7 March 2019

ecoDa’s position paper on Directors Duties

ecoDa supports the fundamental concept of Corporate purpose. However the European Commission should propose policy principles and refrains from trying to standardize directors’ duties among Member States and sectors. ecoDa believes that soft law through Corporate Governance codes is more suitable to adapt to an evolving context.

In its Action Plan on Financing Sustainable Growth of March 2018, the European Commission (EC) announced its intention to assess “the possible need to clarify the rules according to which directors are expected to act in the company’s long-term interest”. This has given rise to an intensified debate about the content and scope of the fiduciary duties of board directors, including the idea of widening this scope to include the interests of a broader circle of stakeholders.

In Europe, the key obligation of board directors is generally defined, legally speaking, as the duty to act in the best interest of the company. In order to avoid misleading interpretation of what the corporate’s interest should cover, the notion of corporate’s purpose is also gaining more and more ground. By expressing its purpose, the company seeks to assert its uniqueness.

It is important to bear in mind that it is up to shareholders to define the purpose of the company at the constitution moment or in a later phase when updating that purpose. Whatever this purpose is, it is determined by the shareholders and has to be in line with national corporate law. This does not mean that the purpose of the company must only be to make a profit, it can very well include the promotion of socially good causes. Shareholders may define the purpose in a broader way than just “profit distribution” or “profit maximization” by including a number of important stakeholder and societal elements.

Acknowledging that shareholders define the company’s purpose does not mean neither that the interests of other stakeholders should not be taken into account by the directors when fulfilling their duties towards the company. On the contrary, **there is no doubt that boards are taking such interests into account to an extent deemed consistent with the company’s purpose.** Basically, there is a sound business case for more social and environmental involvement. Understanding consumers’ expectations and employees’ aspiration is becoming a prerequisite to become more innovative, to attract the right talents and to ensure sustainability in the long run. It is obvious that companies cannot be run in a sustainable manner if boards ignore the context in which they operate.

The current challenge in the general debate is that it too often fails to make a clear distinction within the large scope of stakeholder interests. At the one hand, there are important stakeholder interests, the compliance with which may be seen as supportive of the long-term purpose of the company. On the other hand, some stakeholder interest may be incompatible with the corporate purpose, and hence complying with them cannot reasonably be assumed as supporting the corporate interest.

When it comes to the second category of stakeholder interests, the board not only has no formal duty to comply with such demands but is even legally prevented from doing so.

It is one thing to enhance behaviour and critical judgement rather than box-ticking exercises among board members. It is quite another thing to turn boards into consultative bodies where all opinions can be expressed and can delay decision-making. We should avoid situation encountered in some boards of state-owned enterprises where large boards of stakeholder representatives become more of a Parliament with fractions that vote, rather than collegial bodies that reach consensus.

Taking into account all stakeholders' interests on an equal footing should not be the ultimate goal of companies. The risk would be to weaken the vital role of competitive companies in the modern market economy, both regarding their function as suppliers of goods and services and as instruments for the efficient allocation of capital in the society.

National Corporate Governance Codes are there to reinforce the ethics of responsibility for board members. Accountable boards have to arbitrate between the responsibilities they assume and those they reject. CG Codes are instrumental in guiding them to define their matters of principle.

Therefore, **the European Commission should refrain from trying to harmonize the fundamental concept of corporate interest and directors' duties** due to the very important legal differences across Europe and the different contexts across sectors. No law should hold directors accountable to several "principals", arguably with often mutually contradictory interests. The board can solely be accountable to the company for the discharge of its duty to promote the purpose of the company. If the criteria for liability are not clearly defined, the boards will be liable to nobody for nothing or to everybody for anything. "Being liable to everybody means being liable to nobody". Legal certainty is the basis of a competitive economic environment.

To conclude, it may be tempting for society to solve the current dilemma by resorting to regulation aimed at "micro-managing" companies into behaving in the desired way. In ecoDa's opinion, this would be a serious mistake. It would risk turning innovative companies into bureaucratically administered "business zombies", thus severely weakening the efficiency and dynamism of the economy at large. This does not prevent shareholders to move a step further and to define more precisely the corporate's purpose and indeed to take account of all stakeholders relevant for that purpose.

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About the European Confederation of Directors Associations (ecoDa)

Transparency register: N°3785452741886

The European Confederation of Directors Associations (ecoDa) is a not-for-profit association founded in December 2004 under the laws of Belgium. Through its national institutes of directors (the main national institutes existing in Europe), ecoDa represents approximately 55,000 board directors from across the EU. ecoDa's member organisations represent board directors from the largest public companies to the smallest private firms, both listed and unlisted.

ecoDa full members:

•The British "Institute of Directors" (IoD)
•The Belgian “GUBERNA”
•The French “IFA”
•The Luxembourg “ILA”
•“Directors' Institute Finland”
•The Spanish institute "Instituto de Consejeros – Administradores"
•The “Slovenian Directors' Association”
•The Dutch “Nederlandse vereniging van Commissarissen en Directeuren”
•The Italian Directors’ Association, “Nedcommunity”
•The “Polish Institute of Directors”
•The “Norwegian Institute of Directors”
•The Swedish “StyrelseAkademien”
•“Vereinigung der Aufsichtsrate in Deutschland” e.V., VARD
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•The Baltic Institute of Corporate Governance
•The Swiss Institute of Directors (SIoD)
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Corporate Associates (national institutes of directors):

•The “Danish Board Network”

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