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Can Corporate Governance Codes be Effective
in Emerging Markets?

– Insights from Turkey, India and Colombia

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CAN CORPORATE GOVERNANCE CODES BE EFFECTIVE IN EMERGING MARKETS? – INSIGHTS FROM TURKEY, INDIA AND COLOMBIA

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The purpose of this report is to present background information to participants of the OECD Russia Corporate Governance Roundtable organised for 22 - 23 October 2013 in Moscow, Russian Federation. This report addresses the issue of the effectiveness of corporate governance codes in emerging markets. For this purpose, it adopts a case study approach and looks into the fate of corporate governance codes adopted in three emerging markets: Turkey, India and Colombia. Using a common framework of analysis, the report highlights the factors which determined the success or failure of these codes within the specific systems in which they were adopted. Evidence from the three case studies is used to extract lessons from the specific challenges and policy measures relevant for the implementation of codes within emerging markets.

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INTRODUCTION

1. Corporate governance codes are generally defined as sets of non-binding principles, standards or best practices aimed at improving the governance practices of corporations within a country's specific legal and business context². As such, codes are intended to complement "hard law" rules as laid down in legislation with "soft-law" measures which are either purely voluntary or, as for most codes, apply the "comply-or-explain" approach. The "comply-or-explain" mechanism was first introduced by the Cadbury Report (1992) in the United Kingdom and implies that if a company chooses to depart from the behaviour prescribed by the code, it has to report which parts of the code it does not comply with and explain the reasons for doing so. In contrast to laws and regulations, codes do not mandate compliance with their provisions but reporting on how the company applies the code can be made mandatory via legislation or listing rules.

2. While corporate governance codes are at the core of the corporate governance frameworks in all European countries (Wymeersch, 2013), they have also been increasingly adopted in emerging markets over the last decade to drive corporate governance reforms. In most jurisdictions, these codes are concerned with raising governance standards beyond existing legal requirements, but they differ in focus, scope as well as in terms of mechanisms which encourage corporate compliance with their provisions.

3. The effectiveness of corporate governance codes fundamentally depends on their actual application. By nature not legally binding, if codes are not complied with or enforced they become irrelevant. According to the OECD Principles of Corporate Governance:

"When codes are used as a national standard or as an explicit substitute for legal or regulatory provisions, market credibility requires that their status in terms of coverage, implementation, compliance and sanctions is clearly specified" (Principle I.B. and its Annotations).

4. This paper looks into the fate of corporate governance codes adopted in three emerging markets: Turkey, India and Colombia. It aims to highlight the factors which determined their success or failure within the specific frameworks in which they were adopted. These cases illustrate that for corporate governance codes to be effective in emerging markets it is not possible to simply transplant developed country models. Therefore, the paper attempts to extract lessons from the specific challenges and policy measures adopted by these jurisdictions in the implementation of their codes.

5. The paper is organised in five sections. Section I introduces the analytical framework which is used in the three case studies. Sections II, III and IV respectively analyse the cases of Turkey, India and Colombia. Section V draws some general lessons and concludes.

² See for example: Codes of Good Governance Worldwide (Aguilera et al, 2004); Developing Corporate Governance Codes of Best Practice (IFC, 2005); Corporate Governance Codes and their Implementation (Wymeersch, 2006).

I. THE FRAMEWORK FOR ANALYSIS

1. Overview: Effective Corporate Governance Codes

6. The OECD Principles (2004) describe that corporate governance “involves a set of relationships between a company’s management, its board, its shareholders and other stakeholders” as well as that it “provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined.”

7. The corporate governance framework is constructed mostly via laws and regulations, but as also pointed out by the Principles, it includes

“self-regulatory arrangements, voluntary commitments and business practices that are the result of a country’s specific circumstances, history and tradition. The desirable mix between legislation, regulation, self-regulation, voluntary standards, etc. in this area will therefore vary from country to country. As new experiences accrue and business circumstances change, the content and structure of this framework might need to be adjusted.”

8. For their part, corporate governance codes generally aim at enhancing national corporate governance systems, standards and practices. They are also designed in order to build, sustain or restore investor confidence in national markets (IFC, 2005). The rationale behind corporate governance codes, in particular where a comply-or-explain approach is adopted, centers on flexibility. Companies can adapt their governance practices to their specific situations, taking into account their size, ownership structure and other specificities. Moreover, as flexible instruments, codes rely on market mechanisms and several market participants³ for their development, implementation, enforcement and further evolution.

9. As highlighted by Wymeersch (2013), the nature and objectives of corporate governance codes are determined by the overall framework of which they are a part. For this reason, the case studies of Turkey, India and Colombia first situate the codes in the respective economic and legal contexts in which they were developed and in which they operate⁴. Subsequently, the case studies provide a tentative assessment of the effectiveness⁵ of these codes against their own objectives while taking into account the specific challenges in the three jurisdictions.

10. For the purposes of this paper an effective code can be defined as a code which does not remain unnoticed, becomes a credible corporate governance tool which is actively used by market participants and achieves the goals it was set out to achieve. These goals can include raising awareness for corporate governance, creating a corporate governance culture, creating a flexible instrument to encourage best practices and ultimately genuinely improving the level of corporate governance standards and practices in the respective country. The indicators of success or failure of a code can include answers to the following questions:

³ See Section I.2.

⁴ See Sections II.1-2, III1-2, IV 1-2.

⁵ See Sections II.3, III.3, IV.3.

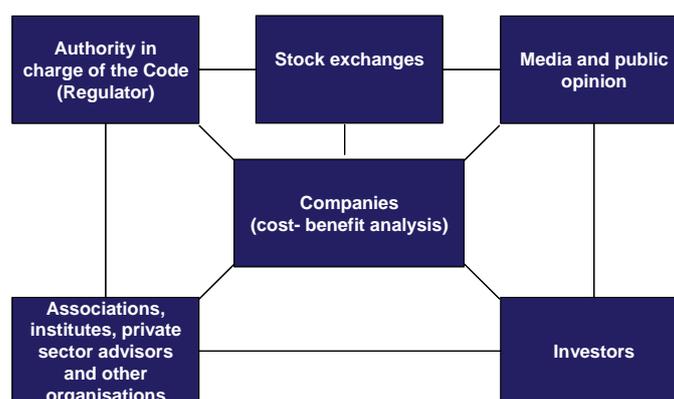
- Do issuers adopt the Code and provide information on their compliance with the Code’s provisions?
- Are investors interested in the fact that companies comply with the Code?
- Is the disclosed information (e.g. in annual reports) on compliance (or explanations for non-compliance in case of comply-or-explain codes) of satisfactory extent and depth?
- Did or does the Code contribute to an increase in good corporate governance practices (e.g. an increased share of independent directors, better shareholder rights and protections of minority shareholders, creation of audit committees, focus on board effectiveness and others)?
- Is the Code regularly updated to be constantly in line with economic and corporate realities?

11. Corporate governance codes are indeed market creatures (Nestor, 2008) and their effectiveness is therefore impacted by a number of drivers which pertain to the markets in which they operate. Therefore, after the overall assessment of the effectiveness of the codes in Turkey, India and Colombia, this paper takes a deeper look⁶ into the underlying roles and actions of various market participants in order to assess their respective impacts on the effectiveness of the Turkish, Indian and Colombian Codes.

2. Key Drivers

12. Several studies and reports⁷ highlight that different market participants and their (inter)actions significantly impact the success or failure of corporate governance codes. In particular, the roles of the following market participants appear to deserve particular attention and are hence analysed in detail in this paper: 1) authorities in charge of the code (i.e. the regulator in the three case studies); 2) stock exchanges; 3) media and the public opinion; 4) investors; 5) internal cost-benefit analyses of companies (in the light of their respective ownership structures), and finally 6) other players, such as associations, private sector advisors and other organisations (Figure 1). The following sub-sections (2.1-2.7) briefly outline why each of these different market participants’ role is important.

Figure 1. Net of key driving forces analysed in the case studies (illustrative)



Source: OECD

⁶ Sections II.4, III.4, IV.4.

⁷ See for example EU Study on Monitoring and Enforcement Practices in Corporate Governance in the Member States (2009); IFC Toolkit 2: Developing Corporate Governance Codes of Best Practice (2005), and Corporate Governance: A Survey of OECD countries (2003).

2.1. The Role of the Authority in Charge of the Code

13. Once a corporate governance code is adopted, its success significantly depends on the role and efforts of the authority in charge (IFC, 2005). Not only can the authority lead the drafting process, but it can also raise awareness for the code and take the leadership in monitoring as well as enforcing the code.

14. The authority in charge of the code can be a regulator (in most cases the securities regulator as corporate governance codes are mainly targeted at listed companies), a self-regulatory organisation, a specific agency such as the UK Financial Reporting Council or a stock exchange. Annex 1 provides an overview of authorities in charge of corporate governance codes in OECD countries.

15. According to Wong (2008), the regulator shall assume the primary role for monitoring and enforcing corporate governance codes in emerging markets as there is often a lack of a mature institutional investor base. Hence, these monitoring activities carried out by the regulator can give issuers incentives to disclose information and provide public exposure. The collected information can also help the regulator identify the need for further regulatory development (EU, 2009). In addition, regulators can provide credible threats of enforcement sanctions to encourage compliance with the code.

16. The analysis of this driver in India, Turkey and Colombia highlights how and to which extent the Securities and Exchange Board of India, the Capital Markets Board of Turkey and the Colombian Financial Superintendency contributed to the effectiveness of the corporate governance codes.

2.2. The Role of Stock Exchanges

17. As abundantly discussed in corporate governance literature, stock exchanges can be an important driver for the effectiveness of corporate governance codes (Christiansen and Koldertsova, 2009). Historically, stock exchanges have been involved in the development of corporate governance codes in numerous jurisdictions, alongside with the regulators and different associations. The extent and type of monitoring and enforcement activities of stock exchanges depend on the interaction between the Code and the listing requirements. In addition, stock exchanges can be at the forefront of awareness raising efforts for corporate governance Codes and lead educational projects⁸.

18. The case studies in this paper look into the involvement of the stock exchanges in the drafting of the code, the extent of monitoring provided, the sanctions (including warnings and delistings) exchanges can enforce, the existence (or absence) of premium segments as well as the impacts of awareness raising efforts led by the exchanges.

2.3. The Role of the Media and the Public Opinion

19. The media, in particular financial and business press can be a market-wide monitoring tool for corporate governance codes (EU, 2009). In theory, the media can provide information (to investors and the public at large) on whether a given company is well or poorly governed, whether it is deviating from corporate governance best practices (as enshrined in the Code) and whether the disclosed information is in line with observed behaviour of the company, the board and the shareholders. In terms of enforcement, the media can impose reputational sanctions.

⁸ For example, in 2008 the Warsaw Stock Exchange established a group of educational partners from across the country to co-organise training sessions and other educational projects in order to increase the awareness of good governance practices and compliance with the Code of Best Practice for WSE listed companies.

20. In practice, the role of the media does not appear to be the most important driver for the effectiveness of corporate governance codes but it is worth analysing its role in order to better understand the contribution it had in the cases of the Indian, Turkish and Colombian codes.

2.4. The Role of Investors

21. Investors play a key role in implementing, monitoring and enforcing corporate governance codes. In particular, if a “comply-or-explain” approach is adopted it can only be effective if investors monitor and enforce compliance with the Code (FRC, 2012). Institutional investors constitute an important category in this regard, as they can effectively drive the implementation of best practices in corporate governance (OECD, 2011a). Their influence is however limited in jurisdictions with concentrated ownership, which is a common feature of emerging markets. This is illustrated by their low attendance of general meetings, low percentage of negative votes and overreliance on proxy voting advisors (Van de Elst, 2010). Nevertheless, certain countries with concentrated ownership structures have devised frameworks where pension funds can have positive effects on corporate governance practices (OECD, 2011a).

22. As to enforcement, investors can engage with the company, ask questions and require disclosure. If the company does not satisfy their requests, they can resolve to enforcement via the exercise of their voting rights or through legal action in form of civil litigation. To be sure, investors can also simply divest.

23. The case studies analyse the role investors played in implementing, monitoring and enforcing corporate governance codes in three emerging markets with highly concentrated ownership structures.

2.5. Internal Cost Benefit Analysis of Companies

24. In this paper, “Internal Cost Benefit Analysis” as a driver means that the study looks into the issuers’ perspective and the factors (beyond possible enforcement threats) which incentivized or disincentivized companies in Turkey, India and Colombia to adopt the code. The compliance with is significantly impacted by the ownership structure as well as by cultural issues (IFC, 2008). Companies are central to the success or failure of a code. In order for companies to embrace the Code and comply with the substance of the provisions the perceived benefits of complying with the code have to outweigh the costs.

25. On the costs side, certain provisions may contradict entrenched interests and established practices and/or require burdensome and time-consuming efforts of boards and executive management (EU, 2009). A prominent example is the recommendation to increase the number of independent directors in countries where controlling shareholders are not naturally in favour of having independent boards or where competent independent directors are difficult to find (Wong, 2008).

26. In terms of benefits, a better access to capital can be an important incentive for companies, especially if they compete for it (IFC, 2005). In addition, compliance with corporate governance codes may lead to improved management and higher profitability (Goncharov, 2006). However, empirical research remains largely contradictory. There is thus no compelling evidence for a direct link between implementing best practices of corporate governance and higher levels of profitability. Finally, image and reputation considerations are also taken into account in the internal cost benefit analysis. Peer pressure can create a race to the top in compliance with codes. Typically, large companies can act as catalysts by publicly embracing the code and setting the example in compliance (OECD, 2006).

2.6. The Role of Associations, Private Sector Advisors and Other Organisations

27. Beyond the market participants described above, other players such as corporate governance associations, business associations, consulting firms, research institutes and international organisations can impact the effectiveness of corporate governance codes. These market participants can provide the initial

impetus for developing a corporate governance code, take active part in the development of the code, endorse it publicly and promote it among companies. The case studies highlight the different roles, outputs and impacts these players had in Turkey, India and Colombia.

2.7. Key Messages from the Driver Analysis

28. Finally, the paper recapitulates, for each of the three countries, the key messages of the driver analysis. It puts them in perspective and highlights their relative importance in Turkey, India and Colombia. Indeed, the abovementioned drivers had different impacts in the three countries. Thus, despite some common features, such as concentrated ownership structures and recent (or ongoing) changes in legal frameworks, the corporate governance codes in these three jurisdictions were not equally successful.

II. TURKEY: THE CMB PRINCIPLES

1. Key Milestones

29. After decades of macroeconomic instability and the banking crisis of 2000, Turkey engaged in ambitious reforms to build a solid legal framework and to develop its financial markets. In this context, the Capital Markets Board of Turkey (CMB) initiated and led the process of improving the corporate governance of listed companies (OECD, 2006). Starting in 2001, the CMB undertook efforts to issue a Code for the Turkish market. The first step was to establish a Corporate Governance Working Group of eminent experts from CMB, the private sector, the Istanbul Stock Exchange (ISE), the Turkish Industrialists' and Businessmen Association (TÜSIAD) as well as distinguished experts from the Sabanci University among others.

30. The Working Group used the OECD Principles of Corporate Governance as a benchmark. While the corporate governance rules, codes and practices of OECD countries were thoroughly examined, the specifics of the Turkish business environment and needs of the Turkish capital market were central in the drafting process of the Code. In addition, extensive public consultations took place (CMB, 2003).

