FESE AISBL
Avenue de Cortenbergh, 52 B-1000 Brussels
VAT: BE0878.308.670
Tel.: +32 2 551 01 80 – Fax : +32 2 512 49 05

LF002.2
16/05/06

Response to the European Commission's Consultation on Future Priorities for the Action Plan on Modernising Company Law and Enhancing Corporate Governance in the European Union

I. Introduction

1. The Federation of European Securities Exchanges (FESE) represents operators of the European regulated markets and other market segments (comprising the markets for not only stocks, but also financial derivatives, and energy and commodity derivatives as well as clearing houses for such financial instruments). Established in 1974 as a small forum of Stock Exchanges in Europe, FESE today has 24 Full Members representing close to 40 Securities Exchanges and clearing houses from all the countries of the EU and Iceland, Norway, and Switzerland, as well as several Corresponding Members from other non-EU countries. FESE co-operates with European settlement and securities depository organisations and works closely with the European Association of Central Counterparty Clearing Houses (EACH).

2. The current response is structured as follows: in the next section we summarise our views in an **executive summary** while in the third section we provide answers to the European Commission's **specific questions**.

II. Executive Summary

3. We welcome the proposed Action Plan and we consider it rather **positive**. The proposal, however, does not provide a legal framework suitable to regulating and lightening the burden of SMEs.

4. There is a broad support for the objective of simplifying the legislation within the European Union. In this field as in others, we believe that all regulatory initiatives to be taken by the Commission should follow **better regulation principles** and seek to identify the optimal solutions for the EU economy as a whole.

5. One of the important principles in the area of company law and corporate governance is the creation of the same conditions for competition for all Member States. To achieve this it could be useful consider reflecting on how to **harmonise** the complex area of the currently very diverse **capital structures**. We reserve our definitive view on this, however, until after the Commission has conducted its cross-EU study.

6. We generally support an EU action on procedures for the nomination and dismissal of directors for harmonisation purposes in order to foster cross-border activities. Our Members believe that measures in this area should be principally aimed at strengthening and protecting minority shareholders although there is some diversity of views regarding whether there should be an EU action to ensure the presence of representitives of minority shareholders in the Board. Cross border exercise of shareholders rights could be encouraged by requiring the publication of candidates' curriculum vitae, lists and similar measures. However we have some concerns regarding the type of legal instrument that would be best designed to deal with this matter. From this perspective recommendations of best practices would be better than binding legislation in providing the necessary flexibility to companies.

7. A company set up within the European Union should be legally accepted in every Member State. Any new legislation on this matter has to solve tax implications and the problem of the co-determination of employees in the boards of companies.

8. European companies should have the choice between a "one-tier" and a "two-tier" board system. However, any legislation concerning the board structure of companies should be left to the Member States. This is particularly necessary with regard to the right of the **co-determination of employees**.

9. We support an EU initiative aiming at generalising the **squeeze-out right** which should be granted no matter how shareholders have obtained the relevant holding. We also support a **sell-out right** to be granted to minority shareholders of all listed companies, regardless of how the relevant threshold has been crossed.

10. In the interest of legal security, it would be desirable for the *Societas Europaea* to be **based only on European law** and for national regulations not to have any subsidiary application.

11. In the light of further globalisation, there might be a need to investigate whether small and medium-sized businesses would benefit from the presence of a **European company** besides the *Societas Europaea*.

12. The views of our Members differ on the need to create a **single Directive on Company Law.** Some Members strongly believe that such a Directive is essential to ensure harmonisation, consistency and internal coherence of the rules in this field. Other Members, while sympathetic to the basic intention of convergence in this area, feel that this is a much more challenging and extensive exercise than is realised. Codification and recasting will have many implications and may end up causing more problems than it solves.

13. Finally, we would like to point out the significant relationship existing among the proposal for a Directive on shareholders' rights, the Transparency Directive and the work in progress of the Unidroit which is drafting a Convention on harmonised substantive rules regarding securities held with an intermediary.

III. Answers to the European Commission's questions:

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.

14. Our general assessment of the proposed Action Plan is so far rather positive. However we believe that the proposal does not provide a framework suitable to regulating SMEs. A competitive legal framework should not overburden SMEs and we believe that it should be ensured that Member States had appropriate flexibility to lighten the burden for SMEs.

15. As their shares are traded on the public markets, the industry has an interest in taking into account the clear need for comparability, transparency and trust building. If these aspects of company law

should become the subject of EU's attention, it would be preferable to leave other matters, especially the rules on the internal functioning of companies, outside the EU's purview. This opinion is also reflected in the Winter report.

