BOARD INDEPENDENCE OF LISTED COMPANIES

FINAL REPORT

**TECHNICAL COMMITTEE
OF THE
INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS**

In consultation with the OECD

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Background Information

The Technical Committee of IOSCO (TC) decided in 2005, as stated in the report on "Strengthening Capital Markets against Financial Fraud", to undertake additional descriptive, thematic analyses of the definition and role of independent directors on the boards of issuers. This is perceived as a key element to reinforce Corporate Governance and, therefore, improve the integrity of capital markets.

For this purpose, a Task Force, co-chaired by the Spanish CNMV and the Australian ASIC, was set up in October 2005 with the mandate to undertake an overview, in a fact-finding approach, of the main mechanisms and provisions by which the independence of the board is protected and strengthened across the jurisdictions represented in the TC plus a number of countries that have volunteered in this exercise. The aim of this Report is not to propose any recommendations or best practices, but to describe, in a structured and comparable way, the situation in the most relevant capital markets.

The Task Force worked in consultation with the Organisation for Economic Co-operation and Development (OECD), recognizing the relevance of the OCDE Principles of Corporate Governance and, particularly, Principle VI.E that states that boards *"should be able to exercise objective independent judgement on corporate affairs"*.

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Introduction

According to Principle VI.E of the Organisation for Economic Co-operation and Development *Principles of Corporate Governance* (OECD Principles),[1] boards "should be able to exercise objective independent judgement on corporate affairs". To achieve this objective, OECD Principle VI.E.1 recommends that boards should consider "assigning a sufficient number of non-executive board members capable of exercising independent judgement to tasks where there is a potential for conflict of interest".

The annotation to OECD Principle VI.E states, among other things, that the variety of board structures, ownership patterns and practices in different countries will require different approaches to the issue of board objectivity. In many instances objectivity will require that a sufficient number of board members not be employed by the company or its affiliates and not be closely related to the company or its management through significant economic, family or other ties. This would not prevent shareholders from being appointed as board members. In other instances independence from controlling shareholders (sometimes called "*block holders*") or another controlling body will need to be emphasised, in particular if the *ex ante* rights of minority shareholders are weak and opportunities to obtain redress are limited.

The OECD Principles are drafted at a high level of generality and emphasise outcomes, which makes it possible to apply them in jurisdictions with varying legal and regulatory frameworks. Accordingly, additional work on how they are implemented in practice may be useful. To this end, in 2005 the IOSCO Technical Committee, given its expertise on standards for listed companies (*e.g.* disclosure standards, principles for board audit oversight committees), set up a Task Force on Corporate Governance to study how OECD Principle VI.E has been reflected in the legal and regulatory frameworks applicable to listed companies in major securities markets.

The Task Force was established in October 2005, with the participation of all IOSCO Technical Committee members[2], plus Ordinary IOSCO members from Brazil, India, Portugal, Thailand and Turkey. The Task Force also arranged for consultation with the Steering Group on Corporate Governance[3] established by the OECD. In December of 2005 the Task Force finalized and circulated a questionnaire to Task Force members to gather information on the subject. This Report is based on the responses to this questionnaire, and on subsequent deliberations of the Task Force on the results of the fact-finding exercise.

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[1] Organisation for Economic Co-operation and Development (OECD), *Principles of Corporate Governance* (revised edition, 2004). OECD, Paris.

[2] Note that this Report reflects responses provided by Task Force members in Quebec and Ontario to the questionnaire. Therefore, the securities and corporate legislation of the other provinces and territories of Canada are not reflected in the survey results, nor in this Report.

[3] The Steering Group coordinates and guides the OECD's work on corporate governance and related corporate affairs issues.

Given the diversity of board structures among IOSCO members and the OECD Principles' recognition that there are potentially many different, functionally equivalent ways to achieve particular outcomes, the study was designed to cover:

- non-executive board members of companies with unitary boards;
- members of supervisory (i.e. non-executive) boards of companies with dual board structures; and
- members of the board of auditors elected by shareholders (which exist, for example, in Brazil, Italy, Japan and Portugal).

This diversity of governance structures recommends to use the term "board" in a broad sense – i.e. encompassing relevant corporate bodies with either management, monitoring or supervisory functions.

The questionnaire gathered information on the relevant standards applicable in each jurisdiction, irrespective of whether such standards take the form of mandatory standards or recommendations and whether the standards are set out in legislation, subordinate legislation, listing rules or recommendations embedded in Codes on Corporate Governance, customary practices or any other understanding or criteria that are locally recognized as applicable corporate governance standards.[4] This report does not enter into specific (and more stringent) requirements that certain jurisdictions, like Switzerland, establish for certain types of companies (like banks or broker-dealers) beyond those for listed companies in general.

In keeping with the Task Force's mandate, this Report describes, on a purely factual basis, how each jurisdiction addresses OECD Principle VI.E, with a particular focus upon how the applicable standards are designed to promote and facilitate the board's exercise of objective, independent judgement. It should be emphasised that OECD Principle VI.E recommends a particular *outcome*, i.e. that company boards are able to exercise objective, independent judgement, rather than specifically recommending that board members maintain an independent *status* according to defined criteria. One mechanism for facilitating the achievement of the outcome specified in Principle VI.E, however, is for a jurisdiction to adopt standards providing for the board, a specified proportion of board members and/or board members performing particular functions to satisfy certain criteria relating to independence. This is the reason why this Report focuses on various jurisdictions' standards in this regard, including: (a) the jurisdictions' criteria for independence; (b) standards relating to the proportion of people who should meet these criteria; (c) determination and disclosure of which board members meet independence criteria; and (d) specific roles and powers of independent board members.

Of equal importance, however, are various other standards that underpin, encourage and facilitate the exercise of objective, independent judgement, such as standards relating to board members' appointment and removal, liability, compensation, dedication, training and evaluation. The OECD Principles include numerous recommendations in this regard and the annotations to these OECD Principles

[4] When jurisdictions fall within a particular category or apply specific provisions, this Report lists them between brackets. When pointing out non-exhaustive examples, it uses brackets preceded by "e.g."

provide additional guidance about why and how these standards could be implemented. It was determined, however, that a detailed discussion of how these standards are implemented in various markets was beyond the scope of this Report.

The Report is purely meant to gather information and identify dominant trends with respect to corporate governance standards, more particularly with respect to the independence of boards, not to pass judgement on actual corporate governance standards or practices in individual jurisdictions or, even less, to determine “best practice” with respect to standard-setting or company practices.

I. The Corporate Governance environment

1. Overview of Listed Companies

While the OECD Principles focus on publicly traded companies, this Report focuses somewhat more narrowly on "listed companies" — that is, those companies whose shares are publicly traded on a stock exchange[5]. Such companies tend to be larger, more prominent, and have more heavily traded shares than publicly traded but unlisted companies. Accordingly, the corporate governance practices of listed companies (and particularly the approaches they have employed to facilitate the board's exercise of independent, objective judgement) are likely to have a significant impact on corporate governance practices generally, and the strength and stability of financial markets.

The table below sets out, from most to least, the approximate number of listed companies in participating member jurisdictions as at December 2006.

Jurisdiction	Number of companies	Domestic market cap. (USD millions)(*)
United States of America	≈7,000	19,286,171
India	4,796	818,879
Canada	3,790	1,700,708
United Kingdom	2,913	3,794,310
Japan	2,391	4,614,068
Australia	1,751	1,095,858
Hong Kong	1,165	1,714,953
France	728	2,425,368
Germany	656	1,637,609
Thailand	518	140,161
Switzerland	256	1,212,308
Brazil	347	710,247
Turkey	316	162,392
Italy	284	1,026,504
Spain	191	1,322,915
The Netherlands	224	778,617
Mexico	132	348,345
Portugal	79	74,779

(*): Source: World Federation of Stock Exchanges. Excludes foreign shares listed in domestic markets.

[5] Throughout the Report, there are references to standards applicable to listed companies in various jurisdictions. Some of these standards in some of the surveyed jurisdictions also apply to publicly traded but unlisted companies (or even closely held companies). Since, however, the Report focuses on standards for listed companies; no mention is made of whether or not the standards also apply to unlisted companies.

Ownership Patterns

Nine[6] out of the 18 jurisdictions have a predominantly block share ownership pattern (that is, listed companies whose shareholder base consists of one or a small number of shareholders who each own a relatively large block of shares). Three countries[7] have a predominantly diffused ownership pattern (that is, most listed companies' shares tend to be held widely by numerous investors, with few -if any- shareholders owning a sufficient number of shares to give them effective control over the company). Six countries[8] have indicated that there is no reliable data on prevailing ownership patterns.

Board Oversight Structures

Essentially, there are three predominant board oversight structures.

The traditional single-tier oversight structure used in 11 jurisdictions[9] is continuing to evolve through the creation of specialist sub-committees, such as audit, nomination and remuneration (or compensation) committees. Where such sub-committees are required, all these jurisdictions either require or recommend that the sub-committee include board members who meet specified criteria for independence.

A two-tier board, such as those used in Germany and the Netherlands, is another common form. This structure is intended to facilitate the exercise of objective, independent judgement by the supervisory board by restricting membership on the supervisory board to persons who represent constituencies other than management and, in some cases like the Netherlands, significant shareholders (see section II.2 for details on appointment of supervisory board).

Other jurisdictions adopt hybrid versions of two-tier board oversight structures. For example, Brazil uses the two-tier model with the added requirement of a fiscal board. Portugal allows for different types of board structures: one comprising a supervisory board and an executive board in which executive directors can be appointed either by the supervisory board or by the shareholders and a model involving an executive board and a board of auditors. In Japan, listed companies may choose between two different types of corporate governance systems: One, the most common, with a board of corporate auditors; and one, introduced in 2003 by amendment of the Commercial Code, consisting on a board of directors with specialized sub-committees. In Italy, companies may choose among three different models: (a) the single-tier model, (b) the two-tier model, and (c) the so-called traditional model, which is currently the most common, where the board of directors coexists with a board of statutory auditors elected by shareholders, who is required to supervise compliance with the law and adequacy of the organisational, administrative and accounting structures.

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[6] Brazil, Canada, Germany, Hong Kong, Italy, Mexico, Portugal, Spain and Turkey.
[7] Australia, the United Kingdom and the United States.
[8] Japan, India, the Netherlands, Switzerland and Thailand.
[9] Australia, Canada, France, Hong Kong, India, Portugal, Spain, Thailand, Turkey, the United Kingdom and the US.

2. Standards Addressing Principle VI.E

In the recent history of the development of Corporate Governance Standards relating to the topic of board independence, both from an international and national perspective, some milestones can be pointed out.

The OECD Principles, published in 1999 and revised in 2004, have become the international benchmark for corporate governance standards among policy makers, investors, corporations and other stakeholders worldwide. The OECD Principles have been recognised by the Financial Stability Forum as one of twelve key standards deserving priority implementation throughout the world. Through the establishment of business sector advisory groups, regional corporate governance roundtables and other initiatives, the OECD has facilitated policy dialogue between the public and private sectors about how the outcomes recommended in the Principles can be implemented in jurisdictions with varying legal and institutional frameworks and company structures.

The development of corporate governance through national Codes or Guidelines has been mainly driven by periodical reviews of corporate governance. In Europe this process started in the United Kingdom. The Cadbury Report goes back to 1992 and was followed by new impulses to corporate governance guidelines with the Greenbury Report in 1995, the Hampel Report and the Combined Code in 1998 and the Higgs Report and the resulting revision of the Combined Code in 2003.

The incorporation of standards about independence of boards spread all over Europe, with expert working groups (that typically are identified by the name of their chairperson) commissioned by governments, stock exchanges or companies' associations to develop new guidelines. Examples of these codes are the Vienot (1995 and 1999) and Bouton (2002) reports in France, the Cromme Code in Germany (2002), the Preda Code (1999) in Italy and the Olivencia (1998) and Aldama (2002) reports and the Unified Code (2006) in Spain.

The creation of permanent bodies in charge of the revision and update of Corporate Governance Guidelines, like the Financial Reporting Council in the UK or the Commission appointed by the German Government, has started to introduce more regularity in the revision of Corporate Governance Standards as compared with the 90s, when ad-hoc groups usually disbanded after the issue of each set of guidelines.

On a Europe-wide perspective, the Winter Report (2002) --that addressed, among other issues, directors´ independence in the EU—was followed by the European Commission Action Plan on " Modernizing Company Law issues and enhancing Corporate Governance in the EU" in 2003. Two recommendations resulting from the Action Plan are especially related to the topic of independence: Recommendation 913/2004/EC on the remuneration of the directors of listed companies and, most notably, Recommendation 162/2005/EC on the role of non executive or supervisory directors and board committees. These recommendations have influenced national Corporate Governance Standards to a great extent.

In the United States, besides the provisions contained in State Laws, the implementation of best practices related to independence of boards goes back as far as 1956 with the NYSE recommendation to include some outside directors in the boards of listed companies. In the seventies, further steps were taken regarding the recommended number of outside directors and the composition of audit committees. Finally, in 1999, the NYSE required the presence of a minimum number of independent directors on audit committees.

