UNICE
THE VOICE OF BUSINESS IN EUROPE

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A MODERN REGULATORY FRAMEWORK FOR COMPANY LAW IN EUROPE

CONSULTATIVE DOCUMENT OF THE HIGH LEVEL GROUP OF COMPANY LAW EXPERTS

UNICE COMMENTS

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PRELIMINARY COMMENTS

UNICE welcomes the Commission's initiative to consult interested circles in order to base its work programme in the field of company law on a broad consensus about the changes that may be required to complete the single market in this sphere.

UNICE particularly supports simplification and modernisation of company law at EU level. This certainly is one of the most pressing needs of companies, and the main issue for a European competitive economy.

In UNICE's view, European company law is already largely harmonised. Shareholder, investor, and creditor protection have reached a high standard and the remaining needs for further action are essentially the elimination of mobility constraints on companies within the single market (cross border mergers and transfer of the seat of companies).

I. FACILITATING EFFICIENT AND COMPETITIVE BUSINESS IN EUROPE

Question 1:

a) Do you agree that the European Union moving forward in the area of company law should primarily focus on establishing new and amending existing company law mechanisms with a view to facilitate the efficient and competitive operation of business across the Union?

b) If so, can you identify other areas of company law than those specifically dealt with in this consultative document where progress could and should be made as a matter of priority?

UNICE agrees with the approach taken by the group of experts of better meeting companies' needs in the area of company law. This is a constant request from UNICE since many years.

New arrangements must establish a more effective, cost-effective, and flexible legal framework for companies to improve their competitiveness at EU and global levels. In particular the need for further action in European company law should concentrate on the elimination of mobility constraints on companies within the single market, in particular concerning cross-border mergers and transfer of the seat of companies.

New rules should be flexible enough to enable facilities for companies while not restricting or hindering the needed competitive business environment. In addition, tax Laws should not deprive companies from making use of the possibilities to be offered to them through revision of company Law.

II. MODERN COMPANY LAW MAKING

Question 2:

a) Should the European Union in future initiatives in company law make use of alternatives as indicated to primary legislation in directives?

b) What areas of company law and which alternatives are particularly suited for such an alternative approach?

Where an EU action for harmonisation is deemed necessary, UNICE supports the use of general framework directives setting the general principles for harmonisation.

UNICE is in favour of leaving implementing regulations to committees (comitology procedure) but this should be restricted to real technical details in a narrow sense. In addition, transparency, consultation and involvement of relevant stakeholders must be ensured when using comitology procedures.

III. DISCLOSURE OF INFORMATION AS A REGULATORY TOOL

Question 3:

a) Do you agree that disclosure requirements can sometimes provide a more efficient regulatory tool than substantive rules?

b) In what areas of company law should the emphasis be on disclosure requirements rather than substantive rules?

UNICE agrees that disclosure requirements can sometimes provide a more efficient tool than substantive and detailed regulation.

This approach should be favoured, whenever possible, and in particular in the area of corporate governance (related parties' transactions; directors' conflict of interests; ownership structure; directors' remuneration) .

IV. DISTINGUISHING TYPES OF COMPANIES

Question 4:

a) Should the European Union in devising new company law regulation and amending existing company law regulation distinguish more between listed companies, open companies and closed companies?

b) In which areas of company law is this distinction most relevant, and what, in general terms, should be the difference in regulatory approach there?

UNICE supports a distinction being made in the Laws applicable to listed companies, open companies and closed companies so that companies are asked only what is indispensable depending of their form.

This should be the case in particular in the area of reporting, transparency, functioning of companies' bodies, protection of shareholders, alternative dispute resolutions.

UNICE thinks, however, that the best criterion in order to distinguish open and closed companies should be the offering of securities to the public. In the light of this criterion we support the regulatory approach of the three types of company suggested by the group of experts.

V. INCREASED FLEXIBILITY VS. TIGHTENING OF RULES

Question 5:

Do you agree that company law should not be changed to include more compulsory rules, monitoring and enforcement regimes and procedures to achieve such regulatory objects as combating fraud and terrorism, but that such objects should be achieved by specific law enforcement instruments outside company law?

