

**UNIFIED CODE**  
**ON**  
**GOOD CORPORATE GOVERNANCE**  
**(DRAFT)**

**SPECIAL WORKING GROUP**

18 January 2006

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## Introduction

The Government agreed on 25 July 2005 to set up a Special Working Group to advise the Spanish Securities Markets Commission (Comisión Nacional del Mercado de Valores, CNMV) with regard to the harmonisation and update of the Olivencia and Aldama Report recommendations for the good governance of listed companies.

The Special Working Group was officially constituted on 16 September 2005 with members as listed in Annex III. It unanimously approved today the present Proposal, comprising

- A draft Unified Code of Recommendations for the Good Governance of Companies quoted on the Spanish Stock Exchange; and
- A set of draft supplementary recommendations (Annex I), less elaborated than the Unified Code, and aimed at Spanish financial institutions, the CNMV and the Government.

In drawing up its recommendations, the Group has elected to confine itself to:

- Good governance recommendations for companies whose shares are traded on the Spanish Stock Exchange, although work may later go into adapting the Code to the issuers of fixed-income securities (in particular, savings banks).
- The internal governance of listed companies, i.e. without venturing into the terrain of “corporate social responsibility”, which mainly refers to companies' relations with stakeholders other than shareholders.
- Recommendations for which compliance is voluntary, rather than mixing them in with legal duties or binding rules. This is a point to remember when analysing the recommendations put forward in this draft Unified Code, especially when comparing them with the good governance codes of other countries. Concretely, readers not familiar with Spanish company law should be aware that what they may see as obvious omissions may be in fact already written into Spain’s current legislation.

In its review of Olivencia and Aldama Report recommendations, the Group has borne in mind a number of international recommendations issued subsequently, in particular:

- Recommendations and proposals of the European Commission
  - Recommendation of 15 February 2005 (2005/162/EC) on the role of non-executive or supervisory directors of listed companies and the committees of the (supervisory) board.
  - Recommendation of 14 December 2004 (2004/913/EC) on the remuneration of the directors of listed companies.
  - Proposal for the modernisation of the General Meeting of Shareholders.

- Recommendations of the Basel Committee on Banking Supervision<sup>1</sup>.

The public consultation round on this Proposal will be composed of two stages:

- Up to 28 February, reception of written comments.
- Subsequently, meetings with experts and/or institutions that have raised objections meriting further discussion.

In order to stimulate public debate and get feedback on some of the recommendations the Group discussed in most depth, we have appended a list of possible questions (Annex II) which we hope will spur comment not only on the handful of items selected, but also on the other ideas presented here.

After working through the comments and criticism received, by 31 March at the latest the Group will approve the final version of its Recommendations, which the CNMV will convey to the Government and make publicly available.

Those wishing to send in written comments, questions or enquiries on this Proposal can address them (in Spanish, English or any other EU language) to:

- E-mail: [gobiernocorporativo@cnmv.es](mailto:gobiernocorporativo@cnmv.es)
- Ordinary mail: COMISIÓN NACIONAL DEL MERCADO DE VALORES. Sub Directorate of Corporate Governance. Paseo de la Castellana 19. 28046 Madrid.

Madrid, 16 January 2006

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<sup>1</sup> Enhancing corporate governance for banking organisations, Basel Committee on Banking Supervision, January 2006.

# RECOMMENDATIONS on the GOOD GOVERNANCE of LISTED COMPANIES

## (Draft Unified Code)

### CORE PRINCIPLES

- *Voluntariness*, subject to the “comply or explain” principle;
  - As such, the Code does not include recommendations that are already a legal duty under Spanish law. Nor does it reiterate other applicable legal provisions. It therefore omits certain recommendations that are necessary in other countries or advocated by the European Commission, on the grounds that they are already written into Spanish law. This point should be borne in mind when analysing the proposed Code or comparing it with those of other countries (e.g., the UK's Combined Code)<sup>2</sup>.
  - Listed companies will have the first opportunity to state their compliance or otherwise with Code recommendations when they approve their Annual Corporate Governance Report for the year 2006<sup>3</sup>, i.e. in the first half of 2007
  - Listed companies can freely decide to comply or not with the Code's recommendations, but must invariably respect the definitions and concepts it contains<sup>4</sup>.
- *Generality*: The Code sets out general rules, and does not list all the possible cases where recommendations could accommodate legitimate exceptions.

As such:

- *Admissibility of justified exceptions*: The “comply or explain” approach leaves it up to the listed company to adhere or otherwise to Code recommendations, but requires that companies failing to comply should disclose their reasons so the market and shareholders can draw the pertinent conclusions.

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<sup>2</sup> In the final version of the Code, each Recommendation will be accompanied, for information purposes, by a reference to the legal provision(s) governing related topics. For example, Recommendation 9 to the effect that Boards of Directors should authorise all related-party transactions does not specify that these must not harm the company's interests, since this would already be in breach of the Public Limited Companies Law and even, in some circumstances, the Criminal Code.

<sup>3</sup> Also relevant in this respect are the transitional provisions mentioned in the annotations to Recommendation 40 h) and i).

<sup>4</sup> For instance, they can decide how many independent directors to appoint, but they cannot call a director “independent” if he or she has business dealings with the company. Likewise, they can decide whether or not to comply with Recommendation 56 on “remuneration reports”, but cannot claim compliance without fulfilling the minimum contents specified for such reports by this and the following (57) Recommendation.

- *Application to all listed companies:* As these are non binding recommendations admitting justified exceptions, the Code does not include separate rules for categories of company (e.g. small caps).
- *Complementarity of annotations:* Along the same lines as the OECD's Principles of Corporate Governance, the Recommendations in the Unified Code are accompanied by Annotations providing useful commentary<sup>5</sup>.

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<sup>5</sup> In this Proposal, the Annotations to each Recommendation figure as footnotes under the title **Annotation**. They will be more numerous in the Code's final version and grouped together in a separate section.

# RECOMMENDATIONS

## CHAPTER I. GENERAL RECOMMENDATIONS

### Listed companies from the same group

1. In the exceptional event that a dominant and subsidiary company are separately listed, they must both sign and publish an agreement specifying exactly:
  - a) The type of activity they engage in, and any business dealings between them as well as with other companies in the group;
  - b) The mechanisms in place to resolve possible conflicts of interest.
2. When related-party transactions take place or are envisaged between a listed subsidiary and its parent company, listed or otherwise, an ample majority of Board places in the subsidiary must correspond to independent directors plus proprietary directors representing shareholders that have no ties with the dominant company.

### Bylaw restrictions

3. The bylaws of listed companies may not limit the number of votes held by a single shareholder, or impose other restrictions on the company's takeover via the market acquisition of its shares.

