

Comparative Study Of Corporate Governance Codes Relevant to the European Union And Its Member States

On behalf of the EUROPEAN COMMISSION,
Internal Market Directorate General

FINAL REPORT & ANNEXES I-III



In consultation with

EASD - EUROPEAN ASSOCIATION OF SECURITIES DEALERS &
ECGN - EUROPEAN CORPORATE GOVERNANCE NETWORK

January 2002

COMPARATIVE STUDY OF CORPORATE GOVERNANCE CODES RELEVANT TO THE EUROPEAN UNION AND ITS MEMBER STATES

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CAVEATS & ACKNOWLEDGEMENTS

This Comparative Study was undertaken by Weil, Gotshal & Manges LLP, in consultation with the EASD and ECGN. Although a number of people contributed to the Study, Holly J. Gregory and Robert T. Simmelkjaer, II of Weil, Gotshal & Manges LLP authored this Study, and they bear sole responsibility for inaccuracies in its content.

The information and views expressed in this Study do not constitute a legal opinion, and should not be relied upon without independent verification and professional advice. Caution in relying on the information contained herein is especially called for given the rapid changes that are taking place in relevant laws and governance codes.

This Study does not necessarily reflect the views of the Commission, nor should the Commission accept any responsibility for the accuracy or completeness of the information contained herein.

* * *

This Comparative Study reflects a considerable team effort involving persons from every EU Member State and regular consultation with representatives of the European Association of Securities Dealers (“EASD”) and the European Corporate Governance Network (“ECGN”). Members of the Federation of European Stock Exchanges (“FESE”) and the Forum of European Securities Commissions (“FESCO”) were also consulted.

The authors wish to recognise the many significant contributions reflected in this effort. We would like to thank especially the persons who served as country correspondents, contributing their time, effort and expertise to our understanding of the legal framework and corporate governance environment in each EU Member State: Johan Aalto, Gonçalo Castilho dos Santos and Maria da Cruz, Gerard Cranley, Stanislas De Peuter, Alexander Engelhardt, Stephan Follender-Grossfeld, Anthony Gardner, Peter Haisler, George Metaxas-Maranghidis, Francisco Prol, Ari-Pekka Saanio, Rolf Skog, and Esfandiar Vahida. We also extend our gratitude to a number of corporate governance experts who kindly reviewed and commented on various portions of the Final Report, including Peter Clapman, Stephen Davis, Guido Ferrarini, Guy Harles, Laurence Hazell, Sophie L’Helias, Mats Isaksson, Mike Lubrano, Ulla Reinius, Anne Simpson, Richard Smerdon and Paul Storm.

A very special thank you is owed to Leo Goldschmidt of the EASD and Marco Becht of the ECGN. Leo and Marco provided invaluable counsel throughout the year-long project, in addition to advice on various aspects of the research methodology, assistance in obtaining codes and identifying country correspondents and insightful comments on the various drafts.

We also wish to acknowledge the considerable efforts of the other members of our Weil, Gotshal team: George Metaxas-Mananghidis, who led the Brussels team and coordinated communications with the European Commission, and William M. Reichert, who served as liaison to the FESE and FESCO representatives and was instrumental in compiling and editing this Report. Valuable assistance was also provided by our team of paralegals and secretaries; in particular, Frederick W. Philippi, who tracked down copies of a great many of the codes referenced in this Report, proofread multiple drafts and compared code provisions for the matrix attached as Annex V; Sally Lehner, who assisted Mr. Philippi in these tasks; and Florence A. Greenstein, who tirelessly typed and re-typed the entire document and created the tables and appendices for this Report.

Last, but certainly not least, the authors of this Study benefited greatly from the intellectual leadership provided in the field of corporate governance by Ira M. Millstein, as well as the wise guidance on this project provided by Michael S. Francies (WG&M, London), George Metaxas-Maranghidis (WG&M, Brussels) and R. Josef Tobien (WG&M, Frankfurt).

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COMPARATIVE STUDY OF CORPORATE GOVERNANCE CODES RELEVANT TO THE EUROPEAN UNION AND ITS MEMBER STATES

STUDY CONTRACT ETD/2000/B5-3001/F/53

This Comparative Study of corporate governance codes and practices in the European Union was undertaken by Weil, Gotshal & Manges LLP (“WG&M”), in consultation with the European Association of Securities Dealers (“EASD”) and the European Corporate Governance Network (“ECGN”). It is submitted within the framework of the European Commission’s Open Invitation to Tender n°MARKT/2000/04/F.

EXECUTIVE SUMMARY

Rules and norms of corporate governance are important components of the framework for successful market economies. Although corporate governance can be defined in a variety of ways, generally it involves the mechanisms by which a business enterprise, organised in a limited liability corporate form, is directed and controlled. It usually concerns mechanisms by which corporate managers are held accountable for corporate conduct and performance. Corporate governance is distinct from -- and should not be confused with -- the topics of business management and corporate responsibility, although they are related.

Over the past decade, interest in the role that corporate governance plays in economies, and particularly in capital markets, has increased in the European Union and its Member States. The adoption of a common European currency, the freer flow of capital, goods, services and people across EU borders, the competitive pressures of globalisation, the realisation of new technologies, privatisation of state-owned enterprises, the growth and diffusion of shareholding, and increased merger activity among large European corporations -- and among Europe’s largest stock exchanges -- all create tremendous interest on behalf of European issuers and investors, Member States and the European Commission in understanding the commonalities and differences between national corporate governance practices, and any related barriers to the development of a single EU capital market.

The purpose of this Comparative Study is to further the understanding of commonalities and differences in corporate governance practices among EU Member States through an analysis of corporate governance codes and -- to a limited extent -- relevant elements of the underlying legal framework.

This Study identifies and compares existing corporate governance codes in the fifteen EU Member States and other corporate governance codes that may affect the operation of companies within the European Union. As explained in greater detail below, for purposes of this Study, a “corporate governance code” is generally defined as a non-binding set of principles, standards or best practices, issued by a collective body, and relating to the internal governance of corporations.

A total of thirty-five codes meeting this Study's definition have been issued in EU Member States, with every Member State except Austria and Luxembourg having at least one code. The vast majority of these codes (25) were issued after 1997. The United Kingdom accounts for the largest number of codes identified in this Study (11) -- almost one-third of the total -- and also accounts for six of the ten pre-1998 codes identified. Two international and two pan-European codes meeting the Study's definition also have relevance to companies in EU Member States and are analysed herein.

The codes identified in this Study issue from a broad array of groups -- governmental or quasi-governmental entities; committees (or commissions) organised by governments or by stock exchanges; business, industry and academic associations; directors associations; and investor-related groups. As one might expect, therefore, compliance mechanisms and the "official" status of the codes vary widely.

Some codes advocate, or through linkage to stock exchange listing requirements mandate, disclosure by listed companies of the degree to which they comply with code recommendations, together with an explanation of any areas of non-compliance. (Throughout this Report, such disclosure against a code is referred to as disclosure on a "comply or explain" basis.) Even though in some instances disclosure against a code is mandated, *all* of the codes are voluntary inasmuch as the substantive code provisions need not be implemented. Nevertheless, comply or explain disclosure requirements do exert at least some coercive pressure: the tendency for some companies may be to "comply" rather than to explain. (This leads some commentators to express concerns that comply or explain disclosure requirements may lead to an overly mechanical and uniform approach to a company's decisions about ordering its corporate governance -- a mere "box-ticking" exercise.)

Note that even though the corporate governance codes put forward by members of the EU investment community are wholly voluntary in nature, given the investment community's significant economic power in competitive capital markets, and the power of investor voice and share voting, such codes can have significant influence on corporate governance practices.

Few of the codes expressly contemplate the formal review of the extent to which a code is followed. However, in some countries various entities have conducted surveys to track compliance on their own initiative.

DIVERGENCE & CONVERGENCE

In virtually every EU Member State, interest in articulating generally accepted principles and best practices of corporate governance is evident. One can infer from this broad interest that the quality of corporate governance is viewed as important to the national economies of Member States and to their domestic companies.

The growing interest in corporate governance codes among EU Member States may reflect an understanding that equity investors, whether foreign or domestic, are considering the quality of corporate governance along with financial performance and other factors when deciding whether to invest in a company. An oft-quoted McKinsey survey of investor perception indicates that investors report that they are willing to pay more for a company that is well-governed, all other things being equal. (McKinsey Investor Opinion Survey, June 2000)

The corporate governance codes analysed for this Study emanate from nations with diverse cultures, financing traditions, ownership structures and legal origins. Given their distinct origins, the codes are remarkable in their similarities, especially in terms of the attitudes they express about the key roles and responsibilities of the supervisory body and the recommendations they make concerning its composition and practices, as described in more detail below. It is important to note that *the codes tend to express notions of “best practice” - but translation of best practice ideals into actual practice may take time to achieve*. If the ideals expressed in codes reflect a dramatic difference from common practice, and the potential benefits of reform efforts are not well communicated and understood, codes may meet with resistance. Investor interest in the codes and investor support for the practices the codes recommend appear to wear away resistance over time.

The greatest distinctions in corporate governance practices among EU Member States appear to result from differences in law rather than from differences in recommendations that emanate from the types of codes analysed in this Study. A significant degree of company law standardisation has been achieved throughout the European Union in recent years. However, significant legal differences remain. Some commentators suggest that the remaining legal differences are the ones most deeply grounded in national attitudes, and hence, the most difficult to change. In contrast, the codes tend to express a relatively common view of what good governance is and how to achieve it. (Of course, the detailed recommendations of the codes differ to some extent as a function of distinct legal requirements.)

Notwithstanding legal differences among EU Member States, the trends toward convergence in corporate governance practices in EU Member States appear to be both more numerous and more powerful than any trends toward differentiation. In this regard, the codes -- together with market pressures -- appear to serve as a converging force, by focusing attention and discussion on governance issues, articulating best practice recommendations and encouraging companies to adopt them.

- **EMPLOYEE REPRESENTATION**

The greatest difference in corporate governance practice among EU Member States relates to the role of employees in corporate governance, a difference that is usually embedded in law. In Austria, Denmark, Germany, Luxembourg and Sweden, employees of companies of a certain size have the right to elect some members of the supervisory body. In Finland and France, company articles *may* provide employees with such a right. In addition, when employee shareholding reaches three percent (3%) in France, employees are given the right to nominate one or more directors, subject to certain exceptions. (Note that in some countries, including France and the Netherlands, employee representatives may have the right to attend board meetings, but not vote.) In all other EU Member States (with the exception of certain Netherlands companies with self-selecting boards), it is the shareholders alone who elect all the members of the supervisory body. This results in a fundamental difference among EU Member States in the strength of shareholder influence in the corporation.

Giving employees an advisory voice in certain issues is one means of engaging employees in governance issues without diluting shareholder influence. Encouraging employee stock ownership through employee pension funds and other employee stock ownership vehicles is another means of giving employees participatory rights in corporate governance, without diluting shareholder influence, and is favoured by some codes.

- **SOCIAL/STAKEHOLDER ISSUES**

Corporate governance is viewed increasingly as a means of ensuring that the exercise of economic power by the corporate sector is grounded in accountability. Different EU Member States tend to articulate the purpose of corporate governance in different ways; some emphasise broad stakeholder interests and others emphasise ownership rights of shareholders. Although the comparative corporate governance literature and popular discussion tend to emphasise “fundamental” differences between stakeholder and shareholder interests, the extent to which these interests are different can be debated. The majority of corporate governance codes expressly recognise that corporate success, shareholder profit, employee security and well being, and the interests of other stakeholders are intertwined and co-dependent. This co-dependency is emphasised even in codes issued by the investor community.

- **SHAREHOLDER RIGHTS & PARTICIPATION MECHANICS**

The laws and regulations relating to the equitable treatment of shareholders, including minority rights in take-overs, squeeze-outs and other transactions controlled by the company or the majority shareholders, vary significantly among EU Member States. Notice of and participation in shareholder general meetings, and procedures for proxy voting and shareholder resolutions also vary significantly among EU Member States. Such variations in laws and regulations, especially as relates to shareholder participation rights, likely pose barriers to cross-border investment, and may cause a not-insignificant impediment to a single unified capital market in the European Union.

To the extent that codes address these issues, they generally call for shareholders to be treated equitably; for disproportional voting rights to be avoided or at least fully disclosed to all shareholders; and for removal of barriers to shareholder participation in general meetings, whether in person or by proxy.

- **BOARD STRUCTURE, ROLES & RESPONSIBILITIES**

Another major corporate governance difference embedded in law relates to board structure -- the use of a unitary versus a two-tier board. However, notwithstanding structural differences between two-tier and unitary board systems, the similarities in actual board practices are significant. Both types of systems recognise a supervisory function and a managerial function, although the distinctions between the two functions tend to be more formalised in the two-tier structure. Generally, both the unitary board of directors and the supervisory board (in the two-tier structure) are elected by shareholders although, as explained above, in some countries employees may elect some supervisory body members as well. Typically, both the unitary board and the supervisory board appoint the members of the managerial body -- either the management board in the two-tier system, or a group of managers to whom the unitary board delegates authority in the unitary system. In addition, both the unitary board and the supervisory board usually have responsibility for ensuring that financial reporting and control systems are functioning appropriately and for ensuring that the corporation is in compliance with law.

Each board system has been perceived to offer unique benefits. The one-tier system may result in a closer relation and better information flow between the supervisory and managerial bodies; however, the two-tier system encompasses a clearer, formal separation between the supervisory body and those being “supervised.” With the influence of the corporate

governance best practice movement, the distinct perceived benefits traditionally attributed to each system appear to be lessening as practices converge.

As described below, the codes express remarkable consensus on issues relating to board structure, roles and responsibilities; many suggest practices designed to enhance the distinction between the roles of the supervisory and managerial bodies, including supervisory body independence, separation of the chairman and CEO roles, and reliance on board committees.

- **SUPERVISORY BODY INDEPENDENCE & LEADERSHIP**

Most -- if not all -- of the codes place significant emphasis on the need for a supervisory body that is distinct from management in its decisional capacity for objectivity to ensure accountability and provide strategic guidance. Codes that relate to unitary boards emphasise the need for some compositional distinction between the unitary board and members of the senior management team. These codes invariably urge companies to appoint outside (or non-executive) directors -- and some truly “independent” directors -- to the supervisory body. “Independence” generally involves an absence of close family ties or business relationships with company management and the controlling shareholder(s). Codes that relate to unitary boards also frequently call for the positions of the chairman of the board and the CEO (or managing director) to be held by different individuals. (This is already usually the case in two-tier board systems.) Codes that relate to two-tier boards also emphasise the need for independence between the supervisory and managerial bodies. For example, like the unitary board codes, they tend to warn against the practice of naming (more than one or two) retired managers to the supervisory board, because it may undermine supervisory board independence.

- **BOARD COMMITTEES**

It is fairly well accepted in law that many supervisory body functions may be delegated, at least to some degree, to board committees. The codes reflect a trend toward reliance on board committees to help organise the work of the supervisory body, particularly in areas where the interests of management and the interests of the company may come into conflict, such as in areas of audit, remuneration and nomination. While recommendations concerning composition of these committees may vary, the codes generally recognise that non-executive and, in particular, independent directors have a special role to play on these committees.

- **DISCLOSURE**

Disclosure requirements continue to differ among EU Member States, and the variation in information available to investors likely poses some impediment to a single European equity market. However, across the EU Member States, the amount of disclosure about corporate governance practices is increasing and there is a converging trend regarding the type of information disclosed. In part, this is due to efforts to promote better regulation of securities markets and broad use of International Accounting Standards. Consolidation and co-ordination among listing bodies may encourage further convergence. The code movement has also played a role in heightening awareness about the importance of disclosure to shareholders. There appears to be a developing “hardening of norms” concerning disclosure of individual executive and director remuneration across the EU Member States, following the U.K. example. Moreover, there is a growing interest in both mandatory and voluntary social issue reporting.

Undoubtedly, the codes have served as a converging force. Through comply or explain mandates, several codes require companies to disclose considerably more information about their corporate governance structures and practices than in the past. As to wholly voluntary disclosure, the codes tend to favour greater transparency on all aspects of corporate governance and, in particular, executive and director compensation and director independence. They also encourage greater transparency as to share ownership and, in many instances, issues of broader social concern.

SUMMARY CONCLUSIONS

The most important differences in corporate governance practices among companies incorporated in Member States result from differences in company law and securities regulation rather than differences in code recommendations. For the most part, the code recommendations are remarkable in their similarity and serve as a converging force.

Neither the minor differences expressed in corporate governance codes nor the number of potentially “competing” codes appear to pose impediments to an integrated European equity market. Code variation does not appear to be perceived by private sector participants to raise barriers to company efforts to attract investment capital. Most European companies apparently continue to consider their domestic capital market as their primary source for equity capital. Corporate decisions regarding which capital markets to access appear to be influenced primarily by liquidity and company law considerations, more than by the existence of corporate governance codes. Codes are flexible and non-binding: Even when a “comply or explain” disclosure mandate exists, a company is generally free to choose *not* to follow the code’s prescriptions, so long as it discloses and explains such non-compliance.

By and large, codes are supplemental to company law. Companies may choose from among the codes that emanate from the EU Member State of incorporation. Alternatively, so long as there is no inconsistency with the company law in the State of incorporation, companies are free to seek guidance from codes from any jurisdiction.

The code movement is a positive development, both for companies and for investors, given its emphasis on disclosure, improved board practices, and shareholder protection. Codes have proven beneficial in a number of ways:

- Codes stimulate discussion of corporate governance issues;
- Codes encourage companies to adopt widely-accepted governance standards;
- Codes help explain both governance-related legal requirements and common corporate governance practices to investors;
- Codes can be used to benchmark supervisory and management bodies; and
- Codes may help prepare the ground for changes in securities regulation and company law, where such changes are deemed necessary.

To reiterate, there is little indication that code variation poses an impediment to the formation of a single European equity market. Moreover, the various codes emanating from the Member States appear to support a convergence of governance practices. This, taken together with the need for corporations to retain a degree of flexibility in governance so as to be able to continuously adjust to changing circumstances, lead us to conclude that the European Commission need not expend energy on the development of a code applicable to companies in the European Union. Ideas about best practice as reflected in the codes should

be allowed to develop over time by the business and investment communities, under the influence of market forces.

A voluntary European Union-wide code could conceivably result in some benefits along the lines discussed above. However, efforts to achieve broad agreement among Member States on detailed best practices that fit well with varying legal frameworks is more likely to express a negotiated “lowest common denominator” of “acceptable” practice rather than true “best” practice. Alternatively, an agreed European Union code might focus on basic principles of good governance. However, the OECD Principles of Corporate Governance (which issued in 1999 after considerable consultation with, and participation from, Member States) already set forth a coherent, thoughtful and agreed set of basic corporate governance principles.

A more valuable area for the European Commission to focus its efforts on is the reduction of legal and regulatory barriers to shareholder engagement in cross-border voting (“participation barriers”) as well as the reduction of barriers to shareholders’ (and potential investors’) ability to evaluate the governance of corporations (“information barriers”). These are areas that the European Commission has already included within the mandate of the Winters High Level Group of Company Law Experts, for study and recommendation.

I. INTRODUCTION

Rules and norms of corporate governance are important components of the framework for successful market economies. Although corporate governance can be defined in a variety of ways, generally it involves the mechanisms by which a business enterprise, organised in a limited liability corporate form, is directed and controlled. It usually concerns mechanisms by which corporate managers are held accountable for corporate conduct and performance. Corporate governance is distinct from -- and should not be confused with -- the topics of business management and corporate responsibility, although they are related.

Modern interest in corporate governance improvement and the development of corporate governance codes in EU Member States dates to the early 1990's and, in particular, a series of financial scandals and related failures of listed companies in the United Kingdom. In 1992, the Cadbury Report was issued in an attempt to address what were perceived as underlying problems in the corporate performance and financial reporting of leading companies, the lack of effective board oversight that contributed to those problems, and pressure for change from institutional investors.

European interest in corporate governance improvement -- and associated company law reform -- and in the development of codes has grown throughout the past decade, gaining considerable momentum in the late 1990's. This interest has paralleled heightened competition brought about by enhanced communication and transportation technologies, and the reduction of regulatory barriers in the European Union and internationally. It has also paralleled growth in the importance of equity markets and a trend toward broader-based shareholding in many EU Member States. Increasing interest in corporate governance improvement and attempts to articulate generally accepted norms and best practices is the result of numerous factors. Chief among them is the recognition that a firm's ability to attract investment capital, which is now internationally mobile, is related to the quality of its corporate governance.

From 1991 through 1997, ten codes -- as defined for purposes of this Study -- were issued in EU Member States. Just over half (six) of these codes were issued in the United Kingdom. In 1998, however, interest in code development exploded across the European Union, with seven codes issued in that year alone. Another seven codes were issued in 1999, and six were issued in 2000. Five more codes (one still in draft form) were issued in 2001.

It is unlikely coincidental that code activity in Europe accelerated after the issuance -- during the height of the Asian economic downturn of 1997-98 -- of an influential report by the OECD Business Sector Advisory Group on Corporate Governance entitled "Corporate Governance: Improving Competitiveness and Access to Capital in Global Markets" ("the Millstein Report"), and the related issuance of the OECD Principles of Corporate Governance in 1999. The flight of capital from Asia, Russia and certain South American nations brought attention to the link between investor confidence and the basic corporate governance principles of transparency, accountability, responsibility and fair treatment of shareholders highlighted in the Millstein Report and expanded on by the OECD Principles.

Both the Millstein Report and the OECD Principles, along with many of the codes issued in or relevant to EU Member States, acknowledge that there is no single agreed system of "good" governance. They tend to recognise that each country has its own corporate culture, national personality and priorities. As stated in Italy's Preda Report: "Corporate governance, in the sense of a set of rules according to which firms are managed and controlled, is the

result of norms, traditions and patterns of behaviour developed by each economic and legal system and is certainly not based on a single model that can be exported and imitated everywhere.” (Report § 2) Likewise, each company has its own history, culture, goals and business cycle maturity: “[D]etermining the ‘best practice’ is not always unequivocal, because making the choice depends on company-specific factors.” (Finland Ministry of Trade & Industry Guidelines, § 1) Therefore, codes tend to recognise that many factors need to be considered in crafting the optimal governance structure and practices for any country or any company. However, the influence of international capital markets is leading to some convergence of governance practices as expressed in the codes.

A. SCOPE OF STUDY & STRUCTURE OF REPORT

The purpose of this Comparative Study is to further the understanding of commonalities and differences in corporate governance practices among EU Member States through an analysis of corporate governance codes and -- to a limited extent -- relevant elements of the underlying legal framework.¹

This Study identifies and compares existing corporate governance codes in the fifteen EU Member States and other corporate governance codes that may affect the operation of companies within the European Union. (A list of the corporate governance codes identified for purposes of this Study is included in Annex I of this Final Report.) As explained in greater detail below (B. Methodology), for purposes of this Study, a “corporate governance code” is generally defined as a non-binding set of principles, standards or best practices, issued by a collective body, and relating to the internal governance of corporations.

This Final Report is structured along the following lines: This Introduction describes the scope of the Study and the structure of the Report; it also sets forth the methodology used. Section II describes the codes identified, their issuing bodies, objective, and compliance mechanisms. Section III provides a more substantive comparative analysis of code provisions within the context of the relevant legal framework. Section IV discusses code enforcement and compliance. In conclusion, Section V highlights areas in which governance practices appear to be converging and those in which practices are not. It includes a discussion of trends and expected developments, and a summary of a roundtable of private sector participants on related issues.

Note that a Discussion of Individual Codes is contained in Annex IV. For each of the fifteen EU Member States, that Discussion begins with a brief overview of the relevant legal framework for corporate governance, and provides the following information for each of the Codes identified:

- Name, date of adoption and adopting body.
- Official languages in which the code is published.

¹ Corporate governance practices arise in the context of, and are affected by, differing national frameworks of law, regulation and stock exchange listing rules, differing business norms and differing cultural values and socio-economic traditions. Effective corporate governance is supported by and dependent on framework conditions, including securities regulation, company law, accounting and auditing standards, bankruptcy laws, judicial enforcement and the nature of the market for corporate control. To understand one nation’s corporate governance practices in relation to another’s, one must understand not only the corporate governance codes that apply but also the underlying legal and enforcement framework. However, a full comparative analysis of this framework is well beyond the scope of this Study.

- Nature of the adopting body and implications for the legal basis and compliance with the code.
- Description of any consultative process in preparing the code and the identity of contributing parties.
- Any formal definition provided in the code of what is meant by “corporate governance.”
- Any explanation provided in the code as to the objectives pursued and manner in which those objectives are presented.
- The criteria used in the code to define the scope of its application to corporate entities (size, legal form, open/closed, listed/non-listed, domestic/foreign, etc.).
- Where several codes have been successively adopted, whether there exists an official consolidated version.
- Code provisions on issues relating to:
 - separate roles and responsibilities of supervisory and managerial bodies;
 - accountability of supervisory and managerial bodies;
 - size, composition, independence and selection criteria and procedures for managerial and supervisory bodies;
 - working methods of managerial and supervisory bodies;
 - remuneration of members of supervisory and managerial bodies;
 - organisation and supervision of internal control systems and relations between supervisory bodies, managerial bodies and internal and external auditors;
 - protection of the rights of shareholders;
 - equal/fair treatment of shareholders (including minority and foreign shareholders); and
 - rights of stakeholders.

In addition, a Comparative Matrix analysing these and other topics in greater detail is provided in Annex V to this Report.

B. METHODOLOGY

The volume of materials concerning corporate governance is vast and growing exponentially in most EU Member States. In addition to articles and treatises on the topic -- in the business, economics, legal and policy literature -- numerous laws, regulations and listing requirements address governance issues. Within this vast literature, a unique group of corporate governance recommendations has arisen in the past decade, loosely called governance “codes,” “principles” or “guidelines.” This growing set of recommendations tends to focus on practices to ensure that corporations are managed effectively and held accountable in their use of assets. It is this unique body of materials that is the primary subject of the Contract and, hence, this Comparative Study.

