

Prior to founding The Delaware Counsel Group LLC, Ms Habbart was an associate and partner with Prickett Jones & Elliott and was the partner in charge of the Delaware office of Stradley Ronon Stevens & Young. In addition to her Juris Doctor, Ms Habbart has a master’s degree in taxation.

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Syafrullah Hamdi is an associate in the real estate practice group of Hadiputranito, Hadinoto & Partners, a member of Baker & McKenzie International in Indonesia. He has been extensively involved in a broad range of major corporate actions, such as mergers and acquisitions, real estate, foreign investments, project financing and capital market. He also regularly advises clients on corporate and commercial legal issues.

MITSUHIRO HARADA
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Mitsuhiro Harada has been a partner in the M&A and corporate group at Nishimura & Asahi since 2010 and was previously seconded to the US international law firm Sullivan & Cromwell LLP in New York for one year. Mr Harada has represented both Japanese and non-Japanese buyers or sellers in numerous cross-border commercial transactions in
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Mr Harada graduated from the University of Tokyo (LLB) in 1999 and gained his LLM from New York University School of Law in 2006. He was admitted to the Japanese Bar in 2000 and the New York Bar in 2007.

MARCUS HOLMING
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Marcus is an associate in Hannes Snellman’s equity capital markets and public M&A team. He works mainly with corporate and securities market law. Marcus’ experience mainly includes work in relation to public equity issues and public M&A transactions, as well as various corporate and equity capital market matters.

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Min-Yung Hong has been an attorney at Kim & Chang since 2007. He practises in a wide range of corporate and finance law areas and various regulations of listed companies, with a focus on corporate governance, insolvency and restructuring, mergers and acquisitions, banking, securities and capital markets.

Mr Hong represents financial and non-financial clients in relation to the restructuring of corporate governance, which typically includes the establishment of financial or non-financial holding companies or de facto holding companies through mergers or spin-offs of related companies.

Mr Hong also represents debtor companies in relation to the pre-workout and workout proceedings that are managed by creditor financial institutions, and rehabilitation proceedings governed by the Korean courts. A thorough understanding of local bankruptcy law and the commercial interests of both creditors and debtors are keys to the successful rehabilitation or financial normalisation of debtors.

Mr Hong received an LLM degree from the University of San Diego, School of Law in 2014, and his bachelor’s degree in business administration from Seoul National University in 2006. He attended the Judicial Research and Training Institute of the Supreme Court of Korea in 2006. He was admitted to the Korea Bar in 2007.

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Klaus Ilmonen is a partner at Hannes Snellman working with transactions involving public corporations. He has considerable experience in public takeovers, as well as in equity capital markets transactions. Klaus also works with governance and regulatory matters of public corporations.

Klaus has served as member of an expert working group for ESMA in relation to EU corporate finance regulations and has participated in drafting Finnish takeover regulations. Klaus holds a Doctor of Laws degree from the University of Helsinki and an LLM degree (Stone Scholar) from Columbia University. Klaus has also been a visiting researcher at Harvard Law School.
About the Authors

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Elke Janssens focuses on corporate law and corporate governance. She advises listed companies and has assisted in several public offerings. Elke also regularly acts in negotiations for M&A transactions and restructurings.

Elke received her law degree from the Vrije Universiteit Brussel (VUB) in 1996. She obtained a master’s degree in business law from the Université libre de Bruxelles (ULB) in 1998 and a master’s in management from VUB in 2001. She completed coursework in the executive MBA programme at the Solvay Business School from 2006 to 2007. Elke was admitted to the Brussels Bar in 1997 and is a partner at NaughtDutilh.

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Anniina Järvinen is a managing associate in Hannes Snellman’s M&A group. She specialises in corporate and securities market law. She has experience in several capital market transactions, equity and bond issues, as well as M&A. She has also worked at an international–US law firm in London. Prior to joining Hannes Snellman, Anniina worked for the Finnish Financial Supervisory Authority in the conduct of business supervision department. She joined Hannes Snellman in 2012 and was admitted to the Finnish Bar in 2016.

