EFAMA Reply to the EU Commission’s Green Paper
The EU corporate governance framework

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I. Introduction

EFAMA\(^1\) welcomes the opportunity to comment on the EU Commission’s Green Paper *The EU corporate governance framework* (the “Green Paper”).

The topics raised in the Green Paper are of importance for the European investment management industry under two different perspectives:

- In managing assets for both retail and institutional investors, EFAMA members are major investors in European companies. Therefore EFAMA members take great interest in governance imposed on these (potential) investee companies and questions of shareholder engagement in these companies.
- Investment managers as well as many of the investment funds they manage are structured as companies. Some of these investment managers and funds are listed and are therefore likely to be directly affected by any regulation on corporate governance based on this Green Paper. Furthermore, while EFAMA Members believe that the governance measures outlined in this Green Paper should only be applicable to listed companies, they will however, in case of an application to non-listed companies, effect investment managers and their products even more.

EFAMA welcomes the discussion of various topics around the composition, role and remuneration of boards of directors. Unfortunately, the Commission limits the discussion of the topics in the Green Paper to the board members in their supervisory role. EFAMA invites the Commission to reconsider this limitation as the topics raised under the Chapter Board of Directors are also extremely relevant for other

\(^1\) EFAMA is the representative association for the European investment management industry. It represents through its 26 member associations and 56 corporate members approximately EUR 13.5 trillion in assets under management, of which EUR 8 trillion was managed by approximately 53,000 funds at the end of 2010. Just under 36,000 of these funds were UCITS (Undertakings for Collective Investments in Transferable Securities) funds. For more information about EFAMA, please visit [www.efama.org](http://www.efama.org).
parts of companies, such as for example the other members of the board of directors and all levels of management.

EFAMA deems the question of shareholder engagement as of the greatest importance. EFAMA has therefore published in early May 2011 its EFAMA Code for External Governance which is attached to this reply.

The EFAMA Code for External Governance provides six high level principles and best practice recommendations regarding engagement between institutional investors and companies in which they invest significantly. The EFAMA Code for External Governance is addressed to Investment Management Companies (IMC). Its six high level principles provide: IMC should have a documented policy available to the public on whether, and if so how, they exercise their ownership responsibilities. IMC should monitor their investee companies. IMC should establish clear guidelines on when and how they will intervene with investee companies to protect and enhance value. IMC should consider cooperating with other investors, where appropriate, having due regard to applicable rules on acting in concert. IMC should exercise their voting rights in a considered way. IMC should report on their exercise of ownership rights and voting activities and have a policy on external governance disclosure. The EFAMA Code for External Governance shall provide a European wide standard which is neither designed to supersede applicable law and regulations nor to replace national self regulation. It should instead allow mutual recognition of national codes which at least reflect its principles. EFAMA Members should, as applicable, publicly confirm adherence to the EFAMA Code for External Governance or to their relevant national code.

II. Replies to questions

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.

The vast majority of EFAMA Members prefer a single set of EU corporate governance measures applicable to all listed companies, independently of their size. To accommodate companies of all sizes and activities, such EU corporate governance measures must be flexible enough to suit all relevant entities, taking into account the nature, scale and complexity of the entities. Equally, the supervision of such application by competent authorities should be proportionate and take into account the nature, scale and complexity of the entities. EFAMA Members advocate in this context governance rules based on the “comply or explain principle”. With such a flexible framework in place, EFAMA Members see no need for a differentiated regime of EU corporate governance measures for small and medium size enterprises.
As opposed to differentiation on size, EFAMA suggests that a distinction be drawn between regular listed (operational) companies (such as BP, Shell, Deutsche Bank, etc) on the one hand and listed products (such as listed investment funds, products under the Prospectus Directive etc) on the other hand.

Some of the proposals in the Green Paper seem disproportionate or less relevant related to the structure and activities of listed products. For example, listed products such as an ETF do not have any employees and accordingly rules on employee participation are not suitable. Imposing the same rules on listed products is likely to have a discouraging effect on listing of products and consequently also have a negative impact on the liquidity of the products on the secondary market. EFAMA therefore suggests refraining from applying the EU corporate governance measures to such listed products.

