European Trade Union Confederation (ETUC)
Confédération européenne des syndicats (CES)

Response of :

The European Trade Union Confederation
Boulevard du Roi Albert II, 5
1210 Brussels

Registered no.
06698681039-26

Public Consultation on

"The Future of European Company Law"

European Commission
DG Internal Market and Services

Consultation on the future of European Company Law:

Draft ETUC Response

Note from the ETUC: This consultation is highly structured and only allows respondents limited possibilities to express their opinions. A limited number of possible "tick the box" answers are offered for respondents to check off, and the maximum amount of text allowed to explain answers is limited to 500 characters.

Proposed answers to the questions and text to explain them are marked in yellow in the documents that follows.

Since respondents are also allowed to upload additional comments, it is proposed to upload the ETUC resolution "The Future of European Company Law: towards sustainable governance", which was adopted by the ETUC Executive Committee on 6-7 March 2012.

Consultation on the future of European Company Law

European company law is a cornerstone of the internal market. EU company law has evolved significantly over the last 40 years. The scope of EU harmonisation covers: the protection of interest of shareholders and others, the constitution and maintenance of public limited-liability companies' capital, takeover bids, branches disclosure, mergers and divisions, minimum rules for single-member private limited-liability companies, shareholders' rights and related areas such as financial reporting and accounting. Considerable work has also been accomplished on different legal forms such as the European Company (SE), the European Economic Interest Grouping (EEIG) and the European Cooperative Society (SCE). In recent times, however, the adoption of European company law initiatives has become more difficult. These difficulties are, for example, illustrated by the lack of progress on some simplification initiatives and on the proposed statute of the European Private Company (SPE). Nevertheless, at the same time, the cross-border dimension of business has grown tremendously both from a company and from a consumer perspective.

Against this backdrop, DG Internal Market and Services launched a reflection exercise at the end of 2010 with the creation of an ad hoc reflection group composed of eminent academics. This group presented a **report to the Commission** which contained a number of recommendations for action. The report was discussed at a **public conference in Brussels** on 16 and 17 May 2011. The Commission now wishes to launch a public consultation to seek views from all stakeholders on European company law from 2012 onwards. Commissioner Barnier

will announce in mid-2012 possible initiatives on corporate governance and company law for the second half of his mandate.

After replying to all the questions in the consultation, you will have the opportunity to upload a document with additional comments. We kindly ask you to use this option only for comments you haven't already expressed in the consultation. Questions marked with an asterisk * require an answer to be given.

I. Background information

This consultation is addressed to the broadest public possible, as it is important to get the views and input from all the interested parties and stakeholders. In order to best analyse the responses received after the consultation, there is a need for a limited amount of background information about you as respondent.

1. Please indicate your role for the purpose of this consultation:

X Trade Union/Employee body

2. Please indicate the country where you are located:

X EU-wide organisation

3. Please provide your contact information (name, address and email-address)

European Trade Union Confederation

Boulevard du Roi Albert II, 5
1210 Brussels, Belgium
Registered no.
06698681039-26

4. Is your organisation registered in the Interest Representative Register?

X Yes

II. Objectives of European 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 allowing for a high level of flexibility and choice.

X Better protect employees.

Better protect creditors, shareholders and members.

X Other.

No opinion.

Please specify (maximum 500 characters)

Worker rights and working conditions in Europe have been eroded by competition between national regulatory regimes, globalization and shareholder value. EU company law should protect the interests of workers and other stakeholders, not just support shareholders and short-termism. EU company law should define high standards encouraging high road, sustainable company strategies. Worker involvement rights in Europe must be implemented and strengthened to realize Social Europe.

III. Scope of European company law

The Treaty on the Functioning of the European Union provides the legal basis to adopt Directives harmonising EU company law (Article 50). That legal basis has been used for the adoption of Directives related to the disclosure of companies and their branches as well as the validity of their obligations and their nullity; the maintenance and alteration of the capital of public limited-liability companies; the merger and divisions of public limited-liability companies; and the single-member private limited-liability companies. It has also been used to adopt Directives concerning take-over bids, cross-border merger of companies and certain rights of shareholders of listed companies.

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, the following pieces of existing legislation harmonising company law could be modernised further.

