Conférence des Notariats de l'Union Européenne

A Modern Regulatory Framework for Company Law in Europe

Response of the CNUE to a Consultative Document of the High Level Group of Company Law Experts

June 2002
Chapter I: Preliminary Remarks

In most member states Company Law, and in particular Corporation Law, constitutes an important domain of the notary profession. The formation of corporations as well as any amendment of their articles by shareholders’ resolution requires a notarial deed. A notarial deed is also required for the transfer and assignment of shares in a Limited Liability Company, as e.g. in the Netherlands, Austria, Germany, Italy or Spain. According to the law of most member states, any application for registration in the Commercial Register requires the witnessing of the signatures of the applicants by a notary. In practice, it is the notary who prepares the application and documents to be filed with the application and so ensures an orderly filing and processing.

These requirements shall ensure the compliance of companies with a minimum of formalities and protection of shareholders as well as creditors in a twofold way: (1) by facilitating proof of the acts completed, and (2) by providing a minimum of legal advice rendered by the notary as a neutral public officer. The preliminary examination of corporate legal acts by the notary also facilitates the work of the Commercial Register with the desired effects of saving costs and gaining time.

Therefore the notary is a player of substantial importance in all (“continental”) legal systems which are based on the philosophy of “prevention”. These systems are based on the presumption that preliminary examination and prior amendment of acts and deeds will avoid further litigation which is usually costly, time-consuming and inefficient.

Chapter 2: General Themes

I. Facilitating efficient and competitive business in Europe

Question 1:

a) Do you agree that the European Union moving forward in the area of company law should primarily focus on establishing new and amending existing company law mechanisms, with a view to facilitating the efficient and competitive operation of business across the Union?

Yes, new mechanisms are desirable if these changes are going to improve the existing system, as opposed to fundamentally changing the system, particularly as regards the safeguarding of creditors’ interests, and even the protection of company shareholders.

b) If so, can you identify other areas of company law than those specifically dealt with in this consultative document where progress could and should be made as a matter of priority?

The areas mentioned are sufficient.
II. Modern company law making

Question 2:
  a) Should the European Union, in future company law initiatives, make use of alternatives as indicated to primary legislation in directives?
     - Yes, if the aim is to intervene in the framework determined by primary legislation using a secondary legislation, because the latter allows us greater flexibility.
     - No, as regards best practice mechanisms: these must be determined according to the rules of the free market, which the Community institutions can, at best, monitor.

  b) What areas of company law, and which alternatives, are particularly suited for such an alternative approach?
     In the area of Corporate Governance: rules should be determined in relation to the functioning of general meetings, as well as rules governing the share capital formation.

III. Disclosure of information as a regulatory tool

Question 3:
  a) Do you agree that disclosure requirements can sometimes provide a more efficient regulatory tool than substantive rules?
  b) In what areas of company law should the emphasis be on disclosure requirements rather than substantive rules?
     Yes, this should apply particularly to the area of Corporate Governance and group policies, taking into consideration the inescapable character of the legislative provisions protecting third parties.

IV. Distinguishing types of companies

Question 4:
  a) Should the European Union, in devising new company law regulations and amending existing company law regulations, distinguish more between listed companies, open companies and closed companies?
     Yes.
  b) In which areas of company law is this distinction most relevant, and what, in general terms, should be the difference in regulatory approach there?
     There should be greater standardisation in public and open companies; on the other hand, priority should be given to the respect for private autonomy as well as the rule of subsidiarity and proportionality for closed companies.

V. Increased flexibility vs. tightening of rules

Question 5:
Do you agree that company law should not be changed to include more compulsory rules, monitoring and enforcement regimes and procedures to achieve such regulatory objects as combating fraud and terrorism, but that such
objects should be achieved by specific law enforcement instruments outside company law?
Yes, essentially, but not exclusively, because even in the context of company law, there are rules such as those relating to authenticity of deeds and verification of legality, which play an essential role in the prevention of, and fight against, organised crime, fraud and terrorism. This being so, these regulations are not excluded provided the limit beyond which the liberty of economic initiative is reduced is not exceeded.

