The Belgian struggle for corporate governance improvements

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Abstract

Belgium did not experience major governance collapses in the nineties. However, the country must not but envied. The corporate governance debate started late and experienced mixed developments. Three different corporate governance codes were published in 1998. The publication of these codes enhanced the debate to modernize the outdated Belgian corporate governance rules. It resulted in the publication of the corporate governance law in 2002, a new corporate governance code for listed companies in 2004 and a number of other governance codes. This Lippens Code for listed companies is similar to many other corporate governance codes but contains a number of particular features, like the requirement to disclose a corporate governance charter and a corporate governance chapter.

This paper briefly discusses the Belgian corporate governance developments and it assesses the most important features of the Lippens code and the law related to the code. Next, the paper evaluates the influence of the Lippens code on the corporate governance practices of Belgian firms, studies compliance with the code and addresses the weak relationship between corporate governance compliance and corporate performance. Further, the article measures the 2008 initiative to modernize the Lippens Code. The other codes are briefly dealt with. It concludes that the progress will be insufficient to improve the Belgian corporate governance practices and promote Belgium into premier corporate governance league in Europe.

Keywords: corporate governance, governance code, Belgium, comply and explain, governance and performance

JEL Classifications: K22, G30, G34, G38

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I. The Start of the Belgian Corporate Governance Debate

I.1. The First Generation of Corporate Governance Codes

The Belgian debate on corporate governance started in the mid 90s.[1] Contrary to other countries, Belgium had not experienced major corporate collapses or debacles. The Belgian interest in corporate governance must be seen in light of the perception that the international capital markets required more disclosure and transparency, which are considered to be important constituents of good corporate governance. The absence of a Belgian corporate governance code could deteriorate the position of the Belgian capital market and the Belgian listed companies.

The Belgian market-driven approach explains the relative late adoption of corporate governance principles and the keen interest in the development of corporate governance codes in the surrounding countries.[2] The British Cadbury Report, the French Vienot Code and the Dutch Peeters guidelines influenced the development of Belgian best practices. After two minor attempts[3], the Brussels Stock Exchange, the Belgian Federation of Enterprises (BFE) and the Belgian market supervisory body, the Banking, Finance and Insurance Commission (BFIC) all issued a corporate governance code in 1998. While drafting their respective Codes, the three commissions consulted together to prevent contradictions.[4] However, none of the three codes contains a reference to or its relationship with the other corporate governance codes. It was considered that companies had to comply with all the recommendations; in case of conflicting rules, the companies had to explain which rule they applied and in case the recommendations treated similar topics, the most rigid recommendation.

1 Although many issues regarding corporate governance are much older. see, for an overview of the Belgian corporate governance system in the nineteenth century, Laga, H. (1997). Het Corporate Governance-model van de wetgever van 1873, *Bank- en Financieel Recht*, 463-470.

2 The three corporate governance codes that were published in 1998 all explicitly refered to the international developments to stress the importance of the code.

3 The Commission Santens issued ten governance recommendations in 1995 and the Belgian Federation of Enterprises issued recommendations in 1997 but they received hardly any public attention.

4 Meeus, D. (1998). De recente Belgische aanbevelingen inzake corporate governance. In Instituut voor Bestuurders (Ed.), *Corporate Governance – Het Belgische Perspectief* (pp. 33-53). Antwerpen, Belgium: Intersentia.

The three corporate governance codes emphasized the role of the board of directors as the most important participant in corporate governance. All three addressed the board of directors, non-executive directors, board committees, management and disclosure. The Code of the Banking, Finance and Insurance Commission indirectly dealt with these topics via recommendations to disclose information regarding corporate governance in the annual report. Only the report of this Commission addressed a core issue of Belgian corporate governance: the relationship of the company with its controlling shareholder as well as with its specific executive structure. Belgian company law empowers the board of directors and only provides for a delegation of day-to-day management of the company. However, many companies established specific executive committees whose competences were hard to fit into the legal structure.[5] Directors could be held liable for courses of action they had not participated in.

Table 1 summarizes the core principles of the three 1998 corporate governance codes. The table illustrates the overlap and similarities of the codes. While the majority of the principles relate to the board of directors, subcommittees and the different kind of directors, the guidelines offer companies sufficient leeway in structuring the internal organisation of the company. This liberty is reflected in the requirement to have a balanced composition of the board of directors, with a "sufficient" number of non-executive directors and a "sufficient" number of independent directors.[6] Peculiar is the requirement to disclose information regarding the directors that represent the "dominant" shareholder. Some legal scholars criticized this approach since each individual board member should represent the company and act in the interest of the company.[7] Whilst everybody was familiar with the factual situation that many

[5] For an overview of the different modes to fit the corporate executive framework in a legal structure see Keutgen, G. (1995). L'Organisation de la Gestion des Sociétés: L'Exemple du Comité de Direction. *Revue de Droit International Comparé*, 7-39. See also Van der Elst, C. (2002). Besluitvorming en werking van de vennootschapsorganen. In Vlaamse Conferentie der Balie van Gent (Eds.). *Omgaan met vennootschappen: regulering en rechtspraktijk* (pp. 7-43). Antwerpen, Belgium: Maklu.

[6] Legal scholars argued that the only "detailed" requirement is the selection of at least two independent directors out of the maximum of 12 directors. Wymeersch identified 12 possible combinations (Wymeersch, E. (1998). De Belgische Initiatieven inzake Corporate Governance. In Instituut voor Bestuurders (Ed.), *Corporate Governance – Het Belgische Perspectief* (pp. 55-86). Antwerpen, Belgium: Intersentia).

[7] Wymeersch, E. (1998). De Belgische Initiatieven inzake Corporate Governance. In Instituut voor Bestuurders (Ed.), *Corporate Governance – Het Belgische Perspectief* (pp. 55-86). Antwerpen, Belgium: Intersentia.

directors are representatives of the major shareholder (or are the major shareholder), Belgian company law forbids board members to act in the interest of one particular corporate constituent or one class of corporate constituents. The three codes had a comply or explain nature. There were no enforcement procedures. The Banking, Finance and Insurance Commission was the supervisory authority of the Belgian financial markets. The Commission was empowered to compel companies to disclose information which the Commission considered indispensable to assess the (financial) position of the company.[8] The recommendations of the Brussels Stock Exchanges were enforceable to the extent that the management committee of the Stock Exchange could issue individual orders to protect the interest of investors. It came as no surprise that most companies provided information that the Banking, Finance and Insurance Commission considered "appropriate".

[8] See article 6 of the abolished Royal Decree of 3 July 1996 on periodic information.

Table 1: Summary of the three Belgian Corporate Governance Codes of 1998

		Euronext Brussels	BFIC	BFE
Board of directors	*meetings*	regular	to be reported	regular
	duties	strategy and general policy		strategy and general policy
		monitoring		monitoring
	composition	majority NED*	to be reported	
	internal information	specific procedure		
	number	maximum 12	to be reported	sufficient in number
	remuneration		to be reported	
	combination of functions		to be reported	
	topics discussed		to be reported	
	secretary			best practice
NED*	*number*	majority	to be reported	sufficient in number
	remuneration	time-related		
			not-company perform related	
ID**	*number*	sufficient	to be reported	some
	requirements	no manager	no manager	no manager
			no family ties with management	
		no manager dominant shareh.	no repr. dominant shareh.	no repr. dominant shareh.
		no supplier		
		no other relationship		
Exec.	*Number/committee str.*		to be reported	
	committee of exec.		to be reported	
	powers		to be reported	
Remuneration		part performance related		report diff. modes
		discussed in RC***		

Committees	*AC*	all NED; >50% ID		at least NED and ID
		at least two meetings		at least two meetings
		duties to be determined		duties to be determined
	RC	to be established		only NED
	details		to be reported	
Int. control		report on efficiency		efficient system required
Dominant shareh.			relationships to be reported	
Report		timely, reliable, comprehensible	all information	extensive and objective

*: Non Executive Directors
**: Independent Director
**: Remuneration Committee

I.2. Corporate Governance Practices in the Nineties

Although data of the period before the three codes were enacted are scarce, it is generally acknowledged that the three codes had a major influence on the corporate governance approach of listed corporations. An analysis of the 1996 annual reports of a large number of listed entities (80%) found that only 5% of all companies included a (short) corporate governance chapter in their annual report.[9] The composition of the board, the separation of the role of chief executive officer and chairman of the board, the existence of board committees, the functioning of the board were among the governance related data that a large number of companies reported. Another research indicated that almost all boards had a majority of non-executive directors, but few were independent.[10] The data illustrated the need for a more comprehensive approach. Even if a company disclosed which members of the board were independent hardly any company informed the shareholder which criteria were applied classifying the board member as an independent director.

