



“Modernising Company Law and Enhancing Corporate Governance in the European Union”

ETUC comments on the Commission Communication (Com. 2003 – 284)

Introduction

The purpose of this Commission Communication is to define the most important objectives intended to serve as a guide for EU initiatives to modernise European company law and enhance corporate *governance*.

Within this framework, the Commission proposes a plan of action for the instruments it intends to use in the short, medium and long term.

The reasons

The main reasons that persuaded the Commission to take this initiative are:

- to define a more homogeneous framework of reference on the subject of company law in order to facilitate the practice of cross-border establishment and restructuring operations. It also takes into account the fact that the now imminent enlargement will increase the differences that exist among the respective national legislations;
- to create the conditions necessary to avoid a repetition of recent corporate scandals, the repercussions of which have hit income, pensions, jobs and investments hard for millions of people.

The objectives

The objectives of the Plan of Action are to increase the rights of shareholders and the protection of third parties, as well as to promote the competitiveness of European enterprises on the world market.

Main contents of the Communication

The Commission plan of action tackles seven basic themes:

Corporate *governance*: the maintenance and alteration of company capital; groups and pyramids; corporate restructuring and mobility; the European private company; the cooperative society; greater transparency of national legislations on the subject of company law.

Corporate *governance*: the Commission proposes not to adopt an appropriate European code, preferring to set the objective of a common approach with the aim of establishing a few basic rules and of ensuring a stronger coordination of the different company codes that exist at national level.

Furthermore, to improve *information* and transparency, the Commission proposes – for listed companies – the drafting of an annual report on the subject of *governance*.

To pursue this objective, in the short term, the Commission intends to adopt the instrument of the Recommendation.

The Commission also believes that the information provided by so-called “*institutional investors*” on the subject of investments and of exercising the right to vote in the companies in which they invest must be increased.

To pursue this objective, the Commission intends – in the medium term – to adopt an appropriate Directive.

As far as strengthening *shareholders’ rights* is concerned, on the other hand, the Commission proposes to make it easier for them to exercise their rights, by asking listed companies to place a range of instruments at their disposal, such as access to information before general meetings, including by electronic means, and the right to vote, even without attending the general meeting, again by electronic means. The right, moreover, to ask questions in order to obtain clarifications needed before the meeting.

To pursue this objective, the Commission intends – in the short term – to adopt an appropriate Directive.

Furthermore, the Commission proposes to set in motion an appropriate study to strengthen the objective of greater corporate democratisation according to the principle known as “*one share, one vote*”.

Modernising the Board of Directors

The Commission proposes that, where there is a risk of conflicts of interest for executive directors (see, for example, directors’ pay and supervision of the auditing of accounts), decisions be made by non-executive directors or by the members of the Supervisory Board, who are therefore more independent.

To this end, the Commission foresees the setting of minimum criteria through the instrument of a Recommendation in the short term, including with regard to the composition and role of the Nomination Committees, the Remuneration Committees and the so-called Audit Committee.

Finally, as far as directors’ *remuneration* is concerned, the Commission’s aim is to establish a regulatory system based on four fundamental elements (information on pay policy in annual reports; detailed information on the composition of pay; preventive approval by the shareholders’ meeting with regard to the allocation of shares or options on shares to the directors; consideration of the costs incurred by the company for the above-mentioned incentive schemes).

To pursue this objective, the Commission intends to take action – in the short term – in the form of a Recommendation.

Furthermore, as far as the *responsibility* of the directors is concerned, the Commission states the objective of providing for the collective responsibility of all the directors, both for the financial state of the company and for non-financial documents.

The Commission also proposes the debarment of directors from holding such a position if they present misleading information – financial or otherwise – or in cases of bad management.

To pursue this objective, the Commission proposes to adopt a Directive in the short term.

In conclusion, with regard to this chapter on *governance*, the Commission proposes to create a European Forum of *corporate governance* with the objective of encouraging the coordination and convergence of the various national codes.

