Federation of European Accountants
Fédération des Experts comptables Européens

European Commission
DG Internal Market

14 May 2012

Ref.: CLC/LAN/SL

Re: EC Consultation on the Future of European Company Law

FEE (the Federation of European Accountants) is pleased to provide you with its comments on the European Commission Consultation on the Future of European Company Law.

FEE welcomes the initiative by the European Commission to analyse how the future company law in Europe can evolve. FEE agrees that European Company Law needs a review to adapt it to the 21st century to reflect the dynamic developments in the corporate world over the last decades. We favour a holistic approach to this fundamental review and look forward to a sustainable future company law framework that is fit for purpose for European companies.

Our responses to the individual questions raised in the EC consultation are submitted through the online questionnaire and are for information purposes included in the appendix attached. FEE awaits with great interest the debate on the Future of European Company Law that is bound to follow as an outcome of this consultation. FEE encourages the Commission to engage with its broad range of stakeholders in this further debate in order to obtain as much input as possible, also beyond what is received through the responses in this consultation where little detail on the issues raised will be provided. For questions where FEE found it relevant, at this point of the consultation phase, to elaborate its response beyond the possible limited response provided through the online questionnaire, an elaborated response has been added in the appendix. Additional comments have been provided in response to Questions 6, 7, 13, 16, 19 and 20.

Some general comments as well as our comments to the questions raised by the European Commission can be summarised as follows:

1. Consolidating and updating EU company law directives with a similar scope would be an appropriate approach.
2. Harmonising company law affects other areas too, such as liability regimes for companies and boards. While direct tax remains a sovereign matter for EU Member States, the attractiveness of using EU company legal forms in practice is limited.
3. With the developments of corporate governance and especially with regard to the role of audit committees over the last couple of years throughout Europe, the role and responsibilities for boards and audit committees should be further addressed in the broader context of the relationship between company law, corporate governance, internal control and risk management. Measures in these areas should be proportionate to the size and complexity of the company in question.
4. The capital regime for limited liability companies should be reviewed**.** Various models for capital regimes exist in different European countries. A certain level of harmonisation of EU company law is an ultimate goal. An in-depth analysis of the impact deriving from proposals is needed to measure costs and benefits of potential alignments.

5. Further analysis on the continued relevance of the distinction “public/private” for limited liability companies could be undertaken. One model for replacing it could be introduction of objective criteria related to size of the company with a distinction between listed and unlisted companies, due to the need for the transparency for listed companies. This would better align company law with accounting used in the fourth directive, audit and relevant parts of capital market requirements. Similar considerations apply to the discussion regarding the EU legal form companies of the (public) SE and the (private) SPE at EU level.
6. Introduction of a possibility to apply a solvency test for distribution of profits which could include the cumulative use of a “snapshot test” and a forward looking test is appropriate.

FEE’s ID number on the European Commission’s Register of Interest Representatives is 4713568401-18.

For further information on this FEE[1] letter, please contact Lotte Andersen at +32 2 285 40 80 or via email at lotte.andersen@fee.be from the FEE Secretariat.

Yours sincerely,

Philip Johnson
FEE President

Encl.

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[1] FEE is the Fédération des Experts comptables Européens (Federation of European Accountants). It represents 45 professional institutes of accountants and auditors from 33 European countries, including all of the 27 EU Member States. In representing the European accountancy profession, FEE recognises the public interest. It has a combined membership of more than 700.000 professional accountants, working in different capacities in public practice, small and big firms, government and education, who all contribute to a more efficient, transparent and sustainable European economy.
FEE’s objectives are:

- To promote and advance the interests of the European accountancy profession in the broadest sense recognising the public interest in the work of the profession;
- To work towards the enhancement, harmonisation and liberalisation of the practice and regulation of accountancy, statutory audit and financial reporting in Europe in both the public and private sector, taking account of developments at a worldwide level and, where necessary, promoting and defending specific European interests;
- To promote co-operation among the professional accountancy bodies in Europe in relation to issues of common interest in both the public and private sector;
- To identify developments that may have an impact on the practice of accountancy, statutory audit and financial reporting at an early stage, to advise Member Bodies of such developments and, in conjunction with Member Bodies, to seek to influence the outcome;
- To be the sole representative and consultative organisation of the European accountancy profession in relation to the EU institutions;
- To represent the European accountancy profession at the international level.

