



Newsletter # 15

October 2008

- Corporate Governance in Europe – Directors' voice -

THIS ISSUE AT A GLANCE

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Several aspects of the UK's Rules can be regarded as "gold-plating", i.e. additional or more stringent measures in comparison with the Transparency Directive. However, these measures are reflective of existing UK listing rules. Furthermore, UK rules have been retained or implemented with the support of UK market participants. Consequently, they do not appear to represent a form of gold-plating that poses a threat to the competitiveness of UK companies or investors.

For more information:

<http://www.ecoda.org/docs/Transparency%20directive%20consultation.pdf>

ecoDa's News

On the 22 October 2008 ecoDa is organizing Round table discussion Executive pay: getting it back on track. The debate will focus on relevant questions from a board of directors' perspective, such as the role of independent directors in remuneration committees. The question of the board's responsibilities in setting remuneration policies and remuneration levels will also be raised. The board's interaction with shareholders, when it comes to informing them about remuneration will equally receive special attention. Finally, the panel will point out that such governance measures could foster a long term success of the company.

For more information:

<http://www.ecoda.org/docs/ecoda%20Forum%20programme.pdf>

ecoDa (European Confederation of Directors' Associations) and IoD (Institute of Directors) responded to the Commission's consultation on stricter national measures (gold-plating) in relation to the Directive on Transparency Requirements For Listed Companies.

European News

CORPORATE GOVERNANCE CODES

On 2 August 2008 the Commission issued call for tender for study on monitoring and enforcement practices in corporate governance in the Member States. The objectives of the study are to describe the relationship, in the 27 Member States, between legislation and 'soft' law in corporate governance; to examine the existing monitoring and enforcement mechanisms in the Member States as far as corporate governance codes are concerned and to evaluate their effectiveness; to obtain an impression of the companies' perception of the codes; and to evaluate the perception of EU shareholders as to the quality of companies' disclosure on the application of corporate governance principles and of explanations given where the company declares not to comply, and of their reactions to disclosure perceived as insufficient. The deadline for the submission of proposals expired on 19 September 2008.

For more information:

http://ted.europa.eu/Exec?DataFlow=N_one_doc_access.dfl&Template=TED/N_one_result_detail_curr.htm&docnumber=199639-2008&docId=199639-2008&StatLang=EN

On 5 September 2008 the deadline for national implementation of the requirement for listed companies to include the corporate governance statement into their annual accounts as it is required by Directive 2006/46/EC has expired.

The CG statement shall contain at least the reference to the CG code to which the company is subject and/or the CG code which the company may have voluntarily decided to apply, and/or all relevant information about the CG practices applied beyond the requirements under national law. If the company departs from CG code or decides not to apply any provisions of such code it shall provide an explanation to which parts of the CG code it departs from and the reasons for doing so.

For more information:

http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_224/l_22420060816en0010007.pdf

EXECUTIVE COMPENSATION

On 7 October 2008 ECOFIN adopted conclusions on executive pay tighten rules on excessive payoffs or 'golden parachutes' for top executives. The recommendations provide that governments shall have a say in determining pay packages for senior executives, remuneration should "correctly and exhaustively" reflect performance, golden parachutes should be linked in an appropriate way to an executive's contribution to the success of the company and that remuneration systems shall encourage the long-term profitability of companies and not incentives focused on short-term profits.

For more information:

http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ecofin/103205.pdf

On 13 June 2008 Parliament's ECON committee adopted the Report by van den Burg and Daianu titled "Lamfalussy follow up - Future structure of supervision". The report calls to: ensure financial institutions disclose their remuneration policy, in particular remuneration and compensation packages of directors and stock related performance based elements for other employees; ensure that all transactions involving management can be clearly identified in the financial statements; ensure prudential

supervisors include in their assessment of risk management the influence of remuneration, bonus schemes to ensure that they contain balanced incentives and do not encourage extreme risk taking.

For more information:

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-407.901+01+DOC+PDF+V0//EN&language=EN>

SMALL BUSINESS ACT

On 25 June 2008 the Commission adopted the communication "Think Small First - A "Small Business Act" for Europe": a package of political principles accompanied by a set of ambitious actions by the EU and Member States. The SBA aims to promote entrepreneurship, make legislation SME-friendly and help SMEs to grow. The main initiatives are: the adoption of Statute for European Private Company, creation of better financing options by European Investment Bank, development of new code of best practice for public procurement, new general block exemption regulation to allow a higher level of state aid to smaller companies, revision of the Late Payments Directive, reduction of VAT etc.