UNICE shares the group view that combating fraud and abuse of accepted legal forms should be achieved through specific law enforcement instruments outside company Law and should not be allowed to hinder the development and use of efficient company law structures.

VI. MODERN TECHNOLOGY

Question 6:

a) Taking into account the current and forthcoming Commission proposals in the field of securities legislation (e.g. prospectus, market abuse, periodic and ongoing reporting), should listed companies be required to maintain a specific section on their website as the single place where they publish all information they are required to file and publish, providing for two-way links with registers where such information should be filed and published, and to continuously update the information on this section of the website?

b) Should other companies be allowed to file and publish information on their website so long as they provide for two-way links with public registers where such information should be filed and published?

c) Should the European Union facilitate or provide for the co-ordination of public company registers in the Member States?

d) Beyond the current reflections at Community level on the establishment of a central electronic filing system for listed companies in each Member State, should the European Union, at some stage, promote the setting-up of a single European central electronic filing system for listed companies?

UNICE is supportive of the use of modern information technology and communication technology in the area of company disclosure

The use of website to publish information that is currently scattered over various places (commercial trade registers, notification in newspapers, stock exchange registers, etc.) is also welcomed as a best practice provided that it is not compulsory.

UNICE support coordination of public company registers in the Member States by the European Union.

UNICE agrees with the general objective of establishing a single electronic filing system for listed companies at EU level but it believes that further thinking is needed on the feasibility of and practical arrangements for such a project.

I. THE ROLE OF THE EUROPEAN UNION IN CORPORATE GOVERNANCE FOR EUROPEAN BUSINESS

Question 7:

Are efforts to improve or strengthen corporate governance necessary and important for efficient business in the EU and for an integrated European securities market?

The debate within UNICE clearly reveals that companies do not need Community legislation on corporate governance.

At national level, it has largely been left to the private initiative of companies to adopt guidelines or codes of good practice.

Binding regulation does not allow for the flexibility required to deal with diverse and complex concrete situations, and it would therefore be ill-advised to adopt uniform rules in this area.

It is UNICE's considered opinion that corporate governance systems will develop and progress in a natural way under pressure from the financial markets. This is already happening and national rules or guidelines adapt all the time to the globalising regulatory environment.

Adding yet another layer of mandatory EU legislation in this area would therefore be perceived as over-regulation.

UNICE has taken good note of the recently released study on Coporate governance. (Weil Gotshal & Manges)

One of the main conclusions of this study is that the most important differences in corporate governance practices among companies incorporated in EU member states result from differences in company law and securities regulations rather than differences in code recommendations.

The study indicates that there is little indication that code variations pose an impediment to the formation of a single European equity market. The various codes emanating from the member states appear to suggest a convergence of governance practices.

The study presents the OECD principles of corporate governance as being already a set of coherent basic corporate governance principles.

The study recommends that the European Commission focuses its efforts on the reduction of legal and regulatory barriers to shareholders engagement in cross-border voting as well as the reduction of barriers to shareholders ability to evaluate the governance of corporations.

UNICE strongly supports these orientations.

II. BETTER INFORMATION FOR SHAREHOLDERS AND CREDITORS, IN PARTICULAR BETTER DISCLOSURE OF CORPORATE GOVERANCE STRUCTURES AND PRACTICES INCLUDING REMUNERATION OF BOARD MEMBERS

Question 8:

- **a)** Should there be more disclosure on corporate governance structures and practices of companies in Europe?
- **b)** If yes, should such a disclosure be given only by listed companies or by all "open" companies or even by "closed" companies?
- **c)** Should this disclosure include an indication whether a certain corporate governance code is followed and where and why the code is not complied with?
- **d)** Should the remuneration of individual board members be disclosed, in particular if it is linked to the share price performance?
- **e)** Should the shareholders have a role in fixing the principles and limits of board remuneration?

UNICE supports disclosure of corporate governance structures concerning listed companies.