Immediately after the publication of the three corporate governance codes, a large number of companies started to implement the new guidelines and principles. Although the codes were published in January 1998, approximately 50% of companies reported on corporate governance in their annual reports over 1997.[11] This figure soared to 55% in the reports over 1998, 87% in the reports over 1999 and 94% in 2004. [12] Research focused on the composition of the board and in particular the presence of representatives of the dominant shareholder, independent directors, the remuneration of the board as well as the operational activities of the board and

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9 Levrau, A. & De Wulf, H. (1998). Corporate Governance in België: Een Verkenning op Basis van de Jaarverslagen 1996. In Instituut voor Bestuurders (Ed.), *Corporate Governance – Het Belgische Perspectief* (pp. 87-111). Antwerpen, Belgium: Intersentia.

10 In 1995, approximately 18% of the boards of 19 large companies were executives, 25% were independent. However every company independently decides which directors were considered independent. The average board had 18 members (Van Rossum, C.E. (1995). *L'Application des principes du Corporate Governance dans les sociétés cotées en Belgique*, Brussel, Belgium: master thesis ULB).

11 De Wulf, H. & Van der Elst, C. (1998). Corporate governance en beursgenoteerde vennootschappen: eerste analyse van de jaarverslagen 1997. *Bank- en Financiewezen*, 6, 335-343.

12 Data for 1998 and 1999: Commissie voor het Bank- en Financiewezen (1999), *Vergelijkende Studie over de Informatie die de Belgische Genoteerde Vennootschappen Publiceren inzake "Corporate Governance"*. Brussel, Belgium: CBFA; data for 2004: Commissie voor het Bank- en Financiewezen (2004), *Informatie over Corporate Governance Verstrekt door de Belgische op de Eerste Markt van Euronext Brussels Genoteerde Vennootschappen – Capita Selecta*. Brussel, Belgium: CBFA.

committees. Research of the annual reports of 2000 showed that not only at shareholder level[13] but also at the board level, the dominant shareholder has a major influence. The majority of the board are considered to be representatives of the dominant shareholder, whilst one out of three is an independent director and approximately one out of four is an executive.[14] A large majority of 84% of all companies elected at least two independent directors, as the Brussels Stock Exchange recommended. Approximately 40% of all companies established audit committees of which 2/3 were solely composed of non-executive directors and similar results were found for remuneration committees.[15] The studies revealed a lot of "box ticking" whilst qualitative information on the activities of the board and the committees remained relatively scarce.

II. Legislative Developments at the Turn of the Millennium

Shortly after the publication of the three corporate governance codes, the government established a commission to assess the demand for an improved legal corporate governance framework. This Commission De Grauwe published its report in March 2000 and addressed eight corporate governance issues, six among them requiring new rules or improvement of the current legal framework: the executive committee, conflicts of interest, the legal person as director, independence of the auditor, the operation of the general meeting and the transparency of shareholder interests.

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13 Cf. infra.

14 Not all companies report on all the different classes of directors. The results for 125 listed companies in 2000 are:

	executive	independent	repr. dominant shareholder
average	30,2%	34,8%	55,4%
median	26,8%	33,3%	56,4%
minimum	0,0%	0,0%	16,0%
maximum	100,0%	75,0%	100,0%
reporting comp.	74%	79%	61%
N	125	125	125

15 All data are taken from Van der Elst, C., *Corporate governance: de huidige praktijk*. Presentation at an IIR conference on corporate governance, 17 april 2002, Antwerpen.

The report served as the basis for the corporate governance bill of April 2001 which was enacted in August 2002. All six topics were addressed in this law.[16]

First the law provides a framework for executive committees. Its organisation and functioning must be addressed in the articles of association or by the board of directors. There is a minimum of two members and all powers of the board of directors are delegated with the exception of the strategic management, the monitoring of the committee and the powers that are legally reserved to the board of directors. The committee has full powers of representation. Legal scholars discuss whether the board of directors is still empowered to take decisions within the powers of the executive committee, if the latter is established. Board members can be member of the executive committee, hence the combination of a board and a management committee can be seen as a modified one-tier model rather than a two-tier model.

Whilst conflicts of interest between board members and the company were already regulated since a long time, the conflicts of interest between a major shareholder and the listed company were only addressed in 1995. The 1995 rule was considered insufficient to achieve an appropriate balance between the interests of the different corporate constituents in a group of companies. Since 2002 all intra-group dealings[17], with the exception of dealings at arm's length and dealings of minor importance, must be assessed by a committee of three independent directors accompanied by a separate report of the auditor, before the board of directors can start the deliberation and take the decision. Corporate opportunities must be disclosed in the annual report of the company.

The assessment by the committee of three independent directors required the law to define the criteria of independent directors. An independent director has to comply with the following criteria[18]:

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[16] For an analysis of the law see for example Braeckmans, H. & Wymeersch, E. (Eds.) (2004). *Behoorlijk vennootschapsbestuur – Een analyse van de wet van 2 augustus 2002*. Antwerpen, Belgium: Intersentia.

[17] With the exception of dealings between the entity and its direct subsidiary and the direct subsidiary of the listed entity and the subsidiary of its subsidiaries.

[18] The translation is taken from: Van Bael & Belis (2003). *Business Law Guide to Belgium*. The Hague, The Netherlands: Kluwer Law International.

(a) he should not have exercised any mandate within the company or any of its associates in the two-year period prior to his appointment;
(b) he should not have a spouse, concubine or relative (to the second degree) exercising a mandate within the company or any of its affiliates, nor having a financial interest in the company or any of its associates;
(c) he should not hold any securities in the company that represents more than 10 per cent of the capital. Even if he hold less than 10 per cent of the capital in his own name, the combined shareholding of their own securities and securities held by companies he controls should not exceed 10 per cent. He should not be tied by any agreements or unilateral commitments with respect to such securities; and
(d) he should not be in contact with any company that would compromise his independence.

The law empowered the King and the company, in the articles of association, to issue additional independence requirements. So far, the King did not make use of this executive power. From 2002 onwards, most companies apply these criteria to classify the independent directors.

The Parliamentary discussions took place at a moment major collapses occurred both in the United States – Enron and Worldcom – and in Belgium – Lernout & Hauspie and Sabena. Belgium developed a specific system to monitor the independence of the auditors combining criteria to accept a mandate as auditor, a relative long list of services that impair the independence of auditors and a threshold for providing other services. If these services cost more to the company than the audit service, a preliminary and peculiar approval system must be applied. An audit committee provided for in the articles of association can approve these services, hence providing this committee with a specific legal duty. More in general, the law endorses the establishment of all kinds of committees in the board of directors.

The last major reform relates to the organisation and operation of the general meeting. First, the period of the notice to the meeting is extended for listed entities. The agenda and the proposals must be made public 30 days before the general meeting. The meeting can be held by means of a written resolution if the decisions are taken unanimously. Finally, most companies issued bearer shares and shareholders could only participate in the general meeting if the shares were deposited before the general meeting, withholding many (institutional) shareholders from participating. The law provides for a record date between 15 and 5 days before the meeting upon which the ownership of shares is established, if the articles of association provide in this record date.

The other amendments of the law are more company-oriented than corporate governance-oriented. After 2002, some of these rules, like the requirements vis-à-vis the statutory auditor, have been amended.

