

## Action Plan on Company law and Corporate Governance, Public Hearing, 3 May 2006

Summary (by Mr. Andrew Laidlaw, *The Law Society of England and Wales*<sup>\*</sup>)

The hearing comprised four panel sessions, as well as a couple of “keynote” speeches (see programme<sup>1</sup>). The four sessions covered: shareholders’ rights and obligation; modernisation and simplification of European Company law; responsibility of directors / internal control; and corporate mobility and restructuring. This note will start with the opening remarks of Alexander Schaub and the closing remarks of Pierre Delsaux – which give an overview of the consultation results and the issues discussed at the hearing. Thereafter, more detailed notes on each panel session can be found:

Panel 1 (Shareholders’ rights)	page 3;
Panel 2 (Modernisation and simplification)	page 5;
Panel 3 (Responsibility of directors / internal control)	page 7;
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### Alexander Schaub (Director General of DG Markt).

The meeting was opened with a brief statement by Alexander Schaub who noted that a **few preliminary results from the consultation** could be drawn:

- there was praise for better regulation principles;
- agreement that there should be no new legislation unless the need for EU level action had been demonstrated;
- that there be systematic impact assessment for every planned legislative measure;
- respondents considered that the 2003 Company Law Action Plan (“CLAP”) has fulfilled its purpose and there was strong support for the priorities in the CLAP;
- there is a sense of regulatory fatigue and respondents have asked for a gap period, but not to the extent that “enabling” legislation such as the 14<sup>th</sup> Directive on transfer of registered seat or the European Private Company are stopped. ]
- there have also been comments on other future initiatives, such as the need to focus more on SMEs or take account of all types of entrepreneurship; and
- respondents have also queried the difference in treatment between listed and non-listed companies.

On a further significant number of issues, there is a significant split of opinion.

### Pierre Delsaux (Head of Company Law Unit, DG Markt)

M. Delsaux summed up the day’s discussions, noting agreement on the principles that underpin the Commission’s initiatives:

1. **Better regulation**, which means real efficient impact assessments; appropriate consultations; and accepting that the Commission should consider the idea of proposing no regulation when dealing with an issue. There may be a need for legislation where barriers to capital flows exist. It could also be used where there is a need to give freedom or flexibility to companies. The EU should focus on key principles and avoid detailed regulation and it should be open to other means, such as recommendations

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<sup>\*</sup> Document available In Internet at  
[http://www.lawsociety.org.uk/secure/meeting/154625/Item\\_9\\_CLAP\\_Hearing\\_3\\_May\\_2006.doc](http://www.lawsociety.org.uk/secure/meeting/154625/Item_9_CLAP_Hearing_3_May_2006.doc)

<sup>1</sup> [http://europa.eu.int/comm/internal\\_market/company/docs/consultation/programme\\_en.pdf](http://europa.eu.int/comm/internal_market/company/docs/consultation/programme_en.pdf)

- or conducting studies. This does not mean that the Commission should do nothing because of regulatory fatigue.
2. There is a need to give **flexibility** to Member States and to companies – one size does not fit all. Regulatory competition is not bad in itself if investor protection is there and it does not create obstacles to the free movement of capital.
  3. There is a need to leave the **market to decide** what is good for it. It is not for the regulator to drive the market but it does have to ensure that the right conditions are in place – levels of transparency and disclosure are important elements.

In reaction to the panel discussions, he noted the degree of consensus on the different topics discussed. On **shareholders' rights** he took away the message that there is wide support for the shareholders' rights proposal but there are different views on the details. There is a need for this proposal, however, in order to avoid further regulatory intervention. There were questions on new developments, such as the situation concerning **debt holders, derivatives and stock lending** and although he did not know if there was a need to do anything, there was a need to explore this issue further at the Community level.

On **one share one vote** ("OSOV") there was no agreement but a wider disparity of views, so the Commission will continue to study this. On the issue of **simplification / codification** he heard the doubts about codification and the fear of opening Pandora's Box but others have said there is a need to solve conflicting provisions. There is possibly a need to "harmonise the harmonisation". There is also a need to take account of new technologies and he wondered whether there is a need to regulate for these or take action – certain practices have developed but the directives are outdated when compared to the markets' behaviour in certain respects. As for simplification, all agree that there is a need to simplify but the question is what this means and how to do it. Simplification at the EU level is important but there is the issue of Member States' transposition and gold plating, so the situation on the ground may not be simplified if Member States do not give effect to them.

