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CCBE Response to the European Commission Consultation on Future Priorities for the Action Plan of Modernising Company Law and enhancing Corporate Governance in the European Union (Company Law Action Plan)

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The CCBE (Council of Bars and Law Societies of Europe), through its Company Law Committee, would like to comment on the above mentioned consultation document as follows:

In summary, as a matter of principle, the CCBE, which represents over 700,000 European lawyers through their national bars and law societies in the EU and the EEA, supports the position of the EU Commission that the Company Law Action Plan needs to be looked at in the light of efforts to make European industry more competitive, namely the Lisbon agenda, and of the EU's better regulation policy.

The CCBE further welcomes the fact that the EU Commission is launching this consultation before entering into the second phase of the Company Law Action Plan.

Before answering the Questions in Annex 1 to the consultation document, following the numbering of the questions, we would like to make the following general comments:

- For some of the questions it is too early to give an answer today. In order to give a solid answer, more factual and legal details would need to be provided to serve as a basis for answering the question. This holds true in particular in the light of the better regulation principle. Regulating legislation must serve a legitimate purpose, and the restriction imposed must be proportionate to such purpose. Whether these conditions are fulfilled can be judged only the basis of sufficient factual and legal information.

- We think that it is equally premature to decide what would be the appropriate form for any EU instrument to pursue the eventual EU legislative objective. To be considered are Regulation, Directive and Recommendation. Each of them has its advantages and disadvantages. The decision as to which of them is appropriate can be taken only if the approximate content of what should go into the EU instrument is known. The decision for any of the three aforesaid instruments, we think, cannot be made in the abstract.

We will now answer the questions one after the other.

1. a) **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.**

Answer: *Yes, we think that the Action Plan does address the relevant issues in the area of company law and corporate governance. Whether the tools identified to enhance the competitiveness of European business are appropriate can be answered only when further details are known about the content of the concrete measures proposed.*

1. b) **What are your views on the balance of legislative/non-legislative measures proposed?**

Answer: *The content of the various measures will depend on the nature of each individual issue and therefore may differ from case to case. It is in our view important to find the appropriate solution for each issue. Whether there is a balance between legislative and non-legislative measures should not be relevant in this context.*

1. c) **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.**

Answer: *The most important cross-border obstacles in our opinion are in the area of taxation and – inspite of the harmonisation that has taken place so far – in accounting. In the area of company law and corporate governance the Action Plan in our opinion does include the major obstacles. Whether the remedy provided in the Action Plan is satisfactory or not can be determined only when the content of the remedy for each particular issue is known.*

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?**

Answer: *As already stated above, we support the better regulation principles. We think that proportionality between regulatory restriction and the purpose being pursued should be an important element in such policy. There should further be a systematic review of regulatory European legislation to determine whether a regulatory provision that was necessary and proportionate when adopted, is still so at a later time. Such review should be carried out e.g. every three years. The period would begin with the entering into force of a Regulation or Recommendation, or with the expiration of the implementation period in the case of a Directive. Failure by one or several Member States to implement a Directive in time should not prevent such a systematic review being undertaken.*

While in the area of regulating legislation we support the better regulation policy of the EU Commission, we think that the area of enabling legislation at European level is equally (and probably even more) important. The competitiveness of European industry is helped not only by limiting regulation to what is necessary and proportionate but also by enabling legislation that broadens entrepreneurial possibilities. Not only should no unnecessary and disproportionate obstacles be set up but also existing obstacles that do not necessarily follow from regulatory provisions in the narrow sense, should be removed. We have in mind in particular the absence of a European Private Company Statute (see below) and the absence of a Transfer of Seat Directive (see below).

3. a) **What would be the added value of addressing the "one share one vote" issue at EU level?**

Answer: *We are not convinced that it would be advisable to follow a strict one share one vote principle. Numerous publications by lawyers and economists have shown that flexibility in this respect has advantages, too. We are at present not in a position to judge whether there would be added value in addressing the issue at EU level. As the consultation document says, the Commission is in the process of commissioning a study on the consequences which the establishment of shareholder democracy in the EU would entail. We think it is advisable to first wait for the outcome of this study before the question is answered whether there would be added value of addressing further the one share one vote issue at EU level. In any case, at the moment we think that the one share one vote principle should be considered only for listed companies.*

3. b) **What would be the appropriate form for any EU instrument? Please give your reasons.**

Answer: *The question comes too early, see the introductory remarks above.*

3. c) **Are there, in your view, specific elements which any such instrument should cover?**