This "corporate governance" law offered companies flexibility to reorganise their management structure. Shortly after the enactment of the law a number of companies started to restructure their corporate governance.[19] By March 2004 more than 30% of the companies had changed their articles of association to empower the board of directors to establish an executive committee. A minority of companies effectively organised this committee with, on average, a majority of board members. The record date was introduced in one company out of seven, although most companies empowered the board of directors to decide for each general meeting whether the record date will be applied. The election of at least three independent directors was in a transition period. Many companies already elected an (insufficient) number of this new type of independent board members but a large majority of companies did not provide detailed information whether and how many independent directors had been elected. The specific rules for the statutory audit committee caused confusion. Many companies established an audit committee but only a limited number had been set up in accordance with the legal requirements.

[19] For an analysis of corporate practice see Van der Elst, C. (2004). Corporate Governance: een wettelijke (r)evolutie. *Tijdschrift voor Rechtspersoon en Vennootschap*, 04/2, 69-86.

III. The New Corporate Governance Codes

III. 1. The Lippens Code

The new legislation did not stop the corporate governance developments. Shortly after the publication of the aforementioned law and in response to the 2003 European Commission's Action Plan on company law and corporate governance[20] a new Belgian corporate governance commission, a joined initiative of the Banking, Finance and Insurance Commission, FEB and Euronext was established in January 2004. Next to the representatives of these organisations, academic scholars and business people joined this commission. A consultation document was published in June 2004. After minor modifications in light of the comments received the Corporate Governance Commission issued the referential Belgian Governance Code in December 2004.

III.1.1. Corporate governance principles

The Belgian corporate governance code for listed companies – also known as the Lippens Code - contains nine general principles that focus on the board's composition and functioning and emphasize the importance of appropriate disclosure of the company's corporate governance framework Table 2 provides an overview of these principles. The Commission supported the view that the principles must always be complied with.

The principles are further developed in provisions how to apply the principles. The provisions are best practice though companies may justify deviations from the provisions. The Commission considers the comply or explain approach as a core element in aligning the interest of all parties involved. The structure of the code in principles and provisions is similar to the UK combined code.

Finally, guidelines help companies implementing and interpreting the provisions. Neither the application nor any deviations of these guidelines should be explained.

[20] Communication from the Commission to the Council and the European Parliament - Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward, 23 May 2003, COM/2003/0284 final.

The scope of application of the code is relatively limited. Companies incorporated in Belgium and of the shares of which are admitted to trading on a regulated market should adhere to the code. The law of 2 August 2002 on the supervision of financial markets and financial services requires a list of regulated markets to be published in the Official Gazette and on the website of the CBFA.[21] As only companies whose shares are listed are envisaged only companies listed on “Euronext Brussels” must apply the code. At the end of July 2008 the shares of 133 Belgian companies were traded on Euronext Brussels, only 68% of the Belgian listed companies traded on Euronext Brussels.[22]

Table 2: The nine corporate governance principles in the Lippens Code

Principle 1.	The company shall adopt a clear governance structure
Principle 2.	The company shall have an effective and efficient board taking decisions in the corporate interest
Principle 3.	All directors shall demonstrate integrity and commitment
Principle 4.	The company shall have a rigorous and transparent procedure for the appointment and evaluation of the board and its members
Principle 5.	The board shall set up specialised committees
Principle 6.	The company shall define a clear executive management structure
Principle 7.	The company shall remunerate directors and executive managers fairly and responsibly
Principle 8.	The company shall respect the rights of all shareholders and encourage their participation
Principle 9.	The company shall ensure adequate disclosure of its corporate governance

The principles are further developed in comply or explain provisions. Provisions support principles. The number of provisions varies for each principle. For instance, only 6 provisions detail the first principle on duties and responsibilities of the board,

[21] Article 3, §1 (*Official Gazette*, 4 September 2002).
[22] Shares of 26 Belgian listed companies are traded on the Free Market, shares of 9 other companies on Alternext (July 2008). The figures do not take into account real estate certificates.

48 provisions have been enacted principle four containing detailed guidance on establishing and operating different subcommittees.[23]

The first principle is related to the duties and responsibilities of the board of directors. It emphasizes the importance to separate the role of chief executive director and chairman of the board. The second principle establishes recommendations regarding the composition of the board with executive, non executive and independent directors. It defines the criteria for qualifying as an independent director. The role and duties of the chairman of the board are clarified. The third principle analyses the role and duties of the members of the board, the assessment of conflicts of interest and requires companies to develop policies with respect to the trading of securities by board members and to acquire and dispose of treasury shares. Provisions regarding the selection and assessment procedure for board members are developed in the fourth principle. The principle contains the requirement to set up an induction programme. Each company must establish at least three subcommittees - the audit committee, the remuneration committee and the nomination committee - asserts the fifth principle. The duties of the latter two committees can be combined and one committee is allowed to perform both. Many provisions develop the composition, the responsibilities, and the organisation of these subcommittees as well as their relationship with the board of directors. The sixth principle requires the board to define the terms for the executive management, including its responsibilities, duties, powers, composition and operation. Remuneration policy as well as the remuneration disclosure rules is developed in the seventh principle. The policy must ensure that the company can attract, retain and motivate directors and executive managers. The board of directors must develop the remuneration policy for management. The remuneration

[23] The total number of provisions is:

	provisions	prov. incl. appendix
Principle 1	6	6
Principle 2	8	10
Principle 3	7	9
Principle 4	14	48
Principle 5	7	7
Principle 6	8	8
Principle 7	18	18
Principle 8	14	14
Principle 9	5	7
Total	87	127

of the non-executive directors must be fixed. The remuneration of the executive board members and executive management must be a combination of fixed remuneration, company performance remuneration and individual performance related remuneration. The corporate governance charter of the company must provide information on the remuneration policy. The remuneration package of each individual non-executive director must be disclosed in the corporate governance chapter of the annual report. For the chief executive officer the information must be split in different components: fixed remuneration, variable remuneration and other components of remuneration. For the other executive members of the board of directors and for the members of the executive management team the information can be globalised. Principle eight requires the company's equal treatment of all shareholders and stresses the duties vis-à-vis different kinds of shareholders: investors should be encouraged to assess corporate governance and the explanations for departing from the code. The board of directors should support the controlling shareholders to make appropriate use of its position and respect the rights of minority shareholders. The general meeting of shareholders is seen as an important communication instrument. The importance of "voice" is emphasized by the code in its provision allowing shareholders with more than 5% to submit proposals for the meeting. For the time being[24], the Belgian Companies Act has set the level at 20% of the share capital. The last principle, principle nine, compels companies to develop a corporate governance charter containing the corporate governance policies and to incorporate a corporate governance chapter in the annual report.

The nine principles are general in nature. Most of these principles, although not explicitly embedded in Belgian company law, are closely related to company law requirements. The second principle requires the board to act effectively and efficiently and to take decisions in the corporate interest. Article 522 Companies Code compels the board of directors to act in the interest of the company.[25] Principle 3 obliges board members to be honest and to be committed.[26] Article 527 Companies Code states that

[24] Article 6 of the shareholders directive (Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies, *O.J. L.* nr. 184, 14 July 2007, p. 17) requires that the threshold in the Belgian Companies Act is lowered.

[25] Both the Belgian Companies Code and the Corporate Governance Code is emphasizing the corporate interest and not the shareholder interest. Belgium adheres the "stakeholder" approach.

[26] Compare with the fiduciary duties of American corporate directors.

board members are responsible for executing their task, since the law requires their commitment, and the board members are liable for the shortcomings in governing the company.

Other principles require companies to take additional "governance" steps. Article 522 Companies Code allows the board of directors to establish committees.[27] Principle 5 states that the board *shall* set up specialised board committees. Principle 9 requires the company to adequately disclose its corporate governance. Article 96 Companies Code limits the reporting to specific governance issues like the major risks and uncertainties that can be considered a part of the internal control system and article 69 and article 76 Companies Code compel the company to disclose the procedure to elect board members and to reveal the identity of the board members. However a legal principle requiring the disclosure of all corporate governance information is lacking.

Finally some principles can be considered to be superfluous. The first part of principle 8 obliges companies to "respect the rights of all shareholders". It is logic that the rights of all shareholders are respected and even more that the rights of all corporate constituents are respected. This principle follows also from principle 2 that states that the board needs to take into account the corporate interest when it takes decisions.

