European Business Organization Law Review 7: 1-3

DOI10.1017/S1566752906000012

Guest Editorial

This issue of EBOR presents to a wider audience the papers and proceedings of a symposium on 'Efficient Creditor Protection in European Company Law', which took place from 1 to 3 December 2005 at the premises of the Max Planck Institute in Munich, as a joint venture of Munich's Ludwig Maximilian University and the Max Planck Institute for Intellectual Property, Competition and Tax Law. As the organisers of this conference, we were proud and delighted that so many outstanding scholars from Europe and the United States agreed to participate, give presentations, make comments and contribute to the discussions, although we had nothing to offer but a lot of preparatory work, uncomfortable winter travel and the prospect of exchanging some views on questions of corporate law reform in our conference room. We would also like to express our gratitude to the Max Planck Society for the Advancement of Sciences for its generous financial support of the conference and this publication.

It is well known that reform of the European rules on creditor protection in company law is imminent. The long-standing instrument of 'legal capital', which was virtually abolished in the United States some decades ago, has come under severe pressure in Europe as well. The reasons are manifold. Academic work on both sides of the Atlantic shows a tendency that traditional mandatory rules should give way to individual solutions which are freely negotiated between creditors and corporate debtors, supported by increased disclosure obligations of firms. The High Level Group of Company Law Experts (Winter Group) has recommended reassessing the merits of legal capital and examining alternative systems of creditor protection. Moreover, recent judgments of the European Court of Justice have spurred regulatory competition between Member States in the field of company law, giving rise to a race (whether to the 'top' or to the 'bottom' has to be decided by the beholder). Perhaps the broadest challenge to the incumbent system stems from the Europe-wide introduction of the International Accounting Standards/International Financial Reporting Standards which are designed to give full and fair information of a company's economic situation. However, they are not conceptualised as the basis of rules on dividend payments and other distributions under a capital maintenance regime. Last but not least, the current debate on the legal and economic effects of the European Insolvency Regulation poses the question how corporate law and insolvency law shall be realigned in the future.

Against this background, the organisers of the conference felt that it was time to bring together some scholars and officials who are currently working on reform projects in different Member States of the European Union and to invite other

experts on company law, insolvency law and accounting law, as well as economic experts, in order to tackle some of the most intensely debated topics and reach if not unanimous conclusions then at least a common understanding of the substantive questions lying at the heart of the current debate. We started by discussing the 'case for regulation', bearing in mind that no legislation should be proposed if market solutions seem available and 'soft' legislation (enabling rules and disclosure obligations) suffices to make this market work. We proceeded with the question concerning which rules on distributions to shareholders should be preferred, comparing the traditional 'balance sheet' approach with alternative instruments: a 'solvency test' in the framework of company law reform or a shift to insolvency law where 'fraudulent transfer' rules play a major role, as in the United States. The third topic concerned rules and standards for directors' behaviour 'in the vicinity of insolvency', including a 'timely trigger' for insolvency proceedings and the merits of 'wrongful trading' legislation. In addition, the methods of subordination and recharacterisation of shareholder loans were discussed. In our final session, we embarked on the ambitious quest for a coherent overall framework for creditor protection and the correct allocation of legislation in a multi-tier jurisdiction in the context of regulatory competition.

In many respects, the conference stood in the tradition of comparative law as an academic discipline and attempted to demonstrate the fruitfulness of this discipline with respect to core issues of company law reform. As is well known, Ernst Rabel founded the first comparative law institute in the world, the Institute for Comparative Law at Munich University, in 1916. Ten years later, Rabel moved to Berlin and founded a similar institute at the Friedrich Wilhelm University (now Humboldt University) which later was integrated into what is now the Max Planck Society for the Advancement of Sciences. Rabel emigrated from Germany in 1939 and later taught at Ann Arbor and Harvard. Hence, the conference participants from Germany (including Munich University and the Max Planck Society), the United States (including Harvard) and the United Kingdom where not only united by a common research theme, but also by a research methodology that dates back to Ernst Rabel and the idea of comparative law as an academic discipline.

The conference programme and the approach of the participants fully reflected this tradition. Comparative law always has been functional in its approach, looking at the problem that certain rules are meant to solve rather than at the dogmatic peculiarities of a particular jurisdiction and caring less about whether certain rules formally belong to a particular branch of law (such as company or insolvency law). Finally, as a measuring rod, comparativists increasingly resort to economic theory as a fruitful instrument to assess the merits of certain legal rules. The organisers of the conference believe that the papers published in this volume are excellent evidence of the fruitfulness of the comparative method as applied to

issues of company law reform and hope that they will not fail to inform and influence the current reform debate.

Last but not least, we would like to express our gratitude to T.M.C. Asser Press and Dr Rainer Kulms, Editor-in-Chief of EBOR, for their willingness to publish the results of our work.

*Horst Eidenmüller**
*Wolfgang Schön***

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* Prof. Dr. iur., LL.M. (Cambridge), Ludwig Maximilian University, Munich.

** Prof. Dr. iur., Max Planck Institute for Intellectual Property, Competition and Tax Law, Munich.