

Consultive Document “A Modern Regulatory Framework for Company Law in Europe”

Dear Mr. van Hulle,

the German Notaries' Association (“Deutscher Notarverein e.V.”) thanks for the opportunity to comment on the consultative document of the High Level Group of Company Law Experts “A Modern Regulatory Framework for Company Law in Europe”.

The German Notaries' Association is the association of all German notaries who only exercise this profession, i.e. in particular who do not exercise the lawyers' profession. Our association represents app. 1,500 notaries in Germany and covers app. two thirds of the territory of the Federal Republic. Within this group of notaries, a vast majority of our colleagues are our members. However, in consideration of the identical legal framework for the notary's profession in Germany, our comments on the document might as well apply to any other German notary.

A German notary does not only convey real estate or draft wills or matrimonial contracts. In Germany, like in Italy, Spain, the Benelux or Austria Company Law, in particular Corporation Law constitutes an important domain of the profession. The formation of corporations as well as any amendment of their articles by shareholders' resolution requires a notarial deed. A notarial deed is also required for the transfer and assignment of shares in a Limited Liability Company, like e.g. in the Netherlands, Austria, Italy or Spain. Any application for registration in the German Commercial Register requires the witnessing of the signatures of the applicants by a notary.

Basically these requirements shall ensure the compliance of companies with a minimum of formalities and protection of shareholders as well as creditors not only by facilitating proof of the acts completed but also by providing legal advice rendered by the notary as a neutral public officer. Hence the German notary in reality is the legal department of the SME. The preliminary examination of corporate legal acts by the notary also eases the work of the Commercial Register with the desired effects of saving costs and gaining time.

Therefore the notary is a player of substantial importance in all (“continental”) legal systems which are based on the philosophy of “prevention”. These systems are based on the presumption that preliminary examination and prior amendment of acts and deeds will avoid further litigation which is usually costly, time-consuming and inefficient.

It is understood that usually, especially in case of SME, but also in case of big listed companies, the aforementioned deeds and documents are drafted by the notary as well. Having these documents drafted by the notary is encouraged by the structure of the notarial fees. At least in Germany, but as far as we can see also in other countries with comparable so-called “Latin” notarial systems fees are charged following a system of

fixed tariffs. What you pay depends on the assessment of the value of the case. Usually caps for the fees exist. Having documents drafted by the notary and obtaining his legal advice does not cost necessarily more than the pure act of recording the notarial deed; at least this applies for most cases in Germany. Of course this saves a lot of cost for legal advice (and provokes attempts to abolish this system by lawyers and consultants). These systems do not only provide a calculable base for the transaction cost incurred by the companies but also encourage the notary to work quickly and without mistakes.

Before answering the questionnaire we would like to point out that in our view the approach of the High Level Group has to cope up with several problems.

The approach focuses on Company Law evidently meant as the sum of all legal provisions for the internal structure of a legal entity and some aspects of its exterior relations (e.g. protection of creditors).

However, the Group should not leave out that the Company Law system of any state is embedded in

- its Civil Law system in general,
- its system of Civil Procedure,
- its Penal Law system,
- its Tax Law system,
- its Public and Administrative Law system.

In case of company law, especially the provisions of a legal system

- on personal liability of the management for fault and negligence (consequences of breach of contract or tort, including consequences of Penal Law),
- on insolvency proceedings,
- on piercing the corporate veil,
- on Capital Market Law as well as
- on accounting

should not be left out.

Moreover, Company Law is closely related to general Civil Law as it determines the relationship between legal entities in the market (e.g. the company and its suppliers, its customers, other creditors, employees as well as the consumer in general). This aspect covers not only liability claims but also the most important issue of legal representation. These issues are also closely related to those of the organisation of Commercial Registers in the Member States.

Also, the Group should not leave out the legal system of information rights of the shareholders and reporting duties towards the shareholders as well as legal remedies to enforce information duties and to avoid shareholders' resolutions, not to forget the formali-

ties to fulfil for convening a shareholders' meeting and attending at a shareholders' meeting. A harmonisation of these topics will have substantial impact on the convergence of the national capital markets.

Thus, harmonisation of Company Law - as urgent the need for it may be - must cope up with the problems of path dependency of the legal systems involved. A Member State in which a board member's liability may be enforced by a lawsuit filed by a single shareholder or with the possibility of a class action is much more inclined to consider rules on maintenance of a minimum capital or on a change of domicile as pure formalities than e.g. a Member State in which such a lawsuit requires a quorum of shareholders.

The German Notaries' Association recommends to focus on the following topics in course of harmonisation:

- (1) Uniform structure of the Commercial Registers in the Member States.
- (2) Uniform structure of the powers of representation (esp. abolition of any *ultra vires doctrines* which confine the power of representation to the object of the company).
- (3) Minimum standard for information rights of the shareholders and for reporting duties at least applying to listed companies.
- (4) Minimum standard for legal remedies to enforce the topics mentioned above sub (3) and to avoid shareholders' resolutions.
- (5) Harmonisation of accounting principles.

We do believe that, notwithstanding the often underestimated task of harmonisation, the idea of an European Company Law is feasible.

However, according to our experiences with European Law, we strongly fear that the common denominator of the interests of the Member States and the innumerate pressure groups lobbying their wishes will lead to a race top-down rather than to an improvement of quality. In consequence hereof, the Member States will find other ways to overrule an European Law that protects the rich and the smart rather than the poor and the industrious. The result will be even more confusion than before.

Therefore, we recommend to rely on a "restatement" approach. As small the step of creating the SE has been, as important it is for a continent growing together. A European Limited Liability Company especially designed for SME, based on a autonomous European legal regime and not being "coloured" by the law of the Member States in which it is domiciled, should unfold a considerable undertow effect towards legal structures based on "European Common Law" even if it offers a non-mandatory regulation but just a choice.

The European Council should not try to enforce a legal system of minor quality on its Member States but offer to lawyers and laymen “the better choice”. The market will take care of the rest.

The advantages of a “restatement” approach may be seen viewing the legal practice of Company Law. The templates used in contract drafting are converging much more rapidly than the law systems themselves. As we know from our legal practice it is much easier to find one’s way in French or Italian Articles of a Stock Corporation, in a Spanish shareholders’ resolution or in a Dutch M & A agreement than in the corresponding Company Law. A European model law would probably accelerate this process of convergence.

The unquestionable fact of convergence of the practice of contract drafting is to a high degree due to a notarial system which has already formed an European identity. Similar access to the profession, almost identical professional standards and duties as well as a compatible organisation of the profession facilitates international cooperation and identical thinking. Whoever plans to harmonise the different systems of European Civil Law should take advantage of these structures and should make use of the notarial system to make his dreams come true. We do this job since centuries: the spreading of Roman Law in Europe which began in the 12th century was highly linked to the spreading of the notary’s profession.

