



## **ETUC ANSWERS RE THE PUBLIC CONSULTATION ON FUTURE PRIORITIES FOR THE ACTION PLAN ON MODERNISING COMPANY LAW AND ENHANCING CORPORATE GOVERNANCE IN THE EUROPEAN UNION**

### **GENERAL PRINCIPLES AND DEMANDS (to be considered as an answer to questions 1, 2 and 14<sup>1</sup>)**

#### *1. The need to pay closer attention on the stakeholders role again*

1.1 In this first stage of implementing the Action Plan, the European Commission has mainly focused on both the free movement of capital and the enhancement of corporate governance. Major efforts have been made to shore up shareholders' rights and protect them. For the time being, the objectives set in the Action Plan concerning the protection and involvement of third parties (whereas employees have to be considered as a specific group of stakeholder) have been substantially ignored.

1.2. On the other hand, ETUC is convinced that a modern model of corporate governance must be based on a fresh balance of the various interests converging under corporate governance. As the European Corporate Governance Forum announced, it is meaningful that the role of stakeholders will be on the agenda starting already at its next meeting.

1.3. In the words of a ruling by the European Court of Justice (ECJ), the economic aim [...], namely the elimination of distortions of competition between undertakings [...], is secondary to the social aim [...] which constitutes the expression of a fundamental human right (Case C-50/96, Deutsche Telekom AG v. Lilli Schröder).

**The European legal framework forces the European Commission to remain mindful of the social consequences of its initiative and ensure that social rights are deemed just as important as the establishment of the internal market.**

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1 Question 1: Does the Action Plan address the relevant issues and identify the appropriate tools to enhance the competitiveness of European business? If not, please give your reasons and indicate which measures are not appropriate and/or would be desirable. What are your views on the balance of legislative/non-legislative measures proposed?

Are you facing particular obstacles in the conduct of cross-border activities to which, in your opinion, the Action Plan does not provide any satisfactory remedy? Please give your reasons.

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

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

Are there, in your view, areas of actual or potential overlap between the Action Plan and other initiatives or measures in related sectors? What, if anything, should be done in order to ensure coherence between the various fields of action? Please give your reasons.

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

## *2. Implementation of the Action Plan and European Social Model*

2.1. Information, consultation and participation of employees are now considered fundamental rights of employees, as stated in the Charter of Fundamental Social Rights (published in 1989) and the Charter of Fundamental Rights of the European Union). But their effective application is under threat, on the one hand from continuous changes to the organisation of companies exploiting the benefits of the integration of the internal market and on the other hand from the strong influence of the modernisation of company law and the enhancement of corporate governance.

**The risk is that the implementation of the Action Plan could be perceived as a further attack on the European Social Model.**

## *3. The way ahead: closer cooperation between the social partners*

3.1. Some of the initiatives foreseen in the Action Plan introduce or modify workers' rights to information, consultation and participation. ETUC intends to reiterate that under the EC Treaty (Articles 138), European Commission initiatives are subject to compulsory consultation with the social partners. It is also worth recalling that ETUC is the only trade union organisation in Europe representing around 60 million people and that it is widely recognised and accepted by the European institutions as a mouthpiece for Europe's workers.

3.2. The establishment of a consultation body with ETUC cannot be viewed merely as the result of a formal compliance with the rules. Failure to consult the social partners introduces inconsistency into EU legislation. Clearly, by implementing the Action Plan, the European executive is using a 'different hand' to write down the rules governing the involvement of workers.

Article 7 of the 10<sup>th</sup> Company Law Directive on cross-border mergers provides for specific information and consultation rights for employees. ETUC is concerned that the concept 'in good time' (*en temps utile*) is here reversed in favour of the company rather than employees, despite the fact that the ECJ judgements and subsequently the directive assigned a precise legal meaning to the words "in good time", a meaning clearly in workers' favour (in particular directive 2002/14 and directive 94/45 and directive 98/59, directive 2001/86, directive 2001/23 ). As a matter of fact, the 10th directive fails to respect either the letter or the spirit of the directives on information and consultation rights of employees.

**Direct consultation with the social partners should be made a top priority in the future implementation of the Action Plan to ensure that the latter pays closer attention to the social consequences of growth and employment, as suggested by the Commission's reference the Lisbon Strategy in the document launching the ongoing public consultation.**

## *4. Competitiveness: a shared objective*

4.1. The range of financial operations is now vast, including anything from investment strategies, share deals, dividend distribution, share buybacks, pension fund organisation/contributions, capital structuring, loans and debt policy, forex transactions, derivatives, and so on. Accordingly, existing rules and mechanisms aimed primarily at investor protection need to be adapted to protect workers.

Operations on financial markets must be consistent with the objective of improving working conditions, respecting the fundamental rights of workers, acknowledging the central role of social

dialogue and social partnership in the EU and at national level, and adhering to the strict principle of the equal treatment of workers.