UNICE believes that all aspects of the remuneration of individual board members should be left to national laws or codes;

III. STRENGTHENING SHAREHOLDERS' RIGHTS AND MINORITY PROTECTION, IN PARTICULAR SUPPLEMENTING THE RIGHT TO VOTE BY SPECIAL INVESTIGATION PROCEDURES

Question 9:

Should shareholders' rights and decision-making, including minority protection, be enhanced by European law, in particular by enabling the general meeting of shareholders, by resolution, or a qualified minority of shareholders to apply to a court or an appropriate administrative body for the ordering of a special investigation?

UNICE believes that European law should provide for general principles concerning shareholders' rights and decision-making, including minority protection.

However it should be left to UE members the authority to implement the general principles in the light of the different types of companies (listed, open and closed companies) – which normally raise different agency cost problems – and ownership structures.

IV. STRENGTHENING THE DUTIES OF THE BOARD, IN PARTICULAR THE ACCOUNTABILITY OF DIRECTORS WHERE THE COMPANY BECOMES INSOLVENT

Question 10:

Should the European Union introduce a framework rule, which would hold company directors accountable for letting the company continue to do business when it can no longer pay its debts?

Contrary to the group of experts' analysis, UNICE believes that this area relates more to insolvency law rather than company law.

V. NEED FOR A EUROPEAN CORPORATE GOVERNANCE CODE OR CO-ORDINATION OF NATIONAL CODES IN ORDER TO STIMULATE DEVELOPMENT OF BEST PRACTICE AND CONVERGENCE?

Question 11:

- **a)** Is there a need for a voluntary European corporate governance code in addition to or instead of the various national corporate governance codes?
- **b)** If yes, please give examples of what rules and recommendations a European corporate governance code should contain.
- **c)** Should the European Union facilitate the co-ordination of national codes in order to stimulate development of best practice and convergence?

As stated above, UNICE believes that there is no need for a European corporate governance code in addition to the various national existing corporate governance codes. In this context, UNICE would like to refer to the recent Weil, Gotshal & Manges comparative study and fully shares its conclusion that no EU action should be taken in this area.

II. NOTICE AND PRE-MEETING COMMUNICATION

Question 12:

- **a)** Should listed companies be required to establish on their websites devices (bulletin boards, chat rooms or similar devices) that allow for electronic communication between shareholders and the company and among shareholders prior to general meetings, including with respect to notices of general meetings, submissions of proposals and questions and solicitations of proxies?
- **b)** If listed companies are required to establish these or similar devices on their websites, should the shareholders then be required to communicate by electronic means and thus be compelled to abandon the use of traditional means of communication, or should electronic communication only be an alternative available to those interested?

UNICE refers to its answer to question 6. Modern technology communication should be encouraged but should not be made compulsory. UNICE supports the view that there should be enabling – not mandatory – rules regarding this issue . The right solution, however, would probably be to leave the regulation of the matter to the self-regulatory bodies, like Corporate Governance Committees.

UNICE believes that a distinction should be made between the regulation of communication between company and shareholders, which needs the provision of guiding principles at primary legislation level, and the question of communication between shareholders outside the general meeting, which is a matter that could be dealt with self-regulation.

In any case, the question of communication between shareholders outside the general meeting should be left to companies.

Question 13:

- **a)** Is there a need, at the European Union level, to provide for minimum standards regarding the right for shareholders to ask questions and submit proposals for decision-making at the general meeting?
- **b)** If so, what should these minimum standards be (minimum shareholding for raising questions and submitting proposals; time of submission of proposal for decision-making)?

Since the situation on this subject differs at Member-State level, a comparative study of the existing regulation and practices is necessary.

III. THE MEETING, ELECTRONIC ACCESS, PROXY VOTING

Question 14:

- **a)** Should listed companies be required to provide facilities for proxy voting by all shareholders?
- **b)** Should listed companies be enabled or required to offer to their shareholders electronic facilities for proxy voting or should they and their shareholders even be required to use electronic proxy voting and thus abandon the use of traditional proxies?
- **c)** Should companies be enabled or even required to allow absentee-shareholders to participate in traditional general meetings via electronic means, including via the internet (webcast) and satellite?
- **d)** Should companies which offer a comprehensive electronic process of information to, communication with and decision-making by shareholders be enabled to abandon the traditional type of general meeting?

