UNICE
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POSITION PAPER

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RESPONSE TO COMMISSION CONSULTATION ON FUTURE PRIORITIES OF THE COMPANY LAW AND CORPORATE GOVERNANCE ACTION PLAN[1]

PRELIMINARY REMARKS

UNICE was supportive[2] of the European Commission Company Law and Corporate Governance Action Plan[3] released in 2003. (hereafter 'the Action Plan'). We welcomed in particular the declared objective of "*fostering efficiency and competitiveness of business*".

In this regard, UNICE agreed 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"*[4]*.*

The Commission Action Plan distinguishes actions to be carried out in three phases (short term – 2003-2005, medium term – 2006-2008, long term – from 2009 onwards).

As the short term phase comes to an end, UNICE appreciates the European Commission's consultation and its declared intention to reflect on whether the actions foreseen in the medium and long term are appropriate in light of what should be considered as priorities for EU action in the field of Company Law and Corporate Governance, not least in light of Commission initiatives for Growth and Jobs and Better Regulation.

UNICE sets out below European business responses to the questions as set out in the aforementioned consultation.

[1] The European Commission (Directorate General Internal Market and Services) launched a public consultation on 20 December 2005. More information available at the following Commission web page: http://europa.eu.int/comm/internal_market/company/consultation/index_en.htm

[2] See UNICE Comments, "*Commission Action Plan: Modernising Company Law and enhancing Corporate Governance in the European Union*", 6 August 2003 – available at www.unice.org

[3] See Commission Communication COM(2003)284,"*Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward*", 21.5.2003

[4] See COM(2003)284, section 2.2, first paragraph, p. 9.

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1. THE OVERALL AIM AND CONTEXT FOR FUTURE PRIORITIES

Question 1
Does the Action Plan address the relevant issues and identify the appropriate tools to enhance the competitiveness of European business? If not, please give your reasons and indicate which measures are not appropriate and/or would be desirable.
What are your views on the balance of legislative/non-legislative measures proposed? Are you facing particular obstacles in the conduct of cross-border activities to which, in your opinion, the Action Plan does not provide any satisfactory remedy? Please give your reasons.

Good and efficient company law and corporate governance are of utmost importance to companies and their stakeholders. Any action in these areas must pursue the objective of increasing competitiveness while respecting the legal environment in which they evolve. Excessive regulatory burdens may ultimately restrict the freedom of companies to do business, thereby holding them back from releasing their potential. This is detrimental to business, to company shareholders and more generally to the EU as a whole.

For this reason, UNICE would like to restate the principles[5] set out below to serve as reference criteria for intervention or non-intervention in the areas of company law and corporate governance.

1. **Subsidiarity** – The EU should only intervene when it is proven that the foreseen objective cannot be reached by national action. EU action should not disrupt the delicate balance found at national level, which takes into account national traditions and cultures.

2. **Principle-based approach** – In light of the subsidiarity principle, in any EU intervention, a general principles-based approach should prevail over a rules-based approach. This would allow a degree of flexibility necessary for companies to develop the governance model best suited to them.

3. **Market-driven approach** - In UNICE's view corporate governance is better served by flexible self-regulatory initiatives as opposed to regulatory interventions. Over-regulating is a disincentive for companies to go beyond legislation and adopt corporate governance best practice.

4. **Comply or Explain** – When a corporate governance code is applicable, companies should either conform to the provisions of that code, or provide an explanation as to why the principles have not been followed. As stated in the

[5] See UNICE Statement, "*Principles for an EU approach to Company Law and Corporate Governance*", 27 July 2004, available at www.unice.org

1992 Cadbury Report, the Comply or Explain route should enable companies to "*strike the right balance between meeting the standards of corporate governance expected of them and retaining the essential spirit of enterprise… Raising standards of corporate governance cannot be achieved by structures and rules alone (...)* ". This 'Comply or Explain' approach has been in operation for over 10 years and the flexibility it offers has been widely welcomed both by company boards and by investors. The spirit of the principles is important, not a mere formalistic 'box ticking' approach.

5. **Transparency and disclosure** - Transparency is an essential ingredient for any form of outside monitoring. It is very important for the shareholders and investors to see the manner in which a company follows the recommendations on corporate governance. Transparency enhances confidence in a company.

6. **Global orientation** – EU policy should be oriented towards and take into account the global environment in which European companies inevitably evolve. Adding an additional and possibly contradictory EU layer of regulation would be a hindrance to achieving the goals of corporate governance.

7. **Competition** – should be encouraged between national systems so that society can benefit from an emulation effect. Competition in the field of legal systems stimulates legal innovation. In this context, the EU should ensure that Member States mutually recognise each other's legal systems.

