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The European Company Law Action Plan Revisited: An Introduction

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This introduction is based on the introductory speech held at the conference on „The European Company Law Action Plan 2003 Revisited“ on 9 January 2009 in Leuven at the occasion of the 20th anniversary of the Ran Ronse Institute. The introdoctury character of the speech has been maintained, references to the contributions made to this conference and reprinted in an updated version in this book have been added as well as some footnotes for further reading.

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Abstract

The European Company Law Action Plan of 2003 has been in the center of corporate law discussions in Europe for almost a decade. This introduction re-visits five of the main reform problems and outlines reform perspectives beyond the financial markets crisis. The five areas that the introduction re-examines are legal capital, corporate governance, one share/one vote, financial reporting, and corporate mobility. For the future, the introduction identifies as critical a mixed system of regulatory approaches, i.e. between market and regulation as well as between national regulation and European rules, a focus on adequate enforcement, and prudence in the aftermath of the financial crisis.

Keywords: European Company Law Action Plan, legal capital, corporate governance, one share/one vote, financial reporting, corporate mobility, regulatory strategies, enforcement

JEL Classifications: G3, G30, G34, G38, K22

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The European Company Law Action Plan Revisited: An Introduction[#1]

Klaus J. Hopt

"The European Company Law Action Plan 2003 Revisited" is an excellent topic for celebrating the 20th anniversary of the Jan Ronse Institute at the Catholic University of Leuven. The Institute was founded in 1988 by the late Professor Jan Ronse, a highly renowned authority in Belgian and Dutch company law, with the goal of carrying out education and research in the field of company, association, and financial law. In doing so, Professor Ronse was a pioneer and a visionary.[2] We must remember that in the early 1980s the slogan of "Eurosclerosis" was circulating, the Delors Commission with its White Book on the Completion of the Internal Market of 1985 was far from completing its turnaround, and on 20 September 1988, Margaret Thatcher gave her widely noticed speech in Brügge declaring Europe to be a mere "family of nations." At that time European company law was in its infancy, and it did not seem to be a promising child. But Professor Ronse's vision came true, and the Ronse Institute accompanied this growth with its activities. The cumulative list of publications from the company law group at the KU Leuven and its Ronse Institute is truly

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[#] Cf. KOEN GEENS/K. J. HOPT, eds., The European Company Law Action Plan Revisited, Reassessment of the 2003 priorities of the European Commission, Leuven (Belgium) 2010. Page numbers refer to the pages in this book.

[1] Professor of Law and former Director of the Max-Planck-Institute of Comparative and International Private Law in Hamburg, member of the High Level Group of Company Law Experts of the European Commission. This introduction is based on the introductory speech held at the conference on „The European Company Law Action Plan 2003 Revisited" on 9 January 2009 in Leuven at the occasion of the 20th anniversary of the Ran Ronse Institute. The introdoctury character of the speech has been maintained, references to the contributions made to this conference and reprinted in an updated version in this book have been added as well as some footnotes for further reading.

[2] Cf. the academic session commemorating Professor JAN RONSE (1921-1988) / Academische zitting in herinnering aan Professor Jan Ronse (1921-1988), chair: WALTER VAN GERVEN, lectures by JAAP WINTER on „Moving forward EU Corporate Governance and Company Law" / „Voortgang maken met Corporate Governance en het Vennootschapsrecht in Europa", and by JO VANDEURZEN on „The message of Professor Jan Ronse for the lawyers of tomorrow" / „De boodschap van Professor Jan Ronse voor de juristen van morgen", at KULeuven on 9 January 2009. Cf. also J. WINTER, „Jus Audacibus. The future of EU company law", in M. Tison/H. de Wulf/C. van der Elst/R. Steennot, eds., *Perspectives in Company Law and Financial Regulation. Essays in Honour of Eddy Wymeersch,* Cambridge (Cambridge University Press) 2009, p. 43.

impressive.[3] The title of one of the last publications by Professor Koen Geens, our host today, asks "Quo vadis ius societatum?"[4]

The topic of this conference has much in common with what has just been recalled. On 4 July 2001, the unheard of happened: The European Parliament voted down the draft 13th directive by 273 to 273 votes, thereby provoking an institutional crisis. It was Commissioner Bolkestein who pointed the way ahead by calling the High Level Group of Company Law as his first step toward the Company Law Action Plan 2003.[5] I shall resist the temptation to dwell on the history, content, and aftermath of the Action Plan,[6] though I myself and other friends who are present today were members of the High Level Group. Instead, I want to approach the key question of today: What are the chances for the Action Plan to be as successful in the long run as the Ronse Institute has been within its sphere of action? This is by no means certain. It is true that the two group reports on the takeover directive and the Action Plan received unusually wide attention throughout the Union and beyond. The first stage with the short-term actions has been completed, with the notable exception of the 14th directive on cross-border transfer of the seat. But the medium-term stage has been halted by Commissioner McCreevy, and the only long-term action of the plan, the possible introduction

[3] See www.law.kuleuven.be/jri

[4] K. GEENS, „ 200 jaar vennootschapsrecht in perspectief: quo vadis ius societatum?", Tijdschrift voor Privaatrecht 2007, 73.