For more information:

http://ec.europa.eu/enterprise/entrepreneurship/sba_en.htm

PRIVATE EQUITY – HEDGE FUNDS

Having approved Lehne report on transparency of institutional investors and Rasmussen report of hedge funds and private equity European Parliament calls on the Commission to submit a legislative proposal or proposals on the transparency of hedge funds and private equity and proposal covering all relevant actors and financial market participants, including hedge funds and private equity. However, the Commission shows reluctance in regulating hedge funds and private equity.

For more information:

<http://www.europarl.europa.eu/oeil/file.jsp?id=5558482>
<http://www.europarl.europa.eu/oeil/file.jsp?id=5558452>
<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/451&format=HTML&aged=0&language=EN&guiLanguage=en>

SIMPLIFICATION OF THE COMPANY LAW

On 25 September 2008 the Commission tabled the proposal on the simplification of the 3rd and 6th Company Law Directives (Mergers and Divisions). The Proposal aims at:

- reducing the reporting requirements of companies in the case of mergers and divisions, in particular where shareholders decide that certain reports are not needed and in the context of so-called "simplified" mergers and divisions between parent companies and their subsidiaries;
- avoiding double reporting where reporting requirements also result from other EU rules; and
- introducing the possibility for companies to use the Internet and electronic mail in order to publish the draft terms of merger or division and to provide shareholders with the documentation required.

For more information:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1407&format=HTML&aged=0&language=EN&uiLanguage=en>

TRANSPARENCY OF SHAREHOLDINGS

On 22 August 2008 the Commission's Legal Certainty Group has put forward solutions to legal barriers related to the cross-border holding and settlement of securities. The solutions shall lead to an improved and harmonised legal framework for holding and settlement of securities through intermediaries and for the processing of corporate actions.

For more information:

http://ec.europa.eu/internal_market/financial-markets/docs/certainty/2ndadvice_final_en.pdf

CREDIT RATING AGENCIES

The Commission is working on the credit rating agencies regulation. The policy is likely to involve a legislative framework for credit rating agencies comprising both a set of legal obligations to be complied with by CRAs as well as independent external oversight. Commission also considers policy options to address the problem of excessive reliance on credit ratings.

For more information:

http://ec.europa.eu/internal_market/consultations/docs/securities_agencies/consultation-cra-framework_en.pdf
http://ec.europa.eu/internal_market/consultations/docs/securities_agencies/consultation-overreliance_en.pdf

AUDIT

On 29 July 2008 the Commission adopted a decision granting a transitional period for the registration requirements for audit firms from 30 non-EU countries. These audit firms are allowed to continue their audit activities regarding third country companies listed on European markets until 1 July 2010. However, transition will only be granted if third country

audit firms comply with the minimum information requirements necessary for investors in Europe. Audit firms from third countries that do not fall under the transitional regime will be subject to full registration and oversight by the competent EU Member State. Common application forms for the registration of third country auditors and audit firms are available.

For more information:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:202:0070:0073:EN:PDF>

On 24 July 2008 adopted the working document on implementation of 8th directive of Company Law Directive regarding statutory audits of annual accounts and consolidated accounts (Doorn Report). The report aims to verify if the Directive itself, the implementation of the Directive in the Member States and the measures of the European Commission are sufficient to meet the general objectives of the Directive

For more information:

http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dt/736/736155/736155en.pdf

The Commission published the Scoreboard on the transposition of the Directive on Statutory Audit (2006/43/EC). The scoreboard shows that twelve Member States completed the entire implementation of the Directive to date. Most of the other Member States have transposed major parts of the Directive but are still missing some important provisions.

For more information:

http://ec.europa.eu/internal_market/auditing/docs/dir/scoreboard_en.pdf

ACCOUNTING

On 29 September 2008 the Commission proposed to exempt micro entities from the accounting requirements. The Commission intends to review and modernize the Accounting Directives. This would be piecemeal changes- simplify the requirements for publication, disclosures and even the layout of the balance sheet.

For more information:

<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/589&format=HTML&aged=0&language=EN&uiLanguage=en>

FINANCIAL MARKETS

Commission proposed a revision of bank capital requirements rules. Under the new rules, banks will be restricted in lending beyond a certain limit to any one party, while national supervisory authorities will have a better overview of the activities of cross-border banking groups.

For more information:
http://ec.europa.eu/internal_market/bank/regcapital/index_en.htm

Parliament's ECON committee adopted the formal request for the Commission to introduce legislation to improve financial market supervision. It includes the regulation of the structure of Level 3 committees and reform of the present mechanisms for managing of systemic risks.

