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Ambassade de France au Royaume-Uni
Barreau de Paris
Chambre de commerce française de Grande-Bretagne
Confederation of British Industry (CBI)
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University of Exeter

LE DROIT DES SOCIÉTÉS AU SERVICE DES ENTREPRISES DANS L'EUROPE DU XXIe SIÈCLE

DES PERSPECTIVES ANGLAISES ET FRANÇAISES AUX PERSPECTIVES EUROPÉENNES

COLLOQUE du 6 DÉCEMBRE 1999

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Le droit des sociétés au service des entreprises dans l'europe du XXIe siècle

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ALLOCUTIONS D'OUVERTURE

M. Ian HUNTER,
Q.C., Barrister, Avocat à la Cour de Paris, Président de la section anglaise du FBLS

Ladies and gentlemen,

Welcome very much to this important and I hope interesting seminar on "Company law as a tool for companies in the Europe of the 21st century". We are facing up to the Millennium in the important and interesting field.

I am Ian Hunter. I am not going to say very much and I just want to welcome you all here. I had particularly pleasure as out going, because this is my last event President of the English section of the Franco-British lawyers' society, working on this particular event. In particular the great pleasure of working with Aristide Levi of the Chamber of commerce and industry of Paris. Aristide, it's really in a sense, his brand child this particular program this afternoon and I am very grateful to him through the hard work he has put into it and for allowing me to participate in the program with him. We will hear a lot more about the work of CREDA, the research institute of the Paris's Chamber of commerce, during the course of the afternoon but he was one of the joint rapporteurs of the rapport on the private European company which lies at the heart of a good deal of what we will be talking about this afternoon. So I want to pay my tribute to him.

And since I may not have an opportunity to do so at the end of the program, I would like to thank all of the speakers who come today. Number of them come from France, Paris particular, there are all most welcome and thank you to you for coming.

Now, we got a series of openings but they are not going to be very long and I am going to get straight into them and invite first of all Monsieur Michel Franck, President of the Chamber of commerce and industry of Paris who's come over with us here and who is particularly welcome.

M. Michel FRANCK,
Président de la Chambre de commerce et d'industrie de Paris

My Lord,
Mme le Bâtonnier,
Messieurs les Présidents,
Mesdames et Messieurs
Ladies & Gentlemen,

Thank you for the kindness of your welcome. I am indeed very touched by such a friendly greeting, especially today, as our ''Entente Cordiale'' may have seemed threatened by tiny particles. Their name, ''PRIONS'', for us, French people, curiously evokes spiritual communication and high feelings of love and mercy. Dare I say ''Prions pour la perennité de notre amitié séculaire...qui en a vu d'autres...! '' or ''Let us pray for the durability of our secular friendship...which has seen worse...!''.

Some months ago, a very interesting and original seminar was presented by the Franco-British lawyers Society and CREDA, which stands for ''Business Law Research centre'' of the Chamber of commerce and industry of Paris. The topic was the negotiation of contracts

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between a French company and a British company. The device used was a role-play, which showed – and explained – step by step, the negotiation. Happily, all this was caught on a video sponsored by VIVENDI, which is now available. Such a fruitful and friendly co-operation could not stop there. That is why we have the pleasure of finding ourselves gathered here today to discuss another interesting matter: ‘‘company law as a tool for companies in the Europe of the twenty first century’’. For this colloquium, the organisators have had the honour of the participation of very prestigious French and British institutions.

I would like to emphasise a word, which I consider to be very important in the title of today’s meeting: ‘‘ Company law as a TOOL...’’ Company law should not be seen as a self-sufficient academic subject matter but rather as a finely tuned tool, which answers companies’ needs as precisely as possible. In other words, a tool which, far from being a barrier to their incorporation, will promote their development and facilitate their transfer in a world where competition is harder and harder. As the Chairman of an Institution which represents 290 000 French firms and defends their interests, I can tell you that they do need – as well as any other firms – such a tool.

Thus, the Chamber of commerce and industry of Paris is very keen on supporting actively any initiative which will tend to adapt companies structures to a highly competitive environment. Which means greater flexibility and greater freedom.

This was precisely the conclusion of a CREDA recent study, published in 1997 by the European Commission, in which experts from England, Germany, the Netherlands and France have elaborated a new type of European company: a ‘‘European close company’’. The aim was to promote a form of company likely to meet expectations of all firms – small and medium-size as well as big ones – willing to find partnerships or to extend their cross-border activity.

On the basis of CREDA’s proposals, the CCIP and the MEDEF drew up, with the assistance of a European working party chaired jointly by Mrs Jeanne Boucourechliev and Mr Bernard Field, a draft regulation relating to the rules governing a ‘‘European Private Company’’. This draft has been supported by European professional bodies such as UNICE and Eurochambres. And the European institutions and organisations concerned by the project have been very interested by this contribution made by Business for Business.

Before I give you the microphone, Mme le Bâtonnier, I would like to thank everyone who has contributed to make today’s meeting a success and to thank in particular the speakers of the highest level who are going to share their knowledge and thoughts with us.

And last but not least, I would like to tell you that it is a great pleasure to be here with you all this afternoon.

Mme Dominique de LA GARANDERIE,
Bâtonnier de l’Ordre des Avocats à la Cour de Paris

President,
Ladies and Gentlemen,
Please do excuse me for my accent.

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The friendly understanding which was recall by President Franck has changed over the years into the true friendship between English and French lawyers. The attendance each year by the head of the London Bar and many UK lawyers at the Rentrée of the Paris Bar evidences this friendship. My attendance and before me that of my predecessors at the Rentrée of the London Bar symbolises such friendship. I should mention the registration of many English lawyers and also French lawyers with our two Bars.