[5] A Modern Regulatory Framework for Company Law in Europe, Report of the High Level Group of Company Law Experts, European Commission, Brussels, 4 November 2002, 161 p., reprinted in: G. FERRARINI/K. J. HOPT/J. WINTER/E. WYMEERSCH, eds., *Reforming Company and Takeover Law in Europe,* Oxford (Oxford University Press) 2004, Annex 3, p. 925-1086. See also the related Report of the High Level Group on Issues Related to Takeover Bids, European Commission, Brussels, 10 January 2002, 96 p., idem at Annex 2, p. 825-924. Cf. K. J. HOPT, „Modern Company and Capital Market Problems: Improving European Corporate Governance After Enron", in: *Journal of Corporate Law Studies* 3 (2003) 221-268, available also at ssrn, and K. J. HOPT/E. WYMEERSCH, eds., „Company Law and Corporate Governance in Europe – Interim Report and Reflections on the Ongoing Reforms in the European Union and in Selected Member States – ", *RabelsZ* 69 (2005) issue 4, p. 611-795. Members of the High Level Group have written a further report for the Commission, see „European Corporate Governance in company law and codes, Report of the High Level Group of Company Law Experts," *Rivista delle società* 2005, 534-587.

[6] 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, Brussels, 21.5.2003, COM (2003) 284 final. As to this Action Plan see the contributions in FERRARINI et al. (note 5) and K. J. HOPT, „European Company Law and Corporate Governance: Where Does the Action Plan of the European Commission Lead?" in: K. J. Hopt/E. Wymeersch/H. Kanda/H. Baum, eds., *Corporate Governance in Context – Corporations, States, and Markets in Europe, Japan, and the US –,* Oxford (Oxford University Press) 2005, p. 119, available also at ssrn.

in the 2nd directive of an alternative regime, has been called off. It is a rough time, and not only for European company law. While the Commission puts on the brakes, the European Parliament wants to go ahead. The mood in the member states tends toward subsidiarity instead of thinking federally; even within a number of member states, national egoism is more popular than ever and there is a great wave of protectionism. On top of this, the financial markets crisis marks a historic division between the pre-subprime and post-subprime era.

In view of all this, the question posed by Koen Geens for this conference – "Quo vadis ius societatum?" – is more than just academic; it touches fundamental issues of European integration. How to tackle this? Let me try to prepare the ground by making five six reform areas of the program, and some perspectives of reform beyond the financial markets crisis.

I. Stock-taking

As to stock-taking I can be very brief since the various contributions give an excellent basis. The three more general questions regarding European company law are the following: What has been achieved? Where have we failed? And why are we where we are with European company law and not further?

As to the first question, some believe that European company law is trivial. I think that this is a superficial observation. Of course, we all know that there are many shortcomings in what we have, and major areas of company law are not harmonized at all as the fate of the draft 5th directive and the pre-draft of the 9th directive illustrate. On the other hand, the sheer number of directives and ECJ cases dealing with company law are already impressive.[7] So are some of the changes brought about by them – without taking a stand on whether the decisions were right or wrong, or whether the changes they bring are good or bad.[8] Just have a look at the accounting and auditing directives. In some countries, including my own, they have changed national law and practice profoundly. Or take the Statute of the European Company. One may discuss how important this new legal form is for practice, but in such prominent cases as the German *Allianz* or the *Porsche Corporation* they were important indeed. As to the relevance

[7] See K. J. HOPT/E. WYMEERSCH, eds., *European Company and Financial Law, Texts and Leading Cases,* 4th ed., Oxford (Oxford University Press) 2007.
[8] Cf. S. GRUNDMANN, *European Company Law,* Antwerpen/Oxford (intersentia) 2007; as to the member state company laws cf. M. ANDENAS/F. WOOLDRIDGE, *European Comparative Company Law,* Cambridge (Cambridge University Press) 2009.

of the ECJ cases, one cannot even argue. *Centros* and its successor decisions have profoundly changed the European company law landscape and have launched a whole new era of competition of company law legislators throughout the Union. The success of the British plc on the continent and the German limited liability company law reform by the so-called MoMiG of October 2008 are just two examples.

This is not to say that there are not many loopholes, and the takeover directive gives examples of the many different types. Take the option and reciprocity regime of Art. 12 of the directive, or the varieties of transformation and even straightforward evasions, as described in a Commission staff report of February 2007.[9] There is a strong reluctance among member states to lift takeover barriers, a popular fear of globalization, and a general trend toward political protectionism.[10] Germany is unfortunately no exception. But on the other side, one should look carefully at each single case. Options may also have a positive effect,[11] in particular if they are not just given to the member state as has been the case traditionally, but to the market participants themselves as in Art. 12 para 2 precited. The same could be pointed out for reciprocity. It is true that it departs from the general anti-frustration principle, but it may also facilitate the decision of companies to opt into the regime of Art. 9 and 11.

