

**DIRECTORATE GENERAL FOR INTERNAL MARKET  
AND SERVICES**

**CONSULTATION ON FUTURE PRIORITIES FOR THE ACTION PLAN  
ON MODERNISING COMPANY LAW AND ENHANCING  
CORPORATE GOVERNANCE IN THE EUROPEAN UNION**

### ***The Action Plan in a nutshell***

The Action Plan on Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward<sup>1</sup>, adopted in May 2003 in response to the Recommendations of the High Level Group of Company Law Expert<sup>2</sup>, outlines the Commission approach to Corporate Governance and Company Law issues. It contains a plan with a list of prioritised measures for adoption in the short, medium and long term.

The main objectives of the Action Plan are: (1) to foster efficiency and competitiveness of business; and (2) to strengthen shareholder rights and third party protection. The Action Plan is based on a comprehensive set of legislative and non-legislative proposals, grouped under six chapters: corporate governance, capital maintenance and alteration, groups and pyramids, corporate restructuring and mobility, the European Private Company, cooperatives and other forms of enterprises and transparency of national legal forms.

The Action Plan was submitted to public consultation in 2003. The outcome of this consultation<sup>3</sup> showed widespread support for a large majority of its proposals.

### ***Results achieved during the first phase of implementation***

Since then, most short term measures have been successfully delivered or are in the process of being delivered shortly<sup>4</sup>. Since May 2003, the Commission has adopted two Recommendations on directors. It has established the European Corporate Governance Forum, the Advisory Group on Corporate Governance and Company Law. The Commission launched the revision of the Accounting Directives, on which there is likely to be political agreement by the end of 2005, as well as the simplification of the 2<sup>nd</sup> Company Law Directive. The 10<sup>th</sup> Company Law Directive on cross-border mergers, which was tabled in November 2003, was adopted in single reading on 26 October 2005. A proposal for a directive on shareholders rights will shortly be submitted for adoption to the College<sup>5</sup>.

### ***Recent market and regulatory evolutions***

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<sup>1</sup> COM (2003) 284 final, hereinafter referred to as ‘the Action Plan’.

<sup>2</sup> The *Winter Group* was set up by the Commission in September 2001 in order to help it preparing a new proposal for a directive on takeover bids and the definition of new priorities for the future development of company law in the EU. Following the Enron scandal, its mandate was extended in April 2002 to corporate governance and auditing issues. The High Level Group presented its key recommendations and priorities on 4 November 2002.

<sup>3</sup> The Commission received 114 responses coming from 17 countries in total, including 14 Member States and one acceding country, as well as from representative organisations at EU and international level. Responses were received mainly from national administrations, industry representatives, institutional investors, professional service providers (auditors, accountants, lawyers) and financial service providers.

<sup>4</sup> For a detailed presentation of the results achieved during the first phase of implementation of the Action Plan, see Annex 2.

<sup>5</sup> A detailed survey of the results delivered during the first phase of implementation of the Action Plan is provided in annex.

It is crucial that the European regulatory framework in this area responds to market needs. In particular, it must take account of recent evolutions in the market and regulatory environment. Market consolidation has been accelerating in all economic sectors. From January to June 2005, the worldwide volume of mergers has reached its highest peak since the second half of 2000<sup>6</sup>. The Action Plan now needs to be looked at in the light of efforts to make European industry more competitive, namely the Lisbon agenda, and the EU's better regulation policy.

### *(1) Commission initiatives for Growth and Employment*

On 2 February 2005, the Commission proposed a new start for the Lisbon Strategy<sup>7</sup> focusing on the EU's efforts on two principal tasks: delivering stronger, lasting growth and more and better jobs. This approach obtained full support from the March European Council, as well as the European Parliament and the European social partners. In June, the European Council invited the Commission to present a *Community Lisbon Programme* covering all actions at Community level. Policy measures proposed under this programme<sup>8</sup> fall under three main areas: (1) knowledge and innovation for growth, (2) making Europe a more attractive place to invest and work and (3) creating more and better jobs. In order to attract more investment, generate employment and accelerate growth, the Commission considers that it is important to facilitate market-entry with sectors and between Member States. The Community will therefore give top-priority to the completion of the internal market and to improving the regulatory environment.

