

Comparative study: corporate
governance codes in 10 European
countries

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Executive summary

In an effort to identify best practices in Europe and to inform the discussion on corporate governance, the *Autorité des Marchés Financiers* (AMF) has studied and compared the AFEP-MEDEF code (*Association française des entreprises privées-Mouvement des entreprises de France*/French business associations) with the codes of nine European countries: Belgium, Finland, Germany, Italy, Luxembourg, the Netherlands, Spain, Sweden and the United Kingdom.

This study (i) examines how the codes work and are enforced and (ii) compares the provisions of the codes with those of the French code as they relate to several corporate governance and executive pay issues, such as the separation of the roles of chief executive officer and chairman of the board, the role of lead director, board member independence, board gender diversity, the criteria for awarding variable remuneration, and caps on severance pay.

The AMF notes that corporate governance codes do not exist in isolation and that the findings of its study should be interpreted in the context of the normative framework into which the codes are integrated.

How the codes work and are enforced

Corporate governance code development and amendment procedure

With respect to code development, it appears that France is the only European country in the sample where the corporate governance code is drafted by associations representing issuers. In three countries, including France, investors and their representatives are not directly involved in drafting the code, although they may be consulted.

The pace at which the codes are revised varies widely in Europe; the frequency of the AFEP-MEDEF code revisions is at the high end of the European average.

In most of the countries considered, amendments to the code are also subject to a prior public consultation on the website of the entity responsible for drafting the code, which is not the case for the AFEP-MEDEF code.

Implementation of the code

In three countries — France, Spain and Italy — implementation of the code is described as voluntary, under provisions that are similar but not equivalent. In the other countries in the study, implementation of the corporate governance code is mandated through market rules or by law.

In terms of adjustments for small- and mid-caps, it appears that the UK and Italian codes require only the largest companies to implement certain recommendations, and that France and the United Kingdom are the only European countries to have developed a specific corporate governance code for small- and mid-caps.

Structure of the code

Unlike the majority of European countries, the AFEP-MEDEF code is organised around a single type of rule — recommendations — and all the rules have the same scope.

Reports on implementation of the corporate governance code

The AMF observed that in five countries in the sample (Belgium, France, Italy, Spain and the United Kingdom), a regulatory authority prepares a report on implementation of the corporate governance codes. As is the case in Belgium and Italy, a second report is prepared in France by a private entity, the High Committee for Corporate Governance (*Haut comité de gouvernement d'entreprise* — HCGE).

Content of the reports

In more than one-third of the reports considered, the findings are exclusively statistical. Nevertheless, eight reports endeavour to provide a more qualitative assessment of respect for the “comply-or-explain” principle. This includes the AMF’s report, which identifies examples (where applicable, by name) of good and bad explanations for deviating from a recommendation in the code. The AMF also observed that several reports classified the explanations into categories to analyse their quality.

“Name and shame”

Of the 15 reports considered in 10 European countries, only the AMF report on application of the corporate governance code and, to a lesser extent, the report by the Finnish Securities Market Association, cited the companies that do not comply with the governance rules by name (“name and shame”).

Sample

The AMF sample appears relatively limited compared with the reports prepared in Belgium, Germany, Italy, Spain and the United Kingdom. This difference can be attributed, first, to the methodology used, as the AMF analyses information using a matrix developed by its staff, unlike the other entities. Second, in some years the AMF publishes a second report on small- and mid-caps, while the studies published in other countries do not specifically target this type of companies. Lastly, in certain countries the study does not cover companies’ most recent accounting period but rather a prior period.

Volume

Compared with the other reports (averaging 67 pages), the report published by the AMF is one of the most voluminous, at more than 150 pages (in 2015).

Recommendations

The AMF (France) and the Financial Services and Markets Authority (FSMA, Belgium) are the only public authorities that, in their last report, made recommendations to issuers regarding compliance with the provisions in the referenced code.

Corporate governance and executive pay issues

Separation of the roles of chairman of the board and chief executive officer

The practice of separating the roles of chairman of the board and chief executive officer is intrinsically linked to governance models, company law, and specific national characteristics. Since the financial crisis, the literature and codes of best practice have nevertheless tended to consider that the concentration of power intensifies conflicts of interest.

Consequently, in countries where the roles may be combined, namely Italy, Spain and France, the codes comment on the appointment of a lead director. Unlike the Spanish and Italian codes, the AFEP-MEDEF code and its application guide do not explicitly refer to the appointment of a lead director as a counterweight to a combined chairman and chief executive officer.

Lead director

The AFEP-MEDEF code is the exception in Europe in that it makes no recommendation that the lead director be chosen from among the independent members of the board, and does not define his or her duties.

Board members independence

Independence criteria are generally incorporated into governance codes and fall under the “comply-or-explain” principle, with the exception of Spain and Belgium, where these criteria have been enshrined in law and are therefore mandatory.

The AMF notes that the definition of independence varies significantly among the different European countries. While many codes rely on the independence criteria defined in Annex II of the European Commission's recommendation, authors of the codes have also taken specific local characteristics into account and have added and/or removed certain criteria.

All the countries in the sample authorise the chairman of the board to be described as independent. An examination of the independence of the chairman of the board nevertheless suggests that the AFEP-MEDEF code should clarify the status of the chairman of the board of directors, by noting, where applicable, whether or not he or she is an executive member, based on the duties actually assigned.

Board gender diversity

Most countries in the sample have imposed quotas through legislative action. Compliance with the quota system is high, particularly when combined with penalties.

France is at the top of the class within the EU in terms of representation of women on corporate boards, with an average of 32.4% in 2014 according to a European Commission study based on a sample of large companies¹. The French law incorporates the targets that had previously been set by the AFEP-MEDEF code.

Board evaluation

The European codes have similar rules on board evaluations.

Criteria for awarding variable remuneration

While in all the codes the award of variable remuneration is subject to performance criteria, only four codes, including the AFEP-MEDEF code, recommend that companies take non-financial criteria into account.

Regarding quantitative criteria, two codes (France and Spain) specify that share price and overall market or sector trends cannot be the only performance criteria.

Five codes (Germany, Italy, Luxembourg, Spain and the United Kingdom) also state that performance criteria must take the internal control and risk management procedures established by the board into account, which is not the case in the AFEP-MEDEF code.

Lastly, as recommended by the European Commission, five codes (Italy, the Netherlands, Spain, Sweden and the United Kingdom) require that clawback clauses be put in place for the variable remuneration of executive directors, which is not the case for the AFEP-MEDEF code.

Caps on executive directors severance pay

These rules must be interpreted in the context of provisions relating to the senior managers' legal status, including whether or not they have employment contracts. Based on the senior manager severance pay cap provisions in the 2009 European Commission recommendation (followed by Finland, Luxembourg, the Netherlands and Sweden), it seems that the AFEP-MEDEF code has set a less restrictive cap on severance pay. However, the AFEP-MEDEF code recommends that, when an employee is appointed as executive director, the employment contract binding him or her to the company or to a group company be terminated, whether through contractual termination or resignation².

Also, unlike the German and Belgian codes, the French code does not provide detailed rules for calculating two years of remuneration.

¹ http://ec.europa.eu/justice/gender-equality/files/annual_reports/150304_annual_report_2014_web_en.pdf (page 20).

² Ten companies in the sample, of which six in the CAC 40, state that they have a senior manager who both holds an office and has an employment contract (2014 Report by the AMF on Corporate Governance and Executive Remuneration).

In its annual report, the AMF had already considered the effectiveness of the rules on severance pay in the AFEP-MEDEF code. The AMF has asked the AFEP and the MEDEF to conduct an overview of the monies and benefits that may be paid to outgoing executives.

1. INTRODUCTION

The proliferation of codes in Europe since the 1990s demonstrates the importance of soft law in corporate governance.

Adopted at the urging of the public authorities, market undertakings and/or issuer associations, corporate governance codes reflect the particular nature of the different national laws and corporate practices, which are the product of each country's history and legal and cultural traditions.

The European Commission³ believes it is important to encourage the coordination and convergence of national codes on a number of principles to ensure that investors receive harmonised information⁴. To that end, European Directive 2006/46/EC⁵ encouraged the implementation of codes⁶ by requiring that listed companies⁷ specify in their corporate governance statement the code to which they refer and report on their implementation of that code in accordance with the “comply-or-explain” principle. To improve the quality of the explanations provided by companies when they do not comply with the corporate governance codes, the European Commission also published a Recommendation⁸ on 9 April 2014 on the quality of corporate governance reporting (“comply or explain”)⁹.

On the same day, it published its proposal for a Directive amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement, and Directive 2013/34/EU as regards certain information of the corporate governance statement discusses the principle of transparency on executive pay and on the shareholder vote on pay (“say on pay”) in Europe.

In parallel with the work of the Commission, in 1999 the OECD published its Principles of Corporate Governance — updated in September 2015¹⁰ — which inspired certain European countries to develop their own codes.

This study reflects a commitment to improve the coordination of governance codes in Europe, by comparing the French code drafted by the AFEP and the MEDEF¹¹ with the codes of nine European countries, namely Belgium, Finland, Germany, Italy, Luxembourg, the Netherlands, Spain, Sweden and the United Kingdom. However, the AMF notes that corporate governance codes clearly do not exist in isolation. They should be interpreted in the context of the national and European normative framework into which the codes are integrated and from which their scope can be derived.

³ Communication of 2003 on modernising company law and enhancing corporate governance in the European Union (<http://eur-lex.europa.eu/legal-content/FR/ALL/?uri=CELEX:52003DC0284>).

⁴ Paragraph 3.1. (corporate governance) of the above-referenced communication.

⁵ Directive 2006/46/EC of the European Parliament and of the Council of 14 June 2006 amending Council Directives 78/660/EEC on the annual accounts of certain types of companies, 83/349/EEC on consolidated accounts, 86/635/EEC on the annual accounts and consolidated accounts of banks and other financial institutions, and 91/674/EEC on the annual accounts and consolidated accounts of insurance undertakings (<http://eur-lex.europa.eu/legal-content/fr/ALL/?uri=CELEX:32006L0046>).

⁶ By adding Article 46a to Directive 78/660/EEC. This Directive was repealed and replaced by Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC. These provisions are now included in Article 20 of Directive 2013/34/EU.

⁷ In accordance with the scope defined in Article 20, paragraph 1, of the above-referenced Directive 2013/34/EU: companies whose transferable securities are admitted to trading on a regulated market within the meaning of Article 4, paragraph 1, point 14, of the “Transparency” Directive.

⁸ Commission Recommendation 2014/208/EU of 9 April 2014 on the quality of corporate governance reporting (“comply or explain”).

⁹ This recommendation applies to companies which are required to submit a corporate governance statement in accordance with Article 20 of Directive 2013/34/EU and which need to provide explanations in case of departure from the recommendations of the corporate governance code(s).

¹⁰ <http://www.oecd.org/daf/ca/principles-corporate-governance.htm>

¹¹ For the purposes of the study, only the French AFEP-MEDEF code was used, as it was published first and has been implemented by most large listed companies.

Pursuant to Article L. 621-18-3 of the Monetary and Financial Code, the *Autorité des Marchés Financiers* (AMF) has, since 2004, been responsible for preparing a report each year on corporate governance, executive remuneration and internal control, based on the information published by legal persons whose shares are traded on a regulated market and who have their registered office in France.

This annual report is an opportunity for the AMF to make recommendations to issuers, but also to suggest areas for discussion to the professional associations responsible for drafting the code so that they may, if necessary, amend it.

It is therefore of interest for the AMF and stakeholders (i) to examine how the corporate governance code is developed and enforced in the major European countries, (ii) to compare the provisions of the codes with the French provisions on foundational topics such as the separation of powers, the composition of the board, and executive pay and, where applicable, (iii) to identify best practices highlighted in one or more of the codes considered to inform the avenues of discussion the AMF has suggested to the AFEP and the MEDEF.

2. METHODOLOGY AND OBJECTIVES OF THE STUDY

2.1 A pan-European study

To conduct an appropriate survey of soft law provisions and identify best corporate governance practices in Europe, this study covers a sample of 10 European countries that have a corporate governance code for issuers: Belgium, Finland, France, Germany, Italy, Luxembourg, the Netherlands, Spain, Sweden and the United Kingdom. The table below summarises the sample of corporate governance codes considered.

