Lewiatan

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European Commission
markt-complaw@ec.europa.eu

Dear Sir or Madam,

In regard to the public consultation on *the Green paper – The EU Corporate Governance framework*, launched by the Commission, the Polish Confederation of Private Employers Lewiatan (PKPP Lewiatan) would like to present it's response.

With kind regards,

Lech Pilawski
Director General
Polish Confederation of Private Employers Lewiatan (PKPP Lewiatan)

Polska Konfederacja Pracodawców Prywatnych Lewiatan
ul. Klonowa 6, 00-591 Warszawa, tel. +48 (22) 845 95 50, faks +48 (22) 845 95 51, e-mail: lewiatan@pkpplewiatan.pl, www.pkpplewiatan.pl

Response to the Green Paper, The EU Corporate governance framework

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PKPP Lewiatan welcomes the opportunity to present its opinion in accordance to the consultation launched by the Commission in regard to the Green Paper, The EU Corporate governance framework.

Response to the specific 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.**

In PKPP Lewiatan's opinion it is difficult to assess whether the size of listed companies should be taken into account. Arguments for and against are given. On the one hand, differentiation of obligations concerning listed companies on the basis of their size seems unjustified. Companies offering its securities for sale to the general public, broadly should be treated even. Hence, relations between the proper bodies (entities) of a company and between the bodies and the stakeholders should be clear and transparent in regard to all companies, independent of their size.

However, obligations - often in form of information duties - may be very difficult and costly for small-sized companies. Therefore, such actions may – independently and contrary to the Commissions intentions create yet more barriers for businesses.

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?**

PKPP Lewiatan stands on the position that no corporate governance measures on the EU-level are justified in regard to unlisted companies. These kind of companies appear in different forms and vary widely. Also, it would be very difficult, if not impossible to create one uniform and coherent corporate governance system, which would enclose all unlisted companies.

More importantly most unlisted companies are small or medium entrepreneurs, which may not be able to realize strict and costly obligations. Thus, such regulations in fact may turn in to obstacles for businesses – in particular small and medium businesses. Therefore unlisted companies of course may apply to national codes of corporate governance, however only on a voluntarily basis.

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?**

PKPP Lewiatan does not recognize need for actions on EU-level in this matter. In our opinion this subject area should remain in the matter of the proper national codes. Also, we would like to underline, that the polish commercial code foresees a clear distinction between the board of directors and the supervisory board. Likewise in many other European countries,

Polska Konfederacja Pracodawców Prywatnych Lewiatan
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this mentioned entities are two independent bodies, each having its own competencies and duties.

Also art. 375 of the commercial code, which applies for companies limited with shares clearly states, that both, the supervisory board, as well as the stakeholders (stakeholders meeting) must not give any binding directions (recommendations) to the board of directors. Being the representative of the company, executive directors take responsibility for actions taken on behalf of the company and must not act under influence of other bodies.

Therefore, taking into account that this area is already regulated in the polish commercial code, any further regulation, in our point of view seem unjustified.

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?**

According to the polish commercial code, shareholders designate members of supervisory boards in both - polish limited companies and companies limited with shares (art. 215 and 385 of the commercial code). Accordingly, taking into account, that shareholders are the ones who should be, and broadly are particular about the companies interests, it should be them to decide about the profile of directors, including the chairman. PKPP Lewiatan stands on the position, that this principle should not be changed under any circumstances.

Also, we would like to underline, that the Commission has already taken measures in this area; with influence on polish regulations. According to The polish Code of Best Practice for WSE Listed Companies two members of the supervisory board have to be independent. This regulation is a directly resulting from the Commission Recommendation of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board. Thereupon, further restrictions are unjustified.

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?**

PKPP Lewiatan stands on the position, that diversity policies and disclosure of these policies, of course could have added value for shareholders, stakeholders and other companies. However, we would like to underline, that in our opinion such policies should be established on a voluntarily basis. As mentioned above, shareholders are to designate members of supervisory boards in both - polish limited companies and companies limited with shares. Being "owners" of the companies, it is in their interest to make a wise choice, and this choice should not be limited through binding regulations. It is our belief, that competency, abilities, skills and practical experience, should be the most important factors for a criterion to designate qualified board members. Diversity of course can be another important factor, but only additionally.

Also, mandatory regulations in regard to diversity of the boards could lead to the situation, that unqualified persons may have to become members of supervisory boards instead of those who may be more qualified or competent, however not complying with such policy. Thereupon, in PKPP Lewiatan's opinion further regulations in this matter seem injustify.