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Kee Yeng’s areas of practice encompass mergers and acquisitions (for both public and private companies), equity capital markets and corporate advisory work for financial institutions and public companies listed on the Singapore Exchange. Kee Yeng has advised sovereign funds, private equity firms and multinational corporates in an extensive range of domestic and cross-border transactions, including public takeovers, private acquisitions and joint ventures. She is also actively involved in the listing of structured warrant programmes on the Singapore Exchange.

Kee Yeng has been recognised for her work in corporate and M&A in *Chambers Global*, *Chambers Asia-Pacific* and *IFLR1000*. She has also been recommended by *The Legal 500 Asia Pacific* for public mergers and acquisitions.

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Prior to joining Kim & Chang, Mr Lee worked at prominent law firms in New York and Silicon Valley.

Mr Lee is a frequent speaker on the topics of M&A, venture capital and IP matters, and he was a speaker at Stanford University’s US-Asia Technology Management Center School of Engineering, giving a lecture entitled the ‘Entrepreneurial Ecosystem of Korea: New Trends in Acceleration and Internationalisation’, which was part of a lecture series entitled ‘New Trends in Startup Company Acceleration: Toward the Rise of the Global Startup’.

Mr Lee received his JD from the University of Pennsylvania Law School in 2004, and his BA from Seoul National University in 2000. He also received a certificate in business and public policy from the University of Pennsylvania, The Wharton School in 2004. He is admitted to the New York and California Bars.

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Andrew is co-head of the corporate mergers and acquisitions department at Allen & Gledhill. He has advised clients on numerous market-leading corporate and merger and acquisition transactions. He also advises clients on corporate governance, regulatory and compliance matters. His clients include multinational companies, listed and non-listed companies, financial institutions and private equity firms.
Andrew was called to the Singapore Bar in 1986. He was an associate with the firm from 1988 to 1989 before spending time as an investment banker. He rejoined the firm in 1993 as a partner.

Andrew serves as a trustee on the board of trustees of the National University of Singapore and is a member of the Committee for Private Education, which is a committee of the SkillsFuture Singapore Board. He currently is a director of Singapore Press Holdings Limited, Jurong Engineering Limited and Singex Holdings Pte Ltd. He is also a fellow of the Singapore Institute of Directors, and a member of the National University of Singapore Law Advisory Council.

He is consistently recognised for his leading expertise in various publications, including *Chambers Global, Chambers Asia-Pacific, IFLR1000, The Legal 500 Asia Pacific, Best Lawyers* and *Who's Who Legal*.

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Andrew MacDougall is a partner in the corporate law group at Osler, Hoskin & Harcourt LLP, specialising in corporate governance, executive compensation and shareholder activism. He leads the Osler corporate governance practice and co-chairs Osler’s executive compensation practice group. He regularly advises boards and in-house counsel on a broad spectrum of corporate governance issues, including director responsibilities, executive compensation, shareholder engagement and shareholders meeting matters. He has a long-standing interest in corporate governance matters, and has written and spoken extensively on corporate governance matters. He has also advised Canadian securities regulators and various professional bodies in Canada that are active in the governance area. Mr MacDougall is an inaugural fellow of the American College of Governance Counsel and a graduate of the Directors Education Program of Canada’s Institute of Corporate Directors.

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Didier Martin is one of the leading specialists on French public tender offers, securities law and privatisations. He devotes a significant part of his time to litigation in various areas such as securities law and takeovers, white-collar crime and bankruptcy.

He has published numerous books and articles on a wide variety of corporate law subjects, with a particular emphasis on French tender offers, including the reference works *Les Offres Publiques d’Acquisition, Les Sociétés Holdings and Mergers & Acquisitions in France*. 
He is also responsible for the drafting and publication of the commentaries on the French Monetary and Financial Code (updated each year).

He is a member of various committees and associations, including the Financial Transactions Committee of the MEDEF and ANSA (major French business associations), as well as the Haut Comité Juridique de la Place Financière, created by the stock exchange authority (AMF) and the Banque de France.

Mr Martin is also co-president of the Commission Europe (within the Club des Juristes – a leading French legal think tank), which makes proposals for improving company law and stock exchange regulations.

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Cristina Melo Miranda joined VdA in 2013 and is an associate in the corporate and governance practice, actively participating in several transactions and group restructuring operations. With professional experience in telecommunications, project finance and natural resources law, Cristina has been actively advising companies in complex corporate-related aspects.

