

**COMMISSION ACTION PLAN: MODERNISING COMPANY LAW AND ENHANCING CORPORATE  
GOVERNANCE IN THE EUROPEAN UNION**

COM(2003)284

**COMMENTS**

**I. GENERAL COMMENTS**

UNICE has taken note of the European Commission's Communication released on 21 May 2003 and entitled "*Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward*" (hereafter 'the Action Plan').

An effective Internal Market in the area of Company Law has been seriously lacking in Europe and, in this context, the Commission's Action Plan as a political commitment and fresh impetus to meeting companies' needs in the area of company law is appreciated by European business.

The fact that one of the key policy objectives of the Action Plan is to "*foster the global **efficiency and competitiveness of businesses in the EU***" is particularly welcomed. In this regard, UNICE agrees with the Commission's analysis that "*key to the achievement of this objective is the setting up of a proper balance between actions at EU level and actions at national level. Some company law rules are likely to be best dealt with, and updated, more efficiently at national level, and some competition between national rules may actually be healthy for the efficiency of the single market*"<sup>1</sup>.

In our view, new arrangements must establish a more effective, cost-effective, and flexible legal framework for companies to improve their competitiveness at EU and global levels.

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.

The Commission's distinction between listed and non-listed companies<sup>2</sup> is supported by business. Indeed, 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.

We believe that the Action Plan prepares the ground for a well balanced approach and generally favours it's orientations as a starting point for the debate on the evolution of European company law. Nevertheless, UNICE is of the opinion that the implementation measures to be adopted pursuant to the Action plan are crucial in order to assess the effectiveness of the plan.

<sup>1</sup> See COM(2003)284, section 2.2, first paragraph, p. 9.

<sup>2</sup> See COM(2003)284, section 2.1, p. 8.

### ***Need for consultation on pursuant implementing measures***

The consultations conducted by the High Level Group of Company Law Experts (hereafter ‘the High Level Group’) and its Final Report<sup>3</sup> which largely inspired the Action Plan have played an essential part in the generally acceptable approach enshrined therein. In this context, UNICE is of the opinion that, for this balance to be maintained in the concrete proposals which will implement the Action Plan, the need for consultation of interested parties remains.

UNICE had the opportunity to respond to consultations conducted by the High Level Group which preceded the publication of the afore-mentioned Final Report<sup>4</sup>.

As highlighted in the afore-mentioned report presented by the High Level Group, “for both primary legislation and any alternatives, proper consultation is necessary”<sup>5</sup>.

Consultation remains one of the basic principles of participatory democracy. We note that the new draft EU Constitution in its article I.46 stresses that the Commission shall carry out broad prior consultations with parties concerned in order to ensure that the Unions’ actions are coherent and transparent.

It is key that the right approach is chosen by the Commission on the actions needed to meet companies needs and, in this context European business urges the Commission to launch a consultation with the appropriate stakeholders on each individual action point of the Action Plan.

### ***UNICE priorities in the area of company law***

In our view, further action in European company law should first and foremost concentrate on cross-border issues such as cross-border voting and the elimination of mobility constraints on companies within the single market, in particular concerning cross-border mergers and transfer of the seat of companies (respectively the so-called 10<sup>th</sup> and 14<sup>th</sup> Directives).

In this context, we read with great interest in the work programme<sup>6</sup> of the Italian Presidency of the Council of the European Union (July – December 2003) that “*in connection with the Action Plan on corporate governance, the proposal for a Directive on cross-border company mergers will be discussed*”<sup>7</sup>. This echoes the Commission’s intention to present in the short term a new proposal for a 10<sup>th</sup> Company Law Directive on cross-border mergers as well as a proposal for a 14<sup>th</sup> Company Law Directive on the transfer of the seat from one Member State to another.

Despite welcoming the fact that the Commission and the Council plan to act swiftly on these issues, we have the greatest concerns about the regime that the Commission envisages for worker involvement in cases of cross-border mergers and transfer of seat. It would be totally unacceptable for UNICE if the regime agreed for the European Company Statute, which companies can choose to opt for freely, was applied in a compulsory way in cases of cross-border mergers or transfer of seat. Preparing texts which could lead to the compulsory import of different systems of worker involvement in countries where such a system does not exist could act a disincentive to cross-border mergers, delay necessary changes in companies’ structures and undermine their competitiveness.