Appendix – Responses to individual questions are uploaded through the online EC questionnaire and are provided below for information purposes only.

I BACKGROUND INFORMATION

1. Please indicate your role for the purpose of this consultation: *(Single choice)*

☒ Auditor/accountant

2. Please indicate the country where you are located: *(Single choice)*

☒ EU-wide organisation

3. Please provide your contact information (name, address and email-address)

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4. Is your organisation registered in the Interest Representative Register? *(Single choice)*

☒ **Yes**.

II OBJECTIVES OF EUROPEAN COMPANY LAW

5. What should be the objective(s) of EU company law? *(Multiple choice)*

☒ Improve the environment in which European companies operate, and their mobility in the EU.
☒ Facilitate the creation of companies in Europe.
☐ Setting the right framework for regulatory competition allowing for a high level of flexibility and choice.
☐ Better protect employees.
☒ Better protect creditors, shareholders and members.
☒ Other: *Please specify*. (max 500 characters) -
☐ No opinion.

FEE Comment uploaded through the online questionnaire:

Company Law should be reviewed to reflect the dynamic progress in the corporate world and to allow for flexibility and choice for companies. Harmonising company law affects other areas too, such as liability regimes for companies and national tax rules for corporate tax regimes. While tax remains a sovereign matter for EU Member States, this may cause

problems for company law harmonisation. Capital maintenance incl. contribution in kind should be part of a harmonisation exercise.

III SCOPE OF EUROPEAN COMPANY LAW

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? (Single choice)

☐ **Yes**, the following pieces of existing legislation harmonising company law could be modernised further *(Multiple choice)*:

- ☐ The Directives on the disclosure of companies and their branches as well as the validity of their obligations and their nullity.
- ☐ The Directive on maintenance and alteration of the capital of public limited-liability companies.
- ☐ The Directives on the merger and divisions of public limited-liability companies.
- ☐ The Directive on single-member private limited-liability companies.
- ☐ The Directive on take-over bids.
- ☐ The Directive on cross-border mergers.
- ☐ The Directive on certain rights of shareholders of listed companies.

☐ **Yes**, new areas could be explored for further harmonisation, such as *(Multiple choice)*:

- ☐ Cross-border transfer of registered office.
- ☐ Cross-border divisions.
- ☐ Groups of companies.
- ☐ Cross-border conversion.
- ☐ Other: *Please specify*. (max 500 characters)

☒ **Yes**, both approaches could be combined and further work could target *(Multiple choice)*:

(N.B. both lists would be opened).

- ☒ The Directives on the disclosure of companies and their branches as well as the validity of their obligations and their nullity.
- ☒ The Directive on maintenance and alteration of the capital of public limited-liability companies.
- ☐ The Directives on the merger and divisions of public limited-liability companies.
- ☐ The Directive on single-member private limited-liability companies.
- ☐ The Directive on take-over bids.
- ☐ The Directive on cross-border mergers.
- ☐ The Directive on certain rights of shareholders of listed companies.
- ☒ Cross-border transfer of registered office.
- ☒ Cross-border divisions.
- ☒ Groups of companies.
- ☐ Cross-border conversion.

☒ Other: *Please specify*. (max 500 characters)

FEE Comments uploaded through the online questionnaire:

Company law could also be modernised in new areas such as corporate governance, the role and responsibility of the board and increased transparency regarding risk management systems as suggested in the Reflection Group report. Measures and increased transparency in these areas should be proportionate to the size and complexity of the company. Harmonisation and the exchange of good practices regarding the role of and functioning of boards across companies and countries should be encouraged.

Additional comments (not uploaded through the online questionnaire):

Company law structures affect the corporate governance of a company, especially in relation to board structure and the role and responsibility of the board and its committees in light of the presence of institutional or major shareholders.

