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THE 2020 BELGIAN CODE ON CORPORATE GOVERNANCE AND THE EXTERNAL AUDITOR

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Introduction

The 9th of May 2019 the Corporate Governance Committee published the long expected new 2020 Belgian Code on Corporate Governance. The Code replaces the previous 2009 Code that itself replaced the 2004 Code. Before 2004 several organisations, including the predecessors of the FSMA and Euronext and the employers' association FEB/VBO published different corporate governance codes.

Already in 2017 the Corporate Governance Committee, chaired by mr. Thomas LEYSEN, launched a public consultation for the revision of the 2009 Code accompanied with a detailed study of ALLEN & OVERY that reported on the needs for revision. In spring 2018 a public hearing took place. In July 2018 the Committee announced that the Code would be published soon, but in January 2019 the Committee informed the market that this publication was postponed. The delay found its roots in the long process for the approval of the new Code of Companies and Associations (CCA). Shortly after the enactment of the CCA on 23 March 2019 and its publication in the Official Gazette on 4 April 2019, the 2020 Code was presented to the public. Contrary to the former editions of the Companies Code, the relationship between the corporate governance code and the CCA

is explicitly acknowledged in the latter, inter alia regarding the identification of independent directors for which article 7:87 CCA refers to the Code of good governance that the King indicates¹. The new 2020 Code will serve as the referential code for listed companies for their corporate governance statement in accordance with article 3:6, § 2 CCA. The Royal Decree of 11 May 2019 as published in the Belgian Official Gazette of 17 May 2019 identified this Code as the only referential code for the Belgian listed companies.²

From the 1st of January 2020 those companies that are submitted to the Code must apply this Code for their reporting years that start after this date. It can be expected that some companies will not wait to report in their corporate

1 As required by European Directive 46/2006/EC of the European Parliament and of the Council of 14 June 2006 amending Council Directives 78/660/EEC on the annual accounts of certain types of companies, 83/349/EEC on consolidated accounts, 86/635/EEC on the annual accounts and consolidated accounts of banks and other financial institutions and 91/674/EEC on the annual accounts and consolidated accounts of insurance undertakings, *Pb. L.* 16 August 2006, nr. 224.

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32006L0046>

2 It must be noted that the Council of State that was consulted for rendering its advice on the proposal for the Royal Decree considered this request as inadmissible as the King is only authorized for "indicating" the Code, not for setting the Code. Further, the Council of State noted that the Corporate Governance Committee is not a governmental body.

SUSTAINABLE VALUE CREATION IS A NEW CORPORATE PARADIGM

governance statement 2020, which will be published in the spring of 2021 but already start reporting accordingly in 2020 (corporate governance statement 2019). The Code identifies the companies that are submitted as "companies incorporated in Belgium whose shares are admitted to trading on a regulated market ('listed companies') as defined by the Code on Companies and Associations". Listed companies are companies of which shares, profit shares or certificates of shares are admitted for trading on a regulated market.³

The overarching goals of the new Code is helping companies in their development and reaching out for sustainability.⁴ Similar to the previous 2009 Code, the 2020 Code requires the companies to comply with its principles and comply with all the provisions or explain the deviations. The principles are "considered as essential pillars of good governance."⁵ The provisions are recommendations as to how the different principles can be effectively

implemented. Different from the ten principles, it is allowed for a company to provide an adequate explanation for deviating from one or more provisions.⁶ The 2009 Code also contained guidelines providing in guidance how the companies should implement or interpret the provisions. Guidelines are no longer part of the 2020 Code. A number of the guidelines have been deleted while other guidelines have been transposed in provisions.

In the next sections, we first briefly enumerate the ten corporate governance principles of the 2020 Code. Next, in the major part of this paper we assess the provisions of the Code and discuss the position of the external auditor in the next section. The last section provides in a conclusion.

The Ten Corporate Governance Principles

The new code contains 10 Principles, one more than its predecessor. The principles are:

Principle 1. The company shall make an explicit choice regarding its governance structure and clearly communicate it

Principle 2. The board and the executive management shall remain within their respective remits and interact constructively

Principle 3. The company shall have an effective and balanced board

Principle 4. Specialised committees shall assist the board in the execution of its responsibilities

Principle 5. The company shall have a transparent procedure for the appointment of board members

3 A regulated market is a by a market operator operated and/or managed multilateral system that brings together multiple buy or sell intentions of third parties with regard to financial instruments or facilitates the process of bringing these intentions together within this system according to the rules and systems of the market admitted for trading and for which a permit has been granted and which works regularly (in accordance with Directive 2014/65/EU). <https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX%3A32014L0065>

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0065&from=FR>
<https://eur-lex.europa.eu/legal-content/NL/TXT/PDF/?uri=CELEX:32014L0065&from=FR>

4 Foreword by the chairman, 4.

5 2020 Code, 6. <https://www.corporategovernancecommittee.be/fr/over-de-code-2020/code-belge-de-gouvernance-dentreprise-2020>

<https://www.corporategovernancecommittee.be/nl/over-de-code-2020/belgische-corporate-governance-code-2020>
<https://www.corporategovernancecommittee.be/en/over-de-code-2020/2020-belgian-code-corporate-governance>

6 It can be questioned when a company deviates from a large number of recommendations that exist for the implementation of a particular principle, the latter principle is still complied with.

