June 27, 2011

Answer to the consultation

Green Paper on the EU corporate governance framework

The European Federation of Employee Share Ownership (EFES) thanks the European Commission for this consultation.

The main aim of the EFES is to promote the development of employee ownership over Europe, as a mean of progress and productivity for companies, a mean of economic and social performances, and a mean of employment enhancement.

The EFES is an open organisation acting as the umbrella organization of employee owners, companies and all persons, trade unions, experts, researchers, institutions looking to promote employee ownership and participation in Europe. The EFES was recognized by the European Commission (DG Enterprises & Industry) as European Business Representative Organisation in the field.

The EFES is a European organisation located in Brussels, with the statute of an international not-for-profit association. It gathers organisations, companies and individuals in all countries of the European Union. Its Board of Directors consists of representatives of organisations and companies from all EU countries. It also works in partnership with similar organizations in all other regions of the world (including USA, Australia, Asia, Africa and others).

Members and partners of the EFES are

- Almost all organizations promoting employee share ownership, associations and federations of employee owners in European countries.
- Top companies like British Telecom, EADS, Voestalpine, France Telecom, Vivendi, Mondragon Corporacion Cooperativa, … as well as small and medium sized ones.
- Trade unions and representatives of workers' unions (CISL, CGT, DirCredito, UIL, etc.)
- Experts and consultants.
- Almost all researchers and university centres working in the issue.

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When we analyze the working of shareholders' assemblies in the large European companies today, we realize that predominance is generally on the top executives' side rather than the shareholders'.

As Henri Lachmann, President of Schneider Electric told us recently: "Shareholders' assemblies have become a real farce" ("*Les assemblées d'actionnaires, c'est devenu guignol*").

During the last decades, the ownership of large European companies has often loosened on family bonds. States have privatized, they have withdrawn from or lighten their position in many companies, hence a reduction of the presence of public share ownership. Formulas of controlling or reference shareholders themselves tend to lose ground.

Large companies have tended to move towards a more and more autocratic governance, the managing power being concentrated in the hands of a very small number of executives.

<u>The key issue of corporate governance today is the one of the control maintained on the top executives</u> and, remarkably the control maintained (or better said: lost) by shareholders.

Today, many declarations point out the "cupidity" of executives as being a crisis factor. They characterize the balance change that has taken place in a few decades. Only a few decades

ago, the political declarations in France pointed out the cupidity and takeover of "the 200 families".

The cupidity syndrome somehow has changed sides. It is remarkable and characteristic of the shift that has taken place in governance and the control of large companies.

Today the predominance of top executives is reflected in visible phenomena like the explosion of remunerations.

It is also reflected in the less known figures related to share ownership held by the top executives and their number. The table on next page shows the number of top executives in the large listed companies in each European country and the capital share owned.

In the 2.196 largest European listed companies in 2010, the number of top executives amounted to 8.688 people holding together a share of € 71,6 billion, that is 1,02% of the share capital and an average of € 8,2 million per person. This reflects the scale of the phenomenon.

How did the top executives generally shield from shareholders' control? The analysis shows multiple "tips and tricks" eventually allowing the executives to control the assemblies: Multiple vote shares, shares without voting rights, various obstacles to the exercise of votes, discriminations in favour of the nationals (incidentally: Overrepresentation of the nationals on the boards), obstacles to proxy votes and the collective exercise of votes.

As for employee ownership in particular, we quite often see a diversion of the votes that puts the mechanism on the same level as the riggings already mentioned.

In this respect a recent emblematic case is the one of Total in France, where the golden parachute vote of the main top executive was recently refused by the majority of external shareholders but accepted by the shareholders' assembly, the vote of the FCPE of employee ownership being controlled by the executives of the company themselves.

In certain cases, the remunerations remained under control, but generally speaking they increased in an uncontrolled and even explosive way.

It is remarkable that in the large companies that still practice the system of a controlling or reference shareholder, the remunerations of the top executives remain more modest, the word is eloquent: Under control.

You can't go on letting the top executives get out of control. This is the key to get back to trust.

The Commission Green Paper is clear from the outset: "The Commission recently reiterated its commitment to a strong and successful single market which refocuses on citizens and regains their trust… Corporate governance and corporate social responsibility are key elements in building people's trust in the single market."

In our opinion, employee share ownership is a key to regain control on the executives, to regain the conditions of trust. It is the specificity of our answer to the current consultation.

