ROUND TABLE chaired by Karel VAN HULLE, Head of Unit - DG 'Internal Market'

Karel VAN HULLE,
Head of Unit - DG 'Internal Market'

Ladies and Gentlemen. Company law in Europe has been a successful exercise in the past but since a number of years it seems as if we have come to a standstill. Why is that? Well, I believe that an important reason is that Member States don't like the way in which we have approached company law harmonisation. This approach has often been referred to as the "salami-approach", i.e. rather than to have one document which deals with the whole company law area, separate areas of company law, such as disclosure, capital maintenance, accounting, etc… are tackled one after the other. This forces Member States to adopt legislation at regular intervals. It leads to frequent changes in national company law. The business community does not like this. Opposition against such an approach has been growing since a number of years.

Another reason why company law harmonisation has not progressed is that we may well have put too much emphasis on the European Company Statute. The negotiation of that Statute has mobilised a lot of resources. It has been extremely difficult and it is still unclear whether the outcome will be successful. A number of company law initiatives, such as an amended proposal for a 10th Directive on cross-border mergers and a proposed 14th Directive on the transfer of the corporate seat, have been waiting for the adoption of the Statute.

The Commission has tried to do something about this state of affairs. We launched a study on corporate governance, we sent a questionnaire to Member States on possible actions in the field of company law, we organised a Conference in 1997 on Company Law and the Internal Market and last but not least we included company law in the SLIM (Simplifying the Legislation on the Internal Market) exercise in order to identify possible ways and means to improve the 1st and 2nd Company Law Directives. Furthermore, we organised last September a meeting with Member States' experts to discuss company law reforms.

An important lesson, which we have learnt from the past, Ladies and Gentlemen, is that we should concentrate in our harmonisation efforts on market needs. If there is no pressure from the market, harmonisation tends to become an academic exercise and the chances of success are limited. We have also come to realise that harmonisation can become a risky venture. Once a Directive has been adopted, there is a risk that the solutions which it contains are cast in stone. Changes are only possible through an amendment of the Directive. This might make it difficult for Member States to adapt their national law to a changing environment.

Let us not forget that the negotiation of a Directive is a formidable exercise. This was already the case with 6 Member States. It is even more so with 15 Member States and with the co-decision procedure. It is not enough to convince the Member States. We also have to convince the Parliament. Any compromise which we have agreed to in the Council will be examined again by the Parliament in their second reading. For the Commission, this is not a comfortable solution.

Let me quickly run over some of the actions which are presently under way in the field of company law:

- There is of course the European Company Statute. We keep hearing that there is hope. There has been hope for the last twenty years or so and we are not giving up yet. The main stumbling blocs are Gibraltar and worker participation.

- On take over bids, there is also hope. The Council adopted the text in June but we still have the problem of Gibraltar, which is likely to be resolved soon. We have indeed received the message that Spain and the UK are looking for a solution that would take care of all cases where a Community instrument requires Member States to set up a competent authority that would also have to decide about situations concerning Gibraltar.

- In the Action Plan on Financial Services, we have announced that we will come forward with an amended proposal for a 10th Directive on cross-border mergers and with a proposal for a 14th Directive on the transfer of the corporate seat. These proposals are linked to the proposal on the Statute for a European Company. However, if no progress is made on the Statute, the Commission might envisage making these proposals any way for companies which are not subject to worker participation.

- On Corporate Governance, the Action Plan on Financial Services announces the launch of a study of the existing codes on corporate governance in order to identify possible conflicts. This study will be launched early next year.

- In our recent Communication on our Strategy for the Internal Market, we announce amendments to the 1st and 2nd Company Law Directives as a result of the recommendations made by the SLIM Working Party on Company Law. The emphasis here is both on simplification and modernisation of those Directives.

- At some stage next year, the Commission will also publish its long-awaited Communication on Company Law. We need to do some preparatory work for this but it is clear that certain things need to be done.