31. The resulting Code, the "CMB Principles of Corporate Governance" (hereinafter CMB Principles) were first issued in 2003 and revised in 2005 to take into account the revisions made to the OECD Principles in 2004. A comply-or-explain approach was adopted, backed by a mandatory requirement for all listed companies to report on compliance in their annual reports from 2004.

32. The CMB principles contain 100 recommendations grouped under four main sections on: i) Shareholders; ii) Disclosure and Transparency; iii) Stakeholders, and iv) Board of Directors (Box 1). Some recommendations, labelled as "voluntary", were not subject to comply-or-explain.

33. The CMB announced that the CMB Principles were part of a gradual process. The aim was to create the "best possible" corporate governance Code for Turkey, raise awareness for corporate governance issues, improve current practices and "play a guiding role for future regulations" (CMB, 2003). The comply-or-explain approach was deemed fit for this purpose. Moreover, experts of the CMB Principles Working Group interviewed for this paper emphasized that private sector representatives had vigorously lobbied against a mandatory approach being introduced as early as in 2003. This lobby thus also supported the comply-or-explain mechanism.

34. The inclusion of a compliance report on corporate governance in the Annual Reports rapidly became a regular formality for listed companies. However, the initial expectation that institutional investors would use these reports to pressure companies to comply with the CMB Principles failed to materialize.

35. In order to promote the implementation of the CMB Principles, the ISE launched a Corporate Governance Index in August 2007. Companies which declared interest to enter the new exchange index were required to undergo a rating by an independent agency authorised by CMB against the CMB Principles. Those with scores above 7/10 were entitled to an inclusion in the index and a 50% reduction of their listing fees over 2 years. Eventually, the index did not achieve the expected impact as it failed to

develop into a tool used by investors in their decision making and only few issuers expressed their interest in the index (Sengur, 2011).

Box 1. The CMB Principles of 2003 (revised in 2005)

The CMB Principles

The 60 page document contains a thorough introduction and also has an educational focus by detailing some provisions and providing explanations. It revolves around the following sections and provisions:

Shareholders

- Facilitating the Exercise of Shareholders' Statutory Rights
- Shareholders Right to Obtain and Evaluate Information
- The Right to Participate in the General Shareholders' Meeting
- Voting Rights (which includes cross-border voting provisions)
- Minority Rights
- Dividend Rights
- Transfer of Shares
- Equal Treatment of Shareholders

Public Disclosure and Transparency

- Principles and Means for Public Disclosure
- Public Disclosure of Relations between the Company and Its Shareholders, The Board of Directors and Executives
- Periodical Financial Statements and Reports in Public Disclosure
- Functions of External Audit
- The Concept of Trade Secret and Insider Trading
- Significant Events and Developments That Must Be Disclosed to the Public

Stakeholders

- Company Policy Regarding Stakeholders
- Stakeholders' Participation in the Company Management
- Protection of Company Assets
- Company Policy on Human Resources
- Relations with Customers and Suppliers
- Ethical Rules
- Social Responsibility

Board of Directors

- Fundamental Functions of the Board of Directors
- Principles of Activity and Duties and Responsibilities of the Board of Directors
- Formation and Election of the Board of Directors
- Remuneration of the Board of Directors
- Number, Structure and Independence of the Committees established by the Board of Directors
- Provisions related to Executive Management

Source: CMB Principles 2005

36. In 2011, CMB revised its approach to corporate governance with the intention to strengthen good practices in listed companies. It was decided to make most of the CMB Principles mandatory and to abandon the comply-or-explain nature of the code. After having 'tested the ground' with the soft law approach, CMB was now in a position to move towards a mandatory approach as initially intended.

37. CMB's Communiqué IV-54 was issued in October 2011 and mandated the 30 largest ISE listed companies to comply with all provisions of the CMB Principles, except for those labelled as "voluntary". Only 80 days later, the CMB replaced Communiqué IV-54 making revisions and issued Communiqué IV-56 which expanded its scope, by mandating all ISE-listed companies⁹ to comply with the mandatory provisions¹⁰. Communiqué IV-56 also indicated the timing and transition period for companies to comply and to modify their articles of association, if required. Companies had about six months to comply (until end of June 2012).

2. Corporate Governance Framework

38. Turkey is a civil law jurisdiction. The corporate governance framework is therefore centred on codified legislation and the enforcement thereof. The main sources of general mandatory corporate governance rules are to be found in the Turkish Commercial Code¹¹ (TCC) as well as the Capital Markets Law (CML) and the subordinate instruments of the CML, i.e. the CMB Communiqués. The CMB plays the fundamental role in setting corporate governance standards for listed companies.

39. Before the CMB Principles became mandatory on a number of issues, the TCC of 1956 regulated a limited number of corporate governance matters, including minority shareholder rights, general assemblies and directors' duties. The CMB and its sub-regulations (Communiqués and decisions of the CMB Executive Board) regulated activities and institutions related to capital markets. The CMB Principles were therefore designed "to fill the gaps of these legislations and give a sign for future legislation" (CMB, 2005). In 2012, the Turkish parliament passed the new TCC and the new CML. The Communiqué IV-56 that codified part of the CMB Principles was part of this new framework¹² (Box 2.).

3. Effectiveness of the Code

40. The declared purpose of the CMB Principles was to create the best possible Code for Turkey, to fill gaps of the legislation and test the ground for gradually developing new regulations. Simultaneously, the aim was to raise awareness and build a corporate governance culture from scratch, relying on a comply-or-explain approach.

41. The CMB Principles successfully served these purposes and their ultimate codification was part of a gradual process rather than a sign of failure. Overall, the vast majority of the code's recommendations made it into mandatory regulation and the structure of the text was maintained. The whole process took around eight years. During this time the CMB was actively involved in monitoring the corporate governance practices and engaged in sustained dialogue with issuers to eventually adopt meaningful regulation.

42. In 2006, the OECD concluded that the CMB Principles had been an important instrument and resulted in an increased awareness of and interest in adopting best practices of corporate governance. This was reflected in the growing number of issuers publicly endorsing and promoting good practices, significantly improved disclosure documents on corporate governance as well as their engagement with the CMB, TÜSIAD initiatives and the Corporate Governance Association of Turkey (COGAT) among others

⁹ Excluding companies on the Watch List and Emerging Companies markets.

¹⁰ See Box 2.

¹¹ Administered by the Ministry of Customs and Trade.

¹² While the content of the new framework is presented, this case study focuses on the effectiveness of the previous (comply or explain) CMB Principles and the pre-2012 framework as the new reforms are too recent to assess their impact.

(OECD, 2006). Market participants interviewed for this case study confirm that the current state of corporate governance in Turkey has been markedly shaped by the introduction of the CMB Principles.

Box 2. The post-2012 Turkish Corporate Governance Framework

The Communiqué IV-56

The Communiqué IV-56, is a 25- page document, of which the Annex includes the revised mandatory and non-mandatory CMB Principles. There are around 100 provisions and the 4 sections are still identical with those of the 2005 text. The main body of Communiqué IV-56 classifies ISE-listed companies into three categories based on their market value and free float and assigns them different degrees of demands in terms of the number of provisions they need to comply with.

	Category I	Category II	Category III
Market value	>TL3bn	>TL1bn	Other
Free float	>TL750m	>TL750m	
Number of companies (as of 2013)	24	24	343
Minimum ratio or number of independent directors on the board	1/3		2 directors
CMB validation of independent directors list	Mandatory	No	
Establishment of board committees on: audit, nomination, remuneration, corporate governance, risk management	Mandatory		
Major transactions and all RPTs approval by majority of independent directors or general shareholder meeting	Mandatory		

The new Turkish Commercial Code (July 2012)

- Extended focus on corporate governance through: 1) special (disclosure) requirements for company groups; 2) squeeze-out rights in mergers where shareholders hold at least 90% of the equity; 3) allowed representation of shareholders in general shareholder meetings; 4) mandatory establishment of electronic voting systems and online general shareholder meetings (e-GEM) and 5) broadens the scope of the compulsory independent auditing requirement to large limited liability companies.
- The new TCC explicitly stipulates that the CMB is authorised to determine the corporate governance rules, prepare and publish corporate governance statements and ratings for public companies, thus further empowering the CMB and in particular preventing cases of regulatory conflicts.

The new Turkish Commercial Code and the new Capital Markets Law (December 2012)

- Salient modifications concern: 1) the governance and authority of the CMB; 2) transformation of the stock exchange into a joint stock company; 3) strengthened role of independent directors; 4) related party transactions; 5) material transactions; and 6) mandatory takeover bids.

Source: Turkish Legislation, OECD research and analysis

43. However, CMB official figures on compliance with the substance of the CMB Principles show mixed results (CMB, 2007). Up to 2007, the last year for which there is available data, awareness and compliance with the mandatory requirement to disclose a comply-or-explain statement continuously increased. Some recommendations had been fairly well implemented. For instance, the risk management and internal control mechanisms were established in line with the Principles for 77% of the companies, 80% of the listed companies disclosed the nomination process of directors and 89% introduced investor relations sections on their websites. However, perhaps because the CMB Principles did not set clear priorities (Ararat, 2011), provisions such as the sufficient number of independent directors only reached a

compliance rate of 18% and only few companies disclosed beneficial ownership. Concentrated, pyramidal ownership structures are a significant challenge to the well-functioning of boards in Turkey and most of them operate heavily dependently on block-holding families.

44. Although investors welcomed the CMB Principles (IIF, 2005), their involvement remained too limited to secure the durable viability of a self-regulatory comply-or-explain code. The CMB Principles hence depended on monitoring and enforcement by the regulator. An investor task force set up to look into corporate governance recommended back in 2005 to make the CMB Principles mandatory in the near future, in particular the provisions aimed at protecting minority shareholders.

45. In this context, the gradual approach adopted by the Turkish authorities with the CMB Principles first being adopted under a comply-or-explain mode and subsequently being codified, proved to be fruitful. After 8 years of preparation, the CMB could compel companies to adopt better corporate governance behaviour in the areas where the already well-known code provisions were made mandatory.

46. The majority of market participants were in favour of Communiqué IV-56's mandatory requirements and believed that the comply-or-explain principles have prepared the terrain in an effective manner. Some concerns have been voiced nevertheless, in particular by issuers. It has been argued that the mandatory provision to appoint independent directors and other strong prescriptions may become disincentives for companies to launch IPOs going forward (OECD, 2013a)

47. At the same time, the regulator appears to be aware of the risks mandatory compliance can bring and has allocated sufficient resources to monitoring and enforcement (OECD, 2013a). For instance, to ensure the genuine quality of independent directors, Category I companies must submit their lists of nominees to the CMB for validation before the general shareholder meeting (CMB, 2011).

4. Analysis of the Underlying Drivers

48. The following sub-sections look deeper into the underlying drivers of the effectiveness of the CMB Principles. The roles of the different market participants highlight factors of success and reasons why self-regulation was abandoned.

4.1. The Role of the Authority in Charge of the Code: The Capital Markets Board (CMB)

49. As the sole national authority to regulate and supervise capital markets, CMB has exclusive standard setting powers as well as extensive supervisory and enforcement powers regarding the corporate governance of publicly held companies and other capital market institutions.¹³

50. Public supervision and enforcement have proven to be fundamental for the effective implementation of the CMB Principles. Investors relied on the regulator to mandate disclosure and to develop a corporate governance awareness from the ground up. The reform process was marked by a strong political and regulatory coherence, where the CMB was a powerful and respected regulator leading the process.

51. Market participants interviewed for this paper, emphasized CMB's central role in the development of the CMB Principles as the process was collaborative and inclusive. Stakeholders involved felt that their views were genuinely taken into consideration. The consensus-based approach adopted by

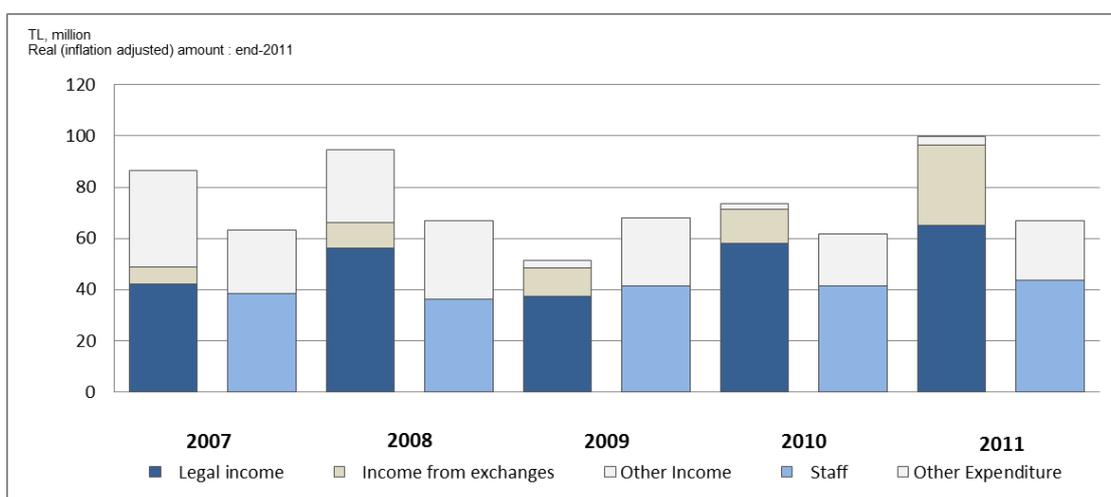
¹³ In order to narrow potential gaps in oversight and/or to avoid potential regulatory conflicts, the new TCC explicitly stipulates that the CMB is fully authorised to determine, monitor and enforce corporate governance provisions for listed companies.

CMB underpinned the nascent corporate governance culture. As a result, the CBM Principles of Corporate Governance became the central reference point for corporate governance standards in Turkey (Ararat and Ungur, 2006).

52. Unlike regulators in some other emerging market jurisdictions¹⁴, CMB’s financial resources (Figure 2) appear to be at par with its needs for effective monitoring and enforcement activities (OECD, 2013a). In addition, CMB is one of the most attractive employers in Turkey and recruits top-ranked candidates, who obtain the highest scores in the civil servant exam (they also undergo a special CMB exam). These professionals then also receive high-quality in-house training. A CMB specialist is assigned to monitor up to 10 companies on a regular basis (including on corporate governance standards implementation). This is important as the lack of appropriate financial and human resources can significantly reduce the effectiveness of monitoring and enforcement actions. According to the OECD Principles:

“Supervisory, regulatory and enforcement authorities should have the authority, integrity and resources to fulfil their duties in a professional and objective manner. [...] As the number of public companies, corporate events and the volume of disclosures increase, the resources of supervisory, regulatory and enforcement authorities may come under strain. As a result, in order to follow developments, they will have a significant demand for fully qualified staff to provide effective oversight and investigative capacity which will need to be appropriately funded. The ability to attract staff on competitive terms will enhance the quality and independence of supervision and enforcement.” (Principle 1.D. and its Annotations)

Figure 2. Income and Expenses of the CMB



Source: OECD Peer Review 2013, based on CMB data.