VI. Modern technology

Question 6:

a) Taking into account the current and forthcoming Commission proposals in the field of securities legislation (e.g. prospectus, market abuse, periodic and ongoing reporting), should listed companies be required to maintain a specific section on their website as the single place where they publish all information they are required to file and publish, providing for two-way links with registers where such information should be filed and published, and to continuously update the information on this section of the website?
Yes, together with rules concerning the legal advertising by Member States.

b) Should other companies be allowed to file and publish information on their website so long as they provide for two-way links with public registers where such information should be filed and published?
Yes, especially if the coordination of national systems has not been achieved with the necessary efficiency required.

c) Should the European Union facilitate or provide for the co-ordination of public company registers in the Member States?
Yes, using fundamental rules for legal advertising.

d) Beyond the current reflections at Community level on the establishment of a central electronic filing system for listed companies in each Member State, should the European Union, at some stage, promote the setting-up of a single European central electronic filing system for listed companies?
Yes.
Chapter 3:
Specific Topics

3.1. Corporate Governance

I. The role of the European Union in corporate governance for European business

Question 7:
Are efforts to improve or strengthen corporate governance necessary and important for efficient business in the EU and for an integrated European securities market?
Yes but Corporate Governance Codes formulated by the market participants (or only some of them) can never replace enforceable rules set by democratically legitimate bodies. One must not forget that the risk of conflict of interest is inherent in self-regulation.

II. Better information for shareholders and creditors, in particular better disclosure of corporate governance structures and practices including remuneration of board members

Question 8:
a) Should there be more disclosure on corporate governance structures and practices of companies in Europe?
Yes.
b) If yes, should such a disclosure be given only by listed companies or by all "open" companies or even by "closed" companies?
These obligations should be applied to listed companies and open companies, but not to closed companies.
c) Should this disclosure include an indication as to whether or not a certain corporate governance code is followed and where and why the code is not complied with?
Yes. Nevertheless, it is necessary to verify in advance whether or not the self-disciplinary Code has been drafted by a body that is truly representative of the general nature and structure of the category. In the event that this is not the case, it could lead to an insidious system, whereby groups of companies are intent on changing the rules of open competition, apparently following ethical business practices, while actually pursuing more selfish interests.
d) Should the remuneration of individual board members be disclosed, in particular if it is linked to the share price performance?
e) Should the shareholders have a role in fixing the principles and limits of board remuneration?
III. Strengthening shareholders’ rights and minority protection, in particular supplementing the right to vote by special investigation procedures

Question 9:
Should shareholders’ rights and decision-making, including minority protection, be enhanced by European law, in particular by enabling the general meeting of shareholders, by resolution, or a qualified minority of shareholders to apply to a court or an appropriate administrative body for the ordering of a special investigation?
Yes, but within certain limits, which do not leave any scope for manoeuvres or obstructive practices, or confusion.

IV. Strengthening the duties of the board, in particular the accountability of directors where the company becomes insolvent

Question 10:
Should the European Union introduce a framework rule which would hold company directors accountable for letting the company continue to do business when it can no longer pay its debts?
No, this is not useful, because it would be better to adopt uniform and unequivocal rules concerning the general liability of company directors for all the member countries of the European Union that go beyond the particular case of continuing to do business.

V. Need for a European corporate governance code or co-ordination of national codes in order to stimulate development of best practice and convergence?

Question 11:
a) Is there a need for a voluntary European corporate governance code in addition to or instead of the various national corporate governance codes?
A complementary voluntary European code would be desirable at some time in the future, but for the time being this is not necessary, since this does not correspond to the current situation of European enterprises.
b) If yes, please give examples of what rules and recommendations a European corporate governance code should contain.
c) Should the European Union facilitate the co-ordination of national codes in order to stimulate development of best practice and convergence?
At present, operators need to be able to compare national self-disciplining codes, in order to identify standards that can re-enforce their credibility on the market and attract international investments. There is therefore a trend towards a convergence of systems.

At present, operators need to be able to compare national self-disciplining codes, in order to identify standards that can re-enforce their credibility on the market and attract international investments. There is therefore a trend towards a convergence of systems.