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

Again, PKPP Lewiatan also fully supports the idea of a better gender balance on boards. However, the arguments mentioned above equally apply to the matter of gender diversity. It

Polska Konfederacja Pracodawców Prywatnych Lewiatan
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has to be kept in mind, that listed companies, likewise any other companies are entities of private law. One of the most important principle of private law is the freedom of contract. This freedom of course is not unlimited. However, because corporations are based on contracts, shareholders (being sides of these contract), should have the possibility to create this contract and subsequently to designate board members according to their will

Therefore, also in this area, PKPP Lewiatan of course supports unbinding measures, like recommendations, best practices codes etc., however does consider any attempts of establishing mandatory provisions as unjustified.

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?**

PKPP Lewiatan stands on the position, that the shareholders right to designate members of the board needs to be respected, and therefore does not see justified reasons for measures on the EU-level in this matter. In practice, it may happen, that non-executive directors simultaneously are members of one or more boards in other companies. However, if in the shareholders opinion those directors still are appropriate to accurately fulfill their duties, then it is our belief, that such right should be respected and not be limited. Directors who are not able to properly represent the companies' interests, eventually will be dismissed from their functions anyway.

In this context it needs to be added, that shareholders have proper instruments do dismiss unqualified or inappropriate members of the board if they wish to do so. For instance, according to art. 385 of the polish commercial code; the supervisory board get designated and dismissed by the shareholders (meeting). Thus, further regulations in this matter seem unjustified.

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

It has to be stressed out that external evaluation in any form exposes companies to many risks. Most importantly, such third persons would have to have granted access to privileged information (trade secrets), what certainly is not in the interest of any company. Also, they would have to be given access to privileged communication; for instance between the boards and shareholders. Subsequently such evaluators could – maybe will-less - cause damages to companies. Another important factor are yet again costs, which supposedly would have to be covered by the company.

Thereupon, in PKPP Lewiatan's opinion such measures would cause another costly and unnecessary barrier. Also, taking into account already existing polish regulations in this matter, it should be underlined, that according to the commercial code, the supervisory board has to report its activity to the shareholders on an annually basis. Again, it is PKPP Lewiatan's belief, that shareholders are capable to ensure and protect their and their companies interests sufficiently.

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?**

PKPP Lewiatan recognizes the need for reasonable and balanced remuneration policies in regard to members of the supervisory board and board of directors. Such policies indeed should be based on the competences and the real scope of responsibility of the board

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members. More importantly, the companies economical results should be another main factor in regard to remuneration policies.

However, it has to be stressed out, that the Commission already published three recommendations in regard to the matter of remuneration policies (2004/913/EV, 2005/162/EC, 2009/385/EC. The most important ensuing recommendations are: disclosure of remuneration policies and individual remuneration (of executive and non-executive directors), establishment of an independent commission regarding remuneration and putting remuneration policy and the remuneration reports to a vote by shareholders. Hence, in PKPP Lewiatan's opinion, this matter should be rather subject of codes of best practices, than EU-legislation.

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

PKPP Lewiatan supports the idea of putting the remuneration policy and the remuneration report to a vote by shareholders. Shareholders should have the right to acquaint with these policies and subsequently to make a proper assessment.

However, we don't agree with the opinion that it should be mandatory. We stand on the position, that these regulations should be covered by domestic codes of best practices, or in recommendations.

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?

Needless to say, any business activity always generates a huge amount of risks. Therefore, businesses (and especially big corporations and corporate groups) work out necessary risks policies. In other words, nowadays risk management is an essential and indispensible feature of a modern business. The lack of risk management simply leads to the weakening of a firm. And companies are absolutely aware of this fact.

More importantly, business activity related to particular external risks, for instance in regard environmental protection, infrastructural protection, health protection, public safety etc. is already governed by proper regulations (also on the EU–level) and supervised by proper public authorities.

Also, taking into account that the board of directors is the body which takes responsibility for the companies activity, it is our belief, that prescribing more obligations upon members of the supervisory board or non-executive directors is unjustified. It seems unlikely, that enlarging the area of responsibility of non-executive directors and other members of the supervisory board will result in a better risk management and consequently will ensure less risk for the whole business activity.

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?

According to the polish commercial code the board of directors and the supervisory board are to two separate bodies with independent competences and different duties. Risk management is to be ensured by the board of directors (executives). Also, this board takes the responsibility in this matter. A contrary to the board of directors, the role of the supervisory board encloses auditing and supervision. Hence, it is not the function of non-executives to ensure that the company's risk management arrangements are effective and commensurate with the company's risk profile.

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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?**

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?**

PKPP Lewiatan recognizes the importance to interrupt the potential practice of asset managers who may mainly tend to achieve only short-termed advantages. Such actions of course may be beneficial for the particular shareholder, but on the other hand disadvantageous from the companies or creditors point of view.

Therefore, PKPP Lewiatan does not object against non-binding measures aimed to create proper incentives for asset managers to invest in accordance to long-termed benefits and also with regard to the companies interest. However, in our opinion such incentives should be regulated in domestic best practices codes and not through hard (binding law) on EU - level. More importantly further assessment on regard to this matter seems required to accurately evaluate the scope of these effects.

