July 2011

AK Position Paper

Green Paper of the European Commission: European Corporate Governance Framework

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About us

The Federal Chamber of Labour is by law representing the interests of about 3.2 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore the Austrian Federal Chamber of Labour is a part of the Austrian social partnership.

The AK EUROPA office in Brussels was established in 1991 to bring forward the interests of all its members directly vis-à-vis the European Institutions.

Organisation and Tasks of the Austrian Federal Chamber of Labour

The Austrian Federal Chamber of Labour is the umbrella organisation of the nine regional Chambers of Labour in Austria, which have together the statutory mandate to represent the interests of their members.

The Chambers of Labour provide their members a broad range of services, including for instance advice on matters of labour law, consumer rights, social insurance and educational matters.

More than three quarters of the 2 million member-consultations carried out each year concern labour-, social insurance- and insolvency law. Furthermore the Austrian Federal Chamber of Labour makes use of its vested right to state its opinion in the legislation process of the European Union and in Austria in order to shape the interests of the employees and consumers towards the legislator.

All Austrian employees are subject to compulsory membership. The member fee is determined by law and is amounting to 0.5% of the members' gross wages or salaries (up to the social security payroll tax cap maximum). 560.000 - amongst others unemployed, persons on maternity (paternity) leave, community- and military service - of the 3.2 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labour.

Herbert Tumpel
President

Werner Muhm
Director

Executive Summary

So far the statements of the Commission have barely paid more than lip service

To begin with, the AK would like to make the point that the Corporate Governance Standards, which are based on voluntary codes of conduct, have significantly contributed to the financial and economic crisis. Companies mainly acted on the principle that everything which is not forbidden is allowed. The lack of legal norms with clear sanctions in case of non-compliance resulted in losses in the billions for companies and in the loss of many thousand jobs.

Our annual review concerning the compliance with the Austrian Code of Corporate Governance is also sobering: the latest evaluation on complying with the Austrian Code of Corporate Governance shows that 15 % of the listed corporations still do not make a relevant commitment. Only 6.6 % of companies listed at the Vienna Stock Exchange, hence only four, adhere to all Comply or Explain Rules; overall 261 cases of non-compliance cases were established. On the whole, the Green Paper "Corporate Governance", which has been presented by the Commission again follows the principle of voluntarism. However, from the point of view of the AK, clear standards and sanctions are required.

The basic focus of the EU Commission on interests of shareholders whilst at the same time ignoring the interests of stakeholders, promotes an entrepreneurial approach, which is oriented towards short-term gains. Hence, what is needed at European level is a basic change in values and a paradigm shifts. It must be the objective to realise an enterprise as a social organisation, which in turn has a responsibility towards shareholders, employees, creditors and the society as a whole. So far the statements of the Commission have barely paid more than lip service. Although in its introduction the Green Paper refers to the responsibility of society as a whole as well as to the social responsibility of corporations, within the scope of this questionnaire, however, the Commission devotes itself mainly to the interests of the shareholders and neglects those of the employees.

Only one paragraph resp. only one of 25 questions deals with the concerns of employees. Employee participation as an important part of social market economy and sustainable corporate governance is thereby completely ignored. The AK demands that the subject of co-determination as part of a holistic corporate governance has to be included. Co-determination is especially then of "paramount importance" when the aim is to achieve "that European businesses demonstrate the utmost responsibility not only towards their employees and shareholders but also towards society at large", as the Commission has stated.

The Green Paper of the Commission does also not enlarge sufficiently upon the dualistic organisational system (supervisory board, executive board). The Commission focuses its questions primarily on the Anglo-Saxon board system and neglects the dual system, which is prevalent in many Member States. The Green Paper of the Commission must not be a one-way street towards promoting the board system, but it has to do justice to European diversity.

The AK position in detail

General 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 or thresholds? If so, please suggest ways of adapting them for SMEs where appropriate when answering the questions below?

