INSTITUTE FOR LAW AND FINANCE

THEODOR BAUMS

EUROPEAN COMPANY LAW

BEYOND THE 2003 ACTION PLAN

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Theodor Baums*

I. Introduction

This paper will sketch out some of the developments in European company law as seen from the current moment, which might be referred to as *post-* 2003 Action Plan, and from my purely personal viewpoint. I will thus restrict myself to presenting the current and expected legislative projects of the EU, with particular focus on the plans and activities of the Commission, and for the moment bracket out both a number of important and interesting decisions of the European Court of Justice and the debates among European legal scholars.

II. Point of Departure: the 2003 Action Plan

1. The Creation of the 2003 Plan

Between 1968, when the first Company Law Directive was issued, and 1989, the European Community adopted a total of nine directives and one

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* The Author is a member of the European Commission's advisory group of non-governmental experts on corporate governance and company law. The paper is based on a lecture given at the Center for European Commercial Law of Bonn University on 11 December 2006 and presents solely the Author's personal opinion.

regulation in the area of company law with the primary goal of harmonizing national company law in order to protect investors and creditors. The period from 1989 to 2001 was, however, characterized by a certain restraint in plans for harmonization and regulation, which many lamented as the stagnation or even the crisis of European Company Law. Then, at the close of 2001, the European Company (*Societas Europaea*) Regulation and Directive were adopted. At the same time, the Commission set up a High Level Group of Company Law Experts, often referred to as the Winter Group, to develop an action plan in the area of company law – including corporate governance – as a parallel to the Commission's Financial Services Action Plan that had been adopted in 1999. Concrete events, particularly the breaking news of accounting and governance scandals in the United States (i.e., the Enron and Worldcom scandals) and the American regulatory responses, triggered an extension of this Group's mandate. The Winter Group's recommendations,[1] which also drew from long-existing plans for specific EU directives and took into account recommendations that had been released by company law commissions in the United Kingdom[2] and Germany,[3] were then evaluated by the Commission and comprised the bulk of the Action Plan published in 2003 "Modernising

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1 "Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe," available at http://ec.europa.eu/internal_market/company/docs/modern/report_en.pdf

2 The UK documents are available at http://www.dti.gov.uk/bbf/co-act-2006/clr-review/page22794.html.

3 *See* the Report of the German Government Panel on Corporate Governance (*Bericht der Regierungskommission „Corporate Governance". Unternehmensführung – Unternehmenskontrolle – Modernisierung des Aktienrechts*), German Parliament Document 14/7515. Published in German: Theodor Baums (ed.), Bericht der Regierungskommission Corporate Governance (2001).

Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward."[4]

2. Contents and Implementation

The 2003 Action Plan listed a total of 24 measures that at the time were recommended for implementation in the following years. These were subdivided into short-term measures (implementation scheduled for 2005), medium-term measures (implementation scheduled for 2008) und long-term measures (implementation scheduled after 2009). In this paper, I will not reiterate the Action Plan by listing and describing each, individual measure in detail. Rather, I will restrict myself to those measures that have been implemented to date, and since the 2003 Action Plan and its recommendations no longer represent the Commission's agenda, I will focus (in Part III) on the Commission's comprehensive re-examination of its company law agenda, and to the extent possible, on future developments (in Part IV).

The following measures of the original action plan have already been implemented:

a) Creation of a „European Corporate Governance Forum" and an advisory group for company law and corporate governance

The Commission initially convened a "European Corporate Governance Forum." This was a group of well-known experts from the various member

[4] Communication from the Commission to the Council and the European Parliament - Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward, 21 May 2003, COM (2003) 284 final.

states who were asked to brief the Commission on the developments in corporate governance in the member states and thus assist it to evaluate the recommendations in this field.[5] Parallel to this, the Commission assembled an advisory group of non-governmental experts on corporate governance and company law. This advisory group was to advise the Commission on the future development of European company law, including corporate governance. Thus, although the tasks of the forum and the advisory group overlap partially, the Commission eliminates any conflict in practice through its assignment of specific tasks and distribution of information.[6]

With respect to the Commission's implementing measures, the following should be briefly mentioned:

The Shareholders' Rights Directive. Among the short-term measures in the 2003 Action Plan was the creation of rules that would facilitate communication between the company and its shareholders, the cross-boarder exercise of voting rights, and the adoption of resolutions at the general meeting. The Commission's proposal for a "Shareholders' Rights Directive"[7] is designed to achieve these ends and is currently being considered by the Parliament and the Council. The proposed Directive would introduce a regime of equal treatment, give the shareholders some power over the agenda of the general meeting, and

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5 Commission decision of 15 October 2004 establishing a European Corporate Governance Forum (2004/706/EC). The agendas and minutes of the Forum's meetings are available at http://ec.europa.eu/internal_market/company/ecgforum/index_en.htm.

