

ES GILT DAS GESPROCHENE WORT

BDI-BMJ-Konferenz

Berlin, 28.6.2006

European Company Law and Corporate Governance

"View from the European Parliament"

Dear Präsident Thumann
 Commissioner McCreevy
 Ladies and Gentlemen

The European Parliament's perspective on European Company Law and Corporate Governance is very broad. So, please allow me to dive directly into the problems.

Our work and our concerns can be summarised in three contradictions:

- Enabling legislation versus red-tape
- Reasonable regulatory policy versus laissez-faire
- Substantive improvements versus first sight improvements.

All current company law dossiers can be located in this triangle of contradictions.

Let me start with legislation in the field of conflict between enabling legislation and red-tape.

Enabling legislation versus red-tape

Enabling legislation: The European Private Company

The best and latest example of enabling legislation is the European Private Company. Do we want companies to profit from the advantages of the internal market? Do we want companies - especially small and medium-sized ones - to pursue their businesses across Europe? The European Parliament has answered these questions with a clear "YES". On 1st of February this year, all European political groups called on the Commission to make a legislative proposal for a Statute for the European Private Company. The Parliamentary resolution is based on Article 192 of the EC-Treaty. That means that the Commission is obliged to react to our resolution. In fact, we did not ask for anything alien to the Commission. In its own Action Plan of 2003, the Commission itself announced the Statute of a Private Company.

I still do hope the Commission currently in office will soon make a proposal. It is difficult to understand why an impact assessment of this piece of legislation should take long. The EPC does not bring any new obligations to companies; thus, the costs are zero. On the contrary, it is legislation which gives companies a free choice. Whether an entrepreneur makes use of it or not, is a purely voluntary decision. In addition, Parliament made a lot of more or less detailed suggestions which can serve as a sound basis for further thoughts and elaborations. And not to forget: the Commission services themselves have started their work on a Statute before Parliament voted on it.

In addition, the Statute would give us the chance to make a piece of real Community legislation and thus boost the integration of the European Union in the field of company law. Other policies have difficulties in finding common ground. We should give them examples on how integration works.

So, what do we wait for?

We have set a deadline in the report to the end of this year. If the Commission is delaying the legislative procedure on the Statute without good reason, I shall certainly recommend to the Legal Affairs Committee a legal action at the European Court of Justice against the Commission for failure to act. Parliament's right - based on Article 192 of the EC-Treaty - to ask the Commission for legislative proposals must be flanked by some judicial rights. Otherwise, it will become null and void.

In this context, I would like to stress that Parliament is very careful with legislative initiative reports. In this legislative period, we have adopted only six reports so far. And it is only 18 reports since 1994. Council, on the contrary, launches around 50 initiatives per year. Given the very careful use of Parliamentary legislative initiative reports, I think I do not demand too much if I ask Commission to take that seriously.

Enabling legislation: The 14th Company Law Directive on the transferral of the registered seat

Another piece of enabling legislation would be the 14th Company Law Directive on the transferral of the registered seat. This directive would open up new possibilities for companies - and again: with ZERO costs. I say "Would" because we have been and still are waiting for a legislative proposal since the beginning of the legislative period.

Allegedly, there is some fear of further discussions on the workers' co-determination. I wonder why. The discussion is over after the cross-border mergers directive. In this directive, we - i.e. all Institutions, the stakeholders and the social partners - have found a workable solution. The cross-border mergers directive uses, in principle, the compromise which was found for the European Public Company and adjusts it to more practicability. I give you two examples. First, companies may apply up-front certain standard rules on employees' participation and can, thus, avoid lengthy negotiations within the company. Second, companies can limit the proportion of employee

representatives in the administrative organ from parity to one third. This responds to the fact that the one-third-participation system is used in most of the Member States.

This new *acquis* in employees' participation rights has, by the way, been again approved and confirmed in Parliament in the Resolution on the Statute of the European Private Company. The resolution explicitly refers to the Cross-Border-Mergers Directive.

So, employee rights cannot be the problem any more. What then?

Of course, we can leave the job to complete the Internal Market to the European Court of Justice. The just mentioned cross-border mergers directive is the best example for the Court's integrative activity. I only have to refer to the SEVIC-decision of the Court. Here, the Court clarifies that Community harmonisation rules "are useful for facilitating" the accomplishment of the Internal Market - however, they are not "a precondition for the implementation of the freedom of establishment" laid down in the EC-Treaty. The court is very active. It enables companies already now to conduct their entire business outside of the country of their registered office.

But, this is not what we want. We as legislator cannot leave the job to the Court. It is our responsibility to realise the Treaty in the current day-to-day context. And this can best be achieved by secondary legislation, not by jurisdiction. In addition, Court decisions are valid only *inter partes*. It is our claim, however, to fulfil the Treaty and its freedoms in general and not only in particular cases.

And in the special context of the 14th Directive, the jurisdiction of the Court does particularly not help us. The court facilitates the conduct of cross-border business. This is a fact since the CENTROS-decision. But: The company remains at one place - it only becomes active in other countries. The 14th Directive, however, aims at the direct mobility of companies. That means:

companies can move from one register to another. So, CENTROS and the 14th directive complement each other, but do not make each other obsolete.