This objective should be set by the Commission in the short term.

As is evident from the details of the above-mentioned information, *corporate governance* forms the basic core of the Communication. The other subjects are, on the other hand, tackled in a more general way.

To sum up:

- Capital maintenance and alteration

The objective is to simplify the second Directive on company law in order to increase competitiveness without reducing the protection offered to shareholders and creditors.

The Commission intends to adopt a Directive in the short term.

- Groups and pyramids

The Commission is not proposing an appropriate Directive but only to: improve information, financial and otherwise; establish rules for a more coordinated group policy; provide for the requirement not to allow companies belonging to unlawful pyramidal structures on to the quoted list of companies.

- Corporate restructuring and mobility

The Commission proposes – in the short term – to adopt a Directive on both cross-border mergers and the mobility of companies from one Member State to another.

In the medium term, the Commission proposes to simplify both the 3rd and 4th Directives on company mergers and break-ups.

- European private company

The Commission intends – in the short term - to carry out a “feasibility study” on the subject of this new company option aimed, in particular, at meeting the needs of small and medium-sized enterprises (SMEs).

- Cooperative society and other legal forms of enterprise (e.g. foundations – mutual societies)

The Commission proposes to develop the legislative initiative to promote the development of new legal forms for these types of enterprises.

- Increase in the transparency of national legal forms of enterprise

The Commission proposes – in the medium term - to increase the advertising requirements applicable to all legal corporations with limited liability.

Appraisals

There are obviously criticisms of a general nature to be presented regarding the Communication as a whole, and more detailed opinions regarding the various chapters that go to make it up.

As far as the latter are concerned, as the consultation procedure is developed, it is our intention to move from general comments to drafting amendments to be presented at every opportunity of the confrontation.

General comments

The Commission’s decision to intervene in company law is legitimate and opportune.

The recent scandals that have emerged, first in Japan, then in the United States as well as in Europe, show how the transparency rules intended to represent the framework of reference for the behaviour of European companies need to be more clearly defined.

The very process of enlargement implies the need to harmonise the various legislations that exist at national level in order to define a general framework within which the processes of mobility and merger can take place from one European country to another.

However, we do not agree at all with the reductive and partial approach with which the Communication tackles the problem of *governance*.

Governance is presented as a problem limited solely to the relationship between shareholders and management, as though an enterprise were a private entity that concerned the interests of the shareholders alone. This is a description of a virtual enterprise, without workers and devoid of more general responsibilities. The fact that it is the workers, first and foremost, who pay the price of any corporate scandals when they lose their jobs, pay and social security benefits is underestimated.

However, the interests of the workers are not taken into account; neither is the role of structures that represent the workers, starting with the European Works Councils (EWC), nor the role of participation and information.

Thus the Communication is in conflict with: the Directive on EWCs and its urgent revision, with the Directive on the Statute for the European Company, and with the Directive on information and consultation.

Furthermore, underestimating a more general function that an enterprise always carries out, not only in the economic sphere but also in the social and environmental sphere, the Communication is, objectively speaking, in obvious conflict with the current Green Paper on the social responsibility of the enterprise.

In fact, the Communication cannot be considered as complementing the Green Paper.

An obvious question arises: if the Commission considers it necessary to intervene in the area of company law because it believes that enterprises are or can be fairly non-transparent, how is it then possible, at the same time, to consider them to be socially responsible?

Whereas, from our point of view, there is a need to reconfirm that the definition of a “good” enterprise must begin with its very constitution.

The workers are an integral part of the enterprise itself. They are an internal rather than external part, just as all the other *stakeholders* in a company are.

For this reason, the relations between management and workers’ representatives – from information to consultation, participation, negotiation and contractual agreements – constitute the very engine of the productive and social function of an enterprise.

For the above-mentioned reasons, the formulation itself of the Communication must be radically changed.