Principle 6. All board members shall demonstrate independence of mind and shall always act in the best interests of the company

Principle 7. The company shall remunerate board members and executives fairly and responsibly

Principle 8. The company shall treat all shareholders equally and respect their rights

Principle 9. The company shall have a rigorous and transparent procedure for evaluating its governance regime

Principle 10. The company shall publicly report on the application of the code

The 2009 Code contained only 9 principles. The new code does not add a new tenth principle but four of the former 2009 principles have now assorted in six of the new 2020 principles. For example, the previous 2009 principle 4 related to the rigorous and transparent procedure of appointing and evaluating the board of the directors and its members is now included in principle 5 regarding the appointment of the board and principle 9 regarding the evaluation of corporate governance. Similarly, the 2009 principles 1, 3 and 6 are now included in the 2020 principles 1, 2, 3, 5, 6 and 9.

Most principles already existed in an identical or similar form or in an embryonic style in the 2009 Code. For example, principle 7 of the 2009 Code not only survived in the 2020 Code, it remained unchanged. All board members should receive a fair and responsible remuneration package. However, the composition of the remuneration packages must in the 2020 Code comply with other provisions than those enumerated in the 2009 Code⁷. Non-executive directors should, according to the 2020 Code be partially paid in shares, whereas the 2009 Code remained silent regarding share-based remuneration for non-executive directors.

⁷ Cf. *infra*, section 3.

A short assessment of the principles and provisions

Principle 1 of the 2020 Code requires the company to reflect on its governance structure of a one-tier or two-tier board. Chapter 1 of Title 4 of Book 7 of the CCA distinguishes between two different board models: the monistic board model which is the model that existed at least since the Companies Act of 1873 and consists of one fraternal board of directors and a two-tier board model that consists of a supervisory board and a management board. The former is responsible for the general policy and strategy of the company, for monitoring the management board and for all deeds for which the CCA empowers the supervisory board. The management board is responsible for all other deeds. Principle 1 requires from each company a recurrent reflection which governance model serves the company best. This principle is different from principle 1 in the 2009 Code that started from the premise of a one-tier board developing the best strategy for the company. More precisely, the board of directors of a one-tier company must assess once every five years whether this governance structure is the most appropriate, whilst the supervisory board should do the same if the company has opted for the two-tier board structure. In the latter structure, the supervisory board should, if need be, propose the general meeting of shareholders, to abolish itself. Why the Commission did not consider the involvement of the management board when assessing the abolishment of the supervisory board is not clear. Every year the company must disclose the relevant information on the events affecting the governance structure.

Further, in some industries, like the financial industry, companies must take into account the *lex specialis*. A bank that is established as a public limited liability company must be governed by a management board in accordance with article 7:104 CCA of which all members are also members of the 'board of directors'.⁸ The

⁸ Art. 24 of the Banking Act of 25 April 2014.

Banking Act was modified to enter some of the specificities of the dual system as provided in the CCA but retained the former governance names “management committee” and “board of directors”.⁹ As this bank governance structure is mandatory, the banking legislation offers banks no room for any kind of reflection of its governance structure.

Principle 2 emphasizes the division of powers between the different board and management levels. Further, sustainable value creation is a new corporate paradigm. The board of directors must guarantee, through its setting of the company’s strategy, ethical leadership and monitoring corporate performance that this kind of value creation has achieved. Further, the board must balance both the interests and expectations of shareholders and other stakeholders. At the same time, provision 6.6 also requires the board members “to look after the interests of all shareholders on an equivalent basis”. The 2009 Code did not yet reach out for sustainable value creation, only a guideline accompanying provision 1.2 related to defining the strategy and values of the company provides in the recommendation of paying “attention to corporate social responsibility, gender diversity and diversity in general”.

