CCBE

Conseil des Barreaux de l'Union Européenne
Council of the Bars and Law Societies of the European Union

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Professor
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20/06/2002

Re.: Consultative Document "A Modern Regulatory Framework for Company Law in Europe"

Dear Professor Winter,

Following the hearing on May 13 the Company Law Committee of the Council of the Bars and Law Societies of the European Union (CCBE), the officially recognised representative organisation for the legal profession in the European Union and the European Economic Area, representing the bars and law societies of the EU, the EEA and the Applicant Countries and their ca. 500,000 lawyer members, hereby submits its written comments on the above mentioned Consultative Paper, following the sequence of the questions posed therein. However, before doing so, we would like to express our appreciation for the quality of the consultative document.

<u>Question 1:</u>

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 facilitate the efficient and competitive operation of business across the Union?

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?

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Response:

a) In principle yes, however due regard should be given to other interests concerned, in particular shareholders' and creditors' interests. The right balance will depend on the definition of interests that a company must take into account in its conduct of business.

b) For the moment no.

Question 2:

a) Should the European Union in future initiatives in company law make use of alternatives as indicated to primary legislation in directives?

b) What areas of company law and which alternatives are particularly suited for such an alternative approach?

Response:

a) and
b) The non-binding nature is the strength and the weakness at the same time of the alternative approaches. The strength insofar as in areas where great differences exist in the national laws and where accordingly full harmonisation by directives is difficult, alternative approaches may lead to a gradual harmonisation over time. The weakness because it is open whether such steps will be undertaken on a voluntary basis and what the result of harmonisation eventually will be. Nevertheless, we think alternative approaches are worth a try although we are not overly optimistic. Of course, there should be full consultation at all stages also in the case of alternative approaches.

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?

Response:

a) Disclosure requirements indeed can sometimes be an efficient regulatory tool. The answer to the question largely depends on to whom the disclosure is to be made and what the consequences are of a failure to disclose. Efficient disclosure requirements require significant consequences in case of non-compliance.

b) We are not yet in the position to answer this question.

<u>Question 4:</u>

a) Should the European Union in devising new company law regulation and amending existing company law regulation distinguish more between listed companies, open companies and closed companies?

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?

<u>Response:</u>

a) In our view, the main distinction should be between listed companies and unlisted companies. Careful attention should be given to the definition of listed versus unlisted. The Consultative Paper looks to the listing on one or more stock exchanges however the meaning of such term could well differ from country to country in particular as regards alternative trading organisations.

b) The areas of company law where this distinction is most relevant, include in particular corporate governance, rights of shareholders, accounting and audit. Listed companies require greater obligations for disclosure and transparency. A proper interface between Company Law and Capital Markets/Securities Law is important.

<u>Question 5:</u>

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?

<u>Response:</u>

We fully agree that the object of combating fraught and terrorism should be achieved by specific law enforcement instruments <u>outside</u> company law. To use one area of law for purposes of other areas of law in the very end is counterproductive.

<u>Question 6:</u>

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?

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?

c) Should the European Union facilitate or provide for the co-ordination of public company registers in the Member States?

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?

Response:

a) Yes. There should be an obligation for correctness and completeness.

b) Same.

c) Yes. The probably most significant problem to be looked into is the language problem. A practical solution could be that all registers are kept bilingual, namely in the language of the Member State and in addition in another language to be selected from the three or four most frequently used languages in the EU. However, even this modest approach will encounter considerable difficulties since the registers' personnel is unlikely to command foreign languages.

d) In connection with the question whether there should be a central electronic filing system in each Member State or one system at the European level, the difference between listed companies and unlisted companies in our view is not overly significant. The registration details of an unlisted company as of today are more difficult to find than the details of a listed company. Without any doubt a central company register in Europe would be of significant importance, and all possibilities in this direction should be investigated. However, we wish to point out to the difficulties that the CCBE encountered when at the request of the EU Commission looking at the idea of a Central European lawyers' directory in electronic form. Because of the difficulties encountered, the CCBE in the end settled for links between the various national lawyers' directories. This may be a feasible short term solution also in the area of company law registers.

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?

Response:

To improve or strengthen corporate governance would be the right tendency for listed companies.