More specific comments

Turning to method, the Commission proposes that *governance* be based on a standard procedure of relations among Member States, companies and shareholders. No provision is made for the participation of the trade union. In our view, it is unacceptable for harmonisation of European company law to occur without the – explicit and recognised – right to participation for the trade union and the workers.

Furthermore, we consider reasonable the proposal presented by the Commission deeming it unnecessary to establish an appropriate *European code* for *governance*.

Indeed, the huge diversity of national legislations would make this extremely difficult.

Just as, for this reason, we believe that the seat of the Forum may be the right place to succeed in bringing about a greater coherence among the various existing codes.

However, in the context of globalisation, it is necessary to have a framework of principles and rules recognised at international level, which protect the interests of companies, investors and workers.

Therefore, we believe that the EU should make it explicit what the framework of international regulations should be and define procedures to assimilate them and complete the regulations that exist nationally.

What is interesting, in our view, is the requirement provided for by the Communication of an *Annual Declaration on governance* on the part of enterprises listed on the stock exchange. Greater transparency and more information is, in fact, necessary in order to determine investors' choices.

However, in our opinion, the Declaration cannot and must not rule out the possibility of the Commission and/or supervisory authority carrying out an independent inspection of the contents of the report if they consider it necessary.

As far as the role of institutional investors is concerned, we believe, precisely because their function is an important one, that it would be useful for the Commission to define the very notion of "institutional investors", in line with the rules that already exist on the financial markets.

The proposal to strengthen the *rights of shareholders*, to use every available piece of technological equipment and to increase their right to ask questions and to knowledge is fair.

As far as the chapter on "*conflict of interests*" is concerned, the Commission needs, first of all, to establish more clearly the criteria necessary to define the figure of "independent director". It also needs to clarify its understanding of how the principle of acting jointly in decisions reached by the Board of Directors is protected. This principle also has to apply in the case of conflict of interests, therefore ruling out decisions by the party concerned.

With regard to *remuneration*, we would emphasise the requirement for a high level of disclosure, as far as both the fixed part and the variable part of pay are concerned. The same applies to any incentive or stock option programmes for the management.

With respect to the part concerning *groups and pyramids*, there is a need for the Commission to improve, in substantial terms, the information and transparency procedures on the subject.

Because, while it is plain that the existence of groups and pyramids is the concrete reality shaping corporate order, it is equally true that the composition of groups and, in particular, pyramids can make the real order of a given company less transparent.

Furthermore, the present process of restructuring increases the processes of company splits, tertiaryisation and relocation, sometimes making the true composition of a company and its real decision-making centres unfathomable.

Throughout this process, it is not only the shareholdings and inter-company investments that are rendered barely comprehensible, but also the rules and contractual provisions regarding the workers who are positioned along the various links of the chain of a pyramid or group.

As far as the chapter on the *restructuring and mobility* of companies is concerned, we agree with the Commission's proposal to quickly adopt a Directive on the subject.

In fact, clear and legally enforceable provisions are also needed to define the rights of workers involved in these processes, starting with right to information and consultation itself.

The contemporaneous revision of the Directive on EWCs, for which we are pressing, is needed to safeguard and improve the transparency itself of the processes of company mobility among different States of the European Union.

Regarding the hypothesis of a *feasibility study*, to assess the advantages and disadvantages of a new corporate model, called a “*European Private Company*”, we very firmly stress that such a possible new form of company must not conflict with the rights of participation established in other corporate models.

We explicitly emphasise that the rights established, in this regard, in the Directive for the European Company Statute should be coherently extended to the so-called European Private Company.

The proposed simplification can, therefore, relate to the regulatory provisions and procedures but not to the democratic and participatory procedures.

That equivalence which the Communication on *governance* emphasises between the monistic or dualistic order of a company is not acceptable to us.

Participation is not an option resulting from the personal opinions of the management but, rather, a legislative arrangement established by Community Directives which should not be contradicted. For this reason, any study must be carried out only as a result of an explicit position adopted by the Commission on the relevant principles of democracy and of participation of the workers, who must be the inspiration behind that position.

November 2003