Meanwhile, the European Court of Justice has created some turmoil in the EU with its Centros ruling. Does this ruling mean that there is no room anymore in Europe for the real seat theory? Does the ruling mean that companies can now transfer their seat by establishing their registered office in one Member State and doing their real business in another Member State? Does this ruling mean that we will know have a real competition between company laws in the EU? Is this the beginning of a European Delaware? How can we protect ourselves against a race to the bottom? These are some of the questions that are being raised after the Court's ruling. I do not believe that the Court intended to fundamentally change things. May be, it was not such a bad idea for the Court to remind Member States that there still is something called freedom of establishment.

Let us now return to our panel discussion of this afternoon. There are three questions, Ladies and Gentlemen, which I would like to ask the members of this Panel.

The first question deals with a subject which was already mentioned several times this afternoon. Should we move in Europe towards a more contractual company law? Is this a realistic perspective? Should we be able to set up a company in the way we like it? Is there a need for the EU to propose such a contractual structure? Are Member States likely to accept this idea? Should this structure appear as a European structure or as a structure along side national legal forms? And what about a minimum share capital? Is it thinkable to require the UK

to introduce a minimum share capital for such a new legal form in order to avoid new Centros cases?

The second question relates to mobility. Is there a need to ensure mobility of companies throughout the EU? I am certain that everybody will say "yes" to this proposition. There is obviously no reason why companies should not be able to benefit from the principle of free movement in the same way as natural persons. However, there are some problems. How do we want to deal with the problem of worker participation? Is there not a risk that companies will move away from those Member States which impose worker participation? Do we still have to take an initiative in this area, now that the European Court has ruled that Member States cannot impose any restrictions on the establishment of branch operations if when the branch is effectively the main establishment?

The third question deals with the treatment of minority shareholders. Do we have at present in Europe a level playing field for minority shareholders? Are foreign shareholders sufficiently informed about their rights? Do we need to do something in order to improve the communication between companies and their cross-border shareholders? Or should we just apply the principle of "let the buyer beware"? Help yourself, so help you God?

These are the questions that I would like to put to the members of this Panel. It is only fair that we should start with the Lady.

The Hon Dame Mary ARDEN,
Justice of the High Court, former Chairman of the Law Commission, Member of the Steering Group of the Department of Trade and Industry's Company Law Review Project

There can be no doubt at all about the economic importance of private companies. In this country, we have about 1 000 000 registered private companies, as opposed to about 11 000 public limited companies. So there is a huge number of private companies in this country. A large number of those of course will be the subsidiaries of public limited companies, so that we can leave those out of account. We do not know how many are subsidiaries, but we can assume possibly as many as the third of that figure. I would be very curious to know what the equivalent figures are for France: how many public limited companies you have and how many private limited companies you have. Even within the United Kingdom there are variations. For instance, in the Northern Ireland there are very many fewer public limited companies than we have in the rest of the United Kingdom, and in the North of England and Scotland, small business is often conducted through partnerships in preference to the limited company.

The large bulk of private companies are owner-managed and it is a common complaint in private companies that they find company law very complex, and who can blame them? They do not have the time or the resources to take legal advice. And so, a major concern must be to simplify company law for their benefit.

Now, a major concern of my own is the low level of understanding by directors of companies of their duties. I regard this as a matter of considerable importance to be addressed. Even a director of a newsagent or a small building company should understand that he has duties. Unless he understands his duties, the likelihood is, that third parties will suffer and of course minority shareholders, if they are any, may also suffer. Now, the Company Law Review, which the UK Government launched in March 1998, regards it of considerable importance to reform the law relating to private companies. They have produce the sound byte that we should

"think small" and focus our minds on the private company. Indeed we should reconstruct the whole of our company law building up from the model of a private company.

