

# AmCham EU's response to the European Commission's Consultation on the EU Corporate Governance Framework

American Chamber of Commerce to the European Union  
Avenue des Arts/Kunstlaan 53, 1000 Brussels, Belgium  
Telephone 32-2-513 68 92 Fax 32-2-513 79 28  
Register ID: 5265780509-97  
**Email: [info@amchameu.eu](mailto:info@amchameu.eu)**

**Secretariat Point of Contact: Aylin Lusi email: [aylin.lusi@amchameu.eu](mailto:aylin.lusi@amchameu.eu) Tel: 02 289 10 33**

CONSULTATION RESPONSE

22 July 2011

## Background and Analysis

The American Chamber of Commerce to the European Union (AmCham EU) is comprised of global companies with significant investments and workforces in Europe. AmCham EU is strongly in favour of the European Commission's efforts to reinforce the Single Market and lower barriers to cross-border business. We therefore welcome the European Commission's consultation on the EU corporate governance framework.

Before responding to some of the more specific questions raised by the consultation, we would like to set out a number of high-level principles that shape the thinking of AmCham EU:

- As with any EU policy and legislation in force, we support a regular review process to assess their impact against policy objectives and their impact on the market. We therefore fully endorse the European Commission's review of the EU corporate governance framework initiated by this consultation.
- AmCham EU cautions against rules on corporate governance which are too prescriptive. The balance of legislation with 'soft law' approaches, in particular those containing the 'comply or explain principle' have proven to be successful. This provides sufficient flexibility in line with changing national and market practices.
- We would welcome better enforcement of existing corporate governance rules, including the 'comply or explain' principle. This should include a review of the Shareholder Rights Directive, and possibly further legislative proposals to strengthen the execution of cross-border shareholder rights.
- Before introducing any changes to the existing corporate governance framework, the European Commission needs to be very clear on the failings which it seeks to address, and the extent to which mandatory and prescriptive corporate governance rules will help address these failings. Taking the financial services sector (an area in which the European Commission's thinking is most advanced) as an example, we cannot detect a clear correlation between the governance structure, such as board composition and the CEO/Chairman role; and financial institutions' performance in the recent crisis. Rather, the failings were behavioural in nature and linked to internal risk management. Much of this is already being addressed through sectoral legislation.
- Careful consideration should be given to the appropriate level – EU or national – at which these changes should be framed and implemented. The appropriate level for the legal framework should also be carefully

considered. In particular, any new obligations imposed on boards or on individual directors must be consistent with applicable company law.

- The initial focus on financial services was triggered by the financial crisis. The rest of the corporate sector (listed or unlisted) should not be treated with that same sense of urgency and should not be tied to the European Commission's response to the financial crisis.
- In considering the introduction of new rules, AmCham EU urges the European Commission to be very conscious of any unintended extraterritorial consequences that could arise. The membership of AmCham EU consists of internationally active companies operating through a large number of legal entities. Each of these complies with corporate governance practices in line with national legal requirements. We urge the European Commission to recognise these regimes and to seek close cooperation with the authorities in key jurisdictions.
- AmCham EU fully recognises the important role of corporate social responsibility (CSR) in the performance of companies. The role of CSR is distinct from that of corporate governance, and the European Commission acknowledges this difference in its consultation document. We strongly believe that the dividing line between these two important functions should not be blurred in the political debate or in legislation. AmCham EU would welcome a revitalisation of the EU's Corporate Social Responsibility Forum as a separate but important, work stream which may not require legislation to be achieved.

## General Questions

### Scope

At present the consultation paper does not state clearly that the EU corporate governance framework only applies to EU incorporated companies. The consultation defines listed companies as "companies that issue shares admitted to trading on a regulated market" without additional clarification. This appears to imply that the consultation also applies to companies incorporated outside the EU who have shares listed in an EU jurisdiction in addition to shares listed on their primary (non-EU) exchange. This would have negative extraterritorial implications. Accordingly, the corporate governance framework should clarify that the framework applies only to companies incorporated in a jurisdiction within the European Union, consistent with the Shareholder Rights Directive.

