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DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

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Relations between company supervisory bodies and the management

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Relations between company supervisory bodies and the management

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DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

Relations between company supervisory bodies and the management

National systems and proposed instruments at the European level with a view to improving legal efficiency

Abstract

Proper functioning of the supervisory body and the quality of its relations with the management are among the essential conditions enabling a business to create value over the long term. The advances proposed in these two areas pertain, in particular, to the membership of the body, the training of its members and the functions of its committees, for which recommendations at the European level may be useful. They also involve the place of stakeholders (gender balance, employee involvement). These two issues are currently handled with a lack of uniformity in the 27 countries in the Union, which would benefit from the adoption of European directives.

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LIST OF ACRONYMS

AFEP	Association Française des Entreprises Privées (French Private Enterprise Association)
AFJE	Association Française des Juristes d'Entreprise (French Corporate Lawyers' Association)
AIM	Alternative Investment Market
AMF	Autorité des Marchés Financiers (French Financial Markets Authority)
ANSA	Association Nationale des Sociétés par Actions (French National Association of Public Limited Companies)
APIA	Administrateurs Professionnels Indépendants Associés (Associated Independent Professional Administrators)
CREDA	Centre de Recherche sur le Droit des Affaires (Business Law Research Centre)
CSR	Corporate Social Responsibility
EBITDA	Earnings before Interest, Taxes, Depreciation and Amortisation
EEA	European Economic Area
EESC	European Economic and Social Committee
ESMA	European Securities and Markets Authority
ETUI	European Trade Union Institute
FTSE	Financial Times Stock Exchange
IFA	Institut Français des Administrateurs (French Administrators' Association)
MEDEF	Mouvement des Entreprises de France (French Enterprise Movement)
ORSE	Observatoire sur la Responsabilité Sociétale des Entreprises (Corporate Social Responsibility Watchdog)
OECD	Organisation for Economic Co-operation and Development
SA	Société anonyme (Joint Stock Company)
SAS	Société par actions simplifiée (Simplified Public Limited Liability Company)
SE	*Societas Europaea* (Public EU Company)
TFEU	Treaty on the Functioning of the European Union

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GLOSSARY OF TERMS

Actionnaire	**Shareholder**	**Personne ou entité détenant des actions.**	**Person or entity owning shares.**
Ad nutum	**Ad nutum**	Expression caractérisant le droit de retirer les pouvoirs qui ont été confiés à un mandataire social sans avoir à justifier des motifs de ce retrait, ni respecter un préavis.	Expression which characterises the right to withdraw the powers given to a board member without having to justify the reasons and without giving advance notice.
Code de gouvernance d'entreprise	**Corporate governance code**	Ensemble de recommandations relatives aux bonnes pratiques concernant les équilibres de pouvoirs des organes sociaux, édictées par des organismes publics ou privés, appartenant au domaine de la *soft law*.	Set of soft law recommendations, providing good practices regarding the balance of powers and controls among corporate bodies, enacted by public or private organisms.
Conflit d'intérêts	**Conflict of interests**	Situation dans laquelle se trouve une personne qui est amenée à choisir entre son intérêt propre et l'intérêt supérieur qu'elle a pour mission de défendre, en particulier celui de la société dont elle est mandataire social ou actionnaire.	Situation of a person who has to choose between his/her own personal interest and the overriding interest of the company he/she shall defend, the company of which he/she is a board member or a shareholder.
Contrôle interne	**Internal control**	Aux termes du référentiel COSO[1] (Committee of Sponsoring Organizations of the Treadway Commission), le contrôle interne est un processus mis en œuvre par l'organe de surveillance, la direction et le personnel de l'entreprise pour fournir une assurance raisonnable quant à la réalisation des trois objectifs suivants: - Réalisation et optimisation des opérations; - Fiabilité des informations financières; - Conformité aux lois et règlements.	According to COSO Framework (Committee of Sponsoring Organizations of the Treadway Commission), internal control is a process carried out by the supervisory body, the management and other personnel designed to provide reasonable assurance regarding the achievement of objectives in three areas: - Effective and efficient operations; - Reliable financial reporting; - Compliance with applicable laws and regulations.
Convention réglementée	**Regulated party agreement**	Convention entre une société et un mandataire social ou un actionnaire significatif qui est autorisée selon une procédure prévue par la loi.	Agreement and/or transaction between a company and a board member or a significant shareholder which is authorised by a procedure provided by law.
Corporate governance	**Corporate governance**	Doctrine de la gouvernance des sociétés d'origine anglo-saxonne, fondée initialement sur la théorie de l'agence, qui privilégie l'intérêt des actionnaires. L'expression *corporate governance* peut aujourd'hui se définir (source OCDE) comme un ensemble de procédures et processus en vertu desquels une organisation est dirigée et contrôlée.	Refers to the theory of corporate governance, of Anglo-Saxon origin, initially based on the agency theory, which mainly aims at protecting shareholders' interests. The term may nowadays be defined (OECD source) as a set of procedures and processes according to which an organisation is directed and controlled
Direction	**Management**	Personne(s) et/ou instance qui exercent le pouvoir exécutif.	Individual(s) and/or body exercising the executive power.

[1] 'COSO 1', *Internal Control – Integrated Framework*, 1992.

Hard law	**Hard law**	Ensemble de règles contraignantes (lois, règlements, décrets, etc.) édictés par des autorités publiques (autorités élues démocratiquement, autorités nationales des marchés financiers, etc.).	Set of binding rules (laws, regulations, decrees, etc.) enacted by public authorities (democratically elected authorities, national securities and markets authorities, etc.).
Soft law	**Soft law**	Mesures, telles que des lignes directrices, recommandations, déclarations ou avis qui, contrairement au droit «dur», ne sont pas contraignantes. En général, le droit souple a une dimension de communication eu égard au principe *comply or explain*.	Measures, such as guidelines, recommendations, declarations and opinions which, in contrast to hard law, are not binding on those to whom they are addressed. In general, soft law has a communication dimension based on the 'comply or explain' principle.
Droit des sociétés national	**National company law**	Règles contraignantes (*hard law*) nationales concernant les sociétés de l'Etat concerné.	Binding national rules (hard law) concerning companies of the State in question.
Equilibre hommes-femmes	**Gender balance**	Objectif d'équilibre entre hommes et femmes (généralement en ce qui concerne la composition de l'organe de surveillance).	Objective of balance between men and women (generally as regards composition of the supervisory body).
Gestion des risques	**Risk management**	Aux termes du COSO II Report, la gestion des risques est un processus mis en œuvre par l'organe de surveillance, la direction et l'ensemble des collaborateurs de l'organisation. Il est pris en compte dans l'élaboration de la stratégie ainsi que dans toutes les activités de l'organisation. Il est conçu pour identifier les événements potentiels susceptibles d'affecter l'organisation et pour gérer les risques dans les limites de son appétence pour le risque. Il vise à fournir une assurance raisonnable quant à l'atteinte des objectifs de l'organisation.	According to COSO II Report, risk management is a process implemented by the supervisory body, the management and the stakeholders of the company. This process is taken into account for the determination of the strategy of the company for each of its activities. It is intended to identify the potential risks which may affect the company, manage them and choose the ones the company is ready to take on. It aims to provide reasonable assurance of reaching the company's objectives.
Gouvernance	**Governance**	Mode d'articulation juridique entre le pouvoir des actionnaires, le pouvoir exécutif et le pouvoir de surveillance.	The way the sovereign power of shareholders legally interacts with the executive power and the supervisory power.
Intérêt social	**Corporate benefit**	Intérêt de la personne morale qui suppose la performance sur le long terme.	Corporate benefit assuming performance over the long term.
Mandat social	**Corporate duties**	Missions et responsabilités qui incombent aux mandataires sociaux.	Duties and responsibilities incumbent upon the board members.
Mandataire social	**Board member**	Membre de la direction et/ou de l'organe de surveillance.	Member of the management and/or of the supervisory body.

Marché réglementé	**Regulated market**	Désigne un système multilatéral, exploité et/ou géré par une entreprise de marché, qui assure ou facilite la rencontre – en son sein même et selon ses règles non discrétionnaires – de multiples intérêts acheteurs et vendeurs exprimés par des tiers pour des instruments financiers, d'une manière qui aboutisse à la conclusion de contrats portant sur des instruments financiers admis à la négociation dans le cadre de ses règles et/ou de ses systèmes, et qui est agréé et fonctionne régulièrement.[2]	Refers to a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments — in the system and in accordance with its non-discretionary rules — in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorised and functions regularly.[2]
Organe de surveillance	**Supervisory body**	Organe qui exerce le pouvoir de contrôle, quel que soit le système d'organisation de l'entreprise (dualiste ou moniste), étant précisé que dans le mode moniste une partie du pouvoir exécutif peut être exercée au sein de l'organe de surveillance.	Body exercising the supervisory power, irrespective of the system of governance of the company (one-tier or two-tier). If the company adopts the one-tier system, part of the executive power may also be exercised within the supervisory body.
Organe social	**Corporate body**	Personne(s) ou collège exerçant l'un des trois pouvoirs (pouvoir souverain, pouvoir exécutif, pouvoir de surveillance).	Person(s) or college exercising one of the three powers (sovereign power, executive power, supervisory power).
Parties prenantes	**Stakeholders**	Groupe, personnes physiques ou institutions ayant un intérêt quelconque dans une société (actionnaires, salariés, créanciers, fournisseurs, clients, autres partenaires, etc.).	Group, individuals or institutions having an interest in a company (shareholders, employees, creditors, suppliers, clients, other business partners, etc.).
Pouvoir de contrôle	**Supervisory power**	Pouvoir exercé par l'organe exerçant un pouvoir de surveillance sur l'organe exerçant le pouvoir exécutif.	Power exercised by the body exercising a power of supervision on the body exercising the executive power.
Pouvoir exécutif	**Executive power**	Pouvoir exercé par la direction qui consiste à définir la stratégie de l'entreprise et à la mettre en œuvre.	Power exercised by the management which consists in defining the strategy of the company and implementing it.

[2] Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments.

Pouvoir souverain	**Sovereign power**	Pouvoir exercé par les actionnaires réunis en assemblée.	Power exercised by the shareholders in a meeting.
Responsabilité sociale des entreprises (RSE)	**Corporate Social Responsibility (CSR)**	«La responsabilité des entreprises vis-à-vis des effets qu'elles exercent sur la société». «Pour assumer cette responsabilité, il faut au préalable que les entreprises respectent la législation en vigueur et les conventions collectives conclues entre partenaires sociaux. To fully meet their corporate social responsibility, enterprises should have in place a process to integrate social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders, with the aim of: – à optimiser la création d'une communauté de valeurs pour leurs propriétaires/actionnaires, ainsi que pour les autres parties prenantes et l'ensemble de la société; – à recenser, prévenir et atténuer les effets négatifs potentiels que les entreprises peuvent exercer.»[3]	'Responsibility of enterprises for their impacts on society'. 'Respect for applicable legislation, and for collective agreements between social partners, is a prerequisite for meeting that responsibility. To fully meet their corporate social responsibility, enterprises should have in place a process to integrate social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders, with the aim of: – Maximising the creation of shared value for their owners/shareholders and for their other stakeholders and society at large – Identifying, preventing and mitigating their possible adverse impacts'
Société anonyme	**Joint stock company**	Société désignée à l'Annexe I du règlement (CE) n° 2157/2001 du Conseil.	Company listed in Annex I of Council Regulation (EC) No 2157/2001.
Société cotée	**Listed company**	Société dont les titres sont admis aux négociations sur un marché réglementé.	Company whose securities are admitted to trading on a regulated market.
Société européenne / societas europeae (SE)	**European company / societas europeae (SE)**	Société régie par le règlement (CE) n° 2157/2001 du Conseil du 8 octobre 2001 et par la directive 2001/86/CE du Conseil du 8 octobre 2001.[4]	Company governed by Council Regulation (EC) No 2157/2001 and Council Directive 2001/86/EC.
Société non cotée	**Non-listed company**	Société dont les titres ne sont pas admis à la négociation sur un marché réglementé.	Company whose securities are not admitted to trading on a regulated market.
Société par actions simplifiée (SAS)	**Simplified public limited liability company**	Société par actions non cotée qui peut être composée d'un seul associé, pouvant être lui-même le président de la société, même s'il s'agit d'une personne morale. Dans cette hypothèse, le président représente la société vis-à-vis des tiers selon les statuts. Les statuts fixent les règles de la gestion.	Private limited liability company whose securities are not admitted to trading on a regulated market which can be composed of one single partner who can be the president of the company. In this case, the president represents the company vis-à-vis third parties in accordance with the statutes. The statutes specify the management rules.

[3] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — Corporate Social Responsibility: a renewed EU strategy for 2011–2014 [COM(2011) 681 final].

[4] Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE).

Système dualiste	**Two-tier system**	Système qui distingue et sépare strictement le pouvoir exécutif et le pouvoir de surveillance, qui s'exercent au sein d'organes distincts.	System which strictly distinguishes and separates the executive power and the supervisory power which are exercised through separate bodies.
Système mixte	**Mixed system**	Système qui offre aux sociétés un choix entre le système moniste et le système dualiste.	System which gives companies a choice between the one-tier and two-tier systems.
Système moniste	**One-tier system**	Système dans lequel tout ou partie du pouvoir exécutif peut s'exercer au sein de l'organe de surveillance.	System in which all or part of the executive power may be exercised within the supervisory body.

SUMMARY

The subject we have been asked to address consists in 'identifying initiatives and instruments at the European level to improve the legal efficiency of the corporate supervisory body and in its relations with management'.

However, the membership of the supervisory body and its interactions with management vary according to legal, historical and cultural differences characteristic of the societies in each of the 27 EU Member States[5].

The comparison of these national legal systems should be based on a common reference framework. However, any system of corporate governance is based on three powers, defined as follows:

- **Sovereign power**, which is that held by the shareholders
- **Executive power**, which defines the strategy and implements the operational decisions that guide the organisation. This is exercised by the *management*, a term which may refer either to one or more physical persons invested with this executive power, or to the bodies whose role and membership varies according to the national company law of each Member State.
- **Supervisory power**, which ensures that the exercise of executive power is compatible with the corporate benefit, the company's permanence and its sustainable performance. This is exercised in bodies whose role and membership vary according to the national company law of each Member State.

The organisation of these three powers and their interactions vary from one Member State to another.

It is, however, a traditional view that three main systems of corporate governance exist within the EU[6]:

- The **one-tier system**, which concentrates all or part of the executive power and the supervisory power in a single body.
- The **two-tier system**, which draws a clearer distinction and separation between the exercise of executive power and supervisory power, in different bodies.
- The **mixed system**, which offers companies a choice between these two systems.

If the company is of the one-tier type, some executive power may still be exercised by the body entrusted with the supervisory power.

In order to refine the analysis of the power of the supervisory body, we have examined the power(s) held by each individual member of this body.

In light of these aspects, we regard the term 'supervisory board' as designating the body that exercises the supervisory power, regardless of whether the company is one or two-

[6] Aside from these systems, there are also 'hybrid' systems, which strive towards a simplified form of governance in non-listed companies, as detailed in Chapter 2.

tier. To avoid any possible confusion, we have given preference to use of the expression 'the supervisory body'/'body exercising the supervisory power' over the term 'supervisory board', which is reserved for the body exclusively invested with the supervisory power in a two-tier system.

We also use the term 'management' to refer to the person(s) and/or governance body exercising the executive power, corresponding to the French term '*direction*'.

The functioning of the relationships between these three powers has long been understood through the lens of the agency theory, which highlighted the potential conflicts between the executive and the sovereign powers.

Corporate governance was built on the foundation of this theory with the aim of returning to the shareholders the power co-opted by the executive power and better monitoring it to ensure that the management's interests are not prioritised at the expense of those of the shareholders.

However, this historic vision of corporate governance focusing on maximising shareholder value has proven its limitations, especially since the financial crisis, in that it incentivises opportunistic behaviour focusing on short-term profits.

Yet good governance should, in contrast, enable the company to meet its ultimate goal, which is to create value over the long term, for everyone's benefit[7].

In this goal of creating long-term value, it is important that the executive power be able to take measured risks, all under the effective oversight of the supervisory body. For this reason, it is vital to ensure proper functioning of the supervisory body and its satisfactory interaction with the executive power.

Our Study has focused on the following countries:

- The **United Kingdom**, which has adopted the one-tier system and has the unusual feature of being the founder of the common law legal system, which is also used today in Ireland

- **Spain**, a country which, like the United Kingdom, has adopted the one-tier system, but which is a traditional civil law country

- **Germany**, a country which has adopted the two-tier system and whose legal system is representative of the Germanic system, as it is also the case with Austria, and is influential throughout Central Europe

- **Denmark**, a country that has adopted the two-tier system and whose legal system belongs to the subgroup of Nordic law countries derived from the Romano-Germanic group

- **France**, a country that has adopted the mixed system with the special feature of being a traditional civil law country and the founder of the 'French' (a.k.a. 'Napoleonic') branch, which has inspired numerous European countries (including Belgium, Luxembourg, the Netherlands, Spain, Portugal, Italy, and Romania)

[7] PACLOT (Y.), *La gouvernance d'entreprise pour quoi faire?*, in La gouvernance des sociétés face à la crise, LGDJ, 2011, p. 279.

- **Romania**, one of the recent countries entering the EU, which has adopted the mixed system.

However, our Study is not limited to a detailed analysis of the legislation and practices in these countries, but examines good practices identified in other EU Member States.

It has uncovered a number of similar problems in the EU States, not only relating to European harmonisation, but also, and above all, to the adoption in all Members States of governance codes which recommend similar practices wherever possible. In particular, this concerns the distribution of powers and their interrelations, plurality of offices, conflicts of interests and board member remuneration.

Therefore, this examination has led us to draft recommendations which fall under two different legal instruments at the European level.

It initially seemed possible to further enhance the functioning of the supervisory body and the quality of its relations with the management, in particular by improving training of supervisory body members and reinforcing the dialogue they should be holding with the management. However, these measures, whose foundations have already been laid within most Member States, do not require a very strong political impetus. Consequently, these are soft laws and may therefore be the subject matter of recommendations by means of a European Parliament resolution.

On further reflection, it appeared to us that the other aims, relating to the representation and expression of all stakeholders in the supervisory body, should nevertheless be achieved. These require a stronger political impetus: the kind capable of modifying behaviours. This is the case with the requirement of equality in the supervisory body and employee involvement.

Recommendations

1. In order to **improve the performance of supervisory bodies**, the following recommendations are given:

- Affirm the existence of an *individual right to information* for the members of the supervisory body.

- Generalise implementation of *civil liability insurance* to cover the various board members at a franchise.

- Ensure *training of the supervisory body members* and coverage of costs by the enterprise.

- Reinforce the *dialogue between the board members and between the members of the supervisory body.*

- *Generalise the committees,* particularly *the remuneration committees* in listed companies.

- Monitor to ensure that *the audit committee is composed of members qualified to evaluate the company's strategic risks independently.*

- Set up *a European corporate governance watchdog*.

2. In order to **promote gender equality**, the following recommendations are given:

- Adopt a *Directive to introduce gender quotas in supervisory and management bodies.*

- Provide *suitable sanctions*, and above all incentives, following the example of Spain, which has decreed that public institutions may give preference to certain companies which adhere to the indicated quotas.

3. In order to **improve employee involvement**, the following recommendations are given:

- Adopt a *Framework Directive on 'the right of employee involvement'.*

- *Amend the Directive for general informing/consulting* (Directive 2002/14 of 11 March 2002).

INTRODUCTION

General description of the subject matter and definitions – The subject matter we have been asked to address consists of 'identifying initiatives and instruments at the European level to improve the legal efficiency of companies' supervisory boards and their relations with management'[8] (hereinafter the 'Study').

This research led us to examine the method of organisation adopted for the purpose of exercising the supervisory power and its interactions with the executive power in corporate governance bodies. This organisation varies according to the legal, historical and cultural differences which characterise company law in each of the 27 EU Member States[9].

In order to compare systems of national law, it was necessary to select a reference framework to make comparison possible.

For this purpose, we have opted to use, where applicable, the reference framework adopted by the French association MiddleNext[10] for the purposes of publishing its Governance Code, in March 2009, which defines the three powers on which any system of governance is based as follows:

- **Sovereign power**, which is held by shareholders, and is examined in the study on the rights and obligations of shareholders.
- **Executive power**, which defines the strategy and implements the operational decisions that guide the organisation. This is exercised by the *management*, a term which may refer either to one or more physical persons invested with this executive power, or to the bodies whose role and membership vary according to each Member State's company law.
- **Supervisory power**, which ensures that the exercise of executive power is compatible with the corporate benefit, the company's permanence and its sustainable performance. This is exercised in bodies whose role and membership vary according to the national company law of each Member State.

For the purposes of these definitions, we assumed that the purpose of supervision of the executive power by the body exercising the supervisory power is not, as is held in agency theory[11], merely to control (by oversight, incentives or penalties) conflicts of interests setting directors against shareholders in an integral manner. We have instead taken a broader view of the role of corporate governance, focusing on the mechanisms framing the decisions of the directors, whose influence is a determining factor in the process of value creation. Thus, we have adopted the approach of Professors Charreaux and Wirtz in France, for whom 'the study of organisations and governance, from the perspective of efficiency associated with value creation, involves … asking ourselves about the determining factors in

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[8] Annex 1 of Order form IP/C/JURI/FWC/2009-064/LOT2/C1/SC2 – Specific terms of reference, ad hoc briefing paper on 'identifying what initiatives and instruments at EU level could enhance legal certainty in the field of supervisory board structures'.

[9] On the date of writing of this Study.

[10] MiddleNext is the association bringing together medium-sized listed French companies. The reference framework used here was developed by Professor Pierre-Yves Gomez in March 2009.

[11] Agency theory, developed in the 1930's by Berle and Means (*The modern corporation and private property*, A. A. Berle and G. C. Means, New York, Macmillan, 1932), is based on the hypothesis that the development of the capitalist corporate structure results in a risk of appropriation of power by the directors to the detriment of a dispersed and thus also weak group of shareholders. This specific situation creates risks of conflicts of interests, incurring significant 'agency costs' (the director pursuing his or her own personal interests to the detriment of those of the shareholders) and constitutes a source of inefficiency for companies.

the presumed link between the structure and the functioning of the governance system and the valued creation process'[12]. This latter concept is similar to the concept of corporate social responsibility examined in the CSR study. It is distinct from the legal concept of corporate benefit, which is well-known in French law (*intérêt social*) and goes beyond the mere interests of shareholders to encompass the interests of the company as an autonomous entity distinct from the stakeholders.

The organisation of these three powers and their interrelations is a function of the legal, historical and cultural differences which characterise company law in each of the 27 EU Member States.

Despite major national differences, the traditional view is that three main systems of corporate governance exist within the EU[13]:

- The **one-tier system**, which concentrates all or part of the executive power and the supervisory power in a single body.
- The **two-tier system**, which draws a clearer distinction and separation between the exercise of executive power and supervisory power, in different bodies.
- The **mixed system**, which offers companies a choice between these two systems.

If the company is of the one-tier type, some executive power may still be exercised by the body entrusted with the supervisory power.

In order to refine the analysis of the power of the supervisory body, we therefore have to examine the power(s) held by each individual member of this body.

Due to the variety of national legal systems existing within the EU, our analysis of the composition of the body in which supervisory power is exercised will also therefore require us to study the interactions between supervisory and executive powers.

In view of the above, we shall assume, for the purposes of this study, that the term 'supervisory board' designates the body that exercises the supervisory power, regardless of whether the company is one or two-tier. In order to avoid any possible confusion, we shall use the expression 'the supervisory body'/'body exercising the supervisory power' rather than the term 'supervisory board'.

We shall also assume that the term 'management', appearing in the call for tenders issued by the Parliament, refers to the person(s) and/or governance body exercising the executive power, corresponding to the French term '*direction*'.

[12] G. Charreaux and P. Wirtz, 'Discipline ou compétence? L'apport des perspectives cognitive et comportementale à la compréhension des mécanismes de gouvernance', Revue Française de Gouvernance d'Entreprise, n°1, 2007, p. 211; by the same authors: *Gouvernance des entreprises, nouvelles perspectives*, Economica, 2006.

[13] Aside from these systems, there are also 'hybrid' systems, which strive towards a simplified form of governance in non-listed companies, as detailed in Chapter 2

For this reason, we shall use the following terms and definitions:

Supervisory Body:	The body exercising the supervisory power, regardless of the system of corporate governance (one-tier or two-tier). In a one-tier system, some executive powers may be exercised by this supervisory body.
Management:	The physical or legal person(s) and/or the governance body which exercises the executive power.

Method used – We have opted for a method that consists of comparing current practices in force in national legislations, whether these are laws in force, codes of conduct adopted by companies and/or recommendations drafted by regulatory authorities, using a comparison chart built around a number of main assumptions, as summarised below:

- The governance practices identified as 'good' are those that contribute to creating long-term value.
- This creation of long-term value involves the organisation as a whole, as it promotes the interests of the business rather than those of shareholders or categories of shareholders alone.
- This creation of value can therefore be defined, in particular, according to the principles of Corporate Social Responsibility (CSR).

We shall therefore determine which rules, usages and practices appear to be most likely to promote the creation of long-term business value, namely, *a priori*:

- Corporate bodies structured in such a way as to provide the company with the most useful skills.
- Interaction between the bodies that aims not only to prevent abuses by one or the other, but also and above all to promote achievement of the company's purpose (aim of capital companies), while doing justice to the company's long-term interests (corporate interest), essentially consisting of defining and implementing one or more strategic actions, while observing the adapted prudential rules (risk management), the applicable legal norms (compliance), as well as full responsibility with regard to the social, economic, business and environmental role of the company as a citizen (CSR).

With regard to the legislations studied in greater detail in the second part of the Study, we have decided to focus on States that are representative of each of these three main corporate governance systems in the EU.

In order to refine this selection, we have combined this initial comparison chart with two more comparison charts in order to distinguish, within each group of States belonging to the same corporate governance system:

- Those belonging to different legal traditions

  The EU is effectively built around different legal systems, which can be traditionally distinguished as:

- Countries belonging to the civil law tradition, originating in Roman law and comprising two branches: the 'French' or 'Napoleonic' branch and the 'Germanic' branch

  The French branch, with the Napoleonic code, inspired the countries bordering France and the North Mediterranean countries, i.e. Belgium, Luxembourg, the Netherlands, Spain, Portugal, Italy and Romania.

  The Germanic branch, today represented by Germany and Austria, to which we can add the Central European countries (Estonia, Latvia, Lithuania, Poland, the Czech Republic, Slovakia, Hungary, Slovenia and Bulgaria) since the end of the socialist regime.

  However, within this group, there is a subgroup: that of the Nordic law countries of Denmark, Sweden and Finland (of the countries which are members of the EU).

- Countries belonging to the common law system, which are England, Wales and Ireland (Scotland has a mixed system combining civil and common law)

• Those that appear to us to have the most accomplished regulatory systems at this time in terms of CSR

  Thus, the CSR study shows that Austria, Belgium, Denmark, Spain, Finland, France, the Netherlands, the United Kingdom and Sweden have implemented the most accomplished regulatory systems.

This triple comparison chart has prompted us to include the following main countries in the framework of our Study:

- The **United Kingdom**, which has adopted the one-tier system and has the unusual feature of being the founder of the common law legal system, which is also used today by Wales and Ireland

- **France**, a country that has adopted the mixed system with the special feature of being a traditional civil law country and the founder of the 'French' (so-called 'Napoleonic') branch, which has inspired numerous European countries (including, as indicated above, Belgium, Luxembourg, the Netherlands, Spain, Portugal, Italy and Romania)

- **Germany**, a country which has adopted the two-tier system and whose legal system is representative of the Germanic system, which is used in countries such as Austria and is influential throughout Central Europe

- **Spain**, a country which, like the United Kingdom, has adopted the one-tier system, but which is a traditional civil law country

- **Denmark**, a country that has adopted the two-tier system and whose legal system belongs to the subgroup of Nordic law countries derived from the Romano-Germanic group. Denmark has the special feature of having one of the most accomplished regulatory systems for CSR among all European countries.

Finally, it seemed appropriate to us to add **Romania** to this chart, as this State, along with Bulgaria, was the last one to enter the EU. Romania adopted the mixed system. Therefore, it was of interest to examine how this State has adapted its national law to European requirements.

Thus our detailed analysis will allow us to compare the legislation and practices implemented within, respectively, two countries with one-tier systems (the United Kingdom, Spain), two countries with two-tier systems (Germany, Denmark) and two countries with mixed systems (France, Romania).

This selection seems all the more appropriate given that these six countries represent the following at the European level:

- 50 % of the total population of the 27 EU Member States[14]: in fact, France, Germany, Spain, Denmark and the United Kingdom alone account for 282 363 092 of the 502 477 005 inhabitants of the EU as of 1 January 2011[15].

- According to estimated data for 2010 (based on data collected between 2002 and 2007)[16], France, Germany, Spain, Denmark, Romania and the United Kingdom alone account for 9 243 663 of the 20 839 226 companies in the EU[17].

For the purposes of illustration, among these 9 243 663 companies in France, Germany, Spain, Denmark, Romania and the United Kingdom, 25 315 are companies with over 250 employees (out of the 43 037 companies with over 250 employees in the EU).

However, our analysis will not be limited to these States. As good practices have been identified in other EU States, we shall take these up and examine them as well.

This will allow us to take into account countries from different legal traditions which have entered the EU more recently and who opened themselves up to the market economy at that time. This will also enable us to draw information from the transposition into their national laws of the requirements for integration into the EU and, in the final analysis, to appreciate the full range of diversity and richness of company law in the Member States.

The limits of the Study – In light of the number of different company forms existing in the EU, our study shall be limited to joint-stock companies as indicated for each EU Member State in Annex 1 of Regulation (EC) of 8 October 2001 on the Statute for a European company (SE)[18]. However, we have noticed that certain EU countries feature simplified forms in the category of joint stock companies (such as the *société par actions simplifiée* (simplified public limited liability company) in France, which competes with the French *société anonyme* (joint stock company) and is generally adopted by non-listed French companies). Where applicable, we shall mention these simplified forms of joint stock companies in our study. We shall also include the SE in our study. On the other hand, we shall not address limited liability companies that do not issue shares as listed in Annex II of Council Regulation (EC) No 2157/2001, nor any other company forms, such as partnerships (e.g. the *société en nom collectif* (general partnership) and the *société civile* (civil law partnership) in France) or those devoid of legal personality (e.g. the *société de fait* (de

[14] On the date of writing of this Study.
[15] Eurostat, Population as of 1 January 2011, 2011 figures.
(http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&language=en&pcode=tps00001&tableSelection=1&footnotes=yes&labeling=labels&plugin=1).
[16] European Commission, Enterprise and Industry, SME Performance Review
(http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/performance-review/index_en.htm#h2-2.
[17] http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/performance-review/files/supporting-documents/2010-2011/annual-report_en.pdf - p. 9.
[18] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE).

facto company) or *société en participation* (holding company) in France).

According to Annex 1 of call for tenders IP/C/JURI/FWC/2009-064/LOT2/C1/SC2:

'The report shall be made up of three parts. The first part will briefly cover existing EU law, both general and sectorial, as well as future initiatives. The second part will address the applicable law and future initiatives of the selected EU member states, including measures based on EU legislation and the status of their implementation. The third part will contain recommendations for possible EU initiatives, including legislative initiatives, (in terms of the structure of the supervisory body), drawing from the second part, in particular the implementable initiatives which may be useful in enhancing good governance. The more specific issues to be examined include rules for membership of the bodies in terms of:

- Gender equality
- Employee representation
- Including the role of independent directors and non-executive directors
- As well as risk management and collective responsibility, especially with regard to financial reports

At the same time, the Study must endeavour to provide critical responses to the issue of sectorial instruments versus horizontal instruments, and whether the sectorial approaches (such as in the area of financial institutions) could serve as a model for horizontal corporate governance instruments.

After examining the main elements of EU law (Chapter 1), the Study shall proceed to review the legal provisions and initiatives of a selection of Member States (Chapter 2), before attempting to draft proposals for a European initiative based on examples of good normative practices[19] identified in specific Member States (Chapter 3).

[19] Within the framework of this report, aside from the exceptions mentioned, we have not examined any of the good practices for corporate governance spontaneously implemented by companies from the States in question which are not part of a hard-law or soft-law regulatory framework).

1. REGULATIONS FROM EUROPEAN UNION INSTITUTIONS

The first European rules on corporate governance pertained to transparency. Plans were then made to harmonise corporate structures, but ended in failure. New provisions were then implemented enabling a different conception of EU company law.

1.1. INITIAL HARMONISATION WITH TRANSPARENCY RULES

Three directives adopted relatively early contain key provisions regarding transparency. These are intended to provide better information both to the executive power and to third-parties, in particular by means of:

- Harmonisation of means of disclosure and the nature of the information to be made public
- A common regulatory framework for financial audit procedures
- Establishment of rules for responsibility of the members of governance bodies

All while taking into account the diversity of national systems.

This system was supplemented with recommendations for listed companies pertaining, in particular, to questions of remuneration.

1.1.1. THE FIRST COUNCIL DIRECTIVE (DIRECTIVE 68/151/EEC) REPLACED BY DIRECTIVE 2009/101/EC

Article 50 of the TFEU enables adoption of directives to eliminate restrictions on the freedom of establishment. It is on this legal foundation (former Article 54 of the Treaty of Rome) that the very first company law directive was drafted and then adopted on 9 March 1968[20]. After several amendments, it was codified in Directive 2009/101/EC of 16 September 2009[21] (the 'First Directive').

The subject matter of the First Directive on company law, less than ten years after the Treaty of Rome came into force, was to harmonise, in particular, the highly divergent disclosure rules existing within the six Member States of the European Economic Community at the time: Belgium, France, Italy, Luxembourg, the Netherlands and the Federal Republic of Germany[22]. Today, this Directive pertains to joint stock companies, limited partnerships with share capital, simplified public limited liability companies and limited liability companies.

In order to guarantee a degree of legal certainty, the directive has enabled the reduction of disparities among national legislations related to means of disclosure, the nature of the

[20] Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, repealed by Directive 2009/101/EC.

[21] Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community.

[22] Van Ommeslaghe P. (1969), *La première directive du Conseil du 9 mars 1968 en matière de sociétés*, Cahiers de droit européen, Bruylant, pp. 524-543.

information to be made public, or even penalties for failure to meet the disclosure obligation[23].

Harmonised disclosure rules ensure that information is disclosed to third-parties wishing to establish relations with a company. The essential elements of the company must therefore be disclosed. Referring to the 1968 Directive and its subsequent amendments, the 2009 Directive[24] lists these documents, which are:

- The company's deed of incorporation or articles of association, if separate from the deed of incorporation
- Any subsequent amendments to the deed of incorporation or the articles of association
- Appointments to and terminations of offices, as well as the identity of the natural or legal persons who are authorised to represent the company in dealings with third parties and in legal proceedings, and those involved in the management or supervision of the company[25]
- Financial and accounting information

These elements must be disclosed, according to the latest Directive, in a computerised public register, in a national bulletin (which may be maintained in electronic form) and must sometimes be included (in whole or in part) in letters and order forms (both on paper and in electronic form)[26]. The electronic medium facilitates and accelerates access to company information.

Appropriate penalties must be instituted by the States for any failure to disclose information, because non-binding measures cannot suffice effectively to penalise failures to disclose a balance sheet or profit and loss account.

The Directive also addresses the validity of the company's commitments and the causes of its nullity.

From this perspective, it ensures the validity of commitments made on behalf of the company that are unconnected with the purpose of the company. It also restricts the cases and the effects of nullity of the company.

In accordance with the High Level Group of Independent Stakeholders on Administrative Burdens[27], and in light of the Resolution of 7 September 2010 of the European Parliament[28], the Commission adopted a proposal for a Directive on 24 February 2011 on interconnection of the business registers of Member States[29]. This draft is currently the subject of a provisional agreement between the Parliament and the Council. It will amend

[23] Habersack M. (2006), in Mustaki G. et Engammare V., *Droit européen des sociétés*, Bruylant, Brussels, p. 108.
[24] Article 2, Directive 2009/101/EC.
[25] Following a ruling by the ECJ, *Haaga GmbH*, 12 November 1974, this information must be recorded in an official register or collection in order to ensure legal certainty in relations between citizens of different Member States, in Mustaki G. and Engammare V., *Droit européen des sociétés*, Bruylant, Brussels, p. 102.
[26] In particular, the European Parliament (2003), Position of the European Parliament resolved on the first reading of 12 March 2003 for adoption of Directive […] of the European Parliament and of the Council modifying Directive 68/151/EEC of the Council, with regard to publication obligations for certain forms of companies.
[27] Opinion of the high-level working group of independent stakeholders on administrative costs (the 'Stoiber group') – Reduction of administrative costs – Priority area of annual accounts/company law, 10 July 2008.
[28] Resolution of the European Parliament of 7 September 2010 on interconnection of business registers [2010/2055(INI)].
[29] Proposal for a directive of the European Parliament and of the Council amending Directives 89/666/EEC, 2005/56/EC and 2009/101/EC as regards the interconnection of central, commercial and companies registers [COM(2011) 79 final].

Directive 2009/101/EC slightly, specifically Article 2, by adding a requirement for a deadline of 15 days to disclose an amendment to the aforementioned documents subject to disclosure.

1.1.2. THE SECOND COUNCIL DIRECTIVE (DIRECTIVE 77/91/EEC)

On 13 December 1976, the Council adopted Directive 77/91/EEC on company law (the 'Second Directive'), more specifically formation of public companies and the maintenance and alteration of capital[30].

Pursuing the objective of transparency, European legislators stipulated the minimum contents of the deed of incorporation or articles of association which must be made public, according to the First Directive.

Thus, the deed of incorporation or the articles of association must at least include the type, name, purpose and duration of the company, where applicable. They must also include (where not specified by law) the information on the company's internal organisation: name, procedures for appointment of corporate bodies and distribution of powers among them[31].

The Directive also sets out significant harmonised rules on alteration of capital (in particular on preferential subscription rights).

1.1.3. THE FOURTH COUNCIL DIRECTIVE (DIRECTIVE 78/660/EEC)

Directive 78/660/EEC on company law (the 'Fourth Directive'), adopted on 25 July 1978[32] and amended several times, on the annual accounts of certain types of companies[33]. This contains provisions on disclosure as well as on the responsibilities of members of the company bodies and the auditing of financial statements.

