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# A Review of the Ethical Aspects of Corporate Governance Regulation and Guidance in the EU

BY JULIA CASSON

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**Author** Julia Casson is Director of Board Insight Limited which advises a wide range of organisations on corporate governance issues. In particular, the company carries out board evaluations, governance reviews and director development programmes.

Julia Casson was EU Policy adviser to the Institute of Chartered Secretaries and Administrators from 2005 - 2011 and currently chairs ICSA's EU committee. She is a Fellow of ICSA. Prior to establishing Board Insight, Julia had a career as a Company Secretary with a number of international listed companies, latterly at Pearson plc. She is a frequent writer and speaker on governance matters.

[www.boardinsight.co.uk](http://www.boardinsight.co.uk)

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## **A Review of the Ethical Aspects of Corporate Governance Regulation and Guidance in the EU**

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# IBE Foreword

In today's environment, stakeholders have high expectations that companies should be run in accordance with good corporate governance practices.

The IBE, in commissioning this report, wished to understand whether there is guidance for companies in governance policies, at national and EU level, on ethical business practice. We wished also to explore whether there are cultural differences or different approaches at a policy level across Europe.

What this report did reveal is that to date, explicit reference to ethical principles has generally been absent from corporate governance guidance and regulation both at the EU level and within member states, except Belgium and the UK. The report did find similarities in corporate governance requirements around practice and certain issues, but a comparison of explicit ethics drivers was not actually possible.

As a practical matter, many companies recognise that to encourage positive behaviours and repeat business with their customers, they need to undertake their business in the right way. Companies therefore draw up their values, embed them with their employees and monitor that they do business according to them, knowing they will be held to account if they do not. The values espoused include for example integrity, honesty and openness.

However, not all companies do this and business, according to many public opinion polls, is not highly trusted. The publication of this report is therefore intended as a prompt for discussion. Why is there a lack of explicit ethical imperative at the corporate governance policy level? Should this omission be addressed? And what else might business do?

**Philippa Foster Back OBE**

IBE Director

# Sponsor's Foreword

EADS is a very successful example of a truly European company with products of repute known around the world. As such, we are proud that these are products of integrity made by people of integrity.

Therefore we are equally proud to sponsor IBE's project on the Ethical Aspects of Corporate Governance Regulation and Guidance in the European Union.

Part of our success is down to our determination to make Ethics & Compliance central to our conduct and our business activities. Indeed, Ethics & Compliance is identified as one of the eight EADS group priorities for 2013. We believe that integrity is a competitive advantage in maintaining sustainable success, and we support the OECD's recommendations to restrict public procurement to responsible contractors.

EADS has embedded a strong ethics culture throughout the company - from top management to all our employees around the world. Furthermore, EADS' Board of Directors proactively monitors the effectiveness of the company's Ethics and Compliance program.

On a personal note, I welcome this IBE project and believe we should strive to make European standards a worldwide reference for ethical corporate governance.

**Pedro Montoya**

EADS Group Chief Compliance Officer



*EADS is a global leader in aerospace, defence and related services. In 2012, the Group – comprising Airbus, Astrium, Cassidian and Eurocopter – generated revenues of € 56.5 billion and employed a workforce of over 140,000.*

# Introduction

Questions of ethics, or the ‘right way to run a business’, are inherent in all aspects of corporate governance and in every board decision and action. Ethical choices are relevant within the core business strategies that boards pursue and the way that they direct the business as a whole to achieve them.

Since the introduction of an EU Directive in 2006 (2006/46/EU), all listed companies in EU member states have been required to publish a corporate governance statement (although many companies were already doing so voluntarily). This paper explores whether, in legislation, frameworks and codes of corporate governance across the EU and within its member states, there are any explicit statements or requirements to govern business in line with ethical principles or commitments. Is the implicit inter-relationship between corporate governance and ethics clearly articulated? Has the consideration of ethical principles explicitly influenced the development of corporate governance? And to what extent are there different notions of what is fair and responsible governance in different countries – in terms of both governance frameworks and governance processes?

## Business ethics and corporate governance

Corporate governance lies at the very heart of the way businesses are run. Often defined as ‘the way businesses are directed and controlled’, it concerns the work of the board as the body which bears ultimate responsibility for the business. Governance relates to how the board is constituted and how it performs its role. It encompasses issues of board composition and structure, the board’s remit and how it is carried out and the framework of the board’s accountability to its stakeholders. It also concerns how the board delegates authority to manage the business throughout the organisation. It does this by cascading down specified limits of authority to committees, the CEO and the executive team, who in their turn delegate tasks to management and employees more generally. This authority allows management to carry out, in accordance with specified budgets and timings, the purpose, vision and strategy which the board has agreed.

The extent to which business decisions reflect ethical values and principles is a key to long term success. **The business case for business ethics** has been well proven by the costs and impacts of the repeated high profile cases of corporate greed and misconduct, often by senior individuals crossing ethical boundaries as well as ignoring or circumventing the rules set out in law. Trust is essential in establishing an organisation’s licence to operate. Maintaining successful business relationships and operations requires businesses to manage their risks, including their integrity risks, and guard their reputations. Trustworthiness is a valuable asset and guarding that asset is a core remit for those running a company; it is a core remit of good corporate governance.

The imperative for ethical behaviours and practices to be part of governance has arguably never been more important. **So how is ethics played out in the boardroom?**

In this context, business ethics, defined as the application of ethical values to business behaviour, is essentially about the discretionary decisions a board takes to deliver on its duties as set down in law, specified by best practice, and demanded by shareholders and other stakeholders. Ethical choices are relevant within the core business strategies that they pursue and the way they direct the business as a whole to achieve them. Boards take decisions which have far-reaching

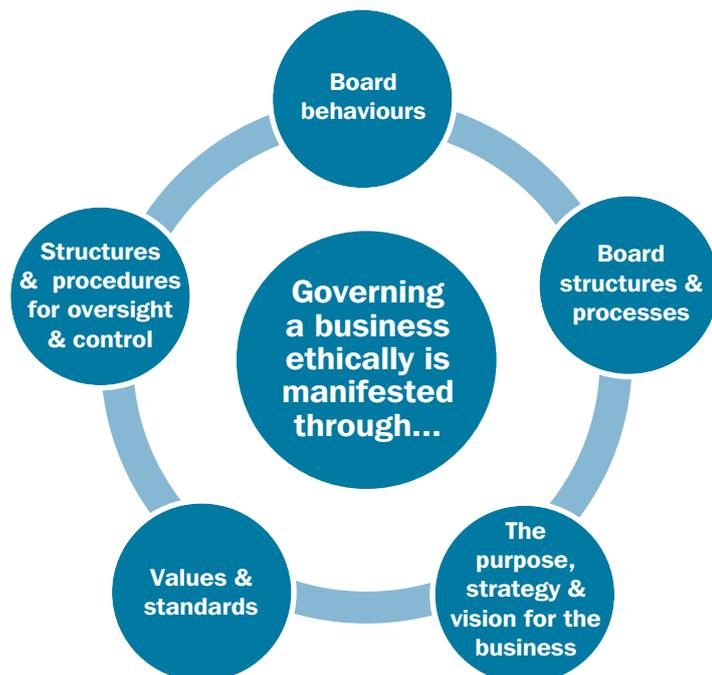
consequences and directly affect the lives of their employees and other stakeholders. Conversely, a lack of decisive action may also have significant consequences.

Business ethics also refers to the way the board conducts itself and the way board members choose to behave in carrying out their role. High levels of competency and skill are required of the board, with directors exercising proper care in their duties, upholding high standards of integrity and acting fairly. The culture of an organisation will be strongly influenced by the nature as well as the quality of the leadership shown by the board. A lack of strong and clear leadership from the board will generally result in inconsistencies in ways of behaving and working, with practices deriving from employees' personal preferences and habits continued from previous employment rather than being ethically driven. A board is responsible for determining, articulating and communicating the values and standards of the business, and for ensuring that the policies, procedures and controls in place act to embed, rather than hinder, ethical values throughout the business.

Figure 1 illustrates the means by which a business is governed ethically. The board sets the 'tone from the top' of the organisation principally through five means and all these elements need to be in place in order for a board's commitment to ethics to be put fully into practice:

- **Behaviours** – example and leadership
- **Board structures and processes** – appropriate committees, terms of reference and documentation, board/committee interface
- **Purpose, strategy and vision** – what the business will achieve and how
- **Values and standards** – the way in which business will be done
- **Procedures and controls for oversight** – appropriate policies, monitoring and reporting.

Figure 1 Ethical aspects of corporate governance



*continues*

Figure 1 *continued*

<b>Board behaviours</b>	The board members carry out their duties in a way that reflects ethical values such as integrity, respect, fairness and honesty.
<b>Board structures &amp; processes</b>	Which facilitate ethical behaviours, avoid unethical ones (such as unmanaged conflicts of interest) and ensure proper accountability - e.g. appropriate board composition, committees, decision-making procedures.
<b>The purpose, strategy &amp; vision for the business</b>	The board sets the purpose for the business and what the business stands for; its strategic decisions reflect the business's core values.
<b>Values &amp; standards</b>	The board articulates and ensures the implementation of the standards of behaviour it expects for business practice, the way business will be done and its role in society (including ethics programmes and CSR initiatives).
<b>Structures &amp; procedures for oversight &amp; control</b>	Mechanisms of delegation and control are conducive to ethical business practice.

## Looking for ethics in governance

The boards of companies are being expected to take the lead in the cultural shift that has resulted from the current economic crisis. If corporate governance measures are being driven by financial sense and business efficiency alone, their role in facilitating this shift may be questioned.

This paper has 3 aims:

1. To review the ethical aspects of corporate governance policy debates and frameworks at the EU and member state level
2. To identify any commonalities and differences regarding principles of good/ethical governance
3. To consider the extent to which ethical behaviours are becoming part of the corporate governance agenda in response to the crisis of trust in business.

To achieve these aims, evidence of explicit reference to any ethical underpinnings of governance in policy, guidance and regulatory documents was sought in the following three forms. It is important to note, of course, that the absence of any explicit reference to ethics in these three ways does not imply that ethical considerations were necessarily ignored during the drafting of guidance, nor that there is no presumption towards an ethical approach to business in the member states of the EU.

### 1. Is there reference to the ethical aspects of governance described in Figure 1 above?

It would be expected that the way the board members ought to behave in carrying out their role would be central to ideas of good governance as set out in guidance and policy. Also salient would be a requirement for oversight of the values and culture of the organisation, as well as of the appropriate structures, processes and controls to ensure decision-making and behaviours that are in

line with ethical principles. Finally, ethics can be seen in terms of a requirement for appropriate governance structures and mechanisms at board level so as to facilitate ethical behaviours by the board.<sup>1</sup>

**2. Have any ethical principles explicitly underpinned the way boards are required to operate and organise themselves?**

What is judged as ethical, and what an ethical choice would look like, is subjective and varies among individuals, and among and within cultures and organisations. However, there are typical ethical value words that are used by businesses to articulate their commitment to ethical standards, behaviours and practices. These include, for example, fairness, honesty, respect, integrity, openness and responsibility. Also, reference to leadership attitudes and traits relating to setting an ethical tone might be expected in corporate governance guidance; including fair-minded, courageous, respectful, open.

