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EUROPEANISSUERS' COMMENTS TO THE GREEN PAPER ON THE EU CORPORATE GOVERNANCE FRAMEWORK

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EXECUTIVE SUMMARY

European companies are the backbone of the EU's economy: they promote jobs and wealth. The current financial crisis has obliged Europe to re-think its regulatory system in order to avoid similar impact on the real economy in the future. Listed companies, who had been subject to waves of regulation a few years before, are now concerned that they may be affected negatively by these regulatory reforms. Why?

As new requirements are being placed on the banks and other financial institutions in the wake of the financial crisis, this will mean fewer loans to companies, which will therefore need to access the capital markets more. Meanwhile insurers will hold fewer bonds due to new solvency requirements, while other investors may hold fewer corporate bonds due to new regulations on derivatives. This leaves us wondering who will provide the companies with capital - if not the public markets, then what is their ultimate purpose?

On top of these setbacks, companies are currently over-regulated re their governance models. Listed companies have to comply with many European directives and national requirements to be able to finance themselves in the capital markets. However, regulators still consider more legislation. The Green Paper on the EU Corporate Governance Framework suggests some new requirements. Although companies are not against many of the proposals, we would like to see sensible and balanced regulation that will not be costly and burdensome without any benefits.

The Green Paper states that companies must demonstrate utmost responsibility not only to shareholders and employees but also towards society at large. However, corporate governance is about the internal dynamics of companies and the responsibility of their different stakeholders. Corporate governance should not be used to implement social and societal policy issues.

Boards of companies

We consider that corporate governance needs to be practical and consistent with the different ways in which companies operate across Europe. It is thus best done at national level, consistent with the national company law structures. We do not therefore support new EU action on Board composition, such as the separation of the roles of CEO and chairman.

Comply or explain

We support the comply or explain system and want to make it work well. To do this, we recognise that we may need to sit down with the shareholders to better understand what they want to see by way of explanations. Those of us in companies should think about how we can share best practice across Europe in communicating our explanations as to why we have chosen not to follow particular recommendations of a code. The explanations themselves should then be judged by the shareholders, who can then vote against company resolutions if they are not happy. Explanations in this context are to be considered as acts of compliance with the code. We do not, however, support a role for regulators in monitoring individual governance decisions.

Shareholder Identification

Europe needs to develop better dialogue between companies and their shareholders to prevent misconceptions on both sides which we need to try to overcome. One problem for EU companies in initiating the dialogue may be difficulties in identifying shareholders across borders. We therefore welcome the fact that the European Commission has raised shareholder identification in its consultation paper and we would like to see all EU companies given the option to enjoy the rights that currently only some possess.

Shareholders

We support disclosure of voting policies by investors, in order to assist companies to understand their shareholders' approach and to ensure greater understanding in advance of any possible areas of disagreement. This would facilitate better dialogue between companies and their investors.

Risk

It is not very clear to non-financial companies, whose business is not financial risk, whether the Commission is seeking in the Green Paper to extend the use of risk-based models used in the financial sector or is referring to the potential downside of company strategy. Listed companies are currently obliged to report on risk in the 4th, 7th and 8th Company law Directives, the Transparency, Market Abuse and Prospectus Directives, and in IFRS. Given the plethora of existing requirements, it is not apparent what further disclosures would seek to achieve.

In Conclusion

Policymakers need to see corporate governance within the context of global competitiveness and the many different disclosure obligations affecting listed companies, which may impact on companies' decision as to whether to go (or stay) public. At the end of 2010, Europe had already fallen to third place[1] after both the US and Greater China in terms of the number of new global listings.

The focus for policymakers should thus be on making financial markets deliver better outcomes for their end users, including listed companies, on the implementation of existing directives before proposing new ones, and on facilitating dialogue between companies and shareholders.

[1] According to PwC's IPO Watch Q4 2010

The Report of the Reflection Group on the Future of EU Company Law

EuropeanIssuers believes that the general approach taken by the Reflection Group on the future of EU Company Law in its report of 5 April 2011 with respect to Corporate Governance of listed companies should be taken into consideration. Although EuropeanIssuers does not subscribe to all the recommendations by the group, e.g. on risk reporting, we support the findings of the Reflection Group that "the diversity of corporate governance systems reflects the complexity of modern enterprise" (p. 11) and that the flexibility of Corporate Governance rules and recommendations is therefore needed "to suit the different needs of companies that may be of different size, engaged in different forms of business and serving different constituencies." (p. 11). This leads to see different Corporate Governance systems as "a treasure trove of different solutions to a wide variety of challenges that has been experienced and overcome" (p. 11).

In particular, we underscore the following recommendations made by the Reflection Group:

- "EU harmonisation should respect the national corporate governance systems of the Member States and should strive to further the trend towards increased flexibility and freedom of choice in respect of company forms and the internal distribution of powers." (p. 12)
- "(…) Current EU legislation (and corporate governance codes) should be reviewed and amended against the background of whether the rules promote or at least facilitate a long term perspective." (p. 38)
- "As regards the shaping of the governance structure of national forms of company the Reflection Group supports the trend of giving more choice for companies to decide the governance structure. The EU should encourage the Member States to provide more options. (…)" (p. 56)

QUESTIONS

1 – Should EU corporate governance measures take into account the size of listed companies? How should a differentiated and proportionate regime for small and medium-sized listed companies be established? If so, are there any appropriate definitions of thresholds. If so, please suggest ways of adapting them for SMEs where appropriate when answering the questions below.

We believe that a differentiated and proportionate approach for smaller quoted companies should be encouraged so that companies at different stages of development can tailor their approach to corporate governance accordingly. This does not necessarily mean that these companies should do less; they may do more in certain areas. What each company decides to do will involve considering the views of investors and other stakeholders and the specific circumstances affecting the company itself. How well a company adopts a proportionate approach will have an impact on long-term value.

We want to see recognition of the need for diversity of market segments built around companies' needs, rather than an emphasis on a single set of rules. Companies should be able to move between markets at different stages of their lifecycle. Growth markets should have lower costs and lower administrative burdens than main market or premium segments. Corporate governance is one of the areas of cost for smaller companies.

As an example, companies on the regulated market in London have to comply or explain against the UK Corporate Governance Code only if they have a premium listing; standard listed companies must describe which governance code they choose to follow. On the French market, small and medium-sized listed companies (the threshold has been defined by the French regulator as companies with stock market capitalisation of less than €1 billion) can choose to refer to the MiddleNext code tailored to them. The French regulator (*AMF*) reported favourably on the first year statements[2]. We believe that this proportionate approach allows for flexibility, appropriate governance structures and reasonable cost.

Companies at different stages of development are subject to different expectations from shareholders; a principles-based rather than didactic approach is better able to reflect this.

It should be recognised that a one-size-fits-all approach to corporate governance would entail smaller quoted companies having to explain why they have not complied with large swathes of a code designed for the largest quoted companies. This is not helpful and does not motivate smaller quoted companies to positively adopt good corporate governance principles.

A proportionate approach does not, by definition, mean lower standards when applied to smaller companies. It does not follow that there will be an increase in the cost of their capital if companies follow a principles-based approach which demonstrates how a governance structure is designed to create long-term value for shareholders. A principles-based approach allows companies to avoid sudden and potentially disruptive increases in governance requirements; they are better able to develop their governance structures organically and in dialogue with their shareholders.

A principles-based approach avoids big step changes and allows for costs to be managed more deliberately. A comply-or-explain approach enables companies to decide what balance is most appropriate for them and to tailor their disclosures accordingly.

2 – What, if any, corporate governance measures should be taken at EU level for unlisted companies? Should the EU limit itself to promoting development and application of voluntary codes for non-listed companies?

It should be noted that most subsidiaries of listed companies are already within a group which often applies a corporate governance code and should therefore not need to follow a separate code.

Unlisted companies may include quoted companies on MTFs or exchange-regulated markets such as AIM, PLUS-quoted, Alternext, and AIM Italia, which have not been admitted to the Official List. We believe that best practice is for these public quoted companies to set out clearly their approach to corporate governance and to state which code or set of principles they choose to follow. We do not believe that corporate governance measures should be taken at an EU level for these companies.

Moreover, while we believe that good governance principles should be adopted by all companies, whether listed or unlisted, we think unlisted companies have different shareholding models and therefore it should be left to these companies to develop its own codes at national level. We do not see a specific role for the EU in the promotion of these codes.

[2] *Recommandation AMF n° 2010-15 du 7 décembre 2010 : Rapport complémentaire de l'AMF … Valeurs moyennes et petites se référant au Code de gouvernement d'entreprise de MIDDLENEXT de décembre 2009*

1. BOARDS OF DIRECTORS

Board leadership

Question:

3 - Should the EU seek to ensure that the functions and duties of the chairperson of the board of directors and the chief executive officer are clearly divided?

We consider that companies should be left free to choose between combining or separating the offices of Chairman and Chief Executive Officer. We believe that the issue here is to ensure that there is adequate and effective challenge to the strategy and operational decisions being taken in the company.

The variety of responses to this issue which currently exist, at national level, suggests that there is no clear evidence that separation of roles achieves a better balance of powers.

In times of crisis, combining both functions may ensure effectiveness. Even in normal circumstances, splitting them does not guarantee the application of independent oversight. In smaller structures it might be an added value to combine functions.

Where both functions are combined, there are other means to create counterweights allowing the Board of directors to operate independently from management. In several Member States, corporate governance codes recommend that there should be a senior independent non-executive element on the Board other than the Chairman (lead independent director) to whom concern, including from other independent directors or from the shareholding, may be conveyed.

Additional means allowing the Board to carry out its oversight function include the appointment of independent directors, the creation of Board committees helping the Board to organize its work in areas where the interests of management and those of the company may come into conflict (audit, remuneration and nomination).

Specifically, in the UK Corporate Governance Code (formerly the Combined Code) recommends that, the unitary system, the roles of the Chairman and the CEO should, in principle, be separate. A decision to combine both offices should be publicly justified. Whether the posts [of chairman and chief executive officer] are held by different people or by the same person, there should be a strong and independent non-executive element on the Board, with a recognized senior independent non-executive other than the chairman to whom concerns can be communicated.

The French system, on the other hand, offers an option between the unitary Board and the dual (two-tier) system in all corporations, including listed companies. Under the unitary system, companies may choose between combining or separating the offices of Chairman and Chief Executive Officer. This principle has been embedded in law. The Board's main role is to determine the company's strategy and oversee its implementation.

In Italy, the Code does not recommend that listed companies should make the separation of the two roles as a matter of principle. It does, however, recommend that listed companies should make the division of tasks and responsibilities among the various positions absolutely clear and disclose adequate information in this respect. Where the roles are combined, a lead independent director should be appointed, with a view to ensuring that directors receive all necessary information and facilitating the Board's smooth operation.

In Germany and Austria, the separation of the roles of Chairman and Chief Executive Officer is mandatory. This is because German and Austrian laws require listed companies to have two separate and distinct Boards. This two-tiered leadership structure is composed of a management Board ("*Vorstand"*) and a supervisory Board (*"Aufsichtsrat*"). Any Board member is either a member of the management Board or the supervisory Board as, by law, it is not allowed to be a member of both Boards simultaneously. Hence, the chairman of the supervisory Board is naturally distinct, independent from the management Board.

In the Netherlands, also the dual (two tier) system is traditionally the system that is applied in all corporations, including listed companies. Recently, new legislation was adopted that allows corporations to apply the one tier model, with a compulsory separation of the Chairman and the Chief Executive Officer.