Corporate governance and especially the role of audit committees has developed over the last couple of years throughout Europe, due to the transposition of the 2006 Statutory Audit Directive and audit committees have now to a great extent found their place in the corporate governance structures of companies. The role of audit committees can be strengthened even further, which current initiatives from the European Commission are aiming at. The improvements already achieved and the new proposed initiatives in this regard are to the clear benefit of the quality of financial information provided by companies. It is also of benefit to internal control structures and risk management systems in companies, in which investors and creditors place their trust with regard to return on invested or provided capital.

With these significant developments in corporate governance, which were not foreseen when company law was developed, a closer link between the two areas should be established, as it is now recognised that neither of them function without the other. When establishing such a link, the size and complexity of the company in question should be considered.

Furthermore, branch registration could be explored for further harmonisation as the current registration of branches can be cumbersome and more onerous than company registration in some Member States.

☐ **No**, further harmonisation is not needed, the approach should rather be based on: *(Multiple choice)*

- ☐ Soft-law instruments, like Recommendations.
- ☐ Increased administrative co-operation and exchange of good practices.
- ☐ Other: *Please specify*. (max 500 characters)

☐ **No opinion**.

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? *(Single choice)*

☐ **Yes**, for all the legal instruments harmonising EU company law.

☒ **Yes**, but only for legal instruments related to *(Multiple choice)*:

- ☐ Disclosure of companies and their branches as well as the validity of their obligations and their nullity.
- ☐ Maintenance and alteration of the capital.
- ☐ Mergers and divisions.
- ☐ Single-member ownership.
- ☐ Take-over bids.
- ☐ Cross-border mergers.
- ☐ Certain rights of shareholders of listed companies.
- ☒ Other: *Please specify*. (max 500 characters)

☐ **No**

☐ **No opinion**.

FEE Comments uploaded through the online questionnaire:

Further analysis on the continued relevance of the distinction "public/private" for limited liability companies could be undertaken. One model for replacing it could be introduction of objective criteria related to size of the company with a distinction between listed and unlisted companies, due to the need for transparency for listed companies. This would better align company law with accounting in the fourth directive, audit and relevant parts of capital market requirements.

Additional comments (not uploaded through the online questionnaire):

Regardless of the threshold used for distinguishing between different types of companies (public vs. private, listed vs. unlisted[2], public interest entities vs. non-public interest entities), the main objective should be the protection of shareholders and creditors, as referred to in Question 5 above. Comparability between companies and the quality of financial information provided is beneficial to shareholders and creditors and can be ensured by having like the audit profession in each Member State providing assurance on such information.

The accounting directives (4th and 7th), the statutory audit directive and the financial services directives include listed companies in the definition of Public Interest Entities. It should be ensured that inconsistencies and unnecessary differences between the

[2] For reference purposes, "*listed companies*" is understood as *"… a legal entity governed by private or public law, including a State, whose securities are admitted to trading on a regulated market…"* as defined in the Transparency Directive, article 2.

requirements applicable to listed companies and to public interest entities that are in the company law directive and other EU legislative text relevant to companies are eliminated through revision of the area.

European company law should only cater for limited liability companies. The term “Public interest entities” is widely used in other areas and affect to a great extent requirements for listed companies. Differences between “listed entities” and “public interest entities” should be limited to as few areas as possible. Some issues may remain as differences between listed companies and public interest entities, since e.g. capital maintenance, including specific requirements related to contribution in kind are not relevant for all (current) public interest entities. Management structures may also differ depending on the legal form of the public interest entity, as for instance some public interest entities do not have shareholders.

Requirements in this area should be proportionate with regard to size, complexity and number of shareholders of the entity. The large differences in size and complexity within the category of unlisted companies should be taken into consideration.

IV USER-FRIENDLY REGULATORY FRAMEWORK FOR EUROPEAN COMPANY LAW

8. Do you think that codifying existing EU company law Directives, thus reducing potential inconsistencies, overlaps or gaps, is an idea worth pursuing? *(Single choice)*

☐ **Yes**, a single EU company law instrument should replace all existing Directives.