8. **Better regulation** – Impact assessments and proper consultations[6] are the basis of good regulation. Consultation remains one of the basic principles of participatory democracy but consultation needs to be carried out in the right conditions: sufficient time for considered responses and a weighted analysis of responses received are fundamental ingredients for successful consultations.

Regulatory fatigue

Since issuing the Action Plan the European Commission has carried out, or is in the process of carrying out, almost all the actions foreseen in the short term (2003 – 2005). This entailed significant activity of the EU Institutions and other interested parties, including European companies over a relatively short period of time.

We would like to draw the EU Institution's attention to the fact that European companies have not only to deal with company law and corporate governance issues but also intensive regulatory activity in other associated areas such as the adoption of International Accounting Standards and the implementation of the Financial Services Action Plan.

[6] As highlighted by the High Level Group of Company Law Experts that largely inspired the afore-mentioned Commission Action Plan "for both primary legislation and any alternatives, proper consultation is necessary". See "A modern regulatory framework for Company Law in Europe" presented on 4 November 2002, available at the following page of the Commission website: http://europa.eu.int/comm/internal_market/en/company/company/modern/, p. 4.

If Commissioner Mc Creevy recognises the existence of "*regulatory fatigue*"[7] when referring to implementation of the Financial Services Action Plan (FSAP), we would like to extend this expression to "*regulatory exhaustion*" when taking into account FSAP at the same time company law, corporate governance, accounting standards and complying with the US Sarbanes-Oxley Act, in particular section 404 on internal controls.

In terms of priorities, UNICE considers that the ***first priority*** of the European Commission should concentrate on correct implementation at national level of the recently adopted or soon to be adopted Commission proposals rather than on new proposals.

Regarding ***other priorities***, we consider that EU interventions should concentrate on initiatives that will provide optional means for companies to reap the benefits of the internal market and adapt their structures to suit their needs in a flexible manner as opposed to initiatives that would entail mandatory changes in company law and corporate governance. In this context, priority issues should be:

- The European Private Company Statute[8] (see response to question 12)
- Providing the choice between monistic / dualistic board structures (see response to question 8)
- Study foreseen on reform of the Second Directive (capital maintenance)

Question 2
Do you have comments on the proposed application of better regulation principles in the area of corporate governance and company law?
Are there other ways in which, in your view, the Commission should be seeking to improve its actions in this field?

UNICE welcomes the foreseen application of better regulation principles (systematic consultation with 12 weeks for response – comprehensive impact assessments) in the area of company law and corporate governance. For further information on the principles to be used when envisaging intervention in this are please refer to the above response to question 1.

Regarding consultation, UNICE welcomes that consultation takes place on these issues. We would nevertheless like to warn against certain consultation mechanisms sometimes used in the initial phase of the action plan. It is necessary to provide for a weighting based on the representativity of respondents to consultations. It is not appropriate to use online questionnaires that would not provide for such weighting. In addition, vague questions allowing for only a "yes", "no" or "don't know" answer are inappropriate.

[7] Speech by Charlie M[c] CREEVY European Commissioner for Internal Market and Services on "Governance and Accountability in Financial Services", Economic and Monetary Affairs Committee of European Parliament, 1.2.2005, SPEECH/05/64
[8] The idea of creating a European Private Company Statute, suited to SMEs originated in 1998 in the work done by the Conseil National du Patronat Français – CNPF – now Mouvemement des entreprises de France – MEDEF, the French business organisation – and the Paris Chamber of Trade and Commerce – CCIP (Chambre de Commerce et d'Industrie de Paris)

2. ESTABLISHING THE RIGHT PRIORITIES FOR THE ACTION PLAN: MEDIUM AND LONG TERM

2.1. Corporate Governance

2.1.1. Shareholder democracy

2.1.1.1. One share, one vote

Question 3
What would be the added value of addressing the issue at EU level?
What would be the appropriate form for any EU instrument?
Please give your reasons. Are there, in your view, specific elements which any such instrument should cover?

Before any decision is taken in the field of "one share – one vote", UNICE refers to the original Action Plan that envisaged conducting a study on this issue. Any study commissioned by the European Commission should be conducted in a truly independent manner in order to get a neutral assessment of the topic and it should involve a sound economic corporate law analysis without prejudging the final outcome of the study in any manner. If such a study is undertaken UNICE strongly advises it should not only deal with one share one vote but should take into account the bigger picture, bearing in mind the wider economic and legal context in Member States.

2.1.1.2. Rights of Shareholders

Question 4
What would be the added value of addressing these questions at EU level? Please give your reasons. Which instrument would be best designed to deal with these matters? Please give your reasons.
Are there, in your view, specific elements which any such instrument should cover?