Once a certain degree of convergence has voluntarily been achieved in terms of practices in the Business community, we can perhaps direct our attention towards EU intervention at a legislative level.
It the meantime, it would be opportune to monitor the evolution of the self-disciplining rules.
3.2. Shareholder Information, Communication and Decision-making

I. Introduction

II. Notice and pre-meeting communication

Question 12:

a) Should listed companies be required to establish on their websites devices (bulletin boards, chat rooms or similar devices) that allow for electronic communication between shareholders and the company and among shareholders prior to general meetings, including, with respect to notices of general meetings, submissions of proposals and questions and solicitations of proxies?

Yes, but only insofar as shareholders have the option, and not the obligation, to communicate with each other by electronic means.

b) If listed companies are required to establish these or similar devices on their websites, should the shareholders then be required to communicate by electronic means and thus be compelled to abandon the use of traditional means of communication, or should electronic communication only be an alternative available to those interested?

No, that is only an alternative option.

Question 13:

a) Is there a need, at the European Union level, to provide for minimum standards regarding the right for shareholders to ask questions and submit proposals for decision-making at the general meeting?

Yes.

b) If so, what should these minimum standards be (minimum shareholding for raising questions and submitting proposals; time of submission of proposal for decision-making)?

We must avoid creating instruments that lead to erratic actions, or confusion, or even obstructions. The standards must be such that they correspond to the substantial and significant interests relating to company dialectics.

III. The meeting, electronic access, proxy voting

Question 14:

a) Should listed companies be required to provide facilities for proxy voting by all shareholders?

Yes.

b) Should listed companies be enabled or required to offer to their shareholders electronic facilities for proxy voting or should they and their shareholders even be required to use electronic proxy voting and thus abandon the use of traditional proxies?
The fundamental issue is one of guaranteeing the authenticity of electronic data transmission. The use of electronic media must remain optional; it would not be appropriate to abandon the traditional system.

c) Should companies be enabled or even required to allow absentee-shareholders to participate in traditional general meetings via electronic means, including via the internet (web-cast) and satellite?

Yes. The essential point is that such a system must be able to provide the same guarantees and dynamics as those of the general meeting itself, as if it were in the same physical space, given that the exchange of ideas constitutes an added value in comparison to the simple sum of each member's will. Thus, it would be necessary to:
- guarantee the verification of legal conditions pertaining to formation, participation and identification for Internet access to the General Meeting;
- guarantee the verification of the authenticity of electronic transmission;
- guarantee electronic access to documents and information that are at the disposal of the persons physically participating in the General Meeting;
- guarantee simultaneous audio-visual relay between participants;
- guarantee the reliability of minutes.

The use of electronic media must be optional; the traditional method should not be abandoned.

d) Should companies which offer a comprehensive electronic process of information to, communication with and decision-making by shareholders be enabled to abandon the traditional type of general meeting?

No, the protection of small shareholders at the general meeting must be guaranteed. However this may be, there is no justification, either from a technical or legal point of view for the total elimination of the General Meeting.

IV. Voting by institutional investors

Question 15:

a) Should institutional investors in Europe, or, alternatively, all shareholders holding a certain percentage of the share capital, be required to disclose their policy as regards the investments they make, and as to how they exercise their voting rights?

No, this would amount to a misinterpretation of transparency. It is the market that tells investors which is the most appropriate way to behave to maintain the exchange value of the shares.

b) Should institutional investors be required to exercise voting rights with respect to shares they hold?

No, abstaining from casting a vote also constitutes an expression of the freedom of the right to vote, and institutional investors are perfectly aware of the effects of their conduct at a general meeting.
3.3. Alternatives to Capital Formation and Maintenance Rules

I. The functions of legal capital and the competitive effect of the current rules

Question 16:

a) Do you believe that legal capital serves all of the functions listed above?

Yes.
Share capital, as a complex expression of the assets that a shareholder may lose the right to have refunded, is the “price to be paid” for having the privilege of limited liability. Due to its non-refundable nature, the higher the cost of the investment, the greater the guarantee, because the commitment of large sums is a sign that the shareholder is, above all, serious and that he believes the initiative will succeed. Moreover, the capital imposes precise obligations on company directors, in particular because it is intangible and concerning the protection of minority shareholders.

b) Are there possibilities of reaching the same results by means of other techniques?

Yes, perhaps, but capital is the most efficient way to avoid insiders within the company dipping into the profits, before the external debt has been covered. Moreover, its finality is the most efficient guarantee for a capital-based system.

c) Do you consider that European companies are at a disadvantage against companies in jurisdictions with a more flexible capital regime?

