

A Convenient Truth

BY STEEF M. BARTMAN, MAIN EDITOR

"Every disadvantage has its advantage", as the Dutch soccer philosopher Johan Crujff puts it so puzzlingly clearly. This saying certainly holds true for the "European project", which is now more than 50 years on its way, starting with the signing of the Rome Treaties on 25 March 1957.¹ It seems that the large diversity in the EU, in terms of languages, cultural and historic backgrounds, ethnic talents, political systems and economic infrastructures, somehow also serves as an endless source of inspiration to revitalize our strength and alertness when required. In the words of Lord Grenfell, Chairman of the House of Lords European Union Select Committee, when confronted with the challenge of the intensifying globalization: *"Paradoxically, our diversity is the key to building our unity in the face of this great challenge."*²

Does this "convenient truth" also apply to matters of company law? It is no understatement to say that there is great diversity in Europe in terms of codetermination systems, in particular concerning employee involvement at board level. The fifth EC Directive on the structure of a public company stumbled over this diversity. The original proposal dated from 1972. After an attempt being made to find a compromise in 1983, by means of a revised version of the proposal, the Commission officially referred the whole project to the waste basket in 2002. Board level participation has also obstructed a fruitful outcome of the discussions and negotiations regarding the *Societas Europaea* and the Cross-border Merger Directive for many years. At last a political compromise was reached in 2001, in the form of the SE Directive on employee involvement supplementary to the SE Regulation. However, serious doubts about its workability are justified, *inter alia* due to the extreme complexity of the Directive's provisions and the inherent time consuming character of their realization.

Following the line of "Crujff's Law" there must be an upside to this rather depressing legal history as well, and I actually think there is. The upside is that the SE Directive at any rate proves the existence of a consensus within the EU on the proposition that the structure of a public company cannot do

without some sort of employee involvement at board level. This basic principle of EU corporate law is laid down in Article 12 (2) of the SE Regulation, stating that an SE simply cannot be registered – and therefore not incorporated – without some sort of arrangement of that kind.³ If this principle applies to an SE, I see no reason why it should not apply to a public company in the form of a national vehicle incorporated in one of the 27 EU Member States. On the contrary, since the SE has little impact in practice, there is all the more justification for a renewed initiative by the European Commission to impose some basic features of the national public corporate form on the Member States by a separate directive.

In other words, the above-mentioned basic principle of EU corporate law calls for action, especially in light of the ongoing hedge fund and private equity debate. We may safely assume that this debate is here to stay for a long time.⁴ Therefore, a structural approach is necessary. In my view any *listed* company should have a sufficiently independent Supervisory Board or non-executives, with the power to prevent the realization of a divestment proposal that is vital to the company. The exercise of this power should not be a valid reason to dismiss the involved board members or non-executives. This measure, combined with an EU-wide – minimal – employee involvement in the corporate structure of all European public companies, could create the necessary counterweight on the ever delicate balance between shareholders and employees as the company's main stakeholders. It could also trigger national legislators to abolish or at least seriously slim down their own – sometimes heavily debated – current rules on employee participation, e.g. the almost unexplainable Dutch Structure Rules. Finally, it would show the outside world that the EU has its own approach to these problems, in conformity with its aim to be *"the key to growth, employment and social cohesion"*, as recently restated by all its Members in the Berlin Declaration of 25 March, 2007.⁵

1 Taking the European Coal and Steel Community Treaty as starting point this project even started in 1951.

2 Lord Grenfell, ELSA Leiden Magazine, 2007-1, p. 12

3 Cf. Paul Davies, Employee Involvement in the European Company, in Jonathan Rickford (Ed.), The European Company. Developing a Community Law of Corporations, Intersentia, Antwerp-Oxford-New York, 2003, pp. 67-82 (p. 67).

4 Cf. Eddy Wymeersch, Shareholders in Action: Towards a New Company Paradigm?, ECL 2007/02, pp. 50-57.

5 http://www.eu2007.de/en/About_the_EU/Constitutional_Treaty/BerlinerErklaerung.html