I wish to insist in greater detail upon the crucial importance of the subject for which we all are assembled: “Company law at the service of Europe”. I (…)also see opportunity to thank the French Chamber of commerce in Great Britain and to the university of Exeter. Both have gathered together the Paris Bar, the MEDEF and the CBI, thus giving an opportunity to jurists and businessmen to compare and discuss their points of view. The assistance of the French Embassy in the UK underlines the importance of the subject. I am pleased to remind that as early as 1960 the Paris Bar organised the seminar on the topic for the establishment of a commercial company subject to European law. 1960: almost 40 years ago and the European company is not born yet. And yourself, your British friends have multiplied efforts to work out a European law. Through the CREDA and the IFC, it’s the training institute of the Paris Bar, we have organised on 4 December 1997 a seminar on this subject with the presence of Mr Mario Monti, the European Commissioner. Even more recently, in November 1998 and November 1999, during my 2 years as head of the Paris Bar, the Paris conference on law and economics has assembled at the Paris Bar initiative, the most well known managers in the world economy, public and private governmental bodies and companies. On this occasion, the expected hoped and claimed birth of a European company. I must mention, speaking from the entrepreneurs’ point of view, M. Vincent Boloré called for a homogeneous clear stable and effective legal system. He also claimed a better knowledge of foreign legal systems as a means of selecting the best rules. In this respect as far as Europe is concerned an harmonising process including sometimely legal bench marking is much better than the kind of individual legal shopping led by firms themselves and meet the conclusion of competing legal system. While Jean Perelevade, Chairman of the Crédit Lyonnais, agreed with this legitimacy concern stressing the important function of the public source of law in the process. He also called for global rules for globalisation. In opposition, unilateralism currently, prevailing in the definition of standards. He stated that the present merging logic underlined the necessity of harmonising European legal system particularly in fiscal matters. Otherwise these merging processes may too often take aggressive forms which would eventually endanger Europe. As all of the speakers from the economical world, he estimated that such a harmonisation should be helped by the creation of a European society statute. The phenomenon of globalisation has forced businesses to reorganise its activities into networks and has led to an important restructuring in various sectors. It is imperative that the construction of Europe, the Euro zone, gives priority to faciliting restructuring of these businesses at European level. This European priority will have as a consequence a true competition for businesses European block, American block, Japanese block. In certain sectors and activities, the European stage is indispensable. Thus, the coherence of construction of Europe requires convergence of legal systems that would permit the creation of European corporate entity as a structure for European businesses which are currently confronted by these obstacles which oblige them to find torturous legal ways to achieve their aim. All the leaders of business ask for this. Haven’t we, the lawyers, the obligation to demand the putting in place of a model in the same manner than the economists used to do it in their area. Our work today will be a strong thing for we consider that this demand is legitimate. This is why it is urgent to hold a meeting such as today’s meeting. I would like to thank everyone for such an event and I thank you very much.

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M. Jonathan Hust,
QC...,

Welcome to all on behalf of England-Wales. What you have to discuss today are issues of great significance for us all. I cannot pretend to being gifted with a great knowledge of English company law. Dan Prentice who is speaking too later tried hard to teach me in the course of the Teen case, the special laws of corporations… I am not sure he completely succeeded; we lost at any rate. As each of our two great countries does more business with each other and we compete internationally across the globe, it has become more important that we understand and merge our two traditions of corporate structures. We live in a time of great change. We can see how French companies come over here and they have bought large trunks of our water industry and our railways. You are welcome to them. We will stick to your claridge. But I hope this afternoon we have a constructive and useful meeting and that we end with a greater understanding of the issues that require to be solved. Thank you.

Mme Joëlle SIMON,
Directeur des Affaires juridiques, MEDEF

Ladies and Gentlemen,

First of all I would like to excuse Mr Kessler who should have been speaking this afternoon as the representative of a French enterprises association MEDEF formally CNPF. But he has been called at short notice to a government meeting. He asked me to express his apologies and I know he was looking forward to being with you here today.

The MEDEF considers that this meeting is of utmost importance because in times of great change in society with the rapid evolution of European integration and globalisation, business structures have to adapt quickly to this new business environment.

We really need flexible forms of companies. That is why the MEDEF and the Paris Chamber of commerce have decided to introduce for debate a new company structure: the European Private Company. We are very pleased to have this opportunity today to present this project and to get feed back from you.

Thank you for your attention and I hope that this meeting will be a fruitful one.

M. Jean-Claude BANON,
Président de la Chambre de commerce française de Grande-Bretagne

Ladies and gentlemen, thank you very much for inviting me to speak today here. As a matter of fact wearing my hat as a chief executive of Vivendi in the U.K. I would say that the media tend to make too much of how much water we've bought in this country. I can assure you that it is much less than they present.

Now this being said, I think that back to our subject, as the single market matures the focus is very much shifting from creating the legal framework necessary for the integration of national markets to that of securing high level performance for the European economy. However the two, the legal framework and the high performance often go hand in hand. When the European company statute comes into force it is hoped that it will paved the way for higher performance

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by pan-european companies. Unfortunately, the European legislative process seems to be rather lengthy. In this case we are still waiting a decision on a proposal which was made by the Commission in 1989.

What is exciting about the European company statute is that it will allow companies incorporated in different member states to merge or form a holding company or joint subsidiaries while avoiding the legal and practical constraints arising from the existence of 15 different legal systems. There is no doubt that this will simplify arrangements for international companies. While there will be no obligation for firms to set up as European companies, businesses will have an option for managing their affairs within the EU. The few worries surrounding Vodaphone's bid for Mannesman has been accompanied by clamours for changes in European company law. Mario Monti, the EU competition commissioner remarked that the Vodaphone/Mannesman case clearly demonstrated the need both for a European company statute and a Directive on European take-overs.

On the employment front, a break-through was reached on 29 November, just few days ago when the Council of Ministers approved the entire employment package that was put to it, notably the employment guideline for 2000 and the recommendations to Member states on the implementation of their employment policies. The employment package will now go for approval to the Helsinki sommet later this week. We may be well on the way to having a truly European employment strategy for Europe.

However the proposal on the European company statute has not been passed yet. After the Davignon report came out in May 1997, outlining recommendations on employee involvement in a European company, the Commission was forced to take a fresh look at the proposal for a European company statute. Issues needing to be resolved included employee participation and acceptable fiscal regime and the provision of adequate protections for creditors. Although compromises have been made the failure to solve the issue of employee participation continues to be a major stumbling block against reaching a political agreement. As a matter of fact, Ader Turner is not here, but having had the opportunity to discuss very much at the CBI Council those issues I think is fair to outline that the CBI maintain that provisions on the employee involvement should be excluded from all European company law proposals. However, when it became clear that such provisions had to remain the CBI continued, successfully I should say, to push for greater flexibility in these arrangements. So let's hope that the disagreement between the EU Member states especially Spain and Germany over the level of employees' involvement in a European company can be resolved before the end of this year. Once this issue is sorted out the way should be clear for the European company statute to come into force. Thank you.

