Date

Le Président

Fédération
des Experts
Comptables
Européens

Avenue d'Auderghem 22-28/8
B - 1040 Bruxelles
Tél. : 32 (0)2 285 40 85
Fax : 32 (0)2 231 11 12
E-mail: secretariat@fee be

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Mr. Jürgen Tiedje
Head of Unit Auditing
Internal Market and Services - Directorate F
European Commission
1049 BRUSSELS

Dear Mr. Tiedje,

RE: ADDITIONAL COMMENTS REGARDING THE GENERAL PRINCIPLES FOR A LIMITATION OF AUDITORS' LIABILTY

FEE welcomes the work undertaken in the Auditors' Liability Forum and is pleased to provide you with further comments on a number of questions that you raised in the discussions.

In its response to the Commission's consultation on auditors' liability, FEE has urged the European Commission to issue a Recommendation and the Member States to take appropriate action to limit auditors' liability in a way that accommodates their legal systems. FEE is convinced that the most suitable solution to meet this Internal Market objective may differ from one Member State to another and should respect the different legal systems and not lead to any change where there are already solutions in place.

It should be noted that the answer to the questions below will vary from one Member State to another due to the differences in their respective legal systems. In certain instances, they will also depend from the type of limitation that is in place (e.g. absolute cap or limitation linked to the size of the company or based on proportionality). The comments below are therefore only general and indicative and do not constitute a legal analysis or opinion, but rather a reflection on the practical issues raised by your questions.

We have identified three general principles which, we believe, should guide the response to these different questions regarding the implementation and practical operation of a limitation on auditors' liability; departing from these principles would defeat the very purpose of limiting auditors' liability:

- The solutions developed must accommodate the different legal systems and respect the limitations already in place;
- Each statutory audit opinion should be subject to a limitation of liability;
- The limitation should apply to all parties concerned (as dictated by national law) in relation to the statutory audit opinion in question.

1. SHOULD A LIMITATION ON AUDITORS' LIABILITY APPLY TO THIRD PARTIES AND HOW?

The answer to this question will depend on the legal system of the Member State: who may sue the auditor and on what legal basis, as well as the treatment of third parties varies from one Member State to another. However, as noted in the general principle above, a cap – or any other form of limitation – should apply to all parties that may sue the auditor in the relevant jurisdiction in relation to the statutory audit opinion in question; otherwise the limitation would be pointless as it would leave room for catastrophic claims and would not address the deep pocket phenomenon.

Where third parties can directly sue an auditor on the basis of tort law, it increases legal uncertainty as well as the potential amount of damages and the frequency of claims. Therefore, as noted above, the limitation should always apply to all relevant parties (as per national law) in relation to the statutory audit opinion concerned.

However the question may not only be to know to what parties the limitation will apply but which court will be bound by the limitation in an international environment.

2. SHOULD A LIMITATION BE TRANSPARENT TO THIRD PARTIES AND HOW CAN THIS BE ACHIEVED?

FEE believes that well functioning markets need transparent information; limitations on auditors' liability should be publicly disclosed regardless of the type of limitation.

If the limitation is a cap written in law, transparency should not be an issue, unless there are variable caps where the precise practical implications are not immediately apparent. In these cases, supplementary disclosure should be made. Where the necessary information is not available in the law, it should be disclosed, regardless of the type of limitation, in a way that accommodates the legal framework of the Member State.

The impact of the form and content of all such disclosures should not result in liability limitations having anti-competitive consequences.

3. SHOULD GROUP AUDITORS BE SUBJECT TO THE SAME LIMITATION?

The Group Auditor bears full responsibility for the audit report in relation with the consolidated accounts, as required in article 27 a) of the Statutory Audit Directive. As per one of the key principles above, the limitation should apply to the individual statutory audit opinion which in this case is the group audit. We therefore interpret the question to mean the form of the limitation. Also as per one of the key principles, the form of the limitation must accommodate the different legal systems and respect the limitations already in place at Member State level. The form of limitation in the Member State where the accounts are consolidated will apply.

In addition, it seems difficult to foresee a specific regime for the liability of the group auditors without increasing complexity and uncertainty. In addition, we would like to outline that "responsibility" and "liability" are different concepts and that being responsible does not entail being liable. Also possible risks of confusion in certain languages should be avoided.

4. How should intentional misconduct and gross negligence be treated in the context of a limitation?

FEE has consistently expressed the opinion that statutory auditors must be held appropriately responsible for their statutory audit; the objective is not to seek a favourable regime but to address a public interest issue linked to the functioning of capital markets, the interests of all market players and the long term sustainability of the whole statutory audit profession.

Intentional misconduct and gross negligence are tort law concepts with different national meanings, interpretations and judicial consequences. As a matter of principle and for the sake of legal certainty, we believe that, unless intentional misconduct is proven and established, the limitation on liability should apply in all instances, in accordance with the general principles outlined above.

5. Can a Network be held liable per se and should it be subject to the same limitation?

In our opinion, the definition of "network" in Article 2.7 of the SAD was provided to fulfil specific regulatory objectives, in particular in the area of independence, transparency and registration. It was not intended to entail legal implications in areas such as liability. In practice, a statutory audit opinion is issued by an individual and legally independent audit firm or an individual auditor and there are no grounds to involve the networks to which the individual audit firm or auditor belongs.

In addition, in accordance to Article 2.7 of the SAD (and Recital 11 *in fine*), the existence of a "network" should result from a factual analysis based on the series of characteristics provided by the text. In most cases, a "network" will not be a legal person and its structure, organisation and resources will vary largely from one network to another. Therefore, it seems unconceivable and unreasonable to hold a "network" liable.

We hope these remarks will be of help to you and we remain at your disposal to discuss these in further details at your best convenience.

Yours sincerely,

Jacques Potdevin
President