### Competences of the Shareholders' Meeting

4. Even if not expressly required under company law, Boards of Directors should submit the following decisions to the General Shareholders' Meeting for approval or ratification:
  - a) The transformation of listed companies into holding companies through the process of subsidiarisation, i.e. reallocating to subsidiaries core activities that were previously carried out by the originating firm, even though the latter retains full control of the former;
  - b) Any disposal of key operating assets that would effectively alter the company's corporate purpose<sup>6</sup>;
  - c) Operations that effectively add up to the company's liquidation;

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<sup>6</sup> **Annotation:** This Recommendation squares with the doctrine of the Directorate General of Registries and Notaries (in particular its Resolution of 25 April 1997), whereby the sale of assets essential for the fulfilment of the company's corporate purpose "exceeds the representative powers of the managerial body and properly falls within the competences of the company's supreme governing body, the General Meeting". Simple sale and leaseback transactions in properties and other assets employed in the company's operations should not be construed as within this category. Nor, for instance, should the sale of a company's plant when it opts to outsource an activity that it once performed directly.

- d) Acquisitions of companies whose corporate purpose bears no relation to that of the buyer, when the investment amounts to more than 20% of the latter's consolidated balance sheet.

### **Separate votes on General Meeting items**

- 5. Separate votes will be taken at the General Meeting on materially separate items, so shareholders can express their preferences in each case.

This rule will apply particularly to the following items:

- a) Appointment or ratification of directors, with separate voting on each candidate;
- b) Changes to the bylaws, with votes taken on all articles or groups of articles that are materially different. In any event, articles must be voted on individually if a shareholder so requests.

### **Split votes**

- 6. Companies will allow split votes, so that financial intermediaries who are shareholders of record but acting on behalf of different clients can issue their votes according to instructions.

### **Annual Corporate Governance Report**

- 7. Companies will take steps so their Annual Corporate Governance Report gets as wide a circulation among shareholders as the Annual Accounts and Directors' Report.

## **CHAPTER II. ON THE BOARD OF DIRECTORS**

### **The corporate interest**

- 8. The Board of Directors shall perform its duties with unity of purpose and independence from Management, according all shareholders the same treatment. It shall be guided at all times by the company's best interest, to be understood as maximising the company's value over time.

It will ensure that the company abides by the laws and regulations in its relations with stakeholders<sup>7</sup>; fulfils its obligations and contracts in good faith; respects the customs and good practices of the sectors and territories where it does business; and upholds any additional social responsibility principles it has subscribed to voluntarily.

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<sup>7</sup> **Annotation:** For the purposes of this Code, "stakeholders" are all those groups (employees, suppliers, customers, local communities, lenders...) having a direct interest in the company's activities without participating in its ownership.



## Competences of the Board

9. The core components of the Board's mission shall be to approve the company's strategy, authorise the organisational resources to carry it forward, and ensure that management meets the objectives set while pursuing the company's interests and corporate purpose.

As such, the Board in full shall approve:

- a) The company's general policies and strategies.

In particular:

- i)* The strategic or business plan, management targets and annual budgets;
- ii)* Investment and financing policy;
- iii)* Design of the structure of the corporate group;
- iv)* Corporate governance policy;
- v)* Corporate social responsibility policy;
- vi)* Remuneration and evaluation of senior officers;
- vii)* Risk control and management, and the periodic monitoring of internal information and control systems;
- viii)* Policy on treasury shares, and the limits to apply.

- b) The following business decisions:

- i)* On the proposal of the company's chief executive, the appointment and removal of senior officers, and their termination clauses<sup>8 9</sup>.
- ii)* Directors' remuneration and, in the case of executive directors, the additional consideration for their management duties and the approval of their contracts.
- iii)* The financial information listed companies must periodically disclose.
- iv)* Investments or operations considered strategic by virtue of their amount or special characteristics; in particular, items requiring ratification by the General Meeting as specified in Recommendation 4;
- v)* The incorporation or acquisition of special purpose vehicles<sup>10</sup> or entities resident in countries or territories defined as tax havens, as well as any

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<sup>8</sup> For the purposes of this Code, "senior officers" shall be those reporting directly to the company's chief executive, including, in all events, the internal auditor.

<sup>9</sup> In cases where a chief executive officer is appointed to relieve the executive Chairman of some responsibilities or facilitate his succession, a proposal from the latter will not be necessary. In the case of the internal auditor, the proposal will be tabled by the Audit Committee (see Recommendation 67).

analogous transactions or operations whose complexity may impair the group's transparency<sup>11</sup>.

- c) Transactions which the company conducts with directors, significant shareholders, shareholders with Board representation or other persons related thereto ("related-party transactions").

However, Board authorisation will not be required for related-party transactions that simultaneously meet the following three conditions:

- 1) They are governed by standard contracts applied on an across-the-board basis to a large number of clients;
- 2) They go through at market rates, set on a general basis by the person supplying the goods or services;
- 3) Their amount is not material for the company, as defined in Recommendation 40 e).

Related-party transactions may only be approved on the basis of a favourable report from the Audit Committee. Directors related to the transaction may neither exercise nor delegate their votes, and shall be absent from the meeting room while the Board deliberates and votes.

The above powers may not be delegated -with the exception of those mentioned in b) and c), which can be delegated to the Executive Committee in urgent cases, subject to subsequent ratification by the full Board-. Notwithstanding this, the Board may decide on the matters spelled out in this Recommendation on the basis of reports sought from the Executive Committee or at the proposal of the other committees described in Chapter IV of this Code.

## Size and composition

10. In the interests of the effectiveness and participatory nature of its functioning, the Board of Directors should comprise between seven and fifteen members<sup>12</sup>.
11. The Board of Directors should have an adequate diversity of knowledge, gender and experience to perform its tasks efficiently, objectively and in an independent manner<sup>13</sup>.

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<sup>10</sup> **Annotation:** For the purposes of this Code, "special purpose vehicle" refers to those companies or entities which, despite having their own legal personality, are created for an exclusive or ancillary purpose and are controlled by the group to which the listed company belongs.

<sup>11</sup> **Annotation:** This Recommendation draws on Principle 8 (know your structure) of the Recommendations of the Basel Committee on Banking Supervision (Enhancing corporate governance for banking organisations, Basel Committee on Banking Supervision, January 2006). According to its text, such transactions must be for legitimate motives, and not be arranged in such a way as to unreasonably impair the transparency of the group's structure and operations.

<sup>12</sup> **Annotation:** The minimum of five directors counselled by the Olivencia Report is here raised to seven, primarily because Recommendation 16 of the Unified Code calls for at least three independent directors.

<sup>13</sup> **Annotation:** This text is inspired by section 11.1 of the European Commission Recommendation of 15/2/05, on external directors and committees.

## Types of director

12. Directors may belong to one or other of the following groups:
- a) Directors who are senior officers or employees of the company itself or of some other group or associated company (“executive” or “internal directors”);
  - b) Directors who owe their board place to being company shareholders, or to representing or having a personal or business relationship with shareholders (“proprietary directors”);
  - c) Directors having no personal or business connection with the company, its shareholders or its management (“independent directors”).
13. In the exceptional case where an external director cannot be considered either proprietary or independent, the company must explain this circumstance and disclose his or her ties with the company or its managers or, alternatively, with its shareholders<sup>14</sup>.
14. The nature of each director must be explained to the General Meeting of Shareholders, which shall make or ratify his or her appointment. Such determination shall subsequently be confirmed or reviewed in each year’s Annual Corporate Governance Report<sup>15 16</sup>.