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PERPECTIVES FRANÇAISES

Pierre BÉZARD
Président honoraire de la Chambre commerciale de la Cour de cassation

et Jean-Jacques CAUSSAIN
Avocat au Barreau de Paris, membre du Conseil de l'Ordre,
associé de Clifford Chance

Pierre Bézard.– Le droit français des sociétés a beaucoup évolué ces dernières années et cette évolution se poursuit à un rythme accéléré. La loi du 24 juillet 1966, applicable à la constitution et au fonctionnement des sociétés commerciales vise à assurer un juste équilibre entre la protection des associés, actionnaires et créanciers des sociétés et le dynamisme de ces sociétés. En réalité, ce texte consacre une réglementation très importante détaillée et rigoureuse dont il est prévu souvent que les manquements soient sanctionnés par des dispositions pénales. Ce texte, établi essentiellement par des juristes, n'accorde qu'une confiance limitée aux entrepreneurs et se fait l'écho, par le nombre des précautions établies, des difficultés et scandales passés.

Ce texte a été renforcé par la transposition des directives européennes prises en application de l'article 54-(3)-(*g*) du Traité de Rome, visant à assurer "la protection des associés et des tiers".

Cette réglementation applicable à toutes les sociétés commerciales quelle que soit leur importance et qu'elles soient fermées ou qu'elles fassent publiquement appel à l'épargne par la cotation de leurs titres.

La réglementation boursière est aussi applicable à ces sociétés cotées mais elle est, à cette époque, de portée limitée.

Si la plupart des dirigeants français se sont montrés réservés sur une réglementation qui leur paraissait sévère, formaliste et coûteuse, il ne leur a pas semblé, alors que la pays bénéficiait d'un large développement économique et de plein emploi, que la question soit prioritaire. Leur attitude va profondément changer lorsqu'est apparue la crise qui a frappé durement les économies des différents pays en particulier de la France et que la concurrence internationale est devenue très forte. On ajoutera aussi à partir du moment où se sont développés les contentieux, l'aspect pénal de la réglementation paraissant particulièrement menaçant. Les pouvoirs publics vont tenir compte – au moins partiellement – de ces souhaits et une série de réformes de portée limitée, vont se succéder visant à assouplir certaines règles de constitution et de fonctionnement des sociétés ainsi qu'à prévenir leurs difficultés.

De même ont été créés deux types nouveaux de sociétés : une société à responsabilité limitée unipersonnelle (EURL) pour tenir compte du fait que de nombreuses petites sociétés ne sont animées que par une seule personne, d'autre part une société par actions simplifiée au statut légal allégé mais réservée aux seules sociétés importantes.

Mais les pouvoirs publics vont surtout chercher à développer la bourse. Il leur est apparu que grâce à celle-ci, les sociétés pourraient trouver des fonds en plaçant leurs titres pour faire

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face à leurs difficultés et se développer. Pour cela des modifications de structure et de fonctionnement fondamentales ont été apportées à la bourse.

Les pouvoirs publics ont aussi conduit une action très forte pour amener les épargnants à investir leurs économies dans les marchés financiers. Pour les motiver, ils leur ont accordé – du moins au début – d'importants avantages fiscaux – Cette action a été couronnée de succès car des millions d'investisseurs ont pris le chemin de la bourse soit directement, soit par l'intermédiaire d'organismes de placements collectifs.

Mais il est apparu nécessaire d'assurer la protection de ces investisseurs. Une réglementation qui a pris une place de plus en plus importante a donc été élaborée par le Ministère des Finances en collaboration avec les autorités boursières et la Commission des Opérations de Bourse (COB), cette dernière étant chargée de la protection de l'épargne.

La protection des porteurs de titres cotés est désormais essentiellement assurée par la réglementation boursière et le droit des sociétés ne présente qu'un intérêt subsidiaire à leur égard. Ils se comportent d'ailleurs en investisseurs susceptibles de se dégager très rapidement et leur qualité d'associé, susceptible de s'exprimer en assemblée générale, les motive peu ou pas du tout.

Ainsi apparaît très nettement en pratique et de plus en plus dans la réglementation la distinction entre sociétés fermées et sociétés ouvertes, c'est à dire celles dont les titres sont négociés sur un marché réglementé. C'est à partir de cette distinction que l'on présentera les observations qui vont suivre.

Sociétés fermées : vers la contractualisation du droit applicable

Les sociétés fermées sont habituellement de petites ou moyennes sociétés mais ce peut être aussi d'importantes sociétés dont le capital est détenu par quelques associés. Toutes ces sociétés ont comme point commun de n'avoir pas de titres cotés en bourse et de n'avoir pas fait appel public à l'épargne.

Ces sociétés sont soumises à la loi du 24 juillet 1966 dont on a souligné le caractère contraignant mais qui a fait l'objet de nombreuses réformes successives, comme nous l'avons indiqué. Cependant ces réformes, si elles allaient dans le sens de l'allégement, ont été ponctuelles et de portée limitée.

Restait à établir la grande réforme du droit des sociétés souhaité par l'ensemble des acteurs économiques pour assurer la contractualisation du droit, sa modernité, sa dépénalisation. Les pouvoirs publics s'y sont engagés. Le Ministère de la Justice a réuni à cet effet, il y a quelques années, une commission composée de juristes et praticiens qui a mis au point un projet de réforme après une large consultation des milieux économiques et financiers. Ce texte a été, par la suite, encore amélioré. Mais il n'a toujours pas été déposé au Parlement, le gouvernement ayant estimé que d'autres projets étaient plus prioritaires. Il est question à l'heure actuelle d'un dépôt au début de l'an 2000.

Il faut signaler que, parallèlement, une importante réflexion a été effectuée sur une réforme du droit des sociétés par le sénateur MARINI.

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Les praticiens, en attente de cette réforme depuis de longues années et déçus de ne pas la voir intervenir, ont été d'autant plus profondément mais agréablement surpris – même si la méthode employée ne leur a pas paru la meilleure – de voir consacrer en juillet 1999, dans une parfaite discrétion, un texte dont la portée est révolutionnaire.

Jean-Jacques Caussain.– Jusqu'à la loi du 12 juillet 1999 à laquelle Mr Bézard vient de faire référence, les seules formes de sociétés fermées étaient :

- La société anonyme (SA) qui est soumise à une réglementation très contraignante laissant peu de place à la liberté contractuelle, et
- La société à responsabilité limitée (SARL) qui bien qu'échappant à la plupart des directives européennes fait l'objet de nombreuses dispositions impératives, souvent inspirées de celles applicables à la SA.
- La société par actions simplifiée (SAS) qui n'existe que depuis la loi du 3 janvier 1994, mais qui n'était pas largement utilisable parce que seules des sociétés ayant un capital minimum de 1 500 000F ou des entreprises étatiques pouvaient en être actionnaires.