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Denis graduated from Saratov State University with a degree in law. He also holds an LLM in international law from the George Washington University, United States, and has been qualified to practise in the state of New York (United States) since June 2011. Denis joined the firm in 2010.

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Marcelo Viveiros de Moura obtained his LLB degree from the Rio de Janeiro State University (UERJ) Faculty of Law in 1988 and his LLM degree from the University of Cambridge in 1993. He is a partner in the corporate division of Pinheiro Neto in Rio de Janeiro, where he has worked for 33 years. Mr Moura has also worked as a visiting associate at Slaughter and May in London. He specialises in mergers and acquisitions (corporate restructuring), regulatory law in relation to oil and gas, capital markets, insurance, project finance, administrative law, government procurements and contracts.
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Mr Nakayama obtained his LLB from the University of Tokyo in 2004, and his LLM degree and the certificate of merit award in mergers and acquisitions from the University of Michigan Law School in 2012. Mr Nakayama was admitted to the Japanese Bar in 2005 and the New York Bar in 2013.

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Daniel Pardede is a partner in the mergers and acquisitions practice group, with more than 10 years of legal practice experience. He has assisted multinational clients in cross-border transactions, and has been involved in handling various legal corporate and commercial issues, varying from corporate and licensing day-to-day work to assisting in providing advisory services to clients in relation to corporate and commercial issues. He has also been involved
in mergers and acquisitions work, as well as corporate restructurings and asset disposals, has assisted major clients in a number of high profile transactions, and has dealt with government authorities such as the Indonesian Investment Coordinating Board (BKPM). He has advised a wide range of domestic and international clients across various industry sectors.

Daniel is praised by clients for being ‘Good’ and having ‘Strong experience’, ‘good at leading the legal team, very helpful and understand[s] how to solve the problem’. Mr Pardede has an ‘excellent understanding [of] our business and issues and he is able to provide feasible and practical solutions’. ‘Daniel is more of a business partner for us than an outsource lawyer. We are truly happy to be working with him’ and gives ‘Top level service’ according to IFLR1000 and the 2019 and 2018 editions of Asialaw Profiles.

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Marcos Saldanha Proença graduated with an LLB degree from the Pontifical Catholic University of Rio de Janeiro (PUC/RJ) Faculty of Law in 2000. Mr Proença is a counsel in the corporate division of Pinheiro Neto in Rio de Janeiro, where he has worked for 20 years. Mr Proença has also worked as a foreign associate at Latham & Watkins LLP in Los Angeles (2005–2006). He specialises in corporate and contractual law, with a focus on capital markets and mergers and acquisitions.

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Geert Raaijmakers is a partner at NautaDutilh and specialises in corporate law, corporate governance and financial regulatory law. Geert is also a professor of corporate and securities law at the VU University in Amsterdam, and a member of the government advisory committee on company law and the joint practitioners’ committee on company law. He publishes regularly on developments in corporate and securities law, including articles on corporate governance, mergers and acquisitions and shareholder activism.

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Christoffer specialises in corporate finance, public M&A, equity capital markets transactions and other financial regulatory work. He has extensive transactions experience from more than 20 years’ practice, including many groundbreaking cross-border mergers of equals and takeovers, financial sector M&A and restructurings, as well as from multi-jurisdiction securities offerings.

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William Savitt focuses on representing corporations and directors in litigation involving mergers and acquisitions, proxy contests, corporate governance disputes, class actions involving allegations of breach of fiduciary duty and regulatory enforcement actions relating to corporate transactions. Mr Savitt writes and speaks extensively on corporate and securities law topics, and has developed and teaches a course on transactional litigation at Columbia Law School.

CLEMENS PH SCHINDLER
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Clemens Philipp Schindler is a founding partner of Schindler Attorneys. Before establishing the firm, he spent six years as a partner at Wolf Theiss, where he led some of the firm’s most prestigious transactions and headed its Brazil operations. Prior to that, he practised with Haarmann Hemmelrath in Munich and Vienna, as well as with Wachtell Lipton Rosen & Katz in New York. Mr Schindler’s practice focuses on corporate and tax advice in relation to public and private M&A, private equity and corporate reorganisations (such as mergers, spin-offs and migrations), most of which have a cross-border element. Mr Schindler is ranked by international legal directories such as Chambers Global, Chambers Europe, IFLR1000 and Who’s Who Legal. The German legal directory JUVE lists him as one of Austria’s top 20 corporate and M&A lawyers, and the Austrian business magazine Trend has named him among Austria’s top 10 capital markets lawyers.

