EUROPEAN COMMISSION
Directorate General Internal Market and Services

CAPITAL AND COMPANIES
Corporate governance, social responsibility

FEEDBACK STATEMENT

SUMMARY OF RESPONSES TO THE PUBLIC CONSULTATION ON

THE FUTURE OF EUROPEAN COMPANY LAW

July 2012

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http://ec.europa.eu/internal_market/

1. OVERVIEW

On 20 February 2012, DG Internal Market and Services of the European Commission launched a public consultation on the future of European company law. European company law provides a common set of rules that offers equivalent protection to shareholders, creditors and other stakeholders across the EU who are affected by companies' actions. The growth of cross-border trade and the development of e-commerce present many opportunities for businesses and consumers but they also present challenges for the existing company law framework. That is why reflection on how to adapt the existing framework to the new landscape of the 21st century is necessary. Moreover, today's challenges require us to look at company law not only from a purely legal perspective but in the wider context of corporate governance, corporate social responsibility and businesses' key role for innovation and growth.

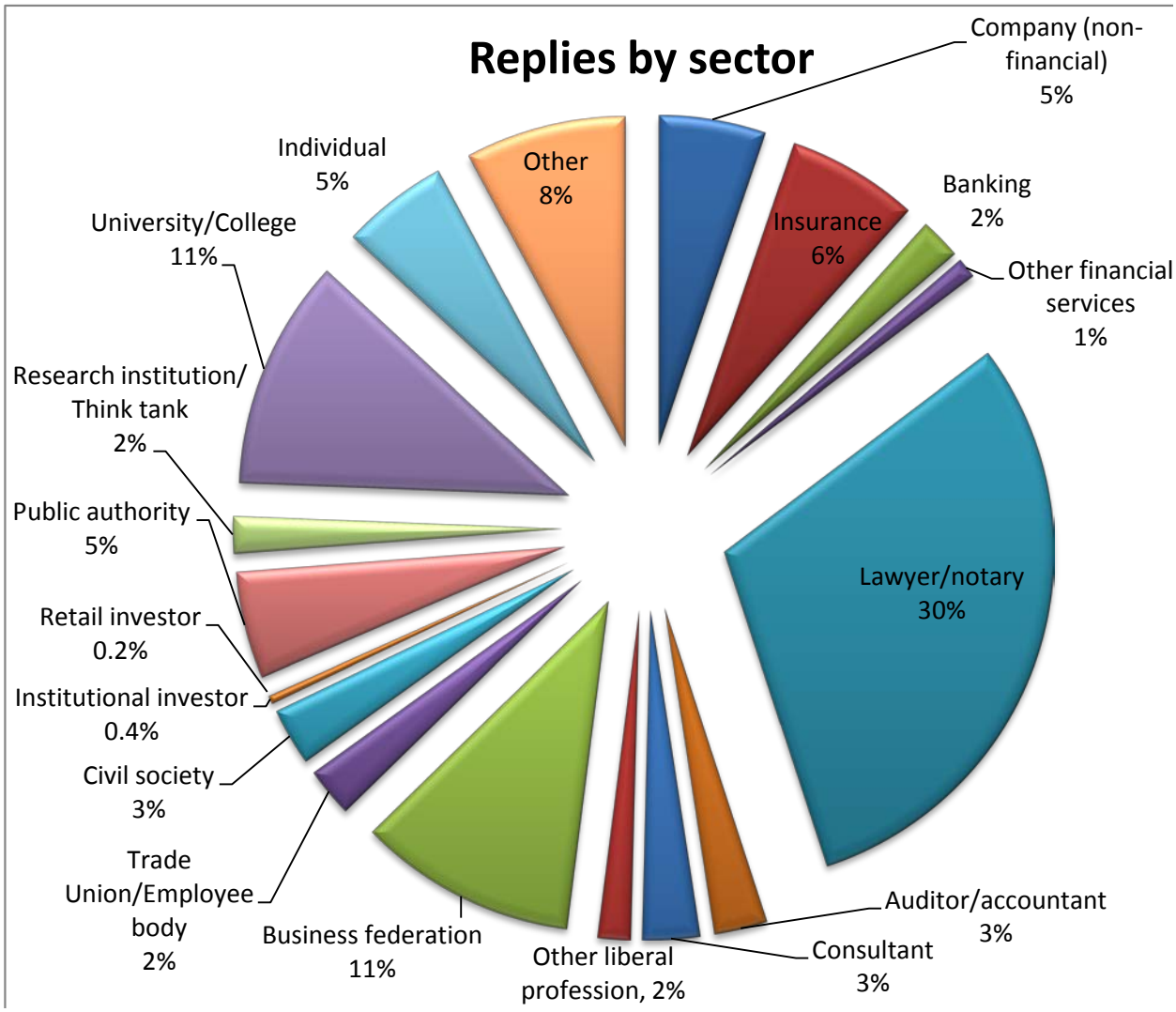
DG Internal Market and Services received 496 responses to the consultation that ended on 14 May 2012. Contributions were made by public authorities, trade unions, civil society, business federations, liberal professions, investors, universities, think tanks, consultants and individuals, allowing for a broad representation of society. Replies originated in 26 EU Member States and in a number of countries from outside the EU. 118 of the 496 replies, i.e. 24%, were provided by organisations and stakeholders registered in the Interest Representative Register.

