Editorial

EC Company Law, Corporate Governance, Directors' Liability and Employee Representation

What should be the future role of Community company law? Have the adopted Directives given sufficient effect to the right of establishment through the formation of companies, or can a programme of further harmonisation be justified?

Most of the responses to the Commission Consultation Paper on Company Law of February this year should by now have been received in Brussels. The Commission raised the question of the fundamental direction of future harmonisation. It may be formulated this way: is further harmonisation of company law necessary to complete the internal market? There are two main aspects must be considered. The first is what part the EU should play in the regulation of corporate governance. The second is if the EU has a role in any move to simplify and deregulate the company laws of the Member States.

Some of the responses will be negative. Company law has been the preserve of a particular breed of lawyers, who perhaps more than most other members of their profession hold their own domestic system out as inherently superior. To the extent they know about other systems such knowledge is used to confirm prejudice. In most Member States reform of company law is left to specialist lawyers in a ministry of justice or a ministry of economics or trade and industry. They limit their constituency to a little group in private practice or in the larger corporations.

The English Law Society's Company Law Committee fits into this picture. Their reply to the Commission's consultation paper holds that no case has been made out for further harmonisation. It is strongly against harmonisation in relation to corporate governance. Otherwise, the reply has its useful aspects, for instance in pointing out the need for periodic review of adopted company law Directives.

The traditional and narrow company lawyers are against any major reform. They oppose not only European harmonisation but also any reform which would broaden directors' liability and strengthen minority shareholders' rights of action. They are also against any form of employee participation, which they regard as alien to company law.

These reforms are of course important benefits which derive from harmonisation. There is a European company law model developing and harmonisation could turn into a force for reform which is sadly lacking in most Member States.

But is this, or should it be, a matter for the EU? Is the case made out for more than the absolute minimum harmonisation? The line of the sceptics seems to be that every measure must be justified against a strict subsidiarity test, and the right of establishment through formation in another Member State has been given effect by the First Company Law Directive and the different tax Directives.

This is of course an excessively narrow perspective. The right of establishment goes much further. It is primarily through Directives that free movement of companies can become a reality. This is a complex matter, depending not only on company law measures but also on a harmonisation of corporate taxation, but is nonetheless an essential condition for an effective internal market.

Conditions surrounding take-overs are also in need of harmonisation. The capacity to take over a company in another Member State is an equally essential part of an effective internal market. Shareholders' rights are important for institutional and small investors. In order for the free movement of capital and the provision of financial services to develop, company law harmonisation has to be taken forward.This also applies to other aspects of corporate governance, such as employee representation, and adopted Directives will have to be tightened up. The Fourth Company Law Directive on annual accounts is far too general and leaves too many alternatives and too much discretion to Member States. Cross border take-overs or investments are not promoted by maintaining such different regimes for financial reporting.

The company laws of most Member States, frankly, are in a mess. A major review is needed, even in the countries that have been through recent reform exercises. This is the prospect offered by the next phase of company law harmonisation as outlined by the Commission.

The Commission's serious effort to bring company law reform forward should be commended. It recently published a broad study under the title *The simplification of the operating regulations for public companies in the European Union*, produced by Ernst & Young and dealing mainly with the corporate governance issues of the draft Fifth Company Law Directive. It also published a study on the Role, Position and Liability of the Statutory Auditor within the European Union produced by a research centre in Maastricht. This study provided the basis for the Commission's Green Paper on the statutory auditor (1996 *OJ* C 321). In May 1997 came the final report of the Group of Experts on European Systems of Worker Involvement.

A good basis for reasoned and well-informed discussion about company law reform has now been provided by the Commission. This discussion should not be dominated by the traditional and narrow company lawyers. That would mean that little, if anything, would come out of the whole exercise.

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