La loi du 12 juillet 1999 a levé cette restriction. En conséquence, toute personne physique ou morale peut désormais être actionnaire d'une SAS dont les principales caractéristiques sont les suivantes :

- Société par actions, la SAS, peut être constituée par une ou plusieurs personnes physiques ou morales qui ne s'engagent qu'à concurrence de leur apport, et son capital minimum est de 250.000 FF dont la moitié doit être libérée lors de la constitution. Elle doit aussi comprendre un commissaire aux comptes.
- Société fermée, la SAS ne peut faire publiquement appel à l'épargne et les actions qu'elle émet sont obligatoirement nominatives.
- "Société-contrat", ses statuts définissent avec la plus grande liberté l'organisation et le fonctionnement des organes de la société et les conditions de transfert des actions.

Concernant l'organisation des pouvoirs de la société, la loi prévoit que les associés sont compétents pour prendre certaines décisions et que la société est obligatoirement représentée dans ses relations avec les tiers par un président. En outre, certaines décisions fondamentales doivent obligatoirement être prises par les associés (augmentation, amortissement ou réduction de capital, fusion, scission, dissolution, nomination de commissaires aux comptes, comptes annuels et bénéfices, de même que la transformation de la SAS en une société d'une autre forme).

Sous réserve de ces dispositions impératives, les statuts fixent librement les règles de fonctionnement de l'assemblée et les droits des associés. Ils peuvent ainsi prévoir, par exemple, les clauses suivantes :

- Convocation, à tout moment, par un ou plusieurs associés qui peuvent fixer l'ordre du jour.
- Réunion par visio-conférence ou conférence téléphonique ou consultation écrite.
- Fixation libre des règles de majorité (plus de la moitié, les deux-tiers, les trois-quarts des voix, etc…) qui varient selon la nature de la décision.

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- Possibilité de prévoir un droit de vote multiple pour certaines catégories d'actions (double, triple ou quadruple), ce droit étant attaché à l'associé ou au titre, ou encore un droit de veto. Alors que cette possibilité existe déjà au Royaume-Uni dans les Ltd, elle reste interdite dans les SARL et dans les SA en France.

Les exemples ci-dessus peuvent sembler évidents à une audience britannique, mais ce degré de souplesse n'existe pas dans la SA ou la SARL.

Concernant la direction de la SAS, la loi est également très souple. Un président, qui peut être une personne physique ou morale, doit être nommé par l'organe prévu par les statuts. Il représente la société et dispose de tous les pouvoirs pour agir en toute circonstance au nom de la société conformément à la première directive du 9 mars 1968, toute limitation apportée à ces pouvoirs est inopposable aux tiers. En outre, les statuts ont la faculté de prévoir la nomination de dirigeants qui peuvent éventuellement siéger dans un organe collégial (conseil d'administration, conseil de surveillance, directoire, etc…), mais ne peuvent être investis de tous les pouvoirs pour représenter la société. Les conditions de nomination et de révocation des dirigeants sont entièrement libres. Les modalités de délibérations des organes qui peuvent être créés sont, comme les décisions collectives des associés, librement déterminées par les statuts, en ce qui concerne notamment le quorum, la représentation, la majorité ou la tenue effective des réunions.

La dernière caractéristique de la SAS est relative au régime de cession des actions. Les dispositions applicables à la SAS favorisent les clauses visant à donner à la SAS son caractère de société fermée. Les clauses statutaires peuvent ainsi prévoir :

- l'inaliénabilité des actions pour une durée n'excédant pas 10 ans ;
- la soumission de toute cession d'actions à des tiers ou même entre associés (ce qui n'est pas possible dans les SA) à l'agrément préalable d'un organe de la société désigné dans les statuts (assemblée, comité "ad hoc", catégorie d'associés, etc) ;

Innovation majeure par rapport aux solutions jurisprudentielles données en matière de pactes d'associés dont la violation était seulement susceptible d'être assortie de dommages-intérêts, la loi prévoit que toute cession effectuée au mépris des clauses relatives au contrôle de l'actionnariat est sanctionnée par la nullité. Enfin, ces clauses ne peuvent être adoptées ou modifiées qu'à l'unanimité des associés.

Désormais accessible à tous, la SAS, grâce à sa souplesse, pourrait devenir très populaire, à moyen terme et pourrait être la forme idéale pour les sociétés fermées. Il est probable qu'elle remplacera progressivement la SA et la SARL et qu'elle deviendra l'équivalent français de la *private limited company* de droit anglais.

Pierre Bézard.– La SAS aura conduit le droit français à faire un pas décisif sur le chemin de la contractualisation. Mais la réforme du droit des sociétés commerciales n'en a pas pour autant perdu de son importance et de son urgence. Il faut permettre cette évolution vers la contractualisation pour tous les types de sociétés.

Les sociétés fermées devraient être soumises à une réglementation allégée et souple permettant à leurs fondateurs et associés de fixer eux-mêmes dans les statuts les solutions applicables à leur fonctionnement.

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Le dispositif pénal devrait être très allégé : seules quelques dispositions seraient maintenues, concernant les infractions particulièrement graves.

On peut d'ailleurs penser que les solutions qui seraient consacrées par la cinquième directive européenne, sur la structure des sociétés anonymes – dont on attend toujours qu'elle soit établie – pourraient constituer les seules règles impératives à retenir dans la réglementation nationale. Les réflexions menées pour une société européenne pourraient aussi être très utile dans l'élaboration du droit national.

La consécration d'un droit contractuel des sociétés rendrait essentiel le rôle des tribunaux. Ceux-ci seraient amenés, à partir des contentieux soumis et au regard des travaux de la pratique ainsi qu'à la lumière de la doctrine, à construire ce droit des sociétés. Les tribunaux le feraient par référence aux grands principes de respect du contrat, de loyauté, de transparence, d'égalité de traitement. La jurisprudence française a d'ailleurs, depuis plusieurs années, engagé cette évolution faisant de plus en plus fréquemment référence à ces notions trop souvent occultées par la complexité et l'importance quantitative de la réglementation actuellement applicable. Le simple respect formel de textes n'établit pas, en effet nécessairement, que les principes fondamentaux qui les soutendent ont été respectés.

Sociétés dont les titres sont cotés : le renforcement du droit applicable

La situation des sociétés dont les titres sont cotés évolue d'une façon fondamentalement différente de celle des sociétés fermées. La raison est qu'elles réunissent de nombreux investisseurs, directement ou par l'intermédiaire d'organismes de placement collectif et qu'il convient d'assurer leur protection. Elle est aussi qu'elles peuvent faire l'objet de sévères batailles boursières lors d'offres publiques et qu'il s'agit d'assurer leur bon déroulement.

Certes, les sociétés cotées sont soumises à la loi du 24 juillet 1966 en ce qu'elles ont le statut de sociétés anonymes, elles bénéficient donc de l'évolution qui allégera ce texte. Mais en réalité la réglementation qui leur est applicable, que ce soit par la réglementation boursière ou le droit des sociétés, se renforce.