The existing situation shows that there can be no certainty that an EU-wide single requirement would achieve the stated goal of separating oversight and management functions. Even where the roles are separate, that separation of itself does not guarantee adequate and effective challenge to the strategic and operational decisions of being taken by the company (e.g. Royal Bank of Scotland Plc).

As a result we believe that the matter should best be dealt with at national level, either within the framework of the relevant corporate governance code or pursuant to local law.

1.1. <u>Board composition</u>

Questions:

4 - Should recruitment policies be more specific about the profile of directors, including the chairman, to ensure that they have the right skills and that the board is suitably diverse? If so, how could that be best achieved and at what level of governance, i.e. at national, EU or international level?

5 - Should listed companies be required to disclose whether they have a diversity policy and, if so, describe its objectives and main content and regularly report on progress?

6 - Should listed companies be required to ensure a better gender balance on boards? If so, how?

Overall, EuropeanIssuers believes that the question of Board composition should be approached on the basis of "comply or explain" in order to maintain the necessary level of flexibility for the companies.

Recruitment

The Board plays an important role in the nomination process even if the authority to appoint and remove directors rests with the General Meeting.

Most corporate governance principles and codes usually cover a mix of the following: the setting up of a specific committee which will lead the Board appointment process and make recommendations to the Board; the requirements that the identification and evaluation process includes a balance of skills, experience and independence, and ensures that the Board is suitably diverse. These principles provide guidance to the committee when discharging its duties.

Corporate governance codes have also adopted principles regarding the selection process. As recalled by the Commission itself in its 2005 Recommendation on the role of non-executive or supervisory directors, the Nominating committee “evaluate(s) the balance of skills, knowledge and experience on the Board, prepare a description of the roles and capabilities required for a particular appointment”.

In the UK, the Corporate Governance Code sets out the procedure on which appointments to the Board should be based.

In France as well, determination of the criteria used by the Board in nominating the candidates for election, (independence, diversity, Board self-evaluation, gender diversity etc.) is left to corporate governance principles.

In Germany, selection of Supervisory Board members should be based, according to the code, on knowledge, ability and expert experience required to complete their tasks. The Supervisory Board shall set objectives regarding composition, taking into account the company’s international coverage, potential conflicts of interest, age limit and diversity. Reference should be made, in determining these objectives, to an appropriate degree of female representation.

Italian law provides for the submission of the lists of Board candidates to the annual general meeting. The lists shall be filed with the issuer by the twenty-fifth day prior to the date of the shareholders’ meeting called to appoint members of the board of directors, and made available to the public at the registered office at least twenty-one days prior to the shareholders' meeting.

In the Netherlands, the corporate governance code provides that the supervisory Board of a listed company shall prepare a profile of its size and composition, taking account of the nature of the business, its activities and the desired expertise and background of the supervisory Board members. The profile shall deal with the aspects of diversity in the composition of the supervisory Board that are relevant to the company and shall state what specific objective is pursued by the Board in relation to diversity. The profile shall be made generally available and shall be posted on the company’s website. The Dutch Corporate Governance Code provides as well that a selection and appointment committee should be appointed from the members of the supervisory Board (provided that the supervisory Board consists of more than four members), with best practice provisions on the tasks of this committee.

It follows that appointments to the Board are usually made on merit and against objective criteria. Evaluation is based on balance of skills, knowledge and experience on the Board and, in the light of this evaluation, a description of the role and capabilities required for a particular appointment is prepared.

Once the evaluation process has been completed, it is important that the job profile, the candidates' résumé and the number of mandates held concurrently be disclosed to the shareholders, so that they can make an informed decision.

It should be borne in mind that the duties and profile of individuals within the Board and of different Boards may vary radically, depending on the type of business, the geographical markets in which the company operates, the range of skills already in existence among the executive and non-executive directors, and the character of those individuals etc. In order to ensure that Boards are suitably diverse to best serve the needs of the business, consideration thus needs to be given to the existing mix.

Even if the general meeting has the authority to appoint and remove directors, the Board and the specific nomination committee, if any, are best placed to determine the required qualifications. They are accordingly the most qualified to draft the recruitment policy which will provide the shareholders with the Board's opinion on the desired job profiles.

While the process of making appointments to a Board is always going to be difficult, adopting an EU wide corporate governance requirement, under these circumstances, is a blunt instrument which will not necessarily ensure that the particular needs of a company will be met.

In addition the chairman should ensure that new directors receive a full, formal and tailored induction on joining the Board. However, this is already dealt with by many national corporate governance codes and so we believe there is no need to adopt further EU wide corporate governance principles.

The Commission has an important role to play in ensuring full transparency of corporate governance requirements, as a way of strengthening Board accountability to shareholders.

Accountability is usually expressed by way of disclosure and transparency requirements. Transparency is first and foremost about financial information and is already highly regulated at EU level. But transparency has been also extended to corporate governance practices.

Transparency of corporate governance principles results first from the implementation of the "comply or explain" rule. Transparency may also be a consequence of EU law: article 46a of Directive 2006/46/EC requires listed companies to include a corporate governance statement in the annual report.

In the case of Board composition, transparency relating to job profiles, candidates résumé and other directorships is best enforced via national codes rather than mandatory requirements.

Gender diversity

Heterogeneous background, knowledge and experience are important to enable the Board to make robust and far reaching decisions. As part of the process of expanding the knowledge, skill base and experience of the Board, diversity is clearly a significant factor, However, while advancement of women in business and their participation in the firm's Board of directors and senior management should be fully supported and promoted (as should other aspects of diversity), the focus should be on the needs of businesses to create sustainable wealth and jobs. While gender is an obvious indication of a single measure of diversity at a very basic level, the requirements of Board thinking and decision-making demand a considerably more sophisticated approach.

As a result we believe the issue should be left to self-regulatory strategies and rely on incentives and policy encouragements to influence organisational behaviour, rather than direct legal enforcement of only one aspect of diversity.

What is important is that there is a range of individuals on the Board such as there is sufficient challenge. This is a matter of character rather than gender. Diversity of experience is what is important. However, it might be appropriate to require the Board via its nomination committee, if any, or the persons or committee charged with reporting on corporate governance matters to explain in some detail why they have selected specific individuals to a Board.

It might also be helpful to approach individual women on Boards to ask what information would have been most helpful to them when they were potential candidates. Particularly for those taking on a cross-border directorship, the expectations and obligations under national law may be different, and it may be helpful to create a central website signposting where to find more information. For example, some of our member associations offer training courses for those coming from other jurisdictions e.g. from a country with a unitary Board structure to one with a two-tier Board structure. Other associations and institutes may also provide training and advice, as may women's networks in different EU countries or other websites providing advice on the recruitment process, how to demonstrate the necessary character and skill set, how to get noticed by headhunters, etc. Providing links to all of these might improve women's access to the relevant information at the right time. Or perhaps the national corporate governance code commissions could also provide such useful links from their websites.

1.2. <u>Availability and time commitment</u>

Question:

7 - Do you believe there should be a measure at EU level limiting the number of mandates a non-executive director may hold? If so, how should it be formulated?

We believe that a rule limiting the number of directorships would undermine the principles based regime on which corporate governance and the comply or explain regime is based. The proposal would only cover directorships and not other time-consuming commitments, which might be relevant, thus potentially undermining the principle that the individual should be able to devote sufficient time to the job.

The experience of the UK, which tried at one stage to limit the number of FTSE100 chairmanships by a rule but then found that this omitted other relevant factors such as time spent in US companies or charities etc, may be instructive in this respect. The only recommendation left in the UK Corporate

Governance Code relates to full time executive directors who should not be given permission to take on more than one non-executive directorship in a FTSE 100 company nor the chairmanship of such a company.

In contrast, the number of directorships is the subject of legal requirements in a series of other Member states, including France, Germany, Austria, the Netherlands and Italy. In the latter instance, the limitation refers only to the number of directorships that members of the supervisory bodies ("Collegio Syndicale") may hold in other companies.

The problem with drafting rules as opposed to facilitating the use of judgement is that it requires consideration of several factors such as whether the director has (or not) an executive role, sits in one or more Board committees, sits in Boards of directors from companies in the same group, or whether it is a listed or non-listed company. Even more detailed rules for exemption would follow. In addition such rules are likely to cause distortions in the market for suitably qualified persons willing to accept appointment as directors of quoted companies.

Setting an EU wide requirement will therefore prove unworkable.

Instead, we should ensure the effective working of the comply or explain regime: shareholders should be empowered to decide whether they consider that an individual is able to devote sufficient time to his or her responsibilities and to vote against individuals where they consider this not to be the case.

To this end, it might be helpful if shareholders could easily access information on other directorships held by individuals within the EU, to assist them to judge whether they are happy with that individual's time commitment.

A common point of access to such information might be the website of the company. Alternatively, the European Business Register (EBR), which already offers information on executive directorships in several countries, may also be considered.

We believe that this would be a better solution than a rule setting out an arbitrary limit.

1.3. <u>Board evaluation</u>

8 - Should listed companies be encouraged to conduct an external evaluation regularly (e.g. every three years)? If so, how could this be done?

We support the principle of evaluations but not their compulsory use at EU level. We are not convinced that the results of the evaluation should be made available to persons outside the Board. Given what we know about human behaviour, it seems likely that directors may be less frank if the evaluation is not confidential, thus potentially undermining its benefits.

Board evaluation can reinforce the Board's accountability to the company's vision and strengthen its importance within the organisation. Additionally, it can highlight opportunities for improvement within the Board's processes and assist with establishing new goals. Areas identified for development can also assist the nominating committee with its recruitment strategy. However these goals cannot be achieved if Board evaluation becomes a simple box ticking exercise.

Evaluating the work of the Board is usually done by the nominating committee, by the remuneration committee or by an independent director. An external evaluator may also carry it out. In addition to providing each director with a standard questionnaire, evaluation programs typically consist of individual meetings with Board members.

In the UK, the Corporate Governance Code prescribes that the Board of companies in the FTSE 350 should state in the annual report how performance evaluation of the Board, its committees and its individual directors has been conducted. Every three years, an external facilitator should assist in the Board's evaluation. The non-executive directors, led by the senior independent director, should be responsible for performance evaluation of the chairman, taking into account the views of executive directors. There is flexibility for smaller companies listed on the regulated market.

In France, for larger companies, the Board evaluation is formally carried out every three years (with the issue being discussed at least yearly under a dedicated agenda item of the Board) either by the Nomination committee or an independent director or the Board's secretary. With respect to its scope, the self-evaluation process should include a review of how the Board is organised and how each director contributes effectively. For small and medium-sized companies, it is an internal evaluation that is recommended yearly, for cost reason.

In Germany, the Code recommends Supervisory Boards to perform regular efficiency reviews but remains silent on how to carry out an efficiency check. In practice, Supervisory Boards tailor their review of efficiency to the individual circumstances of their company.

In Italy, evaluation is carried out at least once a year and covers size, composition and performance of the Board and its committees. Companies are free to adopt the tools best suited to their structure.

In the Netherlands, the Dutch corporate governance code contains the following best practice provision: The supervisory Board shall discuss at least once a year on its own, i.e. without the management Board being present, its own functioning, the functioning of its committees and its individual members, and the conclusions that must be drawn on the basis thereof. The desired profile, composition and competence of the supervisory Board shall also be discussed. Moreover, the supervisory Board shall discuss at least once a year without the management Board being present both the functioning of the management Board as an organ of the company and the performance of its individual members, and the conclusions that must be drawn on the basis thereof. The report of the supervisory Board shall state how the evaluation of the functioning of the supervisory Board, the separate committees and the individual supervisory Board members has been carried out.

