Représentant les avocats d'Europe
Representing Europe's lawyers

CCBE RESPONSE TO THE EUROPEAN COMMISSION CONSULTATION ON BOARD RESPONSIBILITIES AND IMPROVING FINANCIAL AND CORPORATE GOVERNANCE INFORMATION

Conseil des Barreaux de l'Union européenne – Council of the Bars and Law Societies of the European Union
association internationale sans but lucratif
Avenue de la Joyeuse Entrée 1-5 – B 1040 Brussels – Belgium – Tel. +32 (0)2 234 65 10 – Fax.+32 (0)2 234 65 11/12 – E-mail ccbe@ccbe.org – www.ccbe.org

CCBE RESPONSE TO THE EUROPEAN COMMISSION CONSULTATION ON BOARD RESPONSIBILITIES AND IMPROVING FINANCIAL AND CORPORATE GOVERNANCE INFORMATION

The Company Law Committee of the CCBE has discussed the above mentioned consultation document.

The CCBE has come to the conclusion that it would be best to comment on the consultation document not by means of simple yes or no but by commenting in a more detailed form as follows, observing the sequence of the questions of the on-line consultation.

1. The CCBE represents over 700,000 lawyers through their national bars and law societies in the EU and the EEA.

2. The CCBE shares the view of the Commission that the principle of board members' collective responsibility for financial statements and key non-financial information should be confirmed at European level, subject to the comments below.

2.0 The term "responsibility" which is understood to mean civil responsibility, should be defined at community level, in the sense of a minimum standard definition. This should clearly be so with respect to listed companies. As regards unlisted companies the CCBE sees a need for differentiation by size of the company in question; it being understood that in this context the criteria known from other Directives could be used.

When defining civil responsibility the interconnection with questions 2.5 and 2.6 should be borne in mind.

2.1 and
2.2 Notwithstanding the fact that the duties may be the same, the responsibility for failure to discharge such duties should indeed be differentiated between management board members and supervisory board members, and between executive and non-executive board members respectively. The differentiation would also depend on the way in which the responsibility is structured (strict responsibility or responsibility for negligence) and on the kind of information (financial and non-financial).

2.3 Board members should be allowed to limit their responsibility by disclosing their disagreement with the documents prepared under their responsibility.

2.4 Board members' responsibility should also cover the following kinds of non-financial information:

- company's risk management system

- corporate governance statement.

Investment plans and strategies in technical, organizational and human resources areas are more of a managerial nature and therefore in the view of the CCBE should not be subject to the responsibility of all board members for non-financial information.

2.5 Board members should be responsible (in the sense of civil liability for damages) primarily to the company. Only in exceptional cases when the company itself fails to enforce the aforesaid responsibility, should there be responsibility to all shareholders or to groups of shareholders holding a certain percentage of the company. If all shareholders or groups of shareholders holding a certain percentage are under certain circumstances entitled to enforce the

responsibility it should be specified whether the enforcement is individual for each shareholder or must be collective. The result of enforcement should in all such cases enure to the benefit of the company. The CCBE is not in favor of a US type class action, however wishes to point out that there are discussions in several Member States regarding the introduction of a possibility for collective enforcement by shareholders to the benefit of the company. Detailed legislation on this issue exists in article 28 Investment Fund Law of Switzerland according to which the court may appoint a proxy to represent investors if prima facie evidence has been given that there are liability claims for payment to the investment fund. What should be avoided by all means is to open the possibility for a rat race between shareholders for their own pockets.

The introduction of a board member responsibility towards all stake holders (i.e. employees, creditors etc.) in the view of the CCBE would be too broad. However, there could be cases where some of the aforesaid exceptions could be applicable not only in the case of shareholders but also of other stake holders, for instance in cases where the creditors cannot obtain satisfaction on their claims from the company itself.

In any case, in the mind of the CCBE it should be clear that, in spite of the aforesaid room for exceptions, the responsibility of board members is primarily to the company.

Nothing of the foregoing should limit responsibility under general civil law.

2.6 The CCBE has difficulties in understanding the meaning of the term “common sanctions”. If it means civil responsibility for damages (i.e. in the sense of civil responsibility in question 2.5) or non-criminal sanctions such as disqualification as a director, the CCBE agrees with a common community level, again in the meaning of a minimum standard. The CCBE however would not agree to common sanctions at community level in the sense of criminal law sanctions since the EU has no competency in the area of criminal law.

In connection with common sanctions at community level the CCBE sees a need to ensure that the disqualification as a director ordered in one Member State is recognized in the other Member States so that a director after he has been disqualified in one country, cannot simply move to another country and continue his activities as a director of a company in the new country.

2.7 There should be responsibility for providing all relevant information to the auditors on the part of members of the management board and on the part of executive directors, however not necessarily on the part of members of the supervisory board and on the part of non-executive directors.

3.0 Transactions with the related parties should be disclosed in the financial statement both at the respective company level and at group level.

3.1 Community law should provide for common minimum standard definitions for

- related party
- material transactions
- special purpose vehicles
- other concepts referred to in this section.

3.2 Equivalent requirements should apply to listed parent companies. As regards unlisted parent companies the answer would depend on the definition and the size of the company.

3.3 Companies when drawing up their individual accounts should indeed disclose their material transactions with related parties such as special purpose vehicles and companies incorporated off-shore, including their precise economic purpose.

3.4 Material transactions with related parties that are directly or indirectly controlled by the parent company of a group should be disclosed.

3.5 Whether material transactions with related parties that are significantly influenced by board members of the parent company or any other company of the group, should be disclosed depends on the definition of significant influence. Positive action would be likely to be considered a significant influence. In the case of a passive investment a minimum percentage should be required, like in article 33 of the 7th Directive.

3.6 The key financial figures of the most important group companies should be disclosed in the consolidated accounts of a listed parent company.

3.7 to 3.9 The answer of the CCBE is in all cases yes, with the proviso that in 3.7 and 3.8 there should be an exception for immaterial items, just like in 3.9 disclosure requires significant sales of assets.

3.10 The nature and extent of cash management agreements should indeed be disclosed.

3.11 and 3.12 The above described intra group relations and transactions with related parties should be disclosed both in the notes to the account (on an aggregate sum basis) and in the details in the annual report.

3.13 There are many types of agreements with effects similar to cash management agreements, e.g. toll production agreements covering the full capacity of the producer and rights over cash agreements. These agreements should also be disclosed.

4.1 The CCBE answers both questions with yes.

4.2 Same.

4.3 Here, too, the answer is yes, it being understood that the information about shareholders rights is to be given not only to cross-border investors but also to domestic investors.

4.4 The answer of the CCBE is yes, provided there is a reasonable definition of controlling shareholders, such as in the Transparency Directive.

4.5 The answer of the CCBE is yes.

4.6 The answer is yes, depending on the definition of significant transactions and of controlling shareholder.

4.7 The CCBE at the moment sees no other element to be included.

4.8 The corporate governance statement should be disclosed in the annual report (not in the notes to the annual accounts since statement is not really of financial nature).

4.9 Yes, provided the company has a website.