53. Equipped with solid financial and human resources, the CMB was therefore credible and in a position to effectively monitor the implementation of the CMB Principles. Companies were contacted by the respective CMB specialists in cases of inconsistencies and poor explanations for non-compliance with the CMB Principles. This attention of the regulator enhanced the issuer’s commitment to pay an increased attention to corporate governance. Where issuers ignored CMB’s warnings, administrative pecuniary fines were imposed. Most fines reportedly pertain to non-disclosure and misleading disclosure about non-compliance. Unfortunately, the CMB does not regularly publish its summary findings from the market-

¹⁴ See India Case Study.

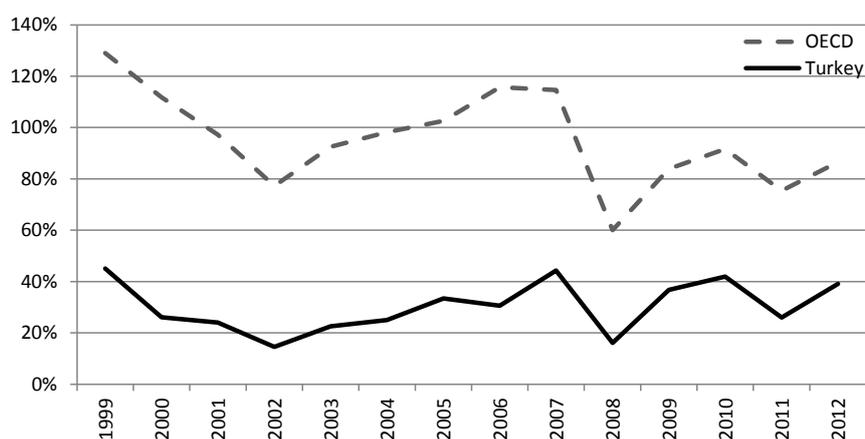
wide monitoring reports of the CMB Principles. The most recent publicly available figures on compliance are from 2007.

54. Today, for monitoring the now mandatory Principles of Corporate Governance in Communiqué IV-56, the CMB is explicitly empowered by the new CML to determine a breach, solicit courts for precautionary legal measures, and file a court case for the execution of the related corporate governance principles or impose a pecuniary fine.

4.2. The Role of the Istanbul Stock Exchange

55. The Istanbul Stock Exchange (ISE) was converted from a public institution into a private self-regulatory entity, now called the Borsa Istanbul, by the 30th December 2012. Borsa Istanbul also merged with the Istanbul Gold Exchange earlier in 2013 and became a joint stock company. As of the end of 2012, it had 405 companies listed, with a market capitalisation of USD 308 bn. However, only 12% of Turkey’s 1 000 largest companies are listed and Turkish companies have historically been reluctant to going public (Erkan, 2012).

Figure 3. Market capitalisation as percentage of GDP in Turkey and all OECD countries



Source: World Bank Indicators, 2013

56. As per the High Planning Council decision of the Turkish Government from 29 September 2012, the government intends to promote Istanbul as a regional financial centre. In this context, the new TCC mandates electronic voting to eliminate the barriers of cross-border voting. The Borsa Istanbul (ex-ISE) will hence be the first stock exchange to require issuers to change their statutes to enable electronic participation and voting at their general assemblies.

57. As a matter of fact, the Exchange works closely with CMB and can take disciplinary action including warnings, putting companies on the Watch List and ultimately delisting. These sanctions need to be validated with the CMB. With regard to corporate governance provisions, however, there are no reported cases where the Exchange has imposed any sanctions.

58. Indeed, the Exchange does not have a specific responsibility to monitor the compliance of listed companies with the CMB Principles (OECD, 2013a). It is worth noting that the listing requirements are determined by regulations prepared by the CMB and not by the exchange. Although the CMB Principles were not part of the listing requirements, the Exchange has been very cooperative in promoting good corporate governance and carried out several initiatives. Such initiatives included public conferences and the implementation of the corporate governance index.

59. As mentioned, in 2007 the ISE launched a Corporate Governance Index based on CMB's initial impetus. However, it did not result either in a credible promotion of the CMB Principles or in a tool which was used by investors in their investment decisions. While the incremental benefit for obtaining a rating and being included in the index was limited for companies, investors largely ignored it (Sengur, 2011). CMB opted for an index rather than a separate market segment (comparable to the Novo Mercado in Brazil), because it wanted to act quickly and the creation of a separate market tier would have required considerably more time (Ararat, 2008). De facto, the Corporate Governance Index regularly underperforms the XU100, the main index of the Exchange (ISE, 2013).

60. While investors rarely rely on Corporate Governance indexes as investment criteria, the Turkish index was particularly criticized as failing to provide links to performance or a protection against abuses of minority shareholders (Sengur, 2011). Before the index was launched, the Turkey Taskforce of the Institute of International Finance, envisioned the case that the index approach may not work and recommended CMB to make a number of the Principles mandatory in future (IIF, 2005). This is now done.

4.3. The Role of the Media and the Public Opinion

61. The media has played a minimal role in promoting the CMB Principles. Interviewed market participants confirmed that a more extensive coverage of companies weak or strong corporate governance performances and/or compliance with the CMB Principles could have been a powerful driving force for market discipline in Turkey.

62. According to the European Journalism Center, 70% of the Turkish media are owned by a few groups. These are typically conglomerates whose activities expand into a variety of other sectors beyond media, including industry, tourism, finance and construction. The Dogan Group alone controls 40% of Turkish media, including leading newspapers such as Hürriyet (EJC, 2013). The media did not challenge critical corporate governance issues and behaviours because those who are the controlling shareholders in major listed corporations also largely control the financial, business and general media.

63. The Turkish Corporate Governance Association (COGAT) has noticed a gradual increase in the media's interest for corporate governance issues over the last few years. Yet, forums, various meetings and publications by associations still play a more important role in raising awareness about corporate governance principles than the business media.

64. Concerned with the low impact of the media on promoting sound corporate governance, COGAT created a "Corporate Governance Handbook for Business Journalism" in 2011. The aim was to enhance the knowledge of business journalists on corporate governance and its importance. Hence, business journalists would make informed judgements and disclose information which would allow market participants to challenge management and controlling shareholders more effectively. As a result of this initiative, which was also strongly supported by the Business Journalists Association, a number of journalists reportedly became more interested in corporate governance issues. However, there was almost no impact on the journalists' willingness to be more challenging and investigative, as evidenced by the absence of such articles or broadcasts.

4.4. The Role of Investors

65. The efforts to develop Turkish financial markets and to attract international investors in the early 2000s can be identified as an important driving force for the very adoption of the CMB Principles. However, over the years, investor driven enforcement of corporate governance provisions has been rarely witnessed in Turkey (OECD, 2013a).

65. At the end of 2012, the average free float ratio of ISE-listed companies was at 28%. None of the 20 largest companies in terms of market capitalisation had a free float ratio above 50%. Indeed, these companies have controlling shareholders, which are mainly family groups.

Table 1. Free float ratios in Turkey

Free float range	Companies		Share of total free float capital
	Number	Percent	
50.0%-100%	62	17%	16%
40.0%-49.9%	41	11%	30%
30.0%-39.9%	59	16%	17%
20.0%-29.9%	82	22%	25%
10.0%-19.9%	71	19%	12%
0%-9.9%	54	15%	1%
Total	369	100%	100%

Source: OECD analysis of data from the Turkish Central Registry Agency (TUYID and MKK (2013))

Table 2. Free float ratios in Turkey by company type as of end 2012

ISE-listed firms by market capitalisation	Average free-float ratio	Number of companies with free-float ratio	
		above 50%	Below 20%
Top 20	28%	0	5
Top 50	27%	3	19
Top 100	28%	11	38
All	28%	62	125

Source: OECD analysis of data from the Turkish Central Registry Agency (TUYID and MKK (2013))

66. According to the Turkish Central Registry Agency, foreign investors (mostly institutional) owned over 65% of the free float in 2012¹⁵. These investors hold their shares for around 389 days on average and are rarely concerned with enforcing corporate governance best practices over their holding period (TUYID and MKK, 2013). On the side of the domestic investors, average holding periods are even shorter and amount to 46 days. It can thus be assumed that over such short periods, domestic investors are more interested in gaining short term profits rather than engaging with the company and/or monitoring and enforcing corporate governance principles. Experts interviewed for this paper confirm that domestic investors have historically considered the stock exchange as a platform for short-term profits. Moreover, according to Gönencer (2008), the portion of stock held by Turkish institutional investors is minimal and they do not have significant impacts on the governance of the companies they invest in. Pension funds were only introduced in Turkey at the end of 2003 and shares represent only about 10% of their portfolio.

67. A study by Ararat and Eroglu (2012) found that the average value of shares held by foreign investors in individual companies is in general too small to justify the costs of monitoring and that institutional investors played a marginal role in corporate governance in Turkey. In an environment of predominantly family-controlled structures and in the absence of pressure from domestic as well as foreign

¹⁵ This accounts for an increase of over 14 percentage points compared to 2003.

investors, no significant influence from the investors side could be exercised to enforce a comply-or-explain code.

4.5. Internal Cost Benefit Analysis of Companies

68. Listed companies in Turkey are characterised by concentrated ownership, where the controlling shareholder owns over 50% of the shares on average. The large groups have been controlled by families¹⁶ for several generations, often through pyramidal structures. Control-enhancing mechanisms such as multiple voting rights are often used and enable controlling shareholders to nominate and elect most of the company directors at their discretion. Controlling shareholders in Turkey have always played a dominant role in the strategic guidance and management of their companies, so most boards do not operate independently and controlling shareholders are reluctant to relinquish tight control.

69. However, key decision makers within Turkish companies saw the “macro” benefits of the CMB Principles and openly supported their adoption. According to an OECD report (2006) Turkish issuers were in favour of the modernisation efforts of CMB and the development of Turkish financial markets, and several large companies acted as catalysts for a wider adoption of the CMB Principles as they publicly endorsed them and started to implement good governance practices like internal control systems.

70. To be sure, corporate governance issues were taken seriously and the awareness kept on growing, however not at the expense of entrenched interests at the level of individual companies. Some provisions, particularly those calling for a greater board independence (1/3 of the board), were not often implemented. Controlling shareholders were not in favour of including outsiders who may challenge their control (Ararat, 2008). It is worth noting that companies sporadically use the term “consultant-directors” in the corporate governance statements when they portray their independent directors, which arguably reflects the truth about the role played by these unaffiliated directors on Turkish boards.

71. Turkish managers and directors have recognised some benefits in terms of professionalization and better management (Gönencer, 2008). Complying with CMB Principles, which are in line with the OECD Principles was considered as a means to bring their companies further in line with international best practices. Directors of Turkish companies confirmed in our interviews that they were interested in developing a corporate governance culture in line with those in European companies and that the CMB Principles have been useful as a formal reference in this endeavour. However, in the absence of credible market forces demanding more compliance with the CMB Principles, companies did not see better access to capital as a significant benefit of enhanced adoption of the code.

72. On the costs side of the equation, interviewed experts mentioned the difficulty to bring independent directors on their boards given the limited pool of competent candidates within Turkey. Some issuers interviewed for this paper questioned the usefulness of independents in Turkish companies. Orbay et al (2010) analysed the relationship between board structure and firm performance for a sample of listed Turkish companies and showed a negative impact of the presence of independent board members on firm performance.

73. Furthermore, issuers highlighted the risk of competitive disadvantages vis-à-vis their non-listed competitors as a significant cost. Full compliance with the CMB Principles would make them disclose a considerable amount of information, for example on human resources policies and relations with customers and suppliers (Chapter 3 of the CMB Principles). Their unlisted counterparts would not have to disclose anything comparable and could use their information to their disadvantage.

¹⁶ At the end of financial year 2012: Koç Holding (Koç family owns 69%), Sabancı Holding (Sabancı family and group companies own 58%), and Dogan Holding (Dogan family and group companies own 67%).

4.6. The Role of Associations, Private Sector Advisors and Other Organisations

74. The aim of the CMB Principles to create awareness for corporate governance in Turkey would not have been achieved to the same extent without the input of private sector associations, research institutes and consulting firms. They publicly endorsed the CMB Principles as a central corporate governance document and originated a number of important initiatives.

75. The Corporate Governance Association of Turkey (COGAT) was created in 2003 and played a key role in developing a corporate governance culture as well as assisting its corporate members with the implementation of the CMB Principles (Gönencer, 2008). The association published research on corporate governance in Turkey together with the Boston Consulting Group (BCG, 2005) and originated a number of publications with leading academics. COGAT developed case studies, published books, newsletters and articles. The Association also organised a number of board trainings and proactively sought to interview with journalists and to connect with international organisations (in particular the OECD) and institutes such as the IIF and CIPE.

76. The Turkish Industrialists and Businessmen Association (TÜSIAD) had a major role in coordinating and presenting the views of Turkish listed companies at the drafting of the CMB Principles and beyond. The Association partnered a number of meetings and consultations as well as targeted director training on corporate governance best practices for its members.

77. The Corporate Governance Forum of Turkey (CGFT), an initiative of the Sabanci University, carried out empirical research on corporate governance and pushed for the integration of corporate governance teaching into curricula of MBAs and graduate degrees.

78. The Big four accounting firms had a financial interest to sell corporate governance and compliance advisory services to their (non-audit) clients. Their commercial proposals have contributed to educating issuers that corporate governance issues are important. Therefore, consulting firms have to some extent contributed raising awareness for corporate governance in general and the CMB Principles in particular.

4.7. Key Messages from the Driver Analysis

79. In the case of Turkey, the CMB was the key driver of the effectiveness of its Principles. The regulator used self-regulation as a means to an end and succeeded in finally codifying the CMB Principles. The limited impact of investors as a driver for successful self-regulation accentuated the need for a strong leadership and ownership of the code by the regulator. It is especially worth highlighting that private sector associations and the stock exchange played a role in raising corporate governance awareness and creating a corporate governance culture from the ground up. Nevertheless, most listed companies remained sceptical as to the genuine benefits of complying with certain provisions of the CMB Principles.

III. INDIA: CLAUSE 49

1. Key Milestones

80. The liberalization of the Indian economy in the early 1990s brought corporate governance to the forefront of policy makers' agenda. With open capital markets, vast economic growth and upcoming privatizations, corporate governance became key to attracting capital and creating a credible equity culture. Over the same period, a series of corporate scandals¹⁷ triggered serious concerns about the state of corporate governance in India. In 1992, the Securities and Exchange Board of India (SEBI) was established with the purpose to monitor and regulate stock trading. The regulator has been gradually empowered to play a paramount role in the field of corporate governance and investor protection.

81. Nevertheless, the initial impetus for corporate governance reform stemmed from the private sector rather than from regulator. In 1995, the Confederation of Indian Industries (CII) set up a taskforce in order to develop a voluntary corporate governance code for India. The objective was to enhance trust in Indian businesses by promoting minority shareholder protection, transparency and corporate governance standards in line with what the CII called "the developed world" (CII,1998).

82. In 1998, CII published its code entitled "Desirable Corporate Governance: A Code". The twelve page document gave a tentative definition of corporate governance and provided seventeen recommendations on the following items: i) Board of Directors; ii) Desirable Disclosure; iii) Capital Market Issues; iv) Creditors' Rights; v) Financial Institutions, and vi) Nominee Directors.