4.2. In principle, major changes in a company's structure due to financial movements may not be allowed to result in unilateral changes in the part of corporate governance concerning labour relations. Specifically, labour relations within a company are the result of a complex interplay of interests and often constitute a strong element in well-balanced corporate governance. This being the case, the European Commission should strive, together with the social partners, to find suitable tools to make the labour relations system in the company neutral vis-à-vis the company's financial transactions.

4.3. ETUC claims that even if systems have a legal basis or are the result of collective bargaining, they should enjoy specific legal protection so that they cannot simply be cancelled due, for example, to changes in shareholder structure, the transfer of a company's registered office, adoption of the European Company Statute, and so forth.

**This objective can be attained by a) recognising workers' specific interest in being involved in corporate governance, b) setting out minimum standards at European level, and c) firmly insisting on the preservation of existing participation rights (and their efficient implementation) at national level.**

4.4. Domestic experiences and practices of employees' statutory involvement in enterprise decision-making and monitoring at the top level should be linked to recent EU policy objectives concerning the need for companies to properly balance the requirements of successful economic performance on a global scale with social interests and environmental needs (referring to the objectives of the Lisbon strategy). Several recognised studies have shown the economic advantages reaped by enterprises which are committed to their employees. In contrast, nowadays it seems that the demands of global investors seeking a high return on their capital are the main determinant of how companies are run. This raises anew the question of enterprises' role and social obligations.

**ETUC firmly believes that a model of corporate governance that encourages businesses and workers to reach agreement on all the important elements of corporate policy and management, will certainly perform better in the long run.**

## *5. Simplification of the EU's regulatory environment and Lisbon priorities*

5.1. ETUC is concerned that the Commission's plan to simplify and modernise the EU regulatory environment, including the directives governing information and consultation rights, could re-open the debate on the existing rights protecting workers.

**The simplification and modernisation of the EU's regulatory environment must not be allowed to curb workers' existing rights to information and consultation.** The revision of the existing directives, if needed, should take place in the framework of the European Social Dialogue as provided in the Treaty.

5.2. This objective can only be attained through a consultation phase based on an agenda shared by the European Commission and the social partners. The resulting consultative body would deal with single actions (e.g. the 14th directive, one-share-one-vote, squeeze-outs, and so on), but would also set out to

reach a consensus on a minimum standard of employee involvement, which would in turn strengthen corporate governance, rendering it more competitive and more socially oriented.

5.3. Finally, ETUC also believes that the respective corporate governance systems and company law frameworks at national level are too fragmented. As a result, the European Union is far from being a place where competition between national legislations can bring forth true competition. It is patently obvious that the EU Member States often opt to compete 'on the sly', with third parties increasingly paying the price of the obvious, negative consequences this has.

**ETUC urges the European Commission both to move forward by accelerating the harmonisation and stepping up its monitoring of European company legislation, in line with the objectives set out in the Action Plan, and to pursue the legitimate position of workers as privileged stakeholders.**

22/03/2006

ANNEX. SPECIFIC ISSUES

SUBJECT	ETUC POSITION
<p><b>Shareholder democracy. Rights of shareholders</b></p> <p>What would be the added value of addressing these questions at EU level? Please give your reasons.</p> <p>Which instrument would be best designed to deal with these matters? Please give your reasons.</p> <p>Are there, in your view, specific elements which any such instrument should cover?</p>	<p>ETUC hopes that the directive on shareholders' rights can soon be adopted.</p> <p>With regard to a special investigation into the transaction of corporate business, some countries afford workforce representatives such a right (e.g. the Netherlands). This model, in conjunction with the existence of specific rights for employees' representatives in the workplace, must be safeguarded.</p> <p>ETUC is convinced that the governance of European companies will be enhanced if such a right is extended to every country by being established as a European minimum standard, perhaps worded along the following lines:</p> <p><i>“If there is good reason to doubt the correctness of a company's policy, the competent court may, at the request of certain parties, appoint one or more persons to investigate its policy and course of business. The persons entitled to file such a request are:</i></p> <ul style="list-style-type: none"> <li><i>– shareholders or holders of depositary receipts, who alone or jointly hold 10% of the issued capital or shares out of the nominal total of 250,000;</i></li> <li><i>– employees' representatives, such as trade unions with members among the workforce, works councils or similar bodies in accordance with national legislation.</i></li> </ul> <p><i>Before such a request is filed, the requesting party must have informed the company of its objections and must have allowed the company a reasonable period to consider the stated reservations and take action.”</i></p> <p>If the Commission decides to set up a coherent framework, it should draft a directive to ensure compliance in all Member States.</p>
<p><b>Shareholder democracy. Disclosure by investors of their voting policies</b></p> <p>Is there a need for this issue to be addressed at EU level? What would be the added value of addressing the issue at EU level? Please give reasons for your reply.</p> <p>What would be the appropriate form for any EU instrument? Please give your reasons.</p> <p>Are there, in your view, specific elements which any such instrument</p>	<p>In principle, ETUC endorses the European Commission's approach, but stresses that most of the proposed measures can only prove effective if they apply consistently throughout the European Union. Comparative studies indicate a lack of convergence between national legislations with respect to the envisaged tools, so we urge the Commission not to hesitate in taking a legislative initiative (directive).</p>