This innovative principle 2 brings the 2020 Corporate Governance Code in line with the Codes of other Western European countries. In the 2016 Dutch Corporate Governance Code, Principle 1.1 on Long-Term value creation states: “The management board focuses on long-term value creation for the company and its affiliated enterprise, and takes into account the stakeholder interests that are relevant in this context”. The notes to this Dutch Principle add: “*Management board members and supervisory board members are expected to act in a sustainable manner ...*”. The UK Corporate Governance Code 2018 articulates in

IF NOT ALL CONDITIONS FOR DEVIATING FROM THE PROVISIONS HAVE BEEN ADEQUATELY ADDRESSED, CAN THE DIRECTOR BE CONSIDERED “INDEPENDENT ENOUGH”

Principle A: “[...] the board, whose role is to promote the long-term sustainable success of the company, generating value for shareholders and contributing to wider society and adds in provision 1: “The board should assess the basis on which the company generates and preserves value over the long-term”. In the French AFEP-MEDEF 2018 Corporate Governance Code of Listed Companies it sounds: “[The Board] endeavors to promote long-term value creation by the company by considering the social and environmental aspects of its activities”.

Most of the other provisions of Principle 2 further specify the specific duties of the board of directors and the executive management as well as the interaction between the board and the executive management. Principle 2 is to be considered pivotal in the Code as it contains the most provisions of all principles.

Principle 3 contains the framework for a balanced board composition. Many provisions in this principle remain unchanged. The board of directors should be composed of a majority of non-executive directors. At least three directors must be independent and the 2009 guideline of balancing size, experience and knowledge turned in the 2020 edition into a provision. Principle 3 – Principle 2 in the 2009 Code – gained importance as the conditions for being considered as an independent director are provided in this principle. Those conditions have transferred from article 526ter of the former Companies Code. The new CCA contains (only) two general conditions that

9 For an extensive analysis of the effects of the new CCA on the financial industry see L. THIJIS and C. HAVERANS, “Het nieuwe WVV en de KREDIETINSTELLING: simple comme bonjour?”, *Bank. Fin. R.* 2019, 183-231.

independent directors have to meet and refers to the Corporate Governance Code for the criteria of which compliance result in adherence with those two general conditions in the CCA. The CCA requires from the independent directors that they have no relationship with the company or with an important shareholder that could jeopardize the independence.¹⁰ In case the director is a legal entity, both the latter and its representative have to meet these requirements. The assessment of the compliance with the Companies Act must take into account all the criteria in the Corporate Governance Code 2020. The conditions in the Corporate Governance Code 2020 are very similar to those laid down in the former Companies Code, but not all are identical. For example, previously a former executive of a company could not become an independent director before a cooling-off period of five years was taken into account. In the Corporate Governance Code 2020 a cooling-off period of three years before the appointment of the former executive is sufficient.

Further, in the former Companies Code the criteria the new CCA allows that not all criteria have been complied with for becoming an independent director if the board of directors informs the general meeting of shareholders why the director is effectively independent.¹¹ This option was not provided in the former system.

This new approach of establishing the independence requirements has important consequences for the registered auditors. For example, the board of directors of a company that has not established an audit committee can permit the external auditor to provide in additional services of which the consideration exceeds the remuneration of the external auditor for providing in its opinion in accordance with article 3:65, § 2 of the Belgian CCA, only if the independent director or the

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majority of the independent directors agree to approve those services.¹² We are of the opinion that the external auditor must control whether the company complies with the new procedure for determining the independence of those directors before making use of the option for rendering additional services.

Principle 3 has also further elaborated on the company secretary with three provisions (the former Code contained only one provision and a guideline with respect to the company secretary). This secretary has a legal position according the UK Companies Act¹³, but it lacks a legal connection under Belgian law. While the competence of the company secretary did not significantly change with the exception of a task defined in provision 10.2, the promotion of a 2009 guideline into a provision in the 2020 Code requires companies to spend more attention to and report on the position, if any, and competences of this company secretary. According to provision 10.2 it belongs to the company secretary to make sure that the board of directors assesses the explanations of the deviations from the provisions at least once a year.

Principle 4 provides the companies with further provisions on how to establish subcommittees within the board of directors. The 2020 Corporate Governance Code recommends the establishment of an audit committee, a remuneration committee and a nomination committee. However, the latter can be

¹⁰ Art. 7:87, § 1, section 1 Belgian CCA.

¹¹ Art. 7:87, § 1, section 2 Belgian CCA.

¹² Art. 3:64, § 4 Belgian CCA. The company can make use of two other options to have those services approved.

¹³ See Section 271 UK Companies Act: "A public company must have a secretary".

combined with the remuneration committee. Those subcommittees must perform the duties that have been defined in the CCA. For audit committees the duties of the committee follow from the transposition of European Directive 2006/43/EU¹⁴ and includes inter alia the monitoring of the work of the external auditor. For remuneration committees, the Belgian legislator considered their establishment and duties pivotal for enforcing corporate governance in 2010, including the duty of proposing the remuneration policy¹⁵. The 2020 Code further elaborates on the tasks of those committees, which should be read in accordance with the legal duties. For example, it is the role of the audit committee to monitor the management responsiveness to the recommendations of the external auditor's management letter¹⁶, which can be seen as part of the legal duty of the audit committee to monitor the follow up of the questions and recommendations of the external auditor¹⁷.