For more information:
http://www.europarl.europa.eu/pdfs/news/expert/infopress/20080910IPR36907/20080910IPR36907_en.pdf

PROSPECTUSES

On the 25 August the Commission published a Study on the Impact of the Prospectus Regime on EU Financial Markets. Overall, the assessment is positive; however, number of areas where the regime does not work efficiently is identified. The most important issues for change identified are the abolition of Article 10 on the preparation of an annual document as it duplicates requirements under the Transparency Directive, reducing the burdens associated with Article 11 on incorporation by reference and clarifications to the definition of a "public offer" to reduce legal uncertainty surrounding the retail cascade. In addition, the current exemption thresholds might be altered so as to reduce burdens on issuers.

For more information:
http://ec.europa.eu/internal_market/securities/docs/prospectus/csес_report_en.pdf

CESR published additional common positions regarding the Prospectus Directive:

For more information:
http://www.cesr-eu.org/index.php?page=home_details&id=301

ESME advises the Commission to abolish the requirement of Article 10 of the Prospectus Directive to annually provide document with an overview on all available information published according to various laws as it duplicates equivalent requirement of the Transparency Directive.

For more information:
http://ec.europa.eu/internal_market/securities/docs/esme/position_prospectus_directive_en.pdf

TRANSPARENCY

The Commission is conducting the study on application of Transparency obligations. The study will evaluate the perception of stakeholders of the directive obligations and compare these obligations with similar obligations regarding disclosure, dissemination and storage of regulated information in major third countries. Finally it will provide an analytical conclusion, focusing on the effectiveness of the rules regarding the selected issues referred to above.

For more information:
http://ted.europa.eu/Exec?DataFlow=N_one_doc_access.dfl&Template=TED/N_one_result_detail_curr.htm&docnumber=160497-2008&docId=160497-2008&StatLang=EN

EUROPEAN CORPORATE GOVERNANCE FORUM

On 30 July 2008 ECGF published its Annual Report for 2007. ECGF mainly worked on questions of proportionality between capital and control, impact of the activities of hedge funds and private equity on corporate governance, the disclosure of derivative positions and the Commission's work in the area of shareholders' rights.

For more information:
http://ec.europa.eu/internal_market/company/docs/ecgforum/ecgf-annual-report-2007_en.pdf

EUROPEAN PRIVATE COMPANY

The Commission presented a proposal for a Statute on a European Private Company ('SPE'). SPE will be a limited liability company which shares would not be publicly traded on any market. SPE does not have minimal capital requirement.

SPE can have a single director or several directors, a one-tier or a two-tier board system. However, if the SPE is subject to employee participation, the chosen management structure must allow for the exercise of this right. The shareholders of the SPE decide on the appointment and removal of directors.

Directors have a duty of acting in the best interests of the company which is owed to the SPE and may only be enforced by the company itself. A general standard of care is the care and skill reasonably required in the conduct of business.

Directors are required to avoid any actual or potential conflicts of interests. The Regulation establishes *directors' liability* for any loss or

damage suffered by the SPE due to the breach of their duties deriving from the Statute, articles of association or a resolution of shareholders. However other aspects of liabilities, e.g. the consequences of the breach of duties or any business judgement rule, are governed by national law.

For more information:

<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/517&format=PDF&aged=0&language=EN&guiLanguage=fr>

News from European Countries

Spanish Instituto de Consejeros – Administradores (IC-A) launched in 2005 the "Principles of Good Corporate Governance for Unlisted Companies-Spain" with a great success. Recently the Code has been revised and a self evaluation questionnaire has been adopted

The aim of this voluntary Code is to provide unlisted companies that are considering creating a Board of Directors, to Administrators and to Directors, principles on Good Corporate Governance with precise characteristics for unlisted companies. This Good Practices Code covers the possible creation of Advisory Boards and its fit with the Board of Directors. It also takes into account the Business Family and its characteristic in a specific analysis with detailed recommendations.

In UK the new provisions on directors' conflict of interest duties laid down in the Companies Act 2006 come into force in October 2008. Under the new rules, a director of a company must avoid a situation in which he or she has, or could have, a direct or indirect interest that conflicts with the interests of the company. This applies, in particular, to the exploitation of any property, information or opportunity by the director, irrespective of whether the company itself could take advantage of it. Directors shall not accept benefits from third parties that are offered to them because they are directors, or because they have done (or not done) something as a director. Directors shall declare to other directors the nature and extent of any personal interest they have in any transaction or arrangement that their company proposes to enter into. The declaration must be made at a meeting of the directors, or by notice in writing, or by general notice. However, a director need not declare an interest if it cannot reasonably be regarded as likely to give rise to a conflict of

interest, or if the other directors already know about it.

