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FREE MOVEMENT OF CAPITAL, COMPANY LAW AND CORPORATE GOVERNANCE
Company law, corporate governance and financial crime

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MINUTES

9th Meeting of the Advisory Group on Corporate Governance and Company Law Brussels, 25 February 2008

(1) Introduction

The Commission services welcomed the Members of the Group.

(2) Approval of the agenda

The agenda was approved.

(3) European Private Company

The Commission services summarised the conclusion of the discussion on the SPE at the sub-group meeting of 12 February. The Members were asked to express their opinion on several issues.

There was a general agreement as to the main principles of the future SPE Statute, i.e. that it should be:

- generally accessible to all kinds of shareholders (single and multiple shareholders, natural and legal persons);
- capable of being set up from scratch, by the merger of existing companies, by division or by transformation of an existing company; free to have its headquarters in any EU Member State regardless of its place of registration;
- able to merge and transfer its registered office cross-border;
- shareholders should be free to determine the internal organisation of the SPE;
- the SPE statute should be as self contained as possible and rely as little as possible on national company law; however national tax, labour, insolvency law would apply. One member underlined that the SPE regulation shouldn't rely at all on national company law.

(a) Should the SPE be generally accessible or should it be cross-border by nature?

Overall the Members were in favour of giving unlimited access to the SPE form irrespective of whether a company's activity is domestic or cross-border. However, some Members expressed their concern about possible abuses of the SPE form and

the likely political opposition from the Member States which would see the SPE as a form competing with their national company forms.

(b) Should the SPE have a minimum legal capital? If so, what should be its amount?

While some Members stated that no minimum start-up capital should be required for the SPE, others were of the view that some minimum capital could serve as a seriousness test, help avoiding abusive uses of the SPE form and be more politically acceptable for Member States in which the legal capital is part of the legal tradition. A Member stated that when fixing a minimum capital requirement for the SPE, if any, one should consider that economic conditions are different in Member States and a low capital in one country might be considered as high in another.

(c) What should be the provisions on capital?

There were different views on this point. One Member said that the results of the KPMG study on the regime alternative to the 2nd company law directive should be taken into account when choosing the system for the SPE. This Member stated that the preferred solution there seemed to be the balance sheet test and directors' solvency declaration. Another Member pointed out that it is important to choose a system that would be useful in practice and give legal certainty to creditors and other stakeholders. A view was expressed that the system on distributions should not make it more difficult for SMEs to obtain credit.

(d) How could the statute protect creditors' interests?

The Commission services stated that in order to ensure sufficient transparency for creditors the SPE should be obliged to publish important information about the company in the register. A discussion emerged on the public disclosure of the shareholders' list of private companies. There are different approaches in Member States. While in UK the identity of shareholders is public, in DK the obligation to disclose such list applies only to private companies, which reach a minimum capital of a public company. In LV and FI the information on who controls company is very sensitive and not disclosed to the public. The Commission services said it would be useful to have the information about the situation in different Member States. In this context one Member suggested that a central system where the information about the relevant national case law on the application of the SPE regulation would help ensuring consistent interpretation of its provisions. One Member stated that it would be very difficult to establish a directors' liability system for the SPE separate from the national law as it is very much rooted in criminal and insolvency law.

(e) What about directors' duties and liability?

Some Members suggested that the SPE statute should set out clearly defined general duties of directors and leave detailed duties to be defined in the articles of association. According to a number of Members the issues related to liabilities should be left to the national law. One Member stressed that the SPE statute should state clearly where the distinction between the regulation and the national law to avoid grey zones. Another Member underlined that the forum (court) competent for dealing with these issues should be clearly identifiable (e.g. the court of the Member State of the SPE's registration).

(f) What are the essential rights of minority shareholders?

According to several Members some basic minority protection rights should be granted by the regulation while leaving the possibility to extend these basic rights to the articles of association. The necessity to provide for an exit mechanism was mentioned by a number of Members. A Member stated that a minority should also have a basic right to information about the company matters. Another Member mentioned the right to challenge directors' decisions as an important minority right.

(g) How to deal with employee participation?

The Commission services informed that the political acceptance of the SPE statute would depend to a great extent on how the employees' participation issue is solved. Generally Members agreed that for this reason the SPE should take inspiration from the existing rules. One Member underlined the importance not to impose any model of workers' participation and in particular not to put in place the same regulation of the SE in this matter. It was stated that the issue could have less relevance in the case of private companies, which have fewer employees.

(4) Future of the Advisory Group

The Commission services announced that in order to ensure continuity of the Group's expert advice in relation to the Commission on-going initiatives on the European Private Company and simplification of company law its mandate will be prolonged until June 2009. All Members present at the meeting expressed their intention to continue their work in the Group. Other Members will be asked to express their intention in writing.

(5) Information points by the Commission services on other issues

(a) Simplification of company law;

The Commission services informed that the proposals on modifications to the 1st and 11th company law directives will be adopted in the fast-track procedure in April 2008. The proposals on modifications to the 3rd and 6th company law directives are scheduled for adoption in the normal procedure, most probably in May/June 2008.

(b) Alternative Capital; KPMG study on the Second Company Law Directive;

The Commission services informed that following the publication of the results of the KPMG study a decision has been taken not to put forward any proposal for the modification of the current capital maintenance system of the 2nd company law directive for the time being.

(c) Shareholders' rights.

The Commission services informed that a political decision on whether to propose a recommendation on shareholders' rights complementary to the directive on this issue is pending.

Ludmiła Żalik
Secretary to the Advisory Group