The differences in the scope of application of the CCA and the 2020 Code regarding the establishment of the audit committee and the remuneration committee, create a number of ambiguities. While the CCA mandatorily requires the establishment of the former two committees only for the larger companies¹⁸, all listed companies must, for acting in compliance with the 2020 Code, establish three committees¹⁹. A first ambiguity exists for the companies that do not mandatorily have to establish an audit committee and a remuneration committee²⁰,

but must consider their establishment as a best practice at least, and, more likely, even as a principle. Principle 4 requires subcommittees to assist the board, which can only be complied with if the subcommittees are established. Therefore it can be debated whether those companies can validly explain the option of not establishing any subcommittee. On the other side, if companies that do not legally have to establish subcommittees must establish those committees according to the 2020 Code, the Corporate Governance Commission takes the position of legislator.

Further, in case a company must not legally establish those committees²¹, the company can comply with provision 4.10 and 4.17, and in accordance with article 7:98 CCA establish an audit committee, a remuneration and a nomination committee. Article 7:98 CCA allows every board to establish any subcommittee of which it determines its composition and duties. The board of directors remains liable. The three aforementioned committees have to be provided with different duties than those that are enumerated in article 7:99 and 7:100 CCA. However, companies submitted to the 2020 Code, but exempted from the legal duty to establish an audit committee and a remuneration committee, must establish those committees in accordance with the provisions of the 2020 Code and empower the committees with the duties as defined in article 7:99 and 7:100 CCA. However, according to article 7:99, § 2 and 7:100, § 4 CCA the board of directors must perform those duties of the audit committee and the remuneration committee in case those committees have not been established. Therefore, according to the CCA those responsibilities belong to the board and according to the 2020 Code to the committees. It is not obvious for those companies to comply with all the requirements²².

14 For an analysis of the legal duties of the audit committee, see for example C. VAN DER ELST and I. DE POORTER, "Upgrading corporate governance: auditcomités in het Wetboek van Vennootschappen", *TRV* 2009, 397-415.

15 For an analysis of this remuneration committee, see for example H. DE WULF, C. VAN DER ELST, S. VERMEESCH, "Radicalisering van corporate governance-regelgeving: remuneratie en transparantie na de wet van 6 april 2010", *TBH* 2010, (909), 939-945.

16 Provision 4.12 of the Code.

17 Art. 7:99, § 4, 4° Belgian CCA.

18 See art. 7:99, § 3 and 7:100, § 4 Belgian CCA.

19 The remuneration and nomination committee can be combined (provision 4.20).

20 See for the criteria for this waiver: art. 7:99, § 3 Belgian CCA.

21 Which is the case if the size criteria that the CCA defines for establishing those committees have not been met.

22 Unless the company explains why it deviates from the 2020 Code.

Principle 5 of the Code 2020, regarding the appointment of the members of the board repeats to a very large extent principle 4 of the 2009 Code. There are only minor changes in the new 2020 Code. One is the promotion of the guidelines to develop a process of succession planning in the 2009 Code into a provision in the 2020 Code.

The interest of the company must be the guiding principle of a director, according to principle 6. The board should also demonstrate independence of mind. This kind of independence did not constitute a principle in the 2009 Code but it results from a reshuffling of the structure of the Code. The preamble of the 2009 Code mentions that *"All directors should demonstrate independence of judgement and objectivity in making board decisions"*. Principle 6 of the 2020 Code states that *"board members [...] should be able to make their own [...] independent judgements when discharging their responsibilities"*.

Further, the new Code spends several provisions on conflicts of interests. Both the former Companies Code as well as the current Code of Companies and Association provide in a detailed set of rules how to address conflicts of interest, which the Corporate Governance Code 2020 even further elaborates with a number of provisions. Any conflict of interest must be reported if it could affect the capacity of judgement. Board members must carefully watch over conflicts of interests that can occur between the company and its significant or controlling shareholders. The members of the board proposed by the latter shareholders must make sure that all board members are aware of the intentions and interests of those shareholders. Provision 6.9 takes care of the reporting requirements of conflicts of interest, including the procedure to protect the interest of the company, which has been followed for addressing this conflict. As article 7:96 CCA already provides in detailed disclosure rules in case of a direct or indirect conflict of interest of a financial nature, we are of the opinion that

provision 6.9 of the Governance Code will be applicable in case another conflict of interest emerges. Also for the potential conflicts of interests between a controlling shareholder and the company, the Belgian legislator provides in a detailed procedure in article 7:97 CCA. This article is currently under revision, inter alia to make it compliant with Directive (EU) 2017/828 (see hereinafter).

