



EUROPEAN COMMISSION

Internal Market and Services DG

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

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ADVISORY GROUP ON CORPORATE GOVERNANCE AND COMPANY LAW

MINUTES OF THE MEETING OF 2 JUNE 2005

1. APPROVAL OF THE AGENDA

The agenda was approved.

2. INTRODUCTION AND WELCOME

The Chairman welcomed the participants to the first meeting of the group. An introductory *tour de table* by the members took place.

3. ROLE OF THE ADVISORY GROUP

The Chairman explained that the role of the group will essentially be

- (1) to provide technical advice to the Commission on its initiatives in the field of corporate governance and company law with a view to prepare better legislation. The group will be consulted on those initiatives at all stages of the procedure to the fullest extent possible. Consultations to the group are without prejudice to consultations with the public and with Member States;
- (2) to reflect, discuss and give advice to the Commission on what should (and should not) be done in the field of corporate governance and company law at EU level.

The group will meet three or four times per year. Further to the formal meetings, consultation documents may be sent to the members of the group for their written reaction.

The Chairman explained that the role of this Group is different from the European Corporate Governance Forum, which is a reflection body on possible convergence of national practices with regard to Corporate Governance. The Chairman indicated that the Commission services will keep the Group informed of the developments that take place in the Forum.

4. WORKING METHODS

The Group agreed to use, whenever possible, a common language for discussions in future meetings, without having recourse to interpretation.

The Group agreed to use the e-mail as a preferred method of distribution of documents. Upon their agreement, a list with their contact details will be distributed to the members of the group.

The Chairman informed the group that, in some cases, the group will be consulted at an early stage of the procedure ultimately leading to the possible adoption of a Commission document. In this context, the Commission services may be obliged, not in all cases, to request persons attending the meetings not to reveal the information obtained during the work of the group. The Commission services will mark the confidential documents.

The Group agreed to provide transparency to its work by publishing the minutes of the meetings on the Internet site of DG Internal Market. Transparency of work will be organised in a manner that does not prevent the members of the Group from freely expressing their different ideas and opinions, in order to maintain a spirit of confidence and open debate, without the fear of public release.

The Chairman explained that *ad hoc* experts with particular knowledge on specific issues may be invited to participate in the work of the group. He invited the members to think of possible persons whose added value for particular subjects may justify the invitation.

5. ADOPTION OF THE GROUP'S RULES OF PROCEDURE

Members were invited to provide comments on the group's rules of procedure in advance of the second meeting. If no comments were received, the rules would be considered to be approved at that meeting.

6. INFORMATION BY THE COMMISSION SERVICES

6.1. Consultation on Shareholders' rights: cross-border voting rights

The Commission services gave an introduction on the initiative, presented the second consultation paper and briefed the Group on the current preparation of an impact assessment, meant to preliminarily evaluate the costs and benefits of these possible measures on shareholder rights.

With regard to the legal form of such measures, some members of the Group supported the idea of a recommendation introducing best practices rules. The possibility to regulate the issues related to the logistics or procedural aspects of calling a general meeting in a directive and the issues related to the rights at a meeting in a recommendation was also discussed.

The Group also addressed the possible scope of such measures. The vast majority of members considered that any future instrument should apply to listed companies in general rather than to be limited to companies with non-resident shareholders only, who in bearer shares systems were difficult to identify.

On the issue of the "ultimate investor", most of the members agreed that such a concept was not a prerequisite to facilitating cross-border voting. The relation between formal

shareholders and possible ultimate investors was rather a matter of contractual law and, as such, usually dealt with at national level. The opinion was also expressed that the rights of “ultimate investors” towards intermediaries could be addressed in a recommendation.

6.2. 10th Directive (cross-border members): legislative process

The Commission services informed the Group about the state of play of the legislative process on the 10th Company Law Directive on cross-border mergers and provided a short summary of its contents for the Group.

According to some members of the Group the employees’ participation rules in the proposed form would result in a limited application of the Directive, as mergers would only occur between companies coming from jurisdictions with similar standards of workers’ rights. Concern was expressed that the ambiguity of the wording in Art. 14(2), an exception to the general principle that employee participation rules of the Member State of the company created by merger apply, could cause divergent interpretations in different Member States with regard to its scope of application.

