INSTITUTE FOR LAW AND FINANCE

REPORT OF THE REFLECTION GROUP ON THE FUTURE OF EU COMPANY LAW

INSTITUTE FOR LAW AND FINANCE
GOETHE-UNIVERSITÄT FRANKFURT AM MAIN

WORKING PAPER SERIES NO. 126

Report of the Reflection Group On the Future of EU Company Law

Institute for Law and Finance

WORKING PAPER SERIES NO. 126

5/ 2011

European Commission
Internal Market and Services

Report of

the Reflection Group

On the Future of EU Company Law

Brussels, 5 April 2011

Report of

the Reflection Group

On the Future of EU Company Law

Brussels, 5 April 2011

Disclaimer

This paper has been drafted by the Reflection Group on the Future of EU Company Law and solely reflects the views of that Group. It should not in any way be interpreted as representing the views of the European Commission.

Reflection Group on the future of EU company law

José Engrácia ANTUNES

Theodor BAUMS

Blanaid CLARKE

Pierre-Henri CONAC

Luca ENRIQUES

András HANÁK

Jesper Lau HANSEN

Harm-Jan de KLUIVER

Vanessa KNAPP

Noëlle LENOIR

Leena LINNAINMAA

Stanislaw SOLTYSINSKI

Eddy WYMEERSCH

About the Reflection Group

The Reflection Group on the future of EU company law was established in December 2010 by the European Commission to provide a report for a conference to be held in Brussels on 16 and 17 May 2011.

The members of the Reflection Group were appointed in their personal capacity and do not represent particular institutions or Member States.

The Group had three plenary meetings in Brussels, on 16 December 2010, 3 February 2011 and 29 March 2011.

At the first meeting, the Group established three sub-committees with subjects suggested by the Commission: I on corporate mobility (chair: Hansen); II on long-term viability of companies (chair: Wymeersch/de Kluiver); and III on management/oversight structures and groups of companies (chair: Conac). The sub-committees have met and discussed their subjects, some of which were overlapping.

At the second meeting, the three sub-committees presented a range of papers discussing various issues within each sub-committee's subject and it was decided which issues merited further attention. The task of combining the various papers into a final report was vested with the chairs of the three sub-committees and the new combined drafts were presented to the Reflection Group by 25 March 2011.

At the third meeting, the drafts for the final report were discussed and adopted.

The Reflection Group is aware that the Commission is preparing a Green Paper on corporate governance. It will be made public after the Group has concluded its work and has thus not been available to the Group.

It has been the ambition of the Reflection Group to address current problems in EU company law and provide analysis and suggest initiatives where appropriate. The concentrated procedure has not allowed the presentation of more detailed proposals for legislative action or to reach a consensus on all issues. The Reflection Group hopes that the present report will enable an informed debate at the Brussels conference and serve as inspiration for the on-going debate on EU company law.

Index

Chapter 1: Introduction ... 7
1.1. EU company law at present ... 7
1.2. Focused harmonisation ... 8
1.2.1. The tool box of regulation ... 8
1.2.2. Private, public and listed companies ... 8
1.3. Issues of corporate governance ... 10
Chapter 2: Cross-border mobility ... 13
2.1. Introduction ... 13
2.2. The reach of free establishment at present ... 13
2.2.1. Case law ... 13
i) The Home State's discretion to design its laws on formation ... 13
ii) Limitations on discretion – Transfer of registered office ... 14
iii) Limitations on discretion – Transfer by way of merger ... 14
iv) The Home State's obligation to respect secondary establishment ... 14
v) Duty of Host State to recognise companies of other Member States ... 14
vi) Duty of Host State to respect freedom of establishment by foreign companies ... 15
vii) Abuse of the freedom of establishment ... 15
2.2.2. EU legislation ... 15
i. The Directive on cross-border mergers ... 15
ii. EU company forms ... 16
2.3. Enhancing the mobility of national companies ... 17
2.3.1. Obstacles for mobility ... 17
2.3.2. Transfer of registered office ... 19
2.3.3. A legal regime for cross-border divisions ... 21
2.4. The significant link between company and Home State ... 23
2.4.1. International private law ... 23
2.4.2. Real seat and registered office ... 24
2.5. Taxation ... 25
2.6. Enhancing cross-border mergers ... 27
2.6.1. Time limits ... 27
2.6.2. Suspension of the merger and the position of creditors ... 28
2.6.3. Exchange of shares ... 28
2.6.4. Other forms of restructuring ... 28
2.7. EU law as a 28th company law regime ... 29
2.7.1. The SE ... 29
2.7.2. The SPE ... 30
2.7.3. Other forms ... 31
2.8. Enhancing transparency ... 32
2.8.1. Increased transparency – business registers ... 32
2.8.2. Increased transparency – branches ... 33
2.8.3. Increased transparency – disqualifications ... 34
Chapter 3: The contribution of governance and investors to long term viability of companies ... 36
3.1. Long term viability in listed companies ... 36
3.1.1 Short Term v. Long Term in Listed Companies ... 36
3.1.2 Risk management in Listed companies ... 39

i) The arguments for EU recommendation and legislation on risk management for listed companies ... 39
ii) The Possible Content of an EU Legislation and Recommendation ... 42
3.1.3 Long term ownership ... 46
3.1.4. Institutional investors ... 48
3.1.5. Voting in listed companies and shareholder identification ... 50
3.1.6 Corporate governance, Position of Management and Independent Directors ... 51
i. Position of management ... 51
ii. Discussion of position and role of Independent Directors ... 51
iii. Other initiatives to be reviewed? ... 52
3.2 Worker participation at the board level ... 53
3.3 Non listed companies ... 55
3.3.1 Choice between different (one tier/two tier) board structures ... 55
3.3.2 Small and medium sized enterprises (SME): further simplification efforts are appropriate ... 57
i. Further simplification efforts ... 57
ii. A simplified single member company template ... 58
Chapter 4: Groups of companies ... 59
4.1 The recognition of the "interest of the group" by EU legislation ... 59
4.1.1 Historical development of the regulation of groups in the EU ... 59
4.1.2. The arguments for an EU recommendation on groups of companies ... 60
4.2. The simplified single member company template ... 66
4.3 Transparency of groups structures and relations ... 68
4.3.1 Current rules on transparency of groups of companies ... 68
i) Transparency of group formation ... 70
ii) Transparency of group structure ... 70
iii) Transparency of group functioning and management ... 71
4.3.2 Assessment of regulatory needs ... 71
i) Transparency of the formation of groups ... 71
ii) Transparency of group structure ... 72
iii) Transparency of group functioning and management ... 73
Annex 1: List of recommendations ... 76
Introduction – recommendations ... 76
Cross-border mobility – recommendations ... 76
The contribution of corporate governance and investors to long term viability of companies – recommendations ... 77
Groups of companies - recommendations ... 79

Chapter 1: Introduction

1.1. EU company law at present

The last comprehensive review of European Company Law and the EU Action Plan aimed at "Modernising Company Law and Enhancing Corporate Governance in the European Union" dates back to 2002 and 2003 respectively. It is therefore appropriate at the start of the second decade of the 21st century to evaluate and review the status of whether new ideas, changes and actions should be added.

When reflecting upon the course of EU Company Law since the report of the High Level Group and the issue of the EU Action Plan, it is inevitable to take into account the financial and economic crisis of the last three years that has led to a substantial economic downturn. As economic sustainable growth is one of the objectives of the EU, it should be considered whether imperfections in EU company law have played a role in the crisis or whether improvements can be thought of to prevent such a course of events in the future. In as far as the crisis can be attributed to short term focus, the issue can be raised whether and how regulation at the EU level may further a more long-term perspective and whether in reviewing the current state of European Company Law any improvements can be worked out against the background of the market failures the crisis has shed light on.

The financial and economic crisis of the last three years has shaken a number of received truths about the functioning of financial markets and how its agents, including financial and non-financial companies, make decisions and allocate resources. The presence of bubbles, first in equity markets back in the 1990s, then in credit markets in the 2000s, casts doubts on the ability of investors to rationally price financial products with a view to the long term success of investee companies. Irrationality in financial markets can only exacerbate the conflicts of interest arising between shareholders and managers and those between shareholders and creditors.

Both existing rules and lack thereof may favour excessive risk-taking and myopic management decisions. In fact, the question may be raised of whether the regulatory framework systematically promotes a long-term perspective. Another question is whether rules can prevent short-termism and whether, in all cases, that is desirable. Securities law provisions may indeed themselves encourage short-sighted investment and business decisions, while the lack of rules correcting for the distorted incentives stemming from limited liability may facilitate an overly aggressive management style.

Furthermore, the financial crisis has highlighted how important it is for businesses to operate in a flexible environment allowing for adaptation to new circumstances and for experimentation of innovative financial, organisational or industrial ideas. Leaner organisations have been quicker and better at adopting all the changes that were needed to survive and thrive in the new business environment of the crisis and its aftermath. A flexible legal framework can itself facilitate adaptation and organisational change and thus reveals itself to be an important factor to sustain competitiveness of European businesses.

Striking a balance between the need for rules discouraging excessive risk-taking and the goal of preserving a flexible legal framework is no easy task: there are no quick, '"one size fits all" rules that are good for each and every company irrespective of its specific features. A balanced approach is needed in answering both (i) the question of which rules might work best and (ii) at which level -

EU or national level - such rules should be adopted. In this respect the starting point is the subsidiarity and proportionality principles enshrined in Article 5 of the TEU. The Reflection Group appreciates the extent to which the Commission uses consultations with the Member States and the public and impact assessments in its preparation of legislative actions and finds them necessary to ensure that all measures rest on a well founded basis and address practical problems in a proportionate way.

In light of the above, the Reflection Group has discussed current trends and developments relevant for EU Company Law and proposals which the Group feels may be useful taking account of the current state of affairs. These discussions have focused on both listed companies and non-listed companies, more specifically small and medium-sized enterprises (SMEs). Possible initiatives for both types of companies are discussed below in the following chapters. In this introductory chapter, the Reflection Group will address general principles that are applicable on a more general scale and thus cut across the various issues discussed in other chapters of the report.

1.2. Focused harmonisation

1.2.1. The tool box of regulation

Harmonisation can take different forms both in substance and in choice of legal instrument. Harmonisation can provide common rules and standards or it can remove obstacles. The choice of legal instrument ranges from directly binding regulations over directives necessitating national implementation to mere recommendations, and subsequent to the Lisbon Treaty legislation is supplemented by a new layer of rule making pursuant to Articles 290 and 291 TFEU. This provides a tool box of regulatory possibilities that should enable harmonisation to be finely calibrated at the problems requiring action at a Union level. In this report, when the term harmonisation is used without further details on choice of legal instrument, reference is made to an initiative at EU level that will make use of any of these regulatory tools. The actual choice of instrument and content should be made when a sufficient basis for action has been established.

Where harmonisation at the Union level is deemed necessary after careful vetting of the facts, the proposed measures should be focused on the particular problem in question and should not rely on broad and imprecise categorisations. Harmonisation should address a particular problem and should include all company forms that are relevant, irrespective of their categorisation or form.

1.2.2. Private, public and listed companies

As it is important to avoid broad and imprecise categorisations, the Reflection Group is particularly concerned about the distinction between public and private limited companies that has traditionally dominated legislation within company law for more than a century. The origin of the distinction is the still correct observation that a company with a large and dispersed crowd of shareholders may in certain respects warrant different regulation from a company with a small and closely knit circle of shareholders. However, in its traditional form the distinction relies on an inapt choice of company form, whereby a company is deemed "public" or "private" simply by its choice of company form[1]. Thus, a "public company" does not necessarily have a large and dispersed crowd of shareholders; in fact, it may not even be listed and may have a single shareholder. Nor does a "private company"

[1] The distinction originates in German law where it is a distinction between the public limited company (AG) and a private limited company (GmbH), each company form governed by a separate act.

have to be a small company in any way; it can have more shareholders, more employees and a greater turnover than a "public company".

The Reflection Group notes with approval that in contemporary modern legislation within company law, both in the individual Member States and at a Union level, the distinction between the two traditional company forms is becoming increasingly less significant and is being replaced by a more apt distinction which differentiates between companies whose shares are listed and companies that are not. In EU company law, recent initiatives of importance have not relied on the traditional distinction, but are either directed at all limited liability companies[2], or only at listed companies.[3]

To avoid once more relying on a distinction that becomes irrelevant, it is important to note that the concept of a "listed" company is also subject to change. In EU law, it used to be a company that was "officially listed"[4], but since the early 1990s the prevailing concept is now one of admission to trading on a regulated market[5], and by the new Directive on markets in financial instruments (MiFID)[6], provisions on transparency that applied only to regulated markets are extended to shares traded on Multilateral Trading Facilities[7] (MTFs), which reflects an increased competition among markets and facilities for securities trading that has continued after the adoption of MiFID and is evident on a global scale. In this report reference is made to "listed companies" which signifies companies with securities, notably shares, admitted to trading on a regulated market. However, it should be contemplated whether this concept is appropriate taking into consideration the development of securities markets. In favour of extending the concept to all companies that have their securities traded on some form of public market or publicly accessible trading facility including MTFs is the fact that these companies share as a common feature that their shareholders cannot be said to constitute a group which are familiar with each others' identity and who may for that reason need the protection offered by EU legislation. Against such an extended application and thus in favour of maintaining its traditional meaning counts that it should be possible for companies

---

[2] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies.

[3] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse); Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC; Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC; Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids and Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies.

[4] The first generation of directives were aimed at "listed" companies. These directives are now codified by Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities.

[5] This concept of "regulated market" was first used in the Directive 89/592/EEC on Insider Dealing and subsequently defined in the Directive 93/67EEC on Investment Service. It denotes what could be described as the second generation directives and is used in most of the directives (note 3 above) that followed the 1999 Financial Services Action Plan, COM(99) 232.

[6] Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC. In this respect, MiFID can be seen as a third generation directive compared to the older directives (notes 4 and 5, respectively).

[7] Article 4 (1) (15) of the Directive 2004/39 defines Multilateral trading facility as "a multilateral system, operated by an investment firm or a market operator, which brings together multiple third party buying and selling interests in financial instruments – in the system and in accordance with nondiscretionary rules – in a way that results in a contract (…)".

to avoid the strict regulation associated with admission to a regulated market by using alternative markets and facilities regulated more leniently. At issue is the need to protect the shareholders of the company, to respect their freedom to choose the appropriate level of regulation and the need to avoid unnecessary distortion of the competition among markets and facilities for securities trading. As this is part of the ongoing revision of the MiFID, the Reflection Group does not offer a view but relies on the established understanding of "listed companies".

It is still a valid notion that listed companies may warrant special regulation where the relevant problem pertains to the special characteristic of these companies: that their constituency of shareholders is dispersed and subject to frequent change. Traditional agency problems within listed companies and regulatory responses thereto are markedly different than those involving private companies. Such regulation may entail issues of corporate governance or pertain to securities trading. However, listed companies should only be subject to special regulation compared to their unlisted competitors where it is justified by this special characteristic and should not be singled out for special regulation beyond that. Listed companies are most often in competition with companies that are not listed and the former should not be placed at a disadvantage compared to the latter by an unequal distribution of legislation and compliance unless this is justified.

If listed companies are put at a disadvantage to their competitors simply due to the fact that their shares are traded on open markets, there is a considerable risk that such companies will cease to have their shares listed (known as going private), thus reducing the investment opportunity for the investing public, and other companies may equally refrain from going public, which may affect their funding and retard their growth prospects. The funding of companies should rely on a decision entered into by the company and its investors with a mutual understanding of the risks and rewards involved. The law should strive to make that decision as transparent and flexible as possible and should avoid measures that will distort the preferences of either party. Regulation of securities trading should dovetail with company law to achieve this and should not place greater burdens on listed companies that go beyond what is necessary to ensure fair and transparent securities markets.

It is a misconception to think of listed companies as "public" companies as if they are part of the public domain; they are private companies because they are privately owned and they should only be subject to special regulation where it is justified by the fact that their securities are listed or in some other way publicly traded. This is not to deny that some companies may be of special importance to society because of their sheer size (which may affect the public coffers or employment of a Member State or a local authority), their carrying out activities of particular importance to overall society, such as infra-structure, utilities or finance, or other reasons justifying their treatment as "public interest companies" subject to special regulation. The fact that a Member State may own all or a substantial part of the shares of a company may also merit special regulation. Such special regulation should, however, be directed at all companies of this particular kind, irrespective of whether they are listed. When reference is made in this report to listed companies, that is, companies with securities admitted to trading on a regulated market, the reference should be read as related to the issue that is addressed and does not offer a view on the more general issue of whether special regulation of any other kind is necessary.

1.3. Issues of corporate governance

The Member States display a multitude of highly sophisticated corporate governance systems that regulate the distribution of powers within a company and the organisational structures that constitute the company. Each system has been developed over time and reflects a careful balancing of interests. It should by now be recognised that this diversity far transcends the simple dichotomy of a one-tier/two-tier system and goes beyond the legal discipline of company law, because the preferred governance system of a particular jurisdiction often interacts with and relies on other parts of the national law of that jurisdiction and reflects different historical and societal events and interests.

Several expert groups have recommended that national law on corporate governance should not be subject to large scale harmonisation[8]. The Reflection Group shares this view in respect of EU company law in general, but notes that financial institutions may merit special regulation in order to safeguard financial stability.

The diversity of corporate governance systems reflects the complexity of modern enterprise. It should be noted that the diversity is not just noticeable among Member States, but even within the national law of the Member States there is a considerable diversity among different company forms, which underlines the need for flexibility to suit the different needs of companies that may be of different size, engaged in different forms of business and serving different constituencies. It is unnecessarily simplistic to expect that one size would fit all and there is no reason to believe that harmonisation at a Union level can provide one or even a few generally acceptable systems of governance that can outperform what has been developed by practitioners over a span of generations to suit their individual needs and which has been refined by the test of time and tried in times of crisis. The different corporate governance systems of the Union should not be viewed as an obstacle to free enterprise within a single market, but as a treasure trove of different solutions to a wide variety of challenges that has been experienced and overcome. Differences in legal regimes are no more an obstacle to cross-border commercial activities than are differences of culture, language and geography.

The recent crisis has shown, however, that there is no room for complacency. Law is developed by learning from past mistakes and both at a Union level and at the level of the individual Member States it is necessary to assess the inadequacies exposed by the crisis and to correct them at the appropriate level.

Harmonisation is necessary to ensure the necessary transparency in respect of governance structure, notably by sufficient description in the articles of a company, but where transparency is provided by public access to the articles through business registers, preferably interconnected at a Union level[9], investors and other stakeholders will be sufficiently informed and can freely decide how to engage with the company.

The trend in many Member States appears to be in favour of increased flexibility by introducing options from other jurisdictions to supplement those already known[10]. This is probably influenced by the increased freedom of movement for companies following the case law of the Court of Justice in cases like *Centros*, *Überseering* et al., which has alerted the Member States to the need to keep their national company laws efficient and attuned to the practical needs of entrepreneurs and

[8] Including the survey made by Weil, Gotshal & Manges, *Comparative Study of Corporate Governance Codes relevant to the European Union and its Member States*, (2002) and the report by the High Level Group of Company Law Experts, Brussels, 4 November 2002, conclusion at p. 77.

[9] See chapter 2, part 2.8.1 below on interconnection of business registers.

[10] See chapter 3 below on the contribution of governance and investors to long term viability of companies.

investors[11]. Thus, there is reason to expect that governance structures will be subject to even more diversity in the future with more options and flexibility within the individual Member States as they introduce and adjust to options available in each other's laws. It is possible that, in time, this development will lead to a de facto harmonisation, because the company law of all the Member States will have adopted more or less the same wide range of options on governance structures. The Commission should support this long-term trend towards convergence of the company laws systems of the Member States and harmonisation may help introduce flexibility into the national law of Member States and make available options throughout the Union that are at this point only available in some Member States.

This also appears to be the approach taken by the project on a European Model Company Act (EMCA). The work on the EMCA, which started in 2007, has been inspired by the American Model Business Corporation Act (MBCA), and covers all company law. The aim of the project is to provide a modern and flexible Model Act, looking at the solutions available in Europe and the latest developments in Member States. The initiative does not strive to harmonise national company law by providing a single act, but to facilitate a learning process that will enhance the understanding of the specific features in various national systems that will serve as a model for adaptation and legislation on a strictly voluntary basis by the individual Member States[12]. In this respect, the Reflection Group welcomes the work on EMCA that is carried out as a project separate from the work of the Reflection Group. Although some members of the Reflection Group are connected to that project, its work is so far not publicly available and has not been relied upon by the Group.

Recommendations:

- *EU harmonisation should be done after careful vetting of the facts, including where appropriate public consultations and impact assessments, and in observance of the principles of proportionality and subsidiarity of Article 5 TEU.*
- *EU harmonisation should be focused and aimed at particular problems; it should not rely on broad and imprecise categorisations.*
- *EU harmonisation should respect the national corporate governance systems of the Member States and should strive to further the trend towards increased flexibility and freedom of choice in respect of company forms and the internal distribution of powers.*
- *The Reflection Group welcomes the work on a European Model Company Act (EMCA), which is a separate project. It promises to facilitate a learning process and serve as a model for adaption and legislation on a voluntary basis. If the final result can serve as an adequate benchmark, the Commission could consider turning the EMCA into a recommendation.*

---

[11] See chapter 2, part 2.2.1 below on the case law of the Court.

[12] On the EMCA project, see T. Baums & P. Krüger Andersen, *The European Model Company Law Act Project*, European Corporate Governance Institute, Law Working Paper No. 097/2008, March 2008. See also the EMCA website: www.asb.dk/emca.

Chapter 2: Cross-border mobility

2.1. Introduction

Among the freedoms enshrined in the Treaties, the freedom of establishment in Article 49 TFEU, as applicable to companies by Article 54 TFEU, is of particular relevance to company law. As a result of the case law of the Court of Justice, considerable cross-border mobility is now available for companies despite continuing differences among the national company law regimes of the Member States. Furthermore, entrepreneurs can also avail themselves of EU company forms as alternatives to national companies, which forms a separate supra-national 28th company law regime. Although considerable progress has been made within these two separate, yet related, areas of company law, more can and should be done.

2.2. The reach of free establishment at present

To fully comprehend how far the freedom of establishment has developed in EU law, it is useful to make a presentation of the law as it stands after the case law of the Court of Justice. The following terminology is applied:

- "Member State" is a State within the EU.
- "Company" is any legal entity covered by Article 54 TFEU.
- "Formation" is the creation of a company according to the laws of a Member State.
- "Home State" is the Member State according to whose laws the company was formed.
- "Host State" is a Member State that is not a Home State where the company may decide to move.
- "Business register" is the register of national companies operated by a Member State according to the 1st Company Law Directive[13].

2.2.1. Case law

i) The Home State's discretion to design its laws on formation

Within the limits placed by EU law, the Home State may arrange its laws on formation as it pleases, including enacting a requirement that the registered office and the real seat of a company must be identical at formation and must remain so[14].

In order to be formed and thereby obtain status as a company according to Article 54 TFEU, which is a necessary prerequisite to enjoy the rights provided by the Treaties including the freedom of establishment according to Article 49 TFEU, a company must conform to the laws of its Home State on formation. Consequently, the Home State may prevent a company formed under its laws from moving its real seat[15]. Or, conversely, the Home State may allow a company to be formed even though it does not engage in actual pursuit of an economic activity in its territory or have its real seat within its territory[16].

---

[13] See Proposal for a Directive of the European Parliament and of the Council amending Directives 89/666/EEC, 2005/56/EC and 2009/101/EC as regards the interconnection of central, commercial and business registers.
[14] See decision of 16 December 2008 in case C-210/06, *Cartesio*, at 110.
[15] ibid.
[16] See decision of 9 March 1999 in case C-212/97, *Centros*.

ii) Limitations on discretion – Transfer of registered office

The transfer of the registered office from the Home State to a Host State, and the corresponding change of registration in the company registers of the two Member States, changes the connecting factor and consequently the nationality of the company[17].