Table 1: Study sample

Country	Code	Author
Germany	German Corporate Governance Code	Regierungskommission Deutscher Corporate Governance Kodex
Belgium	Belgian Code on Corporate Governance	Corporate Governance Committee
Spain	Código Unificado de buen gobierno de las sociedades cotizadas	Comisión Nacional del Mercado de Valores (CNMV)
Finland	Finnish Corporate Governance Code	Securities Market Association Working Group
France	AFEP-MEDEF Corporate Governance Code ¹²	AFEP and MEDEF
Italy	Corporate Governance Code	Corporate Governance Committee
Luxembourg	The Ten (X) Principles of Corporate Governance of the Luxembourg Stock Exchange	Luxembourg Stock Exchange
Netherlands	Dutch Corporate Governance Code	Corporate Governance Code Monitoring Committee
UK	The UK Corporate Governance Code	Financial Reporting Council (FRC)
Sweden	The Swedish Corporate Governance Code	Swedish Corporate Governance Board

Source: AMF

2.2 Objectives of the study

This study (i) examines how the corporate governance code works and is enforced in the major European countries, in particular by analysing by which entities and in what legal context they were drafted, and (ii) compares certain provisions of these codes with the provisions in the French AFEP-MEDEF code on foundational corporate governance topics.

This study further aims to highlight best practices identified in the sample's codes which could, where applicable, inform the areas for discussion suggested each year by the AMF to the professional associations responsible for revising the AFEP-MEDEF code.

2.3 Methodology

The scope of the analysis is limited to the information contained in the corporate governance codes listed¹³ in Table 1 above.

The intention of this study is not to provide a comprehensive overview of corporate governance rules in Europe, but to consider the implementation of soft law. However, corporate governance codes clearly do not exist in isolation, and should be interpreted in the context of the national and European normative framework into which they are integrated.

The provisions of the corporate governance codes of the countries in the sample were analysed and compared using a matrix that covers key corporate governance and executive pay issues.

¹² There are at least two corporate governance codes in France. The MiddleNext code, published in December 2009, is intended for small- and mid-cap companies, but was not analysed as part of this study.

¹³ In their most recent version, as of 1 December 2015.

The study is moreover limited to public information. The AMF did however contact several national regulators to request clarifications on how to interpret certain provisions of the code and/or on how the codes fit into the normative environment of their respective countries.

3. BACKGROUND: HOW THE CODES WORK

3.1. The drafting and the positioning of the codes

All the countries considered have a corporate governance code. These codes were developed in the 1990s-2000s at the urging of the public authorities, market undertakings and/or issuer associations, and were often the result of a consolidation of the reports published in the 1990s, with the aim of improving the transparency of the information provided to investors and the practices of the decision-making bodies of listed companies.

3.1.1 Current authors of the codes

In Europe, the codes are drafted by several different types of entities, such as¹⁴:

- a committee or an “ad hoc” working group¹⁵, as a private initiative (Finland, Italy, the Netherlands and Sweden) or as a joint private and public initiative (Belgium and Germany);
- associations representing issuers — in France;
- regulators — in the United Kingdom and in Spain;
- market undertakings — in Luxembourg.

It should be noted that all countries, with the exception of France¹⁶ and the United Kingdom¹⁷, have just one corporate governance code that listed companies may or must implement.

Several European countries and/or institutions have also developed codes or additional guidelines for unlisted companies¹⁸, companies in which the government has a large stake¹⁹, etc.

The table below summarises the authors of the codes for the 10 countries considered.

Table 2: Current authors of corporate governance codes

Country	Code author(s)	Code creation date ²⁰	Nature of the authoring body
Germany	Regierungskommission Deutscher Corporate Governance Kodex	2002	Committee appointed by the Ministry of Justice in September 2001. The committee is independent of the Ministry and has 14 members, including investors, academics, a union, and issuer representatives
Belgium	Corporate Governance Committee	2004 ²¹	A 21-member committee, created at the initiative of the Financial Services and Markets Authority (FSMA), the <i>Fédération des entreprises de Belgique</i> (Federation of Enterprises in Belgium, FEB) and Euronext
Spain	Comisión Nacional del Mercado de Valores (CNMV)	2006 ²²	Market regulator (in 2013, an expert group made up of 12 members from the public and private sectors was appointed to help the CNMV amend the code)

¹⁴ Only the organisations responsible for drafting the most recent version of the corporate governance code were considered.

¹⁵ These groups are not however the same, just as they have different initiators.

¹⁶ See above.

¹⁷ In the United Kingdom, listed SMEs, which are not subject to the requirement to implement the “UK Corporate Governance Code”, may refer to the “Corporate Governance Code for Small and Mid-Size Quoted Companies” created in 2013 by a private entity, the Quoted Companies Alliance; the code is made available to the association’s members free of charge.

¹⁸ For example, in the United Kingdom, the “Corporate Governance Guidance and Principles for Unlisted Companies in the UK”, ecoDA; in Belgium, the Buysse Code: Corporate Governance – Recommendations for non-listed enterprises; in Finland, the initiative of the Central Chamber of Commerce, “Improving corporate governance of unlisted companies”.

¹⁹ For example, the “OECD Guidelines on Corporate Governance of State-Owned Enterprises”, OECD, 2005.

²⁰ For France, the date used is that on which an organised corporate governance code was introduced.

²¹ Governance principles have been established since 1998.

²² Governance principles have been established since 1997.

Country	Code author(s)	Code creation date ²⁰	Nature of the authoring body
France	AFEP and MEDEF	2004 ²³	Associations representing issuers. Since 2013, the <i>Haut Comité de Gouvernement d'Entreprise</i> (High Committee for Corporate Governance, HCGE), established at the initiative of the AFEP and the MEDEF, has also been tasked with “ <i>proposing updates to the code to reflect changes in practice, including at the international level, AMF recommendations or areas for reflection, and investor requests</i> ”
Finland	Securities Market Association	2003 ²⁴	Cooperation organ established by the issuer association (Confederation of Finnish Industries EK), the Finnish Chamber of Commerce and the market undertaking (NASDAQ OMX Helsinki) and made up of 11 members
Italy	Corporate Governance Committee	2006 ²⁵	Entity made up of issuer and investor associations (ABI, ANIA, Assonime, Confindustria and Assogestioni) and the market undertaking (Borsa Italiana S.p.A)
Luxembourg	Luxembourg Stock Exchange	2006	Market undertaking, in collaboration with issuer representatives
Netherlands	Corporate Governance Code Monitoring Committee	2003 ²⁶	Committee created at the joint initiative of public actors (Ministry of Finance and Economic Affairs) and private actors (employer associations, Euronext), appointed every four years and reporting annually on its findings to the Economy, Justice and Finance Ministries. Originally, the authoring body was made up of issuer representatives and academics (Tabaksblat Committee)
UK	Financial Reporting Council (FRC)	1998 ²⁷	Audit and financial reporting regulator
Sweden	Swedish Corporate Governance Board	2005	Entity affiliated with an association (Association for Generally Accepted Principles in the Securities Market) established by several professional associations to provide a structure for the self-regulation of private sector companies on the Swedish securities market and by the Commission on Business Confidence (a governmental committee, which was chaired by the former Minister of Finance)

Source: AMF

Irrespective of the composition of the body responsible for authoring the code, the various stakeholders affected by corporate governance (issuers, institutional investors, public authorities, audit firms, attorneys, financial

²³ Several reports were published in 1995, 1999 and 2002. The 2003 AFEP-MEDEF code consolidates the recommendations of the previous reports.

²⁴ Governance principles have been established since 1997.

²⁵ Governance principles have been established since 1999.

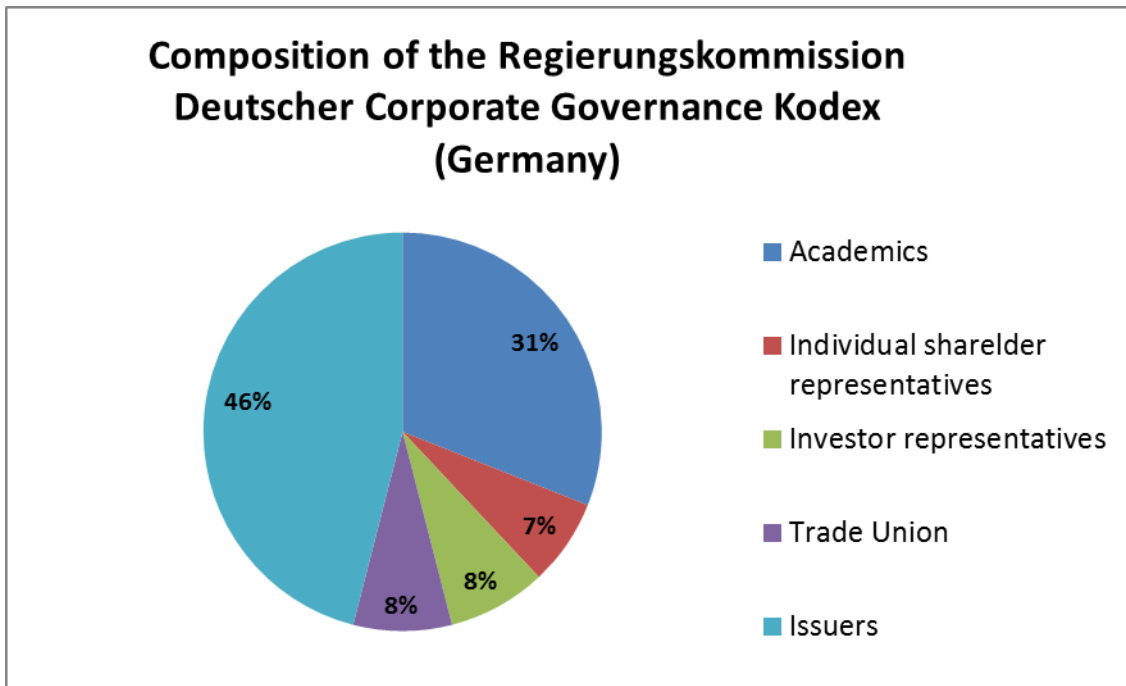
²⁶ Governance principles have been established since 1997.

²⁷ Governance principles have been established since 1992.

analysts, academia, etc.) play a role in drafting the code in almost all the countries considered²⁸ (see the German and Belgian examples below). In Germany, in addition to the parties traditionally involved in drafting and updating the corporate governance principles, employees (or their representatives) are also included in the code development process.

However, it should be noted that in 3 of the 10 countries in the sample (Spain²⁹, France³⁰ and Luxembourg³¹), investors do not play a role in drafting the code as members of the working group, although they may be consulted afterwards.

Lastly, in Sweden, although the Swedish Corporate Governance Board is made up 13 members representing the different interest groups (investors, issuers, market undertaking), it is specified that these members' role is not to represent a particular interest group.



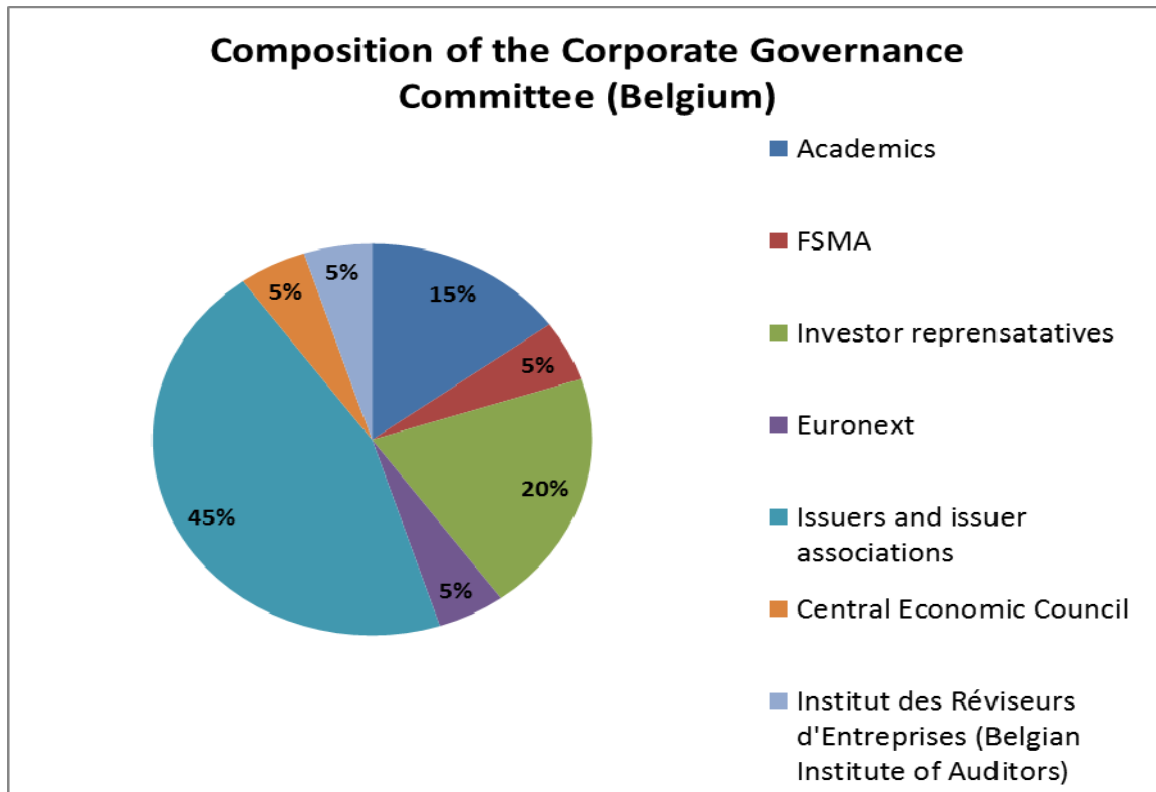
Source: AMF

²⁸ In general, the composition of the entity responsible for drafting the code is public and gives an idea of the diversity of the stakeholders involved. However, it is not always easy to determine which interest group each member represents when no biography is provided.