☐ **Yes**, EU company law Directives with a similar scope should be merged.

☒ **No**, this is not an idea worth pursuing.

☐ **No opinion**.

• *Please specify. (N.B. for all options)* (max 500 characters)

FEE Comment uploaded through the online questionnaire:

Easy accessible consolidated texts of company law directives should be published. Benefits of codification of the directives may not outweigh the costs incurred through such an exercise. Inherent conflicts in the current numerous directives should be eliminated to the benefits of European companies.

EU Company Law should remain regulated through EU directives, allowing flexibility for European companies to choose its appropriate company structure.

V EU COMPANY LEGAL FORMS

9. What, if any, is the added value that EU company legal forms bring for European business? *(Multiple choice)*

- ☒ The European image of those company law forms.
- ☐ Their European label ("SE", "SCE").
- ☐ Their full legal personality.
- ☐ Savings in costs of cross-border transactions.
- ☐ Ad hoc solution to cross-border related issues.
- ☐ Workable alternatives to existing national company law forms.
- ☐ The possibility not to be subject to compulsory national requirements (for example, the SE allow public limited-liability companies to choose between one-tier and two-tier management structure).
- ☐ The possibility to carry out operations, like cross-border transfer of seat.
- ☐ Tax reasons.
- ☐ Labour law reasons.
- ☒ Other: *Please specify*. (max 500 characters)
- ☐ No added value.
- ☐ No opinion.

FEE Comment uploaded through the online questionnaire:

The European Company has merits, especially for companies that are operating cross border, and should have more incentives to be applied in practice. Its attractiveness compared to other legal forms should be considered. The major impediments are related to labour law, which are currently leading to the lack of widespread use of the EU Company legal form. While direct tax remains a sovereign matter for EU Member States, the attractiveness of using EU company legal forms in practice is limited.

10. What, if any, are the main shortcomings of EU legislation introducing EU company legal forms? *(Multiple choice)*

- ☒ The complexity linked to frequent cross-references to relevant national legislation.
- ☒ The uncertainty linked to the application of different national legislations that are applied simultaneously.
- ☒ The differences in the way EU company law forms are understood and used at national level.
- ☐ The different degree of attractiveness across Member States.
- ☒ The limitations that derive from unanimity decision-making.
- ☒ Other: *Please specify*. (max 500 characters)
- ☐ No main shortcomings.
- ☐ No opinion.

FEE comment uploaded through the online questionnaire:

A major impediment for the European Company legal form is national labour law which cause major difficulties in operating cross border in one single company. While direct tax remains a sovereign matter for EU Member States, the attractiveness of using EU company legal forms in practice is limited.

11. Should existing EU company legal forms be reviewed? *(Single choice)*

☒ **Yes**, in particular concerning:*(multiple choice)*

- ☐ Simplification and rationalisation of existing procedures.
- ☒ Increased uniformity through reduction of cross-references to national legislation.
- ☒ Reduction of minimum capital required.
- ☐ Deletion of cross-border element requirement.
- ☒ Possibility to have the registered office and the headquarters in two Member States.
- ☒ Explicit solution to the issue of shelf companies.
- ☒ Other: *Please specify*. (max 500 characters)

☐ **No**.

☐ **No opinion**.

FEE Comment uploaded through the online questionnaire:

The difficulties in moving a company from one member state to another remains. Solutions should be found to simplify this issue. Simplification initiatives for moving a company from one member state to another should be proportionate to the size and complexity of the company in question. This will facilitate more cost-effective cross-border activity, also among small and medium sized companies.

12. Could optional models such as the EMCA –or similar projects- be a suitable alternative to traditional harmonisation? *(Single choice)*

☒ Yes. Please explain (max 500 characters)
☐ No. Please explain (max 500 characters)
☐ No opinion.

FEE Comment uploaded through the online questionnaire:

The EMCA model is an interesting initiative that could work as a best practice example incorporated in soft law without including references to it in European legislation.