Against this very diverse background, we take the view that companies should be left free to select evaluation tools best suited to their specific circumstances and that using external resources may not necessarily produce the best results and even produce conflict of interests. Additionally, a "one-size-fits-all" approach fails to take into account differences between the one-tier and the two-tier system. The scope, role and working procedures of directors serving on a supervisory Board differ from that of non-executive directors sitting on the Board together with executive directors, and/or systems with and without codetermination.

We also believe that, while this is an area where best practice is evolving, it has not yet emerged to a sufficient degree of consensus that currently it would be appropriate to make measurement compulsory.

Any EU prescriptive approach in favour of an external evaluation could therefore have the opposite of the desired result.

1.4. <u>Director's Remuneration</u>

9 - Should disclosure of remuneration policy, the annual remuneration report (a report on how the remuneration policy was implemented in the past year) and individual remuneration of executive and non-executive directors be mandatory?

In Europe, there are various systems already in place that govern disclosure of director remuneration and we cannot say that one system is performing better than the other.

In France, the commercial code provides for a full disclosure of the remunerations of directors both executives and non-executives (article L.225-102-1). The corporate governance code provides for additional rules. For larger companies, a detailed presentation of the policy for determination of the compensation paid to executive directors is recommended.

In Italy, the legislative decree n. 259/2010 foresees disclosure of the remuneration policy for the members of the Board and disclosure for individual remuneration of the members of the Board and internal control bodies. At the moment: i) Consob (Italian Securities Authority) Regulation n. 11971/1999 foresees disclosure of individual remuneration of the members of the board and internal control bodies and aggregate disclosure for key managers in the notes to financial statements; ii) the corporate governance code recommends the annual publication of remuneration policy for executives and key managers which should be submitted to the general meeting.

In the UK disclosure of remuneration policy, an annual remuneration report and individual remuneration of directors (including for each director the amount of each element in the remuneration package for the relevant period including basic salary and fees, estimated money value of benefits in kind, annual bonuses, deferred bonuses, compensation for loss of office and other termination payments and the total remuneration for each director for the period under review and for the corresponding prior period) is mandatory for companies with a Premium Listing on the UK Official List and for UK companies listed on regulated markets in the EU, on NYSE and NASDAQ. For UK companies the remuneration information must be audited and, for companies incorporated outside the UK but with a Premium Listing, the remuneration information must be reviewed by the company's auditors.

In Germany, in addition to the provisions laid down in the Commission's Recommendation of 2004, the obligation to disclose the individual compensation of members of the management Board in the annual report includes e.g. benefits promised to members of the management Board in case of an early termination, at their cash value, as well as the amount expended or set aside by the company during the financial year for this purpose, any changes to these promises agreed upon during the financial year (Sec. 285 no. 9 lit. a sent. 6, Sec. 314 para. 1 no. 6 lit. a sent. 6 German Commercial Code).

EuropeanIssuers supports disclosure of remuneration policy as well as all components of remuneration of executive and non-executive directors pay since it allows shareholders and potential investors to have an appropriate level of understanding and control of the principles of remuneration. What is a key issue for shareholders is to make them able to assess:

- the reasonableness of the compensation which must take into account the company's general interest, market practices and officer performance;
- the alignment of directors pay with the interests of shareholders;
- whether there is a risk inherent in such arrangement and if the remuneration system impedes rewards in case of failure.

Provided shareholders receive sufficient information in order to make informed decisions, we do not consider it necessary to have uniform rules on remuneration disclosure at a European level. It should be left to Member States to decide how disclosure of directors' compensation should be done.

As for the substance, it is up to the Board of directors and supervisory Boards to determine the compensation of executive directors, based on proposals made by the compensation committee if any.

10 - Should it be mandatory to put the remuneration policy and the remuneration report to a vote by shareholders?

We understand that the Commission considers a mandatory rule requiring an advisory or binding vote of shareholders on remuneration policy and the remuneration report.

EuropeanIssuers is not in favor of a one size fits all solution. In Europe, there are various practices to involve the shareholders in the process of setting up the remuneration of directors which have to be respected. Therefore we do not see the need to introduce at EU level a mandatory rule requiring either an advisory or binding vote on the remuneration policy and the remuneration report.

In some jurisdictions, a say on pay vote (advisory vote on a remuneration report) has been introduced (UK, Germany, Italy, etc).

In the UK the remuneration report must be put to a vote of shareholders each year. Approval requires a simple majority vote and, as in Italy, the vote is advisory. Individual director's entitlements to remuneration are not conditional on a shareholder vote. While the availability of such votes has undoubtedly increased levels of shareholder activism in relation to executive pay in the UK they do not appear to have curbed increases in executive pay.

In other jurisdictions, different systems are already in place. For instance, in France, there is a binding vote on deferral payments for executive directors through a specific mechanism (authorization by the Board, report from the external auditors and approval by the AGM): golden parachutes and pension's schemes. Schemes that grant shares or rights to acquire shares have also to be approved by shareholders. But, except for these elements, the determination of fixed and variable pay remains with the Board.

In Germany the determination of the compensation of the members of the management Board lies in the hands of the supervisory Board. However the annual general meeting of a listed company may approve or disapprove the compensation scheme for members of the management Board (say on pay). Such resolution does not create any rights nor obligations especially for the supervisory Board.

If the purpose of this proposal is to empower shareholders and improve shareholder democracy, we have to admit that these goals are not always reached in practice. Indeed, this mandatory vote may lead to unintended effects:

- it could lead to contradictory positions if the shareholders vote for the remuneration policy but against the remuneration report;
- some issuers have noticed that few shareholders have the appetite to get involved in the minutiae of executive pay; in practice, the main institutional investors apply pressure ahead of the AGM in order to align the remuneration of executive directors with their own investment strategy;
- we cannot ignore that overall pay levels, in markets where this advisory vote is in place, continues to increase.

What remains important is that disclosure contains sufficient details in order for shareholders to understand all the components of remuneration and to give them the opportunity to engage in debate and raise questions. In EU member states, the AGM appoints companies Board of directors or supervisory Boards, whose main job is to select executives and to determine their remuneration. When the law provides the AGM with the power to dismiss directors or to decide not to renew their mandate, they give shareholders the possibility to sanction inappropriate remuneration practices.

1.5 Risk Management

Q 11 – Do you agree that the board should approve and take responsibility for the company's "risk appetite" and report it meaningfully to shareholders?

Q 12 – Do you agree that the board should ensure that the company's risk management arrangements are effective and commensurate with the company's risk profile?

EuropeanIssuers opposes the suggested guidelines of the Green Paper for four main reasons:

a) the primary responsibility of senior management in the monitoring and management of risks;

b) the lack of relevance of the concepts of "risk appetite" or "risk profile" as synthetic indicators, for the company or for many risks;

c) the opposition to an overall assessment of risk management and internal control systems;

d) the numerous existing requirements relating to risks, including key societal risks, and risk management systems.

a) The primary responsibility of senior management in the monitoring and management of risks

The role of the Board, which meets several times during the year but is essentially part-time, is to set the company's strategy and main policy lines and/or to oversee their implementation by senior management. In setting the strategy, the Board should consider any potential downside as well as upside.

In the field of risks, based on the essential information received from different sources, the Board may "challenge" the senior management if it considers that the main risks incurred or the risk policies defined and decided by management are not consistent with the company's strategy, or that the risk management systems defined and implemented by management are not effective.

The role of management

The Board and/or a specialized Board committee (if any) cannot identify, analyze and manage risks or carry out the steering and ongoing monitoring of RMIC systems themselves: such is the responsibility of senior management and management.

Senior management takes on the prime and central responsibility role in respect of risk management and RMIC systems. It exercises the following responsibilities:

- Steering the design, implementation, improvement and maintenance of RMIC systems that are best suited to the company's strategy, specificities, activities and risks, setting risk policies, directions and priorities; initiating any necessary corrective actions; ensuring these policies, directions and priorities are properly applied and these actions successfully completed;
- Ongoing monitoring of the risks and RMIC systems, i.e. considering whether the risk management policies and systems and the internal controls are adapted to the company's strategy, specificities and risks, operate as intended over time and whether they are adjusted as appropriate to changes in conditions;
- Ensuring quality information on the key matters, and communication of this information to the Board and/or a specialized Board committee (if any) and, where required, to the public.

Senior management receives support from management and, if any, from the risk department and/or the internal audit department, which report the results of their activities.

The Board's oversight role

Based on the essential information received, the Board or a specialised Board committee (if any) ensures that the main risks incurred and the risk policies defined and adopted are consistent with the company's strategy and that the RMIC systems considered appropriate by senior management are implemented, and subject to ongoing monitoring and adequate controls. This includes overseeing the allocation of responsibilities within the company to avoid major loopholes in that area.

The Board's oversight role (or a specialised Board committee's, if any) reflects a dynamic process of improvement. In the context of the Board's oversight role, "monitoring the effectiveness of RMIC systems" reflects a high level, dynamic process by which, based on the essential information it receives, the Board is able to set overall directions. The aim is to best adapt or adjust these systems and the ongoing monitoring of controls by senior management and to ensure internal control activities are adapted to the company and the permanent evolution of its external and internal environments.

Monitoring the effectiveness of systems does not imply monitoring management as such or the systems themselves.

The Board (or a specialised Board committee, if any) is informed of the main risks, risk policies and results of monitoring and control activities, as well as of the main incidents identified and of the related corrective actions decided or implemented by senior management. It ensures that the public has been properly informed of risk factors and identified incidents likely to have a significant effect on the prices of the financial instruments offered to the public (which does not imply that it initiates communication or gives the information itself).

According to the terms determined by the Board or the specialised Board committee (if any), the internal audit department and/or risk department (or other management function determined by management) informs the Board/committee of its work programme and of the principal results of its activities. The Board (and the committee, if any) may also wish to interview those responsible for key functions, including the persons in charge of internal audit and risk-related functions, in the presence, or in certain cases, without the presence of senior management.

b) ***The lack of relevance of the concepts of "risk appetite" or "risk profile" as synthetic indicators, for the company or for many risks***

The phrases "risk appetite" or “risk profile” are not clearly understood by most issuers throughout Europe and were generally associated with financial services models, rather than strategic risks. It would be preferable to communicate on the main features of the systems put in place to control key risks:

- Risks, which are very different in nature, are thus managed separately for each type of risk and not necessarily at the company or group level. In addition, many risks - as do the business opportunities that might balance them - are not quantifiable or precisely measurable; some may even be difficult to identify;

- It is not possible to aggregate or synthesize all the risks of a company/group into such indicators as the company’s "risk appetite" or "risk profile". Indeed, quantitative thresholds, limits or risk profiles can be established and followed for certain risks only (e.g. market risks); in addition, the risks - such as the measures taken to control them - are changing regularly and interact, thereby rapidly rendering irrelevant and obsolete any attempt to conduct an overall measurement of risks.

c) ***The opposition to an overall assessment of risk management and internal control systems***

The Board's role is to “monitor”, not to "ensure", the effectiveness of the company’s RMIC systems; in addition, while it seems useful to perform assessments of selected areas of these systems - to assess their operation, dynamics and adaptation to circumstances -, it is inappropriate to envisage a periodic assessment of the entirety of these systems - including an assessment of whether they are commensurate with a "company’s risk profile"-. Indeed:

- As mentioned, the notion of "company’s risk profile” should be excluded;

- A periodic assessment of all systems would be overly cumbersome, costly and would be of very limited relevance, given the characteristics of risks and the changes constantly affecting the company and its systems;

- The probability that the systems' objectives will be achieved does not depend solely on the will of the company: every system has its limits and can be affected by external uncertainties, the exercise of judgement, technical failures or errors.

d) ***The numerous existing European requirements relating to risks, including key societal risks, and risk management systems***

Specific approval by the Board of a risk disclosure seems particularly pointless, given the many obligations arising from European legislation (for details, please see the tables in annex I). In particular, the administrative, management and supervisory bodies should ensure that the annual reports, corporate governance statements of and/or financial statements are drawn up and published in accordance with the relevant European legislation: in particular, a description of the principal risks, RMIC systems and non-financial key performance indicators (which would thus include key societal risks) is already required under the 4^{th} and 7^{th} company law directives (again see annex I for detailed requirements). In addition, we note that these risks, the potential impacts of which are particularly difficult to assess, also receive the special attention of governments and companies through specific legislation and monitoring.