The Directive defines the minimum contents of the annex to the annual accounts[34]. This annex must state the remuneration received by company officers for the financial year. Additionally, the annex must also state the advances or loans granted to these same persons, indicating the interest rate, the terms and conditions, as well as any sums already repaid.

The Directive also specifies the contents of the management report. In this respect, since the amendment introduced by Directive 2006/46/EC, listed companies must include a corporate governance statement in this.

The corporate governance statement must state the governance code to be applied by the company, and/or the one it has opted to apply, and/or, finally, the governance practices that it applies which are not required by national law. In the first two cases, the company must also state the location of the texts available for public inspection. In the latter case, the company must make the practices it has decided to adopt accessible to the public.

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[30] Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, amended by Directives 92/101/EEC, 2006/68/EC, 2009/109/EC.
[31] Articles 2 and 3 of Directive 77/91/EEC.
[32] Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies, amended by Directives 2003/51/EC and 2006/46/EC.
[33] The list of these companies is given in Article 1 of the Directive.
[34] Article 43 of Directive 78/660/EEC.

If the company deviates, in whole or in part, from the corporate governance code(s) which it must apply or which it has opted to apply, then it is obligated to state the reasons why (the 'comply or explain' principle first introduced into Community law by Directive 2006/46/EC).

Additionally, the internal control system and risk management system must be described in general terms.

Finally, the membership and the functioning of the management and supervisory bodies and any committees must be detailed in the corporate governance statement[35].

In accordance with the First Directive, the annual accounts as well as the management report must be made public[36].

Provisions introduced by Directive 2006/46/EC also pertain to the responsibilities of the members of company bodies for drafting and disclosing the (consolidated) annual accounts, management report and/or the corporate governance statement.

Finally, as per Article 51, the annual accounts must undergo an audit by statutory auditors. These auditors shall also verify the consistency of the management report with the annual accounts from the same financial year[37]. Article 51a then details the contents of the report by the statutory auditors.

The 2006 Directive extends the area of application of the 1978 Directive to credit and financial institutions and insurance companies[38].

On 25 October 2011, the Commission issued a proposal for a Directive repealing, in particular, Directive 78/660/EEC. This aims to reduce administrative costs for small enterprises and also provides for a different system depending on the size of the company. Henceforth, disclosure of the items pertaining to director remuneration in the annex to the financial statements is only required for large and medium-sized enterprises[39]. Moreover, small enterprises will no longer be subject to account audits. A debate in the Council of the Union was held on 20 February 2012 and the vote on this text by the European Parliament at first reading is scheduled for 10 September 2012[40].

1.2. RELATIONS BETWEEN THE SUPERVISORY BODY AND THE MANAGEMENT

In a major action plan in 2003, the Commission decided to adopt a new approach to corporate governance issues after several proposals for the Fifth Directive failed. This proposal for a Directive was intended to harmonise the structures of joint stock companies and the regulations on the power and obligations of their bodies.

1.2.1. AN ATTEMPT TO HARMONISE COMPANY STRUCTURES

In order to pursue the joint-stock company harmonisation process initiated by the Second Directive, a proposal for a Directive was issued in 1972. This pertained to the structure of

[35] Article 46a, Section 1, a), b), c) and f) of Directive 78/660/EEC as amended by Directive 2006/46/EC.
[36] The management report may forego the formalities of publication, but it must be available at the company's registered offices (Article 47, Section 1 of Directive 778/660/EEC.
[37] Companies whose figures do not exceed certain limits may be exempt from these two obligations.
[38] Articles 3 and 4 of Directive 778/660/EEC.
[39] Article 17 of the proposal for a directive of the European Parliament and of the Council on annual financial statements, consolidated financial statements and reports associated with certain types of companies [COM(2011) 684 final].
[40] http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2011/0308(COD)&l=en.

the joint stock company. After several amendments, the bill was eventually abandoned in 2001.

1.2.1.1. Contents of the first proposal for the Fifth Directive

The proposal for a Directive of 1972 came to regulate the governance of joint-stock companies almost entirely, this being considered a priority because joint-stock companies operate across national boundaries[41].

To begin with, a decision was made to impose the two-tier system, considered to be better at distinguishing the responsibilities of individuals invested with executive power from those of individuals invested with supervisory power. As a result of this choice, the governance of joint-stock companies came to be based on three distinct bodies: the body exercising executive power, the body exercising supervisory power and the shareholders' meeting.

The method of appointment to these bodies was also specified: The members of the management body had to be appointed by the supervisory body and the members of the supervisory body either by the shareholders' meeting, with the participation of employees (for companies with over 500 employees) or by the body itself.

Plurality of offices was prohibited for members of management bodies and supervisory bodies.

The draft of the Directive also required the supervisory body to authorise some of the decisions taken by the management body.

The Directive also addresses the liability of members: civil, joint and several, and unlimited.

In addition to this, the shareholders' meeting had to be convened at least once a year, at any time, either at the request of the management body or at the request of certain shareholders. Specific rules applied to meetings and the agenda of the shareholders' meeting and its resolutions were subject to nullification. Finally, only independent persons were permitted to audit the company accounts.

1.2.1.2. Abandonment of the Fifth Directive (1972–2001)

In view of opposition from the Member States to the adoption of this Directive, the Commission, based on various recommendations from the European Parliament, proposed to leave the option to choose between the two-tier and one-tier system, rather than eliminate the one-tier system. This second proposal for a Fifth Directive included governance rules for both systems, modified with respect to the first proposal, in particular, in terms of information disclosed to members, the authorisations that they grant, the functioning of the shareholders' meeting, and auditing.

In addition to this, it recognises four models for employee participation in order to take into account the diversity of national systems.

In 1991, a new proposal for an amendment to the Fifth Directive was issued by the Commission on limiting or excluding the right to vote for certain shares[42].

[41] Proposal for a Fifth Directive to coordinate the guarantees required of companies in the Member States, in the sense of Article 58(2) of the Treaty, to protect the interests both of partners and of third parties concerning the structure of public limited companies and the powers and obligations of their bodies.

[42] Third amendment to the proposal for a Fifth Council Directive based on Article 54 of the EEC Treaty concerning the structure of public limited companies and the powers and obligations of their organs [COM(91) 372 final – SYN 3], http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1991:321:0009:0012:EN:PDF.

Admittedly, the proposal for the Directive in its second and third versions no longer imposed the two-tier system on joint stock companies in the Member States. Differences of opinion persisted with regard to employee involvement, even if more flexible. The proposal for the Directive, which was pending and no longer up-to-date, was withdrawn in 2001 by the Commission, applying its policy of simplification and improvement of Community regulations.

1.2.2. A NEW APPROACH TO COORDINATION

Following the failure of the proposal for the Fifth Directive, the High Level Group of Company Law Experts issued a report entitled 'A Modern Regulatory Framework for Company Law in Europe' addressing corporate governance[43]. In response to this report, the Commission notified the European Council and the Parliament of its action plan[44]. In this communication of 21 May 2003, the Commission found, following a number of scandals, that sound corporate governance practices would boost the effectiveness and competitiveness of businesses, as well as the rights of shareholders and third-party protections, especially for investors[45].

Taking greater account of national legislation (as a result of decisions made following the Treaty of Maastricht), the Commission highlighted the importance of a modernised EU regulatory system in an overall approach to strengthening the internal market. Rejecting the creation of a European corporate governance code and recourse to regulations, the Commission recommended the adoption of essential rules and principles within directives and recommendations.

The texts have taken into account the studies of the European Corporate Governance Forum[46] and of the non-governmental Group of experts on corporate governance and company law[47], produced on 15 October 2004 and 28 April 2005, respectively.

1.2.2.1 The recommendations

By adopting recommendations, the Commission is encouraging Member States to follow a certain number of rules, but is not forcing them to do so.

A) Commission Recommendation of 14 December 2004 fostering an appropriate regime for the remuneration of directors of listed companies

On 14 December 2004, the Commission adopted a recommendation on the remuneration policy for board members in listed companies[48]. The principle is that investor confidence will increase if transparency of information is guaranteed[49].

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43 Report of the high-level group of company law experts – 'A modern regulatory framework for company law in Europe', 4 November 2002, http://ec.europa.eu/internal_market/company/docs/modern/report_en.pdf

44 Communication from the Commission to the European Parliament and the Council - Modernising Company Law and enhancing Corporate Governance in the European Union – A plan to move forward [COM(2003) 284 final].

45 At the turn of the 21st century, several scandals effectively brought to light the role of director remunerations and demonstrated the need to act to increase transparency (the Parmalat case, or even Vivendi and Skandia). Report on the application by Member States of the EU of the Commission Recommendation on directors' remuneration, 13 July 2007 [SEC(2007) 1022], Resolution of the European Parliament on corporate governance and supervision of financial services: the Parmalat case, 12 February 2004.

46 Commission Decision of 15 October 2004 establishing the European Corporate Governance Forum. Its mandate expired in July 2011.

47 Commission Decision 28 April 2005 establishing a group of non-governmental experts on corporate governance and company law, amended by Commission Decision 2008/358/EC.

48 Commission Recommendation of 14 December 2004 fostering an appropriate regime for the remuneration of directors of listed companies (2004/913/EC).

49 Recital 3 of the recommendation.

Under this recommendation, listed companies are required to publish a remuneration policy statement. This can be incorporated into a report exclusively dedicated to it or included in the annual accounts and the management report and appear on the company website[50].

Recommendation 2004/913/EC specifies the minimum contents of this remuneration statement. In particular, it must include breakdown of the remuneration, on the link between remuneration and performance and on the main parameters and justifications for annual bonuses.

This remuneration statement should be voted on by shareholders during the annual shareholders' meeting[51].

In addition to this, the annual accounts, their annex or the remuneration report must disclose the individual remunerations received by company officers[52].

Finally, monetary benefits in the form of shares, share options or other rights to acquire shares should be approved by a resolution of the shareholders at the shareholders' meeting.

B) Commission Recommendation of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board

In accordance with the communication of 2003, the Commission issued a second recommendation in February 2005[53]. This recommendation aims to guarantee an adequate degree of independence for the bodies of listed companies. It promotes convergence of national governance codes in order to achieve an equivalent level of protection and transparency for investors in the EU.

This includes rules for equality among persons exercising supervisory power and those exercising executive power.

According to the same recommendation, appointment, remuneration and audit committees[54] should be created since the supervisory body plays a role in these areas[55].

In addition to this, this body should self-evaluate and publish, at least once a year, the information on its organisation including any findings from its self-evaluations[56].

The recommendation also specifies various procedures for appointing, dismissing and determining the eligibility of members of the supervisory body[57].

Finally, a number of recommendations are made regarding the independence of the members of supervisory bodies. According to the text of the recommendation, definition of the independence criteria should be left to the States, but evaluation of independence should fall to the supervisory body itself[58].

The financial crisis has demonstrated the inadequacy of these recommendations. For this

[50] Point 3.1. of Recommendation 2004/913/EC.
[51] Point 4. of Recommendation 2004/913/EC.
[52] Point 5.1. of Recommendation 2004/913/EC.
[53] Commission Recommendation of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board (2005/162/EC).
[54] Following Directive 2006/43/EC, formation of an audit committee is compulsory in listed companies.
[55] Point 5 of Recommendation 2005/162/EC.
[56] Points 8 and 9 of Recommendation 2005/162/EC.
[57] Points 10 and 11 of Recommendation 2005/162/EC.
[58] Point 13 of Recommendation 2005/162/EC.

reason, the ECOFIN council, which met on 2 December 2008, has urged the Commission to prepare new recommendations to supplement the two previous ones. Additionally, the European Parliament has stressed that more restrictive instruments are a guarantee of greater legal certainty[59].

C) Commission Recommendation of 30 April 2009 complementing Recommendations 2004/913/EC and 2005/162/EC as regards the regime for the remuneration of directors of listed companies

One of the aims of the 2009 recommendation[60] on remuneration of directors of listed companies is to reconcile director remuneration with the long-term interests of the company.

The recommendation first addresses the structure of the remuneration. The principle of proportionality of remunerations between the members of the company's management bodies should be applied taking into account, in particular, remunerations allotted to company staff.

Furthermore, severance packages (or 'golden parachutes') should be limited or excluded in cases of failure. A balance should then be struck between fixed and variable remuneration, with the variable component subject to pre-defined performance criteria[61].

In order to ensure long-term company viability, the Commission recommends:

- A balance between long-term and short-term performance criteria
- Postponement of disbursement of the variable component of the remuneration
- Introduction of a minimum period of time before final receipt of shares or options on shares
- Retention of some of the shares until the termination of employment
- Repayment of variable remuneration based on incorrect data

To prevent possible conflicts of interests, remuneration of members of the supervisory body by granting of options on shares should not be permitted.

Finally, the recommendation urges shareholders to exercise their powers by voting on remunerations[62].

Lastly, a number of recommendations pertain to remuneration committees. At least one member of these committees should have adequate knowledge and experience in the area of remuneration. Members of these committees should attend the shareholders' meeting when remuneration is on the agenda. Their presence allows explanations to be provided to the shareholders.

The consultants advising the remuneration committees should not advise other company bodies[63].

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[59] European Parliament Resolution of 18 May 2010 on deontological questions related to companies' management [2009/2177(INI)].
[60] Commission Recommendation of 30 April 2009 complementing Recommendations 2004/913/EC and 2005/162/EC as regards the regime for the remuneration of directors of listed companies (2009/385/EC).
[61] Point 3.2. of Recommendation 2009/385/EC.
[62] Point 6.1. of Recommendation 2009/385/EC.
[63] Points 7, 8 and 9 of Recommendation 2009/385/EC.

This recommendation applies to board members of listed financial institutions. Nevertheless, the Commission has deemed it useful to prepare another recommendation exclusively applicable to financial services.

D) Commission Recommendation of 30 April 2009 on remuneration policies in the financial services sector

The Recommendation of 30 April 2009[64] pertains to the entire financial sector: regardless of the size of the financial institution, whether or not the company is listed, and any of the people whose activities affect the risk profile of the financial institution.

It includes principles pertaining to the structure of remuneration, the drafting and implementation of remuneration policy, information on this remuneration policy which must be disclosed to the relevant stakeholders and the prudential control system. A proper balance between these different elements should ensure effective risk management as well as long-term viability.

With regard to the structure of the remuneration, a proper balance should be struck between the fixed and variable components. The fixed component should be of an adequate amount. The variable component should be linked to performance and payment of the main portion of the bonus should be deferred. Performance measurement criteria should be implemented. Remunerations disbursed based on incorrect data should be repaid.

Remuneration policies should include measures to avoid conflicts of interests, and should be internally transparent, clear and well documented.

The body exercising the supervisory power in the financial institution should be responsible for supervising application of the remuneration policy for all persons in the institution whose professional activity affects the financial organisation’s risk profile. This task should be performed with the involvement of the persons in charge of internal control, human resources and the shareholders. All persons tasked with drafting and implementation of remuneration policies should be independent.

The remuneration policy should be updated regularly as changes occur in the entity’s circumstances. Finally, staff members should have access to the general principles governing the remuneration policy applicable to them. They should be informed in advance of the criteria to be used to determine their remuneration as well as the evaluation procedure.

With regard to prudential supervision, the supervisory authorities should ensure application of principles for good remuneration policies and the suitability of remuneration policies for effective risk management.

Transposed into internal law, the principle of remuneration policies should take into account the size, nature and complexity of the financial institution’s activities.

These recommendations were supplemented with Directives, which are legally binding instruments. Basically, the recommendations can describe the best practices in detail, whereas the Directives, by definition, must be limited to general principles[65].

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[64] Commission Recommendation of 30 April 2009 on remuneration policies in the financial services sector (2009/384/EC).

[65] Communication from the Commission accompanying Commission Recommendation complementing Recommendations 2004/913/EC and 2005/162/EC as regards the regime for the remuneration of directors of listed companies and Commission Recommendation on remuneration policies in the financial services sector, 30 April 2009 [COM(2009) 211 final], p. 6.

1.2.1.2. The Directives

Elements of corporate governance appear in several directives. The Directives, which are legally binding instruments, essentially pertain to financial institutions in a broad sense.

A) Directive 2002/14/EC of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community

Prior to the 2003 Commission action plan, Directive 2002/14/EC[66] addressed employee information and consultation.

This Directive applies to companies with at least fifty employees or to institutions with at least twenty employees in a Member State.

This provision of information and consultation pertain to three areas of business:

- Developments of an economic, financial and strategic nature
- The structure and foreseeable development of the job and the measures resulting from this
- The decisions which may result in significant changes in the organisation of the work and in contractual relationships

B) Directive 2004/25/EC of 21 April 2004 on takeover bids

According to Directive 2004/25/EC[67], the supervisory body or the management of the company which is the object of the takeover bid must act in the interests of the company and cannot deny shareholders the option to decide on the merits of the bid[68].

It must disclose its reasoned opinion on the bid, specifically evaluating it with regard to all of the company's interests[69]. During a bidding period, the management of the company which is the object of the bid must receive prior approval from the shareholders' meeting before taking any action which could move the bid forward[70].

According to the Directive, listed companies, within the framework of share takeover bids, are obligated to disclose detailed information on the means of appointment and replacement of members of the corporate bodies, their respective powers, and especially the power to issue or repurchase shares, agreements between the company and members of its bodies or its staff providing for compensation in the event of resignation or dismissal without valid reasons or if employment is terminated due to a takeover bid. This information must be included in the company's annual report[71].

[66] Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community.
[67] Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids.
[68] Article 3, Section 1c) of Directive 2004/25/EC.
[69] Article 9, Section 5 of Directive 2004/25/EC.
[70] See also Article 11 on neutralisation of restrictions.
[71] Article 10 of Directive 2004/25/EC.

C) Directive 2004/39/EC of 21 April 2004 on markets in financial instruments (MIF)

Directive 2004/39/EC[72] applies to investment institutions and regulated markets. As for governance, the persons managing the investment company's activities, according to this Directive, must be 'of sufficiently good repute and sufficiently experienced' in order to ensure sound management of the firm[73]. The same applies to persons managing activities and operations of a regulated market[74].

In addition to this, investment firms must have sound administrative and accounting procedures, internal control mechanisms and effective procedures for risk assessment[75].

Some measures must be implemented to detect conflicts of interests between directors, employees and affiliated agents, in particular. Measures must also be provided for conflicts of interests and risk management by regulated markets for themselves.

This Directive was the subject matter of a proposal for recasting by the European Commission[76] and the vote in Parliamentary committee has been set for 9 July 2012.

This proposal expands the area of application of the provisions of the MIF Directive to include the sale of structured deposits, with or without investment advice, by financial institutions.

The proposal is also intended to reinforce the provisions on the profile, functions and responsibilities of members of the board of an investment firm or a market operator. For instance, it provides for the need to dedicate adequate time to the performance of their duties, to provide resources for training these persons, or even setting up an appointment committee[77].

Finally, effective penalties must be provided, including dismissal of members of the board.

D) Directive 2004/109/EC of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market

Directive 2004/109/EC (also known as the 'Transparency' Directive)[78] harmonises transparency requirements for listed companies. It aims to ensure a continuous flow of information from issuers of securities to investors.

The issuer publishes its annual financial report and a semi-annual financial report[79], and national provisions must be provided regarding at least the issuer's responsibility, or that of corporate bodies, for this information for disclosure[80].

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[72] Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC.
[73] Article 9 of Directive 2004/39/EC.
[74] Article 37 of Directive 2004/39/EC.
[75] Article 13, Section 5 of Directive 2004/39/EC.
[76] Proposal for a directive of the European Parliament and of the Council on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council (recast) [COM(2011) 656 final].
[77] Articles 9 and 48 of the proposal for directive [COM(2011) 656 final].
[78] Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC amended by Directive 2010/78/EU of 24 November 2010.
[79] Articles 4 and 5 of Directive 2004/140/EC. Exemptions are provided in Article 8.
[80] Article 7 of Directive 2004/140/EC.

A certain number of provisions also pertain to the national supervisory authority which must be informed of the publication of all regulated documents, amendments to the statutes, etc. Its competencies must enable it to demand disclosure of information from auditors, issuers, shareholders and directors of the issuer and to impose penalties in cases of violations of the Directive. Finally, the information may be passed on to the European Securities and Markets Authority and to the European Systemic Risk Board.

A proposal to amend Directive 2004/109/EC was drafted by the European Commission on 25 October 2011[81]. If it is adopted in its current terms by the legislature, it will reduce the administrative burden associated with being listed on regulated markets by eliminating the publication requirement for interim management statements and/or quarterly reports. This information should only be published in response to a request from investors.

E) Directive 2006/43/EC of 17 May 2006 on statutory audits of annual accounts and consolidated accounts

With regard to governance, Directive 2006/43/EC[82], based on a recommendation[83], makes it obligatory for listed companies to set up an audit committee within their organisations. This requirement also applies to credit institutions and to insurance firms, but the Member States may exempt these.

These audit committees may be made up of members of supervisory bodies and/or members appointed by the general meeting of shareholders, with the understanding that a member must at least be independent and competent in accounting and/or auditing. It is still permissible for the supervisory body to take on the duties of the audit committee if the chairperson of this body does not exercise the executive power.

Specifically, the audit committee's competencies include:

- Monitoring the trends in the financial information
- Monitoring the effectiveness of internal control systems, internal auditing and risk management.
- Monitoring the statutory audit of annual accounts and consolidated accounts.

The power to recommend appointment of the statutory auditor[84]. This Directive is currently the subject matter of a draft amendment by way of a proposal for a Directive and a Regulation of the Commission of 30 November 2011[85]. The aforementioned provisions would therefore be part of the Regulation dedicated exclusively to the statutory audit of public interest entities. Policies and procedures should therefore be provided by the auditors in order to ensure their independence and to implement internal quality control systems. For two years after completion of their duties, auditors may not hold a management post in the audited entity, nor may they become a member of its audit committee or its supervisory body. If the auditor's independence is subject to any risks,

[81] Proposal for a directive of the European Parliament and of the Council amending Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and Directive 2007/14/EC of the Commission [COM(2011) 683 final].

[82] 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.

[83] Point 5 of Recommendation 2005/162/EC.

[84] Article 41, Sections 1, 2 and 3 and Article 42 of Directive 2006/43/EC.

[85] Proposal for a directive of the European Parliament and of the Council amending Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts [COM(2011) 778 final] and Proposal for a Regulation of the European Parliament and of the Council on specific requirements regarding statutory audit of public-interest entities [COM(2011) 779 final].

then the auditor must evaluate these, then confirm its independence to the audit committee.

The proposal for a Regulation specifies that a report that has been purged of certain information would be disclosed to the public. The full report from the auditor, intended for the audit committee (and also submitted to the company's management), should provide information on the audit conducted and the situation of the company in question (such as its capacity to continue its activities).

The proposal for regulation will reinforce existing rules on the membership and competencies for the recommendation of the committee.

According to the Commission, the European Securities and Markets Authority (ESMA) should publish guides on, in particular, the supervisory activities of audit committees[86].

F) Directives of 14 June 2006 (2006/48/EC) relating to the taking up and pursuit of the business of credit institutions and 2006/49 on the capital adequacy of investment firms and credit institutions

After many amendments, Directive 2006/48/EC[87], in its condensed version, gives the requirement for a sound corporate governance system in credit institutions: Transparency of the organisational structure, which includes a transparent and well defined distribution of responsibilities, effective procedures enabling detection, management, verification and disclosure of risks to which the institution is or may be subject, effective means of internal control and finally strictly controlled remuneration policies ensuring sound and effective risk management.

The regularly published remuneration practices are collected for comparison by national supervisory authorities before being passed on the Committee of European Banking Supervisors. This committee verifies the existence of guidelines (which must take into account the 2009 recommendation) for satisfactory remuneration policies.

In the event of failure to adhere to the provisions of the Directive, the supervisory authorities may, for instance, request reduction of the risk or limitation of the variable portion of the remuneration (percentage of total net income)[88].

Finally, Annex III of Directive 2006/48/EC addresses the handling of counterparty credit risk.

In order to establish risk management policies, it is necessary to take into account the market risk, the liquidity risk and the legal and operational risks associated with the counterparty credit risk.

Significant resources are dedicated to this activity, in which the management must actively participate.

Directive 2006/49/EC[89], for its part, is intended to cover the risks of covering their financial commitments by requiring a minimum capital sum for institutions.

The institutions are subject to oversight from the national authorities and, to this end, are

[86] Point 3.3.4. of the proposal for regulation [COM(2011) 779 final].
[87] Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast), amended by Directive 2010/76/EE of 24 November 2010.
[88] Article 136 of Directive 2006/48/EC.
[89] Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions (recast).

required to disclose the necessary information to them.

With the aim of boosting confidence in the financial markets sector and ensuring its proper functioning, the Commission proposed, on 20 July 2011, for the sake of consistency, merging Directives 2006/48/EC and 2006/49/EC into a single Directive[90]. This proposal for directive governs the taking-up of deposit receipt activities. It is accompanied by a proposal for a regulation of the Commission on the same day governing the activity of the credit institutions and investment firms[91].

Corporate governance is addressed in this, in the sense that it is reinforced. In the desire to reform the financial markets and its crisis prevention programme, the Commission, with the support of the Parliament[92], has made corporate governance its central concern.

By virtue of this proposal, suitable penalties should be provided by national legislations in cases of infringement by natural or legal persons, including dismissal of members of the management, imposition of administrative pecuniary sanctions and publication of these sanctions.

G) Directive 2007/36/EC of 11 July 2007 on the exercise of certain rights of shareholders in listed companies

Directive 2007/36/EC[93] covered the rights of shareholders, specifically their right to vote during general meetings.

The Directive expands voting by proxy. As for the proxies, it introduces limitations on the rights they may exercise in situations of conflicts of interest.

H) Directive 2009/65/EC of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)

According to Directive 2009/65/EC[94], investment and management firms are subject to obligations to disclose information to investors. Thus, a prospectus and reports featuring specific information, in particular on risks, must be published regularly.

Then, on the one hand, some rules limit conflicts of interests between the management firm and its clients, between two clients, between a client and a UCITS or between two UCITS in order to prevent them harming the interests of the UCITSs or the clients.

On the other hand, risk management should enable a management or investment firm to verify and measure the risk associated with the positions and the contribution of the positions to the general portfolio risk profile.

[90] Proposal for a Directive of the European Parliament and of the Council on the access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms [COM(2011) 453 final].
[91] Proposal for a Regulation of the European Parliament and of the Council on prudential requirements for credit institutions and investment firms [COM(2011) 452 final].
[92] European Parliament resolution of 7 July 2010 on remuneration of directors of listed companies and remuneration policies in the financial services sector [2010/2009(INI)].
[93] 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.
[94] Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS).

I) Directive 2009/138/EC of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance

Directive 2009/138/EC[95] features some provisions on the responsibility of corporate bodies ('final responsibility').

Once again, elements of the Directive addressed the need for a governance system that is effective, transparent and regularly re-examined internally.

Similarly, risk management policies[96] are reviewed once a year and approved by the management and the supervisory body.

Sufficiently thorough national oversight is still applied.

The Directive details the minimum contents of the internal risk and solvency assessment, along with the internal control and auditing system.

Executive positions and all other essential positions must be filled by competent and reputed persons. The identity of these persons must be communicated to national authorities.

Finally, we should note that the solvency and financial situations of insurance firms must be made public[97], with some exceptions.

1.2.2.3. Current reflections

A) The Green Paper – Corporate governance in financial institutions and remuneration policies of 2 June 2010

In order to improve the effectiveness of corporate governance for financial institutions, whose weaknesses were uncovered by the financial crisis, the Commission announced in a Communication on 4 March 2009[98] that it would commit to an in-depth examination of corporate governance practices in the financial sector, after which it would decide on the appropriateness of taking legal measures or other measures.

For this, it initiated a public dialogue in June 2010 to propose courses of action. This initiative is at the heart of the work by the Commission to prevent crises and has been an essential part of the financial markets reform programme.

In this way, the courses of action given in the green paper on corporate governance in financial institutions and remuneration policies of 2 June 2010[99] can supplement the other sector-specific texts mentioned above (Directives 2006/48/EC, 2006/49/EC, 2009/138/EC, Recommendations 2005/162 and 2009/384).

As stated by the Commission in the introduction to the green paper, special provisions must apply to financial institutions.

In addition to this, the questions posed in the dialogue phase basically concern large

[95] Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast).
[96] Risk management covers areas specific to the insurance sector (Article 44).
[97] Article 51 of Directive 2007/36/EC.
[98] Communication from the Commission to the Spring European Council, 'Driving European recovery', 4 March 2009 [COM(2009) 114 final].
[99] Green Paper – Corporate governance in financial institutions and remuneration policies of 2 June 2010 [COM(2010) 284 final].

financial institutions.

The ideas to help prevent new crises include:

- The means to achieve better performance and composition of supervisory bodies at financial institutions that are better able to exercise effective supervision
- Mechanisms to instil a culture of risk that guarantees consideration of long-term interests at all levels of the financial institution
- Tools to ensure enhanced participation from shareholders[100], financial supervisory authorities and external auditors
- Amendments to remuneration policies at financial firms to disincentivise taking excessive risks

Specifically, the green paper explores questions on creation, within the supervisory body, of a committee specialising in risk supervision, or even long-term cooperation between this body and the supervisory authorities (in particular, a notification requirement for any substantial or systemic risks). It also puts forward the requirement to take into account the interests of stakeholders other than shareholders (duty of care).

The independence and authority of the risk manager could be reinforced, along with those of the financial director. It could be required to have an assessment report on the functioning and suitability of the internal control system approved by members of the bodies exercising the supervisory power.

The external auditors and the supervisory authorities should cooperate more.

The supervisory authorities should intervene in a stricter and more extensive manner in the internal governance of financial institutions, without their roles and responsibilities being confused with the bodies of the financial institution (such as a requirement to verify proper functioning and effectiveness of the body exercising the supervisory power and to inform it of any shortcomings).

The appropriateness of imposing civil and/or criminal penalties for inadequate implementation of the corporate governance principles is also examined here.

The summary of the feedback from the public dialogue phase highlights a general desire to analyse the malfunctioning of the governance systems in the financial services sector[101].

B) The Green Paper – The EU corporate governance framework of 5 April 2011

On 5 April 2011, the Commission adopted a green paper on the corporate governance framework in the EU[102] and initiated a public dialogue on the corporate governance framework in the EU.

The aim of the green paper and the public dialogue was to examine the effectiveness of the existing EU corporate governance framework in terms of challenges such as CSR, the need to set up a strong international financial system, a long-term vision, etc.

[100] In particular, the question is raised of whether it would be appropriate to introduce a binding or even advisory vote of the shareholders on the remuneration policy.

[101] Commission, Feedback statement – Summary of responses to Commission Green Paper on Corporate Governance in Financial Institutions.

[102] Green Paper – The EU corporate governance framework of 5 April 2011 [COM(2011) 164 final].

This touches on questions regarding distinctions between companies of different sizes, the duties and the responsibilities of the chairperson of the Board of Directors, the importance of diversity in bodies exercising the supervisory power and the eligibility of their members.

The option has again been raised to set term limits on members of these supervisory bodies.

In addition to this, the green paper recalls the importance of implementing a supervisory body evaluation process. This evaluation should be conducted annually and include a review of its membership, its organisation and its functioning and an evaluation of each of its members and committees. In addition to these recommendations, which are included in the 2005 Recommendation, an evaluation should also be conducted to ensure that quality, up-to-date information is provided to this body.

Along the same lines, we should note that the Commission mentioned the advantages of relying on an 'external facilitator' who could submit best practices from other businesses once every three years[103].

With regard to risk management, the Commission is examining the involvement and responsibility of the supervisory body.

The green paper includes a subsection on employee shareholders. Basically, in addition to informing, consulting and involving company staff in the supervisory body, in order to contribute to long-term viability, employee participation may also be achieved by employee shareholders.

Finally, the 'comply or explain' approach should be, first off, better understood, and then better applied and better monitored.

For the twenty-five questions in the dialogue, conflicting responses were given depending on the qualifications of the interviewee. The responses are especially divided with regard to the appropriateness of implementing additional regulations at the EU level in the area of corporate governance. The subsidiarity principle is commonly cited in support of this position.

Significant differences have also come to light on the subject of the plurality of offices (specifically the posts of chairperson of the board of directors and chief executive officer).

However, a consensus has emerged around rejection of a uniform (one-size-fits-all) approach, which is deemed inappropriate for the case at hand. On the contrary, it is preferred to maintain a certain degree of flexibility.

Similarly, the need to foster diversity (competencies, gender balance, etc.) among members of corporate bodies has enjoyed broad acceptance.

Finally, measures at the EU level are desired with regard to disclosure of director remunerations[104].

The Parliament has welcomed this initiative and declared itself in favour in a resolution

[103] OCDE, Corporate governance and the financial crisis: Conclusions and emerging good practices to enhance implementation of the Principles, 24 February 2010, in Green Paper 'The Corporate Governance Framework in the EU', p. 9.

[104] Feedback statement – Summary of responses to the Commission Green Paper on the EU Corporate Governance, 15 November 2011, [D(2011)], http://ec.europa.eu/internal_market/company/docs/modern/20111115-feedback-statement_en.pdf.

adopted on 29 March 2012[105].

C) The process of reflection in the Commission since late 2010

In the autumn of 2010, the Internal Market and Services Directorate General of the Commission initiated a reflection process on EU company law. The process kicked off with the formation of a group of experts which, on 5 April 2011, produced a report on the future of EU company law[106].

On 16 and 17 May 2011, a conference ('European Company Law: the way forward') followed the report's publication.

For the third step in the reflection process, on 20 February 2012 the Commission launched a public dialogue for all interested parties with the aim of outlining new perspectives on EU company law[107]. This dialogue includes questions related to corporate governance, which should enable the Commission to put forward potential measures during the latter half of 2012[108].

Commissioner Michel Barnier has already announced the Commission's intention to reflect on how to arrive at a long-term approach and the importance of effective rules, diversity, proper competencies and independence in corporate bodies[109].

D) Gender balance initiatives among EU institutions

The institutions of the EU have adopted a certain number of texts on gender equality in all areas.

In February 2011, the Commission presented its 2010 annual report on gender equality[110] which falls within the framework of its 2010–2015 Gender Equality Strategy[111]. The gender balance in supervisory bodies is one of the components of gender equality research. This gender equality is a fundamental principle embodied in the Treaties[112].

The 2010 annual report mentioned the advantages of having females present which were demonstrated by the studies: performance, higher turnover, more effective risk management and increased use of female competencies.

On 6 July 2011, the European Parliament adopted a resolution[113] providing some measures that the Commission and the Member States are invited to take. In particular, the Parliament invites the Commission to conduct a study on female representation in governance bodies, after which it should present a legislative proposal to impose quotas if

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[105] European Parliament resolution of 29 March 2012 on a corporate governance framework for European companies, [2011/2181(INI)].
[106] *Report of the Reflection Group on the Future of EU Company Law* of 5 April 2011, http://ec.europa.eu/internal_market/company/docs/modern/reflectiongroup_report_en.pdf.
[107] Consultation on the future of European Company Law: Frequently Asked Questions, http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/12/119&format=HTML&aged=0&language=EN&guiLanguage=en.
[108] Commission Press Release, European Company Law: what way forward?, IP/12/149; Consultation on the future of European company law.
[109] Connection Ecoda – The European Voice of Board Directors, Newsletter, January 2012, http://www.ecoda.org/docs/Newsletters/Newsletter_January%202012.pdf.
[110] Commission communication of 11 February 2011 entitled 'Report on the progress on equality between women and men in 2010' [SEC(2010)0193].
[111] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Strategy for equality between women and men 2010-2015, 21 September 2010 [COM(2010) 491 final].
[112] Articles 2 and 3 of the TEU and Article 8 of the TFEU.
[113] European Parliament Resolution of 6 July 2011 on women in business leadership [2010/2115(INI)].

voluntary measures prove to be inadequate. These latter measures should ensure that 30 % of the members of bodies exercising the supervisory power will be women by 2015, and 40 % by 2020. In a resolution of 13 March 2012[114], the Parliament reiterated its invitation to the Commission to propose, before the end of 2012, a law including quotas of this kind, given the slow rate of increase on a voluntary basis cited by the Commission[115]. The specific economic, structural, legal and regional features of the Member States and their companies must be taken into account.

In the meantime, the Commission has organised a public dialogue on the appropriateness of imposing quotas. It runs from 5 March to 28 May 2012 and the results should be known by the summer of 2012[116].

1.2.3. THE EUROPEAN COMPANY (SE)

With the creation of an SE statute in 2001, the European legislature wanted to offer companies in the EU an optimal tool, in the form of a company with share capital, to meet the needs of a company conducting activities at the European level, in particular from the perspectives of finance and management.

The SE statute therefore aims to create a uniform legal framework in which companies from different Member States should be able to plan and successfully complete a reorganisation of their activities[117].

The SE statute is governed by Regulation (EC) No 2157/2001 of 8 October 2001 and Directive 2001/86/EC of the same date.

- Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE)[118]

From the perspective outlined above, the European legislature cites two principles which have guided drafting of the statute for an SE:

  - Permit 'the creation and management of companies with a European dimension, free from the obstacles arising from the disparity and the limited territorial application of national company law'[119]
  - 'be efficiently managed and properly supervised' bearing in mind 'that there are at present in the Community two different systems for the administration of public limited-liability companies. Although an SE should be allowed to choose between the two systems, the respective responsibilities of those responsible for management and those responsible for supervision should be clearly defined'[120].

- Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European Company with regard to the involvement of employees[121]

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[114] European Parliament Resolution of 13 March 2012 on equality between women and men in the European Union– 2011 [2011/2244(INI)].
[115] European Commission 'Women in economic decision-making in the EU: Progress report – A Europe 2020 initiative', 2012.
[116] Consultation on Gender imbalance in corporate boards in the EU, http://ec.europa.eu/justice/newsroom/gender-equality/opinion/120528_en.htm.
[117] Council Directive 2001/86/EC of 8 October 2001, Recital (2).
[118] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE).
[119] Regulation No 2157/2001, Recital 7.
[120] Regulation No 2157/2001, Recital 14.
[121] Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European Company with regard to the involvement of employees.

The aim of the European legislature is to ensure that creation of an SE does not result in the disappearance or weakening of the existing system of employee involvement in companies participating in the creation of an SE. The European legislature has stated:

'The great diversity of rules and practices existing in the Member States as regards the manner in which employees' representatives are involved in decision-making within companies makes it inadvisable to set up a single European model of employee involvement applicable to the SE'[122].

In the absence of a proposal for a single model, the European legislature has set out the principle of retention of existing participatory rights in the administrative body or the supervisory body of companies making up an SE, while still allowing the parties the option to do otherwise.

