

Opinion of the European Economic and Social Committee on the ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — Action Plan: European company law and corporate governance — A modern legal framework for more engaged shareholders and sustainable companies’

COM(2012) 740 final

(2013/C 271/13)

Rapporteur: **Mr DE LAMAZE**

On 19 February 2013, the Commission decided to consult the European Economic and Social Committee, under Article 304 of the Treaty on the Functioning of the European Union, on the

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Action Plan: European company law and corporate governance – a modern legal framework for more engaged shareholders and sustainable companies

COM(2012) 740 final.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 29 April 2013.

At its 490th plenary session, held on 22 and 23 May 2013 (meeting of 22 May 2013), the European Economic and Social Committee adopted the following opinion by 135 votes to 1 with 11 abstentions.

1. Conclusions and recommendations

1.1 The EESC welcomes the main points of this action plan on corporate governance.

1.2 The EESC would warn against the risk of increasing the legislative burden of conformity for companies listed on stock exchanges and would point out that an open financial market is crucial to companies. A just balance between legislative measures and a ‘soft law’ approach – recommendations and governance codes – will depend on the detail of the implementation of each initiative presented.

1.3 In particular, with regard to the innovative measure of requiring companies to be transparent regarding their remuneration policy, the EESC hopes that the Commission will establish reasonable requirements in order not to jeopardise companies’ development through an increase in their operating costs. It would draw attention to the fact that these new rules should take account of the need to preserve ‘business confidentiality’.

1.4 On the crucial issue of a shareholders’ vote on remuneration policy, the EESC believes that, in the quest for European harmonisation, anything more than an advisory vote would call into question the very foundation of company law.

1.5 In the context of the planned impact assessment, the EESC would urge the Commission to examine rigorously the justification for each initiative in the specific case of SMEs.

1.6 Alongside the initiatives proposed, the EESC believes that, with a view to effective company operations, particularly during a crisis, the need for increased involvement by employees should have been stressed.

1.7 The EESC also calls for the training of administrators to be strengthened and believes that the exchange of good practices in the field should be promoted.

1.8 In relation to company law, the EESC considers that priority should be given to the European Private Company and to measures to facilitate transfers of seats of companies within the EU. In both cases, the involvement of employees should be guaranteed and strengthened, especially via the specific consultation of the social partners provided for in the EU treaties.

1.9 The EESC is not in favour of recognising the concept of ‘group interest’, which would ultimately jeopardise the principle of the independence of legal persons within a group of companies, particularly when those persons are not European. It is also worried by an approach which might see a subsidiary’s interests sacrificed in favour of the interests of the group.

2. Gist of the Communication

2.1 Following on from its communication on 'Europe 2020', in which the Commission called for an improvement in the business environment in Europe, this action plan proposes initiatives aimed at consolidating the EU's corporate governance framework, involving two lines of action:

- through enhanced transparency both for shareholders and society at large and for the company: disclosure of policy on the diversity of management and supervisory boards and on the management of non-financial risk (strategic, operational and conformity risks etc.); improving the quality of explanations to be provided by companies that depart from the recommendations of governance codes; disclosure of voting policies of institutional investors, shareholder identification;
- through better engagement of shareholders: oversight of remuneration policy; better shareholder oversight of related party transactions; regulating proxy advisors; clarification of the concept of 'acting in concert'; encouraging employee share ownership.

2.2 In parallel, various initiatives are proposed in the field of company law, which by definition concern, as well as companies listed on a stock exchange, all public limited liability companies: facilitating cross-border operations (cross-border mergers and divisions and, possibly, transfers of seat), examining the follow-up to the proposed statute for the European Private Company (SPE), information campaign on the statutes for the European Company (SE) and European Cooperative Society (SCE), targeted measures for groups of companies (recognition of the concept of 'group interest'), codification of EU company law. All of these initiatives will be subject to ex ante impact assessments and may be modified as a result.

3. General comments

3.1 Generally speaking, the EESC welcomes the measures proposed in this action plan which, in terms of corporate governance, consolidates the current framework rather than thoroughly over-hauling it, with some exceptions (see below).

3.2 The action plan appears to seek a certain balance between legislative measures and a 'soft law' approach - recommendations and governance codes. The EESC notes that any additional obligation in terms of transparency, particularly in

relation to remuneration policy, will have an impact on companies' operating costs.

3.3 The EESC regrets that, while the action plan seeks to increase the involvement of shareholders, it does not seek to equally enhance that of employees, the importance of which the Committee had stressed in its response to the 2011 green paper⁽¹⁾. The EESC would point out that it is acknowledged in EU law that employee participation in decision-making processes contributes to sustainable development and company performance.

3.4 Beyond this action plan, it recognises that the precise nature and content of this notion of employee participation should be stipulated with reference to the bases of company law, which might be modified⁽²⁾. The EESC favours a multi-stakeholder approach, since this is consistent with the challenges facing companies seeking long-term development and with a commitment to their workers and environment. This kind of approach entails effective social dialogue and a climate of trust founded on clear rules on information, consultation and participation where these exist. In this connection, the EESC would like to encourage the exploration of new pathways, such as the sustainable company concept⁽³⁾.

