

**"A Modern Regulatory Framework for Company and Takeover Law in Europe", Syracuse
Conference, 29-31 May 2003.**

How best to promote effective corporate governance in the light of recent scandals and the role the EU should play in ensuring good corporate governance on a pan-EU basis are pressing questions of international corporate governance. Core questions of corporate governance and the EU's response were recently examined in a wide-ranging and timely conference held in Syracuse, Sicily on May 29-May 31 2003 on "A Modern Regulatory Framework for Company and Takeover Law in Europe", organized by Professors Guido Ferrarini, Klaus Hopt, Jaap Winter, and Eddy Wymeersch. Current and controversial questions of corporate governance, including the role of the board of directors and the auditors, the management of executive remuneration, the treatment of takeovers, and the role of shareholders in decision-making, were examined during the conference discussions. Reflecting the recent focus by the EU, post-Enron and as the Financial Services Action Plan is rolled out, on the corporate governance sphere, these questions were also considered in the context of the important recommendations made by the Report of the High Level Group of Company Law Experts, *A Modern Regulatory Framework for Company Law in Europe* (November 2002) and the legislative proposals contained in the recent Commission Communication, *Modernizing Company Law and Enhancing Corporate Governance in the European Union* (May 2003), which sets out the Commission's Action Plan for Company Law. All the members of the High Level Group (Jaap Winter (Chair), Jose Maria Garrido Garcia, Klaus Hopt, Jonathon Rickford, Guido Rossi, Jans Schans Christensen, and Joelle Simon) participated in the conference, as did leading academics from the US, UK, Europe, and Australia, as well as representatives of the auditing profession, the IASB, the business community, government, and the EC Commission.

Recurring themes of the conference included: the centrality of effective enforcement to good corporate governance, including the role of specialized courts and administrative sanctions; the blockholding/dispersed ownership governance faultline and its impact on corporate governance, particularly in the pan-EU context (notably with respect to the board of directors and executive remuneration); the role of disclosure and shareholder voice in effective corporate governance; the political constraints on law-making in this field; and a sharing of US and European perspectives on corporate governance, particularly with respect to the impact of the Sarbanes-Oxley Act. The discussion was frequently grounded in current controversies, including the challenges to international corporate governance raised by the Enron collapse and other high-profile corporate failures.

General themes of corporate governance were examined in the Thursday (May 29) morning session. The conference opened with a consideration of the need for a regulatory framework for company law

and takeover law in Europe and a discussion of the theory and practice of convergence, path dependency, harmonization, and regulatory competition. Professors Gérard Hertig (Swiss Institute of Technology, Zurich) and Allen Ferrell (Harvard Law School) led the discussion in this session with papers on "Company and Takeover Law Reforms in Europe" and "Why European Takeover Law Matters", respectively. This session also saw discussion of the nature of regulation in the corporate governance sphere and, in particular, the role of disclosure. The disclosure discussion was led by Professor Hanno Merkt (Bucerius Law School, Hamburg) who spoke on "Disclosing Disclosure: Europe's winding road to competitive standards of publication of company related information" and Professor Reiner Kraakmann (Harvard Law School) who presented a paper on "Disclosure and Corporate Governance: an Overview Essay." The opening session also considered the mechanisms of modern company law, including the role of secondary regulation, standards, model laws, and codes. In particular, Professor Eddy Wymeersch (University of Ghent) spoke on "About Techniques of Company Law in the European Union." The afternoon session moved to specific problems of corporate governance and opened with an examination, led by Professor Alain Pietrancosta (University of Tours), of how and whether corporate governance rules should differentiate between types of companies and, in particular, whether rules should distinguish between listed, open, and closed companies: this discussion emerged as one of the themes of the conference generally. The discussion then moved on to a consideration of corporate governance inside the corporation, and the issues generated by one and two tier board structures, non-executive directors, audit committees, and shareholder involvement, with, first, a session on board structure and the role of non-executive and supervisory directors. Professor Paul Davies (London School of Economics) and Professor Jennifer Hill (University of Sydney) led the discussion with papers on "Post-Enron Developments in the United Kingdom" and "Corporate Scandals Across the Globe", respectively. The particular internal corporate governance problem of executive remuneration was the subject of the following session. The discussion was led by Professors Guido Ferrarini (University of Genoa) and Niamh Moloney (Queen's University, Belfast) with a paper on "Executive Remuneration and Corporate Governance in the EU" and by Kimberly Crook (IASB, London) who spoke on "Accounting for Share-based Remuneration." Executive remuneration was also a recurring theme of the conference generally, particularly with respect to the role of law, the importance of disclosure, and the effectiveness of shareholder voice in this area.

The second day (May 30) returned to the theme of internal corporate governance, and opened with a morning session on the responsibilities of management and the board of directors, particularly with respect to fiduciary duties, the accountability of directors, and the nature of disqualification and other sanctions, including those for wrongful trading. Professor Holger Fleischer (Georg-August-Universität Göttingen) led the discussion with a comparative examination of "The Responsibility of the Management and its Enforcement." The second morning session considered the role of the

shareholder in corporate governance, and, in particular, shareholder information and decision-making. Professor Eilís Ferran (University of Cambridge) led the discussion in this session with a paper on "The Role of the Shareholder in Internal Corporate Governance." The morning session closed with a consideration of the timely question of the role of the auditor in corporate governance. Three papers were presented for discussion in this session: Professor Werner Ebke (Universität Konstanz) spoke on "Corporate Governance and the Independent Auditor"; Jens Roder (PriceWaterhouseCoopers, Copenhagen) spoke on the auditor's perspective; and Professor John Coffee (Columbia Law School) spoke on "Gatekeeper Failure and Reform." The final afternoon session dealt with takeovers and the market for corporate control. It opened with an examination of American and EU perspectives on this topic, with discussion of the papers by Professor Jeffrey Gordon (Columbia Law School) on "An American Perspective on the New German Anti-Takeover Law, with EU Implications" and Professor Joseph McCahery (Tilburg University) on "The Economics of the Proposed European Takeover Directive". The discussion then moved to a consideration of the proposed "Break Through Rule," which is under consideration as a possible device for EU takeover management. The discussion focused on the issues raised by the papers by Professor John Coates (Harvard Law School) on "The Effect of the BTR and the Contestability of EU Corporations", Professor Peter Mülbert (Johannes-Gutenberg-Universität, Mainz) on "Make it or Break it: the Break-Through Rules as a Break-Through for the European Takeover Directive", and Professor Marco Becht (Université Libre Bruxelles) on "Corporate Governance and Control." The final session considered the mandatory bid rule and related questions. The discussion was led by Professors Fausto Panunzi (Università di Bologna) who presented a paper on "Mandatory Bids, Squeeze-out, Sell-out and the Dynamics of the Tender Offer Process", and Professor Luca Enriques (Università di Bologna) who spoke on "A Veneer of Harmonization: the Mandatory Bid Rules in the Proposed EC Takeover Directive."

The conference papers are to be published as a monograph by Oxford University Press later in 2003.