To identify corporate governance codes relevant to the EU Member States, and obtain the other information required by the Contract, the following methodology was developed:

- Definition of “Corporate Governance Code”: The methodological challenge for this Study was to create a definition of “corporate governance code” that could be applied consistently and was in line with the scope of the Study as set forth in the Contract. Upon broad consultation, it was determined that, for the purposes of this Study, a “corporate governance code” would be defined generally as follows:
 - a systematically arranged set of principles, standards, best practices and/or recommendations;
 - precatory in nature;
 - that is neither legally nor contractually binding;
 - relating to the internal governance of corporations (covering topics such as the treatment of shareholders, the organisation and practices of (supervisory) boards and corporate transparency); and
 - issued by a collective body.

This definition excludes dissertations, legal treatises, articles and books on corporate governance. It also excludes code-like documents or guidelines that are created by a single company or investor. Although such documents can be influential, especially when issued by a large institutional investor, the potential universe of such documents is simply too large for this Study. In addition, under this definition, statutes, regulations, and listing requirements do not qualify as corporate governance codes. Such materials are used as points of reference to understand the framework in which the governance codes exist, and to assist in the comparative analysis, but under the express terms of the Contract they are not treated as “codes.” (Note, however, that documents that are not themselves listing requirements but are linked to the listing standards of a stock exchange through disclosure requirements, or otherwise, are treated as codes.)

- Preliminary Identification of Codes: Through review of WG&M’s prior collection of codes, consultation with the ECGN concerning its collection of code-like documents and additional research, a set of relevant codes was identified -- consistent with the definition set forth above -- for each EU Member State. (A list of the codes identified is included in Annex I.)
- Consultation with Regulatory Authorities & Listing Bodies: EU Member State representatives of the Federation of European Stock Exchanges (“FESE”) and the Forum of European Security Commissions (“FESCO”) were consulted on the preliminarily identified set of codes. These representatives were asked to confirm that the list was complete for their nation or to identify additional codes. (A list of the stock exchange and security commission representatives who were consulted is included in Annex II.)
- Additional Research by Country Correspondents: Country correspondents designated for each EU Member State were asked to review and perform additional research on each of the codes identified to obtain the information requested in the Contract. They were also asked to undertake research to confirm that the list of codes was complete or to identify additional codes. (A list of the country correspondents participating in the Study is included in Annex III.)

Interim Report: The information collected through research and the iterative process outlined above was then analysed and categorised for comparative purposes. A draft

Interim Report addressing the information requested in Item 1 of the Contract was submitted to the European Commission on March 29, 2001 for comments. A revised Interim Report was submitted on May 28, 2001 and formally accepted on July 2, 2001. (Note that two codes originally identified in the Interim Report (one from Germany and one from Sweden) are not included in this Final Report because further research indicated that both their influence and content was limited in scope. These documents are described in the relevant country discussions contained in Annex IV. A number of other codes have been added.)

- Survey of Legal Framework: Country correspondents designated for each EU Member State were asked to provide information about the Member State's basic legal framework for corporate governance. This information was vetted against and augmented by a draft Study undertaken by the Organisation for Economic Co-operation and Development ("OECD"), which compares the legal frameworks for corporate governance of EU Member States (and other nations) through answers by the relevant Ministries to a survey.
- Code Analysis: Each code was analysed for the remaining information requested in the Contract. (A Comparative Matrix analysing the codes identified in this Study on a detailed point-for-point basis is provided as Annex V to this Report.)
- Private Sector Consultation: On September 10, 2001, senior members of the European business community participated in a consultative roundtable in Brussels to discuss their views on whether the variety of corporate governance codes in EU Member States poses impediments to a unified EU capital market. (A list of the issues discussed in this consultation is included in Annex II.)
- Draft Final Report: The information collected from independent research and the process outlined above was analysed for comparative purposes. A draft Final Report was submitted to the European Commission for comments on October 31, 2001.
- Final Report: This Final Report includes the entire contents of the Interim Report and addresses the comments from the Commission dated December 11, 2001. It provides all information specified in the Contract.
- Terminology: Note that much confusion exists in international discussions and documents relating to company boards and their members due to different usage in EU Member States of certain key terms. In the United Kingdom and Ireland, all the members of the unitary board of directors are called "directors," whether or not they are also executives of the company. However, in France, the Netherlands, Germany, Italy and many other countries, the word *directeur*, *direkteur*, *direktor*, or *direttore* (or the equivalent) is exclusively restricted to members of management, and generally means "manager" or "executive." A member of a unitary board in France or Italy is titled *administrateur* or *amministratore*, which is the proper equivalent of "director" in English. When he or she also has managerial or executive functions, titles such as *administrateur-directeur* or *administrateur délégué* are used.

This Report uses the word "director" to mean a member of the unitary board. For two-tier systems, the expressions "supervisory board member" and "management board member" are used. In addition, the Report refers to both unitary boards and supervisory boards as "supervisory *bodies*" to recognise that both entities are charged with the function of monitoring and advising management. This is true whether that management is formed as a management board (as in the two-tier system) or is less

formally constituted as a management team (as in the unitary system). Management boards and management teams are referred to as “managerial *bodies*.”

II. IDENTIFICATION OF RELEVANT CODES

A. DISTRIBUTION

A total of thirty-five documents that qualify as corporate governance codes for purposes of the Study have been identified (using the definition set forth in Section I.B Methodology) in EU Member States. (See Table A: Codes Identified (EU Member States), below.)

The vast majority (13) of the fifteen EU Member States have at least one code document. (Austria and Luxembourg are the only two EU Member States for which no codes have been identified.) However, the distribution of codes is uneven: the United Kingdom accounts for eleven of the codes; Belgium accounts for four (two of which have been consolidated into one document); France, Germany and the Netherlands each account for three; and Denmark, Finland, and Greece account for two each. The remaining five Member States have only one code apiece.

Few if any conclusions can be drawn from the distribution of codes concerning either the status of corporate governance or any reform efforts in the Member States, given the variety of contexts in which the codes have arisen. For one, governance codes in one nation may address principles and practices of corporate governance that other nations establish more fully through company law and securities regulation. (For example, in Sweden and Germany the law details many governance provisions that are addressed by codes in other nations.) For another, a number of EU Member States are engaging, or have already engaged, in review and reform of company law. In some instances this has been related to a code effort; in others it may actually have the effect of delaying or replacing a code effort.

TABLE A		
CODES IDENTIFIED: EU MEMBER STATES		
Nation	Code	Languages
Belgium	<ul style="list-style-type: none"> • Recommendations of the Federation of Belgian Companies (January 1998) • Recommendations of the Belgian Banking & Finance Commission (January 1998) • Cardon Report (December 1998) • The Director's Charter (January 2000) 	<ul style="list-style-type: none"> • Dutch, French and English • Dutch, French and English • Dutch, French and English • French and English
Denmark	<ul style="list-style-type: none"> • Danish Shareholders Association Guidelines (February 2000) • Nørby Report & Recommendations (December 2001) 	<ul style="list-style-type: none"> • Danish and English • Danish (English summary available)
Finland	<ul style="list-style-type: none"> • Chamber of Commerce/Confederation of Finnish Industry & Employers Code (February 1997) • Ministry of Trade & Industry Guidelines (November 2000) 	<ul style="list-style-type: none"> • Finnish (English summary available) • Finnish and English
France	<ul style="list-style-type: none"> • Viénot I Report (July 1995) • Hellebuyck Commission Recommendations (June 1998; Updated October 2001) • Viénot II Report (July 1999) 	<ul style="list-style-type: none"> • French (English translation available) • French (English translation available) • French (English translation available)

Germany	<ul style="list-style-type: none"> • Berlin Initiative Code (June 2000) • German Panel Rules (July 2000) • Cromme Commission Code (draft, December 2001) 	<ul style="list-style-type: none"> • German and English • German and English • German (English translation available)
Greece	<ul style="list-style-type: none"> • Mertzanis Report (October 1999) • Federation of Greek Industries Principles (August 2001) 	<ul style="list-style-type: none"> • Greek and English • Greek (English translation available)
Ireland	<ul style="list-style-type: none"> • IAIM Guidelines (March 1999) 	<ul style="list-style-type: none"> • English
Italy	<ul style="list-style-type: none"> • Preda Report (October 1999) 	<ul style="list-style-type: none"> • Italian (English translation available)
Netherlands	<ul style="list-style-type: none"> • Peters Report (June 1997) • VEB Recommendations (1997) • SCGOP Handbook & Guidelines (August 2001) 	<ul style="list-style-type: none"> • Dutch (English translation available) • Dutch (English translation available) • Dutch (English translation available)
Portugal	<ul style="list-style-type: none"> • Securities Market Commission Recommendations (November 1999) 	<ul style="list-style-type: none"> • Portuguese and English
Spain	<ul style="list-style-type: none"> • Olivencia Report (February 1998) 	<ul style="list-style-type: none"> • Spanish (English translation available)
Sweden	<ul style="list-style-type: none"> • Swedish Shareholders Association Policy (November 1999) 	<ul style="list-style-type: none"> • Swedish (English translation available)
United Kingdom	<ul style="list-style-type: none"> • Institute of Chartered Secretaries & Administrators Code (February 1991) • Institutional Shareholders Committee Statement of Best Practice (April 1991) • Cadbury Report (December 1992) • PIRC Shareholder Voting Guidelines (April 1994; Updated March 2001) • Greenbury Report (July 1995) • Hermes Statement (March 1997; Updated January 2001) • Hampel Report (January 1998) • Combined Code (July 1998) • Turnbull Report (September 1999) • NAPF Corporate Governance Code (June 2000) • AUTIF Code (January 2001) 	<ul style="list-style-type: none"> • English • English • English • English • English • English • English • English • English • English • English • English

Table B, Codes Identified (Pan European & International), below, lists four pan-European and international codes identified to date that are relevant to EU Member States. These include codes from the OECD, the International Corporate Governance Network (“ICGN”), the European Association of Securities Dealers (“EASD”) and a group of investors known as “Euroshareholders.”

TABLE B		
CODES IDENTIFIED: PAN-EUROPEAN & INTERNATIONAL		
Nation	Code	Languages
International Organisations	<ul style="list-style-type: none"> • OECD Principles of Corporate Governance (May 1999) • ICGN Statement (July 1999) 	<ul style="list-style-type: none"> • English, French, German, and Spanish • English (French translation available)
Pan-European Organisations	<ul style="list-style-type: none"> • Euroshareholders Guidelines (February 2000) • EASD Principles and Recommendations (May 2000) 	<ul style="list-style-type: none"> • English • English

For a complete list of codes identified, with exact denomination and date of adoption, see Annex I: List of Corporate Governance Codes Relevant to European Union Member States.

Note that each code is officially published in the language of the nation in which it issued and many are also published in other languages, as indicated in Tables A and B. An English translation or summary is available for every code that is not otherwise officially available in English.

B. ISSUING BODY, LEGAL BASIS & COMPLIANCE

1. NATURE OF ISSUING BODY

A wide variety of organisations in the EU Member States have issued governance codes meeting this Study's definition. These include:

- Governmental or quasi-governmental entities (3);
- Committees or commissions organised or appointed by governments (4);
- Stock exchange-related bodies (2);
- Hybrid committees related to both stock exchanges and business, industry, investor and/or academic associations (5);
- Business, industry and academic associations (9);
- Associations of directors (1); and
- Various types of investor groups (11).

Table C: Issuers & Code Compliance Mechanisms (EU Member States), below, categorises codes in the EU Member States by type of issuing body and the compliance mechanisms for accomplishing the codes' objectives. As Table C shows, much of the interest in code development throughout the European Union has come from the investor community.

Investor associations and investor-related groups have issued almost one-third of the total. In addition, an investor association -- Institutional Shareholders Committee (U.K.) -- in April 1991 issued one of the earliest codes identified by this Study.

2. LEGAL BASIS & COMPLIANCE MECHANISMS

As one might expect given the variety of the groups involved in developing codes, compliance mechanisms and the "official" status of codes varies widely. However, all of the codes call for voluntary adoption of their substantive recommendations.

- Fifteen of the codes specifically encourage voluntary disclosure related to governance.
- Six codes either recommend or envision the creation of a mandatory disclosure "comply or explain" framework or are being recommended to listed companies by a stock exchange on a comply or explain basis. (Kørby Commission Report (Denmark); Cromme Commission Code (Germany) (expected); Preda Report (Italy); Cadbury Report (U.K.); Greenbury Report (U.K.); Combined Code (U.K.))
- Another code provides advice on complying with such a framework (Turnbull (U.K.)).
- At least eight codes -- all from investor-related entities -- create criteria for the selection of portfolio companies, shareholder voting, protection of shareholder rights, or encourage pressure through investor voice or voting.

- Finally, two codes focus on guidelines for director remuneration.

(Codes were categorised by the major compliance mechanism relied on; some are associated with more than one such mechanism.)

Note that even though the corporate governance codes put forward by members of the EU investment community are wholly voluntary in nature, given the investment community's significant economic power in competitive capital markets, and the power of investor voice and share voting, such codes can have significant influence on corporate governance practices. Frequently, an investor association will recommend that its members apply governance criteria in the selection of companies for their investment portfolio and/or subsequent voting decisions. At least eight investor-related codes in the EU Member States can be categorised as having this compliance approach: Hellebuyck Commission Recommendations (France); IAIM Guidelines (Ireland); Swedish Shareholders Association Policy; AUTIF Code (U.K.); NAPF Corporate Governance Code (U.K.); PIRC Guidelines (U.K.); Hermes Statement (U.K.); SCGOP Handbook & Guidelines (Netherlands).

A number of investor-related codes rely on disclosure, either by: encouraging companies to disclose voluntarily their governance practices using the code itself or another code as a benchmark (Danish Shareholders Association Guidelines; SCGOP Handbook & Guidelines (The Netherlands)); encouraging disclosure by institutional investors of how they vote on governance issues (AUTIF Code (U.K.)); or supporting a stock exchange listing rule requiring that listed companies disclose to shareholders in the annual report, or other such document, whether they comply with the code, explaining or justifying any departure (IAIM Guidelines (Ireland)).

The organisations or groups that can be categorised as made up of business or industry representatives, frequently including some members from academia, have been the next most active in developing corporate governance codes. Such groups account for nine of the codes issued in EU Member States. Like the investor codes, these codes are voluntary in nature. Most of them call for voluntary disclosure and compliance with best practices. Unlike the investor codes, they lack a market mechanism to encourage compliance. Although purely aspirational in nature, such codes do influence corporate governance practices. Frequently they are based on recommendations from investors or they express what is already acknowledged to be common practice for a respected segment of the corporate community. In some cases, voluntary compliance may be thought to help forestall government or listing body regulation, or additional pressures from investors. This may explain why most of these codes encourage some form of disclosure by companies about corporate governance practices. (Note that elements of the Greenbury Code (U.K.) were appended to London Stock Exchange Listing Rules and required certain disclosures.)

Committees related to a stock exchange, which may also include a business/industry association, account for seven codes. In every instance, compliance with the codes issued by these stock exchange-related bodies is voluntary in as much as a company need not abide by the specific corporate practices recommended to retain listed status. However, in the United Kingdom two of the codes (first the Cadbury Code, and then the Combined Code which superseded Cadbury) were linked to listing rules to require listed companies to disclose whether they follow the code recommendations or explain why they do not ("comply or explain"). Thus, listed companies on the London Exchange need not follow the recommendations of the Combined Code (or Cadbury before it). However, they must disclose whether they follow its recommendations and must provide an explanation

concerning divergent practices. (According to the Financial Services Authority, which is now charged with overseeing company compliance with London Stock Exchange listing requirements, there are as yet no cases in which a company has been sanctioned for failing to disclose against the Combined Code. When disclosure problems have been noticed by the authorities, they have been addressed through discussions with the companies concerned, and there has been no resort to sanctions.) The Preda Report (Italy) is associated with a similar comply or explain requirement. Such mandatory disclosure requirements generally exert significant pressure for compliance.

Four of the codes identified in EU Member States were issued by a committee (or commission) best categorised as organised by government and three were issued by a governmental or quasi-governmental entity. One might expect that codes from such government-related bodies would be more likely to contemplate or discuss reform in company or securities law and related regulation. Generally this does not appear to be the case, although the Mertzanis Report (Greece) does contemplate that at a later date its recommendations may serve as the basis for legal reform. The Ministry of Trade & Industry Guidelines (Finland), the Securities Market Commission Recommendations (Portugal) and the Recommendations of the Belgian Banking & Finance Commission all encourage voluntary disclosure of corporate governance practices -- in addition to voluntary adoption of best practice standards. The Cromme Report (Germany), which is still in draft, is expected to be linked to a comply or explain legal requirement. And the Copenhagen Stock Exchange has recommended that listed companies voluntarily disclosure compliance with the Nørby Report & Recommendations (Denmark).

One code was issued by a directors association. The Director's Charter (Belgium) is wholly aspirational, with a focus on educating directors about their role and encouraging them to follow practices that support good board function.

TABLE C		
ISSUERS & CODE COMPLIANCE MECHANISMS : EU MEMBER STATES		
Issuing Body Type	Code	Compliance Mechanism
Governmental/quasi-governmental entity	Recommendations of the Belgian Banking & Finance Commission (January 1998) (Belgium)	<i>Voluntary (disclosure encouraged)</i> : encourages voluntary adoption of best practice standards and voluntary disclosure
	Securities Market Commission Recommendations (November 1999) (Portugal)	<i>Voluntary (disclosure encouraged)</i> : encourages voluntary adoption of best practice standards and voluntary disclosure
	Ministry of Trade & Industry Guidelines (November 2000) (Finland)	<i>Voluntary (disclosure encouraged)</i> : encourages voluntary adoption of best practice standards and voluntary disclosure

Committee (commission) organised by government	Olivencia Report (February 1998) (Spain)	<i>Voluntary</i> : encourages voluntary adoption of best practice standards
	Mertzanis Report (October 1999) (Greece)	<i>Voluntary (may serve as basis for legal reform)</i> : encourages voluntary adoption of best practice standards; advocates “comply or disclose” framework (in connection with listing rules)
	Nørby Report & Recommendations (December 2001) (Denmark)	<i>Voluntary (disclosure encouraged)</i> : Copenhagen Stock Exchange recommends that listed companies disclose (voluntarily) on a “comply or explain” basis
	Cromme Commission Code (draft, December 2001) (Germany)	<i>Disclosure (comply or explain)</i> : anticipated that mandatory disclosure framework will apply
Committee related to a stock exchange	Cardon Report (December 1998) (Belgium)	<i>Voluntary (disclosure encouraged)</i> : encourages voluntary adoption of best practice standards and voluntary disclosure
	Preda Report (October 1999) (Italy)	<i>Disclosure (comply or explain)</i> : creates mandatory disclosure framework (in connection with listing rules to encourage improved practice); encourages voluntary adoption of best practice standards
Committee related to a stock exchange and a business, industry, investor and/or academic association	Cadbury Report (December 1992) (U.K.)	<i>Disclosure (comply or explain)</i> : advocates disclosure framework (in connection with listing rules) to encourage improved practices; also encourages voluntary adoption of best practice standards [See Combined Code]
	Peters Report (June 1997) (Netherlands)	<i>Voluntary (disclosure encouraged)</i> : encourages voluntary adoption of best practice standards and voluntary disclosure
	Hampel Report (January 1998) (U.K.)	<i>Disclosure (in line with the Combined Code’s provisions)</i> : also encourages voluntary adoption of best practice standards [See Combined Code]
	Combined Code (July 1998) (U.K.)	<i>Disclosure (comply or explain)</i> : creates mandatory disclosure framework (in connection with listing rules) to encourage improved practices
	Turnbull Report (September 1999) (U.K.)	<i>Voluntary (advise on compliance with Combined Code)</i> : advises on compliance with mandatory disclosure framework (in connection with listing rules) to encourage improved practices
Business, industry and/or academic association or committee	Institute of Chartered Secretaries & Administrators Code (February 1991) (U.K.)	<i>Voluntary</i> : encourages voluntary adoption of best practice standards
	Viénot I Report (July 1995) (France)	<i>Voluntary</i> : encourages voluntary adoption of best practice standards
	Greenbury Report (July 1995) (U.K.)	<i>Disclosure (comply or explain) (now disclosure required in line with the Combined Code’s provisions)</i> : encourages voluntary adoption of best practice standards; recommends guidelines for director remuneration
	Chamber of Commerce/Confederation of Finnish Industry & Employers Code (February 1997) (Finland)	<i>Voluntary (disclosure encouraged)</i> : encourages voluntary adoption of best practice standards and voluntary disclosure
	Recommendations of the Federation of Belgian Companies (January 1998) (Belgium)	<i>Voluntary (disclosure encouraged)</i> : encourages voluntary adoption of best practice standards and voluntary disclosure
	Viénot II Report (July 1999) (France)	<i>Voluntary (disclosure encouraged)</i> : encourages voluntary adoption of best practice standards and voluntary disclosure; recommends legal reforms
	Berlin Initiative Code (June 2000) (Germany)	<i>Voluntary (disclosure encouraged)</i> : encourages voluntary adoption of best practice standards and voluntary disclosure
	German Panel Rules (July 2000) (Germany)	<i>Voluntary (disclosure encouraged)</i> : encourages voluntary adoption of best practice standards and voluntary disclosure
	Federation of Greek Industries Principles (August 2001) (Greece)	<i>Voluntary (disclosure encouraged)</i> : encourages voluntary adoption of best practice standards and voluntary disclosure
Directors association	The Director’s Charter (January 2000) (Belgium)	<i>Voluntary (association members encouraged to comply)</i> : encourages voluntary adoption of best practice standards

Investors association	Institutional Shareholders Committee Statement of Best Practice (April 1991) (U.K.)	<i>Voluntary (association members recommended to apply to portfolio companies): encourages voluntary adoption of best practice standards</i>
	VEB Recommendations (1997) (Netherlands)	<i>Voluntary (association members recommended to apply to portfolio companies): encourages voluntary adoption of best practice standards</i>
	Hellebuyck Commission Recommendations (June 1998; Updated October 2001) (France)	<i>Voluntary (association members recommended to apply to portfolio companies): creates voluntary criteria for investment selection and shareholder voting by association members</i>
	IAIM Guidelines (March 1999) (Ireland)	<i>Voluntary (now disclosure in line with the Combined Code's provisions): recommends mandatory disclosure framework (in connection with listing rules) to encourage improved practices; recommends guidelines for director remuneration; creates voluntary criteria for investment selection and shareholder voting by association members</i>
	Swedish Shareholders Association Policy (November 1999) (Sweden)	<i>Voluntary (association members recommended to apply to portfolio companies): creates voluntary criteria for investment selection and shareholder voting by association members</i>
	Danish Shareholders Association Guidelines (February 2000) (Denmark)	<i>Voluntary (disclosure encouraged): encourages voluntary adoption of best practice standards and voluntary disclosure</i>
	NAPF Corporate Governance Code (June 2000) (U.K.)	<i>Voluntary (association members recommended to apply to portfolio companies): creates voluntary criteria for investment selection and shareholder voting by institutional investors</i>
	AUTIF Code (January 2001) (U.K.)	<i>Voluntary (disclosure encouraged): creates voluntary criteria for investment selection and shareholder voting by association members</i>
SCGOP Handbook & Guidelines (August 2001) (Netherlands)	<i>Voluntary (disclosure encouraged): recommends that portfolio companies disclose whether they comply with Peters Report or explain non-compliance; creates voluntary criteria for investment selection and shareholder voting by association members</i>	
Investor advisor	PIRC Shareholder Voting Guidelines (April 1994; Updated March 2001) (U.K.)	<i>Voluntary (institutional investors recommended to apply to portfolio companies): creates voluntary criteria for investment selection and shareholder voting by institutional investors</i>
Investor in association with other investor groups	Hermes Statement (March 1997; Updated January 2001) (U.K.)	<i>Voluntary (issuer states shares will be voted accordingly): creates voluntary criteria for investment selection and shareholder voting by association members</i>

The four pan-European and international codes that are relevant to EU Member States have been issued by four distinct types of organisations: an intergovernmental organisation (OECD Principles); a committee related to a pan-European association of securities professionals (EASD Principles and Recommendations); an association of investors and others having an interest in governance (ICGN Statement); and an investors association (Euroshareholders Guidelines).

As set forth in Table D: Issuers & Code Compliance Mechanisms (Pan-European & International), below, compliance with each of these codes is also entirely voluntary. The two investor-related codes -- the ICGN Statement and Euroshareholders Guidelines -- both encourage members to apply their recommendations to companies in their portfolios.

The EASD Principles & Recommendations provide voluntary guidelines. When the Principles & Recommendations were issued in 2000, EASDAQ intended to append them to its requirements for companies listed on EASDAQ on a “comply or explain” basis. Subsequently, control of EASDAQ transferred to NASDAQ (and its name changed to NASDAQ Europe). The current NASDAQ Europe Rule Book makes no express reference to the EASD Principles & Recommendations. However, it does contain a number of corporate governance listing requirements that may have been influenced by the code effort.

The OECD Principles are also wholly voluntary, but given their status -- they were ratified by OECD Ministers (and hence by all of the EU Member States) -- they are quite influential in describing the basic governance principles that should be embodied in each nation's legal, regulatory and/or advisory framework. They also recommend significant disclosure by companies about corporate governance, corporate ownership and corporate performance.

TABLE D		
ISSUERS & CODE COMPLIANCE MECHANISMS : PAN-EUROPEAN & INTERNATIONAL		
Issuing Body Type	Code	Compliance Mechanism
Intergovernmental organisation	OECD Principles of Corporate Governance (May 1999)	<i>Voluntary</i> : encourages creation, assessment & improvement of appropriate legal & regulatory framework; encourages voluntary adoption of best practice standards
Committee related to pan-European association of securities professionals	EASD Principles and Recommendations (May 2000)	<i>Voluntary (disclosure encouraged)</i> : advocates disclosure on a comply or explain basis for markets and companies adopting the code, to encourage improved practice
Association of investors and others (including business/industry) interested in corporate governance	ICGN Statement (July 1999)	<i>Voluntary (investors recommended to apply to portfolio companies; companies recommended to disclose compliance or explain)</i> : pressure through investor voice/voting; encourages voluntary adoption of best practice standards
Investors association	Euroshareholders Guidelines (February 2000)	<i>Voluntary (association members (investors) recommended to apply to portfolio companies)</i> : pressure through investor voice/voting

C. CONTRIBUTIONS & CONSULTATIONS

The processes used to obtain input, the parties contributing to the creation of corporate governance codes, and the nature of broader consultations engaged in by the issuing bodies vary greatly among the identified codes. To varying degrees, code issuers received contributions from an array of industry groups, corporate executives, government and regulatory agencies and investor groups. Consultative activities ranged from publication of consultative documents with public invitation to comment, to consultations with government, business and investor groups.