16. Although consistent implementation is easier to achieve by binding legislation we believe that it should be always preferable to explore alternative methods of legislative intervention before proposing binding legislation. The final choice between legislative/non legislative measures, however, should depend on the characteristics (e.g level of details, technicality, etc.) of the issues involved and may vary case by case.

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?

17. We fully support the proposed application of better regulation principles in the area of corporate governance and company law and we welcome the objective of simplifying the legislation within the European Union under the Better-Regulation Action Plan.

18. The Better Regulation Action Plan is an important instrument to improve the economic environment. It is a step into the right direction specially when being clearly aimed, and limited, to removing cross border barriers. This Plan accompanies the legislation initiative, which is initiated with the public consultation of the markets participants, the estimation of the legislation consequences, the establishment of administrative imposition of the economy and the transparent, technical transformation of proposals. The interests of customers, service providers, EU-Institutions etc. have to be represented in the creation of the integrated European single financial market.

19. Public consultations play an important role in the field of European regulations of corporate governance and company law and cannot be substituted by an expert group discussion. Regular consultations create transparency, which is one of the essential elements of an approach for better regulation.

20. To establish a balance between the companies' interest on the one hand and consumers' interests on the other hand, it is important within a consultation to hear all market participants and interested groups as well as the national financial regulators and respective ministries of finances.

1. Consultation

21. Open and transparent consultation should continue to play a central role in the Commission's policy making. Any public consultation should include all parties involved, e.g. market participants, enterprises, etc.

22. However, consultations on electronic basis such as a 'Multiple Choice Procedure' are not appropriate, e.g. the public consultation concerning the 14th Company Law Directive on the cross-border transfer of the registered office of limited companies. Electronic consultation is insufficient in considering suggestions and critical points.

23. Also important is that the results of expert teams and broad consultation of all market participants and groups of interests are accessible. In particular, with reference to expert teams (such as the two teams of Corporate Governance experts, the Advisory Board and the Corporate Governance Forum), which have relevant influence on the forming of an opinion of the commission, their agendas and meeting minutes should be promptly published and their outcomes should be subject to public consultation.

2. Legislation

24. EU-Institutions have to agree on special guidelines with regard to the way market views are to be incorporated into law.

    a) a fully integrated approach, which considers possible alternative regulatory approaches, such as self-regulating market solutions, appropriate coordination of corporate governance codes and if necessary legislation. Renouncing regulatory measures should also be possible (in the case of negative cost-value ratio).

    b) the avoidance of over-regulation, by means of a strict and full Regulatory Impact Assessment.

3. Impact assessment

25. It is of vital importance that the Commission continues to look for a wider consensus in the preparatory phase, working closely with Member States and the European Parliament, with European regulatory authorities and the financial industry as a whole. It is necessary to prove that any legislative action and relevant implementation underlying new European proposals entail significant economic benefits in terms of stability and efficiency.

26. In particular, an approach based on the principle of better regulation requires that the evaluation of the impact on regulation envisages the following:

- the new initiatives have to allow easier cross-border operations, improve European financial market competition and at the same time safeguard internal stability;
- regulatory complexity has to be avoided (as it implies higher costs and jeopardises competitiveness);
- the financial industry should be involved through the consultation process and the creation and involvement of permanent expert groups;
- effects of any intended European legislation on national legislation should be analysed in detail;
- in this analysis, the proportionality aspect should also be researched, whether the aim of any reform justifies any potential interferences in the functioning market;
- an effective estimation of the consequences requires feedback from practitioners; this means the institutionalized involvement of experts of respective industries.

Question 3
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?

27. A variety of exceptions to the “one share, one vote” principle exist in the Member States. Nevertheless, recent developments show a tendency towards limiting exceptions to the “one share, one vote” principle in some Member States.

28. While the principle of proportionality between risk-bearing capital and control is to be supported in principle, different jurisdictions propose different solutions. Hence, before taking any legislative steps in this area, a thorough analysis of the current situation should be conducted as well as on the consequences for the European markets to introduce a EU-wide “one share, one vote” rule.

29. The intention to analyse the consequences of a complete shareholder democracy within a study is more than welcome.

30. A uniform harmonized shareholder structure increases the efficiency of the market by reducing transaction costs and the liquidity of securities of a company. Such a principle could not contradict the principle of freedom with regard to the organization of a company and the leadership of a company and should not have an impact on the loyalty of the shareholders.

31. It is important to create the same competition conditions within all Member States. The aim is to harmonize heterogenic capital structures within the realisation of a uniform European single market. In Member Sates the companies which follow the "one share one vote" principle, would be in a weaker position compared to companies with multiple voting rights if a uniform EU single market was not realised.

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?

