Key Problems of Company Law and Corporate Governance in Europe

– Introductory Remarks on the Meeting of the Friends of the Hamburg Max Planck Institute, June 12, 2004 –

By Klaus J. Hopt, Hamburg, and Eddy Wymeersch, Ghent

A decade ago, European company law was considered the ailing man of Europe. European harmonization of company law was at a deadlock, partly (but not only) because of the issue of labor co-determination in the boardroom, so dear to German unions and government but so unwelcome and foreign to governments, enterprises, and even trade unions in other member states. Even company law reform in the various member states progressed only one step at a time while more fundamental revisions lagged, though in some countries, in particular in the United Kingdom, a thorough company reform preparation process had begun, and in other countries similar needs were being articulated by academics. The European Commission pursued its goal through the European Company (Societas Europaea), which it finally reached on October 8, 2001, after many detours and incredible obstacles and horse deals. Some of these reached the level of fantasy novels that linked the European Private Company with Gibraltar and terrorism. When the European Company Statute was finally complete and the smoke of the cannons had cleared, however, disillusionment arose as it became clear that the lack of a European solution for the tax law problem was a severe drawback for the new European company law form. For Germany in particular, the compromise on labor co-determination was a Pyrrhic victory since it amounted to a de facto guarantee for the most far-reaching German model

RabelsZ Bd. 69 (2005) S. 611–615

as long as German enterprises were not only junior partners in forming a European company. The result was that the flagship of European company law, as the Societas Europaea was called, was in place, but the wind was missing.

This changed as a consequence of two events, one intelligently brought about by the European Commission, and another arising without anyone having expected it. The first was Commissioner *Bolkestein's* idea of conceiving an Action Plan on company law based on the highly successful model of the Financial Markets Action Plan of 1999. Although the latter had been loaded with many uncertainties and disputes – as is to be expected when conflicting interests must be brought to a harmonization compromise – it turned out to be a success story on the way to a truly European financial market, not only for the European Union but also for the financial industry, or at least a major part of it. In the meantime, strong voices have begun pleading for European financial market supervision to avoid the necessity of dealing with now 25 national capital market authorities. In company law too, a now drive had to be developed. A good occasion seemed to be the mandate given to the High Level Group of Company Law Experts. *Bolkestein* had promised the European Parliament to call in such a group during the encounter between the Commission and the Parliament regarding the takeover directive after the 273 to 273 blocking vote in the Parliament on July 4, 2001. The group, which was deliberately kept small and non-political and enjoyed full independence, was mandated not only to come up with a proposal apt to unblock the takeover deadlock, but also to develop new concepts for making European company law harmonization possible. The latter task seemed at that time a bit academic, though all members of the High Level Group combined an academic background with broad practical and international experience. It was clear, however, that the real political interest in the mandate was at that time centered on the takeover part.

But things changed unexpectedly, from one day to another. The *Enron* crisis burst onto the scene, followed by *Worldcom* and other unheard-of breakdowns and enterprise frauds. This made European politicians worry about whether the company law in their countries and in the European Union was in any condition to prevent similar events in Europe. The rest of the story is well-known. The European Commission was urged by the European Council to take up corporate governance as a matter of primary concern. So the High Level Group of Company Law Experts' mandate was broadened to cover also and even primarily corporate governance questions. The group presented one report on takeovers on January 10, 2002, and another on October 2, 2002, on "A Modern Regulatory Framework for Company Law in Europe". The latter was prepared with a full knowledge of the Sarbanes-Oxley Act of July 2002, which seemed to many Europeans to be a step too far in the right direction, an evaluation that seems to meanwhile be shared by dis-

cernible voices from both theory and practice, even in the United States. The two reports were quickly followed by the final opt in/opt out compromise for the level playing field in the 13th Directive of April 21, 2004, and somewhat before by the Action Plan of the European Commission on "Modernising Company Law and Enhancing Corporate Governance in the European Union" of May 21, 2003. The latter followed the recommendations of the Group in most of the issues and received Europe-wide attention in legal and economic theory, enterprise practice, politics, and the financial press of the member states.