Generally speaking we plead for a strengthened ownership, for a more developed, better rooted and better equipped employee share ownership to exercise its control role.

In other words: The strength and consistency of employee share ownership will be more and more one of the factors and one of the characteristic elements of good governance in the large European companies and of regained trust.

		TOP EXECUTIVES IN LARGEST EUROPEAN COMPANIES				
	Listed Companies	Top Executives	Average in a company	Capital held by each Top Executive	Capital held by all	Share held by all
	Number	Number	Number	€	billion €	in %
AT	43	156	3,63	8.802.164 €	1,4 €	1,99%
BE	52	167	3,21	6.729.033 €	1,1 €	0,73%
BG	8	26	3,25	60.906 €	0,0 €	0,14%
CH	146	879	6,02	8.905.287 €	7,8 €	1,07%
CY	5	12	2,40	7.125.645 €	0,1 €	2,07%
CZ	5	27	5,40	751.681 €	0,0 €	0,06%
DA	73	228	3,12	695.847 €	0,2 €	0,13%
DE	206	811	3,94	9.376.980 €	7,6 €	0,89%
EE	6	18	3,00	193.873 €	0,0 €	0,29%
ES	105	212	2,02	22.007.104 €	4,7 €	1,08%
FI	63	589	9,35	967.876 €	0,6 €	0,43%
FR	252	698	2,77	19.266.755 €	13,4 €	1,19%
GR	70	224	3,20	5.202.657 €	1,2 €	2,15%
HU	12	69	5,75	1.976.255 €	0,1 €	0,64%
IE	34	102	3,00	5.733.663 €	0,6 €	1,27%
IT	157	416	2,65	18.711.747 €	7,8 €	2,00%
LT	10	43	4,30	164.592 €	0,0 €	0,29%
LU	11	32	2,91	1.668.322 €	0,1 €	0,15%
LV	3	11	3,67	0 €	0,0 €	0,00%
MT	5	14	2,80	39.726 €	0,0 €	0,02%
NL	77	267	3,47	7.389.741 €	2,0 €	0,66%
NO	93	520	5,59	3.220.656 €	1,7 €	0,96%
PL	86	396	4,60	4.833.569 €	1,9 €	2,10%
PT	33	177	5,36	1.332.669 €	0,2 €	0,41%
RO	9	36	4,00	35.787 €	0,0 €	0,02%
SK	4	26	6,50	0 €	0,0 €	0,00%
SL	15	53	3,53	107.950 €	0,0 €	0,09%
SV	124	932	7,52	2.748.747 €	2,6 €	0,83%
UK	489	1.547	3,16	10.713.403 €	16,6 €	0,88%
29 COUNTRIES	**2.196**	**8.688**	**3,96**	**8.236.030 €**	**71,6 €**	**1,02%**
12 NMS - PL	82	335	4,09	781.735 €	0,3 €	0,32%

Source: European Federation of Employee Share Ownership, Economic Survey of Employee Ownership in European Countries in 2010

The 2,196 largest European listed companies in 2010 represented together a market capitalization of € 7.045 billion and they employed 31,9 million employees.

Question 1:

(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.

Our opinion is qualified. The questions and factors of governance are multiple. Thus, in principle, the rules should take into account the size of the companies. However the factors of bad governance we pointed out in the introduction are only indirectly linked to the size of the companies.

Question 2:

(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?

We think that the measures to be taken at EU level essentially deal with the listed companies.

Question 3:

(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?

Yes, the executive functions and the control functions must be clearly separated. In this respect, all the countries are not at the same level. They should.

Question 4:

(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?

We answer positively to this question, which we nevertheless find secondary.

Question 5:

(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?

We answer positively to this question, which we nevertheless find secondary.

Question 6:

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

We answer positively to this question, which we nevertheless find secondary.

Question 7:

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

We answer positively to this question, which we nevertheless find secondary.

Question 8:

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

We answer positively to this question, which we nevertheless find secondary.

1.4. Directors' Remuneration

In the introduction we pointed out the phenomenon of dilution of the control of the shareholders on the executive directors which has taken place in the last decades. The bad remuneration policies are an indicator of this loss of control more than anything else.

It is true that “a number of Member States have not adequately addressed these issues".

Consequently only a little more than 75% of the large European companies are currently giving comprehensive and reliable information on the remuneration and ownership of the top executives. About 25% don't do it. These figures are based on the Annual Reports of the 2,500 largest European companies. It is also the case for the information given, in the table on page 2.