We therefore believe that there should be a review of the existing requirements, including a review of whether these have been properly implemented in the Member States, and an analysis of how companies are reporting under the most recent requirements, before any new requirements could be considered.

2. Shareholders

Q 13 Please point to any existing EU rules which, in your view, may contribute to inappropriate short-termism among investors and suggest how these rules could be changed to prevent such behaviour.

2.2 Short-termism of capital markets

Regulatory bias

We are not convinced that the objectives pursued by financial regulators are always in the best interests of the end users of markets. We believe that the emphasis in EU public policy has been flawed in its focus on creating a single market in financial services as the goal, rather than as the means for delivering outcomes which are positive for the end users of the markets, such as delivering capital from investors to companies to create jobs and growth in the real economy, enabling the better management of risk, facilitating communication between companies and shareholders, etc.

Measurements used by the European Commission and other EU policymakers to judge the success of their policies may also be flawed, since they tend (a) to measure the wrong goal, as above, rather than measuring whether they have delivered on outcomes for end users of the markets (b) to use the wrong time horizon or (c) to focus on the wrong details. For example, it appears to us that research on market infrastructure may measure the costs of cross-border transactions as to whether the costs of buying and selling securities have increased or decreased cross-border, but gives no information on the comparative costs of buying and holding over a period of years. This would imply that EU policymakers are only interested in the costs of trading rather than in also considering the costs of long-term investment.

We note that recent regulations have tended to measure assets over a one-year period. While this may be appropriate to some financial institutions, it may not be to all, and may increase pro-cyclicality. Equity investments tend to be volatile over short periods, and to suffer from such measurements, since they are considered more risky and are thus more expensive. However, long-term investors such as pension funds should be able to allocate a larger proportion of their assets to equities without the need to hold higher solvency capital. Meanwhile EU regulation assumes that sovereign debt is risk-free, which is clearly not the case. The timing of regulation is also important in that regulation is often enacted at the wrong point in the investment cycle. Investors are thus forced to sell their holdings at the bottom of the market rather than at the top. If investors are being forced out of equities, who is replacing them?

Likewise the use of credit ratings within EU regulations may work against long-term investors, who may be forced to sell at the bottom of the cycle in order to meet regulatory requirements to only hold instruments with a certain credit rating, or to hold additional capital (which may not be available) upon downgrades. Passive index tracker funds in which many retail shareholders are invested may also sell low and buy high.

We also note that complex derivative products have been included within UCITS as suitable for sale to retail investors, while shares in smaller companies are considered by some regulators as too risky. In reality, we suspect that many retail investors would find it much easier to understand the risks facing their investments in our smaller companies than some of the risks involved in complex financial products. National taxation policies may sometimes also favour short-term investments.

It is not clear to us what the cumulative, long-term impact of all the changes to financial regulation will be. We hear anecdotally that banks will lend less and that companies will be forced to access the capital markets instead. At the same time, we hear that Solvency II may drive insurers to hold fewer equities and that regulations on OTC derivatives etc may drive investors to hold fewer corporate bonds. This leaves us wondering who will be able to provide the companies with capital?

We would like some reassurance that some analysis is being done at EU level to take into consideration the potential impact of all these reforms on companies' access to capital.

Too much of a good thing?

Our members have suggested that there may be too much emphasis by policymakers on liquidity as an end in itself, rather than as a means. This is leading to "superliquidity" and excessive volatility, which we are told forces investors to adopt hedging strategies using derivatives without much economic merit in order to reduce their volatility.

We also wonder whether diversification may be like liquidity – good up to a point, but you can have too much of it. The fact that dispersed shareholdings are so spread out over so many companies makes it more difficult for the shareholders to understand the companies and the risks that they face, and to engage with company management. While we accept that diversification is useful, we wonder whether it has become mistaken for a goal, rather than a means to an end.

We note that the consultation paper cites the figure of turnover on the major equity exchanges at 150% per year of aggregate market capitalisation and an average holding period of 8 months, but presumably this includes figures from high frequency traders and again is only measuring trading. What would be more useful would be to have an indication of the overall shape of the market by types of investor e.g. by style such as value funds, growth funds, and type such as pension funds, private wealth management, other retail investors, etc. What would be the comparative turnover figures for each of these categories and what are the comparative market shares of each of these groups within Europe?

Other issues

We believe that there is a need for greater transparency on stock lending, where the ownership of shares is transferred for a short period.

Finally, we believe that the adoption of annual re-elections for directors may lead Boards to focus more on the short-term.

2.3 The agency relationship between institutional investors and asset managers

Q 14 Are there measures to be taken, and if so, which ones, as regards the incentive structures for and performance evaluation of asset managers managing long-term institutional investors' portfolios?

Q 15 Should EU law promote more effective monitoring of asset managers by institutional investors with regard to strategies, costs, trading and the extent to which asset managers engage with investee companies? If so, how?

We consider that the incentive structures for all agents in the investment chain should be considered, not just those of asset managers. We understand that the AIFM-directive contains rules with respect to the transparency of compensation-schemes and we would like understand how they will work first.

Again a focus on transactions rather than performance over the long-term may be unhelpful. As such, quarterly reporting by asset managers to clients and hence evaluation on that basis may create short-term bias. We support the development of industry-led good practice templates for smaller pension funds, which may help them to measure their managers' performance better.

We believe that comply or explain codes can promote greater accountability if well designed. We believe that stewardship codes can be a good way to ensure that the incentive structures for asset managers are better aligned with those of their clients by ensuring better disclosure of and accountability for the management of their assets. Asset managers should thus be required to disclose whether or not they comply with a code and also with which code they comply – e.g. the FRC Stewardship Code, the EFAMA code or the "*BVI-Wohlverhaltensregeln*".

We support the inclusion of such a disclosure rule in EU conduct of business requirements, in order to ensure that the reporting against such codes is clearly aimed at informing clients, not regulators. This would enable clients to evaluate the performance of their managers as regards their stewardship of the assets under management better. This is already the case for the FRC Stewardship Code in the UK, which is underpinned by a rule in the FSA conduct of business regulations, thus mirroring the requirement on companies in the 4^{th} and 7^{th} company law directives to report against national corporate governance codes. Some pension funds could also be asked to sign up to stewardship codes on a voluntary basis, where they are large enough to conduct their own voting and engagement with companies in-house.

We support disclosure of voting policies by investors, in order to assist companies to understand their shareholders' approach and to ensure greater understanding in advance of any possible areas of disagreement. This would facilitate better dialogue between companies and their investors.

We note that one option being considered by the Commission is a framework for transparency in voting polices and disclosure of general information about their implementation. The disclosure of voting policies and voting guidelines is of crucial importance for issuers. Issuers need reliable information on the thoughts of investors on crucial issues. In addition to a sustainable company-development, this is important for practical reasons at least, i.e. when preparing the agenda for the AGM. Smaller end-investors likewise are interested in the disclosure of voting policies and voting guidelines to learn about the behaviour of asset-managers in order to be able to adjust their investment-decision accordingly.

While we support the disclosure of voting policies and records by asset managers, in order to inform companies and to assist their clients to evaluate their performance, we believe that the quality of engagement is more important that the quantity and we would not wish to see too much focus on the disclosure of voting records overshadow the emphasis on other forms of engagement. Voting against company resolutions should be the last step rather than the first.

Any focus by policymakers on the details of voting disclosure should be careful not to undermine this balance. We would therefore prefer to see the emphasis placed on stewardship codes together with a simple requirement to disclose against a code, as is done for listed companies in the 4th and 7th company law directives, rather than on detailed legislative requirements. In any event, any disclosures should take into account client needs i.e. what information the pension funds and other end clients would find most useful.

2.4 Other possible obstacles to engagement

Q 16 Should EU rules require a certain independence of the asset managers' governing body, for example from its parent company, or are other (legislative) measures needed to enhance disclosure and management of conflicts of interest?

We are in principle in favour of disclosure and management of conflicts of interest, but we would like to see the Commission undertake more extensive analysis of the current problems, followed then by an analysis of possible solutions; e.g. requirements for independence, greater emphasis on the audit of client assets, etc, in order to understand what exactly we are being asked and what the implications might be.

In discussions thus far, there was not much support among members for e.g. independent directors within asset managers at this stage, as it was felt that an emphasis on independence might come at the expense of expertise. Without additional explanation and specific examples, it is difficult to support further proposals.

Q 17 What would be the best way for the EU to facilitate shareholder co-operation?

We leave it to shareholders to respond to the question of acting in concert if they consider that the rules are not working properly, so that we can have a debate. There is no support for making companies offer a website for shareholder discussions, as suggested by some in the Green Paper.

In general, we do not consider further EU-regulatory-action as necessary since there are already means in place on the national level to facilitate shareholder-cooperation. What is rather necessary is to promote and improve the direct dialogue between listed companies and investors cross-border-wise. The General Meeting Market Standards are a good example of an initiative to promote this.

On the question of the Shareholders' Rights Directive, we believe that the Commission should look at its implementation across the Member States. We participate in various industry discussions, including on the implementation of industry standards on communication for general meetings, at which it is clear that there are still some issues to be resolved. Whether some of these require legislative or implementational intervention or changes to market practice is yet to be clarified. There would, however, also appear to be problems with the efficiency of the investment chain and in some cases with the reconciliation of securities as client assets.

We note that there is a disagreement between issuers and intermediaries on the question of record dates, where the issuers do not see any need for harmonisation, although we are open to discussion.

2.5 Proxy advisers

Q 18 Should EU law require proxy advisers to be more transparent, e.g. about their analytical methods, conflicts of interest and their policy for managing them and / or whether they apply a code of conduct? If so, how can this best be achieved?

Q 19 Do you believe that other (legislative) measures are necessary, e.g. restrictions on the ability of proxy advisers to provide consulting services to investee companies?

The main issues for companies in dealing with proxy advisers are the following:

- Lack of clarity as to who is making the voting decisions;
- Differences of opinion in the use of judgement (or lack of);
- Differences of approach as to how to correct inaccuracies;
- Lack of understanding of national practices;
- Dealing with conflicts of interest.

Lack of clarity as to who is making the voting decisions
Companies would like to know that the votes being cast for or against their resolutions are in line with the wishes of the ultimate owners and so are interested to know whether and how the policies being followed by the proxy voting agencies are designed in accordance with client wishes. Transparency as to the policies themselves and also the process followed by the agencies in ensuring that client views are sought in the design and review of their policies might give companies a better

understanding of the level of support and as such the legitimacy of these policies in reflecting the views of the end investors.

Companies would also like to know who is making the individual voting decisions so that they know which shareholders they should approach as to any explanations, where they may have chosen not to comply with the national code. We support disclosure by asset managers under the FRC Stewardship Code[3] as to whether they use proxy advisers, and in what way e.g. whether the asset manager signs up to the policy of the proxy voting agency, or whether it uses the agency as one of two or three external research providers but with its own voting policy.