On **internal controls** and the **role of directors** there is consensus on the need for these and the means to achieve it – there is no desire for an EU Sarbanes Oxley. He acknowledged the desire for flexibility and the application of comply or explain, so a continuation of the line taken. He did not think that the EU should pursue the avenue of allowing class actions for shareholders and he doubted that the EU had competence for this anyway.

Lastly on company mobility he noted an appetite for the **14<sup>th</sup> directive** (transfer of registered seat) as this could give flexibility to companies and it could be low cost in terms of regulatory effort (many of the associated problems had been resolved in previous legislation. On the **European Private Company Statute** ("EPC"), views were mixed, but the Commission could not avoid reflecting on this issue further.

## Detailed notes on the panel discussions

### Panel 1 – Shareholders’ rights and obligations

**Peter Montagnon (ABI)** noted that when there is more accountability to shareholders, there is less need for companies to be regulated, citing Sarbanes Oxley as an example. This depends on the shareholder exercising his rights responsibly and there is a link here to the proposed shareholders’ rights directive, which deals with the “plumbing” of the system – allowing shareholders to exercise their rights. Other issues concern the substance of rights, such as “one share one vote” and questions of responsibility in terms of the disclosure of voting policies and so on.

**Alistair Ross Goobey (Hermes, ICGN)** stated his belief, and that of the ICGN, that the CLAP had been successful and he agreed there was a need for careful consideration of any new initiatives. He thought the Commission should look at issues surrounding stock lending (see ICGN Code on responsibility); the passing of information up and down the chain of ownership; who should be entitled to decide how votes are cast and other such obligations – should it not be the “ultimate investor”? On one share one vote, he thought that if there was divergence from the principle, then this should be disclosed and justified. There are strong opinions even among some shareholders that longer-term investors should indeed have increased rights. As for investor accountability, he spoke of the importance of stewardship obligations, the disclosure of voting policies and records but at the same time thought it was too early for the Commission to take action on this.

**Pierre Bouwyn (French Institute of Directors)** noted the growing interest in France of shareholders’ rights and highlighted three reports that had been adopted recently on the subject, making some interesting proposals. He thought legislation should be used as a last resort and he preferred the comply or explain form of self-regulation. He also encouraged the convergence of practice within the EU. He said intervention by the EU was needed in relation to shareholders’ rights and welcomed the Commission proposal. He agreed with most of its substance but thought certain provisions should have remained for national action: rules on the convocation of general meetings; the right to ask questions; information to shareholders after general meetings etc. On one share one vote, he noted that many Member States allow double votes and that there is a need for considered reflection on this.

**Colette Neuville (French minority Shareholders Association)** spoke from the perspective of someone who acts as an advisor to shareholder activists. There is already a large division between law and practice. Competition has led to an increase in hostile business transactions, which require increased shareholder protection. As for transparency, market practices only render this partial, as transparency rules do not cover all types of transaction and there is rarely discussion of such matters in general meetings. There is also no real control of the voting in general meetings, which means it is open to fraud and other problems. There is a need for greater controls or checks. She also observed a greater degree of communication between certain important shareholders and managers, meaning issues are kept away from the board, leading again to problems of control. A final issue was the way in which debt instruments were replacing capital and the confusion that was being created between the two. Debt was often counted as an asset.

**Daniela Weber-Rey (Clifford Chance)** spoke about shareholders’ obligations and the avoidance of abuse. There was a need for a level playing field and she thought it

important that rights be paired with obligations. There is little in the draft shareholders' rights directive imposing obligations on shareholders but demanding certain disclosure requirements of the investor would create a more level playing field. For example, there could be a general rule on the disclosure of voting policy and specific rules for intermediaries, such as the duty to contact the investor to get voting instructions or ask if he wants to be identified to the issuer etc. The comply or explain principle could be applied in this respect to intermediaries and institutional investors. She thought that the creation of substantive rights should be the focus. The right to ask questions, the obligation to answer and the obligation to share information leads to a high risk of abuse. The directive currently exceeds the needs of corporate governance and should be re-considered to require transparency and avoid abuse. She also noted that the establishment of special investigation rights risked abuse and was better left to Member States.