83. The CII Code was largely inspired by the Cadbury Report and the corporate governance debate in the UK. It was hence not fully adapted to the Indian context. As a self-regulatory private sector initiative the Code also did not have any regulatory backing or support from listing rules. The voluntary nature of the Code did not lead to any impact in terms of adoption by companies and improved governance. Although the CII Code was not an effective code per se, it was the first formal and path-breaking document in the Indian Corporate Governance debate.

84. SEBI followed suit by setting up its own Code Committee chaired by Kumar Mangalam Birla¹⁸ in late 1998. The main goal of the Committee was to develop an adequate Corporate Governance Code for India, focusing on issues of investor protection, the role and composition of boards, transparency and international standards of disclosure. The Birla Committee on Corporate Governance issued its recommendations in 1999. While it welcomed CII's Code, "the Committee however felt that under Indian conditions a statutory rather than a voluntary code would be far more purposive and meaningful, at least in respect of essential features of corporate governance" (Birla Committee, 1999).

85. Therefore, the Birla Committee explored the possible options of the Indian legal and regulatory framework to introduce mandatory compliance with a corporate governance code. It was agreed that

¹⁷ In particular the Harshad Mehta case as well as several cases of companies allotting preferential shares to controlling shareholders for significantly discounted prices and cases of misappropriation of investors' capital (Goswami, 2002).

¹⁸ Indian industrialist and the Chairman of the Aditya Birla Group, one of the largest conglomerates in India.

achieving legal back-up through a modification of the Companies Act of 1956 would take considerable time. This option was thus discarded in order to move ahead quickly. Consequently, the option to enforce mandatory compliance through the listing requirements of the stock exchanges under the direction of SEBI was pointed out as the best and least time-consuming solution to ensure effective implementation of corporate governance provisions. This decision formed the basis of what became Clause 49 of the Listing Agreement (Clause 49), which is referred to as the Indian Corporate Governance Code today.

86. SEBI implemented the Birla Committee's recommendations without further modifications by introducing the Committee recommendations into Clause 49 of the Listing Agreement and followed the Committee's recommended timeline for adoption¹⁹. Thus in line with the Birla Committee's recommendation, Clause 49 contains mandatory and non-mandatory provisions which apply to all listed companies, including State-owned enterprises (SOEs). The Birla Committee highlighted that "compliance with the Code is expected to be in letter but above all in spirit and in a manner to give precedence to substance over form" (Birla, 1999).

87. In 2004, Clause 49 was amended following the recommendations of the SEBI-appointed Narayan Murthy Committee which chiefly focused on refining the provisions on audit committees, audit reports, independent directors, related parties, risk management and disclosure. The revised Clause 49 came into effect from on December 2005²⁰.

2. Corporate Governance Framework

88. Within the Indian corporate governance framework²¹, essentially, SEBI has the ownership of Clause 49 and the Ministry of Company Affairs (MCA) is responsible for the Companies Act.

89. The existing Clause 49 is the result of India's efforts to develop a functioning Corporate Governance Code. Clause 49 has 15 pages including Annexes and applies to listed companies. It consists of a mandatory and a voluntary part. Mandatory provisions include:

- Composition of the Board and its procedures: Frequency of meetings, definition and number of independent directors, code of conduct for Board of directors and senior management
- Composition and role of the Audit Committee
- Provisions on Subsidiary Companies and related party transactions
- Disclosure to the Audit committee, the Board and the Shareholders
- Requirement for CEO/CFO certification
- Requirement for quarterly report on corporate governance
- Requirement for annual compliance certificate

90. Non-mandatory (or "desirable") provisions include:

- Constitution of Remuneration Committee
- Despatch of Half-yearly results

¹⁹ While this new 'code' became mandatory for large companies, i.e. those in BSE 200 and S&P CNX Nifty indexes as well as all newly listed companies by March 2001, smaller listed companies were given two more years to comply.

²⁰ The revised Clause 49 was initially supposed to come into effect on April 2005 but a significant share of BSE 200 companies claimed more time to prepare for full compliance with the revised requirements. SEBI subsequently extended the date to December 2005.

²¹ In this paper, the analysis of its effective implementation will be based on the pre-2013 framework.

- Training of Board members
- Peer evaluation of Board members
- Whistle Blower policy

91. As per Clause 49, the Annual Report should provide a separate section on compliance with the mandatory provisions and whether any of the non-mandatory provisions are complied with. In addition, quarterly compliance reports are to be submitted to the stock exchanges within fifteen days after the end of each quarter. Templates for both annual and quarterly reporting are provided in the annexes of Clause 49.

92. The MCA is responsible for the Companies Act, which provides the basic framework for the regulation of all Indian companies. While the 1956 Act had few corporate governance related provisions²², the 2013 Companies Act significantly increased its corporate governance scope and now includes areas which had been previously dealt with exclusively by Clause 49. Sections of the Companies Act of 2013 related to corporate governance cover the topics of: i) Composition of the board and independent directors (including a new definition of independence); ii) Separation of Chairman and CEO; iii) Director training; iv) Board meetings; v) Director evaluation; vi) Role and functions of the Audit Committee; vii) Risk management; viii) Whistle-blower protection; ix) Remuneration; x) Nomination and Stakeholder Relationship Committees (mandatory); xi) Auditor rotation; xii) Related party transactions; xiii) Mandatory electronic voting for board, and ivx) shareholders meetings.

93. The MCA developed corporate legislation in parallel to SEBI's initiatives, and established a number of Committees of its own²³ that largely overlapped with SEBI's initiatives and are said to have undermined the role of SEBI as the clear owner of the Indian Corporate Governance Code (Afsharipour, 2009). While MCA's Committees issued reports aimed at reforming the Companies Act of 1956 with regard to corporate governance, they reportedly created a general climate of confusion. For issuers, it became unclear which corporate governance standards had to be considered legitimate and whether Clause 49 could be regarded as a viable benchmark for best practices in corporate governance (Dalei et al., 2012). The confusion further worsened after the Satyam scandal in 2009.

94. The Satyam case, also referred to as "India's Enron" shattered India's corporate world. Over several years the company's accounts were falsified and assets were overstated by around USD 1.5 billion. The company obtained loans illegally, created over 13 000 falsified salary accounts and inflated its revenues through fake customer invoices. Satyam's statutory auditors, PriceWaterhouseCoopers, were reportedly not aware of the fraud. While the Satyam case is regarded as an accounting and auditing scandal in the first place, it has also impacted the corporate governance debate. Satyam formally complied with the 1956 Companies Act and followed Clause 49, reporting good implementation of its policies, so the case highlighted the need for meaningful compliance in spirit rather than pure box-ticking. The genuine quality of independent directors was questioned, along with their ability to challenge the course of action of management (and eventually the controlling shareholders) as well as the overall effectiveness of Indian boards.

²² Sections of the Companies Act 1956 relevant to corporate governance matters include: Loan to directors or relatives or associated entities (Sec 295); Interested contract needs Board resolution and to be entered in register (Sec 297); Interested directors not to participate or vote (Sec 300); Appointment of director or relatives for office or place of profit needs approval by shareholders, if the remuneration exceeds prescribed limit (Sec 314); Audit Committee for Public companies having paid-up capital of Rs. 5 Crores (Sec 292A); Shareholders holding 10% can appeal to Court in case of oppression or mismanagement (Sec 397/398).

²³ In particular the Naresh Chandra Committee on Corporate Audit and Governance in 2002 as well as the Irani Committee on Corporate Law in 2004.

95. Following the Satyam episode, the MCA quickly issued the “Voluntary Corporate Governance Guidelines” in December 2009. The aim of the Guidelines was to promote best corporate governance practices among listed and non-listed companies. The 20 page document explains that good corporate governance goes beyond laws and regulations and attempts to encourage companies to voluntarily implement some or all of the suggested guidelines (e.g. separation of chairman and CEO, not more than 7 directorships per independent director, board training, etc.). Going even further, the MCA constituted the Godrej Committee in 2012 which specified seventeen overarching principles for good corporate governance, which were expected to form the basis of further corporate governance debate in India.

96. In August 2013, the Upper House of the Indian Parliament ratified the new Companies Act which formally replaced the Companies Act of 1956²⁴. It provides India with more modern legislation and is considered to adequately address contemporary issues, including those observed during the investigations in the Satyam case. The 2013 Companies Act is expected to enable business-friendly corporate regulation, increase the accountability of companies and auditors, improve corporate governance and levels of transparency and adequately protect the interests of (minority) investors (Deloitte, 2013). The MCA efforts to codify a large number of corporate governance related provisions in the new (2013) Companies’ Act materialised (see next sub-section III.2.).

97. The Voluntary Guidelines developed in 2009 are also an instrument of the MCA, but do not constitute enforceable provisions. Their content is focused on three main topics: i) boards of directors, ii) auditors and iii) whistle-blower protection. They were developed as a reaction to the Satyam scandal and aimed to serve as guidance to companies which wish to improve their corporate governance standards. Market observers report that these guidelines are only marginally implemented by companies because of their purely voluntary nature.

98. In the years following the Satyam episode, SEBI only made some minor modifications to Clause 49, mainly on pledged shares, peer reviews of auditors²⁵, general information dissemination on corporate websites and electronic voting. In early 2013, SEBI released a consultative paper to revisit the existing Clause 49 to align it with the Companies Act of 2013.

3. Effectiveness of the Code

99. The problematic relations between SEBI and MCA did not favour a climate for coherent and consistent policy dialogue which would have led to a more functional approach to corporate governance codification. Overall, Clause 49 cannot be considered an effective instrument as pure compliance without real substance thrived under this framework.

100. Although there is no official data on compliance with Clause 49, SEBI’s estimates suggest that (at least on paper) around 95% of listed companies comply with Clause 49. Analysis of the data provided by the Bombay Stock Exchange (BSE) and the National Stock Exchange (NSE) indicates that around 10% of listed companies have not fully complied with Clause 49 by 2012.

²⁴ One of MCA’s main objectives over the last decade has been to amend the Companies Act of 1956. The Indian Government started a comprehensive review of the Companies Act in 2004, which resulted in a new Companies Bill. The Bill was passed by the Lower House (Lok Sabha) in 2012. The Upper House (Rajya Sabha) of the Indian Parliament ratified the Bill on August 2013.

²⁵ It was decided that in respect of all listed entities, limited review/statutory audit reports submitted to the concerned stock exchanges shall be given only by those auditors who have subjected themselves to the peer review process of ICAI and who hold a valid certificate issued by the ‘Peer Review Board’ of the said Institute (SEBI, 2013).

101. Indeed, the adoption of Clause 49 had an immediate effect on listed companies. IPOs have not been carried out for non-compliant companies and already existing companies reviewed their governance in order to comply with the listing requirements (Afsharipour, 2009). Following the introduction of Clause 49, an increase in good practices was observed. An example for this is the introduction of audit committees with 2/3 of independent members. According to a survey conducted by PwC, all of the top 350 companies by market capitalisation listed on the Bombay Stock Exchange met this composition of their audit committees in 2007 (PwC, 2009). Smaller listed companies reportedly also introduced such committees to comply with Clause 49.

102. However, the question as to whether Clause 49 has been effectively implemented by Indian listed companies goes beyond the pure disclosure aspect of compliance. Upon the introduction of Clause 49, issuers openly categorized it as “harmless” (Hindu Times, 2006) because SEBI’s capacity to effectively monitor, enforce and prosecute companies for non-compliance was in question. The lack of monitoring and enforcement activities (see the sub-section the *Role of the Authority in Charge of the Code*) allowed deviant companies to mark themselves as compliant without having to fear any serious consequences. On the same token, data provided by the stock exchanges (NSE, 2013 and BSE, 2013) indicates that late submissions were frequent as companies did not fear any realistic enforcement actions.²⁶

103. While a high share of Indian companies issue formal compliance statements, SEBI, the stock exchanges and issuers themselves admit that this does not fully reflect the actual conduct of the companies. Companies adopt Clause 49 on paper, ticking boxes in the “Yes/No” compliance template, but they largely consider it a formal exercise. Clause 49 mainly raised awareness for corporate governance as “yet another compliance exercise to satisfy” (The Economic Times, 2011).

104. According to Indian experts interviewed for this report, Clause 49 had no effective educational value and did not succeed in creating a corporate governance culture where issuers would genuinely embrace best practices of corporate governance. De facto, Clause 49 fostered mechanical compliance with corporate governance standards rather than a culture and willingness to devise means of better corporate governance. Only around 38% of board directors believe that Clause 49 significantly contributed to improving corporate governance in India (PwC, 2011). Therefore, on-going effort by SEBI via a Consultative Paper on Corporate Governance launched to review the content of Clause 49 attempt to introduce an educational section on “underlying principles of good corporate governance” (SEBI, 2013).

105. It is important to acknowledge that despite the abovementioned shortcomings, Clause 49 was the first credible and widely implemented codification effort of corporate governance provisions in India. Before its enactment, only the voluntary CII Code on Corporate Governance provided recommendations on corporate governance, but it was largely ignored by companies and investors due its purely voluntary nature. As concluded by the Birla Committee, without a mandatory approach the implementation of essential corporate governance practices would not have been possible in the Indian context. Post-liberalization India needed a functioning corporate governance regime in a timely fashion and it was first established through the adoption of Clause 49. Today, the fact that a significant number of provisions of Clause 49 have entered the Companies Act 2013 underscores that Clause 49 was not seen as a functioning Code. In addition, there remains the challenge of creating corporate governance awareness beyond pure compliance and of improving monitoring and enforcement actions.

106. Indeed, India’s case illustrates that even with detailed provisions, crafted by experts with knowledge of international corporate governance, the reform process is ineffective if the country lacks the

²⁶ For example, an analysis of the raw data from the BSE, suggests that 562 companies submitted their compliance statements for December 2012 too late. Several delays went up to 85 days after the 31 December. On average, there was a delay of 32 days.

adequate infrastructure for implementation and enforcement and if there is no solid corporate governance culture among market participants. Satyam always complied with Clause 49 and was even awarded two awards for Excellence in Corporate Governance (Sharma, 2010). Pure compliance hence does not mean commitment to good corporate governance.

4. Analysis of the Underlying Drivers

107. Several factors explain why Clause 49 failed to develop into a solid corporate governance instrument for India. Although it has been arguably more effective than India's first purely voluntary Code, a deeper look into the roles of different market participants highlights the shortcomings of Clause 49.

4.1. The Role of Authority in Charge of the Code: Securities and Exchange Board of India (SEBI)

108. As mentioned, the MCA regulates the activities of all companies under the Companies Act while SEBI, as the securities market regulator, supervises listed companies only (Act of Parliament, 1992).

109. SEBI played a key role, since regulatory back-up for a corporate governance code was indispensable. As highlighted by the Birla Committee, a purely voluntary Code was not a credible option for the Indian context (Birla, 1999). As evidenced by recent history, modifications to the Companies' Act 1956 would have taken many years²⁷ so SEBI's leadership on corporate governance reform was an important and efficient step forward. However, since SEBI's creation, serious tensions arose between SEBI and the MCA as regulatory overlaps emerged across a variety of issues (Armour, 2008). For companies, even those willing to strive towards good corporate governance practices, it became difficult to identify the most credible source for reference, which arguably exacerbated the "box-ticking" attitude.