UNICE shares the group's thinking that shareholders of listed companies should be given the opportunity to exercise their voting rights without physically attending the meeting and that listed companies should offer their shareholders a facility for proxy voting.

Once again, UNICE supports the enabling philosophy on this concern. Companies should be encouraged to do so by electronic forms but should not be compelled, and they should remain free to attend the meeting physically and to use traditional means of proxy voting.

IV. VOTING BY INSTITUTIONAL INVESTORS

Question 15:

a) Should institutional investors in Europe, or, alternatively, all shareholders holding a certain percentage of the share capital, be required to disclose their policy as regards the investments they make, and as to how they exercise their voting rights?
b) Should institutional investors be required to exercise voting rights with respect to shares they hold?

UNICE believes that this topic should rather be left to corporate governance rules at national level rather than prescriptive rules.

In any case UNICE believe that a clear distinction should be made between holders of a relevant percentage of share capital and institutional investors. Only the second category, in principle, owes fiduciary duties to the beneficial owners.

I. THE FUNCTIONS OF LEGAL CAPITAL AND THE COMPETITIVE EFFECT OF THE CURRENT RULES

Question 16:

a) Do you believe that legal capital serves all of the functions listed above?
b) Are there possibilities of reaching the same results by means of other techniques?
c) Do you consider that European companies are at a disadvantage as against companies in jurisdictions with a more flexible capital regime?

UNICE believes that the case for legal capital regulation needs to be considered in relation with further issues, such as directors' duties, insolvency law, creditor protection and the regulatory context.

Although legal capital regulation does not serve all the functions listed in the Report of the Company Law Group of experts, UNICE supports the European approach on the subject matter and believes that a more flexible regulation is needed in this area.

In this context, the SLIM exercise should be further pursued and UNICE would welcome proposals in this direction.

II. THREE APPROACHES TO THE REFORM OF LEGAL CAPITAL IN EUROPE

Question 17:

a) What is your general impression on the three approaches outlined here?
b) Which is the approach that you consider worth pursuing (if any)?

See the answer on question 16.

III. SPECIFIC TOPICS

Question 18:

a) *Do you see the minimum capital requirement as an appropriate impediment to starting up a company?*
b) *Or would you abolish the minimum capital requirement or rather impose a stricter minimum capital requirement than the one presently in force?*
c) *Do you consider that "wrongful trading" is an effective instrument for creditor protection?*
d) *Do you consider that subordination is an effective and desirable way of enhancing creditor protection?*
e) *Are there any other possibilities worth considering?*

Question 19:

a) Do you believe that other forms of consideration, such as services, should be allowed as valid forms of consideration for capital?
b) Do you think the prohibition of financial assistance for the acquisition of own shares should be eliminated or at least that financial assistance should be allowed if it complies with the general rules for distributions to shareholders?

A majority of UNICE member Federations believes that other forms of consideration for capital, apart from cash and consideration in kind, should be allowed at least for private companies, provided that a clear creditor protection procedure and evaluation procedure is considered.

UNICE agree with the elimination of the financial assistance prohibition provided that the financial assistance complies with the general rules for distributions to shareholders

I. THE EXISTENCE OF GROUPS OF COMPANIES AS A USEFUL AND LEGITIMATE ECONOMIC REALITY

Question 20:

- **a)** *Are groups of companies frequent in your country?*
- **b)** *What are in your view the specific advantages, disadvantages and risks presented by groups?*

Large corporations, and small-medium companies too, are often structured as a group of companies. Groups of companies are a specific issue and it has been discussed for a long time. A specific regulation concerning groups of companies is not necessary. This assumption reflects the European scenery: only German law and Portuguese law make provision for a specific regulation concerning groups of companies, and there are wide discussions in Germany and Portugal concerning the functionality of this specific regulation. Moreover, the proposed IX Directive on groups of companies, based on the German model, is on "stalemate" for 20 years.