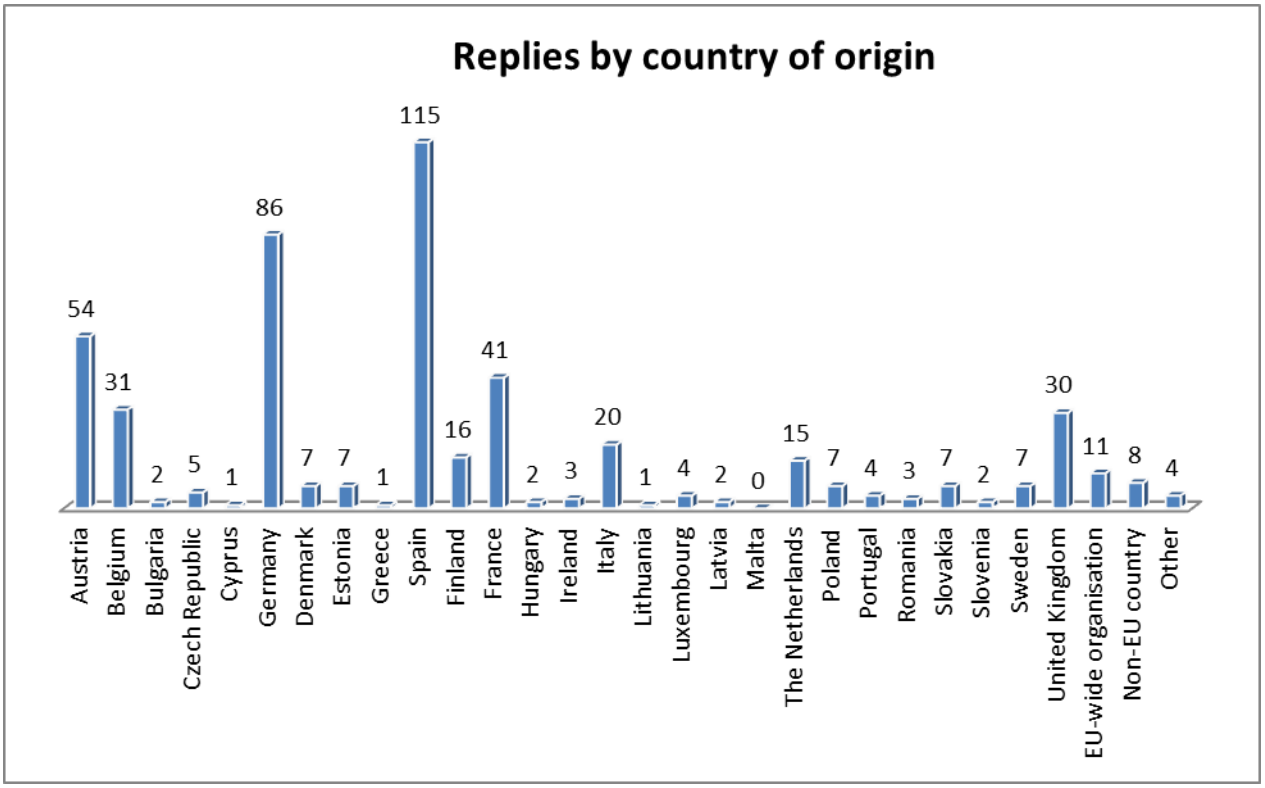
Input was also provided by an important number of EU-wide organisations. An additional number of comments, position papers and contributions were received outside the consultation, including official positions provided by some governments. Even though they are not reflected in the figures of this feedback statement, they will also be taken into account in the analysis of the legal and factual situation and in the preparation of the steps ahead.