In short, our recommendation is: do as the Middle Ages did with Roman Law.

Now to the questionnaire:

Question 1:

Efficient and competitive operation of business across the European Union relies on publicity of the structures of the legal entities taking part. Everybody should have easy access to information on

- corporate name and domicile;
- the legal representatives of the Company and the scope of their power;
- any changes of significance for civil procedure, e.g. change of the corporate name or of domicile, mergers, division, changes of legal form and so forth;
- legal capital (see below) and annual financial statements.

To achieve this purpose, a harmonisation of the Commercial Registers is an urgent desire of the economy. Identical structure and content as well as identical access by the internet should be in everybody’s interest.

As to the structure, the Austrian Commercial Register (“Firmenbuch”) is a model worth copying. As to the access for foreigners not familiar with the local language, the multi-lingual Swedish Commercial Register is worth being highlighted. As to our practical ex-

perience, the easy and comfortable internet access to the British Companies House shows the advantages of IT-structures based on open standard software solutions in comparison to the approach of the Commercial Registers in the different states of the Federal Republic of Germany.

The value of the content of a Commercial Register grows in proportion with the clarity the user gains on the scope of powers of attorney. Here the principles of German or Austrian Law should be taken into account: According to this law system material restrictions of a power of the legal representatives of the company are of no legal significance with regard to exterior relations of the legal entity. Only formal restrictions may be shown in the Commercial Register, e.g. that only two legal representatives may act jointly on behalf of the company. The reason for this strict regulation is that the principal and not the third party is responsible for the agent. In other countries it is left to the third party to find out whether an agent is really entitled to act on behalf of his principal. This results in inefficient research work. The costly legal opinions of US law firms on that issue should deter the European Legislator.

Question 2:

In avoiding “petrification”, a pragmatic combination of all ways ensures success.

As already lined out, a “restatement” model is attractive for legal practice due to its mere quality. Referring to a model law saves time and money in comparison to writing thick contracts which no one reads except in case of their breach.

Standard setting of the market participants may also be useful. In our view, the standard setting in Accounting Law of the “Deutscher Standardisierungsrat” is quite appropriate. However, standard setting may be abused by a group of market participants to dilute the rights of other market participants by “standards” with a merely palliative effect.

It is an illusion that “comply-or-explain”-rules could replace enforcement in full. The consequence might be a desirable “legal disarmament”, but one should never forget that the Goddess of Justice does not only carry scales but also a sword.

Areas for a model law might be the parts of Company Law with capital market relevance, e.g. basic accounting standards, information rights of shareholders, duties as well as legal remedies for their enforcement. In case of a European Limited Liability Company especially for SME a framework for a whole legal entity might be provided by a model law as well.

Standard setting (“soft law”) might be suitable for every-day questions of accounting or of Corporate Governance. One should not forget that the democratic legitimacy of standard setting committees is questionable. At present this can be seen very clearly in the ENRON affair with its effects on the confidence of the American capital markets in the transparency of US-GAAP (cf. Robert Herdman’s - chief accountant of the SEC - testi-

mony before the subcommittee of the US House of Representatives as of Dec. 12, 2001, www.sec.gov/news/testimony/121201tskh.html). Even the chief accountant of the SEC concluded that the SEC “*must carefully look at the adequacy of the current system of financial reporting*” (loc. cit.).

Question 3:

At first view the idea of disclosure requirements fascinates, especially the notaries’ profession. The replacement of substantive rules by procedures like the notarial form definitely leads to more flexibility, adaptability and – in consequence hereof – to more freedom. However, after the experiences with the New Market of the Frankfurt Stock Exchange we cannot agree with this degree of emphasize of disclosure. Disclosure must be enforceable. Moreover disclosure leads to an effect like in a football stadium: if everybody gets up, no one has a better view any more. Disclosed information might be overseen as well if the signal-to-noise-ratio decreases.

Disclosure might be efficient in case of “comply-or-explain”-rules, especially if a company has substantive reason to deviate from certain Corporate Governance standards.

Question 4:

In our view, Europe should primarily focus on the convergence of the European capital markets. The technical revolution in stock trade in the past years will force the European Stock Exchanges to restructure in the near future. Union-wide fundraising should be encouraged and facilitated. In consequence hereof harmonisation should begin with listed companies. There is an urgent need for harmonised provisions on information rights, reporting duties and legal remedies of the shareholders including the liability of the board members.

As many of our clients, entrepreneurs in an export-minded country like Germany, could tell, doing business abroad is difficult. Almost everyone confirms that you pay much more than calculated when doing business abroad. In setting up a branch office or a subsidiary especially the transaction cost for access to legal information is too high. A model company especially for SME together with a standard registration procedure might enable the entrepreneur to do business relying on his domestic advisors. Thus also the export of legal services will be facilitated.

Naturally this model law might be overruled by a bundle of obstacles like local restrictions, permits of authority and so forth. This should be reduced to a minimum, e.g. by abandoning the rule that a legal entity may only be registered in the Commercial Register if the required governmental permits for the intended business has been obtained.

Question 5:

It is not the business of Company Law to combat tax fraud or terrorism. We do not see the point in abandoning freedom only because of the inefficiency of tax or customs authorities. The provisions of Public and Penal Law should prevent these dangers at the borders of the Union following the Schengen model so as to preserve a free capital market within the territory of the Union.

Question 6:

Our answer to Questions a) to c) is yes. First of all we feel an urgent need for a common standard for the European Commercial Registers in the Member States. The structure, the content and the access to this register should be uniform. In this case there would be no need for a central electronic filing system (Question 6d) by which another European super-authority would be created.

In principal, our attitude towards web technologies in Company Law is ambiguous.

On the one hand, at present providing information for shareholders is very costly. These costs may be reduced significantly by information technology. A good example is the information on the agenda of a meeting of shareholders of a German stock corporation pursuant to Sect. 125 Stock Corporation Act the cost of which may attain up to 80 % of the total cost of the shareholders' meeting. On the other hand there is the danger of an "accidental" break down of the IT-system just in the right moment. These dangers could be avoided by providing information not on the website of the company but on the website of a neutral third party. This third party could be a notary.

On the other hand, the second area in which the efficiency of information technology is discussed is the shareholders' meeting of the company. This part of the discussion is not driven by efforts of cost reduction, but rather by providers focussing on a new business model. German practice shows that the cheapest shareholders' meetings are those held without any computer systems present.