It should be noted that several European countries, i.e. Denmark, Ireland and UK, already today follow the comply or explain concept. In this context the difficult question arises whether a non-compliance explained with good reasons could have negative consequences for the board members, which nature such consequences could have, and how they would be dealt with by Directors' and Officers' Liability Insurance. The answer may depend on the legal or factual weight of the Code of Best Practice underlying the comply or explain obligation.

At the hearing of May 13 we have informed you of the Greek Bill of May 2001 on Corporate Governance in Listed Companies. This bill in the meantime has been adopted by parliament and was published as Act 3016/2002 in the official gazette of May 17, 2002. The Bill has undergone a number of modifications during the legislative process. It is now required that the (unitary) board must have at least two independent members among the non-executive members, except where the shareholding minority is represented on the board. In the final version shareholders representing more than five per cent of the paid up capital of the company or of a group company are eligible as independent board members; the provision to the contrary contained in the Bill was eliminated so that the requirement to have independent board members has been eased during the legislative process. However, the right of the independent board members to submit a report of their own to the shareholders meeting has not been removed. This right is an individual right of each independent board member. The other non-executive members do not have such right for special reports. There is no specific statutory provision regarding an obligation to make a special report. The obligation for a special report would follow from the obligations of the board members towards the shareholders.

The aforesaid Greek law also requires listed companies to have one or several internal control officers. They are appointed by the full board. They report to one or up to three non-executive members of the board. They are independent and have the right to inspect the books and records of the company. Board members must answer their questions and must make available to them all means required for the performance of their duties. They are obliged to be present at the shareholders' meeting. They may pass on information to the supervisory authorities or request the help of the supervisory authorities only with the prior consent of the board. This consent requirement was added during the legislative process.

The aforesaid Greek Law on Corporate Governance in Listed Companies requires further that listed companies must have two statutory auditors, comparable to the situation in France and (until 2005) Denmark. Of course, this bears on the issue of independence of the statutory auditor which has been the subject matter of a recent Recommendation of the EU Commission. In this context we would like to bring to your attention the results of a recent analysis carried out by economists from MIT, from Michigan State University and from

Stanford University, all USA on the relation between auditors' fees for non-audit services and earnings quality (copy enclosed). A brief summary can be found on the page preceding the Introduction.

We hope that you find the foregoing factual information useful.

Question 8:

a) Should there be more disclosure on corporate governance structures and practices of companies in Europe?

b) If yes, should such a disclosure be given only by listed companies or by all "open" companies or even by "closed" companies?

c) Should this disclosure include an indication whether a certain corporate governance code is followed and where and why the code is not complied with?

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?

Response:

a) Yes.

b) Such a disclosure should be given by listed companies. With regard to unlisted companies it would depend to whom the disclosure would have to be made.

c) Yes.

d) There should be transparency of the remuneration of individual board members in listed companies.

e) In both (monistic and dualistic) systems one should first wait and see whether transparency on individual management/executive board member remuneration will not work as an effective ceiling on excessive trends. If the transparency is not sufficient it could be necessary to give shareholders a role in fixing principles and limits of management/executive board member remuneration. However, the shareholders should not be given the right to determine the remuneration of individual board members.

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?

Response:

Yes. The right to apply for the ordering of a special investigation should be given to a qualified minority of not less than 5 per cent and not more than 25 per cent. Appropriate would probably be 10 per cent. If in doubt we would go for the lower number.

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?

Response:

Yes. However, the EU framework rule should be so that the desired aim is clearly defined, with the Member States to decide on the systematic approach to reach such aim. The definition of the aim should specify whether in case the company continues to do business when it can no longer pay its debts, the directors are accountable only for the incremental liabilities of the company or also for the base liabilities. The latter in our view would be excessive and would lead to more insolvencies. In our view this is a matter for Company Law and not for Insolvency Law.

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?

b) If yes, please give examples of what rules and recommendations a European corporate goverance 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?

Response:

a) We consider a voluntary European corporate governance code as unfeasible at the moment given the failure of the efforts for the so-called Structure Directive.

b) Not applicable.

c) Yes. A European Corporate Governance Code Committee, following the example of the auditing profession, could be useful in the co-ordination of national codes.

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 ?

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?

Response:

a) Yes (with the exception of the UK member that advocates to encourage website devices on a voluntary basis). However, consideration should be given to the liability risks for the company from making available such devices.

b) Communication by electronic means should be not an obligatory but only an alternative means of communication for the shareholders.

