



# European Investors

An die  
Regierungskommission  
Deutscher Corporate Governance Codex  
c/o Deutsche Aktieninstitut  
Senckenberganlage 28  
60325 Frankfurt am Main  
Germany

Via email: [regierungskommission@dcgk.de](mailto:regierungskommission@dcgk.de)

Brussels: December 15, 2016  
Concerning: Consultation response regarding the proposed amendments to the German Corporate Governance Code 2017

Dear Sir, Madam,

European Investors' Association (**European Investors**) welcomes the opportunity to comment on the Regierungskommission's (**Commission**) consultation regarding the amendments to the German Corporate Governance Codex (**Code**).

European Investors is the voice of (retail) investors in Europe and contributes to the creation of sound legislative and regulatory frameworks in the EU. Based in Brussels, we advocate good corporate governance practices in the EU member states. Furthermore, many of our members have (significant) investments in German companies.

In general, European Investors welcomes the lean and transparent character of the Code, its focus on sustainable value creation and its emphasis on stakeholder engagement, in particular the recommendation which encourages discussions between investors and the Chairman of the Supervisory Board.

We will not comment on all the proposed changes in the Code, but would like to make some specific comments on recommendations that directly affect investors' interests.

## 1) Ethical principles (Foreword)

European Investors supports the amendment in the Foreword of the Code which clarifies the obligation of the Management Board and the Supervisory Board to act in conformity with ethically oriented principles when ensuring the continued existence of the enterprise and its sustainable value creation. In view of recent scandals at German (listed) companies, European Investors agrees that Board members should look beyond legal compliance alone and also adhere to ethical values and behaviours (as the Code states: the Honourable Business Person).

However, we would like to request the Commission to further clarify these ethical principles, values and behaviours and provide practical guidance.

In addition, European Investors welcomes the requirement for investors to exercise their ownership-rights actively (2.1.3). Nonetheless, we would appreciate more clarity on the concepts of sustainability/CSR. In the absence of a German stewardship code, we recommend ICGN's Global Stewardship Principles as a global framework with regard to investor responsibilities.

## **2) Dialogue between investors and the Supervisory Board (5.2)**

European Investors strongly supports the Code's recommendation (5.2) that *under appropriate conditions, the Chairman of the Supervisory Board shall be prepared to engage in discussions with investors on Supervisory Board-related topics*. We believe that regular and constructive dialogue between investors and the Supervisory Board improves transparency and strengthens governance at German (listed) companies. Furthermore, dialogue with the Chairman of the Supervisory Board provides investors with the opportunity to gain first-hand information on the collective knowledge level of the Supervisory Board, the suitability of its composition and whether it carries out its duties effectively. If this means this is an open norm which cannot be restricted by the Chairman of the Supervisory Board, European Investors would support the recommendation.

However, the recommendation does not further specify "Supervisory Board- related topics". Also, it provides the Management Board and the Supervisory Board with the task to jointly decide on aspects that will be up for discussion, which restricts the open norm. European Investors is concerned that the opaqueness of the recommendation enables reluctant companies to keep controversial topics of the agenda. Especially in pivotal situations, for example take-over bids or succession of Board Members, the Code must prevent that the Chairman rejects an investors' request for a dialogue. As a result, investors will be unable to justifiably benefit from a dialogue with the Chairman and investor engagement/communication will not improve.

Therefore, European Investors suggests that the recommendation shall at least outline a list of topics (that rest in the sole responsibility of the Supervisory Board) that can be put on the agenda by investors in all circumstances. Apart from the general topics (composition, nomination procedures and requirement profiles, remuneration policies, strategic involvement, selection process of the auditor and corporate governance reports), European Investors argues that the evaluation and personal development measures for members of the Supervisory Board and their responsibility to obtain (sometimes independently) sufficient information (internally and externally) can be included in the discussion as well.

Companies in almost all economic sectors are challenged by the risks relating to climate change and the profound and disruptive technological changes resulting from the digital revolution. As these developments will change business models and have direct consequences for the long-term growth potential of companies, investors should be allowed to discuss with the Chairman

whether the Supervisory Board has sufficient knowledge and expert experience to challenge the Management Board and offer strategic guidance in this regard.

In addition, European Investors suggests that the Chairman has to report back to the entire Supervisory Board the content of the dialogue with investors and the points raised. An overview of the points which were raised and discussed should be published on the company's website.

