WIRTSCHAFTSPRÜFERKAMMER
Körperschaft des öffentlichen Rechts

www.wpk.de/stellungnahmen/

10. Februar 2012

Stellungnahme zu: Code of Ethics – Proposed Changes to the Code of Ethics for Professional Accountants Related to Provisions Addressing a Breach of a Requirement of the Code

Die Wirtschaftsprüferkammer hat mit Schreiben vom **2. Februar 2012** gegenüber der International Federation of Accountants zu den Änderungsvorschlägen für den Code of Ethics in Bezug auf die Rechtsfolgen eines Verstoßes gegen den Code wie nachfolgend wiedergegeben Stellung genommen:

We are pleased to take this opportunity to comment on the above-mentioned Exposure Draft.

First of all we would like to mention that after the comprehensive amendments to the Code of Ethics (hereafter referred to as "CoE") over the past years, resulting in, at times considerable, demands on the member organizations in terms of implementation and regulation (including translation), there should be no further amendments to the CoE at this time.

We also do not believe that it is absolutely warranted by the facts either - and thus we would like to immediately respond to **Question 1** (**Do respondents agree that the Code should contain provisions that require professional accountants to address the consequences of a breach of a requirement in the Code? If not why not?)** – to create new provisions concerning the legal consequences of breaches of independence requirements in the CoE itself. To the extent that clarifying annotations are considered useful, these could possibly occur in the form of a special guidance paper.

Below we would like to respond to Questions 2 through 8 as follows:

Question 2: Do respondents agree with the overall approach proposed to deal with a breach of an independence requirement, including the proposal that the firm may continue with the audit engagement only if those charged with governance agree that action can be taken to satisfactorily address the consequences of the breach and such action is taken?

For statutory audits, it should first of all be considered that in the EU, and thus also in Germany, switching auditors is not allowed to be left to the discretion of the auditor and/or the company audited (comp. Art. 38 Sect. 1 of the EU Audit Directive of 17 May 2006 (2006/43/EC), § 318 Sect. 3 HGB - German Commercial Code). A provision that would enable, or at least make it easier for, the audited company to "get rid of" an unwelcome auditor would be in violation of European and German law. Given this background, for the realm of *statutory* audits, the CoE should not contain provisions that, in case of possible independence concerns, the audit cannot be continued without the consent of those charged with governance. We are unable to determine conclusively whether this could be superfluous because Section 290.41 contains a subsidiary provision which exempts such cases from the regulatory scope of the new rules. Should this indeed be the case, however, we would embrace a clearer regulatory directive in Section 290.41.

The decision as to the continuation of the audit could thus only be made dependent upon those charged with governance in the case of *voluntary* audits. However, in this area, in Germany at least, it is already possible for both sides to mutually terminate the engagement at any time.

Independent of this, it should be emphasized that those charged with governance, as specified in the definitions of the CoE, can only be the supervisory bodies of the company, and not the management. In Germany, for example, an auditor is required to confer with the **Supervisory Board** or **Auditing Committee**, not with the management, concerning potential threats to independence (§ 171 Sect. 1 Sentence 3 AktG - German Stock Companies Act), without hereby in the case of statutory audits being able – as described above – to make a definitive decision as to the continuation or discontinuation of the engagement.

Question 3: Do respondents agree that a firm should be required to communicate all breaches of an independence requirement to those charged with governance? If not, why not and what should be the threshold for reporting?

We agree that there should be communication with those charged with governance concerning all breaches of an independence requirement, whereby – as spelled out under Question 2 – we understand this to mean the company's supervisory bodies, to the extent that they exist. In addition, however, when in doubt, as according to ISQC1 in the area of quality assurance, there ought to also be communication in the form of a duty of information and consultation concerning internal and/or external third parties (professional colleagues, professional associations), which in case of doubt may also include the auditor's oversight authority.

Question 4: Do respondents agree that the reasonable and informed third party test should be used in determining whether an action satisfactorily addresses the consequences of a breach of an independence requirement? If not, why not and what should the test be?

The third-party test is in our view the adequate criterion for judging whether certain measures are capable of reducing to a reasonable level the compromise to independence. This judgment, however, should occur not only "virtually", i.e. the person being judged should not be the only one placed in the role of the objective third party, rather in cases of doubt, as elaborated in Question 3, a consultation with internal and/or external third party should actually take place. Only in this way it can be ensured that one can properly do justice to the rationale on which the third-party test is based.

Question 5: Do respondents agree that the matters that should be discussed with those charged with governance as proposed in section 290.46 are appropriate? If not, why not? Are there other matters that should be included, or matters that should be excluded?

We think a discussion of the aspects presented in Section 290.46 is both useful and necessary. Additionally, the consultation with internal and/or external third parties should be taken up as a topic of discussion, to the extent that one has occurred. Whether there are other matters that should be discussed, we think it is possible there are.

Question 6: Do respondents agree with the impact analysis as presented? Are there any other stakeholders, or other impacts on stakeholders, that should be considered and addressed by the IESBA?

We are in basic agreement with the Impact Assessment. We would hereby like to point out the remarks on page 12, third column (Impacts), in which the above-mentioned consultation with

internal and/or external third parties, at least with respect to the regulator, is itself mentioned, albeit in another context.

Question 7: Would the proposal require firms to make significant changes to their systems or processes to enable them to properly implement the requirements? If so, does the proposed effective date provide sufficient time to make such changes?

At least in Germany the proposed suggestions would constitute no additional burden, or very little at any rate, for the auditor. This is due to the fact that, as we previously pointed out, many of the anticipated suggestions are already ingrained in German law, and auditors in Germany thus already for the most part fulfill the requirements *de lege lata*. That is why there are no reservations concerning the effective date to make the changes.

Question 8: Is the abbreviated version of the framework described in Section 290 for dealing with a breach of an independence requirement suitable for Section 291? If not, what do respondents believe Section 291 should contain?

The abbreviated version of the framework to be applied in Section 291 would seem to raise the question among those applying the rule whether and what substantive differences exist compared to the normal version (Section 290). The answer to this question appears elusive, however, at least at first glance, which means that the rule seems in need of further improvement in terms of user-friendliness.

In our view, there is basically no cause to differentiate between Sections 290 and 291, thus a relevant reference to Section 290 could be adopted in Section 291. We feel a reference would also be appropriate in this situation because the aspect that the audited company, by virtue of its de facto and indeed official decision-making authority, should not be enabled to terminate the engagement and get rid of an unwelcome auditor, will not apply, because Section 291 does not cover the area of statutory audits.

Furthermore, in the event that substantive differences (objectively justified) between Section 290 and Section 291 exist, we still believe that on regulatory grounds it would be preferable to make a reference to Section 290, whereby it would be necessary to specify which rules would not apply.

We hope that our remarks will be taken into consideration in the subsequent course of the proceedings, and we would be delighted to answer any questions you may have.