

AFEP MEDEF CONSULTATION

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26 MARCH 2018

1.4

It is a very positive sign that Afep and MEDEF intend to strengthen the board's ongoing overview of CSR issues, transforming the current task to be informed about such issues (§3.1) to a more active stance that it is translated into the best effort to take into account the social, societal and environmental dimensions of its activities. The use of the term 'endeavours' is understandable in this framework since not all boards will be in a position to integrate non-financial matters to their functions in the same way and with the same capacity of adaptability to CSR. Nevertheless, following the recently proposed reform of the UK corporate governance code, the provision could be strengthened by reinforcing the board's mission and ongoing link with non-financial matters. Indeed, Principle A (Section 1 - Leadership and purpose) of the proposed UK corporate governance code provides that that the function of a company's board of directors is to 'promote the long-term sustainable success of the company, generate value for shareholders and contribute to wider society'. Although the proposed UK provision does not explicitly refer to any environmental elements, it provides a more direct message with regard to the board's overall responsibility. Achieving a balance between operational flexibility for the board and integration of CSR considerations is a very delicate task. Therefore, the above-mentioned UK example should be seen for the purposes of this consultation as a mere recommendation, and my suggestion does not purport to propose a fundamental change to §1.4 as it currently stands.

Afep/MEDEF propose to place the paragraph relating to the tasks of the board at the beginning of the code, which is important in terms of the symbolic shift towards greater acknowledgement and awareness of the board's importance in the overall governance structure. Apart from this symbolic connotation, I do not expect it to have any other impact on corporate governance culture.

1.6

This addition to the code is a very welcome one. The board needs to regularly review all the matters mentioned in this paragraph, and it is also important to refer in this section to the social, societal environmental risks, given their ever-growing importance in the corporate landscape. Monitoring the quality of publicly disclosed information in the broad sense is also a very strong statement for boards. Disclosure is a valuable mechanism to enhance corporate transparency and, notwithstanding the difficulties in constantly reviewing all content of disclosed information, boards need to assume this role with an overarching and inclusive mentality so as to avoid committing any infringements or offences and, more generally, ensure that the overall image of the company is depicted in a clear, accessible and transparent way. For an exhaustive analysis of disclosure obligations, please refer to the following sources:

a) K. Sergakis, *La transparence des sociétés cotées en droit européen [The transparency of listed companies in EU law]* (Tome 41, Bibliothèque de l'Institut de Recherche Juridique de la Sorbonne-IRJS Éditions, 2013)

b) K. Sergakis, *The Law of Capital Markets in the EU* (Palgrave Macmillan Corporate and Financial Law series, 2018).

1.7

The proposed provision is an encouraging step towards the ongoing monitoring of non-discrimination and diversity within the company. Gender balance is a well-known challenge in this area, but the code could also include other diversity issues, such as ethnicity.

The inclusion of an obligation for a company's board to implement a policy of non-discrimination and diversity on ethnicity would create, in theory, a much more holistic operational spectrum for diversity. Nevertheless, such an obligation should not be translated into a disclosure obligation for boards. This is due to the fact that some companies may not yet be entirely familiar with such priorities. Therefore, introducing such disclosure obligation into the code may prove to be onerous and make them appear not 'up-to-date' with other companies although such a comparison may not be necessary given the different profiles that companies may have. Leaving it open to these companies to adhere voluntarily to these policies without disclosing such data on ethnicity could be a much more feasible and workable solution, at least at the current stage: further disclosure measures could be introduced in a future revision of the Afep/MEDEF Code.

4.2

The proposal is reasonable and in line with other national frameworks (for example, the UK one). The engagement role with institutional investors will undoubtedly become one of the key functions of the board that, if exercised in the correct manner, will facilitate its operational flexibility and will ensure ongoing support by shareholders. To ensure an optimal functioning of such a role, the Chairman of the Board of Directors or, if applicable, the Lead Director should assume the engagement task with shareholders. Alternatively, an 'Engagement Director' could be appointed with an ongoing communication task with shareholders while reporting directly to the Chairman of the Board of Directors, to manage various requests from shareholders, as well as reporting to the Board more generally.

7.1

The presence of directors representing employees is crucial to ensure an efficient method of engagement with employees and stakeholders more generally. Such representation on the board gives gravitas to various stakeholder voices and ensures a more formalized engagement spectrum. It also allows for a more holistic representation of a variety of interests on the board, highlighting the importance of such interests at the highest level of decision-making processes within companies. The proposed §7.1 is a rational way forward by providing that such an appointment will need to take place within any company that refers to the provisions of the code. It also makes sense to allow group companies to offer flexibility to their respective boards so as to determine which entities are eligible for such an appointment and which are not. Although the presence of directors representing employees should be applied throughout the group, employee representation on the board should be up to each company board belonging to a group, and flexibility may be needed – at least at the current stage – so that group companies can gradually evolve towards such a goal.

In the meantime, and for these group companies that want to take advantage of such flexibility, the introduction of employee advisory panels (in companies where employee representation on the board is not feasible) could be a viable alternative step. The efficiency of such panels would largely depend on the institutional safeguards, support and resources within each and every company. Indeed, it would be difficult, in practical terms, to predict their usefulness across sectors and different company profiles at this stage. Their presence might act as a facilitator of communication between employees and boards, but the actual impact of their role may be subject to further debate. In order to perform such a role efficiently, these advisory panels would need to be given a clear and continuous operational mandate within companies, adaptable to the company size, profile and activities. All advisory panels would need to be in an ongoing communication with the director representing employees on the board of the company that applies the provisions of the code so as to ensure continuous feedback to the highest levels of decision-making affecting all companies within the group. Employee participation will need to be, either via director appointments or advisory panels, always present in each entity of the group.

Another option would be to appoint a non-executive director on each board in charge of stakeholder engagement provided that the role of such a director could be enhanced and given proper consideration within the board. Such safeguards may not always be present, and the non-executive director's role may be confined to a 'cosmetic' representation of stakeholder interests on the board, which would ultimately make such a requirement less significant. I firmly believe that non-executive directors for stakeholder representation could see their role take on greater importance if combined with the above-mentioned employee advisory panels. Such a cooperation framework could give the opportunity for the implementation of a more co-ordinated communication channel between panels and directors, and could stand as a viable and convincing alternative to the other options envisaged.

13.4

Companies should strive to provide meaningful information in this regard. I fully support the proposed provision.

24.1.1

I fully support the proposal.

The link between remuneration and the integration of social, societal and environmental responsibility considerations is crucial and a very good addition to the proposed provision.

Nevertheless, some companies may not be in a position to justify such a link with the same clarity or detail compared to other companies given their different organizational/cultural/operational features. The 'comply or explain' principle will be crucial here to ensure accessibility and that compatibility of information in various corporate governance statements.

Composition and tasks of the HCGE

The proposals to enhance the composition and tasks of the HCGE should be welcome. A better balance needs to be related not only to gender but also to ethnicity if possible.

Moreover, the composition of the Panel should be as diverse as possible in order to gain acceptance by all market participants as well as to spark interest in participating in its activities. Besides company directors (executive and non-executive), the HCGE could consider the possibility of integrating eminent representatives from institutional investor and proxy advisory firms into its functions. Membership should also be open to other stakeholder groups provided that they have developed considerable experience in evaluating corporate governance statements. The “considerable experience” criterion would further strengthen the useful character of the discussions taking place in this framework, as well as the quality of the dialogue developed in these discussions.