Today, European companies still face difficulties to exploit the internal market. A more competitive internal market will provide companies with better chances of competing successively abroad.

### *(2) Better Regulation*

Better regulation should have a significant positive impact on the framework conditions for economic growth, employment and productivity. By improving the quality of legislation, it creates the right incentives for business, cutting unnecessary costs and removing obstacles to adaptation and innovation. The Commission will therefore focus on two areas: (1) new policy initiatives in the Commission Legislative and Work Programme will be subject of a solid impact assessment; and (2) simplification of key existing legislation will be pursued and a new phase of the simplification programme will be launched on the basis of sectoral action plans. On 25 October, the Commission presented a three year programme to simplify the existing acquis<sup>9</sup>. Following a broad

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<sup>6</sup> Thomson Financial, Mergers & Acquisitions Review, Second Quarter 2005, <http://banker.thomsonib.com>

<sup>7</sup> COM (2005) 24 final.

<sup>8</sup> Communication of the Commission to the Council and the European Parliament: Common Actions for Growth and Employment: The Community Lisbon Programme (COM (2005) 330 final). The key regulatory, financing and policy actions are listed in the Commission Staff Working Document annexed to this Communication (SEC (2005) 981).

<sup>9</sup> Communication of the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Implementing the Community Lisbon programme: A strategy for the simplification of the regulatory environment (COM (2005) 535 final).

consultation of Member States and stakeholders, the Commission proposes to repeal, codify, recast or modify 222 basic legislations. The Company Law Directives have also been identified for possible simplification and the Commission wishes to include this issue in the present consultation so as to have clearer view of feasibility and extent of such simplification.

### ***Keep pace with market needs***

The Action Plan provided that “*an open, public consultation will [...] be organised where appropriate in the future on the major initiatives following from the Action Plan*”<sup>10</sup>. Given the above-mentioned evolutions, the Direction General for Internal Market and Services considers that it is appropriate to launch such consultation before entering the second phase of the Action Plan.

### ***Objectives of the consultation***

The present consultation document has three objectives. In first instance, it seeks stakeholders' opinions on the strategy for future priorities for the Action Plan. Secondly, the consultation document aims at assessing the continued relevance of the medium and long term measures listed in the Action Plan in 2003 in the light of the Lisbon Agenda. Finally, with regard in particular to the better regulation initiative, the consultation aims at evaluating the opportunity of modernising and simplifying European Company Law. Stakeholders are invited to reply to the questions raised in Annex 1. These questions concern the overall aim and context for future priorities (section 1) and tackle the measures scheduled by the Action Plan for adoption in the medium and long term (section 2). Furthermore, in section 3, questions are raised on the simplification and modernisation of European Company Law.

### ***Practical information***

Responses to this consultative paper should be concise, focussed principally on the questions raised and provided no later than 31 March 2006.

The consultation is closed

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<sup>10</sup> See point 3., third indent, p. 10.

## ANNEX 1

### 1. THE OVERALL AIM AND CONTEXT FOR FUTURE PRIORITIES

As set out above because of market and regulatory evolutions, the context for medium term phase of the Action Plan is different from that of spring 2003. After the corporate scandals of the beginning of this century, restoring investor confidence was the main driver for action and reform in the field of company law and corporate governance. The impetus for future action at EU level must now be more the tandem of improving the competitiveness of EU companies and better regulation.

The EU corporate governance regulatory framework should encourage entrepreneurship, *i.e.* facilitate the setting up and operation of businesses. Emphasis will be put on the concrete steps which should be undertaken in this effect.

#### **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.**

The application of the better regulation strategy and principles in the field of company law and corporate governance will involve

(1) the organisation of systematic consultation with stakeholders on all future initiatives. In order to leave stakeholders and interested parties sufficient time to reply, the deadline for responses will not, save in exceptional and duly justified circumstances, be less than 12 weeks.

(2) strict compliance with the principles that (i) legislating at EU level is only justified when that is the best level at which to act and where legislation is the only way possible – when the market alone cannot efficiently address concerns - and (ii) due consideration will be given to those instruments that put the least burden on companies and leave them as much flexibility as possible.

(3) a comprehensive impact assessment for any new piece of legislation to be submitted to the Commission.

In addition, the Directorate General for Internal Market and Services considers that the modernisation and simplification of company law directives needs to be addressed. Further background and relevant questions on this issue are set out in section 3 below.