Answer: *This question comes too early, see a) above.*

4. a) **What would be the added value of addressing the questions of rights of shareholders at EU level? Please give your reasons.**

Answer: *We do not object to the Commission's plan to do further work in the area of nomination and dismissal of Directors, of shareholder communication and of the possibility of shareholders to launch special investigations into the conduct of company affairs. However, harmonisation is not a value in itself. The Commission therefore will need to determine carefully the economic reasons why measures at EU level – and with which content – would be desirable. The Commission will of course be aware of the numerous difficulties in this area, for instance: The differences between the monistic and dualistic board systems, the danger of frivolous shareholder action, the issue of a minimum share capital percentage which should be required before shareholders should be able to demand a special investigation, the problem of acting in concert, the protection of confidentiality of the company's information in the case of investigations etc. Here again, we think the Commission when doing further work on these issues should limit itself to listed companies.*

4. b) **Which instrument would be best designed to deal with these matters? Please give your reasons.**

Answer: *This question comes too early, see introductory remarks above.*

4. c) **Are there, in your view, specific elements which any such instrument should cover?**

Answer: *The problems mentioned in a) – and there are more of them – need to be addressed.*

5. a) **Is there a need for disclosure by investors of their voting policies 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.**

Answer: *As already stated in our answer to the consultation of the High Level Group of Company Law Experts, we are against compulsory disclosure of voting policies. We see the risk of distortion of financial markets. Compulsory disclosure of voting policies can create a false impression of predictability for the future. The intention to change a publicised voting policy or to sell out the share participation could trigger ad hoc disclosure obligations. What would be the share capital percentage threshold that would trigger the compulsory disclosure obligation? Whatever it would be, it would be an open invitation to investors to use parallel holdings which would then raise the question of acting in concert, with all its difficulties, that is well known from other areas of law. Apart from these considerations, we wonder whether there is a need for regulation if, as the consultation document says, market pressures are already leading investors to disclose their voting policies.*

Our aforesaid critical position refers to disclosure to the market. We have no objections against disclosure to the beneficial shareholders. However, such inter partes disclosure is a matter for the contractual agreements between the relevant parties.

5. b) **What would be the appropriate form for any EU instrument? Please give your reasons.**

Answer: *As stated in a), we think there should not be any EU instrument on this issue.*

5. c) **Are there, in your view, specific elements which any such instrument should cover?**

Answer: *As stated in a), we think there should not be any EU instrument on this issue.*

6. a) **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.

Answer: *The wrongful trading rules are one of several instruments for creditor protection. Which instrument (or instruments) serve the purpose of creditor protection best cannot be answered in an isolated manner but only by looking at the entire system of creditor protection, with all its different elements and tools, as they exist from Member State to Member State. The insolvency rules should also be considered in conjunction with the creditor protection system. Harmonisation in this area, we think, would be a gigantic task. We have not yet seen sufficient economic evidence that would make such an effort of harmonisation really necessary.*

As regards directors' disqualification, we think it is important to have a system in place under which a disqualification order in one Member State must be brought to the attention of the competent bodies in other Member States. To begin with, it would not be necessary to have a compulsory inter-governmental (authorities or courts) system of information, it should rather be sufficient that whenever the appointment of a director is filed with the competent body in a Member State, disclosure is required with regard to any national and foreign disqualification orders that may have been issued.

6. b) **Which instrument would, in your opinion, be most appropriate? Give your reasons.**

Answer: *This question is too early as regards wrongful trading, see the introductory remarks above. As regards the compulsory disclosure of disqualification orders, a Directive is probably the right instrument.*

6. c) **If so, are there, in your view, specific elements which any such instrument should cover?**

Answer: *We refer to our answers to a) and b).*

6. d) **Do you consider that any additional measures are needed to enhance transparency for legal entities and/or legal arrangements (e.g. trusts)?**

Answer: *Our answer is no. In addition thereto we want to repeat what we have stated in previous consultation processes, namely that trust (and similar) arrangements should not be treated with a per se suspicion. Many trust arrangements serve valid legal and economic purposes.*

7. a) **In the light of the existing instruments, is there still a need for a Directive on the transfer of registered office? Please give your reasons.**

Answer: *Yes, we do see such a need. The entrepreneurial possibilities under the Statute of the European Company are available only to large enterprises, not to SMEs. In the absence of directive on the transfer of registered office, a company wishing to transfer its registered office would first of all be required to set up an SE, so that there is an unnecessary costly duplication of steps. To make use of the possibilities under the 10th Company Law Directive on Cross-Border Mergers a company would have to engage in a merger with a company in another Member State. That Directive does not provide for a transfer of seat without merger. The Commission has repeatedly announced that it would*

soon publish the long-awaited draft of the Transfer of Seat Directive, and has even given dates for the publication.

