

2. MINUTES OF THE PUBLIC HEARING ON FUTURE PRIORITIES FOR THE ACTION PLAN ON COMPANY LAW AND CORPORATE GOVERNANCE

Around 300 stakeholders participated to the public hearing organised on 3 May in the follow-up to the public consultation on future priorities for the Action Plan on Company Law and Corporate Governance. *See programme of the hearing in Annex 2.*

Following the opening speech delivered by Mr. Schaub, keynote speaker Mr. Antonio Borges welcomed the Commission's leadership in the quest for better Corporate Governance¹⁰. Mr. Borges considered that the Action Plan should focus on everything that leads to powerful externalities at the European level. According to Mr. Borges, *"to enhance competition, increased transparency is a must; higher corporate mobility is a strong catalyst; and the simplification of legislation, whenever possible, brings clearer choices for investors and business leaders"*.

Four panels successively examined the issues of (1) shareholders' rights and obligations, (2) modernisation and simplification of European Company Law, (3) responsibility of directors / internal control and (4) corporate mobility and restructuring.

Panel 1 – Shareholders' rights and obligations

In his introduction, the moderator, Mr. Montagnon, emphasised the importance of the inversed relationship between the accountability of companies to shareholders and the need for regulation. The discussion on the future of the action plan offers an opportunity to act in a different and more efficient path than that followed in the US.

As regards the continued relevance of the Action Plan, Mr. Ross Goobey considered that it had achieved most of its goals. Hence, a "digestion" period would be appropriate. Similarly, Mr. Bouwyn considered that legislation should be a "last resort" instrument.

In this regard, priority should be given, in the short term, to the proposal for a Directive on the exercise of shareholders' rights, the definition of substantial shareholders' rights as mentioned in the consultation document, including the issue of one share – one vote, and the mandatory disclosure of voting policies of institutional investors. According to Mr. Ross Goobey, short term action should focus on stock lending, the identification of "ultimate investor" and shareholders' responsibilities.

Mr. Müller-von Pilchau, from MünchnerRück/Arbeitskreis Namensaktie, expressed the view that the current initiative on shareholders' rights would not have any effect if the EU would not at the same time introduce an obligation for intermediaries to pass on information to and votes from their client to the issuer. Ms. Weber-Rey considered that the EU should rather concentrate on improving the relevant technology in a cross-border context.

As regards the practical exercise of shareholders' rights, Ms. Neuville pointed to several practical difficulties, such as a lack of control of the votes cast in General Meetings or the influence of major shareholders on companies' boards. She denounced existing

¹⁰ Speech available at http://ec.europa.eu/internal_market/company/consultation/index_en.htm.

practices of protectionism based on the notion of corporate social interest. She questioned the impact of shareholders democracy on shareholders equality, particularly in companies with important institutional investors. Ms; Neuville called for an adaptation of European company law in order to rule new creditors' practices in corporate governance. Deminor considered that it would be important to clarify the concept of '*acting in concert*' and define common criteria, so as to avoid imposing an undue obligation on shareholders to launch a bid, when trying to influence the board. The representative of the German Notaries Association (Deutscher Notarverein) pointed out to the practical problems that a general verification of vote counting would create and questioned the need for any such rule.

The issue of shareholder democracy, and in particular one share, one vote gave rise to different opinions. Mr. Bouwyn considered that any action in this field would have to be approached cautiously and would necessitate thorough prior study. Mr. Micossi strongly opposed any EU initiative on shareholder democracy. In his opinion, rights acquired on the market have no relationship with democracy. Existing practices should be respected. In addition, some pyramidal structures could achieve the same effects as multiple voting rights. The European Policy Forum, in the same sense, stated that harmonisation measures on shareholder structures would be more beneficial in practice than the introduction of the one share – one vote principle.