The information and reliability deficit on remuneration and share ownership of top executives is not only due to the fact that about 25% of the large European companies don't release the necessary information. It is also due to the fact that the population of the top executives targeted is not defined in the same way in each country. This largely explains the differences observed from one European country to the other as to the number of top executives in the large companies. In France, for example, it is typical that the publication only deals with the "*mandataires sociaux*", whereas in Finland, in Sweden or in Norway, the number of people targeted is far more important.

Question 9

(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?

Yes, the release of the information on the remunerations should be compulsory. It should also be convenient, for clarity reason, to harmonize the scope of the people targeted (Who are the "executives"?)

Question 10

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

Yes. The vote of shareholders should be compulsory.

1.5. Risk management

The dilution of shareholders' control on the executives that took place in the last decades is responsible for the emergence of new risks linked to the concentration of management power in the hands of a very small number of top executives, whose behaviour is more and more autocratic because it is literally "out of control".

The ING Group is an emblematic case. At the beginning of the 1990s, the employee shareholders of BBL, second Belgian bank, were the second shareholder of the bank, with nearly 10%. Takeover bid by ING (in fact a share exchange offer). What a surprise to discover that, according to the terms of the exchange, the Belgian shares WITH voting right had been changed into certificates of Dutch shares WITHOUT voting right. Indeed, the usual practice at the time for the majority of the large Dutch companies was to place the shares with voting right in a "stichting" (foundation) controlled by the company. On the other hand the "stichting" emitted a share certificate without voting right for each share being held. This certificate was listed and held by the public. Little by little, during the years 1990-2000, many Dutch companies reacted to the pressure of the shareholders. The system of certificates was abandoned and the public was given shares with voting right. However ING stuck to the former system. Under pressure, the Group granted the certificate holders the possibility to vote in assemblies. For example, at the Shareholders Meeting held in 2011, 43% of holders expressed a vote. However the votes of the remaining 57% were automatically exercised by the "stichting", which automatically expressed a vote of support to the executives. Without any effective control by shareholders, the CEO of ING had every opportunity, every year, to snigger at any question or criticism coming from the assembly. Undoubtedly this lack of control is a cause of the collapse of the Group and the obligation for the Dutch State to inject € 10 billion into it.

Question 11

(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?

Yes

Question 12

(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?

Yes

2. Shareholders

The Green Paper points out the "lack of appropriate shareholder interest in holding (…) management accountable contributed to poor management accountability"; if the observation is accurate, it is a mere epiphenomenon.

The real issue is the one of the changes and practices that enabled the top executives to free themselves from the shareholders' control. If after that shareholders lose interest in a control they have been deprived of, it is only a consequence, even if it still contributes to the loss of control.

Generally speaking, the EU law should see to facilitate the shareholders' vote, including the expression of collective votes, namely by proxy. In many cases the road is still long as we can see with the recent example of the unsatisfactory implementation of the Directive Shareholders' Rights in France.

Question 13

(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.

The analysis underlying this question seems questionable. It is at the very most an epiphenomenon.

Question 14

(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 analysis underlying this question seems questionable. It is at the very most an epiphenomenon.

Question 15

(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?

The analysis underlying this question seems questionable. It is at the very most an epiphenomenon.

Question 16

(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 analysis underlying this question seems questionable. It is at the very most an epiphenomenon.

2.4.2. Obstacles to shareholder cooperation

Generally speaking, shareholder cooperation and shareholders' control should be made easier.

Unfortunately cross-border obstacles to the exercise of votes and proxy votes remain the rule.

The Shareholders' Rights Directive has ***slightly*** improved the situation and its incidence on the final investor is ***still far from*** showing.

Here we echo the dissatisfaction expressed by employee share ownership experts as to the implementation of the Directive in France itself.

Question 17

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

The principles and provisions of the Shareholders' Rights Directive must be delivered again and again and the pretences in the implementation by the Member States should be eradicated.

2.5. Proxy advisors

We repeat it: It is necessary to make the exercise of votes and proxy votes easier.

The fact that "the influence of proxy advisors raises some concern" is understandable, mainly among people who are dependent on the shareholders' vote, that is the top executives.

Questions 18 et 19

(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?
(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 EU legislation should essentially aim at making votes and the activity of "proxy advisors" easier, and not restrict or hinder them.