After the Sarbanes-Oxley Act was enacted, the NYSE developed new relevant rules on Corporate Governance in 2002, approved afterwards by the SEC. These rules required, among other things, that boards consist of a majority of independent directors. Other international markets (like Nasdaq) followed the path of gradually incorporating requirements related to independence in Corporate Governance provisions of their listing rules.

Increasing emphasis on corporate governance can also be traced to major market events, triggering the need for review or reform. Take the example of Germany, where the collapse of a leading construction company prompted the government to initiate an inquiry making recommendations on how the German corporate governance system could adapt to the challenges posed by the rapid development of financial markets, which resulted in the Baums Report. Similarly, the Sarbanes Oxley Act of 2002 also touched on the independence question in the US through the requirements on audit committees and other control mechanisms, following the financial scandals at some US listed companies.

Another recent driver for advances in corporate governance reforms is the creation of networks and fora (both governmental and from the private sector) that discuss these matters on a semi-permanent basis, like the establishment in the EU of the Corporate Governance Forum in 2004. This role, in many other jurisdictions, is played by industry associations, institutes of directors and relevant institutional investors that have issued their own Corporate Governance statements or principles.

Nature of Standards

The primary mechanism in many Task Force member jurisdictions for addressing OECD Principle VI.E is the imposition of fiduciary duties[10] on all board members through company laws, with these duties commonly owed to the "company as a whole" and not merely to the person or persons (e.g. block shareholders or persons with special nomination or voting privileges) who may have nominated particular board members or exercised decisive voting power in electing particular board members. Imposing such duties on board members also addresses OECD Principle VI.A, which states that board members should act on a fully informed basis, in good faith, with due diligence and care, and in the best interests of the company and the shareholders. Fulfilling these duties contributes to the board's exercise of

[10] In some of the jurisdictions surveyed, the term 'fiduciary duties' is not used. In this Report, this expression is used to engulf the duties of care, good faith, loyalty and other connected to these, that are typically expected from board members vis a vis the company and its shareholders, as explained in section II.1.

objective, independent judgement on corporate affairs and thereby facilitates the achievement of the outcome recommended in OECD Principle VI.E.

In all jurisdictions, an additional overlay of corporate governance standards enhances company laws through a combination of mandatory provisions and/or voluntary guidelines.

In most jurisdictions, some or all of these corporate governance standards are supported by the "comply or explain" disclosure requirements contained either in listing rules or in disclosure requirements imposed by the securities regulatory authority (e.g. Australia, Canada, Hong Kong, India, Mexico). In some jurisdictions these "comply or explain" requirements apply either to all listed companies or only to a subset of them (e.g. the largest listed companies).

Most provisions on board members' duties contained in company laws and securities legislation are principle-based. Listing rules are mandatory and are, of their nature, more likely to take the form of specific rules. Corporate governance guidelines are sometimes principle-based, although many guidelines contain more specific recommendations, such as recommended limits on the number of board memberships that a board member can hold.

Development and enforcement of Standards

The survey revealed a multitude of parties involved in the development and enforcement of corporate governance standards, reflecting the multi-focused approach to corporate governance in most jurisdictions.

Company Laws and Securities Codes

If the standard is contained in the companies or securities legislation, then the legislature is ultimately responsible for the statute's enactment and amendment, although other institutions (e.g. regulatory authorities or special task forces) might be involved in developing or commenting on legislative proposals. If the standard is contained in subordinate legislation, then it might fall to another branch of the government (e.g. the executive branch or a regulatory authority) to develop, adopt and amend the standard.

Company laws in some jurisdictions often place significant emphasis on "private enforcement" of standards, e.g. through the pursuit of remedies in civil courts, although they might also provide for administrative, quasi-criminal or criminal penalties for breaches of certain standards. Securities laws sometimes provide for "private enforcement" of standards through the pursuit of remedies in civil courts, although they often place more emphasis upon enforcement by regulators.

Listing Rules

Listing rules are usually established and amended by the various stock exchanges, although it is usual that securities regulators have to approve changes to listing rules, including those Corporate Governance Guidelines included in them. There may be some involvement by the legislature or the regulator, but this is not

common. Enforcement of listing rules is generally the responsibility of the stock exchange, where the listing rules are contractually based, but involves the assistance from the regulator in jurisdictions where an additional legislative overlay applies to compliance by listed companies with the rules (or where the regulator serves as a body to whom parties can apply for a re-hearing of, or appeal from, a decision made by the stock exchange).

Corporate Governance Guidelines

With the exception of the US[11], all surveyed jurisdictions have voluntary corporate governance "guidelines", which in many countries are referred to as “Codes” (in this Report, the terms “Guidelines” and “Codes” are used interchangeably). There is considerable diversity amongst jurisdictions as to which bodies are responsible for the development and maintenance of such guidelines. The guidelines are frequently sponsored or developed by the relevant stock exchange, in consultation with external stakeholders.

In a few jurisdictions, securities regulators are directly responsible for the development of corporate governance guidelines. In Portugal, the CMVM has set the pace for corporate governance reforms by issuing guidelines since 1999. In Turkey the securities regulator has responsibility for the development of the Corporate Governance Code. In Canada the securities regulators have undertaken to provide guidance on corporate governance. In Spain, the recent Unified Code was developed by a special committee chaired by the CNMV’s Chairman.

Due to the voluntary nature of these corporate governance guidelines, the traditional enforcement mechanisms that apply to legislation, regulations or rules are not applicable. In most jurisdictions, adherence to the guidelines and Codes is voluntary, but disclosure to the market of non-adherence with respect to particular standards is mandatory (either for all companies to whom the Code applies or to a subset of companies, such as listed companies). In the event of non-adherence by a listed company to a standard that is subject to the disclosure requirement, this non-adherence becomes public through the company’s disclosure and it is open to shareholders to respond in a variety of ways. Shareholders might respond, for example, by: (a) disposing of all or a part of their investment, or deciding not to invest in the company in the first place; (b) expressing disapproval at a shareholders’ meeting through the exercise of voting rights, submission of shareholder proposals or questioning of the board or senior management; or (c) employing less formal mechanisms, such as contacting the company to express opinions or ask questions about the company’s corporate governance practices, attempting to influence the board or senior management or expressing their criticism to the media. Other interested persons (*e.g.* stakeholders, media, analysts or rating agencies) also may exert a disciplinary influence through commentary about the corporate governance practices that the company has disclosed.

There are also other enforcement mechanisms employed to enforce voluntary codes. One is used in Italy, where listed companies have to make, on a yearly basis, a public declaration on compliance with the Corporate Governance Code, explaining

[11] In the US, matters that might be addressed in other jurisdictions' voluntary codes have been mandated either in legislation or in Stock Exchange’s rules and (in a few cases) SEC regulations.

the reasons for any failure to comply. The internal control body monitors the actual implementation of the code and reports any violation to the securities regulator (CONSOB). In the Netherlands, legislation allows for the Dutch Corporate Governance Code to be enforced if compliance with the code is approved by the majority of shareholders.

Mandatory disclosure to the market in relation to local corporate governance standards is prevalent and has become part of the annual reporting requirements for listed companies in most jurisdictions. Companies subject to the disclosure requirement are required to provide disclosure about voluntary corporate governance standards that they have implemented and those that they have chosen not to implement.[12] For example, they might be required to disclose which board members, and why, they consider to be independent (*e.g*. Canada, Spain, Thailand, Hong Kong) or the extent of board members' shareholdings (e.g. Brazil, Canada, Portugal, Spain, Thailand, the US).

In Turkey, companies are required to not only disclose in their annual report the extent to which they have implemented the corporate governance principles and the reasons for any non-compliance, but to also indicate whether the company plans to change its corporate governance practices in the future.

One jurisdiction that is an unusual hybrid is Australia, where the Corporate Governance Code is part of the listing rules of the Australian Stock Exchange and these have been given statutory force by the Corporations Act. This means that under the relevant section of the Act, it is even possible for the securities regulator, the market operator, the clearing and settlement house, or an aggrieved person to apply for a Court order to compell companies to meet their disclosure ("comply or explain") requirements.

Tables summarizing the main standards in place in each category (statutory, listing requirements, guidelines) can be found in the **Annex**.

[12] It should be noted that, in some jurisdictions, certain corporate governance standards might be exempted from the general "comply or explain" requirement.

II. Standards related to "board independence"[13]

The objective in OECD principle VI.E is addressed in jurisdictions primarily through two different mechanisms:

- In all jurisdictions, through statutory provisions[14] that impose fiduciary duties on all board members and provide for board members to be held personally liable for failing to fulfil these duties.

- In many, but not all, jurisdictions, by setting standards that call for the board to have a "sufficient number" of "independent" members whose lack of personal and economic links with the company, its management, significant shareholders and sometimes other parties is believed to provide greater assurance that the board as a whole will be able to operate objectively and independently of these groups.

Chapter VI of the OECD Principles includes high-level objectives and more detailed guidance on various mechanisms that underpin the effective exercise of objective, independent judgement by board members, including recommendations regarding the board's duties, accountability mechanisms, key responsibilities and access to accurate, relevant and timely information. These standards fall outside the scope of this Report and are not discussed in detail here.

1. General standards intended to facilitate the board's exercise of "objective independent judgement"

Fiduciary duties

OECD Principle VI.A states that board members should act on a fully informed basis, in good faith, with due diligence and care, and in the best interests of the company and the shareholders.

In all jurisdictions there are standards setting out the basic duties of a company's management body and its members. By and large, these duties fall under two main categories:

- *Duty of loyalty*. This duty generally is expressed either as a duty to the company (*e.g.* the Netherlands, Portugal or Thailand) -- where the management board shall be guided by the interests of the company, but taking into consideration in some cases the interests of the company's shareholders. Alternatively, this duty is expressed as a duty to the company, with the company being taken to mean the

[13] Throughout this Report the term "*board independence*" is used as shorthand for "*a board which, in keeping with Principle VI.E of the OECD Principles, is able to exercise objective, independent judgement on corporate affairs and has assigned a sufficient number of non-executive board members capable of exercising independent judgement to tasks where there is a potential for conflict of interest*". The concept applies to the board as a whole, and should be distinguished from the concept of "independent" board members, which refers to individual board members and does not exist as a category in some IOSCO jurisdictions.
[14] The reference to statutory provisions includes the common law based principles that several jurisdictions apply as the source of the obligation to follow those duties.

shareholders as a whole and not any particular shareholders or shareholder group (*e.g.* Australia, Hong Kong).

In some jurisdictions (*e.g.* in Japan and in many US states), company legislation expressly requires board members to "act in good faith" vis-à-vis the company as a whole, which can also be regarded as part of the duty of loyalty. In a few jurisdictions, legislation requires board members to act in good faith but does not expressly require them to act in the best interests of the company or its shareholders.

In the UK, the Companies Act (2006) introduces novel statutory duties in a codified legal provision, which may be seen as a corollary to the general duty of loyalty. Board members are subject to duties to "promote the success of the company", "avoid conflicts of interest" and "not to accept benefits from third parties".

In many jurisdictions, the general duty of loyalty is supplemented by more specific obligations, such as those requiring board members to avoid (or disclose) conflicts of interest or maintain the secrecy and confidentiality of information they receive about the company in their capacity as board members. In Spain, for instance, directors have a duty to maintain the secrecy and confidentiality of the informations they receive in the exercise of their functions, which is spelled out separately from the general duty of loyalty, but could be seen as a corollary.

- *Duty of care*. The formulation of this duty varies across jurisdictions, but the underlying principles are similar. In some jurisdictions, board members are subject to a generally worded obligation to act with due care, skill or diligence. In other jurisdictions, the relevant legislation does not include such a generally worded obligation but board members are subject to more specifically worded obligations relating to the concepts of care, skill and diligence. In some countries where the legislation provides for a generally worded duty of care, like Italy, such a duty is also supplemented by more specific performance-related obligations. The UK´s Companies Act, imposes on directors a "duty to act within powers", *i.e.* to act in accordance with the company's constitution, which can be seen as partly related to the duty of care as well as the duty of loyalty. A recent change in the Portuguese Companies Code imposes on board members' duties of care, availability, technical skills and knowledge of the company's business.

In most jurisdictions (*e.g.* Canada, France, Germany, Italy, Mexico, Spain, Switzerland, the UK and the US) these fiduciary duties take the form of statutory obligations, with some of them (*e.g.* Canada, the US) having extensive case law and jurisprudence on their actual application. In other jurisdictions (*e.g.* Hong Kong, Thailand), however, general and specific duties are also set out in non-statutory sources, like the Guidelines issued by the Hong Kong Registrar of Companies, Corporate Governance Codes or listing rules.

Fiduciary duties are typically established for all board members, with no specific reference to independent board members, where the latter concept exists.

Rules on personal liability

The over-arching Principle for Chapter VI of the OECD Principles emphasises that the corporate governance framework should ensure the board's accountability to the company and its shareholders. The OECD Principles, however, do not endorse any particular mechanisms for achieving this objective. Various mechanisms are employed in the surveyed jurisdictions, including market disciplinary mechanisms and civil, administrative, quasi-criminal or criminal liability provisions. Liability provisions may provide for the board as a whole, or individual board members, to be held responsible in various circumstances.