Why are we where we are and not further with European company law? The answer is politics and lies primarily in the European Council and the member states. While the European Commission and particularly the Court have moved European company law considerably forward, the member states have slowed down the process in many instances, sometimes engaging in real horse trading as with the takeover directive. But after all, as Bismarck said, politics is the art of the possible. When seen in this perspective, the stock of European company law is not so bad at all.

II. Reform problems

[9] Report on the implementation of the Directive on Takeover Bids, Commission Staff Working Document, Brussels, 21.02.2007, SEC(2007) 268.
[10] K. J. HOPT, „Obstacles to corporate restructuring: observations from a European and German perspective“ in: *Essays in Honour of Eddy Wymeersch, supra* note 2, p. 373.
[11] G. HERTIG/J. A. McCAHERY, „A Legal Options Approach to EC Company Law“, in G. Ferrarini/E. Wymeersch, eds., *Investor Protection in Europe,* Oxford (Oxford University Press), 2006, p. 119; cf. also S. B. BARTMAN, „The Impact of Optional EU Law Making on National Company Law“, *European Company Law* 5 (2008) 271-276 and G. BACHMANN, „Optionsmodelle im Privatrecht“, *Juristen-Zeitung* 2008, 11.

The reform problems that the Action Plan has identified and that are in the public eye are many, too many for a one-day conference. But the most critical of these reform problems will be dealt with in the workshops this morning and this afternoon. Therefore I can confine myself to some words on each of them from a European and comparative law perspective. These are, of course, personal observations and I certainly do not purport to preempt in any way the presentation of the reports and the workshop discussions. But one or the other question might be taken up in the workshops and might even be brought back this afternoon into the panel discussion with possible answers and recommendations for action.

1. Capital[12]

One of the most controversial problems in today's European company law debate is legal capital. When we discussed it in the High Level Group, we were influenced by the common view of economists on legal capital and the experiences of jurisdictions like the U.S. under the Revised Model Business Corporation Act 1984, New Zealand and with the private limited company also the UK.[13] Other schemes of creditor protection had proven to work well there, in particular a solvency test bolstered with a certificate checked by an auditor like in New Zealand and by serious liability rules. We were well aware that deregulating the 2nd directive with its mandatory legal capital protection would not be welcomed by all member states. We therefore proposed a very cautious way forward. The European Commission followed this careful approach in its Action Plan and committed itself only to launching a feasibility study.[14] But the inclusion of a long-term action on capital maintenance, i.e., the possible introduction in the 2nd directive of an alternative regime (depending on the outcome of the feasibility study), showed sympathy with the proposal.

What we underestimated was the fierce resistance to change in some member states, in particular Germany. The strong commitment to reform by practice and academia in some other countries like the UK was less surprising. In Germany, legal capital has been a

[12] Part I of this book, see the report by J. M. NELISSEN GRADE/M. WAUTERS, *infra* p. 25, the response by J. RICKFORD, *infra* p. 62, the discussion, *infra* p. 70, and the summary, *infra* p. 61.
[13] Cf. the comparative work by P. MARX, *Der Solvenztest als Alternative zur Kapitalerhaltung in der Aktiengesellschaft,* Baden-Baden (Nomos) 2006.
[14] As to this study made by KPMG see NELISSEN GRADE/WAUTERS, *infra* p. 30 < no. 6 >.

venerable creditor protection device for both the stock corporation and the limited liability company since the early days of German corporate law, and ever since it has been refined by a great number of court decisions and voluminous legal commentary work. The resistance did not so much come from the legislators, but from an alliance of academics and judges as well as from the legal practice in general, which was accustomed to what it had always had. The reaction proved how strong path dependencies can be, in particular if certain rules have been embedded in extensive case law and mountains of doctrine.

The battle lines of today are marked out by the two eminent reports in the UK and in Germany, and two persons and friends: Jonathan Rickford who has an intimate knowledge of the practices in the City and Marcus Lutter, who many years ago wrote his professor thesis on comparative legal capital in the European Community.[15] My task here is not to take parts in the dispute, though as a member of the High Level Group with its unanimous recommendation to the Commission I have been singled out in Germany as a dangerous modernist on this issue. The only point I would like to make is one that seems to me to be important well beyond the legal capital discussion. It concerns the approach European company law should take if such strong path dependencies exist. In the legal capital discussion, there are good points on both sides; in particular, much depends on empirical data that we do not yet have. But if this is so, why should all member states be forced to use the same legal capital standard? If there is reasonable disagreement on the pros and cons, why should a country not be allowed to have its own way and to experiment with it? The argument that the European landscape would become too complicated does not hold. With sufficient disclosure, the market participants would certainly be able to distinguish and to value the presence or absence of legal capital for what it means for them. Legal homogeneity within the Common Market is not an aim in itself. What counts is a well-functioning internal market. And we see that it functions: A number of member states including Germany have reacted to the market pressures from abroad and have introduced a lighter form of limited liability company, as in Germany with the MoMiG statute of October 2008.

The legislative developments related to legal capital problems prove still another point that is important to our discussion, though it may lead beyond: Company law is closely linked to other sectors of the law. European company law should not be seen and reformed in isolation.

[15] NELISSEN GRADE/WAUTERS, *infra* p. 40 et seq. < nos. 21, 22 >.

