



14 May 2012

FUTURE OF EU COMPANY LAW

KEY MESSAGES

- 1 Good and efficient company law and corporate governance are of utmost importance to companies and their stakeholders.
- 2 Policies in this area should aim at contributing to the removal of obstacles of cross-border business integration and reduction of administrative burdens.
- 3 Proper balance between actions at EU level and actions at national level is key. EU action should not disrupt the delicate balances found at national level, which take into account national traditions and cultures.

WHAT DOES BUSINESSEUROPE AIM FOR?

- Correct implementation of the many directives adopted or in the process of being adopted, as opposed to initiatives that would entail mandatory changes in company law and corporate governance. Avoid overregulation in these areas.
- Increase of companies mobility and forms that address the need of specific types of companies (Societas Europaea, Societas Privata Europaea, 14th company law directive on transfer of registered seat; merger directive; divisions of companies directive) so they can better benefit from the Internal Market.
- Ensure legal certainty for companies in this area and active stakeholder involvement in the adoption of new initiatives.



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BUSINESSEUROPE REPLY TO THE QUESTIONNAIRE ON THE FUTURE OF EU COMPANY LAW:

5. What should be the objective(s) of EU company law?

- *Improve the environment in which European companies operate, and their mobility in the EU.*
- *Facilitate the creation of companies in Europe.*
- *Setting the right framework for regulatory competition whilst allowing flexibility and choice.*
- *Ensuring legal certainty and only intervene when the foreseen objective crosses national borders and therefore an EU approach is called for.*

6. Would you support that the EU's priority should be to improve the existing harmonised legal framework or, rather, to explore new areas for harmonisation?

Yes, new areas could be explored for further harmonisation, such as:

- *Cross-border transfer of registered office.*
- *Cross-border divisions.*

7. Should the focus of EU company law move away from the distinction between public/private towards listed/unlisted in order to ensure adequate protection to shareholders?

No opinion

8. Do you think that codifying existing EU company law Directives, thus reducing potential inconsistencies, overlaps or gaps, is an idea worth pursuing?

Yes, EU company law Directives with a similar scope should be merged.

Explanation: *Consolidation and codification could play an important role providing more clarity to the existing European Company Law framework. The aim should be to genuinely provide clarity and stakeholders should be consulted throughout the process. It should be made clear whether we are talking about codification or recasting (combines codification and amendment of European legislation). Consolidation is preferable. The Commission will have to ensure that this process does not lead to a reopening of sensitive compromises.*



9. What, if any, is the added value that EU company legal forms bring for European business?

- *Their European label ("SE", "SCE").*
- *Savings in costs of cross-border transactions.*
- *Workable alternatives to existing national company law forms.*
- *The possibility not to be subject to compulsory national requirements (for example, the SE allow public limited-liability companies to choose between one-tier and two-tier management structure).*
- *The possibility to carry out operations, like cross-border transfer of seat.*

10. What, if any, are the main shortcomings of EU legislation introducing EU company legal forms?

- *The complexity linked to frequent cross-references to relevant national legislation.*
- *The uncertainty linked to the application of different national legislations that are applied simultaneously.*
- *The different degree of attractiveness across Members States*
- *Lack of public recognition and awareness of the SE legal form by Member States' public authorities. It has also proved difficult to explain the SE Statute to authorities outside the EU. The Statute is not very recognisable, a fact which can impose additional barriers to trade. Companies are hesitant to do business with the unknown.*

11. Should existing EU company legal forms be reviewed? (Single choice)

Yes, in particular concerning:

- *Simplification and rationalisation of existing procedures.*
- *Increased uniformity through reduction of cross-references to national legislation.*
- *Reduction of minimum capital required.*
- *Possibility to have the registered office and the headquarters in two Member States.*
- *Adopting the solution laid down in the cross border mergers directive and foresee the approval of the merger by the general meeting of the acquired*
- *Broadening the concept of mergers to allow creation of an SE by a company contributing part of its assets to another company (the SE) without ceasing to exist;*
- *Opening up the method of formation of an SE by allowing its creation ex nihilo;*
- *Opening up the method of formation of an SE by conversion to private limited-liability companies.*