Remuneration of the board and top management is set in principle 7. Each member must be remunerated in a fair and responsible manner. Thereto a remuneration policy has to be developed. While the content of the report is provided in the CCA, the objectives for developing this policy are further developed in the provision 7.1 of the Code 2020: attracting, rewarding and retaining talent; promoting the achievement of the strategic objectives and promoting sustainable value creation. Belgian listed companies are already familiar with the general meeting voting for the remuneration report²³. The Code 2020 also requires the general meeting to vote on the remuneration policy and adds that even if the remuneration report has been approved, the board should take action when a significant proportion of the votes have been cast against this policy. More in particular, the company "should take the necessary steps to address the concerns of those voting against it, and consider adapting its remuneration policy". This principle is a forerunner of the expected changes of the CCA. In accordance with Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement²⁴, the Belgian Parliament is discussing a proposal for a law transposing this Directive²⁵, which

²³ See article 554 former Companies Code and article 7:149 Belgian CCA.

²⁴ Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement, *Pb. L.* 20 May 2017, nr. 60, 1.

²⁵ Proposition de loi portant transposition de la directive (UE) 2017/828 du Parlement européen et du Conseil du 17 mai

includes the introduction of a new article 7:89/1 CCA that requires listed companies to develop a remuneration policy²⁶. This proposal does not request the company to respond to the significant opposition of an approved remuneration policy. However, corporate governance practices are also familiar with this requirement. The UK Code 2018 requires from the company an explanation what actions it intends to take to consult shareholders in order to understand the reasons behind the significant opposition, an update on the views of the shareholders within the next six months and a disclosure of a summary in the next annual report explaining this issue²⁷. Significant opposition is defined as 20 per cent or more of the votes being cast against the agenda item. In the UK there is a database on the Public Register where the details of votes against can be consulted²⁸. A similar register does not exist in Belgium. Finally, it can be noted that this provision could also be part of principle 8 of the Code 2020, which further elaborates the relationship between shareholders and the company.

An important new remuneration topic can be found in provision 7.6. Non-executive board members should receive part of their

remuneration in the form of shares, but stock options should not be granted. The shares must be held for at least three years and at least one year after leaving the board. Whilst less explicit, other corporate governance codes do not oppose this component in a remuneration package of a non-executive director. In the UK Corporate Governance Code 2018 a non-prohibition provision for granting shares is to be found: "Remuneration for all non-executive directors should not include share options or other performance-related elements". Consequently, shares can even be granted without time constraints. Recommendation 22 and 24.2 of the French Corporate Governance Code 2018 reads: "*The Board of Directors defines a minimum number of registered shares that the company officers must retain through to the end of their term of office [... for] non-executive directors [...] it is not desirable to award variable compensation, stock options or performance shares.*" The Belgian Code follows the provisions of the other codes but it adds that shares must be kept until after the end of the directorship. Further, it remains unclear what the consequences of a breach of the time constraint would be. Article 7:91 CCA can provide in a solution: shares, option on shares and other rights for acquiring shares have a vesting period of at least three years, unless the general meeting of shareholders or the articles of association decides otherwise.

Finally, with respect to the remuneration of the executive board members and management, the work of the Corporate Governance Commission reducing the number of principles as to maintain only principles that are not already provided in the CCA is very visible. Out of the 10 principles addressing executive remuneration in the 2009 Code only 6 have been preserved. In particular, the disclosure requirements and part of the severance pay arrangements are now part of the Code of Companies and Associations and were superfluous in the corporate governance code. It can be questioned whether some of the remaining principles are or will also become part of the CCA in light of the transposition of

2017 modifiant la directive 2007/36/CE en vue de promouvoir l'engagement à long terme des actionnaires, et portant des dispositions en matière de société et d'association/Wetsvoorstel tot omzetting van Richtlijn (EU) 2017/828 van het Europees Parlement en de Raad van 17 mei 2017 tot wijziging van Richtlijn 2007/36/EG wat het bevorderen van de langetermijnbetrokkenheid van aandeelhouders betreft, en houdende vennootschaps- en verenigingsbepalingen, *Parl.St. Kamer BZ 2019-20, nr. 553/1*. <https://www.corporategovernancecommittee.be/fr/reglementation/projets-de-texte-belges/55k0553-proposition-de-loi-portant-transposition-de-la>
<https://www.corporategovernancecommittee.be/nl/regelgeving/belgische-ontwerpteksten/55k0553-wetsvoorstel-tot-omzetting-van-richtlijn-eu-2017828-van>

26 This policy should contain the information as required in Directive (EU) 2017/828 which goes beyond the limited information that the remuneration policy must contain in accordance with article 3:6, § 3, 1° en 2° CCA, that currently must be disclosed in the remuneration report.