²⁹ A 12-member expert group of which 2 from the CNMV (chair and vice-chair of the CNMV), 2 representatives from the Ministry of Justice, 2 representatives from the Ministry of Economy and Competitiveness and 6 individuals from the "private sector" (professors and attorneys) whose appointments are proposed by the CNMV, the Ministry of Justice and the Ministry of Economy.

³⁰ The AFEP-MEDEF code of 12 November 2015 nevertheless states that "This new version gave rise to a consultation, in particular of the public authorities, organisations representing individual and institutional shareholders and proxy advisors".

³¹ "It [the Luxembourg Stock Exchange] sought assistance from management of major listed companies to give careful consideration to the scope of these principles as well as to their recommendations. A working group was established and its work relied on an analysis of the schemes implemented in neighbouring countries, the reflections of the European Commission and OECD standards. This was followed by a public consultation process which compiled, in particular, the comments and observations from Luxembourg's financial and academic worlds". Excerpt from the website of the Luxembourg Stock Exchange.



Source: AMF

These findings show that, in a majority of countries, the corporate governance code is drafted by a committee or an “ad hoc” group made up of several stakeholders.

In three countries, including France, investors and their representatives are not directly involved in drafting the code, although they may be consulted.

France, where the code is drafted only by professional associations representing issuers, appears to be the exception.

3.1.2 Interaction between the codes and other applicable regulations

Corporate governance codes do not exist in isolation. Rather, they are soft law instruments, which may or may not be based on self-regulation in the strict sense of the term and which are integrated into a national and European body of rules. They generally complement legislative or regulatory texts and/or market rules.

Consequently, corporate governance codes do not all have the same scope. Where companies' governance is regulated by company law and/or market rules, the coverage and scope of corporate governance codes may be limited merely to those issues not settled by company law. Conversely, in certain countries where company law gives companies wide latitude in their governance structures, the role of corporate governance codes is particularly important.

Certain legislative provisions are also incorporated into corporate governance codes³². In that case, the codes clearly indicate the legislative reference and companies cannot of course deviate from these provisions under the “comply-or-explain” rule but are required to comply. It is sometimes difficult to determine, just from reading the codes, what is soft law and what is law. However, it is crucial that the applicable corporate governance provisions be easily understood.

³² Conversely, the provisions of a code may be “imported” into law, as was the case in 2015 with the “Macron” law, with respect to the stricter cap on directorships held by executive officers.

3.1.3 Changes to the codes

In all the countries in the sample, the corporate governance code has already been amended at least once. These codes are regularly updated to incorporate best practices. In most cases, these revisions are subject to a prior public consultation.

More than half the countries considered (France, Germany, Italy, Spain, Sweden and the United Kingdom) have amended their corporate governance code in the last two years³³.

Table 3: Revisions to the codes

Country	Code	Code creation date	Number of revisions	Date of last revision to the code
Germany	German Corporate Governance Code	2002	11 revisions (2003, 2005, 2006, 2007, 2008, 2009, 2010, 2012, 2013, 2014, 2015)	2015
Belgium	Belgian Code on Corporate Governance	2004 ³⁴	1 revision (2009)	2009
Spain	Código Unificado de buen gobierno de las sociedades cotizadas	2006 ³⁵	2 revisions (2013, 2015)	2015
Finland	Finnish Corporate Governance Code	2004 ³⁶	2 revisions (2008, 2010)	2010
France	AFEP-MEDEF Corporate Governance Code	2003 ³⁷	5 revisions (2007, 2008, 2010, 2013, 2015)	2015
Italy	Corporate Governance Code	2006 ³⁸	4 revisions (2010, 2011, 2014, 2015)	2015
Luxembourg	The X Principles of Corporate Governance of the Luxembourg Stock Exchange	2006	2 revisions (2009, 2013)	2013
Netherlands	Dutch Corporate Governance Code	2003 ³⁹	1 revision (2008)	2008
UK	The UK Corporate Governance Code	1998 ⁴⁰	6 revisions (2003, 2006, 2008, 2010, 2012, 2014)	2014
Sweden	The Swedish Corporate Governance Code	2005	3 revisions (2008, 2010, 2015)	2015

Source: AMF

It is worth analysing the frequency with which the codes in the countries in the sample are revised and noting that:

- in Germany, the code has been amended almost every year since it was implemented in 2002;
- in the United Kingdom, the code has been amended approximately every two years since 2003;
- conversely, in other countries, like the Netherlands⁴¹ and Belgium, the codes have undergone very few revisions since their implementation. To that end, the Belgian regulator, when it was considering a potential

³³ That is, in 2014 or 2015.

³⁴ Governance principles have been established since 1998.

³⁵ Governance principles have been established since 1997.

³⁶ Governance principles have been established since 1997.

³⁷ Several reports were published in 1995, 1999 and 2002. The 2003 AFEP-MEDEF code consolidates the recommendations of the previous reports.

³⁸ Governance principles have been established since 1999.

³⁹ Governance principles have been established since 1997.

⁴⁰ Governance principles have been established since 1992 (Cadbury Report).

⁴¹ The code monitoring committee nevertheless requested a code revision process in the report it published in January 2015.

amendment to the corporate governance code in force in Belgium, nevertheless asked an external consultant⁴² to conduct a study to analyse the principles of the codes of a few major neighbouring countries (the United Kingdom, France, Germany and the Netherlands). The study concluded that the code did not need to be amended.

It can be inferred that, with the exception of Germany and the United Kingdom, where the codes are revised almost every year, in other countries, codes are not revised at regular intervals. The frequency of the revisions is not, however, a sufficient criterion and does not, in and of itself, allow conclusions to be drawn about the importance of the amendments made or about the overall quality of the code.

The main reasons put forward for the updates to the codes are (i) European and national legislative developments (for example, the European Commission Recommendation of 30 April 2009 as regards the regime for remuneration of executive directors of listed companies or that of 2014 on “comply or explain”) and (ii) changes in the business world, which lead to the emergence of new corporate governance standards. The 2007-2008 financial crisis and the various “scandals” relating to the remuneration of certain senior managers have therefore frequently been cited as explanations for changes in corporate governance codes, giving rise to provisions intended to stem short-termist behaviour or strengthen companies' accountability to stakeholders.

The rules amended in the codes considered over the last two years include:

- incorporation of rules on the diversity of members of the board and its committees;
- establishment of procedures for recovering or withholding, where applicable, payment of variable remuneration (clawbacks), and for setting the vesting and lock-up periods for deferred remuneration for all companies;
- alignment of senior managers' variable remuneration with the long-term interests of the company;
- effectiveness of the risk management and internal control arrangements.

Generally, the body responsible for drafting the code states that it considers, on an annual basis, whether to amend the code's provisions in light of best corporate governance practices.

However, the pace at which the codes are amended varies. While in some countries — Germany and the United Kingdom for example — they are changed annually or every two years, in other Member States the codes have been amended sparingly since they were first developed. France falls somewhere between these two extremes with five amendments to the AFEP-MEDEF code since 2003; the 2013 amendment was the most extensive.

Lastly, in most of the countries considered, amendments to the code are subject to a prior public consultation on the website of the entity responsible for drafting the code. In France, while the AFEP and the MEDEF consult a number of stakeholders (the AMF, investors, etc.), they do not publish the initial proposal but wait until the final proposal has been approved.

3.2 Scope and coverage of corporate governance codes

3.2.1 The mandatory or voluntary nature of the codes

Although Directive 2006/46/EC requires that any company listed on a regulated market include in its corporate governance statement the corporate governance code to which it is subject and/or which it has voluntarily decided to apply, Member States still determine whether implementation of a national code is mandatory or voluntary (see the table below on the mandatory or voluntary nature of the corporate governance codes).

⁴² *Corporate Governance Comparative Study*, Allen & Overy, September 2012

(http://www.corporategovernancecommittee.be/sites/default/files/generated/files/page/study_allen_overy.pdf).

Table 4: Mandatory or voluntary nature of implementation of the codes

Country	Implementation of the corporate governance code	
	mandatory	voluntary
Germany	X	
Belgium	X	
Spain		X
Finland	X	
France		X
Italy		X
Luxembourg	X	
Netherlands	X	
UK	X	
Sweden	X	

Source: AMF

In France, Spain and Italy, implementation of the corporate governance code is voluntary and subject to the “comply-or-explain” principle. However:

- in France, Articles L. 225-37 and L. 225-68 of the Commercial Code (for “one-tier” and “two-tier” companies, respectively) specify, based on a “two-stage” architecture, that “*if a company voluntarily applies a corporate governance code drafted by industry groups, the report referenced in this article should also identify any provisions it has chosen not to apply and give the reasons for doing so. The report should also state where the code can be consulted. If the company does not apply a corporate governance code, the report should indicate the rules that it applies in addition to the statutory requirements, and explain why it chose not to apply any of the provisions of this corporate governance code*”;
- in Spain, while application of the code is voluntary, listed companies are also required, in their annual corporate governance report, to provide explanations for each provision of the code they do not comply with⁴³. It is also worth noting that some of the recommendations in the code were recently incorporated into company legislation⁴⁴;
- in Italy, legislation⁴⁵ requires that companies provide information on their adoption of the corporate governance code and explain why they have not complied with one or more provisions of the code. All companies, whether or not they refer to a code, must also provide information on the corporate governance practices they have implemented. In addition, the *Borsa Italiana* requires compliance with several provisions of the code (on director independence, the internal control system, etc.) for companies listed on the *Segmento Titoli Alti Requisiti* (STAR), a segment of the regulated market dedicated to mid-cap companies with a market capitalisation of less than EUR 1 billion and which voluntarily agree to high corporate governance and transparency standards⁴⁶.

Conversely, in Luxembourg, Finland, Sweden and the United Kingdom, market rules mandate implementation of the code:

- in Luxembourg, the Société de la Bourse de Luxembourg preferred to adopt regulations based on normative principles⁴⁷ whose implementation is mandatory for all Luxembourg companies listed on a regulated market;
- in Finland, the rules of the NASDAQ OMX Helsinki mandate implementation of the Finnish corporate governance code for all companies listed on this market, regardless of nationality;
- similarly, in Sweden, since 2007, the rules of the NASDAQ OMX Stockholm have mandated implementation of the Swedish corporate governance code for all companies listed on a regulated market regardless of the location of the registered office;
- in the United Kingdom, pursuant to the FCA Listing Rules (9.8.6 R and LR 9.8.7 R), the UK Corporate Governance Code applies to premium listed companies whose registered office is in the United Kingdom or

⁴³ Article 61 *bis* of the Ley del Mercado de Valores.

⁴⁴ Act no. 31/2014 of 3 December 2014, amending the Companies Act.

⁴⁵ Article 123-bis of Legislative Decree no. 58/98 (Consolidated Law on Finance).

⁴⁶ At 27 February 2015, there were 67 companies in STAR.

⁴⁷ Such as “*The company shall adopt a clear and transparent corporate governance framework for which it shall provide adequate disclosure (principle 1)*” and “*The Board shall assess regularly its operating methods and its relationship with the Executive Management*” (principle 6).

abroad. In accordance with the above-referenced market rules, the companies in question must specify how they apply the Main Principles of the code.