AmCham EU supports proportionate regulation tailored to the issues raised by and circumstances of the regulated entities. Accordingly, AmCham EU believes EU corporate governance measures should take into account the size of listed



companies, especially when new requirements could impose significant costs. AmCham EU believes that this is also consistent with the aspirations of the Single Market Act in terms of reducing the administrative burden for small and medium-sized (SMEs) companies; many of which might consider a listing over time, if they have not already done so.

AmCham EU is also wary of introducing corporate governance measures at EU level for unlisted companies. We are of the opinion that this would require a thorough assessment of the failings such legislation would be intended to address. Moreover, a large number of unlisted companies are in fact subsidiaries of listed companies. It is not clear what purpose imposing EU corporate governance rules on unlisted companies would achieve at this stage. We believe this requires further research.

### **Board of directors**

AmCham EU supports the European Commission's initiatives to improve the operation of the boards of directors of EU listed companies. However, AmCham EU does not favour a mandatory prohibition of combining the functions of Chairman and of Chief Executive Officer. While such a division will often be deemed appropriate, the legal and business models of EU listed companies are diverse. We have also not seen any correlation in the success or failure of financial institutions that adopted one model as opposed to the other. AmCham EU does not believe that it would be appropriate for EU regulation to mandate a particular structure as regards the functions of Chairman and Chief Executive Officer.

#### *Board composition*

AmCham EU is of the opinion that selection policies should specify the duties and the profile of the directors of listed companies and ensure that directors have adequate skills. Diversity is an important part of such policies, however the specific content of such selection policies should not be laid down in legislation, but left to companies to decide according to their needs. Given the diversity of business models and economic activities carried out by corporate entities, AmCham EU does not believe that mandatory requirements on diversity (experience, gender and background) should be put in place. We do however see an important role for national supervisors and regulators to take such factors into consideration as part of the approval process for senior executives where such an approval is legally required for that particular sector. More generally, companies should be encouraged to adopt measures designed to ensure that high calibre female candidates rise through organisations to be candidates for board appointments.

#### *Availability and time commitment*

AmCham EU agrees that directors should commit sufficient time to their duties. The expected time commitment could be defined in a letter of appointment for

each director. However, a general rule limiting the number of boards on which a director may sit seems overly prescriptive and would not take account of the situation of each particular company and director, including acting as director for a number of listed and unlisted companies of the same group. The main measurement should instead be whether a director dedicates enough time to his position. For example this could be achieved through the comply-or-explain principle or self-certification of directors. It should be noted that the amount of time required will also vary based on the size of the relevant company and the nature of its business, among other things.

#### *Board evaluation*

AmCham EU believes that evaluations carried out by independent experts could be a useful tool to assess the board's performance. Currently there are not enough external evaluators of sufficiently high quality to make the external evaluation mandatory for each company. Rather than mandating external evaluations, AmCham EU suggests encouraging the professionalisation of external evaluation and the development of tools and methodologies for independent board evaluation. The European Commission might want to consider promoting best practice exchange in this area.

#### *Directors' remuneration*

AmCham EU believes that incentives for directors must be properly structured in order to encourage the long-term and sustainable performance of companies. We can see some merit in the disclosure of the general remuneration policy and yearly updates on this policy as part of the annual report. However, AmCham EU is not in favour of the mandatory disclosure of the remuneration of executives and non-executives. Such mandatory disclosure would raise complex issues around personal privacy. It could also lead to a number of unintended consequences, such as annual benchmarking, triggering cycles of perpetual upward negotiations of remuneration packages. In cases where disclosure of individual remuneration is seen as politically desirable, AmCham EU believes that a distinction should be made between disclosure to regulators (where appropriate for the sector) and disclosure to the public. AmCham EU could support disclosure to regulators, with particular thresholds being set.

Before addressing the question of whether remuneration policies and remuneration reports should be approved by shareholders, AmCham EU believes that the rights of cross-border shareholders need to be strengthened. It is often these cross-border shareholders that take a more critical look at corporate governance practices, including remuneration policies.