UNICE is of the strong opinion that the Commission must allow thorough consultation of companies, who are the first interested parties, through their representative European organizations on these essential texts. Although time is of the essence, speed should not take precedence over quality of legislation, needed for European business to ***attain and retain its competitive edge***.

<sup>3</sup> “A modern regulatory framework for Company Law in Europe” presented on 4 November 2002 is available at the following page of the Commission website: [http://europa.eu.int/comm/internal\\_market/en/company/company/modern/](http://europa.eu.int/comm/internal_market/en/company/company/modern/)

<sup>4</sup> UNICE comments adopted on 17 June 2002 are available on UNICE’s website at the following link in PDF format: <http://212.3.246.117/Common/GetFile.asp?DocID=6825&logonname=quest&mfd=off>

<sup>5</sup> Underlined by us, see footnote 1, p. 4.

<sup>6</sup> Please see the website of the Italian Presidency of the Council of the European Union available at the following link (in PDF format) p. 37: [http://www.euitaly2003.it/NR/rdonlyres/57F9D4ED-4498-47F5-A4ED-73FE0BF965AC/0/ProgrammaPresidenza\\_ING.pdf](http://www.euitaly2003.it/NR/rdonlyres/57F9D4ED-4498-47F5-A4ED-73FE0BF965AC/0/ProgrammaPresidenza_ING.pdf)

In this context, we look very much forward to engaging in a constructive dialogue with Commission services on the two above-mentioned instruments prior to official adoption of the proposals.

## **II. SPECIFIC COMMENTS**

Notwithstanding our wish to provide more detailed comments on the relevant foreseen action points of the Action Plan, we deem it important to provide preliminary comments on the broad direction the Commission seeks to take on a selection of issues, outlined below.

### **Corporate Governance**

#### ***No need for an EU corporate governance code***

European business agrees with the Commission's assessment according to which there is no need for an EU code on corporate governance.

It is our 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 are constantly adapting to a global regulatory environment.

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

Notwithstanding this, the Commission believes that "*a common approach should be adopted at EU level with respect to a few essential rules and adequate coordination of corporate governance codes should be ensured*".

Although we agree that it is necessary for both companies and investors' legal certainty to be able to rely on minimum number of essential rules, we remain cautious: it is only possible to fully agree on such an approach after analysis of the concrete proposals which make up the "few essential rules" referred to by the Commission.

In any case, 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.

The European Commission makes reference to a full comparative study on corporate governance, prepared for the Commission by Weil, Gotshal & Manges LLP. As highlighted by the Commission, the study recommends that the European Commission focus its efforts on the reduction of legal and regulatory barriers to shareholder involvement 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 but has reservations about some of the actions foreseen by the Action Plan as indicated below and UNICE reserves the right to produce more detailed comments when the measures foreseen in the Action Plan are effectively proposed.

#### ***Enhancing corporate governance disclosure***

##### **Annual Corporate Governance Statement**

UNICE supports the disclosure of corporate governance structures concerning listed companies<sup>7</sup>, through an annual corporate governance statement<sup>8</sup> included in the annual financial statement provided that no audit obligation applies. It is sufficient for auditors to determine whether or not the statement has been prepared, as part of their general audit.

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<sup>7</sup> See footnote 2, p. 5.

<sup>8</sup> See COM(2003)284, section 3.1.1, pp. 12-13.

Considering the appropriate legislative instrument to be used, UNICE favours a Recommendation, as opposed to a Directive as currently foreseen.

Regarding compliance with a possible code of corporate governance, the “comply or explain” principle should be the rule.

#### Disclosure by institutional investors

The Commission plans, in the medium term, to propose a Directive which would make mandatory enhanced disclosure by institutional investors of their investment and voting policies<sup>9</sup>. In our view this topic should be left to corporate governance rules at national level rather than prescriptive rules at EU level. In any case we 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. Furthermore, the definition of institutional investor for the afore-mentioned purpose should be coherent with the one given by the European financial market regulation (ISD and linked regulations).

