

Debriefing on Corporate Governance Conference, Helsinki 5 October 2006

The Presidency Corporate Governance Conference on Better Regulation in EU Company Law, Process and Substance held yesterday in Helsinki gathered around 200 participants. The conference was devoted to Better Regulation (morning) and One share one vote (afternoon).

I. Better Regulation and Challenges of Drafting EU Company Law

In his introductory speech (see slides attached), **Pierre** presented the Commission better regulation policy (RIAs and simplification). He emphasised the need for a common reflection on how to achieve simplification.

Geoffrey Dart, in an incisive reflection on '*How to give Company Law back to stakeholders and the Member States?*' (attached) stated a rather critical opinion on the added value on company law and in particular the 2nd, 11th and 12th Company Law Directives. Regarding better regulation, he acknowledged that the quality of standard Commission regulatory impact assessments has improved massively. As relates to simplification, he reported the UK experience of simplification, which started in 1998 and has not been completed yet (though this should happen soon). Amazingly enough, the old company law Act, composed of 750 Articles, should soon be repealed and replaced by a new simplified company law Act of 1200 Articles...

Ralf Fischer zu Cramburg, Secretary General of **UNIQUE**, illustrated the cost of over-regulation with an economic analysis of the costs of SOX for DE issuers (total average cost: 7 123 189 €). The costs of SOX are deemed superior to the benefits of SOX for 87% of DE companies. Regarding better regulation, UNIQUE has developed 10 commandments:

1. Do not assume all companies directors are rogues and vagabonds;
2. Do not assume all consumers or investors are children;
3. Develop a balance around "caveat emptor" ("let the buyer beware");
4. Accept that risk is synonymous with progress and reward;
5. Stress better, not more, regulation;
6. Consider regulation only as a last resort and evidence based;
7. Look to consistent application of what is in existence (Lamfalussy level 3);
8. Take immediate and firm action against Member States that do not comply (Lamfalussy level 4);
9. Sunset clauses should be standard;
10. Undertake and report RIAs as a matter of course.

Anne Outin-Adam presented the **CCI's** position on how better regulation should imply taking into account the views of European citizens upstream, during and downstream of the legislative process. Regarding public consultations, she considered that the Commission should summarize the content of the responses received. Ms. Outin-Adam advocated enhanced transparency during the legislative process in the EP Committess, the Council and Coreper as well as drafting notes on the position of different Permanent Representations. She also called for transparency during the process of selection of experts to the comitology committees.

Peter Montagnon emphasised that regulation should not stifle entrepreneurship and referred to CMC's statement according to which non working legislation should be repealed. According to him, there is "*nothing wrong with doing nothing*" ...

Marco Becht, from **ECGI**, presented an in-depth analysis of "*Where do firms incorporate ?*" (slides attached), illustrated by two cases of a DE Ltd and a DE Plc registered in the UK. He wondered whether the Ltd is going to be toxic for DE companies and raised concerns about the compliance of DE Ltd/Plc registered in the UK with corporate governance rules (see slide 16).

In reaction to the speakers' presentations, **Jérôme Chauvin**, from **UNICE**, proposed to establish an independent body for the evaluation of RIAs.

Klaus Hopt, from the **Max-Planck Institute**, considered the DE Ltd as a very good incentive for company law reform in DE.

II. Different classes of Shares and other Voting Right Arrangements in Listed European Companies. What types of shares and other financial instruments companies and investors will need, what kind of changers are there going to be in financing instruments, are regulations or recommendations at EU level necessary ?

Keynote speaker **Ron Gilson**, from **Stanford Law School**, presented an analysis of "*Equity Proportionality in Corporate Voting: Linking Problems and Responses*", based on the assumption that voting rights disproportionate to equity holdings are controversial. According to Pr. Gilson, most of the problem resides in law enforcement, more than in the substance of the law. He explored the potential path of an opt in system at companies' level for commercial courts.

In reaction to this keynote speech, **Vanessa Knapp** questioned whether there is a role to play for listing rules. **David Devlin** raised the issue of alternative control mechanisms. **Klaus Hopt** wondered whether arbitration would be one possible way to go. **Antonio Borges** considered that market disclosure is the best way to fighting private benefit. **Jonathan Rickford** stated that some private benefit is actually desirable.

Hannu Ryöppönen, from CFO, Stora Enso, made a short presentation of shareholders' role in corporations, which highlighted the importance of minority protection.

Jesper Brandgaard, from **Novo-Nordisk**, advocated in favour of different class of shares, particularly for research based (e.g. pharmaceutical) companies where a long-term approach is crucial for the development of sophisticated pharmaceutical products. He also mentioned the case of Google. He questioned whether the potential removal of multiple share structures from the EU would create a loss of valuable innovative enterprises to the US - which is in sharp contrast to the Lisbon objectives. He also argued against a one-size-fits-all solution. In his opinion, freedom of contracting shall be supplemented with transparency and accountability.

Peter Montagnon insisted on the need to explore the impact of different classes of shares and highlighted the importance of the study recently commissioned in this regard.

Timo Löyttyniemi, from the FI **State Pension Fund**, presented "*An investor's view*". He considered that voting differences are only a proportionally minor aspect of conflicts of interests in normal financial markets. According to him, voting differences are not a problem and one share one vote is not necessary. Minority protection, fair treatment rules and bid regulation/take-over law, however, are the right path to solve potential arising problems of dual-class shares.

Mats Beckman, from **OMX (The Nordic Exchange)**, presented the new Finnish Companies Act. He observed that investor preferences drive companies subject to an IPO to only have one class of shares. He also stated that the trend is that the number of listed companies that apply shares with differentiated voting rights is reduced over time due to market expectations. According to him, it is not evident that regulatory intervention is needed.

Jean-Nicolas Caprassé, from **ISS**, presented the study on one share one vote.

During the debate, **Antonio Borges** advocated in favour of allowing freedom of contract. In his opinion, the disproportions are not necessarily harmful. Therefore, one should distinguish between the types of disproportionate voting rights on the basis of their potential harmness to the market. According to Antonio Borges, one should eliminate the more extreme situation - which does not imply outlaw disproportionate voting rights.

Jaap Winter questioned whether there is sufficient information in order to be able to make the suggested difference. Should the market be left to solve the problem ?

On the other hand, **Jose Garrido** considered that intervention is needed to reach the one share one vote principle. In this regard, he referred to the old draft proposal for a 5th Company Law Directive. These views were contradicted by **Rolf Skog**, who considers that there is not one optimal financial structure.

Jonathan Rickford considered himself in favour of the one share one vote principle, but against the rule. He questioned the potential existence of lateral ways to deal with such issues and referred to Article 5 of the take-over bid directive on the mandatory bid rule, as well as to EC Treaty provisions on free movement of capital.

Klaus Hopt raised the issue of compensation. He questioned whether compensation is due, whether compensation should be restricted to specific issues and what kind of compensation (what does adequate compensation mean) should be due. Are private benefits to be compensated ?

Replying to Jaap Winter's question on what advice he could give to the Europeans, **Ron Gilson** considered that the study should give guidance about what is dragging market changes.