This is well known for the relationship between company law and capital market law[16], but it is no less true for company law and insolvency law. The German MoMiG statute proves the point. The long-standing company law rules on shareholders' loans to the company have been replaced by rules on voidability in insolvency, and have been moved from the German GmbH statute to the Insolvency Statute. Of course, one reason for this might also have been the hope to escape the consequences of the company case law of the European Court of Justice, a hope which, however, might very well prove to be fallacious. What is really needed is a certain degree of European harmonization of insolvency law. This harmonization should include inter alia directors' liability in the proximinity of insolvency[17] and, as the financial crisis[18] has shown, a better system for early rescue of failing companies. After all, company law is not only about the birth and the growth of the company, but also about its decline and rescue.

2. Corporate governance[19]

As many of you know, corporate governance is one of my favorite research fields, but this is exactly why I shall be very brief here. Corporate governance comprises internal and external mechanisms like takeovers. The building blocks of a good corporate governance system are the board, labor (in particular if there is codetermination in the board), banks and creditors, independent auditing and of course the markets, primarily the stock market and the market for corporate control.[20] These building blocks can be found in all industrialized societies, even though in very different path depending combinations and shapes. The board is certainly a key issue,[21] but so are the highly different shareholder structures[22] in the United States and the

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[16] Cf. N. MOLONEY, *EC Securities Regulation,* 2d ed., Oxford (Oxford University Press) 2008.
[17] See NELISSEN GRADE/WAUTERS, *infra* p. 49, 55 < nos. 34, 41 >.
[18] See *infra* III 3 at p. 22-23.
[19] Part II of this book, see the report by H. LAGA/F. PARREIN, *infra* p. 79, the response by E. WYMEERSCH, *infra* p. 126, the discussion, *infra* p. 129, and the summary, *infra* p. 125.
[20] Cf. K. J. HOPT, „Die internationalen und europarechtlichen Rahmenbedingungen der Corporate Governance", in: P. Hommelhoff/K. J. Hopt/A. v. Werder, eds., *Handbuch Corporate Governance, Leitung und Überwachung börsennotierter Unternehmen in der Rechts- und Wirtschaftspraxis,* Stuttgart (Schäffer-Poeschel) 2d ed. 2009, p. 39. See also most recently C. B. BÜHLER, *Regulierung im Bereich der Corporate Governance,* Zurich/St. Gallen (Dike) 2009.
[21] LAGA/PARREIN, *infra* p. 101 et seq. < nos 18 et seq. >.
[22] GEENS/CLOTTENS, *infra* p. 149 et seq. < nos 6 et seq. > and LAGA/PARREIN, *infra* p. 84 et seq. < no 4 >. See also K. J. HOPT, „American Corporate Governance Indices as Seen from a European Perspective", UNIVERSITY OF PENNSYLVANIA LAW REVIEW PENNUMBRA 158 (2009) 27.

United Kingdom on the one side and in continental Europe on the other. As far as regulatory measures are concerned, the most prominent is certainly mandatory disclosure which under the influence of American law[23] has come to Europe and is now at the center of European company law. More recently the corporate governance discussion has reached out to the non-listed companies[24] and even to the nonprofit sector[25]. Yet all this is a wide field, not only for lawyers and economists, but also for other historic and social science disciplines.[26] At this stage one could be tempted to say a word about the notorious La Porta debate[27], but I shall refrain myself. Let me just say that I am convinced that good corporate governance is a major asset for the companies in our countries and in the European Union, both as it relates to competition with each other and with the multinational companies and foreign states.[28] The crux and the intellectual challenge of corporate governance is finding the right mix of instruments, answering whether and to what degree mandatory or fall-back law is needed and, if it is needed, what the role of the European Union should be. As with the other topics, I distrust the easy answers here, i.e., letting everything be ordered by the market or by self-regulation or by requiring more state action and stringent national and European legal rules. But I am well aware that middle solutions are much more difficult than the extremes. What we need are European framework rules. But what they should look like is the Hamletesque question for our discussions. This is even more true today under the shadow of the financial crisis.[29]

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[23] LAGA/PARREIN, *infra* p. 86 et seq., 118 et seq. < no 5, 31 >; J. VON HEIN, *Die Rezeption US-amerikanischen Gesellschaftsrechts in Deutschland,* Tübingen (Mohr Siebeck) 2008; K. J. HOPT, „Company Law Modernization: Transatlantic Perspectives", *Rivista delle società* 51 (2006) 906.

[24] J. A. MCCAHERY/ E. P. M. VERMEULEN, eds., *Corporate Governance of Non-Listed Companies,* Oxford University Press (Oxford) 2008.

[25] K. J. HOPT/T. VON HIPPEL, eds., *Comparative Corporate Governance of Non-Profit Organizations,* Cambridge (Cambridge University Press) 2010.

[26] Cf. e.g. P. FRENTROP, *History of Corporate Governance 1602-2002,* Amsterdam (deminor) 2002; C. J. MILHAUPT/K. PISTOR, *Law & Capitalism,* Chicago/London (The University of Chicago Press) 2008.