The Home State may not obstruct a company formed according to its law from seeking to transfer its registered office to a Host State, if that Host State permits such a transfer[18]. The reservation that such a transfer is conditioned upon the Host State's acceptance is based on the premise that upon the transfer the Member State in question becomes the new Home State of the company and, as stated at point i) above, the Home State has full discretion to design its laws on formation, including to deny the request of a foreign company to become a company according to its law if it does not meet the relevant requirements. A company wanting to change its registered office to a Host State and thereby obtain the nationality of that Member State must obey the national law of the Host State including any requirements as to change of company form, registration in the national company register, place of registered office and real seat, etc.

iii) Limitations on discretion – Transfer by way of merger

In a cross-border merger, companies participating in the merger may be dissolved and their assets and liabilities transferred to a continuing company already formed in a Member State. Consequently, by a merger the participating companies may effectively transfer their real seat to another Member State and obtain the nationality of the continuing company of that Member State.

The Home State of the continuing company cannot refuse to register such a merger, if it accepts mergers among its national companies[19]. It has not been settled in case law to what extent a Member State has to accept the participation of its national companies in cross-border mergers whereby they are dissolved while the continuing company is subject to the laws of another Member State. However, this is settled by the Directive on cross-border mergers[20].

iv) The Home State's obligation to respect secondary establishment

The Home State may not restrict a national company from engaging in secondary establishment according to Article 49 TFEU in a Host State. However, the Home State is not required to respect a secondary establishment if it is a wholly artificial arrangement aimed at circumventing the application of its laws[21].

v) Duty of Host State to recognise companies of other Member States

A Host State must recognise a company that is validly formed in its Home State as a company that is entitled to enjoy the freedom of establishment according to Article 54 TFEU.

The Host State may not refuse recognition of the company's formation in the Home State on the grounds that the company does not actually pursue an economic activity in the territory of the Home State[22]; or that the company has transferred its real seat outside the Home State's territory[23].

---

[17] See *Cartesio* (note 14 above) at 111.
[18] Ibid. at 112.
[19] See decision of 13 December 2005 in case C-411/03, *SEVIC Systems*.
[20] See part 2.2.2 below.
[21] See decision of 12 September 2006 in case C-196/04, *Cadbury Schweppes.*
[22] See *Centros* (note 16 above).
[23] See decision of 5 November 2002 in case C-208/00, *Überseering*.

vi) Duty of Host State to respect freedom of establishment by foreign companies

The Host State is prevented from restricting the freedom of establishment according to Article 49 TFEU of a company validly formed in its Home State by making its branch conform to particular conditions on liability, capital or documentation that goes beyond the obligations following the 11th Company Law Directive on branches[24], when such conditions do not apply to branches of other foreign companies[25]; or by denying it the right to engage in a merger with a company formed in its own territory and with the latter company serving as the continuing company, where national companies enjoy such a right[26].

vii) Abuse of the freedom of establishment

Both the Home State in respect of companies formed according to its laws and the Host State in respect of companies formed according to the laws of another Member State are entitled to prevent an abuse of the freedom of establishment. Such abuse would include an attempt, under cover of the rights created by the Treaty, improperly to circumvent otherwise applicable national legislation, whereby provisions of EU law are improperly or fraudulently taken advantage of[27].

However, it does not constitute abuse to seek to profit from tax advantages in force in a Host State[28]. Nor does it constitute abuse to form a company in a certain Member State to take advantage of more favourable legislation in that Member State[29]. Thus, it does not constitute abuse to take advantage of differences between Member States in respect of taxes or legislation in force, for example national company law.

Furthermore, national measures by a Home or Host State enacted to prevent abuse must, as must all national measures that restrict the freedom of establishment, be justified by overriding reasons of public interest, and their application must be appropriate to ensure the attainment of the objective pursued and not go beyond what is necessary to attain it[30]. The need to prevent the reduction of tax revenues in a Member State cannot serve as a matter of overriding general interest which would justify a restriction on the freedom of establishment[31].

2.2.2. EU legislation

i. The Directive on cross-border mergers

The Directive on cross-border mergers[32] was a bold and necessary step to provide companies with the freedom of establishment originally envisaged by the Treaties. A merger includes the dissolution without liquidation of one or more companies, whereby the assets and liabilities of these companies are transferred to the continuing company, which may be a newly formed company

[24] Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State.
[25] See decision of 30 September 2003 in case 167/01, *Inspire Art*.
[26] See *SEVIC Systems* (note 19 above).
[27] See *Centros* (note 16 above) at 24.
[28] See decision of 11 December 2003 in case C-364/01, *Barbier*.
[29] See *Centros* (note 16 above) at 27 and *Inspire Art* (note 25 above) at 96.
[30] See decision of 13 December 2005 in case C-446/03, *Marks & Spencer* at 35.
[31] See *Cadbury Schweppes* (note 21 above) at 49.
[32] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies.

created by the merger or a company already existing at the time of the merger and participating in it.

Although mergers were harmonised throughout the Union more than 30 years ago by the 3rd Company Law Directive[33], it remained uncertain to what extent companies from different Member States could engage in mergers. The uncertainty reflected the fact that cross-border mergers entail the departure by the companies that are dissolved by the merger from their Home State and effectively their transfer as part of the continuing company into the latter's Home State and thus their subjection to a new company law regime. This raised the need to offer adequate and fair protection for the stakeholders affected by the merger, notably shareholders, employees and creditors, and furthermore to accept on behalf of the Member States that national companies, once formed according to their national laws, are free to leave for other Member States. In spite of the gravity of the issues involved, the Member States and the European Parliament jointly operating as the EU legislature did not shy away from their responsibilities and adopted the Directive after a reasonably brief and concentrated period of negotiations. That this was a necessary step was made clear by the decision only a few months later by the Court of Justice in *SEVIC Systems*, which held that national companies had a right directly under the Treaty's provisions on the freedom of establishment to engage in mergers with companies of other Member States on the same basis as mergers with companies in their own jurisdictions[34]. Consequently, the Directive provides the necessary legal environment for what is already an inalienable right of companies.

Besides providing a procedural framework for the authorities of the Member States involved in a cross-border merger, the Directive addresses the three groups of stakeholders to secure adequate and fair protection of their interests for them:

- Shareholders are required in most cases to consent to the decision of their company to engage in the merger and must receive adequate information beforehand[35].
- Creditors should be afforded the same protection for their claims against the companies engaged in the merger that they are afforded according to national law in respect of national mergers[36].
- Employees are secured influence on the merger and the continuance of their rights, where their number exceeds 500 or they are not offered at least the same level of employee participation in the continuing company[37].

Furthermore, the Directive also provides, if Member States so desire, for the protection of public interests by regulatory and judicial authorities.

ii. EU company forms

The development of European company forms as part of a 28th regime of EU law separate from the company law regimes of the 27 Member States has so far been modest. There are at present the

[33] Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies.

[34] See *SEVIC Systems* (note 19 above).

[35] See Article 9 of the Directive (note 32 above) calls for the decision to be made by the general meeting of shareholders of each of the participating companies, unless the company is to be the continuing company in which case a minority of 5 per cent may still require a decision of the general meeting. Furthermore, protection of minority shareholders is provided for in Article 4(2).

[36] See Article 4(2), Article 6(2)(c) and Article 7 of the Directive (note 32 above).

[37] See Article 16 of the Directive (note 32 above).

European Economic Interest Group (EEIG)[38], the European Cooperative Society (SCE)[39], and the European Public Company (SE)[40]. These forms will be discussed in part 2.7 below.

2.3. Enhancing the mobility of national companies

2.3.1. Obstacles for mobility

Cross-border mobility is secured by the four freedoms of the Treaties: the freedom of establishment, of services, of goods, and of capital. Within company law, the freedom of establishment is particularly important. However, in respect of companies the freedom of establishment remains incomplete and in need of reform. At present, the freedom of establishment provided by the Treaties does not permit a company to move out of the Member State where it was formed and into another Member State while preserving its legal capacity.

A company is but a figment of our legal imagination. It assumes its existence by the effect that it is provided by man-made law and law provides the embodiment of the company from its formation to its dissolution. Thus, a company is always formed according to the laws of a Member State, which has made the Court of Justice observe that it is a creature of national law[41]. The Court further observes that a company enjoys the nationality of the Member State according to whose laws it was formed[42].

As national law is a precondition for the existence of a company, a company must comply with the various conditions of national law in respect of formation. The national company laws of different jurisdictions provide different conditions. Most jurisdictions require the company to have a presence in its territory at the time of formation. This presence is known as *the registered office*, because it is registered with the national business register operated by the Member State according to the 1st Company Law Directive[43]. Thus, the registered office signifies the link between a company and the Member State according to whose laws it has been formed, that is, its Home State.

Some jurisdictions require the company to use the location of its main administration, known as its *real seat*, as the registered office. As the original six founding Member States did not concur on this subject, the freedom of establishment in then Article 43 EEC was extended to companies by then Article 58 EEC in such a way as to allow both possibilities. Consequently, the freedom of establishment including the obligation to recognise companies formed according to the laws of other Member States was made available to the national companies of a Member State irrespective of whether that Member State required the real seat and the registered office to be identical. However, one particular question of establishment was to be arranged by a separate agreement not provided for in the Treaty's provisions on establishment. In Article 220 EEC, the Member States obliged themselves to provide a separate agreement on the retention of legal personality where the bond between a company and the national law of its Home State was severed by a transfer of its

---

[38] Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG).
[39] Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE).
[40] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE).
[41] See decision of 27 September 1988 in case 81/87, *Daily Mail*, at 19.
[42] See decision of 28 January 1986 in case 270/83, *Commission v France*, at 18.
[43] First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, now codified by Directive 2009/101/EC.

seat to another Member State. Unfortunately, no such agreement has been made in the half century since the Treaty of Rome entered into force[44].

Due to Article 220 EEC the freedom of establishment now enshrined in Article 49 TFEU cannot be seen as providing a right for a company as defined by Article 54 TFEU to move its registered office from the national legal system of its Home State to that of another Member State, that is, to change its nationality and submit itself to the legal regime of a new Home State. This reading of the Treaty's provisions on establishment was recently made clear by the Court of Justice in *Cartesio*[45], and the Reflection Group does not expect that new cases will considerably change this position[46]. Consequently, national companies once formed according to the laws of a Member State cannot reorganise under the laws of another Member State. Only a legislative measure adopted by the Member States and the European Parliament can provide the full extent of the freedom of establishment envisaged by the Treaties.

The lack of agreement on a right for companies to transfer their registered office is further complicated by the inability of Member States to agree on a common understanding of what constitutes the necessary link between a company and its Home State. The Member States that require their companies to maintain their real seat within their territory as a precondition of their recognition as validly existing companies under national law limit these companies' ability to reorganise their internal organisation and relocate their real seat compared to national companies of Member States that do not require the same and thus allow their companies to locate the real seat within the Union as they see fit. This particular problem appears to have been one major reason why it has been impossible to obtain the agreement that the Member States obliged themselves to provide by Article 220 EEC and it is also hindering the development of a 28th EU company law regime, because such EU company forms would be free to move across the Union.

This present condition of the Union provides for paradoxical outcomes. When considering the formation of a company, the founders may take advantage of the company law regime of any Member State in the Union and are free to choose between them, but once the company has been formed, it cannot directly change its company law regime to that of another Member State. A Member State may prevent its national companies from moving their real seat out of its territory, but it cannot prevent a company of another Member State from operating in its territory irrespective of where its real seat is located. Member States can prevent their national companies from transferring to a different national company law regime and require them to keep their real seat in their territory, but they cannot prevent them from engaging in a merger with a company of another Member State which may effectively result in the adoption of a new company law regime and a transfer of the real seat as a result of the merger. The result is an uneven distribution of rights that requires companies to expend considerable resources and costs in order to enjoy the flexible freedom of movement within the Union that should be the birth right of all citizens and companies in the Union; a loss of resources that could be put to better use by the companies in creating jobs and is often outside the reach of SMEs.

---

[44] A convention on recognition was drawn up in 1968, but never ratified. See Goldmam in 6 CMLR 104 (1968-69). No initiative was taken in respect of transfer of registered office, but the Commission has circulated drafts for a 14th Company Law Directive on the subject, however work on this was cancelled in 2007. See the Commission, *Impact assessment on the Directive on the cross-border transfer of registered office*, SEC(2007)1707, Brussels, 12.12.2007.

[45] See *Cartesio* (note 14 above).

[46] One such case is pending before the Court, see reference for a preliminary ruling from the Magyar Köztársaság Legfelsőbb Bírósága (Hungary) lodged on 28 July 2010 concerning VALE Építési Kft. Registered as case C-378/10.

These paradoxes of EU company law must be addressed by the Member States as a matter of urgency. It is important to point out that precisely because EU law has progressed so far in many other areas, the justifiable policy concerns of how to prevent abuse of the Treaties' freedoms and how to provide adequate and fair protection of stakeholders, notably minority shareholders, employees, and creditors, are already addressed in present EU law and can be applied *mutatis mutandis* to this specific area as well.

There is abundant evidence that practitioners want a solution in this area[47], and the European Parliament has expressed very clearly that it supports EU legislation and will work together with the Member States to provide a solution[48]. It is now for the Member States to take legislative action at Union level by acting through the Council and with the European Parliament.

2.3.2. Transfer of registered office

The question addressed in Article 220 EEC was the retention of legal personality where there is a transfer of seat. The reference to "seat" should be understood as the registered office, because by registering such a location in the national business register of a Member State, the company is officially recognised by that Member State as a national company validly formed according to its laws. All Member States require a company to have a presence within their territory upon formation where they can be reached in order to recognise it as a national company and most Member States require that presence to have the form of a registered office, if nothing more then a location where the company can be located, while yet other Member States take, as discussed above, the further step of requiring the company to maintain its real seat within their territory as a precondition of the company's continued existence. There is at present no uniform position of what is sufficient for a company to be registered in the national business register of a Member State; thus the very registration itself becomes the significant link between a company and its Home State because it is an objective indicator of the recognition by a Member State of a company as validly formed according to its laws.

The central element in Article 220 EEC is the *retention of legal personality* when a company transfers its significant link with one Member State to another. The purpose of such a transfer is usually the wish of the company, represented by a decision made according to its internal governance structure, to subject itself to the company law regime of another Member State in lieu of the present regime of its Home State. Consequently, the problem to be solved is how to allow a company to transfer its registered office from its original Home State to a new Home State with the retention of legal personality[49].

When the Commission last examined the need for EU initiatives in this area, the Commission reached the conclusion that no new initiative was necessary[50]. The conclusion was mainly based on the expectation that the Directive on cross-border mergers[51] would be sufficient once it had entered into force. The Reflection Group acknowledges that the Directive goes a long way in facilitating the

---

[47] See Commission, *Impact assessment* (note 44 above), at p. 5.

[48] European Parliament, *Resolution on recent developments and prospects in relation to company law*, (2006/2051(INI)).

[49] The problem to be addressed is thus not whether the registered office should be the location of the real seat. This problem is examined in part 2.4.2 below.

[50] Cf. Commission, *Impact assessment* (note 44 above).

[51] Cf. cross-border merger directive (note 32 above).

need of national companies that want to change their company law regime. Neither the freedom of establishment provided for in Article 49 and Article 54 TFEU[52], nor the Directive itself have any requirements as to the continuing company. Consequently, the continuing company may be a newly formed company acquired or set up in the other Member State for the purpose of the merger or a subsidiary set up to create a presence in the foreign Member State. It is therefore clear that the Directive has effectively provided an effective route for companies that want to transfer from their present Home State to a new Home State without liquidation.

Although the Directive provides both a practical framework for the administrative procedure required under which the authorities of the Member States of the companies involved in the cross-border merger must cooperate and a fair solution to all the problems of affected stakeholder interests, it is limited to one particular kind of restructuring; that of a merger. A merger is a particular form of restructuring, because it entails a mingling of assets, a combination of liabilities and an exchange of ownership rights that requires certain kinds of information to be disclosed and difficult estimations of comparative value to be performed. Thus, the Directive is a more complicated and costly procedure compared to the more simple transfer from one regime to another, which is of importance for SMEs. Consequently, the Reflection Group recommends legislative action in this area.

The Reflection Group agrees with the Commission that the proper legal instrument for legislation would be a directive and that such an initiative should pursue the twin objectives of improving the efficiency and competitive position of European companies by providing them with the possibility of transferring their registered office more easily and choosing a legal environment that best suits their business needs, while at the same time guaranteeing the effective protection of the interests of the main stakeholders in respect of the transfer[53]. The need to protect stakeholders can be accommodated by relying on the provisions available in the Directive on cross-border transfer. It could also be considered whether additional protections offered by the SE Regulation would be appropriate (e.g. that transfers cannot take place if winding up proceedings or proceedings for suspension of payments, etc., have been brought and that the company will be treated as still having its registered office in the previous Member State if it is sued after the transfer takes place in respect of a cause of action that arose before the transfer)[54]. The Commission may also wish to consider whether the full panoply of the creditors' rights and remedies under the Merger Directives is necessary to secure adequate protection to creditors in simple transfer of registered office situations.

Harmonisation is only required to the extent necessary to introduce a right to transfer the registered office from one Member State to another and should not interfere with the national company law regime of either Member State beyond that. For example, Member States should be at liberty to decide which company forms are available under national law, and a transfer of registered office would thus require the *cross-border conversion* from the company form of the original Home State to a company form known in the new Home State, and the transfer would be dependent on the company's compliance with the requirements in the national company law of the new Home State on this company form, including the adequate level of creditor protection.

---

[52] The Court of Justice does not distinguish between companies without prior commercial activity and other companies when assessing the freedom of establishment, see e.g. *Centros* (note 16 above) where a UK company without commercial activity in the UK was acquired to establish a branch in Denmark.
[53] See Commission, *Impact assessment* (note 44 above) p. 5.
[54] See SE Regulation (note 40 above).

Legislation by directive in this area can be done in one of two ways. Legislation can take the form of a separate directive on the transfer of registered office, which has been contemplated for some time by the Commission as a 14th Company Law Directive[55]. A separate directive has the advantage of providing a tailor made solution to the specific problem of a transfer of registered office.

Alternatively, legislation can be made by amending the present Directive on cross-border mergers to provide more generally for cross-border mobility. The advantage of this approach would be that the present Directive already makes provisions for the protection of three groups of stakeholders (shareholders, employees and creditors), whose interests should be addressed in any directive on cross-border mobility, including one on a transfer of registered seat. These provisions can be used either directly, thereby avoiding unnecessary duplication, or amended *mutatis mutandis* to apply for specific instances of cross-border mobility. By providing a single directive on cross-border mobility the full extent of the freedom of establishment and the accompanying principles are made clear to European entrepreneurs while providing a single point of reference for the protection of the affected interest groups.

The freedom of establishment should apply to all legal entities covered by Article 54 TFEU. However, considering the wide variety of legal entities in use in the various Member States, legislation should at first concentrate on the limited liability company. Not only is this the most common form of legal entity used in commerce throughout the Union, it also has the great advantage that it is a legal form well known in all Member States and subject to a high degree of transparency by the 1st Company Law Directive[56]. Legislation on the right to transfer the registered office should at first be made only in respect of national limited liability companies; later the freedom of establishment may be expanded to other legal entities using the experience gained from transfers by limited liability companies.

2.3.3. A legal regime for cross-border divisions

Irrespective of whether a right of transfer of registered office is introduced, a legal regime for cross-border divisions corresponding to the present one for cross-border mergers should be introduced at EU level. A division (or split) entails the transfer of assets and liabilities of a company either to a new company formed for that purpose or to an existing company. The latter is sometimes inaptly referred to as a "partial merger"[57].

Mergers appear in most jurisdictions to be a better known form of restructuring, probably because the combination of resources from two or more companies may appear less threatening to shareholders, employees, and creditors. This can be deceptive, however, as the merger of a financially sound company with a heavily indebted company can seriously affect the position of these stakeholders. Consequently, almost the same safeguards are called for, except that in a merger, the claims of the creditors are concentrated as claims against the continuing company, whereas in a division the claims may be divided among different legal entities as debtors. This raises a question of whether there should be provisions on shared liability at least for claims in existence at the time of the division and whether this should be based on the extent to which assets were distributed in the division. Divisions are closely related to mergers and form an equally important mode of restructuring, which explains why the 3rd Company Law Directive was later

[55] See Commission, *Impact assessment* (note 44 above).
[56] See 1st Company Law Directive (note 43 above).
[57] A merger would require the dissolution without liquidation of at least one company, which is not the case where a division is made.

followed by a separate 6th Company Law Directive on divisions[58], and the similarity of the problems involved can be seen from the extent that the latter is inspired by the former.

If the transfer of registered office is recognized to its fullest extent, the regulation of cross-border divisions at EU level is less pressing. The division can take place under the laws of the Home State and this could be followed by the transfer of registered office of one or more of the newly created entities. This two-step process may be simpler, less time consuming and less expensive.

However, the Reflection Group recommends the introduction of a right of cross-border divisions. Following the reasoning of the Court in *SEVIC Systems*, companies probably already enjoy a right to participate in cross-border divisions within a Member State to the same extent that divisions are accepted by that Member State in its national law[59]. Furthermore, although it may be simpler to make the division within a Member State and then transfer the registered office of the newly formed entities, this route would not be available where the division includes entities in different Member States that should acquire assets and liabilities directly as part of the division. Consequently, legislation is called for to provide the conditions under which a cross-border division may be made. As is the case with cross-border mergers, which rely on the regulation applied to national mergers, the regulation of cross-border divisions can draw on the regulation of national divisions, which in turn is heavy inspired by the regulation of mergers.

As is the case with EU legislation on the right of transfer of the registered office, legislation on cross-border division can either be dealt with by a separate directive or it can be achieved by expanding the present Directive on cross-border mergers to cover divisions. The possibility of engaging in a cross-border division should be made available first to limited liability companies and later for other company forms in due course for the reasons stated in part 2.3.2 above.

Recommendations:

- *EU harmonisation is called for to provide a right for national companies to transfer their registered office from one Member State to another, effectively changing the applicable company law regime from that of the former to that of the latter. Such a change would entail a cross-border conversion from a company form recognised by the former into a company form recognised by the latter.*
- *The regime in place to protect stakeholders, notably shareholders, employees and creditors, of the Directive on cross-border mergers should be applicable mutatis mutandis and the additional protection offered by the SE Regulation could be considered.*
- *National companies should be provided with a right to engage in cross-border divisions.*
- *A legal regime for cross-border conversions and cross-border divisions should be introduced, either via separate directives or by amending the Directive on cross-border mergers into a joint Directive on cross-border mobility. The regime should apply to limited liability companies and later be expanded to other company forms.*

[58] Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54 (3) (g) of the Treaty, concerning the division of public limited liability companies.
[59] See *SEVIC Systems* (note 19 above).

2.4. The significant link between company and Home State

2.4.1. International private law

International private law is a body of law deeply interwoven in the fabric of law of each Member State. Changes to this might give rise to far reaching and unintended consequences. In the opinion of the Reflection Group, the proposed right of transfer of registered office does not require a meaningful harmonisation of the conflict of laws principles existing in private international law. Nor should it be necessary to interfere with national law in respect of arrangements made by individual Member States in respect of companies from non-EU/EEA States on mutual recognition, etc., that only applies to the territory of that Member State. Instead, a more limited approach should be adopted, under which harmonisation is sought to the extent necessary to provide clear guidance while protecting the interests affected by the transfer.

This is not to say that the question of international private law is unimportant or does not merit attention. It is only to stress that any examination of international private law should be undertaken on its own by experts well versed in this particular field and with a view to provide a coherent outcome that respects the legal traditions of the individual Member States.

Thus, the approach behind the proposal in part 2.3.2 above to finally introduce the right of transfer of registered seat while retaining legal personality originally envisaged by Article 220 EEC is to avoid a discussion of what exactly should constitute the significant link between a company and its Home State and simply to rely on the observation that the registration of a registered office of a company in accordance with the 1st Company Law Directive[60] reflects an acceptance by that Member State that the company is a national company formed according to its laws. This would accommodate all Member States, irrespective of whether they require the real seat of national companies to remain within their territory.