## Functional structure

15. The number of executive directors should be the minimum practical bearing in mind the complexity of the corporate group, while external directors (i.e., proprietary directors and independents) occupy an ample majority of board places<sup>17 18</sup>.
16. The number of independent directors shall invariably be three or more and, represent at least a third of all board members.
17. The Annual Corporate Governance Report must justify any appointment of a proprietary director representing a shareholder with an equity stake of less than 5%.

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<sup>14</sup> **Annotation:** Directors completing the 12-year term stated in Recommendation 39 shall cease to be “independent”, and from that point on shall be considered to have ties with the company. In the case of directors linked to significant shareholders or shareholders already present on the Board, the company must disclose the specific shareholder with whom he or she is considered to be linked.

<sup>15</sup> **Annotation:** The definition of independent director given in this Code is binding, i.e. it may not be in any way modified by listed companies. Companies can freely decide to appoint a particular person, but they have no discretion to decide whether or not he or she is an “independent”.

<sup>16</sup> **Annotation:** The nature of directors need not be entered in the Mercantile Registry or, therefore, defined by the Registrar. It may however be revised by the CNMV when verifying the Annual Corporate Governance Report.

<sup>17</sup> **Annotation:** In the exceptional case of an external director with links to the company or its senior management, the said director shall be deemed internal for the purposes of this Recommendation.

<sup>18</sup> **Annotation:** This Recommendation does not preclude senior officers from attending meetings at the board's invitation, with speaking rights but no vote.

Reasons should also be stated for any rejection of a formal request for a Board place from shareholders whose equity stake is equal to or greater than that of others already having proprietary directors<sup>19</sup>.

18. Among external directors, the relation between proprietary members and independents should reflect the proportion between the capital represented on the Board and the remainder of the company's capital.

This criterion of strict proportionality may be relaxed, so the weight of proprietary directors is greater than would strictly correspond to the total percentage of capital they represent, in the following cases:

- 1) In large cap companies where few or no equity stakes attain the legal threshold for significant shareholdings<sup>20</sup>, despite the considerable sums actually invested.
- 2) In companies with a plurality of shareholders represented on the Board but not otherwise related.<sup>21</sup>

As a limit to this potential over-weighting of proprietary directors, they will not occupy more than half the total of Board places unless they represent more than 50% of share capital.

## Gender diversity

19. When women directors are few or non existent, the Board should state the reasons for this situation and the initiatives taken to correct it<sup>22</sup>.
20. In particular, the Nomination Committee should take steps to ensure that:

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<sup>19</sup> **Annotation:** Good Governance Codes are essentially of “Anglo-Saxon” origin. The predominance in these countries of listed companies with a dispersed ownership has meant that they – and even international recommendations like the OECD principles or the European Commission Recommendation of 15/02/05 – devote little attention to the appointment procedures for proprietary directors. However this is a question of some importance in stock markets like Spain's. This Recommendation is an attempt to broach the issue, and to address the practical shortcomings of the proportional representation system envisaged in article 137 of the Public Limited Companies Law.

<sup>20</sup> **Annotation:** For the purposes of this Code, “significant shareholdings” are as defined by legislation; currently, those exceeding 5% of share capital (Royal Decree 377/1991 on the notification of significant shareholdings).

<sup>21</sup> **Annotation:** The first paragraph of this Recommendation and the first two conditions are taken from the Olivencia Report (final paragraph of section 2.2, page 23). However in the second condition, the Working Group has added that significant shareholders should have no links between them. This will lessen the possibility of abusive conduct by a single dominant shareholder, and encourage a reciprocal control among proprietary directors that should benefit dispersed owners.

<sup>22</sup> **Annotation:** This and the next two Recommendations start from the conviction that a good gender mix is not just an ethical-political or CSR question but also an efficiency builder, in the medium term at least: neglecting the potential business talent of 51% of the population - women - cannot be globally efficient for listed companies. Recommendations also assume that men's domination of senior posts is in some way self-perpetuating, possibly fuelled by hysteresis and network externalities (the “old boys’ network”). This makes it likelier that male appointments will continue to predominate, and suggests the diversity deficit will not go away without a directed effort.

- a) The process of filling Board vacancies has no hidden bias against women candidates;
  - b) The company makes a conscious effort to include women with the target profile among the candidates for Board places.
21. Annual Corporate Governance Reports will contain a section on gender diversity with detailed information on:
- a) The year-end gender distribution of company staff, with a detailed breakdown by occupational categories and levels, to include senior officers and directors.
  - b) The changes occurring in the said distribution over the course of the year<sup>23</sup>.

### **The Chairman**

22. The Chairman shall be responsible for the proper operation of the Board of Directors. He or she will ensure that directors are supplied with sufficient information in advance of board meetings, and will work to ensure a good level of debate. He or she will organise and coordinate regular evaluations of the Board and, when different from the chairman of the Board, the company's chief executive, along with the chairmen of the relevant committees.
23. When Chairman and chief executive are one and the same, a Deputy Chairman will be appointed from among the company's independent directors. This Deputy Chairman will be empowered to request the calling of Board meetings or the inclusion of new business on the agenda, may organise coordinating meetings among external directors and will take charge of the Chairman's evaluation. One of his or her duties will be to voice the concerns of external directors<sup>24</sup>.

### **The Secretary**

24. Without prejudice to the general duties required of all directors, the Secretary shall take steps to ensure that the Board's actions:
- a) Adhere to the spirit and letter of laws and their implementing regulations, including those issued by regulatory agencies.
  - b) Comply with the company bylaws and the regulations of the General Shareholders' Meeting, the Board of Directors and others.
  - c) Are informed by the good governance recommendations of this Unified Code and adhere to the letter and spirit of those accepted by the company.

To safeguard the independence, impartiality and professionalism of the Secretary, his or her appointment and removal must be proposed by the Nomination

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<sup>23</sup> **Annotation:** The gender diversity Recommendations of the Unified Code are aimed strictly at improving the performance of Boards of Directors, and do not address other changes that may be desirable from a "social responsibility" standpoint (e.g., disclosure of salary differences or the company's adoption of policies to help reconcile home and working life).

<sup>24</sup> **Annotation:** This paragraph merely suggests a formula to stop too much power being vested in chairmen who are also chief executives. However, taking its cue from the Olivencia and Aldama Reports, the Code gives no opinion as to whether both functions should be carried out by the same person.

Committee and approved by a full board meeting. The relevant appointment and removal procedures must be spelled out in the board's regulations.

The Board Secretary shall not be a director<sup>25</sup>.