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Sven H Schneider is a partner of Hengeler Mueller in Frankfurt. He studied at the universities of Freiburg/Breisgau and Heidelberg. He holds a doctorate degree (Dr jur) from the University of Mainz and an LLM from Boalt Hall School of Law at the University of California at Berkeley. After serving his legal clerkship at the Higher Regional Court of Hamburg, he was admitted to the German Bar in 2003 and joined Hengeler Mueller in 2005. Sven specialises in corporate and regulatory law. He advises regulated and unregulated companies ‘from the cradle to the grave’ in connection with their formation and licensing, the outsourcing or in-sourcing of important functions, joint ventures, mergers and acquisitions as well as on
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Bogdana is a Russian-qualified corporate lawyer specialising in M&A, corporate reorganisations and restructurings, joint ventures and general corporate advisory matters. Bogdana also advises on anti-monopoly law issues.

Bogdana graduated from the Moscow State University of International Relations (MGIMO). Before joining the firm in 2012, she worked with two other international law firms.

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Similoluwa is an associate in the firm’s enterprise practice group, where he provides legal advice on corporate structures, and regulatory and compliance matters. He has a deep understanding of the intricacies involved in complex commercial transactions, and has consistently provided creative and commercially viable solutions tailored to his client’s needs.

Having previously gained considerable experience advising clients on a wide spectrum of finance and capital market transactions as well as commercial disputes, Similoluwa has a firm grasp of the intricate commercial and legal issues commonly faced by clients in the corporate sector.

Similoluwa is a graduate of the University of Lagos and the Nigerian Law School, where he distinguished himself by receiving the Director-General’s prize after having obtained a first-class honours degree.

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Nicholas William Boe Stenderup primarily focuses on issues relating to company law and securities law, corporate governance, legal risk management and compliance.

Mr Stenderup graduated with a bachelor of business administration and commercial law from Copenhagen Business School in 2005 and subsequently with a master’s degree in law from the University of Copenhagen in 2010. The same year, he started working as an assistant attorney with Plesner Law Firm, and in 2013 he was admitted to the Bar.

Mr Stenderup is the author of a number of articles about company law, including an article about the Danish corporate governance recommendations that was printed in The Board of Directors Handbook (2013 and 2014), published by Børsen (a leading Danish journal for trade and industry), and an article about shareholder agreements in the light of Section 82 of the Danish Companies Act, printed in Justitia in 2010.
JOHN VALLEY

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John Valley is a partner in Osler’s Toronto office and practises corporate and securities law, with a particular focus on corporate governance and mergers and acquisitions. Mr Valley’s corporate governance practice includes advising companies and boards of directors on matters regarding director duties, indemnification, stakeholder engagement, disclosure and other governance matters. He is also a member of a cross-disciplinary risk management and crisis response practice, which is focused on advising companies and boards of directors on taking proactive steps to avoid and prepare for and, where necessary, on responding to, extraordinary crisis situations. Mr Valley’s graduate research at the University of Cambridge, England focused on corporate governance in enterprises with significant government shareholders.

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Carsten van de Sande studied law at the University of Bayreuth and Duke University School of Law. He received his doctorate in law in 2000 with a thesis on the supervision of groups of companies in the banking and insurance sector, and his LLM in US law in 2001. Carsten joined the Düsseldorf office of Hengeler Mueller in 2001 and, following a secondment to London, transferred to the Frankfurt office in 2004. He became a partner in 2007 and is a member of the corporate and dispute resolution groups of Hengeler Mueller. He advises domestic and foreign clients on German corporate law, including corporate governance and corporate compliance, and deals with both national and international litigation and arbitration cases. Carsten is admitted to the Bar in Germany and the State of New York.