Some members of the Reflection Group are of the opinion that it is time to envisage an EU regulation to clarify the conflict of law issues within company law. There are already a number of EU regulations the purpose of which is to solve such conflicts, for instance, Regulation 4/2009 on matters relating to maintenance obligations Regulation 593/2008 on contractual obligations (Rome 1), Regulation 864/2007 on non-contractual obligations, and the diverse regulations and directives on conflict of law in the case of bankruptcy. To ensure legal certainty to companies and their stakeholders, it appears to these members of the Group that it would be appropriate to prepare an EU regulation to specify the domains of law applicable to companies registered in a Member State, i.e. the consequences of the transfer of seat, and the rules applicable to the conflicts of law in the case of cross-border operations. This uniform regulation of international law applicable to companies has been proposed in Germany in a recent report which would be an interesting basis for reflection[61].

[60] See 1st Company Law Directive (note 43 above).
[61] See H-J Sonnenberger, *Vorschläge und Berichte zur Reform des europäischen und deutschen internationalen Gesellschaftsrecht*, Max-Planck-Institut für ausländisches und internationales Privatrecht 47 (2007).

2.4.2. Real seat and registered office

A special problem is the requirement in the laws of some Member States that national companies must have and maintain their real seat within the territory of the Home State. As noted above, not all Member States share this requirement and according to the case law of the Court it cannot be applied by a Member State to deny recognition of companies formed according to the laws of another Member State. However, it may be applied to a Member State's national companies and among Member States to adhere to the same concept.

The Reflection Group acknowledges that the Member States which apply the real seat theory were inspired by the objective to maintain the presence of companies' management on their territory and also, with regard to large public companies, to maintain their listing on their home stock exchange, as well as to make tax evasion more difficult. However, it is questionable whether this requirement is proportionate to the restriction on mobility and the possible disruption to competition that it entails. Companies from Member States that do not require their companies to maintain their real seat at the registered office can freely move their real seat across borders whereas companies from Member States that have such a requirement cannot. It is correct that the requirement to maintain the real seat in the territory of the Home State applies to said State's own national companies and does not impair the competiveness of companies from other Member States when acting on its territory, but it is also evident from the case law of the Court that the obligation on Member States not to obstruct the freedom of movement extents vis-à-vis their own nationals[62].

The Reflection Group invites a debate on the pros and cons of the real seat doctrine. It is also worth considering the possibility of a comparative survey conducted by the Commission in order to evaluate this requirement.

Recommendations:

- *The Reflection Group believes that a right to transfer the registered office of national companies would not require major harmonisation of national law in respect of international private law and conflict of laws provisions. Some members furthermore believe that it is time to envisage an EU regulation to clarify the conflict of law issues.*
- *The Reflection Group invites a debate on arguments in favour and against the real seat theory and possibly a comparative study conducted by the Commission.*

[62] See decision of 10 May 1995 in case C-384/93, *Alpine Investments*, which concerned restrictions by a Member State on its own nationals.

2.5. Taxation

The Court of Justice has consistently made it clear that Member States are justified in securing ample and fair taxation of commerce[63]. However, Member States may not go beyond that consideration and prevent the freedoms bestowed on their nationals; where nationals or their companies want to place their labour and commerce in another Member State, their Home State must allow it and cannot for purely fiscal reasons obstruct it.

The Reflection Group has been called upon to provide its opinion on the future of EU company law. As such, the matter of taxation falls outside its sphere of reference and is better left for deliberations on its own by experts within that field. Suffice here to observe, that while taxation is important to the Member States and to the viability of social cohesion of Member States and of the Union, the prospect of enhanced corporate mobility across borders discussed in this report should not be detrimental to these societal needs, but may in fact benefit them by an increase in efficiency and innovation.

Member States apply different tests to determine whether to tax the activities of a particular company that is registered in, or carries on business in, that Member State. It is sometimes on the basis of incorporation or corporate establishment and sometimes on the basis of location of management or other factors. The case law of the Court of Justice accepts the need of Member States to secure adequate taxation and prevent tax fraud. As these modes of taxation rely mostly on the territorial concept of where revenues are made, the possibility of changing the nationality of a company, and possibly its real seat, should not in or of itself cause a major change in how the incomes generated by the company are taxed. Furthermore, national companies already enjoy a considerable freedom of establishment, not least following the Directive on cross-border mergers, and consequently national tax law has had time to adapt to the changed environment of increased cross-border mobility, which should make it easier to accommodate further mobility. There are, however, certain elements of tax law that require special attention.

The Reflection Group believes that companies should be able to transfer their registered office from one Member State to another without detrimental tax consequences to the company or its shareholders. National tax law should not be used as a barrier to cross-border transfer and the Reflection Group notes with approval the Commission's dedication to eliminate any tax treatment that might disadvantage cross-border activities[64]. Possible problems could be transfer taxes on shares in subsidiaries or on land or other property when the company transfers to another Member State or merges with a company in another Member State. A special problem is posed by deferred taxes, which are owed to a Member State but are often payable if the company entity undergoes substantial changes of which a transfer out of the Member State may be one. A solution of how to deal with such deferred taxes in a way that does not prove an obstacle to transfer must be devised. The related Commission initiative of creating a common consolidated corporate tax base[65] may enhance transparency and further facilitate a just taxation that respects the freedom of establishment, but it is not in itself a necessary prerequisite to legislative action in respect of company law and further initiatives should not be made dependent upon it.

---

[63] See paragraph 2.2.1 part vii) above on fair taxation and abuse.

[64] See Commission, *Towards a Single Market Act*, COM(2010) 608, 11.11.2010, Brussels, proposal 16, at p. 15.

[65] See Commission Proposal of 16 March 2011 on a common system for calculating the tax base of businesses operating in the EU.

Recommendations:

- *The question of taxation should be addressed as part of the harmonisation of mobility envisaged here, where it is important to strike a balance between the Member States' right to ensure proper taxation and the companies' right to avail themselves of the freedom to move within the Union.*

2.6. Enhancing cross-border mergers

The Directive on cross-border mergers[66] provides the regulation necessary in respect of cross-border mobility, notably the protection of the involved stakeholders (shareholders, employees, and creditors). However, the procedural framework should be enhanced drawing on the experience gained from applying the Directive for almost four years.

A cross-border merger implies at the same time application of EU common rules, an application of the national laws concerning the merger process and the decision-making process and a combined application of the national laws to the common issues to each of the participating companies, *e.g.*, creditors' rights. This profusion of rules reduces the benefits of the Directive. As the procedural framework of the Directive can be used, *mutatis mutandis*, in respect of cross-border divisions and conversions, whether in a single combined directive or in separate directives, it is important to perfect these measures as far as possible. The Commission should invite comments from practitioners and authorities on the practical problems of applying the Directive, some of which are set out below. It should also publish information about the requirements in each Member State to facilitate use of the Directive and to encourage harmonisation.

2.6.1. Time limits

Concerning the time limit applicable to *creditors' rights*, there is no harmonisation with respect to:

i) The date of commencement of the protection period. This depends on different publications from one Member State to another, *e.g.* type of document, competent national authority as well as date of commencement;
ii) The duration of the protection period, which may vary from a few weeks to several months in different Member States.

Such differences in the creditors' protection period are in practice a source of complexity that may delay and possibly impede the cross-border merger. To remedy these inconveniencies, harmonisation could be envisaged either to provide a harmonised duration of the protection period or by allowing the merging companies, if they wish, to apply only one of the cumulatively applicable national laws and, in that case, only the provisions which are the most favourable to creditors should be applicable.

Concerning the time limit applicable to public review of the decision-making process and legality of the cross-border merger, the Directive only provides guidelines. As such, depending on the Member State, the time limits for monitoring the completion and legality of the decision-making process of each merging company by the national authority having jurisdiction over each of the merging companies and the national authority having jurisdiction over the continuing company are different. As an example, in some Member States, the time limit is very short (8 days) whereas in others no time limit is imposed. In this respect, Member States should strive for a harmonised time limit for the review exercised by their national authorities and harmonisation of the time limit should be based on the experience of the faster national authorities, preferably measured in days or weeks and not months.

[66] See the Directive on cross-border mergers (note 32 above).

There is also a problem in that the Directive states that certain actions *e.g.* publication of the draft terms of merger are to happen a certain time before the general meeting – but then provides that in certain cases a general meeting is not required, but without dealing with when those actions are to take place if a meeting is not held. It would be helpful if the requirement could be clarified in such cases.

2.6.2. Suspension of the merger and the position of creditors

The applicable provisions and formalities relating to the protection of creditors of the merging companies are those of the applicable national law. In particular there is no harmonisation of the consequences of creditors' rights on completion of the merger. In practice, this is a source of uncertainty and also of concern to the national authority in charge of the issuance of the certificate of legality because it may face liability as it must certify the completion of the merger.

It is important to prevent as far as possible the risk of suspension of the merger as a result of claims raised by the creditors. It is worth considering whether it is better to harmonise such provisions at Union level, *e.g.* that a creditor is not entitled to prevent a merger unless it can show that its position would be materially adversely affected by the proposed merger, than to settle creditor protection in national law. It could also be helpful to investigate the position of creditors (i) where neither the relevant contract nor the applicable conflict of laws provision protects a creditor from a change in the law governing the relevant obligation and (ii) as to whether the applicable rules of civil procedure would force a creditor to bring its claim against the company in the new Host State – and in the light of the results of the investigation consider whether any changes to the Directive are desirable.

2.6.3. Exchange of shares

The valuation rules applicable to cross-border mergers have not been harmonised. It is in certain cases a source of divergence and delay when merging entities evaluate the value of the assets contributed as a result of the merger and determine the ratio applicable to the exchange of shares. Depending on the applicable national law, cross-border mergers can be done either at net book value or at market value. In addition, the valuation methods used by one entity (that may be mandatory) are not always satisfactory for the other or for the expert appointed as the case may be. The Reflection Group recommends a review of valuation rules to identify the difficulties and see if it is possible to find common ground.

2.6.4. Other forms of restructuring

The Directive applies to mergers of one or more companies which transfer all their assets and liabilities to another existing company or to a new company. It does not deal with other restructuring methods such as cross-border contribution of assets or universal transfer of assets. Some members of the Reflection Group find it worth considering whether it would be helpful to have provisions in a Directive to enable other means of restructuring, as they may be more adapted to the circumstances and less costly.

Recommendations:

- *The provisions of the Directive on cross-border mergers should be reviewed and, where appropriate, revised taking into account the experience gained, notably in respect of time limits, suspension and the position of creditors, exchange of shares, and, possibly, other forms of restructuring.*

2.7. EU law as a 28th company law regime

A number of company forms have so far been developed in EU law[67]. To borrow from the Court's reasoning, these company forms are creatures of EU law, because although they are inspired by national company law regimes and will operate within the jurisdictions of the 27 Member States, they form a distinct 28th company law regime on a supra-national basis.

The Reflection Group is divided on the merits of having a separate EU company law regime. Some members support the creation of a separate EU company law regime at least in respect of limited liability companies, which can operate as a viable alternative to the individual 27 national regimes of the Member States. On this view, the EU regime should not be viewed as a threat to national regimes, but as a supplement that will allow citizens to avail themselves of the opportunities that the Union presents in the form of a single market.

Other members find that company law can only function properly as part of a national jurisdiction that supplements it. On this view, a separate EU company law regime will be deficient on its own and is likely to divert attention from more important issues concerning harmonisation of national company law and making national company forms available that may serve the need for cross-border mobility.

All members agree that, as with all EU legislation, the creation of company forms to supplement the existing forms should be carefully based on practical evidence of a need by business and industry in the Union. Furthermore, new company forms should be carefully vetted against existing national law so that on the one hand the new forms are as flexible as national companies, and on the other hand the new forms should not intrude on national arrangements. Furthermore, it will be necessary to adjust national tax regimes to cater for any cross-border activities by these new forms.

2.7.1. The SE

The freedom of establishment envisaged for national companies by Article 220 EEC was mirrored by the idea of creating a truly pan-European company, the *Societas Europaea* (SE). In its preface to the Sanders Report which was the main inspiration for its proposal on the SE, the Commission clearly stated that the objectives of this reform were: to allow the mobility of companies by making it possible for them to transfer their registered office from one country to another, to facilitate mergers and the creation of subsidiaries by companies in different Member States, and to encourage the grouping together of production factors scattered all over the Common Market, joint initiatives and access to the European capital market. However, it was difficult to reach political consensus and the original very ambitious draft was over time modified considerable until its final adoption in 2001[68]. As evidenced by the Commission in its recent assessment report, the SE has not been a success[69].

The SE Regulation attempted to solve the problems associated with the relocation of a company from the jurisdiction of one Member State to another. However, when compared with the

[67] See part 2.2.1 above.
[68] See SE Regulation (note 40 above).
[69] See the Commission report, *The application of Council Regulation 2157/2001 of 8 October 2011 on the Statute for a European Company (SE)*, COM(2010) 676, Brussels, 17.11.2010.

sophisticated approach of the Directive on cross-border mergers[70], it appears inadequate in several important aspects.

- The SE cannot be formed by a decision *ab initio*, but requires the previous incorporation of companies with different Home States that either merge into an SE or form the SE as a subsidiary, and it is only available to national companies of the public type (SA/AG/PLC, etc.). Some Members of the Reflection Group think that all limited companies should also be able to create an SE.
- The SE company form is not a truly European form due to the substantial references to national law in the SE Statute Regulation, which effectively provides many different variations depending on the national company law of the Member State where it was formed.
- The subscribed capital (legal capital) must be at least EUR 120,000. It is almost five times higher than the legal capital required of a national public limited company according to the 2nd Company Law Directive[71], and may prove too high a threshold for medium size entrepreneurs.
- The registered office must be in the Member State where the real seat is located. This reduces the flexibility of the SE, which ought to be its primary *raison d'être*. National companies incorporated under the laws of Member States that do not impose the same requirement can move their real seat freely within the Union; an option that is not open to the SE.
- The separate regime on worker participation[72] effectively imposes this particular element of the national company law of some Member States on other Member States, where it is alien to the domestic law.

If the SE is to become a viable alternative to national companies, the Commission has to prepare a reform of the SE Regulation, as is required by such regulation, and take into account inspiration from the flexibility available for national companies. The amended Regulation should be simplified which means that it should limit as much as possible the options offered to the Member States to determine the terms of application of the SE statute.

2.7.2. The SPE

The proposal for a European private limited company (SPE) is currently being negotiated and the members of the Reflection Group who support this initiative limit themselves to noting that the concept of a small vehicle for SMEs and group companies is welcomed and that the Commission in its original proposal[73] appears to have avoided the peculiarities that have prevented the SE from becoming a success. An SPE would serve SMEs and although it may not be highly sophisticated, it could provide a vehicle for SMEs that is not available at present and is not likely to be made available even if the SE is reformed along the lines suggested above.

---

[70] See part 2.2.2 above.

[71] See Article 6(1) of the Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, with later amendments.

[72] See Directive 2001/86/CE of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees.

[73] Proposal for a Council Regulation on the Statute for a European private company, COM(2008) 396/3.

2.7.3. Other forms

Whether other entities should be created within a 28^{th} regime has been debated among the members of the group and must depend on a careful examination of the facts and public consultation to demonstrate a practical need. Some members support the creation of other EU legal entities.

In favour of a *European Foundation*, it could be noted that the number of foundations in Europe has increased dramatically, especially as there are ever increasing needs for the organisation for instance of cultural, social, scientific foundations. These foundations are extending their activities across borders which make it appropriate to reactivate the proposal to set up a status of European Foundation. The European Foundation would facilitate and increase cross-border business and cooperation. It would offer legal certainty, save cost and help to mobilise and channel private assets for public benefit across the Union. Should a European Foundation Statute proposal be put forward by the Commission, its objective should be similar to that sought with other European legal forms, i.e. to make possible the use of a single legal form instead of up to 27 national ones. The European Foundation would be registered as such in one Member State, and at the same time be recognised and operational throughout the European Union which would not only be an advantage in terms of image but also in terms of mobility.

The discussions on the creation of a *European Mutual Company* have so far not been successful. However, there appears to be considerable support from national mutual companies on the appropriateness of a European status which would allow them to extend their activities across Europe and potentially to merge. Mutual companies are increasingly acting as insurance companies but this legal form is not recognised in all Member States. A European Mutual Company could offer this choice to countries where this legal form is absent.

Recommendations:

- *The creation of EU company forms to supplement the existing forms in the national laws of the Member States should be carefully based on practical evidence of a need by business and industry in the Union. Furthermore, new company forms should be carefully vetted against existing national law so that on the one hand the new forms are as flexible as national companies, and on the other hand the new forms should not intrude on national arrangement. Finally, it will be necessary to adjust national tax regimes to cater for any cross-border activities by these new forms.*

2.8. Enhancing transparency

Cross-border mobility helps to promote competition. However, competition will only function and will only enjoy popular support among the citizens of the Union if it is accompanied by adequate transparency and sufficient safeguards against abuse. Measures to enhance competition should consequently be accompanied by legislative efforts in other related areas.

2.8.1. Increased transparency – business registers

The very first legislative initiative within EU company law was a Directive to harmonise the keeping of national registers of limited liability companies, the 1st Company Law Directive of 1968[74]. It is apt to recall that the popular acceptance of the limited liability company from its conception in the 19th Century was closely tied to the call for transparency and in EU company law the harmonisation of company law has equally influenced the need for transparency. Successive directives have expanded the transparency from the articles of association and the members of management in the 1st Company Law Directive to the particulars of its capital structure, and the annual accounts, to mention only some of the more important information deemed of general interest and consequently available to the general public through these national registers. Publicly traded companies are subject to substantial transparency as is evidenced by the Market Abuse Directive and the Transparency Directive[75].

The need to provide national companies with the possibility of cross-border mobility and the access to cross-border restructuring must be accompanied by a corresponding increase in cross-border transparency. In this respect, the national character of the business registers of the 1st Company Law Directive must take on a cross-border capability. In other words, it is important to match the cross-border mobility of national companies with cross-border access to the information stored in the various national registers of the Member States. The national business register of each Member State should not only serve as an entry point to information about national companies of that Member State, but also as an entry point to information about companies stored in the national registers of other Member States. It should be possible to retrieve information from all national business registers of the Member States from each entry point throughout the Union.

It is likely that cross-border access to company information will be made available by private initiative and it is also possible that the creation of European Supervisory Authorities (ESAs) will eventually create similar pan-European registers. However, these developments should not retard the effort to provide cross-border access to information already stored in national business registers.

The Reflection Group welcomes the proposal put forward by the Commission regarding the interconnection of business registers, including the introduction of a unique company identifier which will be particularly helpful to identify and trace a company that may have availed itself of the possibilities of cross-border restructuring through different jurisdictions within the Union, and recommends that it is adopted as a matter of urgency[76]. One of the main difficulties of such a

[74] See note 43 above.

[75] See Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) and Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, respectively.

[76] See note 13 above.

system of interconnected registers is language. One solution would be for the various registries to agree common identifiers for the information recorded in the register (e.g. company name would always be identified as A1, details of directors as A2).

Some members of the Reflection Group find it possible that the cross-border mobility of national companies will in time progress so considerably that a European Central Register for companies will become natural for companies. Such an ECR could be established as a purely European authority under supervision of an independent board and financed by the EU. In the beginning it could rely on information stored with the national registers and submitted to it by them, while at a later point it could receive the information directly, possibly in connection with the adoption of a single identifying number for all national and EU companies. However, at present there is no need to provide for an ECR, as direct cross-border access to national business registers provided by each national register serving as an entry point would be sufficient.

Some members of the Group are of the opinion that if a truly centralised European register is not created, it would be appropriate to gather representatives of national registers designated by each Member State in a consultative group which would be able to elaborate recommendations and technical standards to help national registers share best practices with the assistance of a team of technical experts.

2.8.2. Increased transparency – branches

The establishment of branches in a Host State by a company incorporated in a Home State is an important feature of the freedom of establishment. It offers a company permanent access to the Host State without the need to form an independent subsidiary, which provides benefits in the form of low costs and direct management. Contrary to a subsidiary, a branch does not require funding of its own but can rely on that of the company, which is reflected by the fact that the company is directly liable for all claims directed against it or any of its branches. The present focus by businesses on costs and flexibility may lead to an increased use of branches as a way to access Host States or at least to serve as a first step into new markets to test their viability, which is especially important for small and medium sized companies venturing abroad for the first time.

The use of branches to enhance access to new markets should be encouraged. Requirements imposed by the Host State that may impede or make more costly the establishment and maintenance of branches should be removed unless they can be justified as being proportionate in the public interest.

The adoption of an 11th Company Law Directive on disclosure requirements in respect of branches[77] was an important step in this direction because the Directive strives to reduce the disclosure required by a Host State, and thus the costs of establishment by way of a branch. However, the Directive reflects the time when it was adopted and it is time to expand the approach taken by the Directive and further reduce the need for specific disclosure by a branch in its Host State taking into account the progress made in information technology and telecommunication as well as in company law and the mutual recognition of foreign company forms following the case law of the Court of Justice within the last decade.

[77] See 11th Company Law Directive on branches (note 24 above).

The Reflection Group agrees with the amendment in respect of the 11th Company Law Directive proposed by the Commission in its proposal regarding the interconnection of business registers[78]. If cross-border access to information stored by national business registers is improved to the extent envisaged in part 2.8.1. above, the Reflection Group recommends that the provisions on disclosure in the Directive on branches should eventually be reduced in scope to reflect the increased transparency and to rely more fully on the principle that information about a branch should mainly be filed with the business register of the company's Home State.

2.8.3. Increased transparency – disqualifications

The prospect of increased cross-border mobility by national companies carries with it the understandable fear that people engaged in crime or abuse once caught and disciplined in one Member State may simply continue to carry on their abuse in another Member State.

At present, the public has a varying degree of access to information on the disqualification of directors. In some cases, directors can agree to restrictions on their actions as directors and it may also be appropriate for this information to be made public. In some Member States, the information is freely available to the public for on-line search using the director's name. In other Member States the information is only available to the authorities in charge of the national business register and the names of disqualified directors are not disclosed to the public. However, the European public and all authorities in charge of the registration of directors should be entitled to know who has been disqualified in a Member State in order to secure trust in business. The identity of a person who has been disqualified from serving as a director or in another capacity in respect of company law should be available by an on-line search. The fact that disqualifications are measures of national law and apply only within the territory of a Member State should not preclude the European public's access to the information in a Union with a truly single market.

The prospect of cross-border transparency of criminal sanctions is a matter for the on-going e-Justice project. However, the Reflection Group shares the opinion of the European Parliament, which in its resolution of 4 July 2006 called for enhanced cross-border availability of information regarding the disqualification of directors[79], and recommends that work on this matter is carried out in close connection with the proposal regarding interconnection of business registers. However, it must be realised that to create transparency in this area is a daunting task involving several important considerations on privacy, fundamental rights, etc. It is thus important to stress from the outset that although this is an important corollary to cross-border mobility, the advances suggested in this report should not be made dependent on work in this area.

Cross-border transparency of disqualifications raises substantial problems. First of all, as the reasons for disqualifications differ between Member States, it is imperative that the specific reasons for the disqualification are stated. This represents a particular problem, because in some Member States a decision on disqualification is not publicly available, while in other Member States the decision does not specifically state a reason. Second, even where a reason is available, the next problem is language and how to provide translations. Disqualification is normally sanctioned by legislation and the relevant legislative provision will usually provide one or more reasons for the disqualification. It would be sufficient to provide a translation of these reasons and not of the particular facts of the case in question that lead to the disqualification. Thirdly, it is important that

[78] See note 13 above.
[79] See European Parliament's Resolution (note 48 above).

where a disqualification is limited in time, the public notice of disqualification must be removed when the disqualification ceases to be effective. This should be the responsibility of the authority that is in charge of disqualification under national law, and the person who was disqualified should be entitled to petition the authority to have a notice removed with immediate effect once the time limit is up. Finally, there is the question of where the information on disqualifications should be stored. It could be in a central pan-European register, although that would raise questions of its financing and institutional setting. It could be a part of the national business register, which would also require an extension of the existing register's technical capacity and further raise the question of cross-border access to the information stored.

Another related subject is cross-border transparency of public censure in the form of warnings and reprimands against companies or against directors made by national supervisory authorities pursuant to company law or securities trading requirements. It is equally important that a reprimand made by the national authority of one Member State in respect of a company or an investment firm is available to the public of other Member States where the company or investment firm is active. The same problems as regard disqualifications apply here.