**3. Is there a requirement that boards address particular issues with a strong ethical dimension – either within the board or throughout the company as a whole?**

What is deemed to be an ethical issue, as opposed to a purely business issue, can also be a matter of opinion. There will be multiple drivers for addressing issues such as diversity and bribery and corruption. In governance guidance and regulation, to what extent is there a requirement to tackle issues generally considered to have an ethical dimension, and to what extent is that requirement driven explicitly by ethical principles? In particular, this report focuses on five governance areas: diversity, remuneration, stakeholder accountability, conflicts of interest and transparency.

In addition to desktop research, a small email survey was carried out among organisations representing corporate directors in several EU member states (member associations of ecoDa).

A core assumption for this report is that boards will seek to obey the law, in their own behaviours as well as in what they expect of the company. There is widespread recognition that ethical practices and behaviours in business cannot be attained simply by ‘tick box’ requirements. Doing business ethically transcends what can be captured in laws and rules. As explained above, ethics concerns the way people and organisations choose to behave.

## Who this report is for

This report will be relevant to anyone interested in the evolving debate around culture and behaviour in business, and how this is played out within corporate governance guidance in the European context. All those concerned with the development of governance, whether working within companies or as advisers, should find material within the report which is thought provoking.

This paper should be of interest to boards and executives as it outlines the current status of ethics in corporate governance in the EU and may inspire them to look again at their ways of working and how they gain public legitimacy – particularly in terms of the five governance areas explored later in this report.

Finally, the report will be of use to those responsible for ensuring that a corporate Code of Ethics (or similar) sufficiently reflects ethical practices and challenges at board level.

<sup>1</sup> Foster Back P (2005) *Setting the Tone: ethical business leadership*, IBE

## The structure of this report

Chapter 1 explores the extent to which ethical values and ways of working have, to date, informed governance practice at the pan-European level.

Chapter 2 starts by reviewing the drivers for ideas about what is ethical governance. It considers the extent to which there are generally accepted principles across Europe of the ‘right’ way to run businesses, including right behaviours for board members, and looks for any differences across member states.

To further develop this theme, Chapter 3 looks at approaches to a number of governance issues which have a strong ethical dimension at board level. The five issues – diversity, remuneration, stakeholder accountability, conflicts of interest and transparency – involve discretion by the board and are key aspects of ethical behaviour within the boardroom, as well as being issues which boards need to address for their organisations. They have been chosen primarily as issues which boards are being required to consider by EU governance rules and guidance. A number of other key ethical issues for companies, notably bribery and corruption and fiscal policy, have not been considered here since they are not a central part of the debate at the EU corporate governance policy level.

## 01

# Corporate Governance Within the EU: a context for the right way to run business

## 1.1 Background

The member states of the EU have been struggling to deal with the ongoing ramifications of the acute financial crisis which began in 2008. This has dealt a severe blow to the economies of Europe (and beyond). The EU member states are affected to varying degrees of severity and this situation looks likely to continue for several years.

The crisis has raised many questions concerning governance. Opinions on its causes are mixed, but there is a common view that it was caused at least in part by failures of governance in the banking sector. This has led to criticism of boards, regulators and shareholders alike. Boards have been held to be lacking in engagement, challenge and diversity. Regulators have been deemed to be incompetent and regulation too ‘light touch’ to prevent abuses. Shareholders have been criticised for not engaging sufficiently with their boards on governance, and not acting as responsible owners.

As well as the main players in the governance structure, governance processes and practices have also been criticised. Inadequate risk management is frequently cited here, closely followed by remuneration strategies which allegedly encouraged inappropriate risk taking. Board appointments processes have also been called into question, the view being that they too often led to ‘pale, male and stale’ boards who were susceptible to lack of challenge and ‘group think’.

Although business ethics, or lack of it, may be thought to play a considerable part in many of these issues, the debate has focused almost exclusively on governance processes and procedures while discussion of what might be the ‘right way to do business’, in terms of ethics and integrity, has been rare, certainly at the pan-EU level. **Rather than directly considering ethical and behavioural issues, the EU has responded to the perceived failure of governance processes with a tightening of regulation in the financial services sector.** There has also been a review of governance in the non-financial services sector and the Commission’s response to this was announced in December 2012 when a new EU Company Law and Corporate Governance Action Plan was published.

## 1.2 The origins of the EU approach to corporate governance

To set this current activity in context it is worth considering how the EU approach to governance has developed over the last 10 years and the factors which have influenced it. When looking back, it is interesting to note that discussion has been ongoing for at least a decade on improving standards in many of the areas that are still regarded now as requiring change. Progress at EU level has been slow, apart from the regulatory measures for financial services firms which have been introduced rapidly since the start of the crisis.

To go back to the beginning of the EU drive to improve governance, **a comparative study of European corporate governance codes** was undertaken for the

Commission by a firm of lawyers and published in 2002<sup>2</sup>. It concluded that a pan-European governance code should not be developed, stating:

*Neither detailed study of the codes or the private sector sounding that was conducted indicate that code variation poses an impediment to a single European equity market. The various codes emanating from the Member States are fairly similar and appear to support a convergence of governance practices. This, taken together with the need for corporations to retain a degree of flexibility in governance so as to be able to continuously adjust to changing circumstances, leads us to conclude that there does not appear to be a need for a European Union-wide code. Guidance about corporate governance best practice is already plentiful in Member States, and we agree with the prevailing private sector opinion expressed in our private sector consultation that ideas about best practice should be allowed to develop further under the influence of market forces.*

It was considered that the Commission should instead focus on the reduction of legal and regulatory barriers to shareholder engagement in cross-border voting and the reduction of barriers to shareholders' ability to evaluate the governance of companies.

The **Report of the High Level Group of Company Law Experts**<sup>3</sup> in the same year also asserted that there was no need for a mandatory pan-European governance code, but recommended that the Commission encourage co-ordination between member states on improving corporate governance standards:

*A structure should be set up to co-ordinate Member States efforts on a nonbinding basis. Out of the co-ordination of the national corporate governance efforts of Member States over time, a general framework on corporate governance in Europe can be expected to emerge. The form and content of that framework, however, should not be determined beforehand, but should be left to the developments in Member States and in the wider business context and to co-ordination between them.*

### 1.3 The Corporate Governance Action Plan of 2003 and early priorities

An **EU Corporate Governance Action Plan**<sup>4</sup> was introduced by the EU Commission in May 2003 in response to the *Report of the High Level Group of Company Law Experts*. It aimed to “foster the global efficiency and competitiveness of businesses in the EU” and also to “strengthen shareholders’ rights and third party protection”. In particular, it sought to rebuild investor confidence in the wake of earlier corporate governance scandals.

In the US, there was a presumption that business needed to be controlled by rules, and the *Sarbanes-Oxley Act* of 2002 had been the US response to the collapses of Enron and Worldcom. The EU’s 2003 Action Plan was not produced in response to these corporate failures; its creation pre-dated them and defined the EU’s own approach.

<sup>2</sup> Weil, Gotshal & Manges (2002) *Comparative Study of the Corporate Governance Codes relevant to the European Union and its Member States* [http://ec.europa.eu/internal\\_market/company/docs/corpgov/corp-gov-codes-rpt-part1\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/corpgov/corp-gov-codes-rpt-part1_en.pdf)

<sup>3</sup> European Commission (2002) *The Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe* [http://ec.europa.eu/internal\\_market/company/docs/modern/report\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/modern/report_en.pdf)

<sup>4</sup> European Commission (2003) *Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward* [http://www.ecgi.org/commission/documents/com2003\\_0284en01.pdf](http://www.ecgi.org/commission/documents/com2003_0284en01.pdf)

However, at this time there continued to be a series of corporate integrity failures. In Europe, perhaps the most significant were Parmalat<sup>5</sup> and Shell<sup>6</sup>, and these added to the momentum driving the EU's own approach.

The Commission stated that the Action Plan should be “flexible in application, but firm in principles”. It had avoided the prescription of Sarbanes-Oxley and in so doing stated, in a seemingly pointed reference to the perceived heavy-handed US approach, that it saw “an opportunity for the Union to strengthen its influence in the world with good, sensible corporate governance rules”. The Commission conceived it as a way to demonstrate vision and leadership in governance. It drew a fine line between prescription and flexibility, and sought to demonstrate an ‘equivalent’ level of governance to that of the US but by other means. Although it was principles-based rather than the rules-based framework of the US, both frameworks stopped short of directly addressing questions of expected ethical behaviours in business.

In the EU, the proportion of rules in the governance framework is relatively small, with certain key issues such as measures on shareholders’ rights, audit, market abuse and takeovers being included in EU Directives. Most governance measures are principles-based soft law, and allow discretion in their application to member states, which may in turn ensure that provisions are not mandatory for companies.



**Corporate Governance is primarily an ethical issue. It should be a combination of freedom with accountability and responsibility.**



Michel Delbaere,  
Chairman of VOKA  
[www.voka.be](http://www.voka.be),  
May 2013

The 2003 EU Action Plan received broad support. It was based on a comprehensive set of proposals, grouped under six chapters: corporate governance; capital maintenance and alteration; groups and pyramids; corporate restructuring and mobility; the European Private Company; cooperatives and other forms of enterprises.

The measures of the Action Plan were grouped into short, medium and long term, with the short term phase ending in December 2005. Key elements of this first phase were enhanced corporate governance disclosure, including confirmation of the collective responsibility of board members for key financial and non-financial statements; facilitating shareholder communication and participation; strengthening the role of independent non-executive directors; fostering an appropriate regime for directors’ remuneration; a number of proposals on capital maintenance and restructuring; and a feasibility study to assess the need for and problems of a European Private Company statute. These measures were largely achieved as planned. The Shareholders’ Rights Directive addressed the issues of shareholder communication and participation, in particular in a cross-border context.

Flowing from the Action Plan, **Commission Recommendations** were issued in 2004 on the role of independent directors<sup>7</sup> and directors’ remuneration<sup>8</sup>. In 2007, reports issued on the extent to which these had been implemented<sup>9</sup> concluded that implementation had been very patchy; some member states being far keener to progress this than others.

<sup>5</sup> Italian dairy giant Parmalat went into administration in 2004 with debts of €14.3bn (£10bn) – eight times more than it had claimed. Millions of investors lost their money and the CEO was found guilty of fraudulent bankruptcy and criminal association.

<sup>6</sup> In 2004, Shell overstated its ‘proven’ oil and gas reserves by about 20 per cent. There were claims that Shell executives were encouraged to exaggerate the size of reserves as their bonuses were tied to the level of energy assets booked. They have since paid out around \$450m in compensation and fines as a result of misleading investors.

<sup>7</sup> European Commission Internal Market Directorate General (2004) *Recommendation on the role of (independent) non-executive or supervisory directors* [http://ec.europa.eu/internal\\_market/company/docs/independence/2004-05-consultation\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/independence/2004-05-consultation_en.pdf)

<sup>8</sup> Official Journal of the European Union (2004) *Commission Recommendation of December 2004 on fostering an appropriate regime for the remuneration of directors of listed companies* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:385:0055:0059:EN:PDF>

<sup>9</sup> See next page

## 1.4 Attempts to promote convergence of national governance codes

One of the measures included in the short-term phase of the Action Plan was the establishment of a **European Corporate Governance Forum** to examine best practices in member states with a view to enhancing the convergence of national corporate governance codes and providing advice to the Commission. Frits Bolkestein, then EU Commissioner for the Internal Market, announced the creation of the Forum at the High Level European Corporate Governance Conference organised by the Dutch Presidency in The Hague and commented:

*The more national corporate governance codes converge towards best practice, the easier it will be to restore confidence in capital markets in the wake of the scandals that have shaken trust in some European companies, including traditional “blue chips”. Broad convergence not only strengthens shareholders’ rights and the protection of third parties such as creditors and employees, it makes it easier for investors to compare investment opportunities. That leads to a more efficient allocation of capital, which matters to everyone because it is the basis for creating growth and jobs.*

However, the **Study on Monitoring and Enforcement Practices in Corporate Governance in the Member States** of 2009<sup>10</sup> showed divergences of practice in what governance codes contained and in particular in how they were monitored and enforced – in other words, there had been limited convergence.