## **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?**

## **2. ESTABLISHING THE RIGHT PRIORITIES FOR THE ACTION PLAN: MEDIUM AND LONG TERM**

At this stage of its implementation, the Directorate General for Internal Market and Services is submitting for consultation the measures listed in the Action Plan for adoption in the medium and long term to assess their continued relevance in the light of market developments and the current context for the Action Plan. The Directorate General for Internal Market and Services seeks views on any additional measures which may need to be addressed and, in view of its relevance for the company law landscape in Europe, on the operation of the European Company Statute.

### **2.1. Corporate Governance**

#### *2.1.1. Shareholder democracy*

##### *2.1.1.1. One share, one vote*

A variety of exceptions to the “one share, one vote” principle exist in the Member States, whether these take the form of multiple voting rights, voting right ceilings, priority (or preference) shares, depositary receipts or non voting shares. These exceptions enable shareholders to control companies without holding a corresponding proportion of the share capital, i.e., without bearing the full financial risk. In its 2003 Action Plan, the Commission considered that there was a medium to long-term case for aiming to establish shareholder democracy in the EU, but that a study should first be undertaken on the consequences which such an approach would entail. The Commission is in the process of commissioning such a study which will address the range of restrictions on voting rights which currently exist in Member States.

An analysis carried out by Deminor in 2005 on selected listed EU companies<sup>11</sup> shows that a strong disparity of control regimes exist in the Member States: while the principle of proportionality between risk-bearing capital and control (*i.e.*, one share one vote) is the rule in some Member States, it is the exception in others. Recent developments show a tendency towards limiting exceptions to the “one share, one vote” principle in some Member States.

The issue of disproportional control in terms of capital invested is also touched upon in section 2.2.1.4. on abusive pyramids. Therefore respective policy actions, if any, should be closely co-ordinated.

## **Question 3**

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<sup>11</sup> „Application of the one share – one vote principle in Europe”, March 2005, commissioned by the Association of British Insurers, <http://deminor.org/articles.do?id=3479>

**What would be the added value of addressing the issue at EU level?**

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

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

#### 2.1.1.2. Rights of Shareholders

During work on cross border exercise of shareholders voting rights in the short term phase of the Action Plan, it became clear that there are significant differences in the substantive rights which shareholders enjoy across the EU. For example, procedures for the *nomination and dismissal of directors* as well as the practical consequences of the right to nominate directors differ in the Member States. Important issues at stake are the possibility to hold a vote on individual nominees or the obligation to approve the board in the form of one or different lists of candidates and the right to remove individual directors and/or the board.

In addition the issue of *shareholder communication* has arisen, notably in companies where share ownership is dispersed. Should such shareholders be allowed, even encouraged, to co-operate and co-ordinate their actions in nominating and electing board members?

In a number of Member States, shareholders have the possibility to launch *special investigations into the conduct of company affairs*, often subject to their holding a minimum proportion of the share capital of the company. However, details vary considerably from one Member State to the other, even if core provisions are rather similar. In its 2003 Action Plan, the Commission considered it would be appropriate to introduce a rule at EU level that would provide for such a special investigation right and the procedure for exercising this right.

#### **Question 4**

**What would be the added value of addressing these questions at EU level? Please give your reasons.**

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

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

#### 2.1.1.3. Disclosure by investors of their voting policies

Institutional investors hold significant proportions of the share capital of companies in many Member States (reaching up to 50% of all ordinary shares listed in the UK as on 31.12.2004). Furthermore, they account for the greater part of cross-border investment in listed companies. Institutional investors, therefore, have an important role to play, as shareholders, in the governance of the companies in which they invest. In its 2003 Action Plan, the Commission considered that institutional investors should be required to disclose their investment policies and their policies with respect to the voting rights in companies in which they invest and should also disclose to their beneficial holders, on request, how these rights have been exercised in a particular case. In recent years, institutional investors have been encouraged in a number of Member States to disclose

their voting policies. Market pressures seem to be leading investors to disclose their policies; nonetheless, some Member States are considering adopting legislation to require disclosure. The OECD Principles on Corporate Governance provide for such disclosure.