In Germany, Belgium and the Netherlands, implementation of the code is also mandated by law and/or by regulatory provisions, but with some flexibility as the content of the code is wholly or partially covered by the “comply-or-explain” principle:

- in Germany, Article 161 of the *Aktiengesetz* (German Stock Corporation Act) requires that listed companies issue a declaration of compliance regarding their implementation of the code, in which they must explain any non-compliance with certain recommendations;
- in Belgium, pursuant to the law of 6 April 2010 on strengthening corporate governance and to the royal decree of 6 June 2010 which recognises the 2009 Belgian Code on Corporate Governance as the reference code for listed companies, the latter are now required to state their reasons for deviating from the code's recommendations. Several sections of Belgium's 2009 code have also been incorporated into the legislative code on companies⁴⁸ and are therefore legally binding;
- in the Netherlands, the Royal Decree of 23 December 2004 mandates a statement of compliance with the Dutch code (from 1 January 2005) for companies whose shares or depository receipts are listed on a regulated market and established in the Netherlands (or that are listed on an MTF and whose balance sheet exceeds EUR 500 million) and requires that they explain any instance of non-compliance with a provision.

In the vast majority of cases, implementation of the reference corporate governance code is mandated by market rules or by law. However, the code is not binding in its entirety, in accordance with the “comply-or-explain” principle.

Conversely, in three countries — France, Spain and Italy — implementation of the code is described as voluntary, under provisions that are similar but not equivalent. While compliance with the code is voluntary in Spain and Italy, the law nevertheless requires that companies state in their annual report every deviation from the provisions of the code. In France, companies must give their reasons for not adopting the code and identify the corporate governance measures they have implemented to supplement the legal requirements. France is therefore an exception insofar as Article L. 225-37 of the Commercial Code (or L. 225-68 for companies with a “two-tier” structure) allows companies to provide a general explanation for their decision not to refer to a code, without requiring a recommendation-by-recommendation explanation.

Spain and Belgium chose to codify in law certain rules in the corporate governance codes, thereby mandating their implementation.

The result is a variety of normative arrangements governing implementation of the code and application of the “comply-or-explain” principle. Implementation of a code may be mandatory in principle while remaining flexible with respect to its content and normative scope.

3.2.2 Scope of the code

All the corporate governance codes considered apply at a minimum to companies whose headquarters are located in the country in question and which are listed on a regulated market.

In four countries in the sample (Germany⁴⁹, France⁵⁰, Belgium⁵¹ and Luxembourg⁵²), the code is also intended to apply more broadly to all companies listed on a national regulated market, no matter the location of their registered office.

⁴⁸ Law of 7 November 2011.

⁴⁹ “Primarily, the Code addresses listed corporations and corporations with capital market access pursuant to Section 161 (1) sentence 2 of the Stock Corporation Act. It is recommended that companies not focused on the capital market also respect the Code.”

⁵⁰ “These recommendations are aimed at those companies whose securities are admitted to trading on a regulated market. It is also advisable and recommended that other companies apply these recommendations in whole or in part while adapting them to their own specific features”.

⁵¹ “The Code applies to companies incorporated in Belgium whose shares are admitted to trading on a regulated market (‘listed companies’). However, given its flexibility, the Code could also serve as a reference framework for all other companies”.

Lastly, in three codes in the sample (Italy, the United Kingdom and France), the specific characteristics of mid-cap enterprises are taken into consideration:

- in Italy, some of the recommendations in the corporate governance code apply only to issuers in the FTSE-MIB index⁵³;
- in the United Kingdom, some provisions do not apply to companies below the FTSE 350. Small- and mid-caps can also refer to the “Corporate Governance Code for Small and Mid-Size Quoted Companies” developed by the Quoted Companies Alliance.
- in France, a code for small- and mid-caps was published at the end of 2009⁵⁴. These companies may however choose to refer to the AFEP-MEDEF code⁵⁵.

These findings show that France and the United Kingdom are the only European countries in the sample to have developed a specific corporate governance code for small- and mid-caps.

3.2.3 Structure of the codes

The structure of the corporate governance codes (types of rules, level of detail and description, interaction with legislation and national regulations) varies significantly between the different European countries considered, but often follows a three-stage logic, from fundamental principles to their practical implementation.

Table 5: Structure of the codes

Country	Hierarchy of rules and their scope	
	Types of rules	Scope of these rules
Germany	Recommendations Suggestions	Comply or explain Non-binding
Belgium	Principles Provisions Guidelines	Comply or explain Comply or explain Non-binding
Spain	Principles Recommendations	Comply or explain Comply or explain
Finland	Recommendations	Comply or explain
France	Recommendations	Comply or explain
Italy	Principles Criteria Comments	Comply or explain Comply or explain Non-binding
Luxembourg	Principles Recommendations Guidelines	Mandatory Comply or explain Non-binding
Netherlands	Principles Best practices	Comply or explain Comply or explain
UK	Principles Provisions	Comply or explain Comply or explain
Sweden	Rules	Comply or explain

Source: AMF

⁵² “The X Principles apply to companies incorporated under Luxembourg law, where their shares are listed on a regulated market operated by the Luxembourg Stock Exchange, except for regulated SICAV and Funds, to which specific regulations apply. However, given their flexibility, the X Principles can easily be used as a reference framework for any company incorporated under Luxembourg law, or under the laws of another country, or any company incorporated under Luxembourg law that has asked for its shares to be admitted to a foreign regulated market”.

⁵³ Made up of 40 issuers.

⁵⁴ MiddleNext Corporate Governance Code for Midcaps.

⁵⁵ 41% of Compartment B companies and 18% of Compartment C companies refer to the AFEP-MEDEF code. See the 2015 report by the AMF on corporate governance and executive remuneration.

In three countries (France, Finland and Sweden), the code includes only one type of rule (for example, recommendations or principles) whose application is based on the “comply-or-explain” principle⁵⁶.

Conversely, in seven countries (Belgium, Germany, Italy, Luxembourg, the Netherlands, Spain and the United Kingdom) the code is structured according to a hierarchy of rules that have a specific scope:

- in Germany, the code is structured as “recommendations”, subject to the “comply-or-explain” principle, and as “suggestions”, which are by definition non-binding;
- in Belgium, the code is organised around nine “principles”, “provisions” and “guidelines”. Provisions are recommendations that describe how to apply the principles. Companies are required to comply with these provisions or explain why they have not done so. They are supplemented by guidelines consisting of advice on how to apply or interpret the provisions in the code. They are not subject to the “comply-or-explain” obligation. In addition, the Belgian Corporate Governance Committee has posted several explanatory notes on corporate governance on its website;
- in Spain, the code is broken down into “principles” and “recommendations”; the latter provide practical and specific insight into the former on the basis of the “comply-or-explain” obligation;
- in Italy, the code is divided into three sets of rules: “principles”, “criteria” and “comments”. Criteria describe the conduct to be followed to apply the twenty or so principles. Comments, which are not subject to the “comply-or-explain” principle, have two goals: to clarify the principles and criteria, mainly through examples, and to describe additional best practices, as well as the methods for pursuing the objectives set out in the principles and criteria. Companies must explain how they apply each recommendation contained in the principles and criteria;
- in Luxembourg, the “X Principles” consist of three sets of rules: the actual mandatory (“compliance”) principles, the “comply-or-explain” recommendations, and guidelines, which provide indicative advice on how to properly implement or interpret the recommendations, and reflect best practices observed;
- in the Netherlands, the code contains principles in the form of “best practice provisions”, and all these rules are subject to the “comply-or-explain” obligation;
- in the United Kingdom, the code consists of principles (main and supporting) and provisions. The Listing Rules require companies to apply the code in accordance with the “comply-or-explain” principle.

Unlike the majority of European countries, the AFEP-MEDEF code is organised around a single type of rule — recommendations⁵⁷ — and all the rules have the same scope. In parallel, the application guide for the AFEP-MEDEF code published by the *Haut comité de gouvernement d'entreprise* is an ad hoc document that clarifies the interpretation of certain recommendations in the code.

3.3 Enforcement of the codes

Implementation of the “comply-or-explain”⁵⁸ principle gives companies some flexibility in applying the provisions of the reference code. On the other hand, self-regulation relies primarily on the transparency requirement regarding the status of application of the corporate governance rules, which allows stakeholders (shareholders, auditors, suppliers, etc.) to monitor compliance.

3.3.1 Preparation of reports on implementation of the codes

National enforcement systems vary widely, in terms of both the entity responsible for enforcement or monitoring and the content of the reports on application of the provisions of the governance codes.

⁵⁶ In Sweden, however, some of the rules are preceded by brief introductory texts explaining the principles and/or the regulations behind the rules. Similarly, in Finland, recommendations are preceded by introductory comments and followed by explanations. In France, the *Haut comité de gouvernement d'entreprise* publishes an application guide for the AFEP-MEDEF code, which is updated every year.

⁵⁷ The code also outlines principles on executive pay.

⁵⁸ However, as is the case with the X Principles of Corporate Governance in Luxembourg, some provisions of the code may be mandatory.

Table 6: Entities responsible for monitoring implementation of the codes

Country	Code author(s)	Author(s) of the report(s) on implementation of the codes
Germany	Regierungskommission Deutscher Corporate Governance Kodex	Berlin Center of Corporate Governance (private institute)
Belgium	Corporate Governance Committee	- FSMA (regulator) and - FEB (Federation of Enterprises in Belgium) and GUBERNA (Belgian Directors Institute)
Spain	CNMV	CNMV (regulator)
France	AFEP and MEDEF	- AMF (regulator) and - HCGE (self-regulation body)
Finland	Securities Market Association	NASDAQ OMX (market undertaking)
Italy	Comitato per la Corporate Governance	- Consob (regulator), - Assonime (issuer association) and - Comitato per la Corporate Governance
Luxembourg	Luxembourg Stock Exchange	Luxembourg Stock Exchange (market undertaking)
Netherlands	Corporate Governance Code Monitoring Committee	Corporate Governance Code Monitoring Committee
UK	Financial Reporting Council (FRC)	FRC (regulator)
Sweden	Swedish Corporate Governance Board	- Swedish Corporate Governance Board and - NASDAQ OMX (market undertaking)

Source: AMF

Table 6 above shows that in half the countries in the sample (Belgium, France, Italy, Spain and the United Kingdom), the market regulator prepares a report on implementation of the governance codes:

- in France, the AMF is legally responsible for publishing an annual report on corporate governance, internal control and executive remuneration⁵⁹;
- In Spain, under the law⁶⁰, the CNMV is responsible for monitoring corporate governance rules and publishing any information it deems relevant about the actual level of compliance;
- in the other countries, it seems that the law does not require regulators to prepare a report. In Belgium, the preamble to the code nevertheless states that the regulator “publishes, from time to time, general comparative overviews of corporate governance practices in Belgian listed companies”.

In three of these countries (Belgium, France and Italy), reports are prepared by private organisations to supplement the market regulators' reports:

- in Belgium, the market authority (FSMA) and the Belgian Directors Institute, in conjunction with the *Fédération des entreprises de Belgique* (Federation of Enterprises in Belgium), each write a report on monitoring of the codes;
- in France, the AMF has prepared a report every year since 2004 at the legislature's request, and the *Haut Comité de gouvernement d'entreprise*, a seven-member self-regulation body (formed as an association) has prepared a second report since 2014;
- in Italy, the market authority (the Consob), the corporate governance committee (*Comitato per la Corporate Governance*) and the association representing issuers (*Assonime*) each prepare an annual report.

In the other half of the countries considered, one or more private entities are tasked with drafting a report. For example, in Sweden⁶¹, the Swedish Corporate Governance Board, as an entity whose mission is to promote the development of best governance practices, is responsible for preparing a report on implementation of the

⁵⁹ Article L. 621-18-3 of the Monetary and Financial Code.

⁶⁰ Article 540 of the *Ley de sociedades de capital*.

⁶¹ Annual Accounts Act.

corporate governance code at the macroeconomic level, while the market undertaking is tasked with enforcing companies' individual implementation of the code.

In six of the countries considered (France⁶², Luxembourg, the Netherlands, Spain, Sweden and the United Kingdom), the author of the code also monitors its implementation by the companies that use it as their reference.

3.3.2 Reports samples and methodology

It may be useful to compare the samples and methodologies used in the different reports to understand the full scope of the report and the relevance of the analysis.

Several scenarios are possible. Some of the organisations responsible for preparing the report choose to consider all listed companies (NASDAQ OMX and Luxembourg Stock Exchange), while others choose to select companies by market capitalisation (as is the case with the AMF).