In 2010, the Commission published a Communication entitled **Towards a Single Market Act** - a consultation on a range of measures grouped into 50 proposals drawn up by 10 Commissioners owing to its wide scope<sup>11</sup>. Proposal 38 outlined the general approach on governance. It stated:

*The Commission will launch a public consultation (Green Paper) on corporate governance. It will also launch a public consultation on possible ways to improve the transparency of information provided by businesses on social and environmental matters and respect for human rights. These consultations could lead to legislative initiatives.*

The document continued:

*It is of paramount importance that European businesses demonstrate the utmost responsibility towards not only their employees and their shareholders but also towards society at large.*

*Their governance could be improved particularly as regards the composition and diversity of boards of directors, including the representation of women, long-term shareholder commitment and employee shareholding schemes.*

*In order to strengthen corporate governance and corporate social – and even societal – responsibility, attention will have to be focused on improving transparency, particularly in the areas of human rights and sustainable*

<sup>9</sup> Commission of the European Communities (2007) *Report on the application by Member States of the EU of the Commission Recommendation on directors’ remuneration* [http://ec.europa.eu/internal\\_market/company/docs/directors-remun/sec20071022\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/directors-remun/sec20071022_en.pdf)  
Commission of the European Communities (2007) *Report on the application by the Member States of the EU of the Commission Recommendation on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board* [http://ec.europa.eu/internal\\_market/company/docs/independence/sec20071022\\_en.pdf7](http://ec.europa.eu/internal_market/company/docs/independence/sec20071022_en.pdf7)

<sup>10</sup> Risk Metrics Group (2009) *Study on Monitoring and Enforcement Practices in Corporate Governance in the Member States* [http://ec.europa.eu/internal\\_market/company/docs/ecgforum/studies/comply-or-explain-090923\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/ecgforum/studies/comply-or-explain-090923_en.pdf)

<sup>11</sup> European Commission (2010) *Towards a Single Market Act for a highly competitive social market economy - 50 proposals for improving our work, business and exchanges with one another*: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0608:REV1:EN:PDF#page=2>

*development, and on ways to enhance corporate functioning, with the specific goal of increasing employee involvement, improving relations with shareholders and facilitating more accurate valuation of businesses by the financial markets.*

**This seemed to indicate a move towards greater consideration of behavioural and ethical issues, rather than simply maintaining the earlier focus on process.**

In June 2010 the Commission released a **Green Paper on corporate governance in financial institutions and remuneration policies**<sup>12</sup> followed by a **Green Paper on governance in the non-financial services market** the following year<sup>13</sup>. The latter focused on boards, shareholders and the ‘comply or explain’ model under which companies either comply with a governance provision in their country’s code or explain why they have not done so.

The paper comprised three themes:

- **The board:** Should the number of directorships per individual be limited? Should the EU ‘ensure’ the separation of chairman and CEO roles? Should companies be required to have a diversity policy and to ensure better gender balance on boards? Should external board evaluation be encouraged and how?
- **Shareholder engagement:** How can it be strengthened, including using possible incentives, should there be an EU mechanism for shareholder identification? Should there be additional rights for minority shareholders?
- **Comply or explain:** How can it be better enforced? The Commission believed it would work much better if regulators, stock exchanges etc. checked whether the information disclosed, especially the explanations, were sufficiently informative and comprehensive, it therefore asked whether detailed explanations should be mandatory and independently checked for quality.

## 1.5 The Corporate Governance Action Plan of 2012

The new **Corporate Governance Action Plan**<sup>14</sup> published in December 2012 was the Commission’s response to the consultation on the 2010 and 2011 Green Papers mentioned above. It has 3 stated aims: enhancing transparency, engaging shareholders and supporting companies’ growth and competitiveness. Some of the key measures within these specified aims are:

### *Enhancing transparency*

- Disclosure of board diversity policy and risk management arrangements
- Improving corporate governance reporting, especially of ‘explanations’ for not applying Code provisions
- Better mechanism for identification of shareholders by companies
- Disclosure of institutional investors’ voting and engagement policies and voting records.

<sup>12</sup> European Commission (2010) *Green Paper: Corporate governance in financial institutions and remuneration policies*  
[http://ec.europa.eu/internal\\_market/company/docs/modern/com2010\\_284\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/modern/com2010_284_en.pdf)

<sup>13</sup> European Commission (2011) *Green Paper: The EU corporate governance framework*  
[http://ec.europa.eu/internal\\_market/company/docs/modern/com2011-164\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/modern/com2011-164_en.pdf)

<sup>14</sup> EU Commission (2012) Action Plan: European company law and corporate governance – a modern legal framework for more engaged shareholders and sustainable companies  
[http://ec.europa.eu/internal\\_market/company/docs/modern/121212\\_company-law-corporate-governance-action-plan\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/modern/121212_company-law-corporate-governance-action-plan_en.pdf)

*Engaging shareholders*

- Disclosure of remuneration policies and individual remuneration of directors, a shareholder vote on remuneration policy and the remuneration report
- Better shareholder control over related party transactions
- Improving the transparency and conflict of interest framework applicable to proxy advisors
- Clarification of the 'acting in concert' concept to make shareholder cooperation on corporate governance issues easier
- Investigation of whether employee share ownership can be encouraged.

*Supporting growth and competitiveness*

- Further investigation on a possible initiative on the cross-border transfer of registered office
- Facilitating cross-border mergers and divisions.

Measures are being introduced throughout 2013 and will include hard and soft law, as well as guidance, further study etc.

Other than as implied by these headings, ethical values and behaviours are not referred to explicitly. However, specifying what companies should do about these particular issues might act both as encouragement towards more ethical conduct and lead to increased consideration of ethical matters as part of good governance.

## 1.6 The development of initiatives on Corporate Social Responsibility

There has been much discussion over the years as to whether or not Corporate Social Responsibility (CSR) was a part of corporate governance, but it can be regarded in terms of the board's remit in setting values and standards. This talk of where CSR fits, and indeed whether 'CSR' is the right term (some people now preferring CR – corporate responsibility, ESG – environmental, social and governance, or even CSV – corporate social value) has threatened to overshadow the key issue of what was actually being done, or should be done. Differences in terminology exist not just between different member states, but between companies within a member state. As with the general governance debate, discussion has tended to focus on measures and provisions rather than on ethical values or behaviours directing the way business operates.

In 2001, the Commission published a **Green Paper on CSR**<sup>15</sup>. There had been no appetite for legislative measures and instead a voluntary approach was encouraged. A Multi-Stakeholder Forum (MSF) was established to exchange and promote best practice and to consider whether any measures should be taken at EU level. The MSF concluded that the voluntary approach should continue.

A Commission communication of March 2006 entitled *Implementing the Partnership for Growth and Jobs: Making Europe a pole of excellence on CSR* aimed to underline the voluntary approach<sup>16</sup>. The Commission also launched the 'European Alliance for CSR' as a forum to develop CSR initiatives by companies and their stakeholders. Eight areas for action were identified:

<sup>15</sup> Commission of the European Communities (2001) Green Paper: *Promoting a European framework for Corporate Social Responsibility* [http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001\\_0366en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0366en01.pdf)

<sup>16</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0136:FIN:en:PDF>

- Awareness raising and best practice exchange
- Support for multi-stakeholder initiatives
- Cooperation with member states
- Consumer information and transparency
- Research
- Education
- SMEs
- International CSR.

At a meeting in December 2006 of governments, companies and stakeholders to discuss the position since the MSF report, it was felt that CSR initiatives were becoming more common but that it was still necessary to encourage this and to further cooperation between interested parties.

In March 2007 the European Parliament adopted a resolution on CSR from the Employment and Social Affairs Committee. This report, entitled **CSR - a new partnership**<sup>17</sup>, called on the Commission to propose amendments to the accounting rules to include CSR reporting and recommended that directors should have a personal duty to minimise any harmful social and environmental impacts of their companies' activities. It also called for CSR to be fully integrated into the Commission's work on corporate governance. The Commission did not take up these proposals.

The Commission has not brought forward any legislation on CSR, believing that CSR was too diverse to be encapsulated in legislation, but that voluntary measures should continue to be encouraged. By 2007 it appeared that companies throughout the EU were taking CSR increasingly seriously and introducing more measures and programmes. There was a general consensus that it was important and should continue to develop for the mutual benefit of companies and their stakeholders. Directors should ultimately be responsible for it but there was no consensus on whether it should be delegated to a board committee or indeed on whether a single board member should be named as responsible for it.

In 2011 the Commission published a new **CSR strategy for the EU**<sup>18</sup> which gives a "new definition" of CSR as "the responsibility of enterprises for their impacts on society". The strategy envisages a number of initiatives for the Commission which will be reviewed in 2014.

It does mention ethical matters, but seems to see them as separate from other particular issues, stating that to fully meet their social responsibility, enterprises:

*should have in place a process to integrate social, environmental, ethical and human rights concerns into their business operations and core strategy in close collaboration with their stakeholders.*

Perhaps the most interesting proposal was that, with the aim of improving and tracking the level of trust in business, the Commission intended to launch a public debate on the role and potential of enterprises, and organise surveys on citizens' trust in business.

<sup>17</sup> [http://www.commddev.org/userfiles/files/992\\_file\\_ep\\_report\\_on\\_csr0612\\_1\\_.pdf](http://www.commddev.org/userfiles/files/992_file_ep_report_on_csr0612_1_.pdf)

<sup>18</sup> European Commission (2011) *A renewed EU strategy 2011-14 for Corporate Social Responsibility*  
[http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/new-csr/act\\_en.pdf](http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/new-csr/act_en.pdf)

## 1.7 Barriers to governance convergence

The Commission has, in recent years, introduced requirements for corporate reporting of non-financial matters. Article 46 (1) (b) of the EU Fourth Accounting Directive provided that, where appropriate and to the extent necessary for an understanding of the company's development, performance or position, the annual report shall also contain non-financial information, including information relating to environmental and employee matters.

A new proposal for a Directive was published in April 2013<sup>19</sup> requiring large companies to disclose a statement in their Annual Report including material information relating to at least environmental, social, and employee-related matters, respect of human rights, anti-corruption and bribery aspects.

Governance convergence might be held to be a desirable agenda to the extent that it focuses member states on improving best practice, which should encompass higher ethical standards.

The EU level developments summarised earlier generally evidence slow progress in addressing the governance issues identified as important by the above initiatives. **There is a primary focus on processes and procedures for improving governance generally, rather than on asserting ethically driven standards of governance.** There are, no doubt, many reasons why progress has been slow. In addition to the complex and unwieldy EU decision-making process other key factors are relevant.