27 Provision 4 of section 1 Leadership of the UK Code.

28 This database is maintained by The Investment Association (see www.theinvestmentassociation.org/publicregister.htm).

Directive (EU) 2017/828. Principle 7.7 currently requires a policy in which the components of the remuneration package as well as the balance between the components are described. In the proposal for the amendment of the CCA, transposing the Directive, a more detailed remuneration report, taking into account the business strategy, long term interest and sustainability of the company is requested²⁹, making more than likely some other provisions in the 2020 Code redundant.

Principle 8 develops the relationship between the company and its shareholders and contains some new provisions, which were not part in the 2009 Code. The provisions on the communication with the shareholders and the encouraging use of the general meeting of shareholders are similar to those of the Code 2009. New is the provision of having the controlling and significant shareholders expressed their strategic objectives in the board. Further, provision 8.7 requests from the board a debate on the appropriateness of having a relationship agreement with the controlling and/or significant shareholder. The 2020 Code does not provide in additional guidance as to what in such a relationship agreement should be agreed between the company and the shareholder. However, more than likely the Corporate Governance Commission was inspired by the UK Listing Requirements that requires since 2014 from premium listed companies on the London Stock Exchange with a controlling shareholder holding more than 30 per cent of the votes to be cast at the general meeting to enter in a relationship agreement. Listing Requirement 6.5.4.³⁰ provides in the details of the content of this agreement. First, there needs to be a confirmation that transactions and relationships with the controlling shareholder will be conducted at arm's length and on normal commercial terms. Second, the controlling shareholder confirms that it restrains from any action that has the effect

of preventing the company complying with the listing requirements. Third, the controlling shareholder shall not table any resolution that intends to circumvent the application of the Listing Requirements. Nonetheless, these requirements cannot easily be transferred in the Belgian environment. First, the structure of the legislation is different. The relationship between the controlling shareholder and the company is not separately addressed in the Euronext Brussels Stock Exchange Requirements.³¹ Second, the CCA already addresses a number of elements that the relationship agreement between a listed company and the controlling shareholder must develop in accordance with the UK listing rules. We refer for instance to article 7:97 CCA that contains a detailed procedure for a decision of the board related to a transaction or deed executing a transaction involving a controlling shareholder of the listed company. We hope that the Corporate Governance Commission will further elaborate guidelines with the content of this relationship agreement.

We also note that the provisions that are dedicated to the position of institutional investors are reformulating the provisions of the former 2009 Code but those provisions will become largely redundant when the proposal for a new law transposing Directive (EU) 2017/808 will become effective. Indeed, the Directive requires from institutional investors to *“develop and publicly disclose an engagement policy that describes how they integrate shareholder engagement in their investment strategy, [...] how they monitor investee companies on relevant matters, including strategy, financial and non-financial performance and risk, capital structure, social and environmental impact and corporate governance, conduct dialogues with investee companies, exercise voting rights and other rights attached to shares, cooperate with other shareholders, communicate with relevant stakeholders of the*

²⁹ See the proposed art. 7:89/1, § 2 Belgian CCA.

³⁰ This listing requirement can be found: <https://www.handbook.fca.org.uk/handbook/LR/6/5.html#> (last accessed 15 November 2019).

³¹ An overview of these listing requirements can be found in Euronext & Jones Day, *Vade-Mecum from A to Z*, January 2019, <https://www.euronext.com/en/regulation/euronext-regulated-markets>, 85 p. (last accessed 15 November 2019).

investee companies and manage actual and potential conflicts of interests in relation to their engagement". Next, institutional investors shall disclose how this policy has been implemented. However, the Belgian Code 2020 approaches the developments of the relationship between institutional investors and the company from the company's and board's perspective instead of from the investors' perspective. Further, provision 8.9 requests the board to encourage the institutional investors to discuss its corporate governance of the company before the general meeting takes place. In the Directive (EU) 2017/808 it is not specified that institutional investors have to discuss their engagement policy before the general meeting takes place.

Principle 9 of the 2020 Code retakes principle 4 of the 2009 Code. The principle is accompanied with only three provisions. It refers to the assessment and transparency of the governance structure of the company. In the former 2009 Code, the principle only referred to the appointment and evaluation of the board and its members. As the legislator has opted for a choice between the one-tier and a two-tier board, it required a broader approach of the governance structure in the 2020 Code.

Finally, principle 10 requiring compliance with the 2020 Code is short. Four provisions highlight the comply or explain regime, the process of addressing the deviations from the code and informing the shareholders, the content of the deviations and board's role in addressing the deviations (inter alia with the shareholders). In the former 2009 Code those provisions were part of the first principle.