Table 7: Report samples

Country	Report	Date of last report	Sample
Germany	Berlin Center of Corporate Governance report	2014	120 companies that responded to a questionnaire (113 listed on the Frankfurt exchange, of which 25 in the DAX)
Belgium	Directors Institute and <i>Fédération des entreprises de Belgique</i> report	2015	78 listed companies (BEL 20, BEL Mid, BEL Small)
	FSMA report	2015	113 companies listed on a regulated market for the 2012 report and 91 listed companies for the 2015 report
Spain	CNMV report	2014	142 companies (35 companies in the IBEX, 24 companies with a capitalisation greater than or equal to EUR 500 million and 83 companies with a capitalisation of less than EUR 500 million)
France	AMF report	2015	The 60 French companies with the largest market capitalisations (in 2015, CAC 40 + 26 companies)
	HCGE report	2015	The 120 largest market capitalisations (SBF 120)
Finland	NASDAQ OMX report	2012	120 companies listed on the Nasdaq OMX Helsinki
Italy	Consob report	2014	About 240 listed companies
	Assonime report	2015	230 listed companies
	CCG report	2014	Based on the two reports above and potentially on other studies
Luxembourg	Luxembourg Stock Exchange report	2013	Companies listed on a regulated market, or 19 companies ⁶³
Netherlands	Corporate Governance Code Monitoring Committee report	2015	72 companies that responded to a questionnaire ⁶⁴ (20 AEX; 21 AMX; 19 AMS; 12 Local)
UK	FRC report	2015	FTSE 350 companies ⁶⁵

⁶² The *Haut comité de gouvernement d'entreprise* (HCGE) is responsible for proposing updates to the code to reflect changes in practice, including at the international level, AMF recommendations or areas for reflection, and investor requests.

⁶³ The report covers the 20 companies listed on a regulated market but specifies: "One company will not hold its general meeting until September. As the closing date for this report is 31 July 2013, this company has not been included".

⁶⁴ Out of the 95 companies who received a questionnaire.

Sweden	Swedish Corporate Governance Board report	2015	252 companies that have their registered office in Sweden ⁶⁶ (Nasdaq OMX Stockholm primarily, plus NGM Equity)
	NASDAQ OMX report	2012	194 companies (Nasdaq OMX Stockholm)

Source: AMF

The above table shows that the AMF sample appears relatively limited compared with the reports prepared in Belgium, Germany, Italy, Spain and the United Kingdom.

This difference can be attributed, first, to the methodology used. While the AMF analyses information using a matrix developed by its staff, the UK FRC and the Dutch Corporate Governance Code Monitoring Committee use external service providers and studies (consulting firm, university) for the statistical analysis of corporate governance information. Furthermore, in Germany and the Netherlands, governance practices are identified using a questionnaire sent to the relevant companies, which fill it out themselves. Second, in some years the AMF publishes a second report on small- and mid-caps, while the studies published in other countries do not specifically target this type of company. Lastly, in certain countries the study does not cover companies' most recent accounting period but rather a prior period.

Regarding the “name and shame” approach, which involves publicly naming companies that do not comply with the rules in the governance codes under the “comply-or-explain” principle, the AMF also found that:

- with the exception of the AMF, which adopted this approach in 2012, the code implementation monitoring reports are anonymous⁶⁷;
- the CNMV (Spain) does not “name and shame” strictly speaking, but it does put a name to the figures on companies' capital and ownership structure, as well as to various data on the meetings of the control bodies and the conduct of annual meetings. Additionally, a second appendix of tables details implementation of each provision of the code, company by company, over the last three years.

Of the 15 reports studied in 10 European countries, only the AMF report on application of the corporate governance code — and, to a lesser extent, that of the NASDAQ OMX in Finland — cited the companies that do not comply with the governance rules by name (“name and shame”).

3.3.3 Form and structure of the reports

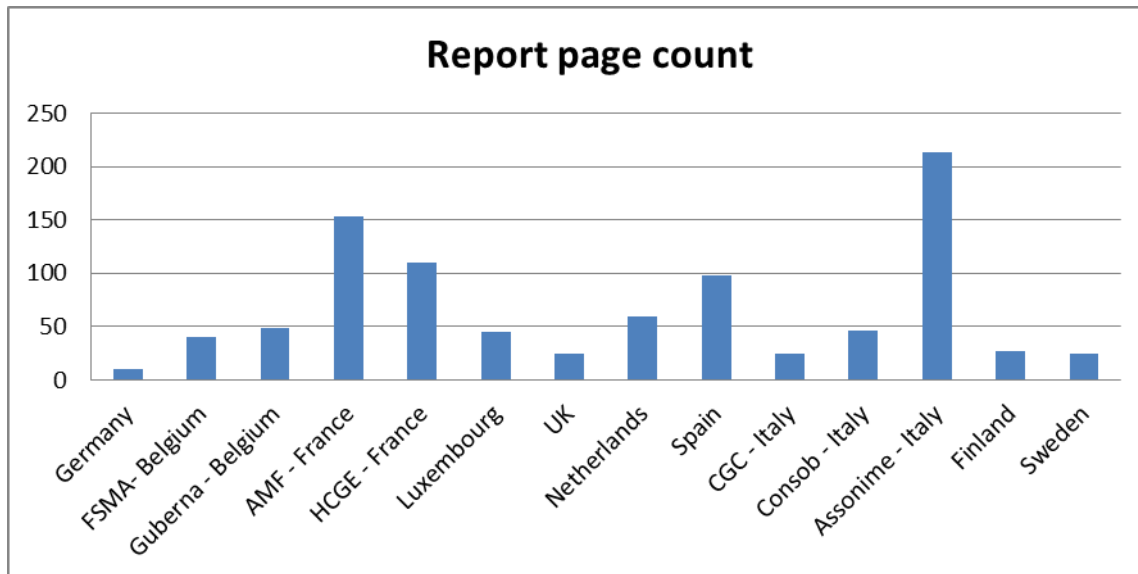
The length of the reports varies widely. It ranges from 10 pages in Germany to 213 pages in Italy⁶⁸. These differences can be attributed primarily to the size of the sample, the content and the structure of the reports (see below). On average, the most recent reports published in each country are 65 pages long.

⁶⁵ The FRC's report is based primarily on the studies conducted by Grant Thornton and Manifest, whose analysis covers the FTSE 350 companies [In 2014, the study covered 307 companies in the FTSE 350].

⁶⁶ Out of the 275 companies listed on a regulated market in Sweden.

⁶⁷ In Finland, the NASDAQ OMX market undertaking names the companies that do not comply with the code's recommendations and do not provide a satisfactory explanation under the “comply-or-explain” principle.

⁶⁸ 2014 report of the Italian association Assonime (more than 60 pages of appendices).



Source: AMF

Compared with the other reports, the report published by the AMF is one of the most voluminous.

Several reports include a section on important discussions around corporate governance, similar to the approach the AMF takes in its report. For example, the Netherlands' last report on corporate governance, dated January 2015 and covering the 2013 financial year, discusses recent developments⁶⁹ in the codes of other countries (United Kingdom, France, Japan, etc.).

3.3.4 Assessment of the “comply-or-explain” rule

The European Commission's 2011 Green Paper on the EU corporate governance framework⁷⁰ identified gaps in the practical implementation of the “comply-or-explain” principle, in particular with respect to the quality of the explanations provided by companies when they deviate from the corporate governance codes.

In its 2012 Action Plan on European company law and corporate governance⁷¹, the European Commission stressed the importance of high-quality explanations, in particular for investors, and announced an initiative to improve the quality of corporate governance reports. It then published, on 9 April 2014⁷², a Recommendation that gives companies guidance on improving the quality of their corporate governance statements.

In parallel, the September 2009 RiskMetrics report⁷³ established five categories into which explanations could be classified⁷⁴ to judge their quality, used as the basis for analysis in certain reports on enforcement of the corporate governance codes.

Several entities responsible for drafting or enforcing the codes have also published guidelines detailing the characteristics of a high-quality explanation.

Regarding the assessment of the “comply-or-explain” rule included in the monitoring reports on implementation of the corporate governance codes, it should be noted that:

- in all the reports, a statistical analysis is performed on the degree of compliance with the code's recommendations;

⁶⁹ Report on the 2013 financial year, Corporate Governance Code Monitoring Committee, p.47.

⁷⁰ COM (2011) 164 of 5 April 2011.

⁷¹ European Parliament resolution of 29 March 2012 on a corporate governance framework for European companies, 2011/2181(INI).

⁷² Commission Recommendation of 9 April 2014 on the quality of corporate governance reporting.

⁷³ Study on Monitoring and Enforcement Practices in Corporate Governance in the Member States, RiskMetrics, 2009.

⁷⁴ 1) Invalid explanations, which indicate a deviation without further explanation; 2) general explanations, which do not identify a company-specific situation; 3) limited explanations, which do not explain the reasons for deviating from the code, but provide alternative procedures, for example; 4) specific explanations, which relate to a specific company situation; and 5) transitional explanations, which indicate that the deviation is temporary.

- 9 reports⁷⁵ out of 15 present examples of explanations provided by companies when they deviated from one or more provisions of the code and assess the relevance of the explanations provided by the companies differently.
 - o In this respect, the 2014 report by Guberna and the FEB (Belgium) dedicates an entire chapter to “*analysing ‘explain’*” and attempts to analyse the quality of the explanations by classifying them into five categories based on the RiskMetrics Group's typology⁷⁶.
 - o Similarly, the Swedish Corporate Governance Board ranks the explanations in three categories, namely “good”, “acceptable” and “none/insufficient”.
 - o The reports by the FRC, Assonime (Italy), Corporate Governance Committee (Italy) and Dutch Corporate Governance Monitoring Committee also devote a chapter to analysing explanations.
 - o The AMF combines statistical findings with a qualitative analysis of the explanations provided, but does not classify them according to a typology.
 - o In France, the *Haut Comité de gouvernement d'entreprise* states in its annual report that it wrote to around 30 companies in the SBF 120 “*to point out deviations from the Code or deficient explanations*”.

In more than one-third of the reports considered (6 out of 15), the findings are exclusively statistical.

Nevertheless, eight reports⁷⁷ endeavour to provide a more qualitative assessment of respect for the “comply-or-explain” principle. This includes the AMF's report, which identifies examples (where applicable, by name) of good and bad explanations for deviating from a recommendation in the code, or provides insight into its assessment of the deficiencies of certain explanations.

3.3.5 Recommendations made by the authors of the reports

The AMF (France) and the FSMA (Belgium) are the only public authorities that, in their last report, made recommendations to issuers regarding compliance with the provisions in the referenced code⁷⁸.

Furthermore, few reports list areas where the code could be improved. As discussed below, it is useful to keep in mind that in six of the countries considered (France — with the HCGE, Luxembourg, the Netherlands, Spain, Sweden and the United Kingdom), the author of the code is also responsible for enforcing its implementation. In France, however, the AMF highlights avenues of discussion for the authors of the code with the aim of suggesting areas for amendment. Similarly, in the Netherlands, the Corporate Governance Committee evaluated, in its annual report published in January 2015, the code and its improvements and called on stakeholders (i.e., associations and Euronext, which were behind the creation of the committee but are not members) to launch a code revision process.

⁷⁵ Report prepared by the AMF, HCGE report (France), FRC report (UK), Guberna and FEB report (Belgium), Luxembourg Stock Exchange report, Italian CGC report, Assonime report (Italy), Swedish Corporate Governance Board report and Dutch Corporate Governance Monitoring Committee report.

⁷⁶ <http://www.corporategovernancecommittee.be/fr/code-2009/respect-du-code>

⁷⁷ The Luxembourg Stock Exchange report merely reiterates the explanations without offering a qualitative analysis.

⁷⁸ The Italian CGC also makes “recommendations” to companies. The Société de la Bourse de Luxembourg included “efforts” that “[companies] will have to make on the principles”.

4. CORPORATE GOVERNANCE AND EXECUTIVE PAY ISSUES

This section of the study considers several defining corporate governance issues by analysing the content of the codes. The AMF notes that corporate governance codes do not exist in isolation. They should be interpreted in the context of the normative framework into which they are integrated and from which their scope can be derived (see 3.1.2).

For each topic, the European regulation, where applicable, is cited first. Then follows an analysis of these provisions based on the national legislative provisions.

The following topics are covered:

- Separation of the roles of chief executive officer and chairman of the board.
- Lead director.
- Independence of the members of the board (and of the chairman).
- Board gender diversity.
- Board evaluation.
- Criteria for awarding variable remuneration.
- Caps on severance pay.

4.1 Separation of the roles of chief executive officer and chairman of the board

4.1.1 European framework

There is no uniformity of practice with regard to the separation of the roles of chief executive officer and chairman of the board in Europe, as this issue is intrinsically linked to methods of governance and types of companies, which are still largely governed by national company law⁷⁹.

However, for credit institutions and investment firms, European Directive 2013/36/EU⁸⁰, or “CRD IV”, provides for a separation of the duties of chairman of the management body and chief executive officer to ensure “*sound and prudent*”⁸¹ management.

⁷⁹ With the exception of European companies (SEs).

⁸⁰ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC.

⁸¹ Article 88.1.e) of Directive 2013/36/EU.