I have to admit that Parliament is getting a bit impatient. Since Parliament is waiting for both the European Private Company and the 14th directive and since we do not get any signal that the Commission is going to move soon, the Legal Affairs Committee will pose an oral question in plenary to the Commission in September. We will ask about the current state of play in the preparation of the legislative proposals; we ask about the substantive and non-substantive problems; we also wonder whether Commission still pursues its task to complete the Internal Market and whether it takes this responsibility seriously.

Red-tape legislation: The 4th and 7th Directive on Annual and Consolidated Accounts

I am stressing the benefits of enabling legislation not without reason. I just remember the last legislative procedure on the 4th and 7th Directives on annual respectively consolidated accounts. We witnessed situations that came alarmingly close to classical red-tape legislation. Useless balance sheet requirements would almost have burdened companies with ineffective transparency obligations. A typical lose-lose situation. Parliament was alarmed. We put a lot of effort - in the end successfully - in limiting the initial proposal to the necessary. In addition, we managed - against the opposition by Council and Commission - to raise the thresholds for SMEs by 20%. So, many more companies can now benefit from exceptions. So, red-tape could be avoided - but it was not a matter of course.

Parliament also fought for other measures of relief for small and medium-sized companies. For example, we do not see any added value in small entities' publishing their accounts. Further, there are companies that are not small but whose structure of members does not have much impact on external third parties. Those companies should, from my point of view, equally

profit from exemptions as small companies do. Even if size is a good criterion, we might need to look more closely to the particular circumstances of companies of any size.

I have heard that - NOW - the Commission is taking some of our previous thoughts and proposals aboard and might be going to use them for their simplification procedures which I will get back to later on. Anyway, I am very pleased about this positive development.

Red-tape: Shareholders rights directive

The shareholders rights directive is NOT a typical example of red-tape legislation. I am convinced that this directive is necessary to build confidence in the capital market and, thus, boost economic growth. However: initially, it was a clear example of meaning well and achieving the opposite. Of course, the proposal sounded very enticing to grant to all shareholders an all-year-around full right to ask questions to the management. But a look at the cost-benefit-relation made it very soon obvious that the initial proposal would not have brought the intended effect. On the contrary: it would have burdened companies without any benefit for whom-so-ever. Most Member States have some sort of question right - but they are designed very differently. Some Member States allow question at any time but have no rules what happens when the company fails to give correct answers. Other Member States have a question right limited to general meetings but equip shareholders with far reaching procedural means when the answers are wrong. You see: co-ordinating different systems bears the risk of distorting existing systems. In the consequence, the whole system does not make sense any more. In order to avoid these distortions we generally have two options: EITHER full harmonisation and the creation of real community systems OR the competition of systems on the basis of a level playing field. From my point of view, there is no only-good and only-bad option. Whether we go for harmonisation or for a level playing field can only be answered case-by-case.

If we want to have a fully integrated Internal Market, we, of course, have to make the experience of full harmonisation.

At this point, let me use the opportunity to briefly mention another project. As far as company law it not yet harmonised, we have to deal with the problem of the conflict of laws. Which law is finally applicable if the company laws of different Member States interact? This question can play a role, for example, in the context of the incorporation of companies, liability of members of a company etc. While we should seek to find European solutions on the Community level, we, nevertheless, have to have an eye on those grey zones which are not yet harmonised. I know that the German Ministry of Justice has taken a special interest in this field of international private law.

Red-tape: IFRS for SMEs

To finalise my thoughts on red-tape-legislation: Let me give you another example of regulation which bears the risk of turning out to become burdensome - even if the contrary might have been intended. I am talking about the International Financial Reporting Standards. Of course, Parliament supported the IAS-Regulation. But we also see that some IFRS - as they are elaborated in London by the International Accounting Standard Board - do not respond to the needs of European Companies. Especially for small and medium-sized companies, the IFRS are burdensome and also useless. I appreciate that the IASB tries to design IFRS which fit to SMEs. But we have to note that the needs of SMEs are still not properly considered. In the so-called comitology-procedures, Parliament has now the chance to better influence the endorsement of Accounting Standards. I am particularly happy about Parliament's becoming more and more powerful in this respect: We are very often the last resort for entrepreneurs that see themselves confronted with burdensome Standards. We use our growing strength in making these critical voices better heard in the IASB and the Commission.

Reasonable regulatory policy versus laissez-faire

Reasonable regulatory policy: hedge funds

You might have gathered from what I just said that - for me - legislators should confine themselves to the very necessary and that I, in principle, subscribe to the slogan "less is more". However, NOTHING is often not enough.

For me, hedge funds and private equity are a topic where some legislative effort would be helpful. I do not want to enter into a discussion whether these forms of investments have a positive or negative impact on the financial market. This decision, I think, we have to leave to the market. Neither do I want to enter into the moral discussion whether hedge funds are to be compared with the biblical curse of locusts or "Heuschrecken", or should be seen as business angels. But I think the legislator cannot remain completely silent. Too much risk is involved, too much money of people who are not financial market experts is spent. Therefore, my approach is to focus on transparency issues in the area of company law and bring light into the grey zone where existing company law legislation does not suffice.