Approximately ten of the codes discussed in this report involved formal consultations of one form or another. In some cases (*e.g.*, Peters Code (Netherlands), Cadbury Report (U.K.) and Combined Code (U.K.)), these consultations consisted of the publication of a draft document with a request for comments by interested parties. Such comments were then incorporated into the final code. In other cases (*e.g.*, the Finnish Ministry of Trade & Industry Guidelines and the Olivencia Report (Spain)), the drafting group requested and received assistance from parties with specific knowledge and experience relating to the subject of corporate governance in their nation. Roughly forty-five percent (45%) of the codes included in this Report do not indicate whether the issuing body consulted with any other parties. Even in many of these situations, however, consultations may in fact have taken place. Moreover, the diverse viewpoints and constituencies represented by the members of the drafting group or issuing body likely acted as an informal consultation. The codes generally are silent as to whether investor entities outside the domestic market were consulted.

D. OBJECTIVES PURSUED

The codes express a relatively small range of objectives, either directly or by implication. Table E, below, shows the code objectives associated with each code emanating from the EU Member States, again grouped by type of issuing body. Verbatim language from the codes regarding how they present their objectives can be found in the Discussion of Individual Codes provided in Annex IV.

The most common apparent objective is improving the quality of (supervisory) board governance of companies. (Note that significant judgements were made on such categorisation, and improving the quality of board governance was a common “default” category because of the focus of most recommendations.) This objective is most strongly associated with the codes emanating from business and industry-related groups (and the one directors association).

The next most common objectives are: improving accountability of companies to shareholders and/or maximising shareholder value; and improving companies’ performance, competitiveness and/or access to capital. Not surprisingly, the latter objective is the focus of many of the government-related entities and of both the Cardon Report (Belgium) and the Preda Report (Italy), while the former objective is the apparent focus of a majority of the investor-related codes.

The code from the Belgian Banking & Finance Commission is unique in that its only stated objective is improving the quality of governance-related information available to the capital markets. Four of the codes in the United Kingdom can be categorised as having this as one of two objectives: the Cadbury Report, the Greenbury Report, the Hampel Report and the Combined Code (which incorporates elements of the other three codes) can all be categorised as seeking to improve the quality of both supervisory board governance of companies *and* governance-related information available to the equity markets and their participants.

TABLE E		
CODE OBJECTIVES: EU MEMBER STATES		
Issuing Body Type	Code	Objectives
Governmental/quasi-governmental entity	Recommendations of the Belgian Banking & Finance Commission (January 1998) (Belgium)	Improve quality of governance-related information available to equity markets
	Securities Market Commission Recommendations (November 1999) (Portugal)	Improve companies’ performance, competitiveness and/or access to capital
	Ministry of Trade & Industry Guidelines (November 2000) (Finland)	Improve companies’ performance, competitiveness and/or access to capital
Committee (commission) organised by government	Olivencia Report (February 1998) (Spain)	Improve companies’ performance, competitiveness and/or access to capital
	Mertzanis Report (October 1999) (Greece)	Improve companies’ performance, competitiveness and/or access to capital
	Nørby Report & Recommendations (December 2001) (Denmark)	Improve companies’ performance, competitiveness and/or access to capital.
	Cromme Commission Code (draft, December 2001) (Germany)	Improve companies’ performance, competitiveness and/or access to capital

Committee related to a stock exchange	Cardon Report (December 1998) (Belgium)	Improve companies' performance, competitiveness and/or access to capital
	Preda Report (October 1999) (Italy)	Improve companies' performance, competitiveness and/or access to capital; improve quality of governance-related information available to equity markets
Committee related to a stock exchange and a business, industry and/or academic association	Cadbury Report (December 1992) (U.K.)	Improve quality of board (supervisory) governance; improve quality of governance-related information available to equity markets
	Peters Report (June 1997) (Netherlands)	Improve quality of board (supervisory) governance
	Hampel Report (January 1998) (U.K.)	Improve quality of board (supervisory) governance; improve quality of governance-related information available to equity markets
	Combined Code (July 1998) (U.K.)	Improve quality of board (supervisory) governance; improve quality of governance-related information available to equity markets
	Turnbull Report (September 1999) (U.K.)	Improve quality of board (supervisory) governance
Business, industry and/or academic association or committee	Institute of Chartered Secretaries & Administrators Code (February 1991) (U.K.)	Improve quality of board (supervisory) governance
	Viénot I Report (July 1995) (France)	Improve quality of board (supervisory) governance
	Greenbury Report (July 1995) (U.K.)	Improve quality of board (supervisory) governance; improve quality of governance-related information available to equity markets
	Chamber of Commerce/Confederation of Finnish Industry & Employers Code (February 1997) (Finland)	Improve quality of board (supervisory) governance
	Recommendations of the Federation of Belgian Companies (January 1998) (Belgium)	Improve companies' performance, competitiveness and/or access to capital
	Viénot II Report (July 1999) (France)	Improve quality of board (supervisory) governance
	Berlin Initiative Code (June 2000) (Germany)	Improve quality of board (supervisory) governance
	German Panel Rules (July 2000) (Germany)	Improve accountability to shareholders and/or maximise shareholder value; improve board (supervisory) governance
	Federation of Greek Industries Principles (August 2001) (Greece)	Improve companies' performance, competitiveness and/or access to capital
Directors association	The Director's Charter (January 2000) (Belgium)	Improve quality of board (supervisory) governance
Investors association	Institutional Shareholders Committee Statement of Best Practice (April 1991) (U.K.)	Improve quality of board (supervisory) governance
	VEB Recommendations (1997) (Netherlands)	Improve accountability to shareholders and/or maximise shareholder value
	Hellebuyck Commission Recommendations (June 1998; Updated October 2001) (France)	Improve accountability to shareholders and/or maximise shareholder value
	IAIM Guidelines (March 1999) (Ireland)	Improve quality of board (supervisory) governance
	Swedish Shareholders Association Policy (November 1999) (Sweden)	Improve accountability to shareholders and/or maximise shareholder value
	Danish Shareholders Association Guidelines (February 2000) (Denmark)	Improve accountability to shareholders and/or maximise shareholder value
	NAPF Corporate Governance Code (June 2000) (U.K.)	Improve accountability to shareholders and/or maximise shareholder value
	AUTIF Code (January 2001) (U.K.)	Improve accountability to shareholders and/or maximise shareholder value
	SCGOP Handbook & Guidelines (August 2001) (Netherlands)	Improve accountability to shareholders and/or maximise shareholder value

Investor advisor	PIRC Shareholder Voting Guidelines (April 1994; Updated March 2001) (U.K.)	Improve accountability to shareholders and/or maximise shareholder value
Investor in association with other investor groups	Hermes Statement (March 1997; Updated January 2001) (U.K.)	Improve accountability to shareholders and/or maximise shareholder value

Table F, below, provides the breakdown of categories for the code objectives of the pan-European and international codes. The OECD Principles and the ICGN Statement are aimed at improving corporate performance, competitiveness and access to capital. The EASD Principles & Recommendations aim to do so as well, but also seek to improve the quality of governance-related information available to equity markets. The Euroshareholders Guidelines aim to improve accountability of companies to shareholders and/or maximise shareholder value.

TABLE F		
CODE OBJECTIVES : PAN-EUROPEAN & INTERNATIONAL		
Issuing Body Type	Code	Objectives
Intergovernmental organisation	OECD Principles of Corporate Governance (May 1999)	Improve companies' performance, competitiveness and/or access to capital
Committee related to a pan-European association of securities professionals	EASD Principles and Recommendations (May 2000)	Improve companies' performance, competitiveness and/or access to capital; improve quality of governance-related information available to equity markets
Association of investors and others (including business/industry) interested in corporate governance	ICGN Statement (July 1999)	Improve companies' performance, competitiveness and/or access to capital
Investors association	Euroshareholders Guidelines (February 2000)	Improve accountability to shareholders and/or maximise shareholder value

E. SCOPE

The vast majority of the codes describe practices for joint stock corporations that are listed and traded on stock exchanges, as indicated in Tables G and H, below. However, many of the codes indicate that the recommendations or principles expressed can also be of value to non-listed, closely held and state-owned corporations. Furthermore, the codes issued by investor-related entities, while they generally aim to improve the governance of listed companies, often seek to do so by influencing investors' investment decisions and share voting behaviour.

TABLE G

CODE SCOPE: TYPES OF COMPANIES CONSIDERED

Issuing Body Type	Code	Scope of Companies Considered
Governmental/quasi-governmental equity	Recommendations of the Belgian Banking & Finance Commission (January 1998) (Belgium)	Listed companies
	Securities Market Commission Recommendations (November 1999) (Portugal)	Listed companies; encouraged to all companies
	Ministry of Trade & Industry Guidelines (November 2000) (Finland)	Listed companies and other privatised companies
Committee (commission) organised by government	Olivencia Report (February 1998) (Spain)	Listed companies and other privatised companies
	Mertzanis Report (October 1999) (Greece)	Listed companies
	Nørby Report & Recommendations (December 2001) (Denmark)	Listed companies; encouraged to all companies
	Cromme Commission Code (draft, December 2001) (Germany)	Listed companies; encouraged to all companies
Committee related to a stock exchange	Cardon Report (December 1998) (Belgium)	Listed companies; encouraged to all companies
	Preda Report (October 1999) (Italy)	Listed companies
Committee related to a stock exchange and a business, industry and/or academic association	Cadbury Report (December 1992) (U.K.)	Listed companies; encouraged to all companies
	Peters Report (June 1997) (Netherlands)	Listed companies
	Hampel Report (January 1998) (U.K.)	Listed companies
	Combined Code (July 1998) (U.K.)	Listed companies
	Turnbull Report (September 1999) (U.K.)	Listed companies
Business, industry and/or academic association or committee	Institute of Chartered Secretaries & Administrators Code (February 1991) (U.K.)	Listed companies; encouraged to all companies
	Viénot I Report (July 1995) (France)	Listed companies
	Greenbury Report (July 1995) (U.K.)	Listed companies; encouraged to all companies
	Chamber of Commerce/Confederation of Finnish Industry & Employers Code (February 1997) (Finland)	Listed companies
	Recommendations of the Federation of Belgian Companies (January 1998) (Belgium)	All companies
	Viénot II Report (July 1999) (France)	Listed companies
	Berlin Initiative Code (June 2000) (Germany)	Listed companies; encouraged to all companies
	German Panel Rules (July 2000) (Germany)	Listed companies
	Federation of Greek Industries Principles (August 2001) (Greece)	Listed companies; encouraged to all companies
Directors association	The Director's Charter (January 2000) (Belgium)	All companies

Investors association	Institutional Shareholders Committee Statement of Best Practice (April 1991) (U.K.)	Listed companies
	VEB Recommendations (1997) (Netherlands)	Listed companies
	Hellebuyck Commission Recommendations (June 1998; Updated October 2001) (France)	Listed companies
	IAIM Guidelines (March 1999) (Ireland)	Listed companies
	Swedish Shareholders Association Policy (November 1999) (Sweden)	Listed companies
	Danish Shareholders Association Guidelines (February 2000) (Denmark)	Listed companies
	NAPF Corporate Governance Code (June 2000) (U.K.)	Listed companies
	AUTIF Code (January 2001) (U.K.)	Listed companies
	SCGOP Handbook & Guidelines (August 2001) (Netherlands)	Listed companies
Investor advisor	PIRC Shareholder Voting Guidelines (April 1994; Updated March 2001) (U.K.)	Listed companies
Investor in association with other investor groups	Hermes Statement (March 1997; Updated January 2001) (U.K.)	Listed companies

TABLE H

CODE SCOPE: PAN-EUROPEAN & INTERNATIONAL

Issuing Body Type	Code	Scope of Companies Considered
Intergovernmental organisation	OECD Principles of Corporate Governance (May 1999)	Listed companies; encouraged to all companies
Committee related to a pan-European association of securities professionals	EASD Principles and Recommendations (May 2000)	Listed companies
Association of investors and others (including business/industry) interested in corporate governance	ICGN Statement (July 1999)	Listed companies
Investors association	Euroshareholders Guidelines (February 2000)	Listed companies

F. CONSOLIDATED/MERGED CODES

In only two nations -- Belgium and the United Kingdom -- have codes been merged or consolidated.

In Belgium, the code issued by the Belgian Banking & Finance Commission and the code issued by the Brussels Stock Exchange (Cardon Report) were consolidated in original form in December 1998 into a single document entitled “Corporate Governance for Belgian Listed Companies” (referred to below as the “Dual Code”). These codes are analysed separately in this Report.

In the United Kingdom, the Combined Code, which was issued in July 1998, has integrated certain of the recommendations of the Cadbury Report with those of the Greenbury and Hampel Commissions. The Combined Code is now linked to the London Stock Exchange

listing rules for disclosure purposes. Because the Combined Code makes certain choices in integrating the various recommendations, it and all three of the codes it is drawn from are analysed separately in the Report.

In addition, several codes have been updated from time to time, with the new edition replacing the old. Updated codes include the Hellebuyck Commission Recommendations (issued in June 1998 and updated in October 2001); the PIRC Shareholder Voting Guidelines (issued in April 1994 and periodically updated, most recently in March 2001); and the Hermes Statement (issued in March 1997 and updated January 2001).

(Note that in France, the first code issued by the committee chaired by Marc Viénot, now known as Viénot I, was neither superseded by nor consolidated into the code issued by the second Viénot committee, known as Viénot II.)

III. COMPARATIVE ANALYSIS

A. DEFINITIONS OF CORPORATE GOVERNANCE

The term “corporate governance” is susceptible of both broad and narrow definitions -- and many of the codes identified by this Study do not even attempt to articulate what is encompassed by the term. Table I: Definitions of Corporate Governance, below, includes examples of definitions used in codes emanating from both the EU Member States and pan-European and international sources.

The majority of the definitions articulated in the codes relate corporate governance to “control” -- of the company, of corporate management, or of company or managerial conduct. Perhaps the simplest and most common definition of this sort is that provided by the Cadbury Report (U.K.), which is frequently quoted or paraphrased: “Corporate governance is the system by which businesses are directed and controlled.”

Another related theme common to the definitions of corporate governance found in these codes concerns “supervision” of the company or of management. In addition, a number of definitions relate corporate governance to a legal framework, rules and procedures and private sector conduct. Finally, some of the codes -- this is common in the definitions in the international codes -- speak of governance encompassing relationships between shareholders, (supervisory) boards and managers.

TABLE I
DEFINITIONS OF CORPORATE GOVERNANCE
EU Member States
<p>“Corporate governance is the system by which companies are directed and controlled.” Cadbury Report, Report ¶2.5 (U.K.)</p> <p>“‘Corporate governance’ refers to the set of rules applicable to the direction and control of a company.” Cardon Report, ¶2 (Belgium)</p> <p>“[Corporate governance is] the organisation of the administration and management of companies. . . .” Recommendations of the Federation of Belgian Companies, Foreword</p> <p>“[Corporate governance is] [t]he goals, according to which a company is managed, and the major principles and frameworks which regulate the interaction between the company’s managerial bodies, the owners, as well as other parties who are directly influenced by the company’s dispositions and business (in this context jointly referred to as the company’s stakeholders). Stakeholders include employees, creditors, suppliers, customers and the local community.” Nørby Report & Recommendations, Introduction (Denmark)</p> <p>“Corporate governance describes the legal and factual regulatory framework for managing and supervising a company.” Berlin Initiative Code, Preamble</p> <p>“Corporate Governance, in the sense of the set of rules according to which firms are managed and controlled, is the result of norms, traditions and patterns of behaviour developed by each economic and legal system. . . .” Preda Report, Report § 2 (Italy)</p> <p>“[T]he concept of Corporate Governance has been understood to mean a code of conduct for those associated with the company . . . consisting of a set of rules for sound management and proper supervision and for a division of duties and responsibilities and powers effecting the satisfactory balance of influence of all the stakeholders.” Peters Report, §1.2 (Netherlands)</p> <p>“Corporate Governance is used to describe the system of rules and procedures employed in the conduct and control of listed companies.” Securities Market Commission Recommendations, Introduction (Portugal)</p>

Pan-European & International

“ [C]orporate governance . . . involves a set of relationships between a company’s management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined.”

OECD Principles, Preamble

* * *

“ Corporate governance comprehends that structure of relationships and corresponding responsibilities among a core group consisting of shareholders, [supervisory] board members and managers designed to best foster the competitive performance required to achieve the corporation’s primary objective.”

Millstein Report to OECD, p. 13

B. CULTURE, OWNERSHIP CONCENTRATION & LAW

EU Member States exhibit a rich diversity in corporate governance practices, structures and participants, reflecting differences in culture, traditional financing options and corporate ownership concentration patterns, and legal origins and frameworks. This rich diversity complicates corporate governance comparisons between nations. Nonetheless, the codes that have been issued in Member States in the last decade express significant similarities: they reveal that as reliance on equity financing increases and shareholdings broaden in Europe, a common understanding is emerging of the role that corporate governance plays in the modern European corporation.

A growing academic literature focuses on the impact of culture on corporate governance systems. In sum, it notes that some EU Member States emphasise co-operative relationships and consensus and other Member States emphasise competition and market processes in their corporate governance frameworks. The typical examples cited of these differences in culture among EU Member States are Germany and the United Kingdom. The United Kingdom is often characterised as more market-oriented, with a higher value placed on competition, while Germany is often characterised as traditionally valuing co-operation and consensus. The German emphasis on co-operation and consensus has been pointed to as underpinning the role of employee co-determination and works councils within the German corporation, and the rights given employees of certain sized companies to information about the economic and financial situation of the company and major plans for organisational changes, such as mergers.

The degree to which Member States have relied on equity markets for corporate finance has also varied significantly throughout EU Member States, although in all Member States equity financing appears to be gaining in importance. For example, in the Netherlands, bank lending has been a far more important source of financing, traditionally, than the stock markets. With less traditional reliance on equity markets for financing, shareholding has been fairly concentrated.

TABLE J	
FACTORS AFFECTING CORPORATE GOVERNANCE SYSTEMS	
U.K.	NETHERLANDS
<ul style="list-style-type: none"> • market culture • market-oriented • short-term strategy • relatively more reliance on equity • stock exchange relatively large • relatively less influence of controlling shareholder(s) 	<ul style="list-style-type: none"> • consensus culture • network-oriented • long-term strategy • relatively more reliance on debt • stock exchange relatively small • relatively more influence of controlling shareholder(s)
<i>See Fraser, Henry, and Wallage (2000).</i>	

The issues that corporate governance rules and codes seek to address, and the breadth and liquidity of equity markets, vary with ownership concentration:

- Where corporate ownership is widely dispersed, and ownership and control of management become separated, equity markets tend to be liquid, but the small, dispersed shareholders may lack capacity, incentives and power to monitor the corporate managers -- the “collective action” problem. In theory, the role of the supervisory body (whether the board of directors in a one-tier system or the supervisory board in a two-tier system) is to monitor management as a solution to this problem. However, boards must guard against domination by the managers who control critical information about corporate performance and often have significant influence on board composition itself. Therefore, where equity markets are highly liquid and shareholders are widely dispersed, corporate governance codes tend to focus on supervisory body structures and practices to ensure that the supervisory body is a distinct entity, capable of expressing an objective viewpoint and able to act separately from management, as well as to encourage shareholder participation in voting.
- Where certain rights of ownership are dispersed, yet control rights are not fully separated from ownership -- as when a large shareholder or consortium maintains a control stake, whether by holding a majority of stock outright or by retaining disproportionate voting rights or other preferences -- concerns shift to ensuring the fair treatment of minority shareholders.

As Table K shows, in Austria, Belgium, Germany and Italy more than half of listed industrial companies have a large holder of stock who accounts for 50% or more of the company’s ownership. Such large controlling shareholders are far less common in the United Kingdom.

TABLE K						
OWNERSHIP CONCENTRATION & MARKET CAPITALISATION OF DOMESTIC LISTED COMPANIES						
Nation	Number of Domestic Listed Companies, 2000	% of Companies: No Holder with Majority Control*	% of Companies: No Holder with at least 25%*	Market Cap as % of GDP (excludes investment funds) Main and Parallel Markets**		
				1990	1995	2000
Austria	97	32.0	14.0	17	14	16
Belgium	161	34.3	6.4	33	37	80
Denmark	225	n.a.	n.a.	29	32	69
Finland	154	n.a.	n.a.	17	35	243
France	808	n.a.	n.a.	26	33	112
Germany	744	35.8	17.5	22	24	68
Greece	309	n.a.	n.a.	18	14	96
Ireland	76	n.a.	n.a.	n.a.	39	87
Italy	291	43.9	34.2	14	19	72
Luxembourg	54	n.a.	n.a.	101	176	179
Netherlands	234	60.6	19.6	42	72	175
Portugal	109	n.a.	n.a.	13	18	58
Spain	1019	67.4	32.9	23	27	90
Sweden	292	73.7	35.8	40	75	144
United Kingdom	1926	97.6	84.1	87	122	185
* See Barca & Becht (2001).						
** FIBV & OECD data base; see Nestor, International Financial Law Review (2001).						
n.a. indicates that the information is not available from the sources cited.						

Finally, it has been suggested in the academic literature that the origin of the legal system may have some correlation to the corporate governance protections available to shareholders, for reasons that are not yet clear. As Table L indicates, EU Member States can be categorised as having legal systems based on four distinct foundations.

TABLE L			
LEGAL ORIGINS			
COMMON LAW	CIVIL LAW		
English Origin	French Origin	Scandinavian Origin	German Origin
Ireland	Belgium	Denmark	Austria
United Kingdom	France	Finland	Germany
	Greece	Sweden	
	Italy		
	Luxembourg		
	Netherlands		
	Portugal		
	Spain		

See LaPorta, Lopez-de-Silanes, Shleifer & Vishny (1998); Reynolds & Flores (1989).

All these differences -- finance, law and culture -- may be catalogued in attempts to broadly describe national systems of governance. (See Table M: Typical Descriptions of Corporate Governance Models, below.) They have also been used to categorise different evolutionary stages of corporate governance. Such distinctions and categorisations may be useful up to a point. However, they tend to emphasise overly-broad distinctions that are blurring as governance systems continually adjust. In addition, by describing models in opposition to one another -- “shareholder” vs. “stakeholder,” “insider” vs. “outsider,” and perhaps worst of all, “Anglo-Saxon” vs. “Continental” -- they tend to polarise the discussion of corporate governance in a manner that is of questionable value.

TABLE M	
TYPICAL DESCRIPTIONS OF CORPORATE GOVERNANCE MODELS	
market-oriented	bank-oriented
outsider-dominated	insider-dominated
shareholder-focused	stakeholder-focused
Anglo-Saxon	Rhineland

As noted by Hansmann and Kraakman (January 2000), “[d]espite the apparent divergence in institutions of governance, share ownership, capital markets, and business culture across developed economies, the basic law of the corporate form has . . . achieved a high degree of uniformity and continued convergence is likely.” Whether or not one agrees with the prediction of further convergence, a significant degree of uniformity as to the basic elements of company law and of corporate governance practice is apparent, as discussed in more detail below.

Nonetheless, EU Member States face somewhat distinct corporate governance challenges. In some Member States, the governance issues centre primarily on the ability of the supervisory body -- either the supervisory board in a two-tier system or the board of directors in a unitary system -- to hold managers accountable to a broad base of relatively dispersed shareholders. This is a very common theme in the code literature in the United Kingdom and Ireland, although it also appears throughout the code literature emerging from continental EU Member States. In other Member States, the central issues involve protecting minority shareholders to ensure fair treatment where there is a dominant shareholder and ensuring that a controlling shareholder, a group or reciprocal or cross-holdings arrangements do not overly influence supervisory and managerial bodies.

C. STAKEHOLDER & SHAREHOLDER INTERESTS

1. INTERESTS OF SOCIETY AND STAKEHOLDERS

a. GENERAL

In every EU Member State, governments allow enterprises to organise as limited liability joint stock corporations as an efficient means of serving the interests of society as a whole -- by co-ordinating capital, human and other resources to produce goods and services that members of society need or desire. The central elements that define the corporate form are embedded in the company law of all EU Member States:

- Providers of equity capital hold a property interest in the corporation (usually proportional to the amount of investment) and as a collective body they “own” the corporation; this property interest is (usually) associated with proportional rights of control and participation in both risk and profit;
- The liability of the equity capital providers is limited to the amount of capital invested;
- The property interests held by equity capital providers are transferable;
- In forming the corporation, the equity providers delegate large elements of control over the corporation to a distinct supervisory body; and
- The corporation has full legal personality, which includes the authority to own assets, bind itself to contracts, and be held legally responsible for its actions.

In every EU Member State, corporations are subject to the control of three entities -- a shareholder body, typically organised through a general meeting (the “GM” or “AGM”); a supervisory body (a supervisory board in a two-tier board system or a board of directors in a unitary board system); and, a management body (a management board in a two-tier board system or a less formally structured management team in a unitary board system).

However, legal systems in EU Member States make different choices about how best to ensure that the interests of certain resource providers are protected. They express different conclusions on issues such as:

- Whether labour concerns and protection of creditors can be sufficiently protected by contract and other specific laws tailored to address such concerns, or whether such concerns are better addressed through board structures and other company law requirements;

- The degree to which shareholders, as providers of risk capital, should participate in company decisions; and
- The degree to which company managers and supervisory bodies should consider shareholder interests in comparison to other constituencies' interests in guiding their decisions (and, if so, in what time frame shareholder interests should be deemed relevant).

