



Corporate Board Elections and Internal Controls



27th September 2005
Federal Reserve Bank of New York

A free all-day conference co-sponsored by the American Law Institute and the European Corporate Governance Institute

[Background to the Dialogue](#) | [Programme](#) | [Transcripts](#) | [List of attendees](#)



Keynote speech by Alexander Schaub, Director General, European Commission, DG Internal Market

Introduction by Antonio Borges, Chairman, European Corporate Governance Institute

Welcome back after an intense morning debate. We are now ready to begin the afternoon session and it is my great privilege to introduce the first keynote speaker this afternoon, Alexander Schaub. Alexander Schaub is, as I think everybody knows, Director General at the European Commission.

He started by being Director General of Competition and now for the Internal Market with responsibility for creating a truly well integrated internal market free of any obstacles to competition. As you know, the European Commission is the executive arm of the European Union and I think everybody will probably agree that it has had a mixed success – very positive in certain areas and less in others. However, if you conduct a poll of what are the areas in which the Commission has had the biggest impact, the strongest influence and certainly the most positive one, I think most people would immediately answer the area of competition. Competition and the creation of an efficient internal market in Europe have been the two most important contributions that the European Commission has made for the future of Europe. Europe, I think we all know, has ingrained a certain degree of protectionism which goes back in history to times way back, which is very prevalent in public opinion, which is often mixed with nationalism, in the defence of national interests – in particular this concept of national champions that keeps coming up, and leads to government support, protectionism, reluctance to an open market, for corporate control and so forth. It is extremely important to keep on fighting this tendency for protectionism and to keep on building on a more open and competitive market within Europe and a more open Europe relative to the rest of the world. This requires, of course, a very steady approach, a very lucid outlook, a great deal of skill and this is indeed what we owe to Alexander Schaub.

Schaub's method, I could argue, is one of building credibility, creating a great deal of substance behind the positions that he chooses to take and then a lot of tactical skill as well. Alex created, both in competition and now in corporate governance, two, we think, very important fora for the debate of the key issues that should drive policy. He firmly believes that it makes sense to bring the best experts, in particular from North America and Europe, together to debate the issues, to make contributions, to build support in public opinion and then move forward with the recommendations and it is because of that conviction that we are here today. He was the main source behind the creation of the Transatlantic Corporate Governance Dialogue. He has supported us throughout. He is the main link with policy-making and he's certainly one of the most enthusiastic participants in this whole process. So, I think we'll listen to him with great interest and we'll debate with him after he finishes.

Alexander Schaub: Antonio, thank you very much for this flattering, kind presentation but, ladies and gentlemen, I have to say it's for me a particular pleasure to be here today with you and to contribute to this second conference of the Transatlantic Corporate Governance Dialogue. We in the Commission have indeed, as Antonio said, believed for some time – and it goes back to my early discoveries in competition policy – that these days, in a phase of accelerating globalisation, a public institution like the European Commission cannot do a decent professional work if it is not in a continuous way exposed to the criticism of the best academics in Europe, in the US and in the rest of the world. That is a quasi guarantee that we cannot go totally in the wrong direction. It is also a guarantee that bureaucrats, as many fear, are becoming crazy in the

obsession about their own importance and that is in addition, I have to say personally, a particularly pleasant ingredient of the work where you do not have to deal every day only with politicians and try to convince them. It's a very attractive ingredient to deal with people from the academic world and to be exposed to new ideas, to get critical input about the direction which is already visible and to obtain suggestions on how inevitably a very sophisticated system in the global context can be further refined, can be simplified, can be driven into the most appropriate direction. That is our common enterprise. It started last year with an extremely successful conference in Brussels and I want to thank here in particular our friends from the European Corporate Governance Institute for their extremely professional and efficient work and I think it is not a great risk to say already at halftime today that this conference will be certainly as successful, as useful and stimulating for the further development of rules on both sides of the Atlantic concerning corporate governance. So, it is really a great pleasure to participate here and, even more than speaking, to listen to the many multifaceted contributions so far.

Dialogue – that is our profound conviction. Dialogue is the best recipe for success and a transatlantic dialogue on corporate governance is essential. We have to engage with each other because you in the United States and us in the European Union, we are the world's largest markets, leading players in the WTO and each other's principal source of foreign, direct investment. Capital markets amount to more than \$50 trillion in both the EU and the US equivalent to around six times the GDP for both of us. These are frightening figures. Whatever rules we have on one side of the Atlantic, corporate law or financial markets regulations, they will inevitably impact on the other side. That is the fundamental law of what we are doing these days. Our economies are interdependent – that is a truism – and this interdependence will keep on growing every day, every week. The consequence of a more global and interlinked economy is that the players in this enlarging market must know the framework within which they operate and that framework must be convergent, not divergent, even if it will never be fully identical. That is the challenge – promoting transatlantic convergence in a globalising economy.