6 Commission Decision of 28 April 2005 establishing a group of non-governmental experts on corporate governance and company law (2005/380/EG). The minutes of the Forum's meetings are available at http://ec.europa.eu/internal_market/company/advisory/index_en.htm.

7 Proposal for a Directive of the European Parliament and of the Council on the exercise of voting rights by shareholders of companies having their registered office in a Member State and whose shares are admitted to trading on a regulated market and amending Directive 2004/109/EC, 5 January 2006, COM (2005) 685 final.

harmonize their right to receive notice of, participate in and vote at the meeting.[8]

One share – one vote. Among its medium-term measures, the 2003 Action Plan lists a proposal to undertake a study of whether – at least in listed companies – the principle of one share/one vote should be realized and how this might be accomplished. The commission for this study has already been awarded.[9]

b) Recommendations regarding directors' remuneration and the independence of directors

The Commission has directed two "recommendations" to the member states, one on the disclosure of the remuneration of directors of listed companies,[10] and the other on the creation and staffing of certain board committees in listed companies and the independence of their members.[11]

The Commission is currently preparing a report on the extent to which the member states have successfully implemented these recommendations. To this end, detailed questionnaires have been sent to the governments of the member states.

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8 *Also See* e.g., *Corinna Ullrich*, "Die geplante Richtlinie zu den grenzüberschreitenden Aktionärsrechten, Vortrag vor dem Zentrum für Europäisches Wirtschaftsrecht," delivered at Bonn University on 20 November 2006, available at [●].

9 "Proportionality between ownership and control in EU listed companies: external study," EU – Doc. 2006/ S 74 – 076808. The commission has been given to Institutional Shareholder Services (ISS) Europe S.A., Brussels.

10 Commission Recommendation of 14 December 2004 fostering an appropriate regime for the remuneration of directors of listed companies, *OJ* 2004, L 385/55 (2004/913/EC).

11 Commission 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, *OJ* 2005, L 51/51 (2005/162/EC).

c) Supplementing the accounting directives; the new Auditor Directive

Further measures foreseen by the 2003 Action Plan were implemented through amendments to the accounting directives (the Fourth and Seventh Company Law Directives). The amending Directive of 14 June 2006[12] reaffirmed the collective responsibility of the directors – consciously taking a different direction than that of the US Sarbanes Oxley Act, which focuses responsibility on a company's CEO and CFO – for annual accounts and important non-financial information. The new provisions will improve the transparency of intra-group relationships, of related party transactions, and of transactions with unconsolidated subsidiaries. Lastly, the management reports of listed companies will be required to contain a governance declaration in which they describe, *inter alia,* their internal controlling and risk management system and name the corporate governance code to which they conform, specify any deviations from the provisions of such code, and provide the reasons for such deviations.

Although not expressly referred to in the 2003 Action Plan, another measure that was designed to address the recent accounting scandals was the replacement of the Eighth Company Law Directive, the so-called Auditor Directive.[13] The new Auditor Directive, which entered into force at the close of

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12 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, *OJ* 2006, L 224/1.

13 Eighth Council Directive 84/253/EEC of 10 April 1984 based on Article 54 (3) (g) of the Treaty on the approval of persons responsible for carrying out the statutory audits of accounting documents, *OJ* 1984, L 126/20.

September of 2006,[14] specifies the duties of auditors and the requirements they must meet with respect to neutrality and independence. "Public-interest entities" subject to audit requirements, which particularly includes all listed companies, will now have to establish audit committees designed to make the board's monitoring functions –as supported by the auditors – more effective.

d) Slimming down the Second Directive (on capital requirements)

A further measure that had been long contemplated and that was also taken up in the 2003 Action Plan was to slim down the Second Company Law Directive.[15] The amending Directive of 6 September 2006 liberalizes the strict requirements of the Second Directive in a number of ways, such as regarding share repurchases, "financial assistance", the valuation of in-kind contributions and reductions of capital.[16] The squeeze-out und sell-out rules found in an earlier draft of the Directive[17] were dropped from the final version.

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14 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, *OJ* 2006, L 157/87.

15 *See* Recommendations by the Company Law Slim Working Group on the simplification of the first and second Company Law Directives, available at http://ec.europa.eu/internal_market/company/official/index_en.htm, and *see* also Winter Report, *supra* note 1, at 84 *et seq.*

16 Directive 2006/68/EC of the European Parliament and of the Council of 6 September 2006 amending Council Directive 77/91/EEC as regards the formation of public limited liability companies and the maintenance and alteration of their capital, *OJ* 2006, L 264/32.