Ms. Weber-Rey focused on shareholder obligations and avoidance of abuse of shareholder rights. Transparency would be the overriding principle and Better Regulation would have to be about achieving transparency and creating a level playing field with minimal interference. Therefore, conceivable measures would lie in the field of a certain disclosure of voting behaviour by institutional investors, a duty for intermediaries and institutional investors to contact the beneficial owners to grant powers of attorney, or to obtain voting instructions, to ask whether the beneficial owners wishes or accepts to be disclosed to the issuer and to offer to inform – upon request – about the votes cast. On the other hand, certain shareholders' rights such as the right to ask questions at general meetings and special investigation rights should be left to the Member States. This view was supported by the BDI representative.

Mr. Massie, representative of the French Corporate Governance Association (Association Française de Gouvernement d'Entreprise) supported the view that the focus would also need to be on shareholders' obligations, in particular to monitor the company's actions throughout the year and to push the alarm button in case of problems. Mr. Montagnon specified that the ICGN Code actually covers such obligations.

Mr Becht, from ECGI (European Corporate Governance Institute), raised the issue of a potential need for a "Lamfalussy process" in the area of corporate governance.

Panel 2: Modernisation and simplification of European company law

The moderator, Ms. Simon, raised the issue of a potential conflict between the regulatory pause called for by many stakeholders and the project of a simplification of existing EU law. She invited the panel members to express their views on such issue as well as on the methods and main beneficiaries of a potential simplification initiative.

She also suggested addressing the following issues: (1) the potential risk of recasting, (2) the necessity to pay more attention to SMEs' needs, and (3) the usefulness of codification and asked the members of the panel to select one emblematic measure of modernisation of company law.

According to Ms. Van den Berghe, simplification might provide an appropriate remedy to face the regulatory fatigue caused by the different layers of regulation (not only hard law but also self regulation, corporate governance codes etc.). The codification of the *acquis* would improve the readability and clearness of terms and definitions. However, recasting the legislation would risk opening the Pandora's box. To achieve the Lisbon Agenda competitiveness objective, Ms. Van den Berghe proposes to take optimal advantage of the European diversity, within a context of minimal European harmonisation. Rather than imposing a unique corporate governance system in Europe, one should rely on regulatory competition and mutual recognition. Given that each governance model faces specific weaknesses, the EU should make sure that each type of governance model has an - appropriate set of governance mechanisms guaranteeing the necessary countervailing powers and checks and balances. However important self-regulation may be to achieve this goal, one should be aware that self-regulation without any form of supervision is not a workable solution, at least for civil law countries.

According to Mr. Radwan, the usefulness of a simplification exercise would need to be assessed by topic. National transposition measures of European company law are of immediate relevance for the users. In this regard, there are significant differences between Member States, particularly with respect to enforcement and importance of courts (judicial interpretation and legal development). A liberalisation of the legislation would be appreciated, but a complete recasting of existing EU law should be avoided. Future legislation should take account of the ECJ case-law. As regards potential future initiative, the adoption of a statute for a European Private Company would entail significant advantages for SMEs. Easy available and genuinely European legal form is likely to have spill-over effect prompting national lawmakers to be more responsive to entrepreneurs' needs. In Poland and some other CEE countries the Centros/Inspire Art-doctrine has not attracted enough attention to trigger off discussion capable of challenging entrenched national legal doctrines. Introduction of pan-European legal form would entail imminent confrontation. Another form of inspiring persuasion would be more frequent use of recommendations.

According to Mr. Hopt, the SLIM-process should be used as a model for the potential revision of the 3rd, the 6th or 11th Company Law Directives. One could also question the continued relevance of the 12th Directive. Deregulation should operate both at EU level (e.g. by allowing for an alternative capital protection system) and at national level (e.g. with a view to offering flexibility, as to the structure of company boards). The level of detail of rules imposed to companies should be sized to the structures of companies. Rules applying to SMEs should be less burdensome than those applied to public companies, which in turn should be less constraining than those rules applied to listed companies. However, according to the London Stock Exchange representative, one should take into account the fact that the increasing regulatory burden on listed companies create a tendency to delist.