(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?

EFAMA does not consider that for the time being corporate governance measures need to be taken at EU level for unlisted companies. EFAMA suggests continuing to reflect, also in this respect, the traditional distinction between listed companies with an open and often very broad shareholder base and unlisted companies. Unlisted companies may on a voluntary basis follow corporate governance principles for listed companies.

However, should corporate governance measures also be taken for unlisted companies, they should not be applied in the same way to regular (operational) companies and products. Products in corporate form should not fall under the same rules as operational companies (please also refer to the reply under General question 1).

Boards of directors

The Commission mentions in its Green Paper that, when referring to “Board of directors” the Green Paper only refers to the supervisory role of the board of directors. In dual structures, this refers to the supervisory board. By this definition, the Commission unfortunately limits the discussion of the topics in the Green Paper to the board members in their supervisory role.

EFAMA invites the Commission to reconsider this limitation. The topics raised under the Chapter “Board of directors” are also extremely relevant for other parts of companies, such as for example the other members of the board of directors and all levels of management. Diversity including a better gender balance, for example, should not only be aimed for regarding board members with a supervisory role, but throughout an entire organisation and certainly at the level of the top management. Remuneration of the top management is often more important than the remuneration of board members and accordingly, the remuneration of the top management should not be excluded from the discussion.
(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?

A majority of EFAMA Members supports that the functions and duties of the chairperson of the board of directors and the chief executive officer should be clearly divided. Only a clear separation of functions of CEO and chairman ensures adequate and independent control function by the chairman and avoids accumulation of too much power in one single decision-maker. In this context, EFAMA Members also referred to international best practice (such as the OECD Principles of Corporate Governance or the ICGN Corporate Governance Principles).

Some EFAMA Members point out that there could however be occasions when a joint position is required, for example in small companies. In these cases, a “comply or explain” approach should be considered.

Again, regarding products in corporate form, whether listed or not, the same rules are not adequate. Requiring a split between the function of chairman and CEO is not appropriate as such products usually do not have a CEO.

(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?

EFAMA considers that adequate skills of directors and adequate diversity in the board are important. The financial crisis exposed a number of instances in which boards lacked the expertise to question executive management and, particularly in the case of complex financial institutions, to oversee the risks. For a board to be effective, it needs to have a mix of relevant experience and a broad range of skills.

EFAMA deems that specifying the profile required in recruitment policies would help to ensure that the members of the board have the right skills and the board is suitably diverse. Furthermore, the recruitment policies could then be used in board evaluations to assess if the directors concerned are fulfilling the responsibilities prescribed.

EFAMA does not believe that there is, for the time being, any need for legislative measures at national, EU or international level regarding recruitment policies for board members. While recruitment policies are deemed useful by EFAMA Members, EFAMA Members are against the obligation for companies of establishing such recruitment policies. In the best interest of the companies and stakeholders, such recruitment policies should be achieved at company level, each company reviewing carefully the composition of its board, the skills and diversity required and the need to establish recruitment policies.

While EFAMA Members are against the obligation to establish recruitment policies, they advocate that companies should be transparent towards shareholders about the existence of a recruitment policy again in application of the comply-or-explain principle.
In this context, EFAMA would also like to remind the Commission of the legal framework applicable to investment management, in particular the UCITS, AIFM and MiFID Directives and their implementing measures. This legal framework and the practices of the national regulators applying it already provide for very specific requirements and skills for managing and non-managing directors and persons who effectively conduct the business of investment management companies. These include requirements regarding good reputation, formation and very specific professional experience as well as domicile. The requirements are automatically reflected in the recruitment process for directors and persons effectively conducting the business. They are applied strictly by the national regulators whose approval is needed for the appointment of such board members and who ask for board members to be removed if the requirements are no longer fulfilled.

(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?

