Position Paper

UEAPME[1] position on the Future of European Company Law

Opinions on Questions on the future of European Company Law

II OBJECTIVES OF EUROPEAN COMPANY LAW

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

o Improve the environment in which European companies operate, and their mobility in the EU.
o Facilitate the creation of companies in Europe.
o Setting the right framework for regulatory competition allowing for a high level of flexibility and choice.
o Better protect employees.
o Better protect creditors, shareholders and members.
o Other: Please specify.
o No opinion.

***UEAPME's position on this question**:*
UEAPME considers this point as a key issue. If the objective of the European Company Law is identified correctly, this can help to achieve the aim of more attractive and user-friendly Company Law at European level. For this reason, according to UEAPME's opinion, all the mentioned points have to be taken into consideration while going forward with European company law, except the better protection of employees. However, to improve the already existing framework should be considered as the first step and prime objective.

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? (Single choice)

o Yes, the following pieces of existing legislation harmonising company law could be modernised further (Multiple choice):
  o The Directives on the disclosure of companies and their branches as well as the validity of their obligations and their nullity.
  o The Directive on maintenance and alteration of the capital of public limited-liability companies.
  o The Directives on the merger and divisions of public limited-liability companies.

[1] UEAPME subscribes to the European Commission's Register of Interest Representatives and to the related code of conduct as requested by the European Transparency Initiative. Our ID number is 55820581197-35.

o The Directive on single-member private limited-liability companies.
o The Directive on take-over bids.
o The Directive on cross-border mergers.
o The Directive on certain rights of shareholders of listed companies

o Yes, new areas could be explored for further harmonisation, such as (Multiple choice):
o Cross-border transfer of registered office.
o Cross-border divisions.
o Groups of companies.
o Cross-border conversion.
o Other: Please specify.

o Yes, both approaches could be combined and further work could target (Multiple choice):
(N.B. both lists would be opened).

o No, further harmonisation is not needed, the approach should rather be based on:
(Multiple choice)
o Soft-law instruments, like Recommendations.
o Increased administrative co-operation and exchange of good practices.
o Other: Please specify.

o No opinion.

***UEAPME's position on this question**:*
As mentioned above, the improvement of the already existing framework before further harmonisation should take place first. This improvement could be achieved e.g. by more administrative co-operation. It would be important as well to simplify unnecessary administrative measures, such as abolishing obligations of publication in paper form. When it comes to the need of improvement, UEAPME could support further modernisation concerning the "Directive on the disclosure of companies and their branches as well as the validity of their obligations and their nullity" and the "Directive on single-member private limited-liability companies" as well.

Comments by the EC to this section: 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? (Single choice)
o Yes, for all the legal instruments harmonising EU company law.

o Yes, but only for legal instruments related to (Multiple choice):
o Disclosure of companies and their branches as well as the validity of their obligations and their nullity.
o Maintenance and alteration of the capital.
o Mergers and divisions.

o Single-member ownership.
o Take-over bids.
o Cross-border mergers.
o Certain rights of shareholders of listed companies.
o Other: Please specify.

o No

o No opinion.

***UEAPME's position on this question**:*
It has to be borne in mind that the distinction between public and private regime and related structures has deep roots in the systems of the Member States. In a limited liability company, the members have the opportunity to operate without personal involvement and those persons most often would not at all be considered as engaged in a listed company investment. There could be a reason for the distinction between public or private companies. If a public company acts on behalf of a public body some distinctions are justified. On the other hand, if a public company acts in the same way as a private company in a competitive market, there are no justified reasons for a different approach. For this reason, in order to ensure adequate protection for the shareholders, the focus should move towards the distinction between listed and unlisted only if it is predictable.

IV USER-FRIENDLY REGULATORY FRAMEWORK FOR EUROPEAN COMPANY LAW
Comments by the EC to this section: 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 6 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? (Single choice)
o Yes, a single EU company law instrument should replace all existing Directives.
o Yes, EU company law Directives with a similar scope should be merged.
o No, this is not an idea worth pursuing.
o No opinion.
• Please specify. (N.B. for all options)

***UEAPME's position on this question**:*
In theory, a single EU company law instrument would be the user-friendliest solution.

V EU COMPANY LEGAL FORMS
Comments by the EC to this section: 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? (Multiple choice)
o The European image of those company law forms.
o Their European label ("SE", "SCE").
o Their full legal personality.
o Savings in costs of cross-border transactions.
o Ad hoc solution to cross-border related issues.
o Workable alternatives to existing national company law forms.
o 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).
o The possibility to carry out operations, like cross-border transfer of seat.
o Tax reasons.
o Labour law reasons.
o Other: Please specify.
o No added value.
o No opinion.