Les sociétés cotées relèvent pour l'émission et les opérations qui les concernent, essentiellement de la réglementation boursière. Mais le droit des sociétés s'est fait l'écho de cette réglementation et de cette évolution et lui a donné des assises légales. Ainsi pour ce qui concerne la détermination des valeurs mobilières, l'information sur les prises de participation significative, la définition de la notion de contrôle…

La réglementation applicable aux titres cotés vise à les traiter comme des produits support d'épargne et pour assurer la protection des investisseurs à ne permettre que ne leur soient proposés que des produits de qualité, c'est à dire susceptibles d'être négociables facilement et rentables. Cette réglementation vise aussi à assurer une information complète et rapide des investisseurs dès qu'un événement important susceptible d'intéresser la valeur des titres intervient. Elle prévoit aussi une sanction sévère des dirigeants et autres personnes visées par les textes en cas d'opérations d'initiés, de manipulation de cours ou d'informations trompeuses. Cette réglementation établit aussi des dispositions, d'ailleurs souvent modifiées, en matière d'offres publiques mais aussi permettant ou imposant le retrait d'actionnaires minoritaires, dans certains cas déterminés.

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Cette réglementation est élaborée par le Ministère chargé de l'Economie et des Finances en relation étroite avec le Conseil des marchés financiers (CMF) et la Commission des Opérations de bourse. Les deux organismes surveillent attentivement son application. Leur rôle n'est d'ailleurs pas seulement de sanctionner les manquements mais aussi de les prévenir.

Il faut aussi souligner le rôle très important joué par la Cour d'Appel de Paris, seule compétente et sur pourvoi la Chambre commerciale de la Cour de Cassation. Un nombre important de procédures leur a été soumis concernant des contestations prises par les autorités boursières. A cette occasion ces juridictions ont veillé, sans chercher à entraver l'action essentielle et bénéfique de ces autorités, à ce que soient respectées les règles, non seulement de procédure en particulier concernant le respect du contradictoire – mais encore concernant le fond du droit.

Il faut aussi souligner, et cette constatation est importante, que de plus en plus les autorités boursières s'intéressent, par delà les titres et les opérations qui les concernent, aux émetteurs eux-mêmes, et particulièrement au statut de leurs dirigeants. Il y a sans doute là une source d'évolution du droit des sociétés sur initiative boursière. L'exemple du gouvernement d'entreprise dont on va parler dans quelques instants est significatif.

On constate donc, en ce qui concerne la réglementation applicable aux sociétés cotées, un renforcement indiscutable des textes et des contrôles. Cette solution se justifie par la protection des investisseurs et l'équilibre de traitement dans les batailles boursières.

Il convient cependant que cette réglementation n'évolue pas vers un formalisme excessif et qu'elle n'éloigne pas les solutions françaises d'un mouvement européen et mondial d'unification. Il ne semble pas que cette dernière crainte soit justifiée comme on va maintenant l'examiner.

Jean-Jacques Caussain.– En 1992 était publié le rapport du comité présidé par Sir Adrian Cadbury consacré aux divers aspects du *corporate governance*. Ce texte recommandait que toutes les sociétés cotées devraient se soumettre à un Code de *Best Practice*. Elles devaient en outre rendre compte dans leur rapport annuel de leur soumission à ces règles de conduite. Il était suivi en 1995, par le rapport d'un autre comité présidé par Sir Richard Greenbury concernant la rémunération des mandataires sociaux. Enfin, en 1998, le Rapport Hampel faisait la synthèse des deux rapports précédents et de ses observations propres sous la forme d'un code (*combined code*) lequel devait être adopté par le Stock Exchange sous le nom de *Principles of Corporate Governance and Code of Best Practice* pour être annexé au *Listing Rules*. Récemment, le rapport Turnbull sur le *risk management* a donné des recommandations relatives l'application de ce code.

La France n'est pas restée étrangère à ce mouvement de réforme. En raison des privatisations et de la mondialisation des marchés, l'actionnariat étranger, en particulier les fonds de pension, détient environ 40% de la capitalisation boursière du CAC 40. Les pratiques des sociétés cotées devaient donc évoluer. La question du *corporate governance*, traduit en français par *le gouvernement d'entreprise*, a ainsi fait l'objet de deux rapports importants.

RAPPORT VIENOT I

Un premier rapport était publié en juillet 1995, par un comité composé de deux grandes instances patronales, l'Association des Entreprises privées (AFEP) et le Conseil National du

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Patronat Français (CNPF), dont la nouvelle dénomination est le Mouvement des Entreprises de France (MEDEF), ont réagi rapidement en mettant en place un comité présidé par M. Marc Viénot, alors président de la Société Générale. Ce rapport contenait plusieurs propositions sous forme d'un code de bonne conduite et plus spécialement :

- La création de comités spécialisés
  - Le Comité de rémunérations
  - Le Comité de sélection des administrateurs et des mandataires sociaux
  - Le Comité d'audit
- Un nouveau statut des administrateurs
  - La limitation du cumul des mandats
  - La limitation des mandats réciproques
  - La nomination d'administrateurs indépendants
  - La limitation du nombre des administrateurs gestionnaires (*Executive directors*)
  - La consultation de l'assemblée par le conseil en cas de cession d'actifs
- Une charte de l'administrateur.

Plusieurs études réalisées sur la mise en place des recommandations du Rapport Viénot I, ont fait apparaître que les trois-quarts des sociétés du CAC 40 ont mis en place un comité d'audit et un comité des rémunérations. Cependant leur mission n'est pas toujours exercée d'une manière efficace et le nombre des administrateurs indépendants reste toujours peu important.

RAPPORT VIENOT II

Tenant compte de ces critiques, et inspiré par les propositions contenues dans les différents rapports publiés au Royaume Uni, un second rapport Viénot sur le *gouvernement d'entreprise* a été publié en juillet 1999. Il contient plusieurs recommandations dont nous retiendrons les plus essentielles :

1. La possibilité de dissocier les fonctions de président de celles de directeur général.

La séparation des fonctions de *Chairman* et de *CEO* avait été préconisée pour la première fois en Royaume-Uni dans le rapport Cadbury. Si cette distinction est, maintenant obligatoire pour les plc, en droit anglais, en France, cela implique une réforme de la loi puisqu'en l'état actuel du droit le président est obligatoirement directeur général.