110. While SEBI took the leading role in the Indian corporate governance debate, the regulator was not endowed with the adequate powers and resources to effectively monitor and enforce the provisions of Clause 49 (Afsharipour, 2009). Contrary to numerous regulators in European countries (Wymeersch, 2013), SEBI does not monitor corporate governance standards and/or compliance with Clause 49. While it issues a comprehensive Annual Report covering various spheres of its activities, there is no (annual) reporting on how companies implement Clause 49. According to SEBI, the human and financial resources available for monitoring and enforcement are too limited to cover the over 6 000 companies listed on Indian Exchanges²⁸ (Table 3). It has no choice but to rely on the compliance and non-compliance data collected by the exchanges. While this data indicates how many companies comply with the provisions, there is no analysis of reasons for non-compliance and whether compliance is genuine.

Table 3. Number of listed companies in India (2008-2012)

Year	Number of listed companies	
	NSE	BSE
2008-09	1432	4929
2009-10	1470	4975
2010-11	1574	5067
2011-12	1646	5133

Source: NSE and BSE

²⁷ It took over 10 years from the first serious efforts to review the Companies Act until its adoption by the Upper House of the Parliament on the August 2013.

²⁸ A large portion (around 50%) of the listed companies on the BSE in particular are junk stock companies, which remain listed but are not actively traded.

111. In terms of enforcement, SEBI has the power to impose fines on companies which do not comply with Clause 49. Delisting is another possible option SEBI can enforce to sanction non-compliance. Despite the existence of such options they are rarely (if not hardly ever) put into practice. Fines are de facto ineffective because of the poor court system in India where there are currently up to 27 million outstanding cases (Armour et al 2008). This year, SEBI has around 1 200 unpaid fines. Due to its limited powers, SEBI has to turn to courts if a fine remains unpaid and such procedures reportedly take over 10 years. Moreover, SEBI cannot impose criminal liability as this power lies solely with the MCA.

112. According to interviews with SEBI officials, there has been no delisting on the grounds of mere non-compliance with Clause 49. The regulator tries to avoid this measure because of the resistance of stock exchanges and because it may harm minority shareholders by depriving them of their ability to exit the stock. However, SEBI has been more rigorous in enforcing Clause 49 through delaying IPOs of non-compliant companies, such as Oil India Ltd. and NHPC.²⁹

113. SEBI's efforts have been particularly fruitless with regard to SOEs, for which the implementation of Clause 49 has been most problematic. Bureaucratic processes exacerbate the costs of compliance and most Ministries in charge of the SOEs do not value the benefits of SEBI's corporate governance instrument (Mishra, 2007).³⁰ In particular, the State is not in favour of having a high share of independent directors on SOE boards, which may dilute its influence in strategic companies (Afsharipour, 2009). Leading large SOEs have argued that they do recognize the need for independent directors on boards, but that the requirement of Clause 49 was not appropriate for SOEs. Their main argument was the complex and long process of finding and appointing independent directors, because "the government must appoint these directors", meaning that the State as an owner needs to validate all SOE directors (Business Standard, 2008).

114. Hence, SEBI seems genuinely committed to promote good corporate governance in India but its limited powers and resources, as well as MCA's competition for leadership in the corporate governance debate have eventually reduced the potential of Clause 49. Now, SEBI's Consultative Paper launched in 2013 to review Clause 49 aims to fill the existing loopholes but under the constraint of being in line with, or stricter than, the Companies Act.

4.2. The Role of the Stock Exchanges: NSE and BSE

115. India has two competing stock exchanges. The Bombay Stock Exchange (BSE) was established in 1875 and is the largest exchange with over 5 000 companies. The National Stock Exchange, with over 1 600 listed companies as of 2013 (see Table 3), was established in 1992. Many companies listed on BSE and NSE have little or no trading in their stock. The high number of low-capitalized companies on Indian stock exchanges is often highlighted as a fundamental structural problem of Indian capital markets.³¹ Despite the high number of listed companies, the market capitalization and trading volumes of the

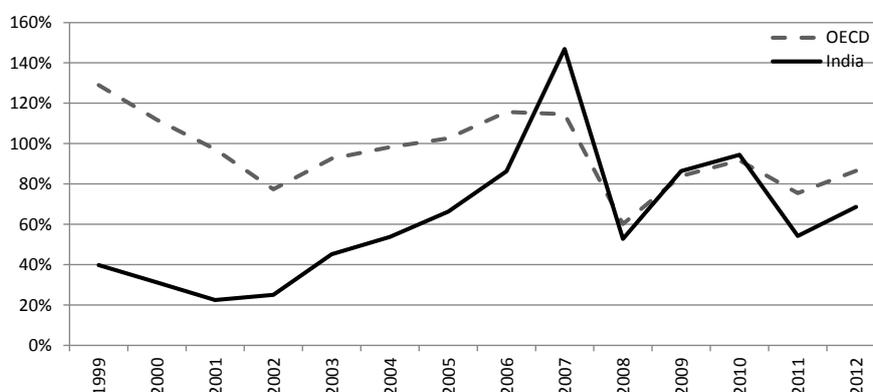
²⁹ Both were denied listing in 2007 on the grounds of insufficient numbers of independent directors.

³⁰ SEBI publicly threatened to delist the SOE Oil and Natural Gas Company (ONGC) in 2007 for systematic non-compliance with Clause 49 (The Hindu Business Line, 2007). Shortly after SEBI initiated the proceedings against ONGC, the Ministry of Petroleum stepped in to request SEBI to immediately stop any proceeding against ONGC and to accept that it would take "a little more time" for oil and gas SOEs to comply (The Hindu, 2007). Although SEBI refused to dilute its standards, large SOEs were openly backed by the Ministry of Petroleum and the MCA who took their side (Mishra, 2007). The proceedings stopped. Today, SOEs' non-compliance continues to undermine the effectiveness of Clause 49.

³¹ For comparison, the NYSE is the world's largest stock exchange by market capitalization and has around 2800 listed companies (<http://www.nyse.com/content/faqs/1050241764950.html>).

exchanges are dominated by a few large companies. In 2012, the total market of BSE and NSE capitalization amounted to USD 1.3 trillion and represented 68% of India's GDP (Figure 4).

Figure 4. Market capitalisation as percentage of GDP in India and OECD countries



Source: World Bank Indicators, 2013

116. Both stock exchanges are self-regulatory organizations which are registered with and regulated by SEBI³². Clause 49 was introduced via the listing requirements³³, mainly because of SEBI's flexibility to amend them.

117. According to Indian experts interviewed for this paper, BSE and NSE have been recipients of SEBI's rules and oversight rather than believers in and drivers of corporate governance improvement. Their involvement in the development of Clause 49 was very limited. Although the exchanges have the power to go beyond SEBI's listing rules and implement stricter corporate governance provisions than Clause 49, they have abstained from doing so. The competition for issuers (and thus listing fees and size) has created a race to the bottom where exchanges do not go beyond SEBI's minimum requirements, as evidenced by their respective listing rules. Moreover, there is a lack of general interest for a premium segment due to the strict and prescriptive nature of Clause 49 as well as the Companies Act of 2013.

118. The listing departments of BSE and NSE are empowered to monitor compliance with the clauses of the listing agreements and to take disciplinary measures up to delisting. Our analysis indicates that delisting is very rarely practiced by both BSE and NSE. In particular, data from the exchanges shows that there were no reported cases of delisting purely on the ground of non-compliance with Clause 49. When companies do not comply and/or fail to file the quarterly compliance reports the Exchanges tend to suspend their shares from trading rather than apply their ultimate sanction of delisting. Suspension however is also only applied for the most severe cases of non-compliance, e.g. not filing compliance reports for several quarters. Delisting implies a loss of fees for the Exchanges. Furthermore, they also consider that non-compliance with Clause 49 is not commensurate with the damage caused to minority investors by delisting. In addition, the activities of monitoring and sanctioning have a cost for exchanges and it is in their interest to keep these costs low.

119. Overall, it appears problematic that due to its limited resources SEBI relies on the exchanges to monitor compliance, while the exchanges have an interest in producing the strict minimum monitoring

³² The Securities and Exchange Board of India Act, 1992, No. 15, Acts of Parliament, 1992.

³³ i.e. the rules and processes companies must follow to become and remain listed companies on Indian stock exchanges.

output. Indeed, the most common and rigorously applied sanction for non-compliance with Clause 49 is to “name and shame” non-compliant companies. BSE and NSE publish detailed lists of companies which have not complied with provisions of Clause 49 or not submitted their compliance reports in time.

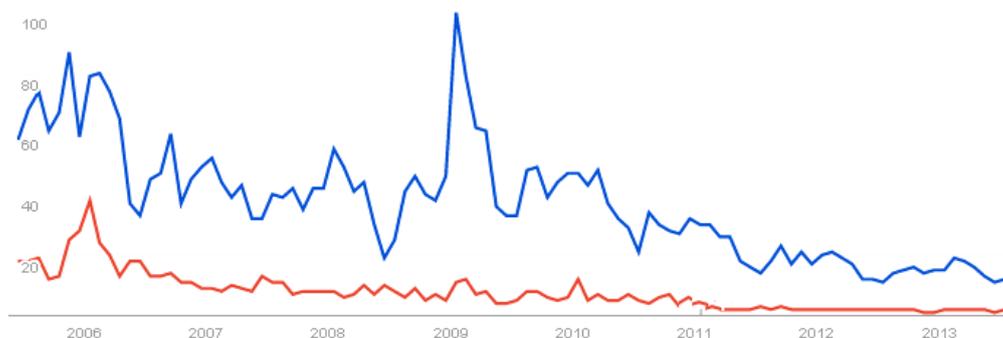
4.3. Role of the Media and the Public Opinion

120. According to Indian experts interviewed for this paper, the impact of the press as a driver for better corporate governance compliance has been gradually increasing over the last decade. The public interest for corporate governance issues increased and even more so after the Satyam episode in 2009.

121. Local proxy voting agencies and the development of the internet have played an important role. These agencies publish their corporate governance analysis on their websites where journalists can easily access this information. However, in general the media has been rather reactive as regards reporting on corporate governance issues. Press articles, reports and broadcasts on corporate governance topics only gain momentum after the occurrence of major scandals (Medora, 2012).

122. Analysis confirms that public interest for corporate governance is significantly impacted by major corporate scandals such as Satyam. Historic data of the search engine Google (Figure 5) illustrates that the interest in India³⁴ for the search of the terms “corporate governance” skyrocketed right after the Satyam case in 2009 and sharply decreased thereafter. As expected, the interest of the Indian public for Clause 49 is lower than for corporate governance in general. It is however worth noting that in other countries³⁵ the levels of interest can be at the same level or show at least a smaller gap. Also, while there is a general correlation between searches for corporate governance and for Clause 49 by the Indian public, the correlation was lower during the Satyam episode, denoting that Clause 49 is not a powerful reference document when corporate governance related questions arise.

Figure 5. India: Internet searches for corporate governance over time



Source: Google Trends

123. Although leading newspapers such as the Economic Times have begun to publish more insightful articles on corporate governance, there is a need for more sustained reporting. Overall, the media is an influential reputation agent in India (Medora et al, 2012) and according to interviewed Indian issuers no company wants to be portrayed as failing on corporate governance compliance.

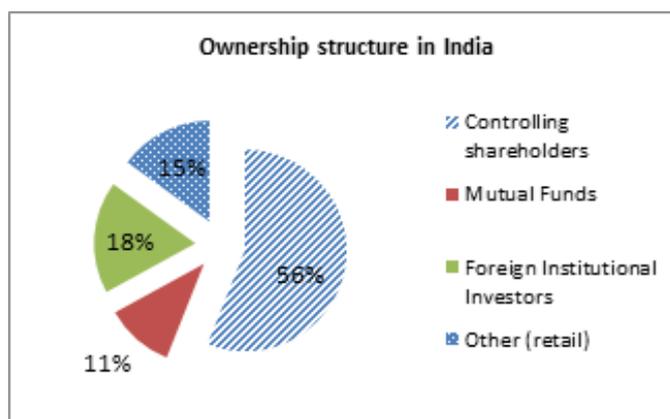
³⁴ The index 100 represents the peak search interest. The first graph shows searches from internet users in India for the terms “corporate governance” (higher line) and “Clause 49” (lower line).

³⁵ For example in Colombia.

4.4. The Role of Investors

124. One of the main reasons why a comply-or-explain code was not chosen as an option in India is the concentrated ownership structure of Indian companies. Indian and foreign institutional investors mostly own only small percentages of Indian firms. Mutual funds account for the largest institutional investor group with around 18% of the market value of listed shares (Figure 6). Neither foreign nor domestic institutional investors focus on enforcing good corporate governance standards in their investee companies (CELSA, 2012).

Figure 6. Ownership of Indian listed companies



Source: InGovern 2012

125. A survey and interview campaign on the role of institutional investors in Indian corporate governance conducted in 2003 concluded that enforcing Clause 49 was far from being a priority for domestic and foreign institutional investors (Mohanty, 2003). Indeed, the study highlighted that fund managers looked into corporate governance practices before making investments, but that these considerations were not a priority in their decision making as their objectives were to simply maximise the returns generated by their portfolios. Fund managers were keen to invest in Indian companies which were expected to generate high returns even when it was well known that they had poor corporate governance practices.

126. Ten years later, experts interviewed for this report suggest that Indian and foreign institutional investors have begun to realize that good corporate governance in their investee companies is in their own self-interest. The global financial crisis has undoubtedly acted as a catalyst for this increased awareness. The Financial Times quotes prominent investors on their role in corporate governance in India, as they confirm that before the financial crisis and the Satyam episode the “main box on the checklist” was growth. Ever since, corporate governance has significantly moved up on the investors’ checklist (FT, August 2013).

127. According to InGovern, a proxy advisory service in India, for the last few years there has been a slight phenomenon of investors engaging more with investee companies on corporate governance matters. But as argued in a recent paper, foreign investors alone are unlikely to have a sufficient influence on a better implementation of corporate governance standards (Kar, 2011). Domestic mutual funds should therefore play a more active role in improving corporate governance standards by probing beyond the quarterly results as they constitute the largest domestic investor base.

128. While there is no evidence for investor engagement with investee companies, there is some recent evidence of investors punishing companies for poor corporate governance. In late July 2013, following a dispute regarding the potential nomination of the daughter of a controlling shareholder to the board of Yes Bank, the investors' reaction was evidenced in the drop of the share price. While banking shares have been generally falling over this period at -20.9%, Yes Bank's share price drop has been more than twice as significant with -44.7% (Figure 7).

Figure 7. India: YES Bank and Bank Nifty price evolution



Source: OECD analysis of Moneycontrol data (2013)

4.5. Internal Cost Benefit Analysis of Companies

129. After India's independence in 1947, the vast majority of businesses have been concentrated in the hands of some families and to a lesser extent by the State (Chakrabarti et al, 2008). Controlling families have been exercising tight control in most Indian companies over generations. Therefore, upon the adoption of Clause 49, concerns were raised as to whether it could be genuinely effective given this ownership structure. In particular, it was feared that Clause 49 would not make a substantive difference in the way companies are governed as board members would not be able to challenge the leaders of family-run companies (Afsharipour, 2009).