EFAMA agrees that listed companies should aim at a better diversification at the level of directors. Diversity has to be appropriate to the activity, the size and business strategy of the company. Diversity should also not be limited to the level of board of directors but also be aimed for at all levels. Diversity is in particular crucial at the senior management level and at the level of the executive committee, among other because this is often the pool from which board members are recruited.

Some EFAMA Members would welcome a requirement for listed companies to disclose whether they have a diversity policy, not necessarily limited to the level of board of directors. They consider such disclosure an important tool to allow stakeholders (in particular investors and employees) to control whether a sustainable diversity process has been successfully established. EFAMA Members consider that a disclosure of the diversity policy itself should not be mandatory. It should be the right of the company to decide whether it discloses its diversity policy or not.

This being said, depending on the national system, the right to nominate, elect and grant discharge to the board is a fundamental right and obligation of the shareholders. To be able to exercise this right in a meaningful way, shareholders must be able to vote on each board member separately and not only in one vote for the board in its entirety.

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

When composing boards, EFAMA believes in encouraging diversity, including gender diversity. However, listed companies should not be specifically required to ensure a better gender balance on boards. Gender should only be one of many criteria employed when striving for better diversification.
Appointing board members with different backgrounds, experiences and skills, improves the quality of the functioning of the board of directors. Mandatory quota for women and or other mandatory quota can hinder the efficient workings of the market and result in the loss of experienced talent. Board appointments should be based on merit.

EFAMA believes that the question of a better gender balance is not only relevant for boards. A better gender balance should be achieved at all management levels. A better progression of women at senior management level is one of the key challenges as this is the pool from which board members are often recruited.

(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?

EFAMA believes that the number of mandates a non-executive director may hold should be limited. However, the limit cannot be fixed in a one-size-fits-all manner at EU level for the broad variety of listed companies existing with their very different sizes and activities. Limits must take into account the specific circumstances of each case. Each company should alert its non-executive directors regarding the importance of their function and the time required.

Some EFAMA Members suggested that general guidance could be issued at EU level. This guidance could require that a non-executive director be in a position to devote adequate time and resources to each mandate, taking into account the scale and complexity of each of the mandates. Based on this guidance it should then be left to the specific circumstances of the individual to decide what is appropriate.

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

EFAMA is in favour of installing an explicit evaluation procedure to assess the functioning of the (supervisory) board and its interaction with the executive management. This could be setup as a self-assessment or could be carried out by external experts. Such self-assessment or external evaluation is not about the ‘content of decisions’, i.e. the entrepreneurial dimension, but rather about the functioning of the diverse functions of the entities involved.

The majority of EFAMA members does not believe that external evaluation every three years should be mandatory.

Companies should not be required to make the results of the evaluation public beyond what is required by the applicable law to ensure sufficient transparency for shareholders.
In this context, some EFAMA Members mentioned conflicts of interest of external experts who are often also mandated as headhunters or advisors by the board or executive management. They strongly advocate transparency regarding such conflicts of interest.

EFAMA Members again felt that the discussion of this topic should not be limited to board members with supervisory functions but to all board members and the management.
EFAMA’s reply to the EU Commission Green Paper on EU Corporate Governance Framework

(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?

EFAMA would welcome a mandatory disclosure of the remuneration policy and the annual remuneration report. Acting as institutional investors EFAMA Members among other monitor and should be aware of moral hazard at the level of investee companies. The disclosure of the remuneration policy and the remuneration report offers an essential tool in this regard.

EFAMA invites the Commission not to limit the discussion to the board of directors’ level. Remuneration of executive management is often higher than the remuneration at board level. The discussion should therefore also include sufficient transparency regarding remuneration policies and structures and related possible moral hazard at management level.

For investment managers, recent and very detailed rules on remuneration have already been introduced and are about to be introduced in the revisions of the CRD and UCITS Directive and in the AIFMD. These rules are not limited to the board of directors’ level. In particular the AIFMD provides for disclosure of remuneration paid by the AIFM in the annual report of the AIF. EFAMA does not believe that additional rules over and above what is required in the CRD, UCITS Directive and AIFMD would be useful.