[27] Cf. e.g. R. LA PORTA/F. LOPEZ-DE-SILANES/A. SHLEIFER, „The Economic Consequences of Legal Origins", JOURNAL OF ECONOMIC LITERATURE 46 (2008) 285; M. J. ROE/J. I. SIEGEL, „Finance and Politics: A Review Essay Based on Kenneth Dam's Analysis of Legal Traditions in *The Law-Growth Nexus",* JOURNAL OF ECONOMIC LITERATURE 47 (2009) 781.

[28] Cf. also the mixed evidence found by S. BHAGAT/B. BOLTON, „Corporate Governance and Firm Performance", *Journal of Corporate Finance* 14 (2008) 257.

[29] See *infra* III 3 at p. 22 et seq. and EDDY WYMEERSCH in his response, *infra* p. 126: „boards have been utterly ineffective".

3. One share/one vote[30]

Here again we have a battle of creeds. The Action Plan placed the one share/one vote issue or, as it is commonly called, "1S1V" under the medium-term action concerning corporate governance and announced an "examination of the consequences of an approach at achieving a full shareholder democracy (one share/one vote), at least for listed companies." The High Level Group dealt with the issue in its first report on takeover bids of 10 January 2002. It pleaded for a level playing field for takeover bids, proposed the new breakthrough rule, and stated as the two guiding principles shareholder decision making and proportionality between risk bearing and control. The Group was aware that the logic of these two principles reaches well into general company law. But it shied away from making proposals beyond takeover regulation. This was not only because of our limited mandate as to the first report, but also and more so because we knew that going all the way would be a major operation, fundamentally affecting the ways listed companies in many parts of the Union are controlled, financed, and operated.

We were all the more surprised that Commissioner McCreevy named this issue as the top company law priority on his agenda. He underestimated the fierce political resistance from interest groups, but also the vast economic varieties of control-enhancing measures in the various member states and their economic pros and cons as described in the two reports by ISS Europe, the ECGI, and Shearman & Sterling.[31] In a 180-degree turn, the Commissioner decided to refrain from any action in this context, even concerning more transparency. In my opinion this may be a political answer for the outgoing Commission, but it cannot be the long-term answer. In view of the many open questions found by the two studies, the European Corporate Governance Forum Working Group on Proportionality of June 2007[32], to whom several of the High Level Group members belonged, showed a way to approach the problem step by step, by starting with more disclosure. In the view of the Group, full board entrenchment is just unacceptable from a corporate governance perspective. But so is the

[30] Part III of this book, see the report by K. GEENS/C. CLOTTENS, *infra* p. 145, the response by J. M. GARRIDO, *infra* p. 192, the discussion, *infra* p. 197, and the summary, *infra* p. 191.

[31] See GEENS/CLOTTENS, *infra* p. 147 et seq. < no. 3 >. Two of the most recent contributions are by R. ADAMS/D. FERREIRA, „One Share – One Vote: The Empirical Evidence", Review of Finance 12 (2008) 51-91, and M. BURKART/S. LEE, „One Share – One Vote: The Theory", Review of Finance 12 (2008) 1.

[32] For more details on the report see K. J. HOPT in *Essays in Honour of Eddy Wymeersch, supra* n. 11, at 392 et seq.

freedom of the controlling shareholder to reap personal advantages from the company to the detriment of his fellow shareholders. Our group has been well aware of the pros and cons of the one share/one vote rule as well as of the less far-reaching rules on the mandatory bid and the breakthrough.[33] But in the end we think that in the interest of the internal market things cannot stay as they are. Without denying a certain convergence I personally doubt that on the long run continental Europe will gradually converge towards the UK model.[34] Unlike in the UK industry is still important on the continent and institutional investors are not playing the same role,[35] inter alia due to different old-age provision systems. But I do hope that the incoming European Commission and the new Commissioner in charge will be less indolent than the old one or, if not, that the European Court of Justice will continue to play its role as a promotor of Europe and its internal market.[36] Of course and as always the problem with the one share/one vote rule is where to draw the right balance between fairness and efficiency.

4. Financial reporting[37]

Here we are in the middle of a revolution. I am not just talking about the numerous technical details of financial reporting, nor about the timely and heated fair value debate. There are more fundamental questions to be asked and decisions to be made: How do we Europeans with our specific legal tradition deal with the mass of materials embodied in the IAS and the IFRS? At least on the Continent, we are used to general principles and bodies of legal rules that are kept within reasonable limits. Is the difference between listed companies and non-listed companies the only right divide for financial reporting, or are size and economic importance more important criteria? How do we avoid overly burdensome requirements for SMEs without sacrificing adequate disclosure to the creditors and the market?[38] What should

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[33] See the excellent and exhaustive treatment by GEENS/CLOTTENS, *infra* p. 147 et seq., 149 et seq. < nos. 3 et seq., 6 et seq. >. See also the response by J. M. GARRIDO, *infra* p. 192. Cf. more generally P. DAVIES/K. J. HOPT, „Control Transactions" in: R. Kraakman/J. Armour/P. Davies/L. Enriques/H. Hansmann/G. Hertig/K. Hopt/H. Kanda/E. Rock, The Anatomy of Corporate Law, A Comparative and Functional Approach, 2d ed., Oxford (Oxford University Press) 2009, p. 225.