## Board meetings

25. As a rule, the Board of Directors will meet at least eight times a year<sup>26</sup>.
26. Board members will be provided with sufficient information far enough in advance to properly fulfil their duties of care under the Public Limited Companies Law.
27. Director absences will be kept to the bare minimum and quantified in the Annual Corporate Governance Report. When directors have no choice but to delegate their vote, they should try to do so to another director in the same category<sup>27</sup>.
28. The Chairman will ensure that directors can take and state positions free of any constraints. Directors, in turn, will participate actively in the Board's deliberations and decisions.
29. The Secretary shall keep the minutes of Board meetings. When directors or the Secretary express concerns about some proposal or, in the case of directors, about the company's performance, and such concerns are not resolved at the meeting, the member expressing them will request that they be recorded in the minute book.

## Evaluation

30. The Board will evaluate the following points on a yearly basis, starting from the report furnished by the Nomination Committee:
  - a) The quality and efficiency of the Board's stewardship;
  - b) How well the Chairman and chief executive have carried out their duties<sup>28</sup>;

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<sup>25</sup> **Annotation:** This Code dissents from the Olivencia Report in advising that Secretaries should not be board members. Although being a director would increase the Secretary's liability for any breach of duty, it might also undermine his or her independence and raise the weight of internal over external directors. That said, the proposal is that Board Secretaries be appointed or removed on the recommendation of the Nomination Committee, in the same way as independent directors, in order to reinforce their independence and professionalism. This parallel with independent directors would also extend to cases of resignation due to serious discrepancy with board decisions. This Recommendation does not go into the debate on whether the Board Secretary should be external.

<sup>26</sup> **Annotation:** At the core of this Recommendation is the belief that a Board which fails to meet with a certain frequency and lapses into absenteeism cannot properly perform its functions of management oversight and control. In practice, however, there are some companies, particularly those with multinational boards, where meetings are fewer than eight a year but with each one lasting a day or more. This situation would constitute reasonable grounds for not following the present Recommendation.

<sup>27</sup> **Annotation:** This paragraph is drawn from the Olivencia Report (section 4.3, page 35). What is new is the reference to disclosing non attendance in the Annual Corporate Governance Report.

<sup>28</sup> **Annotation:** Although the Recommendation makes no general provision on evaluating each director, this option may be worth considering.

This power will be exercised directly by the Board, and may not be delegated to the Executive Committee<sup>29</sup>.

31. The Board will also evaluate the performance of its committees on the basis of the reports furnished by the same.

### **Information to directors**

32. All directors shall be entitled to receive any additional information they require on matters within the Board's competence. Unless the bylaws or board regulations indicate otherwise, such requests should be addressed to the Chairman or Secretary.
33. All directors shall be entitled to call on the company for the advice and guidance they need to carry out their supervisory duties. The company shall establish suitable channels for the exercise of this right, extending in special circumstances to external assistance at the company's expense.

### **Commitment<sup>30</sup>**

34. Directors shall devote sufficient time and effort to perform their duties effectively. As such:
- a) They shall apprise the Nomination Committee of any professional obligations that might detract from the necessary dedication;
  - b) Companies should limit the number of directorships their Board members can hold.

## **CHAPTER III. ON DIRECTORS**

### **Types of director**

#### ***Executive directors***

35. "Executive directors" are those who perform senior management functions or are employees of the company or of any other group or associated company<sup>31</sup>.

However, Board members who are senior officers or directors of the company's parent firm shall be classed as proprietary directors.

#### ***Proprietary directors***

36. "Proprietary directors" are those who:

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<sup>29</sup> **Annotation:** Although the Recommendation makes no general provision for evaluations being conducted by outside experts, this could be a good option on many occasions.

<sup>30</sup> **Annotation:** The text of this Recommendation draws on paragraph 12 of the European Commission Recommendation of 15/2/05.

<sup>31</sup> **Annotation:** When a director performing senior management functions at the same time is or represents a significant shareholder or any shareholder represented on the Board, he or she will be considered an executive director for the purpose of this Code. For other purposes, e.g. the rules on mandatory takeover bids by a shareholder controlling the Board, this same director would be classed as proprietary.

- a) Hold a share package exceeding 5% of the company's capital, or have been appointed to the Board in a shareholder capacity even though their ownership share is below this percentage.
  - b) Represent shareholders referred to in the preceding section or have a personal or business relationship with the same.
37. A director is presumed to represent a shareholder or maintain a personal or business relationship with the same in the following cases:
- a) He or she has been appointed in the exercise of the right of proportional representation, under article 137 of the Public Limited Companies Law.
  - b) He or she is a director, senior officer, employee or regular service supplier of the said shareholder, or companies with the same group.
  - c) Company records show that the shareholder acknowledges the director as his appointee or representative<sup>32</sup>.
  - d) He or she is the spouse or maintains an analogous affective relationship or is a relative to the second degree of a significant shareholder<sup>33</sup>.
38. When a proprietary director is a legal entity, the natural person representing it on the Board will come under the same rules as directors.

### ***Independent directors***

39. Independent directors shall be persons of acknowledged repute as well as proven independence and personal and business integrity.
40. Only persons able personally and professionally to perform their duties without being influenced by past, present or future ties with the company, its shareholders or its directors can qualify as independent directors.

As such, the following shall in no circumstances qualify as independent directors:

- a) Past employees or executive directors of the group, unless 3 or 5 years have elapsed, respectively, from the end of the relation<sup>34</sup>.

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<sup>32</sup> **Annotation:** The conditions stated in a) to c) of this Recommendation are taken from article 3.9 of Royal Decree 1197/91 on takeover bids. Excluded, however, is the last section of this same article, under which a director qualifies as proprietary “when the appointment resolution is supported by the votes in favour of the owner of the significant holding or companies within the latter's group” or by other proprietary directors of the same shareholder. The criticism levelled at this condition is that the directors of listed companies are frequently appointed with the votes in favour of all significant shareholders and board members, but this does not necessarily imply a proprietary relationship with all of them.

<sup>33</sup> **Annotation:** This Code follows the criterion of article 127 *ter* of the Public Limited Companies Law, which is also upheld in remaining legal provisions concerning related-party transactions, whereby analogous affective relationships (e.g. couples living together) are given the same treatment as marriages.

<sup>34</sup> **Annotation:** In the spirit of Recommendation 13, former employees or executive directors who stay on or are appointed as directors in any company within the group shall be considered executive directors. They will not therefore qualify as independent unless they leave the board



- b) They receive some payment or other form of compensation from the company or any other company within its group on top of their directors' fees, unless the amount involved is not significant.

Pension supplements received by a director for prior employment or professional services shall not count for the purposes of this section, provided such supplements are non contingent, i.e. the paying company has no discretionary power to suspend, modify or revoke their payment except in cases of non fulfilment.

- c) They are a partner or employee of the external auditor or the auditor of any other company in the same group, or have been in the past three years.
- d) They are executive directors or senior officers of another company where an executive director or senior officer of the company is an external director<sup>35</sup>.
- e) They have material business dealings with the company or some other in its group or have had such dealings in the preceding year, either on their own account or as the shareholder, director or senior officer of a company that has or has had such dealings.