III.1.2. The Provisions

The provisions can be classified in the same manner as the principles. Some provisions are closely related to corporate law sections, other provisions add corporate governance requirements whilst a third class is more or less redundant.

A number of provisions develop to a larger or lesser degree corporate law requirements. Article 517 Companies Act states that the board of directors must govern the company. Provision 1.2. adds that "the board should decide on the company's values and strategy, its risk appetite and key policies". Related to the former class are provisions that refine corporate law requirements. Most companies

[27] The permission is redundant. The board of directors has the authority to take every action to accomplish the purpose of the company, including establishing committees.

acts in the world hardly define what governing the company involves.[28] The code sums up a number of duties for the board of directors. Provision 1.3 and provision 1.4 lay down duties for the board of directors:

> "1.3. With respect to its monitoring responsibilities, the board should:
>
> - review the existence and functioning of a system of internal control, including adequate identification and management of risks (including those relating to compliance with existing legislation and regulations);
> - take all necessary measures to ensure the integrity of the company's financial statements;
> - review executive management performance;
> - supervise the performance of the external auditor and supervise the internal audit function.
>
> 1.4. The board should decide on the executive management structure and determine the powers and duties entrusted to executive management. These should be included in the terms of reference of the board and in those of executive management."[29]

Boards that are confronted with continuously increasing demands for better performance will embrace this guidance. However the provisions are no free lunch. Third parties and other corporate constituents can sue directors claiming that these duties have not or not appropriately been addressed.

The second, and the most important class of provisions adds requirements to the companies act. Aforementioned were the legal requirements to meet the standards of/qualify as an independent director. Appendix A to the code sets the criteria an independent director has to comply with. The Code requires a "cooling-off" period of at least three years instead of the two-years legal requirement and applies the rule to any kind of labourship, managership or directorship. However, whereas the law leaves no doubt vis-à-vis the relatives of the independent director, the Lippens Code does not

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28 For an analysis of the content of the legal requirement of "governing the company" see Wymeersch, E. (2000). Besturen in tijden van "Corporate Governance". in *Liber Amicorum Walter van Gerven*, (pp. 500-510). Antwerpen, Belgium: Kluwer.

29 The guidelines provide for additional guidance. One of the guidelines of provision 1.1. reads: "The board's role should be to pursue the long-term success of the company by providing entrepreneurial leadership and enabling risks to be assessed and managed."

define “a close family member”. In light of the Lippens Code not only a stake of more than 10% impairs the director’s independence but also, and contrary to the law, its affiliation as director or executive officer of a legal person controlling more than 10% of the shares. However, the Lippens Code does not take into account the legal requirement that smaller blocks of a director that he holds in agreement with other shareholders impairs his independence.[30] Finally the Lippens code refines the general legal requirement of absence of any other kind of relationship that could impair the independence of the director by adding five other requirements (see Table 3).[31]

The aforementioned principle 9 of the governance code requires the disclosure of the company’s corporate governance framework and structure. The Lippens code compels the company to publish on its website a corporate governance charter that contains the company’s corporate governance policies. The corporate governance chapter must inform corporate constituents and investors about the relevant company’s corporate governance events of the reporting period. Next companies must explain in the chapter the Lippens provisions they do not (fully) comply with. These provisions oblige companies developing new corporate governance communications skills.

[30] Another difference is the denominator to calculate the 10% holdings. The legal requirements refer to capital whilst the corporate governance code refers to shares.

[31] However, the detailed Lippens Code requirement can be weaker than the legal requirement to the extent that a relationship with any company can impair the legal independence whilst not hampering its independence in light of the Lippens Code.

Table 3: Director's Independence requirements in the companies act and corporate governance code

Independent director requirements	
Article 524 Companies Code	Lippens Code
1. they should not have exercised any mandate within the company or any of its associates in the two-year period prior to being appointed;	1. not being an executive or managing director of the company or an associated company, and not having been in such a position for the previous three years; not being an employee of the company or an associated company, and not having been in such a position for the previous three years;
2. they should not have a spouse, concubine or relative (to the second degree) exercising a mandate within the company or any of its affiliates, nor having a financial interest in the company or any of its associates;	2. not being a close family member of an executive or managing director or of persons in the situations described in this list.
3. they should not hold any security in the company that represents more than 10 per cent of the capital. Even if they hold less than 10 per cent of the capital in their own name, the combined shareholding of their own securities and securities held by companies they control should not exceed 10 per cent. They should not be tied by any agreements or unilateral commitments with respect to such securities; and	3. not being a controlling shareholder or a shareholder with a shareholding of more than 10%, or a director or executive officer of such a shareholder;
4. they should not be in contact with any company that would compromise their independence.	4. not having, or having had within the last year, a significant business relationship with the company or an associated company, either directly or as a partner, shareholder, director or senior employee of a body that has such a relationship;
	5. not being or having been within the last three years, a partner or employee of the current or former external auditor of the company or an associated company;
	6. not being an executive or managing director of another company in which an executive or managing director of the company is a non-executive or managing director, and not having other significant links with executive directors of the company through involvement in other companies or bodies;
	7. not having served on the board as a non-executive director for more than three terms.
	8. not receiving, or having received, significant additional remuneration from the company or an associated company apart from a fee received as non-executive director;

Table 4 provides an overview of the requirements of the corporate governance charter and corporate governance chapter. From this table it is clear that the division between policies and practices is not elaborated for all issues to the same degree. First, information on shareholders and shareholder relationships should be disclosed in the corporate governance charter. As the charter should be kept up to date at any time, it requires the company to amend the charter as soon as it is informed about any important change in the shareholding or control rights structure. The corporate governance chapter should not provide information on the developments of the shareholder's structure. Next, the company should develop a "rigorous and transparent procedure for an efficient appointment and re-election of directors".[32] A number of provisions give additional guidance how to structure the policy. However the charter must not supply information on this election policy. Similarly, no information must be disclosed regarding the evaluation procedure for directors.[33] Third, one particular policy requires very detailed information. The remuneration policy must be commented in the corporate governance chapter and it should contain detailed information on the remuneration of the non-executive directors, the chief executive officer, the other executive directors and managers. Of the latter classes the fixed remuneration, the variable remuneration and other components of remuneration, as well as share based compensation should be presented separately. Finally, the two types of corporate governance disclosure mechanisms, do not cover all disclosure requirements. Provision 8.11. compels companies to disclose the minutes of the general meeting as well as the result of the votes on the website of the company.

[32] Provision 4.1.

[33] See the provisions 4.11 to 4.14.

Table 4: Comparison of the contents of the governance charter and governance chapter

Corporate Governance Charter	Corporate Governance Chapter
- a description of the governance structure of the company, with the terms of reference of the board [1.1.];	- a list of the members of the board indicating which directors are independent [2.1.] [2.3.]; - a list of the members of the board committees [5.1.] [5.2.] [5.3.] [5.4.]; - information on directors who have ceased to satisfy the requirements of independence [2.3.]; - an activity report on board and board committees meetings including the number of meetings and the individual attendance record of directors [2.7.]; - a list of the members of the executive management [6.2.];
- the policy established by the board for transactions and other contractual relationships between the company, including its related companies, and its board members and executive managers, which are not covered by the legal provisions on conflicts of interest [3.6.] [6.7.];	- comments on the application of the policy established by the board for transactions and other contractual relationships between the company, including its related companies, and its board members and executive managers, which are not covered by the legal provisions on conflicts of interest [3.6.] [6.7.];
- the measures taken by the company in order to comply with Directive 2003/6/EC on insider dealing and market manipulation (market abuse) [3.7.] [6.8.] ;	- comments on the application of the measures taken by the company in order to comply with Directive 2003/6/EC on insider dealing and market manipulation (market abuse) [3.7.] [6.8.];
- the terms of reference of each committee [5.1.];	
- the terms of reference of executive management [6.1.];	
- the remuneration policy [7.2.];	- on an individual basis, the amount of the remuneration and other benefits granted directly or indirectly to nonexecutive directors, by the company or any other undertaking belonging to the same group [7.5.]; - on an individual basis, the amount of the remuneration and other benefits granted directly or indirectly to the CEO, by the company or any other undertaking belonging to the same group. This information should be disclosed with a split between: • basic remuneration; • variable remuneration: any incentive relating to the financial reported year; • other components of the remuneration, such as cost of pension, insurance coverage, monetary value of other fringe benefits, with an explanation and, if appropriate, the amounts of the main components [7.15.]; - on a global basis, the amount of the remuneration and other benefits granted directly or indirectly to the other members of executive management, by the company or any other undertaking belonging to the same group. This information should be disclosed with a split between: • basic remuneration; • variable remuneration: any incentive relating to the financial reported year; • other components of the remuneration, such as cost of pension, insurance coverage, monetary value of other fringe benefits, with an explanation and, if appropriate, the amounts of the main components [7.16.]; - if some members of executive management are also board members, full and detailed information on the amount of the remuneration they receive in such capacity [7.6.]; - for the CEO and the other members of the executive management, on an individual basis, the number and key features of shares, share options or any other right to acquire shares, granted during the year [7.17.];
- the shareholding and control structure of the company	