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

X Yes, both approaches could be combined and further work could target.

No, further harmonisation is not needed, the approach should rather be based on:

No opinion.

Please specify:

X The Directives on the disclosure of companies and their branches as well as the validity of their obligations and their nullity.

X The Directive on maintenance and alteration of the capital of public limited-liability companies.

X The Directives on the merger and divisions of public limited-liability companies.

The Directive on single-member private limited-liability companies.

X The Directive on take-over bids.

X The Directive on cross-border mergers.

X The Directive on certain rights of shareholders of listed companies.

X Cross-border transfer of registered office.

Cross-border divisions.

X Groups of companies.

Cross-border conversion.

X Other.

Please specify (maximum 500 characters)

The resolution "The Future of European Company Law: towards sustainable governance", adopted on 6-7 March 2012, outlines the ETUC's philosophy and a comprehensive set of demands regarding European company law, covering both the revision of existing legislation and the undertaking of new initiatives. In particular, there is a need for a European minimum standard for worker information, consultation and participation rights in European companies and cross-border situations.

EU company law has been built on the basis of the distinction between public and private limited-liability companies. While some EU Directives apply to all company law forms, others focus on one type of company or the other. However, the reality has changed in the last years in particular to confer appropriate protection to public shareholders. A trend in some Member States is that public limited-liability companies are often used as legal form for listed companies while other large and medium-sized companies are private limited-liability companies. New hybrid company law forms have been designed in some Member States to grant further flexibility. Furthermore, the public-private distinction does not exist in all Member States.

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?

Yes, for all the legal instruments harmonising EU company law.

Yes, but only for legal instruments related to

X No.

No opinion.

IV. User-friendly regulatory framework for European company law

Because of the large number of Directives dealing with it, European company law is sometimes regarded as not particularly 'user friendly'. It is also exposed to the risk of inconsistencies, gaps or overlaps. In order to address this risk, the existing Directives could be amended and codified either to create a single instrument on Company Law or to only have a very limited number of Directives regrouping related areas.

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

Yes, a single EU company law instrument should replace all existing Directives.

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

X No, this is not an idea worth pursuing.

No opinion.

Please specify (maximum 500 characters)

Given that previous initiatives with the goal of simplification or codification of EU legislation have pursued an agenda of reducing worker rights rather than advancing genuine company needs, the ETUC is wary of a similar initiative in the area of EU company law directives. Instead of following an abstract codification agenda, serious discussions between the social partners should take place regarding reforms supporting both the interests of workers and sustainable company strategies.

V. EU company legal forms

Apart from harmonisation, EU company law has also focussed on the definition of specific EU company law forms, such as the Statute for a European Company (SE), the Statute for the European Cooperative Society (SCE), the European Economic Interest Grouping (EEIG) and more recently, the proposed Private Company Statute (SPE). Those instruments are often referred to as being a "28th regime" to the extent that they introduce new legal forms that do not harmonise, modify or substitute the existing national legal forms, but provide an additional alternative legal form.

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

X The European image of those company law forms.

X Their European label ("SE", "SCE").

X Their full legal personality.

X Savings in costs of cross-border transactions.

Ad hoc solution to cross-border related issues.

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.

Tax reasons.

X Labour law reasons.

X Other.

No added value.

No opinion.

Please specify (maximum 500 characters)

Research undertaken by the ETUI, SEEurope Network, Hans Böckler Foundation and others highlights that companies have incorporated as SEs or SCEs for a wide range of reasons, which varies from company to company. Positive reasons include a European image/label, savings of unnecessary costs and internationalization of worker representation. Negative reasons include avoiding national worker participation laws and tax "optimization".

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 differences in the way EU company law forms are understood and used at national level.

The different degree of attractiveness across Member States.

The limitations that derive from unanimity decision-making.

X Other.

No main shortcomings.

No opinion.

Please specify (maximum 500 characters)

For the ETUC, the main shortcomings here are the lack of a consistently high standard for worker involvement, the lack of registration at European level and the lack of transparency of many companies with European legal forms. Hundreds of SEs are shelf or "UFO" companies,

for the most part registered in the Czech Republic, on which very little information is available. European legal forms should promote "high road" business practices and Social Europe rather than avoidance strategies.