17 *See* Art. 39(a) and (b) of the Proposal for a Directive of the European Parliament and of the Council amending Council Directive 77/91/EEC, as regards the formation of public limited liability companies and the maintenance and alteration of their capital, 21 September 2004, COM (2004) final, http://ec.europa.eu/internal_market/company/docs/capital/2004-proposal/proposal_en.pdf.

e) Alternative system of creditor protection

Parallel to its liberalization of the Second Directive, the Commission awarded a commission to prepare a feasibility study on the introduction of an alternative system of creditor protection, perhaps comparable to the model used in US company law.[18]

f) Cross border mergers

A proposed directive had been in the Commission's files for a number of years,19 but its adoption was blocked in particular by the question of co-determination. The decisive breakthrough for this Directive was the compromise on co-determination that was reached for the adoption of the SE Directive.20 Thus the Commission was able confidently to include a directive on cross border mergers among the pressing measures to be adopted under the 2003 Action Plan. As is well known, the Directive entered into force at the close of 2005,21 and is currently being implemented by the member states.

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[18] Feasibility study on alternative to capital maintenance regime as established by the Second Company Law Directive 77/91/EEC of 13. 12. 1976 and the examination of the implications of the new EU-accounting regime on profit distribution, EU Doc. 2006/S 203 – 215305. The commission for the study was awarded in October 2006 to KPMG Deutsche Treuhand-Gesellschaft AG.

[19] Proposal for a Tenth Directive of the Council on cross-border mergers of companies with share capital, 14 January 1985, COM (84) 727 final, *OJ* 1985, C 23; *also see* Draft Convention on the international merger of sociétés anonymes; Report on Draft Convention on the international merger of sociétés anonymes, 29 June 1973, EC Bull. Supp. 13/1973.

[20] Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, *OJ* 2001, L 294/22.

[21] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, *OJ* 2005, L 310/1.

II. Re-evaluating the Action Plan in 2005 - 2006

The (former) Commission held its first consultation on the measures foreseen in the 2003 Action Plan to harmonize and strengthen shareholder rights in September 2004,[22] and these consultations formed the basic foundation on which the recently proposed Shareholder Rights Directive was based.[23] Under the new Commissioner for the Internal Market, Charlie McCreevy, the Commission's Internal Market and Services Directorate then decided to examine the entire Action Plan from the ground up for continued relevance and suitability rather than simply reviewing its individual measures for necessity and appropriateness during the course of their implementation. According to the official declarations of the Commission,[24] this examination was to be undertaken pursuant to the Lisbon Strategy of the Union (i.e., in the pursuit of stronger, lasting, economic growth and increased employment[25]) so as to formulate "better regulation". This new beginning[26] required a new impact assessment of the regulatory steps under evaluation. Thus existing statutory provisions, particularly in company law, were to be examined for the possibility

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22 Details on this procedure can be found in Commission Staff Working Document, Annex to the Proposal for a Directive of the European Parliament and the Council on the exercise of voting rights by shareholders, Impact assessment, COM/2005/685 final, 17 February 2006, p. 5 *et seq.* (http://ec.europa.eu/internal_market/company/docs/ shareholders/comm_native_sec_2006_0181_en.pdf).

23 *See supra* note 7.

24 *See* the points listed in the consultation paper of the Internal Market and Services Directorate, "Consultation on Future Priorities for the Action Plan on Modernising Company Law and Enhancing Corporate Governance in the European Union," 20 December 2005, at p. 3 *et seq.* (http://ec.europa.eu/internal_market/company/docs/consultation/cons ultation_en.pdf).

25 Communication from the Commission to the Council and the European Parliament: Common Actions for Growth and Employment: The Community Lisbon Programme, COM/2005/330 final.

26 Commission communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - 'Implementing the Community Lisbon programme: A strategy for the simplification of the regulatory environment', COM/2005/535 final, 25 October 2005.

of simplification – a point to which we will return.[27] Beyond the official communiqués, one could observe both that the market participants' complaints of increasing regulatory fatigue were finding an open ear at the Commission and also that the urge to pursue an ever-expanding harmonization of company law was seen with increasing skepticism.

As a first step, the new Commission that took office in November of 2004 immediately began to examine during the first half of 2005 the legislative proposals that had not yet been adopted and decided to withdraw some of them. In the area of company law (widely understood), this included the proposed regulation for a European association[28] and a European mutual society,[29] including the corresponding directives on labour rights for this organisational forms.[30] However, it should be noted that these initiatives did not originate with the 2003 Action Plan, but had been proposed in the early 1990's as part of a programme for a "social economy".