In all jurisdictions board members are subject to criminal liability in case of fraud. Similarly, legislation or the common law provides for boards or board members to be held civilly liable when there is a breach of their fiduciary duties.

What constitutes a breach of duty and what standards of proof are applied in different jurisdictions vary widely and are not the subject of this Report.

Liability rules, by and large, make no distinction among categories of board members. All board members are liable for breach of the board's fiduciary duties. In practice, however, to the extent that independent or non-executive board members may typically be assigned some specific role (*e.g.* chairmanship of the audit committee or of the board), this circumstance may be relevant when determining the actual liability of a particular board member.

In a number of jurisdictions, most notably Canada and US, courts have recognised the so-called "business judgement rule" when determining board members' liability for breach of the duty of care. The business judgement rule provides that the board members' business judgement will not be overturned by courts and consequently they will not be held liable for the consequences of their business decisions unless certain exceptions –usually related to fraud, conflict of interest or illegality - apply, provided adequate decision-making processes were followed. This rule has also been recently introduced in the Portuguese Companies Code. In some jurisdictions (Canada, Hong Kong, Italy, Portugal, Spain, Switzerland, Thailand and Turkey) there are specific rules discharging board members from liability for board decisions taken without their participation or with their opposition.

In Japan, the articles of association may limit the civil responsibility of outside board members acting in good faith and without gross negligence, with a maximum limit set in the Corporate Code. Shareholder meetings may, through special resolutions, exempt from liability those executive board members who acted in good faith and without gross negligence.

While substantive liability rules are similar across jurisdictions, there are significant differences about who is entitled to initiate legal actions against board members.

Concerning responsibility of board members vis-à-vis their own company, most jurisdictions require shareholders to adopt a resolution at a general meeting before initiating legal proceedings on behalf of the company against board members. However, in 9 jurisdictions, even if there is no vote at the Shareholders General

Meeting or if it is contrary to the initiation of legal proceedings, there are extraordinary mechanisms that allow one or more shareholders to initiate legal proceedings on the company's behalf against board members. The provisions applying in these jurisdictions are as follows:

- In Germany, minority shareholders can initiate legal proceedings on behalf of the company if the general meeting does not vote in favour of initiating legal proceedings against the board, provided that the minority shareholders represent at least 1 % of the total share capital or, in the case of a listed company, hold more than €100.000 in shares. The minority shareholders also have to have purchased their shareholding before they knew of the alleged misconduct and allege facts which indicate that harm was caused by a substantial breach of the law or articles of association.

- In Thailand, the Public Limited Company Act stipulates that if a board member, by action or omission, causes damage to the company, any one or more shareholders holding shares amounting to not less than 5 % of the total number of shares sold of the company, may bring an action to the court to claim compensation on behalf of the company and request the court to order that such acts be stopped and that the director be removed.

- In the US, any shareholder (individually, or as part of a class action, without the requirement of a previous proposal for a resolution by shareholders or any court intervention) may initiate proceedings against board members and bring derivative actions on behalf of the company if the board member has violated a duty owed to the company.

- In Australia, Canada and Hong Kong, individual shareholders may also initiate legal proceedings on behalf of the company, with the leave of a court.

- In Turkey, shareholders holding more than 5% of the capital can force the company to initiate legal action, even if the general meeting voted against, although they are required to deposit their shares as a guarantee.

- In Spain, shareholders holding 5% of the capital or more can request the general meeting to initiate proceedings against board members or can initiate such proceedings themselves if the general meeting fails to do; and in Italy shareholders holding at least one fortieth of the share capital (or the lower proportion established in the by-laws) may also initiate legal proceedings on behalf of the company against board members.

Notwithstanding the usual case that claims of liability for breach of duty are pursued by the company or on behalf of the company, in a number of jurisdictions there is provision for individual shareholders or groups of shareholders to seek remedies for themselves (*i.e.* not on behalf of the company) where they have suffered harm as a consequence of misconduct by a board member or board members. For example, in Mexico and Thailand shareholders representing more than 5% of the shares can pursue such remedies, while in France, India and Italy any shareholder can initiate legal action against board members if the shareholder has been damaged by the board member's misconduct or negligence.

Additionally, in Italy each shareholder has the right to report suspected violations to the board of statutory auditors and in Thailand shareholders accounting for more than 5% of the paid-up capital can ask the courts to remove from the board individuals who do not perform their duties.

Securities regulators can initiate legal action against board members in Canada, Hong Kong, India, Switzerland, Thailand, and the US, while in Brazil the securities supervisor can support a legal proceeding initiated by affected parties.

Liability insurance

Insurance may have significant influence on the actual degree of responsibility borne by board members and, therefore, on their incentives to serve as board members and fulfil their responsibilities. An absolute absence of insurance, by making board members personally liable, from the first cent on, for any damages they may inadvertently cause, may represent a strong disincentive to become board member. Such a situation could arise either because liability insurance is prohibited by law or because it is unavailable or only available at a prohibitively high cost. On the other hand, unlimited or fully comprehensive insurance could, in practice, shield board members from civil liability for breaches of their duties, thereby eliminating or significantly reducing incentives to act loyally and with care. Thus, the scope of, and practices regarding directors' and officers' (D&O) insurance are important factors to bear in mind when assessing the actual liability regime which board members face.

Almost all jurisdictions contemplate the possibility of D&O insurance. It excludes fraud, criminal offences or other obvious intentional wrongdoing, either by legislative prohibition, by insurance industry practice, or by criteria established in court rulings or other public policy grounds.

There are significant differences among jurisdictions concerning insurance coverage where board members have acted negligently. In Australia, for instance, there is an explicit statutory prohibition on the company (or related company) paying a premium for a contract of insurance that seeks to cover a director for liability arising out of a wilful breach of duty to the company or improper use of company information. However, industry practice is for directors' fees to be adjusted to provide the director with sufficient funds to meet the cost of the premia. By contrast, no such limitations exist in the UK, where the Combined Code actually recommends that companies provide board members with insurance coverage.

2. Appointment and termination of board members

While rules on appointment and termination of board members are not strictly related to the *a priori* definition of a board member's independence, they are a quintessential aspect of their true independence of judgement. If independent board members can be appointed directly by those from which they are supposed to be independent, with no evaluation by separate committees or incomplete information to shareholders, the due process to ensure independence is severely put at risk. In a similar vein, if independent board members can be dismissed too easily or without

proper disclosure, as a consequence of their dissenting views, their independent judgement is clearly endangered.

Where specific provisions apply only to independent board members, these are pointed out.

Nomination and appointment

The OECD Principles promote an active role for shareholders in the nomination and election of board members and provide that the board should assume responsibility for ensuring a formal and transparent board nomination and election process.[15] The annotations to OECD Principle II.C.3 recommend, in particular, that shareholders should be able to participate in the nomination process and to vote on individual nominees or on different lists of them.

Regular term and re-election

Although the length of board members' terms of office would be relevant to an assessment of OECD Principle II.C.3 regarding shareholders' ability to participate actively in the nomination and election of board members, the OECD Principles do not include any specific recommendations regarding terms of office. Most jurisdictions specify a maximum statutory term before re-election, which varies from 1 to 6 years, with 3 years being the mode. No compulsory limits on re-election of board members have been reported.

In certain jurisdictions, the corporate governance framework permits or requires staggered terms for board members. For instance, in Hong Kong it is a widespread practice (as included in model by-laws recommended in the Companies Ordinance) that one third of directors - the ones than have been serving for the longest period - leave the board at every annual meeting, making the effective term a three-year one. A similar rotation occurs in Thailand when the board members' election was not through cumulative voting.

In almost all jurisdictions, the term of appointment of a director may be determined by the articles of association of the company to be shorter than the maximum term established in law.

There are no standards on age limits for board members, except in the UK and France. In the UK, it is recommended that board members be under 70 years old, unless the articles allow otherwise or the shareholders meeting has previously approved it. In France, the by-laws of a company should specify an age limit for all directors, or for a specific percentage of them, and for the chairman. In absence of such an explicit provision, the number of directors over the age of 70 may not be more than one third of the directors in office, and the age-limit for the chairman is 65 years old. Any appointment made in violation of these provisions is null and void.

[15] See OECD Principles II.C.3 and VI.D.5.

Procedures for selection, nomination and appointment

In most jurisdictions with unitary boards, the appointment process for board members includes the following general steps:

- A nomination committee of the board analyzes potential candidates and makes a proposal to the full board.
- On the basis of this proposal, the board selects individuals and nominates them as candidates for election to be considered at the shareholders meeting.
- Shareholders vote for and appoint directors.

In the UK, the system is slightly different, as the board itself appoints board members, based on a nomination committee proposal, and the shareholders are asked to ratify the board's appointments at the next general meeting. In Canada, when special shareholders or third parties have a right to appoint a certain number of board members, these appointments do not need a previous recommendation by the nomination committee.

When vacancies occur between general meetings, boards usually are authorized to appoint replacements, subject to ratification at the next shareholders meeting.

In jurisdictions with dual boards – *i.e.* those including either a supervisory board or a fiscal board - rules are more complex and jurisdiction-specific. In countries with a supervisory board regime, management board members are typically appointed by the supervisory board, while members of the supervisory board are appointed in turn by a majority vote of shareholders. Nominating committees play, therefore, a limited role, as the "self interest" that incumbent unitary boards may have when proposing candidates to the shareholders, which the nomination committee is meant to filter, is almost non existent due to the way that supervisory board members are appointed and the fact that management board members are directly appointed and removed by them.

Some seats in the supervisory board may be reserved for special shareholders, employees or third parties. For instance, in Germany, in companies with more than 500 employees, one third of the members of the supervisory board are elected by employees and trade unions; and in companies with more than 2.000 employees the proportion reaches one half. The Chairman - who holds a casting vote - is always elected by shareholders. In addition, the Corporate Governance Code recommends that the supervisory board contain a sufficient number of independent members to encourage independence judgement. Similarly, in the Netherlands the Corporate Governance Code envisages that the composition of the supervisory board be such that members are able to act independently from one another, management or any particular interest (such as a significant shareholder).

Voting rules

As noted above, the OECD Principles recommend that shareholders be able to participate effectively in the election of board members, but they do not recommend that any particular voting mechanisms be adopted.

In 6 jurisdictions (Brazil, Canada, Germany, Italy, Portugal and Switzerland) slates of candidates are put before the shareholders, who vote on the whole list ("slate voting"). In some of these jurisdictions, this is a mandatory procedure established by law, while in others (like Canada) it is a possibility that companies can use when permitted by their articles of association.

In the remaining jurisdictions, voting for individual candidates is either required by law or recommended in Corporate Governance Codes. In these cases, candidates nominated to fill any positions are put forward to the shareholders and voted upon individually.

Voting rules are quite different across jurisdictions. There are jurisdictions with majority voting and some with proportional or semi-proportional systems. In jurisdictions with majority voting systems, the slate or candidate that obtains the majority of the votes cast is elected. In proportional systems, some posts can be filled with candidates that received support of a minority of the shareholders. This is intended to ensure that minorities - either a single block holder or a group of shareholders acting together - are represented in the board, as explained later in this section.

When majority voting is used, the majority rule requires either an absolute majority of the votes present at the shareholders meeting or, more frequently, a simple majority of the votes cast, provided that quorum requirements are met. In some jurisdictions (Italy, Portugal) the voting rules differ depending on whether the meeting is held at first or second call (with softer requirements at second call). For instance, in Italy, appointment requires the support of more than 50% of the present voting capital, with a minimum quorum of 50% of the total voting capital if the meeting is held at first call.

There are also significant differences among jurisdictions whose voting system aims at some sort of proportionality. In jurisdictions where cumulative voting systems are required or permitted, each shareholder has a certain number of votes (points) that can be assigned freely to one or more candidates (either in a list or as separate individuals). Shareholders can assign all their votes to a single candidate or spread them among several nominees. Some jurisdictions (Japan) give each share as many votes as the positions of the board to be filled, if requested by a shareholder (unless otherwise provided in the articles of association).

In a significant number of jurisdictions, there are systems that allow or require that a certain number of directors or proportion of board members is elected by special shareholders (*e.g.* controlling shareholders), third parties (*e.g.* trade unions), or minority shareholders that hold more that a certain percentage of capital.

Illustrative examples include the following:

- In Portugal, if minority shareholders representing more than 10% of the capital vote against the majority when appointing board members, they are entitled to appoint one board member (replacing either the last name of the slate that obtained the support of the majority or the director that received the fewest votes). Similarly, if minorities hold more than 10% and less than 20% of the

capital, they are entitled to appoint one, two or three board member for boards of three, five or more members, respectively.

- In Mexico, shareholders with more than 10% of the capital are entitled to appoint one board member.

- In Spain, company law entitles any shareholder or group of shareholders that holds more capital than the proportion corresponding to each board member (*e.g.* more than a 5% in a 20-seat board) to ask for a separate election and appoint one, or several board members (depending on the share of capital held by the shareholder or group). The votes of this shareholder or group of shareholders are then excluded from the election of the remaining board members.

- In India, if the company's by-laws so permit, institutional shareholders are allowed to appoint board members.