From the point of view of the AK, all EU corporate governance measures should fully apply to all listed corporations

From the point of view of the Austrian Federal Chamber of Labour (BAK), all EU corporate governance measures should fully apply to all listed corporations. Any **differentiation into sizes is strongly opposed,** because different corporate governance structures would in the end disadvantage stakeholders and shareholders of smaller listed companies. All publicly traded companies, independent of size, are obliged to inform their stakeholders (customers, employees, suppliers etc.) and shareholders (shareholders and owners) comprehensively and transparently about the measures for good corporate governance and control. Careful monitoring is urgently needed in all listed companies in order to uncover deficits of corporate governance well in time to prevent serious consequences for the continuation of the company, for employees as well as for investors. Hence, from the point of view of the BAK, the development of a weakened "Special Code of Corporate Governance for SMEs", must be rejected on principle, as parallel code regulations with differentiated provisions based on size would exclusively reduce transparency and result in a lack of comparability.

(2) Should any corporate governance measures be taken at EU level for unlisted companies? Should the EU focus on promoting development and application of voluntary codes for non-listed companies?

To start with, one should say that from the point of view of the AK "good governance" cannot be achieved by voluntary codes and purely self-imposed commitment of companies. This is also confirmed by the current Corporate Governance Report of the international leadership advisory firm "Heidrick and Struggles", which is among the most comprehensive studies on the quality of board performance throughout Europe. None of the 13 European countries resp. the 371 listed companies analysed was anywhere near to fulfil the top rate to be achieved.[1] These results once again show that the principle of voluntariness, on which the self-commitment of the companies is based, does not result in the desired success.

Hence, the AK demands the fundamental **rejection of voluntary codes** and is therefore opposed to a new voluntary code, developed at EU level. What is necessary is to develop the European corporate law for listed and non-listed corporations on the basis of clear standards and sanctions.

[1] Compare 'Boards in turbulent times', Corporate Governance Report 2009, page 4

Board of directors

(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?

The clear division of the responsibilities and competencies of corporate governance and supervision is essential

The AK assumes that this question refers to the monistic board system (one tier board) and recommends that the European Commission - in particular in respect of this supervisory system creates a **clear differentiation** of responsibilities and scopes of the chairperson of the supervisory board (president of the board of directors) resp. the Chief Executive Officer.

In contrast to this, the roles between supervisory board and executive board in the dual system ("two tier board") are far clearer defined: relevant binding and legal regulations apply in Germany, Denmark, Finland and the Netherlands as well as in Austria. The Austrian Stock Corporation Act pursuant to § 70 AktG (1) for example states "the Executive Board manages the Company on its own responsibility in such a way, as is necessary for the good of the company taking into account the interests of the shareholders and employees as well as the public interest" The key responsibility of the supervisory board has been regulated as follows in § 95 AktG. (1): "It is the duty of the supervisory board to monitor the management". The advantage of this dualistic system is that executive board and supervisory board belong to separate bodies and that statutory bases exist for the respective assignment.

The clear division of the responsibilities and competencies of corporate governance and supervision is essential. Because reliable supervision can only be guaranteed by **qualified and independent** non-executive directors resp. supervisory board members. Hereby, independence plays a key role and is decisive for two reasons: on the one hand, in relationship to the executive board and in relation towards the owner on the other. Apart from that, there is a clear link between the quality of the supervisory board and corporate success. According to a recently published study for Austria, supervisory boards in more successful companies are **more likely to be independent** from owners and executive board than in less successful companies.[2]

(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?

The requirement profile of the chairman of the supervisory board, but also of the elected representatives in the entire body, must be sharpened: in this context, the AK refers to the **"Fit and proper test"** for the chairman of the supervisory board in banks and insurance companies, which is already mandatory in Austria.

[2] Compare Stand der Unternehmensaufsicht in Österreich, Hoffmann et al., 2011

Concerning chairmen of the supervisory board in Austrian financial institutions, this competence check is regulated in § 28a Banking Act (BWG). The requirements include that the chairman of the supervisory board is **professionally capable** and that he has the required experience to exercise his function; this requires **appropriate knowledge** in the field of banking **finance and accounting.**

Even though there are as many women graduates as men with equal qualifications, female executives in the European economy, in particular at top management level are clearly underrepresented

Similar to the **"Fit and proper test",** the AK would welcome a competence and requirement check - in accordance with the respective business sector - for all supervisory board chairmen and in slightly simplified form for the entire supervisory board body resp. the non-executive directors. We suggest that the Commission sets out a proposal ("guidelines") with regard to a respective list of criteria. This should also include regular basic and further training programmes.