DG Internal Market and Services would like to thank the respondents for their contributions.

This report summarises the results of the consultation. The report does not provide detailed statistical data but rather seeks to give a qualitative presentation of the contributions received. It does not give any indication of potential initiatives, which the Commission may undertake in the future in this area.

The following page contains two graphs giving a more detailed overview of the replies received by sector and by country of origin.


Replies by sector
Company (non-financial) 5%
Banking 2%
Other financial services 1%
Insurance 6%
Other 8%
Individual 5%
University/College 11%
Research institution/ Think tank 2%
Public authority 5%
Retail investor 0.2%
Institutional investor 0.4%
Civil society 3%
Trade Union/Employee body 2%
Business federation 11%
Other liberal profession, 2%
Consultant 3%
Auditor/accountant 3%
Lawyer/notary 30%


Replies by country of origin
54
31
2
5
1
86
7
7
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115
16
41
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3
20
1
4
2
0
15
7
4
3
7
2
7
30
11
8
4
Austria
Belgium
Bulgaria
Czech Republic
Cyprus
Germany
Denmark
Estonia
Greece
Spain
Finland
France
Hungary
Ireland
Italy
Lithuania
Luxembourg
Latvia
Malta
The Netherlands
Poland
Portugal
Romania
Slovakia
Slovenia
Sweden
United Kingdom
EU-wide organisation
Non-EU country
Other

2. DETAILED ANALYSIS OF RESPONSES

II. OBJECTIVES OF EUROPEAN COMPANY LAW

QUESTION 5

What should be the objective(s) of EU company law?

This was the question on which the highest number of respondents expressed a clear view (99.2%). This demonstrates the strong public interest in where EU company law should be headed. The question allowed respondents to select more than one reply. Improving the business environment and corporate mobility was chosen by two thirds of participants. Enhancing the protection of creditors, shareholders and members came second with more than 50%. Facilitating the creation of companies and fostering regulatory competition came third and fourth with a little more than 40% of responses each. Improving the protection of workers gathered a quarter of replies. More than a quarter of respondents provided other objectives or gave additional input.

The additional or alternative objectives diverged to a large extent. Some said that EU company law should promote a high level of social and environmental protection. Workers' involvement rights should be strengthened. Company law should also promote a sustainable economy with a long term view. Moreover, it should offer protection against delocalisation and standard dumping. Others said that workers' rights were not part of company law as such or that the balance between the interests of creditors, shareholders and employees was not for the EU to decide but should be left to national law. Quite a number of replies held that EU company law should provide a level playing field. Some said that an objective should be to achieve a high degree of transparency. Respondents also argued that EU company law should strive to reduce regulation and provide simple rules and legal certainty. Others demanded that it should also facilitate cross-border transactions which had not necessarily anything to do with mobility. It was also said that EU company law should recognise different models of carrying out business, e.g. in the form of a cooperative, a mutual society or an association. Some held that company law should comprise or fully take into account tax and insolvency rules. Additional objectives that were named included the prevention of the state from interfering with businesses and the abolition of the concept of legal capital.

III. SCOPE OF EUROPEAN COMPANY LAW

QUESTION 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?

The most popular option, with almost 40% of replies, was to combine improving the existing harmonised legal framework and exploring new areas for harmonisation. About one quarter of replies asked the EU to focus on new areas and almost 20% to concentrate on improving the existing rules. Only about 13% of replies mentioned that there was no need for further harmonisation. This group mainly identified soft law or the exchange of best practices as the way forward.

The most frequently mentioned areas for an improved harmonisation were the rules on disclosure, nullity and branches (so-called first and eleventh company law Directives)

and the cross-border merger regime (so-called tenth company law Directive). The instruments on which there was the least demand for reform were the shareholders' rights Directive and the single member Directive (so-called twelfth company law Directive). The four suggested new areas to explore gathered each at least one quarter of all replies, with the transfer of seat coming out on top. More details on these instruments and areas will be given under the questions further below.