Useful provisions concerning groups of companies have to recognise that groups are not an illness of companies, but an efficient way for the organisation of the companies themselves.

As a consequence, it is necessary to collect information on the typical situations of group of companies and, in particular, those concerning the direction powers on the subsidiaries exercised by the parent company. When a company is part of a group, it is necessary to not consider its transactions and the advantages and disadvantages of these transactions in an atomistic way.

II. TRANSPARENCY OF GROUP RELATIONS

Question 21:

- **a)** Should the 7th Company Law Directive on group accounts be supplemented by rules that require greater transparency of group relations and of possible risks arising from them both to the subsidiary and to the parent?
- **b)** What should such enhanced transparency include?
- **c)** If not in general, should such group transparency rules at least apply to listed companies?
- **d)** Are special rules for banks and other financial institutions needed?

UNICE is of the opinion that showing possible risks from a subsidiary is the task of single accounts of that company and not of the group accounts. **IAS-standard 34 should be applied.**

III. PROBLEMS FOR THE CREATION AND FUNCTIONING OF GROUPS OF COMPANIES: TENSIONS BETWEEN THE INTERESTS OF THE GROUP AND ITS PARTS

Question 22:

Is it desirable to require Member States to provide for a "safe harbour" which allows those concerned with the management of the companies within a group to *adopt a* coordinated policy provided that the interests of creditors of the companies within the group are effectively protected and that there is a fair balance of advantage for shareholders over time?

See answer on question 20

IV. PYRAMIDS

Question 23:

a) Are pyramids of companies frequent in your country?
b) Are they useful or harmful or indifferent?
c) If you consider them to be harmful, what are the specific risks they present?
d) Are specific measures beyond group transparency appropriate and desirable for pyramids of companies?

Pyramids of companies ensure the control of large groups of companies by means of minority shareholdings.

It is necessary to avoid companies being managed just to secure personal benefits not connected with the creation of shareholder value. Strict provisions avoiding company directors from* mala gestio *and specific measures beyond group transparency are, as mentioned above, necessary. Anyway in the case of listed companies the power to regulate should be left to the competent market authority.

II. CHANGE OF CORPORATE SEAT, OR DOMICILE

Question 24:

a) Do you agree that Member State laws which automatically deny recognition to any company which has its real seat in a state other than that of its formation should be abolished under EU law, as disproportionate inhibitions of commercial freedom and legal security?
b) If so, do you agree that Member States should be free to apply mandatory internal company law requirements, which are proportionate and non-discriminatory, to companies substantially based within their territories, and how should such connection be defined?
c) If so, should other Member States be bound to recognise such provisions?

As stated above, the elimination of mobility constraints for companies should be a priority area for any EU action. There should be no barriers to the freedom of establishment.

III. 3RD DIRECTIVE MERGERS - POSITION OF THE ACQUIRING COMPANY

Question 25:

a) Should the EU requirements for special provisions governing merger decisions in acquiring companies be removed?

b) Should the Member State of an acquired company be bound to accept any such relaxation in respect of an acquiring company in an international merger, or should that relaxation be made mandatory for all international mergers, or even for all mergers?

UNICE is in favour of EU requirement for unnecessary provisions governing merger decisions in acquiring companies to be removed. Such relaxation should be mandatory for all international mergers.

IV. 3RD DIRECTIVE - ACQUISITION OF A WHOLLY OWNED SUBSIDIARY

Question 26:

a) Should Member States be permitted to relax the directive requirements in the case of acquisitions of 100%-subsidiaries?

b) Should the Member State of the acquired subsidiary be required to accept such relaxation by the Member State of the holding company in an international merger?

c) Or should such requirements be removed in all such international cases, or in all cases, international or not?

Here again, UNICE supports removal of such requirements in the case of acquisition of 100% subsidiaries. Member States should be required to accept such relaxation in all cases.

V. CREDITOR PROTECTION IN RESTRUCTURING

Question 27:

a) Should the creditor protection requirements for reductions of capital, mergers and transfers of registered office be aligned as proposed above?

b) If so, should such alignment be confined to international mergers and transfers of corporate domicile or should it apply to all EU restructuring provisions?