First one has to get aware of the reasons for information technology in the shareholders' meeting. They are used for monitoring the attendance to the meeting, for providing quick answers to questions asked by shareholders and for getting instructions for proxy-voting. In future, some companies hope to get rid of the physical presence of shareholders in favour of a "virtual meeting". We do think that this discussion is a debate on symptoms caused by the following:

- Information rights of the shareholders may only be exercised in the shareholders' meeting as these shareholders' information rights are not enforceable outside the meeting.

- The right to avoid a shareholders' resolution is closely linked to an alleged breach of information rights.
- A lawsuit of avoidance may cause serious harm to the company whereas the plaintiff does not undergo any substantial risk.
- Practically there is no way that a board member may be held liable by a single shareholder.

The consequence of these legal parameters is the technical upgrade of the shareholders' meeting – the present round in the arms race is determined by IT-technology, the next round will be marked by spectacular hacks in those systems. We prefer a causal therapy instead of a symptomatic one.

Question 7:

Again, the answer is yes. A comparative study of the different European Corporate Governance Codes made by the German Notaries' Association on the occasion of commenting on the work of the Second Commission on Corporate Governance in September 2001 shows that the quality of each Code is related to its authors (see: www.dnotv.de, » "Stellungnahmen", » "Corporate Governance", » "Stellungnahme vom 07.10.2001"). If the markets are not represented in the composition of the commission the danger of a conflict of interest is evident. Much of the criticism the new German Code of Corporate Governance had to cope up might be due to the composition of the Second Commission on Corporate Governance.

Especially the independence of the auditor, as many of the European Codes and especially the Spanish studies point out, seems to be a question of substantial interest. As the cases in the US show, the conflict of interest and the economic dependency of the auditor of consulting business seems to be a substantial part of the problem (cf. ENRON in US, ERF in UK, probably also Rover in UK, Flowtex or COMROAD in Germany).

The one-stop-shop-thinking of the market as well as of the auditors themselves downgraded auditing to a cheap commodity which is just the key to open the client's door for consulting, tax and legal advice with considerably improved margins. We see a need for a fixed tariff for auditing services rather than forbidding to the auditors to give a good advice to the client.

Question 8:

The answer to Question a) and c) is yes. As to b), it should be confined to legal entities which are or might be listed, i.e. in Germany only the stock corporation. In case of other legal forms this point may be left to the contract drafter.

As to questions d) and e) we do not see the value of this information clearly. According to the German practice, members of the supervisory board seem to be underpaid in most cases. Discussing individual fees in an “envious society” like the German one tends to discourage high potentials from engaging in boards in favour of working for companies just as consultants. In any case it seems desirable to show fees e.g. for consulting paid to board members in addition to their regular remuneration as well as business activities caused by net-working effects.

As to stock options more information of shareholders on the diluting effects of SOP is a general desire. In the directors’ report or in the appendix to the annual financial statements a section should be included (cf. the US-SFAS 123 para. 46 sqq.) in which the amount of options outstanding and exercised, the value of the options pursuant to the Black-Scholes formula or to the binominal method is stated and the diluting effect on the other shares is quantified.

Question 9:

In German Stock Corporation Law rules on a special investigation exist – the institution of such procedure depends on an application of a quorum of shareholders and a resolution of the general meeting of shareholders. But in reality these rules are rarely applied. This might be due to the following reasons which should be taken into account in harmonising European Law:

- It is difficult for the minority shareholders to form a group exceeding the quorum.
- In case of a outside demand for a special investigation, the management together with the major shareholders might form a block glued together by the “Old-Boys-Network” of “Germany, Inc.”.
- In a market where the number of potential investigators, i.e. independent audit companies, is shrinking rapidly, it is more and more difficult to find an appropriate investigator.
- The efficiency and the results of the special investigation depends how cooperatively the management of the company subject to investigation collaborates with the investigators who cannot enforce their information rights.
- The mere existence of those rules might have a deterring effect on the management.

These facts obviously explain why the special investigation procedure wasn’t of major significance even in the numerous cases in the German “New Market” (in which the deterring effect is questionable, cf. the cases of EM-TV, COMROAD or Infomatec). Moreover it is also extremely improbable that a member of the board is held liable directly by a single shareholder in Germany.

The result in German practice is that the investigation of these cases is largely left to the district attorneys. The result might be a penal trial with the typical end of guilty plea bargaining. Of course this does not enhance shareholders' rights – beside the endless discussion in Penal Law whether Penal Law and its sanctions really deter people from committing crimes (“general prevention”).

In our opinion the solution lies in enhancing the civil liability of the members of the board towards their shareholders. Doing this also the often too prominent role of Penal Law could be reduced.

Question 10:

Many of these Common Law Rules, like the “wrongful trading-rule” or the “business judgement-rule” sound good but in effect lead to endless discussions on their application. As a result the number of billable hours of the lawyers involved in the case might be increased considerably but the gain of the application of these rules for creditors and shareholders, i.e. the gain of legal security, might not easily be seen. Moreover applying the wrongful-trading-rule the management might stay in charge too long, a fact which offers large possibilities to reduce the chances that the necessary proofs could be furnished.

In our opinion there should be few and clear facts which trigger the boards' obligation to apply for insolvency proceedings. Once insolvency proceedings being instituted, the receiver will assume control of the company. An Insolvency Law is or should be flexible enough to allow a quick decision between “fix, close or sell”.

Question 11:

In our opinion a Corporate Governance Code should fulfil the expectations of the capital markets of transparency, accountability, fairness and responsibility (quoting Sir Adrian Cadbury). Therefore drafting such a Code should neither be left to the legislator nor just to the companies themselves. The existence of and the compliance with such a Code being a problem of the relevant capital market, the content of such a Code should be determined by the committee instituted by the Stock Exchange where the company is listed, with members of all the market participants (companies, the Stock Exchange, banks, institutional investors, shareholders' associations). In case of multiple listing or of EASDAQ Companies there might be need for an European Code.

For further details we invite to consult our comment on the Second German Commission of Corporate Governance of 7 Oct. 2001 (www.dnotv.de, » “Stellungnahmen”, » “Corporate Governance”, » “Stellungnahme vom 07.10.2001”). We may quote thesis 7 as to the content of such a Code:

„The Code should contain a list of obligations for certain topics with a duty to information (“disclosure”) and rules on procedure.

Especially rules on procedure deserve special interest. Transparent procedures for decision making ensure the quality of the decision itself without the necessity of a strict corset of rules for its content (“legitimacy by procedure”). It is much easier to ensure quality just by formal rules than by provisions on content. Rules of procedure should concern the forming of a corporate body, the internal decision making of the corporate body and the structures of communication between the single corporate bodies as well as between the enterprise and the market. This applies in particular to take-overs.

