EUROPEAN PERPECTIVES : INITIATIVES IN FAVOR OF A EUROPEAN LAW COMPANY

The draft of the European Commission : the European company

M^me^ Françoise BLANQUET,
Adviser – DG « Internal Market »

I was informed that most of you prefer bad English than good French ! I am sorry for those who prefer good French, but I must respect democracy !

Thank you very much for your kind invitation to speak about my former baby « the European Company (Societas Europea – SE). The SE is defined in the program as « the draft of the European Commission » by opposition to « the draft produced by business » : the European Private Company.

May I express the view that the proposal of the European Commission is also an answer to the business needs to realise the mobility of companies and to improve their competitiveness at community level.

1. - What is exactly the european company

- Au old idea, indeed, a French idea from the notaries in 1959 in order to improve the means of action and competitiveness of companies carrying out their activities at Community level.
- Initially proposed by the Commission in 1970. Amended in 1989 – 1991 and from then discussed over and over again into the Council.
- Why such a long discussion for such a good French idea ?
- When should we expect a final decision ?
- Is it still possible that after 30 years this baby could be killed ?
- Where are we ? What is organised in the European Company Statute as it currently stands ?

As you will already know, in the June Social Affairs Council 14 Member States, including the UK, gave their agreement to the directive on employees involvement within the EC.

Only 1 Member State (Spain) refused to accept one point – therefore blocking – the whole adoption of the Statute. I except for the Regulation (which covers company law aspects) opposition of Spain about Gibraltar because the chances of an agreement at Helsinki (European Council) between Tony Blair and José Aznar are « good ».

Which is the remaining point to bc solved ?

In case of transfrontier mergers, and only in this case, Spain cannot accept that workers of participating companies representing 25 % of the workforce could impose their system of codetermination in the board or the supervisory board of a SE !

Leaving aside this remaining point which we hope will be solved in the near foreseeable future and perhaps even before the end of this week, you will surely be interested to know what would be possible for EC companies, which is **not** possible for companies governed by UK legislation.

(1) the facility for one UK Company with 15 subsidiaries in 15 différent Member States governed by 15 différent company laws after creation of a SE, to apply only **one set of rules** : the EC Regulation and for points not regulated by this regulation, the company law of the Member State where the EC is registered or the Statutes of the EC.

(2) The **possibility** offered to 2 or several public companies registered in différent Member States to **merge** and create only one single EC with branches instead of companies which means important economies of scale and a straight line for the implementation of managerial decisions.

(3) The **possibility** offered to 2 Public or Private companies from different Member States to cooperate by the creation of a holding « SE » or a joined subsidiary « SE ».

(4) The **possibility** offered to a Public company to be transformed into a « SE », if for at least two years it has had a subsidiary company governed by the law of another Member State.

(5) The **possibility** offered to the EC to be registered in the Member States of its choice and after that, the possibility to transfer its registered office to another Member State without dissolution of the company or the creation of a new legal person.

(6) The **right** for the company to use the « European flag » linked to the EC.

(7) The **choice** offered to the founding companies to organise the SE's management either according to the (English or French) board system or the German two tear board system : with a management board and a supervisory board.

(8) As for **taxation**, we hope that the Council could casily accept for the EC when it has been approved

(a) the right to compensate losses suffered by **branches** in other Member States by profits realised by the European Company

(b) the right to benefit for the first time from the directive adopted in 1990 on the common system of taxation applicable to mergers concerning companies of different Member States which could be extended in cases of transfer of the Registered office.

(9) **What about the involvement of workers ?**

This is an important fear suffered by companies registered in Member States, such as UK, where there is no participation of employees in the board. The EC isn't the « Cheval de Troie » of the participation.

The Statute leaves the founding companies **the right to avoid** the application of arrangements for the participation of employees :

(a) **if none** of the participating companies were governed by participation rules before the registration of the SE, it is the so called « before and after rule ».

(b) the right to avoid participation rules is extended in case of creation of a holding SE or a joint venture SE when **less than 50 %** of the overall number of employees of all participating companies were governed by participation rules before the registration of the SE.

(c) and in case of merger, when **less than 25 %** were governed by participation rules. In this case, the founding companies disappear and it appeared necessary to give the workers of these companies a highest level of protection of their acquired rights to codetermination.

In all other cases, the acquired rights of the workers are protected by agreement concluded between the management and the special negotiating body representing the employees.