Next, in a further step in December 2005, the Internal Market and Services Directorate General launched a comprehensive, public consultation procedure on the 2003 Action Plan.[31] This consultation procedure consisted of a running consultation with market participants that lasted until the end of March 2006 and a public hearing on its results in May of that year.[32] A written report on the

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27 *See* Part IV. 1, *infra*.

28 Amended Proposal for a Council Regulation (EEC) on a statute for a European Association, (1993) O.J. C 236/1, earlier version 1991/386/COD.

29 Amended Proposal for a Council Regulation (EEC) on a statute for a European Mutual Society, (1993) O.J. C 236/40, earlier version 1991/390/COD.

30 Proposal for a Council Directive supplementing the Statute for a European association with regard to the involvement of employees, *OJ* 1992, C 99/14; Proposal for a Council Directive supplementing the Statute for a European mutual society with regard to the involvement of employees, *OJ* 1992, C 99/57.

31 *See* the consultation paper cited in note 24, *supra*.

32 Hearing on Future Priorities for the Action Plan for Company Law and Corporate Governance, 3 May 2006 (http://ec.europa.eu/internal_market/company/docs/consultation/programme_en.pdf).

consultation's results has now been prepared,[33] and this report indicates the general contours of the Commission's future company law agenda. In this connection, the European Parliament's 4 July 2006 resolution on the future development of European company law – which presents detailed proposals and urges the Commission to take the necessary initiatives[34] – is also very important. Although the Commission possesses the right of initiative in the Union's legislative process, the Parliament's resolution does in fact signal the projects for which the Parliament is well disposed to provide its approval and those in connection with which there could well be some difficulties in procuring such approval during consultation.

In a speech of 21 November 2006 before the Parliament's Committee on Legal Affairs, Commissioner McCreevy outlined the meaning of the public consultation's results for the Commission, and in so doing reacted to the challenges contained in the Parliament resolution of 4 July.[35] The results of the consultation and the consequences as seen by Commissioner McCreevy can be summarized as follows: the Directorate's decision to refrain from drafting a new action plan to reflect its changed agenda may well provide it with more flexibility for action, but it does not facilitate the public's effort to understand and evaluate the Commission's future plans.

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33 Directorate General for Internal Market and Services, Consultation and Hearing on Future Priorities for the Action Plan for Company Law and Corporate Governance in the European Union. Summary Report (http://ec.europa.eu/internal_market/company/docs/consultation/final_report_en.pdf).

34 European Parliament resolution on recent developments and prospects in relation to company law (2006/2051(INI); http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2006-0295+0+DOC+XML+V0//EN&language=EN), and the prepatory document from the Committee on Legal Affairs (Reporter: Andrzej Jan Szejna), Report on recent developments and prospects in relation to company law, 26 June 2006, European Parliament, Final A6-0229/2006.

35 *See* Charlie McCreevy speaks to the European Parliament JURI Committee European Parliament JURI Committee (Committee on Legal Affairs) Brussels, 21 November 2006, available at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/720&format=H.

IV. Further Developments

1. Goals and methods

Before turning to an analysis of the concrete measures that are either planned or entirely possible for the future, it is useful to review the aims and methods that these legislative efforts will follow in the area of company law under the aegis of the new Commission. Perhaps it is possible to sketch these intermediate goals and practical methods as follows.

a) Simplification of existing law

As mentioned above, the Commission has completely withdrawn a number of the recommendations for legislation made under the 2003 Action Plan.[36] In October 2005, the Commission also proposed that existing provisions of company law be simplified. In the program attached to the discussion of simplification, the entire ***acquis*** in the area of company law was specifically named as subject to a review for possible simplification.[37] In particular, the First, Third, Sixth and Eleventh Company Law Directives were listed.

Simplification can take the form of aligning differing wordings, of repealing single rules and even of a complete directive. Apart from the Third and the Sixth Directive (on intrastate mergers and divisions, respectively), one candidate for repeal – depending, of course, on the outcome of the study

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[36] *See supra* Part III and the text accompanying notes 28 - 30.

[37] *See* COM/2005/535, Annex 2, *supra note* 26; also *see* "First progress report on the strategy for the simplification of the regulatory environment," 14 November 2006, COM/2006/690 final.

regarding alternative systems of creditor protection – may well be the Second Directive, also referred to as the Capital Maintenance Directive. It is also questionable whether we really need a pan-European regulation of the one-member private limited company, as is found in the Twelfth Company Law Directive. Further examples of rules in need of examination for possible repeal are the various information and disclosure requirements in particular for smaller companies.