[34] But see GEENS/CLOTTENS, *infra* p. 184 < no. 50 >.

[35] Institutional investors are much more important in the UK than even in the US.

[36] I agree with GEENS/CLOTTENS, *infra* p. 184 < no. 50 > that the role of the court is inherently a limited one.

[37] Part IV of this book, see the report by K. VAN HULLE/F. HELLEMANS, *infra* p. 209, the response by P. VAN DER ZANDEN/H. BECKMAN, *infra* p. 272, the discussion, *infra* p. 278, and the summary, *infra* p. 271.

[38] VAN HULLE/HELLEMANS, *infra* p. 255 et seq. < nos. 54 et seq. >.

be done with consolidated accounts, and how shall we reconcile financial reporting with fiscal reporting? The IAS/IFRS are privately set bodies of rules. In Germany, some constitutionalists have taken the view that the legislator cannot blindly accept such rules and impose them as mandatory rules. So did the EU when installing the endorsement requirment. But is the EU endorsement process a sufficient guarantee in view of the mass of highly technical standards,[39] or does it just amount to a sampling of major politically or economically important issues? In a long-range perspective, the need for convergence between IFRS and US GAAP is irrefutable, and indeed some progress has already been made in this respect. But will this go on under the new U.S. administration,[40] and are we possibly sacrificing too many of our own principles? Last but not least: What will be the lasting impact of the financial markets crisis on financial reporting?[41] Mitigating the procyclical effects of financial reporting is of course an important problem, but hidden reserves as in the old times in Germany and other countries are not the answer and financial reporting was only one of many issues which have come up in the financial crisis and need reform.

5. Corporate mobility[42]

Corporate mobility is the very essence of the internal market. We should do everything to promote it for the sake of entrepreneurial freedom as well as for the healthy effects of competition. Much has been achieved already by the European legislators and the European Court of Justice. But there are many scenarios not yet dealt with by the Commission and the Court.[43] Much still needs to be done.

As far as the Commission is concerned, the about-face of Commissioner McCreevy dropping the plan of a 14th directive on cross-border transfer of the seat is deplorable, and it has rightly been criticized by the European Parliament and by practice and academia in the member

[39] See the frightfully long lists in VAN HULLE/HELLEMANS, *infra* p. 228 et seq. < no. 21 >.
[40] After a long negotiation foreign companies in the US have been allowed to use IFRS for their financial reports, but the process of opening this option to US companies has come to a halt. How flexible the new SEC will be, is still open to speculation.
[41] VAN HULLE/HELLEMANS, *infra* p. 262 et seq., 266 < nos. 64 et seq., 70 >.
[42] Part V of this book, see the report by M. WYCKAERT/F. JENNÉ, *infra* p. 287, the response by L. TIMMERMAN, *infra* p. 332, the discussion, *infra* p. 334, and the summary, *infra* p. 331.
[43] WYCKAERT/JENNÉ, *infra* p. 290 et seq., 294 et seq., 300 et seq. < nos 2, 5, 10 et seq. >, have tried to set out all possible scenarios.

states. I am aware of the difficulties created by German labor codetermination and other obstacles. But in the end, similar problems have been mastered. Examples are the Statute of the European Company, the 10th directive on cross-border mergers, and the takeover directive. We can only hope that the new Commission will reassess the problem.[44]

As to the ECJ, one has to acknowledge that the court has handed down many courageous decisions. But will the court be courageous enough to continue this line of judgments? Is *Cartesio* the last word?[45] At one point the Court says, "(a)s community law now stands," and adds that the member state of incorporation cannot, "by requiring the winding-up or liquidation of the company, ... prevent... that company from converting itself into a company governed by the law of the other Member state, to the extent that it is permitted under that law to do so." This might lead the way to future decisions. But even if the ECJ goes further ahead, it cannot do the job alone. German practitioners tell me that *Sevic* is a great decision that opens the route to more corporate mobility, but to base a concrete cross-border merger that is outside the 10th directive on *Sevic* alone is a risky affair since a court decision simply cannot provide all the details needed for such a transaction.

There are many additional questions concerning corporate mobility and the actors involved in the transactions and the complicated contracts needed for performing them. One is the role of the notary public. The reasons for not dealing with this topic in more detail in the Action Plan, and indeed in the High Level Group report,[46] are simple. The function of the notary public reaches far beyond company law into commercial law (in particular the commercial and enterprise register), estate law, and even procedural law, if we look at the modern mediation movement. By the same token, the notary public systems in the member states differ considerably. If the European Commission or indeed the European Court of Justice were to take up this area, questions like the following will be asked by both the general public and the

[44] This seems to be the majority view in practice and theory, cf. also WYCKAERT/JENNÉ, *infra* p. 318 et seq. < no. 27 >.