We therefore wonder why this draft Directive was not published and why the Commission now seems to be hesitant on this issue. The better regulation principle cannot be an argument in this context because the Transfer of Seat Directive would fall into the area of enabling legislation. We do not believe that the requirement for a conversion into an SE or for a cross-border merger as a prerequisite for a transfer of seat is an acceptable alternative to a straight forward seat transfer.

The tax treatment of a transfer of seat will be important in determining whether the proposal is successful in enabling companies to move from one Member State to another.

7. b) Are there, in your view, specific elements which any such Directive should cover?

Answer: *The view exists that the transfer of management seat has been sufficiently clarified by the ECJ so that there is no need for a Directive in this respect any more. We do not share this view. Experience has shown that in the case of these migrant companies that have their registered seat in one Member State and their seat of management in another Member State, there is a considerable need for information and cooperation between the relevant authorities in both Member States. For instance, the authorities in the seat of management Member State should bring any Directors' conduct that could lead to disqualification, to the attention of the authorities of the registered seat Member State, and such authorities should be obliged to follow up on this information so received. They should inform the authorities of the seat of management Member State of any disqualification order issued. Similar information obligations are needed in the area of insolvency. An example for such cross-border information and cooperation can be found in the Second Banking Coordination Directive.*

Apart from the aforesaid aspects which have led to considerable difficulties in many cases, there are other issues in connection with the transfer of management seat that should be dealt with, e.g. formalised procedure for transfer of the management seat, requirement of shareholders' vote, protection of dissenting shareholders and of creditors, publicity in accordance with the First Company Law Directive, codetermination etc. Basically, the issues are the same (or similar) as with the transfer of the registered seat. These issues have not been dealt with in the ECJ case law since Centros. As regards Daily Mail, some authors think that that decision of the ECJ is still valid today in so far as it says that a Member State may impose restrictions on the moving out of management seat, because the ECJ in more recent cases has only dealt with restrictions imposed by the Member State to which the seat was to be transferred.

Together with the High Level Group of Company Law Experts we see a need for these issues to be dealt with in a Directive.

We also would like the Commission to look into the question whether a company that has transferred its seat of management should be subject to the obligations of the First Company Law Directive not only in the Member State of the registered seat but also in the Member State of the seat of management. Experience shows that the publicity requirements following from the 11th Directive are often not sufficient.

As regards the transfer of registered seat, we think that the issues to be addressed are those dealt with in the draft of 1997 as well as the aspects of tax neutrality and codetermination as referred to in the consultation of 2004.

8. a) **Should the question of the choice of board structure for listed companies be addressed at EU level? Please give your reasons**

Answer: *Since the recommendation of the High Level Group and since the Company Law Action Plan we now have the SE Statute which gives the choice between monistic and dualistic board structure. The implications of that choice have been dealt with in the Regulation on the SE Statute and, where necessary, in Member State Corporation Law. We see no major reason why the option of choice should be limited only to the SE and not be given to listed companies with a national corporation form, too. To give this choice also to non-SE listed corporations would increase entrepreneurial possibilities. We therefore have in principle a positive position on this question.*

8. b) **Which instrument would best be designed to deal with this matter? Please give your reasons.**

Answer: *A directive would be the right instrument. Special attention should be given to the due implementation by Member States.*

8. c) **Are there, in your view, specific elements which any such instrument should cover?**

Answer: *The SE Regulation should be taken as yardstick.*

9. a) **Do you think that a squeeze-out and a sell-out right should be introduced at EU-level? Please give your reasons.**

9. b) **If so, should these rights be limited to companies which shares are traded on a regulated market ("listed companies")? Please give your reasons.**

Answer: *Company law on this issue varies from Member State to Member State. There are important arguments pro and contra a squeeze-out and a sell-out right. Both such rights should be seen as siamese twins that cannot be separated. A squeeze-out right increases entrepreneurial freedom for the shareholder who holds the necessary majority, however the squeeze-out not only seriously affects but even eliminates the shareholding of the minority shareholder who is converted from a minority investor to a simple creditor. The exercise of a sell out right can create a heavy financial burden on the majority shareholder (or the company itself). The question is whether this burden is necessary and proportionate in order to give sufficient protection to the minority shareholder. An additional problem lies in the question whether the squeeze-out or sell-out right can be exercised at any time or only within a certain time period after the triggering majority threshold level has been obtained and has been made public, so as to avoid there being a Sword of Damocles permanently pending above peoples' heads.*

All these reasons in our view mean that this issue should in general be left to the Member State Level.