No. The systems are comparable. In any case, the continental systems could be improved and modernised, but within the framework based on the share capital. The same can be said for the USA, where the indicator of the lack of share capital is the “pierce the corporate veil” rule, by which a judge may exclude limited liability, on account of certain breaches of the solvency tests.

II. Three approaches to the reform of legal capital in Europe

Question 17:

a) What is your general impression on the three approaches outlined here?

In the European context, only the first approach (SLIM) is reasonable; the other two are unrealistic, because, for them to function correctly, they require a specific and different context.

b) Which is the approach that you consider worth pursuing (if any)?

The SLIM approach.

III. Specific topics

Question 18:

a) Do you see the minimum capital requirement as an appropriate impediment to starting up a company?

No.

b) Or would you abolish the minimum capital requirement or rather impose a stricter minimum capital requirement than the one presently in force?

No. The minimum capital amount, except in relation to specific activities, should serve as an indicator of the seriousness and viability of a company. It does not have
to become an obstacle at the most critical moment, which is that of the creation of companies.

c) Do you consider that "wrongful trading" is an effective instrument for creditor protection?
   Yes, if it is added to the rules relating to the general liability of company directors.

d) Do you consider that subordination is an effective and desirable way of enhancing creditor protection?
   Yes, if it is added to other rules for creditor protection.

e) Are there any other possibilities worth considering?
   No.

Question 19:

a) Do you believe that other forms of consideration, such as services, should be allowed as valid forms of consideration for capital?
   Yes, provided the correct financial assessment of the services and capital intangibility is guaranteed, and respecting the rules relating to the real composition for the capital such as is constituted by contributions in kind and cash.

b) Do you think the prohibition of financial assistance for the acquisition of own shares should be eliminated or at least that financial assistance should be allowed if it complies with the general rules for distributions to shareholders?
   The current situation seems to be satisfactory.

3.4. The Functioning of Groups of Companies

1. The existence of groups of companies as a useful and legitimate economic reality

Question 20:

a) Are groups of companies frequent in your country?
   Yes.

b) What, in your view, are the specific advantages, disadvantages and risks presented by groups?
   - As regards individual companies that belong to a group, there are numerous risks of all kinds, relating to the consideration for quotas sacrificed to the group logic, and as such foreign to a given company's interests, as well as situations that could even damage the interests of individual companies in the group, and which may have artificial repercussions on the other companies, for example, by diverting the interests of individual companies, and finally, the problem of conflict of interests for company directors belonging to several boards of the group.

   Nevertheless, since the group is in a position to constitute the critical necessary force to be competitive on the market (both strictly in terms of productivity, and as regards the availability of integrated services at a low cost), the issues have to be balanced in terms of: a) transparency, simultaneously, both at an individual and group level (see the lessons learnt from the ENRON case); and b) a reciprocal dialogue between the companies, based on the principle of the compensatory advantages and aqua return on investments made by minority shareholders.
II. Transparency of group relations

Question 21:

a) Should the 7th Company Law Directive on group accounts be supplemented by rules that require greater transparency of group relations and of possible risks arising from them both to the subsidiary and to the parent?
   Yes.

b) What should such enhanced transparency include?
   The fundamental element is the simultaneity of information relating to each individual company and the group. This means, on the one hand, the possibility of being able to consult the accounts of each company simultaneously, of understanding its role and its perspectives within the group, but also of being able to gain easy access to information from other companies of the group, as well as their accounts. On the other hand, it also means the possibility of consulting the group’s accounts, as if they belonged to just a single company, and to which all the individual companies belong as simple units or divisions; each of which submitting its own accounts (or sub-accounts), composing the elements of a single and associated account.

c) If not in general, should such group transparency rules at least apply to listed companies?
   Yes.

d) Are special rules for banks and other financial institutions needed?
   Yes.

III. Problems for the creation and functioning of groups of companies: tensions between the interests of the group and its parts

Question 22:
Is it desirable to require Member States to provide for a "safe harbour" which allows those concerned with the management of the companies within a group to adopt a coordinated policy provided that the interests of creditors of the companies within the group are effectively protected and that there is a fair balance of advantage for shareholders over time?
Yes.