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

13. Should the Commission explore alternative means to support European SMEs engaged in cross-border activities? (Single choice)

☐ **Yes**, for example: (Multiple choice)

- ☐ The Commission could prepare a new legislative proposal aimed at promoting EU SMEs through the European labelling of existing national company law instruments that meet a number of pre-defined harmonised requirements.
- ☐ The 12th Company Law Directive could be reviewed 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).
- ☐ The scope of application of the SE Statute could be modified to allow smaller EU companies to benefit from it on the basis of more flexible requirements.
- ☐ Other: *Please specify*. (max 500 characters)

☐ **No**, further efforts should be made to get an agreement on the current SPE statute proposal.

☒ **Other possibilities to explore?** *Please specify*. (max 500 characters)

☐ **No opinion**.

FEE Comment uploaded through the online questionnaire:

FEE has previously supported the proposals for the SPE statute, which appears to be a truly European company. However, if further analysis shows that there are merits in moving away from the distinction "public/private" at national level (see Question 7), a similar approach could be considered for the European legal form company. One model for the European Company could be related to company size and combined with the distinction between "listed/unlisted".

Additional comments (not uploaded through the online questionnaire):

The European Company has merits, especially for companies operating cross-border. However, other company legal forms have so far attracted more companies across Europe.

The distinction between public (SE) and private (SPE) companies at EU level have been introduced to mirror this distinction at national level through transposition of the 2nd company law directive.

As mentioned in our response to Question 7 above, further analysis could be carried out to see if there are merits in maintaining the distinction between "public" and "private" companies. One model for replacing this distinction could be through a model related to the size of the company and a distinction between listed and unlisted companies. Although

private companies cannot have listed shares, it is possible for such companies under the financial services legislation to list bonds and thus be subject to (almost) the same requirements as a (public) company whose shares are listed on a regulated market. Therefore, if the EU legal form, either through reopening of the SPE debate or through amendments to the SE Statute is further pursued, the need for a distinction between "public" and "private" at EU level should be brought into the debate.

An alternative approach to separate EU legal forms of the SE and SPE, respectively, could be to merge the SPE into the SE statute. Some changes to the existing SE statute would be needed, especially to recognise different needs and obligations related to the size and complexity of the European company. Furthermore, to increase the attractiveness of the EU legal form company, the new SE/SPE statute could be simplified and made less restrictive, especially regarding references to national laws and regulations.

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

14. Should the EU act to facilitate the cross-border transfer of a company's registered office? *(Single choice)*

- ☒ **Yes**, through a harmonizing Directive. *Please give further reasons for your opinion* (max 500 characters)
- ☐ **Yes**, through some other measure. *Please give further reasons for your opinion* (max 500 characters)
- ☐ **No**, as the existing EU framework (European Company Statute, cross-border mergers Directive) provides for sufficient tools for a cross-border transfer of registered office. *Please give further reasons for your opinion* (max 500 characters)
- ☐ **No**. *Please give further reasons for your opinion* (max 500 characters)
- ☐ **No opinion**.

FEE Comment uploaded through the online questionnaire:

Cross-border transfers of a company's registered office should be facilitated as much as possible, and should in particular be tax neutral. European case law (such as Case C-210/06 Cartesio 2008 ECR I-9641) indicates that a Company Law directive addressing transfer of seats would be appropriate. With the 2004 proposed 14th directive on transfer of registered office and with the recommendation of the European Parliament in January 2012 (EP JURI A7-0008-2012), further debate on this is encouraged.

15. What should be the conditions for a cross-border transfer of registered office? *(Multiple choice)*

- ☒ A transfer should not be possible if proceedings for winding up, liquidation, insolvency, suspension of payments or similar proceedings have been brought against the company.

☐ Member States should be able to decide whether or not they require the transfer of the company's headquarters or principal place of business together with the transfer of the registered office.
☐ A transfer should be accepted by all Member States even when not accompanied by the transfer of the company's headquarters or principal place of business.
☒ A transfer should be allowed only if accompanied by the transfer of the company's headquarters or principal place of business.
☐ No opinion.