In addition, the disclosures made by several of the proxy voting advisers under the UK code[4] as to the percentage of in-house policies for which they input the data on behalf of investors v those that follow the proxy voting agency's own policies are helpful.

Differences of opinion in the use of judgement (or lack of)

Companies often feel that the proxy voting agencies should exercise more judgement, particularly where smaller companies are concerned, rather than follow strict policies. For example, smaller companies may have fewer Board committees than larger companies. Some agencies may not take the size of Board into account when setting policies e.g. to vote against all directors where there is no audit committee.

Differences of approach as to how to correct inaccuracies

We have had reports that sometimes the proxy voting agencies have made factual errors when sending out reports to clients. Clearly there is a grey area of judgement where there may be disagreements as to the facts, but there are also some instances where mistakes may be made. Companies are therefore interested to have the opportunity to see the report before it is issued to clients, in order to correct any errors. Potential problems may be compounded by inefficiencies in the voting chain which lead to very short deadlines and in the understanding of the local company and other laws to which the company is subject, which vary across Europe, and where expert knowledge may be required. Due to the fact that the AGM season is highly concentrated, however, the proxy voting agencies may hire inexpert staff during the busy season. We would like to see disclosure by the proxy advisers as to whether they send their reports to the issuer for review of accuracy.

Lack of understanding of national practices

Some issuers have experienced difficulties with national uniform voting policies defined by proxy voting agencies that do not take into account national practices or national law.

Dealing with conflicts of interest

Companies would like to know how any actual or potential conflicts of interest are managed.

Next steps

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[3] http://www.frc.org.uk/corporate/stewardshipstatements.cfm#Asset_managers

[4] http://www.frc.org.uk/corporate/stewardshipstatements.cfm#Service_providers

The first step should be to define the intended outcomes of any action such as:

- Contribute towards improved understanding and dialogue between companies and shareholders by promoting greater transparency in the voting chain
- Clarification of current requirements and responsibilities within the investment chain
- Allow companies a right of reply so that the end investors are aware of any areas of disagreement
- Ensure that guidelines reflect the views of the end investor.

<u>Shareholder Identification</u>

20 - Do you see a need for a technical and/or legal European mechanism to help issuers identify their shareholders in order to facilitate dialogue on corporate governance issues? If so, do you believe this would also benefit cooperation between investors? Please provide details (e.g. objective(s) pursued, preferred instrument, frequency, level of detail and cost allocation).

Yes, we would like to see EU recognition of a right for companies to identify their shareholders along the following lines:

❖ The company has the ability to either approach the intermediaries or, particularly if most of the investment chain is known, to target the end owner direct;

❖ The company has the right to ask for the information at any time;

❖ The shareholder (or intermediary) has no right to refuse to reply on grounds of privacy;

❖ In case of non-compliance with the request for information, the company has the right to apply sanctions such as withholding voting rights or payments such as dividends.

❖ It should be a criminal offence to file false information.

We believe that this should be a right and not an obligation, to enable each company to decide for itself according to its own circumstances whether or not to seek to identify its shareholders. In order for comply and explain to work most effectively, companies should be able to establish contact with their major shareholders to discuss potentially contentious cases where they may not follow the corporate governance code.

Companies thus may not need to know the identity of each and every single shareholder. They do, however, need to ensure that information flows along the chain, to know that they can communicate with their shareholders at any given time, and to know that they have the ability to drill down into their shareholder base as necessary.

The nominee shareholder is seldom the real shareholder, who has invested money directly in a share and is subject to the economic risk, or the person to whom that shareholder has delegated the exercise of those rights (e.g. the real shareholder may employ an asset manager to choose the investments and cast the votes, but that asset manager may then employ a custodian bank which may then employ a sub-custodian bank etc). Currently real shareholders may not receive information on the general meeting of the company they have invested in cross-border. They may be deprived of voting rights in cross-border situations, either because intermediaries do not provide them with a certificate of holdings so they can register for attendance at the companies' general meetings or because they are not entered into the share register of those companies so that they can prove that they are shareholders in the company. Intermediaries may fail to forward shareholder data cross-border or fail to comply with disclosure requests cross-border. There is no common practice of intermediaries (banks, custody banks, security depositories, or other agents) for responding to disclosure requests from issuers across borders in Europe[5]. The real shareholders may not even know about such disclosure requests unless they are informed by their intermediaries. If intermediaries do not respond to such disclosure requests, very often referring to assumed confidentiality obligations under contractual laws or data protection laws, shareholders may be deprived of their rights.

While in some Member States of the European Union working mechanisms exist[6] for communication between real shareholders and issuers and for exercising shareholders rights, in others there are no mechanisms to do so. Where there are such national mechanisms, these do not work as well cross border. See also our response regarding the shareholder rights directive to Q17 above.

We believe that a European legal mechanism to help issuers identify their shareholders could:

- create the basis for real dialogue between real shareholders and the issuer;
- enable real shareholders to exercise their rights more effectively;
- establish a real single European market for intermediary services and thus
- make possible efficiency gains in the markets for servicing real shareholders.

We therefore support the proposal by the T2S Taskforce of the ECB[7] that there should also be a duty on intermediaries to disclose to the issuer the identity of their customers.

<u>Company law should be the basis for the relationship between issuers and shareholders</u>

The richness of European corporate law is part of the cultural heritage of Europe. The "bundle" of rights and duties one owns as a partial owner of a share company is expressed in the "share". This is then the asset which may be traded on capital markets and can thus not be changed by the rules of capital markets without seriously harming the asset itself.

We also believe in free competition between national corporate laws and not in forcing all corporate laws into one single legal form. This is even more true because we have identified the source of the

[5] This has also recently been demonstrated by the requirement to execute sanctions against some Libyan companies where issuers had to withhold dividends but had to rely on intermediaries for the execution without being in a position to properly master the process.

[6] See Annex II for a description of current national regimes provided by our members.

[7] See http://www.ecb.eu/paym/t2s/governance/ag/html/subtrans/index.en.html Given that the ECB's T2S project is intended to facilitate cross-border settlement, this could reduce the visibility of shareholders to companies. The ECB therefore created a Task Force to look at technical ways to implement a shareholder identification regime at EU level.

problem not being different corporate laws but being different opinions among intermediaries whether they have to comply with national disclosure regimes.

A European principle should therefore clearly state that the disclosure requirements of any corporate law of any member state of the European Union have to be complied with by all intermediaries and all market participants in Europe no matter whether it is a purely national situation or a European situation which involves cross-border aspects of the relationship between the real shareholder and the issuer, especially in the intermediary chain.

Scope: Addressee of disclosure requests

In order to be effective, any European proposals should cover all participants in the investment and custody chain and not only persons an issuer may already know, e.g. nominee shareholders. The UK system (whereby the company can approach those whom it suspects of having an interest in the shares or other financial instruments) works very well because it requires everybody the issuer believes to have an interest in the shares to declare whether they do indeed have such interest. This avoids shuttle conversations between nominee shareholders and the issuer time and again before arriving at the real shareholder. The company could then choose the level of granularity required as appropriate to its own circumstances; whether to go down to the real shareholder or whether to seek an overview of the shareholder base in terms of pension funds, sovereign wealth funds, hedge funds, retail shareholders, etc.

Enforcement

In several European Member States, there are already rules in place that allow the issuer the option to withdraw rights attached to the share (or other financial instrument) for not responding to disclosure requests. We believe that sanctions for non-compliance with specific disclosure requests or generally applicable regulation are necessary in order for any disclosure to be effective. Such consequences could be the loss of voting rights, the loss of dividend rights or even the loss of the share itself.

How could this be achieved?

The Task Force has recommended that the Transparency Directive, which is due for amendment anyway, would be the best legal instrument to deal with a shareholder identification legal mechanism and that the following provisions could be inserted:

i) The introduction of an obligation of the shareholder towards the issuer to identify himself;

ii) The introduction of an obligation on intermediaries to disclose the identity of their customers; and

iii) The introduction of a set of minimum standards that a national shareholder identification regime should fulfil. The national authorities would have the option of opting out of implementing such a shareholder identification regime, but they would need to explain their decision.

We support these proposals, but discussions within our membership about what makes the best shareholder identification regimes in Europe effective suggests to us that, while this is useful, it will not be not sufficient as we do not believe that a duty on intermediaries will be sufficient without an equivalent enforcement right for companies.

We would therefore like to see the rights above inserted into the Transparency Directive or into EU company law, as well as a duty on shareholders and intermediaries to follow the issuer's law. The following provisions, however, should be left to the Member States:

iv) The power of the company to enforce such measures could be subject to case by case approval from a relevant authority or court (each MS should be free to decide which since their effectiveness varies).

v) Any provisions concerning fees.

We believe that the majority of member states do not allow other shareholders to access this information, or only subject to certain limits. We do not currently believe that it would be possible to agree disclosure of this point at EU level, as the understanding of such disclosure and how it might sit with other national requirements differs considerably.

Some companies are not keen to facilitate greater shareholder cooperation, which access to such information might provide, while some have expressed concerns that withdrawing the investor's right to privacy would damage smaller markets and lead to disinvestment. Larger markets such as the UK which already have such a right do not appear to have suffered, but we understand that there would need to be an impact assessment and cost-benefit analysis to ensure that introducing a EU level mechanism would not have unintended consequences.

2.7 Minority shareholders

Q 21 Do you think that minority shareholders need additional rights to represent their interests effectively in companies with controlling or dominant shareholders?

Q 22 Do you think that minority shareholders need more protection against related party transactions? If so, what measures could be taken?

We are not aware of problems and believe that the Commission should conduct an analysis of the current situation across the Member States before any action, given that there are already existing provisions in IFRS and national law. We understand that some of these issues may be covered in the review of the Takeover Bids Directive.

If shareholders feel that there are problems, then we expect that they will respond to the consultation with details so that we can then discuss any concerns as to whether protection for minority shareholders is lacking. However, as noted above, it appears that this is already covered elsewhere and so there is a question as to whether EU law is also needed.

Employee share ownership

Q 23 Are there measures to be taken, and if so, which ones, to promote at EU level employee share ownership?

There is strong support for the recent reduction of the Prospectus Directive requirements for offers of shares to employees. We would encourage the Commission and ESMA to prioritise any technical advice on transposing these amendments into Member State law.

For companies, the development of financial participation, and of employee shareholding in particular, is a strong factor in the motivation and cohesion within groups. We have identified certain obstacles to the growth of employee financial participation in Europe, which should be investigated further. The main disparities are as follows:

- Variety of investment support e.g. discount or rebate;
- Different characterisation of the benefits e.g. some Member States offer exemptions from taxation and social charges on the employer's supplementary payments when the employee has signed up for the capital increase. Some Member States do not recognise this participation, while others refer to it as a bonus or topping up;
- Disparity of vesting periods: these range from 0 to 10 years so that there is considerable variation in treatment according to the beneficiary's country of residence;
- Disparity in the case of early release: only a few Member States allow for exceptions to the vesting periods, while granting a tax and social benefit in the case of certain events such as marriage, death, etc.

We suggest that some form of mutual recognition between the different systems in different Member States could be useful here.

3. Comply or explain

24 – Do you agree that companies departing from the recommendations of corporate governance codes should be required to provide detailed explanations for such departures and describe the alternative solutions adopted?

We do not think that more detailed requirements for the information to be published by companies departing from the recommendations should be set out in legislation. Such requirements would lead to the quality of disclosure of information[8].

We fully agree with the general principle, lying behind the comply or explain approach, that in providing an explanation, the company should aim to illustrate how its actual practices are both consistent with the principle to which the particular provision relates and contribute to good governance.