#### *Risk management*

AmCham EU agrees that the board is responsible for reviewing and approving the strategy of the company, including the company's approach to the risks that it faces in its business. We believe that companies should have appropriate risk management practices in place, commensurate to the business and the level of risk that they take. The oversight of this requirement should be left to the respective national supervisors, where this is appropriate for the sector.

AmCham EU doubts, however, that it would be useful to require boards to approve their companies' "risk appetite". While this is a familiar concept in the financial sector, it could be difficult to apply across all listed companies in all business sectors, as risk is very conceptual, high-level, and aspirational, with rather limited practical applicability.

AmCham EU believes that companies should be good corporate citizens. We believe that the concept of "societal risks" should be covered by a separate EU work stream on corporate social responsibility, rather than in the EU's corporate governance framework.

## **Shareholders**

As we have stated before, we believe that the EU's corporate governance framework should put significantly greater focus on cross-border shareholder engagement. This should be the first line of defence for ensuring the enforcement of corporate governance rules.

AmCham EU believes shareholder engagement needs to go hand in hand with shareholder responsibilities. Furthermore we don't believe that the European Commission's consultation sufficiently recognises the broad universe of potential investors in companies: from individual investors and other corporate entities, to institutional investors and asset managers acting on behalf of any other group of investors. If additional European rules are to be introduced, they should apply equally to all categories of investors.

AmCham EU does not agree with the observation that institutional investors or asset managers contribute to short-termism and mispricing, and does not find what is meant by short-termism sufficiently clear. We would urge the European Commission to take this into account before considering putting restrictions on the ability of investors to buy and sell, or to define such strategies for their investment managers. There is no inherent tension between short-term profits, or short-term management, and sound long-term investment strategies. If long-term implies passivity or detachment, it could be more suboptimal from a governance perspective. AmCham EU notes the widespread misperception that asset managers are incentivised to churn their clients' portfolios to generate revenues. This overlooks the fact that trading generally erodes fund managers' revenue.

The primary responsibility of the fund management industry and of institutional investors is towards its investors and clients. This principle is explicitly codified in the respective sectoral directives governing the asset management industry, including rules on fiduciary duties, disclosure and investment rules. Many of these sectoral rules are currently being reviewed by the European Commission. To meet their responsibilities to their customers (public and corporate), fund managers and institutional investors follow a wide range of different strategies. Differentiating between short- and long-term strategies alone would unduly simplify this picture.

More broadly, AmCham EU would welcome an EU-wide review of how to stimulate private investments in long-term projects such as infrastructure, research, innovative technologies and venture capital. The barriers are numerous including legal uncertainty, taxation, rigid insolvency laws, disproportionate risk weightings under the regulatory capital requirements for banks and insurers, shortages of trained professionals etc. AmCham EU calls on the EU to make such a review part of its 2020 Agenda and welcomes the recent consultation on venture capital as a helpful step in that direction.

#### *Minority shareholder protection*

AmCham EU is not clear which problems or market failures the European Commission intends to address by this set of questions. Does the European Commission consider that minority shareholders are not adequately protected by existing company law principles, or does it believe that minority shareholders are not willing or able to exercise existing rights? We remain at the European Commission's disposal to answer any questions in this regard.

#### *Employee share ownership*

We support the recent changes to the Prospectuses Directive, which will improve the regulatory framework for listed companies to issue share options or restricted stock to their employees.

#### *Better monitoring of corporate governance*

We believe that enhanced corporate governance monitoring could be helpful, with a monitoring authority/organisation producing an annual (aggregate) monitoring report setting out best practice. As corporate governance codes are and should remain voluntary, best practice recommendations should not be codified and enforced, but firms should nevertheless be expected to address their shortcomings.

AmCham EU looks forward to playing its part in contributing to the EU's ongoing work with respect to a possible reform of the corporate governance framework. At stake is the future smooth functioning of our companies, and with them, our markets and our economies.

\*\*\*

*AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate U.S. investment in Europe totalled €1.4 trillion in 2009 and currently supports more than 4.5 million jobs in Europe.*

\*\*\*