The personal and professional independence of the members of the supervisory board and of the auditors are in the focus of the international debate.”

Question 12:

We refer to Question 6 where we stated that up to 80 % of the cost of a German shareholders’ meeting are due to regulated shareholders’ information. To enhance shareholders’ participation and to ease the access for SME to the capital market it makes sense to start with the reduction of this block of costs. Question 12 aims at that goal.

The transition from information by snail-mail using depositary banks which gives them another chance to charge fees to information by electronic media should reduce the cost for stock corporations dramatically.

To explain our position we may give a summary of the procedure of convening a shareholders’ meeting of a listed company under the German Stock Corporation Act.

- Preliminary information on the date of the shareholders’ meeting in e.g. the “Wertpapiermitteilungen”; (usual, but not necessarily mandatory).
- Banks, shareholders’ associations and shareholders demand mailing of the convention and the agenda pursuant to Sect. 125 Stock Corporation Act.
- Publication of the convention of the meeting, the agenda and the proposals of the board in the Federal Gazette and at least one mandatory stock exchange newspaper.
- Counter-motions of shareholders are possible. The company must communicate them to the shareholders only if they are submitted within one week upon publication in the Federal Gazette.
- The convention, the agenda, proposals and counter-motions shall be communicated to banks, shareholders associations and shareholders pursuant to Sect.

125 Stock Corporation Act within twelve days upon publication in the Federal Gazette (consequence: five days left for printing counter-motions and mailing them together with the convention).

- Shareholders who want to attend to the meeting address the bank where they deposit their shares and apply for an admission ticket. The bank communicates a certificate of deposit of the shares to the company, a notary or the bank stated in the convention. Upon receipt of the certificate, the admission ticket is issued and the applying shareholder is listed in a database (which is the base for the future attendance register). Details, especially terms for application, are subject to the Articles of the Company.
- At the reception desk of the shareholders' meeting, the shareholder shows his entrance ticket and gets registered in the attendance register.

Costs arise especially for mailing of the conventions pursuant to Sect. 125 Stock Corporation Act and for the services of the bank issuing entrance tickets. In comparison to these costs the cost for the meeting itself (room, catering and so on) are of minor importance.

Moreover communication between shareholder, his bank, the company's bank and the company depends on the speed of the German mail. In many cases shareholders are registered as having deposited their shares but don't have received the entrance ticket. Sometimes the quality of the data submitted to the Company by the banks is questionable.

It is understood that this procedure is very suitable for using IT.

It should be sufficient to present the convocation to the shareholders' meeting on a website, including the agenda and all necessary templates for application for attendance and for proxies.

Moreover filling an electronic application form and emailing it to the Company would not only accelerate the whole procedure of application for attendance and drafting the attendance register considerably but also reduce the cost significantly because no bank fees can be charged any more. The attendance register could be drafted or at least prepared to a high degree by computer. Naturally, a prerequisite for any harmonisation of these procedures is a comparative study of how shareholders' meetings are convened and how the attendance to shareholders' meetings is regulated in the Member States.

Yet we doubt that the website of the Company is the right place for providing all this information. In particular in case of a proxy-fight, of shareholders' chat rooms or of shareholders' proposals which contradict the strategy of the board, the Company's webmas-

ter is in a severe conflict of interest. The danger of a breakdown of the system just in the right moment is only too obvious.

Although it is highly probable that the market will satisfy the need for research of such shareholders' information by developing special business models for that need (e.g. virtual news agencies), it remains difficult especially for the private investor to obtain the necessary information.

In our opinion a notary or a notaries' organisation as trustworthy third party could be entrusted with the task of providing a web server for the necessary forms. By international cooperation of the notaries just one URL and just one union-wide data format could be offered to the capital market.

Using IT technology a shareholders' meeting could be convened as follows:

- On a web-server of a trustworthy third party (e.g. notaries' organisation) every listed company has a website offering information on reporting, shareholders' meeting, disclosure of price sensitive information and a chat room for its shareholders.
- Every interested person may enlist there for submission of investors' information by push-email.
- The company publishes the convention and the agenda on that website, together with forms for certificate of deposit, proxies and application for attendance. Automatically the enlisted investors become informed.
- Shareholders who plan to attend to the shareholders' meeting have their bank submit the certificate of deposit by means of secure electronic traffic and fill and submit the application form. The applicant receives an electronic confirmation.
- Automatically the data of the applying shareholder are added to a database which is the register of persons who have applied for attendance.
- Counter-motions are possible, too. After brief examination of their content they are communicated to the enlisted recipients. Of course time periods may be provided for the submission of counter-motions as well as for the application for attendance.
- Proxies may be submitted by means of secure electronic traffic, too.
- In the meeting itself, the shareholder or the proxy-holder is registered as attending.

Providing a chat room for shareholders one should not disregard that communication between shareholders depends on their rights to inspect the complete shareholders' register (in case of registered shares) or – at least – to search in the complete attendance register of the last shareholders' meeting, of course using the appropriate research software. These possibilities are indispensable for minority shareholders if certain proposals (e.g. special investigation) require a quorum.

In Germany, these possibilities have been practically abolished recently, officially based on the argument of protection of data privacy, but in truth strongly lobbied by "Germany, Inc.". Access to shareholders' data should be admitted, at least to the data of those shareholders who agreed to such disclosure.

Question 13:

There should be minimum rights to ask questions for shareholders, but this information right should not be confined to the general meeting.

A view on the German general meeting will explain our position (see also our comment on Question 6):

Since almost 100 years, the so-called "rapacious shareholders", a term already used before the Second World War, are a major topic of the German discussion. Why did this problem arise and why did we not solve it within the last century?

In Germany, the shareholders' rights are concentrated on the annual general meeting. There and only there, questions may be asked, answers may be given or denied. The mere assertion of a shareholder that a question was not or not completely answered may lead to a lawsuit of avoidance of a shareholders' resolution. The lawsuit of avoidance usually impedes the registration of the resolution or its completion. If e.g. a company applies for the authorisation to issue convertible bonds for purposes of its further financing, the market won't accept a bond which authorisation is avoided. As high this risk may be for the company as low it is for the plaintiff. Putting forward a counterclaim on damages is practically useless. In the end, by a court settlement, the plaintiff meets his goals: getting bought out by the defendant for a price which - applying common sense - would be considered as blackmail.

