Company Law

Whither UK corporate governance?

by C A Riley

On 5 August 1997, the Committee on Corporate Governance, chaired by Sir Ronald Hampel, issued its preliminary report. In part, the Hampel Committee represents the successor to the Cadbury Committee and to the Study Group on Directors' Remuneration (Greenbury). Hampel's remit, however, was a broad one and unlike both Cadbury and Greenbury, Hampel was under no immediate pressure to respond to some high profile crisis in the governance system.

ORTHODOX APPROACH

One might have hoped that Hampel would have used this opportunity to offer a deeper and more rounded review of corporate governance. However, in so far as the report has anything to say about the philosophy underpinning corporate governance, its views are orthodox and weakly argued. Its more specific proposals, addressing particular governance mechanisms, say little that is new or innovative. Rather, they largely follow where others have led whilst softening the force of those proposals by calling for a more flexible approach to their enforcement.

Hampel's orthodoxy is most clearly reflected in its view of the purpose of corporate life:

'the single overriding objective shared by all listed companies ... is the preservation and the greatest practicable enhancement over time of their shareholders' investment.' (para. 1.16)

Although written as a descriptive statement the claim is in fact quite clearly a normative one: 'the directors' duty is to shareholders both present and future' (para. 1.18). As such, it offers little support for current proponents of 'stakeholding' within corporations. To be sure, the report notes that:

'...companies can meet this duty and pursue the objective of long term shareholder value successfully only by developing and sustaining their other relationships.' (para.1.18)

But this familiar homily hardly addresses, let alone defeats, the argument for stakeholding. It treats the interests of employees, creditors, consumers and so on, only in an instrumental way – as a prerequisite to achieving the real goal of creating shareholder value.

GOVERNANCE MECHANISMS

As to the most appropriate governance mechanisms for achieving this 'long term shareholder value', Hampel largely follows in Cadbury's footsteps. Like Cadbury, it focuses upon a limited number of governance tools – the board and its sub-committees, shareholders and auditors – with little to say about the broader range of competing governance strategies – market mechanisms, governmental regulatory agencies, the role of fiduciary duties and so on. Like Cadbury, it commends the use of non-executive directors and of specialist sub-committees of the board to deal with the remuneration and nomination of directors, and with the audit function.

Despite the familiarity of many of its proposals, however, there are several changes in emphasis. Hampel begins by claiming that there has been too much concern with accountability and too little with ensuring prosperity; and later argues that the promotion of non-executives has overemphasised their 'monitoring role'.

More broadly, the spirit behind Hampel favours even greater flexibility, and less prescription, than, say, Cadbury advocated. This change is introduced in para. 2.1, with its clear preference for 'principles' rather than 'more detailed guidelines like the Cadbury and Greenbury codes.' It also manifests itself in the report's criticisms of 'box ticking' (para. 1.12), its concern to 'restrict the regulatory burden on companies' (para. 1.6) and finally, in its treatment of more specific proposals. A good example concerns the splitting of the role of chairman and CEO: 'other things being equal, the rôles of chairman and chief executive are better kept separate, but this should not be made a firm rule' (para. 3.18).

CODES OF PRACTICE

One issue which prompted much discussion post-Cadbury concerned implementation and enforcement: how do we ensure that companies, corporate actors and other relevant institutions adopt the preferred governance mechanisms? Will, for example, codes of good practice suffice, or does only law pack the regulatory punch to ensure real compliance? Hampel says little directly on this point. It does not, for example, attempt to state and defend a case for relying on voluntary codes, rather than statutory rules. However, the report's general commitment to flexibility seems logically to require a more voluntaristic approach, in which those to whom the principles of good practice are addressed are themselves charged with interpreting those principles and deciding what they demand in the particular circumstances of their company.

DEEPER CONCERNS

One suspects that many will remain unimpressed by the content of Hampel's proposals, and unconvinced by the reasoning offered in their support. But there lies a deeper and more troubling problem that arises from the very way in which governance reform has been effected over the past few years. Responsibility for reform has been semi-privatised, with the initiative firmly in the hands of fairly small and unrepresentative committees, championing a narrow range of interests, and apparently proceeding more on the basis of casual empiricism than well grounded theories. In consequence, large parts of the governance debate have become effectively marginalised from the process of governance reform. That committees in the mould of Cadbury, Greenbury and Hampel should be so little concerned with, say, arguments for stakeholding, for a broader view of the corporation's social responsibilities, or for the centrality of law as a regulatory tool, is not entirely surprising. But the governance of those large corporations which so dominate our economy is one of the most important questions of social policy. Furnishing appropriate answers requires a wide and inclusive debate, in which the government must inevitably resume a central role.

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