It is only in the rare cases where no agreement is reached, that the employees of the SE are entitled to be represented in the board or the supervisory board of the SE in the highest proportion applicable in the participating companies.

Even in this case, the founding companies are never obliged to register the SE. The new legal vehicle is **optional** and nothing will be changed in national legislation about codetermination in national companies. That's all what I want to say today about the SE.

My second point will be the answer to the question about the European Private Company as a complement, an alternative to the EC.

In the light of the developments of the ECS it will be necessary to examine the question of the European Private Company. Of course we need a political impulsion in favour of this new legal vehicle at Community level. On this condition the European Private Company could be an alternative to the SE as a European Public Company.

One more condition seems to me necessary : the introduction of at least 2 amendments.

First amendment :

The scope of the draft Regulation ought to be limited to cases where persons or companies from at least 2 Member States would create one close company to extend their activities beyond the national frontiers or to cooperate with a company from a différent Member State. Without such a transfrontier aspect, it would be extremely difficult for the Council to accept not to apply its own legislation for a pure national operation and to accept therefore that this operation will be governed by a community regulation.

Second amendment :

A threshold must be fixed to limit the access to the European Private Company to companies employing less than X persons.

This is absolutely necessary to avoid the tremendous problem of participation of employees in the board or supervisory boards of companies from half of the Member States which have blocked the ECS for so long.

The problem will remain for the fixation of one threshold at unanimity. In fact, you must know that the threshold must be under :

– 1.000 employees for Luxembourg
– 500 for Germany
– 100 for the Netherlands
– 50 – 40 for SW– FIN– DK.

At this point will arise the question :Do we need a European Private Company employing less than 40 persons ?

My third point will be on the question of the mobility of companies in the E.U.

As it stands, the legal base choosen by the Council imposes that the 15 Member States give their agreement for the adoption of a new legal vehicle at community level and it is not at all easy to obtain such unanimity.

But in any case :

– if the ECS is adopted or not adopted
– if the EPC Regulation is adopted or not adopted,

something must be done to organise the mobility of the companies provided by the Treaty of Rome and not yet organised forty years later.

For this purpose, the Commission announced some years ago its intention to adopt as soon as politically possible,

- a directive on transfrontier mergers of public or private companies and (the called tenth)
- a directive on transfer of registered office of public or private companies from one Member State to another Member State.

These directives could be adopted at a qualified majority.

CONCLUSIONS

If I could be « a fortune teller », I could add a few thoughts on :

First point

The foreseeable future of the European Company. After a pause during the Finnish Presidency we could imagine that if a decision has not been taken before the end of this year, the Portuguese Presidency will revive the ECS because of high pressure from 14 Member States. The European economy needs the European Company. The internal market will not be complete without this legal vehicle and 30 years hard work at the highest level are more powerful than one reservation by only one Member State on the fixation of the percentage necessary to justify the acquired-rights protection to codetermination.

Second Point

As a transition to Mrs Boucourechliev exposé, I would add that a « Société anonyme » doesn't mean « open company » : Most of the « Sociétés anonymes » in France are « close » companies.

Neither « close » doesn't mean « small » : The big French S.A.S. is a close company. We think that many European companies will be « close » companies, some of them created by medium sized companies wishing to develop their activity beyond the national frontiers – some others created by a holding and its subsidiaries or also holding « SE » created by two companies shareholders or joint subsidiary SE created by two companies from différent Member States.

An EC company could be a company of companies associates together without the need to issue shares to the public : a truc close company.

The SE is a legal vehicle in which either quoted companies or close companies could enter. Quoted companies will be submitted to the legislation applicable to these quoted companies as stated before by Mr President Bézard.

Thirdpoint

In this context my final phrase will be my hope that the ECS will be adopted very quickly, so that we can see if close companies do really need a specific statute. We must bear in mind that after so many years we are still waiting for the adoption of the other European statutes on the « Cooperatives – Mutualities and Associations » proposed by the Commission a long time ago.

Could we imagine a magic speed up for the adoption of a specific Statute for the European close companies ? It is my sincere hope, Madame, but we must then accept the words of Talleyrand : *« Point n'est besoin d'espérer pour entreprendre ni de réussir pour persévérer ».*

« It is not necessary to be hopeful in order to undertake, neither to be successful in order to persevere »