Some countries that have proportional or cumulative systems have put mechanisms in place to ensure that majority shareholders cannot fire directors elected by minorities. In Brazil, the whole board must leave office if a director elected by cumulative voting is removed. In the US, board members elected by cumulative voting cannot be removed without cause if the votes cast against their removal were enough to elect that director again.

Disclosure of personal and professional information

To facilitate effective shareholder participation in decisions relating to the nomination and election of board members, the annotations to OECD Principle II.C.3 call for full disclosure of the experience and background of candidates for the board and the nomination process. OECD Principle II.C.1 states, among other things, that shareholders should be furnished with full and timely information regarding the issues to be decided at the meeting, which would encompass matters such as the election of board members.

In all jurisdictions, there is a general requirement that information on candidates be submitted to the shareholders meeting prior to the election, so that shareholders have sufficient information to make a judgement on the candidates' suitability.

Additionally, in many jurisdictions (Australia, Canada, Hong Kong, Japan, Mexico, the Netherlands, Portugal, Spain, Switzerland, Thailand, Turkey and the US) there are requirements for public disclosure (not only towards shareholders) of biographical and professional information about all board members, including those who are not candidates for re-election.

Typical elements to be disclosed are:

- Biographical details (e.g. name, date of birth)
- Relations with or interests in the company
- Other directorships held or significant time commitments
- Time devoted to the company
- Term in office
- Qualifications

- Professional activities in last few years
- Shares they hold

Such disclosures generally are required to be made: (a) in the company´s annual report, a specific corporate governance report, the information/proxy circular for the shareholders' meeting, or an annual information form filed with a regulator; (b) on the company's website; or (c) through the market operator (*e.g.* a stock exchange). In a number of cases (e.g. Hong Kong Stock Exchange, NYSE), listed companies' annual reports and similar annual filings containing information about board nominees and board members are made available on the exchange's web site. In a few jurisdictions, securities regulatory authorities have established, or are in the process of establishing, publicly accessible, internet-based disclosure systems through which all publicly held companies must file disclosure documents.

Termination

Dismissal

To ensure that board members have the appropriate protections to exercise objective, independent judgement in corporate affairs they should feel able to perform their functions without fear of undue pressure or the threat of retaliation as a consequence of positions they might take. The rules on dismissal are also designed to ensure appropriate accountability in cases when board members breach their duties.

All jurisdictions provide some mechanism to remove a board member from office. In a significant majority of cases, only the body that made the appointment (in general, the shareholders meeting) can do so and in a sub-set of these cases special majorities or procedures are required. For instance, some jurisdictions (Australia, Spain) require the nomination committee of the board to issue a report specifically addressing the case before shareholders decide. Other jurisdictions set a higher voting threshold for shareholder resolutions relating to the removal of board members (*e.g.* 75% of the votes present at the meeting in Germany, 75% of the shareholders and 50% of shares present at a meeting in Thailand) for this kind of decision. In some jurisdictions (Italy and Portugal), more stringent rules apply to the removal of statutory auditors. In Italy, it shall be with due cause and be approved by a court decree.

In some jurisdictions (Germany, Italy, the Netherlands, and the UK), courts can remove directors at the request of the board under certain circumstances. In such cases, the board members usually must approve the resolution requesting the board member's removal by a special majority. In the United Kingdom, the board itself can remove one of its members.

Only in a minority of countries (Canada, Italy –for members of internal control bodies- and Mexico), the securities regulator has powers to remove a board member. In the US, while the regulator does not have the power to remove a member from a specific board, it may bar an individual from serving as an officer or director of a public company (an "O&D bar" in the US terminology) if that individual has violated the anti-fraud provisions of the federal securities laws. In Thailand the Stock

Exchange can de-list a company that refuses to follow an exchange's call to dismiss a director for breach of duties.

When a board member has been (or is to be) removed from the board, four jurisdictions (Canada, Hong Kong, Japan, Thailand) expressly allow him/her to address the shareholders' meeting -either through written statement or in person-. A few jurisdictions stress the transparency of the decision to remove a director by requiring disclosure of the decision and its reasons. Some jurisdictions (Australia, Brazil, Canada, France, India, Italy, Portugal, Spain Switzerland and Thailand) require that new appointments are registered in a mercantile public registry or company registry, which consequently makes market participants aware of the removal of a previous director. A minority of countries (Italy, Portugal, Spain, Thailand, the US) also have rules requiring the communication to the securities regulator (who, in turn, publishes the information) of the removal or appointment of board members.

Resignation

Leaving aside personal reasons, resignation of independent board members may be caused by significant differences of opinion with the rest of the board or by pressure exerted on them by other board members. Therefore, the rules to publicize and explain the resignation of board members are an important element to preserve their independence and avoid that their departure is unnoticed or even disguised.

When an independent board member resigns, a majority of jurisdictions require or recommend specific disclosure about the resignation and, sometimes, his/her motives.

Besides the routine disclosure of changes in the board as envisaged in company law, securities law or listing requirements -through the company's registrar, public registries, official gazettes or stock market operator- in a few jurisdictions (Canada, France, Italy, Spain and Switzerland) additional disclosure is required if the event is considered to involve price-sensitive information.

In some jurisdictions (Hong Kong, Spain, Thailand, the UK and the US), the resigning board member has to send an explanatory statement including the reasons for his/her resignation to the board or its chairman. In two cases (Hong Kong and Thailand), this statement also has to be published through the exchange operator. In the US, issuers are obliged to file with the securities regulator a statement when resignation was due to a disagreement with the issuer on any matter relating to the issuer's operation, policies or practices. In Spain, the reasons for resignation have to be later reproduced in the annual corporate governance report.

Dedication, training and evaluation

Availability and dedication

To facilitate the board's ability to exercise objective, independent judgement, OECD Principle VI.E.3 emphasises that board members should be able to commit themselves effectively to their responsibilities. The annotations to this OECD

Principle note that service on too many boards can interfere with a board member's performance. While standards in most of the jurisdictions call for adequate dedication by board members, they generally do not contain comprehensive rules or recommendations on the matter, such as standards regarding board members' attendance at meetings, restrictions on the number of other board memberships held or restrictions on board members' assumption of other duties outside the company.

Authorities in a few jurisdictions (France, Germany and the Netherlands) set specific limits on the number of board memberships board members can hold, with five such memberships outside the company group being the mode. Several jurisdictions (Italy, Spain, Thailand and Turkey) require or recommend that companies adopt rules restricting the number of outside board memberships or other external commitments that board members can assume. In Italy, the securities regulatory authority has been given the power to impose limits of general application on the number of board memberships and other commitments that members of internal control bodies can hold. In Australia and Spain, board members are asked to notify either the full board (Australia) or the nomination committee (Spain) before engaging in new outside commitments. In Canada, the nominating committee should consider whether or not each new nominee can devote sufficient time and resources to his or her duties as a board member. In the US, boards, as a matter of practice, may impose their own requirements regarding board attendance and number of directorships through the board nomination committee or the company by laws and SEC requirements demands issuers to disclose if a director has attended fewer than 75 percent of the board's meetings.

Some countries (*e.g.* Australia, Canada, Germany, Italy, Spain, Switzerland and Thailand) require or recommend that individual board members' attendance at board meetings be disclosed, either on a routine basis through annual corporate governance reports or as part of the performance evaluation of the board.

Induction courses and training

The annotation to OECD Principle VI.E.3 also notes that, to improve board practices and the performance of board members, jurisdictions are encouraging companies to engage in board training and voluntary self-evaluation. In around half of the jurisdictions (Australia, Canada, Hong Kong, the Netherlands, Spain, Thailand, Turkey, Switzerland and the UK), companies are encouraged to offer their newly appointed board members orientation courses about the business of the company.

Twelve jurisdictions recommend continuous training (Australia, Brazil, Canada, Hong Kong, Italy, Mexico, the Netherlands, Spain, Thailand, Turkey, Switzerland and the UK) for board members.

Access to advice and information

OECD Principle VI.F states that, in order to fulfil their responsibilities, boards should have access to accurate, relevant and timely information. Such access is essential to support their decision-making and facilitate their exercise of sound, objective judgement on company affairs. The annotations to this OECD Principle

note that non-executive board members typically do not have the same access to information as key managers and that their contributions as board members can be enhanced by recourse to independent external advice at the company's expense and access to key management.

There are two general standards focusing on board members' access to information.

The first is access to external legal, accounting or other specialist advice, at the company's expense (Brazil, France, Hong Kong, Italy, Japan, Mexico, Spain, Switzerland, Thailand, Turkey and the UK).

Usually, the board as a whole or the Chair will evaluate this type of request following specific procedures agreed by the board. In Germany, the supervisory board may request external advice for particular matters.

In the US and Canada, the right to ask for external advice at the company's expense is expressly mandated by law for members of the audit committee, although the issuer's own bylaws may expand on this right. It is common for board members, individually or as a group, to hire their own counsel at the company's expense under certain circumstances (e.g., as part of a special committee reviewing a proposed takeover or merger).

The second standard is access to the company's records, management and staff.

In the majority of jurisdictions (Australia, Brazil, Canada, France, Germany, Hong Kong, India, Italy, Japan, Mexico, Portugal, Thailand, Spain, Switzerland and the US), board members (corporate auditors in the case of Japan) have a right of full access to the company's records.

In Canada, Thailand and the UK, the audit committee has the power to access financial records. In Turkey, board members may request this information during board meetings.

Evaluation

The annotations to OECD Principle VI.E.3 note that, in order to improve board practices and the performance of board members, jurisdictions are encouraging companies to engage in voluntary self-evaluation. In several jurisdictions (Australia, Canada, France, Germany, India, Italy, the Netherlands, Spain, Switzerland, Thailand and the UK) it is either recommended in Corporate Governance Guidelines or considered good practice to regularly evaluate the effectiveness of the board and, frequently, its Chair and individual members. In Hong Kong only individual members, but not the board as a whole, are evaluated. In Brazil, Canada and Turkey a periodic evaluation of each board member is recommended.

Few countries have specific recommendations regarding the way to carry out the evaluation process, but the Nominations Committee or the Corporate Governance Committee usually plays a role. In jurisdictions with standards that specify evaluation processes, the process is typically focused on the contributions of the

board member to strategic issues, entrepreneurial leadership, internal control mechanism, corporate governance policy and remuneration policy.

3. Compensation of board members

Compensation of board members is related to the board's capacity to act objectively for at least two reasons:

- The actual level of compensation may be relevant to assure, on the one hand, that qualified candidates are attracted to the job, but also, on the other, to make sure that an excessive level of remuneration is not impairing board members´ objectivity, *e.g.* by making them captive to the interests of those who play a significant role in the nomination (or re-nomination) of board members or determination of remuneration packages.

- Some forms of compensation (e.g. stock options), if not properly designed, may shorten the planning horizon of board members and weaken their incentive to monitor rigorously potential managerial bias in favour of short term gains, earnings management or, in extreme cases, outright fraud.

Hence the interest of this Report regarding different jurisdictions' standards relating to board member compensation, restrictions relating to specific forms of compensation, remuneration committees and rules on disclosure of compensation. Note that the emphasis in this Report is not on executive compensation as such – a topic much debated in many jurisdictions- but on board members´ remuneration.

OECD Principle VI.D.4 states that one of the board's key functions involves aligning board remuneration (as well as key executive remuneration) with the longer term interests of the company and its shareholders. The annotations to this Principle note that, in an increasing number of countries it is regarded as good practice for boards to develop and disclose a remuneration policy statement that covers board members (and key executives), specifies the relationship between remuneration and performance, includes measurable standards that emphasise the company's longer run interests over short term considerations and addresses such matters as holding and trading of company stock, and granting and re-pricing of stock options.

Standards relating to compensation levels

When setting the level of remuneration of board members there are two opposite risks: Setting it too low may limit the ability of companies to attract and retain qualified and experienced individuals; but if it is too high and entails over-compensation, it may impair board members´ independence. In addition, remuneration is one of the areas where executive board members may have a conflict of interest and, thus, where particular account should be taken of the interests of the company and shareholders generally.

In the UK, for example, the Combined Code states that "levels of remuneration should be sufficient to attract, retain and motivate directors of the quality required to run the company successfully, but a company should avoid paying more than is necessary for this purpose. A significant proportion of executive directors´

remuneration should be structured so as to link rewards to corporate and individual performance". In a similar vein, Spain's Corporate Governance Code recommends that "compensation should be sufficient to remunerate the dedication of directors, but not as high as to affect their independence". In Turkey the recommendation is to calculate compensation on the basis of the time actually devoted to the company and the hourly compensation of the company's CEO. In India the overall compensation of non-executive directors cannot exceed the limit laid down in the Companies Act (1% of net profits), except if a waiver is granted by the regulator or other public authorities.

Restrictions applicable to specific categories of remuneration

Shares and stock options

While around one third of jurisdictions do not impose any restriction on access by board members to shares at below-market prices, other than the need to comply with the general rules on the absence of a conflict of interest and some general disclosure requirements, a majority of jurisdictions has some restrictions in place.

A first group of jurisdictions (Australia, France, Germany, Italy and the Netherlands) simply does not allow (or has recommendations against) the participation of independent board members (supervisory board in Germany and the Netherlands) in stock options plans or privileged ways of obtaining shares of the company.