- The significant enlargement of the EU to 27 member states (especially the inclusion of 8 new member states from May 2004) makes it increasingly difficult to agree and implement proposals and to achieve convergence of practice. As each member state joins it is required to adopt the 'acquis', or cumulative total of all EU Directives and Regulations. This has created serious difficulties for many member states, some of which take a considerable length of time to assimilate the 'acquis'. Economic, political and cultural norms differ sharply between EU member states with the inevitable consequence that their approaches to running business are diverse. Furthermore, there is inconsistency in the transposition of EU Directives into local member state law and anomalies in the way they are monitored and enforced. This prevents a 'level playing field' and results in wide discrepancies in practice. A Regulation is directly applied by each member state, without the need to transpose it into local law. This should result in more consistent application of provisions across the EU but the disadvantage is that it is an additional layer of regulation which may cut across local law (rather than being written into local law, as with a Directive).
- Measures have been spread across different administrative sections of the Commission (DGs), for example CSR and diversity have not fallen within the DG which generally deals with corporate governance matters. This has sometimes led to a disjointed approach which has arguably impeded progress.
- Across the EU different cultural norms and views of governance and ethics could be expected to result in varying levels of priority being given to governance and behavioural initiatives. Definitions of practice are interpreted in different ways in the various member states, and also in different organisations.

<sup>19</sup> European Commission (2013) *Proposal for a Directive as regards disclosure of non-financial and diversity information by certain large companies and groups*  
[http://ec.europa.eu/internal\\_market/accounting/docs/non-financial-reporting/com\\_2013\\_207\\_en.pdf](http://ec.europa.eu/internal_market/accounting/docs/non-financial-reporting/com_2013_207_en.pdf)

- In each country the role of the state is important in determining the level of central control and sanctions for non-compliance with governance provisions. This is not only driven by cultural norms but by the country's history, the development and role of business within it and its political situation. The specific financial architecture of each country also plays a part in what is considered acceptable business practice, specifically with regard to the role of the banks in facilitating access to finance and in setting requirements for this regarding corporate practice.
- Board structure differs in EU member states with some, such as the UK, favouring a unitary board system (with executive and independent or 'non-executive' directors on the same board), others, such as Germany, using a two-tier board system (with both a supervisory and a management board) and others, such as France and Luxembourg, operating both models.
- Also, various ownership models and structures are seen. For example, companies in some member states tend to have shareholders, or perhaps founding families, owning a large proportion of their shares. Other member states will generally have companies with a more diverse shareholder base. There are also great variations in employee involvement in companies in different member states, from Germany and France where this is a key aspect of the governance structure, to the UK where employee representation on large company boards is not normally seen.

These varying models impact on the way governance is applied in different companies; for example, with particular regard to the treatment of directors' conflicts of interest (seen by some proponents of the two-tier system as a particular difficulty with unitary boards) and shareholder and employee engagement. However, **principles of good governance and behavioural practice are relevant to all and can be put in to practice irrespective of ownership model and board structure.**

## 02

## What is Considered the ‘Right Way’ to Run Business?

Corporate governance measures have typically been driven by what makes financial sense and increases business efficacy. There has been little discourse within the regulatory and policy backdrop on what is ethically right. However, questions of what is responsible business practice, plus the demand for attention to individual and corporate behaviours, now characterise the context within which business is defending its legitimacy.

What is influencing ideas about the ethically right way to run a business?

Principles and practices of governance vary between countries and organisations but there are a number of key themes which would be widely considered as being the ‘right way’ to run a company, at least in the EU context. These transcend national boundaries and are applied in different ways across the EU but nevertheless provide a general benchmark of ethical good practice.

This Chapter sets out some drivers and sources for these ideas: namely the OECD *Principles of Corporate Governance*, statutes, governance codes and guidance in member states, developments in corporate governance practice and stakeholder pressure.

### 2.1 OECD Principles

The **OECD published its *Principles of Corporate Governance*** in 1999, updated them in 2004<sup>20</sup> and plans to do so again in 2014. They have attracted broad support in many major international markets and gained wide acceptance as a universal model of good practice. Some regard them as the international benchmark of governance. They include reference to some ethical elements core to corporate governance.

Six broad principles are supported by a number of explanatory points. They concern:

- Ensuring the basis for an effective corporate governance framework
- The rights, equal treatment of and role of shareholders (3 principles)
- Disclosure and transparency
- The responsibilities of the board.

The principle on “*The responsibilities of the board*” includes 6 supporting points (see Box 1).

<sup>20</sup> <http://www.oecd.org/dataoecd/32/18/31557724.pdf>

**Box 1 OECD Principle VI The Responsibilities of the Board**

The corporate governance framework should ensure the strategic guidance of the company, the effective monitoring of management by the board, and the board's accountability to the company and the shareholders.

- A. Board members should act on a fully informed basis, in good faith, with due diligence and care, and in the best interests of the company and the shareholders.
- B. Where board decisions may affect different shareholder groups differently, the board should treat all shareholders fairly.
- C. The board should apply high ethical standards. It should take into account the interests of stakeholders.
- D. The board should fulfil certain key functions [8 are listed].
- E. The board should be able to exercise objective independent judgement on corporate affairs [3 supporting sub-points].
- F. In order to fulfil their responsibilities, board members should have access to accurate, timely and relevant information.

It is interesting that the mention of ethical standards goes on to provide that the board should take account of stakeholders' interests, as it directly connects the board's actions to their effect on employees, shareholders, customers and other stakeholders.

## 2.2 Legislation on the 'right' way to run business

**UK:** In the UK, 7 statutory duties in the 2006 *Companies Act* set out the key responsibilities which should influence the behaviour of directors (see Box 2). They included for the first time, a requirement to "have regard to" the likely consequences of a decision in the long term and the interests of employees, suppliers, consumers and the environment. This aimed to encourage a culture where the wider consequences of decisions are routinely considered. It suggests that boards need to identify the interests, views and expectations of all individuals and groups which they judge have a legitimate interest in the achievement of company objectives, and the way in which they are achieved.

**Box 2 Directors duties within the UK Companies Act**

1. To act within powers (i.e. constitutional documents etc.)
2. To promote the success of the company for the benefit of its members, (having regard to certain stakeholder-related factors, as noted above)
3. To exercise independent judgement
4. To exercise reasonable care, skill and diligence
5. To avoid conflicts of interest
6. Not to accept benefits from third parties
7. To declare any interest in a proposed transaction or arrangement.

## 2.3 National governance codes and guidance

EU Directive 2006/46/EC introduced the requirement for all listed companies in each member state to publish a corporate governance statement from 5 September 2008. The statement is to show compliance against the particular corporate governance code which they apply, on a 'comply or explain' basis. Where they felt it necessary, member states also introduced provisions into hard law and issued supplementary guidance to governance codes (for example in the UK). To what extent do these provisions specify the ethical aspects of governance?

Following the introduction of the requirement to report against a governance code set out in the 2006 Directive, a number of member states introduced corporate governance codes for the first time and there was a tendency to incorporate elements of codes already adopted elsewhere. It is therefore not surprising to find that several key themes and principles are common and seemed to have gained general acceptance about the right way to govern a business.

Indeed, when consideration was being given in 2012 to a revision of **The 2009 Belgian Code on Corporate Governance**<sup>21</sup>, the law firm Allen & Overy was commissioned to undertake a study assessing the need for a revision of the Code by comparing the Code to those of neighbouring countries (France, Germany, Netherlands, UK, Italy)<sup>22</sup>. The study found that the structure of codes varied greatly throughout the EU member states but that this did not necessarily affect their level of detail. The codes comprised variously: recommendations, attention points, suggestions, principles and best practice provisions. In certain member states the rules are influenced by the size of the company to which they relate. In France, for example, the **Middlenext Code** addresses the needs of small and medium sized companies, whereas the **AFEP MEDEF Code** is used principally by larger companies.

For this report, organisations representing corporate directors in a sample of EU member states were asked to indicate whether the principles of good governance set out in Box 3 were included in their country's governance codes<sup>23</sup>. The principles were based on the **UK Corporate Governance Code**. Responses were received from Belgium, Denmark, Finland, France, Italy, Luxembourg, Slovenia, Sweden and the UK.

### Box 3 Principles apparent in governance frameworks of EU member states

#### Principle

Board to set company's values and standards

Chairman and CEO not to be same person

Non-executive directors to constructively challenge executives

Board and committees to have appropriate balance of skills, experience, independence and knowledge

Directors' appointment procedure to be formal, rigorous and transparent

Directors to allocate enough time to their duties

Directors to receive induction and training

Board to be sent timely information

*continues*

<sup>21</sup> An index of national corporate governance codes can be accessed at [http://www.ecgi.org/codes/all\\_codes.php](http://www.ecgi.org/codes/all_codes.php)

<sup>22</sup> Allen & Overy (2012) *Corporate Governance Comparative Study*

<http://www.corporategovernancecommittee.be/library/documents/Studie%20Allen%20%20Overy/Study%20Allen%20%20Overy.pdf>

<sup>23</sup> Email survey of ecoDa member organisations, 2012

Box 3 *continued*

Annual board, committee and individual director evaluation
Above evaluation to be carried out by external facilitator at least every 3 years for top 350 companies
Directors to be submitted for re-election by shareholders at least every 3 years (every year for 350 largest companies)
Board to determine risk approach
Formal and transparent procedures should be in place for developing policy on executive remuneration and for determining remuneration of individual directors
Board is responsible for ensuring satisfactory dialogue with shareholders
Board should use AGM to communicate with investors

An extremely high level of commonality was apparent, with most of the countries confirming that all of these principles were included in their governance codes. A few differences were notable:

- Some member states do not require individual director evaluation (Finland, Slovenia, Sweden and Luxembourg; and Finland does not require committee evaluation)
- France does not require a separate Chairman and CEO.

Allen & Overy's 2012 *Corporate Governance Comparative Study*, mentioned above, likewise found that the five governance codes which it reviewed generally contain "various rules of conduct", i.e. commitment, leadership, discretion, independent judgment, integrity, acting in the corporate interest and acting in the interests of stakeholders. It commented on the extent to which these are subject to 'comply or explain', although the concept of how one might make a comply or explain statement about matters such as integrity brings its own problems.

## 2.4 Developments in corporate governance practice – surveys and guidance

### Surveys

A report by **Heidrick & Struggles** (an executive search and leadership consulting firm) noted that<sup>24</sup>:

*A possible reason for why many boards are still found wanting is the fact that despite rigorous efforts to raise governance standards, insufficient attention has been paid to the behavioural standards as opposed to the technical challenges of the boardrooms.*

The Allen & Overy Study mentioned above notes that "board evaluation may be an occasion to monitor the behavioural rules". This presupposes that board evaluation avoids a 'tick box' approach and that it is open to discussing behavioural issues. Both should be the case in any well conducted, open evaluation, and indeed **a focus on behavioural issues is widely considered to be a key element of a serious board evaluation.**

<sup>24</sup> Heidrick & Struggles (2011) European Corporate Governance Report 2011: *Challenging board performance*  
[http://www.heidrick.com/PublicationsReports/PublicationsReports/HS\\_EuropeanCorpGovRpt2011.pdf](http://www.heidrick.com/PublicationsReports/PublicationsReports/HS_EuropeanCorpGovRpt2011.pdf)

**An Ernst & Young survey in 2012** illustrates how, with increasing globalisation, companies are importing good practice developed elsewhere, adapted to their own legal and governance framework<sup>25</sup>. It highlights a number of ‘best practices’ followed in European companies, some of which had been adopted in France. Examples include:

- The creation of a ‘lead director’, where the roles of Chairman and CEO are combined, inspired by UK practice
- Increased transparency in governance reporting, such as more use of tables and diagrams on board evaluation outcomes, also from the UK
- The increase in the culture of consensus inspired by the role of employees on the boards of German companies
- Greater focus on information on compliance systems such as on fraud prevention and anti-money laundering (Italy) and risk management (Germany).