and any cross-shareholdings exceeding 5% of the shareholdings or voting rights, insofar as it is aware of them, and as soon as it has received the relevant information [8.4.];	
- the identity of its major shareholders, with a description of their voting rights and special control rights, and, if they act in concert, a description of the key elements of existing shareholders' agreements [8.5.];	
- any other direct and indirect relationships between the company and major shareholders [8.5.].	
	- a presentation of each new director including a justification when the director is deemed to be independent [2.3.];
	- the main contractual terms on hiring and termination arrangements for executive managers [7.18.];
	- if any, provisions of the Code that were not complied with during the year and explanation of the reasons for non compliance [9.4.].

In corporate law there is no specific role for the chairman of the board. The board of directors is considered to be a collegial body and is collectively responsible. In the corporate governance code the chairman, who must be a non-executive director,[34] is considered the primus inter partes, responsible for the timely convocation of the meetings, for setting the agenda, for ensuring the members receive timely and clear information[35] for having the composition and functioning assessed[36], for ensuring the election of committee members[37], etc. The Lippens Code compels companies to elect a secretary to the board, a position, contrary to the UK Companies Act, previously unknown in Belgian company law.

Another important obligation is the establishment of at least three board subcommittees: an audit committee, a remuneration committee and a nomination committee. A large number of provisions – in the appendix – define the composition, the duties and the terms of reference of each committee, a summary of which can be found in table 5. Two specificities should be mentioned. First and in order to make optimal use of the audit committee vis-à-vis the provision of significant non-audit services[38], the committee should be established in accordance with the articles of association and should monitor the work of the external auditor.[39] These conditions will allow the company to deploy the external auditor for non-audit services the price of which exceeds the fee for the audit service. If the audit committee is not established in compliance with these legal requirements the non-audit services are not allowed unless other mechanisms – a board of auditors or a preapproval of the services by a government agency[40]– are operational.[41] Second, the remuneration committee should issue a recommendation on the remuneration policies of the non-executive directors

34 Ex. provision 4.2., 5.3./2, 5.4./1.
35 Provisions 2.5 and 2.6.
36 Provision 4.11.
37 Provision 5.5.
38 In short, services of which the costs exceeds the fees for the audit services.
39 See article 133, § 6 Companies Code.
40 Called "het Advies- en controlecomité op de onafhankelijkheid van de commissaris / le comité d'avis et de contrôle" (the advisory and monitoring committee on the independence of the statutory auditor).
41 For an analysis of this legislation see De Poorter, I. & Van der Elst, C. (2003). De onafhankelijkheid van de commissaris. In Tison, M., Van Acker, C. & J. Cerfontaine (Eds.), *Financiële regulering: op zoek naar nieuwe evenwichten* (pp. 291-361). Antwerpen, Belgium: Intersentia; and Van der Elst, C. (2003). De commissaris, non-audit diensten en het comité voor advies en toezicht. In Braeckmans, H. & Wymeersch, E. (Eds.), *Behoorlijk Vennootschapsbestuur – Een analyse van de wet van 2 augustus 2002*, Antwerpen, Belgium: Intersentia.

and the executive management. However the code provides a third class for which the remuneration policy should be developed, i.c. the executive directors.

Table 5: Overview of provisions on three subcommittees

	Audit committee	Remuneration Committee	Nomination committee
composition	= 3	= 3	= 3
	100% NED	100% NED	
	=50% independent	=50% independent	=50% independent
Duties (issue recommendations)	Control in broadest sense[5.2.]	Remuneration policy NED	Appointment of directors
	Integrity financial information	Remuneration policy exec manag.	
	review the internal control and risk management systems	Individual remuneration directors and exec. managers	
	review the internal auditor's work programme and review the internal audit effectiveness		
	External auditor appointment and independence; the nature and extent of non-audit services under review		
meeting	= 3 a year	= 2 a year	= 2 a year

Finally the companies are required to grant every shareholder with at least a 5% stake the right to submit proposals to the general meeting of shareholders.[42]

The third class of provisions are the redundant provisions. An example can be found in the provisions for the independent director. Provision 2.3/2. demands the company to apply the criteria laid down in article 524 Companies Code whenever it is legally required. It goes without saying that companies have to comply with mandatory provisions in the companies code. The board members must answer shareholder's questions regarding the annual report or the items on the agenda, according to provision 8.10. The provision is identical to article 540 Companies Act. Provision 9.5 compels companies to disclose information relating to changes in the shareholders'

42 Cf. supra.

rights. Article 15 Royal Decree of 14 November 2007[43] requires issuers of securities listed on a regulated market to disclose modifications in the rights of issued shares as soon as possible.

III.1.3. Guidelines

A number of provisions are accompanied by guidelines. These guidelines can serve companies as a guide. The qualitative nature of the content of the guidelines makes them unfit for the comply or explain regime. Thirty provisions are supplemented by one or more guidelines. Three provisions called for three or four guidelines. These provisions are related to the terms of reference of the board of directors, the tasks of non-executive directors and the evaluation of the board of directors.

III.1.4. Monitoring, Compliance and Follow-up

The Commission Corporate Governance considered its code as the referential framework for all Belgian listed companies on a regulated market. The Committee deemed it necessary that three parties were closely involved in the monitoring and compliance. First, the board of directors must ensure an operational internal monitoring system, in particular regarding the disclosure of the corporate governance chapter and corporate governance charter. Second, shareholders should assess compliance with the code and in particular the explanations for deviations of the code. The code was issued at a time a considerable number of companies experienced large shareholders diminishing their majority voting block. However this development came to an end in 2007. The enactment of the new takeover code which established the threshold of 30% to launch a mandatory takeover offer, stopped the decline. Many shareholders of Belgian listed companies hold a voting block exceeding the thirty per cent threshold and de facto control the company.[44] The Commission acknowledged the typical ownership structure of Belgian listed companies. Table 6 gives an

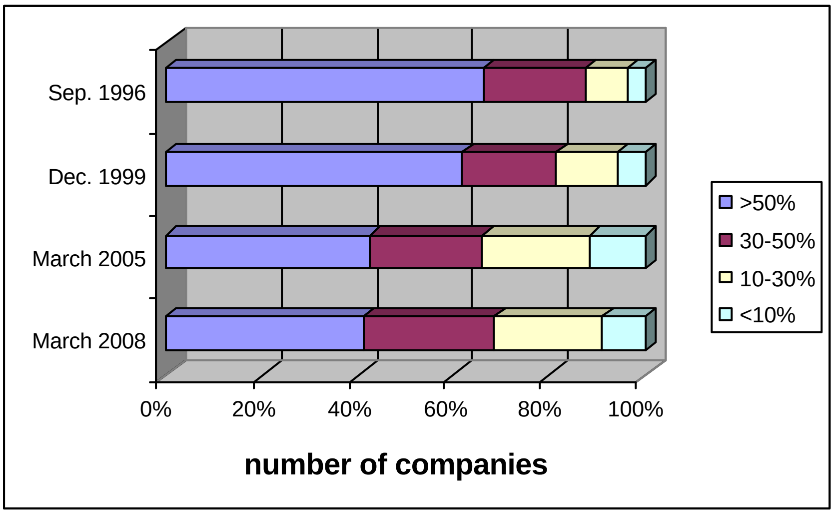
[43] *Official Gazette*, 2 December 2007. It must be mentioned that this legal requirement was introduced after the publication of the code.