In reply to a question raised by some members concerning the exclusion of the collective investment funds (UCITS) from the scope of the 10th Company Law Directive, the Commission services explained that the Directive was intended to cover limited liability companies, whereas UCITS do not always bear this legal form. Therefore, their exclusion from the scope of the Directive avoids the risk of discriminatory treatment of UCITS in the EU. In addition, the Commission informed the members of the Group of its intention to revise the UCITS legislation.

6.3. 2nd Directive (formation, maintenance and alteration of companies’ capital): legislative process

The Commission services introduced the Commission’s proposal of 29 October 2004 for amending of the 2nd Company Law Directive (formation, maintenance and alteration of companies’ capital). A brief overview of the state of play of the legislative procedure was provided.

As regards the consideration in kind, some members of the Group expressed a general concern that, although the changes are intended to simplify the Second Directive, they are unlikely to do so in practice because the conditions attaching to the simplifications are unworkable or impractical in practice. In their view, greater flexibility to companies should be granted (e.g. in relation to the calculation of the value of shares) and simplification of the text should be deeper by reducing the procedural requirements and thus reducing costs.

6.4. Capital: squeeze out and sell out

The Group addressed the issue of introducing and harmonizing the squeeze-out/sell-out rights in European legislation beyond the scope of the Takeover Directive. Some members pointed out that outside takeover cases the sell-out right could not be considered as complementary to the squeeze-out right. A number of members of the Group suggested that minimum standards would be needed at European level as regards squeeze-out and that the sell-out could be provided as an opt-in possibility for companies. Yet many members stressed the importance of enabling the companies to

regulate these matters in their by-laws, without making them mandatory. But others underlined the fact that in some countries it is a real issue for small caps.

The question was also raised about the practical impact of regulating squeeze-out/sell-out for listed companies outside takeover cases, as such situations (when one individual shareholder holds over 90% of votes) were considered by some members to occur only rarely. The view was expressed that squeeze-out and/or sell-out should be extended beyond listed companies to all stock corporations or public limited companies, whose legal form qualifies for a listing under the national laws.

Furthermore, the discussion extended to the desirability of more flexibility with regard to thresholds for squeeze-out or sell-out.

In addition, empirical evidence was quoted concerning cases of abuse of majority positions in squeeze-out contexts. Also, examples were given of abuse of minority positions in sell-out situations.

6.5. Future study on alternative capital

The Commission services announced to the members of the group that the Commission intends to commission a study on alternative capital in the near future. Because of the legal requirements in relation to the tender procedure the terms of reference of the study were not made available to them. The Commission services indicated that as soon as the call for tenders has been launched, a copy of the terms of reference will be sent to the Group's members, together with an invitation to provide the Commission services with related background information. The Commission services also indicated that once selected, the person(s) that will conduct the study may be invited to come to a future meeting of the Group.

6.6. Other issues (transfer of seat)

On their own initiative, the members of the Group exchanged their views on the possible Commission proposal for the 14th Company Law Directive on the transfer of registered office. While some members reminded that the European Court of Justice has already developed case-law on the transfer of seat, others stressed that this case-law does not address all the relevant questions. Although conceptually in favour of such a proposal, a number of members warned that without tax neutrality on the transfer of seat such legislation would not be useful for companies. In addition, the view was expressed that such a directive would require a harmonisation of shareholders' rights to ensure that in case of transfer of seat the level of their protection does not diminish.

7. FUTURE WORK

The Chairman informed that the next meeting will take place end of September/beginning of October, though the date has not yet been fixed. The agenda will be sent after the summer. Possible topics for discussion may include: shareholders' rights, alternative capital, future possible Commission initiatives in relation to transfer of company seat, institutional investors, board structure etc. The Chairman invited the members of the group to propose issues for future discussion in advance of the next meeting. Commission services were requested to provide a written update on the implementation of the 2003 Action Plan on company law and corporate governance.

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Secretaries to the Advisory Group

* With the cooperation of Ionut Raduletu.