**A study of governance practice in the 350 largest UK listed companies by Grant Thornton**, an international advisory firm, noted:<sup>26</sup>

*We have identified an emerging practice among chairmen: one in 20 now emphasise the importance of company culture to effective governance. Although too early to call this a trend, the role of culture and ethical principles in cementing effective governance is gaining credence. This is seen, for example, in statements by Sir David Walker, Barclays’ new chairman, as he endeavours to effect fundamental changes in the bank’s culture and thereby governance practice.*

### Guidance

In 2012 the Belgian Directors’ Association (GUBERNA) produced a **Director’s Toolkit**<sup>27</sup> which is a practical guide for individual directors. The extract in Box 4 includes perhaps the most detailed guide on what it might mean to behave with integrity when carrying out the role of a director.

#### Box 4 GUBERNA Director’s Toolkit - integrity requirements

##### 3. A Director Acts with Integrity

1. A director acts ethically and with integrity (base of minimum requirements for moral values) in accordance with the applicable governance codes and company practices. A director is able to describe the behaviour and identify the common values of the company (for example, respect, dialogue, tolerance, diversity or pluralism).
2. A director has the personal and professional qualities that meet the highest definition and most demanding standards in terms of integrity, honesty and loyalty.

*continues*

<sup>25</sup> Ernst and Young (2012) *Panorama des pratiques de gouvernance des sociétés cotées françaises*  
[http://www.ey.com/Publication/vwLUAssets/Etude\\_Gouvernance\\_2012/\\$FILE/Etude\\_Gouvernance\\_2012.pdf](http://www.ey.com/Publication/vwLUAssets/Etude_Gouvernance_2012/$FILE/Etude_Gouvernance_2012.pdf)

<sup>26</sup> Grant Thornton (2012) *The chemistry of governance: a catalyst for change*  
[http://www.grant-thornton.co.uk/Global/Publication\\_pdf/Corporate\\_Governance\\_Review\\_2012.pdf](http://www.grant-thornton.co.uk/Global/Publication_pdf/Corporate_Governance_Review_2012.pdf)

<sup>27</sup> GUBERNA (2012) *Director’s Toolkit*  
[http://www.guberna.be/sites/default/files/tools/toolkit/TOOLKIT\\_EN.pdf](http://www.guberna.be/sites/default/files/tools/toolkit/TOOLKIT_EN.pdf)

## Box 4 continued

- A director organises his or her personal and professional life so that it does not interfere with or hinder the exercise of his or her professional functions.
  - A director maintains under all circumstances his or her independence of analysis, decision-making and action and rejects any form of pressure.
3. The integrity of a director includes - at the very least - respect for both the letter and intention of written and unwritten rules and customs in place within the company.
  4. A director is familiar with, follows and complies with the procedures put in place within the company to avoid and/or resolve conflicts of interest. When relevant, a director will notify and inform the other directors of his or her interests, clearly and *in tempore non suspecto*. To this end, the director will contact the designated persons within the company.
  5. A director participates in the development and promotion of a culture of honesty. Honesty consists of irreproachable behaviour, with regard to both the law and the company's internal rules, as well as the generally accepted definition of honesty (uprightness, loyalty, etc.).
    - A director does not participate in any way in unlawful transactions and does not use unlawful means to perform his or her duties.
    - A director draws a clear line between the performance of his or her official duties for the company and the promotion of other professional or business activities or executive responsibilities. A director does not use his or her office or the information obtained further thereto for purposes other than to manage and represent the company.
    - A director does not participate in the creation of misleading situations and does not spread or state incorrect information.
  6. A director is incorruptible. A director takes care to maintain his or her free will and to ensure that he or she is free of all pressure when taking decisions.
  7. A director is loyal. A director is faithful to his or her commitments. Such loyalty is constant and should be displayed prior to taking up the directorship, during the appointment process and performance of the directorship, and after the end of the director's term of office.
  8. A director is trustworthy. He or she is capable of safely maintaining the confidence of information received. A director acts in a courteous manner and maintains relations characterised by good faith, in order to preserve the confidence and trust required by his or her office.
  9. A director is responsible.
    - A director acts with diligence and efficiency. He or she behaves and takes decisions in a responsible manner. A director displays caution and reserve in the exercise of his or her duties.
    - A director refrains from holding indiscrete or indelicate conversations about any information that is brought to his or her attention both during and outside the performance of his or her duties.

continues

Box 4 *continued*

- A director respects his or her commitments and assumes the consequences of his or her behaviour (acts and/or omissions). A director discharges the duties conferred on him or her, in pursuit of the company's objectives, to the best of his or her abilities and with discernment.
- A director is in general true to his or her commitments.

The UK **Walker Review** of the governance of financial services contended that many of the problems leading to the financial crisis were caused by deficiencies in behaviour rather than process<sup>28</sup>. This led to a number of measures for the financial services sector and informed the review of the *UK Corporate Governance Code*<sup>29</sup> in 2010. It also led to the production of the market-led **Guidance on Board Effectiveness** under the auspices of the Financial Reporting Council<sup>30</sup>, the UK regulator with responsibility for corporate governance. This guidance focused on practical behaviours which it believed would optimise board effectiveness. It also emphasised ethical behaviours, for example by stating that the chairman should demonstrate the highest standards of integrity and probity. Designed to be read alongside the *UK Corporate Governance Code* to assist with the practical interpretation of its provisions on leadership and effectiveness, it is not mandatory and there is no formal monitoring of the extent to which it is being used by boards.

Sir David Walker, as Chairman of Barclays, later addressed a Parliamentary Commission on Banking Standards, saying that in the recent past boards and banks had “*not focused on culture*” (12 September 2012).<sup>31</sup>

*If anyone in the organisation feels that in any decision that he or she is taking in relation to a client or any other matter that there is a choice between profit and reputation, it is very clear where priority should be given. So we need to say that very strongly at the top, and to say that reputation, culture, conduct, is to be the driver and profit comes second in any choice.*

*We need a performance evaluation system that pays much more attention to people's behaviours. Just as behaviours matter much more in the boardroom, they need to matter all the way down the organisation.*

*It is relatively straightforward, but very important, for there to be values at the top of the organisation and emphasis given to them.*

## 2.5 Stakeholder pressure

**Protest movements:** In the wake of the financial crisis, there has been popular discontent regarding the very nature of capitalism, exemplified by protest movements in the US and EU, such as ‘Occupy’.

<sup>28</sup> Walker Review Secretariat (2009) *A review of corporate governance in UK banks and other financial industry entities* [http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/d/walker\\_review\\_261109.pdf](http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/d/walker_review_261109.pdf)

<sup>29</sup> Financial Reporting Council (2012) *UK Corporate Governance Code* <http://www.frc.org.uk/Our-Work/Codes-Standards/Corporate-governance/UK-Corporate-Governance-Code.aspx>

<sup>30</sup> Financial Reporting Council (2011) *Guidance on Board Effectiveness* <https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/Guidance-on-Board-Effectiveness.aspx>

<sup>31</sup> House of Commons (2012) *Evidence taken before the Joint Committee on Banking Standards* <http://www.publications.parliament.uk/pa/jt201213/jtselect/jtpcb/c606-i/c60601.htm>

This popular opposition has struggled to articulate a coherent message, but seems to have been most concerned with high executive pay; the legal but, in some people's view, unethical avoidance of tax by large companies; the perceived 'unfairness' and inequity of the capitalist system; and lack of employment opportunities for the young. These issues all feature with increasing regularity in the media, and are driving public expectations about the way business ought to be run. Such disgruntlement has forced the business sector to think about how it demonstrates its legitimacy.

**Globalisation:** As global corporations roll-out their notions of acceptable business practices across all the countries in which they operate, a universalising of what is considered basic good practice in running a company can be expected.

**Social media:** is having a similar effect. Campaigns through social media against certain practices can act as a catalyst for change and can force companies to re-think their ways of working. A recent example of this is popular disquiet at the fiscal policy of certain high profile multinational organisations.

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*The Board is the guardian of the ethical values of the company and must play a central role in understanding and monitoring ethical risks. Beyond simple compliance with regulatory frameworks, it is up to the board and the executive management of the company to define the common values and principles that should govern the conduct of the company's activities and the behaviour of its employees and to ensure their implementation.*

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Institut Français des  
Administrateurs  
[www.ifa-asso.com](http://www.ifa-asso.com),  
May 2013

**Shareholders:** are increasingly encouraged to engage on governance with the companies in which they invest, yet widely differing patterns of shareholding across the EU and also between individual companies, as well as varying appetites for engagement amongst shareholders, result in a highly inconsistent pattern of governance engagement. Nevertheless shareholder pressure can result in companies making significant changes. In the UK, for example, there was in 2012 what was called a Shareholder Spring which forced director resignations and pay restraint. Shareholder and media demands continue to exert pressure for pay restraint in the UK and elsewhere.

## 03

## Some Ethical Choices at Board Level

This Chapter considers how five aspects of business practice have been addressed at the pan-EU level and how member states approached them. The issues considered are diversity, remuneration, accountability, conflicts of interest and transparency. They have been selected as:

- Being core to the way that a business is overseen and directed
- Having an ethical imperative
- Involving the discretion of the board and
- Being those consistently highlighted for attention by the EU Commission in recent initiatives.

There are of course many other ethical issues faced by companies, including in particular bribery and corruption, money-laundering and fiscal policy, all of which are currently key areas of corporate and societal concern.

Practice regarding some of these five governance challenges has been prescribed to differing extents on a mandatory basis, either by EU or local member state law. For others, market practice has developed which is non-mandatory, so that adoption is a matter of choice for each organisation. It is important to remember also that a different definition of these issues, as well as perceptions of their importance, may exist in different member states.

The drivers for boards' attention to these practices may, on the one hand, be a desire to 'do the right thing', in other words to behave ethically for its own sake, and/or on the other hand be a conviction about their role in improving business performance. Clearly, the relative importance of these two factors will differ between member states, and of course between companies.

Even in the UK, where the discourse around ethics is amongst the most explicit, the Institute of Directors commented:<sup>32</sup>

*It is less common (than inclusion in a law or Code) for ethical considerations to be used as the sole or primary justification for new governance requirements.*

*For this reason, campaigning groups that wish to promote particular governance practices for ethical reasons are often compelled to demonstrate that their proposals also make good sense from the perspective of economic efficiency or effectiveness.*

### 3.1 Diversity

The drive towards greater diversity on boards has at its core the desire to achieve better board level decisions by avoiding boards comprised of individuals of similar backgrounds who may be inclined to take a similar view on issues, so-called 'group think'. The avoidance of such boards where views go unchallenged is held to promote better corporate performance and to have a direct effect on the bottom

<sup>32</sup> Survey of ecoDa members, 2012

line, as well as the quality of governance. There is also a strong ethical dimension to promoting diversity as business ethics values such as fairness and respect come into play.