Parliament has not yet taken a formal decision to make an initiative report. But I assume we will start with it shortly after the summer break. The Legal Affairs Committee is planning a legislative initiative report on transparency requirements; we will focus on company law aspects. Parallel, the Economic and Monetary Affairs Committee will look at the impact of hedge funds on the financial market. We are at the moment planning, how both committees can co-operate.

Laissez-faire: recommendations on independent directors and directors' remuneration; "one share one vote"

If the European Institutions want to limit their legislative activities, I would start limiting the recommendations. Work force and time can be saved for, for example, the elaboration of the Statute for the European Private Company. I was particularly sceptical as regards the former recommendations on independent directors and on directors' remuneration. I previously had had the chance to share my views - also with the BDI. So, I am not going into detail any more. However, I am equally sceptical with a possible recommendation which we might get in the context of the "one share one vote" discussion. I have two simple reasons:

First and generally: recommendations disguise as non-binding and nicely-meant advice. As such, they are elaborated completely without the participation of the European Parliament. In the end, however, they are more binding than they appear. They are a "warning shot" which can motivate national legislators to anticipatory obedience. They can be also used by Member States to justify some unpopular decisions - with a hint to the scapegoat "Brussels". Second and especially with regard to the "one share one vote"-principle: Parliament demanded not to touch this topic until the review-report to the take over bids directive in 2012. You probably know that I am a supporter of the "one share one vote"-principle. Nevertheless, I think, it is simply too early to tackle this issue. We need to give the market time to react to the take over bids directive and to its national implementation. The market will then tell us - maybe in five years - whether those companies that apply the benchmark of strict proportionality between voting rights and capital are better off and better appreciated than others. By the way, Parliament explicitly expressed twice the view that we do not want any proposal on "one share one vote". We expressed it in our company law resolution from July 2006 and in a debate in the Plenary after a Oral Question to the Commission on the proportionality between ownership and control in March this year. What is a quasi-legislative act worth when it is contrary to the position of Parliament and Council? What is quasi-legislation worth, when it cannot be picked up by real legislation afterwards?

Substantive improvements versus first sight improvements

First sight improvements: Simplification

The Union is constantly pushed to deliver good news. Or I shall say: news that sound good in the newspapers. In this context, the Commission started a huge simplification project. I generally welcome and support it.

However, in the field of Company Law, I cannot tell you whether I would classify the current discussion on simplification as "substantive improvement" or "first sight improvement". Surely, if simplification means to make life easier for market-participants, it is a good thing. If we cut off red-tape and eliminate useless and burdensome provisions, it is, of course, an improvement.

However, what is the benefit of eliminating Community provisions which have already been implemented? Not to forget that each company law directive is the result of very difficult discussions and presents a compromise that Commission, Council and Parliament - with the involvement of stakeholders - agreed on. Once we found an agreement on Community level - why go back? We really risk to open Pandora's Box when we start unbundling our compromises. We should not touch those areas where we already have achieved harmonisation - unless there are substantive reasons why we need to change the *acquis communautaire* in a specific field altogether.

Let me give you two examples. First, the Third and Sixth Company Law Directive on Mergers and Divisions. We are now simplifying them by deleting the requirements of the examination of the draft terms of mergers/divisions and of the expert report. All right. But I cannot recommend going any further. We have been just about to open Pandora's Box here. We suddenly had a discussion about the rights of creditors and of employees even though the draft terms of mergers/divisions in the Third/Sixth directive are not made neither made for creditors nor for employees but for the shareholders. When we touch our compromises we immediately provoke the usual reflects and start into unhelpful discussions.

The second example is the Second Company Law Directive. Of course, directives have to be subject to change and improvement. However, if we have lifted Company Law issues onto the Community level, let us remain

there and improve them on the Community level. It would be a step backwards, if we now leave the Community level and refer back to individual national legislation. We need Directives which also focus on mainly domestic matters because we need to make the different Company Law systems - if not equal - then at least comparable. Comparability is a precondition for the level playing field and the competition of systems.

To complete this thought, I would like to repeat that I do welcome and support the simplification attempts of the Commission. Therefore, I must stress that also the Member States have to make their contributions. Our simplification efforts are useless, when Member States do not pass them on to the real addressees - that are the companies. It might be a good idea to not only monitor the implementation of EC-legislation by Member States but also the implementation of simplification measures.

Substantive improvement: Partnerships (Personengesellschaften), SMEs

Let me finish my remarks with some thoughts about possible developments in European company law. Parallel to our discussions on cutting red-tape for listed companies, we should start thinking about using the advantages of Community legislation beyond listed companies and limited liability companies - which in German would be labelled as "Kapitalgesellschaften". We could transfer those experiences that are good and useful to partnerships - which in German are classified as "Personengesellschaften". Please, don't get me wrong. I am talking only about enabling legislation and not red-tape. And I only recommend to open up the mind for it. I have no particular proposal in mind. But once we feel confident with the Internal Market and the freedom of establishment, we might want to spread the benefits to all participants of the Internal Market.