**In the discussions** views were mixed. One speaker thought the **directive** should go further than simply setting notice periods, another thought that shareholders should be better informed of the rules that apply to them. On **OSOV**, one speaker said he could understand the desire for shareholder democracy but noted that rights attached to shares would reflect the market price at which they were bought. There are different forms of control in different Member States, so we should not force out certain types of arrangements. Another participant said that fostering economic efficiency through tailored structures would be a more appropriate approach than forcing a straight-forward democracy model. A further speaker noted that this is a drive for proportionality – there is an increasing demand from investors that the rights attached to shares are equal to the economic interest of the share and this will lead to a reduction in the cost of capital, as investors will not want to invest for unequal rights. For interest, the **European Policy Forum will organise a conference on one share one vote in London on 26 June**. The **entrenchment of management** was one issue that did need to be addressed.

Also the issue of the exercise of **shareholders' rights and concerted actions** was raised, as was the need for an EU interpretation of what constituted a concerted action (although the UK Code covered this). Another speaker noted the difference between France and the Anglo-Saxon model in this respect and the fact that investors were wary of taking such action in the UK. She agreed there should be an EU definition.

Someone noted the incomplete **role of intermediaries** and that the directive suffers from a lack of duties on the intermediary. There is for example no duty to offer or transmit the proxy vote or ensure that the vote complies with the wishes of the ultimate investor. Direct instructions could be requested from the account holder – there were issues about the communication of instructions through the chain of ownership. There was also an issue over whether there was sufficient knowledge about how these systems work in order to make it feasible to regulate it. It was also noted that the directive did not reflect the difference of bearer shares. Ms Weber-Rey did not want the directive to control the information given to the shareholder – it is possible to put pressure on intermediaries to disclose their policies, such as putting them on the Internet. There is no obligation on the intermediary to pass information on to the beneficial owner.

As for the problem of the **counting or control of votes**, it was noted that in some cases, it can take months for all votes to be checked and counted and systems are not reliable. Also if you represent a number of parties, there can be problems if you have to vote in the same way for all the parties you represent. There are also examples where voting instructions have been given and the investor has then been

informed that the votes were cast in the contrary way. The speaker wondered whether this should not remain a matter for contract, however, rather than a matter for regulation.

It is important for a **shareholder to exercise his rights responsibly**. The ICGN is preparing a statement on this issue. There is also the issue that the ownership structure of companies is changing - there is a move away from ownership being dominated by the large insurance or pension funds towards shorter term investors, but it is unclear whether you can legislate for this change in type of control. Any trustee or beneficiary must insist that the institutional investor fulfil his fiduciary duty.

Another participant questioned whether there was not a need for a **Lamfalussy-style** decision-making process for some of these issues – something which Delsaux said the Commission could study if this view was reflected in the responses to the consultation. **Montagnon** summarised the discussion, saying that the question of shareholder democracy, the transparency and operation of the ownership chain and the responsibility of shareholders were the three key issues that came out of the discussions.

## **Panel 2 – Modernisation and simplification of European Company law**

**Prof. Lutgart Van den Berghe (Belgian Governance Institute)** started by noting the need for improvement. Codification may make a contribution if it can help users to understand the concepts at hand and add value. Recasting may, however, open a can of worms. Codification is not the answer to all the questions, however. So the question is what the best way to achieve the objectives is. It is more difficult to harmonise in the EU as there is more heterogeneity. There is a need to look at the CLAP and its objectives – there are different political visions and different types of company, and different balances of power. So it is not possible to think that you can have OSOV in the EU without looking at other issues. She also noted that self-regulation could not work in civil law countries without some sort of enforcement mechanism in place.

**Dr Arkadiusz Radwan (European Centre for Comparative, Commercial and Company Law)** said that there was no universally agreed response at the Community level and questioned what simplification actually meant in practice. There exists the problem of differences between the Member States and their infrastructures, which make it questionable whether you can have a Community strategy. Simplification should concern those areas where flexibility applies or is needed. Opt outs are not a good option. Community law is based on national systems so should offer choices to Member States and flexibility. Recommendations are also an interesting instrument. He does not support recasting but favours a degree of liberalisation. He thinks there should be a focus on particular issues, such as the capital regime under the 2<sup>nd</sup> Directive or the 11<sup>th</sup> Directive.