With regard to question 12 and some of the following questions it should be noted that recent media reports on inaccuracies and security breaches in private sector operated electronic systems in the securities field may lead to ongoing shareholders' suspicion.

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?

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)?

Response:

a) Yes. However, a ceiling on the number of questions per individual shareholder should be considered, in order to avoid blocking of shareholders meetings. There should be, at the European level, an obligation to answer the questions, except for defined

circumstances, and an effective remedy in case the answer is denied without valid reason.

b) The right to ask questions at the meeting should vest in every single shareholder, regardless of the size of his shareholding, and no submission prior to the shareholders' meeting should be required. The right to put an item on the agenda of the shareholders' meeting should require an aggregate shareholding of not more than 10 per cent. As regards items on the agenda each shareholder, regardless of his shareholding, should have the right to submit motions at the meeting, with a possible ceiling on the number of motions per shareholder per item on the agenda or on all items of the agenda, again in order to avoid a blocking of the meeting.

Question 14:

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

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?

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 (webcast) and satellite?

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?

Response:

a) Yes.

b) Listed companies should be required to do so however not their shareholders.

c) Listed companies should be enabled to do so.

d) No.

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?

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

Response:

a) No.

b) No, not as a matter of company law. The issue of a requirement to exercise voting rights should be left to the corporate governance and capital market rules applicable to the institutional investors.

Question 16:

a) Do you believe that legal capital serves all of the functions listed above (protection of creditors' interests, protection of shareholders, measure of shareholders' rights, capital adequacy)?

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

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

Response:

a) It serves all of the functions, except for the last function.

b) Since there are countries that do not follow the legal capital system there may indeed by possibilities of reaching the same or similar results by means of other techniques. However, this requires an in-depth study, in particular as regards the question whether such other techniques are compatible with the other legal environment. In this context obligatory insurance coverage, similar to deposit insurance protection schemes, may be a possibility worth consideration.

c) This question is more for the economists than for the lawyers. From our viewpoint as lawyers there is, as regards the competitive advantage or disadvantage aspect, no real reason for radical reform of the traditional legal capital system prevailing in Europe.

Question 17:

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

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

Response:

a)
and
b) Priority should be given to the first approach (legal capital in the EU). The SLIM proposals should be taken up, in particular in the area of non-cash contributions to capital. Formalities should be eased wherever possible provided there is no materially negative effect on substantive protection. The second (US) approach appears too radical since it would give up entirely the present system of legal capital. The third (mixed) approach should be explored carefully in order to determine whether improvements of the present legal capital system are possible without giving up the present system.

Question 18:

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

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

c) Do you consider that "wrongful trading" is an effective instrument for creditor protection?

d) Do you consider that subordination is an effective and desirable way of enhancing creditor protection?

e) Are there any other possibilities worth considering?

Response:

a) No, given the low amounts of minimum capital requirements presently in effect.

b) Except for our member from the UK we would not abolish the minimum capital requirement. We would not advocate, either, a stricter requirement than the one presently in force since it achieves its intent to act as a first barrier against financially unsound companies.

c)
and
d) Both "wrongful trading" and compulsory subordination of insider claims are an effective instrument for creditor protection. Whether the arguments pro and con submitted are right or wrong is a question more for the economists than for the lawyers. From a legal point of view it should be noted that both such instruments for creditor protection follow very different concepts, both as regards requirements and scope of protection, and are not mutually exclusive. More important even, both

instruments come into play to protect creditors rather late in the life of a company, and they do not superseed the need throughout the entire life of a company for creditor protection through appropriate instruments (e. g. directors' liability).

e) We see no other possibilities at the moment.

Question 19:

a) Do you believe that other forms of consideration, such as services, should be allowed as valid forms of consideration for capital?

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?

Response:

a) No. As regards services in particular, the claim for services to be rendered is not enforceable, and in addition services yet to be rendered are extremely difficult to value. Services already rendered are a different matter, they produce a financial claim which can be the subject of a contribution in kind to capital.

b) The prohibition of financial assistance for the acquisition of own shares should not be eliminated however it deserves further investigation whether financial assistance should be allowed if it complies with the general rules for distributions to shareholders.

Question 20:

a) Are groups of companies frequent in your country?

b) What are in your view the specific advantages, disadvantages and risks presented by groups?

