BUSINESSEUROPE

SPEAKING NOTES

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EUROPEAN COMMISSION'S CONFERENCE ON EUROPEAN COMPANY LAW: THE WAY FORWARD, 16-17 MAY 2011, BRUSSELS

PLENARY SESSION "PURPOSE AND TOOLS OF EUROPEAN COMPANY LAW"
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I would like to thank Mr Barnier and the DG Market for having taken the initiative to organise this debate on the future of European Company Law.

Let me first say a few words about BusinessEurope.

BUSINESSEUROPE represents more than 20 million small, medium and large companies.

BUSINESSEUROPE's members are 40 central industrial and employers federations from 34 countries, working together to achieve growth and competitiveness in Europe.

It is very refreshing for me to be part of this round table because it reminds me of the High Level Group of Company Law experts, the so-called Winter Group 10 years ago where I was the only member coming from business among distinguished academics. That does not mean that business interests were not taken into consideration, quite the contrary, in fact.

The objectives

What should be the objectives of European Company Law from business point of view?

The publication of the Winter Report in November 2002 and of the European Commission Action Plan in 2003 represented a turning point in European Company Law. Why? Because besides the legitimate objective to strengthen shareholders rights and third parties protection it was stressed that EU company law "should provide for a flexible framework for competitive business" (High Level Group of Company Law Experts, Report, 2002) and foster the global efficiency and competitiveness of business.

For European companies, this is key to hold on to this fundamental objective, because European companies have to face the competition of the so-called BRICS: Brazilian, Russian, Indian, Chinese and South African companies.

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That means in practice:

- First, flexibility and freedom of choice between forms of companies' structure and freedom of choice between board structures (one tier or two tier boards).

- Second, a "one size does not fit all approach". We are convinced that more attention should be dedicated to SMEs which account for more than 90 per cent of European companies. That is why we, as business representatives, have proposed a European Private Company, SPE.

- Third, efficient and simple cross border instruments (14th directive on the transfer of registered seat, SPE) to achieve the development of the internal market.

The recommendations of the Reflection Group do not challenge those orientations. It is quite the opposite, in fact.

But it is also important for companies that European company law does not privilege a short termist approach. And we are pleased to notice that a long-termist approach is a key orientation suggested by the Reflection Group. The Reflection Group rises that the question "can rules prevent short termism which was one of the causes of the crisis?"

I will use two examples to illustrate my remarks:

1st example: 10 years ago, the debate on "one share/one vote" was very vivid. Now the experts recommend to enhance differential voting rights and additional profit distribution to reward long term shareholders.

2nd example: quarterly reports which were the dogma before the crisis, the experts recommend that listed companies will be allowed to opt-out

And there many other positive recommendations to favour long term share ownership and shareholder commitment.

To conclude on the objectives of company law, I would like to stress the point that European Company law should be also compatible with business time constraints.

One example to illustrate my remark: the SE will never be very attractive as long as it will take between 6 months and one year to set up.

Next, I would like to address the issue of the tools.

The tools

After a first step of European company law focused on the harmonisation through directives of the protection of members and third parties, the Winter Group, in 2002, recommended a broader use of alternative to primary legislation.

As a result, the 2003 Action Plan was a mixed of legislative measures, secondary legislation and soft regulation.

And numerous actions on the 2003 agenda have been achieved since then indeed.

Are companies satisfied with this achievement? It is a mix feeling.

Tremendous progress has been made in the field of corporate governance, based on a cocktail composed of a large portion of soft law and a touch of regulation.

But there are some sources of disappointment:

- simplification: it proved to be very difficult to simplify (the 1st and 11th directives, the 4th and 7th directives),

- cross border mobility: indeed the directive on cross-border mergers has been passed, but no real progress has been achieved on the 28th company law regime. As stressed by the Reflection Group Report, “the development of European company forms, as part of a 28th regime of EU law separate from the company law regimes of the 27 Member States has been so far modest”.

Even if we know there are still academic debates about the opportunity to have a 28th company law regime, I would like to remind you that the feasibility study showed a real interest of businesses to set up and run European groups of companies. Groups of companies are a legitimate way of doing business, as far as legitimate interests are protected. The Reflection Group dedicates a large part of its report to groups of companies.

So it is deeply regrettable that the SPE dossier is in a dead end, in particular on the question of workers involvement. And we know that we are now at a critical moment for this dossier.

Of course, workers’ rights should be preserved, but Member States should not use the EU law to export a national system.

As we are now stuck due to the unanimity rule, the Reflection Group suggests a way out in the elaboration of a new directive or an amended 12th directive for a simplified company template[1] "which would allow single-member companies, both individual entrepreneurs and holding companies, to save on transactions costs and unnecessary formalities".

This proposal deserves to be examined, but it could not fulfil the same objectives as the SPE proposal. And in 2008 the Impact Assessment on EPC was rather sceptical about the alignment of national company laws for private companies which would face political difficulties and would not be a good solution.

Besides that, we do not see the necessity for new legislative initiatives at European level.

And we think that soft law still has an important role to play: through recommendations by the European Commission but mainly by businesses.

I intentionally do not use the expression "self-regulation" because it is misleading, it gives the false impression that the regulation is issued by business for business without taking into account stakeholders' concerns, which is not the case in corporate governance issues.

Each time we face a scandal or a crisis and this one is particularly severe, the regulation by professionals is challenged.

But regulation by professionals is both a complement to regulation and a credible alternative to regulation, if it is not conceived as a way to escape legislation but as a higher level ambition than the statutory regulation.

Tremendous progress has been made during the last 20 years and especially the last 10 years.

If the European Commission in 2006 decided not to harmonise the substance but rather the codes' enforcement mechanisms, it is, we think, because it trusted that kind of regulation.

Its main advantage is flexibility. So we are pleased to see that the Reflection Group considers that "EU harmonisation should respect the National corporate governance systems of the Member States and should strive to further the trend towards increased flexibility and freedom of choice in respect of company forms and the internal distribution of powers".

[1] In France, we already know the simplified joint stock company which may be established by one or more persons, which resulted from business initiative.

It is now well established that transparency through disclosure is a powerful tool. A lot has been achieved, it would be difficult and counterproductive to go further.

The “comply or explain” rule is fundamental in that sense. For example, it allows small caps to explain why they do not apply one or several recommendations.

In December 2009, a Riskmeticks Study concluded there is broad support for the “comply or explain” principle among regulators, companies and investors.

We know that there are of course still margins for improvement especially in the monitoring of the rules, but we are working hard on it.

Thank you very much for your attention.