Simplification can also be pursued through codification. An attempt to codify the European company law that is currently fragmented among a number of individual directives and regulations would certainly make it easier to see exactly what rules are currently in force, and help the Commission to weed out duplication, align different wordings and create systematic and perhaps even convincing boundary lines between the provisions covering all juridical persons, companies limited by shares, and listed companies. This could be thought of as a "harmonisation of the harmonisation" or perhaps better a "harmonisation of the *acquis*." On the other hand, we must remember that codification – or perhaps more descriptive of the activity actually intended, the concentration of the various provisions of company law in a single statute – in this area addresses provisions of law which, unlike ordinary civil law, are directed to specialists and governments rather than to ordinary citizens, so that the demand for an easily understood overview of the rules in force is certainly less pressing. In addition, a codification could well mean initiating a new legislative procedure in the Parliament and the Council, which could lead to revisiting and questioning compromises that have already been negotiated and settled with great effort in the past. Lastly, it should be remembered that a codification could cost the Commission well more in hours of personnel spent than the benefits the process would achieve. It should also not be forgotten that the repealing of existing norms and their re-enactment in a uniform code could trigger necessary

implementing measures at the member state level, echoing the concerns referred to above at the local level. Less ambitious, but perhaps better advised, would be to leave the individual directives and regulations in place (unless they are unnecessary, and good candidates for repeal), but to simply their content on the basis of a uniform, streamlining principle to remove overlaps and inconsistencies. Even this process would, however, still require renewed review and approval from the Council and the Parliament.

In his November 2006 presentation to the Parliament's Committee on Legal Affairs, Commissioner McCreevy stated that the Commission would have a detailed plan by the middle of 2007 for the simplification of company law.[38]

b) Impact assessments

In June 2005, the Commission adopted new, broader guidelines for conducting impact assessments.[39] As a result, each proposed piece of legislation will be assessed not only to find out whether the 27 member states can bear the regulatory costs involved in, say, harmonization, but also to discern whether the benefits to be expected from the measure exceed or at least equal the costs incurred. In this regard, the Commission has adopted a comprehensive programme to measure administrative costs connected with company law directives. It entails consultation with both member states and market participants to investigate ways of reducing costs. Results of a current round of the programme will be published in the second half of 2007.[40] The Commission

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38 *See supra* note 35.

39 European Commission, Impact Assessment Guidelines, 15 June 2005, SEC/2005/791, and also http://ec.europa.eu/governance/impact/index_en.htm.

40 *See* first progress report, *supra note* 37, at 13.

sums up the tasks of simplification and impact assessment under the rubric of better regulation.[41]

c) Regulatory instruments

Another essential matter is the choice of the most appropriate regulatory instrument. Even in the period when it was launching the Action Plan and convening the Corporate Governance Forum, the Commission always made it quite clear that it supported *self-regulation through codes of best practice* in the various member states. Whereas this instrument aims at providing for a flexible instrument of self-regulation, the discussion on the pros and cons of harmonization of statutory laws of the member states and the competition for regulation continues. In this debate, only few contributions have been dedicated so far to the possibility of creating a *"European Model Business Corporation Act"* on the US model that would be offered to member states for voluntary adoption, rather than ordering the states to implement mandatory, supranational company law. A Commission recommendation of such a Model Act would not require co-decision by the Council and the Parliament. This option will also have to be considered in the debate regarding a European private limited company, not least because co-determination could obstruct the Union from reaching an organisational form that is truly uniform, as it did in the case of the *Societas Europaea*.

Once it has been determined that a situation calls for binding law, it must then be decided whether the more appropriate tool is a *directive or a regulation*. Replacing directives with regulations can indeed simplify the regulatory

[41] References are available at http://ec.europa.eu/enterprise/regulation/better_regulation/index_en.htm .

structure, given that regulations are directly applicable and directives require local implementing norms. Regulations also present the advantage that all persons subject to a given rule have the same text before them at the same time, subject of course to the vagaries of translation. The Commission intends to more fully exploit the use of regulations in the future to gain these advantages. So, if it comes to the adoption of a statute, rather than just a recommendation, for a European private company, it could well take the form of a regulation so as to create a true organizational form that can be used in all member states, rather than in reality multiply a basic model into 27 different practical manifestations as a consequence of diverse implementing measures.

d) Uniform law *versus* a menu of options

A further question in this context is whether uniform rules or a menu of options should be adopted to regulate a given area. This raises not only the issue of mandatory law *versus* flexible law, but also the question that rests on a different level, whether citizens and undertakings should have as many options as possible between various legal forms, even if the individual options are partially mandatory. In his presentation to the Parliament's Committee on Legal Affairs, mentioned above, Commissioner McCreevy strongly supported the use of "enabling legislation."[42] In the area of company law that means giving a clear priority to the use of legislative measures that incorporate a menu of options. That is the goal both of the contemplated directive for the transfer of registered office and of the "28th" organisational form of a European private limited company. It may only be mentioned in passing that if European citizens

[42] *See supra note* 35.

are given a menu of options, this would open up their national legislatures to a salutary pressure to improve their legal systems ("regulatory competition").