Different answers to these questions lead to different approaches to issues such as minimum capital requirements and who should have a voice in selecting members of the supervisory body. Although a significant degree of company law standardisation has been achieved throughout the European Union, some commentators suggest that the remaining legal differences are the ones most deeply grounded in national attitudes, and hence, the most difficult to change.

The greatest difference among EU Member States relates to the role of employees in corporate governance, a difference that is usually embedded in law. In Austria, Denmark, Germany, Luxembourg and Sweden, employees of companies of a certain size have the right to elect some members of the supervisory body. In Finland and France, company articles *may* provide employees with such a right. In addition, when employee shareholding reaches three percent (3%) in France, employees are given the right to nominate one or more directors, subject to certain exceptions. In all other EU Member States (with the exception of certain Netherlands companies with self-selecting boards), it is the shareholders who elect all the members of the supervisory body. This results in a fundamental difference among EU Member States in the strength of shareholder influence in the corporation.

Under the law of some Member States, works councils may also have an advisory voice on certain issues addressed by the supervisory body, as in the Netherlands and France. Giving employees an advisory voice in certain issues is one means of engaging employees in governance issues without diluting shareholder influence. Encouraging employee stock ownership is another means of giving employees participatory rights in corporate governance, but without diluting shareholder influence, and is favoured by some codes. Ownership through employee pension funds and other employee stock ownership vehicles could give trade unions, works councils and employees greater involvement in corporate governance as shareholders.

Note that legislation has been proposed in the Netherlands that would give employees a role in nominating (but not electing) supervisory board members in large companies currently subject to the Structure Act of 1971. This new legislation would give shareholders of structure regime companies the right to elect the supervisory body, a body that is currently self-selecting.

The role of employees in selecting members of the supervisory body is discussed further below in Section D.2.a.

b. GOVERNANCE & THE CORPORATE PURPOSE

Although it should not be confused with the broad topic of corporate social responsibility, increasingly corporate governance is perceived to provide a means of ensuring that corporate economic power is grounded in accountability. Different EU Member States tend to articulate the purpose of the corporation -- and the focus of corporate governance -- in

different ways. Some Member States emphasise broad societal and constituency interests; others emphasise the property rights of shareholders.

The comparative corporate governance literature and popular discussion tend to emphasise “fundamental” differences in stakeholder and shareholder interests. However, the extent to which these interests differ, at least outside of the short term, can be debated. The codes widely recognise that corporate success, shareholder profit, employee security and well being and the interests of other stakeholders are intertwined and co-dependent. This co-dependency is emphasised even in codes issued by the investor community.

TABLE N
ALIGNED INTERESTS
<p><i>“Corporate success is linked to the ability to align the interests of directors, managers and employees with the interests of shareholders [C]orporate actions must be compatible with societal objectives.... Attending to legitimate social concerns should, in the long run, benefit all parties, including investors.”</i> Millstein Report to OECD, p. 18</p> <p><i>“Boards that strive for active co-operation between corporations and stakeholders will be most likely to create wealth, employment and sustainable economies. They should disclose their policies on issues involving stakeholders, for example, workplace and environmental matters.”</i> ICGN Statement 9</p>

OECD Principle III states: “The corporate governance framework should recognise the rights of stakeholders as established by law and encourage active co-operation between corporations and stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises.” The Principles further explain that: “Where stakeholder interests are protected by law, stakeholders should have the opportunity to obtain effective redress for violation of their rights.” (Principle III.B) And OECD Principle V.C states that: “The board should . . . take into account the interests of stakeholders.” The annotation further explains that “boards are expected to take due regard of, and deal fairly with . . . stakeholder interests including those of employees, creditors, customers, suppliers and local communities.” (Annotation to Principle V; *accord*, Mertzanis Report (Greece), Principle 3 & §§ 3.1-3.4)

It is notable the extent to which codes from shareholder groups, including the International Corporate Governance Network (“ICGN”), as well as other codes, agree:

“The ICGN is of the view that the board should be accountable to shareholders and responsible for managing successful and productive relationships with the corporation’s stakeholders. The ICGN concurs with the OECD Principle that ‘active co-operation between corporations and stakeholders’ is essential in creating wealth, employment and financially sound enterprises over time. The ICGN affirms that performance-enhancing mechanisms promote employee participation and align shareholder and stakeholder interests. These include broad-based employee share ownership plans or other profit-sharing programs.”

(Amplification of OECD Principle III)

The EASD Principles and Recommendations (Principle V) state that: “Pursuing the long-term interests of the company, boards are agents who perform orientation and monitoring functions for which they are accountable to all shareholders.” They further recommend,

however, that “[b]oards are responsible for ensuring that the company’s stakeholders’ rights are respected and their concerns addressed, and that policies in this respect are developed.” (Recommendation V.1)

The Preda Report (Italy) identifies shareholder maximisation as the primary objective. It tempers this, however, by recognising that, “in the longer term, the pursuit of this goal can give rise to a virtuous circle in terms of efficiency and company integrity, with beneficial effects for other stakeholders -- such as customers, creditors, consumers, suppliers, employees, local communities, and the environment -- whose interests are already protected in the Italian legal system.” (Report § 4) The Peters Report (Netherlands) calls on companies to “seek a good balance” between the interests of shareholders, who provide risk capital, and other stakeholders. “In the long-term, this should not mean a conflict of interest.” (§ 1.1) The Berlin Initiative Code merely calls on the management board and the supervisory board “to be aware of social responsibility to a reasonable extent.” (§§ III.1.4 & IV.1.4) (Of course, this Code may downplay social issues because such concerns, at least as they relate to employees, are already well expressed in law.)

The Viénot I Report (France) (p. 5) takes a different approach. It states that the board is to promote the “interests of the company.” This is understood to be “the overriding claim of the company considered as a separate economic agent, pursuing its own objectives which are distinct from those of shareholders, employees, creditors including the internal revenue authorities, suppliers and customers. It nonetheless represents the common interest of all these persons, which is for the company to remain in business and prosper.”

Note that in the United Kingdom, under common law the board is required to promote the interests of the company as a whole, which are viewed as synonymous with the interests of the “corporators”-- *i.e.*, the entire body of shareholders. Proposed revisions to the Company Act would include a statutory statement of director duties to emphasise that the primary duty of a director is to “act in the way he decides, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole.” According to the proposed revision, this would require taking into account a number of factors, including the impact of actions on employees, the environment and corporate reputation. However, it is not yet clear whether this would pose a new responsibility on the board, or whether it simply recognises that a broad variety of interests impact the interests of the company and its shareholders.

A number of codes address stakeholder issues by advocating greater transparency generally as concerning specific issues. The PIRC Guidelines (U.K.) advocate that the board of directors report on (and be held accountable for) the quality of the company’s relations with stakeholders, because they underpin long-term success. (Part IV, p. 12) The Dual Code (Belgium) notes that “[t]ransparency is the basis on which trust between the company and its stakeholders is built” (§ I.A.7) The Swedish Shareholders Association Policy echoes a similar theme. (Guideline 2.2) The Ministry of Trade & Industry Guidelines (Finland) (2.1.2) expressly provides:

“In the annual report or the relating environmental audit, an account of the measures implemented should be given in order to take account of *environmental values* in the business of the company.”

Several codes encourage stock ownership for employees or other incentive compensation (Swedish Shareholders Association Policy, § 3.7; Peters Report (the Netherlands), § 4.6; PIRC Guidelines (U.K.), Part III, p. 11; OECD Principle III.C)

The number of -- and interest in -- social responsibility rankings and indices is growing, bringing direct capital market pressure to bear on corporations for responsible stakeholder relations. Increasingly, investor-related groups are emphasising to companies held in their portfolios that investors view social responsibility as intertwined with corporate success. For example, the Association of British Insurers, whose members hold approximately 25% of outstanding equity in U.K. companies, has announced that it expects boards to assess risks and opportunities in social, environmental and ethical matters. The Association has reminded that failure to do so may damage corporate reputation and financial well being. In a related vein, in April 2001, U. K. fund manager Morley announced it would vote against FTSE 100 managements that fail to disclose “comprehensive” reports on environmental records and policies. Similarly, the AFG-ASFFI, the professional association of French fund managers, is asking corporate boards to consider “the concept of sustainable development, social responsibility and the environment.”

Interest in both mandatory and voluntary social issue reporting is growing throughout the EU. In July 2000, a new U.K. regulation was issued requiring investment fund companies to disclose whether they have policies on social investment. The U.K. company law review effort also recommended that boards disclose the impact of major decisions on communities, employees and suppliers. French corporate law was recently amended to require listed companies to disclose in their annual reports how they take into account the social and environmental consequences of their activities, including how they adhere to principles set forth by the International Labour Organisation.

2. INTERESTS OF SHAREHOLDERS

a. PROTECTION OF THE RIGHTS OF SHAREHOLDERS.

In all EU Member States, equity shares in a limited liability corporation are considered a form of property that can be conveyed through purchase, sale or transfer. However, in some EU Member States, restrictions can be applied to the conveyance of shares in the articles of association or articles of incorporation.

In large measure, the legal role of the shareholders -- as organised through the general meeting -- is similar in most EU Member States with only a few exceptions, as indicated in Table O, below. The major difference concerns selection of the supervisory body. Through participation in the general meeting, shareholders typically elect the supervisory body. However, in Austria, Denmark, Germany, Luxembourg and Sweden, employees of companies of a certain size also elect some members of the supervisory body. In Finland and France, company articles *may* provide employees with such a right. This is a fundamental corporate governance difference among EU Member States that impacts the influence of shareholders in the corporation by reducing their ability to elect (and influence) the supervisory body. (Works councils may also have an advisory voice on certain issues addressed by the supervisory body, as in the Netherlands and France.) Note that legislation has been proposed in the Netherlands that would give employees a role in nominating (but not electing) supervisory board members in structure regime companies; this legislation would give shareholders of structure regime companies the right to elect the supervisory body, a body that is currently self-selecting.

(1) Items Reserved for Shareholder Action

In almost every EU Member State, shareholders have authority to amend the articles or other organic documents (this often requires a supermajority vote), approve new share issues, approve the selection of the external auditors, approve the annual accounts, approve the distribution of dividends, approve extraordinary transactions such as mergers, acquisitions and take-overs, and as noted above, elect the supervisory body (subject to employee rights in certain EU Member States).

Generally, EU Member States recognise the right of shareholders, regardless of the size of their holdings, to participate and vote in the general meeting. Some exceptions apply, however. For example, in some Member States -- including Portugal, Spain and the United Kingdom -- the articles can alter this right.

The laws and regulations relating to notice of and participation in shareholder general meetings, and procedures for proxy voting and shareholder resolutions vary significantly among EU Member States and this very likely poses some impediments to cross-border investment. (These issues are discussed in greater detail in Section II.D.2.b.(3), below.)

TABLE O							
TYPICAL ITEMS RESERVED FOR SHAREHOLDER ACTION OR APPROVAL*							
Nation	Share Issues	Articles	Supervisory Body	Annual Accounts	Auditors	Mergers	Dividends
Austria	X	X	XX	—	X	X	X
Belgium	**	X	X	X	X	X	X
Denmark	X	X	XX	X	X	X	X
Finland	X	X	X	X	X	X	X
France	X	X	X	X	X	X	X
Germany	X	X	XX	X	X	X	X
Greece	X	X	X	X	X	X	X
Ireland	**	X	X	*****	X	X	*****
Italy	X	X	X	X	X	X	X
Luxembourg	**	X	XX	X	X	X	X
Netherlands	X	X	***	****	—	**	—
Portugal	**	X	X	X	X	X	X
Spain	X	X	X	X	X	X	X
Sweden	X	X	XX	X	X	X	X
United Kingdom	**	X	X	*****	X	X	*****
* Under regulatory framework or as otherwise usually provided in articles of association or incorporation.							
** If not otherwise authorised in the articles of association.							
Bold XX under “Supervisory Body” indicates that employees also have right to elect some directors.							
*** Not under structure regime; legislation under consideration to require.							
**** Legislation under consideration to require.							
***** Vote not required, but usual practice.							
See OECD Comparative Company Law Overview (draft, forthcoming 2002).							

Although usually mandated by law and company articles, many codes itemise the issues reserved for shareholder decision at the general meeting.

(2) Disclosure

Disclosure is an issue that is highly regulated under the securities laws of EU Member States. Disclosure requirements continue to differ among EU Member States, and the variation in information available to investors likely poses some impediment to a single European equity market. However, across EU Member States, disclosure is becoming more similar, in no small part because of efforts to promote better regulation of securities markets and broad use of International Accounting Standards. Consolidation and co-ordination among listing bodies may encourage further convergence.

In all EU Member States, shareholders of listed companies have access to information about corporate performance and leadership through both mandatory and voluntary disclosures and reports. Financial data must be disclosed on an annual basis in all instances, and often on a semi-annual or quarterly basis. In addition, in many EU Member States, listed companies are required to disclose information that investors would consider material, as such information is available.

The codes tend to favour greater voluntary transparency as to executive and director compensation. They also encourage greater transparency as to share ownership and corporate governance practices, as a means of ensuring accountability to shareholders.

Disclosure and transparency are discussed in greater detail in Section D.3.a, below.

b. RULES/RECOMMENDATIONS REGARDING EQUAL/FAIR TREATMENT OF SHAREHOLDERS

The codes vary widely in the extent to which they discuss issues relating to the equal treatment of shareholders, in part because in many EU Member States these issues are already addressed in law. OECD Principle II sets forth the general proposition that “[t]he corporate governance framework should ensure the equitable treatment of all shareholders, including minority and foreign shareholders.” It also provides that shareholders should have some ability to enforce their rights.

(1) One share/one vote

The laws applicable to shareholder voting rights in EU Member States vary in the degree to which they recognise the principle of share voting proportionality. Although the concept of share voting proportionality is recognised generally in all Member States -- and the principle of one share/one vote may apply as to the majority of common shares -- the laws in many Member States provide for or allow exceptions. For example, many Member States allow shares associated with multiple voting rights and shares associated with no voting rights. Most commonly, company law may allow for various classes of stock to be issued with different voting rights. This is least controversial from an investor perspective so long as full disclosure of the differential voting rights of all classes is available to potential purchasers. Of more concern from a shareholder perspective are practices that give greater voting rights to longer-term holders of stock or practices that cap voting rights at a certain level. Such practices have been criticised as effectively enabling minority shareholders to exert control

over the company. Although some Member States (notably Germany) have recently revised their laws to limit disproportionate voting rights, wide variation continues.

According to a 2001 survey of companies in the Euro Stoxx 50 by Die Wertpapier Spezialisten (“DWS”), only seventeen of the forty-three European companies sampled comply fully with the one-share/one-vote principle:

- Multiple voting rights are used by thirty-five percent (35%) of the sample;
- Priority or golden shares are used by twenty-six percent (26%);
- A ceiling (or limitation) on voting rights is used by twenty-three percent (23%);
- Non-voting shares are utilised by sixteen percent (16%); and
- An ownership ceiling is used by ten percent (10%) of the sample.

(p.30.)

(The Euro Stoxx 50 survey included companies from the following European countries, all of which are Member States: Belgium, Finland, France, Germany, Italy, the Netherlands, Spain.)

The codes tend to support a one share/one vote principle, although many favour some flexibility. For example, according to OECD Principle II.A, “[a]ll shareholders of the same class should be treated equally.” However, the annotation explains that preference shares and participation certificates that lack voting rights may be efficient ways of distributing risk and reward; it explains that Principle II is not meant to present an absolute view in favour of one share/one vote in all circumstances. (Annotation to OECD Principle II.A) The Peters Report (Netherlands) takes a view in line with the flexible approach of OECD Principle II. It states that, while the general principle should be one of “proportionality . . . between capital contribution and influence,” priority shares and certificates that result in disproportionate rights may be justified in certain circumstances, including those involving a threatened change in control. (§ 5.1)

The ICGN Statement adopts OECD Principle II, but goes further in warning that those capital markets that retain inequality in voting rights may be disadvantaged in competing for capital. (ICGN Amplification of OECD Principle II) The EASD Principles & Recommendations also disfavour deviations from one share/one vote, but note that if deviations cannot be avoided, they should at least not apply in the same share class (in accord with OECD Principle II); they should be easy to understand; and they should be disclosed and explained. (Recommendation III.2)

Most codes issued by bodies affiliated with investors take a harder line. (The exception of the ICGN Statement is noted above.) The Danish Shareholders Association Guidelines favour abandoning shares with disproportionate voting rights. (§ I) The Hermes Statement (U.K.) disfavors issuance of shares with reduced or no voting rights. (§ 4.1) The PIRC Guidelines agree: “Dual share structures with different voting rights are disadvantageous to many shareholders and should be reformed.” (Part V, p. 15) The Hellebuyck Commission Recommendations (France) (§ I.C.3) view double voting rights as “a way to reward the loyalty of certain shareholders.” However, “[b]eing in favour of the principle ‘one share, one vote,’ the Commission takes the view that this practice, which can allow control of a company to be held by minority shareholders, can be abused and used in a manner contrary to

the spirit of reasonable corporate governance.” The Euroshareholders Guidelines (Guideline II) are most adamant:

“The principle of ‘one share, one vote’ is the basis of the right to vote. Shareholders should have the right to vote at general meetings in proportion to the issued shareholder capital. In line with this principle, certification (The Netherlands) should be terminated because it deprives the investor of his voting right and transfers influence to a trust office which lies within the company’s own sphere of influence. Nor should companies issue shares with disproportional voting rights, intended to influence the balance of power within the annual general meeting (AGM).”

(2) Protection from controlling shareholders

Other issues relating to the equal rights and fair treatment of shareholders include the mechanisms for protecting minority shareholders in situations where the majority or controlling shareholders’ interests may not be the same as the interests of the company and/or the other shareholders.

The Dual Code (Belgium) encourages that all transactions between the company and its dominant shareholders be on “an arm’s length,” “normal commercial” basis. (§ I.A.1.9) The Viénot I Report urges that, where there are controlling shareholders, the board should be “particularly attentive,” taking all interests into due account. (p. 13)

The Olivencia Report (Spain) advocates a specific procedure for protecting minority shareholders from the interests of controlling shareholders. Significant shareholders who serve on supervisory bodies should abstain from voting in decisions in which they have a direct or indirect interest, including in a hostile take-over situation. (§ II.8.6)

(3) General meeting participation and proxy voting

The ability of shareholders to participate in general meetings may be limited by the practical difficulties and costs associated with a host of laws and requirements relating to basic issues of notice, proof of shareholding and meeting and proxy mechanics. For example, it is not uncommon for voting at the general meeting to be limited by share blocking or registration requirements. Share blocking and registration requirements generally act to suspend the trading rights typically associated with shares for some period of time prior to the general meeting. Share blocking and registration requirements seek to ensure that voting is legitimately limited to the current owner of the share (or legitimate proxy).

The specific legal requirements and mechanisms for participating and voting (including by proxy) at the general meeting -- such as notice requirements, record dates, share blocking or registration requirements and procedures, proxy voting requirements, the use of corporate funds to collect proxy votes, the rules for voting shares held in custody, and the rules for placing an item on the agenda -- vary considerably among the EU Member States. These differences pose impediments to cross-border investment and this in an area in which greater harmonisation of requirements among Member States may be called for.

Detailed analysis of such technical differences is beyond the subject matter of this Study. (These issues are under current study by the European Commission’s High Level Group of Company Law Experts.) However, a comparative analysis of many of these types of issues

will soon be available for all EU Member States in a study by the OECD Steering Group on Corporate Governance, *Company Law in OECD Countries -- A Comparative Overview* (forthcoming 2002).

TABLE P			
GENERAL MEETING MECHANICS*			
NATION	MINIMUM NOTICE OF AGM	SHARE BLOCKING/ REGISTRATION REQUIRED	SHAREHOLDER PROPOSALS
Austria	14 days	Possible/Possible	5% of capital
Belgium	16 days	Yes/Yes	20% of capital
Denmark	8 days	No/Yes	Any shareholder
Finland	17 days	No/Yes	Any shareholder
France	30 days	Yes/Yes	.5 to 5% of capital (per company size)
Germany	28 days	No/Yes	5% of shares; 1 share for counterproposal
Greece	20 days	Yes/Yes	5% of shares
Ireland	21 days	No/No	10% of capital (to call meeting)
Italy	15 days	Yes/Yes	10% of capital (to call meeting)
Luxembourg	16 days	No/Possible	20% of capital (to call meeting)
Netherlands	15 days	No/No	New legislation: 1% of capital or Euro50 million market value
Portugal	30 days	Yes/No	5% of capital
Spain	15 days	No/	5% of capital (to call meeting)
Sweden	28 days	No/Yes	Any shareholder
United Kingdom	21 days	No/No	5% of votes or 100 shares when 100 GBP is paid up

* OECD Comparative Company Law Overview (draft, forthcoming 2002).

The ability to participate in general meetings and proxy voting is touched on by some of the codes, although as stated above the law usually provides significant requirements relating to shareholder participation. The OECD Principles advocate that processes and procedures for general shareholder meetings treat all shareholders fairly -- and not make it unduly difficult or expensive to vote. (Annotation to OECD Principle II.A.3) Voting by proxy is favoured, as is consideration of new technologies that might facilitate participation. (Annotation to OECD Principle I.C.3) The ICGN Statement suggests exploring options such as telecommunication and other electronic channels to facilitate shareholder participation. (ICGN Amplification of OECD Principle I) Other codes also address these or similar issues. (See Securities Markets Commission Recommendations (Portugal), § 6; Peters Report (the Netherlands), § 5.4.4).

A number of codes call for transparency as to voting results or emphasise that all votes should be counted or counted equally. (e.g., OECD Principles of Corporate Governance, Principle I.C; ICGN Statement, Amplification of OECD Principle I; Euroshareholders Guidelines, Guideline II; EASD Principles & Recommendations, Recommendation I.2;

NAPF Corporate Governance Code (U.K.), § 10; Combined Code (U.K.), Code § C.2.1; Olivencia Report (Spain), § III.18)

D. THE SUPERVISORY & MANAGERIAL BODIES

1. BOARD SYSTEMS

A major corporate governance difference among EU Member States that is embedded in law relates to board structure -- the use of a unitary versus a two-tier board. In the majority of EU Member States (11), the unitary board structure is predominant, although in five of these States, the two-tier structure is also available. In Austria, Germany, the Netherlands, and, it can be argued, Denmark, the two-tier structure is predominant -- with a supervisory board and a distinct executive board of management required for certain types of corporations or corporations of a certain size. Note that in several EU Member States, including Finland and Sweden, a board of directors and a separate general manager or managing director may be required. In addition, several Member States have a unitary board of directors and a separate board of auditors. For purposes of this Study, such variations are categorised as falling under a unitary system (although other commentators may categorise such variations as two-tier).

Notwithstanding formal structural differences between two-tier and unitary board systems, the similarities in actual board practices are significant. Generally, both the unitary board of directors and the supervisory board (in the two-tier structure) are elected by shareholders although, as explained, in some countries employees may elect some supervisory body members as well. Under both types of systems, there is usually a supervisory function and a managerial function, although this distinction may be more formalised in the two-tier structure. And both the unitary board and the supervisory board have similar functions. The unitary board and the supervisory board usually appoint the members of the managerial body -- either the management board in the two-tier system, or a group of managers to whom the unitary board delegates authority in the unitary system. In addition, both bodies usually have responsibility for ensuring that financial reporting and control systems are functioning appropriately and for ensuring that the corporation is in compliance with law.

Each system has been perceived to have unique benefits. The one-tier system may result in a closer relation and better information flow between the supervisory and managerial bodies; the two-tier system encompasses a clearer, formal separation between the supervisory body and those being “supervised.” However, with the influence of the corporate governance best practice movement, the distinct perceived benefits traditionally attributed to each system appear to be lessening as practices converge. The codes express remarkable consensus on issues relating to board structure, function, roles and responsibilities. Many suggest practices designed to enhance the distinction between the roles of the supervisory and managerial bodies, including supervisory body independence, separation of the chairman and CEO roles, and reliance on board committees.

TABLE Q			
PREDOMINANT BOARD & LEADERSHIP STRUCTURE UNDER REGULATORY FRAMEWORK			
Member State	Board Structure	Employee Role in Supervisory Body	Separate Supervisory & Managerial Leadership
Austria	<i>Two-tier</i>	Yes	Yes
Belgium	Unitary*	No	Not Required
Denmark	<i>Two-tier</i>	Yes	Yes
Finland	Unitary*	Articles may provide	Yes
France	Unitary*	Articles may provide (& Advisory)	Not Required
Germany	<i>Two-tier</i>	Yes	Yes
Greece	Unitary*	No	Not Required
Ireland	Unitary	No	Not Required
Italy	Unitary**	No	Not Required
Luxembourg	Unitary	Yes	Not Required
Netherlands	<i>Two-tier</i>	Advisory	Yes
Portugal	Unitary* **	No	Not Required
Spain	Unitary	No	Not Required
Sweden	Unitary	Yes	Yes
United Kingdom	Unitary	No	Not Required
* Other structure also available. ** Board of auditors also required.			

In the majority of EU Member States, the law does not provide employees a role in the supervisory body (although in Finland and France, company articles may provide that right). However, in five EU Member States, employees elect a portion of the supervisory body.

2. THE SEPARATE ROLES & RESPONSIBILITIES OF SUPERVISORY & MANAGERIAL BODIES

The role of the supervisory body is similar across EU Member States. In unitary systems it is generally charged with the direction, control and management of the corporation, and the board of directors generally delegates day-to-day managerial authority to one or more managers. There are variations -- for example, in several countries -- including Denmark, Finland and Sweden -- the law provides that for companies of a certain size or type a general manager or managing director must be appointed. In such instances, managerial power is not wholly delegated at the option of the unitary supervisory body, but is provided at least to some extent directly by law.

In two-tier systems, the law provides a greater distinction between the role of the supervisory body and the role of the managerial body. In either system, however, the supervisory body is charged generally with appointing and dismissing and remunerating senior managers; ensuring the integrity of financial reporting and control system; and ensuring the general legal compliance of the corporation.