The auditor and the 2020 Belgian Code on Corporate Governance

The first corporate governance definition, which is to be found in the Cadbury Code of 1992, states that "corporate governance is the system by which companies are directed and controlled". Obviously, the Code's focal point is the board of directors. However, there were

THE CODE ADEQUATELY BALANCES THE INTERESTS OF MANY STAKEHOLDERS

also 37 provisions in the Cadbury Code on audit related matters. These provisions addressed objectivity, auditor rotation, the expectation gap, etc. In the meantime, many of those issues have been addressed in the UK legal framework that strengthened the independence requirements, introduced strict rotation requirements, the relationship with the audit committee etc. Nevertheless, in UK Code 2018 there are still three principles dedicated to audit and internal control, further elaborated in 8 provisions.³²

For the Belgian Code 2020, the question can be raised: Where are the external auditors? A "search" of the Belgian Code 2020 of the term "external auditor" results in five hits of which four are to be found in the provisions and one in the recitals.

In provision 3.5, the sixth condition for independent directors states that the external auditor of the company, or a related company or person is not eligible as independent director and neither the person who has been auditor of the company in the previous three years. This condition is not new. The law of 17 December 2008³³ introduced in article 526ter of the former Companies Act the definition of independent director. It contained the requirement that a person is not eligible as independent director if he has been, in three years before an appointment as director, a partner or an employee of the (former) audit firm of the company, a related company or

³² However, it must be noted that the position of the external auditor is only referred to one time in the principles. More precisely, Principle M. states: "The board should establish formal and transparent policies and procedures to ensure the independence and effectiveness of internal and external audit functions"

³³ Official Gazette, 29 December 2008.

entity as defined in article 11 of the former Companies Code. The transfer of the conditions for becoming an independent director from the law to the code allows for a deviation of any of the independence requirements. As such, it is, with an appropriate explanation, as of now, possible to elect as independent director a former auditor, if article 3:62, § 3 CCA has been complied with.

Next, three provisions that address the role and position of the audit committee refer to the external auditor. First, according to provision 4.12 it belongs to the audit committee's role to monitor the management's responsiveness [...] to the recommendations made in the external auditor's management letter. This duty of the audit committee is not new and retakes the former provision 5.2./26 of the 2009 Code. However, the requirement to monitor the management response to the auditor's management letter is not a legal duty of the audit committee. Nonetheless, it belongs to the audit committee's role to monitor the legal control of the accounts that also has to include a control of the follow-up of the questions and recommendations of the external auditor.³⁴

Provision 4.15 of the 2020 Code is identical to the last sentence of provision 5.2./31 of the 2009 Code and guarantees the direct access of the external auditor to the chairman of the board and the chairman of the audit committee. The 2020 Code provision 4.15 did not retake the other parts of provision 5.2./31 of the 2009 Code. Hence, the external auditor is free to choose who it should address in case an urgent issue needs to be discussed: the auditor can either approach the chair of the board or of the audit committee or both. Formerly, the auditor should consider the audit committee as the first middleman.

The third provision with a reference to the external auditor is provision 4.16. The audit committee must make sure that at least once

a year the audit plan as well as issues arising from the audit process are discussed with the external auditor. This provision softens the former requirements in provision 5.2./29 of the 2009 Code, which required from the audit committee and the external auditor to meet at least twice a year to discuss issues arising from the audit process, material weaknesses in the internal control and the terms of reference.

Finally, the 2020 Code identifies in its general part the external auditor as one of the parties that is involved in the monitoring duties regarding the application of code. The other monitors are the shareholders, the Financial Services Markets Authority and the Commission itself that will have the level of application of the Code monitored every year. The 2020 Code did not further specify the scope of the monitoring duty of the external auditor. More than likely the Corporate Governance Commission refers to article 3:75, §1, 6° CCA that requires the external auditor to opine whether the annual report of the company is in accordance with the annual accounts and aligned with article 3:5 and 3:6 CCA. The latter articles enumerate the content of the annual report. The content list includes for the listed companies a corporate governance statement and a remuneration report. Article 3:6 CCA also provides in a detailed list of the content of the governance statement and in particular a reference to the 2020 Code, its application and whether, how and why the company deviates from the provisions of the 2020 Code.

Conclusion

After ten years, the time is now for the modernization of the corporate governance code. The Belgian Corporate Governance Commission worked hard on the modernization of the 2020 Belgian Code on Corporate Governance Code. The Code reflects the evolution in Belgian corporate governance, it validly defaults from revolution, and it took into account a number of international developments like the emphasis on long-term

³⁴ Art. 7:99, §4, 4° Belgian CCA.

sustainable value creation. The Commission also waited for the publication of the new Code on Companies and Associations and successfully aligned the Corporate Governance Code with this CCA. This short analysis of the Code's Principles and provisions show that the Code adequately balances the interests of many stakeholders.

We have some concerns related to a limited number of issues. We refer in particular to the division of powers between the board of directors and the remuneration committee and audit committee that have been established in accordance with the 2020 Code in companies that do not mandatorily have to establish those committees. Next, the transfer of the independence criteria for directors from the law to the code creates less certainty: if not all conditions for deviating from the provisions have been adequately addressed, can the director be considered "independent enough" for the specific legislative duties that can also involve the work of the external auditor, like the one for additional non-audit services?