Mr. Hopt also considered that potential codification or recasting exercises would create great difficulties. "Harmonisation of the harmonisation" would be a better approach: definitions used in different directives should be harmonised; the scope of application of different directives could be harmonised; inconsistencies of responsibilities of public authorities could be eliminated etc. Such exercise could be undertaken in the context of a "Lamfalussy-type" process or by an expert group. The priorities of the Commission's work should however lay with the 14th Company Law Directive on the transfer of registered office, the European Foundation and the key principles of Corporate Governance (better control of the board, special investigation rights etc.).

According to Mr. Nestor, simplification and modernisation should be the driver of all reform. Therefore, a functional approach (situation at EU-level – implementation - need for modification) is needed. Furthermore, particular emphasis should be put on the question of costs, in particular due to the vulnerable situation of SMEs regarding costs. Economic impact studies would hardly ever provide for reliable results in company law issues. The Commission's agenda should be about small issues that, however, could facilitate the practical lives of companies considerably. Thus, the fact that not all Member States would allow for the use of videoconferences in board meetings would be a real obstacle for international boards.

Mr. Wymeersch considered that the modernisation of company law is necessary in order to make full use of new technologies. Under the 11th Company Law Directive, translations of all documents to be filed in each national register are still required when information can be accessed through the Internet. Furthermore, simplification and modernisation should not only be envisaged at EU level, but also at national level.

Some stakeholders called for the adoption of a European Foundation Statute (European Foundation Centre), a statute for a European Mutual Company (Association Internationale de la Mutualité) and for a European Private Company statute (Verband Deutscher Maschinen- und Anlagenbauer, VDMA).

Panel 3 - Responsibility of directors / internal control

Whilst the views expressed by the panel were rather diverse as to the scope of directors responsibility, a common view emerged about the fact that the primary responsibility of directors vis-à-vis shareholders but also all other stakeholders (employees, sub-contractors, suppliers, creditors, etc...) was to ensure the long term existence of the company through the choice of a proper company strategy, a point particularly stressed by Mr. Hoffmann, and that guaranteeing proper governance was an important flanking policy and a responsibility of directors, as underlined by Mr. Strenger.

There was also agreement that a lot of ground has already been covered by the short term measures of the Commission Action Plan, with the two corporate governance recommendations on directors' remuneration and independence, the application of the "comply and explain" principle as defined in the recently adopted amendments to the 4th and 7th Accounting Directives and the confirmation in the EU law of the collective responsibility of directors in the preparation of the financial statements of the company.

The panel was not persuaded by the need for the Commission to introduce an option for companies regarding board structures (one-tier board vs. two-tier board) and considered that a recommendation would be the farthest the Commission should go in this area.

There was no appetite for a generalisation across the EU of the wrongful trading rule that exists in some Member States, considering that this matter relates more to bankruptcy law than company law *stricto sensu*. The issue of directors' disqualification was seen through the lens of administrative and criminal sanctions. However, the point was made of the potential usefulness of an EU rule preventing disqualified directors from engaging into "forum shopping" by re-establishing immediately in another Member State than the one where they have been banned from exercising directorship.

Ms. Knapp compared the UK and the US requirements on internal control: while the UK Combined Code on Corporate Governance shares the same objective as Section 404 of the Sarbanes-Oxley Act of ensuring the existence of effective internal control systems in

companies (*in particular directors on both sides of the Atlantic have to review and report yearly to their shareholders on the effectiveness of the internal control systems in relation to financial reporting –and beyond as far as the UK is concerned*), the ways chosen to achieve this objective in practice differ substantially. The US system is far more prescriptive in requiring a statement from an independent auditor about how the internal control systems of a company work. This requirement seems to have led to heavy and costly convoluted procedures for companies listed in the US. The UK approach relies more on the dialogue between the company and its shareholders and the revised Turnbull report provides directors with non-prescriptive guidelines to this end.

In this respect, the FEE indicated that it is about to publish a detailed survey of the practice regarding internal controls in 29 European States and in the US. In essence, respondents preferred market-led systems to US-type legislation.