Ensuring better diversity relates to a desire not to discriminate against any individual owing to his or her religious, cultural or social background, etc. and to treat all prospective board candidates fairly. This ethical dimension is notably absent from most reports available on the subject. The view that greater diversity is ‘the right thing to do’, in that it discourages discrimination and promotes equality of treatment, is certainly under-represented compared to the business case<sup>33</sup>.

The diversity debate in Europe is currently focused predominantly on gender and takes less account of other aspects which may be regarded as equally valid, such as age, ethnicity and disability. In March 2011 Viviane Reding, the EU Justice Commissioner, challenged European boards to improve their gender balance and said that if this did not happen voluntarily she would use her “*regulatory creativity*” to ensure greater progress.

The European Parliament was supportive of the Commission’s stated approach of introducing measures should voluntary initiatives be insufficient. In July 2011 it passed a resolution calling for “*legislation at the European level if companies do not make sufficient progress through self-regulation.*” In March 2012 the EU Justice Commissioner announced that she was not satisfied with progress and launched a consultation on whether and how quotas should be introduced.

At the same time a report was published entitled ***Women in Economic Decision-making in the EU***<sup>34</sup>. The report saw the issue as one of untapped resource. It referred to the high number of female graduates in Europe and the low female participation in top level positions and concluded this represented “*a waste of much highly qualified and needed human resources*”.

The report maintained that empowering women for leadership positions is important for economic growth. It cited various studies which supported this and listed some of the specific benefits of greater female participation in decision-making underpinned by the research (including better governance and ethics). It therefore saw the issue primarily in terms of the economic business case, rather than as an ethical issue concerning equal treatment and equality.

Despite more progress being made during the last few years than in previous times, in March 2012 women occupied just 13.7% of board seats of the largest companies in the EU. The figures in member states varied: from 25% in Finland, Latvia and Sweden; just over 20% in France; just under 15% in the UK; less than 10% in Greece, Ireland, Estonia, Italy, Luxembourg, Portugal and Hungary; less than 5% in Cyprus; and about 3% in Malta. In nearly a third of member states at least half the largest companies had boards with no women.

In November 2012 the Commission published proposals for a Directive on improving the gender balance of non-executive directors (NEDs) in listed companies by 1 January 2020<sup>35</sup>. This is now being considered by the European Parliament and

<sup>33</sup> IBE Business Ethics Briefing (2011) *Business Ethics and Board Diversity*  
<http://www.ibe.org.uk/userfiles/be%20and%20board%20diversity%20briefing.pdf>

<sup>34</sup> European Union (2012) *Women in economic decision-making in the EU: Progress report*  
[http://ec.europa.eu/justice/newsroom/gender-equality/opinion/files/120528/women\\_on\\_board\\_progress\\_report\\_en.pdf](http://ec.europa.eu/justice/newsroom/gender-equality/opinion/files/120528/women_on_board_progress_report_en.pdf)

<sup>35</sup> European Commission (2012) *Proposal for a Directive on improving the gender balance amongst NEDs of companies listed on stock exchanges and other measures*  
[http://ec.europa.eu/justice/gender-equality/files/womenonboards/directive\\_quotas\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/womenonboards/directive_quotas_en.pdf)

Council and so is subject to change. Presuming it is adopted, member states will have two years to implement it. The aim is to increase substantially the number of women on EU corporate boards by setting a minimum objective that 40% of NEDs of listed company boards should be of the “*under-represented sex*”, generally women.

Companies which do not have 40% of NEDs who are women would have to make NED appointments on the basis of a comparative analysis of the qualifications of each candidate against pre-established criteria, in order to reach 40% by 2020. Priority would have to be given to the female candidate if she is equally qualified to the male candidate, unless an objective assessment tilts the balance in favour of the male candidate. An unsuccessful candidate could require the company to disclose the selection criteria and, where relevant, the considerations tilting the balance in favour of the candidate of the other sex. Where this shows the unsuccessful candidate to be equally qualified the onus would be on the company to show it had not breached the rules.

For executive directors, member states would have to ensure that listed companies make individual commitments on gender balanced representation in the same time frame.

Companies would have to disclose information annually about the gender balance on their boards, (executives and NEDs) and, where applicable, measures taken to meet the NED objective, and put it on their website. If the objective or individual commitments have not been met, the company would have to say why this is and what it is doing to rectify it. Member states would set their own sanctions for non-compliance which may include fines or invalidity of a NED appointment.

The proposal for a Directive on disclosure of non-financial and diversity information by certain large companies and groups, published by the Commission in April 2013, contains provisions on diversity reporting<sup>36</sup>. Large companies would have to report on their diversity policy with regard to aspects such as age, gender, geographical diversity, educational and professional background, the objectives of the diversity policy, how it had been implemented and the situation during the reporting period.

### Initiatives in members states

The corporate governance codes of a number of member states encourage gender diversity. According to the report referred to above, *Women in decision-making in the EU*, this is the case in Austria, Belgium, Denmark, Finland, France, Germany, Luxembourg, the Netherlands, Poland, Sweden and the UK.

**Belgium:** In 2011 a law was adopted providing for quotas of female directors on boards of Belgian listed companies, autonomous public enterprises and the National Lottery. The quota is 33%, to be achieved in 7 or 8 years.

The Belgian Corporate Governance Code provides that board composition should be determined on the basis of gender diversity and diversity in general. GUBERNA, the Belgian Directors' Association, has introduced a mentoring programme for its women members in response to debate in Belgium about gender quotas.

<sup>36</sup> European Commission (2013) *Proposal for a Directive as regards disclosure of nonfinancial and diversity information by certain large companies and groups*  
[http://ec.europa.eu/internal\\_market/accounting/docs/non-financial-reporting/com\\_2013\\_207\\_en.pdf](http://ec.europa.eu/internal_market/accounting/docs/non-financial-reporting/com_2013_207_en.pdf)

**Finland:** The approach focuses on business needs and considers age and other factors as well as gender. There is a feeling that gender equality on boards is workable at 30%, but may be a challenge at 40%.

The Finnish Directors' Association and the Chamber of Commerce have developed a mentoring programme for women.

**France:** France adopted a legally binding quota for women on boards in January 2011 (20% by 2014, 40% by 2017). The law also applies to unlisted companies. Currently 25% of director positions in CAC40 companies are held by women and 19% in small cap companies.

**Italy:** Italy has enacted legislative measures aimed at improving the gender balance on company boards.

**Luxembourg:** Again the drive towards diversity of backgrounds is based on the grounds of business efficiency. The impetus is for boards to understand their customers and other stakeholders.

**Netherlands:** The Netherlands has passed law prescribing gender quotas subject to 'comply or explain'.

**Spain:** Spain has passed a law prescribing gender quotas,

**Sweden:** Diversity is also treated more broadly than gender, but it is not in the Governance Code. The Swedish Directors' Institute does not regard board diversity as an ethical issue but as a matter of board efficiency.<sup>37</sup>

**UK:** The *Equality Act* prohibits discrimination on the grounds of a number of "protected characteristics". In September 2012 the *Corporate Governance Code* was amended to state that companies should have a diversity policy and report on it every year, including progress made against any measurable targets. They are also asked to take account of diversity in board evaluation. The Code generally refers to "diversity, including gender", and in the recent consultation to amend it, many UK companies and other interested commentators pointed out that gender is just part of the story and that other aspects of diversity are important.

The UK Government has consulted with the market on whether listed companies should be required to state the number of men and women on their board, at management level and throughout the organisation. According to the ***Female FTSE Board Report 2013***, published by Cranfield University School of Management, the percentage of women on FTSE 100 boards was 17.3% and for the FTSE 250 it was 13.3%.

In the first 6 months of the year under review 44.1% of new board appointments were women in the FTSE 100 and 36.4% in the FTSE 250. However, during the second six months this dropped to 26% and 29% respectively.

Questions of diversity cannot be separated from considerations of how board appointments are made and how board effectiveness is evaluated. In the UK, the *Corporate Governance Code* now requires board appointments to be made "on merit, against objective criteria and with due regard for the benefits of diversity on the board, including gender". Board evaluation should "consider the balance

<sup>37</sup> Response to survey of ecoDa Ethics Working Group members September 2012

*of skills, experience, independence and knowledge of the company on the board, its diversity, including gender”.*

**State owned companies:** Several member states have adopted rules for women on boards in state-owned companies. These are Denmark, Finland, Greece, Austria and Slovenia.

### 3.2 Remuneration

Remuneration has attracted much public anger as well as being a concern for some stakeholders, including investors<sup>38</sup>. This has increased during the years since the start of the financial crisis owing to the perceived general high level of executive pay in the context of income inequalities across society. In terms of business ethics, the concerns relate to perceived unfairness principally around three issues:

- ‘Rewards for failure’ i.e. the high levels of reward being paid out to senior employees departing ‘sinking or damaged ships’.
- How executive remuneration relates to pay lower down the organisation, or average employee pay. The gap between the highest and lowest paid has been increasing significantly in many sectors.
- Low dividend payouts and funds applied to long-term investment in the business while executive salaries rise.

Further information is awaited on measures at EU level, although the Commission has proposed a cap of 100% on the proportion of salary which may be paid as bonus for certain employees in financial services companies and to set a limit on the ratio of highest to lowest pay in each company. Although not in the EU, it is interesting to note that shareholders of listed companies in Switzerland were recently given a binding vote on executive pay and an annual right to vet board appointments. Other proposed sanctions would forbid the award to executives of severance packages, side contracts and rewards for buying or selling company divisions. The penalty for infringements could be as much as three years in prison, or the forfeit of up to six years’ salary. It is not anticipated that the changes will impact annual shareholders’ meetings taking place before 2015 however.

#### Initiatives in member states

**Belgium:** Legislation passed in 2012 requires companies to establish a remuneration committee and to produce a remuneration report. These requirements have moved into legislation from the corporate governance code and thus transferred to a mandatory regime.

**Luxembourg:** There is an annual shareholders’ advisory vote on remuneration for listed companies and non-listed companies in the financial services sector.

**Spain:** An advisory shareholders’ vote on remuneration has been in place since 2011.

**Sweden:** Companies should pay the amount necessary to recruit and retain the right people and no more. The Swedish Directors’ Institute comments that *“this has nothing to do with ethics but is a sheer business consideration”*<sup>39</sup>.

Listed companies have a binding annual shareholders’ vote on the CEO’s pay.

<sup>38</sup> IBE Business Ethics Briefing (2012) *Attitudes of the British Public to Business Ethics*  
[http://www.ibe.org.uk/userfiles/attitudes\\_to\\_be2012.pdf](http://www.ibe.org.uk/userfiles/attitudes_to_be2012.pdf)

<sup>39</sup> Email survey of ecoDa member organisations, 2012

**UK:** Following consultation, the government has decided to introduce a range of new measures applying to financial reporting periods ending on or after 30 September 2013. This is in response to shareholder activism on pay; public criticism; a perceived excessive balance of company money paid out to directors as compared to shareholders; and an ever-widening gap between the lowest and highest pay in many organisations.