16. What should be the consequences of a cross-border transfer of registered office? *(Multiple choice)*

☒ There should be no winding-up of the company in the home Member State.
☒ The company should not lose its legal personality.
☒ The transfer should be tax neutral following the approach of Directive 90/434 applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States
☒ A transfer should not result in the loss of the pre-existing rights of shareholders, members, creditors and employees of the company.
☐ No opinion.

Additional comments (not uploaded through the online questionnaire):

The Directive 90/434 is implemented in different ways across the EU and therefore a cross-border transfer of the registered office is not yet assured to be tax neutral. A link between Directive 90/434 and company law could help.

VIII CROSS-BORDER MERGERS

17. Do you support further harmonized rules in the Directive?

☒ **Yes**. Please specify which areas. *(Multiple choice)*

- ☒ Approval of the cross-border merger by the general meeting.
- ☒ The duration of the review by national authorities of cross-border mergers.
- ☒ The methods for valuation of assets in cross-border mergers.
- ☒ The date of the start of the protection period regarding creditors' rights.
- ☒ The duration of the protection period regarding creditors' rights.
- ☐ The consequences of creditors' rights on the completion of a cross-border merger.
- ☐ Other: *Please specify*. (max 500 characters)

☐ **No**: *Please specify. (Multiple choice)*

- ☐ There is no need for further harmonisation in the area of cross-border mergers.
- ☐ The division between EU regulation and national legislation does not pose a problem.

☐ The areas currently not covered are better dealt with in national regulation.
☐ Other: *Please specify*. (max 500 characters)

☐ **No opinion**.

IX CROSS-BORDER DIVISIONS

18. Do you support introducing regulation regarding cross-border divisions at EU level? *(Single choice)*

☒ Yes. And these harmonised rules should aim at the following: *(Multiple choice)*

☒ Building rules on cross-border divisions around the framework established in the Directive on cross-border mergers. *Please specify why. (Multiple choice)*

☒ The framework is well known by the relevant stakeholders.
☐ The framework has proven to be sustainable.
☒ The framework presents the best structure to deal with this type of cross-border activities.
☐ Other: *Please specify*. (max 500 characters)
☐ No opinion.

☐ Shared liability of the involved companies for claims existing at the time of the division.

☐ Should this shared liability be based on the distribution of assets in the division? *(Single choice)*
☐ Yes: *Please specify*. (max 500 characters)
☐ No: *Please specify*. (max 500 characters)
☐ No opinion.

☐ **No**: *Please specify why: (Multiple choice)*

☐ These areas are best dealt with at national level.
☐ The division between EU regulation and national legislation does not pose a problem.
☐ Other: *Please specify*. (max 500 characters)
☐ No opinion.

☐ **No opinion**.

X GROUPS OF COMPANIES

19. Do you see a need for EU intervention in this field? *(Single choice)*

☒ **Yes**, there should be an EU intervention *(Multiple choice)*

☒ The Commission should recommend the recognition of group interest.
☐ The EU should require groups to provide information on their structure in a consolidated, investor-friendly and easy-to-read document.

☒ Other: *Please specify*. (max 500 characters)

☐ **No**, there is no need for EU intervention.

☐ **No opinion**.

FEE Comment uploaded through the online questionnaire:

There is no need to reopen the 5th Directive on structure of public companies, shareholder right to determine director pay and codetermination or 9th Directive on Corporate Groups. However, some issues related to groups may merit initiatives at European level, such as the definition of a group, group tax regimes, and regulation of "group interests".

Additional comments (not uploaded through the online questionnaire):

The issues related to groups that could be addressed at European level, could be:

- Definition of groups and of the parent company in EU company law. The definition should be aligned with the accounting requirements in the recently proposed 4th Directive and in IFRS, as the definition of a group drives the financial reporting of consolidated financial statements. It cannot be justified that the definition of a group differs for company law purposes compared to financial reporting purposes.
- Group taxation regimes. Company law should not impediment cross border group taxation. Further reflections on group taxation regimes (both from direct and from indirect tax perspectives) should be considered.
- Group interests. Group structures that are relevant for the group as a whole and not for the individual company within the group could be addressed. Such issues could be intragroup loan arrangements and cash pooling which are of interest to the group and not only to the individual company.