130. When Clause 49 was introduced, it did not meet with much resistance from the private sector. Compliance with Clause 49 had no perceived "real costs" or disadvantages for issuers in the absence of credible private and public enforcement. Leading Indian companies, such as Tata, Infosys and others commended the Code as a positive message to investors but only few issuers escaped from the box-ticking approach, according to the Asian Corporate Governance Association (2012). A prominent example of box-ticking concern the provisions related to composition of the board and the definition of independent directors. Kar (2011) shows that traditions and cultural values entail that, even when directors are declared as independent in accordance with Clause 49, for the vast majority they *de facto* have some moral or other link with the controlling shareholder.

131. According to experts interviewed for this report, companies do not see any benefits from compliance with Clause 49 in terms of better performance or access to capital. Indeed, some of the interviewed issuers confirmed that they can "be less regarding about the spirit of Clause 49", in particular if this can "secure some benefits in the short-term". The main perceived benefit of compliance centres on prestige and image related issues. Controlling shareholders, in particular families aim at building respected

empires and therefore their image and reputation are of prime importance (Black and Khanna, 2007). Non-compliance with Clause 49 can attract negative headlines and potentially displease investors. On the same token, full compliance (including with non-mandatory provisions of Clause 49) can be used for corporate communication.³⁶

4.6. The Role of Associations, Private Sector Advisors and Other Organisations

132. Although individual private sector experts were involved in the Birla Committee which developed Clause 49, there were no credible associations to promote compliance with it. Interviewed experts highlighted that India is still in the process of creating a (better) corporate governance culture and call for more inclusive debates with private sector associations such as the Confederation of Indian Industries and the Asian Corporate Governance Association.

133. While the Asian Corporate Governance Association regularly provides comparative research and analysis of the state of corporate governance in India, it has little impact on promoting corporate governance and raising awareness (CELSA, 2012). Local consulting firms, proxy advisory services and big accounting firms sporadically provide empirical evidence, engage in awareness raising and influence the regulator. For example, some of these private sector advisors contact SEBI to provide comments and to influence policy based on issues they observe on the market (InGovern, 2013).

134. A recent initiative of the consulting firm Hay Group to raise awareness for corporate governance led to mixed results. The firm initiated a corporate governance award for India's Best Boards. While the initial objective was to reward ten boards altogether, the jury, chaired by Kumar Mangalam Birla decided that only five boards were genuinely implementing best practices and credible candidates for an award (Economic Times, 2013). Despite the increasing efforts of these agents of positive change, their impact is limited and needs to be analysed over a long-term period.

4.7. Key Messages from the Driver Analysis

135. The Indian case illustrates that corporate governance codes and rules are unlikely to have a significant impact if there is a lack of cohesive (political) support. The role of SEBI was undermined by the MCA which engaged in concurrent efforts to establish different corporate governance benchmarks of its own. In addition, SEBI was not in a position to effectively monitor and enforce Clause 49. The lack of strong corporate governance associations able and willing to promote Clause 49, the absence of active investors as well as the rather passive role of the competing stock exchanges contributed to the ineffectiveness of Clause 49.

³⁶ Over the coming years, however, a positive shift in paradigms may occur. A recent article in the Financial Times (August 2013) highlighted that there is a (slowly) increasing awareness among Indian issuers that good governance is in the company's best interest. In particular, it is expected that younger generations of controlling families and corporate leaders will drive the adoption of best practices in corporate governance in the mid to long-term.

IV. COLOMBIA: THE CÓDIGO PAÍS

1. Key Milestones

136. Until 2001 there were no codes of corporate governance in Colombia. The Colombian Confederation of Chambers of Commerce (Confecamaras), supported by CIPE, IFC, CAF (Development Bank of Latin America) and the OECD started a program to promote corporate governance best practices in early 2001. The objective of the programme was to create awareness of the importance of corporate governance for the country's economic development through dialogue and training. Representatives of the Securities Superintendence (Supervalores)³⁷ actively participated in the debate (OECD, 2007).

137. In order to develop Colombia's capital markets, the Superintendence enacted Resolution 275 in May 2001. It established that issuers seeking to receive investment from mandatory pension funds had to adopt (their own) corporate governance codes. Resolution 275 also restricted local pension funds to invest only in issuers which developed a code. As a result, over 91% of the securities offerings between 2002 and 2004 were done by companies with a corporate governance code (Del Valle and Carvajal, 2005). Resolution 275 became a cornerstone of corporate governance in the country (Supervalores, 2001).

138. At the end of 2001, Confecamaras formed a Committee of various private sector representatives, pension funds and the Colombian Stock Exchange to respond to Resolution 275 by creating a model Code issuers could use as a basis for developing their own. The Conferacameras Code was released in early 2002. It was based on the OECD Principles and practices observed in developed countries. The Code consisted of seven chapters: i) Rights and equitable treatment of shareholders; ii) Board of Directors; iii) Transparency and financial disclosure; iv) Stakeholders and corporate social responsibility; v) CEO rules; vi) Conflicts of interest, and vii) Alternative dispute resolution mechanisms.

139. In 2005 the Colombian Congress passed a new Securities Market Law (Law 964 of 2005) which contained several corporate governance rules and thus reduced the scope for voluntary self-regulation. The provisions covered topics such as: a minimum requirement of 25% of independent directors on issuers' boards, a mandatory and majority independent audit committees, disclosure of shareholder agreements, boards must respond in writing to any shareholder proposal put forward by a group accounting for 5% of the shares, among others.

140. By 2005, most issuers had adopted corporate governance codes of their own. As these codes were different from company to company the comparison of practices was difficult. Superfinanciera realised the need to find a suitable corporate governance model which would relax the strict approach created by the new Securities Market Law and facilitate comparable self-regulation. Therefore, Superfinanciera suggested to Confecamaras and a number of Colombian business associations to review and update the Colombian system of corporate governance. Supervalores explained that the main challenge was to have a central benchmark for corporate governance and to continue the gradual improvement of corporate governance culture and market incentives (Supervalores, 2005).

³⁷ Now Financial Superintendency (Superfinanciera), which is the result of the merger of the Securities Superintendency with the Banking Superintendence.

141. A committee was launched at the end of 2005 between Superfinanciera, Confecamaras, the Colombian Stock Exchange, Analdex (exporting companies), Asofiduciarias (trust companies), Asofondos (pension funds), ANDI (business association), CAF (Development Bank of Latin America) and Fasescolda (insurance companies). It studied the experiences of numerous countries and concluded that a national “comply-or-explain” code could help Colombia achieve its objectives: create consensus within the private sector through dialogue during the drafting process of the national code and encourage the self-regulation of corporate governance in the market (OECD, 2007). The resulting National Code (Código País) was intended to serve as a benchmark and reporting template³⁸ that would provide a method to foster homogeneous reports so that investors, the regulator and other users can compare between companies and the evolution of compliance over time.

142. The drafting process of the Código País was scoped by clear guidelines (Superfinanciera, 2007):

- The focus should not be set on generating more rules but on improving enforcement;
- The model should be based on self-regulation;
- The Code’s provisions should be strictly focused on corporate governance (not management or finance matters), and
- The Code should not include practices which were already required by laws or regulations.

143. After several meetings the Committee released a comply-or-explain code, with 41 best practices in four areas suggested to all issuers. Superfinanciera formally adopted the Código País via External Circular 28 of 2007 and made the reporting on compliance with it mandatory. In parallel, External Circular 55 of 2007 was issued. It was addressed at pension funds and mandated that they include compliance with the Código País in their investment decisions (Superfinanciera, 2007).

144. It is worth noting that even though the code was subject to a comply-or-explain mechanism, until 2011 providing explanations for non-compliance was strictly voluntary. It was acceptable to merely disclose non-compliance without giving any reasons. External Circular 7 of 2011 modified this and made it mandatory to give explanations in case of non-compliance.

2. Corporate Governance Framework

145. The current corporate governance framework of Colombia essentially consists of the Commercial Code of 1971, the Securities Market Law of 2005, the Código País as well as administrative regulations by Superfinanciera.

146. The Commercial Code (Decree 410 of 1971) provides the general framework for company and commercial contract law. The main corporate governance related provisions for stock corporations (Title VI of the Commercial Code) include:

- On shareholders (Article 374 and following): The stock corporation cannot be formed or operate with less than five shareholders and no shareholder can hold over 95.99% of the company’s equity. Shareholders are responsible only up to the amount of capital they invested
- On the administrators of the company (i.e. board of directors and the manager): The administrators cannot either by themselves or through a third party, transfer or acquire shares of the same

³⁸ A survey with 79 questions to be filled in by issuers (see Section on *The Corporate Governance Framework*).

company while they hold their positions, except in the case of operations unrelated to speculation, and with the authorization of the board of directors (Article 404). The attributions of the board of directors shall be stipulated in the by-laws. The board shall be made up by a minimum of three members, each one with an alternate (Article 434). None of the board of directors shall have a majority made up with persons related among each other through marriage, or through family relationship within third degree of blood relation or second degree of affinity, or first degree of civil relation, except in the companies acknowledged as family concerns. If a board is elected in contravention of this ruling, it shall not be able to act, and the previous board will continue performing its functions (Article 435). The board of directors appoints the manager with the powers established in the company's by-laws. The persons whose names are inscribed in the corresponding registry of commerce as manager and assistant manager are the legal representatives of the company (Article 442)

147. The Securities Market Law of 2005 (Law 964 of 2005) mainly regulates the following corporate governance related matters which are mandatory for all issuers:

- Independent directors must account for at least 25% of the board
- Audit committees of at least 3 directors are mandatory and the majority of the audit committee as well as its president must be independent
- The legal representative of the company (e.g. CEO) must not be the same person as the chairman of the board
- The board must reply in writing to shareholders representing over 5% of shares
- The financial statements must be certified by legal representatives of the company

148. The Código País provides 41 best practices in four areas (Shareholders' meetings, Board of directors, Disclosure of financial and non-financial information, and Dispute resolution). Annex 2 provides a detailed list of the recommendations, which go beyond the legal requirements (OECD, 2009).³⁹

149. Reporting on compliance with Código País is to be done by all issuers of securities via the survey designed by Superfinanciera. The 79 questions of the survey follow the 41 best practices (the direct translation is "measures"⁴⁰) and one measure can be covered by one or several questions. Box 3 provides an excerpt of Bancolombia's report⁴¹ for illustration.

150. The Código País thus establishes the corporate governance standards in Colombia with which companies are free to comply or not. In any case issuers must report annually on their compliance or explain their deviations using Superfinanciera's survey format which exposes the practices adopted by the companies to the market. Superfinanciera controls the quality and veracity of the information contained in the reports at its best ability and also publishes annual market-wide monitoring reports which include

³⁹ For example, as to the board of directors the Code recommends setting up additional committees such as the Nomination Committee and the Corporate Governance Committee. As to shareholders' meetings the code recommends for example to use a dedicated website to provide the necessary information in a convenient and timely way.

⁴⁰ The Spanish word is *medidas*.

⁴¹ The full 2012 report is available at:
<http://www.grupobancolombia.com/webcorporativa/governance/pdf/encuestaCodigoPais.pdf>.

statistics and rankings. It is however the market which rewards or punishes the corporate governance model of each issuer.

Box 3. Bancolombia Survey Report (excerpt) on compliance with the Código País

COUNTRY CODE SURVEY BEST CORPORATE PRACTICE CODE- COLOMBIA

Bancolombia S.A.
Issuer NIT 890903938-8
Name of the Legal Representative: Ricardo Mauricio Rosillo Rojas
ID. CC.80.417.151
Evaluated period: 31122012
Legal Structure: Limited Liability Company
Entities Code assigned by SFC: 1 - 7

I. GENERAL SHAREHOLDERS MEETING

Question 1: Was the necessary documentation of the main subjects for the last shareholders meeting, made available to the shareholders during the terms of the notice? (1st Measure)

YES NO

Explanation: For the shareholders meeting that took place in 2012 all the necessary documentation for the development of the meeting was put in reach of the shareholders at the company's main office address during the notice's term limit.

Source: Bancolombia

151. Finally, the corporate governance framework is underpinned by rulings of Superfinanciera. These are issued in form of External Circulars. The main rulings in relation to corporate governance include:

- External Circular 28 of 2007 which mandates reporting on the Código País.
- External Circular 55 of 2007 which addresses Pension Funds and mandates that they consider compliance with the Código País in their investment decisions.
- External Circular 7 of 2011 which mandates issuers to provide explanations in case of non-compliance with the Code's provisions.

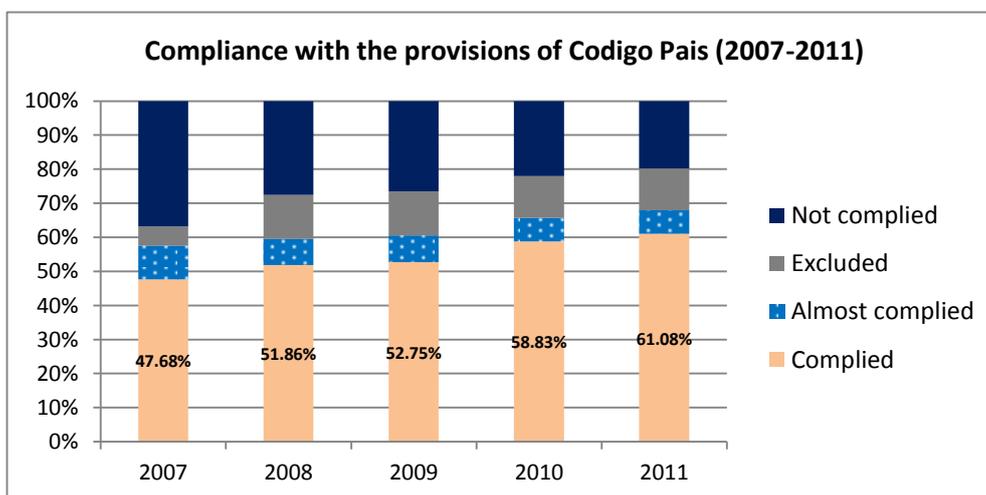
3. Effectiveness of the Code

152. The Código País has become the central benchmark for corporate governance best practices in Colombia and it effectively complements the legal framework (OECD, 2009). It is an interesting case of a successful comply-or-explain code in a country with a concentrated ownership structure. Overall, it achieved its objectives of creating a flexible self-regulation instrument which is broadly embraced by issuers (see sub-section 4.3.) and monitored and enforced by investors, in particular by pension funds (see sub-section 4.4.).

153. The reporting requirements of the Código País provide the market with comparable information on practices of issuers and also allow monitoring progress over time. The Código País also had an

educational impact thus contributing to a solid corporate governance culture⁴². Ultimately, the level of good corporate governance practices has increased in Colombian companies, as evidenced by the data provided in the annual monitoring reports of the regulator (Superfinanciera, 2011).

Figure 8. Compliance with the provisions of the Código País (2007-2011)



Source: OECD analysis of Superfinanciera data for 2007-2011

154. Superfinanciera’s monitoring data shows an increasing trend towards compliance over the 2007-2011 period, with an overall increase of 13.4 percentage points over five years (Figure 8). According to Superfinanciera the observed increase in compliance reflects the issuers’ genuine commitment to improving their corporate governance practices (Superfinanciera, 2011).