In addition to that, the Law Commission of which I was chairman until January 1999 and which is, in this country, the independent body in charge of law reform – it is a body set up by statute – has investigated shareholder remedies and it has also recently reported on the subject of directors' duties. In the former case, there was particular reference to the remedies for shareholders in private companies. The Law Commission did some research and showed that the majority of the cases before the Courts in which shareholders were complaining that they had been oppressed or unfairly prejudiced by majority shareholders, were brought by shareholders in small owner-managed companies, and accordingly, the Law Commission recommended the simplification of the remedy, so that they could obtain remedies from the Courts more easily.

So to take two of the three questions we have been asked to consider:

So far as contractualisation is concerned. Yes, there is a need for simplification and yes, therefore, there is a need to leave more to shareholders to regulate for themselves. But at the same time, we cannot leave the law uncertain and the managers or owners of small companies simply do not have the time and resources to take complex legal advice. They have got to take decisions very quickly and therefore the law must be clear of itself on most occasions to enable to make decisions without having to take legal advice.

So far as equivalence of protection for minority shareholders is concerned, it must be the case that there is not a level playing field for minority shareholders throughout Europe. One way we could seek to deal with this problem is to promote harmonisation of remedies. But that tends to lead, as Karel Van Hulle said, to a race to the bottom. And then, he said, what happens is that you get certain minimum set of remedies or safeguards required by European community law but then each member state builds its own requirements on top of them. The only other alternative is to codify shareholders' remedies But then codification tends to take a very long time.

I recall that in 1965, before I started to practice law, there was a proposal for a European bankruptcy convention that stumbled along with convention after convention being drafted, and finally, as of now there is a draft regulation, but it does not harmonise insolvency laws nor does it make the insolvency procedures of the Member States identical or even similar. All it now seeks to do is to harmonise the rules on jurisdiction between the Member States. So, even after 35 years, we have not been able to achieve an equivalence of protection for creditors throughout the Community in that field.

I think I have said enough. I think there are very difficult issues here and I think we should be realistic.

Pierre BÉZARD,
Honorary President of the Commercial Chamber of the Cour de Cassation

I am in favour of contractualisation and I believe that is really only possible if Europe allows it. So there is an important role for Europe to play.

Having had many years of experience with harmonisation, I have seen that very often indeed harmonisation has been discussed amongst lawyers who try to prevent " abuses " and create all kinds of difficult rules, rather than to look for the real needs of the business community.

When the UK joined the Community there was a delegation from the UK that visited Paris and that made complaints about the way European regulation was going. But now, it seems that things have changed and that there is more interest in developing contractualisation within company law and that allows Europe to take its place and to face international competition.

For future directives, I believe that we should not set the limits too high because Europe should allow Member States to develop.

European private company would be an excellent opportunity because it would be there besides other structures, and would allow Company law to develop.

As far as mobility is concerned, I believe that Europe should help Member States, and notably France, to get rid of the rule that require the unanimous vote of all the shareholders in order to change the nationality of a Company. This no longer finds its place in Europe of today.

I believe that if we finally adopt the 10th and the 14th directives on cross-border mergers and transfer of registered office, That would be already a major step ahead.

As far as a level playing field for minority shareholders is concerned, I think that capital market legislation has a part to play and that a lot depends on the quality of the investment product that has been offered and on the protection of investors. Particularly on take-over bids, it would be important if the directive is finally adopted.

Finally, I think that on investment funds a lot of progress has already been made; but the Securities Commissions in Europe should work more closely together to eventually evolve towards a European Securities Commission.

Charles LATHAM,
Director, Confederation of British Industry (CBI), Brussels

We will live in an age of international expansion and liberalisation. We see increased competitiveness and increased price transparency. We see increased cross-border strategy alliances. Here, within the European Union, we have the Single Market not entirely complete, but none the less, we have that Single Market.

We now also in much of the European Union have the Euro. I wonder whether in the UK the debate is always on whether we actually need the Euro. I suppose the debate on the European company statute is do we need the European company statute.

I don't propose to set out five economic tests for the European company statute but for this proposal for a private European company, I would mention 5 advantages. And possibly looking these in the context of the second question of company mobility, I would say that yes, we could encourage company mobility.

First, through simplicity we will have one law for a European company in addition to the 15 national laws, which will be optional.