- *Allowing cross-border mergers between a SE company and its subsidiary or a later acquired company (without having to form a new company).*
- *Adopt a more liberal approach of the cross border requirement modelled on the European Private Company Statute.*
- *Creating a European register for SEs. This would increase the transparency and visibility of the SE Statute.*
- *Synchronising company registrations at the different business registers to avoid identification problems after converting to an SE.*
- *Create appropriate tax provisions to facilitate the operation of cross-border activities.*

12. Could optional models such as the EMCA –or similar projects- be a suitable alternative to traditional harmonisation?

No

Explanation: *Although there is no consensus among BUSINESSEUROPE's members on this subject, there is willingness to have a constructive dialogue with regard upcoming steps of the project.*

13. Should the Commission explore alternative means to support European SMEs engaged in cross-border activities?

No, further efforts should be made to get an agreement on the current SPE statute proposal.

Explanation: *The SPE Statute remains a main priority for BUSINESSEUROPE although the prospects for political consensus on this proposal are narrow. None of the response options indicated under "yes" seem to be an adequate substitute for the initial SPE-proposal. The study of the alternatives needs further reflection and BUSINESSEUROPE is willing to continue constructive dialogue on it.*

14. Should the EU act to facilitate the cross-border transfer of a company's registered office?

Yes, through a harmonising Directive.

Explanation:

BUSINESSEUROPE believes that a directive regarding this issue would be significant for the elimination of mobility constraints. It would give businesses the right to relocate and fully enjoy the potential of the Internal Market whilst increasing enterprises' competitiveness. Article 54 of the TFEU and Court of Justice of the European Union (CJEU) case law are not sufficient to set the legal framework for the transfer of a company's seat, in particular after the Cartesio case. A 14th Directive will fill the gaps left open by the CJEU and would create legal certainty for the market, creditors, members and workers.

Crucial for the success of the 14th Directive will be the tax-neutrality of the transfer of the registered office. BUSINESSEUROPE does not agree with a 14th Company Law Directive on cross-border transfer of seat that mirrors worker participation arrangements, as was the case for the 10th Company Law Directive agreed in early 2005.



15. What should be the conditions for a cross-border transfer of registered office?

- *A transfer should not be possible if proceedings for winding up, liquidation, insolvency, suspension of payments or similar proceedings have been brought against the company.*
- *A transfer should be accepted by all Member States even when not accompanied by the transfer of the company's headquarters or principal place of business.*

16. What should be the consequences of a cross-border transfer of registered office?

- *There should be no winding-up of the company in the home Member State.*
- *The company should not lose its legal personality.*
- *The transfer should be tax neutral following the approach of Directive 90/434 applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States.*
- *A transfer should not result in the loss of the pre-existing rights of shareholders, members, creditors and employees of the company.*

17. Do you support further harmonized rules in the Mergers Directive?

Yes: on the duration of the review of cross-border mergers by national authorities.

18. Do you support introducing regulation regarding cross-border divisions at EU level?

Yes. And these harmonised rules should aim at the following:

- ***Building rules on cross-border divisions around the framework established in the Directive on cross-border mergers. Why?***
 - *The framework is well known by the relevant stakeholders.*
 - *The framework has proven to be sustainable.*
 - *The framework presents the best structure to deal with this type of*

19. Groups of companies: Do you see a need for EU intervention in this field?

No, there is no need for EU intervention.

Explanation: *Even though there can be some merit to discuss this issue we do not believe this should be a priority.*

20. In your opinion, should the Second Company Law Directive be reviewed?

Yes, for example, in the abolition or change of the minimum capital requirement and clarifying the regime of abstention vote.