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

A large majority of EFAMA Members believe that it should be mandatory that the remuneration policy and remuneration report should be put to a vote by shareholders. Voting on remuneration policy and the annual remuneration report has as such a value of publicity and allows exercising a certain amount of pressure on investee companies for better governance.

Regarding the legally binding effect of the vote, some EFAMA Member considered that such vote should have a purely advisory nature while others considered that it must be legally binding to show its full effect. Those in favour of the advisory legal effect argued that a non-binding vote would be sufficient, since a major dissent poses a clear signal to the company for change, and pointed to the legal difficulties in case of binding votes.

(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?

EFAMA considers that the board as well as the management are responsible for the risk profile of the company. The board should approve and take responsibility of the company’s strategy including its risk
appetite and risk policies taking into account the short term risk as well as the long term risks. They are also in favour of an adequate and meaningful report on the risk profile of the company. Implementation of the decisions by the board of directors is then the responsibility of the management.

(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?

EFAMA considers that the board as well as the management are responsible for the risk profile of the company and should in this framework also ensure that the company’s risk management arrangements are effective and commensurate with the company’s risk profile. Some EFAMA Members mentioned the role of audit committees in assisting board and management with the risk management of the company.

Shareholders

General Statements

Lack of Appropriate Shareholder Interest

EFAMA has some sympathy with the Commission’s view that “lack of shareholder interest in holding financial institutions’ management accountable contributed to poor management accountability and may have facilitated excessive risk taking in financial institutions” 2. However, EFAMA disagrees with aspects of the Commission’s reasoning.

Firstly, we believe the Commission draws the wrong conclusions in relation to the ‘limited liability’ of shareholders and its impact on shareholders’ oversight responsibilities3. EFAMA members, on behalf of their clients, are often holders of both the equity and credit of companies and have an interest in the long-term viability of companies irrespective of the securities they hold. The Commission’s analysis also minimises the significant impact on shareholders when companies fail, particularly as it is shareholders, not creditors, whose assets are called upon first to satisfy any losses.

EFAMA’s view is that there are a multitude of factors which act as a disincentive to shareholder engagement and these should be addressed in order to encourage shareholders to engage more actively with investee companies.

One of the main barriers to shareholders engagement is the absence of adequate shareholder rights in certain jurisdictions. Moreover, there are often obstacles to shareholders exercising those rights. For

2 Green Paper page 11
3 Green Paper page 11.
example, although the Shareholder Rights Directive sought to prohibit share blocking, certain intermediaries still practise it such that it acts as a disincentive to voting.

Furthermore, EFAMA Members pointed to the problem of transparency by the management of investee companies. In many instances, companies do not provide investors with sufficient information to enable investors to take informed and considerate decision regarding proposals submitted at shareholder meetings. In other instances, information is provided but at such a late point in time that shareholders no longer have the opportunity to react.

**Lack of Appropriate Shareholder Engagement**

EFAMA also believes that institutional investors were too reluctant in the past regarding shareholder engagement. Therefore, EFAMA seeks to establish European wide best practice regarding shareholder engagement in form of self regulation. This self regulation was published by EFAMA in May 2011 under the title “EFAMA Code for External Governance”. The EFAMA Code for External Governance aims to provide a framework of high-level principles and best practice recommendations which should act as a catalyst for engagement between investment management companies and investee companies. All EFAMA Members are invited to adhere to this Code or an equivalent national code or explain why they choose not to apply the principles of such codes.

**Publication of Voting Policies and Voting Records**

The Commission mentions that in 2010 in its Green Paper on Corporate Governance in Financial Institutions it asked whether institutional investors, including asset owners and managers, should be required to publish their voting policies and records.

EFAMA considers that publication of voting policies is already customary and very useful.