The Study shall draw special attention to the details of SE governance and to the system for employee representation in the supervisory body of the SE.

[122] Directive 2001/86/EC, Recital (5).

2. ANALYSIS OF NATIONAL LAWS

The status of the transposition by Member States of European Directives relating to company law is given in Annex 2.

The organisation exercising the supervisory power and the one exercising the executive power in legal entities, and more specifically in joint-stock companies, and their interactions, vary along with the different legal, historical and culture features of company law in the Member States. Additional rules have been implemented for listed companies, either in national legislation (hard laws) or by means of principles of good conduct generally combined with the comply or explain rule (soft laws). Finally, there are specific requirements for regulated public companies and/or activities such as banking and insurance.

2.1. STRUCTURING OF MANAGEMENT AND SUPERVISORY BODIES IN NATIONAL LEGISLATIONS

Despite the differences, three main systems of company organisation can be identified at the EU level and are available to joint-stock companies, whether exclusively, in combination, or with variants.

2.1.1. GENERAL DESCRIPTION OF SYSTEMS OF ORGANISATION

As indicated in the introduction, the EU features three main systems of company organisation:

- The **one-tier system**, in which all or part of the executive power may be exercised in the supervisory body.
- The **two-tier system**, which draws a strict distinction and separation between the executive power and the supervisory power, which are exercised in different bodies.
- The **mixed system**, which offers companies a choice between these two systems.

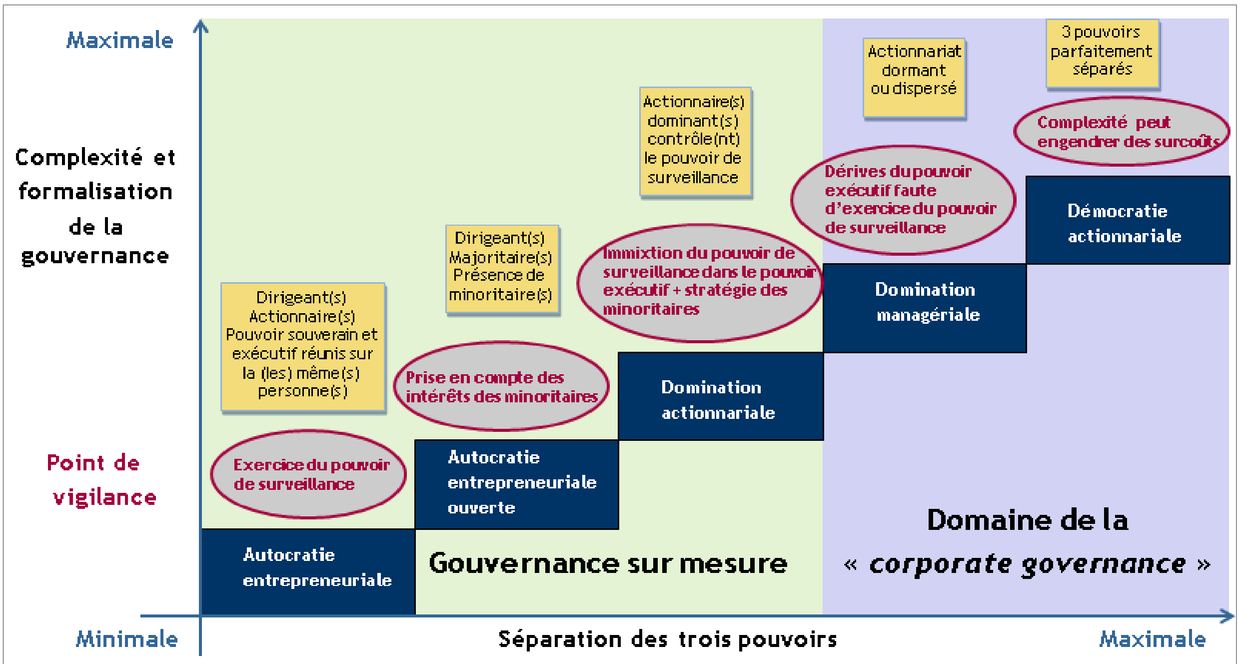
There are also 'hybrid' systems, which strive towards a simplified form of governance in non-listed companies.

The way in which supervisory power is organised depends on the method of governance. The supervisory power is exercised either by an internal corporate body dedicated solely to supervision (the supervisory board in the two-tier system, the board of directors in the one-tier system, or an ad-hoc body created within the company), or by a corporate body which also performs other duties (board of directors, shareholders, chairman in the simplified form) or by a body outside of the company (external auditors).

The supervisory body exercises its power in relation to two other powers and pillars of governance: 1) the management (management body or a sole director, chairperson of the board of directors, general manager, with the possibility of the latter two positions being merged or separate depending on the particular case) and 2) the shareholders (shareholders' meeting or a sole shareholder, as the case may be).

Drawing again from the MiddleNext reference framework, a typological classification of the three powers/pillars of corporate governance can be suggested for the various Member States according to company shareholding and organisational structures. This classification system can be illustrated as follows:

Figure 1: Types of interaction between the three powers on which corporate governance is based according to shareholding and management structure

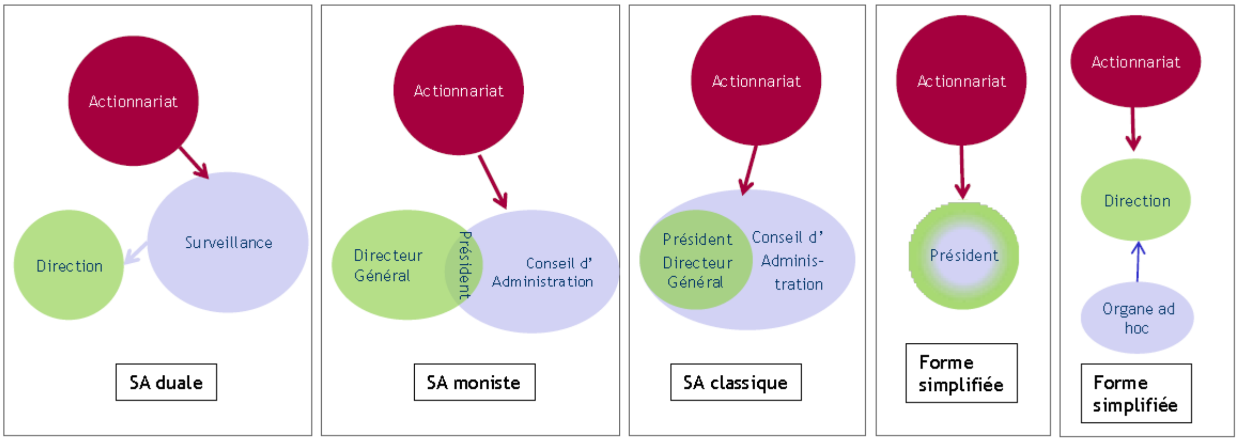


Type de pouvoir	Nature	Porté par
Actionnarial ou souverain	Apport en capital	Les actionnaires
Exécutif	Apport en industrie	Les dirigeants
Surveillance	Contrôle du pouvoir exécutif	Les organes de surveillance CA ou CS ou ad hoc

Source: JeantetAssociés (based on the MiddleNext reference framework)

This analysis by method of interaction of the three powers/pillars of governance may also help to compare the different types of companies, as shown in the figure below.

Figure 2: Comparison of types of companies based on the interaction of the three powers that constitute the pillars of corporate governance



Type de pouvoir	Nature	Porté par
Actionnarial ou souverain	Apport en capital	Les actionnaires
Surveillance	Contrôle du pouvoir exécutif	Les organes de surveillance (Conseil d'Administration ou Conseil de Surveillance ou organe ad hoc)
Exécutif	Apport en industrie	Les dirigeants

Source: JeantetAssociés

2.1.1.1. Definition of the two-tier system

The two-tier system separates the executive power from the supervisory power by stipulating that they be exercised by two different bodies.

Some States have opted to apply this system to the exclusion of all others for joint-stock companies registered within their borders. Thus, the two-tier system is the only method of organisation available to joint-stock companies in the Germanic countries (Germany, Austria), and in the majority of the new Member States, such as Hungary, Poland, the Czech Republic and Slovakia. This is also the case, until 1 July 2012, for joint-stock companies registered in the Netherlands.

2.1.1.2. Definition of the one-tier system

The one-tier system allows all or part of the executive power to be exercised in the body invested with the supervisory power. Part of this supervisory power may also be taken on by a third-party (such as external auditors).

This one-tier organisation differs depending on the relevant national laws.

Thus, executive members, invested with part of the executive power, may co-exist with non-executive members within the supervisory body whose primary activity is to express, by means of their vote, their assessment of the policy and decisions taken by the company.

The distinction between executive and non-executive members is of Anglo-American origin. The spread of codes of governance influenced by this tradition has ultimately led to it being introduced in a number of European countries. Some States have opted to apply this system to the exclusion of all others for joint-stock companies registered within their borders. Thus, the one-tier system is the only method of organisation available to joint-stock companies in Cyprus, the United Kingdom, Sweden, Greece (for non-listed companies), Belgium and Spain (for non-listed companies).

2.1.1.3. Definition of the mixed system

The mixed system offers companies a choice between the one-tier and two-tier systems.

This flexibility exists in the majority of Member States: this is the case in Bulgaria, Denmark, Estonia, Finland, France, Hungary, Ireland, Italy (which is, however, moving towards a hybrid system), Latvia, Luxembourg, the Netherlands (as of 1 July 2012), Poland, Portugal, Romania and Slovenia.

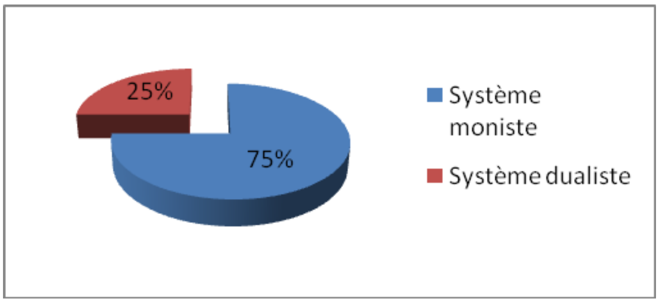
In these States, we note that when the choice is left to the companies, the one-tier system is chosen by the majority, with a few exceptions:

- In Hungary and Slovenia, the two-tier system is used most often (90 %).
- In Spain, the choice between the two-tier and one-tier systems is only available to companies offering their securities to the public. For other companies, only the one-tier system is available.

The flexibility of organisation in the one-tier system (one body instead of two) seems to be the primary reason for this choice.

The general trend in mixed-system countries is illustrated in the chart below:

Figure 3: One / two-tier system distribution in mixed-system countries



Source: JeantetAssociés

We also note that even though some Member States recognise the option to choose between a one-tier and a two-tier system, use of the two-tier system can be made obligatory for specific activities (for instance, Irish sports bodies).

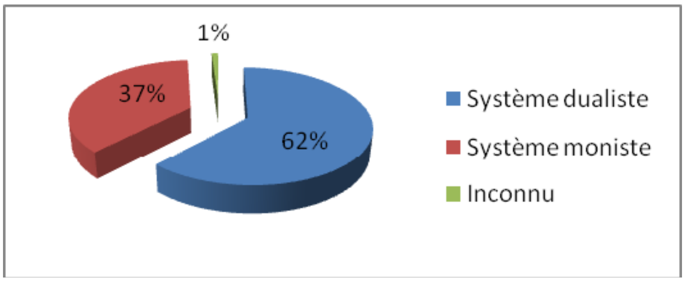
2.1.1.4. The special case of the European company (SE)

The introduction of the SE instituted by Regulation (EC) No 2057/2011 of 8 October 2011 will enable companies that adopt this form of company to choose, at their own discretion, a one-tier or two-tier governance structure, even where national laws on joint stock companies only permit a one-tier or two-tier governance system.

Most operational SEs are currently located in Germany. Thus, some German *Aktiengesellschaft*'s were able to take on a one-tier structure by applying the Statute of the SE, which would not be permitted under national law.

On the other hand, while most companies in Member States offering the same option to joint-stock companies under their national law adopt the one-tier system, the statistics on SEs show that most companies structured under this form have chosen the two-tier system. The reason for this may lie in the provisions specific to SEs, which require implementation of employee participation rights in the SE (0) and the fact that the SE form has been, at least initially, mostly adopted by large enterprises.

Figure 4: One / two-tier system distribution for SEs (in Europe)



Source: ETUI, 1 March 2012

2.1.1.5. 'Hybrid' systems

'Hybrid' systems are other methods of organising corporate governance, aside from traditional one-tier and two-tier systems.

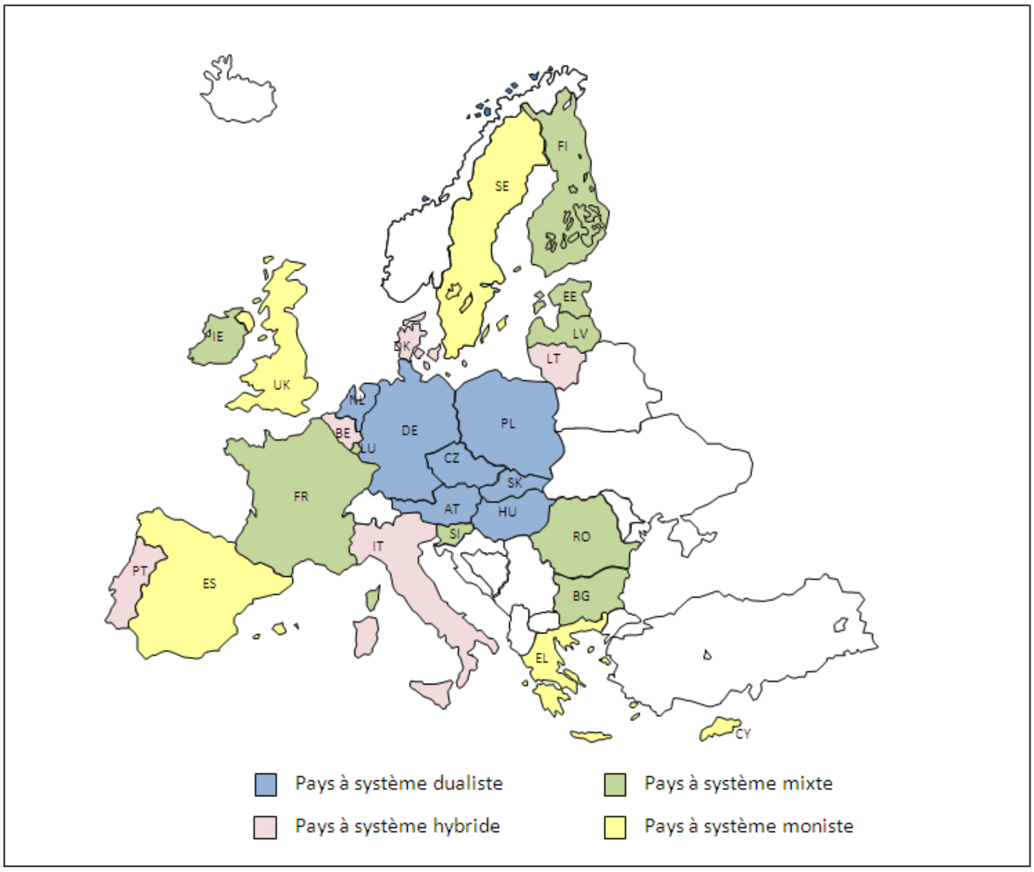
The *société par actions simplifiée* (SAS) (simplified public limited liability company) existing under French law is an interesting example of a hybrid form and is discussed in detail in section 0. The only corporate body whose designation is required by law is its chairman. However, the law authorises creation of other governance bodies in the articles of association, with a great deal of freedom.

Thus, it is common for the articles of association of companies organised in the form of an SAS to provide for a board of directors to be set up and for independent directors to be appointed. This board is the chairman's governance tool. It has neither representation nor decision-making powers. This organisation is commonly found in medium-sized enterprises (*ETIs*), sole-proprietorships and family businesses in which the chairman is also the primary shareholder, alone or along with other members of his/her family, who may also hold positions in the company.

This shareholding structure corresponds to companies of the type designated as 'entrepreneurial autocracy' and 'open entrepreneurial autocracy' in Figure 1.

2.1.1.6. Distribution of governance systems in the European Union

Map 1: Distribution of different governance systems at European Union level



Source: JeantetAssociés

2.1.2. TWO-TIER SYSTEM

The two-tier system of organising a joint stock company in the EU is generally built around two different bodies: a management body and a supervisory body.

This two-headed body structure separates the executive power from the supervisory power.

Relations between these two bodies and between these bodies and the shareholders are highly restricted by national legislation, particularly as regards the supply of information (see 0 below).

Employee representation in the supervisory body is often guaranteed, which gives them some influence over the decisions of the management body (see 0 below).

2.1.2.1. A management body that exercises executive power

The management body, which exercises executive power, manages the company and represents it in dealings with third-parties. This body bears sole responsibility for conducting the day-to-day business of the company, except for any power granted by law or the articles of association to the shareholders' meeting or to the supervisory board and within the limits of the company's purpose. It may also perform special duties such as convening the shareholders' meeting.

Barring any legal provisions or specific stipulations in the statutes, it may, in principle, act within the limits of the objects of the company[123] with full autonomy without requiring any prior approval from another corporate body.

Thus, for instance, the **Polish** company code states that the management body, in conducting the company's business, is not bound by the instructions of the shareholders' meeting or the supervisory board[124].

According to the size of the company and the Member State in question, the management body may be comprised of one or more members (see 0).

If the management body has multiple members, their responsibility is generally collegiate (this is the case in **the Netherlands**, for instance).

In **Italy**, in the two-tier system, the executive power is exclusively entrusted to an executive board which can delegate some of its power to one or more executive directors.

2.1.2.2. A supervisory body that supervises the activity of the management body

The task of the supervisory body is typically to appoint, or even to dismiss, members of the management body and supervise their activities. It monitors to ensure that members of the management body adhere not only to the provisions of the law, but also to the principles in force within the company and the strategy.

The supervisory body examines the company's business plans, annual budgets and financial reports[125].

In principle, the supervisory body is not permitted to take any managerial measures for the company.

National law generally grants authority to the supervisory body to appoint and dismiss members of the management body, in accordance with the other provisions of the articles of association[126].

The **Hungarian** company code (law on companies) states that the supervisory body performs its duties in the interests of the shareholders.

In the **Czech Republic**, the supervisory board (*dozorčí rada*) is authorised to inspect any and all documents relating to the company's activities. It ensures proper management of the accounts and conformity of the company's activities with the laws in force, the articles of association and the instructions of the shareholders' meeting.

In **Italy**, in the two-tier system, the supervisory body is authorised, in particular, to (i) Appoint and dismiss members of the management body and set their remunerations. (ii) Approve the financial reports. (iii) Exercise the same powers as those granted to the Board of Auditors in the 'traditional' system. (iv) Institute liability proceedings against the members of the management. (v) Draft a written report, at least once a year, for the shareholders' meeting, regarding its supervisory activities and any omissions or wrongdoing

[123] In France, the company is bound even by acts of the body representing the company which fall outside the object of the company, unless it proves that the third party knew that the act was outside those objects or could not in view of the circumstances have been unaware of it; disclosure of the statutes shall not in itself be sufficient proof thereof.
[124] Article 375 of the Polish Commercial Company Code.
[125] See also the Polish Company Code: Articles 219 and 382 of the Polish Commercial Company Code.
[126] Example in Poland: Section 368(4) of the Polish Commercial Company Code.

uncovered.

With the introduction of the mechanism of 'co-management', **Germany** distinguishes itself from other Member States by offering employees real power within the supervisory bodies of large companies (see 0).

For the distribution of powers between supervisory body and management, see 0 below.

2.1.3. THE ONE-TIER SYSTEM

The one-tier system of organising joint-stock companies in the EU generally consists of a single body which exercises both the executive and the supervisory powers at the same time. This body, which is referred to generically in this Study as the 'supervisory body', applying the terminology given in the introduction, is usually called 'board of directors' or sometimes 'management committee' in the various national laws.

Some of the supervisory power may also be exercised by means of auditors.

It is also sometimes possible to delegate some of the executive power to one or more persons selected from outside of the members of the supervisory body. This may be one or more executive directors or an ad-hoc body.

Thus, in **Belgium** for instance, the body that holds both the executive and supervisory powers is known as the *raad van bestuur/conseil d'administration* (board of directors)[127]. This body may, where permitted by the articles of association, delegate a large portion of its powers to a committee called the *directiecomité/comité de direction* (management committee) tasked with exercising the executive power.

There are, however, some restrictions. Thus, for instance, the board of directors is not authorised to delegate certain powers. It cannot transfer all of the company's general policy, nor any powers reserved by law to the supervisory body.

Nevertheless, Belgian law leaves a great deal of freedom to the articles of association: The membership, powers, responsibilities and appointment and dismissal conditions for members of this executive body can be freely decided in the articles of association.

In **Greece**, the articles of association may also stipulate that the board of directors may delegate the company's management and representative powers to one or more persons, selected from among or outside of its members. In this way, the board of directors only retains the powers which can be exercised collectively.

In **the Netherlands**, the one-tier system will be available starting from 1 July 2012. It provides for a board of directors comprised of members with executive powers and members with non-executive powers. The former are responsible for day-to-day management of the company while the latter have the power to supervise management by the board members. Conducting company business falls under the responsibility of all members of the board, both executive and non-executive.

In **Italy**, in the one-tier system, management of the company is entrusted exclusively to the board of directors, which may delegate some of its powers to an executive board or to one or more executive directors (see 0), which is the executive power in the 'traditional' system. Within the board of directors, a committee is appointed for management oversight which is comprised exclusively of non-executive directors. It monitors conformity of the company's organisational structure, the internal control system, the administrative and

[127] Section 524a of the Belgian Company Code.

accounting system and implementation of other activities assigned by the board of directors.

2.1.4. THE MIXED SYSTEM

The mixed system can be illustrated by the example of **France**.

Joint-stock companies are free to choose between being a joint-stock company with a board of directors or a joint-stock company with an executive board and a supervisory board.

In joint-stock companies with a board of directors, the tradition has been for the chairman also to be the general manager, hence the traditional title of *PDG* (*president/directeur général*), which carries a certain prestige. Not until 2001 did legislators deem it appropriate to introduce the option into French law for these two roles to be separated, according to the English system, which distinguishes between executive and non-executive directors.

Even though this separation is now commonplace, the title 'PDG' still holds a great deal of cultural weight, which sometimes creates difficulties in properly distinguishing the domain of executive power and supervisory power in joint-stock companies with a board of directors. The governance of joint-stock companies with a board of directors sometimes still has difficulty recognising the superiority of the general manager, who is the sole representative of the company, and admitting that the power of the chairman is more formal (convening the board of directors, moderating discussions, etc.).

The two-tier system, while often considered to offer more satisfactory separation of powers in terms of governance, remains paradoxically very much in the minority among French joint-stock companies.

2.1.5. 'HYBRID' SYSTEMS

In addition to the traditional one-tier and two-tier systems, some Member States have a different system of governance for joint-stock companies.

2.1.5.1. General description

Aside from the structure of the aforementioned SAS in **France**, we can also identify other 'hybrid' systems. Some examples would be:

- The *structuurvennootschap* in **the Netherlands**, in addition to the one-tier and two-tier systems
- The system in **Italy** known as the 'traditional' system, existing in addition to the one-tier and two-tier systems
- The simplified French system with the option of having only a chairman for non-listed *sociétés par actions simplifiées* (SAS)
- The existing simplified system in **Lithuania**
- The system known as the 'classical' system in **Portugal**, which, in addition to the one-tier and two-tier systems, offers a system made up of a board of directors and a supervisory body plus a requirement to have an auditor.

2.1.5.2. Original practices identified

A) The Dutch *structuurvennootschap*

The Netherlands features a special system known as a *structuurvennootschap*. Once a company has reached a certain amount of issued capital and reserves, has set up a works council and, together with its subsidiaries, has at least one hundred employees in the Netherlands, it must file a statement with the trade register. If the company has to file such a statement three years in a row, then it is required to amend its articles of association to set up a supervisory board*.* The supervisory board appoints the company's directors. It notifies the shareholders' meeting of the proposed appointments and cannot dismiss a director without consulting the shareholders' meeting.

The management body must share certain powers with the supervisory body. Some actions must be submitted for the prior approval of the supervisory board, such as a proposal to amend the articles of association or a proposal to dissolve the company.

B) The Italian 'traditional' system

In addition to the one-tier and two-tier systems, **Italy** offers a '*traditional'* system which is the most commonly used system.

Executive power is exercised by the sole director or by the board of directors. The board of directors may delegate some of its powers (excluding certain powers indicated in the law, including the power to draft financial reports) to an executive board or one or more executive directors, specifying the content, limits and methods of enacting this delegation.

The supervisory power is allotted to a board of auditors which verifies (i) that the directors are acting in accordance with the law, the articles of association and the general principles of good management (in particular, acting with due diligence and in the company's interests[128]) and (ii) the conformity of the organisation, administrative and accounting structure adopted by the company and its actual functioning. In the case of delegation of powers by the board of directors, the board evaluates, based on information provided by the executive directors, the performance and general management of the company.

C) The Lithuanian 'traditional' system

Lithuania has neither the one-tier nor the two-tier system.

As in a French SARL, the bodies stipulated in the law are the shareholders' meeting and the director of the company, who holds the executive power. The board of directors and the supervisory board are optional bodies.

The members of any boards present do not hold any executive power. They do not intervene in the management of the company, but may be authorised to intervene in matters related to strategy. If no boards are set up, then the supervisory power is not exercised by any body other than the shareholders' meeting.

D) The Portuguese system

Three systems exist in **Portugal:** (i) board of directors, supervisory board and auditor. (ii) board of directors including an audit committee and an auditor. (iii) an executive board, a

[128] Concept in Italian law related to the existing concept in French law defined in the introduction.

general and supervisory board and an auditor[129].

In the first two systems, the board of directors is responsible for management of the company's activities and is subject to the decisions of the shareholders or to the supervisory board or audit committee, as the case may be, but only where stipulated by law or in the articles of association.

In the third system, the executive board exercises the executive power, without prejudice to articles of association stipulating an obligation to receive prior approval from the general and supervisory board for certain actions. The general and supervisory board appoints its members and supervises the activity of the executive board and sets the remuneration of its members.

In listed companies, the general and supervisory board must also appoint a financial affairs committee.

If there is a vacancy on the executive board, the general and supervisory board must fill it. No member of the general and supervisory board may also simultaneously be a member of the executive board, except in cases of temporary replacements.

The executive board must provide the general and supervisory board with certain information on, in particular, the management policy, the company's situation and the progress of its activities, as well as an annual report.

In the three systems, the body exercising executive power must ensure internal control and risk management systems, and the body exercising the supervisory power is responsible for evaluating the functioning of the systems and proposing any necessary changes according to the company's needs.

E) The French 'simplified' system: the SAS

The *société par actions simplifié* (simplified public limited liability company) under French law is a form of joint-stock company introduced into French law in 1994. It has enjoyed great success, as there are now more SASs registered in France than *sociétés anonymes* (joint-stock companies). The SAS enjoys a great deal of freedom in drafting its articles of association and has become the most attractive form of company for medium-sized companies (*ETIs*) because it frees them from the formalities of the *société anonyme*. The SAS is currently the most flexible form of joint-stock company existing under French law.

The SAS cannot, however, offer its securities to the public, nor, consequently, can it be listed on a stock exchange, but it may sell its shares privately (offers reserved for qualified investors or a limited group of investors). Therefore, the *société anonyme* remains the most common form for listed companies.

The success of the SAS in France warrants a review of its method of governance in this study.

The associates in the SAS are free to specify in the articles of association the membership of the management body of the SAS and the rules for its operation. However, French law views the chairman as the representative of the company to third-parties. The chairman is invested with the most extensive powers to act under any circumstances on behalf of the company within the limits of its corporate purpose.

Thus, unlike the rules applicable to directors of *societies anonymes* (see Part II, Chapter IV

[129] Section 278 of the Portuguese Company Code.

below), there are no legal provisions restricting these powers other than the company's corporate purpose. However, in relations between associates, the articles of association may restrict the powers of the president, but this limitation of powers is not binding on third parties. The management body must therefore include a chairman and it is not possible to appoint multiple chairmen. The articles of association may nevertheless provide for a sole director or a collective body made up of the chairman and other directors (management committee, board of directors, general directors, etc.), as highlighted in Section 0 above.

The articles of association sometimes set up a separate supervisory body tasked with monitoring management by a sole director or by a collective management body and reporting on the management to associates.

The powers of these bodies are set out in the articles of association.

2.2. RULES APPLICABLE TO THE EXERCISE OF THE SUPERVISORY POWER

Exercise of the supervisory power is restricted by the rules applicable to appointment of members of the supervisory body (1), to the functioning of the supervisory body (2) and the responsibility of the members of the supervisory body (3).

Our study mainly covers the systems in place in the United Kingdom, Germany, France, Denmark, Spain and Romania. We shall also deal with original practices identified in other Member States which warrant attention as well as the specific features of the SE.

2.2.1. APPOINTMENT OF SUPERVISORY BOARD MEMBERS

Most legislation does not stipulate any body to prepare a shortlist of members and submit candidates to the body authorised for appointment.

In business practice, the body most often authorised to appoint members is the meeting of shareholders, some variants aside.

A minimum number of three members is typically given in legislation and their term of office is highly restricted by the texts to ensure new members are cycled in, all while allowing for a certain degree of flexibility in the articles of association.

Restrictions on the appointment of supervisory board members primarily focus on prohibitions against plurality of offices, which are highly regulated in France, for instance. Other recommendations, such as those for criteria to ensure independence of a director, are the object of recommendations generally detailed in national soft laws.

Specific rules are given for companies in specific sectors (especially those falling within the public sector).

2.2.1.1. Authorised body

Where Member States recognise the two-tier governance system, the body authorised to appoint members of the supervisory board is, in the laws of most Member States, specified by obligatory provisions of national law. In most cases, the shareholders' meeting is designated as the authorised body.

Nevertheless, variants do exist, for instance with regard to shortlisting potential supervisory board members.

A) Body authorised to shortlist members

Shortlisting of potential supervisory body members is entrusted to different bodies depending on the Member State. These bodies are:

- Shareholders holding a minimum number of shares (**Austria**, **Italy**)
- The supervisory body, with an option for shareholders to reject the choice (**Austria**, **Belgium**, **Denmark**, **Romania**)
- Freely determined in the articles of association (**the Netherlands**)
- The management body, trade union or the works council in the one-tier system (**Czech Republic**)
- The Appointment Committee for companies in the public sector (soft law in **Ireland**) In **France**, it is common, especially in listed companies, to entrust the power to shortlist candidates to an appointment committee.

B) Body authorised to appoint members

Depending on the Member State, the body authorised to appoint supervisory board members is specified in the provisions of national law. For the most part, this is the shareholders. Freedom to specify this in the articles of association is rare.

Table 1: Body authorised to appoint supervisory board members

Body authorised to appoint supervisory board members						
Country	**Shareholders' meeting**	**A category of shareholders**	**Board of directors**	**Appointment committee (soft law)**	**Restricted freedom in articles of association**	**Employees (in certain proportions and under certain conditions)**
AT	X	X				
BE	X			X (2)		
BG	X					
CZ	X					X
DE	X[130]					
DK					X	
EE	X					
ES	**X**	**X**[131]				
FI	X				X	
FR	X					
HU	X					X
IE	X					
IT	X		X			
LU	X					
LV	X	X				
NL(1)	X					
PL	X	X				
PT	X					
RO	X					
SI	X					
SK	X					X
S.E.	X					X

The Netherlands: The one-tier system will also be available as of 1 July 2012.
Recommendation of the Buysse Code II for non-listed companies.
Yellow: one-tier system countries with optional supervisory body
Blue: two-tier system country
Green: mixed system country
Pink: hybrid system country
Only one-tier system countries without a distinct supervisory body have been excluded from the table: United Kingdom, Sweden, Greece.

Source: JeantetAssociés

For the **SE**, the shareholders' meeting is designated as the authorised body, with two reservations: (i) it must not undermine national legislation allowing a minority of shareholders or other persons or authorities to appoint some members of bodies[132] and (ii) the methods of employee participation set out according to Directive 2001/86/EC[133].

It should be noted here that in cases of vacancies in the supervisory body, solutions

[130] If the statutes provide for creation of a board of directors, then it must feature at least three members, with no maximum set by law.

[131] In Spain, if there is a board of directors, directors may be elected by the general meeting by a procedure for proportional representation of minority shareholders.
[132] Regulation No 2157/2011, Article 47, Section 4.
[133] Regulation No 2157/2011, Article 40, Section 2.

allowing the vacancy to be filled as quickly as possible are sometimes stipulated. Thus, in cases of vacancies, temporary appointments are permitted by the supervisory body itself, subject to approval at the next shareholders' meeting (for instance, **Belgium**, unless stipulated otherwise in the articles of association, and **France**).

Special rules apply to listed companies or public sector companies, such as an Appointment Committee (**Belgium**: recommendation of the Governance Code for listed companies).

2.2.1.2. Minimum/maximum number of members

A) General description

The number of members of the supervisory body is typically restricted by the provisions of national law. It varies as follows:

Table 2: Restrictions on the number of supervisory board members[134]

Restrictions on the number of supervisory board members			
Country	**Minimum**	**Maximum**	**Special for listed companies (minimum)**
AT	3	20	-
BE	3 (2 if only 2 shareholders)	-	-
BG	-	7	-
CZ	3	-	-
DE	3	21 (depending on company size)	-
DK	3	-	-
EE	3	-	-
ES	**-**	**-**	**-**
FI	3	-	-
FR	3	18	-
HU	-	15	-
IT	3	-	-
LU	3	-	-
LV	3	-	5
NL (1)	3	-	-
PL	3	-	5
PT	3	-	-
RO	3	11	-
SI	3	**-**	-
SK	3	-	-
S.E.	According to the national law of the country of registration	According to the national law of the country of registration	According to the national law of the country of registration

Source: JeantetAssociés

B) Special practices identified

Certain codes of governance whose application is not obligatory set out principles of good

[134] Barring any special rules on members of the supervisory body representing employees, see chapter below.

conduct with regard to the number of members in the supervisory body.

For example, the **Belgian** governance code recommends having an adequate number of members to ensure a broad range of knowledge and sufficient experience for decision-making.

2.2.1.3. Terms of office

A) General description

The terms of office of the members of the supervisory board, with some rare exceptions, are restricted by the provisions of national law.

Table 3: Restrictions on the terms of office of supervisory board members

Restrictions on the terms of office of supervisory board members			
Country	**Maximum term (in years)**	**Unlimited re-appointment (unless indicated otherwise in the articles of association)**	**Freedom to specify terms in articles of association**
AT	5	X	
BE	6	X	
BG	Subsidiary rule: 5 (3 for the 1st board)	X	X
CZ	-	X	-
DE	4 /5	X	-
DK	4	X	-
EE	Subsidiary rule: 5	X	X
ES	6	X	-
FI	-	X	X
FR	6 (3 for the 1st board)	X	-
HU	-	X	-
IE			
IT			
LT			
LU			
LV			
NL (1)			
PL			
PT			
RO			
SI			
SK			
S.E.	According to the national law of the country of registration	According to the national law of the country of registration	According to the national law of the country of registration

Source: JeantetAssociés

B) Special details for public sector enterprises

For public sector enterprises in France, legislators have set a fixed term of five years.

C) Special practices identified

Certain codes of governance, mainly those applicable to listed companies, the application of which is not compulsory, recommend setting term limits for members of the supervisory board.

- For example, the **Dutch** governance code offers the option to re-appoint a member three times with a total term limit of twelve years.

- In **France**, the AFEP-MEDEF governance code[135] recommends setting a maximum term limit of four years in listed companies.

2.2.1.4. Qualifications needed to be a member of the supervisory board

A) General description

Aside from the legal capacity required to fill these positions (legal capacity for natural persons: being of legal age or an emancipated minor, not being banned from working in a commercial undertaking, not being bankrupt), the law or certain governance codes establish specific requirements with regard to the qualifications needed to be a member of the supervisory board. The requirements typically pertain to the following criteria:

- Natural or legal person:
  - Membership of the supervisory board restricted to natural persons (**Finland, Poland, Czech Republic, Slovakia, Hungary, Slovenia**)
  - Membership open to natural and legal persons (**Germany, Belgium, Bulgaria, France**) but with restrictions on the positions of chairman or vice chairman, which are reserved for natural persons (**France**)
- Other requirements:
  - At least one member must be a national of an EEA country, barring exemptions (**Finland**)
  - At least one member must be an expert in finance (soft law in **the Netherlands**)
  - Freedom to include requirements in the articles of association that exceed legal requirements (**Denmark, Ireland, Italy, France**)
  - Being an employee in certain cases or within certain thresholds (**Czech Republic, Slovakia, France)** or not being an employee of the company (**Hungary**)

  In France, an employee can be a member of the supervisory board. However, no more than one third of the members of the council may be under an employment contract. A member of the supervisory board may also become an employee of the company after appointment, in compliance with the procedure governing regulated party agreements.

- Regulated activities: there are special requirements depending on the activity (finance, education, public sector companies, etc.) or the activity (incompatibility with another specific position: liquidator, company lawyer, accountant, company auditor, officer, etc. (**Poland**, **France**, etc.).

[135] Referenced by almost all CAC-40 companies.

- Additional conditions for listed companies:
  - Requirement for integrity, experience in companies in the same sector of activity (**Italy, Poland**)
  - Recommendations aimed at ensuring that the membership of the supervisory body reflects the international nature of the company, in order to avoid potential conflicts of interests, a maximum age and diversity. Non-compliance with these rules requires an explanation (**Germany**).

For the SE, European legislators established the freedom for articles of association to allow natural or legal person to be appointed to corporate bodies.[136] It is also stipulated that an SE's statutes may, in accordance with the law applicable to joint stock companies in the Member State in which the SE's registered offices are located, lay down special eligibility conditions for members representing the shareholders[137].

B) Denmark, France, Germany, Spain and the United Kingdom in focus

- Denmark

In **Denmark**, the articles of association may set requirements on qualifications for eligibility. These may include familiarity with the company's economic activity, lack of dealings with competitors, term limits on boards, being a shareholder in the company, etc.

- France

In **France**, members of the supervisory body (whether the board of directors or the supervisory board) may be either natural or legal persons.

If a member of the supervisory board is a legal person, a permanent representative must be designated by this legal person and the company must be informed of this designation. This permanent representative must be subject to the same obligations and prohibitions and must bear the same responsibilities as if he or she were a member as a natural person.