A second group (Brazil, Hong Kong, Japan, Spain, Thailand the UK and the US) requires the specific approval of the shareholder's meeting. All of these jurisdictions also require public disclosure of such arrangements, either through disclosure documents filed with the regulator or the stock exchange or through the company's annual report.

In a third group, access to shares or stock options is not only subject to approval and disclosure requirements, but to specific limits in terms of price or time. In Hong Kong, the minimum exercise price of the stock options must equal or exceed the market price. A couple of countries, while having a general statement in their Corporate Governance Codes discouraging this kind of remuneration, allow them in exceptional cases if board members commit to keep the shares either until the end of their mandate (Spain) or for at least one year after they leave the board (the UK).

Loans and financial assistance

A majority of jurisdictions (Australia, Brazil, Canada, Hong Kong, Italy, Japan and Switzerland) do not impose any specific restrictions on the granting of loans or other financial assistance for generic purposes to board members apart from general regimes governing related-party transactions and without prejudice to disclosure obligations, like in Switzerland (to the board) or Canada (to the shareholders).

For those jurisdictions that impose specific restrictions on the granting of loans or other financial assistance to board members, some jurisdictions (France, Thailand and the US) forbid board members from obtaining a loan or receiving financial assistance unless they are granted on the same terms as available to members of the

public in the company's financing business (if any). Germany requires the transaction to be approved by the board. In the UK, loans are prohibited except in certain exceptional cases that should be disclosed to the board.

The provision by companies of financial assistance to anyone (including board members) for the specific purpose of buying shares in the company is subject to prohibitions or restrictions in a number of countries. In particular, the 2nd EU Directive on Company Law forbid such financial assistance in the EU but has recently been reformed and currently allows for national law to regulate this practice with certain limitations.

Persons or committees determining compensation.

The annotations to OECD Principle VI.D.4 suggest that it is considered good practice in an increasing number of countries for remuneration policies and employment contracts for board members and key executives to be handled by a special board committee, of which all or a majority of whose members are independent.

In most jurisdictions (Brazil, France, Germany, Italy, Mexico, the Netherlands, Portugal, Thailand and Turkey) the remuneration of independent board members (and in some jurisdictions all board members) must be approved by the shareholders' general assembly. In one jurisdiction (the UK), the approval is normally a matter for the board, unless the company's articles of association establish the general shareholders' meeting or a specific subcommittee as the approving body.

In four jurisdictions the initial proposal on remuneration of independent board members for every year is made by the nomination/remuneration committee. In two of these (Australia and Spain), the board approves a detailed remuneration policy but has to consult the shareholders meeting through a (non-binding) vote on an annual remuneration report. In the other two countries (Canada, and the US) the approval is a matter for the board.

Disclosure standards

OECD Principle V.A.4 states that there should be disclosure of material information relating to the company's remuneration policy for board members and key executives. The annotations note that the link between remuneration and company performance is of particular interest so that shareholders can assess the costs and benefits of remuneration plans and the contribution of investment schemes, such as stock option schemes, to company performance. The annotations also note that disclosure on an individual basis (including disclosure of termination and retirement provisions) is increasingly regarded as good practice and is now mandated in some countries.

In some jurisdictions (Canada, France, Hong Kong, India, Italy, Thailand and the UK) there are statutory provisions, regulations or rules requiring full disclosure of the remuneration of board members. In the UK, the Directors´ Remuneration Report Regulations 2002 require that listed companies include, as notes to the company's annual accounts, a detailed remuneration report relating to all board members'

remuneration. The Regulations also require that shareholders be given an advisory vote on the report at the annual general meeting. Failure to comply with this provision makes directors guilty of an offence and liable to a fine.

In other jurisdictions the public dissemination of a directors´ remuneration report to shareholders is encouraged by a non-binding recommendation, either with individual (Spain) or collective (Portugal) remuneration data. This is consistent with the approach taken in the EU by the European Commission, which on December 14, 2004 issued recommendations to Member States on how to foster an appropriate regime for the remuneration of directors of listed companies. According to the European Commission's Recommendation, shareholders should be provided with a clear and comprehensive overview of the company's remuneration policy. Such disclosure would enable shareholders to assess a company's approach to remuneration and strengthen a company's accountability to shareholders. Furthermore, "in order to increase accountability, the remuneration policy should be submitted to the annual general meeting for a vote. The vote at that meeting could be advisory, so that the rights of the relevant bodies responsible for directors´ remuneration would not be altered".

4. The concept of "independent" board members

Categories of board members

As noted above, when comparing board structures across jurisdictions, a basic distinction stands out:

- Jurisdictions with "dual systems", i.e. two-tier boards, where all non-executive board members sit in a separate, "supervisory" board;

- Jurisdictions with a "unitary system", i.e. single-tier board, where the board consists of both executive and non-executive directors; and

- Jurisdictions with a board of auditors

In all jurisdictions, regardless of whether they have two-tiered or unitary boards, and whether or not all members owe duties of care, loyalty and good faith, there is a clear distinction between "executive" (or "internal") and "non-executive" (or "external") board members.

This distinction – legally explicit in two-tier systems, less so in single-tier ones - is considered in many jurisdictions to play an important role in facilitating the board's exercise of "objective independent judgement" vis-à-vis the managers of the company. The distinction is a recognition that the interests of the executive management and the wider interest of the company (i.e. the shareholders) may at times diverge.

But in some jurisdictions this distinction between executive and non-executive board members may not be sufficient to protect the interests of shareholders, since:

- Some non-executive board members may have, or have had, personal or economic links with the company or its executives which, as a matter of principle or appearance, may compromise their ability to act with full independence from management. In this vein, the Recommendation of the European Commission of February 2005 suggests that to ensure that management is subject to effective and sufficiently independent supervision, the board should have a sufficient number of non-executive members who do not have any material conflict of interest.

- Furthermore, in companies with significant shareholders who are allowed to exercise their influence on board decisions without any legal impediment, the distinction between executive and non-executive board members may not be sufficient to address all the likely conflicts of interest within the board. As a consequence, there may be circumstances where the distinction between executive and non-executive board members has to be supplemented with an additional distinction between board members representing or linked to significant shareholders or other controlling bodies and those independent not only from management, but also from significant shareholders and other controlling bodies. The annotations to OECD Principle VI.E note that, in some jurisdictions independence from controlling shareholders or other controlling bodies will need to be emphasised, in particular if the *ex ante* rights of minority shareholders are weak and opportunities to obtain redress are limited. In general terms, where there is a party in a special position to influence the company, there should be stringent tests to ensure the objective independent judgment of the board.

In conclusion, the concept of "independent" board members has become common across many participating jurisdictions. Nearly all surveyed jurisdictions have established criteria for "independent status" that describe those non-executive board members who meet certain criteria, the possession of which is considered to make it unlikely, in general, that such board members will have interests that conflict with the interests of the company. As the annotations to OECD Principles VI.E and VI.E.1 suggest, independent non-executive board members can contribute significantly to the board's decision-making process, in particular by bringing an objective view to the evaluation of management and also by providing additional assurance to market participants that their interests are defended in areas where the interests of management, the company and its shareholders may diverge.

Thus, three types of non-executive board members can be identified:

- "Independent" board members, a category recognized in all jurisdictions but two: Germany and Japan. In Germany objective judgement is encouraged by a two-tier board structure comprising an executive board and a non-executive supervisory board, as well as by a range of ex-post mechanisms related to compensation, liability and reporting referred to as the law on corporate groups. This system aims to address both the conflicts related to independence from management and those connected to independence from controlling shareholders, as described above. In Japan corporate auditors are expected to fulfil some of the same functions as independent board members.

- Board members who are, or are related to, significant shareholders. In two jurisdictions (Mexico and Spain), a separate sub-category of non-executive board members, called "proprietary directors", exists to describe those board members who owe their position to being or representing a significant shareholder. These proprietary directors are are either members of the board who hold a stake of 5% or more in the company or members of the board who are appointed by shareholders. While in Spain proprietary directors ("consejeros dominicales") can never be considered "independent", in Mexico they can, provided they meet certain criteria. In Mexico, proprietary directors (referred to as "patrimonial" board members) are those who own (directly or indirectly) 2 % or more of the company's stock and meet the independence criteria. In a number of other jurisdictions, being, or being related to, a significant shareholder is a relevant consideration when assessing whether or not a board member is independent and, in a few jurisdictions, it is a decisive negative criterion.

- Other non-executive board members. In jurisdictions with single-tier board structures, these other board members are often described as "related board members". In jurisdictions with other board structures, however, these "other board members" cannot be simply classified as independent or non-independent as different concepts and criteria are employed.

Classifications of Board members

	Executive	**Non-Executive**		
		Independents	Related to shareholders	Other
Australia	X	X		X
Brazil	X (Internal Directors)	X		X
Canada	X	X		X
France	X	X		X
Germany	X (Management Board Members)			X (Supervisory Board Members)
Hong Kong	X	X		X
India	X	X		X
Italy	X	X		X
Japan	X			X (Corporate auditors)
México		X	X ("Patrimoniales", can be independent or related)	X
Netherlands	X (Management Board Members)	X (Supervisory Board Members)		
Portugal	X	X		X
Spain	X	X	X ("Consejeros Dominicales")	X
Switzerland	X	X		X
Thailand	X	X		X
Turkey	X	X		X
UK	X	X		X
US	X	X		

Some countries allow several board structures as options for companies. This table reflects the more common one in each case

There are significant differences in terms of the origin and nature of the standards that define independence. In 4 jurisdictions the concept of "independent" board members is contained in statutory provisions, like legislation (Italy and Mexico) or regulations (Canada, Portugal). In the remaining jurisdictions the criteria used to assess independence are contained in listing rules (e.g. Hong Kong, the US) or non-mandatory Corporate Governance Guidelines (e.g. Spain, the UK).

In some of these jurisdictions where the concept of "independent director" is contained in voluntary Corporate Governance Codes, the principle of "comply or explain" has been adopted to encourage compliance and increase transparency. There is some divergence amongst jurisdictions in respect of the extent to which they are required to "comply or explain". In Spain, while it is voluntary to follow the recommendation to have at least one third of independent directors in the board, no director can be classified as independent under any circumstance if he/she fails to comply with any of the "negative" criteria set out in the code.

The concept of a "disinterested" board member, which exists in some jurisdictions (the US), is not interchangeable with the concept of an independent board member, since it refers to a director who is under no conflict of interest with respect to a specific board decision (e.g. a related-party transaction).

Definition of "independence"

Positive attributes

As noted elsewhere in this Report, OECD Principle VI.E emphasises a particular *outcome*, *i.e.* that company boards are able to exercise objective, independent judgement, rather than specifically recommending that board members maintain an independent *status* according to defined criteria. Some board members who have significant economic, personal or other interests that potentially conflict with the interests of the company or shareholders generally might be capable of exercising, and actually exercise, objective independent judgement. Other board members who meet all of the standards for "independence" might prove themselves incapable of, or unwilling to, exercise objective, independent judgement. It is generally believed, however, that individuals who do not face material conflicts of interest are more likely to find it easier to exercise objective, independent judgement than those who do face such conflicts. Accordingly, many jurisdictions adopt standards for independence that specify certain relationships, circumstances or conditions that will give rise to a negative presumption or a conclusive determination that a board member should not be considered independent. The annotations to OECD Principle VI.E, however, also note that these "negative criteria" can be usefully complemented by positive examples of qualities that will increase the probability of effective independence.

Some of the qualities that some jurisdictions identify as desirable for independent board members are:

- Having an adequate professional background

- Being able to furnish their experience and knowledge in furtherance of the governance of the company
- Showing integrity and the highest ethical standards
- Having strong interpersonal skills
- Possessing sound judgement and an inquiring mind
- Questioning in a constructive way the strategy of the company and contribute to the strategy's implementation

Negative criteria

The so-called "agency problem" – *i.e.* the potential mis-alignment of managers′ interests with those of shareholders - has been the main focus of corporate governance for many years –especially in the biggest equity markets (*e.g.* the UK and the US), where diffuse ownership of listed companies is common, at least in recent years. Another major corporate governance issue, though, is the potential adverse consequences arising from conflicts of interest between controlling and minority shareholders in jurisdictions where concentrated share ownership and block-holders are still frequent.

Most jurisdictions use slight variations of the same basic set of negative criteria for board members to qualify as 'independent'. Five of those criteria relate to links between the board member and the company or its executives (family relationships, employment relationships, economic or business relationships and relationships with the external auditor). A few jurisdictions also set limits on the length of time an individual can serve on a company board and still be considered to be independent (*e.g.* France --12 year limit--, Italy --9 years out of the last 12 years--). Some jurisdictions (*e.g.* Hong Kong, the UK, Spain, the Netherlands, France, Thailand, Turkey) have a negative criterion relating to the board member's status as, or relationship to, significant shareholders.