Most of the codes reiterate directly or contemplate the legal proposition that the supervisory body assumes responsibility for monitoring the performance of the corporation, while the management body has authority for the day-to-day operations of the business. For example, according to the draft Cromme Commission Report, “[T]he task of the Supervisory Board is to advise regularly and supervise the management board in the management of the enterprise. It must be involved in decisions of fundamental importance to the enterprise. The supervisory board appoints and dismisses the members of the management board. Together with the management board, it ensures that there is long-term successor planning.” (§§ 1.1 & 1.2)

The codes tend to emphasise that supervisory responsibilities are distinct from management responsibilities. This distinction between the roles of the supervisory and managerial bodies tends to be emphasised with more clarity in codes that relate to two-tier board structures, which more formally separate both the composition and the functions of the two bodies, as discussed below.

The codes differ in the level of specificity with which they describe the distinct roles of the supervisory and managerial bodies, and some of the specific ways in which the duties are allocated. For example, the Dual Code (Belgium) provides that: “The board of directors is responsible for all strategic decisions, for ensuring that the necessary resources are available to achieve the objectives, for appointing and supervising the executive management and, lastly, for reporting to the shareholders on the performance of its duties.” (§ I.A.2) Other governance guidelines and codes of best practice are far less specific. Different degrees of specificity among codes on this point likely reflect variations in the degree to which company law or listing standards already specify supervisory and managerial body responsibilities, rather than any significant substantive differences.

Note however that there are subtle distinctions in how codes view the apportionment of responsibilities between the supervisory and management bodies. Some codes place greater emphasis on the distinct role of management than others. This may be due in part to the more formal distinction in two-tier board structures between the supervisory body and the managerial body. In contrast, in unitary board systems, the board of directors is charged with leading and controlling the business; it delegates day-to-day operations to members of management.

In discussing the apportionment of responsibilities in the German two-tier structure, the Berlin Initiative Code explains: “The supervisory board plays an important role with its selection and supervision of the management board. It does not, however, have any managerial function.” (Thesis 6) It serves as “supervisory authority which controls and advises the management board in the sense of ‘checks and balances.’ In this, it is not on an equal footing next to, or even above, the management board.” Rather it serves as a “counterweight.” (Commentary on Thesis 6) According to the Berlin Initiative Code, it is the management board that “forms the company’s clear focus of decision-making” (§ I.6); “the management board leads the public corporation” (§ III.1.1); and “[d]ecisions of fundamental importance for the company (basic decisions) are the responsibility of the management board as a whole.” (§ III.3.4.)

In French one-tier boards, “the board of directors . . . determines the company’s strategy, appoints the corporate officers charged with implementing that strategy, supervises management, and ensures that proper information is made available to shareholders and

markets concerning the company's financial position and performance, as well as any major transactions to which it is a party.” (Viénot I Report, p. 2)

3. THE ACCOUNTABILITY OF SUPERVISORY & MANAGERIAL BODIES.

In most EU Member States, members of the supervisory and managerial bodies must exercise care and prudence, and avoid conflicts of interests in taking actions and decisions in the interests of the company, and/or its shareholders as a collective body.

Accountability of the supervisory and managerial bodies for the activities of the corporation is a central theme of corporate governance codes. How that accountability is expressed and to whom it is directed varies somewhat, depending on how the primary objective of the corporation is viewed (as discussed above). The codes generally specify that the supervisory body should either promote the interests of the company or the interests of the shareholders or both.

In much of continental Europe, the emphasis is on promoting the company's interests. The Viénot I Report (France) explains: “The interest of the company may be understood as the overriding claim of the company considered as a separate economic agent, pursuing its own objectives which are distinct from those of shareholders, employees, creditors including the internal revenue authorities, suppliers and customers. It nonetheless represents the common interest of all these persons, which is for the company to remain in business and prosper. The Committee thus believes that directors should at all times be concerned solely to promote the interests of the company.” (Viénot I Report, p. 5) The Viénot I Report also states that the supervisory body “collectively represent[s] all shareholders and it must at all times put the company's interests first.” (Viénot I Report, p. 2)

The Mertzanis Report (Greece) emphasises accountability “to the corporation and its shareholders” (Principle 5), as do the OECD Principles (Principle V). The Greenbury Report (U.K.) states that “[i]t is a well-established principle . . . that [the supervisory body is] responsible and accountable to shareholders for all aspects of a company's affairs.” (Report ¶ 4.3) The German Panel Rules take a broader view centred on reinforcing the confidence of “current and future shareholders, lenders, employees, business partners and the general public. . . .” (§ I)

Note that even those codes that emphasise accountability to shareholders do not ignore stakeholder concerns. For example, the OECD Principles state that the interests of stakeholders should be taken into account. (Principle V.C) The OECD Principles explain that this means “tak[ing] due regard of, and deal[ing] fairly with, other stakeholder interests including those of employees, creditors, suppliers and local communities. Observance of environmental and social standards is relevant in this context.” (Annotation to OECD Principle V) The ICGN -- which is made up primarily of investors but also includes other types of members -- makes the same point. (ICGN Statement, Preamble & Amplified OECD Principle III)

a. TRANSPARENCY & DISCLOSURE

As discussed above, disclosure is an issue that is highly regulated under the securities laws of many nations. However, disclosure as to supervisory body composition seems to be slowly converging. As indicated by Table R, the amount of disclosure in annual reports and stock

exchange filings related to supervisory body members, varies among Member States, but appears to be increasing.

TABLE R					
DISCLOSURE RE: BOARD INFORMATION*					
Nation	Director's Primary Executive Position	Other Board Positions	Tenure	Director's Shareholdings	Director's Age
Austria	@42%	@32%	0%	0%	0%
Belgium	@80%	@14%	@94%	0%	@30%
Denmark	100%	@91%	@8%	@15%	@23%
Finland	100%	@79%	@50%	@85%	100%
France	@87%	@83%	@83%	@52%	@63%
Germany	@96%	@82%	@12%	0%	@10%
Greece	n.a.	n.a.	n.a.	n.a.	n.a.
Ireland	n.a.	n.a.	n.a.	n.a.	n.a.
Italy	100%	@94%	@73%	@71%	@5%
Luxembourg	n.a.	n.a.	n.a.	n.a.	n.a.
Netherlands	@95%	@92%	@82%	@8%	100%
Portugal	@38%	@45%	@14%	@45%	@22%
Spain	@80%	@51%	@20%	@11%	@2%
Sweden	100%	100%	@94%	@91%	100%
United Kingdom	100%	100%	100%	100%	@97%
European Average 2001	@88%	@78%	@67%	@44%	@49%
European Average 1999	@71%	@50%	@45%	@50%	@35%
* Heidrick & Struggles European Survey (2001); Rough percentages of companies providing information in annual reports & stock exchange filings.					
n.a. indicates that the information is not available from the sources cited.					

In addition, there is a “hardening of norms” concerning disclosure of individual executive and director remuneration across the EU Member States, following the U.K. example. In the past three years, listing rules or legislation have passed or been proposed to require greater transparency in Ireland, France, the Netherlands and Belgium:

- Effective in 2001, the Dublin Stock Exchange became the second stock market in Europe (after the London Stock Exchange) to require disclosure of individual executive remuneration;
- In France in 2000, MEDEF, the French employer association, issued a strong recommendation to companies to voluntarily publish such information. Under new regulation, listed companies are now required to disclose specific information on remuneration of two to four of a company’s top executives;
- Recently the Dutch Ministries of Justice, Economic Affairs and Social Welfare & Employment submitted a joint bill to Parliament that would require listed companies

to disclose in annual reports individual salary and option grant information for all supervisory and management board members; and

- In Belgium, similar legislation was announced that would require listed companies to disclose the remuneration of individual board members and senior executives. However, recently the effort has stalled because of resistance from senior executives and it is unclear whether it will pass and come into effect in the foreseeable future.

Note that there is room in EU Member States for voluntary corporate disclosure beyond what is mandated by law, and many of the codes advocate disclosure of corporate activities and performance as a means of ensuring accountability to shareholders and other stakeholders. According to the Cardon Report (Belgium), “[t]ransparency is the basis on which trust between the company and its stakeholders is built. . . .” (Dual Code of the Brussels Stock Exchange/CBF, § I.A.7; *accord*, Cadbury Report, Report ¶ 3.2)

Codes frequently discuss disclosure of financial performance in an annual report to shareholders. Generally law requires this, but some codes address it as well. Similarly, even though supervisory and managerial bodies are often subject to legal requirements concerning the accuracy of disclosed information, a number of codes emphasise the responsibility to disclose accurate information about the financial performance of the company, as well as information about agenda items, prior to the annual general meeting of shareholders. For example, the EASD Principles & Recommendations call for disclosure -- at a minimum -- of information on: company objectives, company accounts, identity of significant shareholders (if known), identity of supervisory and key managerial body members, material foreseeable risk factors, related party transactions, arrangements giving certain shareholders disproportionate control, governance structures and policies, and internal controls; they also advocate that disclosed information should be readily and simultaneously available to all shareholders and at a minimal cost. (Recommendations VIII.1-3) The OECD Principles add to this list: the financial and operating results of the company; voting rights; remuneration of supervisory board and key managerial board members; and, material issues regarding employees and other stakeholders. (OECD Principle IV.A)

The Mertzanis Report (Greece) adds to a similar (but not identical) list: the disclosure of corporate targets and prospects; and execution of unusual and complex transactions. (§ 4.1) The Danish Shareholders Association Guidelines also advocates disclosure of transactions by directors and managers in company stock. (§ V) Again, disclosure of many, if not most, of these matters may be required by law or listing requirements, to some degree. The Olivencia Report (Spain) summarises the overall approach of many of the codes, whether stated or implied: “The board of directors, beyond current regulatory requirements should be in charge of furnishing markets with quick, accurate and reliable information, particularly in connection with the shareholder structure, substantial changes in governance rule, and especially relevant transactions” (§ III.19)

One area of considerable difference in governance practice among EU Member States involves disclosure of remuneration for key individuals in the company. The disclosure of compensation of individual supervisory and managerial body members has been mandated in the United Kingdom by listing requirements, and most shareholder groups are in favour of such disclosure. However, until fairly recently, resistance to such disclosure has been considerable among many EU Member States. Nevertheless, in the past three years, new listing rules or legislation have passed to require greater remuneration transparency in Ireland and France, and legislative reforms have been proposed in the Netherlands and Belgium.

Many codes recommend that the policies upon which supervisory and managerial body members are compensated be disclosed. (Euroshareholders Guidelines, Guideline V; EASD Principles & Recommendations, Principle VI; Recommendations of the Federation of Belgian Companies, § 1.7; Dual Code of the Brussels Stock Exchange/CBF, §§ I.B.2.1, I.B.3.1 & II.B.2); Danish Shareholders Association Guidelines, § II.; Ministry of Trade & Industry Guidelines (Finland), § 2.2.2)

Another area of disclosure that some codes address concern issues relating to treatment of stakeholders and social issues. For example, the Millstein Report, which was a precursor to the OECD Principles, recommended that corporations “disclose the extent to which they pursue projects and policies that diverge from the primary objective of generating long-term economic profit so as to enhance shareholder value in the long term.” (Millstein Report, Perspective 21) The EASD Principles & Recommendations advocate disclosure and explanation of instances in which concerns other than overall shareholder return or shareholder interests guide corporate decision-making. (Preamble) The ICGN Statement includes a similar recommendation. (ICGN Amplification of OECD Principle I)

Finally, several codes contemplate disclosure of information relevant to the interests of stakeholders (*e.g.*, Mertzanis Report (Greece), § 3.3), or environmental and social issues. (See Ministry of Trade & Industry Guidelines (Finland), § 2.1.2; AUTIF Code (U.K.), Principle 9; Hermes Statement (U.K.), Appendix 4 (Guidelines for Reporting on Social, Environmental and Ethical Matters); PIRC Guidelines (U.K.), Part 7 (Environmental Reporting))

b. CONFLICTS OF INTEREST

The laws of most EU Member States recognise, at least by implication, that conflicts of interest are inherent in the conduct of companies. However, where they cannot be avoided, they can be minimised. Many companies organise formal procedures for such instances.

Codes address the management of conflicts of interest in a variety of ways. Some discuss the need to try to avoid, or avoid and disclose, conflicts. Others simply advocate disclosure. Many codes look to director independence as a means of reducing conflicts.

The Dual Code of the Brussels Stock Exchange/CBF advocates disclosure in the annual reports as to the relevant interests of directors. (§ I.B.2.2) It also calls for arms’ length transactions between the company and a major shareholder. (§ I.A.1.9) The OECD Principles also emphasise that supervisory and managerial board members should disclose “any material interests in transactions or matters affecting the corporation.” (OECD Principle II.C) The EASD Principles and Recommendations urge that conflicts be avoided, where possible; when conflicts are inevitable they should be managed and disclosed. (Principle IX) Moreover, self-dealing contrary to corporate interests should be prohibited, and insider trading should be prohibited. (Recommendations IX.1 & IX.2)

The draft Cromme Commission Code (Germany) includes an entire section addressing conflicts of interest for management board members. In addition to reminding that management board members are subject to comprehensive non-competition obligations, and may not pursue personal interests or advantages in business decisions or appropriate business opportunities, it provides for immediate disclosure of conflicts to the chairman of the supervisory board as well as to other members of the management board. (§§ IV.3.1-3.4)

The many codes that advocate greater “independence” in the composition of boards as a means of reducing the likelihood of conflicts are discussed in Section II.E.4 below.

4. THE SIZE, COMPOSITION, INDEPENDENCE, SELECTION CRITERIA & PROCEDURES OF SUPERVISORY & MANAGERIAL BODIES.

Most codes address topics related to supervisory body size and composition (including qualifications and membership criteria), as well as the nomination process, and supervisory body independence and leadership. Few codes address these issues in any detail as they relate to the management body; those codes that do tend to involve two-tier board structures.

a. SIZE

Minimum supervisory body size is usually set by law or listing rules. As set forth in Table S below, the typical legal minimum is around three members, but average size is closer to twelve or thirteen members. (According to a 2001 European Survey by Heidrick & Struggles, the average supervisory body size of 350 top listed European companies is 12.5 members, down from 13.5 members in 1999.)

TABLE S		
SUPERVISORY BODY SIZE		
Nation	Legal Minimum*	Average**
Austria	3	N/A
Belgium	3	@ 15
Denmark	3	N/A
Finland	5	N/A
France	3	@ 14
Germany	3	@ 18
Greece	See articles	N/A
Ireland	2	N/A
Italy	See articles	@ 13
Luxembourg	3	N/A
Netherlands	n.a.	@ 8
Portugal	n.a.	@ 10
Spain	3	@ 15
Sweden	3	@ 10
United Kingdom	2	@ 8
European Average : 2001 - 12.5; 1999 - 13.5.		
* OECD Comparative Company Law Overview (draft, forthcoming 2002).		
n.a. indicates that the information is not available from the sources cited.		
** Heidrick & Struggles European Survey (2001).		

Fewer than half of the codes discuss the issue of board size. Those that do usually discuss the need for the board not to be overly large:

- “The Commission takes the view that, in most cases, the board of directors should not consist of more than twelve members. The board of directors should decide on the number of directors necessary to govern the company in the best possible manner, taking into account all relevant data. Therefore, the board must consist of enough members to allow a fruitful discussion; too high a number of directors will not enhance the exchange of ideas.” (Dual Code (Belgium), § I.B.1.8)
- “For reasons of flexibility in the decision-making process, it is recommended that the maximum number of board members be no higher than thirteen.” (Mertzanis Report (Greece), § 5.11)
- “[E]ach board should balance the number of members with due efficiency, taking into consideration that an excessive number of members may hamper the desired cohesion and contribution of each member in discussion and decision-taking.” (Securities Market Commission Recommendations (Portugal), § 14)

b. QUALIFICATIONS AND CRITERIA

A common theme apparent in codes emanating from EU Member States is that the quality, experience, and independence of the supervisory body’s membership affects its ability to perform its duties. Membership criteria are described by various codes with different degrees of specificity, but tend to highlight issues such as experience, personal characteristics (including independence), core competencies and availability.

TABLE T
BOARD COMPOSITION
<p>“The board should be composed of capable members representing all-round competence.” Swedish Shareholders Association Policy, § 2.1.</p> <p>“[N]on-executive directors should be selected with the same impartiality and care as senior executives.” Cadbury Report (U.K.), ¶ 4.15.</p> <p>“Boards should only appoint as directors executives whom they judge to be able to contribute [by showing leadership, speaking for the area for which he/she is directly responsible, and exercising independent judgement]. Board appointment should not be regarded simply as a reward for good performance in an executive role.” Hampel Report (U.K.) Guideline 3.6.</p> <p>“[A]s to the suitability of the persons appointed [to the supervisory board], the decisive factor is ability.” Berlin Initiative Code (Germany), § IV.4.1.</p>

In addition, the codes tend to emphasise that a key role of the supervisory body is determining the composition of the board. For example, the Preda Report (Italy) states: “[E]ach company should determine the . . . experience and personal traits of its non-executive directors in relation to its size, the complexity and specific nature of its sector of activity, and the total membership of the board.” (Code § 2.2) The Peters Report (the Netherlands) emphasises that: “The supervisory board of each company should draw up a desired profile of itself in consultation with the [management board]. The supervisory board should evaluate this profile periodically and draw conclusions regarding its own composition, size, duties and procedures. New developments, for example technological and financial innovations, are also of importance The profile should reflect, *inter alia*, the nature of activities, the degree of internalisation [and] the size ... of the company.” (§ 2.2)

As to management board composition, the Berlin Initiative Code encourages supervisory boards to consider “balanced multiplicity of qualifications and the ability of individual . . . members to work together as a team. . . .” (§ II.1.1)

Given the self-selection of supervisory board members in structure regime companies, the Peters Report (Netherlands) emphasises the need to obtain the confidence of the shareholders’ meeting when appointing both management and supervisory board members. (§ 5.3)

c. DIRECTOR NOMINATION

The process by which supervisory body members are nominated has gained attention in many codes, which tend to emphasise the need for a formal and transparent process for appointing new directors. (See Combined Code (U.K.), Principle A.5.; Swedish Shareholders Association Policy, § 1.2.1; Olivencia Report (Spain), § III.11)

The use of nominating committees is favoured in the United Kingdom as a means of reducing the CEO’s influence in selecting the body that is charged with monitoring his or her performance. (See Hampel Report, Principle A.V) This same concern is expressed in the Viénot I Report (France) as part of the rationale for relying on a nominating or “selection” committee. (Viénot I Report, pp. 14-15). Other codes from EU Member States that discuss the use of nominating committees include the Combined Code (U.K.) (Code § 1, A.5.I); Hermes Statement (U.K.) (Appendix 3); Hampel Report (U.K.) (Guideline 3.19); Swedish Shareholders Association Policy (§ 1.2.1); Olivencia Report (Spain) (§ III.11); Peters Report (the Netherlands) (§ 2.10); German Panel Rules (§ III.3); Hellebuyck Commission Recommendations (France) (§ II.B.2); and the Dual Code (Belgium) (§ I.A.2).

The international and pan-European codes also favour reliance on nominating committees. OECD Principle V.E.1 and the relevant annotation (p. 42) suggest that non-executive directors serve on the nominating committee. The ICGN goes further, and calls for such committees to be composed wholly or at least predominantly of independent non-executives. (ICGN Amplified OECD Principle V) At the same time, however, it is generally agreed that the board as a whole bears ultimate responsibility for nominating directors. (See, e.g., Viénot I Report (France), pp. 14-15; Dual Code (Belgium) § I.B.2.4; Olivencia Report (Spain), § II.5.1)

Generally the nominating committee studies the company’s needs, suggests a profile for board candidates and recommends candidates to the supervisory body to be put forth to the shareholders for election. Of course, there are exceptions, including those instances where employees elect a certain number of directors -- as in Austria and Germany -- as well as the system of co-optation in the Netherlands for structure regime companies in which the supervisory board is self-selecting so that shareholders do not elect supervisory board members. (As noted in Annex IV, Section K, legislation is under consideration in the Netherlands that would give shareholders of structure regime companies the right to elect supervisory board members.) Italy is another exception: According to the Preda Report, in Italy, proposals for supervisory body members are put forward by shareholders -- usually the majority or controlling shareholders. (Code, § 7.2)

d. MIX OF INSIDE & OUTSIDE (INCLUDING “INDEPENDENT”) DIRECTORS

Notwithstanding the diversity in board structures among EU Member States, all codes place significant emphasis on the need for a supervisory body that is sufficiently distinct from management to exercise its decisional capacity objectively, to ensure accountability and provide strategic guidance. The ability to exercise objective judgement of management’s performance is important to the supervisory body’s ability to monitor management. A general consensus is developing throughout EU Member States that this is in part an issue of board composition, and that listed company supervisory bodies should include a significant proportion of outsiders (usually persons who are not executives or employees or controlling shareholders). (Note that many codes use the terms “non-executive director” and “executive director.”) Although outside directors may be more likely to be objective than members of management or controlling shareholders, many code documents also recognise that even an outside director may lack the necessary objectivity if he or she has significant financial or personal ties to management or the controlling shareholder(s). Therefore, a number of codes recommend that at least some of the outside directors should lack such relationships.

In two-tier board systems, the supervisory and managerial bodies are already distinct in terms of composition. (Denmark is an exception: there can be overlap in the membership of the two board tiers.) This should facilitate not only objectivity but also help expose management to a multiplicity of viewpoints. Usually under law current management board members are not allowed to sit on the supervisory body although members of the management board may meet with the supervisory board. It is not unusual, however, for retired members of the management body to serve on the supervisory board. Some codes recommend this practice be limited. For example, the Peters Report (Netherlands) states that “[n]o more than one former member of the company’s [management board] should serve on the supervisory board.” (§ 2.5) The German Panel Rules advocate that “[t]he proposal for election to the supervisory board shall not include, as a matter of course, the election of retiring management board members.” (§ III.1.b)

Supervisory boards may also include executives from other entities having close business and cross-shareholding relationships with the company, and “reciprocal” directorships are not unusual. These kinds of relationships may hinder objectivity, yet they have not garnered the kind of scrutiny in two-tier systems that they have in unitary board systems. Nevertheless, the German Panel Rules urge supervisory boards to include “a sufficient number of independent persons who have no current or former business association with the [company’s] group.” (§ III.1.b) The Peters Report also calls for the supervisory body “to be composed in such a way that its members operate independently and critically in relation to each other and the [management board].” (§ 2.3) It calls on supervisory board members “to perform their duties without a mandate from those who nominated them and independently of the subsidiary interests associated with the company.” (§ 2.6)

The codes that address unitary board systems tend to devote considerable attention to the appropriate mix of inside and outside (or executive and non-executive) members, to ensure that the supervisory body is distinct enough from the management team to play a supervisory role and to bring a diversity of opinions to bear on issues facing the company. This is perhaps best expressed in the Cadbury Report (U.K.) (Report ¶ 4.1):

“Every public company should be headed by an effective board which can both lead and control the business. . . . [T]his means a board made up of a combination of executive directors, with their intimate knowledge of the

business, and of outside, non-executive directors, who can bring a broader view to the company's activities, under a chairman who accepts the duties and responsibilities which the post entails.”

The codes from EU Member States with unitary systems almost always devote significant attention to this issue. For example:

- The Ministry of Trade & Industry Guidelines (Finland) discuss the important role of “external” members of the board in ensuring independent decision-making, and suggest that the larger the company, the more important the role. (§ 2.2.1)
- The Swedish Shareholders Association Policy advocates that the unitary board consist of “six to nine members that do not have assignments for, or business connections with the company.” It further recommends that, other than the managing director, company employees should not serve on the board. (§ 2.1)
- The Dual Code (Belgium) (§§ I.B.1.4 & I.B.2.2) calls for the supervisory body to include a majority of outsiders (non-executives), and for “a number” of these to be “independent.”
- The Danish Shareholders Association Guidelines (§ II) also favour having some outsiders on the board of directors.

The Olivencia Report (Spain) urges boards to “incorporate a reasonable number of independent directors who have a good reputation in their profession and are detached from the management team and from significant shareholders.” (§ III.2) It views independent directors as particularly important in representing the interests of minority shareholders, in relation to the controlling interests in a company. The Report notes that it is common for significant shareholders to serve (or be represented) on the supervisory body, and terms such board members “proprietary directors.” It considers such directors to be outsiders, but not independent. According to the Report, “[o]utside directors should widely outnumber executive directors . . . and the proportion between proprietary and independent directors should be established bearing in mind the [proportion of shareholding concentration to “free-floating” or more widely dispersed shares].” (Recommendation 3)

The Preda Report (Italy) (Code §§ 2.1 & 2.2) also views independent directors as a counterbalance to majority interests. It notes that in Italy non-executives usually outnumber executive directors. In commentary, it advocates including non-executive directors and truly “independent” directors as the best way to guarantee consideration of the interests of both majority and minority shareholders. (Code § 3 & Report, § 5.1). It emphasises that “[t]he number and standing of the non-executive directors shall be such that their views can carry significant weight.” (Code § 2.1) The Recommendations of the Federation of Belgian Companies (§§ 1.3 & 2.2) express a similar view.

In the United Kingdom and Ireland, code recommendations generally agree that boards of publicly traded corporations should include some outside (or non-executive) directors, and that some of these outsiders should be independent directors. The Combined Code (Code § 1, A.3.1) -- like the Hampel Report (Guidelines 2.5 & 3.14) before it -- calls for non-executive directors to comprise not less than one-third of the board, and for a majority of these directors to qualify as “independent.” (The Combined Code is adopted in Ireland's IAIM Guidelines and, as discussed in Annex IV, Sections H and O below, both the Irish and London Stock Exchange listing rules require that corporations disclose the degree to which

they comply with the Combined Code.) The PIRC Guidelines (U.K.) (Part II, p.6) advocate that non-executives comprise at least 50% of the board and that a clear majority of these non-executive qualify as independent.

Like the EU Member States' codes, the international and pan-European codes also emphasise the need for the supervisory body to be distinct to some degree from the managerial body to enable it to exercise objective judgement on corporate affairs.

The OECD Principles (V.E.1) advise that having “a sufficient number of non-executive board members capable of exercising independent judgement” is important for supervisory body tasks where there is potential for conflicts with management, such as financial reporting, nomination and remuneration. The EASD Principles & Recommendations (Recommendation VI.1.b) generally agree, as does the ICGN Statement (Amplification of OECD Principle V), which further provides: “[I]ndependent non-executives should comprise no fewer than three members and as much as a substantial majority.”