[44] 7 per cent of the companies in the sample have one shareholder owning between 30% and 31% of the shares and the votes.

overview of the development over the last twelve years of the voting block of the largest shareholder or shareholders acting in concert.

The Commission recommends that these shareholders should make a considered use of their powerful position. However, the Code contains no specific additional provisions regarding the position of or conflicts of interest between the controlling shareholder and the company.

Table 6: Evolution of ownership concentration – voting block largest shareholder



Source: own research

Third, the Banking Finance and Insurance Commission is still responsible for the well functioning, integrity and functioning of the Belgian financial markets and for the ongoing and periodic information obligations as it was also the case in the late nineties of the last century when the former codes were issued.[45] The BFIC has several instruments to enforce transparency rules in general and corporate governance disclosure in particular.[46]

Finally, in a number of documents related to the Free Market and Alternext Market of NYSE Euronext Brussels, the stock exchange explicitly states that contrary to the

[45] See article 45 Law of 2 August 2002 on the supervision of the financial industry and the financial services, *Official Gazette* 4 September 2002.

[46] For an analysis see Leroux, E. (2005). De Code Lippens: juridisch afdwingbaar?. *Tijdschrift voor Rechtspersoon en Vennootschap*, 513 - 529.

main Euronext market, the application of the Lippens Code is not mandatory.[47] Hence, companies listed on Euronext seem to be deemed to apply the code. However, and contrary to the London Stock Exchange, the application of the Lippens Code is not mentioned as a listing requirement in the NYSE Euronext Brussels rulebook. Financial markets expect the application of the code in its comply or explain regime.

Contrary to the Netherlands, Belgium has not (yet) formally established a monitoring commission to assess the compliance of the Code or to modernise the Code. However, the Commission Corporate Governance has restarted its activities in 2007 and a new edition of the Code will be published at the end of 2008. At the same time some parties closely related to the Commission's members prepared reports that assessed the compliance of the code.[48] Also, members of Parliament discussed corporate governance issues and started legislative procedures.[49] However, so far, none of the parliamentary proposals were voted.

III.1.5. Corporate Governance Practices and Compliance

After the publication of the Lippens Code a number of academic scholars and some institutions studied the application of the Code. All parties acknowledge that most corporate governance provisions are applied. However some differences in the results are remarkable.

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47 See NYSE Euronext and Nauta Dutilh, 2008, *Guide Pratique Les PME et la bourse : Alternext et le Marché Libre - Marchés organisés par Euronext Brussels*, Brussels, Belgium (http://www.euronext.com/fic/000/033/337/333372.pdf). See also http://www.euronext.com/editorial/wide/editorial-4700-EN.html where it is mentioned (last visited 28 july 2008): The Euronext Brussels Free Market was created in 2004....For Belgian companies, the main differences with regard to the regulated market are:

- No obligation to distribute/offer a minimum percentage of shares to the public ("free float").
- No obligation to publish accounts in IFRS format.
- No obligation to submit to the Lippens Code of corporate governance. ...

48 Cf. infra section III.5.

49 See for example the Parliamentary reports of Casaer, D., (2005). *De hoorzittingen deugdelijke ondernemingsbestuur (corporate governance) van 1 juni 2005*. Parl. Doc., Chamber of Parliament, 2004-2005, nr. 1824; and Casaer, D., (2006) *Verslag namens de Commissie belast met de problemen inzake handels- en economisch recht*. Parl. Doc., Chamber of Parliament, 2005-2006, nr. 1502/009.

The first two studies that were published regarding the Lippens Code assessed the annual reports over 2003 and 2004 and evaluated to which extent companies should change corporate governance policies to comply with the Lippens Code. The Banking Finance and Insurance Commission found in the annual reports over 2003 that 94% of all companies disclosed a corporate governance chapter and 75% divided the position of chairman and chief executive officer[50].[51] However, many companies still needed to establish subcommittees: 60% had an audit committee, 65% had a remuneration committee but only 25% had a nomination committee. Only 55% of the audit committees had a majority of independent directors. In 2004 95% of the companies included a corporate governance chapter in the annual report and 84% of the board's had the minimum number of three independent directors but in one company out of three the chairman of the board was an executive.[52] Reporting on the operational activities of the board gave a mixed picture: almost all provided information on the number of board meetings but less than half disclosed director's participation. Self-assessment was one of the provisions the 2004 annual report provided hardly any information. Only one out of seven boards referred to this procedure. The presence of audit committees and remuneration committees soared to more than 70%. One of the subjects for which the annual report over 2004 did not sufficiently provide the required information was the remuneration of the board: only 25% of the companies disclosed the remuneration package of the CEO, whereas the globalised compensation packages for the other executives were incomparable due to the huge differences in the number of executive managers. Some companies incorporated the required information but the disclosure of compensation in the annual accounts, the corporate governance chapter and the annual report of different elements of the remuneration package did not offer the required transparency. Both studies were optimistic about the positive effects of the Lippens Code.

The positive influence of the Lippens code was confirmed in the overview studies that were published in 2006 and 2007. At the start of 2006, 60% of the companies had

50 In Belgium most of them have the title of "delegated director".

51 Banking Finance and Insurance Commission, (2004). *De informatie over corporate governance verstrekt door de Belgische op de eerste markt van Euronext Brussels genoteerde vennootschappen – capita selecta*. Brussel, Belgium.

52 Van der Elst, C. (2006). Corporate Governance op het snijvlak tussen wetgeving en aanbeveling: een praktijkstudie. *Maandschrift Accountancy & Bedrijfskunde*, 28, 1, 11-24.

issued a corporate governance charter with the most important governance policies.[53] Mid 2006 this number had reached 70%.[54] The identification of the most important shareholders and the shareholder structure are missing in one charter out of four. Later that year the Banking Finance and Insurance Commission assessed the contents of the corporate governance charters of all listed companies.[55] 79% of all companies published their corporate governance charter. The study confirms the findings of the other studies. Most charters contain the required information with the exception of the relationships with shareholders.

A first study regarding the compliance with the provisions of the Lippens Code was published in July 2006. The BEL-20 companies applied 88% of a large number of provisions[56] and an additional 4,5% was explained.[57] The remainder of 7,5% of provisions is neither applied nor explained. Some of the provisions, like the disclosure of the composition of the board of directors and a majority of non-executive board members, the meetings of the board and the establishment of board subcommittees are applied always applied. Only a small majority of the BEL-20 companies addressed the provision of the appropriate composition of the nomination and the remuneration committee, but most of the other companies explained the departure of the provision. For a limited number of provisions, like the main contractual terms of the contract with executive managers only a small majority of the companies provided the required information in the annual report. Finally, the different independence standards for directors caused companies to opt for many different definitions: some used the legal standard, some applied the Lippens criteria, some a combinations of both standards whereas a limited number of companies referred to other standards. Later that year the Belgian Governance Institute & Federation of Belgian Enterprises published a similar analysis of compliance with the Lippens Code of more than 90

53 Belgian Governance Institute & Federation of Belgian Enterprises, (February 2006). *Onderzoek naleving Code Lippens inzake de publicatie van een Corporate Governance Charter*. Gent, Belgium.

54 Belgian Governance Institute & Federation of Belgian Enterprises, (August 2006). *Onderzoek naleving Code Lippens inzake de publicatie van een Corporate Governance Charter*. Gent, Belgium.

55 Banking Finance and Insurance Commission, (2006). *Vergelijkende studie van de informatie inzake "corporate governance" die door de genoteerde vennootschappen wordt gepubliceerd in het "corporate governance charter"*. Brussels, Belgium

56 Not all provisions have been analysed due to the qualitative nature of some of these provisions. In total 55 provisions have been assessed.