Familiarity, with the system, might well help the lawyers, if not necessarily their clients. There would be a more level playing field across the European Union and I believe that companies may well be less reticent in choosing a pan-European legal form for their businesses. I think this will lead us to foresee greater confidence through reciprocal ties, which will be laid down to a certain extent by the law, to a certain extent by contractual agreement. I think this is one of the merits of this proposal that it allows us a certain amount of flexibility. And that's we've also heard from previous speakers, there will be access to information about this European company on Europe wide bases.

So what this proposal offers is a flexible framework. I think it is important that we avoid a model which is inflexible and which worse then becomes the template for further unwelcome developments at national level.

Turning back to the first question on increased flexibility and freedom for companies and should we move towards a greater contractualisation of company law, I would say the answer is yes, but only as long we have adequate minimum protection for creditors and for minority shareholders. At the risk of saying this in present company, I would say that we can't make legislation judge proof. Very often here, in the UK, many of the members of CBI say: well, if we have European legislation on this subject or that subject, what about the European Court of justice. Isn't the European Court of justice going to come in and harm carefully crafted compromises? Well, I think the answer to that is that if we took that line at all, no legislation will ever get started.

One thing I would add to the discussion today is that we must see the European company statute and the proposal for the European private company in the context of an enlarged Europe. We're going to have to have a model that will fit, not simply, the present Members of the European Union but those members of the European Union to come; those countries which lay further to the East.

How can minority shareholders be given equal treatment? I tend to say that it is a balancing act. I am not entirely convinced that this is purely an issue for protection of capital. We would hope in the CBI to see progress on moves to a Single Market in financial services and that may well mean in due course some kind of European Securities Commission. But I think that certainly in the context of companies, we need to show that there is a right of private action and I believe this proposal does go some way to lending support to that principle in the sense that the minority shareholders will have a right to take action on behalf of the company.

So, those are some primary thoughts. There is a willingness amongst the CBI membership to consider new forms of company in the European Union. I would say that we are not in Europe in quite the same position of the United States. In the sense that we are starting from widely differing starting points and if we wait for harmonisation of company law, I suspect we will be waiting for an awful long time.

Joëlle SIMON,
Directeur des Affaires juridiques, MEDEF

1. The MEDEF has always supported a distinction between public and private companies in order to introduce more flexibility for the latter.

   It is the MEDEF, which has elaborated the simplified company statute – SAS – which was quite a revolution for French company law.

The European private company is much inspired by the SAS.

2. Company law must offer to undertakings the means to achieve trans-border mergers and transfer of registered office. We strongly need directives in these fields, even if at the first stage the scope of application of these directives has to be limited to medium size companies ie those with less them 500 employees.

   The European company statute will afford these transfers even though it is not its main objective.

3. The best way to ensure equality of treatment to minority shareholders is to have a European company. For example, the European private company statute provides for proceedings for minority shareholders, such as management audits.

   But we think that both market pressure and elaboration of common Corporate Governance rules will also help to improve the protection of minority shareholders.

Michael BUTCHER,
General Counsel of Vivendi UK

I would like really to ask questions rather than to pretend I knew the answers. But may I start by saying that I think it is a good idea in principle, the idea of a common company, but I would want to adopt Professor Prentice's suggestion which is that you need to let the market actually decide rather than imposing things.

In this context, I wonder what actual market research has been done as to what companies are actually saying they want. I don't mean to be cynical but has it been a lot if very clever lawyers are sitting around perfecting systems and rationalising problems they've studied themselves over many years? So, what is the market research, I'm afraid, I don't know.