More than a third of respondents who spoke against further harmonisation were companies or business federations. Many were of the opinion that harmonisation had reached a sufficient level. Further measures, if any, should be subject to thorough impact assessments and be limited to cross-border issues. Others had doubts about the merits of harmonisation in general. Some asked the EU to focus on simplifying the existing framework. There was also opposition from respondents who preferred more regulatory competition. The case was made that instead of harmonising company law further, the EU should put in place a substantive insolvency regime. Others promoted the development of clear conflicts of laws rules applicable to companies or a better protection of employees.

Some respondents explicitly mentioned additional or alternative priorities to be examined, for example the development of a European mutual society statute or specific merger rules applicable to mutual societies, allowing the separation of seat, providing a general regime for asset transfers, creating a shareholder identification mechanism, improving the information flow in the investment chain (upstream and downstream), vigorously assisting start-ups, further harmonising the internal governance structures of companies or granting the right to choose between the dual and the single board system, introducing exit rights for shareholders in unlisted companies, improving the tax rules applicable to companies, or putting in place EU minimum standards for the information, consultation and participation of workers. It was also suggested that the EU looked at the development of civil liabilities rules for company directors or a cross-border register for disqualified directors.

QUESTION 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?

More than 60% of respondents were in favour of shifting the focus of European company law away from the traditional distinction between public/private companies towards listed/unlisted companies. About 24% of replies were against such an idea, whilst more than 15% expressed no view on the matter. About a third of replies said that this new approach should apply to all instruments harmonising EU company law. A quarter of replies wanted to see this approach limited to certain instruments only. In this group, there was no common view, however, to which instruments this should be applied in practice. About two thirds (i.e. about 17% of all replies) agreed on the shareholders' rights and takeover bids Directives. But the other instruments gathered only between 13% and 25% each in this group (i.e. only between 3% and 6% of all replies).

The main divide between opinions on the two major options was reflected in practically all sectors. The supporters of a move away from the more traditional distinction argued that the needs for regulation for listed companies were rather different than for public companies whose shares were not admitted to trading on a regulated market. Listed companies needed specific and well-targeted rules. In this context, some respondents also

voiced support for the introduction of further company size thresholds to offer a tailor-made business environment to companies. It was also said that a shift towards a distinction between listed/unlisted companies had the merits of being objective and straightforward. But some warned against the risk that such a new approach could lead to more and more prescriptive rules on listed companies, which they believed should be avoided.

IV. USER-FRIENDLY REGULATORY FRAMEWORK FOR EUROPEAN COMPANY LAW

QUESTION 8

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

There was a strong support for the idea of codifying EU company law Directives. Altogether, more than 75% of respondents said that they would agree with such an initiative. Only a minority of about 19% of respondents were against such a measure. 25 respondents did not show any preference at all. In the group of supporters, more than two thirds favoured the merger of Directives dealing with related topics. Only 22% said they would prefer a codification of all company law Directives.

The positive replies came from across all sectors, in particular from individual companies, liberal professions, public authorities and individuals. They underlined the usefulness of reducing the number of Directives and of consolidating the dispersed legal provisions to make the law more accessible. Business federations were divided on the question. The idea of codification was rejected by a majority of trade unions, institutional investors and think tanks. Amongst their arguments was the fear that codification could mean the introduction of new burdensome regulation in disguise or a reduction of existing workers' rights. It was held that codification was not a priority and that the Commission should rather focus on more pressing issues. As an alternative, a regular consolidation of the applicable Directives was suggested. The case was also made that codification would not help users as they normally dealt with national (transposition) measures and not with the Directives themselves which were only addressed to Member States. Some were afraid that the codification work would lead to unintended errors, new inconsistencies or additional legal risks.

V. EU COMPANY LEGAL FORMS

QUESTION 9

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

The European image and label which EU legal forms offer, and savings in costs of cross-border transactions were mentioned most often by respondents as examples of added value that EU legal forms can bring to European companies, each of those being mentioned by at least a third of all respondents. Whereas the responding business federations, lawyers and academic saw the image as the most important advantage, cost savings came on top for companies and public authorities. Depending on the group of respondents, other advantages were also referred to among the top three priorities. For instance, the fact that the EU legal forms provide an ad-hoc solution to cross-border related issues was the second most important advantage for the responding lawyers; the possibility to carry out cross-border operations such as a transfer of seat was a top

advantage (together with cost savings) for public authorities and was a third priority for academics; and companies, in addition to cost savings, pointed to the EU legal forms giving them a possibility not to be subject to compulsory national requirements and providing workable alternatives to national company law forms. Respondents from trade unions, in addition to cost savings, underlined the importance of labour law reasons and full legal personality provided by the EU legal forms.