155. At, first glance overall compliance of 61% with the Código País in 2011 underperforms the compliance rates of major European Codes. The FRC reports on an average compliance of 97%⁴³ with the provisions of the UK Code (FRC, 2012), while in Germany (Berlin Center of Corporate Governance, 2013) and Spain (CNMV, 2012) issuers comply with respectively 80,7% and 81,3% of their Codes’ provisions, respectively. However, Superfinanciera’s report covers the analysis of 160 companies, of which over 50% do not trade their shares at the exchange⁴⁴. The per annum increases in compliance largely outperform the relatively marginal increases which can be observed in developed countries. For instance, in Germany there has been even a slight decrease of -1,2% over 2007-11.

156. The aggregate analysis of explanations for non-compliance of Colombian companies can also be considered encouraging, according to Superfinanciera, as most companies report on their intention to further improve compliance in the next year (Superfinanciera, 2011). Overall, the observed increase in corporate governance best practices can be considered a significant achievement, in particular for a comply-or-explain code in an emerging market with a shorter history of corporate governance awareness.

⁴² See the analysis of drivers in the subsequent sections for indicators and feedback from interviews.

⁴³ FTSE 350 companies.

⁴⁴ But are companies with registered securities in the National Registry of Securities, often as issuers of corporate bonds.

157. Contrary to the situation in Europe, no company in Colombia reports full compliance. The highest ranking companies in terms of compliance with the Código País achieve rates of up to 92,7% of the Code's provisions (Table 4).

Table 4. Colombia: Top 10 companies in terms of compliance rates

Company	Compliance rate
GRUPO NUTRESA S.A.	92,7%
SOCIEDADES BOLIVAR S.A.	92,7%
ISAGEN S.A. E.S.P.	92,7%
RENTING COLOMBIA S.A.	90,2%
LEASING BOLIVAR S.A. CF	90,2%
BOLSA DE VALORES DE COLOMBIA S.A.	90,2%
BANCOLOMBIA S.A.	87,8%
BANCAMÍA S.A.	87,8%
BANCA DE INVERSIÓN BANCOLOMBIA S.A.	87,8%
FACTORING BANCOLOMBIA S.A. CF	87,8%

Source: OECD calculations based on data from Superfinanciera (2011)

158. Market participants interviewed for this report seem generally satisfied with the quality of disclosure of compliance, although argue that explanations of some companies need to be more elaborate. It is also worth mentioning that the corporate governance reports are not audited and there is no guarantee for their truthfulness as Superfinanciera cannot control each item for each company. However the regulator is committed to verify the veracity of the statements, in particular in suspicious cases and regularly interacts with individual companies (OECD, 2009). To be sure, this is also a common issue in myriad other jurisdictions which adopted comply-or-explain codes (Wymeersch, 2013).

159. The regulator and the main private sector associations are committed to keeping the code updated and in line with changing economic realities and best practices (BVC, 2011). Although there have been no modifications to the 41 measures of the Código País, some fine-tuning is expected to be done by 2014 according to interviewed market participants.

160. Previous reports (OECD, 2007) and experts consulted for this paper emphasize the crucial role played by Superfinanciera in creating an effective Code. The regulator's inclusive approach resulted in strong buy-in from all parties involved, which formed the necessary basis for successful self-regulation.

4. Analysis of the Underlying Drivers

The following sub-sections look deeper into the underlying drivers of the observed effectiveness of the Código País. The roles of different market participants reveal salient factors which impacted the success of the code.

4.1. The role of the authority in charge of the Code: Superfinanciera

161. The Financial Superintendency (Superfinanciera) emerged from the merger⁴⁵ in 2005 of the Banking Superintendency and the Securities Superintendency of Colombia. It is a technical body under the

⁴⁵ As set out in Article 1 of Decree 4327 of 2005.

Ministry of Finance, with legal, administrative and financial autonomy and its own funding. It supervises and controls financial, stock market and insurance activities.

162. Superfinanciera took the leadership in the development of the Código País and actively engaged the leading private sector associations. The regulator's declared objective was to balance regulation and self-regulation to durably strengthen the Colombian capital markets (OECD, 2007). Market experts highlight that Superfinanciera has always been a highly respected regulator with strong "convoking power". As such it was best positioned to take the leading role and co-ordinate the efforts with private sector associations. Experts involved in the designing process of the Code emphasized in particular that Superfinanciera's long-term commitment to creating a functioning self-regulatory instrument and ability to accommodate the interests of different groups have substantially contributed to the success of the code.⁴⁶

163. Beyond its role in the development of the Código País, Superfinanciera engaged in extensive market-wide monitoring efforts starting in 2007. The regulator produced market-wide monitoring reports on an annual basis. The reports were of high quality and consistent from one year to another which allowed effective monitoring of progress over time. Superfinanciera also published all the data and analyses from its monitoring as annexes in excel format so that investors, analysts and other interested persons could use it for their own analyses. Upon the publishing of every annual monitoring report, a special press release was circulated (Superfinanciera, 2011). In order to advise issuers, to verify and help enhance the quality of their reporting, Superfinanciera regularly held one-to-one meetings with issuers (OECD, 2009). These efforts required the commitment of the necessary time and resources. The budget of the regulator⁴⁷ is reportedly adequate and allocates sufficient funds to monitoring compliance with the Código País each year.

164. On the enforcement side, the regulator can issue administrative fines for non-compliance with reporting requirements. It is however the role of the market and not of the regulator to enforce compliance with the Code's provisions as it is a comply-or-explain code which is intended to facilitate flexibility in implementation of its provisions.

4.2. The role of the Colombian Stock Exchange (BVC)

165. Colombia had three different stock markets (Bogota, Medellin, Occidente) until their merger in July 2001. The resulting Bolsa de Valores de Colombia is the only Colombian Stock Exchange today⁴⁸. The market capitalisation reached USD 262 million in 2012 after having grown at a compound annual rate of 39% over 2002-12. In 2012, the market capitalization accounted for around 70% of the GDP (Figure 9).

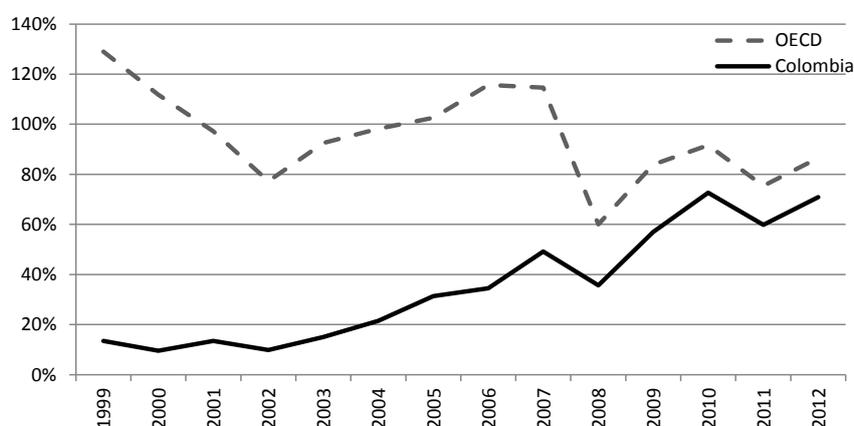
166. Over the years following the merger BVC has grown in depth, transparency and dynamism. BVC was a major contributor to the development of the Código País and actively promoted its implementation by issuers through publications, public seminars and individual meeting with executives.

⁴⁶ It is worth mentioning that all groups and associations involved in the development of the Code have publicly embraced it. Also, the front page of the Code features the names of the main entities which contributed to it: ANDI, Asobancaria, Asofiduciarias, Asofondos, Bolsa de Valores de Colombia, Confecámaras, Fasecolda, Superintendencia Financiera de Colombia.

⁴⁷ USD 73,5 M in 2012, converted from Colombian pesos as published in the Annual Report of the Financial Superintendency.

⁴⁸ The BVC also joined the Santiago and Lima stock exchanges to create the Integrated Latin American Market (MILA) in order to increase the range of options and liquidity offered to issuers and investors as well as to constitute an alternative to the larger Brazilian and Mexican markets.

Figure 9. Market capitalisation as percentage of GDP in Colombia and OECD countries



Source: World Bank Indicators, 2013

167. Even before the adoption of the Código País, the Exchange played a leading role in promoting good corporate governance among its issuers. In 2002 the Exchange started its first programme to improve corporate governance together with the IADB. The first activity of the programme was a survey on corporate governance among companies listed on the exchange. The results were promoted through public seminars and debates with executives. These surveys are considered predecessors of today’s survey reporting approach of reporting on the Código País. In addition, following up on the lessons of the survey the Exchange developed a corporate governance improvement plan, which was implemented in a pilot project involving ten of its issuers in 2005 (OECD, 2007).

168. In the same year, the exchange launched the programme “Colombia Capital”,⁴⁹ with the objective of training companies, investors and local consultants in how capital markets operate and raise their awareness for the benefits of implementing good corporate governance practices. The Código País was actively debated in the context of this programme. In 2009, Colombia Capital published a detailed Guide (BVC, 2009) on the Código País in order to explain its purposes and rationale, to provide advice on implementation and to convince issuers of the benefits of compliance.

169. Furthermore, the BVC is listed on its own exchange and sets an example in terms of corporate governance best practices. It also provides extensive reporting on its own practices via its website. The compliance rate of the Exchange with the Código País was of 90,2% in 2011, BVC thus occupied the 6th place among all companies monitored (Superfinanciera, 2011).

170. The Exchange applies the listing rules conceived by Superfinanciera which require issuers to submit an annual report on corporate governance (BVC, 2013). However, there have been no reported cases of delisting for non-compliance with this requirement.

4.3. The Role of the Media and the Public Opinion

171. According to Colombian experts, the media had no significant influence on the effectiveness of the Código País. The absence of reports and data on the subject matter underscore this point. Colombian business journalism has been focusing on macroeconomic issues for many years and has only recently

⁴⁹ This program receives technical assistance from IADB and works with Superfinanciera, ANDI, Asofondos, Proexport, Chambers of Commerce of Bogotá, Cali, Medellín, Bucaramanga and Decevali.

begun to increase its focus on corporate issues (The Business Year, 2013). According to market observers, the knowledge and interest of business journalists as regards corporate governance has been increasing since the recent global financial crisis along with the international awareness for corporate governance matters over this period. While the Superfinanciera issued press releases about its annual monitoring reports on the Código País in 2010 and 2011, they were only very marginally commented on in business or financial press.

172. It is however interesting that historic data from the Internet search engine Google indicates that the relative public interest for corporate governance is highest in Colombia compared to other countries in Latin America. Over the last ten years, the relative public interest for “*gobierno corporativo*”⁵⁰ in Colombia as registered by Google Trends has been the highest in the region (Table 5).

Table 5. Regional results for the relative interest in “gobierno corporativo”



Source: Google Trends

173. It is important to emphasize that the high public awareness for corporate governance and the code cannot be attributed to the media, but rather to the awareness raising efforts of Superfinanciera, BVC as well as a number of institutions and associations.

4.4. The Role of Investors

174. Institutional investors, in particular pension funds have been playing a key role in improving corporate governance in Colombian companies as they are the largest and most influential minority shareholders (OECD, 2011a). As minority shareholders in a country with highly concentrated ownership structures, institutional investors have an obvious interest that issuers observe best corporate governance practices, in particular if the latter allow protecting the interests of minority shareholders.

175. Pursuant to External Circular 55 of 2007, pension funds are explicitly required to incorporate compliance with the Código País in their investment decisions and to disclose the importance they attach to the evaluation of the corporate governance system of the investee company (OECD, 2008). This requirement to consider the Code was aimed to promote the role of investors as active and informed owners and was key to creating a functioning self-regulatory instrument. The OECD report on *Strengthening Latin American Corporate Governance: The Role of Institutional Investors* (OECD, 2011b) regarded the Colombian experience of introducing a comply-or-explain code in parallel with a corresponding requirement that pension funds take compliance with it into account as a noteworthy practice.

⁵⁰ Corporate governance, in Spanish.

176. Before the introduction of the Código País, pension funds were already compelled to invest only in issuers who have adopted a corporate governance code (as per Resolution 275 of 2001). However, as each company had a different Code it was difficult for investors to compare corporate governance practices between companies. Código País and its harmonized reporting format allowed investors to make comparisons and differentiate well governed companies from those with poor practices. Indeed fund managers interviewed find it easier to incorporate comparable corporate governance information into their models used for investment analysis. It is worth reminding that the code was co-developed and endorsed by Asofondos, Colombia's pension funds association. Preferences of investors with regard to disclosure on the code were reportedly considered.

177. Superfinanciera carried out a review of pension funds' use of Código País in 2008 and concluded that an important advance had been achieved as most pension funds developed criteria to weigh compliance with the Code in their investment decisions (OECD, 2009). According to interviewed experts, some pension funds engage with investee companies by asking questions or demanding more details on compliance with the Code. However, this is not a regular market practice. In most cases investors review the reports on the Code, analyse the information (in particular when investing) and enforce provisions through their votes in the annual general meeting. There is no specific rule requiring pension funds to exercise their voting rights, however it is by and large considered that they have an obligation to exercise their voting rights as a consequence of the fiduciary duties which they must observe (Superfinanciera, 2008).

178. The Latin American Venture Capital Association (LAVCA,2008) found that for 70% of private equity funds corporate governance practices were fundamental for investing in a non-listed company. It is argued that these investors have contributed to driving the awareness and adoption level of the Código País in companies whose shares are not listed but which are interested in attracting capital for further growth.

4.5. The Internal Cost Benefit Analysis of Companies

179. Colombian companies have achieved relatively early a high level of corporate governance awareness. Even before the adoption of Código País companies were required as per Resolution 275 of 2001 to develop their individual corporate governance codes. This was reportedly the nascent phase of a corporate governance culture in the country as companies started reviewing their governance practices and developed best practices of their own. In Colombia, companies broadly consider implementing best corporate governance practices "a managerial tool for speaking the international language of business and opening up to the world" (Bernal, 2005).

180. Issuers welcomed the adoption of the Código País, as it provided them with a benchmark for best practices and an opportunity to inform the market about the efforts they make. With the Code it was possible for issuers to compare in ranking to other companies and to eventually be rewarded for their efforts by an increased confidence of investors and other stakeholders (BVC, 2009). While the average free float ratio of companies listed on the BVC is around 15% (BVC, 2013), the free float ratios of the companies which have the highest compliance rates with the Code are (significantly) above average (Table 6). Listed companies with free float close to market average achieve compliance rates between 40%-80%, while the five companies with compliance rates below 30% all have no listed shares. It can therefore be assumed that a higher free float, i.e. a greater share of capital raised on the market from non-controlling shareholders has a positive impact on the extent of compliance with the provisions of the code.

181. According to interviewed experts, issuers perceived two broad benefits of implementing the Código País. First, a higher level of profitability and professionalism through the implementation of better governance practices. Second, a better access to capital through an increased visibility and understanding of their corporate governance model.

Table 6. Top 3 compliant companies and their free float ratio

Name	Compliance rate with Código País	Freefloat rate
Grupo Nutresa S.A.	92.7%	77%
Sociedades Bolivar S.A.	92.7%	21%
Isagen S.A. E.S.P. ⁵¹	92.7%	26%

Source: Thomson Reuters, Superfinanciera

182. Big four accounting firms report that they have experienced a gradual increase in demand for their corporate governance advisory services since 2008. They confirmed in interviews that Colombian issuers do not intend to tick boxes but that their paradigms rather centre on: “the better you are governed the more profitable you are and the better access to capital, both in shares and loans you get”, as a partner of a leading accounting firm summarised. Market observers emphasize that controlling shareholders do not oppose the implementation of good practices but share the belief that better governed companies will eventually be more successful, which will benefit them in the short and long-term. Consulting firms noted controlling families in particular are preoccupied with following high standards of corporate governance.