In the meantime, frenetic company law reform activities had also continued or begun in the member states, and soon company law reform in Europe was on the agenda everywhere. Company law in Europe, both in the Union and in the member states, had developed into a primary point of the political agenda. Corporate governance seemed to be the clue to avoiding European *Enrons* (though *Parmalat* showed that this was not the case) as well as a means of getting a lead in the competition for attracting or at least keeping enterprises. Though it was disputable whether regulatory competition in company law could work identically or even similarly in Europe as in the U.S., the aim of the European legislators was clearly twofold but connected: By better shareholder and minority protection, shareholders' confidence in the market should be enhanced, and by the same token the financial market and the economy at large would be promoted. Shareholder protection and market promotion seem to go hand in hand, a concept which was first developed by academics and was then taken up by politicians. The consequence of all this was a burst in company law reform activities all over Europe, a spurt characterized by such rapidity that it has been hard even for experts to keep abreast of the developments.

During this time, there was a common feeling among the editors and some of their colleagues in other countries that there was an acute need to look into the most recent developments in European company law, and that the major reforms and reform proposals should be compared and discussed critically by leading company law experts of various European countries in order to get an authentic picture of the reforms, their leading ideas, and their difficulties and shortcomings. This could best be started by a small, nonpublic expert conference which was held at the annual meeting of the Friends of the Hamburg Max Planck Institute for Private Law in Hamburg on July 12–13, 2004, and was aimed right from the start as the basis for a very concise and timely book or law review issue. Of course, the debate needed to be opened by a representative of the European Commission who knew the details and backgrounds of the Action Plan and the corporate governance plans of the European Commission in particular. We were fortunate enough to have *Alexander Schaub*, Director-General of the European Commission, set the key note. The problems were then to be treated in a twofold manner.

On the one side, firsthand and most timely knowledge of what is going on in the national company law reform processes was indispensable. Of course, the aim could not have been to collect information about most or even all of the member states. Instead, four major company law reforms were chosen as examples: the United Kingdom, where company law reform had been going on for many years in the most thorough and standard-setting way; Italy and France, where the company law reforms or at least major parts of them have already been enacted; and Germany, where a piecemeal, controversial process of company law reform has begun on the basis of a somewhat unclear ten-point governmental program. Leading company law experts from these countries were prepared to contribute: *Eilís Ferran* from Cambridge University; *Guido Ferrarini* from the University of Genoa, who joined in for his contribution with *Paolo Giudici* from the Free University of Bolzano and *Mario Stella Richter* from the University of Macerata; *Michel Menjucq* from the University of Paris I; and *Ulrich Seibert*, the man in charge of company law reform at the Federal Ministry of Justice in Berlin.

On the other side, it seemed necessary to pursue some key company law topics by contributions not just centered on the company law reform of one single country. The law of company groups was such a topic, particularly because the European Commission had given up its idea of harmonizing the law of groups as such, let alone of going so far as to follow the group law codification idea of the German *Konzernrecht*; instead, it decided to go for the key issues and framework harmonization concept first developed by the Forum Europaeum Group Law and in part taken up by the High Level Group of Company Law Experts. *José Miguel Embid Irujo* from the University of Valencia took care of this subject. Another important cross-sectional topic is company law and antitrust. The interrelationships between the two sectors in practice are obvious, but in theory they are mostly neglected. In order to start this discussion, the substantive issues of the EC Merger Regulation 139/04 had to be looked at. The former president of the Greek Cartel Commission, *Dimitris Tzouganatos*, took over this task. Another important cross-section is company law versus securities regulation or, as it is called in some continental European countries, capital market law. *José Garrido García* from the University of Alcalà in Madrid and one of the seven members of the High Level Group devoted his efforts to this. *Eddy Wymeersch*, who uniquely combines theory and practice as professor at the University of Ghent and now president of the Belgian Banking, Finance, and Insurance Commission in Brussels, asked the concluding "*Gretchen*" question: "European Company Law and Corporate Governance: Quo Vadis?"

The aim of the two editors – and indeed all the contributors – was to publish these contributions in order to contribute timely information as well as ideas, doubts, and proposals concerning the ongoing company law reform process in the European Union and the member states. If this aim is fulfilled, the conference and the publication will have served their purpose.

The editors thank all those who have contributed, the speakers and authors, the participants of the meeting of the Friends of the Institute, *Alexander Hellgardt*, *Wolf-Georg Ringe*, and *Irene Heinrich* from the Institute who have prepared the manuscripts for printing and last but not least the Association of the Friends of the Institute for helping to arrange and to finance the conference in Hamburg.