**Mr Klaus Hopt (Max-Planck Institute)** mentioned the 2<sup>nd</sup> Directive and the recent revision, welcoming the process. In terms of the content however, he noted the new rules on expert reports and on securities and buy-back of shares. He said that the Commission did need to take account of good corporate governance and the needs of the capital markets. He noted the importance of the link between commercial and civil law as well. In terms of the SLIM programme he said the approach followed could be used for other directives, such as the 3<sup>rd</sup>, 11<sup>th</sup> (branches) and 12<sup>th</sup> directives (in relation to single owner companies) and even wondered about the possibility of repeal. He said that there should be more freedom for market participants:

- For the 2<sup>nd</sup> directive, the Commission should look for real options between the US and German systems and should provide choices.
- On board structures there should be less obligatory law at the EU level and he questioned whether there was a need for less regulation at the national level.
- On the difference between categories of company, there is a need for different regimes for different forms of company.
- He hopes for less obligatory legislation at the EU and national levels.

**Mr Stilpon Nestor (Nestor Advisors)** said the nature of reform is that there is always a need to modernise, so he questioned why the objective is modernisation itself. In terms of company capital and pre-emptive rights, there are substantive issues about the change of balance of power. There is a need to look at the process of modernisation and at the question of costs imposed, especially in relation to vulnerable groups like SMEs. There is always talk of impact assessments but he hasn't seen many economic impact assessments that make sense. The Commission is hard pressed to do these properly in relation to small changes. There is a need for a stock take and a common language of what we have and how to implement it. He thinks it is necessary to look at transposition and disclosure provisions and decide if there is a need to simplify. It is less important to ask whether to recast or to abolish provisions. There is a need to pick out certain targets for simplification.

**Radwan** highlighted the EPC proposal and said we should examine what model to use and see how it would impact on EU and national law. The costs on SMEs would be proportionally higher. The EPC could help holding groups. On a possible regulation, it should be available to domestic companies and there should not be limits as to the stakeholders that can set it up. It could be modelled on the UK private company, allowing silent investors, fast registration procedures etc. The new format could increase competition between legal systems and introduce new solutions to problems.

**Hopt** did not believe that a total codification would make sense. It could create difficulties. It could be difficult in relation to the capital markets but in terms of company law there is a need to simplify certain rules, such as rules that overlap or differences of definitions in directives. There is a need to look at the differences of scope of different directives and a need for clarification. In terms of how to do this, he thought there should be an expert group established to look at this, possibly composed of market users and academics and there is a need to avoid political compromise. The proposals for a 14<sup>th</sup> directive and the European Foundation could be important. There is also a need for key principles of corporate governance; better control of companies; control of shareholders; and reforms in relation to groups.

**Berghe** thought that there were a number of components to this discussion and that the SE was a very interesting laboratory in terms of elements, such as the use of board structures. **Nestor** thought that modernisation should be about smaller things such as electronic voting or the use of audio-visual technology for board meetings, or changes in relation to the language or meeting place for board meetings.

**In the discussions** it was commented that often the problem is not in the directive but at the level of national regulation and **problems of gold plating** etc. Many Member States continue to make legislation more complex. In terms of the modernisation programme, one person noted that, for instance, pre-emptive rights are hardly used any more because markets have adapted and found more efficient means. In terms of developing to the internet, the **11<sup>th</sup> directive** requires information to be filed with the local registry but it should be possible to put the information on the site of the issuer. Weber-Rey said that it is difficult to do impact assessments ex

ante but **ex post evaluation should be common practice**. Another speaker thought the use of different types of company [competition between legal forms] could be useful in terms of achieving the goals of the Lisbon strategy. Another said that we should not underestimate the cost to companies of complying with every new change in legislation – it will cause problems if companies start to de-list. A further speaker wondered whether the approach of the EU was too inward-looking and led to the EU being left behind on the global level. The **chair summarised** that there was no desire for detailed legislation, but support for the use of general principles and the respect for diversity and competition between national systems.