The president of the supervisory body cannot be a legal person, under penalty of nullification of the appointment.

Since the Act of 4 August 2008 on modernisation of the economy, members of the supervisory board are only required to be shareholders if this is stipulated in the articles of association. In such cases, these articles of association must also indicate the number of shares which must be held by the members of the supervisory board. If a member is appointed to the supervisory board but does not have the number of shares required in the statutes, a six-month grace period is granted for compliance. If the member fails to comply within this six-month period, he or she is automatically considered to have resigned.

There are a number of incompatibilities, including: members of the government and civil servants cannot become members of the supervisory board of a *société anonyme*. Members of parliament, on the other hand, can only be banned from the duty of chairman of the supervisory board. A civil law notary may sit on a supervisory board, as well as a board of directors. Finally, a lawyer with seven years of professional practice experience may become a member of a supervisory body, as can an auditor who is not currently auditing the company's accounts nor has audited them during the five year period prior to his or her appointment.

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[136] Regulation No 2157/2011, Article 47, Section 1.
[137] Regulation No 2157/2011, Article 47, Section 3.

The corporate governance code for listed companies, published by AFEP MEDEF, includes a specific recommendation for the qualifications needed to be a member of a supervisory body 6.1, states the following:

'This first criterion for a board of directors is its membership: directors should, of course, be honest, competent, knowledgeable of the functioning of the business, concerned about the interests of all shareholders, adequately involved in setting out the strategy and in discussions to participate effectively in its decisions, which are collective, in order to subsequently support them in a legitimate manner.'

- Germany

In **Germany**, members of the board of directors must be natural persons and have full capacities.

Moreover, the German corporate governance code requires listed companies to implement procedures to ensure proper membership of the supervisory board which reflects the international nature of the company, potential conflicts of interests, and a maximum age for members of the board and features a diversity requirement.

If these principles are not applied, the reasons why must be given (the 'comply or explain' rule).

Most listed companies have established procedures for the future membership of their supervisory boards according to the recommendations of the governance code, and have published these procedures in their annual governance report.

- Spain

In **Spain**, members of the supervisory body are primarily selected from among members of the management (board of directors).

Spanish law on financial markets stipulates that at least one member of the supervisory body must be selected based on his or her experience in accounting and/or auditing. Moreover, the president must be a member of the management body. For the president, a suspension period of one year must be observed between terms.

The Spanish corporate governance code, which is not compulsory, stipulates that all members must be selected based on their experience with and/or knowledge of accounting, auditing and risk management.

- United Kingdom

In the **United Kingdom,** since 2006, the law[138] has required directors of companies (both listed and non-listed) to be at least 16 years of age. There is no maximum age. The law does not require any competencies or level of experience, but the director must perform his or her duties with due diligence[139].

The UK Corporate Governance Code requires the board of a listed company and its committees to have a balanced representation in terms of competencies, experience, independence and knowledge of the company to enable them to perform their duties effectively.

[138] Section 157 of the Act of 2006.
[139] Section 174 of the Act of 2006.

All directors of listed or non-listed companies must dedicate adequate time to the company in order to perform their duties in actuality.

Smaller-sized listed companies, which are not subject to the Governance Code, tend to follow this code or other similar codes with regard to the requirements on competencies, experience, independence and knowledge[140].

C) Other special practices identified

The other special practices identified involve listed companies.

In **Italy**, for listed companies, all shareholders have the right to submit a list of candidates for selection of the permanent or substitute members of the supervisory body, unless the statutes stipulate a minimum number of shares for eligibility. It is stipulated that at least one permanent member and one substitute member of the supervisory body be selected from the candidates chosen by the minority shareholders.

As for listed companies that have adopted a one-tier system, the rules of selection and appointment of members of the management supervisory committee are the same as those that apply to the selection and appointment of the board of directors for listed companies.

For listed companies that have adopted the 'traditional' system, there must be at least three permanent auditors and at least two substitute auditors.

As for listed companies that have adopted the one-tier system, the management supervisory committee must have at least three members.

Other requirements on integrity and professionalism are given for members of the body exercising the supervisory power, including significant experience in the company's area of activity and never having been convicted of certain crimes.

2.2.1.5. Rules on plurality of offices

A) Provisions of the law

The plurality of offices is typically regulated by the provisions of the law in most Member States, with the exception of Denmark, for which we have not identified any legal constraints.

The rules on the plurality of offices apply to offices held at various levels:

- Within the same company:
  - Prohibition against simultaneously holding the positions of member of a management body, general manager or authorised representative (**Germany, Austria, Bulgaria, Estonia, Finland, Italy, Latvia, Luxembourg, Poland, Czech Republic, Romania, France, Slovenia**)
  - Prohibition against membership in the management body of the same company during the past two years, unless appointed by the shareholders with over 25 % of the company's voting rights (**Germany**)
- Within a body of the same kind in other companies:

[140] Companies listed on the AIM must adhere to the rules of the London Stock Exchange (The London Stock Exchange plc's AIM Rules) and must also observe the Guidelines for Smaller Quoted Companies published by the Quoted Companies Alliance.

- In **France**, prohibition against holding more than 5 offices as a member of a supervisory body in companies with registered offices within the territory of France. Offices held by the same person at companies in the same group only count as one office. Offices as a member of the supervisory body in controlled companies are not counted.
- Prohibition against holding positions as a member of the supervisory body if holding offices in supervisory bodies in ten other commercial enterprises (**Germany, Austria**). Limitation to eight offices in listed companies (instead of ten in non-listed companies) for the number of offices in other supervisory bodies (**Austria**).
- In Austria, the physical persons who are already members of at least eight other supervisory bodies in other listed companies are excluded (presidency of supervisory bodies of this kind counts as two offices)
- Prohibition against membership in the supervisory body of a company conducting competing activities (**Hungary**)

* Within a different body in other companies:
  - Prohibition against holding more than five offices in the same territory, unless the person holds at least a quarter of the capital in the company in question (**Romania**)
  - Prohibition against holding shares in a company conducting competing activities (**Hungary**).
* Penalties applicable in cases of violations of the rules on plurality of offices are generally nullification of the appointment (**Germany, Austria**) or immediate termination of the term of office and compensation for any damages incurred by the company (**Bulgaria, Romania, Hungary**).
* As for the **SE**, the European legislature referred to the prohibitions applicable in the countries of registration and stipulated that the following persons cannot be members of the SE's supervisory body nor representatives of a legal person member:
  - Persons who are simultaneously members of the management body (except in exceptional cases of vacancies in the management body), see 0 below.
  - Persons who are not permitted, under the law of the Member State in which the SE's registered office is situated, to serve on the supervisory body of a joint stock company governed by the law of that Member State
  - Persons who are not permitted to serve on the supervisory body of a joint stock company governed by the law of a Member State owing to a judicial or administrative decision delivered in a Member State[141]

B) Soft law

There are also non-compulsory rules from soft laws:

* No more than two members of the management body who were members of the

[141] Regulation No 2157/2011, Articles 39, Section 3 and 47, Section 2.

management of the company or of a company controlled by the company during the past three years may be members of the supervisory body during the same period. It is impossible to be chairperson of the supervisory board of a company in the same group (soft law, **Estonia**).

- Term limit of five terms for members of the board in listed companies, with a term as chairperson of the supervisory board counting as two terms (**Netherlands**)

- Positions held in foreign listed companies taken into account (**France**: AFEP-MEDEF code, MiddleNext governance code)

Specific rules for certain sectors: banking, insurance (**Slovakia**)

Additionally, some States recommend a break between serving in a management position and serving on the supervisory body (**Austria**: two years according to the 2012 governance code).

C) France, Germany, Denmark, Romania, Spain and the United Kingdom in focus

- France

In **France**, a natural person (or a permanent representative of a legal person) cannot simultaneously hold 5 positions on supervisory bodies (whether the company has a board of directors, or an executive board and supervisory board).

Moreover, a member of the supervisory board may not serve on the executive board. This prohibition also applies to members of the supervisory board who are permanent representatives of legal persons. If a member of the supervisory board is appointed by this board to the executive board, this person's duties on the supervisory board are automatically suspended.

The number of terms a person may serve on a supervisory body is otherwise unlimited for supervisory bodies of subsidiaries (listed or non-listed companies). If a person serves up to 5 terms in unlisted companies falling under the control of the same company (sister companies), these terms shall only count as one.

Finally, a statutory limit imposes a maximum of five terms as a company's general manager, executive board member, director and supervisory board member. However, a director may only serve as general manager of the same company for a single term.

In the case of improper plurality of offices, the member of the board (as defined in the Glossary) in question has three months to normalise his or her situation (by relinquishing one of the posts). This same grace period is granted if one of the conditions for exemption ceases to apply. If the person in question fails to normalise matters within three months, he or she shall be considered dismissed from the most recent position accepted and shall be obligated to repay any remunerations improperly received. The validity of the decisions in which this person was involved cannot be called into question.

- Germany

In **Germany**, being a member of the supervisory body precludes membership in the management body (as an individual or as a permanent representative) and holding the positions of director (*Prokurist*) or general manager of the company.

All positions held in listed companies on a regulated European market are taken into account with the exception of positions held in consolidated companies[142].

In cases of non-compliance, the appointment is nullified.

Exemptions apply for persons who are already serving as a member of the supervisory board in ten other commercial enterprises or who are legal representatives in an entity controlled by the company.

Moreover, a supervisory board member cannot also simultaneously be a member of the management body or general manager of the company. In certain cases, the statutes may stipulate additional qualifications required to be a supervisory board member.

In Germany, a supervisory board member candidate at a listed company is ineligible if this person was a member of the management of the same company during the last two years, unless he or she was appointed by shareholders representing more than 25 % of the company's voting rights.

- Denmark

In **Denmark**, there are no rules on the plurality of company offices in Denmark. However, in listed companies, members of the supervisory body cannot be chairperson or vice-chair of the company's management body.

- Romania

In **Romania**, members of the supervisory body may serve up to five consecutive terms in joint stock companies with registered offices in Romania. This does not apply if the member in question holds at least one quarter of the company's capital or if he or she is a member of the management body or supervisory body or a joint stock company which itself holds at least one quarter of the company's capital.

A supervisory body member who exceeds the term limit must resign from the posts in excess of the legally authorised limit within a period of one month starting from the beginning of the non-compliance. At the end of this period, the positions in excess of the limit shall be terminated in chronological order.

- Spain

In **Spain,** the law does not give any rules on plurality of offices.

- United Kingdom

In the **United Kingdom**, the governance code[143] states that all members of the supervisory body (here, the board of directors) must be able to dedicate adequate time to the company to fulfil their responsibilities effectively. The supervisory body may not accept a full-time executive director holding more than one position as non-executive director in a FTSE-350 company or the presidency of a company of this kind.

Non-executive directors must commit to dedicating the time necessary to perform their duties.

There are no specific limits for private companies.

The terms of the governance code apply under the 'comply or explain' principle. If it

[142] Sec 100 AktG.
[143] Book 2 of the *UK Corporate Governance Code.*

appears to the company that it can achieve the objectives set out in the governance code by means other than those suggested, then it is recommended that the company provide an explanation. Whenever it is not in compliance with the objectives of the code, it must provide an explanation.

2.2.1.6. Supervisory body member remuneration

A certain number of Member States (in particular, **Belgium**, **Denmark**, **Austria**, **Spain**, **Finland**, **Ireland**, **France**, **Italy**, **Portugal** and the **United Kingdom**) have adopted corporate governance codes that contain provisions on remuneration for members of the board.

These governance codes are used to:

- Define procedures for remuneration that is in accordance with company policy, proportionate to the level of responsibility taken on by the member of the supervisory body, to the member’s diligence and/or the company’s economic situation.

- Recommend transparency in remuneration via full disclosure to shareholders not only of individual remunerations provided but also the policy applied to determine the remunerations.

- Understand the different forms of remuneration (fixed or variable depending on objectives achieved, benefits in kind, stock options, severance packages, supplementary pension plans, etc.) and the procedures/principles to govern the granting of these remunerations.

- Recommend the formation of remuneration committees tasked with submitting remuneration proposals to the supervisory body.

A) Option to remunerate members of the supervisory body

Most Member States have legislation addressing remuneration of members of the supervisory body (notable exceptions include **Bulgaria**, **Finland** and **Spain**).

European recommendations on remuneration apply to listed companies. Generally, these have been copied over to the governance codes published in the laws of the countries examined in the study.

Thus, in **Spain**, national law does not require remuneration of members of the supervisory body, but does offer the option to stipulate such in the company’s statutes. In this case, Spanish law states that any remunerations for management bodies which are not based on the company’s profits must be determined by the general meeting of shareholders.

B) Procedures for setting remunerations

In most Member States, remuneration for members of the supervisory body is decided based on a procedure specified in the statutes, and determined by a collective resolution of the shareholders.

C) Disclosure of remuneration

- France

In **France**, in listed companies (or those controlled by a listed company), the law imposes the obligation that the management report submitted to the general meeting of shareholders must include the total remuneration as well as any benefits of whatever kind provided by the company, during the past financial year, to each of the members of the board. This requirement is intended to give shareholders a clear picture not only of the individual remuneration provided but also of the policy applied to determine the remunerations.

These transparency rules are particularly extensive given that they also cover the sum of the remunerations and benefits of whatever kind received by each of the members of the board (as defined in the Glossary) from companies controlled by their company and those received from the company controlling the company in which they hold their positions.

The management report details the fixed, variable and exceptional components of these remunerations and benefits as well as the criteria applied to determine them or the circumstances on which they were based. The report must also indicate the commitments made by the company to the benefit of the members of the management body corresponding to elements of remuneration, bonuses or benefits due or which may fall due as a result of acceptance, termination or changing of these positions or acceptance of subsequent positions.

Strictly for listed companies, the law also imposes the obligation on the chairperson of the supervisory body to report on the company's accounts in a report enclosed with the annual report, including, in particular: 'the principles and rules decided on by [the board of directors/supervisory board] to determine the remunerations and benefits of whatever kind granted to members of the board'. This report is approved by [the board of directors/supervisory board] and made public.

As for companies whose securities are not admitted to trading on a regulated market, the law states that the total sum of the remunerations granted during a financial year to all member of the board for performance of their duties must be included in the annex to the annual statement of accounts. The remunerations may, however, be withheld from publication if such would enable identification of a specific board member's situation.

- Denmark

In **Denmark**, Danish law stipulates, with regard to listed companies, that the annual report must contain information on total remuneration granted to members of the supervisory body for the past financial year as well as individual remuneration granted to each of the members.

The annual report must be deposited with the Danish Business Authority, which will publish this document on its Internet site.

The corporate governance committee recommends that listed companies be 100 % transparent with regard to their policy on remuneration and remuneration for members of the supervisory body. Thus, the corporate governance committee (in its Recommendations on Corporate Governance, in the version of August 2011 — which is only intended to apply to listed companies), recommends disclosure of the total remuneration for each member of the board (fixed remuneration, variable remuneration, severance packages, pension plans, etc.).

The committee also recommends that the company remuneration policy and compliance with this policy be explained and justified by the chairperson of the supervisory body during the annual general meeting of shareholders.

Danish companies which do not apply the recommendations of the corporate governance committee are subject to the 'comply or explain' rule.

Non-listed companies are not subject to publication requirements.

- Spain

In **Spain**, which has adopted the one-tier system, members of the board of directors exercise the executive and supervisory powers at the same time in the board of directors, except in listed companies in which an audit committee must be created (in which case it is this body which acts as the supervisory body).

Spanish law states that listed companies must publish a corporate governance report on an annual basis and submit this report to the market authorities. In particular, this report must contain the identity and remuneration of members of the administrative body.

- United Kingdom

In the **United Kingdom**, which has adopted the one-tier system, the members of the board exercise both the executive power and the supervisory power in the supervisory body (board of directors). More precisely, the executive board members are invested with the executive power and the non-executive board members are invested with the supervisory power.

In the United Kingdom, all companies which are not small enterprises must publish the elements of supervisory body member remunerations in their annual report, indicating the highest remuneration.

Listed companies must also issue a report on supervisory body member remunerations featuring detailed information on each member and indicating the base remuneration, the bonus, stock options, long-term benefits, etc. These elements of the remuneration are subject to the advisory 'say on pay' procedure in the general meeting of shareholders. In this procedure, the company's shareholders may vote once per year, during the annual general meeting, on remuneration of supervisory body members. However, the shareholder vote is merely advisory. The UK government recently proposed making the shareholder vote on supervisory body member remuneration under the 'say on pay' procedure legally binding. A law on this should be passed over the course of 2012.

The report must also specify the policy applied for supervisory body member remuneration, as well as details on the associated performance conditions and granting of stock options and long-term benefits.

- Germany

German law requires companies to publish information on supervisory body member remuneration.

This disclosure must be made in the financial report and also in a special report on remuneration. Within the framework of company groups, the parent company must provide information in the report on the group's consolidated accounts. The reports must indicate the remunerations for each individual member separately.

Non-listed companies are required to publish the total sum of the remunerations, without having to publish details on the remunerations granted to each member.

The financial report must contain the following information on remunerations:

- Total remunerations (salaries, dividends, options, expense reimbursements, commissions, benefits in kind, etc.) granted during the financial year. Listed companies on a regulated market must publish individual remunerations for each member, indicating the fixed salary and the variable components separately.
- The total remuneration is the severance packages, pensions, and other benefits granted to the member or his or her beneficiaries. The same distinction applies as indicated in the preceding point.

- Romania

Romanian law does not require publication of remunerations granted to members of supervisory bodies.

2.2.1.7. Types of remuneration

- France

In **France**, individual remuneration for members of the supervisory body is made up of a remuneration associated with attending meetings of this body, known as the director's fee (*jeton de présence*). The general meeting of shareholders determines the total sum granted in director's fees, which the supervisory body may divide among its members. The general assembly has total freedom to decide on the appropriateness of this remuneration and to set the specific sum. It is not bound by the provisions of the statutes nor by any prior resolutions it may have taken. Any members of the supervisory body who are also shareholders may participate in the vote on the resolution on their director's fees.

It is the supervisory body that is authorised to determine the distribution of this total sum among its members.

Director's fees are divided equally among the members of the supervisory body, but it is possible to distribute them unevenly by granting a larger sum to the chairperson, to members who are also members of a research committee, to members tasked with special duties (chairperson, general manager) and to more diligent members.

The supervisory body has the option to entrust one of its members with a special task (example: overseas research trip, testing of a prototype, etc.), which falls under the framework of regulated party agreements examined in 0, and which gives rise to extraordinary remuneration. This remuneration must correspond to actual work and cannot be excessive.

The AFEP-MEDEF code recommends taking the following into account in setting the distribution of director's fees:

- 'the diligence of the directors/[members of the board] in the board and in the committees [audit committee, remuneration committee, etc.]'
- 'the level of responsibility taken on by the directors/[members of the board] and the time they must dedicate to their duties'

It should be noted that when a company voluntarily adheres to a corporate governance code developed by organisations representing the business community, such as the AFEP-MEDEF code or the MiddleNext code, the law[144] stipulates that the company must indicate any provisions of the code which were not applied and the reasons for such (the 'comply or explain' rule). The law states that in the case that a company does not adhere to any code of this kind, the company must indicate the rules applied in addition to the requirements of the law and explain the reasons why the company decided not to apply the corporate governance code.

The members of the supervisory body cannot receive any remuneration, whether permanent or not, other than that indicated above, with the following exceptions:

- Remunerations granted to members of the supervisory body, under certain conditions, by virtue of an employment agreement with the company. This plurality is subject to the conditions discussed in 0.
- The chairperson of the board of directors/supervisory board receives a special remuneration determined by the board of directors/supervisory board. This remuneration may be fixed or variable, or even mixed. It may be fixed as a function of performance criteria for the company or the group to which the company belongs.

- Denmark

In **Denmark**, remuneration for supervisory body members is determined by a resolution of the shareholders convened in a meeting. The general meeting may either approve the remuneration granted to members of the supervisory body for the past financial year or approve the remuneration to be paid for the current financial year under the 'say on pay' rule (vote by the general meeting on remuneration to be granted to members of the supervisory body).

Danish law stipulates (with regard to listed companies only) that the supervisory body must set guidelines on implementation of any incentive programmes involving members of the supervisory body or the management before any such programmes are implemented. Incentive programmes of this kind must be adopted by the general meeting of shareholders.

The corporate governance committee recommends a prohibition on granting free shares or warrants as remuneration to members of the supervisory body.

The committee recommends that the final sum (after calculation of the variable component) of the remuneration not exceed two-years' of remuneration.

- Germany

In **Germany**, members of the supervisory body may receive both fixed remuneration and remuneration subject to achieving specific results. The remuneration subject to achieving specific results is not legally valid unless the method of calculating the sum due to members of the supervisory body has been clearly established.

The set remuneration sum must be proportionate to the responsibilities taken on by the member of the supervisory body.

[144] Section L. 225-37 of the French Commercial Code and Section L. 225-68 for the *SA* (joint stock company) with supervisory and executive boards.

However, granting of convertible bonds or stock options for remuneration of members of the supervisory body is prohibited, as is indexation of remuneration based on the company's share price.

- Romania

Romanian law stipulates that remuneration for members of the supervisory body must be granted in accordance with their duties and the company's economic situation. Remuneration may be fixed and/or variable.

The law does not provide any restrictions on the types of remuneration which may be granted. Remuneration may be fixed, combined with stock options, bonuses, bonus shares, profit-sharing, etc.

Supplementary remuneration may be granted to members of the supervisory body for their services rendered outside of the scope of their duties (for instance, participation in ad-hoc committee, etc.). These elements of supplementary remuneration shall be determined by the general meeting of shareholders or by the company's statutes. It falls to the body to set the specific individual remuneration to be granted to the member in question.

Some Member States have adopted measures primarily intended to set an upper limit on remunerations and/or to ensure they are legitimate.

Thus, in **Lithuania** for instance, bonuses granted to members of the supervisory body and the management, as well as to employees, are capped at a maximum sum of 1/5 of the net profits of the company for the financial year in question. There is a bill that will reinforce the upper limit on remunerations granted to supervisory bodies and management to a maximum of one third of the net profits subject to dividend payment.

2.2.2. FUNCTIONING OF THE SUPERVISORY BODY

The specific details on the rules for functioning of the supervisory body are given in national laws both for frequency of meetings and decision-making, with a certain amount of freedom left to the statutes, which is nevertheless restricted.

2.2.2.1. Frequency of meetings of the supervisory body

In order to ensure effective supervision of the activities of the management by the supervisory body, national legislations have stipulated the frequency of meetings of the supervisory body. It must meet whenever necessary, but generally at least once a year to convey its observations on the annual accounts. Some Member States strengthen this rule by providing for more frequent meetings, as is the case for listed companies and for **SEs**.

Thus, if an SE is of the one-tier type with a board of directors, the European legislature has stated that the board of directors must meet at least once every three month (further details on the frequency are left to the statutes) to discuss the state of affairs at the SE and developments in the foreseeable future[145].

[145] Regulation No 2157/2001, Article 44.

Table 4: Required frequencies for meetings of the supervisory body

Required frequencies for meetings of the supervisory body			
Country	At least 1 meeting/quarter	At least 3 meetings/year	At least 1 meeting/quarter (only for listed companies)
AT			X
BG	X		X
DE			X
EE			X
FR			X[146]
IT			X
LV			X
PT			X
RO	X		X
SI		X	
SE	X		

Blue: two-tier system country
Green: mixed system country
Pink: hybrid system country
One-tier system countries without a distinct supervisory body have been excluded from the table: United Kingdom, Sweden, Greece.

Source: JeantetAssociés

2.2.2.2. Decision-making in the supervisory body

With regard to decision-making rules for supervisory bodies, the question of whether to set a quorum for validity of the meeting is generally left to the statutes, whereas the majority rules are restricted by law.

A) Quorum

Setting a quorum that is required in order for decisions of the supervisory body to be valid falls to the freedom of the statutes. However, legislative texts make up for any omissions in the statutes by stipulating auxiliary rules which automatically apply if the statutes fail to set their own. Thus, where not set out in the statutes, the quorum rules shall be as follows according to the case at hand:

- At least half of the members or representatives present (SE, **Germany, Belgium, Bulgaria, Denmark**)
- At least/more than half of members present (**Estonia, France**[147], **Latvia, Luxembourg, Poland, Romania, Slovakia, Slovenia)**
- At least 3 members physically present, by video conference where applicable (**Germany, Austria, Finland, Italy, Hungary**)

B) Majority rules for decision-making

National legislations restrict decision-making by the supervisory body. A simple majority of members present and represented is typically required in most States.

[146] Once a year for non-listed companies in France.
[147] Note: In France, these rules are compulsory.

Table 5: Majority rules for decision-making in the supervisory body

Majority rules for decision-making in the supervisory body			
Country	**Simple majority of members present or represented**	**Absolute majority**	**Greater majorities may be required in the statutes**
AT	X		X
BG	X		X
CZ	X		X
DE	X		
DK	X		X
EE	X		X
FI	X		
FR	X		X
HU	X		
IT	X		
LU	X		
LV	X		X
NL (1)	X		
PL		X	X
PT	X		
RO	X		
SI	X		
SK	X		

(1) Netherlands: The one-tier system will also be available as of 1 July 2012.
Blue: two-tier system country
Green: mixed system country
Pink: hybrid system country
Only one-tier system countries without a distinct supervisory body have been excluded from the table: United Kingdom, Sweden, Greece.

Source: JeantetAssociés

As for **SEs**, the European legislature has provided the principle of freedom of statutes in this area, while also providing a principle of automatic application in cases of failure to set rules in the statutes: decisions shall be taken by a majority of the members present or represented[148].

An exemption is nevertheless possible if employee participation is organised in the SE in accordance with Directive 2001/86/EC. In this case, the Member State may stipulate that the quorum for the supervisory body is subject, under the same conditions, to the rules applicable to joint stock companies falling under the law of the Member State in question[149].

Additionally, if the statutes do not include provisions on this, the chairperson of each body shall have the casting vote in cases of an equality of votes. There shall, however, be no provision to the contrary in the statutes if half of the supervisory body consists of employee representatives[150].

[148] Regulation No 2157/2001, Article 50, Section 1.
[149] Regulation No 2157/2001, Article 50, Section 3. For information on the position taken by each Member State, see Ernst & Young 'Study on the operation and the impacts of the Statute for a European Company (SE)' of 9 December 2009, p. 40.
[150] Regulation No 2157/2001, Article 50, Section 2.

2.3. COMPOSITION OF THE AUTHORITY EXERCISING THE SUPERVISORY POWER

2.3.1. INDEPENDENT DIRECTORS

2.3.1.1. Obligations stipulated by law

To ensure better supervision, mainly in listed companies, the vast majority of Member States recommend the presence of independent directors. Only **the Netherlands**, **Slovakia**, **Slovenia**, **Latvia** and **Estonia** do not feature provisions for such.

A) Criteria used to determine independence

A general trend can be observed in the definition of independent director used by a large number of countries (14 in total).

The main eligibility criteria for this position are:

- Not being a significant shareholder in the company (some States impose a limit of 10 % of shares)
- Not being a current director of the company or any of its subsidiaries, nor having been one in the recent past (in the past three to five years, depending on the state)
- Not receiving or having received substantial and specific remuneration from the company (other than as a director)
- Not being a senior executive in the company or any of its subsidiaries, nor having been one in the recent past (in the past three to five years, depending on the state)
- Not having any business dealings with the company or any or its subsidiaries, whether directly or indirectly
- Never having been an auditor for the company
- Not having any ties of affection or relation with any of the directors of the company or majority shareholders
- Not being an employee of the company or any of its subsidiaries, nor having been one for a certain period of time (in the past three to five years, depending on the State)
- Not having been a director of the company for a certain number of years (varies depending on the State)

In all States stipulating the presence of independent directors, these can be re-appointed without any special conditions.

The minimum number of independent directors varies from State to State. Some do not set a minimum, such as **Lithuania, Romania** and **Luxembourg**, which recommends a 'satisfactory number', and invites the appointment committee to ensure a 'balance of competencies' in the supervisory body.

Others only stipulate a single independent director, such as **Germany**, who should have competencies in financial auditing, or two, such as the **United Kingdom**, **Greece** or **Poland**.

Finally, some States require half of the directors to be independent, which is the case for **Denmark** and **Ireland**. As for **Sweden** and **Finland**, they require the majority of directors to be independent.

Spain has the unusual feature of stipulating that only candidates submitted by the appointment committee may be independent directors. They must comprise a third of the directors.

In most cases, these requirements only apply to listed companies and are given in soft laws.

B) The United Kingdom, France, Denmark, Germany, Spain and Romania in focus

- United Kingdom

In the **United Kingdom**, there is no legal obligation for companies to appoint independent directors. However, a recommendation from the UK Corporate Governance Code prescribes a minimum of two independent directors for all listed companies. If a listed company fails to apply this recommendation, it is required to explain why. This code also recommends that companies belonging to the FTSE 350 have at least as many non-executive directors as executive directors and details the circumstances under which their independence may be lost.

Practice has shown that at least half of the members on the boards of directors of these 350 companies are independent. This is also a widespread practice in non-listed companies of certain sizes.

This definition of an independent director given in the UK Corporate Governance Code is in accordance with the one given above. A director is no longer considered to be independent after nine years as director.

- France

In **France**, independent directors are not required by law, but are featured in recommendations in the AFEP-MEDEF code as well as the MiddleNext code. The ESMA has also given numerous recommendations in this area, and requests that companies justify the independence criteria applied in selecting their directors.

The AFEP-MEDEF code recommends that independent directors make up half of the members of the board in widely held companies without controlling shareholders. In controlled companies, they must make up one third of the board, under the same code.

The MiddleNext code, for its part, recommends that the board have at least two independent members, or just one if the board is made up of five or fewer members, or more in boards with large numbers of members.

France uses the same definition of independent director as most of its neighbouring European countries. They cannot serve as independent directors for more than twelve years in the same company (or one of its subsidiaries).

- Denmark

The **Danish** governance committee recommends that at least one third of directors be independent in listed companies. Independent director is defined as above. A director is no longer considered to be independent after twelve years as director.

No specific remuneration is granted to independent directors, although the company must provide for their needs in terms of training.

- Germany

Germany requires its listed companies to have at least one independent director, who must have specific competencies in auditing and finance.

- Spain

In **Spain**, the provisions on independent directors are given in the governance code and are therefore non-binding. They only apply to listed companies. It is recommended that one third of the directors of these companies be independent.

The Spanish definition of independent director features the criteria given above. We note that the independent director must be proposed by the appointment committee. After twelve years, a director is no longer considered to be independent.

- Romania

Romanian law provides for the presence of independent directors in companies, but does not set a minimum number. The law gives a definition of independent director that is in accordance with the one given above. To this list, we may add the condition of not having served more than three terms as director in the company.

Independent directors can be re-appointed without any special conditions. They are not granted any special budget.

2.3.2. GENDER BALANCE

2.3.2.1. Legal obligation in some States

A review of the applicable provisions of the law in the 27 countries making up the EU has shown that four countries have passed laws with obligatory quotas (usually only for listed companies) for a minimum percentage of females appointed to supervisory bodies.

These are **Austria**, **Belgium**, **Spain** and **France**[151].

Six countries have supplemented their governance codes with provisions to establish a gender balance in the membership of authorities exercising the supervisory power.

These are **Germany**, **Denmark**, **Finland**, **Ireland**, **Italy** and **Poland**. Only one of these six countries has reported achieving its target (25 % in **Ireland**, with no indication of the date).

The other countries have not adopted any provisions, although discussions are underway in some.

The sections below analyse the state of affairs in the national laws applicable in the six countries selected for detailed analysis, namely: **Germany, Denmark, Spain, France, the United Kingdom** and **Romania**.

[151] Please note that prior to the law, the AFEP-MEDEF code had given a recommendation which has since basically been incorporated into the law.

Although not a member of the EU, **Norway** warrants a brief discussion because it is a remarkable example in at least two regards: not only is it the first country to legislate gender balance, it is also the first country in which the deadline for implementation in the boards has passed.

A) An interesting example: Norway

Since 2003, Norway has had laws on the books prescribing that at least 40 % of supervisory body members be female.

In addition to this, more specific regulations has been set for smaller supervisory bodies:

- If the supervisory body only has two or three members, both genders must be represented.
- If the supervisory body has four or five members, there must be at least two representatives of each gender.
- If the supervisory body has six to eight members, there must be at least three representatives of each gender.
- If the supervisory body has nine members, there must be at least four representatives of each gender.
- If the supervisory body has more than nine members, each gender must account for at least 40 % of the members.

These measures apply to all listed companies, public enterprises and, more recently, to municipal enterprises. Private limited liability companies (160 000 in Norway), however, are not covered by the law because most of these companies are small family businesses and the owners are the members of the board.

Norwegian companies enjoyed a compliance period of five years, i.e. until January 2008, to implement these rules. On the other hand, companies founded after 2008 were required to implement these rules immediately.

In January 2008, 78 companies received a letter of notice giving them four weeks to comply with the rules in force. By February 2008, only twelve recalcitrant companies remained. Finally, in April 2008, all companies were in compliance with the law.

The proportion of women in bodies exercising supervisory duties has been increasing steadily: 6 % in 2002, 9 % in 2004, 12 % in 2005, 18 % in 2006 and finally 40 % in 2009. No other country has such a high proportion of females in bodies exercising the supervisory power.

In cases of non-compliance, the maximum penalty is expulsion of the company from the register of companies and its dissolution.

B) Other countries with laws on the books: Spain and France in focus

- Spain

Spain enacted legislation in 2007 and has been a pioneer within the EU.

Since 2007, companies are therefore required to incorporate an adequate number of females in these supervisory bodies to meet a certain quota by 24 March 2015.

The law states that this adequate number will be achieved when the percentage of individuals of each gender is no greater than 60 % and no less than 40 %. Moreover, the conditions for membership in the body exercising supervisory duties must be the same for men and women.

It should be noted that this obligation only applies to Spanish companies meeting at least two of the following criteria:

- The company's total assets do not exceed EUR 11 400 000.
- The company's net annual turnover does not exceed EUR 22 800 000.
- The company's average number of employees over the course of the financial year is less than 250.

No penalties are stipulated for failure to comply. On the other hand, some incentives have been provided. Thus, within the framework of public tenders or government subsidies, public bodies may give preference to companies adhering to the recommended quotas.

Indisputable signs of progress can be observed: The percentage of women in bodies exercising the supervisory power has more than doubled, from 4 % in 2006 to 10 % in 2010[152].

In addition to this, the corporate governance code also includes a recommendation for listed companies with over 250 employees. Under this code, the following two measures must be implemented in cases of low female representation in a body exercising supervisory duties:

- These companies must actively seek out female candidates as soon as a vacancy arises, especially for independent directors.
- They must report the reasons for non-compliance and measures implemented to remedy the situation.

Moreover, the appointment and remuneration committees must take measures to ensure that:

- The candidate selection process is not disadvantageous to women in any way.
- The company is making significant efforts to incorporate women, with the proper qualifications, into supervisory bodies.

• France

In **France**, first off, a recommendation was adopted by the AFEP and the MEDEF on 19 April 2010[153], and inserted into the AFEP-MEDEF code. It is intended to increase the number of female members in supervisory bodies in listed companies.

As per Section 6.3 of this Code, all supervisory bodies in listed companies must first seek to meet a quota of 20 % women within a period of three years, then 40 % within six years of publication of this recommendation or admission of the company's securities for trading on a regulated market, if this occurs subsequently. A minimum difference must be stipulated if the board has no more than nine members.

Moreover, companies whose supervisory bodies do not feature any women must appoint a

[152] http://register.consilium.europa.eu/pdf/en/11/st07/st07231.en11.pdf.
[153] http://medef.typepad.com/Code-Consolide-AFEP-MEDEF.pdf.

women by no later than the second general meeting of shareholders following release of the recommendation.

Second, an Act on gender balance in supervisory bodies and equality in the workplace was passed on 27 January 2011. By virtue of this Act, the proportion of directors or members of the supervisory board of each gender must be at least:

- 20 % by the end of the first general meeting after 1 January of the third year following the Act's year of publication, which will be in 2014
- 40 % by the end of the first general meeting after 1 January of the sixth year following the Act's year of publication, which will be in 2017

The obligation to meet a quota of 40 % of directors for each gender by the end of next meeting to decide on appointments also applies to companies who meet the following cumulative conditions for three consecutive financial years starting from 1 January 2017:

- Have an average of at least 500 permanent employees.
- Have a net turnover of at least EUR 50 million or have a balance sheet total that is greater than or equal to this sum.

It should be noted that this obligation, imposed on all listed companies, may also apply to non-listed companies after 2017 if they meet the above criteria.

A double penalty is stipulated in cases of failure to meet these legal obligations:

- Nullification of the appointment, unless the appointee is a woman
- Suspension of payment of director's fees until the membership of the board of directors is in compliance with regulations

This legal obligation has now been incorporated into Section L. 225-17 of the French Commercial Code, which states that 'the company shall seek to achieve a gender balance in composing the board of directors'.

2.3.2.2. Obligations given in governance codes

- Germany

Germany has a governance code that gives some regulations on equality. Failure to adhere to these is subject to the 'comply or explain' rule. Thus, the supervisory body must seek to achieve an adequate level of female representation.

In addition to this, the German Institute for Economic Research published a study in May of 2010 which found that there are only twenty-nine women out of the nine hundred supervisory board members at major German companies[154].

Following this study, the government decided to initiate a dialogue with the thirty biggest companies in Germany, but it remains divided on the measures to be taken.

[154] http://www.diw.de/documents/publikationen/73/diw_01.c.356535.de/dp1001.pdf.

- Denmark

Denmark has revised the recommendations in its corporate governance code to stress the need to increase the number of women in positions of responsibility and set new targets[155].

Thus, the Danish Corporate Governance Committee recommends that management bodies ensure that a formal, detailed and transparent procedure is conducted for selection and appointment of candidates.

Therefore, during selection of candidates, the supervisory body must take a number of criteria into account: diversity in terms of age, experience, nationality as well as gender equality, which must be prioritised over the other criteria.

This corporate governance code only applies to listed companies.

The Danish government does not plan to legislate in this area, but rather has decided to initiate a dialogue with companies in order to assess the appropriateness of implementing legal quotas.

- The United Kingdom

In the **United Kingdom**, a report by Lord Davies, dated 24 February 2011, entitled 'Women on Boards' gives various recommendations on the subject of women gaining access to these bodies.

Lord Davies shows that boards of directors observing a gender balance are better able to understand customer expectations and also benefit from new perspectives, ideas, and a broader range of experience.