In France, the law imposes limits on the number of insiders that can serve on the unitary board of directors. Only one-third can hold a contract of employment (*i.e.*, executives). The Viénot II Report (p. 15) recommends that truly independent directors account for at least one-third.

e. DEFINITION OF INDEPENDENCE

As discussed above, the codes emanating from EU Member States express a common understanding of the need for the supervisory body to be able to exercise objective judgement on corporate affairs, including on the performance of management. Likewise they commonly recognise that this requires the supervisory body to be distinct in composition from management to some degree. Generally the codes agree that a significant proportion of non-executives, including some persons who lack close ties with management, controlling shareholders, and the company, is necessary to position both the supervisory board and the unitary board to perform their supervisory duties. As discussed above, there is no firm consensus on what the proportions of executive, non-executive and, within the latter category, independents should be, or on the definition of an “independent” director. Although the concept of director independence is similar in many codes, definitions of “independence” vary.

The following types of persons have relationships often judged by the codes to impede director independence:

- A present or former executive of the company or an executive or board member of an associated company (subsidiaries, etc.);
- A close family member of an executive;
- A controlling or dominant shareholder;
- An executive or board member of an entity that is a controlling or dominant shareholder;
- An individual with business, financial or close family relationships with a controlling or dominant shareholder;
- A significant supplier of goods or services to the firm (including advisory or consulting services);

- A person having any other type of relationship that might interfere with the exercise of objective judgement.

This approach to defining director independence is found in Belgium (*e.g.*, the Dual Code § I.B.2.2.), France (*e.g.*, Hellebuyck Commission Recommendations, § II.B.1), and Greece (Mertzanis Report, §§ 6.2 & 6.3). The Preda Report (Italy) is similar except it does not discuss family relationships. (Code, § 3) As discussed below, variations on this approach are followed in other EU Member States, usually with less specificity or with less concern expressed about relationships with major shareholders.

The PIRC Shareholder Voting Guidelines (U.K.) provide perhaps the most stringent definition of director independence. According to PIRC, in order to be viewed as independent, directors should not:

- Have held an executive position within the company group;
- Have had an association with the company of more than nine years;
- Be related . . . to other directors or advisors to the company;
- Have been appointed other than through an appropriately constituted nomination committee or equivalent . . . ;
- Be employed with a professional adviser to the company;
- Have a service contract, hold share options or other conditional share awards, receive remuneration other than [ordinary director’s] fees, receive consultancy payments or be eligible for pensions benefits or participate in bonus schemes;
- Receive fees . . . indicative of significant involvement in the company’s affairs . . . ;
- Receive remuneration from a third party in relation to the directorship;
- Benefit from related party transactions;
- Have cross directorships . . . ;
- Hold . . . a senior position with a political or charitable body to which the company makes contributions . . . ;
- Hold a notifiable holding . . . or serve as a director or employee of another company which has a notifiable holding in the company [or] in which the company has a notifiable holding;
- Be . . . on the board of a significant customer or supplier to the company;
- Act as the appointee or representative of a stakeholder group other than the shareholders as a whole; or
- Serve as a director or employee of a significant competitor of the company.

(Part II, p.5)

Examples of less specific definitions include the Viénot II Report (France), which simply states that “[a] director is independent of the corporation’s management when he or she has no relationship of any kind whatsoever with the corporation or its group that is such as to jeopardise exercise of his or her free judgement.” (p. 15) The German Panel Rules equate independence with directors “who have no current or former business association with the

Group . . .” (§ III.1.b) And in the United Kingdom, the Cadbury Report simply describes independent directors as persons who are “free from any business or other relationship which could materially interfere with the exercise of their independent judgement, apart from their fees and shareholding.” (Code, ¶ 2.2) Note that this definition has been altered in the Combined Code; the last clause pertaining to fees and shareholdings has been dropped. (Code § 1, A.3.2) Ireland’s IAIM Guidelines reference the Combined Code and therefore also support this definition.

Treatment of significant shareholding for purposes of defining independence also varies. In the United Kingdom, where shareholding is relatively widely dispersed, shareholding is not generally viewed as impeding director independence (as indicated in the above quote from the Cadbury Report); some would argue that shareholding aligns directors’ interests with those of the entire shareholding body. Nonetheless, two codes issued by the investor community in the United Kingdom -- the PIRC Guidelines and the Hermes Statement -- would *not* treat as independent a representative of a significant shareholder. (Hermes Statement, ¶ 2.3; PIRC Guidelines, p. 5)

In Portugal, independence is solely defined as being distinct from dominant shareholders. “The inclusion on the board of one or more members who are independent in relation to the dominant shareholders is encouraged, so as to maximise the pursuit of corporate interests.” (Securities Market Commission Recommendations, § 15) In Spain, as noted above, the Olivencia Report defines independence as distinct from both the management team and dominant shareholders. (Olivencia Report, § II.2.1)

Finally, a number of codes, including the Cadbury Report, view the ultimate determination of appropriate board composition and just what constitutes “independence” to be an issue for the supervisory body itself to determine.

TABLE U
DISCRETION RE: INDEPENDENCE
<p><i>Policy makers and regulators should encourage some degree of independence in the composition of corporate boards. Stock exchange listing requirements that address a minimal threshold for board independence . . . have proved useful, while not unduly restrictive or burdensome. However, . . . corporate governance -- including board structure and practice -- is not a “one-size-fits-all” proposition, and should be left, largely, to individual participants.”</i> Millstein Report (Perspective 15)</p> <p>“<i>[I]t is up to each board to determine the most appropriate balance in its membership.</i>” Viénot I Report (France) (pp. 11-12)</p> <p>“<i>[E]ach company should determine the number, experience and personal traits of its non-executive directors in relation to its size, the complexity and specific nature of its sector of activity, and the total membership of the board.</i>” Preda Report (Italy) (Code, § 2.2)</p> <p>“<i>The precise number of executive directors and non-executive directors for any company is for its board to determine with the approval of its shareholders.</i>” Hermes Statement (U.K.) (¶ 2.1)</p> <p>“<i>It is for the board to decide whether an independent director satisfies the definition of independence.</i>” Dual Code (Belgium) (§ I.B.2.2)</p> <p>“<i>It is for the board to decide in particular cases whether [the definition of independence] is met.</i>” Cadbury Report (U.K.) (Report ¶ 4.12)</p>

Some of the codes recognise that independence is not simply a matter of absence of certain relationships, but also a matter of approach in fulfilling one’s responsibilities. For example,

the Director's Charter (Belgium) calls on directors to "act independently in all circumstances." (p. 2) The Charter (p. 3) explains:

"The Director undertakes to maintain, in all circumstances, his or her independence of analysis, of decision, and of action; and to reject any pressure, direct or indirect, which could be exercised upon him or her The Director undertakes not to seek or accept . . . any unreasonable advantages that could be considered as compromising his or her independence. In the event that the Director finds that a decision of the Board may harm the company, the Director undertakes to clearly express his or her opposition and to employ all methods to convince the Board of the pertinence of the Director's position."

The Peters Report (Netherlands) takes a similar view, stating that: "Neither hierarchic subordination within an interest group, cross bonds nor any other relations with persons under their supervision should prevent members of the Supervisory Board from performing their duties independently." (§ 2.11)

f. SUPERVISORY BODY LEADERSHIP

The role of the chair of the supervisory body is similar in unitary and two-tier board systems: Generally it is to lead and organise the work of the supervisory body. (As expressed succinctly by the draft Cromme Commission Report, "[t]he chairman of the supervisory board co-ordinates work within the supervisory board and chairs its meetings." (§ V.2))

In two-tier board systems, the distinct supervisory and management boards each have their own separate leadership. (However, it is not uncommon for a retired senior executive to become the chairman of the supervisory board, which may raise issues of independence.)

In unitary board systems, it is not unusual for the chairman of the board of directors to also serve simultaneously as an executive of the company, often the senior-most executive. Many commentators have viewed this leadership structure as impeding the supervisory ability of the unitary board: if the leader of the supervisory body is also the leader of the managerial body under supervision, he or she faces a significant conflict of interest. Therefore some codes advocate separation of the leadership roles to increase the distinction between the roles, and the independence of the unitary board, and to eliminate a source of conflicts.

Thus, the Dual Code (Belgium) emphasises the need for "a clear division of responsibilities at the head of a company to ensure a sound balance of power and authority." (§ I.B.1.3) In Sweden, the chairman of the unitary board is a non-executive director by law. The Swedish Shareholders Association Policy emphasises this separation. (§ 2.1) And the Mertzanis Report (Greece) supports separating the roles. (§ 5.5)

In the United Kingdom, it had been traditional to combine the Chairman and CEO positions in a single individual. However, in 1992, the Cadbury Report called for separating the roles to balance power and authority, and to ensure that no one individual had unfettered authority: "Given the importance and particular nature of the chairman's role, it should in principle be separate from that of the chief executive." (Cadbury Report, Report ¶ 4.9) Several years later, the Hampel Report reiterated (in Guideline 3.17) the importance in principle of separating the roles, but seemed to give more room for flexibility:

“We agree with Cadbury’s recommendation and reasoning, and we also note that in the largest companies these may be two full-time jobs. But a number of companies have combined the two roles successfully, either permanently or for a time. Our view is that, other things being equal, the roles of chairman and chief executive officer are better kept separate, in reality as well as in name. Where the roles are combined, the onus should be on the board to explain and justify the fact.”

The Combined Code, now linked to listing rules of the London Stock Exchange, advocates separation: “There are two key tasks at the top of every public company -- the running of the board and the executive responsibility for the running of the company’s business. There should be a clear division of responsibilities at the head of the company which will ensure a balance of power and authority, such that no one individual has unfettered powers of decision.” (Principle A.2) “A decision to combine the posts of chairman and chief executive officer in one person should be publicly justified.” (Code § 1, A.2.1)

The PIRC Guidelines go a step further and call for not only separation but for the chairman to be drawn from the non-executive directors. This would give the non-executive directors a formal leader to look to for authority on the board. (pp. 4 & 6)

In France, for decades the law applying to unitary boards has required that the leadership positions be combined. The Viénot II Report (France) suggested that the law be changed to allow greater flexibility in the unitary board system to allow corporations to choose between combining or separating the offices of chairman and chief executive officer. (p. 6) This suggestion has since been embodied in legislation promulgated in May 2001.

In contrast, the Preda Report (Italy) and the Olivencia Report (Spain) both state that the common practice in each country is for the roles to be combined, that measures are called for to balance the power of the chairman/CEO, but that separating the roles is not among them. (Preda Report, 5.2; Olivencia Report, 3.2)

Note that, in the U.K., the earlier Cadbury Report suggested that independent directors should be relied on more heavily if the roles of Chairman and CEO are combined: Specifically, it recommended that where the Chairman is also the CEO “it is essential that there should be a strong and independent element on the board.” (Code ¶ 1.2) However, the Combined Code does not make this distinction. It states (Code § 1, A.2.1):

“Whether the [chairman and CEO] posts are held by different people or by the same person, there should be a strong and independent non-executive element on the board, with a recognised senior member other than the chairman to whom concerns can be conveyed. The chairman, chief executive officer and senior independent director should be identified in the annual report.”

5. THE WORKING METHODS OF SUPERVISORY & MANAGERIAL BODIES.

a. BOARD MEETINGS & AGENDA

The frequency with which the supervisory body meets varies considerably among companies incorporated in the Member States. According to available data, on average, Italian boards appear to meet most frequently and German supervisory boards meet least frequently, as indicated in Table V.

TABLE V	
AVERAGE NUMBER OF SUPERVISORY BODY MEETINGS*	
Nation	
Austria	n.a.
Belgium	7.15
Denmark	n.a.
Finland	n.a.
France	6.8
Germany	4.97
Greece	n.a.
Ireland	n.a.
Italy	11.8
Luxembourg	n.a.
Netherlands	7.25
Portugal	n.a.
Spain	10.1
Sweden	8.2
United Kingdom	8.65
Average 2001	8
Average 1999	6.8
* Heidrick & Struggles European Survey (2001).	
n.a. indicates that the information is not available from the sources cited.	

A number of the codes address the need for supervisory bodies to meet regularly to discharge their responsibilities. However, a fairly wide variation in meeting frequency is apparent, with German supervisory bodies meeting about five times per year, and Italian supervisory bodies meeting almost twelve times per year. The European average is about eight meetings per year. (According to the Heidrick & Struggles 2001 European Survey, this represents an eighteen percent (18%) increase in the number of meetings since 1999.)

The EASD Principles & Recommendations (pan-European) state that the board must meet at least once every six months and preferably at least once every three months. (Recommendation V.5.a.i.) The Viénot I Report (France) notes that listed company boards meet three or four times per year (p. 16), and the subsequent Viénot II Report observes that the number of board meetings “seems to have increased substantially in recent years, though without reaching the level of . . . U.K. and U.S. listed corporations.” (p. 16) The Berlin Initiative Code notes that supervisory boards normally meet six times a year in Germany, but extraordinary events may require a greater number of meetings. (§ IV.5.1) The Mertzanis Report (Greece) calls for board meetings at least once a month, depending on the company’s size and business sector. (§ 5.1)

Generally, the role of the supervisory body chairman involves co-ordinating the board’s activities, setting agendas and calling and moderating meetings. As to setting the supervisory

body's agenda, a number of the codes indicate that the chairman has primary responsibility, but all directors should have an opportunity to propose agenda items. For example, the EASD Principles & Recommendations (pan-European) indicate that agenda setting is typically the role of the chairman, but every director should have the right to propose items, and the board itself should determine for itself appropriate subjects for the agenda: "The board should define the subjects that it must consider, as well as the decisions that require its approval, and set levels of materiality for them, subject to legal and statutory constraints." (Recommendation V.5.b) The Berlin Initiative Code similarly provides that the chairman of the supervisory board sets the agenda for individual meetings, based on "a schedule of supervision that stipulates the sequence and main focus of the topics . . . to be discussed in the individual meetings. . . ." (§ IV.5.4)

b. INFORMATION

In every EU Member State the supervisory body relies on the managerial body for the information it requires to perform its duties. Obtaining the requisite information is a key theme of the codes: Supervisory body members need to receive sufficient information in a timely fashion to be prepared for board discussions. (*e.g.*, Director's Charter (Belgium), p. 4)

According to the Olivencia Report (Spain), it is the role of the chairman to ensure that members receive necessary information. (§ II.3.2) Codes from Belgium, France, Italy and the United Kingdom agree. (Dual Code (Belgium), § I.B.1.7; Viénot I Report (France), p. 17; Preda Report (Italy), Report § 4.1; Combined Code (U.K.), Code § 1, A.4.1) The EASD Principles & Recommendations (pan-European) are also in accord, and add that background information should be provided in advance of board meetings and should be of a clear, sufficient, relevant and timely nature. (Recommendations V.3.1.iv & V.5.e.iii) This theme is reiterated in other codes.

The draft Cromme Commission Code (Germany) states that providing adequate information to the supervisory board is a joint responsibility of both the supervisory and managerial bodies. (§ III.4) However, it goes on to place heavy emphasis on the role of the supervisory body chairman in maintaining regular contact with the chairman or spokesperson of the management board. In addition to being consulted regularly on strategy, business development and risk management, the supervisory board chairman "will be informed by the chairman or spokesman of the management board without delay of unusual events which are of essential importance for the assessment of the situation and development as well as for the management of the enterprise. The chairman of the supervisory board shall then inform the supervisory board and, if required, convene an extraordinary meeting of the supervisory board." (§ V.2)

The Berlin Initiative Code emphasises that the management board has an obligation to render information and the supervisory board an obligation to collect or obtain the information it requires. "The main responsibility for this lies [with] the management board as a result of the asymmetry of knowledge of both organs." (Berlin Initiative Code, § II.2.1) However, some codes indicate that supervisory body members cannot be passive. "[W]hen directors believe that they have not been put in a position to make an informed judgement, it is their duty to say so at the board meeting and to demand the information they need." (Viénot I (France) p. 17; *accord*, Viénot II (France), p 16; Olivencia Report (Spain), § II.6.1; Combined Code (U.K.), Code § 1, A.4.1)

Finally, a number of codes discuss the need for supervisory board members to treat as confidential the information they receive as board members. For example, the Cardon Report, now part of the Dual Code in Belgium, states: “Directors cannot use the information obtained for other purposes than for the exercise of their mandate. They have an obligation of discretion relating to the confidential information received in their capacity as a director.” (Dual Code (Belgium), § I.B.1.7; *accord*, Director’s Charter (Belgium), p. 7; Preda Report (Italy), Code § 6.2)

c. SUPERVISORY BODY COMMITTEES

It is fairly well accepted in law that many supervisory body functions may be delegated, to at least some degree, to board committees. The codes reflect a trend toward reliance on board committees to help organise the work of the supervisory body, particularly in areas where the interests of management and the interests of the company may come into conflict, such as in areas of audit, remuneration and nomination. While recommendations concerning composition of these committees may vary, the codes generally recognise that non-executive and, in particular, independent directors have a special role to play on these committees. Properly composed committees are viewed as a means of providing an objective judgement on key issues in which members of management may have a personal interest, such as financial reporting and audit, nomination of supervisory body members and remuneration of executives.

The OECD Principles explain (in Annotation to OECD Principle V.E.1) the rationale for supervisory body committees that are at least partially comprised of non-executives:

“While the responsibility for financial reporting, remuneration and nomination are those of the board as a whole, independent non-executive board members can provide additional assurance to market participants that their interests are defended. Boards may also consider establishing specific committees to consider questions where there is a potential for conflict of interest. These committees may require a minimum number, or be composed entirely of, non-executive members.”

Similarly, the EASD Principles & Recommendations (pan-European) advocate that a majority of independent directors serve on board committees where there is a potential for conflicts of interest. (Recommendation VI.4.a)

The Dual Code (Belgium) calls for nomination and remuneration committees to include a majority of non-executive directors, and for the audit committee to consist of at least three non-executive directors. (§§ I.B.2.4, I.B.3.2 & I.B.4.3) The Viénot II Report (France) recommends that independent directors account for at least one third of the audit and nomination committees and make up a majority of the compensation committee. (p. 15) The Berlin Initiative Code (§ IV.3.4) and the German Panel Rules (§§ III.1.b & III.3) also favour the use of supervisory board committees for nominating, audit and remuneration functions -- and the German Panel Rules generally discuss the need to consider director independence in decisions on committee membership. They propose other committees as well.

The Securities Market Commission Recommendations (Portugal) (§ 17) supports the use of committees for issues involving potential conflicts -- including nomination, remuneration, and corporate governance. The Recommendations also contemplate an executive committee representing a balance of directors linked to dominant shareholders and minority

shareholders. (§ 16) The Olivencia Report (Spain) is similar, although it also calls for an audit committee, and it specifies that the audit, nomination, remuneration and governance committees should be made up solely of outside directors. (§§ III.7 & III.8)

Other codes are less explicit on committee composition. The Danish Shareholders Association Guidelines (§§ I & II) and the Ministry of Trade & Industry Guidelines (Finland) (§ 2.2.1), discuss the use of nomination, audit and remuneration committees but do not specify the use of non-executive or independent directors.

Note that the Swedish Shareholders Association advocates that the shareholders general meeting “take the initiative” for setting up nomination, audit and remuneration committees. (§ 1.2) It further specifies that the majority of the nomination committee should be representatives of the shareholders and that the chairman of the board should serve on the committee, while employees of the company should not. (§ 1.2.1) Moreover, like many other codes, it recommends that the audit committee should be made up of directors who are not employees, and it should have at least three members. (§ 1.2.2)

Note that the functioning and composition of the audit committee receives significant attention in most guideline and code documents because of the key role it plays in protecting shareholder interests and promoting investor confidence. (The audit function and internal/external control systems are discussed in greater length in Section III.D.7, below.)

6. REMUNERATION OF SUPERVISORY & MANAGERIAL BODIES.

a. EXECUTIVE REMUNERATION

Determining the compensation of senior executives is generally viewed as a key supervisory body function. A number of codes recommend that remuneration principles and their application should be transparent to shareholders.

As noted by the OECD Principles and other codes, executive remuneration is an issue in which the personal interests of members of management may diverge from the interests of the company and its shareholders. Therefore, most codes suggest a supervisory body committee including non-executives consider and make recommendations to the full board on this topic. (See discussion above in Section III.D.5.c)

The Combined Code (U.K.) advocates that companies establish a formal and transparent procedure for developing policy on executive remuneration and for fixing the remuneration packages of executives. (Principle B.2)

Many codes discuss the need to align executive remuneration with company performance, or the interests of the company and its shareholders. For example, the Combined Code (U.K.) advocates structuring a proportion of executive remuneration “so as to link rewards to corporate and individual performance.” (Principle B.1) The Dual Code (Belgium) states that it is good practice for part of the executive pay to be related to company performance or value. (§ I.B.3.1) The Danish Shareholders Association Guidelines agree: remuneration should “to a reasonable extent” depend on profitability and share price development. (§ II) The Preda Report (Italy) emphasises also that compensation should be linked if possible to achievements of specific objectives set by the board. (Code, § 8.2) The German Panel Rules call for management compensation to “include sufficient motivation to ensure long-term corporate value creation, . . . [including] share option programs and performance-related

incentives related to the share price development and the continuing success of the company.” (§ II.3.a)

The IAIM Guidelines (Ireland) recognise the benefits of share option and incentive schemes. The Guidelines note that when voting in favour of such schemes at companies held in their portfolios, institutional investors should consider whether enhanced corporate performance and return to their clients is likely to be achieved. (Introduction)

The Ministry of Trade & Industry Guidelines (Finland) recommend that the annual report include “[i]nformation on the principles followed when deciding on the salaries and other bonuses of company management.” (§ 2.2.2) France’s Hellebuyck Commission Recommendations also advocate disclosure of such information, including the existence of any stock options. (§ II.C.3)

b. NON-EXECUTIVE REMUNERATION

The general principles emphasised by the codes and discussed above generally apply as well to remuneration of non-executive supervisory body directors. Note that supervisory bodies usually determine -- or propose to the shareholders general meeting -- the compensation of non-executive directors. A number of codes recommend that such decisions be transparent to shareholders.

The major distinction between remuneration of executive and non-executive directors (aside from pay levels) is that a number of codes recommend against non-executive participation in stock option and pension plans out of concern that these may create improper incentives. For example, the EASD Principles & Recommendations (pan-European) state that “[i]t is not improper for independent board members to own some shares of the company, but they should not participate in stock option or pension plans. Nevertheless, stock options may be acceptable in early-stage companies, before they are listed.” (Recommendation VI.3.a - d)

Other codes agree that stock options for members of the supervisory body should not be granted. (*e.g.*, Recommendations of the Federation of Belgian Companies (Note to § 2.2); Dual Code (Belgium) (§ I.B.2.1)) The Berlin Initiative Code emphasises that stock options or other remuneration related to stock market value are not available to supervisory board members as a matter of German law. (§ VI.7.3)

The Peters Report (the Netherlands) disfavours stock options as a form of supervisory board compensation and states: “The remuneration of supervisory board members should not be dependent on the results of the company.” (§ 2.13) Likewise, the Swedish Shareholders Association Policy emphasises that incentive programmes should not extend to outside board members, since it is these board members who are charged with forwarding the proposals on incentive programmes to the shareholders for consideration. (§ 3.3.2)

The Olivencia Report (Spain) is less absolute, favouring incentive schemes generally, but “particularly those [for] executive directors. . . .” (§ II.7.3) The Combined Code (U.K.) expressly favours pay-for-performance for directors, but does not discuss pay-for-performance for non-executives, which may imply that it is not favoured. (Principle B.1) The Hermes Statement (U.K.) expressly disfavours participation in performance-related pay or incentive schemes such as stock options, but favours shareholding by directors -- as do a number of other codes. The Hermes Statement suggests paying non-executive directors

partly in shares, with a requirement that the shares be held while serving as a director. (Appendix 1, ¶ 1.4)

c. MANAGERIAL BODY EVALUATION

Many of the codes view CEO and management performance evaluation as central to the role of the supervisory body, often linked to remuneration decisions. Several codes indicate that to facilitate open discussion on sensitive issues involving management, the non-executive members of the supervisory body (or committees comprised of non-executive directors) should meet occasionally without members of management present. (See, *e.g.*, Ministry of Trade & Industry Guidelines (Finland), 2.2.1; Berlin Initiative Code, IV.5.3; Peters Report (Netherlands), Recommendation 3.5; Hermes Statement (U.K.), Appendix 2, ¶ 3; PIRC Guidelines (U.K.), Part 2: Directors, p. 5.)

The Berlin Initiative Code calls for the individual performance of the chairman of the management board and all other members of the management board “to be systematically evaluated annually by the [supervisory board’s] personnel committee.” In this evaluation, “the target-orientated development of the company and individual contributions made by management board members provide the scale for making the assessment.” (§ II.1.10) If “performance falls short of reasonable expectations contracts are not renewed. Serious deficiencies in performance and mistakes lead as compelling grounds to premature dismissal.” (§ II.1.11) In contrast, the German Panel Rules simply provide that “compensation elements shall be determined by systematic performance evaluation of the individual Management Board members [by the Supervisory Board’s personnel committee].” (§ III.3)

The IAIM Guidelines (Ireland) emphasise the role of the remuneration committee in selecting appropriate performance measures for evaluating and remunerating the CEO and other executive directors. It should “satisfy itself that relevant performance measures have been fully met.” (§ 1) The Preda Report (Italy) also indicates that evaluation of management is an issue for the remuneration committee in the first instance. (Code, § 8.1)

d. SUPERVISORY BODY EVALUATION

Several codes discuss evaluation of the supervisory body itself. As noted in the OECD Principles: “[T]o improve board practices and the performance of its members, some companies have found it useful to engage in . . . voluntary self-evaluation . . .” (Annotation to OECD Principle V.E.2) The EASD Principles & Recommendations (pan-European) suggest that boards establish evaluation procedures and disclose their existence. (Recommendation V.6) The Viénot I & II Reports and the Hellebuyck Commission Recommendations, all from France, are in accord. As the Viénot II Report (pp. 14-15) explains:

“It is . . . fundamental for the proper practice of corporate governance that the board should evaluate its ability to meet the expectations of the shareholders having appointed it to manage the corporation, by reviewing periodically its membership, its organisation, and its operation (implying an identical review of the board committees). The committee considers that this review should be reported to the shareholders in the annual report.”