### **Panel 3 – Responsibility of directors / internal control**

**Mr Reiner Hoffman (European Trade Union Confederation)** started by saying that the goals of corporations should be broader than the returns to shareholders. There is a need to take a wider perspective – what are the challenges and responsibilities? In Germany the board's role is laid down in corporate law. There are rules concerning board procedure, its tasks and responsibilities and there is systematic participation of employees. The responsibilities are clear in the management of the corporation and the long-term existence of the enterprise is looked after. The company has responsibilities towards employees and other stakeholders, such as the local community. There is a need to look at the interaction between the board and the employees; is the company being successful; the need for short- to long-term strategies for investment. We have to evaluate all the relationships involved, including the types of contracts that the company has with its suppliers. There is a need to have sufficient information given to the board so that it can be aware of what is happening and manage the company's success. There is an importance of systematic participation of employees in the company. He had seen the successes of SEs but there have also been some 'abuses' of the model with some SEs being used as shell companies. He wondered whether an SE registry should be created.

**Mr Strenger (DWS Investment)** noted that the German model had found little success elsewhere. There was a need to push on with the CLAP and with harmonisation. There is a need for more self-regulation coupled with more transparency. Member States should apply best practices from other Member States. Personal accountability towards shareholders and the obligation to communicate properly with them is important as there is a rise in large M&A transactions. It is important that independent non-executive directors have obligations to ensure that shareholders are informed and asked for approval. There is a need for increased obligations on directors towards shareholders and a need to define independence properly.

In terms of the personal accountability of directors towards the creditor, this is mainly to do with the situation before insolvency. EU legislation should not upset the balance in Member States between company and insolvency law. Directors should not block warranted shareholder action. Non-executive directors need to look into the details of control. As for the choice of board structures, an EU recommendation should be sufficient because, as well as national legislation, the SE offers another choice. On the question of modernisation or simplification, there is a need to retain a motivating degree of freedom for management but there are limits that directors must impose on management. So there should be a need for approval of shareholders and independent directors on strategic objectives.

**Stefano Micossi (Italian industry Association)** wanted to stress caution. Most company law is based on Article 44 (2)(g) of the Treaty concerning the free

circulation of capital and the freedom of establishment. So there should be a strict application of the subsidiarity test. If there is a need for action it should be based on a lack of equivalent protection and the value added to the internal market. He noted the importance of transparency and disclosure. As for specific measures, these should be enabling legislation and not about imposing constraints. So, the EU could broaden governance structures, look at the transfer of office, and look at the idea of a more general EU company statute. He said that the focus should be on companies that have financial instruments circulating widely within the EU and there is less need to foray into private company law. He noted that a lot had already been done, citing the FSAP. Also he noted the 4<sup>th</sup> and 7<sup>th</sup> directives amendments which contain new responsibilities but where liability is still based on national law. He also noted the new 8<sup>th</sup> directive; the two recommendations on directors and the shareholders' rights directive. He did not think that governance standards are weaker than in Sarbanes Oxley.

As for wrongful trading rules, he noted that this was a UK approach but said that this would not work elsewhere. Most Member States do however have equivalent protections but the legal pre-conditions for them are very different. He questioned whether the Commission had demonstrated a need for EU action on this point. As for directors' disqualification, there was also a move into administrative and criminal sanctions but there was no clear value added. And on special investigation rights, the need to create such a right outside the context of the general meeting at EU level had not been demonstrated.

**Vanessa Knapp (Freshfields Bruckhaus Deringer, Law Society)** gave an overview of the rules on internal control, examining those in the UK Code, which used a comply or explain approach, giving flexibility to companies and allowing them to differentiate approaches. She noted the initial concern among companies over what they needed to do to implement the rules, and highlighted the role of the Turnbull guidance. She also compared the UK to the US system and the requirements in the Sarbanes Oxley Act. A lot of the substantive rules of the Act are similar to the UK Code but there is a requirement for an independent auditor's report in the US. Internal controls need to be a dynamic thing and the rigid US system might not be able to keep up with the degree of change in the outside world.

