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CCBE RESPONSE TO THE EUROPEAN COMMISSION CONSULTATION ON THE ROLE OF INDEPENDENT DIRECTORS

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The Company Law Committee of CCBE (Council of the Bars and Law Societies of the European Union) would like to comment on the above mentioned consultation document a follows:

In summary, as a matter of principle, the CCBE, which represents over 700,000 European lawyers through their national bars and law societies in the EU and the EEA, supports the approach taken by the consultation document, namely in particular to issue

- a Recommendation to Member States
- to introduce in their national framework, as far as listed companies are concerned,
- on a comply or explain basis
- a set of detailed principles derived from minimum standards as defined in the Recommendation.

The following comments are made with regard to certain specific paras of the Consultation Document.

1.1 The CCBE shares the view that the Recommendation would have to be based on Article 211 (and not Article 44) of the EC Treaty.

1.2 Addressees of the Recommendation should be, for the reasons outlined by the Commission, only the Member States. Private actors should be neither sole addressees nor co-addressees.

1.3 The CCBE shares the view that the Recommendation should invite Member States to introduce in their national framework, on a comply or explain basis at the minimum, a set of detailed principles inspired by the minimum standards presented in the Recommendation to be used by listed companies, with Member States being free to use the best suited legal vehicle (company law, security law, listing rules etc.) to achieve the ultimate goal that listed companies will be required to disclose whether they comply with the detailed principles adopted by an appropriate body at national level and to explain any deviations.

The Commission suggests that listed companies in this context should be companies that are incorporated in the respective Member State and listed in the EU. This could give rise to a potential problem where, for example, companies from different jurisdictions are listed in another Member State (e.g. companies from France and Germany are listed in the UK). If Member States adopt different approaches to the Recommendation, companies whose shares are listed in the same country on the same exchange will be subject to different disclosure requirements. This could be confusing for investors in those companies. It might be helpful, in such cases, to allow Member States to permit a company incorporated in that Member State but listed in another Member State to comply with the requirements of that other Member State. The Commission may wish to consult with the competent authorities for listing in the various Member States to see if this would be helpful.

The CCBE would like to raise the question whether the Recommendation should also apply to companies incorporated in a Member State and listed in the EEA.

The CCBE supports the view of the Commission that Member States should be completely free to decide to go further than the comply or explain approach and/or to decide to cover also non-listed companies incorporated in the respective Member State.

1.4 The CCBE agrees with the implementation and follow-up proposal suggested by the Commission.

2.1.1 The CCBE shares the suggestion by the Commission that the Recommendation should be drafted in such a way that Member States are not prevented from extending all or some of the standards set out to all or some categories of non-listed companies.

2.1.2 The position taken by the Commission, namely that it would not be appropriate to cover non-EU companies listed in the EU because they have to comply with their domestic laws and regulations, is quite different from the principles followed by the Sarbanes Oxley Act. Of course, the objective of the Recommendation aims at influencing the way in which listed companies are organized which objective goes further than the simple provision of information. However, this aspect has not prevented the US legislator to submit also non-US companies, provided they are listed in the US, to the organizational provisions of the Sarbanes Oxley Act. The CCBE notes that the proposed Auditors' Directives would subject to the requirement of EU registration also non-EU auditing firms. The CCBE thinks that it would be inconsistent if the same approach (namely to cover also non-EU entities) were not to be followed in the proposed Recommendation. This may lead to the difficulties that are known from the application of the Sarbanes Oxley Act to non-US companies. Yet, these difficulties should be addressed in the Transatlantic Dialogue as in the case of the difficulties that already today follow from existing differences in legal provisions on both sides of the Atlantic. The CCBE sees the risk that the EU will not be able to reach an eye to eye negotiation position vis-à-vis the US unless non-EU companies with listing in the EU are included in the scope of the Recommendation. There are additional considerations that speak in that direction, too. The content of the Recommendation regarding the organization of listed companies serves the purpose of protecting investors and the confidence of the public at large in the integrity of the capital markets and of the issuers in particular. Seen from that angle it should make no difference whether the company listed in the EU is an EU company or a non-EU company.

2.2.1 The CCBE shares the view that the role of non-executive and supervisory directors should be fostered so that there is an overall balance of executive/managing and non-executive/supervisory directors.

2.2.2 The CCBE also agrees that the number of independent directors on the board should be adequate in relation to the total number of non-executive or supervisory directors and significant in terms of representativeness. The CCBE notes that Greece has recently introduced legislation, according to which the board of a listed company must have at least two independent non-executive directors.

2.2.3 The CCBE thinks that the comply or explain principle should be applicable in case the offices of the chairman and of the CEO are not separated.

2.2.4 The CCBE agrees that the creation of nomination, remuneration and audit committees within the (supervisory) board should be recommended as best practice.

2.2.5 The CCBE agrees that the committees as a matter of principles shall have the power to make recommendations only unless the (supervisory) board delegates properly defined decision making power to them.

2.2.6 The CCBE also agrees with the suggestion that companies should be free, on a comply or a explain basis, to have less than the aforesaid three committees. This will give in particular companies from some of the new Member States (e.g. Poland) the possibility to continue present corporate practice.

2.3.1 The CCBE considers of particular importance the proposal that the annual report should include a profile of the board's composition and an explanation as to why individual directors are qualified to serve on the board.

2.3.2 The CCBE agrees that before a board appointment is made other significant commitments (and the time devoted to them) should be disclosed and that the board should be informed of subsequent changes. All such information should be collected on an annual basis however the CCBE has some reluctance to have all of such information disclosed publicly and published in the annual report. Already today there exists the obligation to publish other directorships which is important an obligation for the purpose of transparency of potential conflicts of interest. To ensure that the necessary time can be devoted to the given board membership does not require the disclosure of other non-director commitments. Apart from that, the disclosure of such other commitments could lead to serious problems of confidentiality and professional secrecy.

2.3.3 The CCBE agrees with the minimum criteria for independence, it being understood that these criteria would apply only to those (non-executive or supervisory) board members that are to have the status of independent directors. Based on practical experience the CCBE considers it very important that the independent directors are given the right and obligation to express their opposition to a decision of the majority of the (supervisory) board that they find may harm the company, not only in the minutes of the board meeting but - at least in serious cases – also in the report to shareholders.

2.4 The CCBE is in general agreement. As regards 2.4.5 in particular, the CCBE notes that in some Member States non-members of a committee are entitled to attend committee meetings out of their own right and not only at the invitation of the Committee. The CCBE thinks that this question lies outside the scope of the minimum standard approach and that the appropriate answer to it may be dependent on whether the committee has the power to make recommendation only or the power to make also decisions on behalf of the full board. The same distinction may have to be made in 2.4.6 (availability of the chairman of each committee to answer shareholders' questions at the general meeting).

2.5 to 2.7 The CCBE is in general agreement, it being understood that a final position can only be taken when the detailed language is available. The CCBE suggests that the Recommendation should also address the question whether and to what extent shareholders by resolution outside the Articles of Association/Statutes may give standing determinations to the committees, in particular in the area of remuneration.