The Berlin Initiatives Code is similar: “The supervisory board subjects its activities to systematic evaluation at regular intervals in order to continually improve them.” (§ IV.2.6) Moreover, “[i]f the work of a member of the supervisory board displays serious flaws, it is the supervisory board that causes him to be removed.” (§ IV.4.3) It emphasises that “[r]egular evaluation promotes continuous improvement in the corporate governance of a company.” (Thesis 10)

Other codes discussing issues of evaluation include the Preda Report (Italy) (Report § 5.1), the Peters Report (the Netherlands) (§§ 2.7 & 2.8), the Olivencia Report (Spain) (§ III.10 & Report §§ II.4.5 & II.5.4), the Swedish Shareholders Association Guidelines (§§ 2.2 & 2.3), and the Hampel Report (U.K.) (Guideline 3.13).

7. THE ORGANISATION & SUPERVISION OF INTERNAL CONTROL SYSTEMS

In recent years, the organisation and supervision of internal control systems relating to financial reporting and risk assessment and control has gained considerable attention.

Codes issuing in (or relevant to) EU Member States tend to place heavy emphasis on the financial reporting obligations of the company, as well as on board oversight of the audit function. This is because these are key to investor confidence and the integrity of markets. Indeed several of the codes were drafted out of concern about financial reporting. (*e.g.*, Cadbury Report (U.K.) & Turnbull Report (U.K.)) Also, in the United Kingdom the Combined Code and the Turnbull Report have placed special emphasis on the board’s role in assessing and controlling risk, including ensuring that appropriate internal control systems are in place.

The Combined Code and the Cadbury and Hampel Reports contain lengthy and significant discussion on the issue of financial reporting and internal control systems, as does the Turnbull Report, which gives further guidance on how to comply with the Combined Code. According to Principle D.2 of the Combined Code, “[t]he board should maintain a sound system of internal control to safeguard shareholders’ investment and the company’s assets.” This requires that directors review the effectiveness of internal controls -- including financial, operational and compliance controls, and risk management -- at least annually and report to shareholders. The Turnbull Report (¶ 12) further explains:

“Effective financial controls include the maintenance of proper accounting records. They help prevent exposure to avoidable financial risks and ensure that financial information both within and without the business is reliable. They also help safeguard assets, including the prevention and detection of fraud.”

The Turnbull Report emphasises that the board is responsible for the system of internal control and management is responsible for implementing board policies on risk and control. (¶¶16, 18) The AUTIF Code (U.K.) encourages its member firms, who are investors, to pay close attention to the way companies held in their portfolios comply with these recommendations. (Note on Key Principle 5).

The Preda Report (Italy) (Code, §§ 9.2 & 9.3) notes that the internal control system is charged with the actual tasks of ensuring compliance and identifying financial and operational risks. Those running the internal control system report directly to supervisory

body members who have been delegated the oversight responsibility, as well as to the members of the board of auditors.

The Peters Report (the Netherlands) emphasises that, at minimum, the management board should report to the supervisory board on its assessment of the functioning and structure of the internal control systems that are designed to reasonably assure financial information reliability. (§ 4.3) The Ministry of Trade & Industry Guidelines (Finland) advocate disclosure in the annual report about the resources available to the internal auditing system and how it is operating. (§ 2.1.2)

As discussed in Section III.D.5 above, the use of audit committees comprised of at least some non-executive -- often including independent -- directors are heavily emphasised by codes as a means of reducing the potential for management conflict in issues of financial reporting and external controls.

Many codes discuss the need for integrity in financial reports and for high quality audit and accounting standards to be applied. They also discuss the related need for an annual audit by an independent auditor, as a means of ensuring the accuracy of financial reports and disclosure. In most instances this is viewed as a supervisory body task. For example, the EASD Principles & Recommendations (pan-European) discuss the supervisory body's role in ensuring that financial disclosure be performed under high-quality internationally accepted accounting and audit standards. (Recommendations VIII.4, VIII.5 and VIII.6) The OECD Principles are consistent (OECD Principles IV.B & IV.C and Annotation), as is the Dual Code (Belgium), which notes: "Integrity demands that the financial reports and other information disseminated by the company present an accurate and complete picture of the company's position. . . . [T]he responsibility of the board of directors chiefly relates to the quality of the information it provides to shareholders." (Part I: A.7)

The Mertzanis Report (Greece) provides: "The Board of Directors has the responsibility . . . for . . . [t]he consistency of disclosed accounting and financial statements, including the report of the (independent) certified accountants, the existence of risk evaluation procedures, supervision, and the degree of compliance of the corporation's activities to existing legislation." (§ 5.3.4)

France's Viénot I Report (pp. 18-19) agrees that ensuring financial statement reliability is a key component of the supervisory body's duties:

"The Committee recommends that each [supervisory body] should appoint an advisory committee principally charged with ensuring the appropriateness and consistency of accounting policies applied in consolidated and company financial statements, and with verifying that internal procedures for collecting and checking information are such that they guarantee its accuracy. The advisory committee's task is not so much to examine the details of financial statements as to assess the reliability of procedures for their establishment and the validity of decisions taken concerning significant transactions."

The Euroshareholders Guidelines (pan-European) (Recommendation 6) and the Danish Shareholders Association Guidelines (§ I) both call for independent auditors to be elected by the shareholders. (Such a requirement is embedded in law in many nations.)

IV. CODE ENFORCEMENT & COMPLIANCE

A. ENFORCEMENT MECHANISMS

As has been observed time and again, one size does not fit all when it comes to effective corporate governance practices. How a company applies fundamental principles of good governance can and should vary according to company size and organisational complexity, shareholding structure, corporate life cycle maturity and myriad other factors. Moreover, ideas about just what constitutes good corporate governance are continually evolving, as evidenced by the changes in the past ten years. Therefore, policy makers need to provide corporations with a range of flexibility for determining appropriate governance practices, within a legal framework that mandates minimum requirements. It has been suggested that this legal framework for corporate governance is most effective if aimed primarily at ensuring: fair and equitable treatment of shareholders; managerial and supervisory body accountability; transparency as to corporate performance, ownership structure and governance; and corporate responsibility. (This is the regulatory perspective expressed in the Millstein Report (1998) and the subsequent OECD Principles of Corporate Governance (1999).) As suggested by Goldschmidt (2000), to at least some extent, one can equate the regulatory approach for corporate governance in a market system to the subsidiarity principle applicable in the European Union: regulate only that which is necessary and do so at the most local level possible.

The “soft regulation” of codes is in keeping with this regulatory philosophy. By definition, the codes analysed in this Study attempt to establish standards for improved corporate governance largely through entreaty. Code prescriptions supplement -- and complement -- the mandatory prescriptions provided by company and securities laws and listing rules. However, they are non-imperative, lacking mandatory compliance authority as to their prescriptions regarding specific governance structures and practices.

This does not mean, however, that these codes lack force and effect. Even though compliance with substantive code provisions is wholly voluntary, reputational and market forces, together with heightened disclosure, can result in significant compliance pressures, depending on the status of the issuing body, and the degree of information on compliance available to the market. Moreover, the exercise of establishing a code helps focus the attention of companies and investors on governance issues. Codes have proven highly effective in stimulating discussion of corporate governance issues. They help educate the general public and investors about governance-related legal requirements and common corporate governance practices. They may also assist to prepare the ground for changes in securities regulation and company law, where such changes are deemed necessary. Moreover, codes are increasingly being used by investors and market analysts and commentators to benchmark supervisory and management bodies. All of this works to encourage companies to adopt widely-accepted governance standards.

1. VOLUNTARY DISCLOSURE & THE MARKETS

The vast majority of codes call on companies to provide greater disclosure -- voluntarily -- of corporate governance practices, including in some instances, disclosure about the extent of compliance with a particular code. This focus on disclosure is generally designed to provide the market with more information to enable investors to assess governance along with other criteria in their buy, sell, hold and voting decisions.

Invariably, the codes rely on the market as an important mechanism for encouraging code compliance. This may be especially (but not solely) true as to codes emanating from the investor community. Many of these codes indicate that compliance with code recommendations will be considered by investors affiliated with the issuing body in investment and shareholder voting decisions. But even as to codes issuing from non-investor related bodies, market forces may provide impetus for compliance, especially where compliance efforts are broadly and widely disclosed or surveyed.

In theory at least, companies that do not respond to expectations both as to increased disclosure and reform of actual governance practices may become less attractive to investors. While the theory has yet to be definitively proven, in many Member States shareholder monitoring groups and rating agencies are benchmarking companies, and publicising corporate governance successes and failures. Moreover, as discussed below, surveys that have been conducted on the application of existing codes indicate that companies are changing their practices, albeit at varying paces.

2. DISCLOSURE ON A “COMPLY OR EXPLAIN” BASIS

Several codes rely on a mandatory disclosure requirement to encourage compliance, usually through linkage of the code to listing rules. Listed companies are required to disclose whether they comply with the specified code and explain any deviations. Linking codes to a disclosure requirement on a “comply or explain” basis is a means of encouraging adoption of specific corporate governance practices without mandating actual practices. Yet it recognises that disclosure alone has a significant coercive effect. To avoid lengthy explanation, many companies may consider compliance except as to those few points on which they believe they have strong justification for deviation. (Disclosure provides information to the market. Companies that do not comply with some provisions may well assess whether the market is likely to agree with the justification.)

The Cadbury Report was the first code to suggest disclosure on a “comply or explain” basis as a means of encouraging companies to follow best practice recommendations. The London Stock Exchange required listed companies to include a statement of compliance with the Cadbury Code of Best Practice in reports and accounts for reporting periods ending after June 30, 1993. In 1998, the London Stock Exchange Committee on Corporate Governance combined elements of the Cadbury Report with recommendations from the Greenbury Commission and the Hampel Commission in the Combined Code. Section 1 of the Combined Code was introduced into the listing rules of the London Stock Exchange on a disclosure basis in June 1998.

A company listed on the London Stock Exchange (and incorporated in the U.K.) is now required to include in its annual report and accounts a narrative statement of how it applies the principles set out in Section 1, with sufficient explanation to enable shareholders to evaluate how the principles have been applied. Pursuant to London Stock Exchange Rule § 12.43.A(b), it must also state:

“whether or not it has complied throughout the accounting period with the Code provisions set out in Section 1 of the Combined Code. A company that has not complied with the Code provisions, or complied with only some of the Code provisions or (in the case of provisions whose requirements are of a continuing nature) complied for only part of an accounting

period, must specify the Code provisions with which it has not complied, and (where relevant) for what part of the period such non-compliance continued, and give reasons for any non-compliance. . . .”

The company’s statement must be reviewed by the auditors before publication as it relates to certain provisions of the Combined Code. The auditors’ report on the financial statements must also cover certain of the required disclosures.

Even with the “official” status of the Combined Code in the U.K. due to its relation to Listing Rules, there is still impetus for other types of codes in the U.K. For example, the investor codes that have been issued in the U.K. -- in particular the PIRC Shareholder Voting Guidelines and the Hermes Statement -- urge companies to adopt best practices in addition to, and frequently more rigorous than, those advocated by the Combined Code. (For example, the PIRC Shareholder Voting Guidelines contain a definition of director “independence” that is considerably stricter than the Combined Code’s definition.)

The only other code currently connected to a mandatory disclosure requirement concerning code compliance is the Preda Report (Italy). However, the IAIM Guidelines (Ireland) recommended a mandatory disclosure requirement and such a requirement has been adopted by the Irish Stock Exchange (essentially requiring disclosure against the Combined Code). In addition, it is anticipated that the Cromme Commission Code (Germany) -- now in draft form but expected in final form in February 2002 -- will be linked to a mandatory compliance disclosure requirement through the Transparency and Disclosure bill (to become law in August 2002). Note that several codes that recommended mandatory disclosure or were at one time linked to such a requirement are not currently linked to a compliance disclosure requirement. In addition to the several U.K. codes that have been superseded by the Combined Code, these include the Mertzanis Report (Greece), and the EASD Principles and Recommendations.

B. EVIDENCE OF COMPLIANCE

Efforts have been made to varying degrees in Member States to determine to what extent companies comply with code recommendations. This information would appear easier to collect where disclosure about compliance with a code mandated. However, a number of reports have been issued based on wholly voluntary disclosure. Whether disclosure of compliance is mandated or not, companies tend to respond to code recommendations, albeit to varying degrees.

The United Kingdom has among the longest experiences with codes, and certainly with mandated disclosure on code compliance. A number of reports have been issued analysing the way the Cadbury Report and later, the Combined Code, are applied in practice. In May 1995, the Committee on the Financial Aspects of Corporate Governance issued a report entitled “Compliance with the Code of Best Practice.” This review of disclosures from the top 500 listed companies, plus a one in five random sample of other listed companies, found that every company report contained the required compliance statement. (In only one case did an auditor find the statement inadequate for not specifying areas of non-compliance.)

The Committee concluded:

- “All listed companies whose accounts have been examined are complying with the London Stock Exchange listing requirement to make a statement in their report and

accounts on the extent of their compliance with the Code of Best Practice. Statements of full compliance are most likely to be made by companies in the top 500, whilst the smaller the company the higher the percentage of statements disclosing limited compliance.”

- “Although not a requirement of the Code, the majority of companies have split the roles of Chairman and Chief Executive, and where the roles are combined, there is more often than not an independent element of non-executive directors on the board, as recommended in the Report. There is a relationship between the size of a company and the number of non-executives on the board, with the larger companies most likely to have three or more. There has been a marked increase in the disclosure of Audit, Nomination and Remuneration Committees since the publication of the Code. The larger the company, the more likely it is to have three or more non-executive directors on the Audit Committee, but there has also been an increase in the disclosure of Audit Committees comprising two-non-executives, particularly in smaller companies.”
- “The majority of companies of all sizes have boards on which all or the majority of non-executive directors are independent. The larger the company, the more likely it is to have three or more independent non-executives on the board.”
- “While larger companies have disclosed compliance with the requirement to have formal terms of appointment for non-executive directors, such disclosure decreases in relation to company size. However, high levels of compliance with both the requirement to have a schedule of matters reserved to the board and to have an agreed procedure for independent advice were found in companies of all sizes. There is a higher incidence in all the sample groups of rolling as opposed to fixed-term three-year contracts. The incidence of contracts in excess of three years (either rolling or fixed-term) is very low.”

(Report of the Committee on the Financial Aspects of Corporate Governance (Cadbury Committee), “Compliance with the Code of Best Practice,” p. 13 (May 24, 1995))

According to the Financial Services Authority (“FSA”), which is charged with ensuring Listing Rule Compliance, the extent to which listed companies make required disclosures in line with the Combined Code is one of the items that is regularly reviewed on a sample basis. Although the quality of the information provided can vary from company to company, the FSA views the quality of disclosure as generally high. As to sanctions for non-compliance, companies are subject to public censure or a fine. It appears, however, that the FSA addresses the few instances of substandard disclosure through private exhortation to remit the required information.

In Italy, another Member State with a mandatory disclosure requirement, the Stock Exchange has recently announced that it will post company disclosures on compliance with the Preda Report on the Internet. The Exchange is reportedly studying such disclosures to determine whether to update the Report.

The Peters Report (the Netherlands) requested that listed companies disclose compliance with its recommendations in their annual reports. However, it does not have a mechanism to mandate compliance with its disclosure request. According to an official monitoring survey, “Monitoring Corporate Governance in Nederland,” published by the Tilburg Economic Institute in 1998 (the year following issuance of the Peters Report), only fifty-five percent (55%) of companies fully disclosed the requested information. Another thirty-six percent (36%) selectively provided the information. The Tilburg survey indicated that companies

generally complied more readily with provisions relating to supervisory board processes than with provisions relating to shareholder rights.

The Belgian Banking & Finance Commission has also conducted surveys of compliance with its recommendations. Its 1998 survey -- *Etudes et Documents No. 5* (October 1998) -- concluded that corporate governance disclosure was noticeably improved. Approximately fifty-five percent (55%) of companies introduced in their 1997 annual report, a special section on corporate governance. Disclosure about corporate governance was noticeably more prevalent among the BEL-20. A full eighty percent (80%) of these companies included such a section in their 1997 annual reports. Note, however, that only six percent (6%) of companies provided more than twenty specific items of corporate governance information out of a possible thirty. Thirty-six percent (36%) provided information on fewer than six elements. According to the 1999 follow-up survey -- *Etudes et Documents No. 10* (November 1999) -- corporate governance disclosure increased further in 1998 annual reports. Eighty-seven percent (87%) of companies included a section on corporate governance. This included ninety-five percent (95%) of BEL-20 companies. The amount of information disclosed was expanded as well. The survey found that just over twenty-seven percent (27.5%) of listed companies providing a fairly substantial amount of information.

In a review of Portuguese listed corporations' annual accounts and reports for 2000, the *Comissao do Mercado de Valores Mobiliários* ("CMVM") found that seventy percent (70%) of the companies listed on the Market with Official Quotations voluntarily disclosed (as recommended) information on compliance. However, less than thirty-two percent (31.7%) of the companies providing disclosure (or just over twenty-three percent (23.2%) overall) "categorically state" that they comply with the CMVM Recommendations as to corporate governance structure and practice. In a similar review for 2001, the CMVM found continued improvement in both disclosure and the stated extent of compliance.

In Spain, the regulatory authority (*Comisión Nacional del Mercado de Valores*) reviewed 1998 compliance with the *Olivencia Report* and determined that compliance was considerable given that the recommendations are wholly voluntary. ("*Análisis de los Resultados del Cuestionario sobre el Código de Buen Gobierno Relativo al Ejercicio*," 1999) Note that in Spain, many listed companies have issued their own corporate governance guidelines, and often include them in the annual report.

Similarly, in France, the *Commission des Opérations de Bourse* has issued several reports about corporate governance compliance, including *Bulletin COB n° 352* (December 2000) and *Bulletin COB n° 338* (September 1999).

In addition to these official surveys of compliance, in some EU Member States, various entities -- on their own initiative -- have conducted unofficial surveys to track compliance in reference to a code. For example:

- In the United Kingdom, the National Association of Pension Funds ("NAPF") has a Voting Issues Service (available to subscribers) that tracks compliance with the Combined Code by the 350 largest listed U.K. companies. According to its most recent study, compliance with the disclosure requirement is high and compliance with substantive provisions of the Combined Code is increasing in many areas. Nevertheless, listed companies remain free to deviate from the Combined Code's substantive recommendations, and many companies have decided to do so, at least in some respect.

- Pensions & Investment Research Consultants (“PIRC”) also publishes an annual survey of compliance with the Combined Code. Recently it observed that some listed companies have not separated the roles of chairman and chief executive and that a number of companies have less than the recommended number of independent non-executive directors (according to PIRC’s own rigorous definition of independence).
- According to Company Reporting (U.K.), an Edinburgh-based accounts analyst with a significant electronic database, in January 2000, only nine percent (9%) of the U.K. listed companies represented on its database fully complied with the substantive recommendations of the Combined Code. The remaining ninety-one percent (91%) tend to cite at least some exception to the recommended practices.
- The Irish Association of Investment Managers (“IAIM”) is reported to be working on a survey of Irish companies to determine whether the independence requirements of the Combined Code are being followed by companies listed on the Irish Stock Exchange.
- In Germany, a survey of the DAX 100 carried out at the end of 2000 found that, although corporate governance is the subject of intense interest, large German listed companies were not yet implementing corporate governance reforms on a wide-scale. (Pellens, Hillebrandt & Ulmer, 2001)

As the monitoring evidence indicates, companies in Member States appear to be responding to varying degrees to code recommendations. It is important to note, however, that the codes tend to express aspirations or ideals. Translation into actual practice can be slow, especially if the aspirations are significantly different from common practice. In such instances, a code may help communicate the need for reform and the benefits that may be associated with reform. Institutional investor support for code recommendations does appear to wear away resistance over time.

V. CONCLUSION

In virtually every EU Member State, interest in articulating generally accepted standards and best practices of corporate governance is evident. Even in the two Member States in which codes have not yet been issued (Austria and Luxembourg), interest is apparent. In one (Austria) code efforts are reported to be underway. One can infer from this broad interest that the quality of corporate governance is viewed as important to the national economies of Member States and to their domestic companies.

The growing interest in corporate governance codes among EU Member States may reflect an understanding that equity investors, whether foreign or domestic, are considering the quality of corporate governance along with financial performance and other factors when deciding whether to invest in a company. An oft-quoted McKinsey survey of investor perception indicates that investors report that they are willing to pay more for a company that is well-governed, all other things being equal. Moreover, the reported size of the premium is greatest in countries perceived to have weakest shareholder protections. (McKinsey Investor Opinion Survey, June 2000) In addition, recent research by Pagano, Röell and Zechner suggests that European markets having the highest trading costs, lowest accounting standards and poorest shareholder protection fare worst in attracting and retaining cross-border listings. In addition, companies from such countries are more likely to seek a foreign listing. (Pagano, Röell & Zechner, 2001)

The corporate governance codes analysed for this Study emanate from nations with diverse cultures, financing traditions, ownership structures and legal origins. Given their distinct origins, the codes are remarkable in their similarities, especially in terms of the attitudes they express about the key roles and responsibilities of the supervisory body and the recommendations they make concerning its composition and practices, as described in more detail below.

A. DIVERGENCE & CONVERGENCE

The greatest distinctions between corporate governance practices in EU Member States appear to result from differences in law and not from differences in recommendations that emanate from the types of codes analysed in this Study. Although a significant degree of company law standardisation has been achieved throughout the European Union, some commentators suggest that the remaining legal differences are the ones most deeply grounded in national attitudes, and hence, the most difficult to change. While substantively there may be different points of emphasis and some Member States may embed more governance requirements in law than do others, the end result is that within all Member States it is recognised that good governance practices are beneficial to listed companies and the markets themselves, as well as to shareholders and other stakeholders. Note also that in each Member State the legal framework provides companies a degree of flexibility to experiment with improving corporate governance practices.

The trends toward convergence in corporate governance practices in EU Member States appear to be both more numerous and more powerful than any trends toward differentiation. The codes -- together with market pressures -- may serve as a converging force, by focusing attention and discussion on governance issues, articulating best practice recommendations and encouraging companies to adopt them.

It is important to note that *the codes tend to express notions of “best practice” -- but translation of best practice ideals into actual practice may take time to achieve*. If the ideals expressed in codes reflect a significant difference from common practice, and the potential benefits of reform efforts are not well communicated and understood, codes may meet with resistance. Investor interest in the codes and investor support for the practices the codes recommend appear to wear away resistance over time.

1. EMPLOYEE REPRESENTATION (CO-DETERMINATION)

The greatest difference among EU Member States relates to the role of employees in corporate governance, a difference that is usually embedded in law. In Austria, Denmark, Germany, Luxembourg and Sweden, employees of companies of a certain size have the right to elect some members of the supervisory body. In Finland and France, company articles *may* provide employees with such a right. In addition, when employee shareholding reaches a certain threshold in France (3%), employees are given the right to appoint one or two directors, subject to certain exceptions. In other EU Member States, it is the shareholders who elect all members of the supervisory body. This results in a fundamental difference among EU Member States in the strength of shareholder influence in the corporation.

Under the law of some Member States, works councils may also have an advisory voice on certain issues addressed by the supervisory body, as in the Netherlands and France. Giving employees an advisory voice in certain issues is one means of engaging employees in governance issues without diluting shareholder influence. Encouraging employee stock ownership is another means of giving employees participatory rights in corporate governance, but without diluting shareholder influence, and is favoured by some codes. Ownership through employee pension funds and other employee stock ownership vehicles could give trade unions, works councils and employees greater involvement in corporate governance as shareholders.

Legislation has been proposed in the Netherlands that would give employees a role in nominating (but not electing) supervisory board members in large companies currently subject to the Structure Act of 1971. This new legislation would give shareholders of structure regime companies the right to elect the supervisory body, a body that is currently self-selecting.

2. SOCIAL/STAKEHOLDER ISSUES

Corporate governance is viewed increasingly as a means of ensuring that the exercise of economic power by the corporate sector is grounded in accountability. Different EU Member States tend to articulate the purpose of corporate governance in different ways: some emphasise broad stakeholder interests and others emphasise ownership rights of shareholders. Although the comparative corporate governance literature and popular discussion tend to emphasise “fundamental” differences between stakeholder and shareholder interests, the extent to which these interests are different can be debated. The majority of the codes expressly recognise that corporate success, shareholder profit, employee security and well being, and the interests of other stakeholders are intertwined and co-dependent. This co-dependency is emphasised even in codes issued by the investor community.

Note that the number of -- and interest in -- social responsibility rankings and indices is growing, bringing direct capital market pressure to bear on corporations for responsible stakeholder relations. Increasingly, investor-related groups are emphasising to portfolio

companies that investors view social responsibility as intertwined with corporate success. For example, the Association of British Insurers, whose members hold approximately 25% of outstanding equity in U.K. companies, has announced that it expects boards to assess risks and opportunities in social, environmental and ethical matters. The Association has reminded that failure to do so may damage corporate reputation and financial well-being. In a related vein, in April 2001, U. K. fund manager Morley announced it would vote against FTSE 100 managements that fail to disclose “comprehensive” reports on environmental records and policies. Similarly, the AFG-ASFFI, the professional association of French fund managers, is asking corporate boards to consider “the concept of sustainable development, social responsibility and the environment.”

Interest in both mandatory and voluntary social issue reporting is growing throughout the EU. In July 2000, a new U.K. regulation was issued requiring investment fund companies to disclose whether they have policies on social investment. The U.K. company law review effort also recommended that boards disclose the impact of major decisions on communities, employees and suppliers. French corporate law was recently amended to require listed companies to disclose in their annual reports how they take into account the social and environmental consequences of their activities, including how they adhere to principles set forth by the International Labour Organisation.