### **Question 5**

**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.**

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

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

#### **2.1.1.4. Directors' responsibilities/Enhanced transparency of legal entities**

The on-going modification of the 4<sup>th</sup> and the 7<sup>th</sup> Company Law Directives will confirm the principle of collective responsibility of directors. In order to further enhance directors' responsibility, the Action Plan scheduled the adoption of a proposal for a directive introducing a special investigation right, a wrongful trading rule and rules on directors' disqualification. A wrongful trading rule would establish a European framework for a personal accountability of directors towards creditors for the consequences of failure in case of alleged incapacity to honour debts. Directors' disqualification relates to specific sanctions for misleading financial and non-financial statements and other forms of misconduct. Further research will be conducted on the responsibility of statutory auditors<sup>12</sup>. The Communication on Preventing Fraud and combating Corporate and Financial Malpractice<sup>13</sup> also addressed these issues.

The Commission announced, in the Action Plan, its intention to further examine the need for increased disclosure requirements for all legal entities with limited liability with a view in particular to prevent company law from being abused for fraud, terrorism or other criminal activity.

### **Question 6**

**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.**

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<sup>12</sup> In the context of the recent adoption of the 8th Company Law Directive on statutory audit of annual and consolidated accounts, the Commission has been requested by the Council and European Parliament to prepare a report on the question of limiting the liability for statutory auditors for audits of listed companies.

<sup>13</sup> COM (2004) 611 final.



**Which instrument would, in your opinion, be most appropriate? Please give your reasons.**

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

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

## **2.2. Company Law**

### *2.2.1. Corporate restructuring and mobility*

#### **2.2.1.1. The 14<sup>th</sup> Company Law Directive on the transfer of the registered office**

The Commission announced in its 2003 Action Plan its intention to present a proposal for a 14<sup>th</sup> Company Law Directive on the transfer of the seat from one Member State to another. The transfer of registered office is today either impossible or hindered by burdensome company law and/or fiscal requirements. The proposal would enable European companies to transfer their registered office in the EU without previous winding-up in the Home Member State and subsequent re-incorporation in the Host Member State. Specific provisions would ensure the preservation of employee participation rights.

However, since the adoption of the Action Plan, several developments have occurred which have incidences on the potential mobility of European companies. Hence, the Statute of the European Company, which allows the transfer of a European Company's seat, has entered into force. The 10<sup>th</sup> Company Law Directive on cross-border mergers has also been adopted and will be transposed in the national legislation by the end of 2007.

### **Question 7**

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

**Are there, in your view, specific elements which any such Directive should cover?**

#### **2.2.1.2. The choice between the monistic and dualistic types of board structures**

The High Level Group recommended that at least listed companies in the EU should generally have the option between a one-tier board structure (with executive and non-executive directors) and a two-tier board structure (with managing and supervisory directors). In its Action Plan, the Commission welcomed the idea to offer additional organisational freedom to listed companies, but considered that the implications of such a proposal should be carefully assessed.

### **Question 8**

**Should the question of the choice of board structure be addressed at EU level? Please give your reasons.**

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

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

#### 2.2.1.3. Squeeze out and sell out

In accordance with the High Level Group Recommendations, the Commission proposal for the simplification and modernisation of the 2<sup>nd</sup> Company Law Directive on capital maintenance<sup>14</sup> provided for the introduction of two new provisions, as follows:

- where a majority shareholder holds at least 90% of the shares issued by a listed company he/she would have the right to acquire the remaining shares at a fair price from the minority shareholders (so-called “squeeze out right”), and
- a minority shareholder wanting to withdraw from his/her participation in a company would have the complementary right to compel the majority shareholder to buy his/her shares at a fair price (so-called “sell out right”).

These provisions will, however, not be contained in the final text of the Directive, once it is adopted. One reason for this was that during the negotiations on this proposal the view prevailed that inclusion of such provisions would go beyond the simplification objective pursued by this proposal. The Commission seeks stakeholders' views on whether there remains a need for action at EU level on this issue.

#### **Question 9**

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

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

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

#### 2.2.1.4. Groups and pyramids

The Commission considered in the Action Plan that there is no need to enact an autonomous body of law specifically dealing with group relations. However, it concluded that particular problems should be addressed in two areas in order to protect the interests of shareholders and creditors<sup>15</sup>, *i.e.* the implementation of group policy and abusive pyramids. The Directorate General for Internal Market and Services wonders whether there is any need for EU action in these areas since at present it is not aware of any practical difficulties which render EU action necessary.