There will be a binding shareholder vote on future pay policy at least every three years. The current annual advisory vote on past pay policy will continue. A single figure will need to be shown for the total remuneration of each director. Currently each director's salary is shown but figures for bonus, share incentives, pension and any other benefits are shown separately, making it difficult to identify a total figure for remuneration. The remuneration report will be split into information about how the agreed remuneration policy has been applied over the past year and reporting on future pay policy.

In February 2013 new principles on directors pay were published by a group of institutional shareholders comprising Hermes Equity Ownership Services, the National Association of Pension Funds and the 3 largest UK pension schemes. This followed discussion meetings with companies and other stakeholders<sup>40</sup>. The paper, which aims to stimulate debate on remuneration, sets out 4 principles:

1. Management should hold shares in their business long-term. Shares granted to executive directors should be owned ideally for at least 10 years, irrespective of whether the executive is still working at the company. It may be appropriate for a proportion of the shares to be held until retirement age.
2. Pay should be aligned to long-term strategy and corporate culture. Remuneration committees should therefore start by looking at the strategic plan.
3. Pay schemes should be simple and easy to understand.
4. Remuneration committees should explain and justify how their decisions will deliver long term success.

### 3.3 Accountability

In ethics and governance, accountability is about the board being answerable to stakeholders for performance, both financial and non-financial, and for the way that performance is achieved. There is an expectation by society as a whole that it is right for companies to account for their actions and particularly for their social and environmental impacts. This is key to fostering trust and demonstrating respect, and issues of stakeholder accountability have been highlighted in particular by reactions to the economic crisis of 2008.

Accountability encompasses a two-way process and there are many organisations which exert pressure and influence on corporate practice and demand greater accountability, such as trade unions and campaign organisations. This also includes the investment industry and most recent debate around corporate governance has focused on the relationship between companies and their shareholders.

The 'comply or explain' model of governance which operates throughout the EU relies on the shareholder to engage with the company on governance issues and to consider 'explanations' against the relevant governance code. **The Study on**

<sup>40</sup> Hermes and NAPF (2013) *Remuneration principles for building and reinforcing long-term business success*  
[http://www.napf.co.uk/PolicyandResearch/DocumentLibrary/~/\\_/media/Policy/Documents/0290-Hermes-EOS-NAPF-Pay-Principles.ashx](http://www.napf.co.uk/PolicyandResearch/DocumentLibrary/~/_/media/Policy/Documents/0290-Hermes-EOS-NAPF-Pay-Principles.ashx)

**Monitoring and Enforcement Practices in Corporate Governance in the Member States** supports this point<sup>41</sup>:

*The comply or explain approach traditionally relies on investors to monitor and enforce corporate governance codes. Shareholder participation should place corporate practices under closer scrutiny and lead to increased shareholder involvement against poor corporate governance standards. However, to make such a claim necessarily implies that shareholders place value on their right to voice opinions on key decisions at shareholder meetings, and exercise their rights. Moreover, to assert this claim is to advance the notion that shareholders have come to accept their role as an essential one in the greater regulatory attempt to scrutinise corporate practice.*

In fact there was a very low level of shareholder response to the survey used by the Study (100 out of over 2,000 requested to participate). This was at the height of the financial crisis, which may have been a factor, but shareholders also claimed lack of resources and the necessary expertise to respond.

In April 2012 ecoDa followed its annual conference on the ‘comply or explain’ model with a report which reflected on how the quality of governance engagement and reporting might be improved throughout Europe<sup>42</sup>. The report concluded that there had been a gradual improvement in the quality of ‘explanations’ brought about by the increasing role of market regulators, other stakeholders (such as corporate boards or groups of market practitioners) and statutory auditors. In Sweden, for example, the review of corporate governance reports by external auditors is mandatory. A number of initiatives have sought to develop best practice on the quality of explanations. In Belgium and the UK, guidance has been produced on the content of explanations and in both countries the boards must approve them.

The ecoDa report states that more should be done to increase the effectiveness of governance codes and to foster a better dialogue between companies and shareholders, and that thorough monitoring is necessary to bring about credibility and legitimacy, given the self-regulatory approach.

Poor shareholder engagement continues to be a concern at EU level and the *EU Corporate Governance Action Plan* published in December 2012 sees “*Engaging shareholders*” as one of the three key aims of the Plan and states:

*Shareholders should be encouraged to engage more in corporate governance. They should be offered more possibilities to oversee remuneration policy and related party transactions and shareholder co-operation to this end should be made easier. In addition, a limited number of obligations will need to be imposed on institutional investors, asset managers and proxy advisors to bring about effective engagement.*

Institutional shareholders, notably in the UK, are very active in publishing their own ideas on governance. This can be as part of an institutional investors’ representative body, such as the Association of British Insurers or the National Association of Pension Funds, or by individual institutions themselves or groups of them.

<sup>41</sup> See Risk Metrics Group (2009) *Study on Monitoring and Enforcement Practices in Corporate Governance in the Member States* [http://ec.europa.eu/internal\\_market/company/docs/ecgforum/studies/comply-or-explain-090923\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/ecgforum/studies/comply-or-explain-090923_en.pdf) p173

<sup>42</sup> ecoDa (2012) *Comply or explain – preserving governance flexibility with quality explanations* [http://www.ecoda.org/docs%20-%20OK/Conferences/2012\\_03\\_27%20Comply%20or%20Explain/2012AnnualConf-ecoDa-CoEreport.pdf](http://www.ecoda.org/docs%20-%20OK/Conferences/2012_03_27%20Comply%20or%20Explain/2012AnnualConf-ecoDa-CoEreport.pdf)

The Directive 2006/46/EC requires statutory auditors in member states to formally evaluate compliance with the obligation to publish a corporate governance statement. The monitoring ranges from checking the statement has been made to a qualitative assessment of it. In addition, codes are monitored in member states by a variety of national monitoring bodies, such as the Financial Reporting Council in the UK.

The 2011 Green Paper on the **EU Corporate Governance Framework**<sup>43</sup> maintains that “market-wide” monitoring functions insufficiently and that there is potential to improve and extend the exchange of best practices. However, responses to the Green Paper did not support an assessment by the monitoring bodies of the informative quality of comply or explain explanations.

### Initiatives in member states

The call for greater engagement in monitoring by shareholders has been addressed at the pan-EU level and by various member states by the introduction of shareholder engagement guidelines and/or references to engaging with shareholders in national corporate governance codes.

**Pan-EU:** The European Fund and Asset Management Association (EFAMA) code for investment management companies<sup>44</sup> consists of six principles, which are in essence to:

- Publicly disclose their policy on how they will discharge their stewardship responsibilities
- Monitor their investee companies
- Establish clear guidelines on when and how they will escalate their activities as a method of protecting and enhancing shareholder value
- Be willing to act collectively with other investors where appropriate
- Exercise their votes in a considered way
- Report periodically on their stewardship and voting activities.

**Belgium:** The preamble to the Belgian Corporate Governance Code 2009 states that shareholders:

*should be prepared to enter into a dialogue if they do not accept the company's position, bearing in mind, in particular, the size and complexity of the company and the nature of the risks and challenges it faces.*

**Germany:** The German Working Group for Asset Managers has issued a *Corporate Governance Code for Asset Managers*.

The Code makes a distinction between internal governance (the duties and responsibilities of the Management Board and the Supervisory Board), in particular referring to conflicts of interest and the exercise of shareholder rights and general meeting attendance.

**Italy:** Assogestioni (the Italian Association of Asset Managers) has issued a protocol on the management of conflicts of interest for asset management and investment companies. This asks companies to consider three types of conflict of interest:

<sup>43</sup> European Commission (2011) *Green Paper: The EU corporate governance framework*  
[http://ec.europa.eu/internal\\_market/company/docs/modern/com2011-164\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/modern/com2011-164_en.pdf)

<sup>44</sup> EFAMA (2011) *Code for External Governance: Principles for the exercise of ownership rights in investee companies*  
[http://www.efama.org/Publications/Public/Corporate\\_Governance/11-4035%20EFAMA%20ECG\\_final\\_6%20April%202011%20v2.pdf](http://www.efama.org/Publications/Public/Corporate_Governance/11-4035%20EFAMA%20ECG_final_6%20April%202011%20v2.pdf)



*Ethical principles do not need to be universal to every organisation - they should closely reflect the identity and the unique character of the company. Ethics should not be considered therefore as static but as a dynamic policy within boardrooms.*



EcoDa [www.ecoda.org](http://www.ecoda.org),  
 May 2013

- The selection of investments
- The selection of contractual counterparties
- The exercise of voting rights.

It also sets out measures companies should observe in the management of conflicts of interest.

**UK:** A market-led initiative resulted in the introduction in July 2010 of a non-mandatory **Stewardship Code**<sup>45</sup> aimed at asset managers. This was revised in September 2012.

The Code aims to:

*... enhance the quality of engagement between institutional investors and companies to help improve long-term returns to shareholders and the efficient exercise of governance responsibilities.*

It specifies that:

*Engagement includes pursuing purposeful dialogue on strategy, performance and the management of risk, as well as on issues that are the immediate subject of votes at general meetings.*

The Financial Reporting Council (FRC) keeps on its website a list of institutions which have disclosed a compliance statement against the Code.

The principles of the Code are very similar to the EFAMA principles, but go further concerning the exercise of voting rights by asking institutions to have a clear policy on voting and disclosure of voting activity. There is also a principle requiring a robust policy on managing conflicts of interest in relation to stewardship, and publicly disclosing these conflicts.

In March 2013 a practical guide on getting more out of shareholder engagement meetings was published in the UK by the Institute of Chartered Secretaries and Administrators.<sup>46</sup> It states that: “*there should be a regular and consistent process of engagement, over time, between a company and its key investors, in order to establish, develop and maintain relationships*”.

Also relevant to board accountability in the UK is the statutory duty set out the 2006 *Companies Act* to “*have regard to*” the likely consequences of a decision to the interests of employees, suppliers, consumers and the environment.

### 3.4 Conflicts of interest

Conflicts of interest are avoided in order to prevent individuals seeking personal gain from their position within a company which can often be to the company’s disadvantage. This is seen as an ethical issue in that fairness and honesty are typically absent when there is a conflict of interest.

The above section on accountability to shareholders included the conflicts of interest potentially experienced by institutional investors.

The board and its members can be subject to conflicts of interest in a number of ways. Directors may represent a major shareholder or other key stakeholder or they may be an executive director on a unitary board balancing executive and governance responsibilities. It is essential for the good standing of the organisation

<sup>45</sup> <http://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Stewardship-Code-September-2012.aspx>

<sup>46</sup> ICSA (2013) *Enhancing Stewardship Dialogue*

[https://www.icsaglobal.com/assets/files/pdfs/guidance/Enhancing\\_stewardship\\_dialogue/icsastewardshipreport.pdf](https://www.icsaglobal.com/assets/files/pdfs/guidance/Enhancing_stewardship_dialogue/icsastewardshipreport.pdf)

that such conflicts be recognised and managed in an ethical way, so that the director does not profit from his or her position or suffer from impaired judgement. In essence, directors are in a position of trust and should exercise their stewardship of the company without regard to any personal gain or avoidance of loss. This presupposes both a clear understanding of their role and responsibilities, including the applicable rules on managing conflicts, and a high degree of integrity.

Executive directors on a unitary board have an inherent conflict. They are responsible for their executive remit but have an overriding duty as a board member across the whole of the organisation. This means that matters which might benefit them in their executive role must be subordinated to the interests of the company as a whole. Directors representing any particular constituency, such as a trade union or shareholder, are in a similar position.