Il doit être mentionné que la loi française offre déjà une alternative avec le système dualiste du directoire (*management committee*) et du conseil de surveillance (*supervisory board*) qui est l'équivalent français du système allemand de *Vorstand*, et de *Aufrichstrat.* Cette organisation permet une distinction claire entre les administrateurs dirigeants qui siègent au directoire et les administrateurs non-dirigeants qui siègent au conseil de surveillance. Presque 25% des sociétés du CAC 40 ont adopté cette structure.

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2. La publicité des rémunérations des dirigeants de sociétés

Au Royaume-Uni, cette information doit figurer dans le rapport annuel, depuis le rapport Greenbury, cette information est très complète. Le rapport Viénot II prévoit que celles-ci soient mentionnées dans un chapitre du rapport annuel des sociétés, mais considère que seul le montant global des rémunérations doit être publié, la publicité des rémunérations individuelles étant jugée inopportune. L'information devra être assez détaillée.

3. La publicité des plans d'options de souscription ou d'achat d'actions des sociétés cotées

Un chapitre du rapport annuel doit leur être consacré.

4. Information plus détaillée sur les administrateurs

Ce rapport annuel des sociétés cotées doit contenir des détails relatifs aux administrateurs : le curriculum vitae, le nombre d'actions détenues, les mandats dans d'autres sociétés cotées, etc.

5. Fonctionnement du conseil d'administration

Au moins un tiers de ses membres doivent être des administrateurs indépendants et identifiés comme tels dans le rapport annuel. Une information juste et suffisante doit être donnée aux administrateurs qui en feront la demande. De plus, la participation des administrateurs aux réunions devra être mentionnée dans le rapport annuel.

6. Les comités spécialisés

Les administrateurs indépendants doivent représenter au moins un tiers des membres des comités d'audit et de nomination ainsi que la moitié au moins des membres du comité de rémunération.

7. Information financière

Les sociétés cotées doivent publier leurs comptes consolidés annuels le plus vite possible (ex., un mois pour publier les comptes provisoires).

Enfin il doit être souligné que ces recommandations, destinées aux sociétés cotées, n'ont aucun caractère obligatoire, et qu'aucun mécanisme de sanction n'est prévu. Contrairement à ce qui existe en Angleterre avec le *combined code* annexé aux *Listing Rules*, ces règles ne figurent pas en annexe du règlement du Conseil des Marchés Financiers (CMF). Cependant les rapports Viénot I et II, comme l'avait fait le Rapport Cadbury, recommandent que les sociétés cotées fassent état, dans leur rapport annuel, de l'avancement de l'application de leurs recommandations et expliquent, le cas échéant, les raisons pour lesquelles ces sociétés n'auraient pas mis en œuvre certaines de ces recommandations.

Pierre Bézard.– En conclusion on peut dire en premier lieu qu'apparaît en droit français une distinction de plus en plus nette entre le droit applicable aux sociétés fermées et celui concernant les sociétés dont les titres sont cotées.

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Le droit applicable aux sociétés fermées se contractualise de plus en plus. La liberté des fondateurs et associés s'élargit donc : ils seraient soumis à moins de contraintes et leur démarche commerciale et industrielle sera facilitée.

Le droit applicable aux sociétés dont les titres sont cotés, au contraire se renforce et le contrôle auquel elles sont soumises est plus sévère. La protection des investisseurs justifie cette solution.

On peut relever ensuite que le droit français, soumis à diverses sources poussant à une certaine unification, se rapproche des droits des autres pays occidentaux en particulier Britanniques.

En ce qui concerne le droit des sociétés fermées, l'allégement du droit écrit conduit à mettre en lumière les principes d'éthique attendu des dirigeants, comme c'est le cas dans les pays de *Common Law* lesquels font un mouvement vers le droit écrit en appliquant les directives.

Le droit européen, malgré les retards pris dans l'adoption de textes importants et attendus, est aussi un puissant élément d'unification.

Pour ce qui est des sociétés cotées, l'unification avance à l'évidence rapidement.

Enfin, on dira qu'en droit français la jurisprudence prend une place de plus en plus essentielle. Ainsi, en ce qui concerne les sociétés fermées car, devant le recul des textes, il lui appartiendra de faciliter l'adoption de solutions cohérentes et adaptées aux réalités.

Pour les sociétés cotées, la jurisprudence continuera à mener une mission attentive à l'application par les autorités boursières de la réglementation et se constituera ainsi un véritable droit boursier.

A la veille de l'an 2000, qu'il nous soit permis d'exprimer le vœu que tous les pays disposent d'une réglementation, applicable aux sociétés, de qualité.

De qualité, c'est à dire prenant en compte les intérêts devant être protégés mais d'une manière souple et sans contraintes injustifiées. Les entreprises doivent pouvoir disposer de tout le dynamisme susceptible de créer les richesses qui seront justement réparties.

Sans entreprises fortes, il n'y a pas d'économie prospère et de politiques étatiques efficaces.

Nous ajoutons : puissent ces États disposer d'une Justice consciente de cet enjeu, efficace et qui par une démarche commune et confiante, non seulement des juges mais aussi de tous les juristes : praticiens, conseils, enseignants, consacre des décisions efficaces et adaptées aux réalités économiques.

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PERSPECTIVES ANGLAISES

M. Daniel PRENTICE,
Professor, University of Oxford

M. Mark STAMP,
Partner, Linklaters & Alliance, London

PERPECTIVES EUROPÉENNES : LES INITIATIVES EN FAVEUR D'UNE SOCIÉTÉ DE DROIT COMMUNAUTAIRE

Le projet de la Commission européenne : la société européenne

Mme 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.

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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

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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.

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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 :

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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 »

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Le projet des acteurs économiques : la Société Privée Européenne

Mme Jeanne BOUCOURECHLIEV,
Ancien Directeur du CREDA, Ancien Directeur juridique du Rank Xerox

Je souhaiterais dédier cette brève intervention à la mémoire du Professeur André Tunc, qui vient de nous quitter. Docteur honoris causa des Universités de Cambridge et d'Oxford, pionnier des échanges universitaires franco-britanniques, ses ouvrages lumineux ont largement contribué à la compréhension des systèmes de droit anglo-saxon par les juristes français. Un de ses tout derniers écrits est un compte-rendu du projet que nous discutons aujourd'hui, pour la Revue Internationale de Droit Comparé.

Sous ce patronage bienveillant, je tenterai une brève synthèse du projet qui vient de vous être présenté, en m'attachant particulièrement au choix de la forme de société privée, d'une part et à la méthode législative employée, de l'autre.