#### **Question 10**

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<sup>14</sup> COM (2004) 730 final.

<sup>15</sup> Improved transparency as regards financial and non financial information about groups of companies was regarded by the Commission's Action Plan as a short term priority and already addressed in existing or pending legislative measures.

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

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

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

#### *2.2.2. Legal forms of enterprises*

##### *2.2.2.1. The European Company<sup>16</sup>*

On 8 October 2004, the "Societas Europaea" (SE) became reality, with the entry into force of the Statute of the European Company. The SE represents a significant development as it makes it possible for European companies to merge across borders and to transfer their seat from one Member State to another. SEs can operate across the EU with reduced costs and unified management. Several SEs have been incorporated so far.

After one year of the application of the Regulation, the Directorate General for Internal Market would like to assess use made of the existing law and in particular, whether more flexibility is necessary for companies wishing to establish SE and operate on a European-wide basis.

According to the Regulation, the Commission should draw up, within 5 years from the entry into force of the Regulation, a report on the application of the Regulation and possible proposals for amendments. In particular, the following issues are to be analysed:

- the appropriateness of allowing the location of an SE's head office and registered office in different Member States;
- the need for broadening the concept of merger to admit other forms of mergers than those currently accepted for the constitution of a SE (i.e. merger by acquisition or by the formation of a new company).

### **Question 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.**

##### *2.2.2.2. The European Private Company*

The development of a European Private Company (EPC) in addition to the European Company is demanded by the private sector. Such new legal form, complementary to the national forms of private companies in Member States, would primarily serve the interests of small and medium sized enterprises (SMEs) active in more than one Member State.

The EPC could provide SMEs with an adequate structure to establish joint ventures leaving enough organisational flexibility. Costs linked to the setting up and operation of

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<sup>16</sup> Though not part of the Action Plan, the European Company is inserted in the present consultation document due to the close relationship between such statute and the Action Plan.

subsidiaries of different forms in other Member States would be significantly reduced. The “European label”, notably the transparency of this legal form could raise confidence in partner companies and facilitate doing business across Europe.

The EPC would not create additional administrative burdens for companies. On the contrary, it would provide European companies with a new legislative tool which would facilitate cross-border operations and increase the companies' mobility.

A feasibility study on the EPC Statute, launched on the basis of the Action Plan, identifies the practical benefits of and difficulties related to the introduction of such a Statute. The executive summary is available on

<http://europa.eu.int/comm/enterprise/entrepreneurship/craft/index.htm>

The recently adopted 10<sup>th</sup> Company Law Directive on cross-border mergers solves a number of problems related to corporate restructuring. It therefore meets one of the objectives advocated for the EPC.

### **Question 12**

**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.**

**If so, are there, in your view, specific elements which any such statute should cover?**

#### 2.2.2.3. The European Foundation

A study on a European legal form for foundations (European Foundation Statute) was envisaged for the medium term in the Action Plan. The study would assess whether the introduction of such a Statute is feasible in the light of the regulatory differences in national laws. Furthermore, it would examine whether this new legal form adequately addresses some of the legal and administrative difficulties that foundations face in their cross-border operation (e.g. raising funds from foreign donors) and whether it would significantly contribute to the improvement of their cooperation across borders.

### **Question 13**

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

## **3. SIMPLIFICATION AND MODERNISATION OF EUROPEAN COMPANY LAW**

### ***Simplification of the EU regulatory environment – a Lisbon priority***

Over the past few years, European leaders and the Commission have put increasing emphasis on streamlining the EU's regulatory environment in order to increase its effectiveness. A range of initiatives have been launched by the Commission, the European Parliament and the Council to codify, consolidate and simplify existing legislation and better evaluate the likely economic, social and environmental impacts of new regulatory proposals.

In the context of the renewed Lisbon Strategy, refocused on growth and jobs, the Commission announced its intention to launch a comprehensive initiative to ensure that the regulatory framework in the EU meets the requirements of the twenty-first century. In March 2005, the Commission identified simplification as one priority action for the EU<sup>17</sup>. Simplification intends to make legislation less burdensome, easier to apply and thereby more effective in achieving its goals.

