

# Gibraltar Association of Compliance Officers

## **RESPONSE TO THE CONSULTATION PAPER ON CORPORATE GOVERNANCE**

### **Introductory Overall Comment**

As part of our process of addressing the consultation paper, we sent a draft response to all GACO Members and asked for their comments. Of the specific comments received, all suggested that our draft was not strong enough in rejecting the need for these additional regulations at all. We therefore suggest that the specific comments below reflect the bare minimum response of our members and that there is a good deal of much stronger feeling across the sector. Particular concern was raised over the suggestion that company management and professional trustee business should employ a non executive director, on the basis that such a requirement would be unduly onerous, disproportionate and involve significant unrecoverable costs.

Many of our larger members already adopt most or all of the main principles. The proposals do, however, appear to be more geared to large and/or public companies in a large jurisdiction rather than to smaller and/or private limited companies. The document also does not appear to recognise the realities of some aspects of the global economy in which some international companies operate.

The document is clearly similar to the UK Combined Code but the UK Code is not prescriptive, rather it is set up as a guidance of best practice which means that UK companies can choose only to comply with parts of the code and then state (in their published accounts) the reasons why they have not complied with other parts. Stakeholders, shareholders, members of the public and regulators can then decide whether they want to continue doing business with or investing in or granting licenses to that company.

We would, therefore, seek clarity as to why the FSC proposing a prescriptive version for Gibraltar, as we do not believe it to be appropriate or workable and furthermore we believe that, as currently written, the implementation of these rules would be detrimental to the regulated sector and Gibraltar as a whole.

We feel that the principles of good corporate governance should apply to all companies, not just those regulated by the FSC and therefore suggest a wider consultation through Government.

### **Specific comments on specific items and questions posed by the FSC**

All of the specific comments are made within the framework of and subject to the overall comments made above.

We would also suggest that the detail of the consultation paper lacks definition and clarity in places and suggest that it is too open for interpretation and argument (which we feel can be acceptable in a guideline but not a rule). It may, therefore, be that the FSC mean one thing whereas we have interpreted it differently.

There does not appear to be any provision for whistle blowing.

Q1. Subject to the comments above, it was felt that, if implemented, the rules should apply to all licensed entities. For example, although Category II firms are covered by MiFID, they should also be covered by these provisions. Another example could be firms with less than 10 employees that have considerably more assets under management for the wider public than firms with more than 10 employees. Such a simple limit also promotes the risk that, for example, some companies might re-structure to avoid onerous requirements. (e.g. reduce staff numbers by contracting out certain functions).

Q2. There appears to be some confusion on the term “Head Office” as opposed to “Group Head Office”. For example whereas decisions that affect the day to day running of the local operation and its adherence to local regulatory requirements can and should be made by a local board, in large international organisations, strategic decisions are and have to be made by Group, usually outside Gibraltar.

Q3. Again, there would appear to be a conflict as to what is considered to be Head Office and the difference between strategic and day to day decisions.

Q4. As above.

Q5. This definitely requires further clarification. As it reads, it would appear that “Four Eyes” have to be provided by the same two people for the business as a whole. It gives the impression that a management board could only be made up of two people and that there is no room for six or more eyes. Obviously, this would be totally impractical as, particularly in large firms, management functions need to be split and it also does not take account of sickness and holidays. We imagine this must be a clarity issue (refer to comments above) and therefore further explanations are certainly required.

Q6. In general terms, we believe these expectations of a board to be realistic, however that very much needs to be set in the context of our overall comments above. For example, and once again, in a large or global organisation, the board can only set strategic aims in accordance with the aims set out by Group Head Office.

Q7. The answer is “no”. Overall, the requirements will be much harder for a smaller firm to meet than a larger one. Specifically, imposing a requirement to appoint non-executive and independent directors for all firms coming under these requirements could present a serious problem. The number of suitable appointees is very limited. The cost is liable to spiral and there could be a severe problem with conflicts of interest.

Q8. As Q7 above.

Q9. Directors fees should reflect the experience and value of the person concerned, together with the work done and the level of responsibility imposed and should be established by the Boards of companies and approved by their shareholders. The FSC should have no involvement in that, whether prescriptive or advisory.

Q10. It depends on the size of the company. This would not be workable for smaller and/or owner-managed private companies.

Q11. Achievement of Key Performance Indicators.

Q12. Formal recording of conflicts of interest can mitigate such risk but it depends on the exact circumstance. More clarity is required in dealing with conflicts of interest.

Q13. The appointment of Non-Executive Directors (independent or otherwise) might be an ideal for certain companies in certain circumstances but as mentioned under Q7, the size of the Jurisdiction makes it very difficult to achieve. (How many non-execs did Enron have?)

Q14. As Q13 and Q7 above. There is surely a lack of qualified and eligible non-executive board members in a jurisdiction such as Gibraltar and even fewer that meet the criterion set out in the paper. We would suggest that such a role would more likely be performed by retired professionals whose understanding of the regulations and requirements could be out of date. We cannot see that senior staff in full time employment in Gibraltar would be available both for reasons of productivity and confidentiality. The suggestion of non resident individuals would further increase cost and involve individuals who may be less alert to the Gibraltar environment.

Q15. In view of the above response, yes.

Q16. The establishment of an Audit Committee could be considered excessive for smaller and/or owner managed firms and once again, the problem of independent non-executive directors arises. For smaller companies proper governance by the Board and adherence to the four eyes principle should cover the activities without the necessity of another committee.

Q17 & 18. As above.