XI CAPITAL REGIME

20. In your opinion, should the Second Company Law Directive be reviewed? *(Single choice)*

☒ **Yes**: Please indicate what should be the aim of the review 8[3] *(Multiple choice)*

- ☒ Abolition or change of the minimum capital requirement.
- ☐ Replacement of the balance sheet test by a solvency test.
- ☐ Cumulative use of the balance sheet test and of the solvency test.
- ☒ Alternative use of the balance sheet test and of the solvency test.
- ☐ Use of International Financial Reporting Standards for the determination of distribution of dividends.
- ☐ Clarifying the regime of abstention vote.

[3] Apart from the scope private-public, see question n° 7.

☒ Other: *Please specify*.(max 500 characters)
☐ No opinion.

☐ **No**: *Please give your reasons (Multiple choice)*:

☐ Current rules are flexible and leave a significant margin of manoeuvre to Member States.
☐ Current rules have stood the test of time.
☐ Compliance costs for companies are not excessive.
☐ Other: *Please specify*. (max 500 characters)
☐ No opinion.

☐ **No opinion**.

FEE Comment uploaded through the online questionnaire:

FEE supports a review of the current balance sheet test and believes that introduction of a possibility to apply a solvency test which could include the cumulative use of a "snapshot test" and a forward looking test is appropriate. When using a balance sheet test, distribution of profits should be based on the company's accounting policies, adjusted in accordance with guidance, where relevant. Please see the 2007 FEE Discussion Paper "Alternative Capital Maintenance Regimes" on the FEE website.

Additional comments (not uploaded through the online questionnaire):

The capital regime in the 2nd directive could be reviewed. Various models for capital regimes exist in different European countries. A certain level of harmonisation of EU company law is an ultimate goal. An in-depth analysis of the impact deriving from proposals is needed to measure costs and benefits of potential alignments.

The introduction of an optional alternative or additional option solvency-based regime for distribution of profits is appropriate. It could include a cumulative test comprising a forward-looking test and a 'snapshot' test (which could be either a balance sheet or net asset test). This alternative model should not replace the current model but would be relevant as a possibility in addition to the current balance sheet test.

The structure of a new solvency-based regime should aim to meet the following objectives:

- It should aim at preventing companies becoming insolvent or over-indebted as a direct or indirect result of making distributions;
- It should aim to protect all stakeholders, especially creditors;
- It should be flexible, simple, effective and efficient and not cause any unnecessary burden to companies;
- It should require companies to take into account, in making individual distribution decisions, both their short and long term obligations; and
- It should incorporate the assumption that the longer the time horizon on which estimates of future solvency are based, the greater will be the level of uncertainty as to the reliability of such estimates.

More information can be found in the 2007 FEE Discussion Paper on "Alternative Capital Maintenance Regimes, which can be found on the FEE website[4], where the possible options for "the snap shot test" are described as follows:

- Balance sheet test: Values are directly derived from the balance sheet as drawn up under national GAAP or IFRS; and
- Net asset test: The company could discharge its debts, i.e., the directors would need to compare the value of the company's assets and the amount of the company's liabilities at that date with assets stated at no more than fair value or value in use.

XII ADDITIONAL COMMENTS

21. Do you wish to upload a document with additional comments?

☒ **Yes**
☐ **No**

If you have additional comments you have the possibility to upload these in a separate document here. We kindly ask you to use this option only for comments you haven't already expressed.

[4] The FEE Discussion Paper on "Alternative Capital Maintenance Regimes", September 2007 http://www.fee.be/fileupload/upload/DP%20Alternatives%20to%20Capital%20Maintenance%20Regimes%2007092892 00741923.pdf