3.5 Consistent with its response to the 2011 green paper, the EESC would also point out that good corporate governance also depends on the competences – legal and financial – of the members of the management board. It would stress the need to adapt the latter's training to the type of company and, especially, its size and would encourage all initiatives aimed at promoting the exchange of good practice in this area. The EESC believes it would be useful if the Commission were to draft a recommendation on this aspect. For the sake of transparency and legal certainty, especially for SMEs and their employees, measures to complete European company law must avoid any 'régime shopping' that enables the registration of European companies from scratch or the separation of a company's central administration and its registered office.

3.6 Corporate governance

3.6.1 The EESC has pointed out previously that the main objective of corporate governance is to ensure that the company survives and thrives⁽⁴⁾ by establishing the conditions for trust between the various actors⁽⁵⁾. As in the case of European company law, initiatives on governance should help to facilitate the lives and operation of companies and contribute to their competitiveness.

⁽¹⁾ OJ C 24, 28.1.2012, p. 91.

⁽²⁾ Company law is based, in fact, solely on relations between shareholders, management board and executives.

⁽³⁾ OJ C 161, 6.6.2013, p. 35.

⁽⁴⁾ See EESC Opinion, OJ C 84, 17.3.2011, p. 13.

⁽⁵⁾ Management, worker representatives, investors and local authorities.

3.6.2 In view of the fall noted in the number of listings on stock exchanges and the growing number of companies delisting, the EESC would point out that it is crucial for companies, and SMEs in particular, to have access to the financial market. The current funding difficulties faced by many of them are slowing their development considerably. In order to ensure an open financial market, the EESC considers it crucial to not increase the already very significant constraints relating to corporate governance for companies listed on stock exchanges, particularly SMEs, otherwise access to listing will be discouraged even further. It would also highlight the risk of an increasingly unlevel playing field between listed companies and non-listed companies, since the latter are not subject to the same transparency obligations as the former, but are the main beneficiaries of the information disclosed by those listed companies.

3.6.3 The EESC regrets that the concern expressed by the Commission to take account of the special characteristics of SMEs – in terms of both size and shareholder structure – is only reflected in very general terms and is not broken down and specified for each of the initiatives proposed.

3.6.4 In this regard, the EESC would stress the need to amend the European definition of the SME to take better account of the characteristics of ‘small’ and ‘medium’ enterprises.

3.6.5 Rather than taking a regulatory approach, the EESC would recommend, where possible, an approach laying down principles which the Member States can then adapt in the best way possible according to their national circumstances. Back in 2003 ⁽⁶⁾, the Commission pointed out that national corporate governance codes showed a remarkable degree of convergence. The EESC is pleased to note that the Commission appears to have adopted just such an approach in relation to the essential points of this action plan, in particular improving the explanations to be provided by companies departing from codes.

3.6.6 With regard to the general objective of transparency, the EESC supports the Commission's initiatives aimed at laying down rules at EU level which are currently in place in certain Member States, in particular those that promote companies' long-term performance. The difficulty appears to lie in finding a balance between legitimate transparency requirements and the need to not hinder their growth by imposing an excessive administrative burden and through the disclosure of information which is sensitive in terms of competition.

3.6.7 Believing that the ‘comply or explain’ requirement is the cornerstone of the principles of governance, the EESC agrees that a more rigorous implementation is needed. It welcomes the Commission's initiative in this regard.

3.6.8 The EESC notes the Commission's desire to enhance the role of shareholders, with a view to striking a satisfactory balance between the different stakeholders. It is conscious of the fact that, along with the rights proposed to increase the engagement of shareholders, there are also obligations for those shareholders.

3.6.9 Since it is therefore necessary to promote dialogue between shareholders and issuers, the EESC attaches particular importance to the initiative aimed at encouraging companies to get to know their shareholders, which is an essential prerequisite. The future European instrument in this field should take account of the differences in legislation on personal data protection.

3.6.10 The EESC also supports the proposal to oblige institutional investors to disclose their voting and engagement policies, and in particular their investment plans at companies in which they acquire a share.

3.6.11 On the crucial issue of a shareholders' vote on remuneration policy and the report on remunerations, the EESC believes that the quest for European harmonisation should not involve anything more than an advisory vote.

3.7 *Company law*

3.7.1 The EESC would prioritise the various initiatives in the action plan in a different order to that proposed by the Commission.

3.7.2 Unlike the Commission, the EESC believes it is important to pursue work on the SPE and to seek a solution that meets consensus.

3.7.3 The EESC also considers it a priority to facilitate transfers of seats of companies within the EU and that the initiative that it is calling for should also continue to guarantee and strengthen the conditions needed to actively involve employees.

⁽⁶⁾ See Communication Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward, COM(2003) 284 final.

4. Specific comments

4.1 Corporate governance

4.1.1 The EESC agrees that companies need to improve the quality of the explanations they are required to provide when they depart from governance codes. These explanations sometimes appear to be a purely rhetorical exercise, when in fact they should be properly justified and should mention, where relevant, any alternative solution applied.