#### Strengthening shareholder rights

The Action Plan, in the context of corporate governance, aims to **strengthen shareholder rights** through several measures. Notably, the Commission plans to adopt a Directive in the short-term on an integrated legal framework to facilitate efficient shareholder communication and decision-making (participation in meetings, exercise of voting rights, cross-border voting) and to conduct in the medium term a study on the consequences of an approach aimed at achieving a full shareholder democracy (one share/one vote), at least for listed companies.

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

However it should be left to EU Member States 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.

- *Use of modern information technology*: UNICE is supportive of the use of modern information technology and communication technology in the area of company disclosure. Modern technology communication should be encouraged but should not be made compulsory. The right solution, however, would probably be to leave the regulation of the matter to self-regulatory bodies, such as Corporate Governance Committees.
- *Communications between company and shareholders and between shareholders*: 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.
- *Voting in absentia*: UNICE judges 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 for this matter. Companies should be encouraged to do so in electronic form but should not be compelled.
- *Shareholder democracy*: UNICE takes note of the Commission's intention to conduct a feasibility study into the possibilities of a “one share / one vote” shareholder participation.

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<sup>9</sup> See COM(2003)284, section 3.1.1, p. 13

### Modernising the Board of Directors

The Commission foresees several initiatives on this issue in the short term: strengthening the role of independent non-executive and supervisory directors (Recommendation), fostering an appropriate regime for directors' remuneration (Recommendation) and confirming at EU level the collective responsibility of board members for financial and key non-financial statements.

- *Board composition:* we welcome the Commission's recognition of the importance of organisational freedom in board structure (freedom of choice between one-tier and two-tier structures). Concerning the **strengthening of the role of non-executive and supervisory directors**, we believe that board composition is a corporate governance code issue and should apply the principle "comply or explain", driven by the market. In addition, we have reservations about strengthening the role of independent directors and this topic deserves further reflexion in our opinion.
- *Directors' remuneration:* we believe that the remuneration of board members should primarily be left to national laws of corporate governance codes. Nevertheless, a Recommendation limited to providing guidelines on enhancing transparency could be appropriate. It must be stated that such measures apply to listed companies only.
- *Directors' responsibilities:* should be left to national laws or corporate governance codes. These issues are deeply rooted in the political and cultural background of Member States' legal systems. Therefore, only an in-depth study on the subject matter would be able to assess whether in this field there is need for common EU rules. In any case, it is not appropriate to introduce a principle of **collective responsibility** of board directors for financial and key non-financial statements in a Directive regarding corporate governance disclosure. The liability of directors for misleading information and other negligent behaviour is a topic to be considered in a coherent and common framework and not to be split into different regulatory actions.

### European Corporate Governance Forum

UNICE is of the opinion that, as highlighted by the Action Plan, the existing EU codes on corporate governance show a remarkable degree of convergence. UNICE firmly believes that this is mainly due to convergence pressure from markets.

We take note of the Commission's intention to create a European Corporate Governance Forum but have reservations concerning its usefulness. In any case UNICE could in no way support such a forum not strictly limited to an exchange of best practice in corporate governance.

### **Capital Maintenance and Alteration**

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

We support the European approach on the subject matter and believe that more flexible regulation is needed in this area.

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

## **Groups and Pyramids**

### ***Groups***

Large corporations and small medium companies are often structured as a group of companies. Groups of companies are a specific issue, and one which has been under discussion for a long time. A specific regulation concerning groups of companies is not necessary.

Useful provisions concerning groups of companies have to recognise that groups are not an illness of companies, but an efficient means of organisation.

As a consequence, it is necessary to collect information on the typical situations of groups of companies and, in particular, those concerning the powers of direction exercised by the parent company on its subsidiaries. When a company is part of a group, it is necessary to avoid considering intragroup transactions and the advantages and disadvantages of these transactions in a piece meal way but taking account of the whole effects of belonging to a group.

UNICE believes the Commission should conduct more studies before tabling any proposals related to groups.

### ***Pyramids***

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 preventing company directors from mala gestio and specific measures beyond group transparency are, as mentioned above, necessary. In any event, in the case of listed companies the power to regulate should be left to the competent market authority.

This specific issue merits a special study in order to know the impact of different proposed rules in the different Member States' jurisdictions. The sole expert opinion of CESR could not be considered sufficient.

## **The European Private Company**

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.

In this context we welcome the Commission's intention to conduct a feasibility study in order to assess the practical needs for – and problems of – a European Private Company.

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