Table 8: Separation of the roles of chief executive officer and chairman of the board

Country	Separation of the roles of chief executive officer and chairman of the board		Measures when the roles are combined
	Nature	Source	
Germany	Mandatory	Stock Corporation Act of 6 September 1965 (§105)	N.A.
Belgium	Recommended by the code ("comply or explain")	Provision 1.5	Justify non-compliance with the recommendation
Spain	Voluntary		Election of the chairman must be approved by at least two-thirds of the members of the board of directors A lead director, who takes on additional duties, must be appointed
France	Voluntary		A lead director may be appointed but there is no such recommendation in the code
Finland	Recommended by the code ("comply or explain")	Recommendation 36	Justify non-compliance with the recommendation
Italy	Voluntary		Appointment of a lead director recommended by the Committee responsible for drafting the code
Luxembourg	Recommended by the code ("comply or explain")	Recommendation 1.3	Justify non-compliance with the recommendation
Netherlands	Mandatory	One-Tier Board Act	N.A.
UK	Recommended by the code ("comply or explain")	Provision A.3.1	Justify non-compliance with the recommendation The board should consult major shareholders in advance and should set out its reasons to the market in the annual report
Sweden	Mandatory	Swedish Companies Act	N.A.

Source: AMF

In three countries in the sample (Germany, the Netherlands and Sweden), the separation of the roles of chairman and chief executive officer is provided for by law:

- In Germany, company governance is very largely based on a two-tier model with a supervisory board and a management board⁸², and the law stipulates that a member of the management board may not be a member of the supervisory board⁸³. Article 5.4.2 of the German corporate governance code also stipulates that not more than two former members of the management board shall be members of the supervisory board. Article 5.4.4 specifies that management board members may not become members of the supervisory board within two years after the end of their term of office unless they are appointed upon a motion presented by shareholders holding more than 25% of the voting rights. In the latter case appointment as chairman of the supervisory board shall be an exception to be justified to the general meeting.
- In the Netherlands, governance of companies whose legal form is an NV (*naamloze vennootschap*) or BV (*besloten vennootschap met beperkte aansprakelijkheid*) has also traditionally been based on a two-tier system. However, since 1 January 2013, these companies have had the option of using a one-tier system (company with a board of directors), and the law specifies that the chief executive officer may not be the

⁸² Even though European company (SE) status has met with great success in Germany since 2004.

⁸³ Stock Corporation Act of 6 September 1965 (§105).

chairman of the board⁸⁴. Additionally, companies have also been able to opt for European company (SE) status since 2004.

- Lastly, in Sweden, the law — incorporated in substance into the preamble of the Swedish governance code — states that the chief executive officer may not be the chairman of the board⁸⁵.

In four countries in the sample (Belgium, Finland, Luxembourg and the United Kingdom), the corporate governance code recommends separating the roles of chief executive officer and board chairmanship in one-tier structures. If this separation principle is not respected, the company must explain under the “comply-or-explain” principle:

- The Belgian corporate governance code recommends that “*If the board envisages appointing the former CEO as chairman, it should carefully consider the positive and negative aspects in favour of such a decision and disclose in the CG Statement why such appointment is in the best interest of the company*”.
- In Finland, recommendation 36 of the code stipulates that the chief executive officer may not be the chairman of the board. However, an explanatory note in the code states that, under certain circumstances, such as the development phase of the operations or the ownership structure, the roles may be combined. In that case, the company must explain why it has not complied with this recommendation.
- In Luxembourg, recommendation 1.3. stipulates that “*Executive Management of the company shall be entrusted to a management body, headed by an individual other than the Chairman of the Board*”.
- In the United Kingdom, provision A.3.1. of the code stipulates that the chief executive cannot be appointed chairman of the same company. If exceptionally a board decides that a chief executive should be appointed chairman, the board should consult major shareholders in advance and should set out its reasons to the market in the annual report.

Conversely, in three countries in the sample (France, Italy and Spain), companies may decide whether to separate the roles. In Italy, one of the comments (not subject to the “comply-or-explain” rule) states that separating the roles may strengthen the characteristics of impartiality and balance that are required from the chairman. In Spain, the law⁸⁶ states that, if the same person holds the offices of chairman and chief executive officer, the election of the chairman must be approved by at least two-thirds of the members of the board of directors. The law, incorporated in substance into the code, also specifies that if the roles of chairman and chief executive officer are combined, a lead director, or *consejero independiente coordinador* must be appointed.

The practice of separating the roles of chairman of the board and chief executive officer is intrinsically linked to governance models and specific national characteristics. Since the financial crisis, the literature and codes of best practice have nevertheless tended to consider that the concentration of power intensifies conflicts of interest.

Consequently, in countries where the roles may be combined, namely Italy, Spain and France, the codes comment on the appointment of a lead director. Unlike the Spanish and Italian codes, the AFEP-MEDEF code and its application guide do not expressly refer to the appointment of a lead director as a counterweight to a combined chairman and chief executive officer (see below).

⁸⁴ One-Tier Board Act, which entered into force in 2013.

⁸⁵ Section 49, Swedish Companies Act.

⁸⁶ Article 529 *septies* of the *Ley de Sociedades de Capital*.

4.2 Lead director

4.2.1 European framework

There are no lead director provisions at the European level.

4.2.2 Analysis of corporate governance codes

Table 9: Lead director

Country	Lead director referenced in the code?	Chosen from among independent directors?	Duties specified in the code?
Germany	No	N/A	N/A
Belgium	No	N/A	N/A
Spain	Yes (Principle 16 – recommendation 34)	Yes	Yes
Finland	No	N/A	N/A
France	Yes (Recommendation 6.5)	No	No
Italy	Yes (Criteria 2.C.3 – 2.C.4)	Yes	Yes
Luxembourg	Yes (Recommendation 2.4 guideline 2 – Recommendation 7.4 guideline 2)	Yes	Yes
Netherlands	No	N/A	N/A
UK	Yes (Provisions A.4.1 – A.4.2 – B.6.3 – E.1.1)	Yes	Yes
Sweden	No	N/A	N/A

Source: AMF

Reference to the role of lead director in the code

In five countries in the sample (France, Italy, Luxembourg, Spain, the United Kingdom), the corporate governance code refers to the possibility of appointing a lead director from among the board members.

Conversely, in the five other countries considered (Belgium, Finland, Germany, the Netherlands and Sweden), the code does not refer to the lead director. In three of these countries (Germany, the Netherlands and Sweden), the separation of the roles of chairman of the board and chief executive officer is required by law or by the use of a two-tier governance model. In the other two countries (Belgium and Finland), the governance code recommends that these roles be clearly separated.

Combination of the roles of chief executive officer and chairman of the board and the counter-weight role of lead director

Two codes (Italian and Spanish), which do not, for that matter, recommend separating the roles of chairman and chief executive officer, explicitly recommend appointing a lead director when the roles of chairman and chief executive officer are combined.

In Spain, a lead director must be appointed when the roles of chief executive officer and chairman are combined. As such, Spanish law, incorporated into the governance code, states that a “coordinating director” (*consejero coordinador*) must be appointed from among the independent directors and have expanded powers.

Independence of lead directors

In four countries in the sample (Italy, Luxembourg, Spain and the United Kingdom) out of the five that refer to a lead director, the code states that the lead director shall be appointed from among the independent directors. As such, the lead director is described as “lead independent director” in Luxembourg and as “senior independent director” in the United Kingdom.

In France, where the appointment of a lead director is merely a possibility, the code makes no recommendation that he or she be appointed from among the independent directors. However, the AMF has stated, as an avenue of discussion, that *“it is necessary that the lead director be independent”⁸⁷*.

Duties of the lead director

In four countries (Italy, Luxembourg, Spain and the United Kingdom) out of the five that refer to a lead director, the code details his or her duties.

Some of the codes set fairly high standards in this respect:

- Luxembourg's corporate governance code stipulates that the lead director will be responsible for ensuring compliance with the good governance rules. He or she is the chairman of the board's “preferred contact person” and it is also recommended that he or she chair the nomination and remuneration committees;
- in the United Kingdom, the lead director should hold meetings without the executive directors present at least annually to appraise the chairman's performance and discuss topics he or she deems important. He or she is the shareholders' main contact person;
- in Spain, in addition to the lead director's legal duties, namely calling meetings of the board of directors, setting the agenda items for board meetings, coordinating and calling meetings of the independent board members and conducting the evaluation of the chairman of the board of directors, the code recommends that the lead director assume responsibility for shareholder relations on corporate governance matters, manage the chairman's succession plan, and chair the board of directors in the absence of the chairman or vice-chairmen. He or she also addresses any concerns of the non-executive directors.

The AFEP-MEDEF code is the exception in Europe in that it makes no recommendation that the lead director be chosen from among the independent members of the board, and does not specifically define his or her duties.

In that respect, the AMF has published an area for discussion in which it states *“the appointment of a lead director is an interesting area for discussion which aims to prevent potential conflicts of interest, in particular should the positions of chairman and CEO be combined. (...) In addition, it is necessary that the lead director be independent and that the company takes stock of his/her actions in order to assess on the one hand the nature of the due diligence and tasks performed as a lead director and, on the other hand, how he may have used the powers given to him”*.

4.3 Independence of the members of the board (including the chairman)

4.3.1 European framework

The European Commission recommendation of 15 February 2005⁸⁸ lays the groundwork for the role of non-executive director by defining independence, the profile of non-executive directors and how many non-executive directors should be on the board.

Whereas clause 7 states that *“the presence of independent representatives on the board, capable of challenging the decisions of management, is widely considered as a means of protecting the interests of shareholders and other stakeholders”*.

⁸⁷ AMF Recommendation 2012-02.

⁸⁸ Recommendation 2005/162/EC.

Annex II of the recommendation provides a list of negative criteria for assessing the independence of directors, which must be adapted to the national context:

- “(a) not to be an executive or managing director of the company or an associated company, and not having been in such a position for the previous five years;*
- (b) not to be an employee of the company or an associated company, and not having been in such a position for the previous three years, except when the non-executive or supervisory director does not belong to senior management and has been elected to the (supervisory) board in the context of a system of workers’ representation recognised by law and providing for adequate protection against abusive dismissal and other forms of unfair treatment;*
- (c) not to receive, or have received, significant additional remuneration from the company or an associated company apart from a fee received as non-executive or supervisory director. Such additional remuneration covers in particular any participation in a share option or any other performance-related pay scheme; it does not cover the receipt of fixed amounts of compensation under a retirement plan (including deferred compensation) for prior service with the company (provided that such compensation is not contingent in any way on continued service);*
- (d) not to be or to represent in any way the controlling shareholder(s) (control being determined by reference to the cases mentioned in Article 1(1) of Council Directive 83/349/EEC (1));*
- (e) not to have, or have had within the last year, a significant business relationship with the company or an associated company, either directly or as a partner, shareholder, director or senior employee of a body having such a relationship. Business relationships include the situation of a significant supplier of goods or services (including financial, legal, advisory or consulting services), of a significant customer, and of organisations that receive significant contributions from the company or its group;*
- (f) not to be, or have been within the last three years, partner or employee of the present or former external auditor of the company or an associated company;*
- (g) not to be executive or managing director in another company in which an executive or managing director of the company is non-executive or supervisory director, and not to have other significant links with executive directors of the company through involvement in other companies or bodies;*
- (h) not to have served on the (supervisory) board as a non-executive or supervisory director for more than three terms (or, alternatively, more than 12 years where national law provides for normal terms of a very small length);*
- (i) not to be a close family member of an executive or managing director, or of persons in the situations referred to in points (a) to (h)”.*

4.3.2 Analysis of corporate governance codes

The definition of independence varies significantly among the different European countries. While many codes rely on the independence criteria defined in Annex II of the European Commission’s recommendation, authors of the codes have also taken specific local characteristics into account and have added and/or removed certain criteria.

Reference to independence criteria in the code

Independence criteria are generally incorporated into governance codes and fall under the “comply-or-explain” principle, with the exception of Spain and Belgium, where these criteria have been enshrined in law and are therefore mandatory.

The German code is the only one that does not include detailed independence criteria, due mainly to the use of a two-tier governance structure which ensures that the supervisory board, which is exclusively composed of non-executive directors, supervises the management board. Legislative provisions aiming to reduce the risk of conflicts of interest have also been introduced⁸⁹.

Board consideration of independence criteria

Most of the codes state that the board must, at a minimum, analyse independence against the criteria referenced in the code.

⁸⁹ Articles 100 and 105 of the AktG.

In Luxembourg, however, companies may adopt their own definition of independence as the criteria are provided only as a reference.

The Finnish code includes a flexible definition of independence. Independence criteria are divided into three sub-categories:

- six criteria used to ascertain whether a director is independent of the company;
- criteria used to determine independence relative to a major shareholder of the company; and
- lastly, criteria that the board may, after an overall evaluation, examine to determine whether or not the director is independent overall.