Response:

a) Yes, groups of companies are frequent, at varying degrees, throughout at least the major countries of the EU.

b) This question is primarily for the economists to answer. Legally speaking a group of companies is the combination of of several small legal entities into one large business entity. While this creates advantages for the parent company, it may create dis-advantages and risks for minority shareholders and outside creditors as regards lack of transparency, undue influence of the parent company, unjustified reliance on parent company support etc.

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?

b) What should such enhanced transparency include?

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

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

Response:

a) Yes, at least for listed companies. The rules should follow the spirit rather than the letter of the rule approach.

b) Group accounts at present may be misleading insofar as financially weak subsidiaries do not shine up and may even benefit from the overall good picture given by the group as such. Such benefit is dangerous as long as it is not accompanied by whichever form of responsibility of the parent company for the financial well-being of the subsidiary. Greater transparency could therefore pertain to listing chief financial data of major subsidiaries. In any case, the group accounts should include an intra-group debt table.

c) The enhanced group transparency rules should apply at least to listed companies.

d) For corporate purposes no special rules are needed in this regard for banks and other financial institutions. However, the banking and other regulators may require additional group transparency.

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?

Response:

The "safe harbour" desire within the management of group companies does exist, however this is not a problem of first priority. Practice of management seems to be able to deal with the problem in most cases in a satisfactory way. Apart from that, we wonder how a safe

harbour can be created without determining to whom a director owes his fiduciary and other duties and whether such duties are pertained to his company or also to other group companies, and to shareholders, shareholders of other group companies, and creditors of his company and of other group companies.

Question 23:

a) Are pyramids of companies frequent in your country?

b) Are they useful or harmful or indifferent?

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?

Response:

a) Pyramids seem to be infrequent in Denmark, Finland, UK, Germany, Spain, Portugal and Poland. They are - contrary to the oral submission - frequent in Italy, not so much as an incidental result of mergers but as an intentional technique through a minimum capital investment to achieve maximum influence.

b) and c) Pyramids do not present specific risks different from the risks of any other group structure.

d) There should be no compulsory ceilings on the number of companies and of outside shareholders involved in a pyramid. The general rules on groups of companies (in particular on transparency, protection of outside shareholders, directors liability) are sufficient. There should be no quantitative ceilings in connection with groups of companies either.

Question 24:

a) Do you agree that Member State laws which automatically deny recognition to any company which has its real seat in a state other than that of its formation should be abolished under EU law, as disproportionate inhibitions of commercial freedom and legal security?

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?

Response:

This chapter in our opinion represents a priority area. This applies in particular to cross-border mergers/spin-offs and transfers of seat.

a) Yes.

b) Yes, in principle. However, we see significant difficulties to define the requisite "substantially based" connection.

c) In principle yes, however there are many details to be considered.

Question 25:

a) Should the EU requirements for special provisions governing merger decisions in acquiring companies be removed?

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?

Response:

a) No.

b) No.

Question 26:

a) Should Member States be permitted to relax the directive requirements in the case of acquisitions of 100%-subsidiaries?

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?

c) Or should such requirements be removed in all such international cases, or in all cases, international or not?

Response:

a) Yes.

b) Yes.

c) -

Question 27:

a) Should the creditor protection requirements for reductions of capital, mergers and transfers of registered office be aligned as proposed above?

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?

Response:

a) Yes.

b) -

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?

b) Should minority shareholders have a corresponding right to be bought out where the 90-95% threshold has been reached?

c) In companies with more than one class of share should the rule operate on a class by class basis?

Response:

a) Yes. Member States should however be permitted to have majority requirements of below 90 per cent. E.g. Ireland has 80 per cent.

b) Yes.

c) Yes.

Question 29:

Is there a need for legislation at the EU level providing for restructuring in ways not already discussed above?

Response:

No.

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?

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?

Response:

a) Yes, in particular the SME which account for more than 90 per cent of all firms and 2/3 of all jobs in Europe have a specific need for the EPC as a new European legal form of company, similar to the SE for large enterprises. The European legislator should make this European legal form available as an optional alternative to national forms of private companies and to the SE.