At this time, the government has not implemented any of these recommendations and it does not plan to legislate in this area, at a time when only 7.8 % of members of FTSE-350 company boards of directors are female[156].

These recommendations have been consulted by the Financial Reporting Council. This council concluded that the corporate governance code should be amended to require companies that apply it to publish, in their annual report, both information on diversity in the board of directors and the measurable targets it has set for implementation of the policy.

This revised code is slated for release in 2012.

- Romania

Romania has not adopted any special regulations on equality in bodies exercising supervisory duties.

Basically, there are only legal provisions on equality in general, which are rather limited in the area of discrimination against women.

2.3.3. EMPLOYEE REPRESENTATION IN THE SUPERVISORY BODY

European law has breathed new life into the debate on employee involvement in company supervisory bodies.

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[155] Excerpt from 'Women in economic decision-making in the EU: progress report' of the European Commission, 2012 (http://ec.europa.eu/justice/gender-equality/files/women-on-boards_en.pdf) .

[156] http://www.bis.gov.uk/assets/biscore/business-law/docs/w/11-745-women-on-boards.pdf.

This topic has generated and continues to generate open discussions in which positions that are difficult to reconcile become entrenched, with differences both in national regulations and in the claims of opposing actors in the business community. The issue arose again, for instance, during the European private company (SPE) project.

European law has nevertheless served as an example by instituting a right to participation within the framework of the SE, a delicate compromise which was achieved after lengthy negotiations. 'Participation', which is defined in Directive 2001/86/EC of 8 October 2001 on the SE, refers in particular to the influence of the employees' representatives in electing or appointing some of the members of the company's supervisory body or management.

From the perspective of company law, representation in supervisory bodies cannot be disassociated from other means of employee influence on economic and strategic decisions in the company, such as provision of information and consultation, negotiations and collective action or presence in specialised committees and general meetings.

For this reason, the sections below describe not only the national regulations pertaining to employee representation in supervisory bodies, but also those governing relations between the company's bodies and institutions representing employees in the company. This comparative study highlights some national practices which could serve as useful points of reference in reflections on the development of European law.

2.3.3.1. Methods of employee representation in supervisory bodies

A) Employee representation in supervisory bodies

Seventeen of the 27 Member States of the EU have employee representation in supervisory bodies. All of these countries warrant individual discussion here.

We can distinguish three groups of countries:

- Member States providing for employee representation in both the public and private sectors: **Austria, Germany, Denmark, Finland, France, Hungary, Luxembourg, the Netherlands, Sweden, Slovenia and Slovakia**
- Member States providing for employee representation in supervisory bodies in public sector enterprises only: **Spain, Greece, Ireland, Poland and the Czech Republic**
- Member States with no provisions for rights of representation: **Belgium, Bulgaria, Cyprus, Estonia, Italy, Latvia, Lithuania, Malta, Portugal, Romania and the United Kingdom**

- France

France features four methods of incorporating employees into supervisory bodies, which may be either the supervisory board (two-tier system) or the board of directors (one-tier system).

The French Labour Code stipulates that representatives elected from the works council must be present in the supervisory board or the board of directors. In principle, there must be two representatives from the works council, but if three electoral colleges are formed, then the delegation from the works council must include four members[157].

Joint stock companies have the option to add provisions to their statutes to allow employees to elect representatives to the supervisory board or board of directors. The number of these directors cannot exceed four or, in companies whose securities have been admitted for trading on a regulated market, five, nor can it exceed one third of the number of the other directors. If the number of directors elected by employees is greater than or equal to two, then engineers, management and assimilated workers shall have at least one seat.

Therefore, staff representation is not obligatory and employees do not have the right to demand its implementation, as the shareholders have been granted control over this. Further, the choice for employee representation on the board of a joint stock company is not irreversible: an extraordinary general meeting of shareholders may decide at any time to amend the statutes to eliminate it. Moreover, this option is not typically used in practice.

Representatives of employee shareholders must be appointed if employees hold at least 3 % of the capital in a listed company.

There are two exceptions to this obligation, in order prevent a proliferation of representation in the boards:

- If the board in question has one or more members of the supervisory board of the company's unit trust representing the employees
- If the statutes provide for election of representatives by the employees

These two exceptions are, however, paradoxical given that the representatives of shareholder employees, the members of the supervisory board of the unit trust and the employee representatives do not defend the same interests.

This obligation does not correspond directly to the participation under study because it mainly appears as an accessory to the financial participation of these employees, as their shareholdings make them full shareholders. However, it does represent the interests of all employee shareholders.

Finally, employees may be elected by the general meeting of shareholders to the board of directors or the supervisory board. However, the existence of directors of this kind is not indicative of the participation under study given that they are elected by shareholders and that their capacity as employees, after factoring in the employment contract and job post, is incidental.

In the public sector, representation at the level of the supervisory board or board of directors is a function of the company's number of employees:

- Three seats on the board are reserved for representatives elected by employees in public enterprises with between 200 and 1 000 employees.
- One third of the seats are reserved for these representatives in public enterprises with over 1 000 employees.

With regard to recently privatised companies, employee representation on the boards is not obligatory, but the management would have to adopt a new resolution during the meeting

[157] This covers all companies featuring a board of directors or supervisory board, i.e. joint stock companies, limited partnerships with share capital if they have a supervisory board and are run by a manager, SARLs which have created a supervisory board and SASs, but in this case, the statutes must stipulate the corporate body with respect to which the works council representatives exercise their powers.

of the shareholders to amend the statutes and eliminate this participation.

- Germany

In **Germany**, only the two-tier system is available to joint stock companies: a structure with an executive board and a supervisory board.

Their management model is guided by two principles. On the one hand, the principle of co-decision grants elected representatives from the works committee the power to elect members of the executive board and to monitor its actions. On the other hand, the principle of co-management ensures tenuous association between company employees and management by their obligatory representation in the supervisory board.

Thus, employee involvement in Germany is ensured both at the level of the management body and at the level of the supervisory body.

Co-management, involvement in the supervisory body, is a function of the company's number of employees:

- One third of the seats on the supervisory board are reserved for employee representatives in companies of 500 to 2 000 employees. These must be members of the company's staff.
- In companies with over 2 000 employees, the supervisory board becomes a joint body and some employee representatives may be sent directly by the union from among the union's executive officers.

Companies in the steel and mining industries have their own co-management system: as soon as they have over 1 000 employees, the supervisory board must become a joint body.

- The United Kingdom

In **the United Kingdom**, the structure of the management and the company's control mechanism is one-tier, which means it concentrates all or some of the executive and supervisory powers into the hands of a single body, the board of directors.

There is no text providing for employee participation in company boards. Therefore, they do not sit on supervisory bodies in their companies, but their financial participation is highly developed. However, the voice of employees as shareholders is only expressed in general meetings, and they are not allotted any legal rights of representation in the supervisory bodies.

Employee involvement in supervisory bodies is not a feature of the United Kingdom's system of corporate governance. Other means of protecting the interests of employees are provided.

Basically, the governance code requires remuneration committees to take into account the conditions for employee remuneration throughout the decision-making process.

Further, the Companies Act of 2006 introduced the obligation for members of the board to act in the manner most likely to favour the company's success for the benefit of all of its members and, in doing so, to take into account the interests of the employees, among other things.

However, it is always possible for companies to stipulate employee representation in the board of directors in their statutes. The most salient example would be that of the John Lewis Partnership company, which developed a mechanism of tenuous association between these employees and supervision of the company by virtue of their status as shareholders. Basically, all company shares are held by a unit trust created by the employees who are represented by a partnership board. This board appoints five members of the board of directors and is authorised to dismiss its Chairperson. Moreover, each business unit has its own decision-making body which handles local issues.

No reform project is underway at this time for the current system, even as employee representation in the board of directors is being demanded by employee unions. However, introduction of involvement of this kind has not received a warm welcome from employer's organisations, who view the board of directors and the control board as the two places reserved for business owners.

- Spain

Spanish law does not provide a general right of employee representation on company supervisory bodies. Only certain bodies in the public sector and some enterprises recently privatised must include representatives in their supervisory bodies.

A national agreement provides for union representation from the two most representative unions in the supervisory bodies of public companies with more than 1 000 employees (500 employees for public enterprises in the metallurgy sector) or even creation of supervisory and information committees featuring an equal number of union and employer representatives.

However, in practice, few union representatives are members of supervisory bodies in public sector enterprises.

Finally, employees are also members of supervisory bodies at local savings banks and hold 5 % to 15 % of the seats.

Moreover, no text imposes any shareholder employee representation in supervisory bodies.

- Denmark

In **Denmark**, employees are represented in supervisory boards and boards of directors in public and private companies.

Public joint stock companies are based on a two-tier system while private sector companies may choose between the one-tier and two-tier systems.

The rule for representation in the board of directors/supervisory board is the same for the public and the private sectors: employees in companies with over thirty-five employees over the past three years are entitled to elect representatives to the board of directors.

The number of representatives elected by employees must be equal to half the number of representatives elected by company shareholders during the general meeting. Thus, the minimum number of employee representatives is set to two and may comprise up to a third of members of the board.

In practice, employees in most companies with a board have representatives on it, but they are most numerous in large companies. Relations between these representatives and those of the shareholders are described as based on mutual trust and are characterised by consensus.

Amendments to the law on employee representation in limited liability companies were recently suggested by the Danish Business Authority (the *Erhvervsstyrelsen)*, primarily intended to codify its practices and the case law on employee representation.

Finally, no obligatory representation of shareholder employees is provided.

- Romania

In **Romania**, the structure of the control and management of companies limited by shares is based on a mixed system which therefore permits a choice between the one-tier and two-tier systems.

Employees are not represented in works councils, but delegates elected by representative unions may be invited to attend meetings of the board of directors to discuss 'problems of professional, economic or corporate interest…'

In **Finland,** in all companies with more than 150 employees, employees have the right to be represented in supervisory boards and boards of directors. The principle is that representation is organised based on a negotiation and an agreement between the employer and the employee representatives. In the absence of an agreement, as soon as at least two unions which collectively represent a majority of the company's employees submit a request for representation in the supervisory board or board of directors, the company shall be obligated to provide a form of representation under the conditions stipulated by law.

Sweden has a very similar, but more flexible system of representation. The threshold for number of employees is lowered to twenty-five. Two or three representatives are designed based on a local agreement concluded between the employer and the unions present in the company, if they represent the majority of the employees. In the absence of an agreement, a union representing 80 % of the employees may designate two representatives to the board exercising the supervisory power. If no union meets this criterion, then the two majority unions may each designate a representative.

In **Austria**, representation in supervisory boards is a very common practice. Works councils designate a third of the members of the supervisory board in all joint stock companies with more than 300 employees. These representatives must be members of the works council and company employees.

In **Luxembourg**, a third of the seats on the supervisory board or board of directors are held by employee representatives if the company has over 1 000 employees.

In **Hungary**, this threshold is lowered to 200 employees in the company and their representatives hold one third of the seats on the supervisory board.

In **the Netherlands**, works councils have the right to submit candidates for a third of the seats on the supervisory board in companies with over 100 employees. However, neither employees nor union representatives who have participated in joint company negotiations may sit on the supervisory board. This restriction stems from a desire not to allow individual interests to interfere in the supervision of the company, as the latter should function in the interest of the company in its entirety. However, this method of representation does not appear to allow genuine representation of employees' specific concerns.

Finally, the **Slovak** system reserves a third of the seats on the supervisory board in companies with at least 50 employees and holding over approximately EUR 25 000 in capital.

B) Direct employee representation in supervisory bodies

Some national legislation provide for direct (elected) representation by the employees (**Denmark**, **Finland** under certain conditions, France for employee representatives, **Poland**, **Slovakia**).

In **France**, in joint stock companies in the private sector, direct representation in a supervisory body is not required by law but it can be stipulated in the statutes. Where stipulated in the statutes, employee representatives sit on the supervisory board or board of directors with a right to vote, following their election by direct vote.

The French Commercial Code designates the electorate as all employees of the company and its subsidiaries with registered offices in the territory of France, while stipulating that they must have been with the company for at least three months by the election date. Eligible candidates are employees of the company or one of its subsidiaries with registered offices in the territory of France who have held an actual position in the company for at least two years. However, employees who may, by virtue of the powers they hold, be considered to be the head of the company are excluded from the electorate and from eligibility to run.

With regard to candidates, the representative union organisations do not have a monopoly on proposing candidates because it is also possible for employees to propose their own candidates directly if such a request is endorsed by 5 % of employees in the electorate or, if the electorate exceeds two thousand people, by one hundred of them. All candidates for permanent membership must also run with a replacement candidate. Starting from 1 January 2017, the candidate list must be arranged with candidates of alternating genders.

The arrangement of the ballot depends on the choice made and indicated in the statutes with regard to both the scope of the election and the number of seats (in terms of the upper limits mentioned above). Consequently, the electoral system depends on the numbers of seats available: a two-ballot majority poll for one seat available, and a single-ballot proportional representation list poll according to the greatest remainder when multiple seats are available.

In **Denmark**, employee representatives in the supervisory body are elected by the company staff alone. Representation is therefore direct.

In **Poland**, employee representation in the supervisory body is only stipulated for public enterprises, in which employees may elect representatives by direct vote without eligibility restrictions.

In **Finland**, employee representation is direct if this is stipulated in the agreement concluded between the employer and the employee representatives. If a negotiation procedure is initiated, then the employer must provide the employee representatives with all necessary information. If the employer deems specific information to be unnecessary for the negotiations, this must be communicated to the representatives in writing indicating the reasons why. The negotiations are conducted in the spirit of cooperation with the aim of arriving at an agreement on the issues at hand. Appropriate information on this agreement must then be provided to the employees.

In the absence of an agreement, elected representation may also be stipulated.

In **Slovakia**, the method of representation is also direct. Only company employees are eligible and candidates are proposed by union organisations.

C) Indirect employee representation in supervisory bodies

Some legislations provide for indirect representation, by means of existing representative institutions, such as the works council (**Austria**, **France** for the works council delegation, **Hungary**, **the Netherlands**) or union organisations (**the Czech Republic**, but only in public enterprises), or even by means of an ad-hoc delegation elected indirectly by the staff (example: **Luxembourg**). In some cases, the employee representatives are not company employees and are appointed by the supervisory body at the proposal of the works council (example: **the Netherlands**).

In **France**, the French Labour Code requires members of the works council to sit on the boards. Thus, this representation is indirect: The employees do not elect the persons sitting on the body exercising the supervisory power because the works council delegation is appointed by members of the works council alone.

With regard to the qualifications of the delegates, the texts recommend considering the option for them to be permanent or temporary representatives, or even union representatives to the works council. However, some jurisdictions have restricted appointments to permanent representatives, thus excluding both union delegates and temporary representatives from eligibility. In this case, the electorate would be limited to permanent representatives. Otherwise, it would be expanded to include temporary representatives and union representatives.

Appointment is made by a final majority of the votes legitimately cast.

In **Austria**, employee representatives in the supervisory board are appointed by the works council. Only members of the works council with a right to vote in this council may stand as candidates. They must be elected by the active members of the works council. The selection and appointment process depends on the size of the company.

In **Hungary**, the works council appoints employee representatives to the supervisory board after having heard and considered the opinion of the unions active in the company.

In **the Netherlands**, representation is also indirect. Candidates proposed by the works council must be approved by the supervisory board before being passed to the general meeting of shareholders, which is the body authorised to appoint members of the supervisory board. The law expressly prohibits company or union employees that have participated in joint negotiations from sitting on the supervisory board. Employee representatives to this body are therefore primarily academics, HR managers or former union leaders.

D) Mixed employee representation in supervisory bodies

Some legislation provide for mixed representation. In the case of German law, the supervisory body is composed of both representatives elected directly by employees and union representatives elected by company employees.

In **Germany**, in companies in the steel and mining industries with over 1 000 employees, the supervisory board must be a joint body. Thus, out of five employee representatives, two are appointed by the works council from among the company employees and three by the most representative union organisations. Employee representatives appointed by the works council are subject to a consultation phase with the union organisations followed by confirmation of the decision by the company shareholders.

In other companies, the number of members of the supervisory board, and thus also the number of employee representatives, varies according to the number of company employees. Thus, they will be elected directly by the employees under a system comparable to the **French** system but, in companies with over 2 000 employees, part of the seats are reserved for union representatives not necessarily belonging to the company who are proposed by the union and elected by company employees.

E) Influence of employee representatives in supervisory bodies

The influence of employee representatives is measured, in particular, by the scope of the powers exercised and the number of representatives in the body.

In national legislations which provide for employee representation, the representatives generally have the same rights (right to vote and voting powers) as the other members (except for in **Bulgaria** and **France** for representatives of the works council, who only have an advisory role in the supervisory body).

In **France**, if the statutes provide for an option to elect representatives from the staff to the supervisory body, these persons take on a hybrid status, as they are both employees and members of the board at the same time. They enjoy the same rights and obligations as other members of the supervisory body. On the other hand, members of the works council sitting on this body serve only in an advisory capacity and therefore do not participate in the passing of resolutions. However, they must be convened to all meetings in the same form and with the same period of notice as the other members. Failure to do so constitutes the crime of hindrance. Finally, they may submit their wishes, in response to which the supervisory body must provide a reasoned opinion.

In **Germany**, the representatives of the supervisory board have a power of codecision, a right of supervision and control as well as the right to vote in the same capacity as the other members. They appoint and dismiss the members of company's board of directors, receive reports from this board on the company's policy, participate in the development of company strategy, supervise management, etc.

In **Denmark**, the powers of the employee representatives are identical, with the same voting rights as those of the other members of the supervisory body. This is also the case in **Austria**, **the Netherlands** and **Slovakia**.

The right to vote is sometimes excluded for certain decisions.

For instance, in **Sweden**, employee representatives on the supervisory board may not take part in discussions related to joint negotiations and industrial actions, or to any other issue producing a conflict of interests between the company and the union.

In **Finland**, the legislation stipulates that the agreement instituting employee representation in the supervisory board must grant them the same rights as those enjoyed by the other members representing the company shareholders. However, their right to vote may be restricted by exclusion from situations of conflicts of interests (for instance, if the discussion involves professional elections, trade disputes, working conditions, etc.).

The representatives exercise a certain degree of influence, which is, however, limited to relations between the supervisory body and the executive power. Often, due to a risk of conflicts of interests (the interests of the company and those of employees), the presence and power of the employee representatives in the company body are perceived as obstacles to change and to the necessary level of confidentiality in strategic decisions.

It has been observed that, even in countries where employee representation in supervisory bodies is widespread, these representatives have little means to pose an obstacle to adoption of a decision taken by all of the shareholder representatives to which they are opposed, as there does not exist any right of veto.

However, the legislation in **Hungary** provides for an original system for allowing employee representatives to have their voices heard in such situations. Basically, if they are unanimously opposed to the position of the other members, the minority position of the employee representatives must be brought before the meeting of shareholders.

Finally, it should be noted that most of the national legislation imposes a confidentiality obligation on employee representatives.

2.3.3.2. Relations between institutions representing employees and supervisory bodies

A) The existence of institutions representing employees

The formation of institutions representing employees is not always obligatory for the employer (examples: **Austria**, **Bulgaria**, **Finland**, **Italy**, **Latvia**, **the Czech Republic**, **Romania**, **the United Kingdom**).

In **Austria**, the law provides for formation of a works council as soon as the company has at least five employees. However, there is no penalty for failing to set up an institution representing employees.

In **Bulgaria**, the legislation does not impose any structure for employee representation and the local union remains the primary representative body for employees in the workplace. However, it is possible to elect employee representatives tasked with defending their social and economic interests who will be active in information and consultation procedures. These representatives must be elected by two thirds of the voters during the general meeting of all employees or a meeting of delegates elected by their colleagues. The meeting may be convened by the employer, by the union active in the workplace or by at least 10 % of the employees.

In **Finland**, employee representation in the workplace is essentially based on unions, and national unions may conclude agreements with each employer to provide for introduction of union delegates in the company.

Finally, in **Romania**, no works council is stipulated by law, but employees are represented by unions. Legislation does, however, permit election of employee representatives in organisations where no unions are active but which have at least twenty employees.

Some legislations offer the option to provide representative institutions by way of a collective agreement (**Italy**) or to implement information and consultation procedures with employees without creating a representative institution (**the United Kingdom**). Others stipulate that the decision to set up the institution falls solely to the employees (**Austria**, **Greece**, **Romania**).

In **the United Kingdom**, as there is no text imposing creation of a representative authority for employees, employee representation by a union is subject to recognition of the union by the employer unless the majority of the employees wish to be represented by it (for instance, more than half of the employees are affiliated members).

On the other hand, information and consultation procedures are imposed by EU law. Basically, in companies with at least fifty employees, employers must provide continuous information to and consultation with the employees. However, the process must be initiated by the employer or requested by 10 % of the employees. The employer and the employee representatives must then enter into negotiations to arrive at an agreement. If no agreement can be reached, a committee is set up according to subsidiary prescriptions. In the absence of a request by the employer or 10 % of employees to set up an information and consultation mechanism, no measures are taken.

Other legislations make to the obligation to set up an institution contingent on a specific number of employees (**Austria**, **Belgium**, **Denmark**, **France**, **Hungary**, **Luxembourg**, **the Netherlands**, **Poland**, **Slovakia**).

In **Germany**, a works council must be formed as soon as the company has at least five employees. Members are elected by company employees and union organisations may propose candidates.

French law requires election of employee delegates in organisations with at least eleven employees. Moreover, a works council must be set up as soon as the number of employees reaches fifty. The system in **Spain** is identical.

In **Denmark**, it is the unions that represent employees in the workplace. This representation is supported by a legal foundation set out in binding collective labour agreements concluded between the Danish employers' organisation and the unions. The rights of union representatives are defined in broad terms by a national agreement and the details applying to the specific sectors are given in sectorial agreements.

The institutions generally take the form of a works council (**Germany**, **Austria**, **France**, **Hungary**, **Lithuania** if no union, **Luxembourg**, **the Netherlands**, **Poland**, **Portugal**, **Slovakia**) and employee delegates (**Luxembourg**). Some legislations stipulate specific methods of representation (trustee in **Estonia**).

B) Methods for appointment of members of institutions representing employees

Members are either elected directly by the staff (**Germany**, **France**, **Luxembourg** for employee delegates, **the Netherlands**, **Poland**, **Slovakia**), or appointed by the unions (agreement between management and unions in **Denmark**).

In some cases, they are appointed or elected by an ad-hoc delegation (**Luxembourg** for the works council, **Estonia**).

C) Powers of institutions representing employees

The nature and the scope of the powers held by institutions representing employees determines their degree of influence over the management or supervisory bodies.

In most cases, these representative institutions have an advisory capacity (**Germany**, **France**, **Luxembourg** for employee delegates, **Poland** and **Slovakia**). They must be informed and consulted before any major management decision.

In certain cases, the representative institutions have real decision-making power when their approval is required or when they hold veto rights (**Belgium** on certain subjects, **Lithuania**, **Luxembourg** for the works council and for some non-economic issues, **the Netherlands** for some issues).

D) Legal sanctions for non-compliance with rules on institutions representing employees

Most legislations provide for civil and criminal penalties in cases of violations of the compulsory rules on employee institutions.

This is the case in **France**, which penalises failure to meet the rules on employee representation and on matters of hindrance by one year of imprisonment and a EUR 3 750 fine. Additionally, failure to convene the works council delegation to meetings of the management body or the supervisory body may result in nullification of its deliberations.

German law offers the option to normalise the situation if election of employee representatives to the supervisory body has not been arranged. If the normalisation procedure is not carried out diligently, members of the management body may be held liable.

In **the United Kingdom**, civil penalties apply if the rules on employee institutions are not satisfied and proceedings may be instituted before the Employment Appeal Tribunal or the Central Arbitration Committee by employees or their representatives.

In **Spain**, a labour inspector that uncovers an infringement of the rules may penalise the employer with a fine.

On the other hand, neither **Denmark** nor **Romania** provide for any penalties in their laws on employee institutions.

There is currently a legal framework that is favourable for employee information and consultation. Most national laws recognise these rights and EU company law provides minimal compulsory rules. On the other hand, with regard to the right to participate in supervisory or management bodies, the national legislations are quite diverse and do not currently exhibit any common denominator.

The comparative study of legislation in Members States which provide for employee representation in the supervisory body shows that most national laws subordinate this right to higher or lower limits on numbers of employees. Only **France** does not set a threshold: The obligation to invite the works council delegation is imposed on all companies with a supervisory body. Nevertheless, the French system remains complex and ineffective in terms of employees' rights to direct representation in the supervisory or management body.

As for methods of representation, the current system in **Finland** and **Sweden** is original. It gives preference to conclusion of an agreement between the employer and employee representatives (**Finland**) or the unions active in the company (**Sweden**) to organise employee involvement in the supervisory body. In the absence of an agreement, an alternative and potentially more binding system is implemented. In **Finland** for instance, two unions which collectively include the majority of employees may appoint one to four representatives to the supervisory body, with the same rights and obligations as the other members, for a term of three years.

In addition to this, **the Netherlands** provides for a restriction on representatives eligible to sit on this body: company employees and unions that have participated in joint company negotiations may not be employee representatives on the supervisory board. Therefore, these members will be persons from outside of the company. In contrast, in **France** and in **Slovakia**, only company employees are eligible.

Finally, with regard to the degree of influence of employee representatives in the supervisory body, most national legislations stipulate that they have the same rights and obligations as the other members. Yet some systems exclude the right to vote in situations of conflicts of interests, as in **Finland** and **Sweden**. In **Hungary**, the minority position of the employees must be brought before the meeting of shareholders.

In sum, the legislations in Finland and Sweden warrant further discussion. They are innovative and, in our view, strike the right balance between the different stakeholders in the company, in accordance with the principles governing and guiding the development of EU law.

2.4. RULES APPLICABLE TO THE EXERCISE OF THE EXECUTIVE POWER

2.4.1. COMPOSITION OF THE MANAGEMENT

The executive power may be exercised by a body or a person (management body in the two-tier system, general manager in the one-tier system, president in simplified forms or an ad-hoc body).

2.4.1.1. Appointment of members to the management

A) Number of members

Some countries set the minimum number of members of the management exercising the executive power to a single person (**France**, **Poland**, **the United Kingdom** for non-listed companies, **Denmark**, **Germany** for companies with less than EUR 3 million in capital, **Finland**, **Belgium** for the SEs, **Hungary** and **Sweden**). Others impose a minimum of three members. This is the case in **Spain** for joint stock companies, in **Greece**, **Bulgaria**, **the Netherlands**, **Luxembourg**, **Hungary** for non-listed companies, and **Italy** for companies with a two-tier system.

Only some of the States set a maximum number of members. This is the case in **France** (five members for the executive board), **Spain**, **Bulgaria** (nine members), **Finland** (five members) and **Hungary** (eleven members for listed companies).

For the SE, the European legislature has applied the principle of freedom of the statutes, while leaving the option to the Member States to set a minimum or maximum number of members[158].

B) Body authorised for appointment and method of appointment

The members of the body exercising the executive power, or the person exercising this power alone, are always appointed by a resolution of the general meeting of shareholders.

It is interesting to note that for the SE, the European legislature has stipulated the principle that the supervisory body is authorised to appoint and dismiss the member(s) of the management. The option is, however, left to the Member States to require or permit the statutes to provide that the member or members of the management be appointed and dismissed by the general meeting under the same conditions as for joint stock companies that have registered offices within its territory[159].

Nevertheless, there are two reservations: (i) do not undermine national legislations which allow a minority of shareholders or other persons or authorities to appoint some members of the management[160] and (ii) adhere to the methods of employee participation set out according to Directive 2001/86/EC[161].

2.4.1.2. Term of office

The terms of office range from four years (**Portugal**, **the Netherlands**, **Lithuania**, **France** where not indicated otherwise in the statutes) to six years (**Spain, Slovenia**), with the most common term being five years (**Germany**, **Slovakia**, **Austria**, **Hungary**, **Poland**, **Bulgaria**, **the Czech Republic**).

There are no legal restrictions on re-appointments. In addition, legislations in the States do not provide for a maximum number of terms.

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158 Regulation No 2057/2001, Article 39, Section 4. For information on the position taken by each Member State, see Ernst & Young 'Study on the operation and the impacts of the Statute for a European Company (SE)' of 9 December 2009, p. 38.
159 Regulation No 2157/2001, Article 39, Section 2. For information on the position taken by each Member State, see Ernst & Young 'Study on the operation and the impacts of the Statute for a European Company (SE)' of 9 December 2009, p. 37.
160 Regulation No 2157/2011, Article 47, Section 4.
161 Regulation No 2157/2011, Article 40, Section 2.

2.4.1.3. Member eligibility

A) Required qualifications for members

Most States stipulate that appointees to the management cannot have been convicted of certain crimes, generally including swindling and fraud, or declared bankrupt (**Poland**, **Spain**, **Germany**, **Finland**, **Hungary**, **Italy**, **France**).

Some countries require members of the management to be 18 years of age (**the United Kingdom**, **Sweden**, **Finland**). Most require by law or merely request in recommendations that members be legally qualified, have the necessary experience, be independent and be natural persons (**Poland**, **the United Kingdom**, **Estonia**, **Portugal**, **Germany**, **Luxembourg**, **Finland**, **Spain**).

For the SE, the European legislature leaves the option to appoint natural or legal persons to bodies to the principle of freedom of statutes.[162] It is also stipulated that an SE's statutes may, in accordance with the law applicable to joint stock companies in the Member State in which the SE's registered offices are located, lay down special eligibility conditions for members representing the shareholders.[163]

B) Special rules for listed companies

With regard to appointment of members of the management, no special rules apply to listed companies except in Ireland, where listed companies are not subject to any recommendations with regard to persons appointed to boards of directors.

2.4.1.4. Rules on plurality of offices

Most Member States provide rules restricting (or prohibiting) the option for a single person to be a member of both the supervisory body and the management body at the same time (in particular **France**, **the Czech Republic**, **Denmark**). These rules are sometimes limited to independent directors, as in **Greece**. Some States provide more extensive rules on incompatibility (in particular **Italy**, **Poland**, **Estonia**, **Slovakia,** hard law and soft law, **Portugal**) while others do not provide any rules on this matter (in particular **Belgium**, **the Netherlands**, **the United Kingdom**). Others have laws limited to listed companies (**Greece**).

A) Limits on plurality of offices in the same company

The restriction sometimes applies to the position of chairperson of the board of directors (**Sweden**), which may not be held concurrently with other offices, including that of independent director (**Portugal**), or even executive director (**Ireland**).

In **France**, in two-tier structures, the law prohibits a member of the supervisory board from sitting on the company's executive board (and vice versa). On the other hand, in the one-tier structure, the general manager (who exercises the executive power) may be a member of the board of directors.

With regard to the SE, the European legislature, while affirming the principle that 'no one may simultaneously serve as member of the management body and supervisory body', has provided for a link between these two bodies. Thus, in an SE that has opted for the two-tier system, the supervisory body may, in cases of vacancies in the management body, appoint

[162] Regulation No 2157/2011, Article 47, Section 1.
[163] Regulation No 2157/2011, Article 47, Section 3.

one of its members to perform the duties of the member of the management body. During such a period, the duties of the person in question as a member of the supervisory body shall be suspended. The European legislature has left the option to the Member States to set a time limit on this period[164].

B) Limits on plurality of offices in the same company group

In **France**, the rule applicable to members of the management (general manager, executive board member, sole general manager) is the same as the rule applicable to members of the supervisory body (directors and members of the supervisory body) discussed above in 0: they cannot serve on more than five boards in joint stock companies with registered offices in the territory of France.

This rule must be combined with the rule prohibiting a natural person from simultaneously holding more than one position as general manager or executive board member (or sole general manager) of a joint stock company with registered offices in the territory of France, as detailed in 0.

As an exception, a second post may be held as general manager or executive board member in a controlled subsidiary or in another company provided that neither of the companies are listed.

Other countries have similar or more stringent prohibitions.

Thus, in **Bulgaria**, a person cannot serve more than two terms in the same company group.

In **Italy**, it is prohibited to simultaneously serve on the management body, as general manager or proxy in a parent company or controlled company.

C) Limits on plurality of offices in all companies

As mentioned in Section 0 in **France**, a natural person cannot hold more than one position as general manager, executive board member or sole general manager in joint stock companies with registered offices in the territory of France.

In **Slovenia**, it is prohibited for a member of the management to be a member of the board at another group.

D) Other special rules

In **Spain**, members of the management are subject to a non-competition obligation. Consequently, they cannot be members of the management of a competitor company unless authorised for such by the company.

The number of offices held is limited in listed companies in countries like **Germany**, **the Netherlands**, **Sweden**, **Italy** or **Estonia** (soft law), States that prohibit holding multiple simultaneous positions on boards of listed companies (for instance, five positions maximum in **Belgium** according to the soft law).

As for the SE, the European legislature has referred to the prohibitions applicable in the countries of registration and stipulated that the following persons cannot be members of an

[164] Regulation No 2157/2001, Article 39, Section 3. For information on the position taken by each Member State, see Ernst & Young 'Study on the operation and the impacts of the Statute for a European Company (SE)' of 9 December 2009, p. 37.

SE's management or administrative body nor representatives of a legal person member:

- Those disqualified, under the law of the Member State in which the SE's registered office is situated, from serving on the management or administrative body of a joint stock company governed by the law of that Member State
- Those disqualified from serving on the management or administrative body of a joint stock company governed by the law of a Member State owing to a judicial or administrative decision delivered in a Member State[165]

E) Penalties

The applicable penalties are typically nullification of the post exceeding the number of permissible offices (in particular, **Germany**, **Italy**, **Greece**, **Austria**). They may also include the company holding the board member liable (**Bulgaria**, **Greece**, **Belgium**).

2.4.1.5. Chief Executive Officer

This term is used to refer to the board member who is both chairperson of the supervisory body in a one-tier system (board of directors) and is invested with the executive power (general manager or executive officer)

A) Use of the concept of Chief Executive Officer

Many EU member states recognise the concept of the Chief Executive Officer. The ones which do not are **Austria**, **Luxembourg**, **Slovakia**, **Latvia**, **Portugal**, **the Czech Republic** and **Poland**.

In **France**, this plurality of powers is often seen under the title of *president directeur générale* or *PDG*, even though since 2001, joint stock companies with boards of directors have had the option to separate them, as mentioned in 0 below.

In the **United Kingdom**, this plurality of powers is also common in practice, and often stipulated in the statutes, under the title of Chief Executive Officer or CEO, even though the concept of a Chief Executive Officer is not recognised under UK company law.

As for the SE, the legislature leaves the option to the Member States, both in the one-tier and two-tier systems, to stipulate that a general manager or general managers shall be responsible for day-to-day management of the company under the same conditions as joint stock companies with registered offices in its territory[166].

B) Separation of the offices of chairperson of the board and general manager

In all Member States, the positions of chairperson of the board and general manager may be held by different persons, except in **Poland** and **Latvia** where the chairperson of the board is necessarily the general manager and in Slovenia where the principle of separation of offices is not recognised.

In a more original way, company law in the **United Kingdom** does not mention the option for this separation, but it is recommended by the UK governance code. It should be noted that in **France**, neither the AFEP-MEDEF code nor the MiddleNext code address this issue.

[165] Regulation No 2157/2011, Article 47, Section 2.

[166] Regulation No 2157/2001, Article 39 (two-tier system) and Article 43 (one-tier system). For information on the position taken by each Member State, see Ernst & Young 'Study on the operation and the impacts of the Statute for a European Company (SE)' of 9 December 2009, p. 37.

2.4.1.6. Management remuneration

A) Option to remunerate members of the management

The bulk of the Member States have laws on the books that set the remuneration for management (with notable exceptions **Bulgaria**, **Denmark**, **Hungary**, **Finland** and **Spain**).

B) Remuneration calculation methods and disclosure requirements

This remuneration is set in most Member States by the supervisory body, or alternatively, by a collective resolution of the shareholders.

The principles applicable to publication of these remunerations are identical to those for remuneration of members of the supervisory body, covered in 0 above, and are briefly reviewed below for the six countries examined in detail in this Study.

- France

In **France**, the procedures for publication of management remunerations are the same as those detailed in 0 above with regard to remuneration of members of the supervisory body, as the rules discussed apply to all members of the board (as defined in the glossary).

The AFEP and MEDEF also recommend, for listed companies, to make public, immediately following the meeting of the body in which the resolution was adopted, all elements of potential or acquired remuneration for the management.

- Denmark

In Denmark, rules on publishing remunerations for members of the management are identical to those applicable to members of the supervisory body (see our discussion on procedures for remuneration of members of supervisory bodies in 0 above).

It should be noted here, however, that, for listed companies, the annual report must contain, in addition to information on total remuneration granted to members of the supervisory body for the past financial years as well as individual remuneration granted to each member, the incentive programmes involving members of the administrative bodies with the indication of the category of the members in question and the types of benefits granted as well as any other information needed to evaluate these programmes.

- United Kingdom

In **the United Kingdom**, which has adopted the one-tier system, the members of the board exercise both the executive power and the supervisory power in the supervisory body (board of directors). More precisely, the executive board members are invested with the executive power and the non-executive board members are invested with the supervisory power. The procedures for publication and classification of these remunerations have been examined in the part on remuneration of members of the supervisory body, given in 0 above.

- Spain

In **Spain**, which has adopted the one-tier system, members of the board of directors exercise the executive and supervisory powers at the same time in the board of directors, except in listed companies in which an audit committee must be created (in which case it is this body which acts as the supervisory body).

The procedures for publication and classification of these remunerations have been examined in the part on remuneration of members of the supervisory body, given in 0 above.

- Germany

German law requires companies to publish information on management body member remuneration. This disclosure must be made in the traditional financial report and also in a special report on remuneration. Within the framework of company groups, the parent company must provide information in the report on the group’s consolidated accounts.

The reports must provide separate indications for the individual remuneration of each member as well as the remuneration of members performing management duties.

Non-listed companies are required to publish the total sum of the remunerations, without having to publish details on the remunerations granted to each member.

The financial report must contain the following information on remunerations:

- Total remunerations (salaries, dividends, options, expense reimbursements, commissions, benefits in kind, etc.) granted during the financial year. Listed companies must publish individual remunerations for each member, indicating the fixed salary and the variable components separately.
- The total remuneration is the severance packages, pensions, survivor’s benefits and other similar benefits granted to the member or his or her beneficiaries. The same distinction applies as given in the preceding point.

- Romania

Romanian law does not require publication of remunerations granted to members of supervisory bodies or the management.