In its strategy for the simplification of the regulatory environment<sup>18</sup>, the Commission announced its intention to make use of several methods for the simplification of the EU acquis. These could consist of a combination of the repeal of irrelevant or obsolete legal acts, the codification and the recasting of EU legislation.

Efforts are on-going to ensure the repeal of those legal acts which are irrelevant or obsolete. However, in order to have the desired practical effect, the repeal of Community instruments must be followed by the repeal of the corresponding national implementing measures.

The codification method provides more readable and legally secure texts, thus facilitating transparency and enforcement. The recasting technique allows simultaneously amending and codifying legal acts. According to the Communication on simplification, priority will be given to the merging of legal acts to maximise synergies, minimise overlaps and redundancies and increase the clarity and consistency of Community rules<sup>19</sup>.

### ***On-going efforts in the field of Company Law***

Several initiatives have already been launched for the simplification and modernization of Company Law Directives. In the context of the fourth phase of the Simplification of the Legislation on the Internal Market process (SLIM), the Commission undertook the revision of the First and Second Company Law Directives. The on-going revision of the 2<sup>nd</sup> Company Law Directive will allow simplify the rules on the formation of public limited liability companies and the maintenance and alteration of their capital. Moreover, additional simplification measures seem appropriate in order to allow for more flexibility in the management of companies.

In the 2003 Action Plan, the Commission considered the simplification of the Third and Sixth Company Law Directives as a priority for the medium term (2006-2008). A further revision of the Second Company Law Directive was envisaged in the long term in order to allow the possible introduction of an alternative capital regime in this Directive.

The simplification of restructuring transactions pursued by the relaxation of some of the requirements foreseen by both the 3<sup>rd</sup> and 6<sup>th</sup> Company Law Directives on merger and division of public limited liability companies is desirable in so far as the necessary safeguards are ensured. Both Directives are encompassed in the simplification rolling programme contained by the Communication on the simplification of the regulatory

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<sup>17</sup> Better Regulation for Growth and Jobs (COM (2005) 97 final).

<sup>18</sup> COM (2005) 535 final.

<sup>19</sup> See COM (2005) 535 final p. 7.

environment<sup>20</sup>. They have been identified as presenting a simplification potential likely to lead to the improvement of industrial competitiveness

### ***Coherence with other actions in related sectors***

Improving the competitiveness of European business requires an integrated approach at EU level which encompasses actions led in complementary sectors. In this regard, it is crucial to ensure that the initiatives launched in the field of company law and corporate governance are coherent with existing and planned measures in related sectors such as financial services, financial reporting, corporate social responsibility and the EU industrial policy.

### ***Towards a simplified, more user-friendly regulatory framework for company law***

The proliferation of isolated amending acts does not help making European Company Law more ‘*user friendly*’. On the contrary, isolated amending acts make legislation difficult to understand. They should therefore be avoided. Potential inconsistencies or gaps should be tackled.

All this could be achieved through the recasting of European Company Law. The horizontal recasting technique permits the adoption of a single legislative text which simultaneously makes the necessary amendments to several parallel earlier acts relating to the same subject (simplification and/or modernisation), codifies them with the unchanged provisions of the earlier acts and repeals these acts.

The recasting technique would allow to simplify and modernise existing Company Law provisions without revolutionizing the nature of such provisions. The existing directives could be merged and a single Directive on Company Law adopted with different sections regrouping relevant provisions of the various directives.

### **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.**

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<sup>20</sup> COM (2005) 535 final.

## **ANNEX 2: Results delivered during the first phase of implementation of the Action Plan**

### *(1) Recommendations on directors*

The Recommendation on independent directors<sup>21</sup>, adopted on 15 February 2005, will help reinforcing the presence and role of independent non-executive directors on listed companies' boards. The Recommendation on directors' remuneration<sup>22</sup>, adopted on 14 December 2004, will help ensuring that listed companies disclose their policy on directors' remuneration and inform shareholders of the amount and form of individual directors' remuneration. Protecting shareholders, employees and the public against potential conflicts of interest and ensuring that shareholders are given adequate control over remuneration schemes are particularly important to restore confidence in financial markets after the recent wake of scandals.

