EUROPEAN PERPECTIVES : INITIATIVES IN FAVOR OF A EUROPEAN LAW COMPANY

The draft produced by business : the European Private Company

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I would like to dedicate this brief speech to the memory of Professor André Tunc who recently left us. Doctor *honoris causa* at the Universities of Cambridge and Oxford, pioneer of French-British university exchanges, his brilliant works have largely contributed to French lawyers' understanding of Anglo-Saxon legal systems. One of his last works is an account of the project under discussion today, for the *Revue Internationale de Droit Comparé*.

Under this benevolent patronage, I will attempt to briefly summarize the project which has just been presented to you, paying particular attention to the form of the private company chosen, on the one hand, and the legislative method used, on the other.

Let us remember that this project is the result of a study by the *Centre de recherche sur le droit des affaires* published in October 1997 by the European Commission. This three year study, which I had the pleasure of directing, united economists and lawyers from various Member States. They reflected, without prejudice, on the place of private companies in the integration of firms in the European Union and on the possibility of setting up a corresponding European form, bearing in mind the teachings of comparative law.

I – The choice of private company

1. For decades European lawyers and legal authors were exclusively interested in public limited companies. It appeared that large firms, already open to Europe, had to be the essential actors of Community integration through joint ventures and mergers. Moreover, the Treaty of Rome granted the Commission the task of protecting the interests of shareholders and third parties, a topical problem of public issues characterizing large companies.

Therefore, apart from rare exceptions, the important work of harmonizing company law only concerned public limited companies. Centred on the internal running of companies, this work only subsequently addressed the operations of transnational structures, such as the merger between companies belonging to different Member States. As from 1970, the European company project anticipated the harmonization of domestic laws and offered a real freedom of establishment to companies adopting this form. One knows that both projects stumbled on substantive differences, the representation of employees in the company's bodies generally being quoted at the top of the list.

However, what law could not do, the stock exchange has made possible. Recently, the liberalization of transnational investments has permitted partnerships, mergers or the integration of firms to be carried out by the acquisition of shareholdings or controlling interests, friendly or hostile take-over bids by way of purchase or exchange of shares. It is not certain that the implementation of mechanisms for formal freedom of establishment would alter these practices.

2. Alongside these global transactions, countless cases of co-operation and partial or progressive integration between groups or companies take the form of joint subsidiaries. Unlisted subsidiaries, true companies of partners whose Articles of Association reflect the convergence of various interests (investment for one, research for the other, access to a market, etc.).

This method of co-operation or integration is not the prerogative of large companies. Small and medium-sized companies commonly practise it, either at the level of the firm itself or at that of a subsidiary. However, since the end of the 80s, a new interest for small and medium-sized companies has arisen. The Authorities in Brussels have become aware of their role in the development and integration of the Union as well as their specific needs, in particular in the legal field : the 12th Directive and the European Economic Interest Grouping bear witness to this.

A European form of private company would therefore fulfil the requirements of all firms in the Union; and it is the only one able to do so. Indeed, the number of Member States, which will increase, and the disparity between domestic laws do not permit one to hope for a harmonization of domestic laws, likely to promote the integration of firms beyond national borders, within an acceptable period of time.

II – The principles of a European private company status

I will not recall the provisions of the project which have already been presented to you. However, I would like to highlight the principles which inspired its drafting.

The European private company should :

be accessible to everyone

guarantee the security of shareholders and third parties, whilst organizing the shareholder's freedom

be integrated into domestic law.

1. A form which is accessible to everyone

In this respect, the project differs from the European public limited company project which reserves the form for large companies in the framework of specific transactions and which requires a pre-existing European element.

The European private company is intended for wide use which will certainly increase its appeal as a common form. It is open to everyone alongside domestic forms. These traditional forms remain unchanged in each country, since they are familiar and adapted to the most modest and traditional firms. This solution is in accordance with the principle of subsidiarity.

The European private company may therefore be created by one or more individuals or corporate entities, unionist or otherwise, carrying on their business in one or more Member States. It is an ordinary law form, alongside others, which does not have any privilege and which one wishes to make commonplace.

Its sole practical “privilege” would be to enable the transfer of the registered office from one Member State to another without the obligation to amend the Articles of Association.

2. Balance between security and flexibility

The freedom of shareholders to define the corporate organization and shareholders’ rights in the Articles of Association is the very principle of the company described herein. However, it is for the legislator to define the indispensable rules to ensure the essential rights of shareholders and third parties. Hence, it defines the appropriate balance between mandatory public policy rules and the freedom of agreements. These rules vary considerably from one Member State to another, in their extension and in the methods used. Therefore, only the European status should be applied here : no reference is made to domestic laws, even in a subsidiary manner. Otherwise the current disparities would be re-established.

Mr Drury has explained these protective provisions whose method is mainly inspired by English law. Prior procedures and formalities are ruled out. The security of shareholders and third parties relies on compliance with the Articles of Association, the duty of information and the liability of the directors on the one hand, and the possibility for the interested parties to bring lawsuits, on the other.

The European private company thus constitutes an extremely flexible legal tool capable of being adapted to extremely diverse types of firms and situations. The model Articles of Association concerned here may guide the shareholders when drafting the Articles of Association, without restricting them.

3. Integration into domestic law

The very idea behind the project and the wish for widespread use of the form prompt one to limit oneself to the definition of a company regime and to refrain from any encroachment on domestic law. As regards the general regime of companies or firms, legal publicity, accounting, tax and criminal law, large sections of these laws have already been harmonized. Even where this is not the case, the application of domestic law in each country appears the most natural, less disturbing solution, in that it does not create a distortion inside an individual State.

After thirty years of sterile debates, this solution also seemed to be the only one applicable to the representation of employees in company bodies. It should be indicated that a minority opinion in the working group suggested limiting the number of employees which a European private company could employ, enabling the problem of German joint management to be avoided.

Beyond the discussion of the 38 Articles submitted to your wisdom, these general rules, which reflect a certain modesty in the project, appear to me to be essential for its success. Respectful of the state of law in Europe, both as it currently stands and is foreseeable in the medium term, it is thus likely to be widely used, leading to a common regime, favourable to thousands of firms of all categories within the Union.