Linked to this, in my past, I was the group legal director and company secretary of Euro Tunnel and Euro Tunnel had a construction contract, which provided for disputes to be regulated by principles common to French and English law and in the absence of such common principles, general principles of international law. The result was great uncertainty on what such law was on specific issues arising out of the contract. Now, what actually is the system of law that is going to apply as questions come up about this European company and which Courts are going to decide them. Is it going to be a European Court to which alone you can go or are you in fact going to have 14 different kinds of "European" companies who in each jurisdiction invent their own precedents. In which case you have boarded a spaceship with stars receding in every direction and you will not know where you're going or where you have been. Well, at least if you have the pole star of your own country's law you know where you are going with reference to that relatively stable point. Now, entrepreneurs want to spend their money on their business. They are not interested in speculating highly costly risk capital on developing European law. And so, if you are asking entrepreneurs to come along and take a pot on something that academics have produced in the absence of market research, I don't know whether they are prepared actually to do that.

So, this, I think, brings me to my final point which is linked to these three questions. Question one and question 3, I would link in this way. Which is: Why have a company? What is the principal benefit to an entrepreneur? It is because if it goes bust, he doesn't or she doesn't lose their entire fortune, their family's wealth and so on. So actually, the state and the

community is conferring a great benefit on an entrepreneur and a business person by allowing them to have this escape and this is the reason why there are additional duties put upon people, in these circumstances. What has happened over the years, is that lawyers have developed more and more complex L.O.R.E not just L.A.W around this, around company law, and it's time to get back to some simple principles like honesty, fairness, reasonability; because business people understand these concepts. And there is a phoney certainty in having lots of rules because when it comes to it, there is always another rule that you could look at. Business people sit around a table pondering the ins and outs of the rules but in the end they actually settle what they are going to do by whether it is honest, fair, reasonable or sensible. So, why not just go for that to start off with?

The final point I'd make is in relationship to mobility and worker participation. More than 50 % of the world's equity is now supplied by the United States. Europe is keen to access this capital. North Americans are the people that are actually calling the cultural tune and is all very well saying: I'm going to dance with the most beautiful person at the ball. But actually, it's the most beautiful person who chooses you to dance with. And, what I see is Europe busily dressing up in its finery but actually, it is not the fashion. And what you have got to do it's to find out what Americans and that kind of investor would like to see. I suspect they are not keen on seeing worker participation.

Karel VAN HULLE,
Head of Unit - DG 'Internal Market'

Clearly, a number of important points have been made here.

I do very much appreciate that the UK and the CBI see again merits in proposals coming from Brussels in the field of company law. On new structures, a heard another language than in the past. The issue is not entirely ruled out. On mobility, I hear that the business community, particularly in France, is prepared to accept a 14th Directive without thresholds, opening the way for a transfer of the corporate seat at least for those companies which are not affected by worker participation.

The reference to the US worries me. Should we let the US call the tune? Do we always have to follow the US example? It is a great country and we can no doubt learn a lot from them. But the US are over-regulated in many areas, particularly in securities regulation and financial reporting. We should be careful not to fall in the same trap. Once you have the regulation, it is difficult to get rid of it. Everything seems so essential. There is the risk that regulators perpetuate themselves.

An important observation I wanted to make after this panel discussion is, that we, in Europe, need to know what we want. Seminars like the one which we had today help to focus our minds on the issues. If we know what we want, we should then have the courage to go for it. The problem is that we usually spend so much time fighting each other that there is no more energy left for common action. We try to defend our own territory and to make sure that the EU does not adopt measures which call our own system into question. As a result, the real challenge often comes from the US, which is a more homogeneous market. A solution that works well in the US does not necessarily suit the needs of Europe and, of course, vice versa. The problem is that the EU often fails to agree on an alternative solution to that presented by the US. Let us therefore think about solutions that help our markets become more efficient. And let us do it together and not each on our own.

As far as the Commission is concerned, we want to make progress on mobility. We will certainly come forward with the necessary proposals. Company law will more than ever be influenced by the needs of capital markets. As the markets further develop, the need for more common regulation will become evident. This also applies to supervision of the markets. FESCO (Forum of European Securities Commissions) is slowly establishing itself. Our regulators still have to learn to work together. Markets will force them to do so. The Action Plan on Financial Services identifies the areas where we believe that common action is needed. Let us start implementing them.