It is important to emphasise that the impact of finding one of the negative criteria in relation to a particular individual varies from jurisdiction to jurisdiction. In some jurisdictions (*e.g.* Hong Kong, India and Thailand, Italy, Spain, the US), the conclusion that any of the negative criteria apply results in the individual being deemed (or conclusively determined) to be not independent. In other jurisdictions (*e.g.* France, the UK), all of the negative criteria are merely presumptions: The board of a company can take the view that a board member is independent even if one or more negative criteria apply, but it has to disclose which criteria apply and why the board believes that the board member should nevertheless be considered to be independent. In a few jurisdictions (*e.g.* Brazil) some negative criteria are considered to be determinative and others are presumptions.

Negative criteria, while focused on board members themselves, often also take into account the relationships that their close relatives have either with the company, its management or other persons who exercise a degree of control over corporate affairs (e.g. significant shareholders or significant creditors). The ways in which these family ties are described vary: they include terms like "family member", "close family member", "second -or even fourth- degree relative" and, in some jurisdictions, "spouse-equivalent" or "domestic partner". For instance, in the Netherlands, independent board members must not be spouses or relatives up to the

fourth grade of any of the following: (1) employees or relevant officers of the issuer; (2) shareholders who integrate the group that controls the company; (3) an important supplier, debtor or creditor; or (4) those with significant influence or authority over the company or the main officers.

Some negative criteria apply to relationships that the board member may have with companies related to the company and not just the company itself. There are differences in how jurisdictions refer to "related companies". To take the example of Spain, the relevant relationship for the criteria concerning not receiving compensation other than directors' fees is "the company or any of its subsidiaries". In Turkey, the relevant relationship for the criteria of not being a member of the management of the company or an employee or a business associates is "between the company, its subsidiaries, affiliates or any other group company." Similarly in Thailand, the relevant relationship for the criteria of not being an employee is "the company or controlling person of the company, the parent company, affiliate company, associated company or connected persons". For ease of reference, the report will refer to "companies in the group" or "related companies", notwithstanding that the term is not necessarily used in all responding jurisdictions.

The following is a list of typical negative criteria (for the sake of simplicity, they have been formulated in the present tense, even though most of them include look-back periods):

1) Not to be a member, or an immediate family member of a member, of the management of the company.

All jurisdictions use this criterion. The only divergences are:

- Who constitutes the management. Some jurisdictions use the word "executive director", others, "administrators" of the company, but these terms cover executive members of the board in all cases.

- Look-back periods. They are usually between 2 and 5 years, with some 1-year periods. The European Commission's non-binding recommendation proposes a 5-year span.

- Whether the criteria apply only to the company (e.g. France) or also to its group (e.g. Canada, Thailand, Turkey).

In some jurisdictions (e.g. Spain, the UK) cross directorships are considered to be an impediment to a board member being considered independent. To take the example of Spain, if the director is an executive board member of a second company where a director of the first company serves as a non-executive director, then this is considered an impediment to being declared independent.

In Japan, where the board of corporate auditors is an entity which is independent from the board of directors, the qualification for all corporate auditors is that they are not concurrently serving as directors or employees of the company.

2) Not to be an employee of the company or a company in the group

This negative criterion is used in all jurisdictions[16] with unitary boards.

In jurisdictions that have a dual board system, such as Germany, certain members of the supervisory board are often appointed to represent the interests of employees or unions. This will not prevent those members from being considered independent provided that they don't have any business or personal relationship with the company or its management board which causes a conflict of interest. This is in line with the European Commission's recommendation on the role of non-executive or supervisory directors of listed companies, which states that employee status is a negative criterion "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".

In many jurisdictions the restriction applies not only to the company where the directorship is held, but also to any company in the group.

Look-back periods are normally between 2 and 5 years before the appointment as independent board member. There may however be slight differences in how this period is applied. To take the example of the US, the NYSE Rules –which apply a 3 year look-back period- specifically state that having been an interim Chairman or CEO shall not disqualify a director from being considered independent following that employment.

3) Not to receive compensation from the company or its group other than directorship fees.

In 10 jurisdictions, independence is impaired if the board member receives or has received in the last few years any kind of remuneration, donation or allowance, apart from the directorship fees from the company, that exceeds a level or amount specified in the standard.

The main differences across jurisdictions relate to:

- Whether pension benefits are considered "compensation" for the purposes of this negative criterion. They are, for example, in the UK, but they are not under NYSE listing requirements or the European Commission's Recommendation, provided such compensation is not contingent on continued service.

- The level of payments which impair independence. The NYSE listing requirements establish a threshold of US$100,000 during any twelve-month period. In Italy and Spain there are just references to "significant" payments. In the Netherlands, there is a reference to payments "not in keeping with the normal course of business".

[16] In the case of Hong Kong, there is no written explicit restriction but as a matter of practice the Stock Exchange has kept the view that employees cannot qualify as independents.

- The length of the look-back period, which is 3 years in Italy and the US. In Canada the look-back period is any 12 month period within the last 3 years.

- Whether the restriction applies exclusively to compensation paid by the company (e.g. the UK, the US) or extends to compensation paid by any related company (e.g. Canada, Spain).

4) Not to have material business relations with the company or its group

For a significant majority of jurisdictions, being a significant customer or supplier of a company is considered to impair independence.

Depending on the jurisdiction, the existence of material business relations is defined as the existence of a business contract, the actual provision of goods and services, or the exchange of actual payments.

This restriction on business relations typically applies:

- To business relations not only with the listed company, but with any other company within its group. In Hong Kong, for example, the restriction applies also to business relationships, within the immediate 2 years preceding the date of appointment, with the listed company's director or chief executive. In another example, Portugal, this applies to business relations with a controlling company, either directly or indirectly.

- To business relations maintained by the board member as partner, significant shareholder, director or senior employee of an entity maintaining such business relationship with the listed company.

- To business relations including the situation of significant supplier of goods or services (including financial, legal, advisory or consulting services), significant customer, or organisation receiving significant contributions from the listed company. Thus, while this criterion may overlap with the restriction on *receiving* compensation from the listed company (*e.g.* as consultant or legal counsel), it also applies to significant customers.

- Some jurisdictions (France, the Netherlands) specifically include continuing and significant banking relations as a category of business relationship. In Mexico a specific reference is made to relations as debtor or creditor.

- In a few jurisdictions (Hong Kong, the Netherlands, Turkey, the US) there are look-back periods ranging from 1 to 3 years.

Generally, the standards require for the business relation to be material. There are a number of jurisdictions (e.g. Hong Kong, Portugal, Spain) that do not have specific thresholds for determining whether a business relationship impairs the classification of a board member as "independent". Rather, these jurisdictions rely on a general principle. In the case of Portugal a board member is not considered independent if they have a "significant commercial relationship" (either direct or indirect) with the company or a related company. In Hong Kong, a board member is not considered to

be independent if they have "any material business dealings" with the company or its related companies. In Canada, a director would not be independent when the board considers that he has a material relationship, which is a relationship that could interfere with the exercise of the director's independent judgement.

In other jurisdictions, specific thresholds for materiality apply. In the US, for example, the relevant threshold applies to directors who are employees or immediate family members of the executive officer of another company which has made or received payments for property or services in the last 3 years that exceeds US$ 1 million or 2% of consolidated gross revenue. In Mexico the threshold for determining whether a client or supplier is significant is whether the sales or purchases involving the company are 10% or more of the company's total sales or purchases during the previous 12 months. The threshold for determining whether a debtor or creditor of the company is significant is whether its debt or credit with the company represents 15% or more of the assets of the company.

5) Not to have been an employee of the external auditor of the company or of a company in the group.

Since in many jurisdictions independent board members are assigned an important role in the audit committee, their past or current relations with the external auditor are relevant to their independence.

Differences across jurisdictions relate to:

- The look-back period, which ranges between 2 years (Turkey) and 5 years (France), with a mode of 3 years.

- Whether the employment relation refers only to the current auditor at the time of appointment, or also to the previous one.

- Whether any employment relation, or only a qualified one –e.g. having been the partner in charge of the audit or having been a part of the auditing team - impairs independence.

- Whether the prohibition applies exclusively to auditors of the particular company (e.g. India, France, Turkey, the US) or extends to auditors of other related companies (e.g. Australia, Canada, Hong Kong, Italy, the Netherlands, Spain)

6) Not to exceed some maximum tenure as a board member

In a number of jurisdictions, a long tenure as a board member is considered to jeopardize independence. This is so because personal relationships established over the years with other board members, including executive ones, key staff or significant shareholders may be deemed to influence the board member's decision-making.

One jurisdiction (the Netherlands) prohibits the indefinite re-election of any supervisory board member beyond 12 years, since its Corporate Governance Code provides that a member can only be appointed for a maximum of three four-year

terms. Others (France, Hong Kong, Italy, Turkey and the UK) have standards that specify a maximum tenure – ranging between 7 and 12 years, with an average of 10 - after which an independent board member can either: (a) remain on the board but cannot be considered as independent (France, Hong Kong, Italy and Turkey); or (b) can remain as an independent board member if re-elected as such annually (the UK). In two jurisdictions (Australia, Spain) independent board members are not deemed to automatically lose their independence after 12 years, but it is recommended that their tenure should not exceed this period.

In Italy, the time limit is calculated on a cumulative basis, so that no board member is considered independent if he/she has been a board member for more than 9 years in the last 12-year period.

In jurisdictions where there is no particular limit, time of service is usually regarded as one of the several factors to assess the independence of candidates.

7) Not to be or represent a significant shareholder

Almost half of the jurisdictions (France, Hong Kong, the Netherlands, Spain, Thailand, Turkey and the UK) expressly specify being, representing, or having links with a significant or substantial shareholder as a negative criterion for independence. In Spain, for example, the independence criterion is not met if the board member maintains with a significant shareholder any of the relations described in points 1, 2, 3 and 4 of this section.

The definition of "significant shareholder" ranges from 1% (Turkey) to 10% (France, the Netherlands) of issued capital.

In Hong Kong a board member is not deemed, in principle, independent if he/she owns more than 1% of the listed company's total issued share capital.

In some jurisdictions (e.g. France) the link with a significant shareholder does not necessarily disqualify a board member as independent, but triggers the need for a specific analysis by the nomination committee or the board to determine whether, in light of the specific circumstances of the structure of ownership and potential conflicts of interests, the board member may be considered independent. In Italy independence is only impaired if the board member's shareholding entails "considerable influence" or involves participating "in a shareholders agreement through which one or more persons may exercise a control or considerable influence over the issuer".

As explained above, two jurisdictions (Mexico and Spain) recognize a special category of board members ("proprietary directors") who owe their seat in the board to being or representing company shareholders. While in Spain they are not considered independent, in Mexico they can be, provided they satisfy the criteria for independence. The duties of proprietary directors are the same as other directors and their loyalty to the company's interest and to the other shareholders cannot be compromised by the fact that they were appointed by a controlling shareholder. However, the basic purpose of this classification is to identify clearly who appointed them effectively (instead of mixing those directors with other non-executives or even

independent ones), in order to better scrutinize their performance and the observance of their general duties.

In Germany, where the concept of independent board members is not formally recognised due to the dualistic board system, controlling shareholders, whether or not represented on the supervisory board, are subject to a wide range of provisions (collectively referred to as the law on corporate groups, that includes disclosure, compensation and liability requirements) aimed to protect the company from being harmed in the interests of controlling shareholders.

Determination and disclosure of independence of individual board members

As the OECD Principles are outcome-oriented and recognise that there are often a number of functionally equivalent ways of achieving the same objective, they do not specify how a board member's independence should be determined, nor do they specify who should make this determination. The annotations to OECD Principle VI.E, however, emphasise that boards should declare who they consider to be independent and the criteria used for this judgment.

Three separate issues come up in this regard:

- Whether "independent" board members are declared as such when nominated or appointed and whether the nomination process is subject to any special rules, different from those applicable to other board members.

  In one jurisdiction (Spain), only the nomination committee of the board can nominate independent board members, with existing independent board members representing a majority of the nomination committee. This rule is meant to limit the influence of executive and "proprietary" board members in the selection – but not in the appointment - of "independent" board members.

- What mechanisms are used by the listed company to disclose which of its board members are independent and to ascertain periodically whether the criteria for independence continue to be met.

  In many jurisdictions (Australia, Canada, France, Hong Kong, Italy, Spain, Thailand, the UK and the US) companies are required or encouraged to identify their independent board members. The most common practice is through an annual report or information circular provided to shareholders in connection with the annual general meeting, but some countries also mention the issuer's website.

  In two jurisdictions (Hong Kong, Turkey), independent directors must submit to the company an annual statement declaring their compliance with the independence criteria and this has to be filed with the Stock Exchange by the company.

- The degree of latitude or subjective "judgement" of the corporate body when classifying a board member as "independent", particularly when applying the negative criteria on independence established in the jurisdiction and whether the

classification as "independent" of an individual board member is subject to oversight or control by any third party, other than markets and public opinion.

In some jurisdictions (Canada, France and the UK), the board of directors, collectively, has the final word on the independence issue, notwithstanding the powers of the shareholders meeting to appoint and re-elect directors. In others (Hong Kong, India and Thailand), the Stock Exchange has the ability to re-classify a director incorrectly labelled as independent. In some jurisdictions, the securities regulator (Italy, Spain and the US) and the Stock Exchange (the US) can take disciplinary action, declare that a person is disqualified from serving as an independent board member of the company or even sue the issuer for misstatements in the declaration of independence.