C) Classification of remunerations and restrictions

- France

In **France**, a distinction should be drawn between elements of remuneration related to performance of duties and those granted on termination of duties (in particular, golden parachutes and deferred remunerations).

The classification of remunerations granted for performance of duties to members of the management is similar for the chairperson of the board of directors, the general manager, the deputy managing director[167] and the executive board members. They all receive a remuneration determined by the supervisory body. This remuneration may be fixed or variable, and/or exceptional (special bonuses).

In contrast to the freedom allowed for distribution of director’s fees, the supervisory body must determine the individual remuneration for each member of the management and may not grant a total sum for the management body (members of the general management or executive board) to distribute among its members.

In the two-tier system, remuneration for members of the executive board is set by the supervisory board. This authority is exclusive: the statutes cannot entrust this power to the

[167] In the one-tier joint stock company with board of directors, the deputy general manager has the same powers as the general manager with regard to third parties.

general meeting.

The AFEP-MEDEF and MiddleNext codes recommend that remuneration for presidents of listed companies be determined by a proposal from the remuneration committee in accordance with the following principles: the remuneration must be balanced, consistent, legible, measured, evaluated in the context of a career and a European or global reference market, and all of its element must be taken into account (fixed component, variable component, stock options, bonus shares, director's fees, pension terms and special benefits). Granting of stock options and bonus shares must be subject to performance criteria.

As for the fixed component of the remuneration granted to members of the management, the AFEP-MEDEF code recommends:

- That it be revised at relatively long intervals, such as once every three years
- That changes to it be associated with events affecting the company and take into account the variable component of the remuneration
- That it include benefits in kind

The variable part of the remuneration may be proportionate to growth/decline in profits. In listed companies, the decisions of the supervisory body on elements of remuneration subject to beneficiary performance criteria must be published.

For listed companies, the AFEP-MEDEF code recommends that the variable component of remunerations granted to members of the management:

- Be fixed for a defined period of time
- Correspond to a maximum percentage of the fixed component and that the sum is not linked to the share price but rather rewards the company's short-term performance and progress over the medium-term
- That the rules for setting the variable component be consistent with the annual performance evaluation of members of the board and with the company's medium-term strategy
- Within the variable component of the remuneration, that the qualitative part be measured and take into account exceptional circumstances

The European Securities and Markets Authority (ESMA) recommends that companies define the exact method and explicitly state the qualitative criteria used to determine this variable component, except in special cases in which the companies indicate that, for confidential reasons, certain non-public qualitative criteria have been established and defined precisely[168].

The quantitative criteria must be simple, few in number, objective, measureable and adapted to the company's strategy. Only very special circumstances should give rise to an exceptional variable component.

With regard to elements of remunerations granted on termination or changing of positions, we can distinguish the system applicable to listed and non-listed companies.

In non-listed companies, a retirement fund may be granted to members of the

[168] AMF report on remunerations for directors of listed companies and implementation of AFEP-MEDEF recommendations of 9 July 2009.

management. This pension shall be regarded as supplementary and therefore shall be granted by the supervisory body according to three criteria:

- If the benefits allotted correspond to specific services rendered to the company
- If it is proportionate to this service
- And if it does not constitute an excessive expenditure for the company

If these three criteria are not met, then allotment of a pension of this kind falls under the procedure for regulated party agreements referred to in 0.

In addition to this, under this same procedure, a severance package and/or non-competition fee may be granted.

In listed companies, the law prohibits elements of remuneration, payments and benefits due or which may fall due by virtue of termination or changing of positions as a member of the board, except where subject to satisfaction of the conditions related to beneficiary performance. This performance is evaluated with regard to the performance of the company in which the person chairs the board of directors or performs general management or deputy general management.

This restriction is specifically intended to limit deferred remunerations granted to directors of listed companies[169], known as golden parachutes. It should be noted that non-competition clauses and 'cloth cap schemes' are not affected by this special system.

With specific regard to severance packages, the AFEP-MEDEF and MiddleNext codes recommend:

- No payment if the company or board member in question is in a situation of default
- That granting of severance packages be subject to performance criteria set by the company's bodies, based on compulsory criteria and do not authorise compensation of a director except in the case of forced departure associated with a change in control or strategy
- That the severance package not exceed two years' pay (fixed and variable)
- That these rules apply to all severance packages, specifically including any benefits granted under a non-competition clause

It should be noted that, according to the applicable case law, the president awarding him/herself excessive remuneration with respect to the company's resources and situation is punishable under criminal law, by virtue of misuse of corporate funds or abuse of power (even if this remuneration is formally approved by the board of directors/supervisory board). Similarly, failure to decrease this remuneration when the company's activity decreases and it becomes necessary to reduce company expenditures is also punishable.

- Denmark

In **Denmark**, remuneration of members of the board is set by the supervisory body.

The rules on setting these remuneration are the same as those applicable to members of the supervisory body.

[169] These cannot be members of the board of directors.

For listed companies, the corporate governance code recommends that:

- Proposals for management remuneration, and more generally the company's remuneration policy, be approved by the shareholders during the general meeting of shareholders
- The remuneration policy include a precise description of the elements of remuneration for members of the board and the supervisory body
- The company's remuneration policy includes the reasons for the different components of the individual remunerations granted to members of the management and the supervisory body. In the case of variable remuneration, the maximum limit of this variable component in the total remuneration to be granted, taking into account in this remuneration, for members of the management, the criteria for performance, risks and the creation of short, medium and long-term value for shareholders.

In this way, the corporate governance committee specifies that the total remuneration package must be reasonable, reflect the performance of each member of the management, their responsibilities and creation of value for the company. Within this framework, the variable component of this remuneration must be based on concrete achievements contributing to creation of long-term value for the company.

In any case, Danish law states that remuneration of this kind must be 'reasonable', cannot exceed what is considered normal, must take into account the nature and scope of the work performed and be appropriate with regard to the company's financial situation (and in the case of a company belonging to a group, it must be evaluated in light of the financial situation of the group taken on the whole).

- The United Kingdom

In **the United Kingdom**, the law does not include any compulsory provisions on remuneration for persons exercising the executive power. However, the statutes may provide for remuneration of this kind. It falls to the board of directors to set the remuneration for its members.

As for listed companies, the statutes generally stipulate a 'maximum' which can only be amended by a resolution of the general meeting of shareholders.

- Spain

Spanish law does not provide any specific rules on remuneration for members of the management. However, in joint stock companies, when the remuneration is based on sharing in the company's profits, this remuneration may only be taken from the net profit (deduction of sums allocated to the legal reserve or any other statutory reserves and to payment of the dividend of 4 % due to shareholders).

Additionally, Spanish law states that remuneration may also consist in granting company shares or options, under two conditions:

- This option must be stipulated in the company's statutes.
- Use of this option must be authorised by the general meeting of shareholders, which shall determine the details of this transfer (number of shares granted, option price, share value, etc.).

The corporate governance code recommends the following practices for listed companies:

- The supervisory body must approve a specific remuneration policy which must be submitted to the general meeting of shareholders for an opinion.
- The remuneration policy approved by the supervisory body must specify: (i) the sum of the fixed elements of the remuneration by way of director's fees for the supervisory body and the committees, all with evaluation of the annual sum to be paid (ii) the sum of variable elements, and in particular, the identity of the persons receiving remuneration of this kind (all with statement of reasons justifying the sum of the variable component in relation to the fixed component of the remuneration), the performance evaluation criteria used to calculate the number of shares or options or other remunerations associated with these performance criteria, the main parameters and bases of any systems for annual or other bonuses, benefits in kind, estimation of the total sum of these variable remuneration elements, etc.
- The main characteristics of the pension systems (retirement, insurance, etc.) with an estimate of their sum or annual cost
- The contractual conditions for members of the management, in particular the term of these contracts, any applicable period of notice, all clauses pertaining to payment of the welcome bonus, severance packages and especially golden parachutes

The Spanish governance code also recommends that independent directors be excluded from remuneration schemes involving variable remunerations based on company profits or criteria based on company performance (EBITDA, etc.), or the share price at a specific time. Thus, it recommends that variable remuneration be limited to persons exercising the executive power who are members of the company's board. However, it also states that granting of variable remuneration to an independent director will not nullify the 'independent' status.

The governance code also stipulates that the remuneration for independent directors must provide compensation for work actually performed by these directors, their involvement, their abilities and responsibilities in their position, but that it shall not under any circumstances exceed a threshold that would be likely to comprise their independence.

Finally, Spanish law provides certain limits on allocation of compensation to members of the management at credit institutions.

Institutions supported financially by the Spanish bank support fund or in which the Spanish bank support fund holds a majority share cannot under any circumstances allot a sum exceeding the lesser of the two following sums to members of their management body as compensation for completion of their terms of office:

EUR 600 000 for members in management positions if the Spanish bank support fund holds a majority share in the company's capital, or EUR 1 200 000 for members in management positions if the Spanish bank support fund does not hold a majority share in the company's capital.

- Two years' fixed remuneration

A remuneration sum that is greater than that stipulated in the first subsection above may be granted to members of the management body (including those in executive positions) but within the limits set by the subsection above for those who have joined the company after or at the same time as the acquisition of the majority share in the company's capital by the Spanish bank support fund or provision of its financial support to the company.

- Germany

German law provides for implementation of a 'say on pay' procedure similar to that implemented in the United Kingdom (the 'advisory vote' procedure). For listed companies, the general meeting of shareholders gives its approval for remuneration of management body members. However, the decision taken by the meeting in accordance with this 'say on pay' procedure does not affect the decisions of the supervisory body, which, it seems, remains free to set the remuneration for members of the administrative body.

There are no restrictions on the type of remuneration which may be allotted to members of the management body (bonus, stock options, profit-sharing, bonus shares, benefits in kind, etc.).

The German code of good practices recommends granting a fixed remuneration combined with a variable component based on the performance of each member of the administrative body.

The German governance code recommends that packages granted on termination be made up of a fixed component and a variable component, which may not exceed two years' remuneration, and which includes any benefits in kind, if the administrative body member leaves their post without justifiable reason. This rule is different in the case of dismissal of a member of the administrative body as a result of a change in control of the company. In a situation of this kind, according to the German governance code, the sum of the remuneration granted should not exceed 150 % of the remuneration granted to that member over the past three years.

- Romania

Romanian law stipulates that remuneration for members of the administrative body must be granted in accordance with their duties and the company's economic situation. Remuneration may, however, be fixed and/or variable.

The law does not provide any restrictions on the types of remuneration which may be granted. Remuneration may be fixed, combined with stock options, bonuses, bonus shares, profit-sharing, etc.

Supplementary remuneration may be granted to members of the management for their services rendered outside of the scope of their duties (for instance, for participation in an ad-hoc committee, etc.). These elements of supplementary remuneration are determined by the general meeting of shareholders or by the company's statutes. It falls to the body to set the specific individual remuneration to be granted to the member in question.

With regard to tax and labour law, these remunerations are classified as salaries.

D) Special practices identified

In **Lithuania**, bonuses granted to members of the supervisory body and the management, as well as to employees, are capped at a maximum sum of 20 % of the net profit of the company for the financial year in question. There is a bill that will reinforce the upper limit on remunerations granted to supervisory bodies and management to a maximum of one third of the net profits subject to dividend payment.

2.4.2. FUNCTIONING OF THE MANAGEMENT

2.4.2.1. Frequency of meetings of the management body

For the most part, the Member States do not set an obligatory frequency for meetings of the management, with the exception of some Mediterranean States (**Spain**, **Italy**, **Portugal**) and **Lithuania**.

The frequency of meetings may be freely stipulated in the statutes in the other Member States.

Where not stipulated in the statutes, some Member States have set a minimum frequency. For instance, in **Slovenia**, if no provisions are given in the statutes, the management must meet at least once every four months (the same frequency as for the supervisory body).

With regard to the SE, for the two-tier system, the European legislature has not stipulated any frequency for meetings of the management, but has set a frequency for this body to disclose information. Thus, it has stipulated the following for the supervisory body[170]:

- A requirement to disclose information on a quarterly basis on the state of affairs of the SE and its foreseeable development
- A requirement to disclose all information — at the appropriate times — on events which may have serious consequences for the SE's situation

2.4.2.2. Decision making

A) Quorum

The general rule is that at least half of the members of the body must be present (**Portugal**, **Spain, France**). There are, however, some exceptions to this rule. **The United Kingdom** requires at least 2 directors to be present unless indicated otherwise in the statutes.

In some countries, such as **Slovenia**, the quorum of half of the members only applies where not stipulated otherwise in the statutes.

[170] Regulation No 2157/2001, Article 41.

As for SEs, the European legislature has provided the principle of freedom of statutes in this area, while also providing a principle of automatic application in cases of failure to set rules in the statutes: The quorum is satisfied if half of the members are present or represented[171].

B) Majority

The majority of Member States require a simple majority for decision making (**the United Kingdom**, where a greater majority is not required by law or the statutes, **the Czech Republic**, **Estonia**, **Spain, France, Portugal**, **Bulgaria**, **the Netherlands**, **Finland**, **Lithuania**, **Latvia**). Exceptions include I**taly** and **Poland**, which require an absolute majority, while **Germany** prescribes unanimity.

As for SEs, the European legislature has provided the principle of freedom of statutes in this area, while also providing a principle of automatic application in cases of failure to set rules in the statutes: decisions shall be taken by a majority of the members present or represented.[172]

Additionally, if the statutes do not include provisions on this, the chairperson of each body shall have the casting vote in cases of an equality of votes. There shall, however, be no provision to the contrary in the statutes if half of the supervisory body consists of employee representatives[173].

2.5. LIABILITY REGIME AND SYSTEM FOR DISMISSAL OF MEMBERS OF THE BOARD

2.5.1. BOARD MEMBER LIABILITY

2.5.1.1. Joint and several liability

Seventeen countries provide for joint liability of members of their management/supervisory bodies for damages they cause in the performance of their duties due to misconduct or negligence. Some countries provide a list of obligations for these bodies. The victims of the damages in question are: the company, shareholders, and third-parties.

Seven countries (**Spain, Finland, Denmark, Slovakia, Poland, France** and **Austria**) do not stipulate this joint liability. These countries only provide for several liabilities of members of the management/supervisory body.

Other countries provide for a combination of these joint and several liabilities.

Only **Lithuania**, **Slovenia** and **Latvia** do not provide for the several liabilities of the members of management/supervisory bodies.

Sixteen states provide for joint liability of the members of the management for damages caused in the performance of their duties.

Six States do not provide for this liability: **Denmark**, **Slovakia**, **Poland**, **the United Kingdom**, **Austria** and **Finland**.

Twenty States provide for several liabilities of members of management. Once again, only

[171] Regulation No 2157/2001, Article 50, Section 1.
[172] Regulation No 2157/2001, Article 50, Section 1.
[173] Regulation No 2157/2001, Article 50, Section 2.

Latvia and **Lithuania** do not provide for this.

In the vast majority of Member States, there is no difference in the liability regimes for members of the company's management and members of its supervisory body.

Similarly, this liability regime is identical or nearly identical in the vast majority of States. The directors are jointly and/or severally liable for failure to meet their obligations, for misconduct, infringements of the law, or negligence causing damage to the company or to third parties.

Thus, this is the liability principle based on the traditional trio of act – damage – causal link.

When the liabilities of members of the board are joined, they are typically convicted jointly. Any members that have paid more than their fair share may take legal action against their colleagues.

Several States, including **Austria** and **Greece,** require members of the board exercising the executive power to conduct management in accordance with the 'good businessperson' principle.

There are grounds for exemption from liability. The most common is for the member of the board being held liable to demonstrate that he or she was not the author of the decision which caused the damage. Different countries have different degrees of proof for this.

The most common is that the member of the board must demonstrate that he or she was actively opposed to the decision in question. Mere abstention from voting, for instance, is not sufficient to exempt the member of the board from liability.

For some countries, demonstration of diligent conduct in the interests of the company is sufficient to exempt members of the board from their liabilities.

Portugal, in contrast, is more flexible. In order to hold a member of the board liable, this person must have played an active role in the decision causing the damage. Mere membership in the management/supervisory body is not sufficient to hold a member liable. The burden of proof does not fall to the director.

Other countries, such as **Latvia,** are more stringent. Basically, directors are presumed to be liable in cases of bankruptcy of a company.

Finally, **Poland** stipulates that during the AGM, the shareholder must approve of the management provided by the members of the board by way of a vote of confidence. If the AGM validates the management of a member of the board, then this person is exempted from liability for the year. If the vote of confidence does not pass, then the member of the board must resign from his or her post.

A) Denmark, Germany, Spain, the United Kingdom, France and Romania in focus

- Denmark

Denmark does not provide for joint liability of the members of the board, only several liabilities for misconduct in their management.

The members of the board are liable to the company, the partners and third parties, for any misconduct or negligence committed in their management which results in damages. Thus, in order to hold them liable, it is necessary to demonstrate the existence of misconduct, damages and a causal link.

The liable members of the board are required to repair the damages caused by their misconduct, by payment of compensation for damages.

- Germany

Germany provides for both joint liabilities of the members of the supervisory body, in the sense that they all have the same duties and several liabilities for each member for the misconduct committed in the performance of their duties.

Although Germany draws a clear distinction between supervisory and management bodies, their liability is based on misconduct committed or negligence in the performance of their duties. As for the management, all of its members are jointly liable for any damages caused, regardless of their specific area of expertise. The German governance code recommends setting rules on the functioning of the management in order to distribute areas of activity among its members along with corresponding liabilities.

- Spain

Spain does not provide for joint liability of the members of the supervisory body, only several liabilities.

They are not subject to any specific liability regime. Thus, they are subject to a general law on civil liability, i.e. they are liable for any and all damages caused by their misconduct or negligence.

Members of the board are liable to the company, the shareholders and third parties for any damage caused by improper, erroneous or negligent management or by any infringement of the law, as well as any adverse repercussions of their culpable conduct. In order to hold a member of the board liable, it is necessary to demonstrate the misconduct, negligence, default or infringement of the provisions of the law by the member of the board in question. It is then necessary to demonstrate the existence of damage and a causal link between the conduct of the member of the board and the alleged damages.

Members of the board are jointly liable for decisions taken by the supervisory body, and severally liable for their personal misconduct.

They may be exempted from liability if they demonstrate either that they did not participate in the decision that caused the damage and that they were unaware of it, or that on becoming aware of it they took all possible measures to oppose it or prevent the damages resulting from the decision in question. The burden of proof rests on the member of the board seeking exemption from liability. Mere absence from the meeting during which the decision in question was taken is not adequate to provide exemption from liability.

Finally, approval of the decision in question by the meeting of shareholders does not exempt directors from their liability.

- The United Kingdom

The United Kingdom does not provide any private joint liability regime for members of the board of directors.

On the other hand, it does provide for several liabilities, which is even more severe if the member is an executive director (as opposed to a non-executive director, whose duties are restricted exclusively to exercising the supervisory power).

In general, members of the board of directors have obligations to the company:

– They cannot have a conflict of interests with the company.
– They cannot gain personal benefits from their management.
– They must demonstrate their total loyalty to the company.
– They are subject to a confidentiality obligation.

The members of the board of directors must act in the sole interests of the company and the shareholders in their entirety. It is easier for them to be held liable to the company itself than to third parties or shareholders.

- Romania

Romania provides for joint and several liabilities of the members of its supervisory body.

This liability is based on general civil liability law, i.e. the existence of misconduct, damages and a causal link between the two. However, their liability is limited to cases of misconduct or negligence. Thus, they cannot be held liable for damages resulting from a management decision taken with a reasonable degree of diligence in light of the information available at the time and in accordance with the interests of the company.

The liability regime for members of the management is identical to that of members of the supervisory body.

In the two-tier system, members of the supervisory body must also take out a professional civil liability insurance policy.

In the one-tier system, persons holding the supervisory power must also take out a professional civil liability insurance policy.

- France

France provides for several liabilities of members of the supervisory body, as well as members of the management, to the company, shareholders and third parties. However, it should be noted that conviction of members of the supervisory body may be joint if the decision taken by the body is culpable and if each of the members may have engaged in misconduct.

With regard to the civil liability of members of the board, it is necessary to demonstrate that the member of the board is the perpetrator of an infringement of the provisions of the law or the statutes or of misconduct (or negligence) in management.

Once this fault has been demonstrated, it is necessary to establish the existence of damage and a causal link between the two. In order for the member of the board to be held liable to a shareholder, the shareholder must have suffered damages distinct from those suffered by the company. The member of the board may not be held liable to a third party unless that member has engaged in misconduct outside of the scope of the member’s duties.

Members of the board who have been held liable must repair the entirety of the damages. This member may, however, receive an exemption from liability by invoking *force majeure* or demonstrating that he or she was opposed to the decision in question.

It should be noted that it is more difficult to hold members of the supervisory board liable than members of the board of directors because they are subject to a prohibition against involvement in management and, in principle, only exercise supervisory power.

Finally, with regard to the **SE**, the European legislature has stipulated that members of the supervisory body shall be liable for damages suffered by the SE resulting from an infringement on their part of legal or statutory obligations or other obligations inherent to their duties, under the conditions given in the laws of the Member State in which the SE holds its registered offices which are applicable to joint stock companies[174].

2.5.2. DISMISSAL OF MEMBERS OF THE BOARD

We have found harmonisation of national legislations authorising the general meeting of shareholders to dismiss members of the board, though majority rules for passing of the resolution may differ. The reasons for the decision need not be given barring certain limits such as just and proper grounds (executive board members) or wrongful dismissal as stipulated under French law.

2.5.2.1. Bodies authorised to decide on dismissal of members of the board

Most EU Members States stipulate that the decision for dismissal falls to the general meeting of shareholders. In some countries, such as **the United Kingdom**, **Italy**, **the Netherlands**, **Portugal** and **Austria**, the courts are also authorised to dismiss a member of the board. The Mediterranean States, in addition to **Germany, Belgium**, **Ireland**, **Slovenia** and **Austria**, also provide for dismissal by the supervisory board.

But there are some variations depending on the national laws, detailed in 0below.

A) General description

The authorised body, according to the relevant Member States, is:

- The general meeting (**Germany, Austria, Belgium, Bulgaria, Denmark, Estonia, France, Italy, Latvia, Luxembourg, the Czech Republic, Romania, Slovakia, Hungary, Slovenia**)
- The board of directors in the one-tier system (**Italy**)
- Employees in some cases (**the Czech Republic**, **Slovakia**)
- The courts
  - At the request of other members of the supervisory body (**Germany, Slovenia**)
  - At the request of shareholders collectively representing a minimum percentage of the capital (for instance, 10 % in **Austria** or **Slovenia**)
- In some States, this question is left to the freedom of the statutes (**Finland**, **Poland**).

B) Dismissal procedure

The Mediterranean countries, along with **Germany**, provide rules on quorums or possession of capital. All States aside from **Ireland**, **Austria**, **Luxembourg**, **Germany** and **Slovenia** provide for *ad nutum* dismissal[175], at any time and without indication of the

[174] Regulation No 2157/2001, Article 50, Section 3.
[175] Can be dismissed at any time, according to the definition in the Glossary.

reasons why. Some States, such as **Belgium**, **Ireland** or **the Czech Republic** require the dismissal to be entered as an item on the agenda for the general meeting. **The United Kingdom**, **Portugal** and **Italy** also require that the member of the board be given a chance to speak in the meeting prior to his or her dismissal[176].

If the court is competent for dismissal of the member of the board, it will generally organise an inquiry resulting in drafting of a report on the member of the board **(the Netherlands**, **Germany**, **Italy**, **Portugal**).

2.5.2.2. Conditions for dismissal of supervisory body members

The conditions for dismissal of supervisory body members by the shareholders varies from Member State to Member State.

A) Resolution of the meeting of shareholders

A resolution for dismissal is generally taken by the generally meeting of shareholders under the following conditions:

- A three-fourths majority of the voting rights of the members present, unless indicated otherwise in the statutes (**Germany, Austria, Slovenia**)
- A two-thirds majority of the members present or represented (**Estonia**, **Romania**)
- Shareholders representing 20 % of the capital (**Italy**)
- Freedom to specify terms in the statutes: simple majority or greater majority (**Germany**, **Austria**, **Poland**)

B) No requirement to give just and proper grounds

In some Member States, the decision for dismissal need not be based on just and proper grounds (**Germany**, **Belgium**, **Bulgaria**, **Estonia**, **Poland**, **the Czech Republic**, **France** except in cases of abuse of rights)[177].

Nevertheless, there are also special rules on dismissal of members representing employees (**Hungary**, **France**) or for public sector companies (**France**, whose case is discussed in detail above).

2.5.2.3. Denmark, France, Germany, Romania, Spain and the United Kingdom in focus

- Denmark

In **Denmark**, the general meeting of shareholders is authorised to dismiss members of the board of directors.

However, if a member was appointed by a public authority or by another third party entitled to appoint one or more members in accordance with the statutes, these same parties shall be authorised to dismiss the members.

The members of the board of directors may be dismissed at any time. If there is no temporary member to replace the dismissed member, then the other members of the board

[176] French case law also requires adherence to the adversarial principle when dismissing members of the management body.
[177] French case law requires dismissal to be decided following a procedure adhering to the adversarial principle.

may organise an election of a new member to replace the dismissed member for the remainder of his or her term. If the election must be held during the general meeting, then it must be postponed until the next annual general meeting provided that the current members and the temporary member have a quorum.

- France

In **France**, conditions for dismissal vary depending on the legal form of the joint stock company: one-tier with board of directors or two-tier with executive board and supervisory board.

The directors sitting on the board of directors, just like the members of the supervisory board, may be dismissed *ad nutum* by the general meeting of shareholders. The adversarial principle must be observed.

The chairperson and the vice-chairperson of the supervisory board may be dismissed by the supervisory board. In such cases, they remain members of the supervisory board.

The chairperson of the board of directors may be dismissed *ad nutum* by the board of directors. Any clauses to the contrary are automatically null and void — this stipulation is particularly aimed at severance packages which may violate this principle by virtue of their excessive sums, and which are regularly nullified by the courts for this reason. The resolution for dismissal is taken by a majority of votes of the administrators present or represented. Moreover, it does not matter if the dismissal was entered as an item on the agenda or even if it occurs after an irregularity in the meeting. The resolution for dismissal must be taken under the legal conditions of quorum and majority.

As soon as the chairperson is dismissed as a director by the meeting of shareholders, the chairperson must also relinquish his or her duties.

However, this principle of *ad nutum* dismissal is limited by the option of the courts to award damages in cases of wrongful dismissal (characterised by abrupt or vexatious circumstances or by failure to apply the adversarial principle or recognise rights of the defence).

The general manager may also be dismissed *ad nutum*, but the decision must be based on just and proper grounds. Otherwise, it may give rise to damages (even if the general manager is also chairperson of the board of directors). The CEO is therefore more exposed than the general manager.

For the executive board, the resolution for dismissal must be taken by the general meeting, even if the statutes have designated the supervisory board as the authorised body. Just as with the general manager, the dismissal must rest on just and proper grounds (for instance, a difference of opinion), under penalty of a claim for compensation for damages.

- Germany

In **Germany**, the general meeting may dismiss members of the supervisory board. If the statutes grant a shareholder the right to appoint delegate members of the supervisory board, then this shareholder may dismiss this delegate member of the supervisory board at any time. A court may also dismiss a member of the supervisory board at the request of other members in cases of just and proper grounds. Just and proper grounds mean that the continuation of the term of a member of the supervisory board would be unacceptable for the company.

The members of the supervisory board may be dismissed by the general meeting before the end of their term by a three-fourths majority of the shareholders present with voting rights (the statutes may reduce this majority to 50 %). The dismissal may be enacted *ad nutum*, without indication of any reasons why.

- Romania

In **Romania**, members of the supervisory body may be dismissed by the meeting of the shareholders.

In the one-tier system, the general meeting of shareholders may, at any time, dismiss members holding the supervisory power.

In the two-tier system, the general meeting of shareholders may dismiss members of the body exercising the supervisory power by at least a two-third's majority vote of the shareholders present at the meeting.

- Spain

In **Spain**, the board of directors is authorised to appoint and dismiss members holding the supervisory power.

- The United Kingdom

In **the United Kingdom**, the Act of 2006[178] allows shareholders to dismiss directors. The statutes may also grant the board of directors the power to dismiss one of its members.

The shareholders may dismiss a director by simple majority. Some formal procedures are stipulated, including the requirement to give 28 days' advance notice to the general assembly and to grant the director in question the right to present his or her defence in the general meeting.

The statutes may also stipulate abnormal circumstances in which the members of the board may resign and stipulate that the board of directors may dismiss one of its members.

For instance (i) where institutional shareholders in private companies are permitted to appoint a member of the board to ensure representation of their interests, they alone are entitled to dismiss this member, (ii) if a member of the board ceases to be employed by the company (or its group), (iii) if a member of the member is declared bankrupt or (iv) is declared mentally ill. The statutes may only provide that the board of directors may dismiss a member of the board by unanimous decision or by a majority decision.

2.6. INTERACTION BETWEEN THE EXECUTIVE POWER AND THE SUPERVISORY POWER

2.6.1. DISTRIBUTION OF POWERS

As detailed in the Introduction and in 0, the interaction between the executive power and the supervisory power is highly dependent on the legal structure of the company (one-tier or two-tier).

In the two-tier structure, the distribution of powers is 'pure': the executive power is clearly separated from the supervisory power. The body holding the supervisory power even has a legal obligation to refrain from interfering in the management.

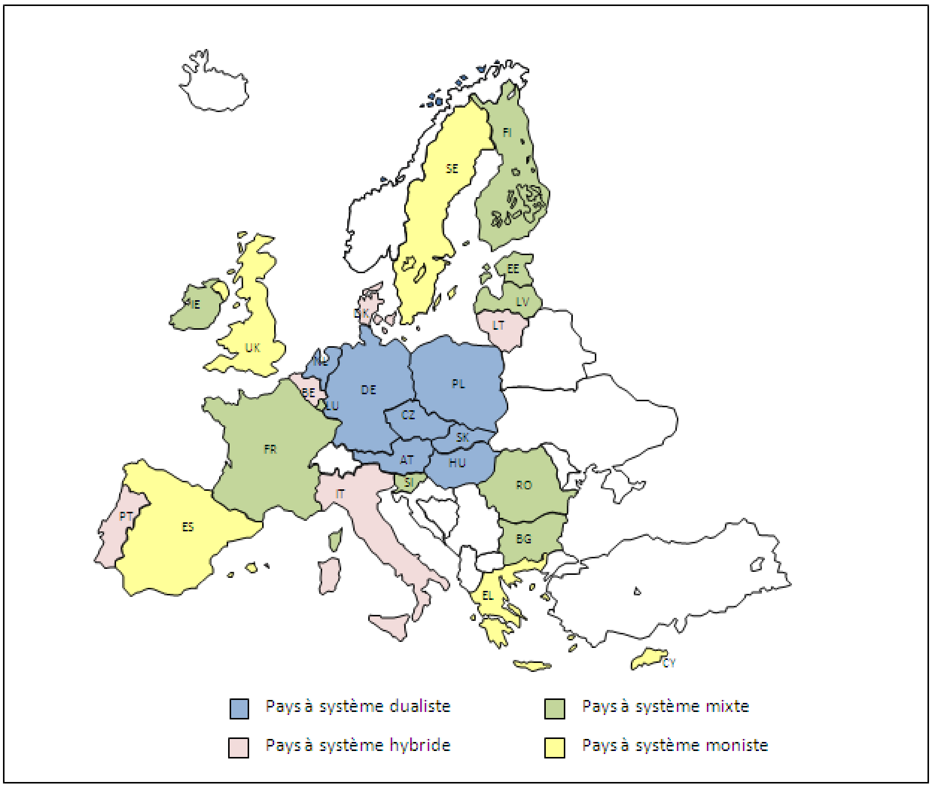
In contrast, this distinction is much more blurred in one-tier companies, where governance is controlled by a supervisory body which also exercises some of the executive power.

[178] Section 168 of the Act of 2006.

This is the case in the **United Kingdom**, which distinguishes between executive board members, who are invested with some of the eponymous power, and the non-executive directors.

In this section, we discuss the approaches taken in the countries in focus and their positions in the classification system given in 0, indicated in the map below:

Map: Distribution of different governance systems at the EU level



Source: JeantetAssociés

2.6.1.1. Description of the one-tier system countries

- The United Kingdom

In **the United Kingdom**, which has adopted the one-tier system, the members of the board exercise both the executive power and the supervisory power in the supervisory body, which is called the 'board of directors'.

UK company law therefore does not distinguish between the body exercising the supervisory power and the body exercising the executive power. It leaves this to the statutes, which generally stipulate that the company is managed by the board of directors in accordance with the law, the statutes, and the instructions resolved in the meeting.

The board of directors is a collective body which is jointly liable for the management of the company. The statutes may provide the option for the board to delegate certain duties to committees in the board.

Some members of the board of directors may be entrusted with specific duties which involve them in the day-to-day management of the company: these are the 'executive directors'.

The board of directors may also include members who are 'non-executive directors', appointed to provide independent supervision in matters related to strategy, performance, resources deployed, including appointment of board members, and codes of conduct[179]. The supervisory power is held by non-executive directors who are not responsible for the day-to-day management of the company but who are appointed to provide constructive advice on the activities of the executive directors in the management of the company's affairs. However, members of the board all have the same liability, regardless of whether they are executive or non-executive.

In addition to this, the statutes generally authorise the board to delegate certain competencies to ad-hoc committees. The Governance Code recommends creation of an audit committee, an appointment committee and a remuneration committee. The power entrusted to these committees is based on actual delegation of power (cf. the audit committee) or is merely advisory (other committees).

- Spain

In the **Spanish** one-tier system, the board of directors represents the company in dealings with third parties and also exercises the executive and supervisory powers.

The board of directors is invested with the following powers:

- Represent the company
- Direct and manage the company
- Draft and present the annual balance sheet
- Supervise and manage day-to-day business
- Provide internal control and risk management

In listed companies, the law requires an audit committee to be in place which may be considered as holding some of the supervisory power. All listed companies are obligated to appoint an audit committee that supervises the internal company audit and risk management.

The specific competencies and the rules for functioning of this committee must be stipulated in the statutes or by regulations applicable to the company. However, Spanish law on market security sets out some 'minimum duties' which the committee must perform, such as supervision of procedures for preparation and presentation of financial information and verification of the independence of outside auditors.

The audit committee of a listed company has the following competencies:

- Monitor the effectiveness of internal controls and the audit
- Propose auditors for the management body
- Verify the independence of outside auditors
- Supervise procedures for preparation and presentation of financial information

[179] 1992 Cadbury Commission Report.

The corporate governance code recommends that listed companies create an internal audit function supervised by the audit committee.

2.6.1.2. Description of the two-tier system countries

In **Germany**, the management body is the executive board. It is appointed by the supervisory body, in this case the supervisory board.

It is the executive board that is responsible for the company's day-to-day management, planning, coordination and control as well as drafting and implementation of company policies. It represents the company in its relations with third-parties and in the legal system.

More specifically, the executive board is responsible for management of the company. It receives instructions neither from the supervisory board nor the meeting of shareholders.

The task of the supervisory board is expressly restricted exclusively to oversight of the executive board. The supervisory body need not perform any management duties but it may advise the management body. It also has the power to appoint the auditor.

It is not authorised to issue instructions to the management body or to take operational decisions. However, the statutes and internal procedural rules may make certain decisions falling under the authority of the management body subject to prior approval of the supervisory board.

The statutes or the supervisory board give the various categories of actions which require prior authorisation from the supervisory board. In principle, these actions include decisions or measures which fundamentally alter the company's capital, its financial situation or its profits[180]. On the other hand, only the executive board may initiate the measure, which can then either be approved or rejected by the supervisory board.

In exceptional cases, administrative action must be approved by the general meeting. This is the case if the administrative measure is comparable to an amendment to the statutes[181].

2.6.1.3. Description of the mixed-system countries

A) France

Three scenarios should be distinguished in **France**:

- That of the joint stock company in the form of a joint stock company with executive board and supervisory board
- That of the joint stock company in the form of a joint stock company with board of directors, with separation of powers of the president and the general manager
- That of the joint stock company in the form of a joint stock company with board of directors, with plurality of powers in the position of *PDG* (CEO)

- Joint stock company in the form of a joint stock company with executive board and supervisory board

[180] La direction des sociétés anonymes en Europe, Creda, Litec, 2008, p. 19.

[181] *La direction des sociétés anonymes en Europe*, Creda, Litec, 2008, p. 29. This rule is derived from legal precedent, 'Holzmüller – Bundesgerichtshof', Court Reports BGHZ 83, p. 122 sq Gelatine, Bundesgerichtshof, Die Aktiengesellschaft (AG), 2005, p. 137.

As in Germany, it is the executive board, as a college, which handles day-to-day management of the company. The powers granted to the executive board are stipulated in the law as follows:

- The executive board is invested with the most extensive powers to act under any circumstances on behalf of the company. These powers are rather broad and go well beyond the duty of representing the company, which only falls to the chairperson of the executive board. Thus, for instance, the executive board may sell part of the company's assets, initiate a takeover bid, etc.
- It draws up the company's statement of accounts for the past financial year and submits it to the supervisory board (which decides on it) and to the ordinary general meeting, just as with the annual report.
- The executive board also drafts a quarterly report that it submits to the supervisory board.
- The executive board convenes the general meeting of shareholders, sets the agenda, adds additional draft resolutions from shareholders to the agenda, verifies that shareholders receive proper information and responds to written questions.

The powers granted to the supervisory board are also set out by law:

- '[t]he supervisory board exercises continuous oversight of the management of the company by the executive board'.
- This power includes verification of the regularity of the accounts, in particular the annual accounts. The supervisory board exercises this oversight in cooperation with the auditors.
- However, the main aspect of control is of a more legal and political nature by examining the regularity of the management with respect to the rules and regulations and assessment of the appropriateness of the executive board's management.
- In addition to this, the supervisory board appoints the member of the executive board and sets their remuneration.
- It also holds the power to propose candidates for appointment of auditors by the general meeting of shareholders, to convene a general meeting of shareholders, and to create committees within the board. The supervisory board is also authorised to resolve to relocate the company's registered offices within the same department or an adjacent department (Section L. 225-65). Finally, it holds a power of prior approval over certain actions by the executive board.

• Joint stock company in the form of a joint stock company with board of directors, with separation of powers of the president and the general manager

In this case, the powers granted to the board of directors are also set out by law, which states that '[t]he board of directors sets the direction of the company's activities and monitors to ensure their implementation'.

Therefore, it is a strategic direction-setting body whose task goes far beyond the supervisory power. This is why it is said that some of the executive power is exercised in the board of directors, and this explains why directors may be examined in the same way as those of the management for the purposes of our study (CEO, president, general manager).