(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?

The AK demands the transparent, informative and detailed disclosure of the diversity strategy of listed companies similar to **mandatory diversity reports** as part of the annual reports. In this report, corporations have to clearly specify, which concrete measures will be taken to achieve more diversity in the employment structure, in particular in the executive committees of the European economy. Further development, progress and targets must conform to qualitatively uniform criteria and quantitatively documented to ensure comparability. The publication of the measures to promote diversity in listed companies is required to achieve a balance with regard to age, gender and internationality among executives.

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

The share of women in leading positions has been at a constant low level for years. Even though there are as many women graduates as men with equal qualifications, female executives in the European economy, in particular at top management level (executive board, supervisory board), are clearly underrepresented. This is impressively demonstrated by the latest figures: in **Germany** for example, there are only 2.2 percent female chairpersons in the companies of the German Stock Index (DAX) resp. of the 100 largest companies; that means only eleven out of 490 top managers are women. In **Austria** too, both bodies are dominated by men: according to the latest study conducted in March 2011, the share of women at management level of the top 200 companies even fell by almost one percentage point to 4.4 % (2010: 5.3 %), whilst the proportion of women in supervisory boards only marginally rose to 10.3 % (2010: 9.7 %). Only every twentieth management

body (28 of 637) and every tenth supervisory board (145 of 1,404) is female. In only 13 of the top 200 companies is at least one woman represented both at management level and on the supervisory board. Particularly problematic is the situation in respect of listed companies: an analysis from the end of May 2011[3] shows that only two female chairpersons are represented in all listed companies in Austria; a share of women of only 0.9 %. Although at 6.9 % the proportion with regard to supervisory boards is higher, women are still clearly underrepresented in control and steering committees.

More diversity is found only in countries where the women quota has already been enshrined in law. In Norway for example, a respective law (woman quota: 40 %) for semi-privatised companies has been in force since 2004 and for listed companies since 2006. Spain also plans to fill 40 % of all supervisory board positions with women by 2015; at the beginning of this year, France has also adopted a quota law for women for companies with at least 500 employees and 50 million Euro annual turnover. From 2014, a quota of 20 % for supervisory boards will apply in France and of 40 % from 2017. And from 2016, in the Netherlands, companies with more than 250 employees will have to fill 30 % of the positions in supervisory and in executive boards with women. The successes justify the quota system.

The AK demands the immediate preparation of an EU regulation, which prescribes a **uniform gender quota of 40 %** for the appointment of supervisory board mandates by **2015 at the latest.** In doing so, the AK supports the request of EU Justice Commissioner Viviane Reding, who already supports a **statutory uniform woman quota** for all Member States. Of course, there have to be **measures for the promotion of positive action for women** to accompany the process; apart from that, an international database with candidates for supervisory boards resp. board of directors functions could play a supportive role.

The AK demands as an **immediate measure** effective and concrete regulations to be included in the current voluntary codes as well as a quantification of the relevant objectives. The implementation of the mandatory woman quota of 40 % could be carried out gradually: initially in publicly owned and listed companies and then in all major corporations. **Sanctions** for the non-compliance should be expressed as **administrative fines** and an **entry in the international resp. national** register (e.g. the companies' register in Austria or the commercial register in Germany).

(7) Do you believe there should be a measure at EU level limiting the number of mandates? If so, how should it be formulated?

The AK is decidedly in favour of **limiting the number of mandates** of board of directors resp. supervisory board members: the number should be **maximal four supervisory board mandates** in other listed companies or in superviso-

[3] Compare analysis from 30 May 2011 (in accordance with the companies' register), Department of Economics, AK Vienna

ry bodies of companies with comparable requirements whereby the **chair of the supervisory board counts double.** It should be pointed out that this mandate limitation should also apply to intra-group supervisory board functions.