2.6. Identification of shareholders

Question 20

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

Yes. We are in favour of instruments of identification of shareholders. More specifically we are in favour of instruments and information on employee shareholders in the large European companies, in relation with the structure of their ownership and their capital.

It is noticeable that a great number of countries have set up standards aiming at identifying their national and non-national shareholders, obviously in a concern of national protection. What is possible and justified for bad "national" reasons should *a fortiori* be for transparency and good governance motives.

2.7. Minority shareholder protection

Experience shows that the approach "comply or explain" generally comes down to thumbing one's nose, not only in big companies having a control shareholder but also in companies where the top executives have managed to free themselves from shareholders control.

Quite obviously the current EU rules are not sufficient to protect shareholders' interests (minority shareholders) against the abuses of the managing authorities. It is generally

reflected in the fact that top executives' remunerations have got out of hand in the last decades.

The involvement of minority shareholders is problematic, not only in companies with a dominant or controlling shareholder, but in all large companies.

Question 21

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

The real issue is not the one of minority shareholders in companies with dominant or controlling shareholders. The issue is generally the weakening of shareholders' control.

Question 22

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

We find this question secondary.

2.8. Employee share ownership

Employees' interest in the long-term sustainability of their company is going to be increasingly a crucial element of trust and corporate governance. Not only can employee owners contribute greatly to increase the proportion of long-term shareholders, but we will also see that employee ownership itself will be more and more perceived as a trust indicator.

Employee ownership is developing in nearly all the large European companies. It is present in all the countries.

This development is spectacular as shown in the chart on following page.

The following table shows the full extent of the phenomenon:

	2010	2009	2008	2007	2006
Employee owners (million people)	**9,6**	**9,4**	**9,0**	**8,5**	
Employees' share in ownership structure	**2,71%**	**2,82%**	**2,72%**	**2,69%**	**2,37%**
Capitalisation held by employees (billion €)	**192**	**162**	**242**	**282**	**205**
% European companies having employee ownership	**91,7%**	**91,5%**	**85,9%**	**83,3%**	**79,3%**
% European companies having broad-based plans	**53,7%**	**53,1%**	**51,8%**	**49,7%**	**46,1%**
% European companies having stock option plans	**64,1%**	**63,6%**	**62,4%**	**60,1%**	**56,7%**
% European companies having launched new plans	**27,5%**	**31,3%**	**36,0%**	**26,7%**	

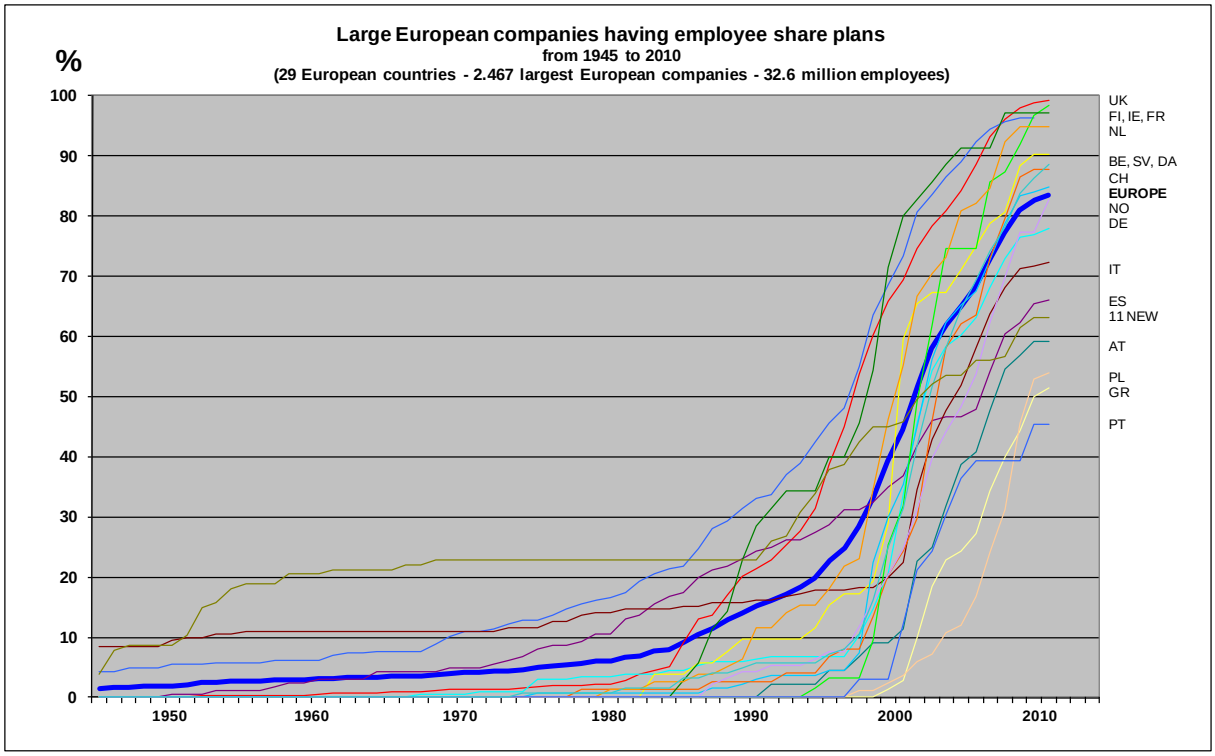
Today over 50% of the large European companies have a "significant" employee ownership (> 1%).