### *(2) Establishment of the European Corporate Governance Forum and the Advisory Group on Company Law and Corporate Governance*

In order to coordinate the corporate governance efforts of Member States, the Commission set up, on 18 October 2004, the European Corporate Governance Forum composed of high-level personalities whose experience and competence are widely recognised at Community level. On 28 April 2005, the Commission created the Advisory Group on Company Law and Corporate Governance, composed of non-governmental experts from various professional backgrounds with particular experience and knowledge of the subject, to provide detailed technical advice on preparing corporate governance and company law measures. Both Forum and Advisory Group are delivering precious input to the Commission.

### *(3) Revision of the Accounting Directives*

The Commission tabled, on 28 October 2004, four key revisions of the Accounting Directives to enhance confidence in financial reporting by companies<sup>23</sup>: (1) confirm the collective responsibility of board members for financial statements and key non-financial information at EU-level; (2) increase the transparency of unlisted companies' transactions with related parties; (3) improve the provision of information about off-balance sheet arrangements, including Special Purpose Vehicles which may be located offshore and (4) establish the obligation for listed companies to issue an annual "corporate governance statement". The ECOFIN Council agreed on 6/7 June 2005 on a general approach<sup>24</sup>. The European Parliament adopted its opinion on 15 December 2005. The Directive could be adopted in single reading in early 2006.

### *(4) Simplification of the 2<sup>nd</sup> Company Law Directive*

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<sup>21</sup> OJ L 52/51, 25/02/2005.

<sup>22</sup> OJ L 385/55, 29/12/2004.

<sup>23</sup> COM (2004) 725 final.

<sup>24</sup> Documents 9588/05 ADD 1 and ADD2.

On 29 October 2004, the Commission adopted a Proposal modernising the Second Company Law Directive on the formation, maintenance and alteration of capital of public limited liability companies<sup>25</sup> with the objective to reduce the cost and procedural burden for public limited liability companies in the context of capital related measures. The Council adopted its general approach on 29 November 2005. The vote in Parliament could take place in Committee in the beginning of 2006 and in Plenary during spring 2006.

#### *(5) 10<sup>th</sup> Company Law Directive on cross-border mergers*

The 10<sup>th</sup> Company Law Directive on cross-border mergers was adopted in single reading on 26 October 2005<sup>26</sup>. At the expiry of a twenty-four month transposition deadline, this Directive will facilitate mergers of limited-liability companies on a cross-border basis, which at present are impossible or entail prohibitive costs. It sets up a simple framework drawing largely on national rules applicable to domestic mergers and avoids the winding up of the acquired company. The cross-border mergers Directive is considered as a key regulatory action for growth and employment<sup>27</sup>.

#### *(6) Shareholders rights*

On 16 September 2004, DG Internal Market (MARKT) published a public consultation document entitled “fostering an appropriate regime for shareholders’ rights”. This consultation paper called for comments on the need, if any, for EU minimum standards to facilitate the cross-border exercise of shareholders’ rights in listed companies. A total of 146 responses were received. The vast majority of respondents confirmed that non-resident shareholders face several difficulties when seeking to exercise their rights and that EU minimum standards would significantly facilitate both their access to the relevant information and the exercise of their rights in General Meetings. On this basis, a second public consultation was launched on 13 May 2005, inviting comments on possible EU minimum standards to facilitate the cross-border exercise of shareholders’ rights. 138 responses were received. The large majority of respondents confirmed the need for a directive in this field and supported the minimum standards submitted to discussion in the consultation document. A proposal for a Directive will be submitted to the College before the end of 2005.

#### *(7) Feasibility of an alternative to the capital maintenance regime*

On 13 August 2005, the Commission published a call for tender for a feasibility study on alternative to capital maintenance regime as established by the Second Company Law Directive and the examination of the implications of the new EU-accounting regime on profit distribution. The terms of reference of the feasibility study will be re-examined by the members of the Advisory Group on Company Law and Corporate Governance and a further call for tender will be published in early 2006.

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<sup>25</sup> COM (2004) 730 final.

<sup>26</sup> Directive 2005/56/EC, OJ L 310/1.

<sup>27</sup> Commission Staff Working Document: Annex to the Communication from the Commission to the Council and the European Parliament – Common Actions for Growth and Employment: the Community Lisbon Programme, Regulatory Action n° 19 (SEC (2005) 981).