57 Belgian Governance Institute & Federation of Belgian Enterprises, (2006). *De naleving van de Code Lippens over 2005 bij de BEL20*. Gent, Belgium.

companies.[58] The most important findings were that 80% of all provisions were applied, whereas 15% of the provisions were neither applied nor explained. The larger the company the more the provisions have been applied: large companies do not explain 8% of the provisions, small companies 20%. Only 60% of all companies disclose the individual remuneration package of the chief executive officer. The same provisions as aforementioned were regularly applied or disregarded. The study of Trumperer, Vandermaelen en Vergauwen of 10 large, 10 medium and 10 small companies confirmed most of the aforementioned findings.[59] Their analysis showed that for ten provisions less than 50% of the companies in their sample complied.[60] In a large sample of 119 companies Vermeersch and Van de Poel found that seven (sub) provisions have non-compliance rates above 50%.[61] Companies complied with 5 provisions for more than 90%.[62]

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58 Belgian Governance Institute & Federation of Belgian Enterprises, (2006). *Naleving van de Belgische Corporate Governance Code: een stand van zaken*.Gent, Belgium.

59 Trumpener, J., Vandemaele, S. & Vergauwen, P. (2007). De toepassing van de code Lippens: een analyse van de jaarverslagen en corporate governance-charters van Belgische beursgenoteerde bedrijven. *Maandschrift Accountancy & Bedrijfskunde*, 29, 7, 17-24.

60 These provisions are: Non-executive directors should not consider taking on more than five directorships in listed companies; directors should update their skills and improve their knowledge of the company to fulfil their role both on the board and on board committees; the non-executive directors should regularly (preferably once a year) assess their interaction with executive management; The audit committee should review the specific arrangements made, by which staff of the company may, in confidence, raise concerns about possible improprieties in financial reporting or other matters; the internal and external auditors should be guaranteed free access to the board; an executive manager who is also an executive director, the remuneration should be determined taking into account; schemes under which executive managers are remunerated in shares, share options or any other right to acquire shares should be subject to prior shareholder approval by way of a resolution at the annual general meeting the compensation received in that person's capacity as a board member; at least once a year, the remuneration committee should discuss with the CEO both the operation and performance of executive management; the company should disclose in the CG Chapter of the annual report the main contractual terms of hiring and termination arrangements with executive managers and the level of shareholding for the submission of proposals by a shareholder to the general shareholders' meeting should not exceed 5% of the share capital.

61 Vermeersch, W. and Van de Poel, K. (2008). Corporate governance en de implementatie van de code Lippens: een empirische studie. *Maandschrift Accountancy & Bedrijfskunde*, 30, 1, 12-33. These (sub)provisions are: The number of board and board committee meetings and the individual attendance record of directors should be disclosed in the corporate Governance chapter of the annual report (subdivided in the attendance list of the nomination committee, the activity report of the remuneration committee, the report of the nomination committee, the individual attendance list of the remuneration committee, the report of the audit committee and the individual attendance list of the audit commitee) and the number of meetings of the nomination committee is equal or higher than two.

62 These provisions are: publication of the list of the members of the board of directors; at least half of the board are non-executive directors; publication of the list of the executive management members and publication of the members of the board that are considered independent.

Two other studies concentrated on a limited number of provisions. Van Gysegem and Devos concluded that the provisions related to the remuneration committee have low compliance rates.[63] In only 56% of the companies the remuneration committee is composed in accordance with the Lippens Code. Half of the companies that do not comply, provide an explanation for the divergence. Only 40% of the companies that comply with the committee rules established the duties and responsibilities of the remuneration committee. The strategy vis-à-vis the remuneration committee still needs further development. The authors conclude that the major improvement of the Code is the awareness of companies optimising remuneration procedures and processes.

Van der Elst studied the attendance of shareholders at the general meeting.[64] Provision 8.11. requires companies "to post the results of votes and the minutes of the general meeting on its website as soon as possible after the meeting". In 2007, out of 95 companies only 43% disclosed this information on their website.

III.1.6. Corporate Governance and Corporate Performance

At least two Belgian studies addressed the important question whether better corporate governance improves corporate performance. The event study of Corhay, Dighaye and Michel analysed the influence of the invitation of the European Commission to issue a corporate governance code on 21 May 2003; the announcement that the Commission Corporate Governance started its operational activities on 22 January 2004 and the publication of the draft corporate governance code on 18 June 2004.[65] Both the mean adjusted rates of return and the risk adjusted rates of return are significantly positive for the first two events. The publication of the draft code had no significant influence in the short term. More particularly, the first event resulted in a positive return in the period after the announcement whereas the second event was already positively influencing the returns before the announcement

63 Van Gysegem, J. and Devos, W. (2006). De samenstelling en werking van het remuneratiecomité na de Code Lippens. *Oriëntatie*. 183-197.

64 Van der Elst, C. (2008). Algemene vergadering van aandeelhouders: revitaliseerbaar?. In Instituut Financieel Recht (Eds.), *Liber Amicorum Prof. Dr. Eddy Wymeersch*. Antwerpen, Belgium: Intersentia, pp. 977-996.

65 Corhay, A., Dighaye, A. & Michel, P.-A., (2006). The Impact of the New Corporate Governance Code on the Belgian Stock Market. in Ali, P. & Gregoriou, G. (Eds.), *International Corporate Governance after Sarbanes-Oxley* (pp. 95-125). Hoboken, New York: John Wiley & Sons

and its positive influence continued three weeks after the announcement. Smaller firms experienced larger abnormal returns than larger one. It suggests that the Belgian market was already expecting some time before the announcement that a Belgian governance commission would address the invitation of the European Commission, whereas the financial market was not pre-informed about the European Commission's work. Unfortunately, the study did not incorporate the publication of the final corporate governance code in December 2004 or, even of more interesting, a company's publication of its governance charter or the publication of a corporate governance chapter.

The second study measured the influence of corporate governance instruments on the return on equity and the return on assets.[66] The corporate governance score was measured as the number of 43 provisions the company complied with in 2005. If the company explained its divergent corporate governance policy, the result for that particular provision was 0,5. Five companies complied with all 43 provisions, 13 companies had a governance score of less than 10, the average being 27,6 and the median 30. Higher corporate governance scores are correlated with lower performance, although the statistical significance was modest. However, companies that explicitly report compliance or divergent behaviour and companies with higher price to book ratios have higher returns on equity and returns on assets than other companies. Disclosure of information seems to be more positively valued than compliance with all corporate governance provisions. As the study made use of variables of the same time period, the results emphasize correlation and less causation. In the same study it was assessed which variables influence the behaviour of companies in applying the corporate governance codes. Out of 9 variables, only two has a significantly positive effect: larger companies and companies with a BIG-4 statutory auditor[67] apply more corporate governance provisions.[68]

66 Vermeersch, W. and Van de Poel, K. (2008). Corporate governance en de implementatie van de code Lippens: een empirische studie. *Maandschrift Accountancy & Bedrijfskunde*, 30, 1, 12-33.

67 Ernst & Young, PWC, KPMG and Deloitte.

68 The other variables that were tested were: growth, multiple listings, industry, free float, solvability, region of incorporation and balance sheet structure.

III.1.7. New developments

At the end of 2007 the Lippens Commission was revitalized and organised a public consultation. A broad support for the code as it stands with the comply or explain approach is read in the Commission's summary of the comments.[69] However the Commission Corporate Governance was concerned with European and Belgian legal developments and wanted to amend the Code to comply with the new legislations.

In July 2008 a draft version of the updated corporate governance code was published and public consultation was requested. Until September 2008 all parties can submit comments.

With regard to the provisions, two major amendments are proposed. First, the Commission no longer considers the principles as mandatory rules, but as pillars for developing good corporate governance. Second, the Commission proposes to change principle 8. The relationships with shareholders should be developed in a dialogue instead of the former "one way" approach to encourage shareholder's participation. The new proposed principle 8 reads: "The company shall enter into a dialogue with shareholders and investors based upon mutual understanding of objectives and concerns." The new provision 1.8 is similar to this principle.