At the same time, a third of respondents questioned that the EU legal forms brought added value to European businesses. This view was in particular expressed by around 40% of replies from insurance industry and lawyers, more than half of participating accountants and consultants, and 19% of national business federations. The limited added value was thought to be caused, among others, by complexity and many cross-references to national legislation. Some respondents also mentioned lack of common tax provisions in this context whereas some others thought there was no practical need for EU legal forms as shown, in their view, on the example of experience with the European Cooperative Society Statute.

QUESTION 10

What, if any, are the main shortcomings of EU legislation introducing EU company legal forms?

The three main shortcomings according to the respondents included the complexity caused by frequent cross-references in EU legal forms to national legislation (according to 66% of respondents), uncertainty due to simultaneous application of different national laws (according to 55% of replies) and different ways in which the EU legal forms were used at national level (in view of half of respondents). This order of importance of shortcomings was shared by companies, business federations, public authorities, lawyers and the academic sector.

More than a fifth of respondents quoted additional shortcomings. For instance, more than 80% of respondents from trade unions provided such examples and, among others, drew attention to the lack of EU level registration, lack of sufficiently high standards for worker involvement and lack of transparency about many companies which took on the EU legal form. Some companies mentioned lack of awareness about the EU legal forms by public authorities, lack of common tax provisions and rules regarding worker involvement which were seen as complex. The issue of lack of experience among practitioners with the EU legal forms was also raised in some replies from lawyers.

QUESTION 11

Should existing EU company legal forms be reviewed?

The majority of respondents (62%), including almost all responding trade unions, more than 80% of companies and academics, 75% of business federations, and majority of public authorities (69%) and lawyers (53%), were in favour of reviewing the existing EU company legal forms.

Most of respondents favouring revision thought that it should focus in particular on increasing uniformity of the EU legal forms by reducing cross-references to national legislation (61%) and on simplifying and rationalising the existing procedures (60%). These two issues were seen as particularly important objectives by a large majority (over 85%) of responding companies, including in the financial services sector. Over a third of

all respondents also stressed that the revision should focus on making it possible to have the registered office and the headquarters in two different Member States; this issue was often raised by the participating companies and representatives of the academia and think-tanks. Finding an explicit solution to the issue of shelf companies was the next most often raised objective, by 28% of replies supporting the revision. Almost all responding trade unions and a number of responses from lawyers and public authorities drew attention to it. Among additional reasons for revision, several respondents provided specific suggestions for revising the European Company Regulation; a few replies referred to the European Cooperative Statute and a new statute for mutuals but views were divided as regards the need for future work in those two areas.

At the same time, a quarter of respondents did not see the need for modification; this view was expressed, for instance, by a third of responding lawyers and notaries.

QUESTION 12

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

75% of respondents had a clear view on this. Out of this group, only one third replied positively to the question. Support came in particular from university sector. Respondents which were in favour of this initiative considered that it could promote best practices and serve as inspiration to national legislators. The flexibility of this framework and its optional character were seen as an advantage.

Many of those that responded by negative considered that EMCA could not be seen as an alternative but rather as a complement to traditional harmonisation. Several respondents pointed out that EMCA project did not benefit from the views of business, investors, creditors, legal practitioners and other interested parties. Some respondents also considered that the great diversity of national legal traditions made it impossible to propose universal solutions.

VI. THE PARTICULAR CASE OF THE *SOCIETAS PRIVATA EUROPAEA* (SPE) STATUTE

QUESTION 13

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

Over 85% of participants had a view on this question. A vast majority were in favour of Commission actions supporting SMEs. They differed, however, as to the means to achieve it. A majority of those who expressed an opinion were in favour of exploring alternatives to the SPE Statute, in particular supporting an instrument labelling existing national company law forms that meet a number of pre-defined harmonised requirements. The second most favoured option was the continuation of work on the current SPE proposal. The support was lower for initiatives such as modifying the Statute of the European Company or the creation of a simplified single-member company charter.