“Business dealings” will include the provision of goods or services, including financial services, as well as advisory or consultancy relationships.

Business dealings will be deemed to be material when billing or payment flows come to over 1% of either party's annual revenues.

The terms of this section will also apply to any direct business dealings maintained by the independent director in the year preceding his or her appointment<sup>36</sup>.

- f) They are shareholders, directors or senior officers of an entity that receives significant donations from the company or some other company in the same group, or has done so in the past 3 years<sup>37</sup>.
- g) They are the spouse or maintain an analogous affective relationship or are relatives to the second degree of one of the company's executive directors or senior officers.
- h) They have served as independent directors without interruption for a period of over 12 years<sup>38</sup>.

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for a period of 5 years, even though 3 or 5 years have elapsed since they ceased to be employees or executive directors respectively.

<sup>35</sup> **Annotation:** This Recommendation takes the view that “cross directors” do not qualify as independents: hence, when company A has directorships in company B no senior officer of B would qualify as an independent, because the presence of company A directors on B's board could influence the attitudes of its management team.

<sup>36</sup> **Annotation:** Note that this last paragraph refers only to the past, as the rendering of such services (e.g., as a consultant or lawyer) by persons currently holding an independent directorship is barred under b) of this same Recommendation.

<sup>37</sup> **Annotation:** This provision will not apply to those who are merely trustees of a Foundation receiving donations.

- i) They have not been proposed for appointment or renewal by the Nomination Committee<sup>39</sup>.
- j) They stand in some of the situations listed in a), e), f) or g) above in relation to a significant shareholder or a shareholder with Board representation. In the case of the family relations set out in letter g), the limitation refers not only to the shareholder but also the proprietary directors of the same.

Proprietary directors who are disqualified as such and obliged to resign due to the disposal of shares by the shareholder they represent may only be re-elected as an independent director if all the following conditions concur:

- 1) The shareholder they were representing up to that point has sold all shares held in the company;
- 2) The Nomination Committee unanimously propose their re-election;
- 3) The time they served as proprietary directors does not bar them from continuing under h) above.

The Nomination Committee will determine annually, in accordance with Recommendation 14, whether each independent director continues to qualify as such under the terms of these Recommendations, and will disclose its determinations in the Annual Corporate Governance Report.

## **Appointment and removal**

### ***Selection, appointment and renewal***

- 41. The proposal for the appointment or renewal of directors which the board submits to the General Shareholder's Meeting will be approved by the board:
  - a) On the proposal of the Nomination Committee, in the case of independent directors and those dealt with in Recommendation 13.
  - b) Subject to a report from the Nomination Committee in all other cases.
- 42. Companies will post the following director particulars on their websites, and keep them permanently updated:
  - a) Professional experience and background;
  - b) Other directorships held, and any professional activity in other companies, listed or otherwise<sup>40</sup>;

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<sup>38</sup> **Annotation:** To give time for the replacement of directors now considered independent who will be disqualified under this 12-year rule, it will only be incorporated into the definition of "independent director" as of 31 December 2007.

<sup>39</sup> **Annotation:** In the case of directors appointed before the publication date of the Unified Code, this condition will be deemed to be met if their first re-election after such date is at the proposal of the Nomination Committee. Before re-election is secured, and providing all other independence standards are fulfilled, the company may continue to call them "independent directors", though disclosing that they do not comply with the terms of letter j).

- c) A reasoned explanation of the director's classification as executive, proprietary or independent, as the case may be; in the case of proprietary directors, stating the shareholder they represent or to whom they are affiliated.
- d) The date of their first and subsequent appointments as a company director; and
- e) Shares held in the company and any options on the same<sup>41</sup>.

***New director induction courses***

- 43. Companies shall organise induction courses for new directors to supply them rapidly with the information they need on the company and its corporate governance rules.

Directors will also be offered refresher courses when circumstances so advise (for instance, in the event of major regulatory changes).

***Removal and resignation***

- 44. Proprietary directors shall resign when the shareholders they represent dispose of the shares owned in their entirety. If such shareholders reduce their stakes, thereby losing some of their entitlement to proprietary directors, they must reduce their director numbers correspondingly.
- 45. The Board of Directors may not propose the removal of independent directors before the expiry of their tenure as mandated by the bylaws, except where just cause is found by the Board on the proposal of the Nomination Committee. In particular, just cause will be presumed when a director is in breach of his or her fiduciary duties or comes under one of the disqualifying grounds enumerated in Recommendation 40.

The removal of independents may also be proposed when a takeover bid, merger or similar corporate operation causes changes in the capital structure of the company, in order to meet the proportionality criterion set out in Recommendation 18.

- 46. Directors will inform the Board immediately of any criminal charges brought against them and the progress of any subsequent trial.

The moment a director is indicted for any of the crimes stated in article 124 of the Public Limited Companies Law<sup>42</sup>, the Board will examine and, in view of the particular circumstances and potential harm to the company's name and reputation,

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<sup>40</sup> **Annotation:** This disclosure requirement will not extend to portfolio companies of the director or his or her immediate family.

<sup>41</sup> **Annotation:** This information is also available in the Official Registers of the CNMV. But its simultaneous dissemination by the listed company would cost little while saving interested investors and shareholders the time and expense of searching.

<sup>42</sup> **Annotation:** In accordance with article 124 of the Public Limited Companies Law (amended by the twentieth final provision of Insolvency Law 22/2003 of 9 July), the offences cited are "crimes against liberty, property, the social and economic order, collective security or the administration of justice, and crimes of deception". Being sentenced for any of these offences entails a bar on holding directorships.

decide whether or not he or she should be called on to resign. The Board will disclose all such determinations in the Annual Corporate Governance Report<sup>43</sup>.

47. All directors should express clear opposition when they feel a proposal submitted for the Board's approval might harm the corporate interest; in particular, independent directors should strenuously challenge any decision that might unjustifiably harm the interests of shareholders lacking board representation. When the board makes material or reiterated decisions about which a director has expressed serious reservations, then he or she must draw the pertinent conclusions. Directors resigning for such causes should set out their reasons in the letter referred to in the next Recommendation.

The term of this Recommendation will also apply to the Board Secretary in the discharge of his or her duties.

48. Directors who give up their place before their tenure expires, through resignation or otherwise, will state their reasons in a letter to be sent to all members of the board. As well as being filed as a significant event, the removal of any director and the motives for the same must be explained in the Annual Corporate Governance Report<sup>44</sup>.

