Corporate Governance and Company Law News (January 2010)

Topics: European Private Company (SPE); consultation on the interconnection of business registers; Corporate Governance Forum; Study on 'comply-or-explain'; Directive relaxing reporting and documentation requirements; Number of SEs

European Private Company (SPE)

At the Competition Council session on 4 December the Swedish presidency presented a new compromise proposal (Council document: 16115/09 DRS 71 SOC 711 ADD1) regarding the Council Regulation on a European Private Company (SPE). In the Council's discussions, the German representative made it clear that the Swedish proposal is unacceptable, for three reasons: (i) the lack of a **minimum capital requirement of €8000** for all SPEs; (ii) **the possible separation of the statutory seat and the de facto head office** of the SPE and (iii) the inadequate **board-level participation rules**. After this clear statement, the Swedish presidency broke up the discussion. As unanimity in the Council is required, Sweden did not press for a decision on the SPE. Besides Germany, other member states – such as Austria, Hungary and the Netherlands – also did not agree with the proposal's lax board-level participation rules. This shows that it is unlikely that EU Member States will agree to legislation which undermines well established national board-level participation standards. In 2010, the SPE dossier will again be subject to negotiation under the Spanish presidency.

It remains to be seen whether the Spanish presidency will be able to make up the shortcomings of the Swedish proposal. From a trade union perspective, it must be hoped that a new proposal will improve the defects of the recent proposal, especially with regard to the board-level participation rules. The core points for improvement should be: (i) a **substantial cross-border element** (as is the case in Art. 2 SCE Regulation), (ii) **obligatory provisions regulating the corporate governance structure** adopted in the SE, (iii) a **general clause on the duties of directors**, which includes taking into account the interests of all stakeholders (including employees) and (iv) the duty to conduct **negotiations on worker involvement** – which also includes issues of transnational information and consultation – **in each instance of founding an SPE** (as is the case in the SE).

In particular, ignoring the condition of a sustainable cross-border element for the SPE entails the risk, based on the Treaty of Lisbon, that national parliaments will initiate **subsidiarity proceedings** before the European Court of Justice, which could lead to the nullification of a future SPE Regulation (Art. 5 III Treaty on the European Union, together with Art. 263 Treaty on the Functioning of the European

Union and Art. 8, Protocol No. 2 on the Application of the Principle of Subsidiarity and Proportionality). In the German Bundestag, for example, a quarter of its members is enough to initiate a subsidiarity procedure of this kind.
Links:

- More information regarding the SPE
- Proposal of the Swedish presidency
- ETUC position, press release

Commission consults on the interconnection of business registers

The European Commission has launched a public consultation on possible ways of enhancing cooperation between business registers. The objective of the consultation is to improve access to business information and to increase legal certainty with regard to cross-border operations in the EU, which the Commission considers to be missing links in the Internal Market. Company information would also be interesting to employee stakeholders. Therefore it should generally be ensured that regulations on company registers also include information on issues related to employee rights, such as board-level participation.
The consultation is based on the European Commission's 'progress report' and a green paper on the interconnection of business registers. While the progress report describes the current legal and factual situation with regard to access to information and cooperation between business registers, the green paper considers possible ways forward and asks, for example, whether an improved network of member-state business registers is necessary.
Responses to this consultation will be taken into account in assessing the need for legislative or non-legislative initiatives in this area. The **deadline** for responses is **31 January 2010**.
Links:

- Consultation page
- Commission page with links to the green paper and progress report

European Corporate Governance Forum

At its last meeting, in November, the Forum discussed the following topics: corporate governance in financial institutions; a study on the monitoring and enforcement of corporate governance codes in the Member States; audit tendering procedures; empty voting and transparency of investors' positions; executive and financial sector remuneration; and cross-border voting. Moreover, in the summer, the Forum published its Annual Report 2008.
Links:

- Commission page on the Forum

Study on 'comply-or-explain'

At the Corporate Governance Conference, which was held under the Swedish Presidency in December 2009, the previously announced study on 'comply-or-explain' was presented. The study was commissioned by DG Internal Market and Services in December 2008. The objectives of the study were: (i) to describe relations in the 27 Member States between legislation and 'soft' law (codes) in corporate governance; (ii) to examine the existing monitoring and enforcement mechanisms in the Member States, as far as codes of conduct are concerned and to evaluate their effectiveness; (iii) to obtain an impression of companies' perception of the codes; and (iv) to evaluate shareholders' views on the quality of corporate disclosure with regard to the application of corporate governance principles and the explanations given when a company declares that it will not comply, as well as their reactions to disclosure which is perceived as insufficient.

The study was carried out by the RiskMetrics Group, in collaboration with BUSINESSEUROPE (the Confederation of European Business), ecoDa (the European Confederation of Directors' Associations) and the law firm Landwell & Associés. If one bears in mind that the RiskMetrics Group, according to its webpage, serves 70 of the 100 largest investment managers and 42 of the 50 largest hedge funds it is not surprising that the study is narrowly focused on the shareholder perspective and ignores other important stakeholder groups, such as employees.

Nevertheless, the findings of the study are interesting. To anticipate the outcome: self-regulation on the basis of codes of conduct does not work. No wonder the study was the subject of a critical discussion at the conference in December. The study does acknowledge some problems: 'Nevertheless, it is apparent that certain deficiencies in the practical application of the comply-or-explain mechanism might affect its proper functioning, and thereby prevent it from attaining its goal of improved corporate governance practices' (p. 166). Furthermore, the study says: 'Although the comply-or-explain mechanism is considered an efficient regulatory tool by a large majority of market actors and regulators [the employees, who are one of the most important stakeholder groups in a company, are totally ignored by the study], the mechanism does not function perfectly' (p. 168). Particularly unsatisfactory, according to the authors, are the deficiencies with regard to the quality of information on deviation by companies and the low level of shareholder monitoring (p. 188).

Departing from these findings, 'regulation' via codes of conduct is tantamount to no regulation. The solutions suggested by the study to make up the shortfalls in compliance, such as strengthening the role of market-wide monitors and statutory auditors, are unconvincing. The only way of obtaining compliance in corporate governance is binding legislation. This is even more the case with regard to safeguarding the interests of the main stakeholders in good corporate governance, such as the employees.

Link:

- Commission page with link to the study

Directive relaxing reporting and documentation requirements

On 16 September 2009, the Council adopted Directive 2009/109/EC amending Directives 77/91/EEC (Second Council Directive), 78/855/EEC (Third Council Directive), 82/891/EEC (Sixth Council Directive) and 2005/56/EC (Merger Directive) on reporting and documentation requirements in the case of mergers and divisions (OJ L259 of 2 October 2009) . The objective of this Directive is to reduce the administrative burden related in particular to the publication and documentation obligations of public limited liability companies within the Community. The core elements are: (i) company websites or other websites may offer an alternative to publication via company registers; (ii) some reporting or information requirements may be relaxed upon the agreement of all the shareholders of the companies involved in the merger or division, as well as in the event of mergers between parent companies and their subsidiaries; and (iii) Member States may exempt companies from the reporting requirement under Directive 77/91/EEC.

The changes in the Merger Directive in particular will not have any impact on the information rights of the employees laid down in Art. 5 lit. d and Art. 7 I of the Merger Directive.

Links:

- Text of the Directive