As a result the German general meeting of shareholders, which should be – beside the formality of passing the necessary resolutions - an instrument of investor relations, has often degenerated to a mere battlefield in which several divisions of lawyers demonstrate their skill. At least Japanese yakouza as yet have not been applied.

Thus, (1) the prerequisite for a shareholder's right of information should be that, when a shareholder asserts that one of his questions has not been answered properly, he/she

shall only be entitled to damages and shall in general have no right to avoid a resolution.

(2) in lawsuits the chances and risks of plaintiff and defendant should be equalized. A lawsuit of avoidance should in general only impede the registration or execution if the plaintiff has provided a collateral for the counterclaims of the company.

(3) in order to discharge the general meeting information procedures for listed companies outside general meetings should be harmonised. It will serve the interest of investors if they can rely on comparable information given by all European listed companies every quarter as well if they can rely on comparable information rights in the general meeting.

Question 14:

In a recent general meeting the retiring chairman of the supervisory board thanked the assembly for so many years emphasizing that he was glad to be able to express his gratitude personally and not by mail to a virtual meeting.

This little story illustrates how difficult it is to answer this question.

On the one hand the “real” shareholders’ meeting should not be abandoned. The main purpose of the general meeting is to provide a place in which the management of the company communicates with all its owners and not only with its major shareholders or its institutional investors who should not be more equal than the other shareholders. Evolution has not built the human race for communication in virtual chat-rooms.

On the other hand globalisation of fundraising and therefore a multinational composition of shareholders is a desire for effective and competitive capital markets. But this does not necessarily lead to a virtual meeting, which, due to the necessary technical equipment, will probably cost more than the actual general meeting. Hence the virtual general meeting in the actual debate is strongly lobbied by IT-service providers whereas, in our experience, the cheapest general meeting is one without computers.

The problem how to ensure a wide attendance of shareholders begins with the convention of the meeting, as a view on the German system shows. Upon publication of the convention of the meeting the shareholders willing to attend to the meeting shall deposit their shares in blocked deposit and shall apply for attendance. This system usually stops at the German border – with remarkable side-effects. If for instance a venture capital financed company goes public, it is extremely difficult to integrate the shareholding venture capital funds abroad into that procedure. Typically the banks abroad do not cooperate with German banks to ensure the attendance of their clients. Therefore the convention procedure for listed companies should be harmonised and internationalised.

Once a convention procedure ensuring the attendance of all European investors being implemented, we do not see a need for absentee-shareholders voting or mandatory proxy-voting. When the information is given that shareholders' rights may be exercised, it should be left to the shareholders whether and how they exercise their rights or not.

Hence the problem is not one of the meeting itself but of its preparation. Here, a common standard of procedure of convention and application for attendance is a desire. A proxy-voting system may be easily integrated in such a system.

In consequence hereof we are in favour of union-wide mandatory standards for the convention of the meeting including standards for communication between the shareholders' banks. However, a proxy-voting system should be allowed but not required. Under the given parameters of the technical possibilities of secure electronic traffic, absentee-voting or a virtual general meeting seem to raise more problems than it solves. The imagination of a lawsuit of avoidance in which only technical questions of electronic voting are discussed at court is pure horror.

Question 15:

We do not see a necessity for disclosure of policy of institutional investors (whatever the meaning of this term may be). Mandatory disclosure of someone's policy towards shareholders of companies in which someone invests is a discrimination with regard to other major or minor shareholders. This issue as well as the question whether to exercise voting rights or not should be left to the responsibility of the investors towards their own shareholders.

Question 16:

Without any doubt, the system of legal capital has its defects.

It does not ensure the capitalisation of the enterprise required by the market. For this purpose, the legal capital in most enterprises must be considerably higher, as the new "Basel II" standards show. However capital adequacy has never been a purpose of the system of legal capital.

On the one hand, the system of legal capital has the following advantages:

- The system provides few and clear rules for the management what to do or not to do in raising and maintaining legal capital. The system sets forth a standard for liability which is easier to apply than e.g. the US business judgement rule. Therefore it effectively protects creditors' interest providing a minimum standard. Its clear rules are also appropriate to enforcement by Penal Law.

- The system protects minority shareholders. It is not so easy for the management to dilute their rights by issuing new shares than e.g. in the Delaware Corporate Law system.
- The system provides a desirable threshold for newcomers. Requiring a minimum of cash or assets for the access to a legal form of a corporation the system of legal capital excludes slippery people. This seems to be a well-founded restriction, for the concept of a corporation implies a restricted personal liability in case of insolvency. It can be expected of people with some personal fortune and therefore a substantial personal risk to behave properly.

The advantages of clear and simple rules are quite evident e.g. comparing the continental system of accountancy to US-GAAP. In US-GAAP questions of accountancy are often discretionary (e.g. booking of discontinued operations, restructuring reserves, special purpose entities, issuance of stock in exchange for notes receivable or mark to market accounting, cf. Herdman loc. cit.). These rules which practically leave the decision between two or more alternatives to the discretion of the company lead to enforceability neither in penal nor in civil law.

The disadvantages of the system of legal capital lie (i) in its inflexible structure and (ii) in the often difficult procedures of financing of an enterprise.

The inflexibility is no major problem if the threshold for newcomers is not too high. The difficulties of financing are often a problem of the repertoire of capital measures provided in the national Company Law. E.g. there is no authorized capital in French Stock Corporation Law. Thus, an extraordinary meeting is required to increase the share capital in any case with detrimental effects for French companies to make the most of actual favourable conditions of the capital market.

As a result, we prefer the system of legal capital. It may be often inadequate and alternatives conceived in theory may often look brighter. But the world we live in, with human beings being sometimes dishonest and apathetic, does not always offer a place for all ideas of the realm of academic theory.

Question 17:

The answer to this question is very difficult for any answer is deeply rooted in the civil law system of the Member State.

E.g. in the French system, the consideration for the issuance of shares (*apport en liquide ou apport en nature*) is not restricted to assets which could be shown in a balance sheet. This freedom is compensated by a strict liability of the contributor towards the company's creditors whose legal remedy is the "*action paulienne*". In countries without a comparable legal remedy consideration for new shares and its assessment must be regulated more strictly.

Recently the possibility of increasing equity by the issuance of stock in exchange for notes receivable in US Corporate Law has come under fire (cf. Herdman, loc. cit.). Only the restatement of the ENRON balance sheet due to these operations had accounted for a loss of US-\$ 1.1 billion.

Difficulties arise especially when services or intellectual property rights are contributed. Of course this also is a question of accounting. But the answer does not only lie just in the company's balance sheet. How shall the promise to render services be enforced in insolvency? Slavery seems to have been abandoned since some years.