## Remuneration

### *Approval*

49. The company's remuneration policy, as approved by its Board of Directors, will specify at least the following points:
- a) The amount of the fixed components, itemised where necessary, of board and board committee attendance fees, with an estimate of the fixed annual payment they give rise to;
  - b) Performance-related components, in particular:
    - i) The types of directors they apply to, with an explanation of the relative weight of variable to fixed remuneration items.
    - ii) Performance evaluation criteria used to calculate entitlement to the award of shares or stock options or any performance-related remuneration; and
    - ii) The main parameters and justification for any system of annual bonuses or other, non cash benefits;

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<sup>43</sup> **Annotation:** A director's indictment for an intentional crime, which presupposes a judicial decision based on reasonable evidence of criminal conduct, does not undermine the presumption of innocence in the judicial terrain, but may undermine the relation of trust supporting the appointment of any director or affect the company's name and reputation. As such, this Unified Code advises the Board to examine whether a director's resignation is called for depending on the concrete circumstances of the case. For instance, the Board may feel resignation is not required if the prosecutor disagrees with the judge and urges the dismissal of proceedings; or if it decides that the case does not threaten the company's reputation or good name.

<sup>44</sup> **Annotation:** Under powers conferred by article 85 of the Securities Market Law, the CNMV may act on any suspicion of irregularity, requesting a copy of the resignation letter and even obliging the company to make it public.

- c) Main characteristics of pension systems (for example, supplementary pensions, life insurance and similar arrangements)
50. In the case of performance-related awards, the remuneration policy statement will be accompanied by an estimate of the total remuneration resulting as a function of degree of compliance with the applicable benchmarks.
51. Remuneration policy will also specify the conditions to apply to the contracts of executive directors exercising senior management functions. Among them:
- a) The term of their contracts
  - b) Notice periods
  - c) Any other clauses covering hiring bonuses, as well as indemnities or 'golden parachutes' in the event of early termination of the contractual relation between company and executive director.

### **Guidelines**

52. Remuneration comprising the delivery of shares in the company or other companies in the group, stock options or other share-based incentives, or incentive payments linked to the company's performance or membership of pension schemes shall be confined to executive directors<sup>45</sup>.

The delivery of shares is excluded from this limitation, when such delivery is contingent on directors retaining the shares till the end of their tenure.

53. Director remuneration shall sufficiently compensate them for the commitment, qualifications and responsibility that the post entails, but should not be so high as to jeopardise their independence.
54. In the case of remuneration linked to company earnings, deductions should be computed for any qualifications stated in the external auditor's report.
55. In the case of performance-related awards, remuneration policies should include technical safeguards to ensure they reflect the professional performance of the beneficiaries and not simply the general progress of the markets or the company's sector, atypical or exceptional transactions or circumstances of this kind.

### **Transparency and voting at the General Shareholders' Meeting**

56. The Board will submit a consultative report on the directors' remuneration policy to the vote of the General Shareholders' Meeting, as a separate point on the agenda. The said report shall be provided to shareholders along with the Annual Accounts and Directors' Report.

The report will focus on the remuneration policy the Board has approved for the current year, with reference, as the case may be, to the policy planned for future years. It will address all the questions referred to in Recommendations 49, 50 and 51, except points potentially involving the disclosure of commercially sensitive

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<sup>45</sup> **Annotation:** Except where individual remuneration is variable or related to the company's performance, directors' compensation shall not be deemed variable simply because the company's bylaws state that variable payments may not exceed a given percentage of its profits.

information<sup>46</sup>. It will also identify and explain the most significant changes in remuneration policy with respect to the previous year.

The role of the Remuneration Committee in designing the policy will be reported to the Meeting and, if external advisors have been retained, the identity of the same.

57. The report stated in the preceding Recommendation shall also provide a general summary of how remuneration policy was implemented in the prior year, including a detail of the payments made in the period to individual directors. This summary, which shall be for information purposes only, shall contain:

a) A breakdown of the remuneration obtained by each company director, to include where appropriate:

- i) Participation and attendance fees and other fixed director payments;
- ii) Additional compensation for acting as chairman or member of a Board committee;
- iii) Any payments made under profit-sharing or bonus schemes, and the reason for their accrual;
- iv) Contributions on the director's behalf to defined-contribution pension plans; or any increase in the director's vested rights in the case of contributions to defined-benefit schemes;
- v) Any indemnities agreed or paid on the termination of their functions;
- vi) Any compensation they receive as directors of other companies in the group;
- vii) The remuneration executive directors receive in respect of their senior management posts.
- viii) Any kind of compensation other than those listed above, of whatever nature and provenance within the group, especially when it may be considered a related-party transaction or when its omission would detract from a true and fair view of the total remuneration received by the director.

b) An individual breakdown of deliveries to directors of shares, stock options or other share-based incentives, itemised by:

- i) Number of shares or options awarded in the year, and the terms set for their execution;
- ii) Number of options exercised in the year, specifying the number of shares involved and the exercise price;
- iii) Number of options outstanding at the annual close, specifying their price, date and other exercise conditions;
- iv) Any change in the year in the exercise terms of previously awarded options.

c) Information on the relation in the year between the remuneration obtained by executive directors and the company's profits or some other measure of enterprise results.

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<sup>46</sup> **Annotation:** The proviso at the end of this sentence means that a company, for instance, need not disclose the specific criteria or incentives referred to in Recommendation 49 b), if revealing commercial strategies to competitors could be deemed as harming the corporate interest.

## CHAPTER IV. ON COMMITTEES<sup>47</sup>

### **Executive Committee**

58. When the company has a Delegate or Executive Committee (hereafter, “Executive Committee”), the breakdown of its members by director category should roughly mirror that of the Board itself<sup>48</sup>.
59. The Executive Committee secretaryship will invariably be held by the Board Secretary.
60. The Board shall be kept fully informed of the business transacted and decisions made by the Executive Committee. All Board members will receive a copy of the Committee’s minutes.

### **Supervision and control committees**

61. In addition to the Audit Committee, which is mandatory under the Securities Market Law, the Board of Directors will form a Committee, or two separate committees, of Nomination and Remuneration<sup>49</sup>.

The rules governing the make-up and operation of the Audit Committee and the Committee or committees of Nominations and Remuneration will be set forth in the board regulations, and will include the following at least:

- a) The Board of Directors will appoint the members of these committees with regard to the knowledge, skills and experience of its directors and the terms of reference of each committee; will discuss their proposals and reports; and will be formally responsible for overseeing and evaluating their work<sup>50</sup>;
- b) These committees will be composed exclusively of external directors and will have a minimum of three members. This is without prejudice to executive directors or senior officers attending meetings, for informational purposes, at the committees’ invitation. However, the Executive Chairman may only attend on exceptional occasions and with the unanimous agreement of committee members.

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<sup>47</sup> **Annotation:** This Chapter draws on the text of the European Commission Recommendation of 15 February 2005, in particular its Annex I. The section on the Audit Committee seeks to harmonise the content of this Recommendation with the precepts of the eighteenth additional provision of the Securities Market Law (approved as part of the 2002 Financial Law).

<sup>48</sup> **Annotation:** This will be without prejudice to senior officers taking part in the Committee, with speaking but not voting rights, as the Board sees fit.