2. Individual projects

a) Preliminary observation

This following section will discuss some of the projects that are expected with reasonable probability to be taken up in the foreseeable future. I find it useful to group these projects under the headings 'mobility of companies', 'new organisational forms', 'corporate governance', and 'miscellaneous'. In this respect we must also remember that the Commission has placed the simplification programme high on its agenda and this programme can potentially affect every measure in the area of company law. It is thus impossible to say at this point which pieces of legislation or particular provisions might be amended or repealed during the course of the simplification programme. For the moment, I will also bracket out those matters discussed serially in the first part of this paper – i.e., the measures fully implemented or initially introduced between 2003 and 2006 – although further steps in these areas could well be on the way, depending on the results of the feasibility studies and impact assessments in progress or contemplated. Such matters would of course include the discussion of the "one share – one vote" principle,[43] and recommendations in connection with executive remuneration and the independence of directors,[44] as well as the consideration of a possible,

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[43] *See supra* Part II. 2. c).

[44] *See supra* Part II. 2. d).

alternative system of creditor protection.[45] Lastly, I will intentionally omit any discussion of other policy *desiderata* in the area of company law if they were not addressed in the 2003 Action Plan, such as, for example, the demand for a harmonization of conflicts of law or international private law as applicable to companies.[46]

b) Mobility of companies

Now that the path-breaking decisions of the European Court of Justice have made it possible for a member state company to transfer its real seat of administration while preserving its legal form (and, for example, the German legislature is also preparing to allow German *GmbHs* and *Aktiengesellschaften* to transfer their seats abroad while preserving their corporate forms[47]), perhaps the last, remaining wish in the area of corporate mobility is to allow a transfer of seat with direct reorganisation into the corporate form of another member state. A preliminary draft of a 14th Company Law Directive on the cross-border transfer of the registered office of limited companies has long existed.[48] The 2003 Action Plan had categorised this legislation under the short-term measures that were to be implemented by 2005.[49] Although that did not occur, the re-

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45 *See supra* Part II. 2. g).

46 On this point, *see* most recently Sonnenberger & F. Bauer, "Vorschlag des Deutschen Rates für IPR für eine Regelung des internationalen Gesellschaftsrechts auf europäischer /nationaler Ebene," *Recht der Internationalen Wirtschaft* (RIW) 52, 2006, Supp. 1 to Vol. 4, pp. 1 – 24.

47 *See* Draft Law to Modernise the Limited Company Law and Combat Misuse (*Entwurf eines Gesetzes zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Mißbräuchen – MoMiG*) of 29 May 2006, Art. 1 § 4a GmbHG, and Art. 5 § 5 AktG (http://www.bmj.bund.de/media/archive/1236.pdf).

48 Proposal for a Fourteenth European Parliament and Council Directive on the transfer of the registered office of a company from one member state to another with a change of applicable law, 20 April 1997, doc. XV D2/6002/97, en-Rev 2.

49 2003 Action Plan, *supra note* 4, at 29.

examination of the Action Plan nevertheless yielded a broad majority in favour of retaining this initiative.[50] The opportunities for a transfer of seat with reorganisation into a new corporate form as offered by the SE-Statute[51] and the Cross-Border Mergers Directive that is currently being implemented (e.g., a French company establishes an English merger vehicle and then is merged into this vehicle) are limited. In the case of the SE, reorganisation is restricted to a single, legal form, and in the case of the cross-border merger, it requires a detour that should be expendable. In its resolution on recent developments in company law, the European Parliament also advocated the short-term submission of a proposed directive on the transfer of seat with reorganisation of form,[52] and Commissioner McCreevy announced that such a proposal will be submitted in the spring of 2007.[53]

c) New organisational forms

aa) The European private limited company

In response to private initiatives in this field, the 2003 Action Plan announced that a feasibility study would be launched with respect to the creation of a European private company (EPC).[54] This study was completed at

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50 *See* Summary Report, *supra note* 33, at 16-18.

51 *See* Council Regulation 2157/2001, of 8 October 2001 on the Statute for a European company (SE) 2001 *OJ* 2001, L 294/1.

52 *See* Parliament Resolution, *supra* note 34, Nos. 32 and 33.

53 *See supra* note 35.