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Meyer van den Berg is an attorney and notary practising as a partner with Koep & Partners in Windhoek. He specialises in mineral law, energy law, environmental law, competition law and general corporate and commercial law. Meyer holds a bachelor’s degree in law and a bachelor’s degree with honours cum laude in classical literature (Latin) from the University of Stellenbosch, as well as a master’s degree cum laude and a PhD from the University of Cape Town. His postgraduate studies focused on mineral and petroleum law.

Meyer is a project leader for the Mineral Law in Africa (MLiA) Project, hosted by the University of Cape Town. He is a member and chairperson of the Law Society of Namibia, member of the International Bar Association and member of the Institute of Directors of Southern Africa.

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Stefan completed his legal education at the University of the Free State, during which time he worked as a research assistant and academic tutor and was invited to join the Golden Key International Honour Society. He holds a bachelor’s degree in law and completed his master’s degree in tax law (cum laude) in 2015.
Stefan commenced his articles of clerkship with Koep & Partners in 2016 under the supervision of Josias Andries Agenbach, and was admitted as an attorney on 24 October 2017. Stefan is an associate attorney in the commercial department and focuses on tax law, competition (antitrust) law, mining law and general corporate and commercial law. He is a member of the Law Society of Namibia and speaks English and Afrikaans.

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Paul White is a partner in the corporate department specialising in the areas of corporate and commercial law, mergers and acquisitions, corporate restructurings, corporate governance and corporate finance.

Paul was awarded ‘Ireland Corporate Lawyer of the Year 2016’ by Client Choice. He is recommended by a number of leading publications and directories, including *Best Lawyers, Who’s Who, Chambers Global, The Legal 500, IFLR1000* and *Chambers Europe*.

‘A leading individual . . . very experienced and knowledgeable’ (*Legal 500* 2018); ‘Exceptional lawyer with great commercial and legal abilities . . . his knowledge of technical and commercial realities is very strong’ (*Chambers Global* 2018); ‘A very experienced lawyer. He displays very sound judgment and commercial understanding’ (*IFLR1000* 2018); ‘Top-class for capital markets . . . very accomplished, very articulate: good commercially and technically. Very calming, competent, a good communicator, efficient and proactive’ (*Chambers Global* 2017).

He has been a partner with the firm since 1996; managed A&L Goodbody’s London office from 1999 to 2004; served as head of the firm’s corporate department between 2005 and 2010, and as chairman of the firm between 2010 and 2016; and continues actively to serve clients on a range of corporate and commercial law matters. Paul also carries management responsibility for a number of the firm’s key relationships.

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Andrzej Wierciński is a co-founder and senior partner at WKB Wierciński, Kwieciński, Baehr. He heads the M&A practice and is a head of the restructuring and insolvency teams, and advises clients on state aid matters. His extensive experience derives from many years’ work on the most high-profile and innovative projects, such as the very first cases of privatisation of state enterprises and state-owned banks, and the creation of the first joint ventures in post-transformation Poland. He has also assisted on a number of international restructuring and distressed M&A transactions, including the first successful attempt to restructure high-yield debt in Poland. He holds a higher doctorate in law, and is a former visiting lecturer at Trinity College Oxford. Andrzej is engaged as a professor at the faculty of law of SWPS University of Social Sciences and Humanities, Warsaw, and is the author of numerous publications, including ones on matters related to corporate law.

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Margaretha (Greet) Wilkenhuysen is a partner in the corporate practice of NautaDutilh Avocats Luxembourg. She specialises in cross-border corporate transactions, with a particular
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Ms Wilkenhuysen received her law degree from the Katholieke Universiteit Leuven in 1991, a master’s degree in business and tax law from the Free University of Brussels in 1993, and an LLM from Duke University School of Law in 1996. She joined NautaDutilh in 1997 and became a partner in 2007.


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He has been recognised as a leading individual for corporate and M&A in legal publications like *Chambers Global*, *Chambers Asia-Pacific*, *The Legal 500 Asia Pacific* and *IFLR1000*.

Richard joined Allen & Gledhill on a scholarship in 1995 and became a partner in 2000. At Allen & Gledhill, he undertook a secondment as regional legal counsel for CNBC Asia and National Geographic in Singapore, and later with General Electric International Inc, in Hong Kong. He also did a one-year stint in the London office of Linklaters, where he gained considerable experience in cross-border transactions.
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