11. Should existing EU company legal forms be reviewed

X Yes, in particular concerning…

No.

No opinion.

Please specify:

Simplification and rationalisation of existing procedures.

Increased uniformity through reduction of cross-references to national legislation.

Reduction of minimum capital required.

Deletion of cross-border element requirement.

Possibility to have the registered office and the headquarters in two Member States.

X Explicit solution to the issue of shelf companies.

X Other.

Please specify (maximum 500 characters)

In the recent first stage social partner consultation on the SE, the ETUC took the position that discussions on the revision of the directive should include discussion of the regulation as well. With regard to the SCE, the ETUC has spoken out for a European minimum standard of worker involvement, oriented to the SE directive, and against liberalizing SCE legislation simply for the sake of encouraging more SCE formations.

The European Model Company Act (EMCA) on which academics are currently working aims at providing a modern and flexible Model Act, taking account of the latest developments in Member States. The initiative does not strive to harmonise national company law, but rather to

facilitate understanding of the specific features in various national systems and to serve as a flexible and optional model. For further information please see: **http://law.au.dk/forskning/forskningscentre/europeanmodelcompanyactemca/overview-over-the-emca-project/**

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

Yes.

No.

X No opinion.

VI. The particular case of the *societas privata*

***europaea* (SPE) statute**

The proposal on the SPE Statute has been discussed for more than three years without any final outcome. After lengthy negotiations, Member States could not agree in particular on the possibility to separate their registered office and the headquarters and the regime for employee participation. However, the Commission still believes that European small and medium size businesses need support at EU level, particularly in the current economic context.

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

X Yes.

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

Other possibilities to explore?

No opinion.

for example:

X The Commission could prepare a new legislative proposal aimed at promoting EU SMEs through the European labelling of existing national company law instruments that meet a number of pre-defined harmonised requirements.

The 12th Company Law Directive could be reviewed in order to introduce a simplified company charter to facilitate the organisation of groups (i.e. single member private

limited-liability companies would be exempted from certain harmonised rules, not indispensable for a single member company).

The scope of application of the SE Statute could be modified to allow smaller EU companies to benefit from it on the basis of more flexible requirements.

Other.

Please specify (maximum 500 characters)

The ETUC has been very concerned about the negative implications of previous proposals on the SPE for worker involvement, taxation and minimum capital requirements. The need for an SPE company form has not been adequately demonstrated from the point of view of a "high road" approach to employment creation and innovation. An alternative could be European labeling of national instruments, which meet minimum requirements for worker involvement, minimum capital and environmental and social reporting.

VII. Cross-border transfer of a company's registered office

Apart from the rules contained in the Statutes for the European Company (SE) and for the European Cooperative Society (SCE), the current EU rules do not provide for a general right to the cross-border transfer of a company's registered office, which would preserve the company's legal personality. Currently, only few Member States allow for a seat transfer without winding up and subsequent re-incorporation. In most Member states, companies must therefore establish a new legal entity in the Member State of destination, merge the companies in question and register the company formed by merger in that Member State.

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

X Yes, through a harmonizing Directive.

Yes, through some other measure.

No, as the existing EU framework (European Company Statute, cross-border mergers Directive) provides for sufficient tools for a cross-border transfer of registered office.

No.

No opinion.

Please give further reasons for your opinion (maximum 500 characters)

The ETUC has called for a directive on the cross-border transfer of a company's registered office. This directive should provide a clear legal framework for such transfers. However, a minimum requirement for this directive is a provision for worker involvement based at least on standards contained in the SE directive and a prohibition on having the registered office and the real seat of a company in different countries.

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

X 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.

Member States should be able to decide whether or not they require the transfer of the company's headquarters or principal place of business together with the transfer of the registered office.

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.

X A transfer should be allowed only if accompanied by the transfer of the company's headquarters or principal place of business.

No opinion.

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.

X A transfer should not result in the loss of the pre-existing rights of shareholders, members, creditors and employees of the company.

No opinion.

VIII Cross-border mergers

The Directive on cross-border mergers of limited-liability companies* contains rules for mergers between companies from different Member States. The Directive contains a harmonized framework for cross-border mergers and national rules are applicable on the merger procedure and the decision making process, as well as on common issues, such as creditors' rights.