UNICE shares the view of the Group of Company Law Experts on the above issue in order to provide a liberalised common standard of creditor protection, perhaps based on the right to apply to the court for protection pending completion.

VI. SQUEEZE-OUTS AND SELL-OUTS

Question 28:

a) Should Member States be required to introduce provisions enabling a majority shareholder (the majority to be set at not less than 90% nor more than 95%) in a company to buy out the minority for a fairly appraised price?

b) Should minority shareholders have a corresponding right to be bought out where the 90-95% threshold has been reached?

c) In companies with more than one class of share should the rule operate on a class-by-class basis?

UNICE believes that simpler rules should be available in this area.

UNICE broadly supports harmonisation of squeeze-out and sell-out rules but believes that it still should be subject to conditions. Close attention has to be paid on the conditions and practical modalities of the sell out procedure. UNICE is in favour of applying these rules on a class-by-class share basis.

VII. OTHER ISSUES

Question 29:

Is there a need for legislation at the EU level providing for restructuring in ways not already discussed above?

I. AN INITIATIVE TO ESTABLISH A EUROPEAN PRIVATE COMPANY

Question 30:

a) Do you think there is a specific need for a new European legal form of company, complementary to the SE and national forms of private companies, the European Private Company as proposed?

b) If not, do you think a European model for regulation of private companies is a desirable and appropriate way to encourage Member States to adopt flexible regulation of private companies?

UNICE has always supported the European private company statute and is calling on the Commission to present such an additional optional statute to respond in particular to SMEs' needs.

A European model for regulation of private companies should in no way be a substitute for the needed European private company statute.

II. INCORPORATION OF THE EUROPEAN PRIVATE COMPANY

Question 31:

Do you think that it should be possible for a European Private Company to be set up by both individuals and legal entities and by one or more nationals of one Member State, as long as the European Private Company undertakes economic activities in two or more Member States?

Yes

III. A GENUINE EUROPEAN COMPANY

Question 32:

a) Do you think that the European Private Company for the company law applicable to it could be exclusively governed by the provisions of the regulation and the provisions of its articles, which are not inconsistent therewith, with autonomous interpretation ultimately by the European Court of Justice?

b) Or is it necessary to refer to the law applicable to private companies in the Member State of incorporation where a question is not answered in the regulation of the European Private Company or its articles of association?

UNICE is of the opinion that the European Private Company statute can work without reference to national law but as a fall-back position it could consider reference to national laws.

I. REGULATION OF THE EUROPEAN CO-OPERATIVE, EUROPEAN ASSOCIATION AND EUROPEAN MUTUAL SOCIETY

Question 33:

a) Do you consider that the enactment of the proposed regulations is necessary or desirable?

b) What is your assessment of the potential these regulations have in the solution of the problems affecting co-operatives and other forms of enterprise in the European Union?

c) II. Harmonisation of national laws on co-operatives, associations and mutual societies

Yes

Question 34:

a) Do you think there should be harmonised rules in Europe for these alternative forms of enterprise?

b) Do you consider it to be satisfactory that the regimes in the proposed regulations are completed by application of the Company Law Directives, which do not apply to the national forms of these enterprises?

III. Foundations in Europe

Question 35:

a) Do you think there is a need for a specific regulation of the European Foundation?

b) Do you think that national rules of Member States relating to foundations should be harmonised to some extent (as for other forms of enterprise, see question 34)?

IV. ENTERPRISE LAW

Question 36:

a) Do you think a definition of "enterprise" in EU-law would be useful?

b) If so, do you agree on the elements of economic activity and organisation as the main elements in the definition?

c) Do you think basic harmonised rules should be applied only to limited liability entities?

UNICE believes that the definition of "enterprise" is not needed in the area of company law.

Question 37:

a) Do you think there is a need to introduce harmonised rules in Europe for registration, access to core data and powers of representation relating to enterprises as defined above?

b) Do you think other issues should be addressed in an Enterprise Law Directive (financial reporting, branches, groups of enterprises, transformation, transfer of seat?

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