A majority of EFAMA Members consider that the publication of voting records should be left to the discretion of each institutional investor. These members see the risk that public knowledge of a disagreement with investee company management may have an adverse effect on shareholder value without solving the disagreement and could result in institutions, their employees or clients, facing the risk of inappropriate pressure by special interest groups. Furthermore, the costs for setting up systems, vetting the information, and analysing the information is deemed inappropriately high. They also see particular problems with regard to fund managers who act for different clients, as they can vote a particular block of shares different ways. For example, some beneficial owners give managers free discretion to vote, some give specific guidance and some ask that the recommendations of a particular voting service are followed. It would not be appropriate for the number of shares voted to be disclosed and thus they will end up disclosing "some shares were voted against, some were voted for and some were consciously withheld".
Some EFAMA members, on the other hand, would welcome also an obligation to disclose actual voting behaviour.

**Short-termism of Capital Markets**

EFAMA was in particular astonished by the reference to and conclusions drawn from the report by Paul Woolley “Why are financial markets so inefficient and exploitative – a suggested remedy”, in *The Future of Finance: The LSE Report*, 2010. While this report concerns investment banking, the Commission applies its content to asset management only, an entirely different activity with a different business model. It is not quite understandable why, in the Green Paper, the Commission does apply the report to asset management, and to asset management only, without even mentioning investment banking.

The business model of the asset management industry is fundamentally different from banks and investment banks and the same systemic issues do not apply. Asset managers serve as trustees for their clients and act as agents, managing their clients’ assets on their clients’ behalf and in the clients’ name. The clients’ assets may be managed either through collective investment schemes or individual mandates. The clients’ assets are segregated from the own assets of the asset manager and from other clients’ assets. Managing the clients’ assets does not affect the assets of the asset manager but entails operational and reputational risks. The MiFID and UCITS Directives as well as the AIFMD provide for capital requirements for asset managers to take the operational risk into account. The reputational risk is one of the most sensitive issues for asset managers as the reputation of the asset manager is based on a good performance and track record in managing clients’ assets in the longer term which aligns the interests of asset managers and investors.

The Commission mentions a turnover on the major equity exchanges of 150% per year of aggregate market capitalization, equalling an average holding period of 8 months. EFAMA doesn’t see any value deriving from this statement. Apparently the underlying data cover all kinds of transactions, from highly speculative “day trading” which aims at gaining profit from smallest price movements by buying and selling assets repeatedly, even several times within a fraction of a second, to the trading activities of truly long-term oriented investors. There is absolutely no evidence that the mere average of all holding periods is of any significance for the holding pattern of asset managers whatsoever. Last, publicly traded companies seek listing of their shares among other to enhance liquidity through trading.

**The agency relationship between institutional investors and asset managers**

EFAMA agrees with the Commission’s statement that investors are free to choose a short-term-oriented investment model without engagement. Investors are free to choose whether they are short-term oriented or long-term oriented and independently may choose to engage or not engage. There are, for example, investors who are both short-term oriented and engaged.
EFAMA however strongly disagrees with the assumption that “the agency relationship between asset owners and their managers contributes to capital markets’ increasing short-termism and to mispricing”\(^4\). Again, these conclusions are drawn based on the report by Paul Woolley which discusses investment banking only and does not speak about asset management.

EFAMA is wondering why the Commission raised specific questions in relation to asset managers in this section of the Green Paper, without including any other market participants such as the investment banks to whom Paul Woolley’s report refers.

(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.

EFAMA shares the Commission’s analysis that a number of existing EU legal rules contribute to inappropriate short-termism. These rules usually also have a pro-cyclical effect. EFAMA Members mentioned EU legal rules which impact their clients and are reflected in the mandates given by the clients to EFAMA Members. EU legal rules particularly mentioned in this regard were CRD, Solvency I and Solvency II.

Some EFAMA Members also referred to national rules in Member States which may have the same effect of contributing to inappropriate short-termism.

Other EFAMA Members also pointed to IFRS accounting rules, in particular regarding “fair value”.

(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?

Asset managers welcome institutional investors to mandate them for long term investment horizons and set corresponding incentive structures and performance evaluation mechanisms. Acting as trustees on behalf of their clients, asset managers are bound to implement their clients’ investment strategy insofar as it has been specified in the relevant mandate.