3. SHAREHOLDER RIGHTS & MECHANICS OF SHAREHOLDER PARTICIPATION

The laws and regulations relating to the equitable treatment of shareholders, including minority rights in take-overs, squeeze-outs and other transactions controlled by the company or the majority shareholders, vary significantly among EU Member States. Notice of and participation in shareholder general meetings, and procedures for proxy voting and shareholder resolutions also vary significantly among EU Member States. Such variations in laws and regulations, especially as relates to shareholder participation rights, likely pose barriers to cross-border investment, and may cause a not-insignificant impediment to a single unified capital market in the European Union. (These issues are on the agenda of the High Level Group of Company Law Experts appointed by the European Commission on September 4, 2001.)

To the extent that codes address these issues, they generally call for shareholders to be treated equitably; for disproportional voting rights to be avoided or at least fully disclosed to all shareholders; and for removal of barriers to shareholder participation in general meetings, whether in person or by proxy.

4. BOARD STRUCTURE, ROLES & RESPONSIBILITIES

Another major difference embedded in law relates to board structure -- the use of a unitary versus a two-tier board. In Austria, Germany, the Netherlands, and, it can be argued, Denmark, the two-tier structure is predominant -- with a supervisory board and a distinct executive board of management required for certain types of corporations or corporations of a certain size. In all other EU Member States, the unitary board structure predominates (although in at least five of these countries, the two-tier structure is also available). Note that in several EU Member States, including Finland and Sweden, a board of directors and a separate general manager or managing director may be required. In addition, several Member States have a unitary board of directors and a separate board of auditors. For

purposes of this Study, such variations are categorised as falling under a unitary system (although other commentators may categorise such variations as two-tier).

Notwithstanding formal structural differences between two-tier and unitary board systems, the similarities in actual board practices are significant. Generally, both the unitary board of directors and the supervisory board (in the two-tier structure) are elected by shareholders although, as explained, in some countries employees may elect some supervisory body members as well. Under both types of systems, there is usually a supervisory function and a managerial function, although this distinction may be more formalised in the two-tier structure. And both the unitary board and the supervisory board have similar functions. The unitary board and the supervisory board usually appoint the members of the managerial body -- either the management board in the two-tier system, or a group of managers to whom the unitary board delegates authority in the unitary system. In addition, both bodies usually have responsibility for ensuring that financial reporting and control systems are functioning appropriately and for ensuring that the corporation is in compliance with law.

Each system has been perceived to have unique benefits. The one-tier system may result in a closer relation and better information flow between the supervisory and managerial bodies; the two-tier system encompasses a clearer, formal separation between the supervisory body and those being “supervised.” However, with the influence of the corporate governance best practice movement, the distinct perceived benefits traditionally attributed to each system appear to be lessening as practices converge. The codes express remarkable consensus on issues relating to board structure, roles and responsibilities; many suggest practices designed to enhance the distinction between the roles of the supervisory and managerial bodies, including supervisory body independence, separation of the chairman and CEO roles, and reliance on board committees.

5. SUPERVISORY BODY INDEPENDENCE & LEADERSHIP

Notwithstanding the diversity in board structures among EU Member States, all codes place significant emphasis on the need for a supervisory body that is distinct from management in its decisional capacity for objectivity to ensure accountability and provide strategic guidance.

Codes that relate to unitary boards emphasise the need for some compositional distinction between the unitary board and members of the senior management team. These codes invariably urge companies to appoint outside (or non-executive) directors to the supervisory body -- and also frequently urge that some of these outsiders be “independent” directors. “Independence” is defined in a variety of ways but generally involves an absence of close family ties or business relationships with company management and the controlling shareholder(s). Codes that relate to unitary boards also frequently call for the positions of the chairman of the board and the CEO (or managing director) to be held by different individuals. (This is already usually the case in two-tier board systems.)

Codes that relate to two-tier boards also emphasise the need for independence between the supervisory and managerial bodies. For example, like the unitary board codes, they tend to warn against the practice of naming (more than one or two) retired managers to the supervisory board, because it may undermine supervisory board independence.

6. BOARD COMMITTEES

It is fairly well accepted in the company law of Member States that some supervisory body functions may be delegated, to at least some degree, to board committees. The codes reflect a trend toward reliance on board committees to help organise the work of the supervisory body, particularly in areas where the interests of management and the interests of the company may come into conflict, such as in areas of audit, remuneration and nomination. For example, a nominating committee, an audit committee and a remuneration committee are recommended in Belgium, France, the Netherlands, Spain, Sweden, the United Kingdom and other EU Member States. While recommendations concerning composition of these committees may vary, the codes generally recognise that non-executive and, in particular, independent directors have a special role to play on these committees.

7. DISCLOSURE

Disclosure requirements continue to differ among EU Member States, and the variation in information available to investors likely poses some impediment to a single European equity market. However, across EU Member States, disclosure is becoming more similar, in no small part because of efforts to promote better regulation of securities markets and broad use of International Accounting Standards. Consolidation and co-ordination among listing bodies may encourage further convergence.

Note that a “hardening of norms” concerning disclosure of individual executive and director remuneration is slowly developing across the EU Member States, following the U.K. example. In the past three years, listing rules or legislation relating to increased remuneration disclosure have passed or have been proposed to require greater transparency in Ireland, France, the Netherlands, and Belgium.

Interest in both mandatory and voluntary social issue reporting is growing throughout the EU. In July 2000, a new U.K. regulation was issued requiring investment fund companies to disclose whether they have policies on social investment. The U.K. company law review effort also recommended that boards disclose the impact of major decisions on communities, employees and suppliers. French corporate law was amended in May 2001 to require listed companies to disclose in their annual reports how they take into account the social and environmental consequences of their activities.

Most codes call for enhanced disclosure of information to enable shareholders to judge the qualifications and independence of directors. Undoubtedly, corporate governance codes are playing a converging force, both increasing the amount of information disclosed and encouraging disclosure of similar types of information. Through “comply or explain” mandates, several codes require companies to disclose considerably more information about their corporate governance structures and practices.

As to wholly voluntary disclosure, the codes tend to favour greater transparency on all aspects of corporate governance and, in particular, executive and director compensation and director independence. They also encourage greater transparency as to share ownership and, in many instances, issues of broader social concern.

B. OTHER TRENDS & EXPECTED DEVELOPMENTS

In addition to the general convergence on views about governance best practices as evidenced in the codes, a number of trends and developments related to corporate governance are apparent in EU Member States.

- Contestability of Corporate Control:

The rise in take-over activity indicates that the control of corporations in EU Member States has become more “contestable.” Similarly, management power is also becoming increasingly “contestable”; management entrenchment is being reduced, as boards are less hesitant to remove managers for poor performance.

- Corporate Governance Information:

In many EU Member States there is a growth in information and analysis available to shareholders about corporate performance and governance. There is also a trend toward greater disclosure by pension funds and intermediaries about their voting policies.

In addition to heightened disclosure being required by regulatory bodies, companies are disclosing more information voluntarily. Moreover, a growing number of advisory firms and ratings agencies are also providing information through corporate governance ratings of firms and of nations, as well as other types of analyses.

- Electronic Shareholder Communication & Participation:

Institutional investors and other shareholders are increasing their communication with one another. The Internet is proving to be a powerful tool for enabling communication between shareholders and for co-ordinating shareholder activities. It is also proving useful for disseminating information -- including companies’ annual reports and other company information. Eventually, the Internet may facilitate the exercise of shareholder rights to participate in and vote at general meetings. The ability to participate and vote by electronic means in general meetings is increasing with technological breakthroughs and the removal of legal barriers:

- In the United Kingdom, the Electronic Communications Bill passed in 2000 recognises electronic signatures and allows electronic dissemination of company information.
- In Germany, the NaStraG legislation passed in 2000 allows proxy voting via fax, phone and e-mail, and eases the ability of companies to communicate with holders of bearer shares.
- In France, electronic signature is now recognised by law and should enable voting by electronic means -- such as over the Internet -- for companies that provide for such voting in their bylaws.
- In 2001, J.P. Morgan Investor Services asked that companies, custodians, vendors and investors work together through the SWIFT system to agree on a single global transmission protocol for agenda notices and proxy forms.
- Efforts are underway to build electronic share voting systems for casting, tracking and verifying ballots (Manifest, CREST); a system for electronic voting (NetVote) is being tested in the Netherlands, and may be marketed in the United Kingdom and Germany.

- Remuneration Concerns:

Shareholder and public concern appears to be growing in EU Member States about the use of golden parachutes and bonus payments to managers in mergers, acquisitions and take-over transactions. Such payments are viewed as potentially creating incentives inconsistent with the creation of corporate value and the interests of domestic labour.

Heightened shareholder scrutiny of executive pay levels can be expected, as more detailed information becomes available about executive and director remuneration in several EU Member States. (Also note that in the United Kingdom, under pressure from leading shareholder advocates, legislation has been proposed that would give shareholders of listed companies a non-binding vote on pay policies.)

C. VIEW FROM THE PRIVATE SECTOR

On September 10, 2001, a roundtable was held with high-level private sector participants from major companies in the European Union to discuss whether, in their experience, differences in corporate governance codes and the variety of codes pose impediments to an integrated European financial market. The consensus view was that the most important differences in corporate governance emanate from company law and securities regulation rather than from codes.

Participants expressed little concern about variation among the “soft law” requirements of codes; code variation is not perceived by these private sector participants to raise barriers to company efforts to attract investment capital. According to participants, most European companies continue to consider their domestic capital market as their primary source for equity capital. Therefore, the European company’s primary listing is usually in the EU Member State in which the company is incorporated. Participants explained that corporate decisions regarding which capital markets to access are influenced primarily by liquidity and company law considerations, and very little by the existence of corporate governance codes. As to cross-border listings, the corporate governance requirements of listing rules for most European exchanges are minimal; moreover, corporate governance requirements generally may be waived for non-domestic issuers under principles of mutual recognition. And, finally, even compliance with codes linked to exchanges is wholly voluntary: codes tend to be flexible and non-binding. At most, they might require disclosure of non-conforming practices. Moreover, many participants opined that it is the track record of individual companies’ governance practices that investors look at, rather than the codes that might exist in a country.

Participants agreed that the multiplicity of codes neither confuses nor poses difficulties for companies. Companies can consider codes as supplemental to company law and simply choose from among the codes that emanate from the EU Member State of incorporation. Alternatively, so long as there is no inconsistency with the company law in the State of incorporation, companies can seek guidance from one, or even more than one, code from any jurisdiction.

The majority of participants strongly opined that the Commission should not create a mandatory “Euro-code.” Best practice recommendations are better developed by the business and investment communities over time through the impact of market forces. Although some participants suggested that a voluntary Euro-wide code might encourage

greater commonality, other participants expressed concern that even aspirational recommendations might eventually lead to regulation.

This is not to say that there are no perceived impediments to a single market in the European Union resulting from corporate governance differences. As discussed above, variations in laws and securities regulations continue to pose difficulties to cross-border proxy voting. (A recent survey by the International Corporate Governance Network (2002) found that short ballot deadlines and rules that block share trading for a period prior to the annual meeting are two of the primary obstacles to cross-border proxy voting.)

Note that the French investor's association, AFG-ASFFI, has recommended that discussion of corporate governance issues be had at the European level "so that its recommendations constitute minimum corporate governance guidelines for all listed companies in the Euro zone." (Hellebuyck Commission Report, Introduction) However, as set forth in more detail below, harmonisation of laws and securities regulations in the areas of disclosure and shareholder participation should take priority if the goal is to provide impetus to a single European market.

D. FINAL THOUGHTS

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

Although development of a voluntary European Union-wide code might add to general awareness and understanding of governance issues throughout the European Union, given the continued variation among the Member States' legal frameworks, we believe a code agreed to by all Member States would be likely to focus more on basic principles of good governance than on detailed recommendations of best practice. The OECD Principles of Corporate Governance (which issued in 1999 after considerable consultation with, and participation from, every European Member State) already set forth a coherent, thoughtful and agreed set of basic corporate governance principles. Achieving broad agreement on a more detailed set of best practices that fit the varying legal frameworks of the Member States will be difficult and may succeed only in expressing the "lowest common denominator."

Future European Union-wide efforts on corporate governance will be most valuable if, rather than focused at the code (and best practice) level, they focus on:

- Reducing participation barriers that currently make it difficult for shareholders to engage in cross-border voting; and
- Reducing information barriers to the ability of shareholders (and potential investors) to evaluate the governance of corporations, both at the Member State level and the level of individual companies.

Law and regulation set the minimum requirements for corporate governance participation and disclosure. Agreement and harmonisation on the minimum requirements -- for example concerning the mechanics of cross-border voting and shareholder participation in general meetings -- take logical priority over harmonisation of best practice. (The recently announced panel of experts convened by the Winters High Level Group of Company Law Experts is expected to provide recommendations with respect to issues of shareholder participation such as share blocking and registration.)

Disclosure requirements are critical to the ability of shareholders to exercise participation rights and to make value judgements about the corporation. Disclosure requirements are also critical to the ability of capital markets to help convert the value judgements of market participants into appropriate financial incentives. The European Commission consultation on transparency obligations of listed companies is an important move towards improving the quality and comparability of corporate disclosure in Member States, as is the move to International Accounting Standards. The European Commission may wish to explore other ways to encourage greater corporate governance disclosure by listed companies within EU Member States. For example, how can fuller use of available electronic communication technologies be made by Member States, to enable electronic filing of company disclosures; by listed companies, for disclosure to shareholders and the public; and for participation in general meetings? (The Winters High Level Group of Company Law Experts is expected to make recommendations in this area.)

The Commission may also wish to consider whether there is an appropriate European Union vehicle for encouraging listed companies to provide more information about internal governance, such as:

- Corporate ownership structure (including identity of controlling shareholders; existence of special voting rights or agreements; existence significant cross shareholding relationships)
- Identity, age, length of board tenure, and main affiliation (primary employment position) of supervisory body members;
- Stock ownership by supervisory body members;
- Close family relationships between supervisory body members and senior members of management or controlling shareholders;
- Transactions between the company and supervisory body members, or business entities they are affiliated with;
- Whether individual supervisory body members are considered “independent” and what definition is used;
- Individual director remuneration and basis for remuneration (including any performance-based elements);
- Identity and composition of board committees;
- Number of board meetings per year;
- Number of committee meetings per year;
- How many board and committee meetings each supervisory body member attended in the past year; and

- Whether the company follows a specific code and, if so, its identity.

(This list is merely illustrative -- it is neither complete, nor necessarily at the appropriate level of detail.) This is *not* meant to suggest that disclosure against a European Union-wide code on a comply or explain basis be used. In addition to the concerns expressed above about a European Union-wide code, codes express normative values and on a European Union-wide basis, we believe that simply seeking greater disclosure of what companies are doing would be sufficient.

Finally, we note that a number of Member States are engaged in various aspects of company law review and reform. It may be useful to create a forum in which the national policy makers involved on such issues could come together and discuss common issues and approaches. The European Commission may wish to consider how it might act to convene or support such a forum.

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ANNEX I

LIST OF CORPORATE GOVERNANCE CODES RELEVANT TO THE EUROPEAN UNION AND ITS MEMBER STATES

For the purpose of this Comparative Study, a “corporate governance code” is defined as a non-binding set of principles, standards or best practices, issued by a collective body that is neither governmental nor regulatory in nature, and relating to the internal governance of corporations.

AUSTRIA

BELGIUM

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THE NETHERLANDS

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SWEDEN

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ANNEX II

CONSULTATION:

A. REPRESENTATIVES OF THE FEDERATION OF EUROPEAN STOCK EXCHANGES (FESE)

AUSTRIA

Wiener Börse AG (Mr. Erich Obersteiner)

BELGIUM

Euronext Brussels (Mr. Luk Delboo)

DENMARK

Copenhagen Stock Exchange Ltd (Mr. Hans Ejvind Hansen)

FINLAND

Helsinki Exchanges (Mr. Jukka Ruuska)

FRANCE

Euronext (Mr. Jean-François Théodore)

GERMANY

Deutsche Börse AG (Mr. Werner G. Seifert)

GREECE

Athens Stock Exchange (Mr. Panayotis Alexakis)

IRELAND

Irish Stock Exchange (Mr. David Kingston)

ITALY

Borsa Italiana SpA (Mr. Massimo Capuano)

LUXEMBOURG

Luxembourg Stock Exchange (Mr. Remy Kremer)

THE NETHERLANDS

Euronext (Mr. George Möller)

PORTUGAL

BVLP - Lisbon & Oporto Exchange (Mr. Ricardo Silva)

SPAIN

Bolsa de Madrid (Mr. Antonio J. Zoido)

SWEDEN

OM Stockholm Exchange (Mr. Carl Johan Högbom)

UNITED KINGDOM

London Stock Exchange (Mr. Don Cruickshank)

ANNEX II

CONSULTATION:

B. REPRESENTATIVES OF THE FORUM OF EUROPEAN SECURITIES COMMISSIONS (FESCO)

AUSTRIA

Austrian Securities Authority (Mrs. Andrea Kuras-Eder)

BELGIUM

Commission Bancaire et Financière/Commissie voor Bank- en Financiewezen (Mr. Michel Cardon de Lichtbuer)

DENMARK

Finanstilsynet (Mrs. Marianne Knudsen)

FINLAND

Rahoitustakastus (Ms. Anneli Tuominen)

FRANCE

Commission des Opérations de Bourse (Mr. Xavier Tessier)

GERMANY

Bundesaufsichtsamt für den Wertpapierhandel (Ms. Sigrid Langner)

GREECE

Capital Market Commission (Ms. Eleftheria Apostolidou)

IRELAND

Central Bank of Ireland (Mr. Patrick Neary)

ITALY

Commissione Nazionale per le Società e la Borsa (Mr. Carlo Biancheri)

LUXEMBOURG

Commission de Surveillance du Secteur Financier (Mr. Charles Kieffer)

THE NETHERLANDS

Stichting Toezicht Effectenverkeer (Mr. Bert Canneman)

PORTUGAL

Comissão do Mercado de Valores (Mr. Gonçalo Castilho Santos)

SPAIN

Comisión Nacional del Mercado de Valores (Mr. Rafael Sanchez De La Peña)

SWEDEN

Finansinspektionen (Mr. Håkan Klahr)

UNITED KINGDOM

Financial Services Authority (Mr. Nigel Phipps)

ANNEX II

CONSULTATION:

C. PARTICIPANTS IN 10 SEPTEMBER 2001 PRIVATE SECTOR ROUNDTABLE

Stelios Argyros	<i>Chairman</i> STET Hellas Telecommunications SA (Greece)
Marco Becht	<i>Executive Coordinator</i> European Corporate Governance Network (Europe)
Antonio Borges	<i>Vice Chairman & Managing Director</i> Goldman Sachs International (United Kingdom)
Philippe Bougon	<i>Secretary of the Board</i> Schneider Electric SA (France)
Willy Breesch	<i>Chairman of the Board of Directors</i> KBC Bank and Insurance Holding Company (Belgium)
Alan Buchanan	<i>Company Secretary</i> British Airways PLC (United Kingdom)
Javier Chércoles Blázquez	<i>Director of Corporate Responsibility</i> Inditex SA (Spain)
Renato Conti	<i>Vice President and General Counsel</i> Telespazio SpA (Italy)
Guido De Clercq	<i>Deputy General Counsel</i> Tractebel SA (Belgium)
Graham Dransfield	<i>Legal Director</i> Hanson PLC (United Kingdom)
Hans Duijn	<i>Corporate Secretary</i> ABN AMRO (The Netherlands)

Léo Goldschmidt	<i>Director</i> European Association of Securities Dealers (Europe)
Richard Grayson	<i>Senior Manager Corporate Support Services</i> British American Tobacco (United Kingdom)
Gian Maria Gros-Pietro	<i>Chairman</i> ENI SpA (Italy)
Sherry Jacobs	<i>Director</i> Guilford Mills (United States)
Joachim Kaffanke	<i>General Counsel</i> Celanese AG (Germany)
Jacques Lévy-Morelle	<i>Corporate Counsel</i> Solvay SA (Belgium)
Jules Muis	<i>Director General (Internal Audit)</i> European Commission (Europe)
Lasse Skovby Rasmusson	<i>Vice President</i> Danisco A/S (Denmark)
Henrik-Michael Ringleb	<i>General Counsel</i> ThyssenKrupp AG (Germany)
Dominique Thienpont	<i>Administrator (Internal Market)</i> European Commission (Europe)
Karel Van Hulle	<i>Head of Unit (Internal Market)</i> European Commission (Europe)
Michel Van Pée	<i>General Counsel</i> Fortis (Belgium)
Arie Westerlaken	<i>General Counsel</i> Royal Philips Electronics (The Netherlands)

WEIL, GOTSHAL & MANGES LLP PARTICIPANTS:

David Cantor

Holly J. Gregory

Stephen E. Jacobs

George Metaxas-Maranghidis

William M. Reichert

Roman Rewald

Robert T. Simmelkjaer, II

R. Josef Tobien

ANNEX II

CONSULTATION:

D. ISSUES FOR DISCUSSION

CORPORATE GOVERNANCE AND THE SINGLE EUROPEAN MARKET

CONSULTATIVE ROUNDTABLE FOR EUROPEAN COMMISSION'S COMPARATIVE STUDY OF CORPORATE GOVERNANCE CODES RELEVANT TO THE EUROPEAN UNION AND ITS MEMBER STATES

Hosted by Weil, Gotshal & Manges LLP

**The Conrad International Hotel
71 Avenue Louise
1050 Brussels, Belgium**

10 September 2001

DISCUSSION THEMES

Does the variety of governance practices in the EU pose an impediment to the creation of a single unified European market?

Theme 1.

Do differences in corporate governance practices and recommendations impede companies in an EU member state from raising equity capital in markets outside their own national jurisdiction?

Question 1.1: As companies seek to raise external finance in equity markets and maintain a liquid market for corporate shares internationally, they face pressures to conform to capital market expectations about their corporate governance practices. Does the variety of governance practices among EU member states -- as evidenced by the variety of codes -- confuse investors about a company's corporate governance standards and procedures and thereby impair investment?

Question 1.2 : Several EU member states have governance codes that apply to domestic issuers listed on the domestic market but, under principles of mutual recognition, not to issuers from other countries listed on that market or to a domestic issuer listing on an exchange located in another member state, but not on the domestic market. Are problems created when different companies quoted on the same market are not subject to the same corporate governance code? (For example, a U.K. company and a Germany company both listed on the London Exchange; only the U.K. company is subject to the disclosure requirements of the Combined Code.) Would it be more efficient for the same code to apply for companies based on the company law regime that applies, *i.e.* should the Viénot code apply to all French issuers even when they are only listed on Xetra and not on Euronext? Or for the same rules to apply to all listed companies on the same market as is the case, for example, for Nasdaq-Europe and the EASD code?

Theme 2.

Do different concepts, across EU member states, of the place and purpose of the corporation in society pose any impediments to the creation of a unified market?

Question 2.1: Throughout the EU, nations have differing conceptions of the interests for which the corporate is governed. Do these differences impact the ability of publicly-traded companies to attract and retain capital? to attract and retain labour? to compete in product and service markets? other?

Question 2.2: In some EU member states, employees select some members of the supervisory board.* What impact does this have on the ability of a publicly-traded company to attract and retain capital? to attract and retain labour? to compete in product and service markets? other?

Theme 3.

What difficulties, if any, arise from specific differences in corporate governance practices and recommendations?

Question 3.1: Does the current diversity of proxy solicitation, voting rights (one share one vote, multiple voting rights, voting caps, voting agreements and voting methods) pose any difficulties to companies seeking to attract capital? Would market efficiency be enhanced by some form of harmonisation?

Question 3.2: Do recommendations to increase diversity and independence in the composition of supervisory boards* pose any difficulties?

Question 3.3: The level of disclosure, and the ease and timeliness of access to disclosed information, varies widely across EU member states. Does this pose any problems for companies? For example, disclosure of board and executive remuneration is sought by many activist investors. What are the disadvantages and advantages to the company that are perceived to follow from such disclosure?

* Throughout this discussion, “supervisory board” is used to refer to the top tier board in a two-tier system and the board of directors in a unitary board system.

Question 3.4: Does the variety of rules and practices relating to conflict of interest situations pose any difficulties for companies?

Theme 4.

Should the EC play a role in promoting convergence of corporate governance practices throughout the EU?

Question 4.1: The rich variety of governance codes within the EU has encouraged discussion about corporate governance practices and continual efforts at governance improvement. At the same time there appear to be some market pressures for convergence. Is market driven convergence of corporate governance practices sufficient for the EU goal of a single market? Or is there a need for something stronger?

Question 4.2: Would a single set of EU-recognised corporate governance standards be beneficial? Is it necessary? If so, should such standards be aspirational (like the OECD Principles) or should they set a mandatory minimum standard (through an EU Directive or Regulation) for all listed companies? Or should flexibility be given in a disclosure based model, *e.g.*, in the form of “comply or explain”?

ANNEX III

COUNTRY CORRESPONDENTS

AUSTRIA

Alexander Engelhardt (WG&M; Frankfurt)

BELGIUM

Stanislas De Peuter (WG&M; Brussels)

DENMARK

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FINLAND

Johan Aalto (Hannes Snellman, Attorneys at Law; Helsinki)

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GERMANY

Alexander Engelhardt (WG&M; Frankfurt)

GREECE

George Metaxas-Maranghidis (WG&M; Brussels)

IRELAND

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ITALY

Anthony Gardner (WG&M; London)

LUXEMBOURG

George Metaxas-Maranghidis (WG&M; Brussels)

THE NETHERLANDS

Stephan Follender-Grossfeld (Attorney at Law & Secretary to the Netherlands Corporate Governance Foundation; Amsterdam)

PORTUGAL

Gonçalo Castilho dos Santos and Maria da Cruz (Comissão do Mercado de Valores Mobiliários; Lisbon)

SPAIN

Francisco Prol (Prol & Asociados, Attorneys at Law; Madrid)

SWEDEN

Rolf Skog (Secretary to the Swedish Securities Council, Ministry of Justice; Stockholm)

UNITED KINGDOM

Gerard Cranley (WG&M; London)