4.1.2 The EESC welcomes the fact that the Commission is leaving responsibility for stipulating the methods for improving governance practice statements to Member States and national codes.

4.1.3 As the EESC has previously pointed out ⁽⁷⁾, the quality of explanations to be provided by the company above all protects that company's interests, and it is penalised by the market if explanations are insufficient.

4.1.4 Should the Commission wish the quality of information on governance communicated to the market to be controlled – or certified – the EESC would point out that it is not in favour of a binding approach in this area. Furthermore, it would point to the technical difficulties facing such a project, which, like the directive on statutory audits establishing an audit committee, would mean setting uniform criteria at EU level applicable to all companies.

4.1.5 The measure that could add most significantly to the administrative burden for companies is the measure on transparency requirements for remuneration policies and on the details of individual remuneration of directors, currently based on various recommendations and national governance codes, and for which the Commission's action plan proposes a binding instrument at EU level. The EESC could accept such a measure provided that its implementation does not significantly increase the legislative burden for companies, which should be rigorously examined in the prior impact assessment. The EESC also warns of the risk that divulging criteria governing variable components of remuneration for executives could endanger 'business confidentiality'. As well as the actual amounts paid, the EESC would stress the importance of providing shareholders with clear and complete information on how those amounts are calculated and the criteria used to determine them.

4.1.6 One of the points which raises the most difficulties in the EESC's view is the idea of granting shareholders the right to vote on the remuneration policy and the remuneration report, and it would call for particular care to be taken regarding the arrangements for such votes. The EESC would point out that the Commission is somewhat vague regarding this issue and does not stipulate whether this vote would be of an advisory or a binding nature.

4.1.7 As well as the legal and technical difficulties of implementation, a binding vote would mean a transfer of powers from the board to the shareholders. The EESC cannot support such an approach, which would profoundly alter company law, although each Member State should, it believes, be able to decide whether the vote is advisory or binding.

4.1.8 The EESC has given its opinion on this issue previously, in favour of a vote but stating that the motion on remuneration policy proposed to shareholders at their general meeting must be discussed and approved beforehand by the whole board, as is already the case in Germany ⁽⁸⁾.

4.1.9 Regarding the variable portion of remuneration for executive directors, the EESC would point out that the approval by shareholders at the general meeting must relate to the system and rules applied (predetermined and measurable performance criteria), as well as the amount itself, as paid in accordance with those rules ⁽⁹⁾.

4.1.10 With regard to the activity of proxy advisors, the EESC acknowledges that stricter rules are needed. In particular, it recommends that they be subject to the following obligations: to disclose their voting policy (with reasons for their recommendations); to present their draft analysis report to the company before communicating it to investors (so that the company can put forward its observations); to declare any conflicts of interest liable to affect their activities, in particular any links they may have with the company and shareholders, and to state the measures they take to prevent such conflicts.

⁽⁷⁾ See EESC Opinion, OJ C 24, 28.1.2012, p. 91.

⁽⁸⁾ See EESC Opinion, OJ C 24, 28.1.2012, p. 91.

⁽⁹⁾ In accordance with the Commission's recommendation of 2004.

4.2 Company law

4.2.1 The EESC thinks it important to make progress on the SPE project, the final form of which must be compliant with the Treaty and with company law in force. Beyond the harmonisation of national legislations, a uniform instrument such as the SPE would, it believes, have a substantial leverage effect in boosting crossborder operations by SMEs. The active involvement of employees in the SPE, following the same rules as those for SEs and SCEs, is a requirement which the EESC believes cannot be called into question without undermining the project and is an essential condition for the agreement which the EESC would like to see.

4.2.2 Similarly, on the issue of EU rules to facilitate the transfer of seats of companies between Member States, the EESC would have liked to see more conviction on the part of the Commission, which itself acknowledges that there is a real need in this area. The initiative in this field that it is calling for should continue to guarantee and strengthen the conditions needed to involve employees. Employees must be informed about and consulted on the proposed transfer, in line with Article 4 of Directive 2002/14/EC and the directive on European works councils.

4.2.3 On the other hand, the EESC is very wary of any EU initiative moving towards the recognition of the concept of

'group interest', which is bound eventually to jeopardise the principle of the independence of legal persons within a group of companies, particularly when those persons are not European. Notwithstanding the Commission's cautious and reasonable position, it is also worried by an approach which might see a subsidiary's interests sacrificed in favour of the interests of the group. In any event, if the Commission is to maintain this approach, work first needs to be done on a common EU-level legal definition of the concept of 'group of companies', which is a particularly delicate and arduous task given the diversity of definitions amongst the Member States.

4.2.4 Given the breadth of the action plan, the EESC does not consider it a priority to codify EU company law by the end of the year, since that is something which, by definition, is a very time-consuming process.

4.2.5 Furthermore, the EESC doubts whether this could be done on the basis of established law, particularly as the Commission calls for the unintended legal gaps and overlaps of directives to be remedied.

4.2.6 The EESC would point out finally that this would be a difficult task, since the directives in question, which contain a variety of options, have for the most part already been transposed into national legislations.

Brussels, 22 May 2013.

The President
of the European Economic and Social Committee
Henri MALOSSE