So, transatlantic co-operation on corporate governance is not only mutually beneficial, it is an economic, a political and a regulatory necessity. Co-operation means dialogue, open dialogue and ongoing. This is the only way to avoid difficult issues arising and casting doubt over our financial markets. The corporate scandals leave us with a legacy. Legislators and supervisors worldwide must work together, the key players as well – politicians, regulators and market participants. The dialogue must involve market players and stakeholders. They know where the useless, the duplicative excessive costs are and the transatlantic bureaucratic red tape that needs to be scalped. I'm a firm believer in better regulation and in applying global regulation as well. The European Commission has pioneered dialogue and public consultation quite particularly in the important area of financial markets. As Commissioner McCreevy, I consider dialogue as a prerequisite to any initiative, which the Commission may take on an internal market issue. All new initiatives we undertake are submitted today to public consultation so that the stakeholders have an opportunity to take a position but also to ensure that the stakeholders are not surprised by sudden new bright ideas which have not been tested with those who know best and the result of this, by the way, is that the legislative rulemaking machinery of the European Union will produce less but better, we hope.

In this regard a public consultation will be launched this autumn on the mid-term priorities of our corporate governance and company law action plan. We want to check if the priorities set in 2003 still reply to market needs today. Some adjustments may be necessary but whatever specific initiatives are undertaken in the future, the Commission's action in this field will continue to focus on finding the appropriate balance between opening up markets, proper levels of prudential control, minimum cost of regulation and overall high levels of consumer protection. And in trying to implement these objectives we are, of course, aware that the marketplace already within the 25 Member States of the European Union is not exactly the same everywhere. We are even more aware that the marketplace on one side of the Atlantic is not exactly the same as the marketplace on the other side of the Atlantic. These marketplaces are continuously developing. We will never be able to lean back and congratulate ourselves that we have done our job. We must be aware that what was a brilliant idea ten or fifteen years ago may be a very bad and hopeless idea for the next fifteen years.

We have to judge carefully whether legislation is preferable for the relevant sector and problem or whether alternatives such as co-regulation or self-regulation would be better. A key overriding objective is how best to minimise the risk of corporate malpractice and thereby protect shareholders. These risks can never be completely eliminated but enhancing transparency, strengthening the internal controls of corporations, restoring the credibility of external audit and promoting fair and reliable accounting will reduce them. This is not an ad hoc bolt on, or just the right thing to do; it is essential because the economic damage that major scandals can generate affect millions of people. Their pensions, their investments grow in the economy, so jobs and the welfare of ordinary people.

In the field of transparency, three key measures have been adopted in the European Union. The transparency directive imposes minimum disclosure requirements on issuers. The prospectus directive harmonises the content of prospectuses and the market abuse directive sets clear standards for the prompt and fair disclosure of inside information. These instruments give investors a minimum equal level of information throughout the European Union. A fourth instrument is currently being examined by the Member States and the European Parliament, which instrument requires the systematic disclosure of complex shareholder structures and recourse to off balance sheet arrangements. We have proposed specific disclosure requirements with regard to off balance sheet arrangements, covering special purpose vehicles. The same proposal extends the requirement to disclose related party transactions to non-listed companies. As you will know, the Sarbanes-Oxley requirements concerning internal control, the so-called Section 404, popular on both sides of the Atlantic, imposes severe burdens on all companies registered with the SEC. Sarbanes-Oxley does not distinguish between US companies and non-US companies although the SEC has given more time for foreign issuers and small companies to apply it. According to Section 404 of Sarbanes-Oxley, public companies must provide full disclosure of their internal controls in their management reports. In addition, companies must review the effectiveness of their internal controls and procedures each year. Management must also provide written confirmation that internal controls are in place and being maintained. Finally, the companies' external auditor must report publicly on the effectiveness of the company's internal control and opine as to the management's opinion about internal control.

Living up to such requirements means immense costs. It has been estimated that listed companies have to spend between five and ten million US dollars just to fulfil that particular one legal requirement. Companies are rightly wondering whether the costs do match the benefits. Even if one considers the context within which the Sarbanes-Oxley Act came about – and it was a very specific context, we must keep this in mind – the question is relevant. The situation seems clear-cut. For foreign issuers, this amounts to overregulation. Was there an impact analysis? I believe so but the numbers were clearly inaccurate. Was there consultation on the basic requirements of the Act? Regrettably no, even if the circumstances, of course, were special and can explain a lot. EU-listed companies cannot delist either due to restrictive US deregistration rules – the 300 investor rule – which I have to add immediately is now being re-examined by the SEC. We hope this will change in the future which will help, not hinder, the flow of capital across the Atlantic.

I was pleased to hear that US Secretary Snow agrees that overregulation hampers growth and that in the US there are a lot of things that need to be worked out. The same is true in Europe, I hasten to say. Unfortunately Secretary Snow has not yet

been very specific about what the US actually would do, for instance, about the abovementioned issues. In the European Union the Commission has proposed to follow a somewhat different route. In its proposal for the Eighth Company Law Directive on statutory audit and its proposal to amend the existing accounting directive, the Commission has outlined some principles regarding internal control. The proposed eighth directive requires as a minimum listed companies to have an audit committee or a body performing functions equivalent to an audit committee. Such a committee must oversee the financial reporting process, monitor the independence of auditors and select the statutory auditors of their company. The committee must monitor the financial reporting process and the audit. It shall also monitor the internal audit where there is one or monitor the effectiveness of the company's internal control. These are all internal functions and hopefully the existing audit committee already do them. This directive, the statutory audit directive, is very close to adoption. Actually, the European Parliament should vote on it this week, opening the door to a rapid adoption by the Council.