Obviously, as corporate governance is not static, the Commission's work is not over. First, over the last decade, the Commission has issued some helpful explanatory notes on high-quality explanations, related party transactions, the nomination of external auditors, internal control and reporting on remuneration. The new Code will affect some of those notes, which need to be updated. Also, the Institute of External Auditors and the Belgian Association of Listed Companies supported by the Corporate Governance Commission will have to consider the modernization of the 2014 guidelines for an effective relation between the audit committee, the internal audit and the external audit.³⁵

Second, also new legislative developments affect the 2020 Code. We will see in the near future new mandatory rules on the approval of the remuneration policy, related party conflicts and engagement policies for institutional investors³⁶, which will invite the Commission to reconsider some of the best practice provisions. Corporate governance remains, in the first place, a never ending process.

35 See for the guidelines https://www.corporategovernancecommittee.be/sites/default/files/generated/files/page/2015.02.17_richtlijnen_samenwerking_auditcomite_interne_en_externer_audit_erratum.pdf (last accessed 15 November 2019).
https://www.corporategovernancecommittee.be/sites/default/files/generated/files/page/2014.12.18_lignes_de_conduite_

[collaboration_audit_comite_interne_audit_externer_audit_def.pdf](#)

36 All these topics are part of the current proposal for transposing Directive (UE) 2017/828.

Samenvatting

Op 9 mei 2019 verscheen de langverwachte Belgische Corporate Governance Code 2020. De publicatie liep vertraging op omdat de Corporate Governance Commissie de publicatie van het nieuwe Wetboek van Vennootschappen en Verenigingen afwachtte. De Code bestaat uit 10 principes die genoteerde vennootschappen moeten naleven en tal van bepalingen met aanbevelingen om in de implementatie van de principes te voorzien. Hoewel de Code 2020 vele principes en bepalingen uit de Code 2009 herneemt, vallen er ook vele nieuwigheden te noteren. Zo staat voortaan duurzame waardecreatie centraal waarmee de Code 2020 aansluit bij de corporate governance codes van de ons omringende landen. Ook bevat de Code 2020 de criteria waaraan een onafhankelijke bestuurder moet voldoen.

Er rijzen hierbij ook vragen. Zo vergt het enige creativiteit voor genoteerde banken om aan alle bepalingen te kunnen voldoen en is het niet duidelijk op welke wijze vennootschappen die geen wettelijke verplichting hebben tot inrichting van een audit- en remuneratiecomité, moeten omspringen met de principe 4 over de inrichting van gespecialiseerde comités.

De commissaris en/of bedrijfsrevisor komt in de Code 2020 nauwelijks aan bod. Algemeen wordt de commissaris een toezichtsfunctie toegedicht en stuurt de Code 2020 aan op een regelmatig contact van de commissaris met het auditcomité.

De Commissie Corporate Governance leverde een "deugdelijk" document af, dat slechts een beperkt aantal vragen doet rijzen doch spoedig, met de omzetting van de tweede Aandeelhoudersrichtlijn, een bijwerking zal behoeven.

Résumé

Le Code belge de gouvernance d'entreprise 2020 tant attendu a été publié le 9 mai 2019. La publication a été retardée au motif que la Commission Corporate Governance attendait la publication du nouveau Code des sociétés et des associations. Le Code comporte 10 principes devant être respectés par les sociétés cotées, ainsi que de nombreuses recommandations pour assurer leur mise en œuvre effective. Bien que le Code 2020 reprenne de nombreux principes et dispositions du Code 2009, il contient également beaucoup de nouveautés. Ainsi, l'accent est désormais mis sur la création de valeur durable, ce qui permet au Code 2020 de s'aligner sur les codes de gouvernance d'entreprise des pays voisins. Le Code 2020 comporte également les critères auxquels un administrateur indépendant doit répondre.

Cette nouvelle édition soulève toutefois quelques questions. Ainsi, les banques cotées doivent faire preuve d'une certaine créativité pour pouvoir se conformer à toutes les dispositions et la manière dont les sociétés n'ayant pas d'obligation légale de mise en place d'un comité d'audit et de rémunération doivent appliquer le principe 4 relatif à la création de comités spécialisés n'est pas claire.

Le rôle du commissaire et/ou du réviseur d'entreprises est à peine évoqué dans le Code 2020. En général, le commissaire se voit attribuer une fonction de contrôle et le Code 2020 vise un contact régulier du commissaire avec le comité d'audit.

La Commission Corporate Governance a fourni un document « valable », qui ne soulève qu'un nombre limité de questions, mais qui devra bientôt être mis à jour suite à la transposition de la deuxième directive relative aux droits des actionnaires.