Cross-border investment is much more significant in listed companies than in unlisted companies. This cross-border aspect could perhaps justify the introduction of a squeeze-out and sell-out right at EU level. However, more legal and economic analysis would be required in the first place before a decision should be made.

9. c) **Which instrument would best be designed to deal with this matter? Please give your reasons.**

Answer: *This question comes too early, for the reasons mentioned above.*

10. a) **Should the issues of framework rules for groups and abusive pyramids, in your view, be addressed at EU-level? Please give your reasons.**

Answer: *Already in the consultation of the High Level Group we have expressed our position that pyramids do not present specific risks different from the risks of any other group structure, and that the general rules on groups of companies (in particular on transparency, protection of outside shareholders, directors' liability) are sufficient.*
As regards groups in general, we see no need for action at EU level. The relevant provisions of Member State law so far have proved to be sufficient.

10. b) **Which instrument would be best designed to deal with this matter? Please give your reasons.**

Answer: *Not applicable.*

10. c) **Are there, in your view, specific elements which any such instrument should cover?**

Answer: *Not applicable.*

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.**

Answer: *It is far too early for a full evaluation of the success or failure of the SE as created by the ECS. Experience to date has indicated some practical problems which should probably be addressed at some point in the future, namely:*

- *The ECS prohibits the separation of head office and registered office (seat of management and registered seat). This means that in the case of a merger SE there is the all or nothing principle as regards the seat. A merger is likely to be psychologically more acceptable if the registered seat can be in one Member State and the seat of management in another. A modification of the ECS in this respect could facilitate cross-border mergers in the form of the SE.*

- *Some Member States require a foreign SE which has operations in their country to register as a branch, others do not do so. This question requires urgent attention. What is definitely needed is a uniform answer to the issue of whether an SE incorporated in one member state which has operations in another member state (which would require it to register a branch in that member State if it were not an SE) should be required to register a branch.*

- *Another obstacle in practice is clearly the uncertainty about the tax regime.*

12. a) **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.**

Answer: *To begin with, we would like to repeat our response to the High Level Group Consultation of 2002:*

„Yes, in particular the SMEs which account for more than 90 per cent of all firms and 2/3 of all jobs in Europe have a specific need for the EPC as a new European legal form of company, similar to the SE for large enterprises. The European legislator should make this European legal form available as an optional alternative to national forms of private companies and to the SE.

There is a significant cost argument in this context. Unlike large enterprises SMEs usually have no in-house legal departments at all or only of small size. An SME therefore faces a

significant in-house manpower and/or outside counsel cost problem when setting up and operating subsidiaries in different European countries each of which has its own corporate law regime. This barrier to the cross-border establishment of subsidiaries would greatly be reduced if the legal form of the subsidiary in all countries were the same. Everyone in the SME dealing with the European subsidiaries would benefit therefrom since the corporate life of all such subsidiaries would follow the same rules.

The creation and operation of an SE is very complicated because of the co-determination problem. The EPC regulation can be much simpler, by limiting the number of employees to 500 so that co-determination is not an issue. Even with this ceiling the EPC would be available to almost all SMEs.

The EPC, compared to the SE, would provide much greater possibility for custom-tailoring the articles of association to the needs of the shareholders. Standard articles of association attached to the EPC regulation would provide useful guidance.

It would mean a discrimination of the SME to give big business with the SE a specific European company form for European activities, however to deny the SME a similar European company form suitable for their needs and purposes.

Such discrimination would even less be justified since the extreme co-determination difficulties that have characterised the SE regulation would not be applicable in the case of the EPC.

For these reasons the European Economic and Social Committee in March 2002 has published, after expert hearings in Brussels, an own-initiative opinion which was unanimously adopted in a plenary session. This initiative had been preceded by initiatives from France in 1993 and the publication of outline suggestions for an EPC in November 1997 by a working group of academics and practitioners from France, The Netherlands, the UK and Germany. These EPC suggestions were presented to the public in a conference held in Paris in December 1997 organised with the support of Eurochambre and the French CNPF - Conseil National du Patronat Francais (now MEDEF). An enlarged working group with members from CREDA and CNPF and with academics from the universities of Paris, Heidelberg, Exeter, Louvain and Groningen and a number of representatives of several professional associations (including UNICE, CBI, BDI and DIHT) has then drafted the Statute for the EPC. This draft was published by the Paris Chamber of Commerce and the CNPF in September 1998 and has been presented in conferences and discussed with practitioners - legal advisors, representatives of professional associations and in-house legal counsels - in several European countries (i. a. London, Paris, Heidelberg, Rotterdam). Members of the working group have also developed draft articles of association which could be used as templates for the formation of EPC. This initiative for the EPC has received strong support in all these discussions. Both SME and multi-national groups have expressed a need for a European company form alternative to the SE which offers a more suitable, flexible framework for joint ventures and subsidiaries. The culmination of this support development has been the resolution of the European Economic and Social Committee of March 2002 mentioned above."