Additionally, the board of directors has the power to:

- 'Take up any issue of interest to the proper functioning of the company and govern the matters affecting these issues in its deliberations'.
- 'Conduct any oversight or verification it deems appropriate'.
- Appoint and dismiss the chairperson of the board of directors and the general manager, set their remuneration, choose between separation of powers of the president and the general manager or unification of these positions.
- Co-opt directors, appoint a deputy director to perform the duties of the president in cases of temporary unforeseen difficulties or death.
- Decide on the distribution of director's fees and the granting of any exceptional remuneration.
- Entrust directors with special tasks as detailed in 0.
- Decide on the creation of committees.
- Convene general meetings of shareholders, set their agenda, draft reports to provide information to shareholders.
- Grant or withhold prior approval for regulated party agreements.
- Authorise deposits, endorsements, guarantees and figures issued by the company.

In principle, the chairperson of the board of directors does not take on the executive power. This is reserved for the general manager. However, the chairperson of the board may fulfil these duties concurrently with those of the general manager.

In the separated variant, the general manager only holds the power to represent the company in dealings with third parties. Under the terms of the law, it is this person who holds the management power: '[t]he general manager is invested with the most extensive powers to act under any circumstances on behalf of the company'.

However, this person may only take actions falling under the object of the company which are not expressly reserved by law or the statutes for the meeting of shareholders or the board. However, case law also deems that the general manager cannot be deprived of his or her management powers. Their civil and criminal liability is similar to those of other members of the board of directors.

- Joint stock company in the form of a joint stock company with board of directors, with non-separation of powers in the position of CEO

In this case, the executive power normally held by the general manager is held by the chairperson of the supervisory body which is also the board of directors, which may create risks of conflicts of interests and harm the full exercise by the board of directors of the supervisory power with which it is also invested.

B) Romania

In **Romania**, the two-tier system entrusts the management body with the power to manage the company and inform the supervisory body of its activities.

The supervisory body exercises continuous supervision of the management of the company by members of the management body. It appoints and dismisses members of the management body and sets their remuneration. It verifies that the administrative actions are carried out in accordance with the provisions of the law, the statutes and the resolutions of the general meeting of shareholders. It shall report at least once per year to the general meeting of shareholders on these supervisory activities.

The Romanian one-tier system allows separation of management and supervisory duties.

The supervisory body holds the following powers:

- Determine the company's main activities and their development.
- Set the budgetary policy and the system of financial control and approval of the financial planning.
- Appoint and dismiss members of the body exercising the executive power and set their remunerations.
- Supervise the activities of the members of the body exercising the executive power.
- Prepare the annual report, organise the general meeting and implement its decisions.
- Monitor initiation of insolvency proceedings for the company, etc.

The body holding the executive power is tasked with management of the company and must provide information on this management to the body exercising the supervisory power.

Decisions which must be taken by the supervisory body in the one-tier system:

- Set the company's main activities.
- Determine accounting policy and the system of financial control and approve the financial planning.
- Appoint and dismiss members of the body exercising the executive power and set their compensation.
- Supervise the activities of the members of the body exercising the executive power.
- Prepare the annual report, organise the general meeting of shareholders and implement the resolutions adopted.
- Also play a role in initiation of collective proceedings against the company.

Decisions which must be taken by the supervisory body in the two-tier system:

- Supervise the management of the company by the members of the body exercising the executive power.
- Appoint and dismiss members of the body exercising the executive power and determine their compensation.
- Verify that the management of the company is in accordance with the provisions of the law, the statutes and the resolutions of the general meeting.
- Submit a progress report on the exercise of its right of supervision to the general meeting at least once a year.

Decisions which must be taken by the body exercising the management power:

- Manage the company.
- Provide the body exercising the supervisory power with information on its management, etc.

C) European company (SE)

In an **SE**:

- The supervisory body supervises the management provided by the management body. It may not itself exercise the management power for the SE[182].
- The management body is responsible for management of the SE. A Member State may provide that a general manager or general managers are responsible for the day-to-day management under the same conditions as joint stock companies that have registered offices within that Member State's territory[183].
- The administrative body — or the general managers — manage(s) the SE[184].

2.6.1.4. Description of the 'hybrid' system countries

A) Denmark

In the **Danish** system, the company is managed by a board of directors which may appoint an executive board to assist in its management. This board is responsible for the day-to-day management of the company, which is why this county is classified as a hybrid system country.

The board of directors, on the one hand, must supervise the executive board with regard to, for instance, the company's bookkeeping, financial reports, risk management and internal control procedures and, on the other hand, must perform management duties and ensure that the company's affairs are in good order.

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182 Regulation No 2157/2001, Article 40, Section 1.
183 Regulation No 2157/2001, Article 39, Section 1.
184 Regulation No 2157/2001, Article 43, Section 1.

The executive board must adhere to the policy decided by the board of directors. Decisions affecting the company in a fundamental way cannot be taken by the executive board without the approval of the board of directors, except in emergency situations. In situations of this kind, the executive board must immediately report this to the board of directors.

B) European company (SE)

The Statute for the **SE** also provides for governance of the SE under a one-tier system.

The main rules on the functioning of an SE are set out by the Regulation and apply regardless of the Member State of the SE's registered offices.

Thus, in the one-tier system of the SE, the administrative body manages the SE.

A Member State may provide that a general manager or general managers are responsible for the day-to-day management under the same conditions as joint stock companies that have registered offices within that Member State's territory.

2.6.2. HANDLING CONFLICTS OF INTERESTS

2.6.2.1. Rules for handling conflicts of interests

Most Member States do not provide any specific rules on handling conflicts of interests, but require the members of the management bodies to avoid any conflicts of interests, except where authorised by the body (in particular in **the United Kingdom**).

There is no legal system to prevent conflicts of interests in the United Kingdom, but the directors must avoid conflicts of interests, i.e. avoid situations in which a direct or indirect personal interest may be in conflict with the interests of the company. The directors are under obligation to disclose any private interests they may have in the agreements involving the company that they manage.

In reality, the issue of conflicts of interests is generally approached from three primary angles:

- Rules restricting the plurality of offices, discussed in 0, which we will not cover again here
- Rules on abstention from voting on issues presenting a conflict of interests for the member of the board in question
- Regulation of agreements between the member of the board and the company (known as 'regulated party agreements' or 'related party agreements').

A) Rules for abstention

In **France**, several provisions address situations of conflicts of interests between a member of the supervisory body and/or the management of the company. In these situations, it is at least required for member of the body to abstain from the decision on the agreement that is the source of the conflict (cf. the procedure on regulated party agreements).

According to the AFEP-MEDEF code, which is more strict on this point than the law, the director must inform the board of any situation of conflict of interests, even potential ones, and must abstain from participating in the vote during the relevant deliberations[185].

[185] Point 17 of the AFEP-MEDEF Corporate Governance Code.

In **Spain** and **Romania**, similarly, a member of the board with a conflict of interests must abstain from taking part in decisions related to the transaction which is the source of conflict.

2.6.2.2. Regulations on agreements involving members of the management or supervisory bodies

A) Definition of agreements or transactions involving members of the management or supervisory bodies

Many countries have adopted special regulations on agreements concluded between companies and members of their management or supervisory bodies, or even members of management bodies at companies in the same group (e.g. **Bulgaria**, **Spain**) or even persons affiliated with members of the body (**Spain**, **Lithuania**, **Greece**). Some legislations give a very broad definition of interested parties (**Lithuania**, **Estonia**). This regulation may also be derived from case law (**Ireland**, for instance, for non-listed companies) and/or the company's statutes (**the Czech Republic**). Some countries do not regulate these matters (**the Netherlands**, **Finland**) or only do so indirectly (**Belgium**), while others only for certain transactions (**Germany**, **the Czech Republic** — loans to directors).

Some countries (**Belgium**, **the Netherlands**, **Spain**) have a regulation similar to the 'regulated party agreement' when a member of the joint body has an interest in a decision taken by the board on which he or she sits.

- France

In **France**, a regulated party agreement refers to any agreement concluded directly between a company and its general manager, any of its deputy general managers, any of its directors, the chairperson of the board of directors, a member of the supervisory board, a member of the executive board, or any of its shareholders holding over 10 % of the voting rights or, in the case of a corporate shareholder, the controlling company.

An agreement is still regulated if it is concluded by way of an intermediary or if the person in question is involved indirectly.

Finally, regulation also applies to agreements concluded between the company and an enterprise if the general manager, any of its deputy general managers or its directors or any of the members of the executive or supervisory boards is the owner, partner with unlimited liability, manager, director, member of the supervisory board or, in general, an administrator of this enterprise.

Additionally, some elements of the remuneration which are also subject to regulation should be mentioned: Exceptional remunerations and severance packages for directors of listed companies (these agreements are called 'individual regulated party agreements').

- Germany

German legislation on agreements involving members of management bodies focuses on the issue of loans granted for these members.

Denmark

In **Denmark**, members of the management body may not participate or act in any transaction, agreement or legal proceedings involving or implicating the company if they have a material interest which could conflict with the interests of the company.

- Spain

In **Spain**, the directors must inform the company of any involvement or activities that they themselves or parties affiliated with them have or conduct in a company with the same or similar object as the company they manage. In this regard, they must indicate their duties at the company.

Affiliated parties are the following:

- For a natural person, this may be the director's spouse, parents, children or siblings, parents' spouses or even companies controlled by the director.
- For a legal entity, the affiliated parties may be the company's controlling partners, directors, liquidators, lawyers, companies in the same group and their partners, or any person considered to be affiliated with the company.

The conflict of interests described above must be included in the annual report.

As per Section 229 of the Spanish Capital Companies Act (*Ley de Sociedades de Capital - LSC*), in cases of conflicts of interests between the directors and the company, the latter must notify 'the management body' or the other directors, or if there is only one director, the general meeting of shareholders.

- The United Kingdom

The United Kingdom has laws on conflicts of interests which should lead directors to avoid these situations. However, situations of conflicts of interests are not prohibited (though directors cannot accept benefits from a third party provided on account of his or her position, unless there is no conflict of interests with the company).

Directors must report the existence of any personal interests in any transaction or agreement concluded with the company in which he or she performs duties. In some cases, these situations of conflicts of interests must be 'approved' either by the board made up of directors with no conflict of interests (this is obligatory for listed companies) and/or by the general meeting (see below).

- Romania

In **Romania**, a conflict of interests is any situation in which the member of a corporate body or a close friend or relative up to four degrees of separation has interests contrary to those of the company.

B) Prohibited transactions

Several States prohibit certain transactions for members of the management body (loans and borrowing from the company, deposits or guarantees from the company: **France**, **Portugal**, **Estonia**, **and Greece**). These prohibitions are not imposed in the majority of the other Members States (**Slovakia**, **Sweden**), but transactions are typically restricted (**Poland**, special approval from the general meeting). In addition, several countries (legislation and/or case law) impose a non-competition obligation on members of the management body (**the Czech Republic**, **France** for the executive director).

- France

France prohibits loans and guarantees (deposits) granted by the company to natural persons who are members of the management or control body and their close friends/relatives.

- Germany

We have not found any transactions that are prohibited in **Germany**.

- Denmark

In **Denmark**, the concept of the regulated party agreement is related to that of the conflict of interests. In principle, members of corporate bodies cannot enter into an agreement if they have an interest that is in conflict with that of the company. This must be a material interest which may be not only personal but also related to family members or other close relations. In such situations, however, the transaction may be authorised by the company (see below).

- Spain

We have not found any transactions that are prohibited in **Spain**.

- The United Kingdom

We have not found any transactions that are prohibited in the **United Kingdom**.

C) Restricted transactions: methods of restriction (notification of bodies performing supervisory duties, vote by these bodies)

If an agreement and/or decision of a body involves a member of that body, it is generally put to a vote of the body in which the person in question may not take part.

Notification of the body depends on the chairperson of the body from which a decision is requested or the person in a situation of conflict of interests, where this person is often required to identify and report the conflict (the **United Kingdom**).

- France

In **France**, the member of the management in question must inform the supervisory body of the existence of a regulated party agreement as soon as he or she becomes aware of such.

The supervisory body will then vote under normal quorum and majority conditions (in the absence of stricter requirements in the statutes). The board member in question must then abstain from voting.

Once the authorisation is granted, the regulated party agreement can be concluded. It will, however, be subject to approval of the ordinary annual general meeting of the shareholders which will decide based on a special report by the auditor. If the person in question is a shareholder, he or she may not take part in the vote of the meeting of the shareholders and his or her shares will be deducted from the counts for the quorum and majority. If the meeting of shareholders does not approve the authorised agreement, it will not be nullified, at least with regard to third parties. But the person in question, or even other members of the management, may be held liable in cases of adverse consequences for the company.

- Germany

In **Germany**, the company may grant a loan to members of the body exercising the management power only if the body exercising the supervisory power authorises this by a special resolution. A resolution of this kind can determine the nature of the credit transaction, which may not exceed a specific term. The same applies to loans to a spouse or minor child of a member of the management body or other authorised representatives.

- Denmark

In **Denmark**, in cases of conflicts of interests, notification must be provided to the board members not involved. The latter members may approve the agreement, where the member in conflict cannot vote on the agreement.

If the board cannot take a resolution due to lack of a quorum, the resolution may be approved by the general meeting. On the other hand, and barring any specific provisions of the law, this kind of option is excluded if the resolution provides one or more shareholders with an undue advantage with regard to the other shareholders in the company.

- Spain

In **Spain**, the law on capital companies states that these directors must inform the body or, if there is no body, the other directors or, in the case of a sole director, the general meeting, of any situation which may involve a conflict between their own interests and those of the company (such as an agreement concluded between the company and a director). The directors, in such situations, must abstain from taking part in decisions related to the transaction giving rise to the conflict of interests.

For joint stock companies, Section 220 of the Spanish Capital Companies Act (*Ley de Sociedades de Capital*) stipulates that establishment of any payment between the company and one or more of its directors in relation to performance of services or work must be decided by the meeting of shareholders.

Moreover, Section 116 of the Spanish Financial Markets Act states that listed companies must publish a corporate governance report every year which must be submitted to the National Securities Market Commission. These reports must mention, among other things, any regulated party agreements between the company and its shareholders, directors or persons exercising the management power and the intragroup agreements.

- The United Kingdom

In **the United Kingdom**, as noted above, Section s175 of the Act of 2006 stipulates that the director must avoid situations giving rise to a conflict of interests, whether direct or indirect, current or potential, or to liability. Conflicts of this kind may be approved by directors not subject to conflicts of interests, except for private companies (non-listed companies) registered before 1 October 2008, which must adopt a resolution to allow them to apply this system.

According to Section s177, a director is required to notify the other directors of the nature and the extent of any interests, whether direct or indirect, which the director or an affiliated person may have in a proposed transaction or agreement to be concluded with the company.

Section s182 states that a director must report his or her interests in all transactions concluded with the company. This situation may occur if the member of the board failed to meet the notification requirement given in Section s177 or if he or she became a member of the board after conclusion of the agreement or if the personal interest arose after conclusion of the agreement.

As per Section s190 of the Act of 2006, shareholder approval is required if the company and a director are involved in an agreement whose subject matter is a non-monetary asset of a value greater than GBP 100 000 or 10 % of the company's assets.

These agreements must be approved by the directors not involved in the conflict of interests, then normally by the general meeting, where the board member in question cannot take part in the vote and is not counted in the calculation of the quorum[186].

Agreements with directors which require approval of the shareholders are, for instance:

- Long-term service agreements exceeding two years[187]
- Transfers and acquisitions of considerable value (Section 190 of the Act of 2006)
- Loans granted to directors (Section 197 of the Act of 2006)
- Agreements on compensation for loss of a position on the board (Section 217 of the Act of 2006)

In the absence of stricter requirements in the statutes, these kinds of transactions require a simple majority of the shareholders participating in the vote (excluding the directors in question).

- Romania

In **Romania**, the decision giving rise to the conflict of interests may be authorised by a majority vote of the general meeting, where the person with the conflict cannot participate in the vote.

D) Penalties

The penalties given for failure to adhere to procedures for approval in advance or after the fact are: the person in question will be held liable if the decision/agreement has adverse consequences on the company and, in some cases, the agreement/decision may be nullified (**France, Belgium, and Bulgaria**).

- France

In **France**, agreements not authorised in advance by the board of directors are only nullified if they have adverse consequences for the company. Additionally, the person in question will also be held liable. Nullification may be requested by the company or the shareholders. They must take action within three years starting from the date of the agreement.

Section L. 225-42 of the French Commercial Code provides for approval by a vote of the general meeting.

In addition to this, the person in question is only required to compensate the company for any resulting damages if the general meeting did not grant its approval.

[186] *La direction des sociétés anonymes en Europe*, Creda, Litec, 2008, p. 73. Other special rules may apply to companies whose shares are listed on certain markets, such as the Alternative Investment Market (AIM).
[187] Section 188 of the Act of 2006.

- Germany

In **Germany**, any loans granted in violation of the aforementioned provisions must be repaid immediately unless subsequent approval is granted by the supervisory body.

- Denmark

In **Denmark**, in cases of violations of the provisions on conflicts of interests by members of management bodies, the perpetrator of the violation may be penalised by a fine. In addition to this, the agreement may be nullified if it was not approved by the body authorised for such under the conditions given above.

- The United Kingdom

In **the United Kingdom**, if a director infringes on Section s177 of the Act of 2006, the transaction may be nullified at the company's initiative and the director may be required to repay any profits he or she makes from the transaction. In contrast to Section s177, infringement of Section s182 is a criminal offence. This does not, however, call the validity of the transaction into question.

As per Section s195 of the Act of 2006, infringement of the provisions of Section s190 of the Act of 2006 results in nullification of the agreement or contract.

In addition to this, the Financial Services Authority (FSA) may impose sanctions for violations of the Listing Rules. In this regard, the FSA may impose fines or even go so far as to suspend listing of the company's shares.

- Romania

In **Romania**, in the absence of approval from the meeting of shareholders granted without the vote of the person with the conflict of interests, the agreement is null and void and the person with the conflict of interests is liable for damages incurred by the company.

E) Disclosure requirements to the supervisory body or shareholders for these agreements

Where national legislation features specific provisions on 'regulated party agreements', the supervisory body is generally authorised to decide on these agreements (**Estonia**). The meeting of shareholders is typically notified of these transactions and may be prompted to approve them (**France**, **Luxembourg**, **and Spain**). In some cases, it is the only body that can decide on the agreement (**Greece**, **Hungary** in particular, **Estonia** in some situations). Some legislation do not stipulate any notification of shareholders or the supervisory body (**Latvia**). We note that some legislation require notification of the execution of regulated party agreements (**Italy**). Some legislation also require special notification of the market if the agreement is of interest to a listed company and is of a certain scope (see **the United Kingdom**).

2.6.3. PRESENCE OF THE MANAGEMENT AT MEETINGS OF THE SUPERVISORY BODY

2.6.3.1. Participation of the management in meetings of the supervisory body

Most States (exceptions: **Italy**, **Bulgaria**, **Poland**, **Spain**) allow members of the management and supervisory bodies to participate in each other's meetings. However, in general, some decisions on management oversight must be taken by the supervisory body alone. In practice, the bodies typically meet separately (**Luxembourg**, **Slovakia**, **Portugal**, **Finland**, **the Czech Republic**, etc.).

- France

In **France**, there is no text which requires the general manager or deputy general managers to attend meetings of the board of directors, but the statutes may stipulate such.

- Germany

German law authorises members of the supervisory body and members of the management to hold meetings together. Each of these bodies may also hold meetings separately.

- Denmark

Danish law authorises members of the supervisory body and members of the management to hold meetings together. Each of these bodies may also hold meetings separately.

More specifically, the body exercising the supervisory power must convene itself whenever such appears necessary. All members of the body must be invited to participate in this. Members of the management (whether or not they are members of the body exercising the supervisory power) as well as auditors may ask to participate in and speak at meetings of the body exercising the supervisory power, unless the body decided to the contrary.

- Spain

Spanish company law has a one-tier system for non-listed companies. In these companies, the management body also performs the control function. In listed companies, the supervisory body is assisted by an audit committee. These two bodies must hold separate meetings. Nevertheless, the supervisory body must verify the work of the audit committee.

- The United Kingdom

This topic is not relevant to **the United Kingdom** given that the board of directors brings together persons exercising the executive power and those exercising the supervisory power within the same collective body.

- Romania

Romanian law does not authorise members of the supervisory and administrative bodies to hold joint meetings.

2.6.3.2. Duties, roles and powers of members of the management at meetings

Some legislation does not draw a distinction between executive and non-executive members of the supervisory body (**Luxembourg**, **Slovakia**, **the Netherlands**, **Poland**, **Lithuania**, **the Czech Republic**). The position of CEO may be merged with that of chairperson of the executive board (**Portugal**, **Denmark**). While some legislation grants CEOs the right (or the obligation) to attend meetings of the body performing supervisory duties (board of directors — **Finland**, **Greece**, **and Denmark**: a right extended to all members of the executive board and auditors), others do not address it expressly (**France**) and yet others even expressly deny this right (**Estonia**). Some regulations state that the same person cannot head both the company and the board of directors at the same time (**the United Kingdom**, but this is a soft law — the company may decide to merge these roles).

The chairperson, in some cases (but not all: **Hungary**, **the Netherlands**, **the Czech Republic**, **the United Kingdom** unless indicated otherwise in the statutes) has rights and obligations in addition to those of members of the management body to which he or she belongs. This person may be responsible for the organisation and functioning of this body (**Denmark**, **France**, **Italy**, **Luxembourg** — right to convene, **Portugal**, **Estonia**). In some cases, this person may also exercise a casting vote (**Belgium**, **Luxembourg**, **Spain**, **Germany**, **Poland**, **Portugal**, **Lithuania**, **Estonia**, **Finland**, **Denmark** — this right typically depends on the statutes, which may even include a right of veto: **Germany**). This person may also represent the company in the legal system (**Slovakia**).

- France

In **France**, the chairperson of the board of directors organises and directs the work of the board.

- Germany

Under **German** law, the person presiding over the management is typically appointed by the supervisory body. The chairperson of the management must ensure its proper functioning and represent it. The statutes may grant these persons specific rights, such as the right of veto or a right to a casting vote.

- Denmark

In **Denmark**, unless indicated otherwise in the statutes, it is the management body also performing the supervisory duties which elects its chairperson. The statutes may grant certain prerogatives to this person, such as a right to a casting vote.

In principle, unless decided otherwise by the body exercising the supervisory power, executive directors may attend and speak at meetings of the body even if they are not members of it.

- Spain

In **Spain**, the chairperson of the management may, if permitted by the statutes, have the right of a casting vote.

- The United Kingdom

This topic is not relevant to **the United Kingdom** given that the board of directors brings together persons exercising the executive power and those exercising the supervisory power within the same collective body.

- Romania

In **Romania**, the chairperson of the management is tasked with organising the work of the body by collecting and verifying the relevant information provided, by convening and presiding over meetings of the body.

2.6.4. COMMUNICATION OF INFORMATION BY THE MANAGEMENT

2.6.4.1. Scope of the supervisory body’s right to information

A) Right to Information: collective or individual?

In most situations, the members of the body performing the supervisory duties (which may be an audit committee, as in **Greece**) may have full access to information related to the company (*contra* **Finland**). Many States permit this right to be individual and collective while others only permit collective information for the body [**Bulgaria**, **Spain** (audit committee for listed companies), **Lithuania**, **Slovenia**] or only individual information for members (**Belgium**, **the Czech Republic**, **Denmark**, **Estonia**). This right may be extended to other bodies (auditors in **Hungary** for instance, employees in **Italy**, etc.). Some countries are questioning the actual effectiveness of these rights (**Estonia**).

- France

In **France**, the board of directors conducts the checks and verifications that it deems appropriate.

The president or general manager is required to communicate to each director (right to individual information).

The same information requirement applies collectively to the executive board, which is obligated to inform each member of the supervisory board individually. The supervisory board requests provision of the documents it deems necessary. This right to information is available to each member of the board individually.

- Germany

In **Germany**, the supervisory body may request that the management provide information on the affairs of the company, the group and subsidiaries whose activities may have an impact on the company. The members of the management may also request this information, but it is only provided to the supervisory body, in the form of a report. Its members may peruse these reports individually, which must be provided to it if they were prepared in writing, unless decided otherwise by the supervisory body.

- Denmark

In **Denmark**, the supervisory body (board of directors) has full access to information on the company in order to fulfil its duties defined under the law, which are not limited to deciding on company policy and direction (the executive board must apply this). The supervisory body must also ensure that the accounting and financial procedure (including risk management) are suitable, that the financial and cash-flow resources are adequate, and that the management is fulfilling its duties with the required diligence.

The right to receive information also falls to each member of the supervisory body which can/must be able to access all of the information on the company. This right is individual.

- Romania

In **Romania**, the right to receive information on the company's affairs falls to every member of the supervisory body. This is an individual right. Additionally, the management must regularly inform the supervisory body of its past management activities and on the planned actions.

B) Best practices identified

- Denmark

In **Denmark**, with regard to good practices, it is desirable that the management provides the supervisory body with a continuous flow of information by submitting financial reports at regular intervals. More generally, it is desirable for the management to inform the supervisory body, unprompted, of any relevant issue affecting the company.

- Spain

In **Spain**, with regard to listed companies (see above), the audit committee has access to all information on the company to supervise the internal audit mechanisms and monitor the procedures related to risk management. The audit committee's right to information is not subject to any particular procedure.

C) Communication of information in a European Company (SE)

In an SE[188], the supervisory body must receive the following from the management body:

- Periodically (once every three months), information on the state of affairs at the SE and their foreseeable developments

- At the appropriate times, all information on events which may have serious consequences for the SE's situation

While the principle set out by the European legislature is a collective right to information, it also stipulates that each member of the supervisory body may inspect any of the information provided to the supervisory body. Moreover, the European legislature has left the option to the Member States to stipulate, for SEs registered in their territory, that each member of the supervisory body may also enjoy this right[189].

2.6.4.2. Provisions of the law with regard to the reciprocal right to information between the supervisory body and the management

A) Recommendations with regard to the reciprocal right to information between the supervisory body and the executive body

Many countries do not limit the right to information to members of the body exercising the supervisory power. The supervisory body and/or its members may be the recipients of ad-hoc documents periodically drafted by the management (**Luxembourg**, **Slovakia**, **the Netherlands**, **Portugal**, **Estonia**, **Italy**) or may request such documents (**Germany**, **Estonia**, **Italy** for instance). They may also attend meetings of the management body and request explanations and information (**Poland**, **Portugal**, **Italy**, etc.) or consult members of the management body.

Additionally, some legislation provides procedures for exchanging information between members of bodies (**Belgium**) or between corporate bodies in the same group (**Slovakia**).

The supervisory body may have the right to request that the management body revisit some of their decisions (**Lithuania**).

B) Best practices identified

For some, the best practice consists in a distribution of authorisations between the management and supervisory bodies so the most important decisions of the management require consultation with or authorisation from the supervisory body (**Poland**). This form of cooperation may be stipulated in the statutes (**Poland**).

[188] Regulation No 2157/2001, Article 41.
[189] For information on the position taken by each Member State, see Ernst & Young 'Study on the operation and the impacts of the Statute for a European Company (SE)' of 9 December 2009, p. 38.

For others, the best practice consists in systematic submission to the supervisory body of proposals for decisions important to the company which the management wishes to adopt (**Lithuania**, **Denmark**). In order to be effective, this practice must, for some, be based on the right of the supervisory body to ask the management body to revoke its decisions (**Lithuania**).

C) The provisions of the law on the European company (SE)

Aside from communication obligations imposed on the management body, the European legislature has granted the supervisory body of the SE the option to take the initiative to request information[190].

Thus, the supervisory body may require the management body to provide information of any kind which it needs to exercise its supervision. The supervisory body may also undertake or arrange for any investigations necessary for the performance of its duties.

2.6.5. RISK MANAGEMENT

2.6.5.1. Legal procedures for risk management

All enterprises are exposed to risks in carrying out their activities. These risks are the result of strategic and operational choices by the company, as well as its involvement in a particular sector which may be more or less regulated. The more regulated the activity, the greater the risk of change in this regulation for the company.

Taking risks is inherent to any entrepreneurial activity. It can never be eliminated, but rather should only be subject to prior analysis and ongoing monitoring, the details of which may be stipulated and restricted by the legislature or by a soft law.

The result of this is that the vast majority of Member States require their companies to implement risk management policies. Only **Luxembourg**, **Latvia**, **Sweden** and **Austria** do not require such.

The supervisory body is responsible to the shareholders for implementing and controlling these policies.

The degree to which establishing these risk management policies is compulsory varies depending on whether or not the company is listed. Thus, for twelve countries, including **Denmark**, **France**, **Italy**, **Lithuania**, **Belgium**, or even **Spain**, only listed companies are required to have an audit committee.

In the vast majority of companies, whether listed or not, the directors are obligated to include in the annual report a statement on the risks to which the company is exposed and the internal measures taken to address them. Some countries even stipulate an obligation to publish this report on the company's website.

Some countries require their companies to have recourse to an outside auditor for all matters concerning financial risk, as is the case in **Bulgaria** and **Denmark**.

Other countries, such as **Italy** and **Bulgaria**, provide for stricter control obligations (more developed internal audit systems, more frequent assessments) for companies conducting banking, asset management and insurance activities.

Ireland takes inspiration from the UK's Corporate Governance Code and requires its listed

[190] Regulation No 2157/2001, Article 41.

companies to draft a compliance code detailing their internal audit and risk management policies.

Similarly, **Greece** requires inclusion of a good governance statement in the annual report detailing the risks run by the company and the measures put in place to detect and mitigate these risks.

- Germany

German law stipulates the obligation for a company's management body to implement risk detection and management protocols in the company.

- Spain

Spain only provides for implementation of risk management policies in listed companies by way of an internal audit department, under the supervision of the audit committee. The internal audit department must issue an annual report to the committee and make proposals for risk management policies and methods. This report must include:

  - The various major risks to which the company is exposed
  - The level of risk deemed acceptable for the company
  - The measures put in place to mitigate these risks and limit their potential impact
  - An evaluation of the policies already implemented in the company

- Denmark

In **Denmark**, it is the members of the executive who are tasked with providing risk management for the company. For this, they must establish the internal control procedure, in particular with regard to finance. In order to do so, listed companies are obligated to form an audit committee in charge of control and implementation of risk management and supervision procedures (procedural efficiency, auditor independence, etc.).

- France

In **France**, a study published by the IFA in February 2012[191] shows that members of the management of medium-sized companies (*ETIs*) interviewed have good knowledge of the risks to which their activities are exposed, despite the relative lack of formalisation in the tools for mapping out and monitoring these risks.

For listed companies, the AFEP-MEDEF code recommends that the annual report include a statement of the internal procedure implemented to assess significant risks to the company. The law requires the president of the company to issue an annual report on governance and internal control.

According to this code, the audit committee is required to examine the significant off-balance-sheet risks and commitments, to consult the internal audit manager, then give its opinion on the organisation of its service, and must also be informed of its work programme. Finally, it must receive internal audit reports or at least a periodic summary of these reports.

[191] Study entitled: 'ETI – rôle du conseil en matière de stratégies et de risques'.

2.6.5.2. Good practices for risk identification, discovery and management

A) Obligation to issue a 'risk' policy

This obligation varies from country to country. For most, this only applies to listed companies. And these may take different forms: Annual statement at the general meeting, formation of an audit committee, development of an upstream risk definition system followed by assessment of the management process for these risks. Some countries also combine multiple solutions.

B) Persons under obligation

Here again, the situation varies from State to State. Countries stipulating audit committees place this obligation on the members of the supervisory body. But many countries allot this responsibility to the management.

C) Recipients of the statements

The recipients of the statements are typically the general meeting. If the management is tasked with the risk management procedure, they often first report on this to the company's supervisory bodies.

2.6.5.3. Rules on verification of company financial statements

In most situations (however, see **Finland**, **the Netherlands**, **Spain** for non-listed companies), the financial statements are prepared by the management and then reviewed and approved by the supervisory body (**the Czech Republic**, **Estonia**, **the United Kingdom**, **France**, **Hungary**) in some cases in the presence of auditors before being presented to the general meeting. The supervisory body may also simply provide the general meeting with a report on the accounts submitted by the management (**Italy**, **Luxembourg**, **Portugal**) and the proposed dividend (**Poland**, **Slovakia**).

Regulation may focus primarily on listed companies (**Spain**: audit committee which restricts internal control mechanisms and external audits, and prepares financial information) or fall under governance codes (**Greece**).

A) France

In France, the supervisory body verifies the regularity of the accounts, in particular the annual accounts. If this role is delegated to auditors, then it shall perform this verification in collaboration with these auditors.

The AFEP-MEDEF code recommends creation of specialised committees, in particular, for: review of the accounts, monitoring of the internal audit and selection of auditors[192].

In listed companies, the audit committee is compulsory.

B) Germany

In **Germany**, the statutes may stipulate that the supervisory body is permitted to set up an audit committee with the task of monitoring accounting procedures and verifying the internal control system (including risk management). This committee may collaborate with

[192] AFEP-MEDEF Corporate Governance Code, revised in April 2010, Point 13.

outside auditors.

C) Denmark

In **Denmark**, the annual financial report and the accounts for the financial year are reviewed and approved by the board of directors (management/control) in the presence of auditors.

D) Spain

In **Spain**, in listed companies, the obligatory audit committee must internally supervise preparation of the financial statements for the company and the group. It must also verify the independence and effectiveness of the internal control service. In this regard, it proposes the appointment (or dismissal) of the head of this service, who must submit a report on his or her activities. It must also follow the recommendations of the committee.

The audit committee must also implement a system enabling employees to anonymously report any accounting anomalies they detect which may have a real impact on the company.

As for the outside auditors, the audit committee must make recommendations to the management body on the choice of an auditor and the terms and conditions of the auditor's appointment. It must verify this person's independence. The audit committee must still receive the information from the outside auditor that it needs to fulfil its duties (see above).

It appears that the audit report prepared by outside auditors and verified (see above) by the committee is submitted to the management, which may indicate its reservations. In this case, the outside auditor and the chairperson of the audit committee must respond to these before the shareholders.

E) The United Kingdom

It appears that all companies under obligation to issue annual statements of account must retain their accounting records.

The United Kingdom has several rules applicable to financial statements depending on the size of the company.

The responsibility for the accounts is allotted to the Directors, who must ensure these reflect a faithful picture of the company (reasonable accuracy). If they do not, then the director's civil or criminal liability may be called into question if they cannot demonstrate that they acted in good faith and that the shortcoming is excusable. They may still be held criminally liable if the accounting documents prepared are not in compliance with certain standards and if the director(s) are aware of these shortcomings or are not reasonably assured of their compliance with applicable regulations.

F) Romania

In **Romania**, the annual financial report must be accompanied by a statement from the management body regarding the accuracy of the annual accounts. This is accompanied by a management report and an auditors' report. The annual general meeting decides on this and may resolve to grant its final discharge.

2.6.6. EXISTENCE, FUNCTION AND RESPONSIBILITY OF THE SPECIALISED COMMITTEES

We find a great deal of uniformity in these practices. The six reference States are no exception. Thus, it will suffice here to highlight some of the specific differences in certain States.

With the exception of **Latvia**, all States provide for the existence of specialised committees within their supervisory bodies. These committees are typically stipulated by national soft laws, in governance codes.

Thus, in the vast majority of countries, an audit committee is required for all listed companies. Some even extend this obligation to companies that have reached a certain size as well as banks and insurance and asset management firms. This is the case in **Sweden**, **Belgium**, **Bulgaria**, **Ireland**, **Slovakia**, **Estonia** and **Greece**. In this regard, **Germany** exhibits originality in that it makes a personnel management committee obligatory for companies which require employees to be shareholders. **Ireland**, for its part, requires a risk management committee for listed companies.

Aside from these obligatory committees, the committees most commonly formed are appointment, remuneration, ethics and governance committees (**Portugal**, **Spain**, **Luxembourg**, **Belgium**, **France**), and strategy committees. **Slovakia** provides for the option to create 'temporary' committees to set a strategy for a specific project.

None of these countries stipulates a minimum number of members for these committees, although in practice this number seems to be set at a threshold of three. Members of committees are directors appointed for their competencies as well as their experience (**Portugal**, **France**, **and Finland**). Moreover, most countries also require that a majority or, for some, even all of these committee members to be independent directors.

In **Estonia**, the number of number of terms for these committee members is never limited, and the length of the term only very rarely. However, the designation as an independent director is lost after a certain number of years in this position in a company (see the section on independent directors).

These committee members are typically appointed and dismissed *ad nutum* by the supervisory body. However, some countries allot this authority to the general meeting of shareholders: **Slovakia**, **Portugal** (for remuneration committees only), **and Bulgaria**.

Similarly, for the vast majority of States, the opinion of these committees is not binding. **The United Kingdom** allows this opinion to be binding if this authority is granted by the supervisory body. The same applies for **Sweden**. **Portugal**, for its part, stipulates that the opinions of the audit and remuneration committees are binding.

No special budget is stipulated for these committees, but the company must, however, give them the means to fulfil their duties properly. Thus, it is often stipulated that they may have recourse to consultancy of any kind outside of the company.

Finally, members of these committees have a liability that is not specified but which results from the director's post they are filling. However, they must demonstrate, by their competencies, a greater degree of diligence. In cases in which the opinion of the committee is binding, the other directors will not be liable for damages resulting from the decision made by this committee.

3. RECOMMENDATIONS TO IMPROVE THE FUNCTIONING OF THE SUPERVISORY BODY AND ITS INTERACTION WITH THE MANAGEMENT

Based on:

- The responses received by our correspondents, a list of which is available at [reference to the list's location], from the questionnaire developed by the authors of this Study and approved by the Parliament
- Good practices identified in the Second part of the Study
- Responses given by companies consulted in the various Member States based on a questionnaire prepared by the authors of this Study
- Responses given by organisations consulted based on a questionnaire prepared by the authors of this Study
- Interviews conducted with various academics (two economists and a professor of management science)

The authors have taken the findings of this Study and proposed recommendations likely to improve governance of joint stock companies, more specifically in terms of the functioning of the supervisory body and its relations with the management.

3.1. FINDINGS OF THE STUDY

The investigations mentioned above reveal a real diversity of national legislations applicable to companies based in the EU. Thus, the first question which arises is whether it is appropriate to reduce this diversity with a view to bringing about harmonised structures at the European level.