The support for further work on the SPE came in particular from companies and business federations. Some business federations mentioned also means other than company law

which could be used to improve the legal environment for SMEs. Some voices argued for the revision of the 12th Company Law Directive 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).

Trade unions supported the labelling initiative and expressed concerns about possible negative impact of the SPE Statute on employee rights. Most lawyers were also in favour of the labelling, although some stated that the major difficulties for SMEs were due to the complexity of the national legislations in the field of taxation and social law.

VII. CROSS-BORDER TRANSFER OF A COMPANY'S REGISTERED OFFICE

QUESTION 14

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

A great majority of respondents (over 80%) expressed a clear view on this question. There was a strong support for the option of facilitating cross-border transfer of registered office by introducing a harmonising Directive, with a strong majority of 68% of participants. The support was even higher as regards certain groups of participants, in particular, over 80% of trade unions and lawyers, and over 50% of companies and business federations.

The minority of respondents (7%) preferred the option of facilitating cross-border transfers of registered office through some other measure. . This option was supported only by less than 10% of companies, lawyers and business federations.

Also less than 10% of respondents (lawyers, trade unions, business federations and companies) did not support action at EU level at all. The reasons differed; either it was because the existing framework provided sufficient tools for cross-border transfer of registered office or was due to other causes.

QUESTION 15

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

The significant majority of participants (over 70%) conditioned the cross-border transfer of registered office on there being no proceedings for winding-up, liquidation, insolvency suspensions of payments or similar open against a particular company. This option was supported by nearly all trade unions and over 80% of business federations. The opinions on the other necessary conditions for the transfer of seat were divided.

On the one hand, less than half of participants expressed support for imposing an obligation on Member States to accept the transfer of registered seat, even if it was not accompanied by the transfer of the company's headquarters or principal place of business. Overall, this was the most favoured option and the decoupling of registered and real seat was supported by 46% of lawyers, 43% of business federations but did not gain much support from the trade unions.

On the other hand, the compulsory attachment of the real seat to the registered seat during a transfer was the most favoured option by the trade unions but only received the support of around 30% of participants. Companies and business federations were predominantly against this approach. Only less than 10% of the latter supported this option. The number of public authorities and universities in favour of this option was also low (less than 20%).

At the same time, only a quarter of participants were in favour of leaving the decision to the Member States as to whether they would require the transfer of both registered and real seat together. This option was mostly favoured by the public authorities but only less than 10% of business federations, companies and trade unions supported it.

QUESTION 16

What should be the consequences of a cross-border transfer of registered office?

According to the overwhelming majority of participants (77%) the company should not lose its legal personality in case of the transfer of seat. This option was favoured by over 80% of lawyers and companies but did not receive much support from the trade unions.

Also the significant majority took the view that the transfer of registered office should not result in a loss of the pre-existing rights of shareholders, members, creditors and employees. This option received unanimous support of the trade unions. 80% of lawyers, 65% of companies and 60% of business federations were in favour.

Most of the participants agreed that the company seat should be transferred without the necessity of winding up the company in the home Member State. This option received the overwhelming support of business federations and lawyers (over 70%), with the support of 50% of companies. The majority of trade unions were not in favour.

VIII. CROSS-BORDER MERGERS

QUESTION 17

Do you support further harmonised rules in the Directive?

79% of participants expressed a clear view on this question. 67% of respondents supported introducing further harmonised rules in the Directive, with 58% of the participating companies and 55% of the participating business federations, majority of the participating trade unions and most of the responding lawyers, accountants and consultants being in favour. All the potential areas for further harmonisation received considerable support, of at least around a half of respondents. The methods for valuation of assets in cross-border mergers were the most supported area for introduction of the rules; for instance, a large majority of companies (80%) indicated this area as a priority. Lawyers, accountants and consultants also expressed a preference for focusing on the methods for valuation of assets but other areas also received their substantial backing.

The subsequent highest-scoring areas were the consequences of creditors' rights on the completion of the merger (53% of those in favour of revision) and the duration of the reviews by national authorities (52%). These issues were mentioned by a number of lawyers and academics and some business federations. Among additional areas for

harmonisation, half of trade unions who were in favour of further harmonisation called for strengthening the worker involvement rules.