32. We support an EU action on procedures for the nomination and dismissal of directors for harmonisation purposes in order to foster cross-border activities. However, such a measure should have as the main purpose the strengthening and the protection of minorities. For this purpose, the EU action should provide for mechanisms aimed at ensuring the presence in the board of minorities representatives. Cross border exercise of shareholders rights could be encouraged by requiring the publication of candidates' curriculum vitae, lists and so on.

33. However we have some concerns regarding the type of instrument that would be best designed to deal with this matter. From this perspective recommendations of best practices s would be the best option in order not to burden companies' autonomy.

34. According to the Commission, 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. Such a possibility is to be supported from the corporate governance point of view. Nevertheless, usually a large percentage of voting rights is necessary, which means that it is often institutional investors who would initiate the procedure. Such investors are accustomed to national legislations and may not considerably benefit from a European-wide unification. In other words legislative costs may be bigger than benefits achieved.

35. The Commission already published a proposal for a directive to facilitate the cross-border exercise of shareholders' rights in January 2006. Because of the expected transformation of this directive, we believe that there is no necessity for a further directive.

36. Partial interferences in national company law are always risky. Success remains to be seen with respect to the transformation of the measures until now for the strengthening of shareholders rights.

37. From the above proposed measures we welcome a special audit right. In Germany, for example, this special audit right authorizes the shareholders' meeting with simple majority of votes or shareholders with 1% of the shares of the share capital or shareholder with a prorate amount of 100.000,00 Euro reached to request a special examination in the case of a considerable suspicion of management misconduct. This regulation within German law could be used as an example for a European framework regulation.

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?

38. A company set up within the European Union should be legally accepted in every Member State. Any new legislation on this matter has to solve tax implications and the problem of co-determination of employees in the boards of companies.

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?

39. European companies should have the choice between a one tier and a two tier board system. However, any legislation concerning the board structure of companies is to be left to the Member States in particular with regard to the right of co-determination of employees.

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.

40. We support an EU initiative aiming at generalising the squeeze-out right, i.e. granting shareholders of all listed companies owning more than 90-95 percent of the shares the right to buy out minority shares.

41. Such a right should be granted no matter how shareholders have obtained the relevant holding. The Take-over directive, instead, provides for squeeze-out/sell-out rights only following a bid made to all the holders of the offeree company's securities for all of their securities.

42. At the same time, we support a sell-out right to be granted to minority shareholders of all listed companies, regardless of how the relevant threshold has been crossed. In practice such a right would indirectly introduce the concept of a minimum floating on listed companies for market integrity purposes.

43. Where the market has become illiquid, market integrity problems will arise, with the consequent difficulties from the perspective of de-listing and minority protection. We believe that these rights should be offered throughout the EU on a generalised (also outside the context of take over bids) and harmonised basis. Transparent and common rules on the protection of investors should increase their confidence and thereby the liquidity of the financial markets.

44. We believe that the appropriate threshold should be carefully assessed and could be different from the relevant percentages set by the take over directive.

45. Market efficiency and integrity should be the main purpose of such an EU action. The level of capitalisation of companies should be taken into account in setting up such a threshold.

Question 10:
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?

46. Any regulation will have to take into account the interest of the management to efficiently manage the group, the interest of the minority shareholders to have as much as transparency as possible and the interest of the creditors of a 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.

47. The *Societas Europaea (SE)* is just gaining more importance. In the interest of legal security, it would be desirable for the Societas Europaea to be based only on European law and for the national regulations not to have any subsidiary application.

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?

48. According to the Commission, 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 subsidiaries of different forms in other Member States would be significantly reduced.

49. In the light of further globalisation, there might be a need to investigate whether small and medium-sized businesses would benefit from the presence of a European company besides the *Societas Europaea*.
50. It can be noted from the Winter Report that the most important national and European economic organizations welcome the legal form of a European limited liability company as an additional organization form for cross-border activities. A European limited liability company should only be based on European law without subsidiary application of domestic .

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.

51. FESE supports the Commission's steps towards simplification of the EU regulatory environment. The repeal of irrelevant or obsolete legal acts, the codification and the recasting of EU legislation seem to be necessary. Coherence with other actions in related sectors and more user-friendly regulatory framework for company law are the ideas that have FESE's support.

52. The views of our Members, however, differ on the need to create a single Directive on Company Law. Some Members strongly believe that such a Directive is essential to ensure harmonisation, consistency and internal coherence of the rules in this field. Other Members, while sympathetic to the basic intention of convergence in this area, feel that this is a much more challenging and extensive

exercise than is realised. Codification / recasting will have many implications and may end up causing more problems than it solves.

53. We would also like to point out the strong relationship existing among the proposal for a Directive on shareholders' rights, the Transparency Directive and the work in progress of the Unidroit which is drafting a Convention on harmonised substantive rules regarding securities held with an intermediary. The links among these different streams of work have to be identified and aligned.