Rappelons que ce projet est l'aboutissement d'une étude du Centre de recherche sur le droit des affaires, publiée en octobre 1997 par la Commission Européenne. Cette étude qui a duré trois ans et que j'ai eu le plaisir de diriger, réunissait des économistes et des juristes d'États membres différents. Ils se sont interrogés, sans préjugé, sur la place de la société privée dans le rapprochement des entreprises dans l'Union Européenne et sur la possibilité d'instaurer une forme européenne qui y corresponde, compte tenu des enseignements du droit comparé.

I - Le choix de la société privée

1. Pendant des décennies, l'intérêt des juristes et des autorités européennes s'est porté exclusivement sur les sociétés anonymes. Les grandes entreprises, déjà tournées vers l'Europe, apparaissaient comme devant être les acteurs essentiels de l'intégration communautaire, à travers opérations communes et fusions. De plus, le Traité de Rome investissait la Commission du soin de garantir les intérêts des associés et des tiers, problème topique de l'appel public à l'épargne qui caractérise les grandes sociétés.

Sauf rares exceptions, l'œuvre importante d'harmonisation du droit des sociétés n'a donc concerné que les sociétés anonymes. Axée sur le fonctionnement interne des sociétés, elle n'aborde que tardivement les opérations de structures transnationales, telles que la fusion entre sociétés d'États membres différents. Dès 1970, le projet de société européenne anticipait sur l'harmonisation des droits nationaux et offrait une véritable liberté d'établissement aux sociétés qui adopteraient cette forme. On sait que l'une et l'autre entreprises ont achoppé sur des divergences de fond, au premier rang desquelles la représentation des salariés dans les organes de la société est généralement citée.

Cependant, ce que n'a pu faire le droit, la bourse l'a rendu possible. Depuis peu d'années, la libéralisation des investissements transnationaux permet, par prise de participation ou de contrôle, OPA ou OPE amicales ou hostiles, d'effectuer partenariat, fusion ou intégration d'entreprises. Il n'est pas sûr que la mise en place des mécanismes d'une liberté d'établissement formelle modifierait ces pratiques.

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2. À côté de ces opérations globales, d'innombrables cas de coopération et rapprochement partiel ou progressif entre groupes ou sociétés prennent la forme de filiales communes. Filiales non cotées, véritables sociétés de partenaires dont les statuts traduisent la convergence d'intérêts différents (investissement pour l'un, recherche pour l'autre, accès à un marché, etc.).

Cette modalité de coopération ou d'intégration n'est pas l'apanage des grandes sociétés. Les PME la pratiquent couramment, soit au niveau de l'entreprise elle-même, soit à celui d'une filiale. Or depuis la fin des années 80, un nouvel intérêt pour les PME se manifeste. Les autorités de Bruxelles ont pris conscience de leur rôle dans le développement et l'intégration de l'Union et de leurs besoins spécifiques, notamment en matière juridique : la 12e directive, le GEIE en attestent.

Une forme européenne de société privée répondrait donc aux besoins de l'ensemble des entreprises de l'Union ; et elle est seule à pouvoir le faire. En effet, le nombre des États membres, appelé à s'accroître, et la disparité des législations nationales ne permettent pas d'espérer dans des délais acceptables une harmonisation des droits nationaux susceptible de favoriser les rapprochements d'entreprises par delà les frontières nationales.

II - Les principes d'un statut européen de société privée

Je ne reviendrai pas sur les dispositions du projet, qui vous ont été exposées. Je voudrais cependant insister sur les principes qui ont inspiré sa rédaction.

La société privée européenne doit :

– être accessible à tous
– assurer la sécurité des associés et des tiers tout en ménageant la liberté des associés
– s'intégrer dans les droits nationaux.

1. UNE FORME ACCESSIBLE à TOUS

À cet égard, le projet se démarque du projet de société anonyme européenne qui réserve la forme à de grandes sociétés, dans le cadre d'opérations précises et qui exige un fait européen préexistant.

La société privée européenne est destinée à une large diffusion qui ne peut qu'accroître son intérêt comme forme commune. Elle est offerte à chacun à côté des formes nationales. Ces formes traditionnelles subsistent, inchangées, dans chaque pays, car elles sont familières et adaptées aux entreprises les plus modestes et traditionnelles. Cette solution est conforme au principe de subsidiarité.

La société privée européenne peut donc être créée par une ou plusieurs personnes, physiques ou morales, unionistes ou pas, exerçant leur activité dans un ou plusieurs États membres. C'est une forme de droit commun, à côté d'autres, qui ne dispose d'aucun privilège et que l'on souhaite voir se banaliser.

Son seul « privilège » de fait, serait de pouvoir transférer son siège d'un État membre à un autre sans être obligée de modifier ses statuts.

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2. l'équilibre entre la sécurité ET la souplesse

La liberté des associés de définir, dans les statuts, l'organisation sociale et les droits des associés est le principe même de la société ici décrite. Cependant il appartient au législateur de définir les règles indispensables pour assurer les droits essentiels des associés et des tiers. Il définit ainsi l'équilibre souhaitable entre les règles d'ordre public et la liberté des conventions. Ces règles varient considérablement d'un État membre à l'autre, dans leur extension et dans les méthodes employées, et c'est pourquoi seul le statut européen doit s'appliquer ici : aucun renvoi n'est fait aux droits nationaux, même à titre subsidiaire. On rétablirait sinon les disparités actuelles.

M. Drury a exposé ces dispositions protectrices, assez largement inspirées du droit britannique dans leur méthode. Les procédures et formalités préalables sont bannies. La sécurité des associés et des tiers repose sur le respect du pacte statutaire, les obligations d'information et la responsabilité des dirigeants d'une part, la possibilité pour les intéressés d'intenter des actions judiciaires, de l'autre.

La société privée européenne constitue ainsi un outil juridique extrêmement souple, susceptible de s'adapter à des types d'entreprise et des situations extrêmement diverses. Les statuts types dont il a été question peuvent guider les associés dans l'élaboration du pacte social, sans les contraindre.

3. l'intégration dans le droit national

La conception même du projet, le souhait d'une large diffusion de la forme, incitent à se cantonner dans la définition d'un régime de société et à s'interdire tout empiétement sur le droit national. En ce qui concerne le régime général des sociétés ou des entreprises, publicités légales, droit comptable, fiscal, pénal, de larges pans de ces droits sont d'ores et déjà harmonisés. Même là ou ils ne le sont pas, l'application du droit national dans chaque pays apparaît comme la solution la plus naturelle, la moins perturbatrice, en ce qu'elle ne crée pas de distorsion à l'intérieur d'un même État.