**In the discussions** a representative of the European accountants' federation noted a survey of Member States' legislation that they been carried out and which they would be publishing soon. It seemed like respondents to this survey did not want something like section 404 (Sarbanes Oxley) and that **control should be investor led**. It is important to keep this issue on the agenda. There is also a need to keep in mind the possibilities of fraud and the transatlantic dimension. Neuville wanted to know what happens when directors' responsibilities are not met. How are sanctions enforced? How can one ensure that there are effects in the different Member States or that action can be brought? Knapp said that it was often difficult to bring an action as the directors' duties are often owed to the company and not the shareholder. In the UK the interested shareholder can sometimes take an action on behalf of the company. Often publicity and asking questions of the company are just as effective if not more so. She said she was not in favour of class actions - if the claimants do not bear the risk of having to pay if they lose she thought this could produce undesirable consequences for business – and there is a risk that boards could become too risk averse.

Mr Strenger noted the need for full transposition of EU legislation and the need for self-regulation using comply or explain. The director has then to ensure that this works properly and the market will force necessary change. Micossi said that



redress has to be in the courts of the country where the company is. One should not underestimate the small owner of one share in another Member State. A **class action** bill has been tabled in Italy, which states that you can not bring a class action if it is possible to have arbitration before a regulator in advance. Another speaker noted that US investors can sue if the company is listed in the US but the EU investors in the same company cannot benefit from this, as they do not have the same possibilities to sue. There are real obstacles to class actions in the EU. Someone noted that as for class action, it is not a good idea to generalise this in the EU, whereas in the US class action was brought in to make up for a lack in the ability of the state to exercise control. Another speaker said that class actions are in line with the capital markets approach as they focus on financial damages and compensation for financial loss. As such we should consider class actions. Micossi doubted that the question of class actions was within the competence of the EU. A representative of Shell noted that class action were possible for shareholders if they did not get just satisfaction at general meetings.

Ross Goobey spoke of the independence of directors and questioned the need for sanctions / the need to force them to comply. He thought that the **best sanction is taken by the market and shareholders**, as this goes to the capital and the rating of the company. As for special investigation rights, he noted an example in Italy where a special investigation requested by a shareholder in Parmalat and carried out in 2002 found nothing to be wrong. So he questioned the extent to which these could really unearth fraud. Another speaker noted that in Germany lots of economists query the co-determination laws and he wondered if we should not look to the markets to exercise more control. Strenger noted the VW model, where there are far too many people involved in a board meeting to have a discussion. There is a pre-disposition in the board to make any redundancies outside of Germany and make investments in Germany. He thought the Dutch model was not too bad in terms of worker participation.

In terms of the enforcement of codes, in the Netherlands there is hardly any discussion of corporate governance codes or comply or explain in general meetings, so how can it be enforced? It was noted that in Italy, with regard to enforcement and sanctions, there is not the same tradition of scrutiny by investors and the press is not active in this respect either, so there is a real question of the effectiveness of codes. It was proposed that a board / **panel be set up to review corporate governance** and hold up a "yellow card" if company statements are not clear or there is non-compliance. In the end the law set up a body that sanctions compliance, so the regulator has the power over a self-regulation code. Strenger noted that it may be useful to have a panel that could look at questions where a company or an investor needs some sort of clarification or guidance on issues that are not clear.

There is a dichotomy between the need for regulation /legislation to ensure compliance against the need for shareholders to ensure enforcement. Someone noted that shareholders always have the right to sell their shares but another queried this, saying that it was not always so easy in practice and that was why institutional investors pushed for the creation of codes. Someone else said it was **very difficult to entrust oversight to a supervisor** as this changes the nature of the rules to a regulation and opens up liability to sanctions. One speaker noted the recent European Corporate Governance Forum statement on comply or explain, which states that the regulator should only intervene where there is a real problem.

#### **Panel 4 – Corporate mobility and restructuring**

**Mr Paul Davies (Professor at LSE)** stated that the proposal for the 14<sup>th</sup> directive could be made with little legislative cost as many of the issues at hand had already been worked out in previous proposals. Although transfers can be done using the SE or under the 10<sup>th</sup> directive by merging with a shell company established in a second Member State, the 14<sup>th</sup> would offer the possibility of a transfer to be taken more cheaply. If a company moves to a second Member State just for the better regulatory environment, they may have to rely on the European Court's jurisprudence. It is not clear whether this case law applies if the company moves mid-stream. The success of the SE depended on the uniformity of rules but in fact the rules are too dependent on national legislation. He wondered if it was possible to do any better with the European Private Company ("EPC"). He also wondered whether the purpose of the EPC was to give a high level of contractual freedom to those setting up a company or to create a high level of uniformity of rules. There are still questions over minimum capital, employee participation and mandatory sell out rules for shareholders. He wondered if it would be possible to get either uniformity of rules or a high level of freedom to contract. If not, then people may go for other attractive national models. The EPC will require a high degree of legislative time and this could be better spent on other things.