The implementation of this measure is urgently required as supervisory board activities, if they are taken seriously, are very time consuming: according to a current survey in Austria, the annual time spent by a chairman of the supervisory board is 22.3 days; simple supervisory board members devote 7.2 person days to their activities.[4] An Austrian supervisory board member holds up to **six** additional mandates on average (peak values can be as much as 30 functions). This accumulation of offices - often criticised by experts - results in the fact that in many cases the available time budget is significantly limited, leaving little scope for high quality preparation and intensive discussions in board meetings (e.g. involving experts and authorities, setting of key audit areas or reflections on the efficiency of one's own contribution).

"The infrequency of the board meetings and the fact that both chairman and directors hold too many simultaneous positions have eroded trust"[5] , confirms the current Corporate Governance Report of the international leadership advisory firm "Heidrick and Struggles". This report is regarded throughout Europe as one of the most comprehensive studies on the quality of corporate governance; the results of the study are particularly sobering in respect of the frequency of board meetings: the European average, for example, lies at only 9.6 times. At 5.6 meetings per year, the frequency in Austria compared to Europe is the lowest; however, greater efforts could also be made in Germany (5.8) and in France (8.1) to attend more meetings. An example for best practice is Finland, where the supervisory board meets on average 12.6 times per year.

A limitation of the mandates would not only **increase the frequency of meetings,** but also bring **more time** and with that **more quality** to corporate supervisory bodies. It must be the long-term goal that supervisory board functions are not only - as can be observed in practice - regarded as prestigious secondary jobs, but as an appointment with obligations and responsibilities.

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

The actual efficiency of the supervisory board can only be ensured via **regular efficiency audits** (external audit and self-evaluation) and relevant subsequent reporting to the shareholders' meeting. Only **critical, systematic self-reflection** and the **acceptance of external impulses** make any development of process control in corporate governance possible. The AK proposes the following **measures,** which should be implemented via **regulation:**

[4] Compare Stand der Unternehmensaufsicht in Österreich, Hoffmann et al., 2011

[5] Compare 'Boards in turbulent times', Corporate Governance Report 2009, page 20, page 6

Apart from the external assessment of the work of the supervisory board, it is also recommended that the supervisory board carries out a self-regulation each year

External audit (every two years)

The AK regards an external audit as necessary and proposes it to be carried out in two-year intervals: the main objective is - starting from an objective and impartial point of view - to develop measures to increase efficiency and to open up potentials for improvements concerning the work in committees. Practice shows that a demand for action in particular exists to improve communication and to develop a constructive meeting and discussion culture. To view the supervisory board system through the eyes of expert third parties is definitely an advantage for making the work more professional - only then will it be possible to detect blind spots, which are not evident to someone looking from the inside. The AK is aware of the fact that external audits are also regarded with a certain amount of criticism. However, the issue is not an additional supervisory body, but the objective view from outside aimed at improving the work of the supervisory boards for the good of the company and the stakeholders.

Self-evaluation (annually)

Apart from the external assessment of the work of the supervisory board, it is also recommended that the supervisory board carries out a self-regulation **each year.** Thereby special emphasis must be put on the procedural sequences in the supervisory board, the flow of information between the committees and the plenum as well as the timely and content-wise sufficient supply of information of the supervisory board. The national Corporate Governance Code already recommends this for listed companies in Austria: "The supervisory board shall discuss the efficiency of its activities annually, in particular, its organization and work procedures (self-evaluation)." (C-Rule 36). However, recent survey results show that only 12.2 % of supervisory board members devote time to an efficiency audit.