<sup>49</sup> **Annotation:** No reference is made in this Code to the Strategy and Investment Committee advocated by the Aldama Report, on the understanding that its functions come under the powers attributed to the Board *per se*. Likewise, while acknowledging that a separate Corporate Governance Committee might be a good idea for some listed companies, we see no immediate need for a blanket recommendation on establishing a committee of this kind. Individual companies, are, of course, free to create one or to assign its functions to one of the committees referred to in this Code (setting up, for instance, an “Audit and Compliance Committee”, a “Nomination and Corporate Governance Committee” or some other combination).

<sup>50</sup> **Annotation:** As stated in Recommendation 63, Audit Committee members should have accounting, finance and even management skills (so they can issue a reasoned judgement, for instance, on “related-party transactions”). By the same token, members of the Nomination and Remuneration committees should be knowledgeable on the selection, evaluation and compensation of senior officers.

- c) All committees should have a majority of independent directors and be chaired by one of their number.
  - d) They may engage external advisors, when they feel this is necessary for the discharge of their duties<sup>51</sup>.
  - e) Meeting proceedings will be minuted and a copy sent to all Board members.
62. The job of supervising compliance with internal codes of conduct and corporate governance rules will be assigned to the Audit Committee, the Nomination Committee or, as the case may be, separate Compliance or Corporate Governance committees.

### **Audit Committee**

63. All members of the Audit Committee, particularly its chairman, will be appointed with regard to their knowledge and experience in accounting and auditing matters.
64. Listed companies will have an internal audit function, under the supervision of the Audit Committee, to ensure the proper operation of internal information and control systems. In the absence of such a function, the company should review the need for one at least annually, with the Audit Committee in the meantime entrusted with monitoring the integrity of the said systems<sup>52</sup>.
65. The head of internal audit or, where no such function exists, the company's senior internal management control officer shall present an annual work programme to the Audit Committee, report to it directly on any incidents arising during its implementation, and submit an activities report at the end of each year.
66. Control and risk management policy shall specify at least:
- a) The different types of risk (operational, technological, financial, legal, reputational...) the company is exposed to, with the inclusion under financial or economic risks of contingent liabilities and other off-balance-sheet risks;
  - b) The probability of risks occurring and the determination of the risk level the company sees as acceptable;
  - c) Measures in place to mitigate the impact of risk events should they occur;
  - d) The internal reporting and control systems to be used to control and manage the above risks, including contingent liabilities and off-balance-sheet risks.
67. The Audit Committee's role will be:
- 1. With respect to internal control and reporting systems:
    - a) Monitor the preparation and the integrity of the financial information prepared on the company and, where appropriate, the group, checking for compliance with legal provisions and the correct application of accounting principles.

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<sup>51</sup> **Annotation:** A typical case of external advice would be a Nomination Committee retaining a specialist search firm to select candidates for a director's post.

<sup>52</sup> **Annotation:** In small cap companies, this function may be entrusted to the head of internal management control or risk supervision.



- b) Review internal control and risk management systems on a regular basis, so main risks are properly identified, managed and disclosed.
- c) Oversee the independence and effectiveness of the internal audit function; propose the selection, appointment, reappointment and removal of the head of internal audit; propose the resources to be assigned to the internal audit function; receive regular report backs on its activities; and verify that senior management are acting on the conclusions and recommendations of its reports.
- d) Establish and supervise a mechanism whereby staff can report any irregularities they detect in the course of their work anonymously or confidentially<sup>53</sup>.

2. With respect to the external auditor:

- a) Make recommendations to the Board for the selection, appointment, reappointment and removal of the external auditor, and the terms and conditions of his engagement.
- b) Receive regular information from the external auditor on the progress and findings of the audit programme, and check that senior management are acting on its recommendations.
- c) Oversee the independence of the external auditor, to which end:
  - i) The company will notify any change of auditor to the CNMV as a significant event, stating the reasons for its decision.
  - ii) The Committee will ensure that the company and the auditor adhere to current regulations on the provision of non-audit services, the limits on the concentration of the auditor's business and, in general, other requirements designed to safeguard auditors' independence;
  - iii) The Committee will investigate the issues giving rise to the resignation of any external auditor.

68. The Audit Committee may meet with any company employee or manager, even ordering their appearance without the presence of any senior officer.

69. The Audit Committee will report on the following points from Recommendation 9 before Board decision-making:

- a) The financial information that listed companies must periodically disclose. The Committee shall ensure that intermediate statements are drawn up under the same accounting principles as the annual statements and, to this end, may ask the external auditor to conduct a limited review.
- b) The creation or acquisition of shares in special purpose vehicles or entities resident in countries or territories considered tax havens, and any other

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<sup>53</sup> **Annotation:** This Recommendation, tied in with the "Anglo-Saxon" concept of whistleblowers, draws on Annex 1 section 4.3.8 of the Recommendation referred to in the preceding footnote. Such mechanisms are mandatory in the United States under the Sarbanes-Oxley Act and, as such, already apply to Spanish firms listed on the New York Stock Exchange.

transactions or operations of a comparable nature whose complexity might impair the transparency of the group.

c) Related-party transactions.

70. The Board of Directors shall present the annual accounts to the General Shareholders' Meeting without reservations or qualifications in the audit report. Should such reservations or qualifications exist, both the Board Chairman and the auditors will give a clear account to shareholders of their scope and content.

### ***Nomination Committee***

71. The Nomination Committee will have the following functions in addition to those stated in earlier Recommendations:

- a) Evaluate the skills, knowledge and experience of the Board, define the roles and abilities required of the candidates to fill each vacancy, and decide the time and dedication necessary for them to properly perform their duties.
- b) Examine or organise, in appropriate form, the succession of the Chairman and chief executive, making the pertinent recommendations to the Board so the handover proceeds in a planned and orderly manner.
- c) Report on the senior officer appointments and removals which the chief executive proposes to the Board.
- d) Report to the Board on the gender diversity issues discussed in Recommendations 19 to 21 of this Code.

72. The Nomination Committee will consult with the company's Chairman and chief executive, especially with regard to executive director appointments.

Any director may suggest candidates to fill director vacancies to the Nomination Committee for their consideration.

### ***Remuneration Committee***

73. The Remuneration Committee will have the following functions in addition to those stated in earlier Recommendations:

- a) Make proposals to the Board of Directors regarding:
  - i) The remuneration policy for directors and senior officers;
  - ii) The individual remuneration of directors and the forms of contract the company should conclude with each executive director;
  - iii) Hiring modalities for senior officers.
- b) Oversee compliance with the remuneration policy set by the company.

74. The Remuneration Committee will consult with the Chairman or chief executive, especially on issues involving executive directors and senior officers.

# ANNEX I

## DRAFT SUPPLEMENTARY RECOMMENDATIONS

### 1. Exercise of voting rights by institutional investors

The management companies of collective investment schemes and pension funds are urged to actively exercise the voting rights conferred by their ownership of listed companies' shares.