The aim of comply or explain is not to achieve full compliance as would be the case with legislation, but rather to promote good practice which is appropriate to the individual company.

[8] In this regard, RiskMetrics Study on Monitoring and Enforcement Practices in Corporate Governance in the Member States showed that "looking at the quality of these explanation, companies disclosing general information tend to disclose explanations with a higher informative value than companies disclosing information on a provision-per-provision basis"(page 15).

When the system of comply or explain was first designed, its fundamentals were that for companies to grow and be successful, accountability should be given to each player involved in order to make it work. Companies (including Boards and management) had thus to be accountable to shareholders, who are the owners of the company. Companies cannot be accountable to everyone because at the end of the day they would be accountable to no one – no one would fully assume their failure except the shareholders who would be damaged by their loss.

The original Cadbury Code in the UK was designed by a committee of senior businesspeople, whose views were respected by their peers. Many other review bodies or national corporate governance code commissions have chosen a corporate leader to head their work. In terms of behavioural finance, their recommendations are less likely to be dismissed by other companies as mere compliance than recommendations from a regulator, since these are recognised as having some basis in experience. The involvement of corporate leaders may thus lead to more emphasis on substance over form via peer pressure. We are therefore in favour of corporate governance codes designed by corporates who are better placed to consider the best needs of companies.

The focus should rest on the “explanation”. Information on the compliance to a code of corporate governance and on departures from its recommendations is the core of the comply or explain approach and is the foundation of the flexibility of national corporate governance codes. This implies that that good corporate governance can be achieved by other means than blindly following the code. The reasons for not following the code should, however, be explained clearly and carefully to shareholders. Therefore, such explanations for decisions not to follow the code are considered as acts of compliance. Shareholders who do not consider the explanations sufficient can then vote against the company resolutions.

Against this background, we fully support the statement of 22 February 2006 by the European Corporate Governance Forum on comply or explain[9], which states that there has to be:

- A real obligation to comply or explain. Given that Article 46a of the 4th and 7th company law directives require all EU companies to report against a corporate governance code, and that, as of this year, all EU countries have a code in place, we believe that this obligation has now been met.

- A high level of transparency. Companies disclose information on corporate governance in their annual reports and on their websites so that the information is accessible to shareholders. We see room for greater sharing of best practices between companies.

- A way for shareholders to hold Boards ultimately accountable for their decisions and the quality of their disclosures. Given that the explanations as to why the company believes that the principles of a corporate governance code should not apply to it are directed to shareholders, their ability to exercise their rights is important. Ultimately the shareholders should be able to vote against the Board if they are unhappy with the explanations given. An

[9] http://ec.europa.eu/internal_market/company/docs/ecgforum/ecgf-comply-explain_en.pdf

important factor in enabling shareholders to hold Boards accountable is thus the implementation of the shareholder rights directive to facilitate the cross-border exercise of voting rights.

We note that the shareholder rights directive has only just been implemented in some Member States this year and we would encourage the Commission to conduct a thorough survey of whether this has been implemented properly before proposing any additional action.

In addition, we consider that the following factors are important in promoting the success of comply or explain:

- Encouraging ownership by company Boards in order to leverage peer pressure;
- Reputation (i.e. reaction of shareholders to bad governance practices);
- Promoting better dialogue and understanding between companies and shareholders.

25 – Do you agree that monitoring bodies should be authorized to check the informative quality of the explanations in the corporate governance statements and require companies to complete the explanations where necessary? If yes, what exactly should be their role?

We believe that the primary responsibility for monitoring of corporate governance statements should rely primarily on shareholders, to whom the explanations are addressed, according to the rights conferred to them by national laws. This is more likely to ensure qualitative explanations. There is also a role for peer review.

We agree that monitoring may improve the quality of compliance to corporate governance. Our main concern, however, is that monitoring might interfere with the nature of the corporate governance codes, while it should be limited to reporting. We are also concerned about the adoption of a European wide solution which might not fit the different characteristics of national corporate governance systems.

It should be up to the shareholders themselves to monitor the explanations. We are concerned that the quality of the information given might be negatively affected if regulators become involved in looking at the quality of the explanations, as we believe that they are likely to pay more attention to the disclosure of information on provision-per-provision basis. They are also more likely to place a higher value on blind compliance, rather than accepting explanations where the company has chosen not to follow the code. The danger there is that companies might choose outcomes which are less than optimal for the company in order not to have to explain.

We recognise that the ability of shareholders to engage in such monitoring may differ among Member States because of different market structure, ownership structures and culture. With the spread of cross-border ownership and the appearance of more international shareholders, we believe that we will see greater convergence over time.

Role of private organisations

We believe that peer review should play an important role and should be encouraged at EU level. Actually, in different Member States, private organizations publish surveys on the compliance of companies to the corporate governance code every year with encouraging results (i.e. Afep-Medef and MiddleNext in France; Assonime -Emittenti Titoli in Italy; Association belge des sociétés cotées and GUBERNA in Belgium). Self-engagement of business organisation or of national Committees on Corporate Governance (where in place), directly or through an independent panel, could play an important role in monitoring. The initiative should be left to self-discipline. We are willing to play a role in developing such surveys where necessary.

Monitoring by Regulators

We disagree with any European recommendation on the involvement of public authorities or regulators in the monitoring of the corporate governance statement. Different solutions have been adopted in different Member States[10], but there is no evidence that compliance to corporate governance codes and quality of information are better in those countries where monitoring is entrusted to regulators (e.g. Portugal).

Regulated information

If the corporate governance statement were defined as regulated information within the meaning of the Transparency directive, this would make it subject to the powers of competent national authorities. We do not believe that this would bring any added value to shareholders, but would cause additional costs for companies, since this would also bring in additional audit and other advisory costs.

We therefore disagree with the idea of defining the corporate governance statement as regulated information.

Role of auditors

We also believe that no role should be played by auditors in the monitoring of the CG statements, as it seems to be suggested in the Green Paper (page 20, footnote 63). Auditors should only ensure that financial statements give a true and fair view and that they are prepared in accordance with the applicable financial reporting framework. The kind of information given in the corporate governance statement are different in nature from those contained in financial reporting, since they may relate to behavioural outcomes.

EuropeanIssuers *was set up to represent the interests of publicly traded companies in Europe, which are subject to complex rules on issues such as shareholder rights, corporate governance and reporting and market regulations. Our members include both national associations and companies from all sectors in 14 European countries.*

More information can be found at www.europeanissuers.eu.

[10] See RiskMetrics study, page, 62.

ANNEX I Existing Risk Reporting Requirements

SOURCES	SCOPE	REQUIREMENTS			LOCATION OF INFORMATIO N	ROLE OF COMPANIES'BOARDS / COMMITTEES (IF ANY)	
		INFORMATION ON RISKS	Internal control and risk management systems	Other information requirements			
4th Company Law Directive Annual accounts and annual report.	All types of companies covered by the 4th Directive, except for Art. 46a 1. (c): companies having their securities admitted to trading on a regulated market.	Art. 46 1. (a): description of the principal risks and uncertainties faced. Art. 46 2. (f), in relation to the use of financial instruments and, where material: - the company's financial risk management objective and policies; - the company's exposure to price risk, credit risk,	Art. 46a 1. (c): description of the main features of the company's internal control and risk management systems in relation to the financial reporting process (corporate governance statement included as a specific section of the annual report or, if permitted by the competent Member State, separate report published together with the annual	Art. 2 3. and 4.: the annual accounts shall give a true and fair view of the company's assets, liabilities, financial provision and profit or loss. Additional information must be given, where the application of the Directive would not be sufficient to give a true and fair view. Art. 46 1. (b): to	Art. 46 and 46a: annual report or, for article 46a, if permitted by the competent Member State, separate report published together with the annual report.	Art. 50b and c – Duty and liability for drawing up and publishing the annual accounts, the annual report and, when provided separately, the corporate governance statement. Within the competences assigned to them by national law, collective duty, and liability, of the members of the administrative, management and supervisory bodies of the company to ensure that they are drawn up and published in accordance with the requirements of	

SOURCES	SCOPE	REQUIREMENTS			LOCATION OF INFORMATION	ROLE OF COMPANIES'BOARDS / COMMITTEES (IF ANY)	
		INFORMATION ON RISKS	Internal control and risk management systems	Other information requirements			
		liquidity risk and cash flow risk.	report).	the extent necessary for an understanding of the company's development, or position, financial and, where appropriate, non-financial key performance indicators relevant to the particular business.		the Directive and, where applicable, in accordance with the international accounting standards adopted in the European Union (EU).	
7th Company Law Directive Consolidated accounts and consolidated annual report.	All types of companies covered by the 7th Directive, except for Art. 36 (2)(f): undertakings having their securities	Art. 36 (1): description of the principal risks and uncertainties faced. Art. 36 (2) (e) In relation to the use of financial	Art. 36 (2)(f): description of the main features of the group's internal control and risk management systems in relation to the process for preparing	Art. 16 3. and 4.: consolidated accounts shall give a true and fair view of the assets, liabilities, financial provision and profit or loss of	Art. 36 and 36 2. (f): consolidated annual report or, for art. 36 2. (f) if permitted under art. 46a of the 4th	Art. 36a and b – Duty and liability for drawing up and publishing the consolidated accounts, the consolidated annual report and, when provided separately, the corporate governance	

SOURCES	SCOPE	REQUIREMENTS			LOCATION OF INFORMATION	ROLE OF COMPANIES'BOARDS / COMMITTEES (IF ANY)	
		INFORMATION ON RISKS	Internal control and risk management systems	Other information requirements			
	admitted to trading on a regulated market.	instruments and, where material: - the financial risk management objective and policies of the undertakings; - the exposure to price risk, credit risk, liquidity risk and cash flow risk.	consolidated accounts.	the undertakings included therein taken as a whole. Additional information must be given, where the application of the Directive would not be sufficient to give a true and fair view. Art. 36 (1): to the extent necessary for an understanding of the development and performance of the business and of the position of the undertakings included in the	Directive (see above), separate report published together with the annual report.	statement Within the competences assigned to them by national law, collective duty, and liability of the members of the administrative, management and supervisory bodies of the undertaking to ensure that they are drawn up and published in accordance with the requirements of the Directive and, where applicable, in accordance with the international accounting standards adopted in the EU.	