***UEAPME's position on this question**:*
In theory, the legal forms of EU company law would have the aim to give ad hoc solution to cross-border related issues, workable alternatives to existing national company law forms and the possibility to carry out operations such as cross-border transfer of seats. However, in the reality there is no added value to recognise. One of the reasons for this is that the form of a company alone is not relevant, but the whole legal framework the company is operating is decisive. As general remarks, it can be said that because of rising investments from third countries the attractiveness to third party inwards investors has a high priority if it comes to any reform.

10. What, if any, are the main shortcomings of EU legislation introducing EU company legal forms? (Multiple choice)
o The complexity linked to frequent cross-references to relevant national legislation.
o The uncertainty linked to the application of different national legislations that are applied simultaneously.
o The differences in the way EU company law forms are understood and used at national level.
o The different degree of attractiveness across Member States.
o The limitations that derive from unanimity decision-making.
o Other: Please specify.
o No main shortcomings.
o No opinion.

***UEAPME's position on this question**:*
Under the main shortcoming 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 and the differences in the way EU company law forms are understood and used at national level can be listed.

11. Should existing EU company legal forms be reviewed? (Single choice)
o Yes, in particular concerning:(multiple choice)
- o Simplification and rationalisation of existing procedures.
- o Increased uniformity through reduction of cross-references to national legislation.
- o Reduction of minimum capital required.
- o Deletion of cross-border element requirement.
- o Possibility to have the registered office and the headquarters in two Member States.

o Explicit solution to the issue of shelf companies.
o Other: Please specify.

o No.

o No opinion.

***UEAPME's position on this question**:*
Since the existing forms are rarely used, a review could be useful in order to improve the situation. In this respect, simplification and rationalisation of existing procedure would be useful. However, also improvements concerning increasing uniformity through reduction of cross-references to national legislation and reduction of minimum capital requirements should be considered if it comes to review. Significant administrative hurdle could be removed if an "off the shelf" EU form would be available, alongside any other domestic alternatives, for groups looking to restructure, or set up new investments.

Comments by the EC to this section 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.

12. Could optional models such as the EMCA –or similar projects- be a suitable alternative to traditional harmonisation? (Single choice)
o Yes. Please explain
o No. Please explain
o No opinion.

***UEAPME's position on this question**:*
The theoretical answer would be yes, since useful company structure models are from interest. However, because of the particularities of the European Union and currently 27 different legal systems, the future of such a system would be uncertain as domestic judiciaries interpret the underlying legislation according to their own background and ingrained juristic practices. The current proposal of the Common European Sales Law is a good example in order to demonstrate which difficulties could appear in respect of such a project.

VI THE PARTICULAR CASE OF THE SOCIETAS PRIVATA EUROPAEA (SPE) STATUTE
Comments by the EC to this section: 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? (Single choice)
o Yes, for example: (Multiple choice)
o 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.

o 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).
o 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.
o Other: Please specify.

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

o Other possibilities to explore? Please specify.

o No opinion.

***UEAPME's position on this question**:*
A change of SPE building on the lessons learnt from the experiences may be one of the most profitable ways forward. The modification of the scope of application of the SE Statute in order to allow smaller EU companies to benefit from it on the basis of more flexible requirements could be welcomed. Beside of these, restrictions related to move-in, move-out should be prohibited, as well.

VII CROSS-BORDER TRANSFER OF A COMPANY'S REGISTERED OFFICE
Comments by the EC to this section 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? (Single choice)
o Yes, through a harmonizing Directive. Please give further reasons for your opinion
o Yes, through some other measure. Please give further reasons for your opinion
o 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. Please give further reasons for your opinion.
o No. Please give further reasons for your opinion.
o No opinion.

***UEAPME's position on this question**:*
The answer is definitely, yes to this question. If this would happen through other measures the already mentioned issue related to move-in and move-out should be kept in mind.

15. What should be the conditions for a cross-border transfer of registered office? (Multiple choice)
o 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.
o 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.
o 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.

o A transfer should be allowed only if accompanied by the transfer of the company's headquarters or principal place of business.
o No opinion.

***UEAPME's position on this question**:*
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 as well, even when not accompanied by the transfer of the company's headquarters or principal place of business. And a Member State should not 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.