The aforesaid need has been confirmed by the Feasibility Study of a European Statute for SMEs undertaken by AETS. The executive summary and the Study were presented by the Commission in December 2005.

The European Interest Grouping is definitely not an alternative to an EPC, because of its many restrictions (e.g. auxiliary activities only, profit making only on behalf of its members, joint and several liability of the members). These deficits are the main reason for the low aggregate number of EIGs that have been formed over the years.

As regards national companies as an alternative, the reasons for an EPC are the same as the reasons for an SE. The statement that national forms of companies are no alternative for a European law company form holds true not only for large but also for small and medium-large enterprises.

12. b) If so, are there, in your view, specific elements which any such statute should cover?

Answer: The elements to be addressed are basically the same as with the SE. The problem of codetermination could be solved in the same way, or could be avoided from the outset by limiting the number of employees in the EPC to 500. Even with such limitation the EPC would be useful for SMEs since most of them have a lower employment figure.

The problems of the tax regime should not be forgotten, just like with the SE.

13. Do you consider it useful to carry out an examination on the feasibility of a European Foundation Statute? Please give your reasons.

Answer: Yes, we think so. So far, there is very little cross-border setting up of foundations, and there is equally little cross-border activity of existing foundations. In addition, national tax regimes are quite reluctant to accept charitable contributions to foundations from another Member State as being deductible. All of this taken together means that in all respects we are miles away from a European common market for foundations. This could be considerably improved by carrying out an examination on the feasibility of a European Foundation Statute. To launch this idea could already be of help.

14. a) Do you agree that there would by added value in modernising and simplifying European company law? Please give your reasons.

Answer: Yes, we think so in principle. However, as always ,the devil is in the detail. What is first needed is a thorough review to find where the regulatory framework could be modernised and simplified, together with an assessment of the (positive or negative) economic consequences.

We are quite sceptical however about the idea of merging all company law directives into one single directive. Because the scope of applicability (forms of companies) is frequently different from Directive to Directive, it will be impossible to have a real single Directive on company law, instead it will be necessary to break the Directive down into chapters each one of which would then more or less repeat one of the existing Directives. We do not think that the users would gain much from such an approach. To the contrary, everybody today is used to referring to a Directive not by their number but by their name (Publicity Directive, Capital Directive, National Merger Directive etc.). All users know what is meant by such reference. We are also concerned that the process of modernising and simplifying the Directives could be taken as an opportunity to raise new issues for consideration or re-open decisions which have already been taken. We think that if this were to be done, it would be very important to consult on any proposed changes in the same way as if they were new initiatives. We would not want this process to detract from other areas which are being considered as part of the Company Law Action Plan.

Many of these Directives have been amended since their original adoption. Therefore, it would be useful to have for each Directive the full text, as amended and as in effect as of today, in official form. This could be achieved for instance by the Commission officially publishing the full text of all Directives as in effect of today, and by updating these texts whenever they are amended in the future.

14. b) **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.**

Answer: *Quite a few observers have already made the point that there is a partial overlap between Company Law Action Plan (and the measures issued thereunder) and the Financial Services Action Plan (and the measures issued thereunder). Well-known examples are the Take Over Bid Directive and the Transparency Directive. There are also aspects within the Company Law Action Plan where there is an overlap, e.g. as regards the Merger SE and the Cross-Border Merger Directive. We realise of course the underlying historical and political reasons for these differences. We think nevertheless that elimination of these differences should be one of the goals of the Commission in order to lower the level of complexity and in order to reduce possibilities for arbitrage in law.*

14. c) **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.**

Answer: *This question has in part been answered already in a) above. An improved readability of texts of the various Directives and their amendments and a harmonisation of the differences between the various Directives when dealing with more or less identical or comparable issues, would be very helpful to all users. We realise, of course, that one and the same issue can be looked upon quite differently from say the company law angle and the capital markets angle. Nevertheless, it is our view that a convergence of these different aspects and their different solutions would be helpful.*