Considering the progress being made at a Union level in respect of accessibility to information in criminal records, it is advisable for the Commission to conduct a comparative study to provide an overall system that secures the proper balance between the public's need for transparency and considerations of personal privacy, data protection and fundamental rights[80].

As is evident, cross-border transparency of disqualifications and public censure raises substantial problems and as these are formidable, the availability of cross-border transparency should not be made a pre-condition for cross-border mobility but something that should be achieved over the mid- to long-term future.

Recommendations:

- *It is important to enhance transparency in such a way that information stored in national registers becomes accessible and understandable from the entry point of all national registers throughout the Union, and the Group supports the proposal for interconnection of business registers.*
- *If national business registers are interconnected, this should in time reduce the need for branches to report to the national register of the Host State and rely on filings made with the Home State.*
- *It is important that disqualifications and similar censure are made known throughout the Union to avoid that unacceptable behaviour is continued by use of cross-border mobility. However, substantial problems not just concerning technology, but also and more seriously concerning privacy, data protection and fundamental rights must be solved first.*

[80] Taking into account Council framework decision 2009/315/JHA on the exchange of information extracted from the criminal record between Member States and Council Decision 2009/316/JHA on the European Criminal Records Information System (ECRIS).

Chapter 3: The contribution of governance and investors to long term viability of companies

3.1. Long term viability in listed companies

3.1.1 Short Term v. Long Term in Listed Companies

Over the last decades the focus of listed companies has moved to some extent from a long term orientation to also taking account of the short term perspective more specifically on creating shareholder value in the short term. The underlying reasons for this have been the role of institutional investors whose shareholdings have increased considerably, pressure of markets and investors to achieve greater returns, and the rise of shareholder activism by hedge funds and private equity, in combination with the vast liquidity that was available in the market (which enabled to substantially increase the leverage as such or on the basis of LBOs [leveraged buyouts]) until the 2008 credit crunch. Moreover we have seen some corporate scandals (like the Parmalat and Ahold fraud cases) and serious questions have been raised on management compensation and bonuses (and the commitment of management of listed companies).

In addition, behavioural finance studies and the actual, bubblish behaviour of financial markets in the last two decades have cast doubt on the relevance and normative validity of the Efficient Capital Market Hypothesis and the idea that financial markets' daily evaluation of a company's prospects, as reflected in prices, was accurate and reliable. If this is not the case, two of the most powerful market devices to ensure efficient management, i.e. leverage and stock-based compensation can themselves allow, or lead to, distorted and conflicted management decisions and to undue emphasis on the short-term and excessive risk-taking. This has started a debate on several issues including governance and the role of shareholders as well as remuneration of management[81].

The focus on short-term results has translated into market pressures as well as specific regulation both at the national level and at the EU level for example requiring that quarterly reports must be published. One could also think of the rules requiring listed companies to publish all confidential, price sensitive information forthwith even if the longer term objectives will not be affected. The current uncertainty as to what constitutes price sensitive information is not satisfactory and clearer guidance would be welcomed.

The focus on the short-term has also led to additional pressure in certain companies and by certain categories of shareholders on the distribution of cash not finding an immediate use to be distributed, be it by way of dividends, share buy backs, or other techniques. This may have a negative effect on the ability to execute a long term strategy. More generally over the last years there has been substantial pressure to incur more debt. The tax deductibility of interest payments also constitutes an extra incentive for debt financing, often short term (commercial paper), rather than by equity which may affect the balance between the short term and long term objectives of management. Of

[81] The Reflection Group refers also to the launch of a consultation on "The EU corporate governance framework" in a Green Paper which was published by the Commission on 5 April 2011. For the avoidance of doubt it is noted that the Reflection Group was not involved in the preparation of that consultation and the Green Paper. Having said that, of course, both projects are initiated by the Commission to rethink company law against the background of the economic crisis and the lessons to be learned. The discussion in this report may help to clarify issues that are raised in the Green Paper.

course this is not meant to underestimate the importance of a reasonable dividend specifically for minority shareholders and certainly not to set aside rules under national law which secure such dividends[82]. The distribution policy is a crucial touchstone in the relationship between companies and their shareholders. Like excessive dividends, excessive reserves or liquidity are not desirable and may lead to unwise investments. A right balance has to be struck, by way of disclosing how the distribution policy is conceived in connection with the long-term investment plans, and the needs for liquidity.

In addition, in some cases, accounting rules have resulted in making companies' returns geared to short-term market movements. Some financial regulations or practices, such as solvency regulations for insurance firms and pension funds, also lead to measuring performance on a short term basis. Accounting standards reading fair value as market value may be said to point to the same direction.

Notwithstanding the pressure for short-termism, many companies strive at realising their objectives from a perspective of long-term continuity[83]. Of course this should not be understood as precluding short term opportunism, which also is an integral part of doing business, as long as this is not prejudicing the long term interest. Basically what is sought here is a healthy balance between the two.

Although the Reflection Group believes that there is no basis for a mandatory rule providing that all EU listed companies should focus on the long term development of their business (even at the cost of short term shareholder welfare), the Group acknowledges that listed companies in all EU jurisdictions should be able to make a deliberate choice for a stakeholder-oriented view of their own purpose and goals, via amendments to their articles of association. Of course such an amendment can only be adopted in compliance with the required procedures under national company law. In all EU jurisdictions the law should make this approach available to companies and its application would then require an affirmative vote by the shareholders meeting.

It is therefore suggested to explore at the EU level a Directive or Recommendation which would offer all companies the possibility to amend their charters and/or Articles to make it easier for longer term objectives to prevail over short term-oriented pressure of certain shareholders. This may include the option for companies in all EU jurisdictions to state in their Articles that the board and the management of the company have to run it primarily in the interest of the company (and the enterprise associated therewith), which may have priority over the interest of individual shareholders if these two are in conflict and if serving the short term interest of shareholders would

---

[82] We note for example that under Finnish law there is an interesting rule providing that in a general meeting already 10% of the shareholders can secure that half of the profits (less the amounts not to be distributed under the Articles of Association) will be distributed provided this is not more than 8% of the equity of the company and a solvency test is met. In that respect there is a role for both the shareholders and the management of a company.

[83] This idea is, for example, reflected in Dutch law (and the Dutch Corporate Governance Code) where it states that "the board acts in the interest of the company and of the enterprise that it is associated with". This concept implies that companies should be run with a long-term perspective and aim at continuity. Dutch courts have on the basis of this principle, and the principle that shareholders must act towards the company in accordance with the standards of "reasonableness and fairness", for example enjoined shareholder resolutions, initiated by private equity funds holding around 30% of the shares in a listed company, calling for a break up of the company and supported management and directors who favoured a longer term strategy. We refer to the well known Stork case decided by the Amsterdam Enterprise Court in 2007. For the avoidance of doubt we note that of course "continuity" should not be (mis)understood as preventing reorganisations, acquisitions, divisions, mergers or not being flexible in any way. What is meant is that such operations are undertaken with a long term business perspective.

have a direct negative impact on the long-term viability of the company[84]. Although, if adopted by shareholders, such a rule would take precedence over conflicting provisions of national law, it would not prejudice the authority of shareholders to approve (or not) certain decisions (some of which stem from EU Directives) like substantial transactions and divestments, mergers/schemes of arrangement and the authority of shareholders under the EU Takeover Directive[85] (2004/25/EC).

Recommendations:

First, current EU legislation (and corporate governance codes) should be reviewed and amended against the background of whether the rules promote or at least facilitate a long term perspective. Second, on an optional basis, and upon the approval of shareholders, it should be possible to create the conditions for a longer term strategy to be implemented by management. This would imply that:

- *Transparency and reporting rules should be reconsidered and reviewed to see whether and where those rules focus too much on a short term perspective. An example is quarterly reporting, which could be considered to be made subject to an opt-out by listed companies.*
- *The conditions under which some disclosures have to be made on the basis of the Market Abuse Directive should be clarified to better define what items are price sensitive and/or should be disclosed, especially in the relationship to stable shareholders, that are more interested in the longer terms policies and developments of the company.*
- *An EU Directive or Recommendation could be considered with the aim to require (or recommend) that national legislators allow companies in the EU to amend their Articles to reflect that the overall goal of the company is the long term viability and continuity of the enterprise.*
- *The Board should indicate in its corporate governance report what its long term objectives are and how it plans to realise such goals while taking account of the short term imperatives.*

[84] It is noted, of course, that "interest of the company" may have a different legal meaning and connotation in the various legal systems and jurisdictions. In this framework of a more high level review, a legal definition is not envisaged. In the current text the term "interest of the company" is therefore used and should be understood in a general way.

[85] Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids.

3.1.2 Risk management in Listed companies

i) The arguments for EU recommendation and legislation on risk management for listed companies

Risk management refers to the process of identifying the material risks that companies face and implementing appropriate risk management strategies in response.

Risk management is not a new concept. For instance, in the Nordic Member States boards have since the introduction of the dual executive system in 1930 been vested with the task of ensuring the company's internal organisation and ensuring proper accounting and bookkeeping, which was understood to comprise what is now known as risk management. This approach is also adopted in other countries (UK, France).

However, the financial crisis has increased awareness of business risks and of the importance of carefully reviewing and managing risks. As has been evidenced by several highly publicized incidents, viability of companies may be threatened by numerous factors or occurrences. Although quite well documented in the financial sector, it is clear that also other, operational risks may bring a company to the brink of collapse urging these risks to be adequately monitored and kept under control. Cases of liability for deficient products undermine not only stock prices, but reputation and attractiveness to consumers. Unethical or stronger criminal conduct may, apart from sanctions, result in jeopardising the company's assets, its reputation or undermine its credibility. Insider trading violations or abusive conduct in favour of related parties may, apart from direct sanctioning, cast a shadow over reliability of management. The public awareness and reactions in this respect may be expected to require more from management in terms of CSR policies and also will call for a long term perspective of the company.

The Reflection Group is aware that the elaborate and costly US Sarbanes Oxley Act, especially section 404 did not prevent the financial crisis and that there are therefore limits to what can be achieved by increasing disclosure or substantive obligations relating to risk management. However, this should not be an obstacle to improving the situation at the European level.

At the European level, the parameters of internal control and risk management systems are based on the minimal requirements of two European Directives. Directive 2006/43/EC[86] (Article 41) requires most "public interest entities" to have audit committees and imposes a duty on audit committees (or alternative bodies) to monitor the effectiveness of companies' internal control, internal audit (if any), and risk management systems. This has been described in the *RiskMetrics Study of Monitoring and Enforcement Practices in Corporate Governance in the Member States (2009[87])* as "the Directive's most frequently non-transposed article". Directive 2006/46/EC[88] (Article 7) requires

[86] Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC.

[87] Available at http://ec.europa.eu/internal_market/company/ecgforum/studies_en.htm.

[88] Directive 2006/46/EC of the European Parliament and of the Council of 14 June 2006 amending Council Directives 78/660/EEC on the annual accounts of certain types of companies, 83/349/EEC on consolidated accounts, 86/635/EEC on the annual accounts and consolidated accounts of banks and other financial institutions and 91/674/EEC on the annual accounts and consolidated accounts of insurance undertakings.

listed companies to include a corporate governance statement in their annual report containing "a description of the main features of the company's internal control and risk management systems in relation to the financial reporting process." An amendment contained therein to Article 36(2) of Directive 83/349/EEC[89] provides that in the case of a consolidated annual report there should be a description of the main features of the group's internal control and risk management systems in relation to the process for preparing consolidated accounts.

In addition, the European Commission's Recommendation 2005/162 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board, recommends that an audit committee be established (unless the board is small) and that it assist the board in its task to review the internal control and risk management systems and the effectiveness of the external audit process and to ensure the effectiveness of the internal audit function. It also provides that the (supervisory) board should ensure that shareholders are properly informed as regards the affairs of the company, its strategic approach, and the management of risks and conflicts of interest (9.2). In terms of risk disclosure, the Transparency Directive 2004/109/EC[90] (Article 4(2)) requires the annual financial report to include a description of the principal risks and uncertainties that the companies face.

The well-documented international banking company failures in 2007 and 2008 highlighted the importance and scope of the risk management function performed by boards and increased EU regulation of risk management for investment firms and credit institutions (e.g. through the Capital Requirements Directive[91] and the Commission Recommendation 2009/384/EC[92] on remuneration policies) in recognition of the high systemic risk involved..

An argument against introducing risk control devices is that viable companies have a market incentive to engage in all cost-effective risk control devices, whether formal or informal, verifiable or unverifiable, and imposing a legal duty to adopt such devices, as a consequence restricting them to *formal* and *verifiable* ones, is unjustified for listed companies. While acknowledging that a controlling shareholder will possess a particular interest in the long-term viability of their company, it is pertinent to recall that market forces proved inadequate in this role in the case of the credit institutions. While of course there is no guarantee that increased risk management and risk disclosure will produce better governance, it is hoped that they contribute towards this end.

In some Member States, the need for appropriate internal control and risk management systems as an integral part of the governance structure of the listed companies has a direct and explicit legal basis. For example aaccording to German law (§ 91 (2) AktG), Aktiengesellschaften are obliged "to establish a system by which developments endangering the existence of the company can be detected from early on". According to Danish and Swedish law, the board must ensure that the company's organisation is structured so that accounting, cash management and the company's business operation are controlled in a prudent manner (Danish Companies Act 2009 sections 115

[89] Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54 (3) (g) of the Treaty on consolidated accounts.
[90] Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC.
[91] Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions and Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions.
[92] Commission Recommendation of 30 April 2009 on remuneration policies in the financial services sector.

and 116 and Swedish Limited Liability Companies Act, chapter 8, section 4). Furthermore, in certain jurisdictions such as Finland, the statutory control duties of the board expressly extend to the administration of the company, the appropriate organisation of its operations and the appropriate arrangement of the control of the company's accounts and finances (Limited Liability Companies Act, chapter 6 section 2). Arguably such responsibilities could also be interpreted as a necessary component of a director's general duty to act with diligence and care and to promote the success of the company – common statutory features in most jurisdictions.

However it seems that in many Member States detailed risk management matters are largely left to national corporate governance codes many of which are applied on a comply-or-explain basis. Directive 2006/46/EC introduced the comply-or-explain principle in European law. It mandates the application of corporate governance codes either by way of comply or-explain or alternatively it allows the application of company-specific extra-legal principles. (It should also be noted that the 2007 Commission Staff Working Document on the application of the European Commission's Recommendation 2005/162[93] indicated that there are differences between Member States as regards the scope of application of the national corporate governance codes, with certain codes applying to companies listed in the relevant Member State, and others only to companies listed and incorporated in the Member State. Where a company is incorporated in one Member State but is listed in another or several other Member States, this may result in situations where several codes are applicable or no code at all.

Many jurisdictions such as the UK and Belgium utilise a balanced approach that combines features of mandatory requirements in combination with best practices. The UK Corporate Governance Code (2010) states that the boards of all listed companies are responsible for determining the nature and extent of the significant risks they are willing to take in achieving their strategic objectives. Boards are required to maintain sound risk management and internal control systems. These are core principles which listed companies must comply with and report on to their shareholders. In some Member States such as the UK and the Netherlands, the codes provide that internal control and risk management extends to all operational activity and is not merely limited to the financial reporting process. The UK Turnbull Guidance which assists in the application of this requirement advises that "for groups of companies, the review of effectiveness of internal control and the report to the shareholders should be from the perspective of the group as a whole".

While the comply-or-explain principle enjoys the support of regulators, companies and investors, even outside the banking sector, there has been a clearly acknowledged need for improvements in the effectiveness of internal risk management and firm governance. The *RiskMetrics Study* found that Member States have implemented this comply-or-explain approach through different instruments resulting in discrepancies of universes of companies covered by the requirement. Companies and directors surveyed found that codes have almost no effect on issues linked to risk management from the perspective of strategic scenarios. The survey of investors indicated a perception that disclosure is worst regarding risk management, financial risk exposure, and non-financial risk profile. Furthermore, codes vary considerably when determining the body responsible for ensuring the development of a reliable system of internal control and the type of supervision provided and lack of clarity and consistency may be problematic.

---

[93] Report on the application by the Member States of the EU of the Commission Recommendation on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board (SEC(2007)1021).

It is acknowledged that requiring the board of listed companies to monitor all relevant control activities within the perimeter of the company, including subsidiaries, would be expensive and cumbersome, especially for large multinational companies with a decentralised organisation. However, it is submitted that, at least in the case of large listed groups of companies there is a role for EU law in regulating management and oversight structures. The classification of "large" could refer to companies which exceeded the average market capitalisation threshold set out in the amended Prospectus Directive 2010/73/EU[94], i.e. over €100 million on the basis of end-year quotes for the previous three calendar years. Alternatively, because of differences in each Member States about what is large, each Member State could be left to set the relevant threshold so that only the larger companies are covered.

ii) The Possible Content of an EU Legislation and Recommendation

The identification of risks, their management and mitigation are integral elements in a company's functioning and should be expressly and systematically addressed by management, under the general oversight of the board of directors who will report about it to the shareholders in the corporate governance report. The Reflection Group would support extending the obligation in Directive 2006/46/EC beyond financial reporting. Obviously the management and the board should be responsible for the appropriate structures and procedures depending on the nature of the risks associated with its business which may range from financial risks (foreign exchange counterparty, etc.) to operational risks, including product safety, insider trading, leaks of business secrets or conflicts of interest. In some cases internal procedures aiming at reporting risky or undesirable conduct may strengthen these policies.

However, it is proposed that the primary responsibility in relation to risk management for large listed companies should be placed upon the board of the parent company.

The board of the listed company should be required to establish a governance structure which contributes to the effective oversight of subsidiaries and which takes into account the nature, scale and complexity of the different risks to which the group and its subsidiaries are exposed. This would be without prejudice to the legal and governance responsibilities which might apply to subsidiary boards. It is thus recommended that a general duty, similar to that imposed in Nordic countries, be imposed on directors to take into account the risks of the company and to provide for safe and prudent organisation of its affairs. If the company is part of a group, this risk assessment and risk handling duty should expressly take into account the company's relation to the group. Where such a duty forms part of a Directive, questions may arise as to the nature and enforceability of such an obligation. That said, similar concerns could be said to arise in respect of the duty of directors in a target company imposed by Article 3.1(c) of Directive 2004/25/EC[95]. Another possibility is to recommend the inclusion of such a provision in the Member State's corporate governance code

The relevant governance structure might include the following requirements:

[94] Directive 2010/73/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market.

[95] Directive on takeover bids, see note 85.

- The board should establish adequate risk management processes and internal control mechanisms including all operational activities not merely the financial reporting process. This might include sound administrative, reporting and accounting procedures to identify, measure, monitor and control risk in all entities in the group. The board should adopt and review policies to identify potential conflicts of interest and monitor their implementation and, if these conflicts cannot be prevented, whether they are appropriately managed, based on the permissibility of relationships or transactions under sound corporate policies consistent with national law and supervisory standards. Boards should also have the appropriate instruments to identify early signs of impending financial weakness, thereby enlarging the implicit going concern assumption to a broader, and especially longer term, perspective about the risk that may threaten the company's existence and the sustainability of its business model. For non financial companies, taking into account the specific risk profile of the firm, the board of directors may constitute an internal risk committee that would report to the shareholders on the measures adopted by the management to identify, manage or mitigate the risks. At the same time we should be careful not to place an unnecessary burden on small and medium sized companies. Therefore, this function should be exercised by the full board in companies which choose not to deal with it in a special committee.
- The board should adopt adequate procedures to integrate risk monitoring systems into the company in a consistent way so that the risks can be measured, monitored and controlled at the level of the company, including subsidiaries.
- The Reflection Group considered whether in all cases or possibly following the MiFID example (Directive 2006/73/EC[96], Article 7), "where appropriate and proportionate in view of the nature, scale and complexity of their business and the nature and range of the … activities undertaken in the course of that business" group companies should be required, apart from the functions of a board, to establish and maintain a risk management function which operates independently. This might have involved the appointment of a risk officer who would participate in the risk-management and oversight process at the highest level on an enterprise basis with group-wide authority and a status of total independence from individual business units as per Walker's recommendations or alternatively, the appointment of a risk committee comprising of independent non-executive directors to oversee the risk management function. On balance, the Reflection Group considered that, unlike the position with financial institutions, an independent risk function for all listed companies would be an overly burdensome and possibly counterproductive obligation. For example having a separate risk officer may in certain cases actually diminish the status of risk management. In companies where there is a very strong Chief Financial Officer, it might be argued that a risk officer would not be able to compete with the former. Instead the Reflection Group recommends that the person or committee responsible for risk management should have a strong status within the entity and strong reporting lines to the relevant committee and board.
- A system should be established providing for the consistent reporting of information on risk and risk management systems. Although as noted above, Directive 2006/46/EC provides for the publication of "a description of the main features of the company's internal control and risk management systems in relation to the financial reporting process", consideration might be given as to whether this is sufficient. Should disclosure

[96] Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

extend for example to all internal control and risk management systems and not just those relating to financial reporting? There may also be a case for providing further elaboration of the main features of the relevant internal control and risk management systems (*e.g.* based on the COSO2 framework)) and management's views on whether these operations are working effectively. This is an area that is particularly suited to "best practice" recommendations rather than hard law. Much of the risk information is industry or company specific and may not be standardized. In terms of risk disclosure, the requirements in the Transparency Directive are minimal. However it must be acknowledged that disclosure may be a costly undertaking in terms of management time, loss of confidentiality, etc. As the European Corporate Governance Forum noted "the wider the types of risk to be addressed and the more extensive the disclosures required, the greater the costs, difficulties and challenges faced by management and those charged with governance". While empirical evidence would appear to suggest that a risk information gap exists, clearly a balance will need to be struck between providing excessively detailed risk disclosures on the one hand and overly generalised boiler-plate statements of risk management policy on the other. Determining the exact nature of the disclosure obligation (both how detailed and of what) is not straightforward. A distinction can be drawn between disclosure of the risk monitoring structure of a particular company which serves to a) ensure that it is in place within the company or b) to enable investors to assess the risks of the company in their overall evaluation of the company. The distinction is thus between disclosure as a) compliance or b) pricing mechanism.)

While the board and management of subsidiaries remain responsible for effective risk management processes at the subsidiary, the board of the listed parent company should also have appropriate input into the local or regional adoption of the strategic group-wide risk management policies prescribed by the parent board and to the assessments of local risks. Subsidiary management, with subsidiary board oversight, should be responsible for assessing and ensuring that group risk management systems are appropriate, given the nature of the operations of the subsidiary.

Sarbanes Oxley establishes the responsibility of the Chief Executive Officer and Chief Financial Officer to certify the existence and effectiveness internal control system. At European level, the European Corporate Governance Forum has suggested there is no need to introduce a legal obligation for boards to certify at EU level and it is submitted that this is correct.

Recommendations

- *The increased awareness of risks should imply that Boards and management are expected to explain, avoiding boilerplate approach, risk management functions, risk management policies, structures and procedures, in the corporate governance report. This should be done by way of an amendment to Directive 2006/46/EC.*
- *The issue of board responsibility could also be dealt with by way of an amendment of Directive 2006/46/EC. However, in view of the complexity of many of these issues and the differences in national corporate governance structures, the Reflection Group considered that on balance the adoption of detailed binding rules is not necessarily the most desirable or efficient way of achieving the desired aims. It is proposed thus that the appropriate regulatory tool to implement the remaining proposals set out in this part of the paper would be a Commission Recommendation. All Member States would be invited to take the steps necessary to introduce at national level a set of provisions based on the*

principles set out in this Recommendation, to be used by large listed companies either on the basis of the ‘comply or explain’ approach or, upon individual Member States' choice, pursuant to legislation.

3.1.3 Long term ownership

In some EU jurisdictions an attempt has been made to strengthen the position of long term shareholders who seek to engage with the company on the basis of a commitment to long term success. Sometimes the nature of these attempts is more implicit (for example via stewardship codes like the one in place in the UK, which we will discuss in the next section of this report), sometimes these attempts much more explicitly seek to promote long term ownership. For example, France allows stable shareholders to cast twice as many votes than other shareholders. Other EU Member States also provide for flexibility in terms of number of votes which can be attached to shares[97]. France, Italy and the Netherlands allow companies to pay those shareholders higher dividends. At the same time it is noted that such arrangements may exacerbate issues associated with dominant shareholders and may diminish liquidity. An evaluation of these effects can however be left to the shareholders. The Group therefore feels that EU regulation should seek to secure that companies all across the EU have the option (clearly EU regulation would have an enabling character) to include clauses allowing for differential voting rights or additional profit distribution rights in their Articles of association. In this respect it is noted however that it may be appropriate to set certain limits. In France for example the extra dividend is limited to maximum 10% more than short term shareholders would receive (Article L. 232-14 of the Commercial code).