We refer to our comments on Question 16 where we emphasized the "threshold function" of legal capital. With the concept of a corporation the law offers the possibility of personal liability limited to the assets of a fictional entity in case of insolvency. This privilege should not be offered at any price. This is also a major issue of consumer protection, because in case of insolvency also consumer rights (e.g. refund of down payments, fulfilment of representations and warranties) are in danger.

In Germany the acquisition of own shares is in principal a taboo after the horrible experiences of the crash of 1929 and the consequences it had for the political system in this country. Therefore the question is delicate. Since 1998 restrictions have been eased. At the present stage it is too early for conclusions. Especially the spectacular cases in the New Market are yet to be assessed if the acquisition of own shares has been abused to manipulate exchange rates.

Also, "pre-emptive rights" of the shareholders (probably in the meaning of rights of first refusal to subscribe for new shares) are assessed differently in the Member States. In Germany, any regulation of subscription rights always implies questions of the guaranty of personal property in the Constitution of the Federal Republic (Art. 14).

We consider the principle of "one share one vote" as fundamental in Company Law. Golden shares or multiple voting rights per share are obstacles to an efficient capital market, in particular to an efficient market of corporate control, and should be abandoned (cf. Court of Justice of the European Communities: judgements of 4 June 2002, cases C-483/99, C-503/99, C-367/98).

Question 18:

As to a) to c) see our answers to Questions 10, 16 and 17.

Subordination exists in the concept of legal capital in Germany not only in the way of subordination by agreement but also in deemed subordination in case any third party would not have given a loan to a company under the given circumstances. This doctrine of "capital-replacing loans", based on case law, seems to have worked quite well. It equalises the lead on information a shareholder at least of an SEM has in comparison

to its creditor. As a result, this system brings the system of legal capital closer to the wrongful trading or business judgement rule.

The courts seem to be flexible enough to react on new financing methods so that the development of law can be left to them. A good example is the recent jurisdiction of the German Supreme Court on financial plan credits.

Question 19:

As to a) see Question 17 above.

As to b) we do think that whatever the system of capitalisation is, a capital measure should imply the flow of “fresh” money or “fresh” assets. Financial assistance for the acquisition of own shares is rather comparable to the famous paintings of the Dutch artist Escher and therefore very suitable for deceit and fraud. However there is one situation in which we tend to recommend the possibility of such financial assistance. E.g. in the Monsanto stock option scheme a loan is granted to the employees on the condition to buy Monsanto shares. The loan carries interest in the amount as required by the bond market. The performance of the shares must exceed the interest on the loan to make the deal good for the employees. This system should be encouraged – of course accompanied by reporting duties of the company. However, the issuance of stock in exchange for notes receivable (the ENRON model of aggressive accounting) should not be permitted at all.

Question 20:

Groups of companies are very frequent in Germany. As statistics tell most of the registered German corporations are members of a group of enterprises.

Groups are an adequate way to structure a profit-centre oriented organisation. They allow the allocation of entrepreneurial risk and chances. The problems with groups usually start if problems in one area are not solved but hidden by mixing the group funds with central cash management by the holding. This might delay necessary restructuring – usually the parents’ shareholders’ problem. But this gives reason to concern for the legislator if there are minority shareholders left in controlled companies.

Question 21:

Transparency in groups is not only a problem of accounting but also an important issue of Corporate Governance. Typically the members of the executive board of the holding assume memberships in the executive boards or at least in the supervisory boards of the subsidiaries. This might lead to self-referential systems with the danger of conflicts of interest and in particular the temptation to avoid the cover up of mistakes. Forming of groups leads from direct to indirect control of the business activities by the supervisory board of the parent and therefore gives more power and freedom to the management of

the parent. Therefore the information rights of the supervisory board and of the shareholders of the parents should be enlarged to activities at least in consolidated subsidiaries.

Of course in branches with special supervision by the state (e.g. insurance companies or banks) grouping (usually by outsourcing business activities) is also a way to escape from control. This should not be permitted.

Question 22:

Tensions between the group and its parts are no problem if all the subsidiaries are 100% owned by the parent. Problems arise when there is a minority of shareholders left in a subsidiary. In German practice the parent and the subsidiary usually enter into a corporate agreement (domination agreement and profit and loss agreement) offering a guaranty dividend to the minority shareholders. By this, a quite acceptable solution is reached at first sight but not in the long run.

Problems arise again when the question arises under what circumstances the management of the controlled company shall terminate the corporate agreement. Theoretically the management of the controlled company should act in the company's and all its shareholders' interest. But if the management is in part identical with the management of the parent, the termination of the agreement is highly improbable. It cannot be reasonably expected that someone bites the hand that feeds him.

In case of a squeeze-out, the compensation of the minority shareholders is limited to the present value of the guaranty dividend and not assessed on the base of the actual discounted cash flow. This offers possibilities for the major shareholders which he should not have.

Therefore there should be a legal remedy for the minority shareholders to enforce either the termination of a corporate agreement, if according to the judgement of a reasonable businessman the termination is justified, or to enforce a modification of the rules on compensation (i.e. compensation calculated with the corporate agreement deemed terminated or not, whatever is higher).

Question 23:

Pyramidal structures not being frequent in Germany, the home of large conglomerates, we have no experience with these structures. These structures seem dangerous because of their lack of transparency. According to German law, the corporate veil may be pierced if a subsidiary is dominated by a parent without any corporate agreement.

Question 24:

The famous debate between incorporation doctrine and real seat doctrine is deeply routed in the civil law system of the different states. When the High Group considers the real seat doctrine as a “*disproportionate inhibition of commercial freedom and legal security*” this argument is as well pure rhetoric as well denying that both concepts serve the purpose of legal security in their correspondent legal surroundings.

The choice between the two systems is largely influenced by the available legal remedies in a certain state such as *in rem* jurisdiction, piercing the corporate veil and direct liability of the management towards the shareholders or discovery procedures. E.g. a country without *in rem* jurisdiction or with only a theoretical chance of piercing the corporate veil like Germany will have to take into account severe side-effects on its whole law system. Moreover the question is also an issue of consumer protection.

So finally the issue is directly related to the preventive or litigious approach of a Law System, hence to the different ways to build up a civil society the legal culture being its substantial part.

As a matter of fact, justified reasons for a cross-border change of corporate domicile are not yet obvious. There is no provision in tax law permitting to avoid a taxable profit of liquidation. Therefore under normal circumstances a subsidiary is set up instead of the domicile being changed.