The interaction between **external and self-evaluation** is a key element to make the work of the supervisory board more professional and plays a decisively contributes to increasing **information, interaction and time efficiency.**

Against the background of **evaluating the quality of supervisory board work,** the AK recommends as a **concrete measure** to make it mandatory to hold at least **one meeting per year without executive board members:** even though the executive board is not a member of the supervisory board, in Austrian companies it participates in 94.9 % of cases in all board meetings.[6] Due to the permanent presence in meetings of the management, any evaluation of the performance of the management is difficult and is only rarely found on the agenda of meetings. However, in particular the **supervision/monitoring of the management** and thereby the **evaluation of the company success** is one of the key tasks of the supervisory board. In view of the fact that for example in accordance with current data of the Credit Protection Association (KSV) in 2010

[6] Compare Work of the supervisory board work in crisis, AK Vienna, 2009

every second insolvency in Austria was the result of mistakes at management level, this task gains even more in significance.

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

From the point of view of the AK, all listed companies as well as public interest entities and semi-privatised companies in accordance with Directive 2006/43/EC should be included in the mandatory obligation to **disclose individual remuneration of supervisory board and executive board members** as quickly as possible. This requires a detailed and comprehensive **remuneration report, which includes on the one hand extensive and detailed information on the remuneration structure and the remuneration criteria resp. incentive models** in case of variable remuneration and shows all **pay components** (fixed, variable, profits from share options, severance payments, pension benefits, benefits in kind, etc.) on the other.

An evaluation of the business reports of companies listed at the Vienna Stock Exchange for 2009 shows that **almost 60 % of all companies** refuse to disclose individual remuneration of executive directors and thereby ignore the respective C-Rule 31 of the Austrian Corporate Governance Code. The current low disclosure behaviour demonstrates that the policy of the Corporate Governance Code, which is based on voluntariness, is no more than an ineffective tool: more corporate transparency can only be achieved through law. A relevant **EU Regulation** must be initiated quickly, which prescribes the **individual disclosure** of supervisory board and executive board remuneration as well as their pay components and thereby ensures more transparency with regard to supervisory boards and executive board remuneration throughout Europe.

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

Following the election of the executive board through the entire supervisory board, the employment agreements are normally prepared by the supervisory board executive committee. Often members belong to the supervisory board executive committee, who are at the same time acting executive board members in other companies. As the size of executive board remuneration depends on various parameters (industry, size of the company, general salary developments etc.), in the end the executive board members on the supervisory board executive committee indirectly also decide their own salary development. This circumstance definitely requires increased transparency in order to avoid any possible conflicts of interest.

The determination of the general principles of business policy has to be approved by the supervisory board resp. the board of directors

The AK regards an increased involvement of the shareholders resp. of the shareholders' meeting as an effective tool to ensure the appropriateness of executive board salaries. In this respect a remuneration report of the supervisory board to the shareholders' meeting is required, which has to provide comprehensive information on the amount and the composition of executive board salaries. Thereby, the principles about the weighting of fixed and variable salary components, the performance-related success criteria, the parameters for annual bonus regulations as well as benefits in kind have to be disclosed for each member of the executive board.

(11) Do you agree that the board should approve and take responsibility for the company's 'risk appetite' and report it meaningfully to shareholders? Should these disclosure arrangements also include relevant key societal risks?

The determination of the general principles of business policy has to be approved by the supervisory board resp. the board of directors. Hence, the supervisory board (board of directors) also shares in the responsibility of determining the risk profile resp. the risk strategy of the company. A **disclosure of the most important corporate risks,** under consideration of operational and business secrets, is definitely desirable.

(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?

The **audit committee** of the supervisory boards (board of directors) is already responsible for monitoring the risk management of the company. It has to ensure that risk management exists, that risk reporting is detailed and informative and carried out in a timely manner and that the crisis-related framework conditions are taken into account. It is a matter of course that the risk management has to be based on the risk profile of the company.

Shareholders

(13) Please point to any existing EU legal 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.

In its Green Paper 2010, the Commission has already pointed out that the behaviour of investors on the capital markets is increasingly more oriented towards short-term gains. Many investors are no longer interested in the sustainable and long-term positive development of their investments, but try - by using complex financial instruments - to achieve maximum gains in as little time as possible. Short selling, taking high leverage positions or en-

forcing a corporate policy for the short-term profit maximisation (e.g. dividends instead of investments, breaking up companies instead of continuous development) are only examples of an investor policy, which is oriented towards speculation.

