

COMMISSION RECOMMENDATION

of 5 June 2008

concerning the limitation of the civil liability of statutory auditors and audit firms

(notified under document number C(2008) 2274)

(Text with EEA relevance)

(2008/473/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 211, second indent, thereof,

Whereas:

- (1) Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC⁽¹⁾ establishes a minimum harmonisation of statutory audit requirements. Pursuant to Article 31 of that Directive, the Commission is to report on the impact of the national liability rules for the carrying out of statutory audits on European capital markets and on the insurance conditions for statutory auditors and audit firms and to make recommendations if it considers it appropriate.
- (2) Smooth functioning of capital markets requires sustainable audit capacity and a competitive market for audit services in which there is a sufficient choice of audit firms capable of conducting and willing to conduct statutory audits of companies the securities of which are admitted to trading on a regulated market of a Member State. However, increasing volatility in market capitalisation of companies has led to much higher liability risks, whilst access to insurance coverage against the risks associated with such audits has become increasingly limited.
- (3) Since unlimited joint and several liability may deter audit firms and networks from entering the international audit market for listed companies in the Community, there is little prospect of new audit networks emerging which are in a position to conduct statutory audits of such companies.
- (4) As a consequence, the liability of auditors and audit firms, including group auditors, carrying out statutory

audits of listed companies should be limited. However, any limitation on liability is not justified in cases of intentional breach of professional duties on the part of an auditor and should not apply in such cases. Nor should such a limitation prejudice the right of any injured party to be fairly compensated.

- (5) In view of the considerable variations between civil liability systems in the Member States, it is appropriate at this stage that each Member State be able to choose the method of limitation which it considers to be the most suitable for its civil liability system.
- (6) Member States should accordingly be able to determine under national law a cap in respect of auditors' liability. Alternatively Member States should be able to establish under national law a system of proportionate liability according to which statutory auditors and audit firms are liable only to the extent of their contribution to the damage caused, without being jointly and severally liable with other parties. In the Member States where any claims against statutory auditors might be brought only by the audited company and not by individual shareholders or any other third parties, Member State should also be able to allow the company, its shareholders and the auditor to determine the limitation of the auditor's liability, subject to appropriate safeguards for investors in the company audited,

HEREBY RECOMMENDS:

Subject matter

1. This Recommendation concerns the civil liability of auditors and audit firms carrying out a statutory audit of the consolidated or annual accounts of a company which is registered in a Member State and the securities of which are admitted to trading on a regulated market in a Member State.

Limitation of liability

2. The civil liability of statutory auditors and of audit firms arising from a breach of their professional duties should be limited except in cases of intentional breach of duties by the statutory auditor or the audit firm.

⁽¹⁾ OJ L 157, 9.6.2006, p. 87. Directive as amended by Directive 2008/30/EC (OJ L 81, 20.3.2008, p. 53).

3. The limitation of liability should apply against the company audited and any third party entitled under national law to bring a claim for compensation.

4. Any limitation of civil liability should not prevent injured parties from being fairly compensated.

Methods for limiting liability

5. Member States should take measures to limit liability. For that purpose, it is recommended that any one or more of the following methods in particular be used:

(a) establishment of a maximum financial amount or of a formula allowing for the calculation of such an amount;

(b) establishment of a set of principles by virtue of which a statutory auditor or an audit firm is not liable beyond its actual contribution to the loss suffered by a claimant and is accordingly not jointly and severally liable with other wrongdoers;

(c) provision allowing any company to be audited and the statutory auditor or audit firm to determine a limitation of liability in an agreement.

6. Where liability is limited by agreement as referred to in point 5(c), Member States should ensure that all the following conditions are met:

(a) the agreement is subject to judicial review;

(b) with regard to the company to be audited, the limitation is decided collectively by the members of the administrative, management and supervisory bodies referred to in Article 50b of Council Directive 78/660/EEC⁽¹⁾, or, in the case of a group audit, in Article 36a of Council Directive 83/349/EEC⁽²⁾, and such a decision is approved by the shareholders of the company to be audited;

(c) the limitation and any modification thereof are published in the notes to the accounts of the audited company.

7. Before adopting measures implementing any of the methods referred to in point 5(a), (b) or (c), or any other method limiting liability which complies with points 2, 3 and 4, a Member State should take into account the impact on financial markets and investors and on conditions for access to the market of statutory audit for listed companies, as well as the impact on audit quality, insurability of risks and the companies to be audited.

Follow-up

8. Member States are invited to inform the Commission of actions taken in light of this Recommendation by 5 June 2010.

Addressees

9. This Recommendation is addressed to the Member States

Done at Brussels, 5 June 2008.

For the Commission

Charlie McCREEVY

Member of the Commission

⁽¹⁾ OJ L 222, 14.8.1978, p. 11. Directive as last amended by Directive 2006/46/EC of the European Parliament and of the Council (O) L 224, 16.8.2006, p. 1).

⁽²⁾ OJ L 193, 18.7.1983, p. 1. Directive as last amended by Directive 2006/99/EC (O) L 363, 20.12.2006, p. 137).