* Directive 2005/56/EC. For the text of the Directive, please see: **http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:310:0001:0009:EN:PDF**

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

X Yes.

No.

No opinion.

Please specify which area

Approval of the cross-border merger by the general meeting.

The duration of the review by national authorities of cross-border mergers.

The methods for valuation of assets in cross-border mergers.

The date of the start of the protection period regarding creditors' rights.

The duration of the protection period regarding creditors' rights.

The consequences of creditors' rights on the completion of a cross-border merger.

X Other.

Please specify (maximum 500 characters)

The ETUC has spoken out for the revision of this directive, in order to strengthen worker participation rights and the add worker information and consultation rights in line with the SE directive.

IX Cross-border divisions

Divisions at national level are currently harmonized by the *Directive on divisions**, but EU Company Law does not provide for rules on cross-border divisions.

* Directive 82/891/EEC. For the text of the Directive, please see: **http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1982:378:0047:0054:EN:PDF**

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

Yes.

X No.

No opinion.

Please specify why

These areas are best dealt with at national level.

X The division between EU regulation and national legislation does not pose a problem.

Other.

No opinion.

Please specify (maximum 500 characters)

The need for legislation in this area has not yet been adequately demonstrated.

X. Groups of companies

From a business perspective, company groups or holdings are a reality. However, not all national legal systems have come up with specific legal frameworks dealing with groups of companies. Many Member States have legal safeguards in place which try to deal with the most important legal issues that may arise in such a context. At EU level, there were attempts in the past to produce a comprehensive European framework on groups of companies, the so-called 9th company law Directive. This initiative never succeeded.

The Reflection Group has tabled recommendations which are not aimed at creating an exhaustive legal framework, but try to target specific aspects where they feel action* is needed. We would like to seek views on them. * For more information, please see Reflection Group report, pages 59-75,

http://ec.europa.eu/internal_market/company/docs/modern/reflectiongroup_report_en.pdf

19. Do you see a need for EU intervention in this field

X Yes, there should be an EU intervention.

No, there is no need for EU intervention.

No opinion.

Please specify:

The Commission should recommend the recognition of group interest.

X The EU should require groups to provide information on their structure in a consolidated, investor-friendly and easy-to-read document.

Other.

Please specify (maximum 500 characters)

There is a need for greater transparency in the legal and ownership structure and the economic, social and environmental performance of groups of companies in the EU.

XI. Capital regime

In 2008 an external study was launched by the Commission to provide input on the feasibility of an alternative to the capital maintenance regime of the Second Company Law Directive (77/91/EEC) and the impact of the adoption of IFRS on profit distribution*.

The study found that the current minimum legal capital requirements and rules on capital maintenance do not constitute a major obstacle to dividend distribution. It also held that the impact of IFRS on dividend distribution was not significant. Taking into account the results of the study, the Commission decided not to adopt any immediate follow-up measures or changes to the 2nd Company Law Directive.

* See **http://ec.europa.eu/internal_market/company/docs/capital/feasbility/study_en.pdf**.

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

X Yes.

No.

No opinion.

Please indicate what should be the aim of the review*

* Apart from the scope private-public, see **question no 7**.

Abolition or change of the minimum capital requirement.

Replacement of the balance sheet test by a solvency test.

X Cumulative use of the balance sheet test and of the solvency test.

Alternative use of the balance sheet test and of the solvency test.

Use of International Financial Reporting Standards for the determination of distribution of dividends.

Clarifying the regime of abstention vote.

Other.

No opinion.

Please specify (maximum 500 characters)

The financial and economic crisis, in particular the negative effect on workers of companies that are highly leveraged and/or pressured to make high dividend payouts, demonstrates the need for requiring companies to have adequate levels of capital. Given the varying size of companies, this should be based not only on a minimum absolute level, but also on adequate relative levels/ratios, for example through a solvency test.

XII. Additional Comments

21. Do you wish to upload a document with additional comments?

If you have additional comments you have the possibility to upload these in a separate document here. We kindly ask you to use this option only for comments you haven't already expressed.

X Yes. (Resolution adopted at Executive of 6-7 March 2012)

No.