In case of long term shareholders who have committed themselves to the company's long term success and actively engage themselves with the company on that basis, there may be good arguments for the company to involve them more than other shareholders in the decisions management and directors are envisaging. Of course this would require that it can be established that it is not just an intermediate institution holding the shares, but that the ultimate investors/beneficiaries are the long term participants and that they are the ones deciding how the shares are voted. In addition it is noted that existing rules on insider trading and concerted action may discourage shareholders' involvement. This is even more so if major long term shareholders would agree on such decisions as that may imply the risk of having to launch a mandatory offer should the action by shareholders involve a sufficient percentage of them (usually around 30 percent). It is suggested that mandatory bid rules should be clarified and basically, in this context, should only apply if actions aim to actually control the company at board level.

Existing EU regulations may therefore be counter productive in as far as the goal is to further a long term orientation of the company and its shareholders. The Group recommends therefore that the existing EU regulations in the field of sharing information with insiders and concerted action rules be reviewed from the perspective of whether they unnecessarily limit the possibilities to align the company and its shareholders in respect of its long term objectives.

Recommendations:

In order to favour long term share ownership and shareholder commitment:

[97] It is noted, for example, that in the Nordic countries shares with different voting rights are widely used. Although this clearly can promote stable shareholdership, such shares are not being awarded as loyalty shares but are issued as part of the corporate structure.

- *Companies' Articles should be allowed to provide for long term shareholders preferential treatment. These benefits might consist of:*
    - *a) Enhanced voting rights*
    - *b) Higher dividends*
- *Coordination between the company and its long term shareholders to further its long term objectives should be possible without triggering rules on sharing of inside information and concerted action.*

3.1.4. Institutional investors

As noted above, over the last decades the overall role of institutional shareholders has increased considerably. It is therefore important, when reviewing trends that may affect a short term or long term orientation of companies, to take into account developments related to institutional shareholders. Institutional investors like insurance companies and pension funds traditionally were long-term investors per definition, balancing their stable bond portfolio returns with additional returns from equity. However, regulations - both of a prudential nature or relating to the applicable accounting systems - have resulted in these institutional investors unloading their equity portfolios in favour of bonds, often sovereign ones. The stable funding of the investee companies necessarily has suffered. In addition other types of institutional investors have come to the fore, including investment funds, private equity and hedge funds.

In the field of investment funds – here in the sense of UCITS, Alternative Investment Funds, national funds, etc. – investors usually require full liquidity, preventing their portfolio managers to build up a long-term position in the companies in which they invest. Only in cases of extreme stress have they accepted to partially, or even wholly suspend redemption of their shares ("side pockets"). One may wonder whether a longer-term engagement could not be considered also for these investors, provided certain conditions - especially in terms of disclosure and risk measurement - are fulfilled. This is the practice followed in the alternative investment fund business where relatively long lock-up periods are usually agreed upon. More in general, the EU has acted in this area with a new framework of rules requiring more transparency in the hedge fund business, the Directive on Alternative Investment Fund Managers (AIFMs), which also requires disclosure of the redemption restrictions.

Up to now the role and functions of institutional investors have been addressed in national corporate governance codes. However, the level of regulation in the various EU Member States varies considerably. In some Member States, institutional investors are expected to be more transparent than in others in as far as their policies are concerned (including the voting policies) as well as the way they are expected to operate. The Group feels that in any case institutional investors active in several EU Member States should be obliged to publish their voting policies and the specific votes that have been cast in EU listed companies in which they hold shares. In that respect it would also be expected that these institutions indicate whether they have a short term or long term focus and what that essentially entails.

A further step would be to develop a more comprehensive Code applicable to institutional investors. An example is the recent UK Stewardship Code. However, the concrete principles and rules set out in such Codes also may encourage and legitimize institutional investors to directly involve themselves with the investee listed companies, including determining their strategy and board composition in a way that may not necessarily reflect long term objectives and may come down to micro-managing the company and minimise the responsibilities of management and directors for the longer term well-being of the company. One will have to take a closer look at the role investors may fulfil in general and their relationship with other shareholders and the investee companies, including their exercise of voting rights. At the same time, one will need to differentiate between the many categories of institutional investors which all may have different characteristics like Alternative Investment Funds, UCITS, Insurance companies, Sovereign Wealth Funds, etc.

Having said that, there is a consensus in the Group that in itself the issue of overall investment conduct of institutional investors warrants the attention of the EU as it may affect cross border investments and could as a consequence distort the level playing field for investments in European listed companies. At the same time it is clear that this is a sensitive area and very much associated with national policies, traditions and cultures. However, it would seem that developments in this respect should be monitored and mapped out by the EU. The Group recommends that the EU regularly undertakes a detailed review of investment restrictions and patterns by different classes of institutional investors, for example every three years, aiming at identifying the evolutions in their investment policies, and whether short term and longer term goals are sufficiently balanced and consider whether additional EU actions and/or recommendations, including recommendations to amend national Codes, may be called for. At some time it may even be considered whether an EU Directive is the appropriate instrument. In this respect it is interesting that under the UK Stewardship Code (see above) the PIRC reported earlier this year that just under half of the asset managers did not make any voting data public (in spite of what that Code provides in principle 6 thereof).

Finally, for the sake of completeness, it is noted that in this respect other avenues may become relevant as well. Taking into account the growing need to provide for an ageing population, initiatives are being taken to explore the creation of a specialised investment product specifically aimed at securing pension obligations that would run over a long(er) period of time, could not be redeemed before pension age, and offer a higher return than the short term instruments, mainly by investing a larger portion in equity. This would also imply that these instruments, or at least part of the portfolio, would be exempted from the redemption obligation. It may benefit from the favourable tax treatment that is already in place for pensions in most Member States.

Recommendations:

In respect of institutional investors it is suggested that:

- *Institutional shareholders- or the asset managers that act for them - should explain their voting policies indicating whether or not they will adopt a long term engagement with the investee companies.*
- *The role and actions of institutional investors should be analysed and a report on actions and trends should be published regularly (for example every three years). On the basis thereof it can be considered whether additional actions would be appropriate including rules that could foster a long term rather than a short term perspective.*
- *An analysis should be made of the risks involved in long-term equity investing by insurance companies and pension funds (in correspondence to their long term liabilities) and allowing them to exempt part of their portfolio from the redemption obligation.*

3.1.5. Voting in listed companies and shareholder identification

The issue of cross border voting of shares in EU listed companies has been on the table for a relatively long time. The Reflection Group feels that facilitating shareholders' votes at general meetings should be a priority of the European Commission. Whatever the perspective in terms of long term or short term interests of listed companies, there is consensus that in any case it is important that ultimate beneficiaries should face the lowest possible burden when exercising their voting rights. An EU wide system could be much more efficient and practicable than the various systems in 27 Member States. Nowadays, preferably with the help of modern electronic means it should be possible to achieve this goal so that direct casting of votes without the intervention of the chain of intermediaries and custodians should be possible. A way to realise this may be that the depositary bank, where the direct contact with the multitier financial holding system and the investors takes place, would deliver a "certificate" in physical or electronic form which would authorise this investor to attend (and vote in) the shareholders meeting, or cast his vote electronically. In principle this approach should be in accordance with company law provisions as to who the company recognises as the person entitled to vote. Obviously, this should necessarily imply that beneficial owners in intermediate institutions can be identified and will be provided with the opportunity to determine the exercise of the shareholder rights.

Initiatives that would further facilitate (electronic) voting by shareholders may also be combined with mechanisms that facilitate companies to identify who the shareholders are and make it easier to communicate with its shareholders, especially in multilayered depositary systems. The majority of the Reflection Group is of the opinion that there is no good reason why the identity of its shareholders should be kept from the company. However, this does not mean that the company is free to share these particulars with third parties. On the contrary, in principle such information should be treated as confidential and may only be used for communications directly associated with information that normally is to be shared between the company and its shareholders.

Recommendations:

Instruments for activating absentee shareholders should include:

- *Simplifying the mechanisms whereby shareholders exercise their voting rights, especially in a multi-tier holding system;*
- *Requiring issuers to organise an efficient voting platform system, allowing all shareholders to vote electronically, subject to an opt out by smaller listed companies who may have a more local character and for which this may be an unnecessary burden;*
- *Allowing companies to identify their shareholders and communicate with them.*

3.1.6 Corporate governance, Position of Management and Independent Directors

A focus for the short-term can also be the outcome of rules relating to the position of managers and directors. The linking of remuneration to short term outcomes or market price movements or deferred compensation vesting within a short term time frame are just two examples.

i. Position of management

In many legal systems directors can be dismissed at will. Similarly, in some jurisdictions directors are appointed for very short terms, *e.g.* one year. This may make them overly sensitive to day-to-day concerns, and much less focused on the medium and long term. As directors in these situations will be responsive to their shareholders, a short term focus may increase if the shareholders are also focused on short term goals towards their investors.

At the same time the Group notes that there are quite a few examples of management becoming entrenched in a way that does not promote responsiveness to new developments and justifies criticism on their performance. The Group notes that finding a balance here is extremely difficult and probably cannot be addressed via one-size-fits-all legislative solutions. It will always be a mixture of terms' length, re-appointment schedules, exit packages to be paid (and national rules providing for such packages) and the role of the judiciary in this respect.

However, the EU could have a role in facilitating choice by requiring Member States to grant the option to allow either one year or multiple year terms (e.g. not exceeding 4-6 years) and not to make directors and/or management of companies dismissible at will ("*ad nutum*") - *e.g.* by explicitly stating the causes for dismissal- and/or to introduce staggered board structures if Member States do not yet provide for such options. Obviously the shareholders meeting would have to consent to such a regime and EU law would only be enabling in this respect. Member States may be allowed to subject such amendments to supermajority requirements such as a MOM (majority-of-the-minority) clause or a two-thirds quorum, to avoid insiders' (*e.g.* controlling shareholders') dominance of the approval process.

ii. Discussion of position and role of Independent Directors

In respect of the composition of boards the EU already as early as in 2003 issued its recommendations in the EU Action Plan on Company Law[98]. The main recommendations at the time were that in a board of a listed company there should be a substantial representation of 'independent' directors and that managing directors should have a say in who will be appointed. Since 2003, and the additional EU Recommendation of February 2005 on Independent Directors[99], we have seen all over Europe that the principle of having a substantial number, and in principle a majority of independent directors, is adopted in national corporate governance codes.

However at the same time it can be noted that the role played by (independent) directors in the crisis period has not necessarily been convincing and that sometimes even a certain level of distrust in independent directors and their level of knowledge relevant to the company of which they are a director, can be identified. Therefore the Group recommends that the Commission would initiate an

[98] See EU Action Plan on Company Law, section 3.1.3.
[99] Commission Recommendation of 15 February 2005, 2005/162/EC, OJ L 52/51 of 25 February 2005.

evaluation of the institution of the independent director and identify whether their role is satisfactory and whether independence criteria should not be revisited and should less focus on independence from shareholders. In this respect, it should be underlined that "independence" is differently defined in the various EU Member States. In some Member States this would require independence from the company and any of its stakeholders, including the shareholders, while in other EU Member States independence from shareholders is not required and may even not be deemed desirable. In evaluating the role and performance of independent directors one should explicitly distinguish between these two categories.

In addition it may be deemed appropriate to consider whether companies should require to state more explicitly the skills, expertise and experience that a board needs as a whole to run the business effectively and should explain how, between them, the directors meet these requirements and what continuous training takes place and how the board evaluates its performance.

As noted above[100] the Commission has launched a wide consultation on "The EU corporate governance framework" on 5 April 2011. The Reflection Group finalised its work before this document was released but recommends that the issues raised above be explicitly made part of that evaluation process.

iii. Other initiatives to be reviewed?

In the 2003 EU Action Plan[101], following the recommendations of the High Level Group, three other initiatives were put on the agenda by the European Commission. One was the introduction of a special investigation to be requested by shareholders, another was the development of an EU wide wrongful trading rule and the third was the imposition of directors' disqualification across the EU. All these proposals could very well be understood to be aimed, or at least to have the effect of, discouraging an exclusive focus on the short term and of stimulating a more balanced long term orientation. In this report of the Reflection Group the issue of disqualification across the EU is already discussed in chapter 2 and the issue of an EU wide wrongful trading rule will be discussed in chapter 4.

Recommendations:

In respect of the position of management and boards the Reflection Group advises:

- *that options available to listed companies should be increased by issuing an EU Directive enabling listed companies under their national law to amend their Articles of association (of course in full accordance with the national rules on amending the Articles, and possibly subject to supermajority requirements) to define different directors' term length, to adopt staggered boards, and to limit directors' dismissal at will ("ad nutum");*
- *that the Commission will initiate an evaluation of the institution of the independent director and its functioning in practice.*

[100] We refer to the Introduction to this report and note 81.
[101] *Ibid.*

3.2 Worker participation at the board level

The participation of employees on the board level, mostly in dual board systems, is a path-dependant element of several Member States corporate governance systems which cannot be found in others. The protection of the interests of employees of companies and groups of companies and the forms which this protection may vary from Member State to Member State. Empirically it has not been proved so far that systems which rely completely on contract and labour law are superior to models which provide for codetermination rights on the board level and vice versa. Nor has it been proved that companies without codetermination on the board level fare comparatively better or worse than companies without such a governance structure although numerous empirical econometric studies have tried to find marked differences in the performance of these types of company. The argument that codetermination is detrimental because otherwise it would have been developed by the market and hence need not and should not be introduced by mandatory law disregards that codetermination on the board level is basically an issue of a consciously taken *political choice* which must be respected (that does not exclude that there are also vested interests in keeping such a system once it is established).

The appropriate attitude for the EU legislator is therefore (a) not to ask Member States which have not considered such a system or have deliberately decided against it to introduce it; (b) not to ask Member States to restrict or cut down on the extent or form of the codetermination chosen by them. The latter includes that it should not be tried to provide for loopholes through which market actors can easily escape a given system.

Having said that, there are however two areas where the EU should consider acting, and where the Commission in particular, as the guardian of the EU Treaties, may have a role to play.

The first area relates to *European forms of company* which Member States aiming at an enhanced cooperation may want to introduce which other Member States do not want to be part of (See the provisions in Article 20 EU Treaty and Articles 326 et seq. TFEU). If, say, the SPE would meet with insurmountable resistance of one or a few Member States whereas others want to go along and introduce this form of company alongside their national forms in order to enhance their cooperation, it should not be self-evident that single Member States should be able to object to this. Or, to put it more bluntly, single Member States should not be allowed to stand in the way of such a cooperation wanted by the majority of Member States only to force their domestic system upon the others.

The other area where the Commission in particular as the guardian of the EU Treaties should act is where a co-determination system discriminates against employees from other EU states. This is for example the case in the German regulations regarding the codetermination for the Aktiengesellschaft and the GmbH, not, however, in the codetermination regimes for the SE and the SCE. If co-determination in such companies would be restricted to employees of companies incorporated in that jurisdiction and would not give rights to employees in foreign subsidiaries that could be deemed unjustified discrimination under the EU Treaty. This discrimination may lead in turn to business decisions which are biased in favour of branches and business locations located in that jurisdiction as opposed to branches and locations in other Member States. The discrimination against employees in other Member States is in clear conflict with basic principles of the common market. There is an easy way to end this discrimination by simply introducing the codetermination system provided for by the EU Directive for the SE and the SCE (with, if necessary, changes regarding the size of the board, etc.) also for the domestic forms of company. The traditional discriminatory system should be challenged before the Court of Justice by the Commission if it is not being changed into a discrimination-free regulation. This should be part of the agenda of the Commission on its way forward in company law.

Recommendations:

- *There is no need for further comparative studies to illuminate the many different forms for employee representation that are currently being used throughout the Union as these studies have already been done, and the differences are well known. As regards worker participation on the board level, the Commission should be neutral vis-á-vis Member States' systems which have such a regime and those which do not provide for such a system on the condition that this does not contradict principles and freedoms of the internal market. If so, the Commission should take the necessary steps to provide for a discrimination – free regulation on the Member States' level, i.e., a suit before the Court of Justice if necessary. Further, Member States should not be allowed to impede the progress in enhanced cooperation among willing Member States (Article 20 EU Treaty and Articles 326 et seq. TFEU) by blocking such cooperation.*

3.3 *Non listed companies*

3.3.1 Choice between different (one tier/two tier) board structures

Providing a choice between different board structures in all Member States has been discussed for a long time. It is possible for SEs and now allowed in many Member States for national company forms as well. However, there are still Member States where the choice between the one-tier and the two-tier system has not been given to the market participants.

Belgium is an example of a Member States which only offers the one-tier system for its *Sociétés anonymes* (SA). The UK also offers the one-tier system for Public limited companies as the usual structure[102]. Therefore, family shareholders who do not want to face liability for managing directly the company, and foreign companies for their Belgium or UK subsidiaries, cannot adopt the dual board system, although it might be the one they would be more comfortable to work with. At the other end of the spectrum are EU Member States which only allow a two-tier board system like Germany for the Aktiengesellschaft (AG). This is understandable as far as the company is subject to codetermination which would rather be implemented on the supervisory board, not on the management board level. Frequently, however, companies remain below the necessary threshold for co-determination (500 and 2000 employees, respectively). Even in these cases market participants are not free to choose between a single board and a dual board structure.

If the supervisory board would be removed as a mandatory element in the governance of such a company, the supervisory function needs either to be taken over by the shareholders themselves, or it has, depending on the size of the company and the structure of the shareholdings in this company, to be vested in the outside directors of the company's board. Providing the shareholders with the necessary supervisory powers is however not possible in a legal system with a fixed, mandatory dual board. Hence this company form may not suit well with the needs of families or single investors who want to exercise direct control as shareholders and not via an additional board. Nor is this form of company suitable for subsidiaries within groups of companies where the holding company, for instance a foreign one, wants to exercise its rights of control immediately and not through an additional intermediate organ[103].

Giving market actors the choice between a one tier and a dual board system would therefore require that the respective mandatory regulation would have to be adapted accordingly. The choice between a one tier and a two – tier board system had already to be provided for the SE. So it has already been shown that the necessary regulatory steps can be taken and would not create non-surmountable problems. However, it is noted that this does not mirror the whole spectrum of choices which, as has been shown in various recent comparative studies, hide behind the term "one tier board system". Both the Nordic and the Swiss systems differ markedly from for example the British "one tier board system" although all of them are covered by the same term, and if one looks into a national system and the types of structures empirically, one discovers a whole panoply of variations within the so-

---

[102] The UK Government has however indicated that a two-tier structure is compatible with UK company law.

[103] This would also imply that foreign investors entering such a jurisdiction via a cross border merger or by setting up a new company cannot choose the form of company equivalent to what they are used to in their domestic market. It may mean that they are obliged to either choose an SE (which may not meet their needs because of the stated capital required) or a private company which may however not fit their purpose.

called "one tier system". For instance, in the Nordic Member States a one tier board system evolved into a hybrid system known as the dual executive system, because it vests executive powers with two layers of management (board of directors and daily management). Thus, the dual executive system resembles the later developments in the UK one-tier system, where a distinction between executives and non-executives was introduced in the 1990s. The dual executive system, which was introduced in Denmark in 1930, was adopted by Sweden in 1944 and eventually spread to the other Nordic countries.

The Reflection Group recommends that this issue be reviewed anew with a view to facilitating a more flexible regime across the EU, which serves the differing needs of the market participants better, may be less costly, and allows (within limits) for the experimentation with various sub-systems. This should in the end lead to achieving a better level of corporate governance. By supporting this proposition, the Reflection Group does not imply that one or the other model yields better results but only submits that freedom of choice should be given to companies in all Member States.

The Reflection Group does note that introducing freedom of choice as to board structures may raise questions on duties and (potential) liabilities of directors which may differ depending on the particular organ on which the director sits. Although in principle this should be a matter for the national law of the EU Member States, it may be necessary or appropriate that certain principles would be established at the EU level and/or that Member States should be required to set out what the duties and potential liabilities of directors would be if they sit on a particular organ. Clearly this matter should be further analysed before specific proposals can be considered.

Providing the choice in all Member States between different board structures is consistent with the long-term trend mentioned in the introductory chapter of this report and the recommendation that the real distinction should be made between listed and non listed companies rather than between the two traditional forms of limited liability companies (AG/SA/NV/Plc, etc., vs. GmbH/Sarl/B.V/Ltd., etc.).

Recommendations:

- *As regards the shaping of the governance structure of national forms of company the Reflection Group supports the trend of giving more choice for companies to decide the governance structure. The EU should encourage the Member States to provide more options. It is noted that this could also have a positive impact on cross-border activities. This may be an area where actions by the EU may be called for if no progress would otherwise be made in this field. Initially the instrument of a Recommendation would then seem appropriate. The use of other instruments should however not be excluded.*

3.3.2 Small and medium sized enterprises (SME): further simplification efforts are appropriate

The importance of SMEs in the EU economy leads one to question whether their present legal and regulatory environment is adapted to the needs of supporting them in taking on an even more significant and innovative role. However, proportionality as to the regulatory regime applicable to SME's is not effectively achieved: often they are subject to heavy administrative burdens, some of these directly related to their status as companies. Over the last decades simplification initiatives have been taken and have been executed, but these initiatives were relatively modest. The Reflection Group feels these simplification efforts should be broadened and intensified (see below).

i. Further simplification efforts

There are various ways to simplify the legal regime applicable to SMEs. Part of these relate to the formalities to be accomplished before a firm can be established: simplification of the registration of new companies, intervention of a public official or notary, publication of annual accounts, electronic access to procedures, possibility to create a company otherwise than by notarial deed, exempting micro-SMEs from the obligation to file annual accounts, etc. Apart from the formalities themselves, their cost and the time needed for going through them have to be compared on a Europe wide basis and where needed reduced at least to the Union's resulting average.

With respect to the SMEs that are run in company form, different simplification approaches could be followed. Indeed, a good deal of company internal life is purely formal paperwork. National traditions vary considerably: in many Member States the SA/AG/NV/Plc form is practically not accessible to SMEs whereas in other states it represents a large part of that same population. In both groups of jurisdictions, the Sarl/GmbH/BV/Ltd is the most frequently used alternative. With no clear justifications, this makes the harmonisation measures that have been conceived for the largest companies proportionally heavier for the SMEs that are run in SA/AG/NV/Plc form.

For these reasons the existing rules should be simplified as much as possible. In many jurisdictions, due to spill-over effects both company forms are subject to largely identical regulation: rules originating in the EU Directives and applicable only to the SA type, were extended to the smaller company forms, leading to a regulatory overload. The phenomenon is especially striking for the 2nd and 4th Company Law Directives[104], and efforts to simplify the requirements have proved fruitless. At the same time it is recognised that these heavy regulations, although incorporated in actual company life, are not very fit and useful to SMEs envisaged here. Here it would certainly seem appropriate to analyse how the present harmonised rules can be simplified, or at least the administrative burden reduced

Simultaneously, it could be explored what the obstacles are to convert subsidiaries into branches and how such obstacles could be removed. This may also involve a review of the relevant tax

[104] Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent and Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies.

regimes (and if necessary EU measures to remove obstacles which may be identified in that respect).

ii. A simplified single member company template

Over the last years a third theme has surfaced, i.e. that cross-border groups of companies seek to simplify their legal structure and would like a legal framework allowing them to set up subsidiaries with the same legal structure across Europe: in short, a simple vehicle available to groups of companies with operations in various EU Member States. This could be realised relatively easily at the EU level by issuing a Directive requiring all Member States to make available a private company template for a single parent shareholder company with a simple structure basically limited to harmonised rules on key issues which would be possible because this company would only have one shareholder. That would mean that issues that normally are the hardest to address in company law such as minority protection, conflicts of interest and conflict resolution procedures including buy-outs, squeeze outs, and other exit rights would not have to be addressed. The external form would be a company under national law but the essential elements would be harmonised by EU legislation. This will be further discussed in section 4.2.