[45] I belong to those who had hoped that the ECJ would decide along the lines proposed by the Advocate-General Maduro on 22 May 2008. But WYCKAERT/JENNÉ, *infra* p. 317 < no. 25 >, are right to ask that the concept and the foundations of unfettered corporate mobility should be looked into in more detail. See also the response by L. TIMMERMAN, *infra* p. 333 < no. 4 > who argues that there is an inherent tension in company law between its facilitating role and its goal of shareholder protection and that as to the latter there is a deficit in the jurisprudence of the ECJ. In my opinion an interesting route for European company law could be to impose a fiduciary duty on the controlling shareholder like in German law.

[46] This is why it finally was decided not to include in this book the section on the role of the notary public in company law in the Leuven conference (cf. note 1).

legislators in the different countries: What are the experiences with the Latin system and others in those countries where they coexist? Is there cross-border competition between the notaries of the different member states, apart of course from the public status of the notary public in some countries? What about competition between, for example, German or other member states' notaries and Swiss notaries? Should European company law enlarge the mandatory role of the notaries in order to protect the shareholders and the general public? Is this what the profession wants? Is it compatible with this protection to offer company contract models and other forms as can be found in the new British company code and in the draft European Private Company Statute? Finally: If the services of the notary to the entrepreneurs are to be expanded, what does this mean for the professional association between notaries and the big international law and auditing firms and, in particular, would that be compatible with the particular independence of the notary public? In sum: What should be recommended to the European Commission for the future of European law?

III. Perspectives

What is the conclusion of this stock-taking and the look at some of the reform problems of European company law? Some answers to will be found in the reports, the responses, the discussions and the summaries mentioned above. But without anticipating them, let me present some preliminary thoughts of my own.

One timely answer is "better regulation" as propagated by Commissioner McCreevy. But this is a truism and views on what constitutes better regulation differ widely. Another offer is far-reaching deregulation of the existing directives as mentioned among other options by the Commission under the same Commissioner. But the European Parliament as well as industry and practice, at least in Germany, are far from supporting this route. A third answer is this: European company law as well as some European law in general should confine itself to cross-border issues. In the Statute of the European Company there is such a prerequisite. Yet the dividing line between internal and cross-border trade and national and multinational companies is becoming more and more blurred. As we know from antitrust law, even transactions fully outside the EU may affect competition within, and many medium and even small companies are nowadays living off export and sometimes are leaders in their segment in the world market. The draft statute of the European Private Company rightly refrains from

such trans-border requisites, though this is politically controversial. Let us hope that the drafters will end up being successful with this and not give in to member state pressures.

My own personal conclusions from what we have seen are different. Let me quickly sum them up in three theses at the end of my opening remarks. They concern 1) the need in European company law for flexible mixed system solutions, 2) adequate enforcement, and 3) the financial market crisis and beyond.

1. Flexible mixed system solutions

As I said before, I distrust pure solutions. They are academically challenging and often conceptually easy, but down at the grassroots of the economy and society they are seldom right. What is needed is usually a flexible solution in a mixed system, though of course finding the right mix is controversial and difficult. This right mix must be found on two levels: between market and regulation and between national regulation and European rules.

As to the first level: The presumption should be for the market and personal freedom of the market participants. To take an example from my own country, I would prefer a system of private bargaining on labor codetermination. The German system is too inflexible and therefore has not been an export success. The European solution found in the SE directive is, of course, a political compromise. Germany has blocked European company law harmonization on this issue for decades. Still the compromise found starts with the right idea, namely bargaining between capital and labor on codetermination.[47] The *Allianz* case proves that this can lead to decent solutions like a smaller board and representation of foreign labor. I also see a role for private law-making in the shadow of company law, such as more freedom for corporate by-laws than we have under mandatory German stock corporation law. In a more international example, this would include more room for experimentation and bonding by voluntary codes of conduct, as in the international corporate governance code movement. But free markets fail where they do not deal adequately with entrenchment of managers in

[47] Unfortunately for political reasons Chancellor Angela Merkel has promised that also its new government shall neither touch German labor codetermination nor deregulate to a certain degree labor dismissal right, though the first measure could help to attract foreign capital and the second would help unemployed workers.

public companies as well as with misappropriation or tunneling[48] by controlling shareholders. Therefore, we need anti-frustration rules like those contained in the takeover directive and beyond, and fiduciary duties of controlling shareholders toward the company and their fellow-shareholders, with such duties possibly extending beyond the single company in the group.[49]

As to the second level, we need a mixed system in which the body of company law may remain with the member states, but where competition of rulemakers and legislators as well as European framework rules set limits. Of course, we can hold different opinions on where these limits should be drawn, what can be left up to legislative competition, and what should be set up by European company law. My own choice would be in dubio pro competition. Issuer choice is an important. But sometimes issuer choice needs a legal backing against member state egoism, as *Centros* and the successor decisions of the ECJ amply demonstrate.[50] As to the capital directive, I tend to advocate more freedom to choose from different, non-legal capital-based systems, provided they give an equivalent or even better creditor protection. As to one share/one vote, the difficulty lies in striking the balance between fairness and efficiency. Cross-border mobility certainly needs mandatory European rules for opening the frontiers since this is the very essence of an internal market. In the takeover field, I think that if options are granted, they should not just be granted to the member states, but be passed on to the market participants who bear the financial consequences of such choices. Insofar, I feel that Art. 12 is progressive. By the same token, I have long been a fervent advocate of free choice between the one-tier and the two-tier board system[51].

