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Internal Market DG

FINANCIAL MARKETS

Company law, corporate governance and financial crime

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European Corporate Governance Forum

Minutes of the meeting of 1 June 2006

1. APPROVAL OF THE AGENDA

The agenda was approved without discussion.

2. APPLICATION OF THE COMPLY-OR-EXPLAIN PRINCIPLE IN EUROPE - MONITORING OF THE APPLICATION OF THE PRINCIPLE IN THE MEMBER STATES

The Forum agreed that contacts should not be limited to the persons and bodies indicated by the Member States following a request from the Commission services but that in addition other bodies should be addressed. This would be e.g. in IT the CONSOB, in IE the Office of the Director of Corporate Enforcement (ODCE), in FR the AMF, AFEP and MEDEF, in ES the National Securities Market Commission, in BE the Banking, Finance and Insurance Commission (CBFA). Furthermore, in general all stock exchanges and regulatory authorities should be addressed. It was stressed that the emphasis of the letter should be on clarifying that the main purpose would consist in an exchange of information that would benefit also the bodies in question by providing them with information how certain problems are addressed in other Member States. Using the word "monitoring" could lead to misunderstandings as the implementation codes established by private entities would normally not be monitored by public bodies.

The Forum agreed that on the basis of the replies received it would identify those bodies with which a more intensive contact could be established. Also a meeting with representatives could be envisaged. However, members agreed that it should be clarified that there is no intention to establish an EU code or to exercise any supervisory function at EU level.

The replies received will be valued by a small working group that will report back to the Forum at its next meeting.

3. PROPORTIONALITY OF CAPITAL AND CONTROL: STATE OF PLAY

The Chairman informed the Forum that the call for tender for an outside study on the subject had been published in April and thanked the members for the input they had provided to the services of DG MARKT. The offers are opened on 6 June. The Commission, once the contract has been concluded, will suggest the contractor to involve the members of the working group set up at the last meeting into the work on the study. This would ensure that best use is made of the expertise available inside the Forum.

The Forum took note of the intentions of the incoming Finnish Council Presidency to organise a Corporate Governance Conference that will also address this issue. It was confirmed that the Forum will continue to follow the issue also after completion of the study. Another conference on the subject could be envisaged at that stage, depending on the outcome of the study.

4. THE ROLE OF EMPLOYEES AS STAKEHOLDERS IN CORPORATE GOVERNANCE

A member reported on the outcome of the conference organised by the European Trade Union Confederation (ETUC) on 19 May. The organisation of a conference on Corporate Governance emphasizes the growing interest in the subject on the sides of ETUC and the trade unions in the Member States.

For the trade unions, the point of departure is the fact that employees who spend a considerable part of their life time at their workplace and normally depend financially completely on the company are in a particular situation vis-à-vis the latter. This is recognised by Member States' laws on co-decision, consultation and information procedures. In the view of the trade unions it is important that the process of enhancing corporate governance in the Member States takes into account the body of acquired rights in the field and does not lead to a dilution of these rights. For example, the trade unions see a need for ensuring that in the forthcoming proposal for a 14th Directive on the transfer of a company's seat appropriate room is left for information and consultation processes, that appropriate mechanisms for the protection of whistleblowers are established, a special investigation right for employees is introduced and Commission proposals in the field of company law and corporate governance be preceded by a consultation process pursuant to Art. 138 of the Treaty. More generally the trade unions would very much welcome the EU encouraging Member States to promote employees involvement at company level although leaving to national legislation and social partners agreements to define its modalities.

In reaction to the presentation, a number of other members pointed out to possible risks of including employees or other stakeholders into the corporate governance debate. In some cases, their interests are used by the management as excuse for following its own line and acting contrary to the interests of the shareholders. This can even result into being detrimental for the employees who increasingly are shareholders themselves, either directly or through their pension funds. One member also pointed out to the OECD principles that deal with the role of employees only in very general terms and took the view that the Forum should stay within that framework.

Another member stressed that in the long term the success of the company would to a large extent rely on its employees and supported the view that the Forum should take account of corporate social responsibility. However, the question would be whether they

would dispose of the right tools given that the introduction of more and more procedures on worker participation in the end would not lead to any benefit in practice.

It was agreed that the Chairman and some members will discuss the question how the Forum could approach this subject, at least under a corporate social responsibility perspective.

5. STATEMENT FROM THE FORUM ON INTERNAL CONTROL

The Forum agreed on the text of a statement on internal control and risk management in EU companies. The statement also takes account of the most recent discussions of the US SEC that show a tendency of moving away from giving guidance to auditors to providing guidance to the management.

The statement will be published with a short press release from the Forum.

6. PRESS POLICY

The Forum addressed the question how its messages can be best conveyed to the outside with the Spokesperson of Commissioner McCreevy. There was agreement that a mere publication on the Commission's website would not lead to reaching a sufficiently broad public.

The Forum decided therefore to set up a longer term planning of its work in order to allow for a proper preparation of the publication.