183. Companies are hence pro-actively contacting consulting firms to provide corporate governance services which will help them to obtain tangible improvements in line with the measures of the Código País. Reportedly, the most sought after corporate governance advisory service is corporate governance diagnosis and assistance with introduction of best practices. Compliance related services come second, followed by board services (in particular advice on risk management) and finally board performance evaluations.

184. The costs of compliance with the Código País are rather limited for Colombian issuers. The comply-or-explain approach offers flexibility to implement practices which they consider meaningful and to explain non-compliance with measures which they do not consider appropriate. The reporting on compliance is not burdensome as the survey which needs to be submitted is easy to use and submit along with the Annual Report (BVC, 2009). For some companies achieving high levels of compliance was not difficult because they had already adopted high standards in their own corporate governance codes as from 2001. This was in particular the case of Grupo Nutresa and Bancolombia (Sanin and Arteaga, 2012).

4.6. The Role of Associations, Private Sector Advisors and other Organisations

185. The high degree of corporate governance awareness and the effective implementation of the Código País are the product of a private-public dialogue. Apart from Superfinanciera and the BVC, entities such as Confecamaras, CAF (Development Bank of Latin America), Analdex (exporting companies), Asofiduciarías (trust companies), Asofondos (pension funds), ANDI (business association) and Fasecolda (insurance companies) have played a leading role in developing and promoting the Code. Their participation in the process allowed creating a legitimate Code which is in line with the realities of the Colombian market. The Code could hence obtain the buy-in from issuers and investors.

186. Confecamaras with the support of CAF, IFC, CIPE and the OECD started the corporate governance debate in Colombia and organised a number of public conferences and workshops to enhance

⁵¹ State-owned enterprise.

the awareness for best practices in corporate governance. The associations endorsed the Código País⁵² and promoted it among their members as the central instrument for best practices (OECD, 2009).

187. According to market observers, the associations have played a role in promoting the inclusion of corporate governance in the curricula of MBAs and postgraduate courses, so that the young generation of corporate leaders is aware of the importance and benefits of good governance. Big accounting firms and other private sector advisors have not played a major role in raising awareness for the code, however they have assisted companies with the implementation of best practices.

188. Three Colombian companies, Argos, Carvajal, and ISA are members of the Latin American Companies Circle⁵³ and have thus committed to acting as catalysts and ambassadors of corporate governance best practices in Colombia. As the Director of Enterprise Affairs of Argos highlighted:

“Being part of the Companies Circle has allowed us to have a forum for reflection and discussion with other companies in the region, companies that might have different characteristics to ours, but that share the same belief in the benefits of good corporate governance to the development of companies. It has also allowed us to become ambassadors of corporate governance in Colombia.”

4.7. Key Messages from the Driver Analysis

189. The Colombian Código País is an interesting case where the regulator has been the main driving force of the effectiveness of the code. Superfinanciera created a functioning framework where issuers and investors embrace the code and have incentives to implement and enforce it. In this regard, the comprehensive monitoring activities of the regulator also played a key role. At the same time, the high level of awareness for corporate governance significantly contributed to the success of the Code. The Colombian Stock Exchange as well as a number of private sector associations fostered the corporate governance culture, in particular by actively promoting the benefits of implementing the Código País.

⁵² Which mentions the names of these associations on its front page.

⁵³ The 15-members Companies Circle brings together a group of leading Latin American companies who have adopted good corporate governance practices in order to provide private sector input into the work of corporate governance regional development and to share their experiences with each other and other companies in the region and beyond. The Companies Circle is currently sponsored by the IFC, and it is supported by the OECD and was launched in May 2005 at the recommendation of the OECD Latin American Corporate Governance Roundtable.

V. LESSONS AND CONCLUSIONS

190. The different experiences of introducing corporate governance codes in Turkey, India and Colombia illustrate that a “one size fits all” approach is not viable. For corporate governance codes to be effective in emerging markets it is not possible to simply transplant the models from developed countries. The level of corporate governance awareness, the countries’ traditional regulatory frameworks, the content of existing laws and established corporate practices impact on codes’ effectiveness. Overall, corporate governance codes in emerging markets can serve as tools for further legal reform (as in Turkey and India) or complement the existing legal framework with soft law as in the case of Colombia.

191. The analysis of the different drivers of the effectiveness of codes in these three countries indicates that several factors can increase the likelihood of positive impacts.

192. First, for a Code to be effective, the goals that it is set out to achieve should be clear and realistic in light of the specific context. In the Colombian case, there was already a high level of corporate governance awareness when the Código País was adopted, so the legal framework and the role of institutional investors enabled the creation of a comply-or-explain code. The goal of the Código País was realistic and clear from the beginning. In the Turkish case the goal was clear, but fundamentally different from the Colombian case considering the absence of an institutional investor base to enforce a comply-or-explain code, a low level of corporate governance awareness of issuers and the need to further reform the legal framework. Thus, the goal of the CMB Principles was to serve as a step in the gradual process towards further regulation. In the case of India, the absence of realistic goals led to an ineffective Clause 49. A voluntary and ineffective code, it was subsequently replaced by a mandatory approach, which in turn was not realistically enforceable in the Indian context. Because of this, India is still working on a suitable approach to create a sound corporate governance culture and effective instruments.

193. Second, public-private dialogue is vital to achieving effective codes. The three case studies have shown that authorities (regulators) in charge of the code need to involve private sector associations, the stock exchanges and other organisations in the creation and promotion of the code. The public-private dialogue is crucial in the design of legitimate codes and a number of market participants can take on a leading role in promoting implementation of the codes. In the long-term, an inclusive approach is fundamental for creating a robust corporate governance culture.

194. Third, a coherent and consistent approach with one clear leader such as the CMB in Turkey and Superfinanciera in Colombia is essential. While in the case of India, conflicts between SEBI and the MCA undermined the effectiveness of Clause 49, the powerful and respected authorities in Turkey and Colombia were in a position to develop solid instruments of corporate governance. Moreover, the optimal allocation of monitoring and enforcement responsibilities is fundamental for effectiveness of corporate governance codes in emerging markets. If the code is a solid document on paper, but there is no credible monitoring or enforcement there is a risk that issuers adopt a box-ticking approach and ignore the substance of best practice recommendations.

195. Fourth, for a comply-or-explain code to work effectively, institutional investors need to be willing to monitor and enforce such codes themselves as well. The regulators cannot do it all. The Colombian approach to create a corresponding requirement for pension funds to incorporate compliance with the Código País in their investment decisions is an interesting example for making comply-or-explain

scheme work in countries with concentrated ownership structures. A reporting format which facilitates comparability of compliance reports can be useful for investors, regulators and issuers. In the absence of a mature institutional investor base the regulator needs to play a stronger role in monitoring and enforcement. Therefore, it has to be endowed with the necessary financial and human resources to carry out these tasks. While the CMB in Turkey had adequate resources at their disposal, one of the key reasons for the lack of monitoring and enforcement in India were the poor resources of SEBI.

196. Finally, market-wide monitoring reports are useful and should be issued annually. The Colombian case in particular shows that such reports can encourage issuers to strive towards the implementation of best practices as the rankings provide exposure. They are also useful for investors who can compare among issuers (and over time). For the regulator the elaboration of monitoring reports provides an overview of the situation and facilitates future planning. In Turkey such reports were used by the CMB to test the compliance levels of Turkish issuers before deciding to adopt a mandatory approach. Monitoring of individual companies is costly but can help foster effective implementation by issuers. In the case of Turkey, CMB professionals actively monitored the veracity of corporate governance information and advised individual issuers when they had questions on the CMB Principles. Colombia's Superfinanciera monitored the veracity and quality of information disclosed by issuers as disclosure forms the basis for enforcement of comply-or-explain codes.

197. Turkey, India and Colombia have adopted different approaches to corporate governance codes with varying degrees of success. Yet, the process itself of devising suitable codes for their markets proved to be rich in learning experiences for each country.

ANNEX 1: AUTHORITIES IN CHARGE OF CODES IN OECD COUNTRIES

Jurisdiction	Authority in charge of the Corporate Governance Code	
	Name	Type
Australia	Australian Securities Exchange Corporate Governance Council	Exchange
Austria	Austrian Working Group for Corporate Governance	Private
	Federal Ministry of Finance	Public
Belgium	Corporate Governance Committee	Mixed
Canada	Toronto Stock Exchange (TMX)	Exchange
Chile	Not applicable	-
Czech Republic	Czech National Bank	Public
Denmark	Committee on Corporate Governance	Public
Estonia	EFSA	Public
	NASDAQ OMX Tallinn Stock Exchange	Exchange
Finland	Securities Market Association	Private
France	Association Française des Entreprises Privées (AFEP) Mouvement des Entreprises de France (MEDEF)	Private
Germany	Commission of the German Corporate Governance Code	Mixed
Greece	SEV Hellenic Federation of Enterprises	Private
Hungary	Budapest Stock Exchange Company Limited	Exchange
Iceland	Iceland Chamber of Commerce	Public
	NASDAQ OMX Iceland	Exchange
	Confederation of Icelandic Employers	Private
Ireland	UK Financial Reporting Council	Mixed
Israel	Goshen Committee of Israeli Securities Authority	Public
Italy	Borsa Italiana	Exchange
Japan	Tokyo Stock Exchange	Exchange
Korea	Korea Corporate Governance Service	Mixed
Luxembourg	Luxembourg Stock Exchange	Exchange
Mexico	The Security Exchange	Exchange
Netherlands	Monitoring Commission Corporate Governance	Private
New Zealand	New Zealand Exchange	Exchange
	The Securities Commission	Public
Norway	Norwegian Corporate Governance Board	Mixed
Poland	Warsaw Stock Exchange	Exchange
Portugal	CMVM	Public
Slovak Republic	Central European Corporate Governance Association	Mixed
Slovenia	The Ljubljana Stock Exchange	Exchange
	The Slovenian Directors' Association	Private
	Managers' Association of Slovenia	Private
Spain	CNMV	Public
Sweden	The Swedish Securities Council	Mixed
Switzerland	Economiesuisse	Private
Turkey	Capital Market Board of Turkey	Public
United Kingdom	Financial Reporting Council	Mixed
United States	NASDAQ	Exchange
	NYSE	Exchange

Source: OECD

ANNEX 2: COLOMBIAN CODE (INDICATIVE SUMMARY TRANSLATION)

COUNTRY CODE – CODIGO PAIS
I. Shareholder Rights
1. Notice of the Meeting
The stockholders shall be adequately informed in the notice of the general meeting [15 working days before the meeting for ordinary meetings (Colombian Commercial Code)].
The Code recommend information regarding nominated directors and material financial information about the company and its holding and/or subsidiaries.
The Code recommends using a corporate web page to disclose the information provided.
The agenda of the meeting should clearly address the different issues to be discussed.
2. Development of the Annual Meeting
A corporate spin-off should be approved by the shareholders meeting.
The following decisions should be discussed only where they had been expressly included in the notice of the meeting: changes of the purposes of the corporation, preemptive rights, corporate legal address, anticipated liquidation and spin-offs.
The Code recommends establishing electronic mechanisms for “live” communication of the shareholders meetings with investors.
3. Authorization of Related Transactions
Required authorization of related party transactions of the corporation. Except where these operations are part of ordinary transactions or made at fair market price.
4. Shareholders Rights and Fair Treatment
The corporation should inform shareholders of rights and duties in a concise, clear and precise form.
The corporation should permanently disclose the types of authorized shares and its number of shares issued and in treasury reserved.
A shareholder meetings' set of rules is recommended.
II. Board of Directors
1. Size and Formation of the Board
The Code recommends an odd number of directors in the board.
Recommendation to have at least monthly board meetings
To have a board set of rules with mandatory requirements and disclose it to the shareholders
The code recommends that corporations define a minimum personal and professional standards for its board of directors [the standards are not defined].
The Code recommends to have a majority of external directors [understanding external directors as not employees of the issuer; notice the difference with independent directors].
2. Duties and Rights of Board Members
The Code recommends an express disclosure of directors' conflicts of interest.
The Code recommends providing all corporate information to new directors, including economic data and directors legal duties, rights and functions.
The Code recommends expressly including in the board minutes all the information used to make a board decision including: studies, documents and data.
The Code recommends providing to directors all the information required to make informed decisions within at least two days before the meeting.
Substitute directors should keep informed of the decisions made by the board.
The Code recommends including in the Board set of rules a provision allowing directors to hire external advisors or consultants. The practice also establishes that all costs associated should be budgeted and assumed by the company.
3. Responsibilities of the Board of Directors
The Code recommends having corporate governance and human resources committees in the board. [The Audit committee is mandatory (Law 964/05)]

The Human Resources Committee should have at least the following responsibilities: evaluate performance of top managers; propose candidates for external auditors to shareholders [the election of revisor fiscal (external auditor) is reserved to shareholders (Commercial Code)]; establishing a compensation policy for all employees, including top management; hire, replace and fix CEO compensation; and establish recruiting policies for top management.
The Corporate Governance Committee should have at least the following responsibilities: be responsible to disclose all corporate material information to the market; disclosing audit committee evaluations; evaluate the board performance periodically; review trading transactions of directors; and supervise the compensation policy of top management.
The Audit Committee should include in its functions: provide a written report of future transactions of the corporation with affiliates assuring fair market value and not harm to minority rights; establish the corporate accounting policies; create reporting mechanisms to the board of directors.
III. Disclosure of Financial and Non-Financial Information
1. Request of Information
The Code recommends having a formal and permanent mechanism to provide corporate information to investors.
In cases in which the information provided to an institutional investor could give him any advantage, it is recommended to disclose this information to the rest of the market.
The Code recommends allowing "special audits" requested by investor groups.
Regarding the above practice, the Code recommends having a corporate formal commitment to protect minority shareholders rights. The corporation should disclose the policy regarding "special audits" including: the percentage required; the reasons for establishing this percentage; the requirements for having "special audits"; and who should pay for them.
2. Market Disclosure
The corporation should have mechanisms to disclose material findings of internal controls to the market.
The corporation should disclose the compensation policy for CEOs, directors, auditors and consultants.
The corporation should disclose all contracts between its directors and managers including their family and business partners.
The corporation should disclose its internal rules for resolving conflicts.
The Code recommends disclosing corporate policies regard executives' trading.
The corporation should disclose the resume of managers, directors and internal control officers.
3. External Auditor (Revisor Fiscal)
The Code recommends not hiring auditors or auditing firms that receive more than 25% of its total income from the corporation or its subsidiaries.
The Code recommends not hiring auditor firms for services other than auditing.
A rotation policy for partners of the auditing firm every five years.
IV. Dispute Resolution
The Corporation should disclose to its shareholders the judicial rights to protect their interests. [Law 446 gave judicial power to the Financial Superintendence to protect minority shareholders groups].
The Code recommends that every corporation should have a mechanism to resolve controversies between the company and its shareholders, shareholders against directors or between shareholders.

Source: OECD

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