In the debate with the audience, a vivid discussion took place about the class action concept and its viability in a European context. Most speakers and interveners were opposed to the introduction of such a concept, privileging redress through swift court action. Deminor noted that in the absence of the possibility for European shareholders to launch class actions in Europe, these did not benefit from settlements that may have taken place in the US with US investors. Mr. Micossi mentioned the existence of a draft Italian law on class action, and referred to a current experiment whereby legal action could be avoided by going first through an arbitration procedure to solve the controversy before the relevant regulatory authority (e.g. in the field of telecommunications). Mr. Micossi further stated that legislating on class action was probably outside the scope of competence of the Commission. Ms. Simon was of the opinion that the class action mechanism in the US had been introduced to compensate a weak involvement of the US public authorities and regulators.

In view of the cost for an investor to launch procedures in another Member State than his/her own, Ms. Neuville called for a coordination mechanism between regulators to ensure a proper sanctioning of directors failing to comply with their duties. A representative of the London Stock Exchange reminded that shareholders always have the right to sell their shares.

Another debate took place on how powerful a code of corporate governance can be. Mr. Micossi was of the opinion that in Italy, the condition for stringent surveillance by shareholders, financial analysts and the market did not exist, which explained that corporate governance principles, stemming from self-regulation, have been enshrined in the law and that the securities market regulator, Consob, has been tasked with the duty to enforce the application of the "comply or explain" principle by listed companies, whilst it should have been for the market (e.g. the stock exchange) to police the companies' practice. For Mr. Ross Goobey, this exemplified the classical problem of the absentee landlord and underlined the importance of the active role of institutional investors. Mr. Wymeersch reminded the audience of the recent statement of the European Corporate Governance Forum on the monitoring of the "comply or explain" principle. Such statement invites regulatory authorities to limit their role to checking the existence of the statement and to react to blatant misrepresentation of facts, acknowledging that, in some Member States, there was a temptation of the legislator to step in, and that administrative and penal sanctions have been foreseen in some Member States for directors who do not abide by the "comply or explain" principle.

A few participants were of the opinion that in order to address cases of poor governance, shareholders can always either sue the company or vote with their feet by selling their shares. Other participants did not share this view, considering that transaction costs would be dissuasive and that there is therefore a need to find adequate ways to ensure a proper enforcement of the "comply or explain" rule.

Panel 4 – Corporate mobility and restructuring

The fourth panel, which was moderated by Mr. Baums, discussed the issue of corporate mobility and restructuring. Mr. Baums introduced the subject and informed that among the topics related to corporate mobility and restructuring raised in the consultation on the Action Plan the panel members decided to focus the debate on three main topics: 1) the transfer of a company's corporate seat; 2) the European Private Company Statute and 3) the European Foundation.

1) The transfer of registered office

There was a general agreement among the panel members that there is a need for a directive on cross-border transfer of the registered office.

Mr. Davies considered that even though the cross-border mergers Directive and European Company Statute already make possible cross-border transfer of registered seat, the 14th Company Law Directive would allow such transfer at lower transaction costs. He mentioned two possible motives for companies to move their registered seat: 1) when the main part of business has moved to another Member State; 2) to take advantage of more favourable legal regime. However, in the second case the company would have registered and head office in different Member States and would have to heavily rely on the ECJ case-law on the freedom of establishment.

Mr. Enriques stated that one should focus on minimising the clash between two, often conflicting, objectives: the removal of barriers for business and harmonisation. He suggested that maximum harmonisation directives could be one of the options. Following this approach, the 14th Company Law Directive should contain a closed list of requirements that Member States may impose on companies transferring their registered seat to prevent gold plating.

Mr. Piñel stressed that a discussion on the possible 14th Company Law Directive should not marginalise other company law aspects of the mobility of companies, and in particular the problem of taxation and worker participation. The tax neutrality of the transfer should be ensured before the adoption of the 14th Company Law Directive.