SOURCES	SCOPE	REQUIREMENTS			LOCATION OF INFORMATION	ROLE OF COMPANIES'BOARDS / COMMITTEES (IF ANY)	
		INFORMATION ON RISKS	Internal control and risk management systems	Other information requirements			
				consolidation taken as a whole, financial and, where appropriate, non-financial key performance indicators relevant to the particular business.			
8th Directive on Statutory Audits	Art. 41 2. (b): Public-interest entities, including entities whose transferable securities are admitted to trading on a regulated market, credit institutions,		Art. 41 2. (b): Monitor the effectiveness of the company's internal control, internal audit where applicable, and risk management systems.			Art. 41 2. (b): - audit committee, without prejudice of the responsibility of the members of the administrative, management and supervisory bodies; - body performing equivalent functions or	

SOURCES	SCOPE	REQUIREMENTS			LOCATION OF INFORMATION	ROLE OF COMPANIES'BOARDS / COMMITTEES (IF ANY)	
		INFORMATION ON RISKS	Internal control and risk management systems	Other information requirements			
	insurance undertakings and, where applicable, other entities of significant public relevance designated by Member States because of the nature of their business, their size or the number of their employees.					administrative or supervisory body as a whole, in the case of exemption from an audit committee under article 41 1. and 5..	
Transparency Directive Art. 4 2. (c) (annual	Issuers whose securities are admitted to trading on a regulated	Art. 4 2. (c) (annual financial report) and art. 5 2. (c) and 4 (half-yearly financial			Annual and half-yearly financial reports.	Art. 4 2. (c) (annual financial report) and art. 5 2. (c) and 4 (half-yearly financial report): statements made by the	

SOURCES	SCOPE	REQUIREMENTS			LOCATION OF INFORMATION	ROLE OF COMPANIES'BOARDS / COMMITTEES (IF ANY)	
		INFORMATION ON RISKS	Internal control and risk management systems	Other information requirements			
financial report) and art. 5 2. (c) and 4 (half-yearly financial report)	market situated or operating within a Member State.	report): - Description of the principal risks and uncertainties (faced/for the remaining six months of the financial year); - Statements about: . the true and fair view of the assets, liabilities, financial position and profit or loss of the issuer and the undertakings included in the consolidation taken as a whole; . the fair review of their				persons responsible within the issuer ("whose names and functions shall be clearly indicated"). Article 7 Responsibility and liability Members States shall ensure that the responsibility for the information to be drawn up and made public lies at least with the issuer or its administrative, management or supervisory bodies and shall ensure their laws, regulations and administrative provisions on liability apply to the issuers, the bodies referred to above or the persons responsible within	

SOURCES	SCOPE	REQUIREMENTS			LOCATION OF INFORMATION	ROLE OF COMPANIES'BOARDS / COMMITTEES (IF ANY)	
		INFORMATION ON RISKS	Internal control and risk management systems	Other information requirements			
		development, performance and position.				the issuer.	
Regulation (EC) on the application of international accounting standards and IFRS, in particular IAS 1 Presentation of Financial Statements, IAS 37 Provisions, Contingent Liabilities and Contingent Assets and IFRS 7 Financial Instruments:	Companies whose securities are admitted to trading on a regulated market of any Member State, for their consolidated accounts.	- Under IAS 37, in addition to the provisions that the entities concerned include in their balance sheets, entities are required to disclose contingent liabilities, i.e. possible obligations whose existence will be confirmed by uncertain future events (unless the possibility of an outflow of economic	IFRS 7 requires inter alia disclosure of qualitative information about exposure to risks arising from financial instruments. The disclosures describe management objectives, policies and processes for managing those risks.	Under IAS 1, financial statements must present fairly the financial position, financial performance and cash flows of an entity. Compliance with IFRSs is presumed to result in financial statements that achieve a fair presentation. An entity whose financial	Consolidated accounts.	Please refer above to art. 36a and b of the 7th Directive, regarding the responsibility and liability for the consolidated accounts.	

SOURCES	SCOPE	REQUIREMENTS			LOCATION OF INFORMATION	ROLE OF COMPANIES'BOARDS / COMMITTEES (IF ANY)	
		INFORMATION ON RISKS	Internal control and risk management systems	Other information requirements			
Disclosures.		resources is remote); - IFRS 7, which specifies disclosure for financial instruments, applies to all risks arising from all financial instruments of all entities.		statements comply with IFRSs shall make an *explicit and unreserved statement of* such *compliance*.			
Prospectus Directive (D) and Regulation (R)	Securities offered to the public or admitted to trading on a regulated market situated or operating within a	- D Art. 5 2. : summary conveying the essential characteristics and risks associated with the issuer, any guarantor and the securities;			Prospectus, including a summary and a declaration by the person(s) responsible (D Art. 6) that the information	D Art. 6 Responsibility attaching at least to the issuer or its administrative, management or supervisory bodies, the offeror, the person asking for admission to trading on a regulated market or	

SOURCES	SCOPE	REQUIREMENTS			LOCATION OF INFORMATION	ROLE OF COMPANIES'BOARDS / COMMITTEES (IF ANY)	
		INFORMATION ON RISKS	Internal control and risk management systems	Other information requirements			
	Member State.	- R Annex I § 4.: prominent disclosure of risk factors that are specific to the issuer or the industry in a section headed "Risk Factors".			contained is in accordance with the facts and that the prospectus makes no omission likely to affect its import (subject to D art. 8).	the guarantor, as the case may be (names and functions/registered offices shall be clearly identified).	
Market Abuse Directive	Financial instruments admitted to trading on a regulated market in at least a Member State, or for which a request for			Art. 1 and 6 of Directive 2003/6 of 28/01/2003 Inform the public as soon as possible of inside information, i.e. "information of a precise nature	Includes posting on the issuer's Internet site of all inside information that the issuer is required to disclose		

SOURCES	SCOPE	REQUIREMENTS			LOCATION OF INFORMATION	ROLE OF COMPANIES'BOARDS / COMMITTEES (IF ANY)	
		INFORMATION ON RISKS	Internal control and risk management systems	Other information requirements			
	admission to trading has been made; financial instruments not admitted to trading, but whose value depends on a financial instrument as referred above.			(…) relating to one or more issuers of financial instruments or to one or more financial instruments and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments.	publicly.		

Annex II

SHAREHOLDER IDENTIFICATION AND VOTING

SUMMARY OF NATIONAL LEGAL REGIMES

Austria

SHAREHOLDING SYSTEM

All shares listed on the Vienna Stock Exchange are bearer shares. The full demateralisation of shares is an ongoing process and will be finalised by 2014. By then registered shares system are mandatory for non-listed entities (that should convert their certificated shares into bearer ones if they want to go public) or de-listed companies, but these are not the objective of this questionnaire.

SHAREHOLDER IDENTIFICATION

Shareholder identification of private shareholders is almost impossible in Austria due to banking confidentiality laws. Para 38 of Austrian Banking law prohibits banks to provide data about their customers to third parties. Exception is only a criminal investigation.

Issuers only know about private shareholders if shareholders register personally for the AGM or if they get in touch with the issuers' investor relations department. Many issuers however use IR-service companies like IPREO, ThomsonReuters or Capital Precision to get some information about institutional shareholdings. There are no means to get information about private shareholdings in Austria at current time.

COST

We have no information about the costs of identifying shareholders.

France

For bearer shares

In France the company's choice to have shareholder identification for bearer shares has to be expressly authorised in the company's articles which have to be approved by the shareholder's general meeting. Therefore, the issuing company's articles of association may authorise it to request the central custodian administering its securities, at any time in return for payment of a fee (around 3 euro for each shareholder), to provide it with: the name or trading name, nationality, year of birth or incorporation, and address of the holders of securities which, immediately or eventually, confer the right to vote at its own shareholders' meetings, the number of securities held by each of them and any restrictions applicable thereto.

The central custodian gathers the said information from the book-keeping institutions affiliated to it, which are required to provide it within ten days. The central custodian then provides that information to the company within five working days of receiving it.

In the light of the list provided by the aforementioned central custodian, the issuing company is entitled to request, either through the said central custodian or directly that any persons included in the said list whom the company suspects of being registered on behalf of third parties provide the information relating to the holders of securities.

When such persons have intermediary status, they are required to disclose the identity of the owners of the securities. The information is provided directly to the book-keeping authorised financial intermediary, who is responsible for communicating it to the issuing company or the aforementioned central custodian, as applicable.

Whenever the issuing company considers that certain holders whose identity has been communicated to it are acting on behalf of third-party owners of the securities, it is entitled to ask the said holders to disclose the identity of the owners of those securities and the number of securities held by each of them.

For registered shares

If the company's capital securities have been admitted to trading on a regulated market and their holder is not domiciled in France, any intermediary may be registered on behalf of that holder. Such registrations may be made in the form of a joint account or several individual accounts each corresponding to one holder.

When it opens its account with the issuing company or with the authorised account-keeping financial intermediary, the registered intermediary is required to declare its status as an intermediary holding securities on behalf of others**.**

In the case of securities in registered form giving immediate or eventual access to the capital, the person registered is required, within ten days, to disclose the identity of the owners of those securities and the number of securities held by each of them whenever so requested by the issuing company or its representative.

Just as for bearer shares, if the issuing company considers that certain holders whose identity has been communicated to it are acting on behalf of third-party owners of the securities, it is entitled to ask the said holders to disclose the identity of the owners of those securities and the number of securities held by each of them.

Sanctions

If the person who is the subject of a request has failed to provide the information within the time limits stipulated or has provided incomplete or erroneous information regarding his own status or the owners of the securities or the number of securities held by each of them, the shares or securities giving immediate or eventual access to the capital relative to which the said person is registered are stripped of voting rights for any meeting of shareholders held prior to the date on which the identification information is corrected, and payment of the corresponding dividend is deferred until that date.

Moreover, in the event of the registered person deliberately failing to apply the provisions which relates to identification, the court having jurisdiction at the place where the company has its registered office may, at the request of the company or of one or more shareholders holding at least 5% of the capital, order the total or partial suspension of the voting rights attached to the shares to which the order relates for a total period not exceeding five years, and deferral of the corresponding dividend payment for the same period.

Germany

Shareholder Identification in Germany is restricted to registered shares only. Especially with regard to foreign shareholders, it is common practice that an intermediary is registered in the share register instead of the end investor.

Since the introduction of the so called "Risk Limitation Act" in 2008, a nominee is obliged to disclose the identity of the true shareholder upon the issuer's request. Therefore the law allows the issuer to request the identity of the beneficial owner along the chain of intermediaries until the end investor is reached.

If an investor does not want to disclose his identity he automatically loses the right to vote in the general meeting (but is still allowed to participate in the meeting). The time limit for the sanction mechanism is not accurately defined. The law offers the terminus "appropriately time limit". The commentary to the law provides for "at least 14 days".

The majority of German issuers obtain shareholder ID through public filings, which of course is not always comprehensive, timely or fully accurate. However, some companies make use of the German legislation to drill into nominee positions on their registers and obtain disclosure of the underlying beneficial owners. This is done directly by the companies, and at present is done by sending a letter or fax to the nominee.

Some German companies have also made changes to their articles to require any shareholder with over 3% of their shares to be directly registered or else lose their voting rights; and any holder with between 1 and 3% must disclose their identity or else also lose voting rights.

There are proposals to automate the ID process, generating a disclosure request to all nominees on an issuer's register and prompting them to input their beneficial owner information into the system, thus creating a central file for the issuer. If the intermediary's client is in turn a nominee, the system then contacts that nominee and so on through any lower chains of ownership until the beneficial owner is identified. Each nominee will be paid a small fee per beneficial owner that they input to cover their costs of complying through this central mechanism.

Intermediaries are obliged under sec. 67 para. 4 of the German Stock Corporation Act to disclose to issuers the respective information which are necessary for keeping the share-register up to date. The issuers are obliged to bear the necessary costs for this. The German Federal Ministry of Justice launched a regulation in the year of 2003 about which costs are considered as necessary. According to this regulation, an intermediary may from 1 January 2005 claim the amount of EUR 0,10 for each new set of data with a shareholder-number and EUR 0,08 for each new set of data without a shareholder-number.

EUR 25.000 is the maximum fine which can be imposed on a nominee in case he refuses to disclose the identity of the true shareholder.

Italy

Italy has recently introduced a rule on shareholders' identification. According to the law, where envisaged in the Articles of Association companies may at any time and at their own expense call upon intermediaries – through a central depository – to provide data identifying shareholders together with the number of shares registered on accounts in their names; however, shareholders may deny consent to such disclosures.

Where the Articles of Association envisage the option of identification, the company shall make the same request if asked to do so by a number of shareholders representing a threshold fixed by Consob; in this case, costs shall be divided between the company and the shareholders concerned according to criteria established by Consob regulation, with due regard to the requirement not to encourage the use of this tool by shareholders for purposes not consistent with the aim of facilitating coordination between such shareholders for the exercise of rights calling for a professional investment .