In calculating the 1% of the issuer's capital referred to in article 81 of the regulations to the Law on Collective Investment Undertakings, the following steps are recommended:

- a) The shares held by collective investment schemes and pension funds run by managers from the same group should be pooled together;
- b) Independent pension fund managers should apply the same criterion.

### 2. Exercise of voting rights through intermediaries and depositories

Financial intermediaries belonging to the *Sociedad de Sistemas* (i.e. Spain's Central Securities Depository) and acting as depositories or custodians of listed company shares are urged to be scrupulous in passing the details of General Shareholders' Meetings on to their principals and procuring their instructions on how to vote.

### 3. Clarification and harmonisation of legal and regulatory precepts.

In order to unify the multiple definitions contained in different laws and regulations, the Government is called on to clarify and harmonise the following concepts:

- "Related-party transactions". Particularly recommended is the exclusion from this category of small-scale transactions under standard form contracts, as in Recommendation 9 c) of this Unified Code.
- "Senior officer".

The Government is also urged to review the reporting requirements applying to listed companies, to avoid unnecessary repetitions and duplications.

### 4. Change of auditor

As a means to safeguard auditor independence, the CNMV should request the following information whenever a listed company changes auditor:

- a) From the company: the corresponding significant event notice should state whether discrepancies arose with the outgoing auditor and, if so, explain their nature.

- b) From the outgoing auditor: a declaration of conformity or dissent regarding the above statement by the listed company;
- c) From the incoming auditor: confirmation that it had no conversations with the company, prior to its services being engaged, regarding the accounting or audit principles it would apply.

## **5. Coordination among small shareholders in defence of the corporate interest**

The Government should look at ways to foster coordination among the small shareholders of listed companies, so they have a bigger say in the General Shareholders' Meeting and can better exercise the "minority rights" they are accorded under current law, while ensuring that any such mechanisms are used in good faith, to defend the corporate interest, and not for spurious or opportunistic purposes.

Among the coordination mechanisms worth considering, singly or in combination, would be:

1. Creation of an Electronic Shareholder Forum of the kind recently approved in Germany<sup>54</sup>, so individual shareholders and shareholder groups can seek others' backing or proxy for proposals to be put to the General Shareholders' Meeting.

Among the issues requiring further analysis would be:

- o The institution, public or private, that would manage and supervise the operation of the Electronic Forum;
- o The conditions for posting invitations and proposals, and the form in which the listed company can give its feedback on the same;
- o The precautions need to prevent possible abuse;

2. Creation by the CNMV of a Voluntary Register of Shareholder Associations.

Among the issues to analyse in this case would be:

- o The conditions for such associations to be entered in the Register;
- o Cases where the CNMV would be authorised to reject an application, or strike out an existing entry if it concludes that a given association is not wholly devoted to defending the corporate interest;
- o The resources to be allotted to registered associations, especially in the run-up to General Shareholders' Meetings, so they can convey their proposals and viewpoints to all shareholders or publicly seek their proxy.

## **6. Shareholder lists and attendance cards**

The Government is urged to amend Royal Decree 116/1992 in order that listed companies' entitlement to know their shareholders, as enshrined in the first additional

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<sup>54</sup> The "*Gesetz sur Unternehmensintegrität und Modernisierung des Anfechtungsrechts (UMAG)*", of 22 September 2005 writes this concept (*Aktionärsforum*) into German legislation by adding a new article 127a to the public limited companies law (*Aktiengesetz*).

provision of the Public Limited Companies Law, is available to all – and not only to those companies whose shares must be registered under legal mandate.

This would mean attendance cards could be issued by the listed company itself, and not by the multiplicity of financial intermediaries acting as share custodians, thus ensuring a more uniform content and distribution.

## **7. Challenging of shareholder resolutions**

The Government is urged to study the necessary legal amendments to prevent the excessive, improper or abusive use of the powers to challenge General Shareholders' Meeting resolutions provided by article 117 of the Public Limited Companies Law.

## **8. Directors' liability for breach of trust**

The Government is urged to tighten up and toughen the civil liability regime for breaches of trust by company directors. Some measures that might be considered are:

- a) A better typification of the duties of loyalty and the procedures to follow in the event of conflicts of interest;
- b) The extension of duties of loyalty, and the associated liability, to controlling shareholders, as well as to de facto and shadow directors.
- c) Direct empowerment of shareholders to file a derivative suit for breach of trust, to be typified perhaps as a "minority right";
- d) Establishment of a leave to proceed filter so the judge can reject any cases constituting abuse of process;
- e) Imposing of heavier penalties, to include at least the return of sums corresponding to unjust enrichment.

This Recommendation refers solely to breach of trust and not negligence or breach of care.

## ANNEX II

### List of possible questions

- Are any of the Recommendations in the Unified Code *a priori* unsuitable for certain kinds of listed companies (e.g. medium-size or small cap firms; family-owned companies in which some members are proprietary directors and others executive directors although this last group may include significant shareholders and even founders)?
- Although listed companies are completely at liberty to comply or not with its Recommendations, could the publication of the Unified Code as currently drafted dissuade new firms from going public? If so, what specific Recommendations would be most off-putting?
- Should the Unified Code envisage some exceptions in the case of Recommendation 3 on bylaw restrictions? Exceptions, for instance, of the following kind:
  - When restrictions were already in the bylaws when the company went public;
  - When restrictions have been approved by shareholders representing at least 75% of voting capital.
- Are there convincing arguments in Spain's case for recommending the blanket separation of the Chairman and chief executive function? Would such separation be wise in the absence of a controlling shareholder, when the result would be to concentrate more power in the hands of an executive Chairman?
- Are there effective ways to stop too much power accumulating in the hands of the executive Chairman other than the appointment of a deputy Chairman, as advocated in Recommendation 23?
- Should the Unified Code recommend that Secretaries be Board members, be silent on the issue, giving no arguments against?
- Does Recommendation 40 on independent directors – based on the European Commission Recommendation of 15 February 2005 – contain any burdensome or poorly adapted requirements? Does it leave out anything important?

## **ANNEX III**

### **Composition of the Working Group**

#### **Group Members from the public administration:**

- Manuel Conthe, Chairman (CNMV)
- Joaquín de Fuentes, Director of the State Legal Department (Ministry of Justice)
- Pilar Blanco-Morales, Director General of Registries and Notaries (Ministry of Justice)
- Soledad Núñez, Director General of the Treasury and Financial Policy (Ministry of Economy)
- Carmen Tejera, Senior Legal Advisor to the State Secretary for the Economy (Ministry of Economy)
- José Manuel Gómez de Miguel, Head of Regulation (Banco de España)

#### **Group members from the private sector:**

- Jesús Caínzos
- Ana María Llopis
- Cándido Paz-Ares
- Aldo Olcese
- Vicente Salas

#### **Experts members on EU corporate governance initiatives:**

- José María Garrido
- Enrique Piñel

#### **Group Secretary:**

- Javier Rodríguez Pellitero, Director of the CNMV's Legal Department