

BETTER REGULATION – HOW TO GIVE COMPANY LAW BACK TO STAKEHOLDERS AND THE MEMBER STATES

[SLIDE ONE]

1. As an old de-regulator, now responsible both for better regulation policy and for a major area of regulation, I'm very grateful to our conference hosts for giving me the chance to work out my schizophrenia in public. Or perhaps its paranoia
2. I expect many of you will be familiar with the British TV programme "Yes Minister". Very funny, but often painfully close to the truth. You'll remember that one of Sir Humphrey's favourite maxims was "Never set up a review unless you know what it will find".
3. I detect a bit of this conundrum in the programme notes for this session. The very real problem that some players are so afraid of unwelcome change, that they see all change as threatening. I'm not so naïve as to believe that all change is good. But we live in a dynamic world where, like it or not, change is not only inevitable but is happening at an increasing rate. We cannot afford to stand still.
4. Many people worry that we risk opening Pandora's box. Or, more to the point, that the Commission will open it despite our Promethean warnings not to do so.
5. José Manuel Barroso recently said, "The member states, European Parliament, lobby groups ask the Commission to deliver less and better regulation. But when we do, the very advocates of better regulation are the ones who complain about the consequences."
6. We cannot eliminate risk. But we can take steps to minimise it. The answer, as President Barroso suggested, is not to leave the Commission on its own to do the job, but to work with it and each other. Fortunately, the better regulation agenda is designed to ensure that all stakeholders can contribute to, and even control, the process of legislation.
7. The problem is that we in the EU are very good at expressing better regulation principles, but less so at applying them to individual Directives. In preparing this presentation, I asked my team to produce a slide-show. One that illustrates how better regulation principles can indeed improve company law Directives. After many days of hard work, they came up with just a single slide.

[SLIDE TWO]

8. I told them that this was a commendable effort. But that it needed just a little more detail. Especially in the heart shape.
9. Hopefully today I can provide some of that detail to explain how we can keep the lid on Pandora's box.

[SLIDE THREE]

10. I will focus on five elements of better regulation:

- competitiveness
- simplification
- administrative burdens
- impact assessments , and
- consultation.

11. These apply not only to simplification of the existing acquis, but also to new legislation. There is no point in reducing burdens by simplifying or removing old law, only to replace or increase them in newly introduced laws. We need to aim at a net reduction in burdens.

Competitiveness

[SLIDE FOUR]

12. At the 2004 Hague corporate governance conference, the UK Minister, Jacqui Smith, argued that the key objective of company law must be to improve competitiveness. At EU level, this should be achieved through action dealing with cross-border market failures that met certain economic criteria. Those included:

- improving access to capital,
- increasing investment flows and
- facilitating company mobility.

13. The Commission has made clear that competitiveness is its key goal for the remainder of the Plan. This is hugely welcome. To achieve it in practice, competitiveness testing must be an element of all Impact Assessments, allowing stakeholders to judge whether the Commission is meeting its own objective.

14. Those Assessments should also demonstrate the cross-border problem and the economic benefits. If the Assessment does not pass these tests, the proposal should be amended or even dropped.

15. This approach can radically simplify the achievement of objectives like shareholder democracy – the subject of this afternoon’s session. A blanket proposal for ‘one share/one vote’ creates fears that Member States’ systems will be uprooted. But if we focus on clear abuses and market failures that create cross-border barriers to capital and investment, any reform will be focussed, respecting national cultures and social policies.

Simplification

[SLIDE FIVE]

16. Now my second better regulation element – simplification. In its consultation document on the Action Plan, the Commission suggested recasting the entire company law acquis as a means to simplification.

17. I believe the Commission now recognises that there are two dangers in such a wholesale programme:

- First, Member States and stakeholders would fear loss of control over what amendments were made.
- And second, we would waste resources on technical clarifications rather than getting rid of the dead wood that weighs heavily on companies and investors.

18. I speak from experience. In the UK, we are nearing the end of a complete recasting of UK company law. By the time we have finished, the process will have taken about 10 years. We are making real improvements, but it has been a huge task. Our new Act will be over 50% longer than the old one it's deregulating. Simplification can be complicated.

19. The process has succeeded at national level for the UK. But it's not the right one for the EU. We cannot take forever, and we need to focus our efforts.

20. This does not mean that we can't think big. No existing directive should be seen as sacred. If I had the power, I would happily sweep away today about a quarter of the company law acquis by radically changing or repealing three directives:

- The 2nd Directive on capital maintenance. I know some Member States seem to believe this is sacred – written in stone and brought down from the mountain. But it's bad, outdated and ineffective law, and should be replaced with a more modern system.
- The 11th Directive, which requires companies to register details of branches. Just as the 1st Directive now embraces electronic communications, we should recognise that the world has moved on, and that there are better ways of accessing information across borders.
- The 12th Directive on single-member companies, which, quite simply, seems redundant.

21. Sadly, I don't have the power to make these decisions. But, what we do need is a way for stakeholders and Member States to tell the Commission which parts of the acquis need reform. And our efforts should then be devoted only to those parts.