2. Adequate enforcement

[48] S. JOHNSON/R. LA PORTA/F. LOPEZ-DE-SILANES/A. SHLEIFER, „Tunneling“, 90(2) American Economic Review 22 (2000); L. ENRIQUES/G. HERTIG/H. KANDA, „Related-Party Transactions“ in: Kraakman et al., *supra* note 34, p. 153 et seq.
[49] Cf. *supra* note 45.
[50] See *supra* note 45.
[51] Cf. K. J. HOPT/P. C. LEYENS, „Board Models in Europe - Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France, and Italy“, *European Company and Financial Law Review* 2004, 135 at 163 et seq., available also at ssrn; reprinted in E. Gepken-Jager/G. van Solinge/L. Timmerman, eds., *VOC 1602-2002, 400 Years of Company Law,* Deventer (Kluwer) 2005, p. 281. See also A. B. GILLETTE/T. H. NOE/M. J. REBELLO, „Board Structures Around the World: An Experimental Investigation“, *Review of Finance* 12 (2008) 93.

When we talk about European company law, we usually talk about substantive company law rules and tend to forget that enforcement is vital.[52] There is a fundamental reciprocity between substantive and procedural company law. Giving rights to shareholders without giving them the standing to enforce these rights against the management or the controlling shareholders is pointless. This opens up the discussion on derivative suits, minority rights, and finally maybe even association actions and class actions, as presently discussed in the antitrust field and in consumer regulation.[53] Again I see here a case for an adequate mix between state supervision and private enforcement. In capital market-related company law areas, supervision and enforcement by capital market authorities is more important than private enforcement. But the latter may supplement the former. To do this it may need more disclosure and special inquiries by experts, possibly with a carefully drafted group-wide dimension. At the end enforcement needs courts, good courts. Yet as we know from certain accession candidates, adapting national company law verbatim to the acquis communautaire may be easier than installing a competent and incorruptible court system. If a country does not yet have such courts, ex post rules do not work and bright line ex ante rules may also be needed in company law.

3. The financial markets crisis and beyond

Let me end with a word on the financial markets crisis. In a January 2008 statement from a respected and experienced observer of European company law developments in Brussels, I read this about the plans of the Commission: "In spite of the relatively small number of new initiatives, there is nevertheless no danger of 2008 being overly quiet." One year later we are wiser. The financial market crisis has opened a new era, not only of financial law, but more generally of rule-making.[54] The problem is twofold: to find the adequate rules, including

[52] J. ARMOUR/H. HANSMANN/R. KRAAKMAN, „Agency Problems and Legal Strategies" in: Kraakman et al. (*supra* note 34), p. 45 et seq.; M. B. FOX, „Civil Liability and Mandatory Disclosure", 109 *Colum L. Rev.* 237 (2009).

[53] P. MATTILL/V. DESOUTTER, „Die europäische Sammelklage – Rechtsvergleichende und EU-rechtliche Betrachtungen, Wertpapier-Mitteilungen 2008, 521.

[54] See e.g. the analysis and reform proposals of the DE LAROSIÈRE group which have been followed by the European Commission in its proposals on 23 September 2009 on a new European financial architecture: The High-Level Group on Financial Supervision in the EU, Report, Brussels, 25 Feburary 2009. Cf. also M. HELLWIG, *Systemic Risk in the Financial Sector, an Analysis of the Subprime-Mortgage Financial Crisis,* Jelle Zijlstra Lecture, Wassenar 2008. The German Lawyers Association (Deutscher Juristentag) will deal with the reform problems on its 150th anniversary session in Berlin in September 2010 (chair: K. J. Hopt, reporters Hellwig, Höfling and Zimmer).

European company law rules, for crisis situations, and to have them confined to these exceptional situations. From case law we know that "hard cases make bad law." This is also a danger for the present-day crisis legislation in all our member states. True, the state must intervene in such crises, but it must also step back when the crisis is over. There is a real danger that the progress we have made in curtailing golden shares, subsidies, protectionist measures, and other ways and means not compatible with the internal market may stay on. But sooner or later the economy will recover and the market will continue to be the better regulator than the state. For normal times we need less state and more market, and in the market we need less entrenchment of management and less tunneling by controlling shareholders. The role of the company law academia and practice is not to forget this and to work together with the national and European legislators on the future of European company law.

Let me conclude with a word of thanks to Professor Koen Geens for calling us together to this challenging conference and for choosing such a timely topic. We certainly can look forward to stimulating ideas and animated discussions on the five topics in the workshops (from which we expect brief reports back to the plenary session)[55] and in the final panel debate.[56] But we also look forward beyond this day to a consistent joint publication[57] with the aim to present the state of the art of European company law at the beginning of the second decade of the 21th century.

[55] The responses to the five reports can be found in the book behind the reports. As to the reports of the five workshops see the summaries at the end of each chapter.
[56] Cf. *infra* p. 345 et seq.
[57] See *supra* note #.

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