

Final Report High Level Group of Company Law Experts

November 2002

■ Highlights

Amsterdam, 4 November 2002 – The High Level Group of Company Law Experts today presented its Final Report on a Modern Regulatory Framework for Company Law in Europe to the EU Commission. The Group is chaired by Jaap Winter, who will join De Brauw Blackstone Westbroek as a partner on 1 January 2003.

Recommendations on corporate governance issues, some of which deal with the same matters as the US Sarbanes-Oxley Act, form a major part of the Final Report. The Final Report also addresses a number of company law subjects. The Group has identified priorities for the EU in the short, medium and longer term and advises the Commission to set up an EU company law action plan.

This Newsletter gives a short overview of the key priorities and recommendations of the High Level Group. De Brauw Blackstone Westbroek will organise a meeting to discuss these on 28 November 2002. Further information about this meeting is given at the end of the Newsletter.

■ Priorities

The Group recommends that the first priorities for the EU should be to

- Improve the EU framework for corporate governance, specifically through:

- Enhanced corporate governance disclosure requirements
- Providing for a strong and effective role of independent non-executive or supervisory directors
- An appropriate regime for director's remuneration
- Confirming as a matter of EU law the collective responsibility of directors for financial and key non-financial statements of the company
- An integrated legal framework to facilitate efficient shareholder information, communication and decision-making, on a cross-border basis
- Setting up a structure to co-ordinate the corporate governance efforts of Member States
- Offer efficient mechanisms for cross-border restructuring and mobility of companies, specifically by adopting proposals for the 10th and 14th Company Law Directives on cross-border mergers and transfers of seat
- Simplify the 2nd Company Law Directive on capital formation and maintenance rules on the basis of the recommendations of the SLIM Group of Experts published in 1999, as supplemented in the Final Report of the Group

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■ Overview of recommendations

Corporate governance

1. Disclosure

- Listed companies in the EU should be required to make a coherent, descriptive statement in their annual accounts covering the key elements of their corporate governance structure and practices. They should refer to a national code on corporate governance or company law with which they comply or in relation to which they explain deviations.

2. Shareholders

- Listed companies in the EU should be required to provide shareholders with electronic facilities to access relevant information and to vote *in absentia*, in particular through their website
- These facilities should be offered to shareholders across the EU and beyond and specific problems related to cross-border voting should be solved urgently
- Institutional investors should be required to disclose their voting policies to their beneficiaries and, at the request of their beneficiaries, their voting records in individual cases
- Shareholders holding 5 or 10% of share capital should have the right to ask a court or administrative authority to order a special investigation into the affairs of the company; the Dutch enquiry (enquête) rules already provide for such special investigation rights

3. Board

- At least listed and open companies in the EU should generally have the option between a unitary board structure, with executive and non-executive directors in one board, and a two-tier board structure, with a board of managing directors and a board of supervisory directors, as now enacted for the European Company (SE)
- In three key areas where executive directors have conflicts of interests:
 - Nomination
 - Remuneration
 - Supervision of the audit of accounts decisions within the board should be made by non-executive or supervisory

directors who are in the majority independent. A majority of independent non-executive or supervisory directors is sufficient to deal with conflicts of interests while accommodating the wide existence of controlling shareholders in some parts of Europe and employee participation regimes in some Member States, in particularly Germany, thus avoiding in Europe some of the problems caused by the US Sarbanes-Oxley Act

- This requirement is to be enforced by Member States at least on a 'comply or explain' basis
- An appropriate regulatory regime for director remuneration includes:
 - Disclosure of remuneration policy in the annual accounts. The remuneration policy should be an annual agenda item, at least for debate, in the shareholders meeting
 - Disclosure of details of remuneration of individual directors in the annual accounts
 - Share and share option schemes in which directors participate require prior approval of the shareholders meeting
 - The annual costs of such schemes to the company must be accounted for
 - As a matter of EU law, it should be confirmed that the financial and key non-financial statements (like the corporate governance statements in the annual accounts) are the collective responsibility of the board, and not only of (certain) executive directors like the CEO and CFO as would follow from the US Sarbanes-Oxley Act. In conformity with such an EU law principle, directors and supervisory directors of Dutch companies are collectively responsible for the company's financial statements and are already required to sign the annual accounts of the company
- To enhance director's responsibility a wrongful trading rule should be introduced: if directors (including shadow directors) foresee or ought to foresee that the company cannot continue to pay its debts, they must decide either to rescue the company and ensure payment, or put it into liquidation, or otherwise face personal liability in the

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case of failure by the company. Such a concept is already part of Dutch case law, but may need to be formalised in legislation

- The Commission should review whether director's disqualification across the EU could be an appropriate sanction for publishing misleading financial and non-financial statements and other forms of misconduct by directors. Under such a rule directors would be barred from being director in companies across the EU after personal misconduct has been established