Mr. Wymeersch suggested that the reasons for change of the company's seat should be considered. Two types of transfer were distinguished in this respect: 1) voluntary seat transfer in order to change the legal regime applicable to the company and 2) *de facto* seat transfer (*Überseering*-like) which would not require adaptation of the company to a new legal system and be based on the case law (however, in this respect, a 'general good' exception should be better defined in a directive not to allow Member States to impose unnecessary restrictions on companies wishing to move cross-border). In conclusion, the content of the 14th Company Law Directive should be focused on the mechanics of transfer of the registered seat and the voluntary seat transfer which involves the change of legal regime, while *de facto* transfer should not be regulated (except for the specifications concerning provisions of 'general good').

The statements of the panel members were followed by the questions and comments from the audience. Mr. Wymeersch agreed with the comment a representative of the University of Heidelberg that the 'general good' exception should be limited to extraordinary cases, such as public health or defence. Some form of disclosure should be secured and therefore one could examine the potential applicability of the 11th Company Law Directive concerning disclosure requirements in respect of branches to seat transfer. Mr. Enriques stressed the importance of taking into account the interrelation between insolvency law and company law. According to a participant, despite the existing case-law, the 14th Company Law Directive is still needed because several issues are still unregulated which may create confusion and practical problems.

2) The European Private Company (EPC)

Opposing views were expressed regarding the need for and the characteristics of an EPC Statute with more interventions in favour of such a new legal form.

As to the need for such a Statute, Mr. Davies pointed to the fact that its benefits largely depend on its characteristics, including the extent to which it would be regulated by European law and national laws. A high quality text would necessitate an agreement on either a text harmonising all the important issues relevant for the operation of such a private company or a text allowing for extensive contractual freedom. Since it is doubtful whether an agreement on either of the options can be achieved, it is more appropriate to allocate resources on issues where the usefulness of the output is less questionable. According to Mr. Enriques, the UK private limited liability company (PLLC) is so widely used in other Member States that it can be considered as an "EPC" lacking the European label only. According to Ms. Weber-Rey, the success of the PLLC should not be overlooked from the point of view of competitiveness and the principle of better regulation requires the EU Institutions not to spend resources on an instrument which will not be used.

Those intervening in favour of an EPC Statute (e.g. German business representatives) pointed to significant differences between national laws regulating private companies and emphasised that legal costs incurred by setting up different companies in different Member States can be so high for SMEs that it discourages them to operate across borders. Directives in force do not allow SMEs to operate in a cost-effective way (e.g. using the possibility provided by the merger Directive to merge subsidiaries into the parent company and establish branches in different Member States.) T. Baums pointed to the lack of uniformity of European companies compared to those of the US. Mr. Piñel was of the view that the lack of mobility is to a large extent due to the absence of enabling European legislation. Interventions from the private sector drew attention to the difficulties of using the PLLC - being a common law instrument – in the continental legal system. There is legal uncertainty as to the applicable law in certain fields (e.g. insolvency). The low survival rate of PLLCs operating in Germany has been highlighted. Mr. Radwan stressed the benefits of a European label for unknown Eastern European private companies.

As to the characteristics of the EPC, there seemed to be general consensus that the EPC should not follow the model of the European Company Statute. Interventions emphasised that people setting up private limited companies invest their own money, therefore it is crucial that this Statute should not be highly regulated. Furthermore, according to Mr. Enriques, the EPC could compete with the PLLC only if it would be extremely flexible and would have the characteristics of this latter.

3) The European Foundation

Mr. Baums shortly mentioned a potential European Foundation Statute, which in his view could be a long-term measure. Mr. Piñel considered that the real issue was not to create a European Foundation model, but to apply a mutual recognition system, such as the one applied for the Pension Funds. In this regard, any donation made to a European foundation recognised in the home country by citizens of any European country should benefit from the tax advantages given in such country to their national foundations. The same rule should be applied to the tax regime applicable to the operations made by a recognised Foundation in any European country in third European countries.

Mr. Baums concluded that the possible future priorities for the Commission could be: the 14th Company Law Directive on the transfer of registered office (short-term measure), the European Private Company Statute (mid-term measure) and European Foundation Statute (long-term measure).

Commissioner McCreevy's closing remarks are available at http://ec.europa.eu/internal_market/company/docs/consultation/closing_en.pdf.