From the point of the AK, certain speculative instruments such as short selling should be banned on principle. Apart from that it is necessary to abolish the principle of 'One share - One vote' and instead to entrust long-term oriented investors with more corporate responsibility. One option, for example, could be that a retention period for shares of more than one year is introduced for exercising absolute rights (voting rights) in the shareholders' meeting. Apart from that, long-term oriented investors should also receive multiple voting rights. Relevant experiences have already been made in France.

From the point of the AK, certain speculative instruments such as short selling should be banned on principle

(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?

The remuneration structure of asset managers has to be restructured. The current incentive structures promote short-term profit maximisation and excessive risk taking. Analogue to the discussion concerning the salaries of executive board members, the remuneration structure of asset managers must in future be more oriented towards incentives for a sustainable portfolio policy. This also includes the promotion of ethical investments. Also needed are concrete guidelines concerning the contents of the incentive structures, so that variable salary components are not paid for short-term gains, but only in case of sustainable success development. Any deterioration of performance must also affect the performance evaluation.

The AK also attaches particular importance to the idea that asset managers have to disclose to their customers their remuneration structure in a clear and transparent manner (e.g. kick back payments, conflicts of interest). Any shifting of assets, which incurs additional fees and commissions for the asset manager, have to be made transparent in advance. That way, short-term incentive structures will be disclosed and institutional investors have the chance to react. At the same time, the independence of asset managers by disclosing conflicts of interests has to be promoted.

(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 the investee companies? If so, how?

Not only institutional investors but all investors should be informed in an open and transparent manner (investment policy, costs of portfolio turnover,

cost and risk of the engagement etc.). One option would be a regular report of the asset manager, which has to be made available to all investors directly or indirectly via the institutional investors. Apart from that it has to be ensured that the independence of the asset manager is guaranteed.

(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?

The Commission should provide a list of criteria in respect to the independence of the asset manager and the respective national financial market authority should monitor its compliance

The independence of the asset manager is an important requirement for avoiding conflicts of interest. The Commission should therefore provide a list of criteria in respect to the independence of the asset manager and the respective national financial market authority should monitor its compliance. For example, transparency measures such as the disclosure of a possible close relationship to funds could provide important impulses with regard to strengthening independence.

(17) What would be the best way for the EU to facilitate shareholder cooperation?

Important portfolio shareholders often conclude syndicate agreements to combine their voting rights. Any joint action of shareholders has to be regarded as a uniform approach and must, if the control threshold has been exceeded, result in a mandatory offer.

(18) Should EU law require proxy advisors 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?

The consulting market for voting recommendations and proxy voting is gaining increasingly in importance. Today, two companies, RiskMetrics and Glass Lewis, with a market share of more than 90 % dominate this consulting market. The working methods of proxy advisors is non-transparent and their analytical methods often questionable. At the same time, they exercise increasingly more power at shareholders' meetings and are exclusively accountable to their clients. In view of the growing influence of these proxy advisors, the AK demands clear rules of conduct and transparency provisions, which have to subject to being monitored by the Financial Market Authority.

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

The large consultancies work both for institutional investors (proxy advisor) and for issuers. This can result in considerable conflicts of interest. An obligatory separation of consulting services for institutional investors and consultancy services for issuers is an essential requirement for the ability of proxy advisors to work independently.

(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 detail and cost allocation).

The AK is in favour of the obligatory introduction of registered shares. This promotes on the one hand the transparency of the shareholders and enables the issuer to access his shareholders easier on the other. Better transparency of the shareholding structure also contributes to the early recognition of a creeping controlling participation, which develops under the protection of anonymity. The AK demands in this context that the initial reporting threshold (minimum threshold of the Transparency Directive, 2004/109/EC) of currently 5 % throughout Europe, will be lowered to a uniform rate of 2 %. With regard to determining the voting rights, derivative financial instruments (options) and voting rights, which can be exercised by a person who is not the owner of these shares, have to be taken into account.

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

Significant progress has already been made within the scope of the Shareholder Rights Directive (2007/36/EC).