If we limit ourselves to the large listed companies only, we see that nearly 20% of the large European listed companies today have a "strategic" employee ownership (>6%), "determining" (>20%) or "controlling" (>50%). This figure didn't reach 5% 30 years ago.

So we see that it is not in the nature of employee ownership to be small or minority.

However numerous obstacles still slow down this development.

Two types of measures must be taken in order to facilitate and encourage it.



Source: European Federation of Employee Share Ownership, Economic Survey of Employee Ownership in European Countries in 2010

Question 23

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

The first measures aim at bypassing or smoothing the cross-border obstacles to employee ownership. Today these measures are clearly identified. They are the result of several years of thought, discussion and settling, and they have led to the Own-Initiative Opinion on Employee Financial Participation voted by the European Economic and Social Committee on October 21, 2010.

This Opinion contains all appropriate recommendations:

See http://www.efesonline.org/EESC/SOC%20371%20EN.pdf

In short: Considering employee ownership, an adequate European policy for present needs should be articulated around two main proposals, seeking both large enterprises, and small and medium sized ones.

Aimed at large enterprises:

Each European country should introduce into its legislation a "simplified model" of employee ownership.

In countries where appropriate legislation is lacking, this introduction would provide a first element of encouragement.

In countries where legislation is sophisticated and with a long tradition, like Britain and France, this sophistication forming an obstacle to employee share schemes for companies from neighbouring countries, the introduction of a simplified, basic model beside existing legislation would ease things considerably. Extending employee share plans beyond borders would be greatly facilitated for French companies in Britain and vice versa.

Aimed at small and medium sized enterprises:

Each European country should encourage the transfer of business to employees, following the example of what the U.S. has established since 1974 with the ESOP.

This is why we call for the introduction of a "European ESOP Model".

We don't go further here about the advantages of such a policy for the transfer of businesses beyond generations, for business owners and for employees, as well as for general economic health and entrepreneurship spirit. There is a growing disparity here between Europe and the USA. It needs to be corrected.

On the other hand the opinion SOC 371 demands the vote of an ad hoc budget line to support this approach in the EU budget. So far it is not the case and it impairs the transparency and efficiency of what is achieved.

The second measures deal with the organization of employee share ownership and the exercise of its voting rights.

It is more and more recognized that it is to the employee ownership‘s benefit to be organized through legal instruments that guarantee a collective holding and exercise of the voting rights (FCPE, trust, foundation, stichting, employee shareholders cooperative…).

However, practically, we quite often see that the employee shareholders don’t have the exclusive control on these legal instruments, so that the voting rights are influenced, even exercised directly or indirectly by the top executives of the company. We have already mentioned the emblematic case of Total in France.

These practices contribute to the mechanisms with which the top executives have taken a greater and greater control of the assemblies. They should be eradicated. The EU law should guarantee the exercise of the votes of employee share ownership by the employee shareholders themselves, without any other interference.

3. The "comply or explain" framework

It is true that the overall quality of the "explain" declarations is unsatisfactory, that they come from control shareholders towards minority ones, or they come from top executives towards shareholders in general. They often come down to thumping one’s nose at the shareholders.

We doubt that the explanation of this situation is to be found in the misunderstandings, the lack of details or the precision of the demands.

The power and control relations are responsible for this. This is what should be put right if need be.

Questions 24 et 25

(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?
(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?

Subject to the above observations, we answer in the affirmative to these questions.

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