It is remarkable that all the cases which have gone to court have been a little “smelly”. In the German case “Landshuter Druckhaus Ltd. & Co. KG” (of the Supreme Court of Bavaria) a German owned general partner in form of a UK Ltd. was used in a German Limited Partnership for the only purpose to circumvent the provisions on workers’ participation. In the “Centros” case of the European Court of Justice the Danish owned British corporation should serve as a legal entity for slippery financial operations in Denmark. In Ireland and the Netherlands the incorporation doctrine is used to slip through holes of International Tax Law. Perhaps this is the reason why the European Court of Justice as yet did not make up its mind expressly.

The draft of the 14th Company Law Directive provides a fair compromise between the two theories as well as Art. 8 of the Council Regulation No. 2157/2001 does.

The concept of an European Private Company especially for SME should provide a comparable solution. In implementing this approach, there would be a free choice between a “transferable” European legal form and a “not transferable” national legal form. Of course, in an European Regulation the consequences for liability of the management and the possibility of piercing the corporate veil should be regulated, too.

Question 25:

The difference between a merger and a take-over bid should not be overseen.

Consequence of a merger is not only the assumption of all the liabilities of the transferring legal entity but also, unless in case of a parent-subsiary merger (“up-stream-merger” or “down-stream-merger”), the granting of new shares in the acquiring legal entity to the shareholders of the transferred legal entity. Granting of these shares has a diluting effect as to the voting rights of the shareholders of the acquiring legal entity as well as to their financial participation, the latter at least unless the conversion ratio between the shares in the transferred legal entity and the acquiring legal entity is adjusted exactly to the ratio of the true and fair values of the two legal entities. All this does not apply to take-overs.

These effects which constitute the difference between a merger and a take-over are the fundamental reasons for the requirement of a resolution also of the shareholders’ of the acquiring legal entity.

Art. 8 of the 3rd Company Law Directive is an exception from that general principle. According to a pure deduction from the principle, the requirement of a resolution of the shareholders of the acquiring legal entity might be abandoned just for the cases of a parent-100%-subsidiary-merger. If no new shares are granted, there is no diluting effect. If one legal entity holds 100 % of the shares of the other one, at least according to German Law on groups of companies there will most likely be a liability for losses of the controlled company anyway, even without a corporate agreement. Moreover a general meeting costs time and is expensive. Therefore the requirement of a merger resolution of the acquiring legal entity is abandoned by Art. 8 not only in the cases of 100 % control, but also in cases of a so-called “trifle” merger.

In German Law Art. 8 is only applied for Stock Corporations. In case of other legal forms a merger resolution of both legal entities involved in the merger is required. There is sufficient reason for that, for the principles of the law of groups of companies directly only apply for stock corporations, for other legal entities only analogously and in part.

Art. 8 offers only a possibility for the provision taking into account the different approaches of the Member States to groups of companies (see Question 22). The possibility of Art. 8 of which Germany made use might not be appropriate for other Member States.

The High Level Group seems to mix the question of Art. 8 of the 3rd Company Law Directive with the question whether an international merger should be possible. The latter is a necessity for an economy growing together not only in case of big companies but also for SME. One must not only think of leading cases like Hoechst and Rhône-Poulenc but also of small-scale cases of a German SEM merging with its Dutch or Austrian subsidiary.

The SE-Regulation shows that a solution for these cases is feasible. The principles of the 3rd Company Law Directive can be maintained in just extending the scope of application of the Directive to international mergers.

Question 26:

See our comments on Question 25.

Question 27:

The German Law on Restructuring (“Umwandlungsgesetz”) did not care very much on creditors’ safeguards. The extent of capital measures (increases or reductions of share capital) is largely up to the agreement and the approval of the shareholders. The creditors may claim a collateral for their claims within six months after publication of the merger/division/change of legal form when they show probable cause that the performance of their claim is endangered by the restructuring. Cases are quite rare so that one might conclude that the provisions of German Law are sufficient.

The Austrian Law chooses a stricter approach. In Austrian Law capital measures shall reflect the ratio of the true and fair values of the legal entities involved in restructuring.

It might well be that an international merger affects the creditors’ position more severely than a national one, especially in Member States which do not admit an *in rem* jurisdiction in the assets of the former transferring legal entity. In these cases it might be necessary again to think over the liberal German approach.

Question 28:

Since January 1, 2002, the possibility of a squeeze-out exists in German Company Law. Of course it is too early to comment with expertise on this new instrument.

So let us give just a short summary of the first experiences:

- The quorum of 95 % of the majority of the major shareholder seems fair enough.
- In German Law, the amount of compensation paid to the minority shareholders is determined by the major shareholder, after that audited by an auditor appointed by court and finally submitted to the shareholders’ resolution. The quality of the audit depends on the degree of cooperation of the company subject to squeeze-out with the auditor. The auditor, beside the problem to find an independent auditor in the shrinking auditing market, may not enforce his rights of information. This might be a source of lawsuits ending up finally at the German Federal Constitutional Court.

- The minority shareholders may ask questions to the executive board of the company subject to squeeze-out, but not to the major shareholder (although questions to the latter may be of specific interest). The executive board may answer: “we don’t know – that is not our business.” Also this seems to be weak point of the German approach.
- Furthermore it is not permitted under the actual terms of the German regulation of „squeeze-out“ to offer the choice between consideration in cash and consideration in shares in the major shareholders to the minor shareholders (or a combination of both). This might make grow the tensions between minor shareholder and major shareholder for if shareholders’ rights in the major shareholder are offered it might be easier for the minor shareholders to withdraw.

Question 29:

No.

Question 30:

As already pointed out in several answers to this questionnaire we do see a need for an European Limited Liability Company especially for SME. Such a legal entity could provide an adequate vehicle for SME which are active in several Members States as well as for SME in several Member States merging their enterprises to a legal entity with a genuine European corporate identity. We do hope that a Regulation on an European Private Company will not be so complicated like the SE-Regulation but will also provide e.g. regulations on liability of directors.

As the German Notaries’ Association, we do not conceal our concern that a Regulation on an European Private Company might be used by powerful pressure groups to squeeze us out of the market by abolition of the requirement of notarial deed in Company Law. As many studies show transaction cost of notarial work in Corporate Law is considerably lower than transaction cost of other advisors. After the French notaries lost their competences in corporation law, the fees charged for formation of corporations (as well as the fees for other legal paperwork in corporate law) multiplied. The long experience with contract drafting and the lean organization of notaries generates advantages of efficiency which are transferred to the clients. It is understood that an efficient competitor without any lobby provokes attempts to get rid of him with unfair methods. We know from experience of the past that we cannot count on economic facts when dealing with the European legislator. The notary’s Achilles heel is the legal tariff. Because the notarial tariff is too transparent to be hidden in a cost calculation, notarial fees may easily be branded as “too high” and “unnecessary” – at least by other advisors who charge a multiple. We cannot downsize the cost for formation of an off-the-shelf-company and upgrade the cost for its continuous legal advice as British law firms can do.