A harmonisation of this kind would provide standardisation of company structures, which is a factor in legal certainty for companies and their partners. It would also promote company mobility in the European sphere, a fundamental principle of EU law.

Yet a development of this kind towards standardisation of company law, already envisioned in the proposal for the Fifth Directive, would disregard the specific characteristics and traditions of the various Member States. In addition to this, it would go against the subsidiarity principle. For these two reasons, the path of standardisation appears neither necessary nor appropriate at this stage of European development.

Moreover, the diversity of existing structures allows operators to implement their projects in the structure best suited to its realisation.

Consequently, it cannot be recommended to limit the diversity of company structures offered in the EU, at the risk of imposing new organisational constraints on operators, which may potentially be useful over the long-term, but which are costly over the short term.

On the other hand, the challenges of governance could be addressed, at least in part, by means of harmonised recommendations, to the extent that the goals of good corporate governance have become shared:

- In the traditional view inspired by agency theory (protection of shareholder interests, prevention of conflicts of interests by implementing mechanisms for control and incentives, transparency, information to shareholders, etc.)

- In the study, more recently conceptualised, of optimisation of processes for value creation for the company (the company's long-term interests), of even for society (CSR)[193].

These principles attempt to implement decision-making procedures which should result in the company, and more specifically the management and supervisory bodies, functioning in such a way that ensures the company's development, prosperity, and performance over the long term.

Next, the practices favouring implementation of a structural governance framework enabling the company to take the best decisions with regard to ensuring its long term development should be regarded as **best practices**. The best practices are therefore those which lead the bodies to take decisions in accordance with the corporate benefit.

Although a unique objective can, in this way, be attributed to the practices designated as best practices, the pursuit of this objective nevertheless falls to recommendations which must be adapted to the type of company (listed or not, size, sector of activity, etc.).

3.1.1. NEEDS BY COMPANY TYPE

Corporate governance, historically largely inspired by agency theory, is based on a fundamental assumption of suspicion with regard to directors and the perceived need to align their interests with those of shareholders, specifically by way of an incentive system based on remuneration policies.

For this reason, it primarily focused on restricting their discretionary power with supervisory bodies and disciplinary control mechanisms which became more and more formalised in the name of transparency.

Today this is the subject of much criticism, in particular because it results in a costly and ineffective headlong rush into formalism.

But above all, it disregards the real issue of the corporate benefit, which cannot be reduced to the interests of the shareholders.

Additionally, it is poorly adapted to medium-sized enterprises (*entreprises de taille intermédiaire - ETIs*) which account for the majority of European companies. These are mostly sole-proprietorships and family-owned business, and in which the manager is also the majority shareholder. In this configuration, which is the most widespread in Europe, there is no structural conflict of interests between the management and shareholders, but rather a convergence, given that the shareholders and management are one in the same person.

This reality is reflected particularly well in the MiddleNext reference framework, which proposes different forms of governance according to company categories based on shareholding structure and degree of separation of powers, which is illustrated in Figure 1, shown above in the introduction, which also warrants reproduction here.

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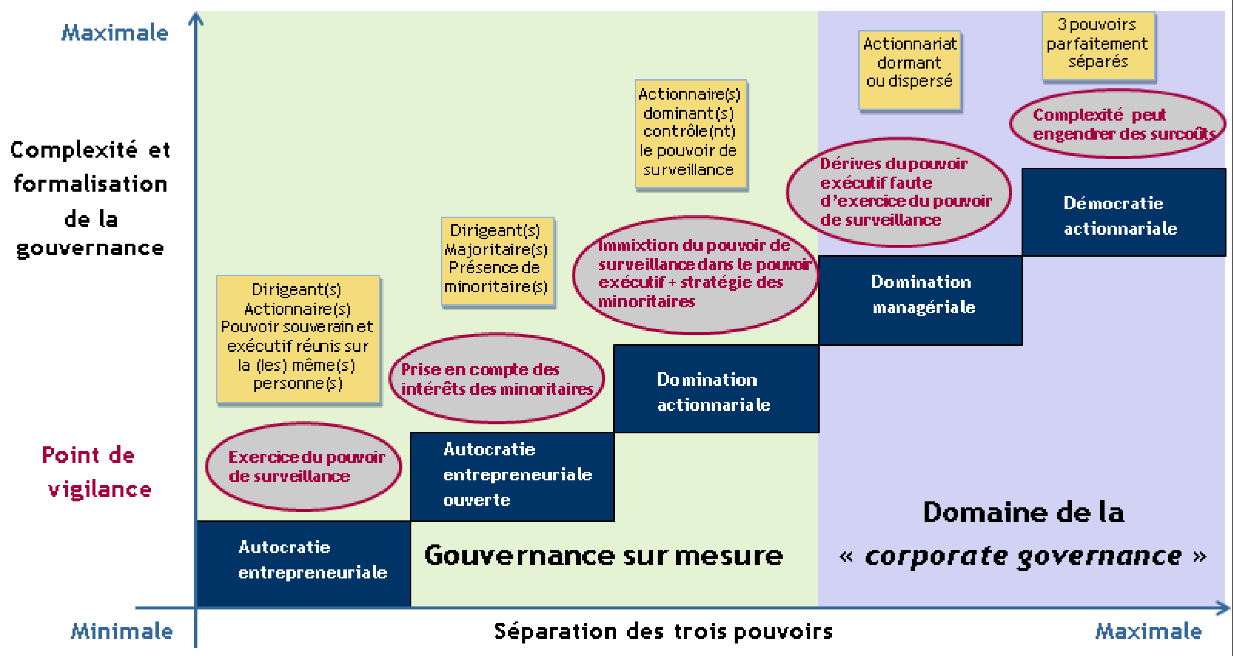
193 For further information on this convergence of corporate governance law, see, for instance, the OECD Principles of Corporate Governance, 2004.

Figure 4: Types of interaction between the three powers on which corporate governance is based according to shareholding and management structure



Type de pouvoir	Nature	Porté par
Actionnarial ou souverain	Apport en capital	Les actionnaires
Exécutif	Apport en industrie	Les dirigeants
Surveillance	Contrôle du pouvoir exécutif	Les organes de surveillance CA ou CS ou ad hoc

Source: JeantetAssociés (based on the MiddleNext reference framework)

Therefore, our recommendations should be designed taking into account this complexity and ensuring proper consideration of each type of enterprise, while achieving the ultimate goal of any system of corporate governance, which is long-term promotion of the corporate benefit.

Traditionally, governance codes have favoured a distinction between listed and non-listed companies.

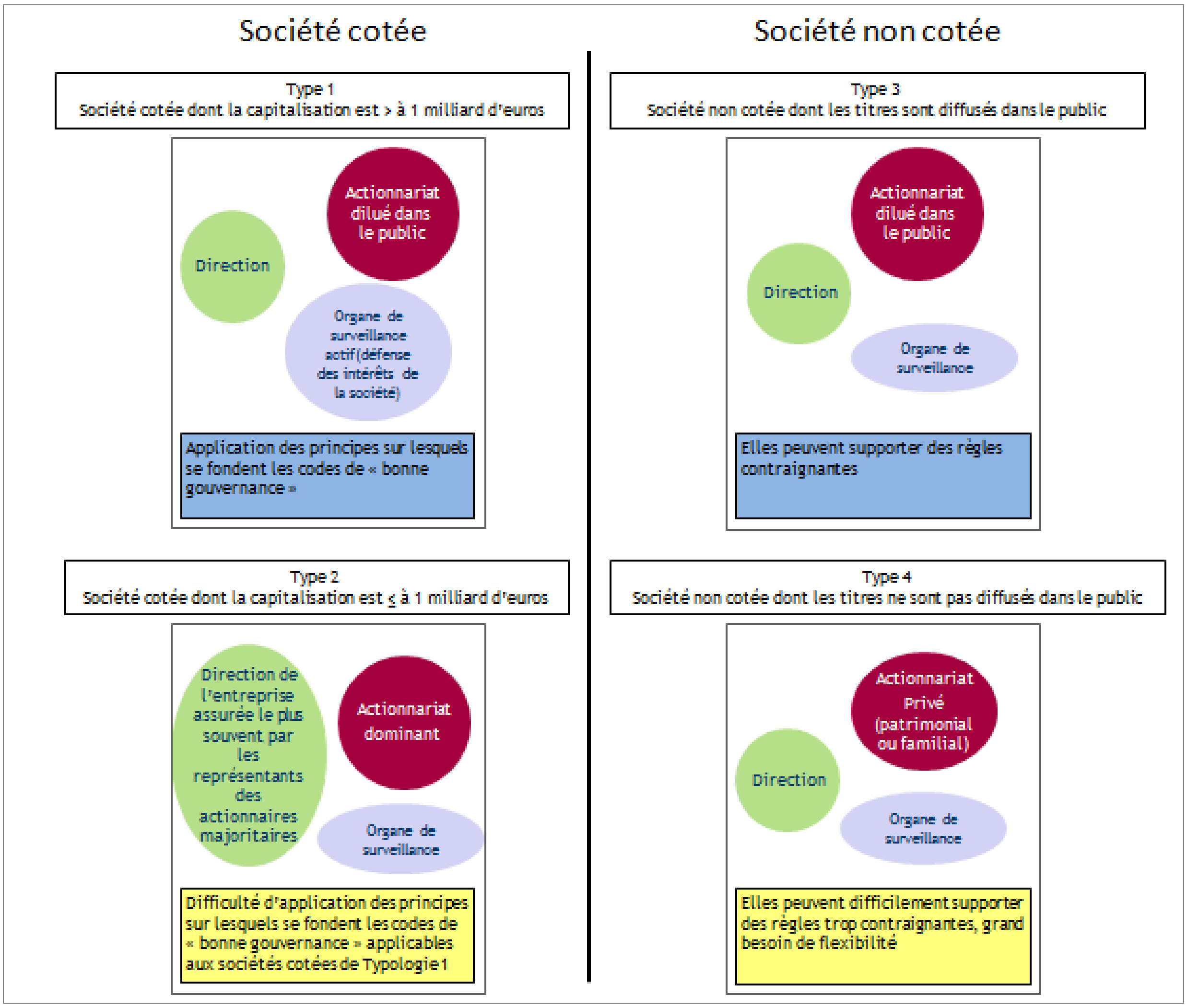
Other systems have also been based on the listed/non-listed company distinction.

As soon as companies offer their shares to the public, we note that they generally must adhere to additional conditions intended to protect investors.

However, listed companies find themselves in a wide variety of situations depending on the amount of their capitalisation. As a result, it does not seem worthwhile to devise a system of classification based solely on whether or not a company is listed.

Joint stock companies can be classified as follows:

Figure 5: The four types of joint stock companies



Source: JeantetAssociés

Each type has different needs and challenges.

The principles and recommendations given in the governance codes are designed for large listed companies whose shareholders are generally dispersed among the general public.

This is much less common among small to medium-sized listed companies, in which the real issues of governances are related to proper interaction between:

- On the one hand, the freedom of entrepreneurial action on the part of the directors who are, typically, the majority shareholders and therefore those who bear the primary risk in cases of mismanagement
- On the other hand, protection of minority shareholders whose interests may be damaged by certain decisions of the management

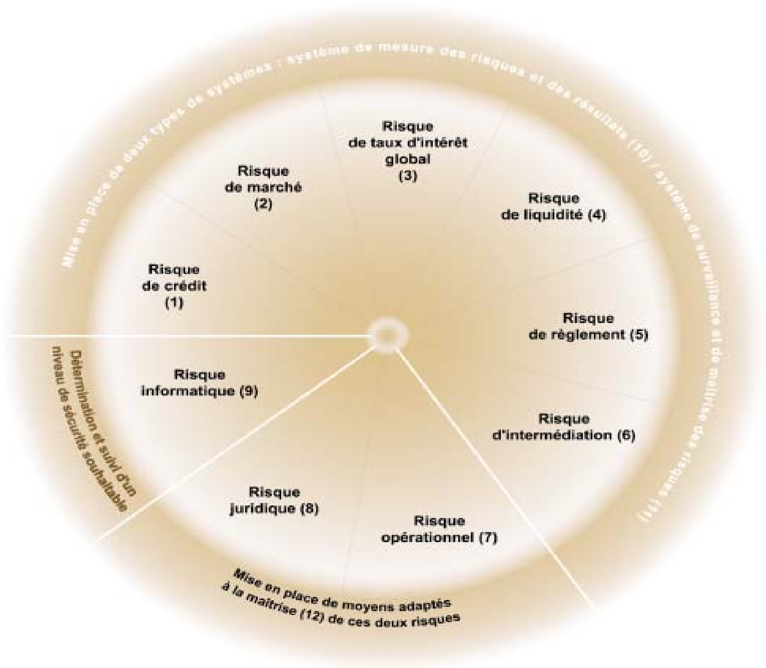
The above applies with the understanding that the supervisory body, regardless of its composition, is a collective body which represents all shareholders and which is obligated to take into account the interests of the company under all circumstances.

3.1.2. SPECIAL FEATURES OF COMPANIES IN REGULATED SECTORS

For a companies in regulated sectors, where risk management is the fundamental issue, such as the financial sector (banking, insurance), it is each company's responsibility to adapt its system of internal control to:

- The nature and volume of its activities
- Its size
- Its developments
- The various risks to which it is exposed, indicated in the figure below:

Figure 6: Internal control at credit institutions and investment enterprises



Source: PriceWaterhouseCoopers France, February 2002

For institutions supervised on a consolidated basis, the internal control system must also correspond to the organisation of the group and the nature of the controlled companies.

The company in question must monitor to ensure implementation of adequate means adapted to its activities, size and developments of the company, whether in terms of:

- Human resources (number and qualifications of persons participating in the functioning of the control system)
- Or technical resources (risk monitoring tools and analysis methods)

The numerous texts published in the Member States with recommendations drafted based on best practices taken from a certain number of French or foreign credit institutions, and the discussions held within international banking authorities, tend to demonstrate that risk monitoring and control should be based on:

- A system of general limits, set by the general management (the management) and, where applicable, by the board of directors (deliberative body) taking into account the amount of funds available to the institution, and

– Procedures to guarantee effective and continuous compliance with these same limits (for instance, creation of a risk committee, as recommended by Regulation CRBF 2001-01 on internal control of credit institutions and investment enterprises, amending Regulation 97-02).

The persons tasked with the supervisory power therefore play a major role, but, in these enterprises, all members have a role to play in the area of internal control.

Figure 7: Distribution of roles for internal control

* *Conseil d'Administration* (board of directors)

Source: PriceWaterhouseCoopers France, February 2002

3.1.3. CHOICE BETWEEN ONE-TIER AND TWO-TIER STRUCTURES

Between the one-tier and two-tier structures, there is no one method of organisation that is better than any other. In both cases, it is necessary regulate the executive power with a counter-power, the supervisory power.

The various forms of governance found within the Member States must not be altered by binding harmonisation provisions in the law. Thus, imposing either the one-tier or the two-tier system on joint stock companies at the European level, which is at the discretion of the company under the SE governance model, does not seem appropriate.

In countries which do not offer a choice between the two structures, recourse to the Statute of the European Company has been a response to their expectations.

Therefore, it does not appear to be necessary to legislate in this area.

3.1.4. PROMOTE A SIMPLIFIED PUBLIC LIMITED LIABILITY COMPANY?

The simplified forms of capital companies existing in certain countries, such as the *société par actions simplifiée* in France for instance (with simplified forms existing in Latvia, Lithuania and Estonia), by allowing implementation of a structure with a President (executive and supervisory power) and a shareholder and leaving a great deal of freedom to the statutes in the organisation of the powers and counter-powers, has enjoyed a certain degree of success among enterprises.

However, the interest in this simplified structure varies according to the size of the group and the scope of the company's activities, projects and markets.

This simplified form with a sole director and a sole partner is of some interest to 100 %-subsidiaries of a group or for an asset such as a property investment or an asset requiring ad-hoc financing, for instance.

However, where it exists, this simplified form must be treated with caution, as the editorial freedom in the statutes calls for increased oversight. For this purpose, companies set up ad-hoc bodies, for instance to provide minority shareholders with the right to information. Often, the director/shareholder creates a board of directors, which holds neither the executive nor supervisory powers, but which provides this person with a forum for reflection, discussion and consultation, thus promoting effective governance.

However, groups express a need for flexibility consisting in the option to take advantage of a simplified company in addition to the traditional joint stock company in order to accommodate the specific characteristics of their development.

3.1.5. RISK MEASUREMENT

In determining good governance practices, it is important to take into account the need for companies and their bodies to take measured risks.

Taking risks is effectively an essential condition for innovation and, ultimately, the company's development. Risk-taking of this kind is inherent to the spirit of enterprise and it should therefore be encouraged.

However, this risk-taking must also be restricted and controlled.

From this perspective, a supervisory body independent from the management must perform this duty of controlling the risks taken by the management body. These two bodies should answer to the meeting of shareholders for the proper performance of their duties.

Harmonious functioning of all of these bodies entail that they work in unison in order to ensure the company's long-term development and that they do not pursue any of their own interests that are distinct from the company objective.

From this perspective, good practices must lead to development of efficient systems to prevent or eliminate conflicts of interests.

These reflections lead to an examination of which regulatory framework for governance is best adapted to the specific features of companies (number of shareholders, listed or not, sector of activity).

3.2. RECOMMENDATIONS

As stated above, it seems inappropriate to propose a development that would go in the direction of standardisation or even harmonisation of company law applicable in the Member States. On the other hand, the Study shows that, in certain areas, lines for improvement can be identified.

In particular, these lines for improvement are as follows:

- Performance of governance bodies
- Gender balance
- Employee representation

Thus, the recommendations have been arranged according to these topics and the degree to which the recommendation is compulsory.

Aside from their diversity, the recommendations from this Study share a common goal: the company's long-term performance and continuity. It is also necessary to take into account the imperatives with which companies are confronted over the short term and their need for flexibility in the law with regard to their specific features, those of the group to which they belong and those of the activities they conduct.

3.2.1. FIRST LINE FOR IMPROVEMENT: PERFORMANCE OF GOVERNANCE BODIES

The corporate governance codes dedicate a large number of recommendations to the composition of the supervisory body, the creation and composition of committees, the presence of independent directors in the committees and to the obligations of the members of the board.

The recommendations proposed to improve performance of supervisory bodies therefore mainly fall under the category of soft laws. From our point of view, they should only apply, at least initially, to listed companies.

3.2.1.1. Recommendations on members of the supervisory body

Recommendations for the members fall into four categories:

- The individual right to information
- Liability insurance
- Training
- Communication between members of the board

R1. Affirm the existence of an individual right to information for the members of the supervisory body

The study of legislations applicable in EU countries has revealed that an individual right to information is not always recognised.

And yet, this kind of right to information would lead members benefiting from it to exhibit greater diligence and vigilance in the performance of their duties, given that individual liability would be the natural corollary of this right. This means that recognition of an individual right to information would result in enhanced performance of the supervisory body.

However, increased liability should not pose an obstacle to risk-taking, which is the essence of enterprise.

This prompts us to propose, as is the practice in some Member States, such as Romania, that the company take out an insurance policy on behalf of the members of its supervisory body.

R2. Generalise implementation of civil liability insurance to cover the various board members at a franchise

This insurance will ensure a certain degree of protection for members of the board. Nevertheless, it is important to monitor to ensure that this does not remove responsibility. Therefore, the franchise should remain this person’s responsibility in cases of misconduct in the performance of this person’s duties. This person’s criminal liability, on the other hand, would not be covered (insurers generally refuse to do so at any rate, even where it is permitted by law, which is not everywhere).

R3. Ensure training of the supervisory body members and coverage of costs by the enterprise

Proper assurance should be in place for training of members of the supervisory body. This should address the job profiles in the company and their specific requirements. This also entails onsite visits and meetings with technical directors and employees.

This concern has already been expressed by the European Parliament in its Resolution of 29 March 2012 on a corporate governance framework for European companies (SEs), which recommends providing companies with a flexible tool for ongoing training of members of its bodies and committees to support development of the company’s policy.

In order to incentivise the company to implement this training programme, it should be required to declare whether or not it offers training options to its board members. If so, then it should cover the costs of such. This obligation to issue a declaration must be adequately incentivised.

The company should also provide procedures for monitoring the training its board members receive.

R4. Reinforce the dialogue between the board members and the members of the supervisory body

Even if the functions of the supervisory body and the management are separated, it is beyond question that performance requires communication between the members of the supervisory body and the management. From this perspective, informal meetings should be held regularly, as is already recommended and practised at a certain number of large companies. These informal meetings would serve as occasions for communication between the members of the board and members of the supervisory body, but also among the members of the supervisory body themselves.

3.2.1.2. Recommendations on the functioning of the supervisory body

R5. Generalise the committees, particularly the remuneration committees in listed companies

Following the example of the audit committees, whose formation in listed companies is stipulated in Directive 2006/43/EC, it seems appropriate to generalise the practice of committees.

Formation of committees allows the supervisory body to work more efficiently because it provides for a certain degree of specialisation among its members. At the end of the day, it is the company itself that will benefit from this boost in efficiency in the supervisory body. Naturally, the committees must be made up of members competent in the committee's area of activity (audit, strategy, appointments, remunerations, ethics, etc.). Independence of their members with respect to the company and the management provides assurance of impartiality of the decisions which will be proposed to the supervisory body. On the other hand, it is vital to ensure that the number, nature and composition of the committees is adapted to the characteristics of the specific company (dispersed or concentrated capital, large enterprise or SME, etc.).

The competence combined with the independence (it is critical to stress that one will not work without the other) of committee members promotes the pursuit of the corporate benefit by the supervisory body.

This recommendation applies first and foremost to the remuneration committee.

A proper system of remuneration for members of the board is a key element in the company's cohesion and long-term performance. Without even delving into the issues of equality and ethics, it has been found that remuneration beyond a certain level creates a disconnect with reality, and thus also a potential degree irrationality in decision-making. Therefore, remuneration of members of the board must be justified. This means that it should be neither excessive nor inadequate, because this would result in the board member's involvement in the company being out of step with their duties and responsibilities. As it happens, remuneration committees have been found to have a moderating effect on the growth of these remunerations.

Finally, we may add that these remunerations should be published, as stipulated in Directive 78/660/EC revised.

Knowledge of the sum, the components and the development of the remuneration is an essential element of the information to be provided to shareholders and the market. Additionally, as suggested in the MiddleNext reference framework, the development of the ratio between the growth in remuneration for members of the board and other stakeholders should be provided.

On the other hand, in our view, there is no need to alter the remuneration-related authorisations reserved for the corporate bodies by the national laws, and thus to extend the 'say on pay' rule to systems which do not feature it by giving remuneration-related decision-making authority to the general meeting of shareholders. The expansion of a system of this kind would basically call the authority of the supervisory body into question with regard to remuneration even though this body guarantees the corporate benefit.

R6. Monitor to ensure that the audit committee is composed of members qualified to evaluate the company's strategic risks independently

It is absolutely vital for companies to measure, control and prevent strategic risk. Directive 2006/43/EC reserves this risk supervision requirement for the audit committee. Therefore, it is important for the members of this committee to be able to evaluate strategic risks and perform their duties in a completely independent manner with regard to the management while bearing the related responsibility.

R7. Set up a European Corporate Governance Watchdog

In order to keep track of the good practices recommended by the corporate governance codes in the EU and progressively define the contents of reasonable governance, adapted to the specific features of the enterprises as discussed under 0 above, it is recommended to set up a European Corporate Governance Watchdog.

3.2.2. SECOND LINE FOR IMPROVEMENT: PROMOTE GENDER BALANCE IN GOVERNANCE BODIES

Gender balance in supervisory bodies is one of the components of gender equality, which is a fundamental principle set out in the Treaties[194].

In March 2011, the European Council adopted the European Pact for Gender Equality.

On 13 March 2012, the European Parliament adopted a resolution on gender equality in the European Union, which states the following in Subsections 28 and 29:

'28. Calls on the Commission to present, as soon as possible, comprehensive current data on female representation within all types of companies in the EU and on the compulsory and non-compulsory measures taken by the business sector as well as those recently adopted by the Member States with a view to increasing such representation; notes that, according to the Commission's report on women in economic decision-making, steps taken by companies and the Member States are found to be inadequate; welcomes the announced consultation on measures to enhance gender balance in economic decision making; is disappointed, however, that the Commission is refraining from taking immediate legislative measures, as it had committed to do should the targets not be met; believes the meagre progress made in 2011 merits more concrete measures than a mere consultation; reiterates, therefore, its call from 2011 for legislation, including quotas, to be proposed by 2012 to increase female representation in corporate management bodies to 30 % by 2015 and to 40 % by 2020, while taking account of the Member States' responsibilities and of their economic, structural (i.e. company-size related), legal and regional specificities;'

'29. stresses the need for Member States to adopt measures, in particular through legislative means, to set binding targets to ensure the balanced presence of women and men in positions of responsibility in business, public administration and political bodies; refers to the successful examples of Norway, Spain, Germany, Italy and France;'

It is indicated that the Commission has organised a public dialogue on the appropriateness of imposing quotas. It runs from 5 March to 28 May 2012 and the results should be known

[194] Articles 2 and 3 of the TEU and Article 8 of the TFEU.

by the summer of 2012[195].

Here, support for a strong initiative to promote equality will be in place in the logic of the corporate structure. Essentially, our Study has demonstrated that only four countries have passed a compulsory law, generally applicable to listed companies only: **Austria**, **Belgium**, **Spain** and **France**[196].

Six countries have supplemented their governance codes with provisions to establish a gender balance in the membership of authorities exercising the supervisory power: **Germany**, **Denmark**, **Finland**, **Ireland**, **Italy** and **Poland**. Only one of these six countries has reported achieving its target (25 % in **Ireland**, with no indication of the date).

The other countries have not adopted any provisions, although discussions are underway in some. Therefore, it is important for the EU to play the role of catalyst to overcome the persistent resistance on this sensitive issue.

R8. Adopt a directive to introduce gender quotas in the supervisory and management bodies of 30 % by 2015 and 40 % by 2020, in accordance with the resolution adopted by the Parliament on 13 March 2012.

R9. Provide suitable sanctions, and above all incentives, following the example of Spain, which has decreed that public institutions may give preference to certain companies which adhere to the indicated quotas.

3.2.3. THIRD LINE FOR IMPROVEMENT: IMPROVE EMPLOYEE INVOLVEMENT

The concept of the enterprise, in European law, manifests both meanings of the word 'community': the concept of being shared in common by the community of EU Member States and the concept of the enterprise as a community of actors and 'stakeholders'.

In EU law, employees are basically considered to be 'stakeholders' in the company. The real value of the company cannot be reduced merely to its market value, but rather also includes a social dimension. The enterprise is an institution, a vector both for the creation of wealth and for social progress. Thus, from the perspective of a 'community', the corporate dimension cannot be separated from the social one.

In light of the increasing degree of internationalisation of businesses, the European legislature must work to guarantee respect for this fragile balance. In this regard, it must adopt the provisions necessary to promote and protect a fundamental right: the right of employee involvement in the enterprise.

R10. Adopt a Framework Directive on 'the right of employee involvement'

- A Directive that officially makes the right of employee involvement — as defined in Directive 2001/86/EC of 8 October 2001 — a general principle of European Union law.

[195] Consultation on Gender imbalance in corporate boards in the EU, http://ec.europa.eu/justice/newsroom/gender-equality/opinion/120528_en.htm.
[196] Please note that prior to the law, the AFEP-MEDEF code had given a recommendation which has since basically been incorporated into the law.

  - A right to involvement in its three essential and indivisible dimensions: information, consultation and participation
  - A general principle of EU law endowed with horizontal direct effect
  - A general principle of EU law applicable to all companies located in the EU, regardless of whether they are transnational

- A directive to affirm the minimum provisions for the right to information and consultation

The framework directive on the right to involvement must refer to the revamped 2002 Framework Directive on information and consultation (see below) and direct the information and consultation towards a real 'right of co-determination' (between consultation and approval).

- A directive adopting a flexible approach for the right of participation

An approach based on two principles:

  - Primacy of negotiation: introduce an obligation to negotiate the details of the right to participation with a special negotiation group representing the employees of the companies or institutions in question (SNG) in enterprises of a certain size (defined by the Member State) with transnational activities
  - Subsidiary application of standard rules: provide standard rules to apply in the absence of an agreement, leaving the Member States the option to determine the adapted details of participation

And including minimum rules to ensure:

  - Protection of rights in terms of participation resulting from national law ('before/after principle' in accordance with the model from the 'SE' Directive)
  - Balanced and non-discriminatory representation of employees for the entire company group (including foreign subsidiaries) in the supervisory and administrative bodies of the parent company
  - Effectiveness of national participation systems
  - Empowerment of employees who are members of the supervisory body (confidentiality obligation, training, etc.)

R11. Amend the Directive for general informing/consulting (Directive 2002/14 of 11 March 2002)

This Directive provides for consultation of employees 'on the situation, structure and likely development of the job as well as any anticipatory measures, particularly in the case of threats to the job'. This consultation must also include 'decisions which may result in major changes in the organisation of the work or in labour agreements': Expand the consultation obligation to 'any major decision related to the company's functioning, organisation, general progress' including those without a direct or immediate impact on the work or the job.

The information/consultation obligation applies in companies exceeding a threshold defined by the Member State: apply it to the groups as well.

The Directive has adopted a minimalist conception of the useful impact of consultation by requiring it to be prior to the transaction: stipulate that it must be prior to the decision.

The obligation to cooperate is a vague notion, without any predefined implication: redefine it based on community case law, but without requiring conclusion of an agreement.

R12. Improve directives on European structures (SE – SCE)

- This improvement of directives may address the following points:
    - Obligation to form an SNG when a 'dormant' SE becomes active when an SE reaches a minimum number of employees.
    - Reduce the negotiation timeframe.
    - In the standard rules, provide for the principle of a threshold for number of employees which makes it obligatory to set up an SE works council (below the threshold, set up an obligatory information/consultation procedure without a representative structure).
    - If a European Works Council, in the sense of Directive 94/45/EC of 22 September 1994, revised by Directive 2009/38 of 6 March 2009 — already exists within the same scope, stipulate that the provisions on the European Works Council do not apply.
    - In a group made up of multiple SEs, provide the option to set up an SNG and a Joint Committee.

CONCLUSIONS

Under the influence of initiatives already taken by European Institutions, the national company laws have undergone profound development. Today, the harmonised framework resulting from EU law appears to be generally satisfactory and provides operators with a diverse and effective toolkit, in a context of increasing international competition. The examination of the supervisory body and its interaction with the management confirms this favourable assessment.

The result of this is that, for most of these, the planned progress intended to improve the functioning of the supervisory body, to better guarantee corporate benefit, does not fall under enactment of compulsory standards (regulations, directives).

On the other hand, the soft law instruments have demonstrated their effectiveness in improving the conduct of members of the board while creating a framework for convergence meeting the objective of European construction. We propose recourse to this type of instruments to improve the efficiency of the supervisory body.

However, in some situations (gender balance within the supervisory body, employee involvement), self-regulation will not provide significant advances. For this reason, the progress sought would require implementation of harmonisation instruments.

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- **Businesses interviewed**[197]
  - AS Tallinna Vesi
  - Eesti Pank
  - L'Oréal
  - Scor SE
  - Société Générale

- **Bodies consulted**
  - ANSA
  - APIA
  - IFA
  - Middlenext

[197] Only companies who agreed to disclose their names are included in this list. The interviews covered a wide range of companies (listed companies, non-listed companies, companies whose activities are regulated (banking, insurance), etc.)

ANNEXES

Annex 1: Glossary for the term 'joint stock company': Annex I of Regulation (EC) 2157/2001 of 8 October 2001[198]

BELGIUM:
la société anonyme/de naamloze vennootschap
BULGARIA:
акционерно дружество
CZECH REPUBLIC:
akciová společnost
DENMARK:
aktieselskaber
GERMANY:
die Aktiengesellschaft
Estonia:
aktsiaselts
Greece:
ανώνυμη εταιρία
SPAIN:
la sociedad anónima
FRANCE
la société anonyme
IRELAND:
public companies limited by shares
public companies limited by guarantee having a share capital
ITALY:
società per azioni
CYPRUS:
Δημόσια Εταιρεία περιορισμένης ευθύνης με μετοχές, Δημόσια Εταιρεία περιορισμένης ευθύνης με εγγύηση
LATVIA:
akciju sabiedrība
LITHUANIA:
akcinės bendrovės
LUXEMBOURG:
la société anonyme
HUNGARY:
részvénytársaság
MALTA:
kumpaniji pubbliċi / public limited liability companies
THE NETHERLANDS:
de naamloze vennootschap
AUSTRIA:
die Aktiengesellschaft
POLAND:
spółka akcyjna

[198] Annex I of Regulation (EC) No 2157/2001 of 8 October 2001, pp. 27–28.

PORTUGAL
a sociedade anonima de responsabilidade limitada
ROMANIA:
sociÉtate pe acţiuni
SLOVENIA:
delniška družba
SLOVAKIA:
akciová spoločnosť
FINLAND:
julkinen osakeyhtiö/publikt aktiebolag
SWEDEN:
publikt aktiebolag
THE UNITED KINGDOM:
public companies limited by shares
public companies limited by guarantee having a share capital

Annex 2: Status of transposition of European Directives on company law as of 18 January 2012

Transposition of Company Law and Anti-Money Laundering Directives - State of play as at 18/01/2012

CP = partially notified to the Commission; NC = no notification received by the Commission; EX = notification received and under examination by the Commission; OK = notification received and checked by the Commission or no notification required = ok*

NA = not applicable = ok; D = derogation = ok

			Austria	Belgium	Bulgaria	Cyprus	Czech Republic	Germany	Denmark	Estonia	Greece	Spain	Finland	France	Hungary	Ireland	Italy	Lithuania	Luxemburg	Latvia	Malta	Netherlands	Poland	Portugal	Romania	Sweden	Slovenia	Slovakia	United Kingdom
Action	**Measure taken**	**Transposition deadline**	**AT**	**BE**	**BG**	**CY**	**CZ**	**DE**	**DK**	**EE**	**EL**	**ES**	**FI**	**FR**	**HU**	**IE**	**IT**	**LT**	**LU**	**LV**	**MT**	**NL**	**PL**	**PT**	**RO**	**SE**	**SI**	**SK**	**UK**
First Council Directive	Directive 68/151/EEC	11/09/1969	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK
Second Council Directive on the formation of public limited liability companies and the maintenance and alteration of their capital	Directive 77/91/EEC	17/12/78	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK
Third Council Directive on mergers of public limited liability companies	Directive 78/855/EEC	13/10/81	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK
Sixth Council Directive on division of public limited liability companies	Directive 82/891/EEC	1/01/86	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK
Eleventh Council Directive on disclosure requirements in respect of	Directive 89/666/EEC	1/01/92	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK
Twelfth Council Law Directive on single-member private limited-liability companies	Directive 89/667/EEC	1/01/92	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK
1st Council Directive amending 2nd Company Law Directive	Directive 92/101/EEC	1/01/94	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK
Directive amending 1st Company Law Directive, as regards disclosure requirements in respect of certain types of companies	Directive 2003/58/EC	30/12/06	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK
Directive on Take Over Bids	Directive 2004/25/EC	20/05/06	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK
Transparency directive	Directive 2004/109/EC	20/01/07	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK
Directive on cross-border mergers of limited liability companies	Directive 2005/56/EC	15/12/07	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK
Directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing	Directive 2005/60/EC	15/12/07	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK
Commission Directive implementing Anti-money laundering Directive	Directive 2006/70/EC	15/12/07	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK
Council Directive adapting certain Directives by reason of the accession of BG and RO	Directive 2006/99/EC	1/01/07	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK
Commission Directive implementing Transparency Directive	Directive 2007/14/EC	8/03/08	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK
2nd Directive amending 2nd Company Law	Directive 2006/68/EC	15/04/08	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK
Directive amending 3rd and 6th Company Law Directives	Directive 2007/63/EC	31/12/08	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK
Directive on the exercise of certain rights of shareholders in listed companies	Directive 2007/36/EC	3/08/09	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK	OK
Directive on, among others, the supervisory review of remuneration policies in financial institutions	Directive 2010/76/EU	1/01/11	OK	CP	OK	OK	OK	OK	OK	OK	CP	OK	OK	OK	OK	OK	CP	OK	OK	OK	OK	OK	OK	CP	OK	OK	OK	OK	OK
Directive amending 2nd, 3rd, 6th, 10th Company Law Directives	Directive 2009/109/EC	30/06/11	EX	NC	EX	NC	EX	EX	EX	OK	EX	NC	OK	OK	EX	EX	NC	EX	OK	EX	EX	EX	EX	EX	NC	OK	NC	OK	CP
Directive on, among others, the supervisory review of remuneration policies in financial institutions (2nd deadline)	Directive 2010/76/EU	31/12/11	EX	NC	CP	NC	NC	EX	NC	EX	CP	EX	NC	EX	NC	EX	EX	EX	EX	EX	NC	EX	CP	NC	EX	EX	EX	NC	NC
Directive on the exercise of certain rights of shareholders in listed companies (2nd deadline)	Directive 2007/36/EC	3/06/12	EX	NC	EX	NC	NC	NC	NC	EX	NC	EX	NC	NC	NC	EX	NC	NC	NC	EX	EX	NC	NC	EX	NC	NC	NC	EX	NC

*) The Commission can always initiate infringement proceedings under Article 258 of the Treaty on the basis of non-compliance of national implementing measures or incorrect application of Directives

Source: European Commission (http://ec.europa.eu/internal_market/company/official/index_en.htm)

Annex 3: Responses to the questionnaire sent to Member States[199]

[199] This annex, which contains answers to the questionnaire sent to Member States, can be obtained upon request from the Department C: Citizens Rights and Constitutional Affairs of the European Parliament (poldep-citizens@europarl.europa.eu)

EUROPEAN PARLIAMENT

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

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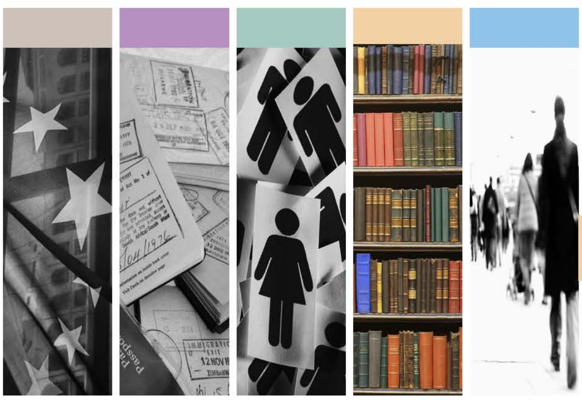

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