AFEP/MEDEF issued the Recommendations on the remuneration of executive officers of companies whose securities are traded on a regulated market. The Recommendations supplement and clarify the AFEP-MEDEF code of corporate governance and shall be applied at "comply or explain" basis. The French text and English translation will be soon available on MEDEF web-site
<http://www.medef.fr/main/core.php>

News from out-side EU

OECD released the report Using the OECD Principles of Corporate Governance: A Boardroom Perspective. The report consists of the comments of the business leaders on the practical implementation of the Code's recommendations.

For more information:

<http://www.oecd.org/dataoecd/20/60/40823806.pdf>

The U.S. Securities and Exchange Commission issued a Roadmap that could lead to the use of International Financial Reporting Standards (IFRS) by U.S. issuers beginning in 2014. Currently, U.S. issuers use U.S. Generally Accepted Accounting Principles (U.S. GAAP). The Commission would make a decision in 2011 on whether adoption of IFRS is in the public interest and would benefit investors. The proposed multi-year plan sets out several milestones that, if achieved, could lead to the use of IFRS by U.S. issuers in their filings with the Commission.

For more information:

<http://www.sec.gov/news/press/2008/2008-184.htm>

The 700 bil USD financial institution bail-out plan *inter alia* foresees the imposition of restrictions on executive pay for banks involved in the programme, however, the shareholders are not given a vote on pay.

For more information:

<http://thomas.loc.gov/cgi-bin/bdquery/z?d110:H.R.1424>

The U.S. Securities and Exchange Commission has approved another one-year extension of the deadline for smaller public

companies to comply with the Section 404(b) auditor attestation requirement of the Sarbanes-Oxley Act.

For more information:

<http://www.sec.gov/rules/interp/2007/33-8810.pdf>.

United Nations Human Rights Council adopted resolution which proposes that corporations shall bear the "responsibility to respect human rights," that the State has a "duty to protect" against human rights abuses by companies, and that both the State and businesses must provide more effective access to remedies for human rights violations. Recommended framework could impose on businesses an array of expansive obligations that require close attention by corporate management and boards. To discharge their responsibility to respect human rights, corporations would be required to conduct a broad due diligence process "to become aware of, prevent and address adverse human rights impacts," purportedly in the same way as corporations already must "assess and manage financial and related risks."

For more information:

http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_7.pdf

<http://blogs.law.harvard.edu/corpgov/files/2008/05/a-united-nations-proposal-defining-corporate-social-responsibility-for-human-rights.pdf>

Events Calendar

7th European Company Law and Corporate Governance Conference (under the French presidency)

October 17, Paris



**ecoDa Round table discussion
Executive pay: getting it back on track
October 22nd, Brussels**

Contact: olivia.vernaux@ecoda.org



**RILE - VIPE Conference
"Changing Perspectives on Corporate Law
and Economics"**

November 6, Rotterdam

http://www.frg.eur.nl/english/rile_vipe_conference_2008/



**DG Internal Market and Services
Conference on reviewing Market Abuse
regime**

November 12, Brussels

http://ec.europa.eu/internal_market/curities/abuse/12112008_conference_en.htm



**DG Internal Market and Services
Conference on the Markets in Financial
Instruments Directive 2004/39/EC
(MiFID)**

November 13, Brussels

http://ec.europa.eu/internal_market/curities/isd/conference_en.htm



**ICGN Mid-year meeting
Back to the Future: The New Agenda for
Global Corporate Governance**

December 9-10, Wilmington, Delaware

<http://www.icgn.org/conferences/2008/delaware/>



**International Auditing Conference with
third countries- Better cooperation
between public oversight systems**

December 10, Brussels

http://ec.europa.eu/internal_market/auditing/docs/relations/10122008_programme_en.pdf

Related documents



Presentation and speeches at the transatlantic CG conference:

<http://www.ecgi.org/tcgd/2008/presentations.php>



"Pass the Parcel Leadership", Governance,

<http://www.governance.co.uk/current/2008/200808-ed1.htm>



"Securities Class Action Litigation: The problem, its impact and the path to reform", U.S. Chamber

Institute for Legal Reform Report, July 2008

<http://www.instituteforlegalreform.com/issues/docload.cfm?docId=1213>



"The Financial Impact of Sovereign Wealth Fund Investments in Listed Companies", Fotak, Bortolotti, Megginson, Working paper

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1148336



Shareholder Activism and the "Eclipse of the Public Corporation": Is the Current Wave of Activism Causing Another Tectonic Shift in the American Corporate World?

<http://blogs.law.harvard.edu/corpgov/files/2008/06/shareholder-activism-and-the-eclipse-of-the-public-corporation-is-the-current-wave-of-activism-causing-another-tectonic-shift-in-the-american-corporate-world.pdf>



Ignazio Angeloni, Testing Times for Global Financial Governance,

http://www.bruegel.org/Public/Publication_detail.php?ID=1170&publicationID=8809

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