A minority (12%) of participants did not support introducing further harmonised rules in the Directive, with the majority of those indicating that there was no need for further harmonisation in this area but also with a considerable number of responses mentioning that the areas currently not covered in the Directive were better dealt with in national legislation. Those replies came from, among others, more than a third of responding public authorities and a quarter of responding trade unions.

IX. CROSS-BORDER DIVISIONS

QUESTION 18

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

74% of participants expressed a clear view on this question. A majority (64%) of participants were in favour of introducing rules on cross-border divisions, including almost all responding lawyers, accountants and consultants; majority of business federations, public authorities and academics; and half of responding companies.. Out of those, 75% indicated that the rules should build on the framework established in the Directive on cross-border mergers. A majority of those respondents saw all the presented reasons for building on this framework as important. More specifically, the responding lawyers gave most weight to the fact that the framework in the Directive presented the best structure to deal with this type of cross-border activities (this view was also supported by some companies) and that it had proven to be sustainable whereas a majority of public authorities, business federations and some companies saw the fact that it was well known by the relevant stakeholders as more important.

Many participants in favour of introducing rules on cross-border divisions also indicated support for the harmonising rules to aim at shared liability of the involved companies for claims at the time of the division (over 40%). These replies came from a third of responding lawyers and, among others, from some business federations, public authorities and academics. The vast majority of those were in support of the shared liability to be based on the distribution of assets in the division.

At the same time, more than a quarter of respondents had no opinion and a small minority of respondents (10%) was not in favour of introducing rules on cross-border divisions at EU level. The latter response was expressed by the majority of participating trade unions, with replies otherwise spread across different categories of respondents. The opinions were divided as regards the reasons why EU legislation in this area would not be necessary. 52% of those against thought that divisions were better dealt with at national level whereas 46% believed that the division between EU and national legislation did not pose any problems, with the latter view being expressed by most of the trade unions.

X. GROUPS OF COMPANIES

QUESTION 19

Do you see a need for EU intervention in the field of groups of companies?

Over two thirds of respondents expressed support for EU intervention in the area of groups of companies. Support came in particular from lawyers but also from companies, trade unions and universities.

Proponents of EU action supported almost equally measures for better information on the group structure and the recognition of the group interest. Some also recommended other actions in this area, and namely several respondents mentioned the need for rules establishing liability of the parent company for subsidiaries. A small number of respondents also supported a harmonised European framework for corporate groups. Many respondents underlined, however, that any rules on groups should protect the interests of stakeholders involved, namely those of minority shareholders and creditors. Several responses also supported rules on groups of entities other than limited liability companies (such as mutual companies), rules on cash pooling or the need for equal treatment of vertical and horizontal groups.

A minority of respondents, in particular business federations, were not in favour of EU measures on groups. Respondents opposed to EU measures in this area considered in particular that there were no significant problems relating to groups that would require EU intervention or that in any case this was not a priority for EU action. Certain respondents also judged that national authorities were better placed to regulate groups.

XI. CAPITAL REGIME

QUESTION 20

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

Nearly 75% of respondents expressed an opinion on this question. Nearly two thirds of those were opposed to the review of the Second Company Law Directive. In particular, lawyers and business federations were opposed to the changes, while companies did not have a strong view. The opponents of the revision pointed out in particular that the current rules were flexible and left a significant margin of manoeuvre to Member States and that they had stood the test of time. Some respondents also recommended prudence and warned that changes of the capital regime could have considerable impacts on the protection of creditors and thus would require a very thorough assessment of possible effects.

Support for the review of the Second Company Law Directive came in particular from universities and think tanks but also from trade unions, who specifically supported the cumulative use of the balance sheet and the solvency test. Among the minority of respondents who were in favour of the review, the largest group supported the abolition or change of the minimum capital requirement, claiming that the legal capital was not an appropriate tool for the purpose of creditors' protection. There were also numerous voices supporting the use of the solvency test instead of, or in addition to, the balance sheet test. Several respondents also recommended that the regime of the abstention vote be

clarified. Some also recommended simplification of rules on evaluation of contributions, and of procedures for capital increase.

3. NEXT STEPS

The results of this consultation will feed into the analysis of the European Commission on the state of play and necessary future company law projects. The European Commission will prepare an Action Plan setting out the main initiatives it will take in the coming years concerning EU company law and corporate governance. This Communication is scheduled for adoption by the European Commission before the end of 2012. All interested parties are invited to visit DG Internal Market and Services' website regularly to keep informed of developments.