7. DISCLOSURE OF INVESTORS' IDENTITIES

The point was discussed over lunch in presence of Commissioner Charlie McCreevy.

One of the members introduced the subject emphasizing three aspects:

- The increased use of derivatives (such as options) and other devices (such as stock lending) makes it increasingly difficult for the management of companies to identify the persons who in reality own the company. This leads not only to that decisions that the general meeting will take are difficult to predict but also risks to expose management to pressure from parties claiming to owe a considerable stake in the company although this is not reflected in the company's register (because the influence is based on derivatives). Such a development does not only create problems for the management but also for the other shareholders.
- This development is likely to lead to pressure from the market to take action at level of the regulators. However, limiting or prohibiting certain activities would seem excessive as they fulfil important functions and make markets work more efficiently (e.g. by adding liquidity).
- Before the pressure gets so strong that the only possible answer would be to prohibit certain activities in that area one should consider introducing additional disclosure requirements covering these activities. However, given that the market is already complaining about the already existing transparency requirements a balance should

be struck by setting a threshold (e.g. at 5%, the threshold that is also contained in the Transparency Directive).

Reference was also made to the recently revised UK Takeover Panel Regime which already has introduced such additional disclosure requirements for the UK in November 2005.

Another member reported that most investment firms would not allow their clients to lend stock with the only purpose of voting in a general meeting. Such cases would nevertheless happen in practice. It was also stressed that, from the perspective of good corporate governance, the management should not establish privileged contact with certain shareholders. Where shareholders would be interested in interfering into the day-to-day management of the company they should be represented in the board.

The Forum agreed that if the problem was to be addressed transparency would be the only tool. Regulating certain activities would only achieve that markets would move into another direction and invent new instruments. However, it was also reminded that any new disclosure requirements would always have to be balanced against the risk of companies moving off-shore.

The Commissioner agreed that there was a legitimate interest on the side of the company in knowing which person is behind a vote that is being cast. However, any measure might never have the effect of investors becoming afraid of intervening into the company's affairs and exercising the function assigned to him in the company. The Commissioner thanked the Forum for providing its input on the subject which is likely to be continued to be discussed.

8. COMMISSION CONSULTATION ON THE FUTURE OF THE 2003 ACTION PLAN: RESULT OF THE CONSULTATION AND OF THE HEARING OF 3 MAY

Under the second agenda point discussed during the lunch the Forum was informed about the results of the consultation carried out between December 2005 and March 2006 and of the public hearing held in Brussels on 3 May 2006. Reports on both the consultation and the hearing will soon be available on DG MARKET's website (http://ec.europa.eu/internal_market/company/consultation/index_en.htm).

The general impression retained from the replies and discussions is that there is a certain regulatory fatigue in the EU due to the relatively important changes that have been made in the field of company law and corporate governance during the last few years. There is, however, still interest on the side of the stakeholders in enabling legislation that offers company additional options for organizing their business. Concerning the idea of codification, i.e. to consolidate and simplify the existing EU law in the field of company law in one legal act, the majority feeling is that for companies the implementing measures at Member State level are of much higher relevance in their daily work so that a codification exercise at EU level would not have much effect in practice.

9. COMMISSION PROPOSAL FOR A DIRECTIVE ON THE EXERCISE OF VOTING RIGHTS BY SHAREHOLDERS OF COMPANIES HAVING THEIR REGISTERED OFFICE IN A MEMBER STATE AND WHOSE SHARES ARE ADMITTED TO TRADING ON A REGULATED MARKET AND AMENDING DIRECTIVE 2004/109/EC (COM(2005)685 FINAL)

Members were informed about the state of the negotiations on the Commission proposal in the Parliament and the Council.

The Forum agreed on issuing a recommendation to the Council and the Parliament asking these two institutions to introduce a rule into the directive obliging financial intermediaries to facilitate the exercise of voting rights in general meetings of listed companies by or on behalf of their clients. It pointed out to the Commission's explanation in its proposal that today shares are typically held through intermediaries such as banks and brokers and that these chains of intermediaries not only make the communication process between issuers and shareholders but also the voting process more difficult. The Forum concluded that these difficulties can only be overcome if it is ensured that all intermediaries in the chain provide voting services which currently is not the case and that therefore the text of directive should be complemented by this aspect.

10. REINFORCEMENT OF CONTACTS WITH THE EUROPEAN PARLIAMENT

The Forum approved the text of a letter to be sent by the Chairman and by the Forum's spokesperson to the Presidents of the Legal Affairs Committee and of the Committee for Economic and Monetary Affairs in the European Parliament.

11. UPDATE ON THE AMENDMENT OF THE 2ND COMPANY LAW DIRECTIVE AND THE STUDY ON ALTERNATIVE CAPITAL PROTECTION

Members have been informed by e-mail about the latest state of play ahead of the meeting.

12. CONCLUSION

The Forum's spokesperson thanked the Chairman who chaired the meeting for the last time for his support and co-operation.

The next meeting will take place on 9 November 2006.