Independence criteria

Based on the independence criteria, the AMF found that:

- in almost all the countries in the sample, with the exception of Germany and France, it is stipulated that an independent director cannot receive significant additional remuneration from the company apart from that which he or she receives as a non-executive member of the board. However, in France, director remuneration is regulated. Directors may receive only attendance fees⁹⁰ and “exceptional payments”⁹¹ if they are assigned a specific task approved by the board and submitted to the general meeting in the context of the regulated agreement procedure.
- all the codes in the sample include a criterion for the existence of material direct or indirect business relationships between directors and the company. In contrast, none of the codes set out criteria for assessing this materiality. The Italian code specifies in this respect that the governance committee did not deem it useful to publish specific criteria for assessing materiality. The issuer must disclose the quantitative and qualitative criteria used. It is also specified that materiality should be considered both in absolute terms and with reference to the economic situations of the parties concerned. Moreover, a relationship that may not be significant from an economic standpoint may be material for the reputation of the director concerned. The Italian code likewise considers that certain non-economic relationships may also be material (for example, political relationships);
- in five countries (Belgium, Finland, France, Luxembourg and Spain), an independent director cannot sit on the board for more than 12 years. In Finland, this criterion is optional. In Italy, this period is reduced to 9 of the last 12 years. In the United Kingdom, the period is nine years from the first election. The Netherlands is the only country not to list any criteria relating to the length of the director's service.

Independence of the chairman

All the countries in the sample authorise the chairman of the board to be described as independent. In the United Kingdom, the code expressly recommends, as a best practice, that the chairman be appointed from among the independent members.

In all the countries in the sample, with the exception of France, it is also stipulated that independence be reserved for non-executive members. Paragraph 9.1 of the AFEP-MEDEF code states that an independent director is a “*non-executive director, i.e. one not performing management duties in the corporation or the group*”. Conversely, the criteria listed in paragraph 9.4. no longer refer to the criterion of “executive” member but to that of “executive director” (*dirigeant mandataire social*), which is defined in a footnote on page 1 with a list of titles, including that of chairman of the board of directors. The latter cannot therefore, in principle, be considered an independent director, but paragraph 9.4. ultimately provides for the possibility that the chairman of the board of directors could be considered independent provided this can be justified “*based on the criteria set out*” in that same paragraph. The result is a complex and inconsistent formulation of the independence principle.

Independence criteria are generally incorporated into governance codes and fall under the “comply-or-explain” principle, with the exception of Spain and Belgium, where these criteria have been enshrined in law and are therefore mandatory.

⁹⁰ Articles L. 225- and L. 225-83 of the Commercial Code.

⁹¹ Article L. 225-46 of the Commercial Code.

The AMF notes that the definition of independence varies significantly among the different European countries. While many codes rely on the independence criteria defined in Annex II of the European Commission's Recommendation, authors of the codes have also taken specific local characteristics into account and have added and/or removed certain criteria.

Lastly, an examination of the independence of the chairman of the board suggests that the AFEP-MEDEF code should clarify the status of the chairman of the board of directors, by noting, where applicable, whether or not he or she is an executive member, based on the duties actually assigned.

4.4 Board gender diversity

4.4.1 European framework

Since 2012, the European Union has intensified its efforts to promote gender diversity within companies' senior management.

The European Commission proposal for a Directive⁹² published in December 2012 aims to set a minimum gender balance ratio within the board of directors of 40% by 2018 for listed companies, and by 2020 for other companies, as Member States' practices in this area are viewed as highly varied. The examination of this text was interrupted before the Coreper took it up again in 2015 and the EPSCO (Employment, Social Policy, Health and Consumer Affairs) Council discussed it at its December 2015 meeting.

4.4.2 Analysis of corporate governance codes

Table 10: Board gender diversity

Country	Type of action	Quotas	Quota(s) to be achieved	Deadline	Penalties proposed
Germany	Legislative	Yes	30% 50%	2016 2018	Yes, but not for SMEs
Belgium	Legislative	Yes	30%	2017	Yes
Spain	Legislative Code	Yes Yes	40% 30%	2015 2020	No
Finland	Self-regulation	No	N/A	N/A	N/A
France	Legislative	Yes	20% 40%	2014 2017	Yes
Italy	Legislative	Yes	33%	2015	Yes
Luxembourg	Self-regulation	No	N/A	N/A	N/A
Netherlands	Legislative	Yes	30%	2016	No
UK	Self-regulation	25% ⁹³	N/A	N/A	N/A
Sweden	Self-regulation	No	N/A	N/A	N/A

Source: AMF

Six countries in the sample (Germany⁹⁴, Belgium⁹⁵, Spain⁹⁶, France⁹⁷, Italy⁹⁸ and the Netherlands⁹⁹) have set legislative quotas for representation of each gender in the composition of boards:

⁹² Proposal for a directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, available at <http://eur-lex.europa.eu/legal-content/FR/ALL/?uri=CELEX:52012PC0614>

⁹³ The February 2011 report by Lord Davies on diversity recommended that companies in the FTSE-100 meet a quota of 25% by 2015 and that those in the FTSE-350 set and disclose their own targets to be achieved.

⁹⁴ Law on Equal Participation of Men and Women in Private-Sector and Public-Sector Management Positions, Section 25 Subsection 1 EG-AktG (Introductory Law of the German Stock Corporation Act), German Federal Gazette I. 2015, 642, 656.

⁹⁵ Law of 28 July 2011 amending the Law of 21 March 1991 on the reform of certain economic public companies, the Company Code, and the Law of 19 April 2002 on the streamlining of the operation and management of the Belgian National Lottery.

⁹⁶ Article 529 *bis* of the Spanish Companies Law.

- in Germany, self-regulation was the initial choice, but this did not prove highly effective¹⁰⁰. A recent law¹⁰¹ imposed a 30% quota which will have to be met in 2016 or 2017 at the latest, and a 50% quota by 2018. This law applies to listed companies subject to the co-management system (“*Mitbestimmung*”), and affects about 100 major German listed companies. Mid-size companies must set internal quotas which they then disclose to the public. They will not, however, be subject to penalties if they do not meet their quotas;
- Belgium also took legislative action to impose a 30% quota by 2017 on listed companies (2019 for SMEs¹⁰²), and, like the French system, provided for the harsh penalty of invalidating any subsequent appointment that does not go towards meeting the quota;
- similarly, in 2007 Spain opted to take legislative action¹⁰³, with a law stating that companies must “ensure” women join boards of directors so as to meet a 40% quota in 2015. However, this law is flouted in practice, as it does not provide for any penalties. The corporate governance code therefore recommended, in its first revision, that a more modest target of 30% be met by 2020;
- in France, the legal objective is for each board to achieve and then maintain a percentage of at least 20% women within three years and at least 40% women within six years, starting from the general meeting of 2010 or the admission of the company's shares to trading on a regulated market, whichever is later. Any appointment or designation made in violation of the law and that does not remedy the defect in the composition of the board of directors or the supervisory board will be null and void;
- in Italy, the law requires listed companies and state-controlled companies to meet a quota of one-third no later than 2015. This law authorises the Consob to impose a financial penalty, which can be as high as EUR 1 million or EUR 200,000, in the event of failure to comply with the quota, depending on whether it concerns, respectively, the composition of the board of directors or that of the board of statutory auditors (*Collegio sindacale*¹⁰⁴);
- the Netherlands adopted a law in 2011 requiring that a minimum quota of 30% be met in 2016, based on a “comply-or-explain” system. There are no penalties for non-compliance, but the company must provide an explanation in its annual report. This measure is set to expire in 2016¹⁰⁵, as the idea was to evaluate its implementation three years after it took effect¹⁰⁶. The law applies to “NV” (*Naamloze vennootschap*) and “BV” (*Besloten vennootschap met beperkte aansprakelijkheid*) companies¹⁰⁷ considered “large”¹⁰⁸ as well as to NV companies appointed as a member of the board of a large NV or BV or of an NV or BV itself appointed as a member of the board of a large NV or BV. Moreover, the governance code also makes a general recommendation as to the diversity of executive and non-executive members, but without setting a quota.

Only the German and French codes incorporate, in substance, the quotas required by law. The Belgian and Dutch codes limit themselves to general recommendations while the Italian code addresses the gender diversity target

⁹⁷ Law no. 2011-103 of 27 January 2011 on Equal Representation of Women and Men on Corporate Boards and on Equality in the Workplace.

⁹⁸ Law no. 120/2011 of 12 July 2011.

⁹⁹ Law adopted by the Parliament on 31 May 2011: *Wet tot wijziging van boek 2 van het Burgerlijk Wetboek in verband met de aanpassing van regels over bestuur en toezicht in naamloze en besloten vennootschappen* [the Act to change book 2 of the DCC (i.e., the Dutch Company Act) in order to amend the rules on the Management and Supervision in NVs and BVs]. *Staatsblad* [Official Gazette] 2011, no. 275, 14 Jun. 2011.

¹⁰⁰ http://ec.europa.eu/justice/gender-equality/files/womenonboards/womenonboards-factsheet-de_en.pdf

¹⁰¹ Law passed by the Bundestag on 6 March 2015.

¹⁰² Defined by law as being “companies whose securities are admitted for trading on a regulated market referenced in Article 4 of the Company Code and whose free float is less than 50% and for companies that, on a consolidated basis, meet at least two of the following three criteria:

a) average number of employees less than 250 people for the financial year in question;

b) total balance sheet less than or equal to EUR 43,000,000;

c) annual net turnover less than or equal to EUR 50,000,000¹.

¹⁰³ Article 75 of the *Ley Organica* 3/2007 of 22 March 2007.

¹⁰⁴ A body specific to Italy's two-tier governance system.

¹⁰⁵ http://ec.europa.eu/justice/gender-equality/files/womenonboards/womenonboards-factsheet-nl_en.pdf

¹⁰⁶ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2083449 (end of paragraph 4.1. — “30% Women on Boards: New Law in the Netherlands (2012)”, Tineke Lambooy, University of Oslo Faculty of Law Research Paper No. 2012-4, 13 June 2012).

¹⁰⁷ Article 2.276 of the Civil Code.

¹⁰⁸ That is, NVs that do not meet at least two of the criteria set in Article 2.397(1) of the Civil Code.

only through the evaluation and appointment of directors. The Spanish code includes a more modest quota than that defined by law.

The four other countries, which have not adopted legislation on gender diversity on boards of listed companies, have opted for self-regulation; note that in the United Kingdom quotas are set through simple recommendations that are not even included in the governance code:

- Finland has opted for self-regulation; the governance code has a target of representation of both genders but does not set a quota. On the other hand, there are some legal obligations for state-controlled companies¹⁰⁹;
- in Luxembourg, similar to the Finnish system, diversity in the composition of the board is recommended in the governance code, but no quota is set. Quotas exist only for state-controlled companies and for public administrations;
- in the United Kingdom¹¹⁰, a February 2011 report on diversity¹¹¹ recommended that companies in the FTSE-100 meet a quota of 25% by 2015 and that those in the FTSE-350 set and disclose their own targets to be achieved. The UK government would prefer not to set mandatory quotas but could consider this option if companies do not make progress on their own¹¹²;
- in Sweden, legislation does not provide for board diversity quotas. The governance code nevertheless makes general recommendations on diversity. This approach does not seem highly effective, however. The government recently¹¹³ “threatened” companies with the prospect of submitting a bill to set mandatory quotas if the situation does not improve significantly by 2016.

Most countries in the sample have imposed quotas through legislative action.

France is at the top of the class within the EU in terms of representation of women on corporate boards, with an average of 32.4% in 2014 according to a European Commission study based on a sample of large companies¹¹⁴. The law incorporates the targets that had previously been set by the AFEP-MEDEF code.

4.5 Board evaluation

4.5.1 European framework

According to the recommendation published by the European Commission in 2005 on the role of non-executive or supervisory directors of listed companies, the board of directors or supervisory board must evaluate its performance each year¹¹⁵.

4.5.2 Analysis of corporate governance codes

All the codes of the countries considered recommend that a board evaluation be conducted in an effort to improve governance on a continuous basis. In Spain, the code notes that listed companies have a legal obligation to conduct an annual evaluation of the board and its committees¹¹⁶.