<u>Standards on "sufficient number" of independent board members</u>

According to OECD Principle VI.E , boards should consider *"assigning a sufficient number of non-executive board members capable of exercising independent judgement to tasks where there is a potential for conflict of interest"*.

Concerning the implementation of this OECD Principle, the surveyed jurisdictions take one of the following three approaches:

- In some jurisdictions with two-tier systems (Germany and the Netherlands) there are no standards on the minimum number or percentage of independent board members, presumably because they rely on the independence of the overall supervisory board members to control the management board and there are no special concerns about the potential links between individual supervisory directors and significant shareholders. A different approach is adopted in Italy, where there is a minimum number required by Law (depending on the total number of directors) for the so-called traditional and two-tier models and a minimum recommended proportion (one third) in the one-tier model.

- Another group of jurisdictions (Brazil[17], Portugal) employ only a generally worded standard, usually adopting the wording of the OECD Principle that the board include "a sufficient number of independent members", without specifying what "sufficient" might mean in practice and leaving the issue of "sufficiency" to be determined on a company-by-company basis. This approach is also reflected in the Recommendation of the European Commission.

- Finally, other jurisdictions either: (a) specify quantitative minimum thresholds for the number of independent board members (a minimum number or percentage) (Hong Kong, India, Mexico, Spain, Thailand and Turkey); or (b) employ the generally worded standard (i.e. a "sufficient number" of independent board members) in combination with a quantitative minimum threshold (Italy). In Mexico, 25% of the board members must be independent. In five jurisdictions (Hong Kong, India, Spain, Thailand and Turkey) the minimum recommended proportion of independent board members to total board members is one third,

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[17] In Brazil, listing rules of the Bovespa market require, for companies quoted in certain market segments (Level 2 and Novo Mercado) a minimum 20% of independent board members.

sometimes with an absolute minimum of either two (Turkey, Spain) or three individuals (Hong Kong, Thailand). In India the requirement that one third of the members are independent increases to a requirement that 50% of board members are independent if the Chairman of the board is an executive. In six jurisdictions (Australia, Brazil, Canada, France, the UK and the US) independent board members should represent more than 50% of the board members. Within this last group, some exceptions apply. For example, in the UK, small listed companies are only expected to have at least two independent board members. In France and the US the minimum percentage of independent board members does not apply to "controlled companies" (i.e., companies with a shareholder holding more than 50% of the capital). In Switzerland, the guideline refers to a majority of non-executive members (not only independents).

It should be noted, however, that notwithstanding the requirements in the surveyed jurisdictions requiring a minimum number of independent directors, such requirements cannot be considered in isolation from general measures designed to encourage board members to act objectively and independently.

Specific roles and powers of "independent" board members

While all jurisdictions recognize that boards should be collegial and cohesive and entail for all their members the same fiduciary duties vis-à-vis the company and its shareholders, "independent" board members are expected to play a special role in helping boards meet the OECD objective of exercising "objective independent judgement on corporate affairs". In so doing, they are typically expected to:

- Scrutinise the performance of management in meeting agreed goals and objectives and monitor the reporting of performance.
- Satisfy themselves on the integrity of financial information and that financial controls and systems of risk management are robust and defensible.
- Be responsible for determining appropriate levels of remuneration of executive directors and have a prime role in their appointment.
- Play a leading role in board committees such as audit committees and nomination/corporate governance committees.
- Take the lead where the interests of management, the company and shareholders may diverge, for example in relation to such matters as succession planning, changes of corporate control, take-over defences, the review of related party transactions and large transactions.
- Bring an independent judgement on issues of strategy, policy and accountability.
- Provide a balanced and independent view to the board.

In Mexico, the role of independent board members is stated in the legislation. In the US, their role is specified by the relevant exchange (i.e. NYSE, NASDAQ and other exchanges). In the other surveyed jurisdictions, the role of independent board members generally is dealt with in non-binding Corporate Governance Guidelines. However, as discussed in more detail below, in most jurisdictions, there are mandatory standards relating to the involvement of independent board members on audit committees, while a few jurisdictions also have mandatory standards regarding the involvement of independent board members on other specialized committees.

Chairmanship of the board

In 4 jurisdictions (Australia, Canada, Thailand and the UK) the appointment of an independent board member as Chairman of the board is considered good corporate governance practice. The UK Combined Code recommends that the Chairman should on appointment meet the independence criteria set out in the Code, but states that after appointment a test of independence is no longer appropriate. In the Netherlands , the Chairman of the supervisory board shall not be a former member of the management board of the company. In Germany, the Code does not rule out that the chairman, or a former member of the Management Board assumes the role as Supervisory Board Chairman. However, should this occur, a special reason for this appointment is to be given to the annual general meeting.

Some of the arguments put forward in favour of having a board with an independent chairman are:

- It allows the chairman to focus on ensuring the effectiveness of the board, and the CEO on running the business.

- It facilitates the monitoring and oversight by the board of the CEO and senior management.

In Australia, Canada, Italy, Spain, Switzerland, Thailand and the UK, corporate governance standards recommend that, if the same person holds the post of chairman and CEO (or, additionally, if the chairman is not independent in the case of Canada), then a lead independent director should be appointed to coordinate the other independent directors.

In most jurisdictions corporate laws allow all individual board members, whether independent or not, to request the Chair to convene board meetings or insert items in the agenda, but do not entitle them directly to do so themselves. In Mexico, board members representing more than 25% of the total board members can call a board meeting. In Italy every member of the internal supervisory body which is composed exclusively of independent members, may call a meeting of the board after notifying the chairman. In the UK all board members have the right to propose board meetings or agenda items. However, the final decision rests with the board as a whole. In Mexico, independent board members, through their respective committees, are able to call shareholders meetings and insert items in the agenda. In Brazil, the Corporate Governance Code recommends that the company's by-laws should allow any board member to call a meeting whenever it is needed, if the responsible board member failed to call such a meeting.

Separate meetings.

Separate meetings of independent board members are recommended or required in several jurisdictions (Australia, Canada, France, Italy, Thailand, the UK and the US). The typical purposes of these meetings are:

- To review the functioning of the Board;

- To promote a more open discussion among non-executive directors, reinforcing their role as supervisors of the day to day activities of the management; and
- To evaluate the Chairman's performance.

5. Specialized board committees and the role of independent board members

In all jurisdictions full boards are supported by a number of specialized standing committees which focus on specialized topics and help the board prepare its debates and decisions.

The following table provides an overview of typical committees, and the recommended minimum number or percentage of independent board members on them. A brief comment follows on the most typical committees.[18]

Number of countries that have specific sub-committes

Committee	Mandatory (*)	Common (**)	Chaired by an indep.	Min. % of independents		
				50	66	100
Audit	13	17	11	6	2	7
Nomination	1	11	6	8		3
Remuneration	1	11	8	7		4
Evaluation of the board	2	2	2	1		1
Related parties	1	2	2			2
Risk Management	0	3	2			
Internal control	1	1	1	1		

(*): There is a legal/statutory requirement to have this committee.

(**): Engulfs mandatory, recommended and committees that are common in practice (recommended or not)

<u>Audit Committee</u>

OECD Principle VI.E.1 recommends the assignment of a sufficient number of non-executive board members capable of exercising independent judgement to tasks such as ensuring the integrity of financial and non-financial information.

In the same spirit, IOSCO issued in 2002 a set of principles on auditor independence and the role of corporate governance in its monitoring. The main connection between these principles and the issue of independence of boards is that they (principle 19) recommend the existence of an independent corporate body equivalent to the audit committee. As shown in the following lines, this principle is widely followed.

In most jurisdictions (Australia, Canada, Germany, Hong Kong, India, Italy, Japan, Mexico, the Netherlands, Spain, Thailand, Turkey and the US) the existence of an audit committee (corporate auditors in the case of Japan) is mandatory for listed

[18] In Japan, some committees (remuneration or nomination) are mandatory for those companies that opt for the "committee" system, instead of the Kansayaku (corporate auditors) system. References to Japan in this section refer to the former, not the latter system.

companies. In Brazil, France, Switzerland and the UK the use of audit committees is a recommended corporate governance practice. In Portugal, an audit committee or an equivalent body (committee for financial matters in the two-tier structure) are mandatory.

Specific functions of the audit committee vary from jurisdiction to jurisdiction. The most common functions are:

- Ensuring the integrity of the company's financial statements. To do this, the audit committee should play a very active role in monitoring and analysing the financial information provided by management and check compliance with legal provisions and the correct application of accounting principles.
- Meeting on a regular basis with the internal and the external auditor to discuss the financial information. The audit committee should be in a position to evaluate the external auditor's qualifications, performance and independence. The audit committee should review with the external auditor the problems that could arise or have arisen in auditing the financial statements. Concerning the internal auditor (if any), the audit committee supervises the quality of the internal procedures developed by the company.
- Ensuring the effectiveness of the internal control and risk management policy.
- Reporting on a regular basis to the board on all relevant questions under its responsibility, including making recommendations on the appointment of the external auditor, its remuneration and the term of its contract.
- Monitoring related-party transactions.

There is wide agreement that an effective audit committee requires a significant presence of independent board members. More specifically, it is recommended or required that independent board members should constitute at least one half of the committee members (Australia, Hong Kong, Japan, Portugal, Spain[19], Switzerland, Turkey), two thirds (France and India) or even the entire committee (Brazil, Canada, Mexico, Italy, Thailand, the UK and the US).

In Australia, Canada, Hong Kong, Italy, Mexico, Spain, Switzerland, Thailand, Turkey, the UK and the US, it is recommended or required that an independent board member chair this committee. In Canada and in the US when the company does not have an audit committee comprised entirely of independent board members, the entire board acts as an audit committee. Several jurisdictions recommend (*e.g.* Germany, Turkey) or require (e.g. Hong Kong) that all or a specified proportion of the members of this committee have a certain degree of financial literacy.

Remuneration Committee

OECD Principle VI.D.4 recommends that the board assumes responsibility for aligning key executive and board remuneration with the longer term interests of the company and its shareholders. The annotations to this OECD Principle note that it is considered good practice in an increasing number of countries that remuneration policy and employment contracts for board members and key executives be handled by a special committee, all or a majority of whose members are independent.

[19] In Spain the requirement refers to non-executive (not necessarily independent) board members.

In Japan, Mexico, and the Netherlands, remuneration committees are mandatory for listed companies. In Australia, Brazil, Canada, France, Hong Kong, Italy, Portugal, Spain, Switzerland, Thailand, the UK and the US (at the NYSE but not at Nasdaq) their establishment is recommended.

The annotations to OECD Principle VI.D.4 note that in an increasing number of countries it is considered good practice for the board to develop and disclose a remuneration policy statement covering board members and key executives. Such policy statements are supposed to: (a) specify the relationship between remuneration and performance; (b) include measurable standards that emphasise the longer run interests of the company over short term considerations; (c) set conditions for payments to board members (including payments for extra-board activities such as consulting); (d) specify terms to be observed by board members and key executives for holding and trading company stock; and (e) if applicable, specify procedures for granting and repricing of stock options.

In the surveyed jurisdictions, standards typically recommend that the remuneration committee perform the following functions:

- Propose, and review periodically, the company's remuneration policy for directors and seniors officers.
- Monitor the compliance of the board with the remuneration policy agreed by the company.
- Determine targets for any performance-related pay schemes operated by the company.
- Determine the policy for and scope of pensions arrangements for each executive director.

In some countries (e.g. France and Spain) it is common that one single standing committee is in charge both of the remuneration and the nomination issues.

The minimum required or recommended percentage of independent board members is 50% in Australia, Brazil, France, Hong Kong, Italy, Switzerland and Thailand. In Canada, India, Mexico, Portugal and the UK it is required or recommended that 100% of the committee members be independent. In Australia, Canada, India, Italy, Mexico, Spain, Switzerland, Thailand, the UK and the US it is required or recommended that an independent board member chairs the Committee. In the US, when the company does not have a remuneration committee comprised entirely of independent board members, officer and board compensation must be determined solely by independent board members. According to the listing rules, companies that are listed on the New York Stock Exchange must have a remuneration committee comprised solely of independent board members (though this requirements is waived for "controlled companies")[20].

[20] Nasdaq does not require companies to have a remuneration committee but, if they do have one, it has to be formed exclusively by independent directors.

Nomination Committee

OECD Principle VI.D.5 recommends that the board assumes responsibility for ensuring a formal and transparent board nomination and election process. The annotations to OECD Principle VI.E.1 note that, while responsibility for matters such as nomination of board members pertains to the board as a whole, independent non-executive board members can provide additional assurance to market participants that their interests are defended.

In the surveyed jurisdictions, nomination committees are not as common as audit or remuneration committees. In Australia, Brazil, Canada, France, Hong Kong, Italy, Spain, Switzerland, Thailand, the UK and the US having a nomination committee is required or recommended as good corporate governance practice, but is not very common in Italy and Hong Kong. Only in Germany, Japan, Mexico and the Netherlands is a nomination committee mandatory.