UNICE does not believe that action should be taken by the European Commission on the issues mentioned under this section (*nomination and dismissal of directors, shareholder communication, investigations into the conduct of company affairs*). It is our opinion that there is no need to harmonise the substantive rights of shareholders beyond the proposed Directive on shareholders' rights currently under discussion in the European Parliament and Council. As in any initiative, it is essential that the Commission bear in mind "better regulation" principles and conduct sufficient studies to identify whether any problems justifying European intervention actually do exist followed by extensive and objective consultation.

2.1.1.3. Disclosure by investors of their voting policies

Question 5
Is there a need for this issue to be addressed at EU level?
What would be the added value of addressing the issue at EU level?
Please give reasons for your reply. What would be the appropriate form for any EU instrument? Please give your reasons. Are there, in your view, specific elements which any such instrument should cover?

On the issue of disclosure by investors of their voting policies, there are already a certain number of best practice approaches in place. 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).

The OECD Principles on Corporate Governance provides for a disclosure of the investors' policies with respect to their voting policies. Additionally, there are similar provisions in certain national Corporate Governance Codes (e.g. the German Corporate Governance Code for Asset Management Companies of 27 April 2005 which comprises rules and recommendations both on the exercise the respective voting rights and on the disclosure of voting policies). This flexible, best-practice approach seems the most reasonable approach for the time being. These voluntary sets of rules should be allowed sufficient time to prove their worth.

2.1.1.4. Directors' responsibilities/Enhanced transparency of legal entities

Question 6
Do you consider that
a) the question of the wrongful trading rules and
b) the issue of directors' disqualification should be addressed at EU-level? Please give your reasons.
Which instrument would, in your opinion, be most appropriate? Please give your reasons.
If so, are there, in your view, specific elements which any such instrument should cover?
Do you consider that any additional measures are needed to enhance transparency for legal entities and/or legal arrangements (e.g. trusts)?

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. 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.

2.2. Company Law

2.2.1. Corporate restructuring and mobility

2.2.1.1. The 14th Company Law Directive on the transfer of the registered office

Question 7
In the light of existing instruments, is there still a need for a directive on the transfer of registered office? Please give your reasons.
Are there, in your view, specific elements which any such Directive should cover?

UNICE considers that the elimination of mobility constraints on companies within the single market is an important issue and a Directive to facilitate the transfer of seat would be significant. However, UNICE does not agree with a 14th Company Law Directive on cross-border transfer of seat that would mirror the worker participation arrangements as was the case for the 10th. Company Law Directive agreed early 2005.

2.2.1.2. The choice between the monistic and dualistic types of board structures

Question 8
Should the question of the choice of board structure be addressed at EU level? Please give your reasons.
Which instrument would be best designed to deal with this matter? Please give your reasons. Are there, in your view, specific elements which any such instrument should cover?

The Action Plan endorses the views of the Winter Group of High Level Company Law Experts (the High Level Group) in proposing that listed companies across the EU should have the choice between a one-tier and two-tier board system and be able to adopt the structure which best suits their particular corporate governance needs and circumstances.

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).

We stress the importance of adopting a principles based approach in this area. Any initiative should refrain from adopting a detailed list of requirements to be implemented when offering the choice. Indeed, there are different types of two tier boards in different countries and there is no evidence to suggest that one system is better than the other.

We recommend therefore a light-touch approach outlining a few essential principles recommending to Member States to enable their companies to choose between a monistic and a dualistic board structure which would be suited to their needs.

2.2.1.3. Squeeze out and sell out

Question 9
Do you think that a squeeze out and a sell out right should be introduced at EU-level? Please give your reasons. If so, should these rights be limited to companies which shares are traded on a regulated market ("listed companies")? Please give your reasons.
Which instrument would be best designed to deal with this matter? Please give your reasons.

UNICE considers that the introduction of general squeeze out and sell out rights is unnecessary. The takeover Directive provides for adequate measure in this specific context. More EU regulation is not needed in this field[9].

2.2.1.4. Groups and pyramids

Question 10
Should the issues of framework rules for groups and abusive pyramids, in your view, be addressed at EU-level? Please give your reasons.
Which instrument would be best designed to deal with this matter? Please give your reasons. Are there, in your view, specific elements which any such instrument should cover?

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 study 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 that if the Commission pursues its intention to table any proposals related to groups, in-depth studies should be carried out beforehand.

Pyramids: Pyramids of companies ensure the control of large groups of companies by means of minority shareholdings. UNICE would like to stress the difficulty to define pyramids.

[9] MEDEF, (the French business organisation) and Svenskt Näringsliv (Confederation of Swedish Enterprise) do not share this view.

It is necessary to avoid companies being managed just to secure personal benefits not connected with the creation of shareholder value. While strict provisions preventing company directors from mala gestio and specific measures beyond group transparency may be necessary, there may be cases where a Pyramid is useful tool.

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.

2.2.2. Legal forms of enterprises

2.2.2.1. The European Company

Question 11
How useful do you judge the ECS to be in practice? Do you consider any modifications are appropriate and desirable? Please give your reasons.