**Luca Enriques (University of Bologna)** said that there is a tension between greater flexibility through removing barriers and harmonising through new rules. The 14<sup>th</sup> directive should be a maximum directive, containing all the rules that Member States may impose. So there would be no mandatory requirements but it would clarify the requirements that Member States may impose, leaving no room for gold plating. On the EPC he had similar views to Davies. There is already use of the UK private company as a type of "EPC" but without the European label. He did not feel that it was a good thing to experiment with entrepreneurs and their money in this way. The EPC needs to be as low-regulation as possible in order to compete with the UK limited company. He found it difficult to imagine that the "ultra-liberal" model suggested in the EPC feasibility study would be adopted.

**Mr Enrique Piñel** said that there was a problem of restructuring within the EU and a problem of a lack of effective EU law. There is a need to address the problem of taxation before dealing with the 14<sup>th</sup> directive. There is little point in a directive without fiscal neutrality being agreed. As for the European Foundation, he wondered if it was needed. There is a need for mutual recognition of foundations in the EU, especially with respect to taxation issues. So it should be ensured that foundations can benefit from the same benefits as companies under the law. The issue of worker representation may constitute an important further obstacle and the issue of consumer protection harmonisation should also be looked at, as the divergences in this are a real barrier.

**Eddy Wyneersch (Belgian Banking, Finance and Insurance Commission)** said that there was an issue of regulatory competition and there were fears of governments about companies moving to less-regulated Member States. This fear led to the EU's large programme of harmonisation. Another problem is the difference of the real seat and the seat of incorporation. Regulatory competition has become more accepted through the ECJ's case law. There is a Becht and Mayer study which shows a number of German companies registered in the UK. In terms of regulatory arbitrage, mergers are often used to change subsidiaries into branches, so there is a need to enable cross-border mobility.

If there is a need for a directive on the transfer of seat, there is a need to take account of the question of change of nationality. There is a distinction between voluntary seat transfer (a choice to move to another legal system where the company must be located locally) and a de facto change of seat (freedom of establishment rights used where the company is not regulated locally and can continue to exist in its original form in the second Member State). In this case Member States still have the possibility of using the “general good” exemption, which is used to impose a number of rules. Tax is the main handicap. He questioned whether the 11<sup>th</sup> directive should be adopted to apply beyond branches to cover de facto a transfer. He favoured a 14<sup>th</sup> directive, but said there was a need to think of some of the issues surrounding the de facto transfer as well, and a need to resolve taxation issues.

**In the discussions** it was noted that there were difficulties in Germany concerning the use of **UK private companies**, in relation to the use of common law and the insolvency rules and concerns over applicable law. The reputation of the UK company has suffered a lot in Germany, so it is not clear that the EPC is not needed. Davies responded that he was only saying the UK company would be more attractive than a possible EPC and not that it was without problem or that these problems would be solved.

Another speaker thought that the EPC would allow easier market access from the new EU Member States and would make it **easier to access limited liability** as set up costs in countries like Poland are very expensive because of strict rules and levels of capital supply. Another speaker agreed there is a real need for the EPC among EU mid-size firms with branches. He did think that it was feasible. There is a need for a standardised tool rather than 25 Member States systems. Companies do not like to use branches because of tax reasons and a **need to limit their exposure** in other Member States. Cross-border control is difficult to exercise, so they prefer to have a separate legal entity in each Member State shielding the parent from risk.

In the US there is the Delaware model but it is difficult to envisage support for such a model in the EU. Someone noted that the UK company is still not a cross-border instrument. Piñel feared that much of the implementation of the EPC would be left to the Member States’ legislation, as with the SE. He wondered whether it would not be better to have something like the US’s **Model Corporation Act in the EU** to allow different Member States to establish a new company statute within national legislation. Weber-Rey said that we should allow competition between Member States on their existing models, which would lead to a convergence of national models.

Andrew Laidlaw  
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