Insofar we also refer to the German Professor Hommelhoff who also underlined that the formation of an European Private Company should be subject to notarial deed at least in the Members States with “Latin” notaries.

We are convinced that as notaries already cooperate on international scale with many colleagues and draft and record notarial deeds in foreign languages, we will offer cheaper and quicker solutions especially, but not limited to SME than our competitors and we will also be able to export our services. One should not forget that the French notaries were the first to demand an European Corporation in 1959.

Question 31:

The way to the SE is complicated and will lead to a market of ready-made “off-the-shelf”-SE formed by professionals and then sold on the market. The complicated way to form an SE is an obstacle which will reduce the importance of this legal form. It is a shame, but for political reasons the product SE is not 100 % suitable for the market. We do hope that the Member States will not repeat this mistake in enacting the Regulation on the European Private Company.

Moreover, we propose that the requirement of undertaking economic activity in two or more Member States should be abandoned. The European Private Company should be available for every citizen of the Union, at least for citizens who plan to undertake such activities. The abolition of this requirement would enhance the “restatement” character of the European Private Company which should be the better alternative to the national forms and therefore should trigger a process of convergence of the national Company Law.

Question 32:

In mid 19th century the states of the “Deutsche Bund”, the association of the states of German tongue excluding Switzerland, commonly enacted the “Allgemeines Deutsches Handelsgesetzbuch”, the “Common German Law on Trade”. This Code contained provisions on Company Law as well as provisions concerning legal relations between merchants. Despite an area of applicability of the Code in which the French Code Napoleon, the Common Law for the Realm of Prussia, the Common Civil Code for Austria as well as Roman Law was applied, apparently there have been no such difficulties as feared by the High Level Group. In the end, harmonisation of Commercial Law led to harmonisation of Civil Law in the German Empire.

So we think that a Regulation on European Private Company with provisions on the relevant areas of Civil Law could place a nucleus for a future European Private Law. If the European model meets common sense of the citizens, if it is modern and easy to apply, the market will give you the right answer. Its character as a “restatement” of the common base of European Civil Law (which is wider considering the law in action than

just the law in the books) will accelerate the process of convergence of the national Civil Law systems.

The copious references to national law in the SE-Regulation seem to go too far and will harm the purpose to create a genuine European legal form instead of an European legal form coloured in the colours of the respective Member State. This extent of references should be avoided in a Regulation on the European Private Company. The task might be easier due to the absence of all the intricate questions of workers' participation.

Question 33:

Co-operative Societies in Germany exist mainly in the sector of agriculture and rural banking. In the last years the practice of Co-operative Society Law was mainly the practice of mergers of co-operatives. The reasons, although rarely discussed, are that several co-operatives ran into trouble due to self-referential structures without effective corporate control. Moreover, growth strategies are difficult to realise due to restricted possibilities of financing. Financing of a Co-operative Society is basically restricted to its internal cash flow.

Almost the same applies to Mutual Societies which in Germany exist in the insurance sector with a market share of app. 20-25 % (in other Member States, the market share of Mutual Insurances is considerably lower). The share is shrinking, which is due both to a lack of financing possibilities and to a lack of corporate control, a situation quite comparable to Co-operative Societies. E.g. in Germany cooptation of the "assembly of representatives", the corporate body of a Mutual Insurance, comparable to the shareholders' meeting, is permitted. However, due to the effective supervision on insurance companies, serious troubles of Mutual Insurances as yet have been avoided.

For both legal forms there might be a need to set up multinational legal entities. Although we think that in the long run the legal form of the Corporation offers better chances in the capital market, the proposals for a European Co-operative Society and the European Mutual Society at least do not harm anyone. Whether these proposals meet the expectations of the market is questionable.

A European Association might be attractive for multinational entities with ideal, not economic objects.

Question 34:

The problem of Co-operative Societies and Mutual Insurances in Germany is that their respective pressure-groups have built a fortress lobbying against any proposal of substantial reform. Therefore no one is interested in restructuring, and of course their competitors do not wish to have that comfortable situation changed either.

European harmonisation will not be able to better financing possibilities of these legal forms, for these disadvantages are deeply rooted in the legal structure of these entities itself. But European harmonisation, although the chance might be very small, could better the internal Corporate Governance structures of these entities. A better Corporate Governance will better the performance of the whole legal entity.

Question 35:

Foundations are firstly a problem of tax law and only secondly an issue of Company Law. Basically there are two approaches to set up a foundation:

- The (first) traditional way of forming a foundation is signing the act of formation and applying for a governmental permit. This way is similar to the ancient way to set up Stock Corporations like the Dutch East India Company.
- The (second) modern approach is that the law just prescribes what requirements should be fulfilled and, upon signing an act of formation complying with these prerequisites and having it registered, the foundation comes into legal existence. Registration also eases the proof of representation considerably.

In Germany there are proposals of the government to shift from the first approach to the second one. We appreciate these proposals. Of course, a Directive or Regulation of the European Council would encourage the national legislator to decide for the modern second approach. However, the scope of application for a European Foundation does not seem big enough to justify European legislation.

Question 36:

The concept of “enterprise” in Company Law is academic, but nevertheless useful. However at the moment, the national and international scientific debate did not reach a level which would justify a definition by the legislator. At present, “enterprise” or “entrepreneur” might be conceived as more or less the contrary to “consumer”. Already the definition of consumer is quite difficult, for it depends whether a subject deserves protection by consumer law or not. There might be cases in which consumer protection against big conglomerates might be required for SME as well (e.g. unfair contract terms). Therefore the further development should be left to legal practice at the present stage.

Question 37:

As we already outlined before, we do see a need for harmonised rules for the Commercial Registers in Europe. However, the legal entities subject to registration should be defined express and not by a general rule like “every enterprise is subject to registration”. The former, not the latter is in the interest of legal security.

Moreover we think that at present it is too difficult to derive rules for all enterprises from the different rules for the different types of corporations, partnerships, societies and associations on accounting, reporting, restructuring and so forth. We should take a start in defining these rules for the individual legal forms at first and derive more general rules for all types of legal entities later.

In case you need further information, please do not hesitate to contact us. The German Notaries' Association will appreciate the opportunity to participate in the further proceedings of the High Level Group.

Yours truly

Dr. Zimmermann
(President)