54 *See* 2003 Action Plan, *supra* note 4, at 29.

the end of 2003.[55] A significant majority of those participating in the consultation procedure spoke out in favour of an EPC statute.[56] Large international concerns with over 100 subsidiaries want to decrease their administrative costs – at least in Europe – through recourse to a single organisational form. Small and medium sized companies are also in favor of an organisational form with a "European market". For a number of reasons, the UK private limited company is thought not to meet the needs of the market in all of the member states. However, the supporters of the EPC seek a real unitary organisational form, not a patchwork approximation to one, as is the SE. At this point, the old problem of co-determination raises its head, but this paper is not the place to explore new solutions to this long-standing puzzle. Also for the EPC, the European Parliament has asked the Commission to prepare a proposal;[57] on 29 November 2006, the Parliament's Committee on Legal Affairs resolved detailed recommendations to this effect.[58] The Commission responded that a detailed feasibility study of the EPC statute is currently being prepared.[59] All things considered, it would seem that a proposal will not be submitted before 2008.

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55 For information on the study, *see* http://ec.europa.eu/enterprise/entrepreneurship/craft/index.htm, and an executive summary of the findings ("Feasibility Study of a European Statute for SMEs") available at http://ec.europa.eu/enterprise/entrepreneurship/craft/craft-priorities/doc/en_resume_rapport_final.pdf.

56 *See* Summary Report, *supra* note 33, at 24-26.

57 *See* Parliament Resolution, *supra* note 34, Nr. 28.

58 European Parliament, Committee on Legal Affairs, Report with recommendations to the Commission on the European private company statute (2006/2013(INI)), 29 November 2006 (Rapporteur: Klaus-Heiner Lehne).

59 *See supra* note 35.

bb) The European foundation

On the other hand, it is far less settled whether the Commission will in the future submit a proposal for legislation to create a European foundation form. The 2003 Action Plan stated that in the medium term, the need for other organisational forms such as the European foundation would be examined.[60] The foundations sector, as the Action Plan also testified, support the creation of such a form.[61] The European Parliament has also spoken out in favor of a European foundation.[62] Commissioner McCreevy, however, has expressed skepticism as to whether the problems facing the foundations sector can really be solved through the introduction of a pan-European form, and has postponed any further evaluation until a feasibility study can be completed.[63]

d) Corporate governance

aa) Shareholders' rights

In addition to the rights addressed in the Shareholders' Rights Directive,[64] the 2003 Action Plan set forth other shareholders' rights that should be harmonized, although no progress has been made in this regard, such as *inter alia* a right to appoint a special auditor and a duty of institutional investors to disclose their investment and voting policies. In the context of the public consultation for the Action Plan, a number of other, conceivable measures for

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60 *See* Action Plan, *supra* note 4, at 30.

61 Summary Report, *supra* note 33, at 26.

62 Parliament Resolution, *supra* note 34, No. 34.

63 *See supra* note 35.

64 On this point, *see supra* notes 7, 8.

strengthening shareholders' rights were raised – with some receiving support and others being rejected.[65] In the explanatory memorandum to its proposed directive for the exercise of voting rights, the Commission explained why, in its opinion, the directive should restrict itself to those points contained in the proposal, and also stated that it was considering issuing a recommendation on specific shareholders' rights to supplement the proposal.[66] As possible subject matters for such a recommendation, the commission expressly named stock lending, depositary receipts, and the rules governing languages of documents directed toward foreign investors in a domestic company.[67] We will have to wait to see whether such a recommendation will be adopted.

bb) Regulation of governing bodies

With respect to the regulation of a company's governing bodies, the proposal of the Winter Group to introduce a pan-European rule against "wrongful trading"[68] was clearly rejected.[69] However, this proposal may be on the agenda again in connection with the evaluation of implementing an alternative model of creditor protection.[70] The imposition of directors'

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65 This is addressed in detail in the Summary Report, *supra* note 33, at 10 *et seq.* (right to appoint a special auditor; election and removal of directors; communication between shareholders; competence of the general meeting; right to demand entry in the shareholders' register and the rights consequent upon such entry; rights protecting minorities and rights affecting the exercise of voting, such as securities lending, recognition of shareholder associations, disclosure of shareholder identity, and the information duties of institutional investors vis-á-vis investors and beneficiaries).

66 Proposal for a Directive, *supra* note 7, at 3.

67 *See* the Impact Assessment on the Shareholders' Voting Rights Directive, *supra* note 22, point 6.3 „Secondary Issues", p. 34 *et seq.*

68 *See* High Level Report *supra* note 1, at 73 *et seq.*

69 *See* Summary Report, *supra* note 33, at 13 *et seq.* and Parliament Resolution, *supra* note 34, at Nr. 20.