Directors also have a conflict if they have a personal connection with any part of the business or any proposed transaction. They may also have a conflict of interest because of a position they hold outside the business. The principle here is similar. They must subordinate this interest to that of the company. In practice this may mean withdrawing from board discussion of a matter, not receiving papers on it, not voting on it or a combination of these or any other steps agreed by the board.

Good practice in the recruitment process for directors would include an assessment of ethical acumen, by for example seeking responses to a hypothetical conflicts of interest situation posed to the candidate.

### Initiatives in member states

Recognising the importance of managing these conflicts to enable boards to govern businesses as objectively as possible, many member states have set out provisions in law and/or governance codes to address such issues.

**Belgium:** The law in Belgium requires directors to notify conflicts concerning a proposed transaction to the board in advance. The board will decide the action to be taken. The governance code requires directors to arrange their affairs to avoid conflicts of interest with the company.

**Italy:** The Italian **Corporate Governance Code**, in considering board composition, discourages cross-directorship situations among CEOs of companies not belonging to the same group.

**Sweden:** Directors who have a personal conflict regarding a matter under discussion are prohibited by law from taking part in the decision-making process on that particular issue.

**UK:** The law in the UK requires directors to notify conflicts concerning a proposed transaction to the board in advance. The board will decide the action to be taken. Other aspects of conflict management also appear in the *UK Corporate Governance Code*.

Conflict management might be said to begin with the appointment process. Directors should be appointed using a process which is as objective as possible to avoid persons being appointed who have close connections with the board and who may not therefore act impartially in the best interests of the company as a whole. The UK Code requires a “*formal, rigorous and transparent*” appointments process.

When appointing non-executive directors, the UK Code gives criteria which the board should consider in assessing whether the director should be considered to be 'independent'. The intention is as far as possible to ensure an 'arm's length' relationship.

### 3.5 Transparency

Transparency is an ethical issue for boards as they seek to meet stakeholders' expectations and demonstrate fair and honest practices to shareholders and other stakeholders.

Transparent disclosure enables the stakeholder to gain an informed and accurate view of the organisation and the way it is doing business, negative points as well as positive. It reduces the scope for an unscrupulous company to conceal unwelcome facts.

Transparency is also important in the context of the ownership structure of the company and the extent to which it is possible for a company to identify its ultimate shareholders so that it can communicate effectively with them and they can exercise their full governance rights.

It should be noted that true transparency is perhaps unrealistic for any organisation where commercial sensitivity is relevant. A commitment to 'openness' would be a more accurate aspiration for the way business is done.

#### Corporate reporting

As regards corporate reporting, the 2006 Directive requires listed companies to publish a corporate governance statement containing a 'comply or explain' statement against the governance code which they apply.

The 2012 Action Plan envisages new provisions for reporting on board diversity, risk management and executive remuneration as well as on improving the quality of corporate governance reports, especially regarding 'explanations' made under the comply or explain framework. The Commission's initiatives in these areas are currently awaited.

A new proposal for a Directive was published in April 2013 and applies to companies in which the average number of employees exceeds 500, and which exceed either a balance sheet total of 20 million euros or a net turnover of 40 million euros<sup>47</sup>. They will be required to disclose a statement in their Annual Report including material information relating to at least environmental, social, and employee-related matters, respect of human rights, anti-corruption and bribery aspects. Within these areas, the statement will include (i) a description of its policies, (ii) results and (iii) risk-based aspects. Such narrative reporting is one area in which ethics and the corporate governance framework can be said to coincide.

#### Shareholder identification

Shareholder identification is included in the theme of enhancing transparency in the 2012 EU Commission Action Plan for Company Law and Corporate Governance which states:

*Companies need to provide better information about their corporate governance to their investors and society at large. At the same time companies should be allowed to know who their shareholders are and institutional*

<sup>47</sup> European Commission (2013) *Proposal for a Directive as regards disclosure of non-financial and diversity information by certain large companies and groups*  
[http://ec.europa.eu/internal\\_market/accounting/docs/non-financial-reporting/com\\_2013\\_207\\_en.pdf](http://ec.europa.eu/internal_market/accounting/docs/non-financial-reporting/com_2013_207_en.pdf)

*investors should be more transparent about their voting policies so that a more fruitful dialogue on corporate governance matters can take place.*

These issues have been debated at EU level for many years and opinions have been divided on the question of companies being able to identify the shareholder, with a majority being in favour of this. Without the ability to identify shareholders a company has reduced possibilities for engagement with them, since this can only occur in a very limited way by passing information through intermediaries. More meaningful engagement requires direct discussion.

The Commission now sees it as important that holders of ‘name shares’ (i.e. non-bearer shares) should be able to know the identity of the ultimate owner and will bring forward an initiative in 2013 to enable this.

The UK has for many years had a law (the UK Companies Act 2006) which allows companies to enquire of, and receive a response from, shareholders listed on their register as to the identity of the underlying or ultimate shareholder.

#### **Transparency of proxy advisors’ services**

The 2012 EU Commission Action Plan on company law and corporate governance noted that concerns had been expressed regarding the lack of transparency of proxy advisors in preparing their advice and about perceived conflicts of interest.

Proxy advisors are typically used by institutional investors not having the resources to assess how to vote at all the general meetings held by their investee companies. Proxy advisors offer a service advising them on how to vote, undertaking the voting themselves and also providing corporate governance ratings on companies in which the institution invests. Their services are used in particular in markets with a high proportion of international investors. They have wide influence, yet are not regulated at EU level. They are considered to be subject to conflicts of interest in certain circumstances, such as where they act as governance consultants to a company on which they are also providing voting advice to investors.

The Commission has therefore said that it will consider an initiative in 2013 with a view to improving the transparency and conflicts of interest frameworks applicable to proxy advisors.

#### **Reporting**

In recent years the UK has put more emphasis on narrative reporting with the aim of achieving clear explanations of the company’s business model and key risks. From October 2013 all but ‘small’ companies will be required to publish an annual Strategic Report which will be part of the Annual Report & Accounts but shareholders will be able to elect just to receive this summary document. Final details of the content of the Strategic Report are currently awaited, but it is likely to comprise information on the principal activities of the company and its principal risks. Quoted companies will also need to report, to the extent necessary to understand the business, on the company’s strategy and business model; likely future trends affecting it; plus information about environmental matters, social, community and human rights issues; and a breakdown of the number of directors, managers and other employees by gender.

The *UK Governance Code* was amended in September 2012 to provide that the board confirm that the Annual Report & Accounts is “*fair, balanced and understandable*”.

Annual awards, such as the ICSA Hermes Excellence in Governance Awards and PwC's Building Public Trust Awards in the UK, celebrate clear reporting and aim to encourage more open and informative reporting.

#### **Initiatives in member states**

**Belgium:** The 2009 Belgian Corporate Governance Code requires companies to publish a Corporate Governance Charter on their website, giving their main principles of corporate governance and a Corporate Governance Statement in its Report and Accounts with more specific information. This level of disclosure facilitates external monitoring and aims to achieve increasing adoption of accepted best practice.

## Concluding Remarks

As noted throughout this report, there is an element of discretion in the interpretation of EU governance practice and this increases the scope of the choices and decisions to be made by boards about the way a business is governed and run. The choices made will in part reflect the ethical sensitivity and acumen of the board.

The purpose of governance can be said to be to encourage companies to make robust decisions, manage risk properly and account to those that provide their capital. Without attention to the ethical dimensions of these goals, any guidance and regulation for corporate governance is unlikely to be fit for the purposes of supporting business sustainability.

**Yet at the pan-EU level, there is a general lack of ethical language in corporate governance provisions. This is in spite of the fact that the approach is generally soft law and principles based, and that boards are expected (though not required) to set the values which will guide their company's operations.**

For some key governance issues that boards have been expected to address, the explicit driver is still most often given only in terms of what is 'good for business' rather than engagement with any moral imperative. This is the case even though what is generally viewed as unethical behaviour, including at the most senior levels, has led to business failure on numerous occasions. The link has yet to be explicitly made in corporate governance discourse that what is ethical is very often good for business, or at least that what is unethical generally impacts negatively on business.

At the member state level, the beginnings of a greater focus on board behaviour and conduct in some countries can be seen, especially in guidance for directors. Some governance codes contain 'various rules of conduct' (i.e. commitment, leadership, discretion, independent judgment, integrity, acting in the corporate interest and acting in the interests of stakeholders) and refer more to behaviours required by boards, even if in response to corporate failures or misdemeanours.

There is growing recognition of the importance of ethical behaviours in business generally, including the boardroom, and demands are being made for boards to be accountable for this. Key figures in a number of member states have spoken out about the importance of ethical behaviours in business. Stakeholder pressure for this has been building, perhaps most noticeably in the press and social media which are quick to criticise what they see as unethical corporate behaviour.

In spite of the apparent lack of explicit engagement with ethical principles in corporate governance guidance and discourse, and the limited requirement, or indeed encouragement, that boards operate with high ethical standards, attention to ethics is increasingly a core feature of corporate governance and boardroom agendas. **Many companies recognise business ethics, sustainability and social responsibility, and also boardroom ethics as characterising the right way to run a business as well as being essential for long-term success.**

The aim of this Paper was to identify the ethical aspects of corporate governance policy debates and frameworks. Its findings actually serve to draw attention to a notable lack of explicit reference to ethical imperatives, and so raise further questions about why this is the case, whether this should be addressed and how.



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## About the IBE and ecoDa



### **The Institute of Business Ethics**

*The IBE was established in 1986 to encourage high standards of business behaviour based on ethical values.*

**Our vision** To lead the dissemination of knowledge and good practice in business ethics.

**What we do** We raise public awareness of the importance of doing business ethically, and collaborate with other UK and international organisations with interests and expertise in business ethics.

**We help organisations to strengthen their ethics culture and encourage high standards of business behaviour based on ethical values.** We assist in the development, implementation and embedding of effective and relevant ethics and corporate responsibility policies and programmes. We help organisations to provide guidance to staff and build relationships of trust with their principal stakeholders.

**The IBE is a charity based in London; its horizons are international as it works with global corporations based in the UK and overseas. Our work is supported by donations from corporate and individual subscribers.**

**The IBE's charity number is 1084014.**



### **The European Confederation of Directors' Associations**

ecoDa is a not-for-profit association acting as the “European voice of directors”. ecoDa's national member organisations represent board directors from the largest public companies to the smallest private firms, both listed and unlisted. ecoDa's mission is to promote Corporate Governance at large, to promote the role of directors towards shareholders and corporate stakeholders, and to promote the success of its national institutes. It was established in 2005 and is based in Brussels.



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## **A Review of the Ethical Aspects of Corporate Governance Regulation and Guidance in the EU**

Questions of ethics, or the ‘right way to run a business’, are inherent in all aspects of corporate governance and in every board decision and action. Ethical choices are relevant within the core business strategies boards pursue and the way that they direct the business as a whole to achieve them.

This Paper explores the extent to which, in legislation, frameworks and codes for corporate governance across the EU and within its member states, there are explicit statements or requirements for business to be governed in line with ethical principles or commitments.

This report will be relevant to those interested in the evolving debate around culture and behaviour in business, and those concerned with the development of corporate governance and responsible business practice.