

POLSKIE FORUM
Corporate Governance

Response from
the Polish Forum for Corporate Governance (PFCG)

with respect to the consultation document
of the Services of the Internal Market Directorate General

“Recommendation on the role of (independent)
non-executive or supervisory directors” issued on 5th of May 2004

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Dear Sirs,

We are pleased to provide this comment to the planned recommendation on the role of independent directors, which we perceive as an important step in improving corporate governance in EU and securing stability and confidence of European securities markets.

The Polish Forum for Corporate Governance (PFCG) is an independent initiative established in 2001 by the Gdańsk Institute for Market Economics – a non for profit, private think-tank – to discuss the institutional settings within the corporate sector and develop recommendations for public policy in this respect. PFCG has prepared the White Book on Corporate Governance in Poland and organised the process of drafting the very first, independent Corporate Governance Code for Polish Listed Companies (available at www.pfcg.org.pl).

We agree and endorse most of the thinking of the services of the Internal Market DG. However based on our experience with drafting the corporate governance code for the local market, which followed broad consultations with market practitioners, we would like to comment on the following issues discussed in the draft Recommendation.

1. Defining independent director

Securing the independence of appropriate number of (supervisory) board members is the focal point in ensuring the effective corporate governance over the publicly listed companies. This is particularly important in the situation of concentrated ownership structures, when the influence of controlling shareholder over the company, and its board(-s) is pervasive.

Consultative document proposes (p. 2.3.3 on pages 12-13) that the recommendation puts forward a definition of independent director and moreover sets a list of criteria that delimits independence. We fully agree with this approach.

However consultative document proposes (page 13) that "...the... determination of... what constitutes independence is fundamentally an issue for the (supervisory) board itself to determine. Having in mind our Polish experiences we would like to emphasize that this approach may bring wrongful results in respect to minority protection. It is then reasonable to question whether leaving the discretion to the (supervisory) board to determine itself what constitutes independence of some of its members is an optimal corporate governance arrangement. Setting independence criteria as well as appointing (based on this criteria) candidates for independent "posts" is a fundamental shareholder right. Delegating this power to the supervisory boards which are – in whole Europe – controlled by large blockholders is a dangerous solution and may be used under certain circumstances as a "legal" way diminish board independence (if the corporate situation requires the part of the board members that is linked to blockholder may decide that limit independence of a one board member in that way influencing decision making process). We therefore propose that recommendation should state a) that independence criteria should be defined and at minima made publicly available (at best included in company statute), b) shareholders should decide who is and who loses its status.

The consultation run for PFCG code resulted in the recommendation that in case of the presence of controlling shareholder the independent board members should be elected without decisive influence of this shareholder. This recommendation has been implemented by one of the Polish listed companies, which introduced a voting cap of 5% together with one-share-one-vote principle with respect to electing (two) independent board members.

2. Board Composition

With respect to the composition of the (supervisory) board we would welcome the explicit articulation that it should consist of at least two independent members. In fact this is an implicit logic recommendation as it is stated that the board committees should consist of at least three members and mainly of independent directors.

If the Recommendation will include the "open and liberal" proposition as stated on page 8 (... number of independent directors...adequate in relation...etc) and simultaneously – according to Jaap Winter propositions – there will be a provision demanding to set up three committees comprised mostly of independent directors companies may be confused how to follow these rules. If the company considers that one independent director is fully appropriate for governance framework how to fulfil the recommendation on committees?

While promoting the functioning of board committees composed of mainly independent directors the final Recommendation could also take into account another solution, which could be applicable especially to smaller companies (with smaller board). The consultation process run for PFCG code resulted in the recommendation that certain decisions of the supervisory board (especially with respect to remuneration, nomination, auditor election and

related party transactions) should require a “yes” vote from two independent directors. It has to be mentioned that in Poland functioning of board committees is a rather rare practice.

3. Nomination committee

We endorse the consensus that the nomination committee should also consist mainly of independent directors. While the draft Recommendation insist that the CEO must be adequately consulted by with respect to the nomination proceedings, it should also state that the nomination committee should not only consider proposals made by shareholders but have the appropriate procedures to consult outside shareholders. The Recommendation might also notice as specificity that in the Polish two-tire system managers (executive directors) could be also elected directly by the shareholders’ meeting.

We would be delighted if we could further serve DG Internal Market with our opinions and experiences in respect to Central European Markets. Let us also include our paper on dilemmas that are discussed in hereby Consultation document that we published last year in European Business Organization Law Review.

Yours Sincerely,

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