Recommendations:

In respect of small and medium sized enterprises ("SMEs") in Europe:

- *There is a need for a simplification strategy for SMEs and intensified simplification efforts should be initiated by the Commission;*
- *In addition it should be considered to make available a private company template in national jurisdictions for a single shareholder company with a simple structure (see further section 4.2 of this report).*

Chapter 4: Groups of companies

4.1 The recognition of the “interest of the group” by EU legislation

4.1.1 Historical development of the regulation of groups in the EU

The international group of companies – not the single company – has become *the* prevailing form of European large-sized enterprises, which business activity is typically organised and conducted through a network of individual subsidiaries located in several States inside and outside Europe. The group management is the heart of this leading business organisation: the main reason for its success consists in the sophisticated and flexible management issuing from the optimal combination of central control exercised by the parent and local autonomy granted to subsidiaries. No successful regulation could ignore this central feature. *Any EU legislation and/or recommendation on groups of companies should seek to maintain and enhance the flexibility of the management of groups in its international business activities.*

During the late 1970' and beginning of 1980', the EU Commission elaborated a proposal for a 9th Directive on groups of companies, largely inspired by the German *Konzernrecht* model, which was abandoned due to lack of support. In the late 1990’s, the "Forum Europaeum on Group Law", composed of a group of leading company law academics, elaborated a proposition for a European regulation of groups based on some standards and rules – entitled "The Corporate Group Law Principles and Proposals" (1998)[105]. Finally, it should be noted also that the "High Level Group of Company Law Experts", established by the Commission in the beginning of 2000, decided against the introduction of a comprehensive law on groups of companies, recommending instead that the EU should consider provisions within the existing range of corporate law to address particular problems, such as the management of a group (rule allowing group policy, squeeze-out), transparency of groups, protection of creditors (wrongful trading) and minority shareholders’ protection (sell-out rights)[106].

These proposals were not subsequently implemented. However, in a sense, the SPE relates indirectly to the issue of groups of companies since it was designed to make the management of EU cross-border groups easier.

Many Member States generally have a piecemeal approach to the regulation of groups although they recognise the notion. For instance, the Nordic Member States and countries[107] do not have a law on groups but introduced provisions on "groups" in their company legislation back in the 1970s to accommodate consolidated accounts, which was an issue in Nordic law long before it became an item for the 7th Company Law Directive. Only Germany (1965), and a few other countries who adopted more or less the German model (Portugal, 1986; Hungary, 1988; Czech Republic, 1991; Slovenia, 1993), have developed a global and autonomous body of law. However, such a regulatory

[105] European Business Organization Law Review (EBOR) I (2000) 165-264 ; “Corporate Group Law for Europe”, Forum Europaeum Konzernrecht, Stockholm (Corporate Governance Forum) 2000.

[106] Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe, 2002.

[107] The Nordic countries are Denmark, Finland and Sweden (EU Member States) and Iceland and Norway (EEA Member States).

model is criticized not only in Central and Eastern Europe countries which followed the German example, but also in Germany itself. Separately, some countries have developed specific rules and chapters in Companies acts on groups, but not by following the German approach (Italy, 2003). Finally, some Member States have introduced similar proposals (Spain, 2002) or are currently having discussions on whether to introduce such rules (Poland).

Because these issues relate to all companies, and most groups are not listed, an EU legislation and/or recommendation on groups should not be limited to public listed companies but also include private ones. However, two different alternative approaches have been also suggested in the Reflection Group. Some members of the Reflection Group are of the opinion that the recognition of the interest of the group should be limited to wholly-owned subsidiaries. Other members considered that the regime should not apply to listed subsidiaries.

Furthermore, some members of the Reflection Group are not in favour of any action at EU level on groups. Other members would not oppose the recognition of a doctrine involving the interest of the group and adoption of ‘an interest of the group’ doctrine, be it for listed or non listed companies, with appropriate safeguards, but only as a choice made by individual companies (*opt-in*).

The Reflection Group as a whole considers that it would be helpful to explore whether there would be a benefit in a recognition, at EU level, of the interest of the group and, if so, what form this should take. The Group is aware that EMCA is working on a model law for groups.

4.1.2. The arguments for an EU recommendation on groups of companies

In order to *enhance the flexibility of the management of groups* especially on a cross-border basis, an EU recommendation should bring the consecration of the interest of the group ("Konzerninteresse", "intérêt du groupe", "interesse di gruppo"). Similarly to the case of an individual company (whose directors must promote the company interest), the parent corporation could be vested with *a right but also a duty to manage the group and its constituent companies in accordance with the overall interest of the group.* Some members of the Reflection Group think that the board of the parent company should have a duty to manage the group only if they choose to. The directors and managers of EU subsidiaries would be allowed, subject to certain safeguards, but possibly not forced, to take into account the interest of the group. The situations in which this could happen and the basis on which it would happen, including whether it would need to be disclosed, would need further consideration.

A major advantage of the recognition of the interest of the group is that it provides more clarity to the directors of the subsidiary as to which transaction or operations they can approve.

Therefore, if the doctrine of the group interest is recognized, the effect of this would be that it could operate as a "safe harbour" for the managers of both EU parent and subsidiary companies against liability (civil and criminal) if they take action for a group company taking into consideration the existence of the group as a unitary business entity, particularly in the case of instructions from a parent company to take action that is in the interests of the group as a whole but arguably not in the interests of that particular company. In a cross border situation, that would mean, for example, that if a German parent has a subsidiary in the UK and another one in Italy, the directors of the subsidiaries could be relieved of their duties under UK and Italian law to act in the "best interests of the company" they are serving and could lawfully rely on the "best interest of the group". However, in order to ensure that the management of a subsidiary would be responsible for ensuring that the company still has appropriate responsibilities to its stakeholders, including its creditors, consideration needs to be given to the circumstances in which this protection is available and whether such circumstances can be uniform throughout the EU. Consideration should also be given to whether the rule should only apply to wholly-owned subsidiaries or also apply where there are minority shareholders in a subsidiary. If agreement can be reached as to an EU-wide test in what circumstances EU companies can apply this approach, this would provide protection for the EU subsidiary companies and its stakeholders (creditors and minority shareholders). The intention would be to seek a balance between benefits/losses which would be considered whenever a parent company gives an instruction and for the balance to be weighed in such a way that it would prevent the creditors and other stakeholders of EU subsidiaries from suffering arbitrary and uncompensated prejudices as a result of instructions from a parent company.

One specific argument that such a rule may not be needed is that if a company wants to require a subsidiary to act in the interest of the group rather than that particular company, then it can establish a branch rather than a subsidiary. However, a parent company may want to establish a subsidiary for other reasons, and still retain the benefits of managing the subsidiary as part of a group.

So far, there is no strong evidence that introduction of such a rule is needed. However, it can be argued theoretically that the adoption of an EU wide rule recognizing the interest of the group should provide several benefits for parent companies, especially in a cross-border context in which most groups operate and where only EU action can bring harmonisation if needed. The discussion at the conference on 16-17 May 2011 could provide input from practitioners and businesses as to whether there would be interest in an EU wide rule of this sort and, if so, how such rule should be formulated, and from creditors and other stakeholders as to any appropriate safeguards they would want to see, as well as any concerns about such a proposed approach.

There are several arguments in favour of the introduction of such a rule at the EU level.

First, it would help parent companies located in EU countries recognizing the interest of the group to manage and enter into transactions with their subsidiaries located in other EU countries without having to analyse whether or not the legislation in the other country recognizes or not the interest of the group. A more uniform rule could therefore reduce the cost for groups doing business in EU cross-border situations since they would have to invest less in knowing and analysing the technicalities of each national law. It will be important to provide factual evidence as to whether the reduction in legal costs and the facilitation of cross-border activity would offset the costs of introducing a new harmonised rule and any uncertainties it might give rise to.

Second, the lack of flexibility in some Member States could also prove, to a certain extent, an obstacle to parent companies from other Member States that are used to this flexibility. It would provide the management of the parent company with more legal certainty and in certain Member States more flexibility when managing a foreign subsidiary and would therefore improve freedom of establishment. A typical transaction that, in some Member States, may be subject to criticism in the absence of recognition of a group interest doctrine is cash pooling or intra-groups loans and an interest of group principle could provide more legal certainty in such cases. An EU intervention may be justified by the cross-border nature of many groups, although the EU rule would not have to be limited to cross-border groups and could be of assistance for groups in a particular Member State.

Third, Member States which have adopted the German approach but wish to have an opportunity to change to a more flexible approach might have the impetus for such a change.

Finally, it might clarify the duties of the board of EU companies, both at the parent and at the subsidiary level. The duty or ability of the board to act in the interest of the group, as opposed to the interest of the parent company only, is usually not very clear in Member States law. At the subsidiary level, it would allow the directors of the subsidiary company to take into account, within certain limits, the interest of the company as part of the group, which may be thought to reflect what many subsidiaries are often, in practice, asked to do.

The disadvantages to such recognition seem limited because many Member States share this approach.

Some Member States already deal with these or similar issues in various ways.

First, such a doctrine has been adopted in several European countries under different forms, e.g. the French "Rozenblum" jurisprudence or the Italian "*teoria dei vantaggi compensative*" (Article 2497 Codice Civile), the Nordic countries. The UK also allows a company to take account of the interests of other group companies in considering what is in the interests of the UK company in certain cases.

For instance, in the Nordic countries, a company may not make a transaction that will convey a benefit to a shareholder and a corresponding loss to the company. This would be seen as a "private benefit", which is illegal. The transaction could be voided and the management could be held liable for causing the loss. If the shareholder effectively made the transaction, he/she/it could also face liability as a shadow director. However, if management can reasonably state that they made the transaction as part of a normal give and take system of mutual transactions that would within the foreseeable future compensate the company, the transaction would most likely be upheld as there is not a requirement that each individual transaction must provide a profit for the company. It just must not result in a certain loss, either. So, a company may not make a transaction that will convey a benefit to the group and a corresponding loss to the company, unless there are reasonable grounds to expect that the company will be compensated on balance. Thus, the interest of a company may include the interest of that company as being a part of a group.

In France, the approach is similar. The main criminal law tool against self-dealing is the provision against abuse of corporate assets (*abus de biens sociaux*)[108]. It punishes, among others, board chairmen, directors or managing directors of a public limited company (*Société anonyme*) or a limited liability company (SARL) who "use the company's property or credit, in bad faith, in a way which they know is contrary to the interests of the company, for personal purposes or to favour another company or undertaking in which they have a direct or indirect interest". The penalty is a prison term of up to five years (with no minimum). French courts have created a special doctrine on abuse of corporate assets within groups (the so-called Rozenblum doctrine)[109]. This doctrine admits a "group defence" under certain conditions. First, there must be a group characterized by capital links between the companies. Second, there must be strong, effective business integration among

[108] Article L. 242-6 French Commercial code.
[109] See Trib. Corr. Paris, 16 May 1974, Soc. Saint-Frères, D. 1975, p. 37, Rev. Sociétés 1975, p. 657, n. B. Oppetit, JCP éd. E. 1075, II-11816, p; 381; Court of cassation, Criminal Chamber, 4 February 1985, Rozenblum and Allouche, D. 1985, p. 478, n. D. Ohl, I-639, JCP 1986, II-20585, n. W. Jeandidier, Rev. Sociétés 1985, p. 648, n. B. Bouloc.

the companies within the group. Third, the financial support from one company to another company must have an economic quid pro quo and may not break the balance of mutual commitments between the concerned companies. Fourth, the support from the company must not exceed its possibilities. In other words, it should not create a risk of bankruptcy for the company. In practice, the number of cases going to court in France has been rather limited, and managers and directors have, in the great majority of cases, been refused the benefit of the defence. This does not mean that the defence is not useful. One could argue that the number of cases going to court would have been probably much higher in the absence of the Rozenblum doctrine. Only egregious cases go to court, which could explain why the defence has not been successful in most cases.

In Hungary, the doctrine pertaining to "de facto groups" (as opposed to "contractual groups") also resembles the Rozenblum doctrine. If, in a group of companies there has been a continuous cooperation for at least three years under a coordinated business strategy, and the actual decisions and actions taken assure that the benefits and costs (burdens) of the cooperation as a group are predictable and shared in a fair and balanced manner, then the parent may instruct the subsidiary and its management or pass resolutions binding upon the subsidiary. Neither the parent nor its directors shall be liable for their actions. The directors of the subsidiary shall not be liable for actions on grounds that such actions are not in the best interest of the subsidiary and the parent shall be immune from liability in an insolvency proceeding based on wrongful trading.

In the Netherlands, the so called "Nimox doctrine", which derives from a Dutch Supreme Court decision of 1991 resembles the French Rozenblum approach but in a simpler fashion[110]. In this case, the Dutch Supreme Court ruled that the sole shareholder of a BV had committed a tort against creditors by voting in favour of a distribution of all freely distributable reserves available which endangered the company's continuity. The company was declared bankrupt afterwards.

In the UK, directors are able to take account of the interests of the group in reaching a decision about what will promote the company's success for the benefit of its members. If there is a doubt that something is in the interests of the company (e.g. giving a guarantee for the benefit of the group), any doubt about whether this involves a breach of the director's duties can be dealt with by the shareholders passing a resolution to approve the action proposed. However, because directors may incur personal liability for wrongful trading by the company if the company goes into insolvent liquidation and the director knew or ought to have concluded that there was no reasonable prospect of avoiding this and did not take every step to minimise the potential loss to the creditors, directors will be very careful not to prefer the interests of the group over the interests of the creditors of the company if the company may become insolvent.

Some countries, such as Germany, could be more affected by the introduction of such recommendation than other Member States. According to German law, there is a duty to cover losses of the subsidiary on a yearly basis in contractual groups (*Vertragskonzern,* § 302 of German "AktG") or to compensate all disadvantages on an yearly basis in factual groups (*Faktischer Konzern,* § 311 of German "AktG") in case of action contrary to the subsidiary's own interest. However, any recommendation would be without prejudice to a Member State's regulation of "contractual groups".

[110] HR 9 November 1991, *NJ* 1992, 174 (*Nimox*).

Therefore, on a preliminary view, it appears that Member States take different approaches to the reality of groups of companies and more precisely to the protection of minority shareholders and/or creditors of subsidiaries. Taking a more functional approach, differences among European countries might be more technical than fundamental, as regards protection of creditors. It is noted that "whether the German regime is effective in protecting minority shareholders remains unclear. In the past, parent companies usually ignored the indemnification or compensation requirements – unless the subsidiary was insolvent, in which case not much was left for minority shareholders. Nowadays, improvements in business practices and an increase in litigation risks seem to have resulted in a more adequate treatment of minority shareholders"[111]. Of course, the authors could not assess to which extent the respective provisions are being anticipated in practice. However, the German system, at least relating to factual groups, seems to be closer than it looks to the UK, Nordic and French approach where flexibility is allowed and liability for managing a subsidiary in the interest of the group occurs in practice mostly when the subsidiary is insolvent or close to it. By recognizing the "interest of the group", the EU could therefore lead the German and German oriented system to move towards the alternative model, which is the one towards which, after decades of application, they seem to be moving in practice anyway.

The other potential disadvantages that would need to be considered include whether a change to the duties of directors of EU companies would improve the standard of decision making or confuse matters for directors. There is also a question as to whether it is possible to agree upon an EU wide rule on the circumstances in which a director can take account of the interests of the group and the effect this will have on existing protections under national law for creditors and other stakeholders. Further consideration should also be given to whether this is a problem that can properly be dealt with at national level or whether the benefits of having an EU wide approach are such as to outweigh the changes involved in doing this. Any such consideration should also take account of the approach adopted outside the EU on such matters, as many EU groups also have companies outside the EU.

Further consideration of this principle should distinguish two situations: (i) where the subsidiary is not close to insolvency and (ii) where it is close to insolvency. It would be necessary to see if a form of words can be devised that is clear and separates the two cases clearly and whether this should be an EU-wide test or should be left to Member States to determine (the disadvantage of the latter approach being that then there would not be one single test, with the result that parent companies would still need to be informed about the different test in each Member State). This would involve consideration of the approach to company insolvency in the Member States and the different tests that are applied. In the first case, where the subsidiary is not close to insolvency, the proposal could be that the standard of the "interest of the group" would allow the directors of the subsidiary to take a decision in the interests of the group even if it is unclear that it is in the interests of the company provided that it is compensated or that it can be reasonably expected that it will be compensated or that some benefit may accrue to it by virtue of being part of the group in the future. The precise formulation of this proposal would need careful thought. It would not mean to allow any sacrifice in favour of the group or parent company short of such steps that cause insolvency.

If it is decided that action at EU level is appropriate, the proposal would need to set out the conditions that would need to be satisfied for the group interest approach to apply. Some members

[111] Kraakman and al.,The Anatomy of corporate law. A Comparative and Functional Approach, 2nd ed., OUP, p. 177.

of the Reflection Group consider that the approach adopted in France under the Rozenblum test is too complicated and not always clear.

The recognition of the interest of the group would be a standard that national judges would need to implement. National traditions and diverging interpretations would certainly lead to differences in the implementation and interpretation by judges of such a standard. Therefore, harmonisation would probably be limited. However, this should not be an obstacle to adopting such standard, since despite differences, there would be a common acceptance in the EU that the interest of the group could be taken into account. In addition, depending on the view that national judges would take, this could lead national legislators to implement additional safeguards to protect minority shareholders and creditors. The recognition at the EU level of an interest of group could therefore act as an incentive for Member States to modify their national company law with a view to harmonisation.

Recommendations:

- *The EU Commission should consider, subject to evidence that it would be a benefit to take action at the EU level, to adopt a recommendation recognising the interest of the group.*

4.2. The simplified single member company template

As already discussed in section 3.3.2 of this report, the Reflection Group has noted that over the last years the theme has surfaced that cross-border groups of companies seek to simplify their legal structure and would like a legal framework allowing them to set up subsidiaries with the same legal structure across Europe. In short, a simple vehicle available to groups of companies with operations in various EU Member States would be desirable. In part the SPE, as mentioned above (section 2.7.2), is perceived to be a solution to this need. The Reflection Group has expressed, subject to the general observations in section 2.7, its support for the SPE. However, this specific goal of facilitating cross border groups could also be realised relatively easily at the EU level by adopting a Directive, which would require all Member States to make available a private company template for a single shareholder company limited to harmonised rules on key issues regarding the formation, operation and governance of such company. This would be possible because this company would only have one shareholder. As a result, issues that normally are the hardest in company law such as minority protection, conflicts of interest and conflict resolution procedures including buy-outs, squeeze outs and exit rights, would not have to be addressed in the context of a single shareholder company.

Apart from the broader simplification initiatives proposed in section 3.3.2 of this report this would be a more innovative proposal in the form of a Directive which would aim to substantially simplify company law specifically for single shareholder start ups and subsidiaries of holding companies. The proposal would introduce a simple template for a limited liability company within the national private company framework. This template could, in certain respects, build on the work done for the SPE and/or the European Model Corporation Act (EMCA). However, rather than developing a new full blown company type (as the SPE Regulation, yet unsuccessfully, aims to do), this approach would essentially consist of mandating all EU Member States to make available a single member template of their national private company form suitable to both the individual entrepreneur and holding companies. This could be achieved either by issuing a separate EU Directive or by amending the 12th Company Law Directive[112] (already providing specific rules for the single member company).

Such a Directive should not only exempt single member companies from certain harmonised rules (what is known as the "negative harmonisation" approach), but in order to secure the basic needs of entrepreneurs, it would identify the rules that are indispensable for a single member company. Member States would have to allow this simplified vehicle to be introduced in their legal system, thereby adopting the "Simplified Sarl/GmbH/BV", etc. Although the essential characteristics of this entity would be formulated at the European level, such regulatory approach would obviously not change the domestic nature of the company type.

On the basis of this analysis, a Simplified Company Charter, as a standardised document could be provided for as an Annex to such a Directive, which may be adopted by simply filing the signed document at the relevant national register. The publication and reporting obligations of these companies could also be governed by such simplified formalities. Also the governance of the company could be very much simplified: in one member companies, there is no need to have

[112] Directive 2009/102/EC of the European Parliament and of the Council of 16 September 2009 in the area of company law on single-member private limited liability companies.

general meetings (written resolutions of the sole member would satisfy concerns of regularity), a board of directors since the functioning of these bodies in a single member company often result in purely formalistic practice. Further analysis should be undertaken what purely formalistic and superfluous rules could be removed or rendered optional for entities of this kind.

The common charter may only provide for limited if any variation but would leave freedom to deviate from the rules in as far as the interest of the company, its stakeholders and specifically creditors is not prejudiced. The Directive and national law will allow the single shareholder to easily replace the uniform charter by adopting one of the traditional national company forms if for example additional shareholders would step in.

As indicated above subsidiaries of group companies, with a group company as sole shareholder, could make use of this simplified regime. In that situation a concern will be that the position of creditors and the interest of the subsidiary, its stakeholders and specifically its creditors is respected in a reasonable way. As explained in section 4.1 of this report, such limits on group operations have been developed in many Member States. Although one should be careful to adopt specific rules developed in certain jurisdictions on the EU level, it is clear from this chapter of this report that the fundamental concept of "group interest" is recognised in many EU jurisdictions and offers a good starting point to develop appropriate rules to safeguard the interest of the subsidiary and its stakeholders, specifically its creditors.

Recommendations:

In respect of small and medium sized enterprises ("SMEs") which are part of a group in Europe:

- *It is proposed that a new EU Directive or an amended 12th Company Law Directive require EU Member States to provide for a simplified company template, which would allow single-member companies, both individual entrepreneurs and holding companies, to save on transaction costs and unnecessary formalities.*
- *In as far as the single-member company is part of a group of companies appropriate rules should be developed to safeguard the interests of the subsidiary and its stakeholders, specifically its creditors.*

4.3 *Transparency of groups structures and relations*

4.3.1 Current rules on transparency of groups of companies

The Winter report[113] had proposed that the Commission address specific problems relating to the Transparency of group structure and relations. The proposals were as follows[114]:

> "Increased disclosure with regard to a group's structure and relations is needed, and the parent company of each group is to be made responsible for disclosing coherent and accurate information.
>
> The Commission should review the 7th Company Law Directive's provisions in the light of the need for better financial disclosure, and consider whether improvements can be made consistent with International Accounting Standards.
>
> With respect to non financial disclosure, it should be ensured that – especially where listed companies are involved – a clear picture of the group's governance structure, including cross-holdings and material shareholders' agreements, is given to the market and the public.
>
> In addition, companies could be required to provide specific information when they enter into or exit from a group."

Transparency has been significantly improved since 2002 for listed companies due to the adoption of the Transparency Directive (2004)[115] and the Takeover Directive (2004)[116]. Likewise, transparency has been improved for companies establishing consolidated accounts due to the modification of the 7th Company Law Directive on consolidated accounts[117] (2003, 2006) and to the adoption of many IFRS standards (e.g. IAS 24 on Related party transactions). Of special interest is the corporate governance statement required by Directive 2006/46/EC[118]. Article 46a of Directive 78/660/EEC[119], as amended, states, notably, that:

> "1. A company whose securities are admitted to trading on a regulated market within the meaning of Article 4(1), point (14) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments shall include a corporate governance statement in its annual report. That statement shall be included as a specific

[113] High Level group of Company Law Experts on a modern regulatory framework for company law in Europe, 2002.
[114] Winter Report, p. 18.
[115] Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC.
[116] Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids.
[117] Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54 (3) (g) of the Treaty on consolidated accounts.
[118] Directive 2006/46/EC of the European Parliament and of the Council of of 14 June 2006 amending Council Directives 78/660/EEC on the annual accounts of certain types of companies, 83/349/EEC on consolidated accounts, 86/635/EEC on the annual accounts and consolidated accounts of banks and other financial institutions and 91/674/EEC on the annual accounts and consolidated accounts of insurance undertakings.
[119] Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies.

section of the annual report and shall contain at least the following information:

(a) a reference to:

(i) the corporate governance code to which the company is subject, and/or

(ii) the corporate governance code which the company may have voluntarily decided to apply, and/or

(iii) all relevant information about the corporate governance practices applied beyond the requirements under national law.