In case of infringements, financial penalties shall be sanctioned to intermediaries. This rule will be soon implemented by secondary regulation.

Among the main issues at stake in Italian debate: 1) shareholders' right to privacy ; 2) costs of the identification procedure; 3) enforcement of shareholders' identification , especially vis-à-vis foreigner intermediaries.

A request for identification has never been filed so far, so data are not available. Currently, a working group composed of issuers, banks, intermediaries and CSD is working to agree on technical procedures and costs.

Poland

Registered shares

The Management Board is obliged to maintain a share register with names, addresses, number of shares, history of transactions and paid in capital. Hence, the registered shareholders are known to the issuer.

Bearer shares

There is no shareholder identification mechanism in Poland. The issue has been discussed before but no decisions have been taken so far. Hence, the companies do not have access to any tools to identify their up to date shareholder base.

Nonetheless, there are some limited options for shareholder identification:

- Major shareholders (5% threshold) have to report certain transactions to the company (the information has to be made publicly available through ESPI - the official electronic system for issuer reports)
- A shareholder reveals himself to the company (wants to execute some rights e.g. a group of shareholders who would like to convene an EGM have to present a proof that they own the shares, etc.)
- Registration for GMs (publicly traded companies only): after the convocation, shareholders have to register their participation (no need to register all the votes); the information goes through the chain of intermediaries to the CSD; the CSD creates a list of shareholders

registered for the GM and makes it available to the issuers through a special online system (the shareholder data includes the name, address, number of shares/votes registered).

The companies are not entitled to demand shareholder information. In the abovementioned cases the information is 'pushed' towards the issuer due to regulatory requirements, but cannot be 'pulled' by the issuer.

Portugal

The system was almost fully dematerialised (99%) with the creation of the Portuguese Central Securities Depositary (Interbolsa). Shares of a company quoted on the Stock Exchange are bearer shares and are held by means of book-entry.

Issuers that have their shares entered in the books of the Portuguese central securities depository may, at any time and at their own expense, call upon intermediaries – through the CSD – to provide data identifying shareholders together with the number of shares registered on accounts in their names.

However, although the CSD has the right to request such (updated and accurate) information from the intermediaries, the intermediaries do not have a legal obligation to provide this data.

This can lead to the data not being disclosed or being provided in an incomplete or erroneous way regarding the owners of the securities or the number of securities held, which would make it difficult or impossible to trace the effective shareholder.

In any case, Portuguese issuers are not in a position to know the intermediaries or shareholders behind the first level of account holders, as the issuers are not allowed to request the identity of the beneficial owner along the chain of intermediaries until the end investor is reached, and it is common practice, especially in what regards foreign shareholders, that an intermediary is registered in the share register instead of the end investor.

Spain

REGISTRATION SYSTEM

In 1992 the Spanish Central Securities Depositary ("Iberclear") was created, and the system was dematerialised. Since then, all shares of every company quoted on the Stock Exchange are bearer shares and are held by means of book-entry. The registered shares system only applies to non-listed entities (that should convert their certificated shares into bearer ones if they want to go public) or de-listed companies, but these are not the objective of this questionnaire.

Some listed companies must keep a daily register, a legal requirement that applies to banks, insurance companies, highway operators, TV licenses or airlines, companies whose shares are treated as "registered" ones as far as information goes, while they are traded, cleared, settled and held under custody as any other bearer share represented by book-entry form.

COST

According to CSDs official fees & tariffs:

Notification at the issuers' request of shareholders details will be subject to a fixed fee of 4,000 € plus a variable charge of 0.30 € per shareholder (or reference) up to a maximum for this variable charge of 16,000 € plus VAT. Half of the proceeds from this source will be distributed among the participant members that have taken part in collecting shareholder data.

For "registered" shares, no relevant cost is charged, except the internal expenses of maintaining the systems to support the register or those fees charged by the agents (registrars) who take on that function by the issuer's mandate.

NEW REGULATION

A new regulation was enacted to allow the issuers to have access to their shareholders information at any time, without the necessity to call for a General Meeting. This is a first step, long time desired by issuers, but not enough, as the expenses are still high and the number of requests, limited.

NEXT STEPS

Spanish regulation still needs a more frequent flow of information, to facilitate daily information on their shareholders to those issuers that require so (as it happens with the so called "registered shares") at a reasonable cost. Finally, what is more, Spain has no regulation that allows the issuers to ask who is behind the omnibus accounts, as all the information described above refers only to the registered level, and shows the first layer of ownership, and not the final beneficial owner. There is no rule that authorise the issuers to enquire who are the actual shareholders and, consequently, there is no sanction regime for those not fulfilling.

The development of these new rules, as in other European markets of similar size, is a major aspiration of Spanish companies that rank among the best and biggest in their respective industries.

Switzerland

There is no provision regarding shareholder identification, except for the disclosure of major shareholdings reaching more than 3% of voting rights (equivalent to Transparency Directive).

On a contractual basis, issuers that have their shares entered in the books of the Swiss CSD (SIX SIS) are able to get to know the number of shares held by each SIX SIS participant. But it stops there, meaning that Swiss issuers are not in a position to know the intermediaries or shareholders behind this first level of account holders.

The share of shareholdings without registration with the issuer's shareholder registry varies, among the most important issuers, between 30 and 50% of voting rights.

The Netherlands

In the Netherlands, the issuer is required to maintain a shareholders' register with records of the holders of registered shares. There is no requirement to register beneficial ownership of the registered shares. The shareholders' register does not provide evidence of ownership of the shares.

The Issuer has no right or ability to obtain information about the identity of holders of bearer shares. Shareholders who have the intention to attend and vote on shareholders' meetings are subject to an obligation to register themselves with the Issuer in advance of the meeting. Disclosure of holdings of 5% or more in listed companies is required, in accordance with the requirements from the Transparency Directive. Following recommendations of the Dutch Monitoring Committee Corporate Governance, a draft bill was prepared in July 2009, addressing several matters:

- Lowering the first notification threshold for shareholders with a substantial interest from 5% to 3%;

- Introducing an obligation for shareholders with an interest of 3% or more to state their views on the company;

- Raising the threshold for the right to put items on the agenda of the shareholders' meeting from 1% to 3%;

and

- Introducing a scheme for identification of shareholders.

The main characteristics of this proposed scheme are the following:

- A request for identification is only possible 60 days in advance of (extraordinary) meetings of shareholders;

- Only shareholders or holders of depositary receipts of shares can be identified ("investors" in the definition of the Act);

- The Issuer may address his request to Euroclear the Netherlands, associated institutions (banks), brokers, institution outside the Netherlands, management companies of collective investment schemes, etc. and subsequently to similar institutions higher up the chain;

- A response is required within two working days;

- Shareholders who alone jointly represent more than 10% of the share capital of the Issuer, may force the Issuer to start an identification process;

- The start of the identification process needs to be disclosed on the Issuers' website;

- The information obtained may be used by the Issuer to provide information to its shareholders. Provided certain conditions have been fulfilled, shareholders representing more than 1% of the issued share capital may have information be sent to shareholders.

- The Issuer is obliged to keep the identity of its shareholders confidential.

In case of non-compliance with an identification request of the issuer, the issuer may request a court order for compliance or suspension of voting rights. This bill would complement existing private sector initiatives such as the "Stichting Communicatiekanaal Aandeelhouders", which already exists for a substantial number of years and was founded by a number of listed companies in the Netherlands to promote communication with shareholders. The bill has not yet been adopted in its final form.

UK

Shareholder visibility in the UK has four strands:

- Obligation to report share ownership over fixed thresholds (Transparency Directive);
- Ability for issuers to demand information (Companies Act);
- Legal penalties for failure to provide information (Companies Act)
- Information provided is in the public domain (Companies Act).

The UK Market operates in a registered share environment (no bearer shares), governed by:

- The Companies Act 2006
- The Uncertificated Securities Regulations
- The Articles of Association.

Each company must keep a register of its members (s113) including :

- Name and address
- Date(s) of membership
- Number of shares.

The Register is a public document – anyone has the right to inspect or obtain copies on payment of the statutory fee, subject only to a 'proper purpose' test.

Under S126 of the 2006 Act, "No notice of any trust, expressed, implied or constructive, shall be entered on the register…." While s127 of the Act states that "The register of members is prima facie evidence of any matters which are by this Act directed or authorised to be inserted in it". The register must be kept completely up to date as it is the legal record of the identity and contact details of the shareholders.

For publicly traded companies, the Register of Members will be in two parts:

- ***The Operator Register***, maintained by Euroclear UK & Ireland as the UK Central securities depositary (CSD) on their proprietary system, CREST, for all dematerialised holdings on the register; and
- ***The Issuer Register***, maintained by or on behalf of the issuer, for all certificated holdings on the register.

The Issuer is also responsible for maintaining a copy of the Operator register so that the public information about the Register of Members is always available in one place. The Operator (Euroclear) is obliged under Schedule 5 of the Uncertificated Securities Regulations to provide a regular update to the Issuer of changes to the Operator Register, so that the Issuer copy of the Operator Register is always up to date (under the CREST Rules, this happens on a continuous basis and the register is usually updated within 2 hours so UK companies can receive daily information about any changes). There is a process in place for shares to move between the two parts of the register if necessary.

The key principles of the 2006 Act regarding shareholder identification for nominee holdings which are not on the register are as follows:

- The company has the ability to either approach the intermediaries, or, particularly if most of the investment chain is known, to target the end owner direct;
- The company has the right to ask for the information at any time, not just before the general meeting or for corporate actions;
- The shareholder has no right to privacy – the information is recorded in the company's shareholder register within three days (others may have access but only for a 'fit and proper purpose');
- The company has enforcement powers since the Act allows it to apply to court for restrictions on the shares if there is no response e.g.
    - any transfer of the shares is void;
    - no voting rights are exercisable in respect of the shares;
    - no further shares may be issued in right of the shares or in pursuance of an offer made to their holder;
    - except in a liquidation, no payment may be made of sums due from the company on the shares, whether in respect of capital or otherwise.
- The company's Articles of association may provide for some or all of these sanctions to be applied without the need to seek an Order from the Court;
- It is a criminal offence to file false information.

It is important to consider in this context not just section 793 which is the most often quoted part of the UK legislation, but the whole of Part 22 INFORMATION ABOUT INTERESTS IN A COMPANY'S SHARES. See http://www.legislation.gov.uk/ukpga/2006/46/part/22 Note in particular that it is the company's ability to apply to the court for sanctions for non-compliance which makes the legislation effective across borders. Without enforcement rights, any shareholder identification rule is very difficult for companies to use because so many financial intermediaries may refuse to respond or may demand remuneration for the response. In reality, an application to court is not necessary as the provisions have been in legislation for 20 years and the intermediaries are familiar with them, so the threat of enforcement either through the Court, or through the Articles of Association is sufficient. There is thus no right to privacy for shareholders in UK companies – it is public policy that the investing in a company with the benefit of limited liability carries an obligation to disclosure of ownership.

The cost of a s.793 enquiry to a UK company is "*..nothing more than the cost of the letter/fax/email. A company could (and some do) carry out their own investigations. But typically a UK company would authorize an agent to carry out the analysis on its behalf. Costs vary, particularly for the larger companies, but for straight identification of owners, anywhere between 600 and 2000 EUR, with the average sized company typically around 1000 EUR.*"

As a response to a s793 Notice is a legal duty, there is no right on the part of the recipient to charge the company to respond.