



COMMENTS REGARDING THE EUROPEAN COMMISSION'S INVITATION TO SUBMIT COMMENTS ON THE FUTURE DEVELOPMENT OF EU COMPANY LAW

The Swedish Corporate Governance Board, (“the Board”) was invited by the Swedish Ministry of Justice to comment on the European Commission’s initiative to commence a general discussion on the future of European Union company law. The Commission’s questions have been collected in an on-line survey, which is referred to in the comments below.

1 Point of departure

Attempts to harmonise company law within the EU have been going on for 40 years. When viewed in these terms, the achievements of the EU in this area have been extremely limited. We still have a number of national corporate forms with different organisational structures originating in different national legal and economic systems operating as limited companies. The attempts at launching pan-European corporate forms, such as European Companies, European Economic Interest Groupings, European Cooperative Societies, have had little success. One major reason for this is that they have not been based on agreed European corporate regulations, but on a mixture of the applicable national corporate regulations in each particular case.

Harmonisation of certain fundamental aspects of company law, such as capital boundaries or notice periods for meetings, has been successful, but EU initiatives have in the most part resulted in complex and watered down compromises. The costs involved to achieve these compromises have been significant, and the work carried out by national legislatures to implement them into national law without damaging the corporate sector considerable. The societal value of these exercises is highly questionable.

Regulations for limited companies comprise a standard contract from legislators to allow cooperation in corporate form. The primary purpose is to reduce transaction costs for such cooperation by providing a simple, manageable and well-functioning general structure. Corporate forms have no political dimension as such and are not designed to achieve any particular political goals. It is crucial that this corporate form ambition is respected. The majority of company legislation products issued within the EU cannot be regarded as achieving this goal. The total transaction costs for operating in the form of a limited company have in all likelihood not decreased as a result of harmonisation measures, but rather increased to a not insignificant extent.

The question therefore is whether the EU should to a greater extent restrict its attempts at company law harmonisation to purely cross-border issues, with the exception of cases in which it is obvious that a common European platform would be beneficial to the corporate sector in Europe.

Below, the Board offers some concrete views on the different areas which the EU Commission has included in its on-line questionnaire. The Board has limited its answers to areas concerning corporate governance.

2 The goals of EU company law

Question 5.

The questionnaire lists a number of goals for EU company law. The first point states “improve the business climate for European companies and their mobility within the EU”. EU harmonisation has not improved the business climate for European companies to any significant extent. One conclusion that should be drawn from the past 40 years is that the kind of regulation the EU has produced so far is not good enough.

That the setting up of companies within the EU should be easy, as is raised in the second point, is an issue more appropriately addressed by national lawmakers. Points 3 and 4, on improved competition legislation and greater employee protection, are not aspects of company law. The aim of corporate legislation, as stated above, is primarily to organise cooperation between parties to the agreement, not to achieve other goals.

Adequate protection of the stakeholders of a company – shareholders, creditors etc – which is raised in point 5, is an integral part of a functioning corporate model. The question is whether this is best achieved on a national basis or within a European framework. With regard to stock exchange listed companies, there is reason to ensure a certain degree of basic protection for investors, regardless of where the investor comes from. This can be achieved in various ways, not least through harmonisation of EU legislation, but it is vital that such harmonisation provides a de facto level playing field within the Union. It is questionable whether current regulations achieve this.

3 The scope of EU company law

Question 6.

As the Board has pointed out in a number of comments and submissions, it is difficult to harmonise the regulation of corporate governance issues against the background of disparate underlying national corporate legislation on the organisation of companies. This is an area in which the work of the Commission should focus primarily on the development and sharing of good practice and the issuing of non-binding instruments.

Question 7.

EU harmonisation efforts should be limited to stock exchange listed companies, and the dividing line should run between listed and non-listed companies. They should ensure, however, that listed companies are not over-regulated in comparison with non-listed companies so that competitiveness between these forms of company is not affected.

4 A user-friendly framework for European company law

Question 8.

There should be a codification of EU acts in the field of company law in order to remove inconsistencies and suchlike. Simultaneously, there should be an assessment of which acts need to be retained and which could be repealed.

A thorough assessment of the quality of existing directives and other acts is needed. In cases where the quality of an act is deemed too poor, it should either be improved to a standard which is beneficial to European corporate sector or repealed.

5 Company forms in EU legislation

Questions 9 -12

Through their ties to national laws, the existing European-level company forms have added very little of value.

Instead of working with compromises in national legislation, the EU should be able to offer a functioning European corporate model, primarily for listed companies. One major requirement, however, is that this model not be a compromise between the different sets of regulations in Europe, but a distinct model of its own, not least with regard to its organisation and associated corporate governance issues. In the light of the EU's previous achievements in the field of company law, there is a significant risk that the former would be the case, and there would therefore be little point in initiating such efforts.

This also means that it is difficult to justify efforts to create a European model act based on highlighting unique national characteristics. The aim should rather be to provide a European corporate model.

6 Other issues

Questions 13-20.

The Board has no comments regarding the remaining questions in the survey.

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