Where points (i) and (ii) apply, the company shall also indicate where the relevant texts are publicly available; where point (iii) applies, the company shall make its corporate governance practices publicly available;

(b) to the extent to which a company, in accordance with national law, departs from a corporate governance code referred to under points (a)(i) or (ii), an explanation by the company as to which parts of the corporate governance code it departs from and the reasons for doing so. Where the company has decided not to apply any provisions of a corporate governance code referred to under points (a)(i) or (ii), it shall explain its reasons for doing so;

(c) a description of the main features of the company's internal control and risk management systems in relation to the financial reporting process;

(d) the information required by Article 10(1), points (c), (d), (f), (h) and (i) of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, where the company is subject to that Directive;

(e) unless the information is already fully provided for in national laws or regulations, the operation of the shareholder meeting and its key powers, and a description of shareholders'rights and how they can be exercised;

(f) the composition and operation of the administrative, management and supervisory bodies and their committees."

The objective of a corporate governance statement is to provide shareholders with easily accessible key information about the corporate governance practices actually applied, including a description of the main features of any existing risk management systems and internal controls in relation to the financial reporting process as well as information concerning the group's risk management system and internal control system.

The point of view of corporate governance statements differs from the objective of rules concerning financial statements and annual reports. The objective of corporate governance statements is to provide key information in an investor-friendly manner whereas rules on financial reporting emphasize accurateness and aim for giving a full picture of the financial status of the group. The level of expertise needed to study corporate governance statements for receiving information is nowhere near the expertise required for studying financial statements. For this reason, corporate governance codes require information to be given in an investor-friendly manner.

The goal of transparency on groups of companies involves, at least theoretically, the disclosure and information at three main levels: the level of group *formation*, the level of group *structure* and the level of group *management*.

i) Transparency of group formation

Transparency of group formation means that the creation or the existence of groups should be disclosed to the public or the interested parties.

Except for those few countries which provide for specific instruments of the formation of a group (e.g., "contract of domination" or "annexation" in Germany and Portugal, "agreement for management a dependent company" in Poland), the classical instrument or the “vital link” for constructing a corporate group is *stock ownership*, namely the acquisition and holding of a majority or controlling participation in a company.

Thanks to the so-called "Transparency Directive" of 2004 (Articles 9 to 16 of Directive 2004/109/EC), the formation of groups based on inter-corporate stock ownership in publicly-traded companies is now fairly disclosed in most of the European countries, given the mandatory duties of information of acquisition and disposal of major holdings reaching or exceeding several thresholds up to 75 % of capital (e.g., Article L. 233-7 of French "*Code de Commerce*", §§ 21 and ff. of German "*WpHG*", Article 120 of Italian "*Testo Unico della Finanza*", etc.).

ii) Transparency of group structure

A second major level relates to the transparency of group structure, meaning basically the information and disclosure of the companies included within the perimeter of a group of companies.

According to the *7th Company Law Directive on consolidated accounts*, the notes of the accounts must set out information about "the names and registered offices of the undertakings included in the consolidation; the proportion of the capital held in undertakings included in the consolidation, other than the parent undertaking, by the undertakings included in the consolidation or by persons acting in their own names but on behalf of those undertakings" (Article 34.º, 2(a) of the Directive 83/349/EC). Following this mandatory ruling, it is now provided for in the overwhelming majority of European legal orders that the explanatory notes of the group’s accounts ("*Konzernanhang*", "*annexe*", "*nota integrativa*", etc.) have to identify its constituent companies of that group and to give detailed information about the nature and type of the relationships between them, namely the controlling interest of the parent in subsidiaries (e.g., Article L. 233-16 of French "*Code de Commerce*", § 313 of German "*HGB*", Article 2427, (6) of Italian "*Codice Civile*", sec. 409 of the UK Companies Act).

Likewise, according to *IAS 27 on consolidated financial statements*, the financial statements of a group of companies must disclose "the nature of the relationship between the parent and a subsidiary when the parent does not own, directly or indirectly through subsidiaries, more than half of the voting power" as well as "the reasons why the ownership, directly or indirectly through subsidiaries, of more than half of the voting or potential voting power of an investee does not constitute control".

However, there is no European rule requiring an annual report, corporate governance statement or company website to describe the main features of a company's group structure in a clear and investor-friendly manner.

iii) Transparency of group functioning and management

Transparency of group functioning and management means essentially the information on the relationships between the constituent companies of a group, especially between the parent company and its subsidiaries.

The issue of transparency of the management and functioning of a group is, by and large, a consequence of the model of *regulation of the group itself*. For instance, in those countries who have a group law, the disclosure of the nature, content and patrimonial significance of the relationships or transactions between parent and subsidiaries is ensured by the norms regulating the exercise of the power of direction of the former over the latter, be that regarding legal groups (*e.g.*, the duty to cover losses of the subsidiary in a yearly basis of § 302 of German "*AktG*") or to compensate all disadvantages on a yearly basis in factual groups (§ 311 of German "*AktG*" *e.g*. and the dependency report of § 312 of German "*AktG*").

Even in those countries who do not have a general group law, something similar can be observed: for example, in Italy, the annual management report of the subsidiaries have to give a detailed information about the managerial decisions taken under parental control (Article 2497-ter e 2428 of "*Codice Civile*") and, in France, the application of the "Rozenblum" jurisprudence requires necessarily, in case of suit, the disclosure of the structure of the group and of the balance between benefits/losses at a concrete parent-subsidiary relationship.

4.3.2 Assessment of regulatory needs

Considering the current rules on transparency of groups of companies, there are no considerable regulatory needs. One point of view is the actual amount of information available under the current regime and another is the clarity and investor-friendliness of the current information given by listed companies.

i) Transparency of the formation of groups

In general, there can be seen a need for enhanced transparency concerning the formation of groups of non-listed companies or the formation of groups via other types of mechanisms (*e.g.*, articles of association, personal linkages, etc.).

Regarding the former case (*groups of unlisted companies*), only a few Member States impose specific duties of notification on the acquisition of voting or equity participations on unlisted companies (*e.g.*, § 20 of German *AktG*, arts. L. 233-2 and L. 233-6 of French "*Code de Commerce*", Article 484 of Portuguese "*Código das Sociedades*"). The extension to unlisted companies of a European-wide mandatory system similar to the one imposed by the Transparency Directive of 2004 is not advised. Whereas this extension would promote an equal level playing field for both listed and non-listed groups, avoiding thus any undue competitive advantage for the later (in line with the general orientation of the Reflection Group) it would cause unnecessary administrative burden to unlisted companies, SME's in particular.

Regarding the *other mechanisms of group formation*, there seems to be no case for a further regulatory intervention. The Takeover Bids Directive 2004/25/EC provides some duties of giving information in respect of cross shareholdings, special control rights and certain shareholder agreements. According to article 10 of the Takeover Directive, the company shall publish information in its annual report about inter alia significant direct and indirect shareholdings (including indirect shareholdings through pyramid structures and cross-shareholdings), the holders of any securities with special control rights and a description of those rights as well as any agreements between shareholders which are known to the company and may result in restrictions on the transfer of securities and/or voting rights.

Besides, the overwhelming majority of groups are today created and organised on the basis of stock inter-corporate linkages. Linkages of other type – such as personal linkages ("interlocking board of directors"), organisational linkages or devices (*e.g.*, special provisions on the articles of association) or contractual and market-based linkages (*e.g.*, cooperation agreements, disguised control contracts) – certainly exist, but they are far less important and, in any case, often a mere by-product or consequence of a previous relationship of control established between two or more companies on the basis of a stock ownership. However, there might be a need to consider enhanced transparency concerning interlocking board of directors or multiple directorships (see below).

ii) Transparency of group structure

Therefore, while it is true that the consolidation perimeter is not entirely coincident with the perimeter of a group (i.e. not all companies belonging to a group are included in the consolidation accounts), it seems that the existing European and national accounting rules already provide an adequate *disclosure of the structure of group*, that is, a transparent image of the network of inter-corporate relationships between the parent and its subsidiary companies.

Furthermore, the transparency of group structure is also enhanced, in relation to groups of listed companies, by others disclosure rules provided for in some national laws or in corporate governance codes: for instance, rules concerning the mandatory information and disclosure of *shareholders' voting agreements* (e.g., Article 122 of Italian "*Testo Unico della Finanza*", Article 19 of Portuguese "*Código dos Valores Mobiliários*", Article L. 233-11 of French "*Code de commerce*" for listed companies), and the *annual corporate governance report* (which must include, "inter alia", the networks of share ownership, the shareholders with special rights, the agreements affected by the change of company control, etc.)

The question remains, however, if basic information on a listed company's group structure can be assessed to be easily accessible through the current regime of financial statements and annual reports. For example, in some cases the listed company is a holding company and subsidiaries are the ones conducting all business whereas there are groups with subsidiaries acting as sale offices only in different countries.

Although there are numerous and detailed rules on group information, there is no rule requiring an annual report, corporate governance statement or company website to describe the main features of a company's group structure in a clear and investor-friendly manner. Currently, for example, some companies' annual reports contain a chapter on changes in group structure without providing information on the existing group structure.

A further issue to be discussed could be the case of interlocking board of directors ("*personelle Verflechtungen*", "*liens personnels*"). In fact, the organisation of a group often leads to the practice consisting in a same person sitting on the boards of directors (or others boards) of several interconnected companies: such interlocks allow a better cohesion and coordination of group management but they may also increase the risk for conflicts of interests.

A disclosure of such "multiple director" practice and interlocks seems already ensured for the case of listed companies, at least partially. In fact, a few European legal orders already provided for some type of limitations to the possibility that a member of the board of directors may also serve on the board other companies (e.g., Article L. 225-21 of French Commercial Code), and most Corporate Governance Codes expressly contain several requirements which may also be relevant in this regard (e.g., requirement of "independence" for members, requirement of approval of multiple directorship by the supervisory board).

The Commission's Recommendation of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board (2005/162/EC) deals with interlocking board memberships. According to Annex II of the Recommendation, the following criteria is suggested to be used for consideration of directors' independence

> "(g) not to be executive or managing director in another company in which an executive or managing director of the company is non-executive or supervisory director, and not to have other significant links with executive directors of the company through involvement in other companies or bodies"

Many European corporate governance codes include interlocking directorships in the criteria for board members' independence (e.g. Denmark, Finland, France, Sweden, UK). Where this is the case, the issue may be considered to be addressed adequately. In Member States where the issue is not addressed in the corporate governance code or otherwise, there may be a need to enhance transparency. In that case a rule requiring that the annual report or company website should release information about whose members of their corporate organs are serving, and in which capacity, on the organs of a controlling or controlled company of the same group, could enhance the transparency of the group structure and reduce the risk of hidden situations of conflict of interest.

However, some members of the Reflection Group do not think that it is necessary to have disclosure of directorships within the same group as they feel that there is no real conflict of interest and that it could lead to a large amount of disclosure without any real benefit.

iii) Transparency of group functioning and management

Finally, transparency of group functioning and management means essentially the information on the relationships between the constituent companies of a group, especially between the parent company and its subsidiaries.

The issue of transparency of the management and functioning of a group is, by and large, a consequence of the model of *regulation of the group itself*. For instance, in those countries who have a group law, the disclosure of the nature, content and patrimonial significance of the relationships or transactions between parent and subsidiaries is ensured by the norms regulating the exercise of the power of direction of the former over the later, be that regarding legal groups (*e.g.*, the duty to cover losses of the subsidiary on a yearly basis of § 302 of German "*AktG*") or to compensate all disadvantages on a yearly basis in factual groups (§ 311 of German "*AktG*" e.g. and the dependency report of §312 of German "*AktG*"). Even in those countries who do not have a general group law, something similar can be observed. For example, in Italy, the annual management report of the subsidiaries have to give a detailed information about the managerial decisions taken under parental control (arts. 2497-ter e 2428 of "*Codice Civile*") and, in France, the application of the "Rozenblum" jurisprudence requires necessarily, in case of suit, the disclosure of the structure of the group and of the balance between benefits/losses at a concrete parent-subsidiary relationship.

The only problem here, thus, relates to those countries that do not have a group law or even a group case law, since here the classical norms of Company Law, firmly anchored in the approach of the independent company, may not be well equipped to detect the effects of the group central management on its constituent members. However, this legal gap is today partially filled by those international and national rules on *related party transactions*, which provide a reasonable disclosure and information on parent-subsidiary relationships. Following the Regulation (CE) nº 1606/2002, the publicly-traded parent companies must prepare the consolidate accounts for the group according to the International Accounting Standards (IAS) and the International Financial Reporting Standards (IFRS) : of utmost importance is the *IAS 24 on "Related Party Disclosures"* (also adopted by the Regulation (CE) nº 2238/2004).

Groups of companies are precisely one of the main addressees of IAS 24: according to § 9, the relationships between parent and subsidiaries, either directly or indirectly, are relevant to its application (which also covers associate companies, in the sense of IAS 28, and joint ventures, in the sense of IAS 31). According to § 12, "the relations between parent and subsidiaries will be revealed, regardless of whether transactions have occurred between the parties involved. An entity shall disclose the name of their immediate dominant, and if different, the dominant of the main group. If neither the parent of the parent entity or principal financial statements available to produce public use, will reveal the name of the next intermediate dominant closer within the group to do so". Furthermore, according to § 17, "where there have been transactions between related parties, the entity shall disclose the nature of the relationship with each party involved, as well as information on transactions and balances outstanding, for understanding the potential effects that the relationship is in the financial statements".

The above mentioned provisions seem to ensure *a transparent and broad yearly picture of the relationships between the constituent members of a group*. Firstly, the wide-ranging concept of "related party" is able to grasp extensively the group reality Secondly, the information disclosed relates to all types of intra-group relationships, either from a structural (parent-subsidiary, between sister subsidiaries, etc.) or functional perspective (transactions, dealings or simple relations). Thirdly, the identification of links between the parent and its subsidiaries is in addition to the information requirements contained in IAS 27, IAS 28 and IAS 31, which requires both a list and a description of the significant investments in subsidiaries, associates and entities joint control.

Recommendations:

- *There is no considerable legal gap on the transparency of groups of companies. The existing European and national rules seem already to provide an adequate disclosure and information on the formation, organisational structure and management of groups of companies. Of course, this legal regime may always be improved and some new rules for a certain specific problem could be thought of (e.g., interlocking directorships). But these would correspond to mere sporadic rules, thus insufficient to give raise to an autonomous or substantial issue on group transparency.*
- *The question remains, however, if basic information on a listed company's group structure can be assessed to be easily accessible through the current regime of financial statements and annual reports. This basic information should cover e.g. main features on how the group conducts its business, including information on intra-group relationships. Although there are numerous and detailed rules on group information, there is no rule requiring an annual report, corporate governance statement or company website to describe the main features of a company's group structure in a clear and investor-friendly manner. Currently, for example, some companies' annual reports contain a chapter on changes in group structure without providing information on the existing group structure. It should also be assessed if a list of subsidiaries should be available for stakeholders.*
- *Although studies on corporate governance statements have been conducted in some Member States, there is no overall assessment of the functioning of the Directive 2006/46/EC. Before any decision on the necessity or usefulness of a review of the Directive is made, the functioning of the current regime should be assessed. Listed companies should not be burdened with new requirements if there is no proof of a need to amend the Directive. When the functioning of the rules on corporate governance statements is examined, one aspect should be to study the need and usefulness of adding a requirement to give basic information on the group structure in the corporate governance statement. At the same time, it should be assessed if there is a need for giving basic information on the group functioning and management in corporate governance statements.*
- *If it is established that investors benefit from easily accessible information on group structure given in corporate governance statements, and that the benefits outweigh the cost to companies of providing such information, the Commission should act through an amendment to the 1978 Accounting Directive as amended by Directive 2006/46/EC. The Directive is currently under review by the Commission, so this aspect should be added to the review. The obligations created should in any case be limited to listed companies.*

Annex 1: List of recommendations

Introduction – recommendations

- *EU harmonisation should be done after careful vetting of the facts, including where appropriate public consultations and impact assessments, and in observance of the principles of proportionality and subsidiarity of Article 5 TEU.*
- *EU harmonisation should be focused and aimed at particular problems; it should not rely on broad and imprecise categorisations.*
- *EU harmonisation should respect the national corporate governance systems of the Member States and should strive to further the trend towards increased flexibility and freedom of choice in respect of company forms and the internal distribution of powers.*
- *The Reflection Group welcomes the work on a European Model Company Act (EMCA), which is a separate project. It promises to facilitate a learning process and serve as a model for adaption and legislation on a voluntary basis. If the final result can serve as an adequate benchmark, the Commission could consider turning the EMCA into a recommendation.*

Cross-border mobility – recommendations

- *EU harmonisation is called for to provide a right for national companies to transfer their registered office from one Member State to another, effectively changing the applicable company law regime from that of the former to that of the latter. Such a change would entail a cross-border conversion from a company form recognised by the former into a company form recognised by the latter.*
- *The regime in place to protect stakeholders, notably shareholders, employees and creditors, of the Directive on cross-border mergers should be applicable mutatis mutandis and the additional protection offered by the SE Regulation could be considered.*
- *National companies should be provided with a right to engage in cross-border divisions.*
- *A legal regime for cross-border conversions and cross-border divisions should be introduced, either via separate directives or by amending the Directive on cross-border mergers into a joint Directive on cross-border mobility. The regime should apply to limited liability companies and later be expanded to other company forms.*
- *The Reflection Group believes that a right to transfer the registered office of national companies would not require major harmonisation of national law in respect of international private law and conflict of laws provisions. Some members furthermore believe that it is time to envisage an EU regulation to clarify the conflict of law issues.*
- *The Reflection Group invites a debate on arguments in favour and against the real seat theory and possibly a comparative study conducted by the Commission.*
- *The question of taxation should be addressed as part of the harmonisation of mobility envisaged here, where it is important to strike a balance between the Member States' right*

to ensure proper taxation and the companies' right to avail themselves of the freedom to move within the Union.

- *The provisions of the Directive on cross-border mergers should be reviewed and, where appropriate, revised taking into account the experience gained, notably in respect of time limits, suspension and the position of creditors, exchange of shares, and, possibly, other forms of restructuring.*
- *The creation of EU company forms to supplement the existing forms in the national laws of the Member States should be carefully based on practical evidence of a need by business and industry in the Union. Furthermore, new company forms should be carefully vetted against existing national law so that on the one hand the new forms are as flexible as national companies, and on the other hand the new forms should not intrude on national arrangement. Finally, it will be necessary to adjust national tax regimes to cater for any cross-border activities by these new forms.*

The contribution of corporate governance and investors to long term viability of companies – recommendations

- *First, current EU legislation (and corporate governance codes) should be reviewed and amended against the background of whether the rules promote or at least facilitate a long term perspective. Second, on an optional basis, and upon the approval of shareholders, it should be possible to create the conditions for a longer term strategy to be implemented by management. This would imply that:*
    - *Transparency and reporting rules should be reconsidered and reviewed to see whether and where those rules focus too much on a short term perspective. An example is quarterly reporting, which could be considered to be made subject to an opt-out by listed companies.*
    - *The conditions under which some disclosures have to be made on the basis of the Market Abuse Directive should be clarified to better define what items are price sensitive and/or should be disclosed, especially in the relationship to stable shareholders, that are more interested in the longer terms policies and developments of the company.*
    - *An EU Directive or Recommendation could be considered with the aim to require (or recommend) that national legislators allow companies in the EU to amend their Articles to reflect that the overall goal of the company is the long term viability and continuity of the enterprise.*
    - *The Board should indicate in its corporate governance report what its long term objectives are and how it plans to realise such goals while taking account of the short term imperatives.*
- *The increased awareness of risks should imply that Boards and management are expected to explain, avoiding boilerplate approach, risk management functions, risk management policies, structures and procedures, in the corporate governance report. This should be done by way of an amendment to Directive 2006/46/EC.*

- *The issue of board responsibility could also be dealt with by way of an amendment of Directive 2006/46/EC. However, in view of the complexity of many of these issues and the differences in national corporate governance structures, the Reflection Group considered that on balance the adoption of detailed binding rules is not necessarily the most desirable or efficient way of achieving the desired aims. It is proposed thus that the appropriate regulatory tool to implement the remaining proposals set out in this part of the paper would be a Commission Recommendation. All Member States would be invited to take the steps necessary to introduce at national level a set of provisions based on the principles set out in this Recommendation, to be used by large listed companies either on the basis of the 'comply or explain' approach or, upon individual Member States' choice, pursuant to legislation.*
- *In order to favour long term share ownership and shareholder commitment:*
  - *Companies' Articles should be allowed to provide for long term shareholders preferential treatment. These benefits might consist of:*

    a) Enhanced voting rights

    b) Higher dividends
  - *Coordination between the company and its long term shareholders to further its long term objectives should be possible without triggering rules on sharing of inside information and concerted action.*
- *In respect of institutional investors it is suggested that:*
  - *Institutional shareholders- or the asset managers that act for them - should explain their voting policies indicating whether or not they will adopt a long term engagement with the investee companies.*
  - *The role and actions of institutional investors should be analysed and a report on actions and trends should be published regularly (for example every three years). On the basis thereof it can be considered whether additional actions would be appropriate including rules that could foster a long term rather than a short term perspective.*
  - *An analysis should be made of the risks involved in long-term equity investing by insurance companies and pension funds (in correspondence to their long term liabilities) and allowing them to exempt part of their portfolio from the redemption obligation.*
- *Instruments for activating absentee shareholders should include:*
  - *Simplifying the mechanisms whereby shareholders exercise their voting rights, especially in a multi-tier holding system;*
  - *Requiring issuers to organise an efficient voting platform system, allowing all shareholders to vote electronically, subject to an opt out by smaller listed companies who may have a more local character and for which this may be an unnecessary burden;*
  - *Allowing companies to identify their shareholders and communicate with them.*

- *In respect of the position of management and boards the Reflection Group advises:*
    - *that options available to listed companies should be increased by issuing an EU Directive enabling listed companies under their national law to amend their Articles of association (of course in full accordance with the national rules on amending the Articles, and possibly subject to supermajority requirements) to define different directors' term length, to adopt staggered boards, and to limit directors' dismissal at will ("ad nutum");*
    - *that the Commission will initiate an evaluation of the institution of the independent director and its functioning in practice.*
- *There is no need for further comparative studies to illuminate the many different forms for employee representation that are currently being used throughout the Union as these studies have already been done, and the differences are well known. As regards worker participation on the board level, the Commission should be neutral vis-á-vis Member States' systems which have such a regime and those which do not provide for such a system on the condition that this does not contradict principles and freedoms of the internal market. If so, the Commission should take the necessary steps to provide for a discrimination – free regulation on the Member States' level, i.e., a suit before the Court of Justice if necessary. Further, Member States should not be allowed to impede the progress in enhanced cooperation among willing Member States (Article 20 EU Treaty and Articles 326 et seq. TFEU) by blocking such cooperation.*
- *As regards the shaping of the governance structure of national forms of company the Reflection Group supports the trend of giving more choice for companies to decide the governance structure. The EU should encourage the Member States to provide more options. It is noted that this could also have a positive impact on cross-border activities. This may be an area where actions by the EU may be called for if no progress would otherwise be made in this field. Initially the instrument of a Recommendation would then seem appropriate. The use of other instruments should however not be excluded.*
- *In respect of small and medium sized enterprises ("SMEs") in Europe:*
    - *There is a need for a simplification strategy for SMEs and intensified simplification efforts should be initiated by the Commission;*
    - *In addition it should be considered to make available a private company template in national jurisdictions for a single shareholder company with a simple structure (see further section 4.2 of this report).*

Groups of companies - recommendations

- *The EU Commission should consider, subject to evidence that it would be a benefit to take action at the EU level, to adopt a recommendation recognising the interest of the group.*
- *In respect of small and medium sized enterprises ("SMEs") which are part of a group in Europe:*

- *It is proposed that a new EU Directive or an amended 12th Company Law Directive require EU Member States to provide for a simplified company template, which would allow single-member companies, both individual entrepreneurs and holding companies, to save on transaction costs and unnecessary formalities.*
- *In as far as the single-member company is part of a group of companies appropriate rules should be developed to safeguard the interests of the subsidiary and its stakeholders, specifically its creditors.*

- *There is no considerable legal gap on the transparency of groups of companies. The existing European and national rules seem already to provide an adequate disclosure and information on the formation, organisational structure and management of groups of companies. Of course, this legal regime may always be improved and some new rules for a certain specific problem could be thought of (e.g., interlocking directorships). But these would correspond to mere sporadic rules, thus insufficient to give raise to an autonomous or substantial issue on group transparency.*
- *The question remains, however, if basic information on a listed company's group structure can be assessed to be easily accessible through the current regime of financial statements and annual reports. This basic information should cover e.g. main features on how the group conducts its business, including information on intra-group relationships. Although there are numerous and detailed rules on group information, there is no rule requiring an annual report, corporate governance statement or company website to describe the main features of a company's group structure in a clear and investor-friendly manner. Currently, for example, some companies' annual reports contain a chapter on changes in group structure without providing information on the existing group structure. It should also be assessed if a list of subsidiaries should be available for stakeholders.*
- *Although studies on corporate governance statements have been conducted in some Member States, there is no overall assessment of the functioning of the Directive 2006/46/EC. Before any decision on the necessity or usefulness of a review of the Directive is made, the functioning of the current regime should be assessed. Listed companies should not be burdened with new requirements if there is no proof of a need to amend the Directive. When the functioning of the rules on corporate governance statements is examined, one aspect should be to study the need and usefulness of adding a requirement to give basic information on the group structure in the corporate governance statement. At the same time, it should be assessed if there is a need for giving basic information on the group functioning and management in corporate governance statements.*
- If it is established that investors benefit from easily accessible information on group structure given in corporate governance statements, and that the benefits outweigh the cost to companies of providing such information, the Commission should act through an amendment to the 1978 Accounting Directive as amended by Directive 2006/46/EC. The Directive is currently under review by the Commission, so this aspect should be added to the review. The obligations created should in any case be limited to listed companies.

