

## PRESS RELEASE HIGH LEVEL GROUP OF COMPANY LAW EXPERTS

Brussels, 4 November 2002 – Chairman Jaap Winter of the High Level Group of Company Law Experts today presented the Final Report of the Group on a Modern Regulatory Framework for Company Law in Europe to EU Commissioner Frits Bolkestein.

After the Group had delivered its Report on Issues Related to Takeover Bids in January 2002, it has turned to its original mandate to provide recommendations for a modern regulatory European company law framework. This mandate was extended by the Commission following the ECOFIN Council meeting in Oviedo on April 12 and 13, 2002, to review specifically a number of issues related to corporate governance: the role of non-executive and supervisory directors, management remuneration, the responsibility of management for financial statements, and auditing practices. These and other corporate governance issues form a major part of the Final Report. The Final Report also addresses a number of company law subjects, such as capital formation and maintenance rules, group and pyramid structures, corporate restructuring and mobility, the European Private Company and other European legal forms of enterprise, as well as certain general themes for future development of company law in Europe. The Group has identified what it believes to be the priorities for the EU on the short, medium and longer term and advises the Commission to set up an EU company law action plan.

### **KEY RECOMMENDATIONS AND PRIORITIES**

The Group recommends that the priorities on the short term 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 for independent non-executive or supervisory directors, particularly in three areas where executive directors have conflicts of interests, i.e. nomination and remuneration of directors and supervision of the audit of the company's accounts
  - An appropriate regime for directors' remuneration, requiring disclosure of the company's remuneration policy and individual directors' remuneration, as well as prior shareholder approval of share and share option schemes in which directors participate, and accounting for the costs of those schemes to the company
  - 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, using where possible modern technology, in particular the company's website
  - 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 10<sup>th</sup> and 14<sup>th</sup> Company Law Directives on cross-border mergers and transfers of seat
- Simplify the 2<sup>nd</sup> Company Law Directive on capital formation and maintenance rules on the basis of the SLIM Group recommendations as supplemented in the Final Report of the Group

## OVERVIEW OF RECOMMENDATIONS OF THE FINAL REPORT

### 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; a report published recently by a separate group of experts on these issues is endorsed by the High Level Group
- Institutional investors are to be required to disclose their voting policies to their beneficiaries and, at the request of their beneficiaries, their voting records in individual cases
- In addition to their standard rights of information, shareholders holding 5 or 10% of share capital should have the right to ask a court or administrative authority to grant a special investigation into the affairs of the company

#### 3 Board

- At least listed and open companies in the EU should generally have the option between unitary board structure, with executive and non-executive directors, and a two-tier board structure, with managing directors and supervisory directors, as now enacted for the European Company ( SE)
- In three key areas where executive directors have conflicts of interest, i.e.
  - Nomination for appointment by shareholders
  - Remuneration
  - Supervision of the audit of the company's 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 the conflicts of interests while accommodating the wide existence of controlling shareholders in some parts of Europe and employee participation regimes in some Member States

- This requirement is to be enforced by Member States at least on a 'comply or explain' basis. Listed companies should also explain in their corporate governance statement who of their non-executive or supervisory directors they consider to be independent. Certain

minimum standards of what cannot be considered to be independent should be established at the EU level

- An appropriate regulatory regime for directors' remuneration includes:
  - Disclosure of remuneration policy in the annual accounts. The remuneration policy should be an annual agenda item 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
- To enhance directors' responsibility, a "wrongful trading" rule should be introduced: if 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; there should be personal liability for the consequences of the company's failure in such cases
- The Commission should review whether directors' disqualification across the EU could be an appropriate sanction for misleading financial and non-financial statements and other forms of misconduct by directors

#### 4 Auditing practices

- The Audit committee, consisting of non-executive or supervisory directors who are in the majority independent, should be responsible for
  - Selecting the external auditor for appointment by shareholders
  - Monitoring the relationship with the external auditor, including non-audit fees, 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 and the other conditions which discipline company governance also vary widely in the different member states
- 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 avoid divergence, and to facilitate mutual learning
- 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
- Member States are to be required to participate in the co-ordination process by the EU, but the process itself should be voluntary and non-binding, with a strong involvement of market participants

## **Capital formation and maintenance**

- The current capital formation and maintenance regime for public companies laid down in the 2<sup>nd</sup> Company Law Directive should be simplified, along the lines proposed by the SLIM group, 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. The alternative system of creditor and shareholder protection could become optional for Member States as an alternative to the present 2<sup>nd</sup> Directive regime. 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**

- The disclosure of the governance and financial relationships of and within groups of companies is to be improved, partly by extending the enhanced corporate governance disclosure requirements to groups, partly by reviewing the 7<sup>th</sup> Company Law Directive on consolidated accounts, taking account of international accounting standards
- 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 that there is a fair balance of burdens and advantages for minority shareholders
- The Group reaffirms its concerns about pyramid structures expressed in its Report on Issues Related to Takeover Bids. It recommends that
  - Enhanced disclosure requirements are to 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 the national authorities on the ground that 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 10<sup>th</sup> Company Law Directive on cross-border legal mergers and a 14<sup>th</sup> Company Law Directive on cross-border transfer of seat should be urgently put forward and adopted
- There is no good case for application of an unlimited 'real seat' theory, denying corporate existence and legality when the place of administration/management is moved to a state other than the state of registration of the company; a more limited application of appropriate mandatory rules remains permissible where this can be justified in accordance with the general principles of Community law
- Certain formalities imposed by the current 3<sup>rd</sup> and 6<sup>th</sup> Company Law Directives on legal mergers and divisions should be simplified
- A uniform and efficient system of creditor protection should be imposed in all restructuring transactions where specific creditor protection is deemed to be required

- General squeeze-out and sell-out rights are to be introduced with a threshold of at a minimum 90% and a maximum 95% of the company's share capital, where applicable on a class by class basis

### **The European Private Company**

- The Group acknowledges that a clear need by market participants is expressed for a EU Regulation on the European Private Company (EPC), focussed on small and medium sized business, which can be used to facilitate cross-border activities and is based mainly on contractual freedom
- One of the purposes of the EPC can be satisfied by the 10<sup>th</sup> 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**

- Member States have agreed the text of a Regulation on the European Co-operative (SCE). 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. Market participants could build model laws for these forms of enterprises themselves, which could serve to produce the level of harmonisation required to enable European legal forms to be developed
- Basic disclosure rules for all legal entities with limited liability engaging in business activities should be introduced

### **General themes**

- Listed companies are to be required to publish all company law and securities law filings and disclosures on a specific section of their website, with two-way links to relevant public registers and filing systems
- Linking of commercial registers in the EU should be actively promoted and facilitated
- Each Member State should set up a central electronic filing system for filings and disclosures by listed companies

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The High Level Group of Company Law Experts comprises:

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