70 On this point, *see* Part II. 2. g), above.

disqualification across the EU as a sanction for misleading financial and non-financial statements was another point in the programme of the 2003 Action Plan.[71] The public consultation saw no need also for this rule.[72] The proposal to follow the technique used in the SE Statute and give companies in Europe the option of choosing between a two-tier and a single tier board[73] also failed to receive an enthusiastic reception in the public consultation.[74] Nevertheless, the European Parliament has spoken in favour of anchoring such an option at the European level.[75] For German companies, given the applicable requirements of co-determination, the chance to choose a single tier board has very little attraction.

cc) Auditors

The Auditor Directive has been briefly discussed above.[76] This Directive does not address the liability of auditors either to the company or to investors. Such liability takes on very different forms in the various corners of the international financial market.[77] When approving the Directive, the Parliament instructed the Council and the Commission to investigate the economic effects of having different regimes of auditor liability throughout the European Union. To this end, the Commission retained experts to prepare a study and convened

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71 *See* Action Plan, *supra note* 4, at 16.

72 *See* Summary Report, *supra* note 33, at 14 *et seq.*; for information on a number of jurisdictions regarding impedements to appointment as a sanction for evasion, *see* the Parliament Resolution, *supra* note 34, at Nr. 19.

73 *See* Action Plan, *supra* note 4, at 29.

74 *See* Summary Report, *supra* note 33, at 18 *et seq.*

75 *See* Parliament Resolution, *supra* note 34, at Nr. 26.

76 *See supra* Part II. 2. e).

77 *See* the country reports in *Hopt/Voigt* (eds.), *Prospekt- und Kapitalmarktinformationshaftung*, 2005.

an expert forum.[78] The study has now been published.[79] It is at the time of this writing not yet certain whether the Commission will recommend taking measures to prevent a further reduction in the number of audit firms as a result of the difficulty of insuring auditor liability, given the large damage awards that have been handed down against auditors.[80]

e) Miscellaneous

What has been left by the wayside and is unlikely to be revisited in the near future?

The 2003 Action Plan proposed in the short term to improve disclosure of corporate groups, intragroup holdings and pyramid structures (defined as "chains of holding companies with the ultimate control based on a small total investment thanks to the extensive use of minority shareholders").[81] It was proposed to sanction the misuse of pyramid structures by preventing them from publicly listing,[82] and to improve the transparency of limited liability companies and "other vehicles" that could be used to hide illegal transactions.[83] These recommendations did not receive support in the public consultation procedure.[84] However, existing transparency concerns with respect to interlocking holdings will be addressed by the amended disclosure requirements for consolidated

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78 Details are available at http://ec.europa.eu/internal_market/auditing/liability/index_en.htm .

79 London Economics & R. Ewert, "Study on the Economic Impact of Auditors´ Liability Regimes" (MARKT/2005/24/F). Final report to EC-DG Internal market and Services, 2006 (http://ec.europa.eu/internal_market/auditing/docs/liability/auditors -final-report_en.pdf).

80 On this point, *see* Comissioner McCreevy speech, *supra* note 35.

81 *See* Action Plan, *supra* note 4, at 19, and the Parliament decision, *supra note* 30, at Nr. 35.

82 *See* Action Plan, *supra* note 4, at 20.

83 *See* Action Plan, *supra* note 4, at 22, footnote 25.

84 *See* Summary Report, *supra* note 33, at 15 *et seq.* and 22.

accounts,[85] the disclosure rules for significant holdings in listed companies,[86] and the electronic publication of company data through a central, readily-accessible portal. In addition, national company registers throughout Europe will be joined in a single electronic network (the "BRITE" Project).[87] Relationships within a corporate group will also be made more transparent through developing financial accounting standards such as IAS 24 on "related party transactions" and the amended requirements of the Accounting Directives.[88]

Another measure on groups – the proposed introduction of framework rules that allow subsidiaries to follow an agreed-upon business policy within a corporate group – have also failed to attract continued attention and initiative.[89]

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85 *See supra* note Fn. 12.

86 For Germany, *see* §§ 21 *et seq.* of the Securities Trading Act, as they will be amended by way of the Law to Implement the Transparency Directive, available at (http://www.bundesfinanzministerium.de/lang_de/DE/Geld__und__Kredit/Aktuelle__Gesetze/003,templateId=raw,property=publicationFile.pdf).

87 "BRITE" stands for "Business Register Interoperability Throughout Europe." On this project *see* http://www.briteproject.net/uploads/brite_sweg_2006.pdf.

88 *See supra* note 12.

89 *See* Action Plan, *supra* note 4, at 25.

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