European Commission

WORKING PAPERS

1	Andreas Cahn	Verwaltungsbefugnisse der Bundesanstalt für Finanzdienstleistungsaufsicht im Übernahmerecht und Rechtsschutz Betroffener (publ. in: ZHR 167 [2003], 262 ff.)
2	Axel Nawrath	Rahmenbedingungen für den Finanzplatz Deutschland: Ziele und Aufgaben der Politik, insbesondere des Bundesministeriums der Finanzen
3	Michael Senger	Die Begrenzung von qualifizierten Beteiligungen nach § 12 Abs. 1 KWG (publ. in: WM 2003, 1697-1705)
4	Georg Dreyling	Bedeutung internationaler Gremien für die Fortentwicklung des Finanzplatzes Deutschland
5	Matthias Berger	Das Vierte Finanzmarktförderungsgesetz – Schwerpunkt Börsen- und Wertpapierrecht
6	Felicitas Linden	Die europäische Wertpapierdienstleistungsrichtlinie-Herausforderungen bei der Gestaltung der Richtlinie
7	Michael Findeisen	Nationale und internationale Maßnahmen gegen die Geldwäsche und die Finanzierung des Terrorismus – ein Instrument zur Sicherstellung der Stabilität der Finanzmärkte
8	Regina Nößner	Kurs- und Marktpreismanipulation – Gratwanderung zwischen wirtschaftlich sinnvollem und strafrechtlich relevantem Verhalten
9	Franklin R. Edwards	The Regulation of Hedge Funds: Financial Stability and Investor Protection (publ. in: Baums/Cahn [Hrsg.] Hedge Funds, Risks and Regulation, 2004, S. 30 ff.)
10	Ashley Kovas	Should Hedge Fund Products be marketed to Retail Investors? A balancing Act for Regulators (publ. in: Baums/Cahn [Hrsg.] Hedge Funds, Risks and Regulation, 2004, S. 91 ff.)
11	Marcia L. MacHarg	Waking up to Hedge Funds: Is U.S. Regulation Taking a New Direction? (publ. in: Baums/Cahn [Hrsg.] Hedge Funds, Risks and Regulation, 2004, S. 55 ff.)

12	Kai-Uwe Steck	Legal Aspects of German Hedge Fund Structures (publ. in: Baums/Cahn [Hrsg.] Hedge Funds, Risks and Regulation, 2004, S. 135 ff.)
13	Jörg Vollbrecht	Investmentmodernisierungsgesetz – Herausforderungen bei der Umsetzung der OGAW – Richtlinien
14	Jens Conert	Basel II – Die Überarbeitung der Eigenkapitalmarktregelungen der Kreditinstitute im Fokus von Wirtschaft- und Wettbewerbspolitik
15	Bob Wessels	Germany and Spain lead Changes towards International Insolvencies in Europe
16	Theodor Baums / Kenneth E. Scott	Taking Shareholder Protection Seriously? Corporate Governance in the United Stated and in Germany (publ. in: AmJCompL LIII (2005), Nr. 4, 31 ff.; abridged version in: Journal of Applied Corporate Finance Vol. 17 (2005), Nr. 4, 44 ff.)
17	Bob Wessels	International Jurisdiction to open Insovency Proceedings in Europe, in particular against (groups of) Companies
18	Michael Gruson	Die Doppelnotierung von Aktien deutscher Gesellschaften an der New Yorker und Frankfurter Börse: Die sogenannte Globale Aktie (publ. in: Die AG 2004, 358 ff.)
19	Michael Gruson	Consolidated and Supplemetary Supervision of Financial Groups in the European Union (publ. in: Der Konzern 2004, 65 ff. u. 249 ff.)
20	Andreas Cahn	Das richterliche Verbot der Kreditvergabe an Gesellschafter und seine Folgen (publ. in: Der Konzern 2004, 235 ff.)
21	David C. Donald	The Nomination of Directors under U.S. and German Law
22	Melvin Aron Eisenberg	The Duty of Care in American Corporate Law (deutsche Übersetzung publ. in: Der Konzern 2004, 386 ff.)

23	Jürgen Than	Rechtsfragen bei der Festlegung von Emissionsbedingungen für Schuldverschreibungen unter besonderer Berücksichtigung der Dematerialisierung und des Depotgesetzes (publ. in: Baums/Cahn [Hrsg.] Die Reform des Schuldverschreibungsrechts, 2004, S. 3 ff.)
24	Philipp von Randow	Inhaltskontrolle von Emissionsbedingungen (publ. in: Baums/Cahn [Hrsg.] Die Reform des Schuldverschreibungsrechts, 2004, S. 25 ff.)
25	Hannes Schneider	Die Änderung von Anleihebedingungen durch Beschluß der Gläubiger (publ. in: Baums/Cahn [Hrsg.] Die Reform des Schuldverschreibungsrechts, 2004, S. 69 ff.)
26	Hans-Gert Vogel	Die Stellung des Anleihetreuhänders nach deutschem Recht (publ. in: Baums/Cahn [Hrsg.] Die Reform des Schuldverschreibungsrechts, 2004, S. 94 ff.)
27	Georg Maier-Reimer	Rechtsfragen der Restrukturierung, insbesondere der Ersetzung des Schuldners (publ. in: Baums/Cahn [Hrsg.] Die Reform des Schuldverschreibungsrechts, 2004, S. 129 ff.)
28	Christoph Keller	Umschuldung von Staatenanleihen unter Berücksichtigung der Problematik einer Aggregation aller Anleihegläubiger (publ. in: Baums/Cahn [Hrsg.] Die Reform des Schuldverschreibungsrechts, 2004, S. 157 ff.)
29	René Bösch	Die Emission von Schuldverschreibungen nach schweizerischem Recht – ein Rechtsvergleich mit dem geplanten deutschen Schuldverschreibungsrecht (publ. in: Baums/Cahn [Hrsg.] Die Reform des Schuldverschreibungsrechts, 2004, S. 189 ff.)
30	Lachlan Burn	Bond Issues under U.K. law: How the proposed German Legislation compares (publ. in: Baums/Cahn [Hrsg.] Die Reform des Schuldverschreibungsrechts, 2004, S. 219 ff.)
31	Patrick S. Kenadjian	Bond Issues under New York and U.S. Law: Considerations for the German Law Maker from a U.S. Perspective (publ. in: Baums/Cahn [Hrsg.] Die Reform des Schuldverschreibungsrechts, 2004, S. 245 ff.)

32	Andreas Cahn	Bankgeheimnis und Forderungsverwertung (publ. in: WM 2004, 2041 ff.)
33	Michael Senger	Kapitalkonsolidierung im Bankkonzern (publ. in: Der Konzern 2005, S. 201 ff.)
34	Andreas Cahn	Das neue Insiderrecht (publ. in: Der Konzern 2005, 5 ff.)
35	Helmut Siekmann	Die Unabhängigkeit von EZB und Bundesbank nach dem geltenden Recht und dem Vertrag über eine Verfassung für Europa
36	Michael Senger	Gemeinschaftsunternehmen nach dem Kreditwesengesetz
37	Andreas Cahn	Gesellschafterfremdfinanzierung und Eigenkapitalersatz (publ. in: Die AG 2005, S. 217 ff.)
38	Helmut Siekmann	Die Verwendung des Gewinns der Europäischen Zentralbank und der Bundesbank
39	Guido Ferrarini	Contract Standards and the Markets in Financial Instruments Directive (MiFID): An Assessment of the Lamfalussy Regulatory Architecture (publ. in: European Contract Law Review 2005, p. 19)
40	David C. Donald	Shareholder Voice and Its Opponents (publ. in: The Journal of Corporate Law Studies, Vol. 5, Issue 2, 2005)
41	John Armour	Who should make Corporate Law? EC Legislation versus Regulatory Competition (publ. in: 58 Current Legal Problems [2005], p. 369 ff.)
42	David C. Donald	The Laws Governing Corporations formed under the Delaware and the German Corporate Statutes
43	Garry J. Schinasi/ Pedro Gustavo Teixeira	The Lender of the Last Resort in the European Single Financial Market (publ. in: Cross Border Banking: Regulatory Challenges, Gerard Caprio Jr., Douglas D. Evanoff, George G. Kaufman eds., 2006)
44	Ashley Kovas	UCITS – Past, Present and Future in a World of Increasing Product Diversity

45	Rick Verhagen	A New Conflict Rule for Securitization and other Cross-Border Assignments – A potential threat from Europe (publ. in: Lloyd's Maritime and Commercial Law Quaterly 2006, p. 270)
46	Jochem Reichert/ Michael Senger	Berichtspflicht des Vorstands und Rechtsschutz der Aktionäre gegen Beschlüsse der Verwaltung über die Ausnutzung eines genehmigten Kapitals im Wege der allgemeinen Feststellungsklage (publ. in: Der Konzern 2006, S. 338 ff.)
47	Guido A. Ferrarini	One Share – One Vote: A European Rule? (publ. in: European Company and Financial Law Review 2006, p. 147)
48	Theodor Baums	Die Fremdkapitalfinanzierung der Aktiengesellschaft durch das Publikum (publ. in: Bayer/Habersack (eds.), Aktienrecht im Wandel der Zeit, Vol. 2, 2007, 952 ff.)
49	Ulrich Segna	Anspruch auf Einrichtung eines Girokontos aufgrund der ZKA-Empfehlung „Girokonto für jedermann"? (publ. in: BKR 2006, S. 274 ff.)
50	Andreas Cahn	Eigene Aktien und gegenseitige Beteiligungen (publ. in: Bayer/Habersack [Hrsg.] Aktienrecht im Wandel, Band II, 2007, S. 763 ff.)
51	Hannes Klühs/ Roland Schmidtbleicher	Beteiligungstransparenz im Aktienregister von REIT-Gesellschaften (publ. in: ZIP 2006, S. 1805 ff.)
52	Theodor Baums	Umwandlung und Umtausch von Finanzinstrumenten im Aktien- und Kapitalmarktrecht (publ. in: Festschrift für Canaris, Bd. II, 2007, S. 3 ff.)
53	Stefan Simon/ Daniel Rubner	Die Umsetzung der Richtlinie über grenzüberschreitende Verschmelzungen ins deutsche Recht (publ. in: Der Konzern 2006, S. 835 ff.)
54	Jochem Reichert	Die SE als Gestaltungsinstrument für grenzüberschreitende Umstrukturierungen (publ. in: Der Konzern 2006, S. 821 ff.)
55	Peter Kindler	Der Wegzug von Gesellschaften in Europa (publ. in: Der Konzern 2006, S. 811 ff.)

56	Christian E. Decher	Grenzüberschreitende Umstrukturierungen jenseits von SE und Verschmelzungsrichtlinie (publ. in: Der Konzern 2006, S. 805 ff.)
57	Theodor Baums	Aktuelle Entwicklungen im Europäischen Gesellschaftsrecht (publ. in: Die AG 2007, S. 57 ff.)
58	Theodor Baums	European Company Law beyond the 2003 Action Plan (publ. in: European Business Organization Law Review Vol. 8, 2007, 143 ff.)
59	Andreas Cahn/ Jürgen Götz	Ad-hoc-Publizität und Regelberichterstattung (publ. in: Die AG 2007, S. 221 ff.)
60	Roland Schmidtbleicher/ Anh-Duc Cordalis	„Defensive bids“ für Staatsanleihen – eine Marktmanipulation? (publ. in: ZBB 2007, 124-129)
61	Andreas Cahn	Die Auswirkungen der Kapitaländerungsrichtlinie auf den Erwerb eigener Aktien (publ. in: Der Konzern 2007, S. 385)
62	Theodor Baums	Rechtsfragen der Innenfinanzierung im Aktienrecht
63	Theodor Baums	The Law of Corporate Finance in Europe – An Essay (publ. in: Krüger Andersen/Engsig Soerensen [Hrsg.], Company Law and Finance 2008, S. 31 ff.)
64	Oliver Stettes	Unternehmensmitbestimmung in Deutschland – Vorteil oder Ballast im Standortwettbewerb? (publ. in: Die AG 2007, S. 611 ff.)
65	Theodor Baums/ Astrid Keinath/ Daniel Gajek	Fortschritte bei Klagen gegen Hauptversammlungsbeschlüsse? Eine empirische Studie (publ. in: ZIP 2007, S. 1629 ff.)
66	Stefan Brass/ Thomas Tiedemann	Die zentrale Gegenpartei beim unzulässigen Erwerb eigener Aktien (publ. in: ZBB 2007, S. 257 ff.)
67	Theodor Baums	Zur Deregulierung des Depotstimmrechts (publ. in: ZHR 2007 [171], S. 599 ff.)
68	David C. Donald	The Rise and Effects of the Indirect Holding System: How Corporate America ceded its Shareholders to Intermediaries

69	Andreas Cahn	Das Wettbewerbsverbot des Vorstands in der AG & Co. KG (publ. in: Der Konzern 2007, S. 716 ff.)
70	Theodor Baums/ Florian Drinhausen	Weitere Reform des Rechts der Anfechtung von Hauptversammlungsbeschlüssen (publ. in: ZIP 2008, S. 145 ff.)
71	David C. Donald	Die Übertragung von Kapitalmarktpapieren nach dem US-Amerikanischen *Uniform Commercial Code* (UCC)
72	Tim Florstedt	Zum Ordnungswert des § 136 InsO (publ. in: ZInsO 2007, S. 914 ff.)
73	Melanie Döge/ Stefan Jobst	Abmahnung von GmbH-Geschäftsführern in befristeten Anstellungsverhältnissen (publ. in: GmbHR 2008, S. 527 ff.)
74	Roland Schmidtbleicher	Das „neue" acting in concert – ein Fall für den EuGH? (publ. in: Die AG 2008, S. 73 ff.)
75	Theodor Baums	Europäische Modellgesetze im Gesellschaftsrecht (publ. in: Kley/Leven/Rudolph/Schneider [Hrsg.], Aktie und Kapitalmarkt. Anlegerschutz, Unternehmensfinanzierung und Finanzplatz, 2008, S. 525 ff.)
76	Andreas Cahn/ Nicolas Ostler	Eigene Aktien und Wertpapierleihe (publ. in: Die AG 2008, S. 221 ff.)
77	David C. Donald	Approaching Comparative Company Law
78	Theodor Baums/ Paul Krüger Andersen	The European Model Company Law Act Project (publ. in: Tison/de Wulf/van der Elst/Steennot [eds.], Perspectives ind Company Law and Financial Regulation. Essays in Honour of Eddy Wymeersch, 2009, S. 5 ff.)
79	Theodor Baums	« Lois modèles » européennes en droit des sociétés (publ. in: Revue des Sociétés 2008, S. 81 ff.)
80	Ulrich Segna	Irrungen und Wirrungen im Umgang mit den §§ 21 ff. WpHG und § 244 AktG (publ. in: Die AG 2008, S. 311 ff.)

81		Börsenkooperationen im Labyrinth des Börsenrechts
	Reto Francioni	Börsen im internationalen Wettbewerb: Konsolidierung als Teilaspekt einer globalen Wachstumsstrategie
	Roger Müller	Kooperationen und Zusammenschlüsse von Börsen als Bewährungsprobe für das Börsenrecht
	Horst Hammen	Verschmelzung von Börsen?
82	Günther M. Bredow/ Hans-Gert Vogel	Kreditverkäufe in der Praxis – Missbrauchsfälle und aktuelle Reformansätze (publ. in: BKR 2008, 271 ff.)
83	Theodor Baums	Zur AGB-Kontrolle durch die BaFin am Beispiel des Bausparrechts (publ. in: Entwicklungslinien im Bank- und Kapitalmarktrecht. Festschrift für Nobbe, 2009, S. 815 ff.)
84	José Engrácia Antunes	The Law of Corporate Groups in Portugal
85	Maike Sauter	Der Referentenentwurf eines Gesetzes zur Umsetzung der Aktionärsrechterichtlinie (ARUG) (publ. in: ZIP 2008, 1706 ff.)
86	James D. Cox, Randall S. Thomas, Lynn Bai	There are Plaintiffs and… There are Plaintiffs : An Empirical Analysis of Securities Class Action Settlements
87	Michael Bradley, James D. Cox, Mitu Gulati	The Market Reaction to Legal Shocks and their Antidotes : Lessons from the Sovereign Debt Market
88	Theodor Baums	Zur monistischen Verfassung der deutschen Aktiengesellschaft. Überlegungen de lege ferenda (publ. in: Gedächtnisschrift für Gruson, 2009, S. 1 ff.)
89	Theodor Baums	Rücklagenbildung und Gewinnausschüttung im Aktienrecht (publ. in: Festschrift für K. Schmidt, 2008, S. 57 ff.)
90	Theodor Baums	Die gerichtliche Kontrolle von Beschlüssen der Gläubigerversammlung nach dem Referentenentwurf eines neuen Schuldverschreibungsgesetzes (publ. in: ZBB 2009, S. 1 ff.)
91	Tim Florstedt	Wege zu einer Neuordnung des aktienrechtlichen Fristensystems (publ. in: Der Konzern 2008, 504 ff.)

92	Lado Chanturia	Aktuelle Entwicklungen im Gesellschaftsrecht der GUS
93	Julia Redenius-Hövermann	Zur Offenlegung von Abfindungszahlungen und Pensionszusagen an ein ausgeschiedenes Vorstandsmitglied (publ. in: ZIP 2008, S. 2395 ff.)
94	Ulrich Seibert, Tim Florstedt	Der Regierungsentwurf des ARUG – Inhalt und wesentlich Änderungen gegenüber dem Referentenentwurf (publ. in: ZIP 2008, 2145 ff.)
95	Andreas Cahn	Das Zahlungsverbot nach § 92 Abs. 2 Satz 3 AktG – aktien- und konzernrechtliche Aspekte des neuen Liquiditätsschutzes (publ. in: Der Konzern 2009, S. 7 ff.)
96	Thomas Huertas	Containment and Cure: Some Perspectives on the Current Crisis
97	Theodor Baums, Maike Sauter	Anschleichen an Übernahmeziele mittels Cash Settled Equity Derivaten – ein Regelungsvorschlag (publ. in: ZHR 173 (2009), 454 ff.)
98	Andreas Cahn	Kredite an Gesellschafter – zugleich eine Anmerkung zur MPS-Entscheidung des BGH (publ. in: Der Konzern 2009, S. 67 ff.)
99	Melanie Döge, Stefan Jobst	Aktienrecht zwischen börsen- und kapitalmarktorientiertem Ansatz (publ. in: BKR 2010, S. 136 ff.)
100	Theodor Baums	Der Eintragungsstopp bei Namensaktien (publ. in: Festschrift für Hüffer, 2010, S. 15 ff.)
101	Nicole Campbell, Henny Müchler	Die Haftung der Verwaltungsgesellschaft einer fremdverwalteten Investmentaktiengesellschaft
102	Brad Gans	Regulatory Implications of the Global Financial Crisis
103	Arbeitskreis „Unternehmerische Mitbestimmung“	Entwurf einer Regelung zur Mitbestimmungsvereinbarung sowie zur Größe des mitbestimmten Aufsichtsrats (publ. in: ZIP 2009, S. 885 ff.)
104	Theodor Baums	Rechtsfragen der Bewertung bei Verschmelzung börsennotierter Gesellschaften (publ. in: Gedächtnisschrift für Schindhelm, 2009, S. 63 ff.)

105	Tim Florstedt	Die Reform des Beschlussmängelrechts durch das ARUG (publ. in: AG 2009, S. 465 ff.)
106	Melanie Döge	Fonds und Anstalt nach dem Finanzmarktstabilisierungs-gesetz (publ. in: ZBB 2009, S. 419 ff.)
107	Matthias Döll	„Say on Pay: Ein Blick ins Ausland und auf die neue Deutsche Regelung“
108	Kenneth E. Scott	Lessons from the Crisis
109	Guido Ferrarini Niamh Moloney Maria Cristina Ungureanu	Understanding Director’s Pay in Europe: A Comparative and Empirical Analysis
110	Fabio Recine Pedro Gustavo Teixeira	The new financial stability architecture in the EU
111	Theodor Baums	Die Unabhängigkeit des Vergütungsberaters (publ. in: AG 2010, S. 53 ff.)
112	Julia Redenius-Hövermann	Zur Frauenquote im Aufsichtsrat (publ. in: ZIP 2010, S. 660 ff.)
113	Theodor Baums Thierry Bonneau André Prüm	The electronic exchange of information and respect for private life, banking secrecy and the free internal market
114	Tim Florstedt	Fristen und Termine im Recht der Hauptversammlung (publ. in: Z IP 2010, S. 761 ff.)
115	Tim Florstedt	Zur organhaftungsrechtlichen Aufarbeitung der Finanzmarktkrise (publ. in: AG 2010, S. 315 ff.)
116	Philipp Paech	Systemic risk, regulatory powers and insolvency law – The need for an international instrument on the private law framework for netting
117	Andreas Cahn Stefan Simon Rüdiger Theiselmann	Forderungen gegen die Gesellschaft als Sacheinlage? – Zum Erfordernis der Forderungsbewertung beim Debt-Equity Swap
118	Theodor Baums	Risiko und Risikosteuerung im Aktienrecht

119	Theodor Baums	Managerhaftung und Verjährungsfrist
120	Stefan Jobst	Börslicher und Außerbörslicher Derivatehandel mittels zentraler Gegenpartei
121	Theodor Baums	Das preußische Schuldverschreibungsgesetz von 1833
122	Theodor Baums	*Low Balling, Creeping in* und deutsches Übernahmerecht (publ. in: ZIP 2010, S. 2374 ff)
123	Theodor Baums	Eigenkapital: Begriff, Aufgaben, Sicherung (publ. in: ZHR 2011, S. 160 ff.)
124	Theodor Baums	Agio und sonstige Zuzahlungen im Aktienrecht
125	Yuji Ito	Das japanische Gesellschaftsrecht - Entwicklungen und Eigentümlichkeiten

Institute for Law and Finance

Prof. Dr. Theodor Baums
Prof. Dr. Andreas Cahn

Institute for Law and Finance

im House of Finance der Goethe-Universität Frankfurt

Campus Westend – Grüneburgplatz 1

D-60323 Frankfurt am Main

Tel: +49 (0)69 / 798-33753

Fax: +49 (0)69 / 798-33929

www.ilf-frankfurt.de

INSTITUTE FOR LAW AND FINANCE
GOETHE-UNIVERSITÄT FRANKFURT AM MAIN