Just over 50 provisions are amended, deleted or added. Many of the changes serve the purpose of clarity but some provisions are fundamentally altered. In principle 1 two new provisions regarding the relationship between the chief executive officer and the chairman of the board are introduced. The former CEO is only allowed to become chairman of the board after a cooling off period of at least two years. The provisions of principle 2 were only amended to encourage the board to meet on a sufficiently regular basis. With an average number of 7,4 meetings a year[70], it is reasonable to assume the average Belgian board complies with this new provision. In the provisions of the principles 3 to 6 there are no major modifications. Major alterations can be

69 The report can be read at http://www.corporategovernancecommittee.be/library/attachments/press/37b58013-7e4d-4ddd-ba03-6b91b7e312f7/nl/PB%20CGC%20publ%20raadpl%2020maart.pdf

70 Vermeersch, W. and Van de Poel, K. (2008). Corporate governance en de implementatie van de code Lippens: een empirische studie. *Maandschrift Accountancy & Bedrijfskunde*, 30, 1, 12-33.

found in the provisions of principle 7 on the remuneration and to a lesser extent principle 8 regarding the relationship with the shareholders.

The board should prepare a remuneration report to be published in the annual report. The report should contain an explanation if the remuneration package of a board or executive manager deviates from the established remuneration policy. Companies are offered the option to disclose individual or globalised remuneration packages of executive managers whereas in the 2004 Code globalised data were sufficient. For all parties, packages should be split in four classes instead of three: the cost of pensions should be separately mentioned. Finally severance pay packages for the CEO should be limited to 18 months basic remuneration and variable remuneration. The 2004 Code divided the involved parties in non-executive directors, executive directors, CEO and executive managers. The proposed new Code abolished the provisions regarding the executive directors. It is not clear why the Commission deleted these provisions

Provisions with low compliance are related to the disclosure of shareholder and control structures, cross-shareholdings above the threshold of 5%, and identities of major shareholders in the corporate governance charter. The former requirements regarding the control structures and cross-shareholdings are abolished. Whilst information on cross-shareholdings can be collected via other tools, the proposal for the abolishment of the requirement to disclose control structures is regrettable. Many Belgian listed entities are part of a pyramid group structure and any information on the control structures via foreign companies or non-listed entities is still difficult to collect. Finally, companies should develop a specific disclosure and communication policy for shareholders and investors.

The proposed amendments urged the Commission to modify the disclosure provisions of principle 9 and the accompanying appendix.

The Commission recommends that companies improve their corporate governance framework in accordance with the new corporate governance code in 2009. We expect that most of the Commission's proposals will be endorsed, although the debate on the disclosure of individual remuneration packages and severance pay packages will continue.

III.2. Other Corporate Governance Codes

III.2.1. The Buysse Code

In 2005, a second code, this time for non-listed companies - known as the Buysse Code – was published. The methodology for developing this code was similar to the Lippens Code. A commission, composed of academic scholars and practitioners developed a draft code and consulted all interested parties to comment. The final Code was published in September 2005. Its basic aim is a company's professional governance structure of non-listed companies. The Code is divided in three parts. The first part contains recommendations for all non-listed entities. A professional board of directors that is actively involved in the development of (the strategy of) the company and a professional management teams are considered basic conditions of an appropriate corporate governance framework. The second part addresses family companies. This type of company requires an advisory family board and a family charter to balance the interest of the company with those of the family. The third part provides recommendations for small entities. The guidelines relate to sound entrepreneurship. Overall, the Buysse code is less detailed than the Lippens Code and more oriented towards sound entrepreneurship and balancing the interests of the company with the interests of controlling shareholders, in particular family ownership.

Unizo, a Flemish employer's organisation that initiated the development of the Buysse Code, studied the familiarity of non-listed entities with the Buysse Code one year after its publication.[71] Approximately 68% of the respondents confirmed their familiarity though only 60% was familiar with (parts of) the content of the code and only 21% applied the recommendations of the code. The importance of corporate governance practices in non-listed entities is not yet generally acknowledged. In a

[71] The results can be found on http://www.unizo.be/behoorlijkbestuur/images/res251976_1.doc (last consulted 28 July 2008).

subsample of the study, only 16% of the respondents confirmed that "external" directors are member of the board, in 40% of the companies the board of directors only meets once a year and only 8% of the companies has established an advisory council.

III.2.2. Other Codes

1. The FBE Code for Non-Listed Entities

The Buysse Code was not the first Belgian corporate governance for non-listed entities. In 2001 the Federation of Belgian Enterprises published recommendation for non-listed entities.[72] The code emphasized the important role for the board of directors. Its main task should be to elect the chief executive officer, to organize the internal audit, to ratify the strategy of the company and to assess the budget.

2. Code for Cooperative Companies

In January 2007 the "Boerenbond"[73] launched a corporate governance code for cooperative companies. The code contains 49 recommendations and additional guidelines. The recommendations are classified in four parts: the general meeting, the board of directors, the executive management and the cooperative company's relationship with other parties. The Code emphasizes the importance of the separation of executive management and monitoring. The board of directors must be composed of non-executive directors. The board should take the strategic decisions, should monitor corporate policy and should organize the cooperative movement.

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72 Federation of Belgian Enterprises, (2001). *Corporate Governance in niet-genoteerde vennootschappen*. Brussel, Belgium.

73 It can be translated as "Farmers Association".

IV. Conclusion

Since the Belgian debate on corporate governance started, the governance framework as well as the governance practices have improved significantly. The Lippens Code lays down the basic framework to develop an appropriate governance structure whilst offering sufficient flexibility. Disclosure and reporting on corporate governance have improved substantially. According to the analysis of Heidrick and Struggles the Belgian governance rating increased significantly over the last 8 years.[74] However in 2007 the Belgian rate is still lower than the European average. All neighbouring countries, with the exception of Germany have higher rates. The 2008 modernisation of the Lippens Code can help to foster the Belgian corporate governance environment. The question can be raised whether confidence in the Belgian corporate governance structures will increase sufficiently to bridge the gap with the surrounding countries. The market demands more disclosure on the remuneration (policy). With the exception of the CEO's remuneration package, only globalised remuneration figures of the other executives must be disclosed. The position of the controlling shareholder and holding companies, a typical feature of the Belgian corporate governance scene, might become more obscure due to the abolishment of the provision to disclose the control structure of the company.

Belgian corporate governance scene is confronted with a number of other serious drawbacks. First, the Belgian political crisis that has been going on since June 2007 hampers further development. Since more than one year the legislative framework is no longer updated and European legislation has not yet been implemented. The government should acknowledge the corporate governance code in line with the European Directive 2006/46/EG, set up the framework in line with the requirements of article 41 of the European Directive 2006/43/EG to establish an audit committee and work on the transposition of the shareholder rights Directive 2007/36/EC.[75]

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74 See their last report, Heidrick & Struggles, (2007). *Raising the Bar – Corporate Governance in Europe*. US: Heidruck & Struggles Inc. (http://www.heidrick.com/IC/Published/Governance).

75 Directive 2006/46/EG of the European Parliament and of the Council of 14 June 2006 amending Council Directives 78/660/EEC on the annual accounts of certain types of companies, 83/349/EEC on consolidated accounts, 86/635/EEC on the annual accounts and consolidated accounts of banks and other financial institutions and 91/674/EEC on the annual accounts and consolidated accounts of insurance undertakings,*O.J. L.* nr. 224, 16 August 2006 and Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and

Furthermore, in some countries, like the Netherlands, a monitoring commission was installed. Every year this monitoring commission issues a report on the corporate governance practices. In Belgium, recent information on corporate governance practices is lacking. Only the first year after the publication of the Lippens Code, a number of studies addressed compliance issues. The annual reports of 2006 and 2007 are not yet analysed and neither are the updates of the corporate governance chapter. As far as we could ascertain, there are no studies that explore the relationship between corporate governance and corporate performance in an evolutionary perspective. We are however hopeful that the proposals to modernize the Lippens Code will trigger the interest of the political and academic community.

Finally, in most international corporate governance reports Belgium is never rated in the top league. A broader discussion is required to analyse the shortcomings of the Belgian financial system with regard to corporate governance. Many (institutional) investors only invest in capital markets with the best corporate governance frameworks. Belgium does not belong to that list. This must be considered a major challenge for Belgium.

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83/349/EEC and repealing Council Directive 84/253/EEC, *O.J. L.* nr. 157, 9 June 2006; Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies, *O.J. L.* nr. 184, 14 July 2007.

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