4. Auditing practices

The Audit committee, consisting of non-executive or supervisory directors who are in the majority independent, should be responsible for

- Electing the external auditor for appointment by shareholders
- Monitoring the relationship with the external auditor, including non-audit services, if any
- Reviewing accounting policies
- Monitoring internal audit procedures and the company's risk management system

5. Corporate governance regulation in Europe

- The EU should not strive to create a single European code of corporate governance, as the underlying company law in Member States is not harmonized in key areas
- Rather, the EU should actively co-ordinate the corporate governance efforts of Member States through their company laws, securities laws, listing rules, codes or otherwise, in order to facilitate convergence and mutual learning and to ensure a continuous debate in Europe on corporate governance standards, compliance and enforcement
- Member States should each designate one national code of corporate governance with which listed companies subject to their jurisdiction are to comply or in relation to which they are to explain deviations

Capital formation and maintenance

- The current capital formation and maintenance regime for public

companies laid down in the 2nd Company Law Directive should be simplified, along the lines proposed by the SLIM Group of Experts in its report published in 1999, as supplemented in the Final Report (SLIM-Plus)

- The Commission should review the feasibility of an alternative to the capital formation and maintenance rules as amended according to the SLIM-Plus proposals. Key elements of such a system would be the abolition of the concept of legal capital and allowing distributions to shareholders on the basis of solvency tests rather than the availability of distributable reserves

Groups and pyramids

- An EU framework rule should require Member States to allow group companies to adopt and implement a co-ordinated group policy, provided that the interests of creditors are effectively protected and there is a fair balance between burdens and advantages for minority shareholders. Again Dutch case law already provides for such a concept but this may need to be formalised in legislation
- The Group reaffirms its concerns about pyramid structures expressed in its Report on Issues Related to Takeover Bids. It recommends that
 - Enhanced disclosure requirements should be imposed at all levels of the structure relevant to the control of the pyramid
 - Holding companies whose sole or main assets are their shareholdings in other listed companies should not be admitted to trading on regulated markets, unless permitted by national authorities where a strong case has been made as to the economic value of such admission to trading (other than the financing of control by the controlling shareholder)

Corporate restructuring and mobility

- Proposals for a 10th Company Law Directive on cross-border legal mergers and a 14th Company Law Directive on cross-border transfers of seat should urgently be put forward and adopted
- The Group rejects the unlimited 'real

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seat' theory, denying corporate existence and legality when the place of administration/management of a company is moved to a state other than the state of registration; a more limited application of appropriate mandatory rules remains permissible where this can be justified within the general principles of EU law

- Certain formalities imposed by the current 3rd and 6th Company Law Directives on legal mergers and divisions should be simplified and a uniform system of creditor protection should apply to all restructuring transactions where specific creditor protection is required
- General squeeze-out and sell-out rights should apply with a minimum threshold of 90% and a maximum threshold of 95% of the company's share capital, where applicable on a class-by-class basis. Dutch law provides for a squeeze-out facility (uitkoop), but not for a sell-out facility

The European Private Company

- The need expressed by market participants for an EU Regulation on the European Private Company (EPC), facilitating cross-border restructuring and joint ventures by small and medium sized businesses, can be satisfied to a large extent by the 10th Company Law Directive on cross-border mergers
- The Commission should carry out a feasibility study in order to assess the additional practical needs for and problems of an EPC Statute before deciding to submit a formal proposal

Other European legal forms of enterprise

- A Regulation on the European Co-operative (SCE) has recently been adopted. The Group is not convinced of an urgent need for and feasibility of other European legal forms of enterprise, like the European Association, the European

Mutual Society and the European Foundation.

- Basic disclosure rules for all legal entities with limited liability engaging in business activities should be introduced. The Dutch Trade Register Act (Handelsregisterwet 1996) provides for such rules for all types of enterprises, regardless of their legal status

Filing

- Listed companies should be required to publish all company law and securities laws filings and disclosures on their website, with two-way links to relevant public registers and filing systems
- Each Member State should set up a central electronic filing system for filings and disclosures by listed companies

■ Meeting

A meeting will be held on 28 November 2002 at 19.00 h. at the offices of De Brauw Blackstone Westbroek in Amsterdam, Tripolis, Burgerweeshuispad 301, where Jaap Winter, Sjoerd Eisma and Martin van Olffen will further explain and discuss the recommendations of the High Level Group, the follow-up by the Commission and implications for Dutch companies. If you would like to attend the meeting, please confirm this to Natasja Verhoeven (telephone: (31-20) 577 16 75, or e-mail: cmmverhoeven@dbbw.nl).

This publication is intended to highlight issues. It does not intend to be comprehensive or to provide legal advice.

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