IV. Pyramids

Question 23:

a) Are pyramids of companies frequent in your country?
   Yes.

b) Are they useful or harmful or indifferent?
   They are indifferent. They are one of the complex legal structures of Western companies, and they should at least in principle benefit from the right of freedom of association for meritorious purposes.
   If the conditions of transparency and protection relating to the afore-stated items have been created, the problem of pyramids becomes an issue of rivalry of types of control and defence against escalation, as well as the maintaining the value of shares owned by small shareholders, who do not enjoy the price advantages that
are available to the strategic percentage. These factors impose specific legislative requirements.
c) If you consider them to be harmful, what are the specific risks they present?
d) Are specific measures beyond group transparency appropriate and desirable for pyramids of companies?
   Yes.

3.5. Corporate Restructuring and Mobility

I. Introduction

II. Change of corporate registered office, or domicile

Question 24:
a) Do you agree that Member State laws which automatically deny recognition to any company which has its real registered office in a state other than that of its formation should be abolished under EU law, as disproportionate inhibitions of commercial freedom and legal security?
   No, the current situation is preferable, particularly taking account of the different systems for the incorporation of companies in the member States of the European Union.
b) If so, do you agree that Member States should be free to apply mandatory internal company law requirements, which are proportionate and non-discriminatory, to companies substantially based within their territories, and how should such connection be defined?
c) If so, should other Member States be bound to recognise such provisions?

III. 3rd Directive Mergers - position of the acquiring company

Question 25:
a) Should the EU requirements for special provisions governing merger decisions in acquiring companies be removed?
   The company rules that impose the procedure applicable between the general assemblies and its administrative bodies, providing for specific opposability, are sufficient for creditors.
b) Should the Member State of an acquired company be bound to accept any such relaxation in respect of an acquiring company in an international merger, or should that relaxation be made mandatory for all international mergers, or even for all mergers?
   The current European legislation imposed by the third and sixth directives seems to be satisfactory.
IV. 3rd Directive - acquisition of a wholly owned subsidiary

Question 26:
a) Should Member States be permitted to relax the directive requirements in the case of acquisitions of 100%-subsidiaries?
   Yes.
b) Should the Member State of the acquired subsidiary be required to accept such relaxation by the Member State of the holding company in an international merger?
   Yes.
c) Or should such requirements be removed in all such international cases, or in all cases, international or not?
   No.

V. Creditor protection in restructuring

Question 27:
a) Should the creditor protection requirements for reductions of capital, mergers and transfers of registered offices be aligned as proposed above?
   Yes, but by providing a high level of protection.
b) If so, should such alignment be confined to international mergers and transfers of corporate domicile or should it apply to all EU restructuring provisions?
   It should apply to all transactions to avoid the phenomenon of *forum shopping*.

VI. Squeeze-outs and sell-outs

Question 28:
a) Should Member States be required to introduce provisions enabling a majority shareholder (the majority to be set at not less than 90% nor more than 95%) in a company to buy out the minority for a fairly appraised price?
   Yes, it is a sacrifice acceptable by the minority, if the price is right, while it makes the purchase more attractive for the bidder.
b) Should minority shareholders have a corresponding right to be bought out where the 90-95% threshold has been reached?
   Yes.
c) In companies with more than one class of share should the rule operate on a class by class basis?
   Yes.

*N.B.*: *It is thought that the appropriateness of this increase in discipline should be assessed in the light of the increase in the burden, and the costs, of organising the rules that it implies. It should not concern closed companies. Moreover, it would be desirable to leave each Member State free to decide whether to adopt this rule.*
VII. Other issues

Question 29:
Is there a need for legislation at the EU level providing for restructuring in ways not already discussed above?
No.

3.6. The European Private Company

I. An initiative to establish a European Private Company

Question 30:

a) Do you think there is a specific need for a new European legal form of company, complementary to the SE and national forms of private companies, the European Private Company as proposed?
Yes, in order to provide an operational model for modern SMEs (small and medium-sized enterprises) that is capable of resolving problems on a European level. Developing a model for European private companies is both important and useful, provided that it respects the conditions of legal security and the forms required by each national legislative framework.

b) If not, do you think a European model for regulation of private companies is a desirable and appropriate way to encourage Member States to adopt flexible regulation of private companies?
No.