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?**

In PKPP Lewiatan's opinion there is no need to regulate the subject matter on EU - level.

17. **What would be the best way for the EU to facilitate shareholder cooperation?**

Shareholder cooperation, but also their attention and carefulness for the companies interests – especially in regard to holders with small shares (minority shareholders) – is a very interesting and important topic. PKPP Lewiatan supports non-binding measures in order to achieve a larger activity and engagement of shareholders for "their" company.

The best way to facilitate such activity, in our opinion is through the internet. Companies could be encouraged to create internet forums for shareholders, which would allow a quick and cost-effective information exchange. As a result both – individual and institutional investors (shareholders) could make assented and wise decisions in regard to the companies matters.

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?**

In PKPP Lewiatan's opinion there is no need to regulate the subject matter on EU - level.

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**

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between investors? Please provide details (e.g. objective(s) pursued, preferred instrument, frequency, level of detail and cost allocation).

The possibility for issuers (companies) to identify the shareholders naturally can be beneficial. Nevertheless, in PKPP Lewiatan's opinion the present technological means necessary to indentify shareholders already are in existence (internet, forums etc.). Hence, those companies who wish to identify shareholders are free and able to do so. Also, corporate governance codes and issues are easily available in the internet. Thus, at present no burdens or obstacles for shareholders, granting access to those information exists. Thereupon, in our opinion this matter shouldn't be subject of EU–legislation.

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

The polish commercial code provides minority shareholders with several instrument and right in order to protect their interests. For instance minority shareholder have the right to call a Extraorinary Grnearal Meeting (EGM). According to art. 400 of the polish commercial code "*The shareholder or shareholders representing at least one twentieth of the share capital may request that the extraordinary general assembly be convened, as well as that certain matters be placed on the agenda of that assembly, the statutes may authorize shareholders representing less that one twentieth of the share capital to request that the extraordinary general assembly be convened.*" Also, they are granted to force the purchase of his shares (art. 418^1 of the commercial code). Moreover, the general assembly may adopt a resolution on a forced buyout of shares of the shareholders representing not more than 5% of the share capital (minority shareholders) by not more than five shareholders, holding jointly not less than 95% of the share capital and where each of them holds not less than 5% of the share capital.

Thereupon, PKPP Lewiatan stands on the position, that present regulations already effectively protect minority shareholders interests, and no further legislation is necessary. However, PKPP Lewiatan does not object to initiatives for soft laws in the corporate governance codes in regard to this subject matter, should the Commission come to the conclusion, that minority shareholders in other member states are less or inadequately protected.

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

Taking into account the arguments stated in the latter answer, and also the fact, that members of the board of directors, as representatives of the company bear an individual responsibility (both civil and criminal), which in Poland is very intensive, further measures seem unjustified. Therefore, present regulations, according to which shareholders (including minority shareholders) have the right do be informed about actions and transactions, including those with related parties, in our opinion are sufficient. Hence, PKPP Lewiatan does not support binding EU – legislative in this area.

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

In PKPP Lewiatan's opinion there is no need to regulate the subject matter on EU–level.

24. Do you agree that companies departing from the recommendations of corporate governance codes should be required to provide detailed

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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?**

PKPP Lewiatan fully supports the principle of "comply or explain" and stands on the position, that this instrument is sufficient to ensure the effectiveness of corporate governance codes. More importantly, we don't agree, that external bodies should be authorized to check the informative quality of the explanations in the corporate governance statements and require companies to complete the explanations where necessary. It would be yet just a different kind of external evaluation exposing companies to many risks, as these bodies would have to be given access to privileged information and communication. It is our belief, that shareholders are capable to ensure and protect their and their companies interests sufficiently. Therefore, explanation duties in regard actions which don't comply with corporate governance regulations should be addressed to shareholders or creditors and not as suggested to "monitoring bodies". Thereupon, this matter shouldn't be subject of EU–legislation.

General comments:

PKPP Lewiatan fully supports an efficient and effective corporate governance, which certainly brings many benefits for shareholders, companies, creditors and other business entities. However, it is our belief, that in most of these areas, the need for EU-legislation is not given. Mostly, the principle of "comply or explain" is a sufficient means to ensure the effectiveness of corporate governance codes. Nevertheless, our response shouldn't make the wrong impression, that we don't recognize some of the issues the Green Paper has called attention to. Many of the problems stated in this Green Paper of course seriously have to be taken into consideration. Though, initiatives on the European level in regard to this subject matter in fact could result in over-regulation. For these reasons PKPP Lewiatan mainly supports non-binding measures, or domestic initiatives, like codes of best practices.

PKPP Lewiatan, 21th July, 2011

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