Whilst UNICE believes the European Company Statute is an important contribution to creating a real Internal Market for companies, we reiterate our view that it has certain weaknesses:
it does not include an agreement on a suitable tax regime;
it falls short of providing companies with a genuine Community law instrument but rather creates fifteen different statutes and
automatic application of pre-ordained "reference" rules**,** which prescribe a form of co-determination alien to the majority of Member States may have the effect of distorting the negotiating balance from the outset.

Nevertheless in UNICE's view, it is too early to assess the usefulness of the ECS from a practical perspective as more experience is needed.

2.2.2.2. The European Private Company

Question 12
Do you see value in developing an EPC Statute in addition to the existing European (e.g. Societas Europaea, European Interest Grouping) and national legal forms? Please give your reasons.
If so, are there, in your view, specific elements which any such statute should cover?

We consider that a proposal for a Statute for a European Private Company would be a Commission initiative that would provide small and medium-sized companies (hereafter "SMEs") with a statute close to their needs and size. The existing European Company Statute or "*societas europaea*", (hereafter "SE") is ill-suited to SMEs because it was designed mainly for larger companies. It is inherently cumbersome, due in particular to the fact that this type of company may issue securities to the general public. One of the recitals of the SE regulation is very explicit in this sense in that it provides that the SE

must be of a ""reasonable size". The minimum capital required is €120.000 euros which is too high for SME's.

The results of the feasibility study commissioned by the European Commission were presented on 13 December 2005. It is our understanding that the results are in favour of such a Statute. We recommend strongly that the European Commission pursue this issue which will be beneficial to European companies in terms of flexibility, providing a European label and reinforcing their mobility in the Internal Market and presence in international markets. European business is keen to contribute to the assessment of the results and to fully cooperate with the EU institutions in any the ensuing action.

3. SIMPLIFICATION AND MODERNISATION OF EUROPEAN COMPANY LAW

Question 14
Do you agree that there would be added value in modernising and simplifying European Company Law? Please give your reasons.

Are there, in your view, areas of actual or potential overlap between the Action Plan and other initiatives or measures in related sectors?

What, if anything, should be done in order to ensure coherence between the various fields of action? Please give your reasons.

What should be the extent of simplification in the interests of improving the regulatory environment and rendering the text more user-friendly? Please give your reasons.

Simplification of company law: codification and recast of existing legislation?

Recently, additional activities in the area of company law and not fully provided for in the Action Plan, are foreseen by the Commission in the context of its strategy to simplify the regulatory environment[10]. It is foreseen that the Commission would "codify or recast" several existing company law Directives[11] in 2006.

[10] See COM(2005)535, 25.10.2005, Communication of the Commission "Implementing the Community Lisbon programme: A strategy for the simplification of the regulatory environment", pp. 16-17.

[11] *Id*. **First Council Directive** 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community.
Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies.
Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54 (3) (g) of the Treaty, concerning the division of public limited liability companies.
Directive 2005/.../EC of the European parliament and the of the Council on cross-border mergers of limited liability companies [**Tenth CLD** – awaiting formal adoption]
Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State

The Commission does not specify which Directives would be subject to codification[12] (where no changes to the substance would be proposed) and which one(s) would be recast[13] (which would result in new legally binding act repealing the acts which it replaces, combining both the amendment of the substance of the legislation and the codification of the remainder which is intended to remain unchanged).

While we consider positive the Commission's declared intention to simplify existing legislation, it is still unclear how the concrete simplification proposals will look. It is thus important that simplification proposals really reduce burdens for business and that stakeholders are continuously consulted throughout the process of developing, determining and adopting simplification measures. This is particularly true in the case of recasting legislation. The 'raison d'être' of such proposals is simplification and if the process of recasting ends up running contrary to this objective, the proposal should be withdrawn. We would also like to reiterate that the first priority should be correct implementation of existing and recently adopted legislation.

Conclusion

In essence we urge the European Institutions to concentrate on correct implementation of the many Directives recently adopted or in the process of being adopted and take initiatives with a view to providing the optional means to companies to benefit of the internal market and adapt their structures to suit their needs in a flexible manner as opposed to initiatives that would entail mandatory changes in company law and corporate governance. Furthermore, objective, independent studies, impact assessments and proper consultations must precede any EU initiative.

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Twelfth Council Company Law Directive 89/667/EEC of 21 December 1989 on single-member private limited-liability companies
Directive 2003/58/EC of the European Parliament and of the Council of 15 July 2003 amending Council Directive 68/151/EEC, as regards disclosure requirements in respect of certain types of companies
[12] See definition of "codification": *Id*., footnote 18, p. 6
[13] See definition of "recasting": *Id*., footnote 21, p. 7