EFAMA considers that no measures are required to be taken regarding the incentive structures for and performance evaluation of asset managers managing long-term institutional investors’ portfolios. The content of mandates is negotiated between the long-term institutional investors and the asset managers. The institutional investors enjoy the contractual liberty to choose their asset manager freely, to determine the content of the mandate and to keep their agreement confidential. The institutional investors are free to set the incentive structures and to determine the performance evaluation.

\(^4\) Green Paper p 12.
Further, EFAMA would like to know why the Question 14 only refers to asset managers and does not refer to measures to be taken regarding incentive structures for a performance evaluation of other market participants. In particular, in the context of Question 14, the Green Paper refers once again to the article by Paul Woolley which concerns investment banking and not asset management.

(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?**

EFAMA believes that institutional investors already dispose of sufficient means for monitoring effectively the asset managers they have mandated. Strategies and the extent to which the asset manager engages with investee companies are determined by the institutional client. Costs are negotiated between the institutional client and the asset manager. Implementation of the strategies, actual costs, trading and the extent to which asset managers engage with investee companies are then reported by the asset manager to the institutional client as agreed between the parties. Most information can be found in annual, semi-annual or quarterly reports as well as any additional reporting required by the client. The EFAMA Code of External Governance and also existing national codes further promote transparency of asset managers about the extent to which asset managers engage with investee companies. Some EFAMA Members also pointed out that institutional investors often have recourse to consultants to assist them with the effective monitoring of the asset managers they have mandated. These consultants are generally well informed about a range of asset managers in terms of performance, fees, incentive arrangements and personnel.

Therefore, EFAMA believes that there is no need for additional EU measures in this regard.

Further, EFAMA again is wondering why Question 15 only refers to asset managers and does not refer to other market participants.

(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?**

Conflict of interest rules for asset managers are already addressed in a very detailed manner in the UCITS Directive, MiFID Directive and in the AIFM Directive and their respective implementing measures. Asset managers already have sound conflict of interest policies in place which allow them to handle conflicts of interest appropriately when they arise. UCITS managers are under the specific obligation to develop measures and procedures in order to prevent or manage any conflicts of interest arising in the execution of voting rights (cf. Article 21 para. 2 c) of Directive 2010/43/EC).
EFAMA does not consider that additional EU rules requiring a certain independence of the asset managers’ governing body or other legislative measures to enhance disclosure and management of conflicts of interests are required.

Again, EFAMA would like to know why Question 16 only refers to asset managers and does not envisage the necessity of measures for other market participants.

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

EFAMA Members mentioned that legal uncertainties often make shareholders hesitant about shareholder cooperation. Shareholder cooperation could be deemed under certain circumstances as acting in concert. The appreciation is still subject to diverging interpretation in the Member States. EFAMA would appreciate more clarity regarding the acting in concert rules and on related party transactions. Some EFAMA Members also fear that as engaged shareholders, they could acquire knowledge which would then make any trading in the shares insider trading under the Market Abuse Directive. Shareholder cooperation could also be enhanced if investee companies and investors where required to name a point of contact for enquiries relating to stewardship and engagement.

(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?

EFAMA would welcome greater transparency by proxy advisors. EFAMA agrees that EU law should require such transparency, especially transparency regarding conflicts of interest and transparency with regard to analysis guidelines and methods for developing recommendations to shareholders. Such transparency could for example be achieved through mandatory publication of information for example on the website of the proxy advisors. The relevant provisions should not only apply to European proxy advisors but also to non-European proxy advisors for all activities in Europe.

Some EFAMA Members believe that greater transparency about methods or conflicts of interest should be developed between the proxy advisors and their clients to restrict additional services and that no measures on EU level are required.

(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?

EFAMA considers that there are various conflicts of interest arising in the current activities of proxy advisors. For example, proxy advisors who issue recommendations about investee companies to whom
they provide consulting services. Or proxy advisors selling information on voting behaviour of institutional clients they have represented to investee companies.

