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European Corporate Governance

in support of Competitive Business in Europe

Position statement on some major corporate governance questions addressed to the future European Commission and European Parliament

European competitiveness is being particularly challenged and the need for concerted actions from the European business community, European governments and not the least the EU institutions has never before been more pronounced. The quality of Corporate Governance is one of the factors that influences the competitiveness of national economies and consequently of the European Union.

While the European Commission is preparing technical notes for the new Commissioners and their staff to be appointed and while (potentially new) MEPs started their election campaigns, the ecoDa board, acting as “the European Voice of Directors”, would like to take the opportunity to address a number of corporate governance issues we consider important and relevant to the European Business Community for the coming years.

In short, ecoDa would like to pass the following messages:

- Corporate Governance should not be used as a leverage to speed up societal and political changes instead of enhancing companies’ competitiveness,
- Transparency has to be treated with caution. In order to keep efficient reporting, its scope should not be broadened too far,
- Regarding the limits to Corporate Governance in developing new business models, the lines between tasks assigned to the board and the management should be clear to prevent overlapping of responsibilities and to maintain the non-executive directors’ oversight,
- An abundance of regulations concerning soft law should be avoided, leaving enough flexibility to companies.

EU Competitiveness as a motto for regulators

Although the competitiveness rationale has been an important driver of the Lisbon Strategy (2000-2010) and the Europe 2020 Strategy, we have the feeling that it has been losing ground in the EU regulations over the past years. All EU-flagship initiatives to promote smart, sustainable and inclusive growth should include the European economic competitiveness as an important condition. Today, sustainability and related governance regulations, are too often restricted to social responsibility (CSR) and stakeholder reflections. Therefore, ecoDa pleads for integrating competitiveness as an essential ingredient, or even a condition sine qua non, to foster sustainability objectives.

To a certain extent, Corporate Governance is no longer treated only as a legal matter dealing with structures and procedures to promote the corporate interest, but it is more and more perceived as a leverage to serve other objectives. Over the past years, regulators have used Corporate Governance as a tool to accelerate or force societal changes. This was the case with gender diversity and the obligation to integrate women in decision-making bodies. It is also the case with the emphasis on many sustainability and stakeholder inclusiveness aspects.

Corporate governance standards should not be jeopardized to serve political or societal purposes. One should not forget that the goal of Corporate Governance is to foster the long-term success of the company. In order to reach that goal, one must consider the legitimate stakeholders' interests, but the final goal will remain to create sustainable, competitive companies that can tailor their CG model to their specific needs. Before considering governance recommendation about the allocation of corporate income, one needs to make sure that such income can be realized in a sustainable manner, or put differently, "you cannot discuss the distribution of a cake unless you are able to make that cake first".

Beyond compliance

Regulations should cover the challenges of tomorrow and not the crisis of the past. Most recent legislations were designed as a European exit strategy from the global economic and financial crisis that started in 2008. As a result, corporate boards were forced to comply with more stringent requirements. A shift in perspective is now required to achieve the desired results in terms of innovation and to let boards operate as a strategic actor rather than limiting it to a compliance body.

Compliance has taken on too much importance. In fact, the compliance approach, is no longer sufficient to address the issue of sustainability of medium and long-term business models, to nurture growth that is now based on the circular economy, the collaborative economy. The board expresses a general strategic vision on the creation of sustainable value of the company and sets priorities in this direction. Sustainability and Corporate Social Responsibility should therefore not be embedded as a compliance exercise and should not be controlled by audit committees. It should be on the contrary part of the board's strategic reflection.

Transparency not being an end goal

ecoDa has always strongly supported transparency as a key component of an efficient Corporate Governance system. However, we believe that transparency should not become the end goal as it happens to be the case with regards to the new developments on whistleblowing protection, remuneration requirements, the requirements on non-financial information and gender diversity. We feel that the regulators should prevent abusive and malicious reporting in a world of fake news and manipulation of the truth. The EU regulator should not place European companies in a situation of high vulnerability that would injure their competitiveness.

The whistleblower should be obliged to first use the internal reporting channel when it exists. He/she should have a personal knowledge of the circumstances.

The same is true concerning reporting requirements. A harmonised reporting and transparency framework is a prerequisite for a common capital market. Effective reporting and transparency regulation is also a prerequisite for effective access to equity and debt capital in every member state. But broadening its purpose too much with other worthy goals (like ensuring stakeholder protection) endangers its effectiveness in achieving these primary goals and makes it too demanding for companies. There are other tools better suited for those tasks than reporting.

The limitation of what Corporate Governance can do to encourage new business models

To our mind, Corporate Governance is seen as a catalyst to push businesses to have an eye for people and planet, and to encourage new business models accordingly. The regulators should acknowledge that if Corporate Governance can help in that sense, it cannot be the magic solution for all the downsides of financial capitalism.

Management is the most important party when it comes to coping with the challenges of the XXI century. In contrast to the shareholders, who legally only meet once a year, and the board who periodically gathers to direct and control the firm, the executives are the true leaders of the firm, and this on a daily basis.

There is a tendency nowadays to request that board members step in the shoes of management. The board indicates to management the priority of the issues to be addressed, according to the expectations expressed by shareholders and by taking into account the legitimate stakeholders' interests.

Even if this is important to generate more dialogue among the different Corporate Governance actors, a clear cut of command should remain to avoid an overlap of responsibilities that would undermine a system of checks and balances. The tendency to put more and more managerial responsibilities on board members would also erode the added value brought by non-executive directors. Non-executives provide independent oversight. They are capable of seeing business issues in a broad(er) perspective without being involved into the nitty-gritty details of daily management. Even if the European Commission has put less emphasis on independent directors over the past years, it should further promote the independence of the board, without promoting one board model above the other.

In addition, if it is true that board members can stimulate new business models, one should not neglect the education of the new up-coming generation of managers to embrace the new challenges faced by society.

Directors' duties towards stakeholders

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.

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.

The risk of having a complex set of soft law

With the better regulation policy, the Commission is focusing on the things that really do need to be done. As a result, if ecoDa welcomes the tendency to limit the burdens put on companies with constant regulation changes, we see a propensity to develop more guidance.

While developing its own guidelines, the Commission should sufficiently take into consideration the existing self-regulations developed at national levels. Trying to get complete harmonization in terms of best practices might be too far-reaching.

For instance, it is important that the upcoming guidelines related to remuneration reports remain non-binding and that the concept of comply or explain is not introduced there. Companies should not have to explain why they don't follow the guidelines if they are not binding. There is a risk of getting too detailed guidelines.

Any guidance should not be rules based and should leave flexibility to companies for the implementation furthermore that listed companies are already overloaded by the amount of existing regulations.

Reducing pressure on listed companies should not be done to the detriment of unlisted companies by aligning to a certain extent their legal obligations.

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About the European Confederation of Directors Associations (ecoDa)

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;
•The Portuguese “Forum de Administratores Emprases » ;
•The Baltic Institute of Corporate Governance;
•The Swiss Institute of Directors;
•The Romanian Independent Directors Association ;
•The “Croatian Institute of Directors”.

ecoDa affiliated members (national institutes of directors):

•Cyprus IoD Branch;
•Malta IoD Branch.

Corporate Associates (national institutes of directors):

•The “Danish Board Network”

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