### **3) Compliance management (4.1.3)**

European Investors commends the Code's recommendation (4.1.3) that *the Management Board provides for a proportionate Compliance Management System corresponding to the level of risk that the company is exposed to and shall publish the basic features of this system in the annual corporate governance report*. Also, employees as well as third parties shall be given the opportunity of anonymously reporting misconduct within the company in a protected manner.

We welcome the introduction of compliance reporting as well as whistleblowing mechanisms for employees and third parties. Both recommendations will strengthen trust in the corporate governance policies of German companies and enable investors to gain insight in their internal compliance efforts. Nevertheless, European Investors feels that transparency in this regard can be improved even further. The Code should make more clear what the information requirement on basic features exactly entails. In addition, and again in view of recent scandals at key German businesses, the compliance report should also highlight the effectiveness of internal compliance policies by providing information on the number and nature of recent incidents, measures taken to address these weaknesses and cases of misconduct which were reported by whistleblowers.

### **4) Compensation structures (4.2.3)**

European Investors is supportive of a compensation structure for the Management Body which is oriented towards sustainable growth. Therefore, we commend the Code's recommendation (4.2.3.) that the variable compensation elements are in general based on a *multi-year, future-related* assessment. However, "in general" implies that there could be exceptions. European Investors believes that the recommendation should be applicable in all cases, and if this is not the case, that the Code is more clear on its scope. Moreover, the Code should explain how the assessment incorporates future developments and how they relate to sustainable value creation.

### **5) Requirement profiles (5.4.1)**

European Investors welcomes the recommendation that (5.4.1) that the Supervisory Board *shall specify concrete objectives regarding its composition and shall set up a profile of competencies for all of the Supervisory Board*. As regards to its composition, the Board *takes appropriately into account* several factors including potential conflicts of interest, the international activities of the enterprise and its structure of ownership. With regard to structure of ownership, we are of the opinion that representation on the board of major shareholders could improve the quality in terms of internal oversight, but also stress that the majority of the members should be independent and that the Code should provide more clarity in this regard.

Moreover, European Investors suggests to offer more specifics regarding collective and individual competencies which the Board is required to have to properly fulfil its tasks. Therefore, the recommendation should distinguish between competencies which all members need to have to execute their oversight role and which competencies individual members need to possess to ensure that the Supervisory Board is up to its tasks collectively. The Supervisory Board should monitor and update the requirement profiles on an ongoing basis and publish the results in the corporate governance report. Also, European Investors suggests to specifically include industry expertise in the requirement profiles for all members of the Supervisory Board.

European Investors commends the Code's recommendation that the Supervisory Board ensures that respective candidates for vacant positions in its Board can devote the expected amount of time required. *The candidate's proposal shall be accompanied by a brief curriculum vitae and an abstract about the respective's candidates essential activities further to the Supervisory Board Mandate.* In general, we believe these documents will help investors to determine whether a candidate is suitable for the vacant position, apart from time commitment. Therefore, we would like to add a recommendation with a limit on the number of Supervisory Board functions.

We agree with the new recommendation that the corporate governance report offers public information about the appropriate number of independent members in the Supervisory Board including their names and an explanation why these members can be considered independent. This will help shareholders to assess the quality of internal supervision.

#### **6) Audit committee (5.3)**

European Investors commends with the Code's existing recommendation that the Chair of the Audit Committee should be independent, cannot be Chairman of the Supervisory Board at the same time and has not been a member of the Management Board in the previous two years. Moreover, we believe that the entire Audit Committee should be independent.

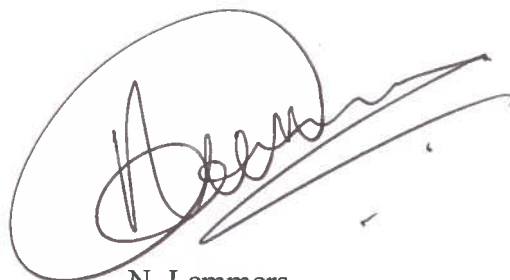
#### **7) Closing remarks**

We hope our comments and suggestions are useful and hopefully contribute to the development and further improvement of the Code. If your commission would like to elaborate on our observations or discuss our views in further detail, please do not hesitate to contact us.

Yours faithfully,



P.M. Koster  
Chairman



N. Lemmers  
Managing Director