There is a significant cost argument in this context. Unlike large enterprises SME usually have no in-house legal departments at all or only of small size. An SME therefore faces a significant in-house manpower and/or outside counsel cost problem when setting up and operating subsidiaries in different European countries each of which has its own corporate law regime. This barrier to the cross-border establishment of subsidiaries would greatly be reduced if the legal form of the subsidiary in all countries were the same. Everyone in the SME dealing with the European subsidiaries would benefit therefrom since the corporate life of all such subsidiaries would follow the same rules.

The creation and operation of an SE is very complicated because of the co-determination problem. The EPC regulation can be much simpler, by limiting the number of employees to 500 so that co-determination is not an issue. Even with this ceiling the EPC would be available to almost all SME.

The EPC, compared to the SE, would provide much greater possibility for custom-tailoring the articles of association to the needs of the shareholders. Standard articles of association attached to the EPC regulation would provide useful guidance.

It would mean a discrimination of the SME to give big business with the SE a specific European company form for European activities, however to deny the SME a similar European company form suitable for their needs and purposes.

Such discrimination would even less be justified since the extreme co-determination difficulties that have characterised the SE regulation would not be applicable in the case of the EPC.

For these reasons the European Economic and Social Committee in March 2002 has published, after expert hearings in Brussels, an own-initiative opinion which was unanimously adopted in a plenary session. This initiative had been preceded by initiatives from France in 1993 and the publication of outline suggestions for an EPC in November 1997 by a working group of academics and practitioners from France, The Netherlands, the UK and Germany. These EPC suggestions were presented to the public in a conference held in Paris in December 1997 organised with the support of Eurochambre and the French CNPF - Conseil National du Patronat Francais (now MEDEF). An enlarged working group with members from CREDA and CNPF and with academics from the universities of Paris, Heidelberg, Exiter Louvain and Groningen and a number of representatives of several professional associations (including UNICE, CBI, BDI and DIHT) has then drafted the Statute for the EPC. This draft was published by the Paris Chamber of Commerce and the CNPF in September 1998 and has been presented in coferences and discussed with practitioners - legal advisors, representatives of professional associations and in-house legal counsels - in several European countries (i. a. London, Paris, Heidelberg, Rotterdam). Members of the working group have also developped draft articles of association which could be used as templates for the formation of EPC. This initiative for the EPC has received strong support in all these discussions. Both SME and multi-national groups have expressed a need for a European company form alternative to the SE which offers a more suitable, flexible framework for joint ventures and subsidiaries. The culmination of this support development has been the resolution of the European Economic and Social Committee of March 2002 mentioned above.

b) -

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?

Response:

Yes.

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?

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?

Response:

a) Yes. We realise that a few of the supporters of principle of the EPC have difficulties with the exclusion of any fall-back on national company law. We think, however, that the discussion on this issue is more of an academic nature. As practitioners we expect the SME practice to successfully deal with this issue. The national courts and the European Court of Justice have demonstrated so far that they very well are able to interpret and develop further European company law from itself. They will be able to do the same with the EPC. After all, this task today is much easier than some decades ago when harmonisation of European company law started.

The high number of legal disputes regarding e. g. GmbHs in Germany would not be a counter-argument. In relation to the aggregate number of GmbHs there are probably fewer court cases involving GmbHs than involving AGs.

b) -

Question 33:

a) Do you consider that the enactment of the proposed regulations is necessary or desirable?

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?

Response:

a)
and
b) In our view only the regulation of the European cooperatives has real economic importance however we do not feel expert in the entire area.

Question 34:

a) Do you think there should be harmonised rules in Europe for these alternative forms of enterprise?

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?

Response:

Same.

Question 35:

a) Do you think there is a need for a specific regulation of the European Foundation?

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)?

Response:

Same.

Question 36:

a) Do you think a definition of "enterprise" in EU-law would be useful?

b) If so, do you agree on the elements of economic activity and organisation as the main elements in the definition?

c) Do you think basic harmonised rules should be applied only to limited liability entities?

Response:

a) The usefulness of a definition of "enterprise" in EU-law depends on the purpose of such definition.

b) -

c) -

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?

b) Do you think other issues should be addressed in an Enterprise Law Directive (financial reporting, branches, groups of enterprises, transformation, transfer of seat)?

Response:

a) Not yet.

b) We see no need for an Enterprise Law Directive.

We will be pleased to answer any questions that you may have on our foregoing submission.

Sincerely yours,

Hans-Jürgen Hellwig
Chairman
CCBE Company Law Committee

Enclosure