In our proposal to amend the accounting directives, we suggest that listed EU companies must issue an annual corporate governance statement. Such statement shall include a description of the main features of their internal controls and risk management in relation to the financial reporting process, targeted information about the overall process in order to empower shareholders and facilitate discussion between market participants. The major difference between the EU approach and the US approach seems to be that we rely on principles and require Board members and auditors to actually reflect on what it is they are doing rather than requiring them to follow a tightly drafted rule-based approach to avoid litigation. The principle-based approach fits best in a European context because we feel it is market-orientated and offers the best possible way to meet the needs of investors. I want to add here, of course, that in the real world things are a bit more complicated than I may have sounded with my preceding sentences. I believe – and we have discussed this intensely in the last days with our American friends – that a principle-based approach and rule-based approach are two philosophies, which somehow are interlinked. You will not have one of them in complete purity and so it is important that we continue our discussion on practical cases and that we try to learn from each other whether, in a given situation, it may be preferable to be slightly more on the rule-based approach and in other circumstances to be slightly more on the principle-based approach. It would be wrong to state that one side has an eternal single wisdom and the others are dead wrong in their overall approach.

In the end, we want to make sure that investors are provided with better information so that they are able to make rational investment choices to ensure economic growth and employment. Nevertheless, I was very encouraged by the results of the recent visit of my Commissioner, Charlie McCreevy, to Washington. The SEC has announced a road map to eliminate the IAS or IFRS reconciliation requirement to US GAAP as early as 2007 which is the Commission's strong preference and by no later than 2009. Why does the Commission attach so much importance to this road map? Because delivering the road map would considerably lighten the regulatory burden and eliminate significant unnecessary costs for EU industry and business. Currently EU companies listed in the US must reconcile their IAS accounts to US GAAP. For some EU issuers in the US this cost has been estimated at between five and ten million dollars a year. You can very quickly see that the cost savings could be very significant and this in every year. Not only did we find an understanding with our American colleagues on the road map, we also agreed to support the convergence agenda identified by the International Accounting Standards Board and the US Financial Accounting Standards Board. We agreed that convergence work must be accelerated, focus on key areas and aim to have real progress made as rapidly as possible.

In the European Union we too have to make a so-called equivalence finding on the conditions for US GAAP, Japanese GAAP and so on to be allowed to be used in the European Union from 2007 onwards, now that we have chosen to use IFRS as our standards in the EU. The Commission has not yet made a proposal in this matter and we will work closely with our partners to ensure a fair and sensible outcome. This is one of the most important challenges confronting us in the coming months. A sober analysis of honest co-operation and a sense of realism will be necessary in order to avoid a new outbreak of hostilities but prove that people on both sides of the Atlantic are able to handle complicated matters in a way that strengthens mutual trust and confidence.

Equivalence and the whole move to make standards mandatory and enforceable will impact on the process of standards setting and on the standards-setters themselves and this is already underway. Yes, international standards-setters must be independent. Nevertheless, they must also recognise the needs of the users of the international standards that are set. Technical understanding of standards setting is required but so is an understanding of the impact standards will have on business in jurisdictions using or at least recognising the use of international accounting standards. Part of a solution lies in effective oversight of standards-setters and their work programme but the standards-setters themselves must also equip themselves with the right skills. This is a crucial policy function. So, the policy, that is the standards, must be drawn up in an open and transparent way and accounting standards-setters cannot and should not be able to avoid the better regulation disciplines of impact analysis and cost benefit analysis. Standards-setters cannot work in vacua; they have to work together and develop together the appropriate environment. The standards need to be rigorously tested including a robust economic examination. This also explains the at times certainly heated debate about the composition of the IASB and their trustees.

I return to my introduction. Dialogue and co-operation in a spirit of mutual openness are essential if we are to create a regulatory environment in which business and markets on both sides of the Atlantic can thrive. The Transatlantic Corporate Governance Dialogue provides one response to this need but if we are to converge our rules and our thinking, I conclude we need the following essential ingredients.

First, real political will and I believe it is there. Second, real energy investment and determination and also there I must say I'm really encouraged. Third, comprehensive ex ante transatlantic regulatory discussions to avoid the need for ex-post regulatory repair. This seems to be the key lesson of what we have witnessed over the last years and in repairing the accidents many of us have discovered the enormous charm and attraction to anticipate problems and avoid them instead of afterwards living with the dramas which are much more difficult to repair. Fourth, the better regulation agenda that is open consultation, impact analysis, review and evaluation. Finally, keeping our eyes on the wider picture to reduce the frictional costs of doing transatlantic business with proper levels of investor protection. Minimising corporate scandals in the EU and the United States ultimately means benefiting all our citizens. That is a challenge we have to handle with even more care over the coming years. Thank you for your attention.