Procedures for conducting the evaluation

The AMF notes that:

¹⁰⁹ http://ec.europa.eu/justice/gender-equality/files/womenonboards/womenonboards-factsheet-fi_en.pdf
[http://www.europarl.europa.eu/RegData/etudes/workshop/join/2013/474413/IPOL-FEMM_AT\(2013\)474413_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/workshop/join/2013/474413/IPOL-FEMM_AT(2013)474413_EN.pdf)

¹¹⁰ <https://www.gov.uk/government/collections/women-on-boards-reports>

¹¹¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31480/11-745-women-on-boards.pdf

¹¹² http://ec.europa.eu/justice/gender-equality/files/womenonboards/womenonboards-factsheet-uk_en.pdf

¹¹³ <http://www.thelocal.se/20150515/employ-more-women-or-else-swedish-companies-told>

¹¹⁴ http://ec.europa.eu/justice/gender-equality/files/annual_reports/150304_annual_report_2014_web_en.pdf (Figure 11, page 20)

¹¹⁵ Commission Recommendation 2005/162/EC of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board.

¹¹⁶ Provided for in Article 529 *nonies* of the *Ley de Sociedades de Capital*.

- in all countries, except for Germany, the code specifies the frequency of the evaluation, ranging from one to three years. For example, the codes stipulate that an evaluation be included on the agenda every two years in Luxembourg and every two to three years in Belgium;
- in three countries (France, Spain and the United Kingdom), the code offers the possibility or recommends that an external firm conduct an evaluation at least every three years. In three other countries (Belgium, Finland and Luxembourg), the code recommends as a best practice that an external firm be hired to conduct the evaluation, but does not indicate a frequency.

Objectives of the evaluation

In seven countries (Belgium, France, Italy, Luxembourg, the Netherlands, Spain and the United Kingdom), the code details the objectives that the evaluation must pursue.

More specifically, the codes recommend evaluating:

- in six countries (Belgium, France, Italy, the Netherlands, Spain and the United Kingdom), the composition of the board from the standpoint of the diversity of its members and/or the balance of the skills of its members;
- the individual contribution of each director to the work of the board in seven countries (Belgium, France, Italy, Luxembourg, the Netherlands, Spain and the United Kingdom). For example, the UK code states that the aim of the individual evaluation is to assess whether each director contributes effectively and demonstrates commitment by evaluating the time spent by each director at board meetings and on other related work (their attendance, for example). In this regard, Belgium recommends that “*when dealing with re-election, the director’s commitment and effectiveness should be evaluated in accordance with a pre-established and transparent procedure*”;
- in three countries (France, Spain and the United Kingdom), the code recommends paying particularly close attention to the evaluation of the chairman of the board. The Belgian code also advocates such a practice.

Follow-up to evaluation

In seven countries (Belgium, France, Italy, Luxembourg, the Netherlands, Spain and the United Kingdom), the code recommends publishing the results of the evaluation. In five countries (Belgium, France, Luxembourg, Spain and the United Kingdom), the code recommends that action be taken, where applicable, based on the results of the evaluation. For example, the Spanish code recommends that, on the basis of the results obtained, companies develop an action plan to correct the deficiencies identified in the evaluation.

Meetings without executive directors

In five countries (Belgium, France, Luxembourg, the Netherlands and Sweden), the code recommends holding at least one meeting a year without the executive directors to evaluate the interaction between executive directors and independent directors.

The European codes have similar rules on board evaluations.

4.6 Criteria for awarding variable remuneration to senior managers

4.6.1 European framework

In its Recommendation of 30 April 2009¹¹⁷ on the remuneration of directors, the European Commission recommends that:

“3.2. *Award of variable components of remuneration should be subject to predetermined and measurable performance criteria.*

Performance criteria should promote the long-term sustainability of the company and include non-financial criteria that are relevant to the company’s long-term value creation, such as compliance with applicable rules and procedures.

¹¹⁷ Commission Recommendation complementing Recommendations 2004/913/EC and 2005/162/EC as regards the regime for the remuneration of directors of listed companies.

3.3. *Where a variable component of remuneration is awarded, a major part of the variable component should be deferred for a minimum period of time. The part of the variable component subject to deferment should be determined in relation to the relative weight of the variable component compared to the non-variable component of remuneration.*

3.4. *Contractual arrangements with executive or managing directors should include provisions that permit the company to reclaim variable components of remuneration that were awarded on the basis of data which subsequently proved to be manifestly misstated’.*

For credit institutions and investment firms, Article 94 of European Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, known as CRD IV, stipulates that:

“(a) where remuneration is performance related, the total amount of remuneration is based on a combination of the assessment of the performance of the individual and of the business unit concerned and of the overall results of the institution and when assessing individual performance, financial and non-financial criteria are taken into account;

(b) the assessment of the performance is set in a multi-year framework in order to ensure that the assessment process is based on longer-term performance and that the actual payment of performance-based components of remuneration is spread over a period which takes account of the underlying business cycle of the credit institution and its business risks; (...) (k) the allocation of the variable remuneration components within the institution shall also take into account all types of current and future risks (...).”

The directive also requires that variable remuneration be subject to clawback arrangements¹¹⁸.

Lastly, Article 9a of the proposal of 9 April 2014 to revise the shareholder rights directive — still under negotiation — states that *“(...) For variable remuneration, the policy shall indicate the financial and non-financial performance criteria to be used and explain how they contribute to the long-term interests and sustainability of the company, and the methods to be applied to determine to which extent the performance criteria have been fulfilled (...).”*

4.6.2 Analysis of corporate governance codes

First, it should be stressed that, at the European level, there is no consistent categorisation of the different types of remuneration (fixed, variable, other). The term “variable remuneration” therefore covers a variety of situations. A few countries, like Belgium¹¹⁹, Finland¹²⁰ and the Netherlands¹²¹, include a definition of variable remuneration in their laws and/or corporate governance codes.

Performance criteria

In all the countries in the sample, the variable component of remuneration is subject to performance criteria.

Only four codes (France, Spain, Italy and Finland) recommend that companies take into account not only quantitative criteria but also qualitative or non-financial criteria.

Regarding quantitative criteria, two codes (France and Spain) specify that share price and overall market or sector trends cannot be the only performance criteria.

Lastly, the AMF found that all the codes considered specify the characteristics of the performance criteria. The codes stress in particular that these criteria must be “specific”, “measurable” and “relevant”. In that respect, the AFEP-MEDEF code appears to be one of the most specific.

Relationship between performance criteria and internal control and risk management procedures

¹¹⁸ Article 94.1. (i) of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms.

¹¹⁹ Article 96, par. 3, 6° of the Company Code.

¹²⁰ Section 7. Remuneration, Finnish corporate governance code.

¹²¹ Articles 383 to 383° of Book 2 of the Dutch Civil Code and Article II.2.13 of the corporate governance code.

Half the codes (Germany, Italy, Luxembourg, Spain and the United Kingdom) state that performance criteria must take the internal control and risk management procedures established by the board into account.

Evaluation of performance criteria

Investors need a way to assess whether the initial performance criteria have been fulfilled, as well as appropriate disclosures on the achievement of these criteria. In this respect, the Finnish code specifies that an evaluation of the criteria increases trust.

The AMF found that two codes in the sample (Finland and Luxembourg) state that companies must specify the methods used to evaluate performance criteria.

The Finnish and Dutch codes require that companies also disclose the relationship between performance criteria and their impacts on the company's long-term success and performance.

In France, the AMF recommends¹²² that companies provide information on the application of criteria that resulted in the payment, during the financial year, of a portion of the multi-annual variable remuneration.

Clawback clauses

Five codes¹²³ (Italy, the Netherlands, Spain, Sweden and the United Kingdom) require that variable remuneration include clawback arrangements.

While in all the codes the award of variable remuneration is subject to performance criteria, only four codes, including the AFEP-MEDEF code, recommend that companies take qualitative or non-financial criteria into account.

Five codes (Germany, Italy, Luxembourg, Spain and the United Kingdom) also state that performance criteria must take the internal control and risk management procedures established by the board into account, which is not the case with the AFEP-MEDEF code.

Lastly, as recommended by the European Commission, five codes require that clawback clauses be put in place for the variable remuneration of senior managers, which the AFEP-MEDEF code does not.

¹²² AMF Recommendation 2012-02.

¹²³ The German code does not explicitly recommend introducing such a clause, but does indicate in a remuneration table that companies must disclose clawback clauses.

4.7 Caps on severance pay

4.7.1 European framework

The European Commission stipulates, in the above-referenced 2009 recommendation, that “*termination payments should not exceed a fixed amount or fixed number of years of annual remuneration, which should, in general, not be higher than two years of the non-variable component of remuneration or the equivalent thereof*”.

4.7.2 Analysis of corporate governance codes

Country	Does the code set a cap on severance pay?	Cap on years of remuneration paid in the severance pay	Components of remuneration included in the severance pay calculation
Germany	Yes (rule 4.2.3)	2	Total remuneration
Belgium	Yes (provision 7.18)	1	Fixed + variable
Spain	Yes (recommendation 64)	2	Fixed + variable
Finland	Yes (recommendation 46)	2	Fixed
France	Yes (recommendation 23.2.5)	2	Fixed + variable
Italy	No	N/A	N/A
Luxembourg	Yes (recommendation 8.2, guideline 3)	2	Fixed
Netherlands	Yes (Principle II.2)	1	Fixed
UK	No	N/A	N/A
Sweden	Yes (rule 9.9)	2	Fixed

Source: AMF

All the codes discuss developments in senior manager severance pay.

Severance pay cap rules

Several approaches have been taken, and they should be interpreted in the context of the provisions relating to the senior managers' legal status in the countries in the sample, including whether or not they have employment contracts¹²⁴:

- in Italy, the code requires that severance pay not exceed a fixed amount or fixed number of years of annual remuneration but does not specify the number of years to be used (criteria C.6.1);
- in the United Kingdom, the corporate governance code recommends that the remuneration committee carefully consider, when directors are appointed, what compensation they would receive in the event of early termination (provision D.1.4). The code also states that the notice period for directors should be set annually at most. Until 2013, the annual report had to include details on all directors' contracts with a notice period in excess of one year or with provisions for pre-determined compensation on termination which exceeded one year's salary and benefits (Listing Rule 9.8.8 (8)). This provision was eliminated as the rules on executive pay in listed companies¹²⁵ defined by the Department for Business, Innovation & Skills¹²⁶, applicable since 1 October 2013, more broadly require transparency on all contractual obligations that have an impact on salary or compensation for the loss of office;
- in line with the above-referenced European Commission recommendation, four codes (Finland, Luxembourg, the Netherlands and Sweden) require that the cap be set based solely on fixed remuneration. Generally, the severance must not exceed two years of fixed remuneration, with the exception of the Netherlands, where the cap is set at one year of fixed remuneration;
- in four codes (Belgium, France, Germany and Spain), the severance pay cap is set in proportion to fixed and variable remuneration:

¹²⁴ So, for example, in Germany, senior managers have fixed-term contracts and receive full pay until the expiration of said contract; severance pay is added to this calculation.

¹²⁵ Defined in the 2006 Company Act, or about 900 companies.

¹²⁶ CP13/7 Consequential Changes to the Listing Rules.

- in Germany, France and Spain, the code states that severance pay must not exceed two years of total remuneration;
- in Belgium, severance pay awarded in the event of early termination should not exceed 12 months' basic and variable remuneration. The board may award higher severance pay further to a recommendation by the remuneration committee. Such higher severance pay is, however, limited to 18 months' basic and variable remuneration.

Methods for calculating severance pay

Only two codes (in Belgium and Germany) specify the methods for calculating remuneration:

- the German code requires that severance pay be calculated based on the previous financial year and, if necessary, also on the total remuneration for the current year;
- the Belgian code states in a guideline that *“basic remuneration component should be based on the monthly remuneration paid the last month before termination. Variable remuneration component should be contractually determined. It should be based on variable compensation effectively paid during the contract. It could, for instance, refer to the previous year’s variable remuneration or to the mean value of the variable remuneration paid over a specific number of previous years”*.

Only Finland, Luxembourg, the Netherlands and Sweden follow the European Commission's recommendation on the cap on senior manager severance pay; it seems that the AFEP-MEDEF code, like other countries such as Germany and Spain, has set a less restrictive cap on severance pay. However, the AFEP-MEDEF code recommends that, when an employee is appointed as executive director, the employment contract binding him or her to the company or to a group company be terminated, whether through contractual termination or resignation¹²⁷.

Also, unlike the German and Belgian codes, the French code does not provide details on calculating two years of remuneration.

In its annual report, the AMF had already considered the effectiveness of the rules on severance pay in the AFEP-MEDEF code but had not, however, sought to have the cap lowered. The AMF has asked two professional associations to conduct an overview of the monies and benefits that may be paid to outgoing executives.

¹²⁷ Ten companies in the sample, of which six in the CAC 40, state that they have a senior manager who both holds an office and has an employment contract (2014 Report by the AMF on Corporate Governance and Executive Remuneration).