Some EFAMA Members deem that to ensure the independence of the proxy advisor, measures are necessary, in particular restricting the provision of additional services they provide to the investee companies.

The majority of EFAMA Members do not consider that a ban of additional services is necessary. They consider that sufficient transparency about conflicts of interest and additional measures such as Chinese walls should be sufficient. They believe that it should be left to the business model of the proxy advisors and the contractual liberty between the proxy advisors and their clients to restrict additional services. They consider that no measures at EU level are required to restrict additional services.

EFAMA Members in general advocate more transparency about conflicts of interest. Solutions mentioned were mandatory conflicts of interest policies and the mandatory publication of conflicts of interest statements as well as disclosure regarding specific conflicts of interest. The management of conflicts of interest should be scrutinised more rigorously.

(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).

Although the Transparency Directive should allow issuers to identify major shareholders, such identification is in practice not always possible. In particular in case of shareholdings through intermediaries and nominee accounts, it is not always possible for issuers to identify the shareholders and for shareholders to exercise their shareholder rights. Some EFAMA Members mentioned problems due to an inconsistent implementation of the Transparency Directive throughout the EU. Some EFAMA Members deem that a central shareholder register would allow a more efficient mechanism to identify shareholders, both for the companies concerned as well as other shareholders looking for cooperation.

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

EFAMA Members mentioned that it could help minority shareholders to represent their interests effectively if they have the right to table agenda points at shareholder meetings already with a relatively low shareholding (beneath 10%). Furthermore an access to a communication with the board would be important.
EFAMAMembers also mentioned that the right of one share-one vote was important to strengthen minority shareholders.

EFAMA Members mentioned that they were in favour of measures reserving some board seats to minority shareholders. However, national legislation in some Member States will need to be specifically taken into account.

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

EFAMA Members mentioned existing national rules regarding related party transactions. These rules require, among other, that such transactions are to be reviewed by auditors, are disclosed in the financial accounts and that the related party concerned must abstain from any vote regarding the transaction. Sufficient disclosure of related party transactions is crucial for minority shareholders. However, any rules, including rules on disclosure, should not apply to all related party transactions but only to material related party transactions. Some EFAMA Members in this context also referred to the Statement of the European Corporate Governance Forum on Related Party Transactions for Listed Entities.

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

EFAMA considers that employee share ownership is already a very common concept and often fiscally attractive in a large number of Member States. Employee share ownership is a very good concept to create awareness and enhance interest of the employees in their employer. However, especially in large listed companies, employee share owners are often minority shareholders and not necessarily active or engaged shareholders. Furthermore, employees are not necessarily long term share owners.

EFAMA considers that is important that pension vehicles should not be used for such employee share ownership to avoid making employees more vulnerable in case of difficult economical situations of their employers. If pension vehicles would be used, employees are exposed to risks regarding their jobs as well as risks regarding their savings.

5 http://ec.europa.eu/internal_market/company/docs/ecgforum/ecgf_related_party_transactions_en.pdf
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?

EFAMA agrees that companies departing from the recommendations of corporate governance codes to which they have adhered should be required to provide detailed explanations and describe the alternative solutions adopted. “Comply or explain” systems are only meaningful if sufficient explanations are provided in case of derogations. Although the requirements should be more specific, the rules should not create unnecessary burden or extra controls.

(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?

Some EFAMA Members believe that the adherence to corporate governance codes should be checked by the board of directors and the shareholders and that no other monitoring authority is required.

Other EFAMA Members agree that monitoring bodies should be authorized to check the informative quality of the explanations and may ask companies to complete the explanations where necessary.

This being said, EFAMA strongly believes that it would not be appropriate that regulators interfere with the content of the information disclosed or make business judgments’ on the solution chosen by the company. Monitoring authorities should limit their review the quality and completeness of the information provided. As these codes are self regulation, the monitoring body should also be an industry body or an association. Furthermore, auditors will also check in the framework of their audit whether corporate governance codes to which a company has adhered are complied with by the company.