16. What should be the consequences of a cross-border transfer of registered office? (Multiple choice)
o There should be no winding-up of the company in the home Member State.
o The company should not lose its legal personality.
o 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
o A transfer should not result in the loss of the pre-existing rights of shareholders, members, creditors and employees of the company.
o No opinion.

***UEAPME's position on this question**:*
There should be no winding-up of the company in the home Member State and the company should not lose its legal personality. One of the main difficulties is to create a regime which offers sufficient protection to creditors and stakeholders in the "old" country, without introducing restrictions for the company, in a way which would negatively influence the future activity and attractiveness of the company towards investors in the new country.

VIII CROSS-BORDER MERGERS
Comments by the EC to this section 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.

17. Do you support further harmonized rules in the Directive?
o Yes. Please specify which areas. (Multiple choice)
- o Approval of the cross-border merger by the general meeting.
- o The duration of the review by national authorities of cross-border mergers.
- o The methods for valuation of assets in cross-border mergers.
- o The date of the start of the protection period regarding creditors' rights.
- o The duration of the protection period regarding creditors' rights.
- o The consequences of creditors' rights on the completion of a cross border merger.
- o Other: Please specify.

o No: Please specify. (Multiple choice)

- o There is no need for further harmonisation in the area of cross-border mergers.
- o The division between EU regulation and national legislation does not pose a problem.
- o The areas currently not covered are better dealt with in national regulation.

o Other: Please specify.

o No opinion.

***UEAPME's position on this question**:*
Yes, further harmonisation is supported in relation to the approval of the cross-border merger by the general meeting. Furthermore, further harmonisation would be welcomed also on the methods for valuation of assets in cross-border mergers, on the date of the start of the protection period regarding creditor's rights and on the duration of the protection period regarding creditors' rights.

IX CROSS-BORDER DIVISIONS
Comments by the EC to this section 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.

18. Do you support introducing regulation regarding cross-border divisions at EU level? (Single choice)
o Yes. And these harmonised rules should aim at the following: (Multiple choice)
- o Building rules on cross-border divisions around the framework established in the Directive on cross-border mergers. Please specify why. (Multiple choice)
  - o The framework is well known by the relevant stakeholders.
  - o The framework has proven to be sustainable.
  - o The framework presents the best structure to deal with this type of cross-border activities.
  - o Other: Please specify.
  - o No opinion.

o Shared liability of the involved companies for claims existing at the time of the division.
- o Should this shared liability be based on the distribution of assets in the division? (Single choice)
  - o Yes: Please specify.
  - o No: Please specify.
  - o No opinion.

o No: Please specify why: (Multiple choice)
- o These areas are best dealt with at national level.
- o The division between EU regulation and national legislation does not pose a problem.
- o Other: Please specify.
- o No opinion.

o No opinion.

***UEAPME's position on this question**:*
No opinion on the issue.

X GROUPS OF COMPANIES

Comments by the EC to this section: 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.

19. Do you see a need for EU intervention in this field? (Single choice)

o Yes, there should be an EU intervention (Multiple choice)
- o The Commission should recommend the recognition of group interest.
- o The EU should require groups to provide information on their structure in a consolidated, investor-friendly and easy-to-read document.
- o Other: Please specify.
- o No, there is no need for EU intervention.

o No opinion.

***UEAPME's position on this question**:*
Basically there is no need for EU intervention. If there would be any it should be in order to provide a harmonised framework and information on their structure in a consolidated, investor-friendly way with easy-to-read documents could be any time useful.

XI CAPITAL REGIME

Comments by the EC to this section: 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 2ndCompany Law Directive.

20. In your opinion, should the Second Company Law Directive be reviewed? (Single choice)

o Yes: Please indicate what should be the aim of the review (Multiple choice)
- o Abolition or change of the minimum capital requirement.
- o Replacement of the balance sheet test by a solvency test.
- o Cumulative use of the balance sheet test and of the solvency test.
- o Alternative use of the balance sheet test and of the solvency test.
- o Use of International Financial Reporting Standards for the determination of distribution of dividends.
- o Clarifying the regime of abstention vote.
- o Other: Please specify.
- o No opinion.

o No: Please give your reasons (Multiple choice):
- o Current rules are flexible and leave a significant margin of manoeuvre to Member States.
- o Current rules have stood the test of time.

o Compliance costs for companies are not excessive.
o Other: Please specify.
o No opinion.

o No opinion.

***UEAPME's position on this question**:*
No opinion on the issue.

Brussels, 21 May 2012

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