

Introduction to the Session by Klaus J. Hopt, Professor and Director, Max Planck Institute for Foreign Private and Private International Law, Hamburg; ECGI Fellow

It is a great challenge for my colleagues on the panel and myself to discuss with you the European experience as to regulatory competition and subsidiarity in corporate governance and its possible implications for the US.

Let me begin with a very quick presentation of the panel. This will be brief because you already have this information in your programme.

On the panel are:

Gerard Hertig, Professor of Law at the Swiss Institute of Technology, is one of the European leaders in law and economics;

Colin Mayer, Peter Moores Professor of Management Studies (Finance) at the Said Business School, University of Oxford, is the economic specialist among us. He has worked and published widely on corporate governance, takeovers, competition and regulation;

David Wright is director at the European Commission in the DG Internal Market and Financial Services. He is a true insider and has witnessed the corporate governance discussion in the Commission and in the transatlantic context right from the beginning.

Eddy Wymeersch was a professor at the University of Kent for many years. He is now Chairman of the Belgian Banking Finance and Insurance Commission here in Brussels. In this capacity he has the unique opportunity to combine theory and practise and to see how his many academic writings on European company law fit or do not fit with legislative and supervisory practise in the EU.

As to myself, I'm Klaus Hopt, Professor and Director, Max Planck Institute for Foreign Private and Private International Law in Hamburg. I had the honour and privilege to be a member of the European Commission's high-level group of company law experts, which tried to offer to the Commission some ideas for the future of European company law and corporate governance.

The organisers have structured the conference in quite an ingenious way. They organised two competing teams, one European and one American, both with parallel set ups and more or less equal time to present their cases. It will be probably up to the audience or behind the curtain, on the European side, Mr. Schaub, to judge who has won the day but, as we know from soccer and other sports, the European team may have the slight home field advantage.

Our task is to look into regulatory competition and subsidiarity in the field of European corporate governance. Regulatory competition is the overall economic concept while subsidiarity is a legal principle laid down in the treaty. As we shall see, both concepts, while certainly having a common core, are by no means the same. Yet both are strong weapons in today's political arena, where the battlefronts are far from clear - member states against the EU, coalitions of certain member states against others, the European Commission, European Parliament and European Court of Justice as European organs with different functions and players with different interests. And industry and labour with no clear overall preferences but with varying standpoints according to the concrete issue concerned. Then there are, of course, the academics, lawyers and economists of whom it is said if you have two of them you will have three or more different opinions.

Originally, in Europe, as in the United States, competition between different company laws and legislators was considered to be dangerous – carrying fear of the ‘race to the bottom’ was the dogma on this side of the ocean as well as originally in the States. Delaware was considered to be the prime example not to be imitated in Europe. This had consequences both at the level of member states and the union. Some member states, particularly Germany, feared losing out in such a competition and stuck to the so-called seat principle, as opposed to the incorporation doctrine, for example, in the UK and elsewhere. At the EU level, the Commission tried to harmonise corporate law by mandatory rules and conceded to giving options only if harmonisation was not feasible.

Since Centros in 1999 there is new case law of the European Court of Justice. Überseering in 2002, Inspire Art in 2003 and we will see de Lasteyrie du Saillant on March 11 2004. This new case law has changed the landscape dramatically as later on Eddy Wymeersch will explain to us. The court has managed this by reinterpreting the freedom of establishment and in a while also the other freedoms in the internal market.

Legally speaking there are three logical steps. The first step, by restricting the free entry and maybe also the free exit of companies, member state company law may be in violation of the treaty’s freedom of establishment. Second step: in exceptional circumstances i.e. when a public good is at stake and needs protection, the member state’s legislators are allowed to take the appropriate and necessary steps of protection. Third step: in such a case i.e. when the freedom of cap establishment is legitimately restricted by member states, the European Union may overcome diversity if necessary by harmonising the parts of company law in question. This three-step approach sounds easy but, in fact, there are many difficult economic and legal issues at stake, which we shall discuss, taking corporate governance as the prime example.

The panel has agreed to proceed in the following way:

key issues from the three or four famous cases of the European Court of Justice: this is for Eddy Wymeersch;

the case for regulatory competition in corporate governance: Colin Mayer;

the possibility and probable impact of such competition in Europe: Gerard Hertig; and the meaning of subsidiarity and regulatory competition in the field of company law and corporate governance – this is for David Wright.

After that, we shall take up a number of concrete corporate governance issues and discuss them both in the panel and with the audience. We intend to spend about one hour for this exercise and have chosen three major topics:

the relevance of the ECJ case law: what does it really mean for a corporation in member states? what about corporate freedom not only to enter but also to exit? are we talking only about corporate law or also of tax law? what kind of public goods legitimise member states’ protection, shareholder protection, creditor protection, labour codetermination?; corporate governance as addressed in the European Commission’s company law action plan of May 2003 on which Mr. Schaub has spoken: what matters in this plan as far as corporate governance is concerned? do we really need common rules, for example, for the board of our board independence (as you know, the Germans in the moment are quite upset about all that)? what about the European code of corporate governance or at least a European corporate governance forum?; what does all this mean in the transatlantic context: what the influence of the Sarbanes-Oxley Act in Europe? what about legal transplants and, in particular, what is all

this for the relevance if not good enforcement by regulators and possibly by the private attorney-general is granted for?