<p>should cover?</p>	
<p><b>Company law:</b></p> <p><b>Transfer of the registered office</b></p> <p>In the light of existing instruments, is there still a need for a directive on the transfer of registered office? Please give your reasons.</p> <p>Are there, in your view, specific elements which any such Directive should cover?</p>	<p>Companies' mobility always has a social impact. There are two fundamental aspects to be considered in the directive:</p> <ol style="list-style-type: none"> <li>1) Information and consultation of employees on the strategic choices made by the company.</li> <li>2) The potential threat to employee participation rights enshrined in national legislation.</li> </ol> <p>1) Concerning the first point, a directive should further specify employees' information and consultation, clearly stating what information needs to be passed on to workforce representatives and stipulating that consultation must take place before any decision is actually taken.</p> <p>2) It is well-known that in many countries, employee participation rights (within the meaning of the definition set out in directive 2001/86) are set out in legislation or collective agreements.</p> <p>This being the case, the 14th directive must provide a mechanism for dealing with the withholding of participation rights. This mechanism could draw on selected procedures taken from Directive 2001/86 that are compatible with the purpose of the new directive. A directive would be the right legislative tool.</p> <p>ETUC's proposals in this connection could be expressed in detail in face-to-face meetings with the European Commission.</p> <p>The following principles already enshrined in EU legislation should be included in the 14th directive:</p> <ol style="list-style-type: none"> <li>i) Adequate, proportionate protection of the interests of minority shareholders opposing a transfer, of creditors and of the holders of other rights. The transfer of a registered office should not affect any rights that originated prior to the delocalisation.</li> <li>ii) The 'real seat' principle (as established in Directive 2001/86) must serve to protect the existing rights of employees.</li> <li>iii) The 'before and after' principle should apply to companies affected by structural changes, including the transfer of a legal registered office.</li> </ol>

<p><b>Company law:</b></p> <p><b>The choice between the monistic and dualistic types of board structures</b></p> <p>Should the question of the choice of board structure be addressed at EU level? Please give your reasons.</p> <p>Which instrument would be best designed to deal with this matter? Please give your reasons.</p> <p>Are there, in your view, specific elements which any such instrument should cover?</p>	<p>There is no need to address this question at EU level. The first reason for this is that many Member States already permit the choice between two types of board structure. Secondly, the European Company (SE) provides for the possibility of choosing between the two types of board structure. Thirdly, under ECJ case law, companies can now opt to comply with the company law applying in the 25 EU Member States, which provides for enough options.</p>
<p><b>Company law:</b></p> <p><b>Squeeze-out principle</b></p> <p>Do you think that a squeeze out and a sell out right should be introduced at EU-level? Please give your reasons.</p> <p>If so, should these rights be limited to companies which shares are traded on a regulated market ("listed companies")? Please give your reasons.</p> <p>Which instrument would be best designed to deal with this matter? Please give your reasons.</p>	<p>Squeeze-outs could threaten employee share ownership schemes. Any initiative included in EU legislation should include measures capable of defending employee share ownership schemes even if they derive from legal or contractual provisions.</p> <p>A preliminary consultation with the social partners would appear essential.</p>
<p><b>Company law:</b></p> <p><b>Societas Europaea</b></p> <p>How useful do you judge the ECS to be in practice? Do you consider any modifications are appropriate and desirable? Please give your reasons.</p>	<p>There is no need for any fresh legislative initiatives.</p> <p>The low number of cases makes it impossible to judge this for the time being. ETUC suggests involving the social partners in the monitoring of negotiations provided for in Directive 2001/86 in a bid to establish good practices and prevent abuses.</p>
<p><b>Company law:</b></p> <p><b>European private company</b></p> <p>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?</p>	<p>Any initiative must be implemented in consultation with ETUC to ensure that sufficient account is taken of employees' information and consultation in the European Private Company (EPC) and that existing participation rights are safeguarded.</p>

<p>Please give your reasons.</p> <p>If so, are there, in your view, specific elements which any such statute should cover?</p>	
<p>Corporate governance.</p> <p><b>Shareholder democracy: One-share-one vote</b></p> <p>What would be the added value of addressing the issue at EU level?</p> <p>What would be the appropriate form for any EU instrument? Please give your reasons.</p> <p>Are there, in your view, specific elements which any such instrument should cover?</p>	<p>A preliminary study should explain precisely the existing differences between national regimes. In this study, a range of possible actions at European level should be highlighted, as should their impact on national systems.</p> <p>ETUC will state its position in the light of the findings of this study.</p>