22. The administrative burden process provides one tool for this....

Administrative burdens

[SLIDE SIX]

23. The Commission has made it clear that the process will play an important part in the simplification programme, and I strongly welcome Commissioner Verheugen's commitment to reduce administrative burdens by 25% across the board.

24. Businesses understand – even if they don't always appreciate – the need for regulations. What they do not understand – and definitely do not appreciate – is the amount of time and money they need to spend complying with the regulations.
25. If we are to increase productivity and improve our competitiveness in global markets we need to find ways of cutting these costs.
26. We, in the UK Government, have recently carried out such an exercise – using a methodology developed by the Dutch and the Danes. The results have been very revealing.
27. My own department, of Trade and Industry, stands next to the tax authorities as one of the two biggest sources of burdens on business. This isn't surprising, given the wide range of areas DTI has responsibility for: Employment Relations, Consumer Protection, Sustainable Energy Supplies to name just a few. But company law is among the most burdensome of those areas.
28. The key to the exercise in the UK has been that indicative costs of information requirements have been firmly based on businesses' response to interviews. This has allowed us to focus our attention on unduly high compliance costs, as well as to streamline processes to ensure they are as efficient as possible. A much better approach than trying to simplify everything.
29. We – and no doubt the Dutch and the Danes – have learnt a lot about tackling administrative burdens which we can pass onto the Commission and other Member States.
30. It is just as important to use these methods to identify potential new burdens. In the UK, therefore, we have undertaken to introduce the Standard Cost Model approach into all new Impact Assessments. I look forward to the Commission doing the same.

Impact Assessments

[SLIDE SEVEN]

31. At the Hague in 2004, Jacqui Smith referred scathingly to an Impact Assessment on a company law proposal that ran to the grand total of one and half pages. It consisted of no analysis, but merely the assertion that the proposal was needed for shareholder and creditor protection.
32. No UK Minister would make that criticism today. The standard of Commission Impact Assessments has improved massively, and the Commission officials who have worked hard on them deserve our congratulations.
33. The problem with Assessments is that no one seems quite sure exactly what to do with them. Even an excellent Assessment gives no guarantee that the legislation produced by the Commission, Council and Parliament will actually be any good.

34. We need to ensure that Assessments lead to real changes in the way we regulate. They should force us to consider the option of alternatives to legislation such as best practice and industry-led solutions. The EU Corporate Governance Forum offers a means to use alternatives at EU level.

35. The better regulation agenda gives us a three-point plan for making systematic use of Impact Assessments to change the way we regulate:

- First, they can form a key part of the simplification programme. All simplification proposals should be subject to an Impact Assessment in the same way as new proposals. The Assessments should include competitiveness testing and estimates of administrative burdens.
- Second, Impact Assessments should form a part of the process of consultation with stakeholders. In the UK we ask stakeholders what they think of an Assessment. They sometimes say “rubbish”. But we work with them to improve it. I urge the Commission to follow the same approach.
- Third, the Council and Parliament must make use of Impact Assessments. The shareholder rights directive offers an example here. In the light of the Commission assessment and consultation, the proposal that rights be conferred on ultimate investors was dropped as unduly burdensome. The Council is now considering including a similar proposal with none of the discipline of an Impact Assessment. No one knows what costs or benefits will derive from the addition. To avoid this in future, Council working groups on company law should always follow the guidelines prepared under the Austrian Presidency. And I thoroughly endorse the call in the Internal Market and Consumer Protection Committee’s report for all legal proposals forwarded to Parliament to include an executive summary of the impact assessment.

36. Impact Assessments cannot, of course, replace the political process. But they can, and should, inform it.

Consultation

[SLIDE EIGHT]

37. My fifth, and final, better regulation element is consultation.

38. The improvement in the Commission’s consultations on company law proposals over the past few years has been extraordinary:

- proposals – and the Action Plan itself – have been subject to written consultations
- public hearings have been held on major issues
- an Advisory Committee of market experts considers each proposal.

39. But there is one additional plea that I would make to the Commission. This is that they should consult routinely not only on policy proposals (and impact assessments), but also on full texts of draft Directives.

40. In the bad old days, when no one consulted stakeholders on company law proposals, the Member States used to meet in secret with the Commission to pore over draft directives. The meetings took place in an anonymous and heavily-guarded Commission building. Member States were severely warned against allowing anyone outside the meeting room to see the draft Directive.

41. The secrecy was, of course, absurd. But the discipline of thorough readings of draft Directives was a good one. So, I commend to the Commission the practice of consulting on draft Directives through three methods:

- discussion of drafts in the Advisory Committee;
- public, web-based consultations; and
- Commission working groups of Member State governments.

42. I recognise the constraints that the Commission has on its timetable, but time spent in this way before a formal proposal is made will be saved many times over in the Council working group.

43. Indeed, the consultation framework already established by the Commission provides the key mechanism for bringing together all the other strands of better regulation that I have discussed today.

44. If:

- it is applied properly to simplification and new proposals alike;
- if it includes competitiveness testing and measurement of administrative burdens;
- if it exposes Impact Assessments and draft texts to examination.

it will give stakeholders and national authorities the best defence against the contents of Pandora's box – control over what we regulate and how.

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