II. Incorporation of the European Private Company

Question 31:
Do you think that it should be possible for a European Private Company to be set up by both individuals and legal entities and by one or more nationals of one Member State, as long as the European Private Company undertakes economic activities in two or more Member States?
Yes.

III. A genuine European company

Question 32:

a) Do you think that the European Private Company for the company law applicable to it could be exclusively governed by the provisions of the regulation and the provisions of its articles which are not inconsistent therewith, with autonomous interpretation ultimately by the European Court of Justice?
The answer is the same as was given to question 30 a).

b) Or is it necessary to refer to the law applicable to private companies in the Member State of incorporation where a question is not answered in the regulation of the European Private Company or its articles of association?
Here, the principle of subsidiarity should prevail, on the grounds that the development of models and principles for companies derives from the express
needs of national communities. Today, in Europe, a joint sensitivity that is well articulated and shared in order to lead to the creation of a new self-sufficient model does not exist, and as such, any operation that simply attempts to impose Community rules would lead to an artificial “laboratory-produced” model, and not to the creation of a long-standing and continuous tradition.

3.7. Co-operatives and Other Forms of Enterprise

I. Regulation of the European Co-operative, European Association and European Mutual Society

Question 33:
  a) Do you consider that the enactment of the proposed regulations is necessary or desirable?
     Yes.
  b) What is your assessment of the potential these regulations have in the solution of the problems affecting co-operatives and other forms of enterprise in the European Union?
     Creating a cooperative movement at a European level would mean reinforcing its competitiveness in relation to other company models that operate on international markets (cf. its potential in terms of adjudication).

II. Harmonisation of national laws on co-operatives, associations and mutual societies

Question 34:
  a) Do you think there should be harmonised rules in Europe for these alternative forms of enterprise?
     Yes.
  b) Do you consider it to be satisfactory that the regimes in the proposed regulations are completed by application of the Company Law Directives, which do not apply to the national forms of these enterprises?
     Yes, because legislation that is not expressly adopted will inevitably be secondary, and relate to non structurally specific questions concerning the cooperative phenomenon that are common to the collective organisational structures of the company.

III. Foundations in Europe

Question 35:
  a) Do you think there is a need for a specific regulation of the European Foundation?
No, because generally speaking, it is an institution that is particular to each Member State.

b) Do you think that national rules of Member States relating to foundations should be harmonised to some extent (as for other forms of enterprise, see question 34)?
   Yes.

IV. Enterprise law

Question 36:

a) Do you think a definition of “enterprise” in EU-law would be useful?
   Yes.

b) If so, do you agree on the elements of economic activity and organisation as the main elements in the definition?
   Yes, but provided that this respects the sphere of autonomy given to traditional liberal professions, which are considered as being part of the very fabric of European society, and which answer to the principle of subsidiarity.

c) Do you think basic harmonised rules should be applied only to limited liability entities?
   No. The definition of an “enterprise” constitutes one of the fundamental categories, and, as such, it should be applied liberally, beyond the specific requirements of organisational models. In this way, there is also the positive effect of having a set of general principles.

Question 37:

a) Do you think there is a need to introduce harmonised rules in Europe for registration, access to core data and powers of representation relating to enterprises as defined above?
   Yes. The standardisation and generalisation of certain fundamental notions are essential to eliminate the differences between information (information divergences), and above all, if it relates to the deficit that an operator could incur due to his ignorance of the foreign market on which he is going to operate. This makes the freedom of movement more effective, and reduces the costs of making reports and reduces risks, as well as making cross-border relations more transparent. Of course, an absolute respect for the reliability of information and acquisition funds is the best guarantee for the authenticity of written deeds.

b) Do you think other issues should be addressed in an Enterprise Law Directive (financial reporting, branches, groups of enterprises, transformation, transfer of seat)?
   The philosophy of the approach on this issue tends to be based more on a basic belief in a general Enterprise Law Directive, in the light of current Community law developments in the area of commerce, and the considerations developed in the preceding parts of the questionnaire. As such, it should be limited to constituting the legal framework, setting forth the general principles and rules on which the specific disciplines of each operational model and ordinary vicissitudes of trading are founded.