Typical functions include:

- Evaluating the skills, knowledge, and experience of the existing board members and defining the criteria that future candidates to the board should fulfil.
- Leading the selection process for new board members, which might involve: (a) designing, recommending for approval (by the full board or shareholders, as appropriate) and overseeing the implementation of search and nomination procedures; (b) evaluating potential candidates; (c) submitting proposals to the full board in accordance with previously established criteria; and (d) ensuring that established procedures for the nomination and election of board members (including procedures providing for the active participation of shareholders) are transparent and respected.
- Examining and organising the succession of the Chairman and the CEO and making the pertinent recommendations to the board, so that the handover proceeds in a planned and orderly manner.
- Reporting on senior officer appointment and removals.

Regarding the nomination committee's composition, recommendations are quite similar to those for the audit committee. In Australia, Brazil, France, Hong Kong, Italy, Thailand and the UK the majority of the members are to be non-executive directors (independent board members in Thailand). Two countries recommend the majority (Spain) or all (Canada) of the committee's members to be independent. An independent board member should act as chair of the committee in Australia, Canada, Italy, Mexico, Spain, Thailand, the UK and the US.

In jurisdictions that have a two tier board structure, such as the Netherlands and Germany, there is also provision for a nomination committee. In Germany it is mandatory. In the Netherlands, when the supervisory board has more than four members the Code requires that it appoints from its members a selection and appointment committee. In the event that the supervisory board does not establish a separate committee, then the provisions in the Code are to apply to the supervisory board when carrying out these functions. The supervisory board is required to include in its annual report details of the operation of its various committees.

Other Committees.

Hong Kong, Italy, Mexico, Turkey and the US have standards recommending or requiring the establishment of other standing committees such as: risk management committees (e.g. Italy), board evaluation committees (e.g. Italy, Mexico or Turkey, where it is called Corporate Governance Committee) or related-party transactions committees (e.g. Hong Kong, Mexico). In other jurisdictions, most of the duties of these committees are performed by the audit, remuneration or nomination committees.

In the US, there is no mandatory requirement for listed companies to have a related party transaction committee, but as a matter of practice many companies establish such committees in order to comply with State laws requiring approval of related party transactions by disinterested directors. Similarly, it is common practice amongst US listed companies to confer responsibility for evaluating the board's performance (a listing rule requirement) on the nomination committee or the remuneration committee.

In Hong Kong, specialised committees comprising independent board members have a specialised role in advising shareholders on specific matters, in particular on the merits of related-party transactions that require approval of disinterested shareholders. The establishment of such a committee is a requirement of the listing rules of the Hong Kong Stock Exchange. The listing rules also require the establishment of a committee to advise shareholders in the event of the company receiving a takeover or merger offer. Unlike the related party transaction committee, this committee advising on takeovers and merger offers can have members who are non-executive directors that do not satisfy the definition of "independent director" in the listing rules, provided they do not have any direct or indirect interest in the offer under consideration.

In Italy, companies listed in the “Star” segment of Borsa Italiana are required to have an internal control committee, which helps board members to verify, at least once a year, the adequacy of internal control systems. This function is often fulfilled by the audit committee in other jurisdictions.

Annex I: Main sets of corporate governance standards.

I: Company Laws

	Short Name	Full original name	Comment	Website	Year (first publ.)	Last ammend
Australia	**Corporations Act**			http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/asmade/bytitle/618AABD8E453AE27CA256F72000C6CC1?OpenDocument	2001	
Brazil	**Corporations Law**			www.cvm.gov.br	1976	2001
Canada	**Canada Business Corporations Act**	Canada Business Corporations Act	& related provincial corp. Statutes, such as Ontario and Quebec	http://www.laws.justice.gc.ca/en/C-44/index.html	1985 last consolidated	2005
France	**Commercial Code**			http://195.83.177.9/code/liste.phtml?lang=uk&c=32		
Germany	**Stock Corporation Act**	Aktiengesetz, "AktG"		http://bundesrecht.juris.de/bundesrecht/aktg/gesamt.pdf.	1965	
Hong Kong	**Companies Ordinance**	Chapter 32 Companies Ordinance		www.legislation.gov.hk/blis_export.nsf/home.htm	1932	2005
India	**Companies Act**				1956	
Italy	**Civil Code**			www.normeinrete.it	1942	2003
Japan	**Corporate Code**	Kaisha Hou	Replaces the section of the commercial code that dealt with corporate law		2006	
Mexico	**Company Law**	Ley General de Sociedades Mercantiles			1996	
Portugal	**Company's Code**	Código das Sociedades Comerciais		http://www.cmvm.pt/NR/exeres/9EFB8ED6-88F7-4D59-B875-84D2AD2EF11F.htm	1986	2006
Spain	**Company Law**	Ley de Sociedades Anónimas		http://www.igsap.map.es/CIA/dispo/25354.htm	1989	2006
Switzerland	**Code of Obligations**		Sub-section of the Civil Code	http://www.admin.ch/ch/d/sr/c220.html	1912	
Thailand	**Public Company Act**			http://www.dbd.go.th/thai/law/public.doc	1992	2001
Turkey	**Commercial Code**	Türk Týcaret Kanunu		http://www.hukukcu.com/bilimsel/genelkanunlar/6762.html		
UK	**Company Law**		In the process of approving a new version (in Parliament)	http://www.publications.parliament.uk/pa/ld200506/ldbills/034/2006034.htm	1985	2006
US	**State Company Law**		Every State has its own. Main models: Delaware General Corporation Law (DGCL). American Bar Association's Model Business Corporations Act (MBCA).	DGCL can be found at: http://www.delcode.state.de.us/title8/c001/index.htm#P-1_0 | MBCA can be found at: http://www.abanet.org/buslaw/library/onlinepublications/mbca2002.pdf		

II: Securities Laws and equivalent regulations

	Short Name	Full original name	Website	Year (first publ.)	Last ammend
Brazil	Securities Law	Lei mercado de valores mobiliários	http://www.cvm.gov.br/	1976	2001
Canada	**Corporate Governance Practices**	Disclosure of Corporate Governance Practices	http://www.lautorite.qc.ca/userfiles/File/reglementation/valeurs-mobilieres/Normes/58-101Ang.pdf		2005
Hong Kong	**SFO**	Securities and Futures Ordinance	www.legislation.gov.hk/eng/home.htm	2003	2003
Italy	**Law on Finance**	Testo Unico della Finanza	www.consob.it/main/regolamentazione/tuf/tuf.html?queryid=main.regolamentazione.tuf&resultmethod=tuf&search=1&symblink=/main/regolamentazione/tuf/index.html	1998	2005
Japan	**Securities and Exchange Law**	Shouken Torihiki ho			
Mexico	**Securities Law**		http://www.cnbv.gob.mx/recursos/LMV_2006.doc	1975	2005
Portugal	**Securities Code + CMVM regulations**	Código dos Valores Mibiliários + Reg. 7/2001 (CMVM)	http://www.cmvm.pt	1999	2006
Spain	**Securities Markets Law**	Ley del Mercado de Valores	www.cnmv.es/english/index_e.htm	1988	2005
Thailand	**Jyoujyou Kaisha Corporate Governance Gensoku**		www.sec.or.th/en/enforce/regulate/legalsecact_e.shtml	1992	2004
US	**Securities Laws**	Securities Act and Securities Exchange Act	http://www.sec.gov/about/laws.shtml	1933/1934	

III: Listing requirements with relevant corporate governance provisions

	Short Name	Comments	Website
Australia	**ASX Listing Rules**		http://www.asx.com.au/resources/publications/index.htm
Brazil	**Bovespa Listing requirements**	Different requirements for each market segment	www.bovespa.com
Hong Kong	**Listing Rules**	In particular, Appendix 14 Code on CG Practices	www.hkex.com.hk
India	**Listing Agreement**	Clause 49	www.nseindia.com
Switzerland	**SWX Directive on Corporate Governance (DCG)**		http://www.swx.com/admission/being_public/governance_en.html
Thailand	**SEC Notification No. Kor Jor 12/2543**	No. 16	http://capital.sec.or.th/webapp/nrs/data/499p.doc
UK	**LSE Rules**		www.londonstockexchange.com/en-gb/products/membershiptrading/rulesreg/rulesIse/
US	**SRO Listing requirements (e.g. Nasdaq, NYSE, AMEX)**		www. nasdaq.com || www.nyse.com || AMEX: www.amex.com

IV: Corporate Governance Codes

	Short Name	Full original name	Nature	Website	Year (last version)
Australia	**ASX Corporate Governance Principles**		Comply or explain: disclosure required	www.asx.com.au/resources/publications/index.htm	
Brazil (I)	**IBGC Corporate governance Code**	Código de Melhores Práticas de Governança Corporativa do IBGC	Voluntary	www.ibgc.org	1999
Brazil (II)	**CVM Code**	Cartilha de Governança Corporativa da CVM	Comply or explain: disclosure required	http://www.cvm.gov.br	
Canada	**Corporate Governance Guidelines**	Corporate Governance Code	Advisory	http://www.lautorite.qc.ca/userfiles/File/reglementation/valeurs-mobilieres/Normes/58-201PsAng.pdf	2005
France	**Corporate Governance Code**	Rapport AFEP-MEDEF: "Le gouvernement d'entreprise des sociétés cotées"	Advisory, disclosure req.	www.medef.fr	2003
Germany	**Corporate Governance Code**	Deutscher Corporate Governance-Kodex	Comply or explain: disclosure required in some provisions	http://www.corporate-governance-code.de/ger/kodex/index.html	2002
Italy	**Preda Code**	Codice di Autodisciplina delle società quotate	Compliance with standard is mandatory only if the company has opted in.	http://www.borsaitalia.it/documenti/regolamenti/corporategovernance/corporategovernance.htm	2006
Japan	**Principles of Corporate Governance**	Jyoujyou Kaisha Corporate Governance Gensoku	Advisory	www.tse.or.jp/english/listing/cg/index.html	2004
Mexico	**Best Practices Code**	Código de Mejores Prácticas Corporativas	Advisory, disclosure req.	http://www.cnbv.gob.mx/recursos/circula/Emisoras/Emisoras_Compilada2005.doc	2003
Netherlands	**Tabaksblat Code**		Comply or explain: disclosure required	http://www.commissiecorporategovernance.nl/	2003
Portugal	**CMVM Recommendations**	Recomendações da CMVM sobre o Governo das Sociedades Cotadas	Comply or explain: disclosure required	www.cmvm.pt	2005
Spain	**Unified Code**	Código Unificado de Recomendaciones sobre Buen Gobierno de las sociedades cotizadas	Comply or explain: disclosure required	www.cnmv.es	2006
Switzerland	**Best Practices Code**	Code of Best Practice for Corporate Governance	Advisory	www.economiesuisse.ch/	
Thailand	**Principles of Corporate Governance**		Advisory, disclosure req.	www.set.or.th/en/education/infoserv/files/CG15-ENG.pdf	2001
Turkey	**Principles of Corporate Governance**			/www.cmb.gov.tr	
UK	**Combined Code**	The Combined Code on Corporate Governance	Comply or explain: disclosure required	www.frc.org.uk/corporate/combinedcode.cfm	2003

Annex II: feedback statement

Introduction

The Technical Committee expresses its sincere thanks for the responses to its *Consultation Paper on Board Independence of Listed Companies*. The comments greatly assisted the TC in improving specific parts of this paper.

While some comments were on the subject of the paper in general, most comments focused on specific elements of this paper regarding national regulations and codes on corporate governance which had not been reflected correctly in the consultation paper or which had recently been updated. In this feedback statement a reaction is given to the general comments, without going into every country-specific comment received.

Comments

The European Association of Listed Companies (EALIC) noted that the outcome-oriented approach of the OECD-Principles on Corporate Governance has to be maintained and that no detailed guidance on corporate governance should follow since "one size does *not* fit all". The TC recognises and agrees with this observation, that is totally coherent with the consultation report. It stresses that the *Final Report on Board Independence of Listed Companies* (the Report) is strictly meant as a comprehensive overview of existing codes on the independence of board members of listed companies in the most relevant capital markets. It does not judge existing corporate governance standards or practices in individual jurisdictions, nor does it determine any best practices on this subject.

EALIC also advised to indicate the source of the standards highlighted by the Report. For this we refer to Annex 1 of the Report.

EALIC, Borsa Italiana and the Association of Capital Market Intermediary Institutions of Turkey have commented on some misrepresentations or updates in the report with regard to the French, Italian and Turkish corporate governance codes. Where applicable, changes and corrections have been made after checking the accuracy of the comments and taking into account that some balance between the description of general trends and the inclusion of very specific provisions for some countries has to be found.

The Taiwan Stock Exchange and the Singapore Exchange have submitted an overview of their corporate governance codes. These two jurisdictions were not initially in the group of countries analyzed by the Technical Committee. As the present report is based on specific answers to a comprehensive questionnaire with active participation by representatives of the securities commissions of each analyzed country, it proved problematic to include Taiwan and Singapore in this report based only on their responses to the Consultation Report. However, the Technical Ccommittee appreciates the information provided by these two stock exchanges and the codes have been taken up in the overview of comments which has

been published on the IOSCO website (http://www.iosco.org/library/pubdocs/pdf/IOSCOPD234.pdf).