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

From the point of view of the BAK. it could be considered to increase the squeeze-out quote from currently 90 % to a uniform level of 95 %.

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

From the point of view of the AK, employee share ownership is not to be recommended in general, but only if it has been defined, which personnel-policy objectives it should pursue and whether any financial involvement has proven to be a suitable instrument to achieve these. An individual assessment of the framework conditions, of the economic situation of the company, of the financial viability of the employees concerned as well as of the objectives of the scheme is essential requirements. It must generally be taken into account that interests of employees always result in risk agglomeration (income and asset risk). In the extreme case, the meeting of these risks may lead to serious, existential consequences for the employees in question.

A requirement for the applicability of equity participation schemes must be that companies are not facing any risk of insolvency, that employees are able to cope with the risk and that respective risk reduction instruments are provided (e.g. obligatory redemption at agreed prices, for example in personal emergencies). If employee share ownership is supposed to create strategic ownership, additional instruments to combine voting rights have to be introduced. The BAK is strictly opposed to non-voting shares. Apart from that, employee share ownership schemes should by no means replace collective bargaining negotiations and may only be implemented in agreement with collective bargaining partners. Apart from that, share options for supervisory board members and chairpersons have to be banned as these instruments promote the short-term and speculative orientation of corporate governance.

Monitoring and implementation of corporate governance codes

(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?

The AK welcomes all measures, which are aimed at a **higher quality and an improved information content of explanations,** and supports the idea that companies in case of non-complying with recommendations, have to make the effort to describe the respective chosen alternative. International and national code evaluations have shown that the basic principle "comply or explain" when implemented in practice exposes significant deficiencies. A study, which was commissioned by the EU and published in 2009[7] clearly shows that in most cases the information quality of explanations is **not satisfactory** and that therefore the **benefit** of corporate governance reporting is considerably **limited:** in 60 % of cases of non-compliance with the recommendation, **no sufficient explanation** has been provided. Either it has just been stated - without any further ex-

[7] Compare Study on Monitoring and Enforcement Practices in Corporate Governance in the Member States, available under: http://ec.europa.eu/internal_market/company/docs/ecgforum/studies/comply-or-explain-090923_en.pdf.

planation - that the recommendation is not complied with or the comment does not go beyond superficial and very general explanations.

This problem also becomes apparent in respect of the evaluation of corporate governance reports Austrian corporations: the **Mayr-Melnhof Group,** for example, justifies the deviation from the C-Rule 31 on disclosing individual executive board salaries as follows: "We do not believe this information is material or relevant for any decisions."[8] **HTI AG** in turn justifies the non-compliance of the same rule by saying that "individual disclosure is not prescribed by law and that we therefore refrain from doing so."[9] These explanations show that only binding regulations can improve disclosure behaviour; this applies in particular in the field of management remuneration.

As already pointed out several times, the turning away from voluntary codes must be a lesson learned from the financial and economic crisis.

One option would be a EU recommendation according to which those responsible for the existing national codes in the Member States would make sure that the information quality of corporate governance reports is improved: the preparation of **precise, detailed requirements (list of criteria) for explanations resp. non-compliance declarations** could be the subject of such a recommendation. A good example for a **concrete requirement** for companies is the Swedish Corporate Governance Code, according to which a company in its corporate governance report has to prescribe that it must be stated specifically, which code rules were not complied with, the reason for each case of non-compliance and the solution (alternative, which was instead.

(25) Do you agree that monitoring bodies should be authorised 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?

The fundamental requirement for using regulatory authorities to monitor corporate governance declarations is a democratic decision-making process concerning code recommendations. This is currently far from being the case. Corporate governance codes are compiled by task forces on a regular basis; however, they are lacking any democratic legitimisation. Hence, what is initially required is a democratic reform of the decision-making process concerning code recommendations. Once that has been achieved it is conceivable that regulatory authorities, such as the Financial Market Authority, will act as a supervisory body.

[3] Compare Annual Report Mayr-Melnhof Karton AG, 2010, page 44

[9] Compare Annual Report HTI AG, 2010, page 40

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