Après trente ans de débats stériles, cette solution a semblé également la seule applicable à la représentation des salariés dans les organes de la société. Signalons qu'une opinion minoritaire dans le groupe de travail a proposé de plafonner le nombre de salariés que pourrait employer une SPE, ce qui permettrait d'éluder le problème de la cogestion allemande.

Par delà la discussion des 38 articles offerts à votre sagacité, ces règles générales, qui traduisent une certaine modestie du projet, me paraissent essentielles à son succès. Respectueuse de l'état, actuel et prévisible à moyen terme, du droit en Europe, elle est ainsi susceptible d'une large diffusion qui peut apporter un régime commun favorable à des milliers d'entreprises de toutes catégories dans l'Union.

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Le projet des acteurs économiques : la Société Privée Européenne

Mme Joëlle SIMON,
Directeur des affaires juridiques, MEDEF

Ladies and Gentlemen,

It this brief presentation, I will try to answer the two following questions :

- Why a European private company ?
- Is this project alternative or complementary to the Commission's one ?

I - Why a European private company ?

An instrument to serve business competitiveness.

We are deeply convinced that there is a real need for a European company. It would be paradoxical since we are able to use a single European currency, not to be able to use a single European structure.

First of all, the economic integration of Europe which is only just beginning must be accompanied by the availability for its participants of suitable technical management structures.

This new form of company would enhance economic integration because it would favour exchanges inside the European market and it would also help to overcome the obstacles to mobility of companies.

The European private company would provide its users with all the flexibility expected of a genuine European corporate form affording them the option to set up in the country of their choice provided that the company's place of business and actual management are located there and if necessary to transfer them to another country without special difficulties, in order to accompany their development or to facilitate their management.

It would also be attractive for foreign investors.

Secondly, since most European companies are close companies SME's 90 % – independant but also subsidiaries of groups – this structure should be a simple and flexible form meeting their specific requirements.

The European private company would provide the shareholders with as much leeway as possible for the organisation and running of their undertaking as required by the constraints of management independant of the local legislation in the country of establishment.

I will let the following speakers develop this aspect.

Thirdly, European companies but also foreign cormpanies need legal certainty and security.

To be able to choose a European form which would be recognised in every member State would be a very important simplification for business.

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For example, it would be very convenient for a group of companies to have a uniform set of European subsidiairies. It would also solve the delicate problem of the law applicable to a joint venture.

This would also contribute towards the reduction of their costs.

II - Is this project alternative or complementary to the Commission's one ?

A project to complement the European company.

Definitively, this project is complementary to the Commission's one.

Each proposal can complement the other.

This conception was supported by Mr Mario MONTI as a commissionner in charge of the internal market and is supported by Mrs Nicole FONTAINE, the president of the European Parliamant. When our president, Mr Seillière recently presented our common project to Mr Bolkenstein who is now in charge of this field, he specifically stressed this concept of complementarity.

We would not have conceived the European private company as a substitute to the Commission's project which is a very ambitious one.

But because the Commission's draft includes public companies, this regulation is rather complicated and unsuitable to SME's.

So we think there is room for a more simple and flexible form.

Furthermore we think that this modest project could, maybe, help to make this important issue progress after decades of successive failures.

It is our wish that these two projects soon become reality.

Thank you for your attention.

The scheme of the regulation

Robert DRURY,
Solicitor, Senior Lecturer, University of Exeter

Introduction – The Construction of the Regulation

I trust that you have all got a copy of the Regulation in your conference pack. A drafting team including myself whose members were drawn from France, Germany and England constructed this Regulation. The team drew on their knowledge of the company laws of other jurisdictions in the Community as well, in drafting a piece of legislation which we hope works as a harmonious and coherent whole. The European Private Company has many features that will be familiar to British company lawyers as well as a few drawn from other jurisdictions which we feel will be very effective in this context.

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1. Access

Under the Regulation a European Private Company can be formed by individuals or companies either by the straight registration of a new company from scratch or by way of the transformation of an existing national company into a European Private Company. Initial creation can be as a joint subsidiary or a holding company and access is not restricted to nationals of the European Union, but is open to all.

2. Basic Features

The European Private Company has limited liability with each shareholder being liable only to the extent of the contribution made for their shares. It may not issue securities to the public, in line with the conception of the private or close company form. It has legal personality from the moment of its registration. To assist with overcoming potential conflict of laws problems the registered office of the European Private Company must be located in the same jurisdiction as its central administration. There is considerable freedom in the choice of a name for the company provided that the name is “ not misleading or liable to cause confusion. ” The name must be preceded or followed either by the words “ European Private Company ” or by the acronym “ EPC ”.

3. Formation Procedure

The European Private Company is created by means of registration in the normal companies registry in the State where its central administration is to be located. This may be in the local Commercial Court or, as in the UK at a central Companies Registry. Certain basic information must be provided which will be put on the register and also sent on to a central EU register to be created for the purpose. This will be publicised both locally and at EU level in the Official Gazette and should be readily accessible by means of public search facilities. The relevant registry will issue a Certificate of Incorporation.

The initial capital provisions, requiring a minimum of ?25,000, reflect the need to establish economic credibility for this new form of company. To ensure that the money is forthcoming shares must be paid up in full before registration, and the company will only be registered if an official receipt for this money by a bank or a notary is submitted.

4. Organisation and Operation

The basic principle that we have adopted is freedom of choice, as long as this is consistent with the adequate protection of shareholders and third parties. Thus the founders may in the company’s articles of association set up any form of management structure that they feel comfortable with. A single manager, a one tier board, with or without a managing director or a two tier board are all possible. These articles too will set out the rights of the shareholders, and considerable freedom is permitted, much on the British model, and the voting or other rights do not have to be proportionate to the nominal value of the shares. However, certain minimum rights are guaranteed to the shareholders. Although the articles will set out who does what, in the sense of allocating which matters are to be dealt with by the shareholders and which by the management body, certain matters are specifically reserved for the shareholders. These include the approval of the accounts, the allocation of the annual profits – to reserves or distribution – the appointment of auditors if necessary and the alteration of the articles.

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Third party protection is achieved in a way consistent with a lot of European legislation, and will be familiar. The Regulation provides in Article 16 that " The company shall be represented in relation to third parties by one or more individuals or legal entities having full power to act in all circumstances in the company's name. ". The power allocation follows French phraseology, but is apt for its purpose. As the names of these representatives will be published, and accessible to third parties, all that they have to do is to access the right person and the deals made by them should be fully binding.

The Regulation lays down certain standards for the actions of the management body. Basically the company's officers on its governing body or bodies (boards of directors or management etc.) are liable if they breach the terms of the Regulation or the company's articles or other rules applicable. It was difficult to impose universally acceptable yet realistic standards of duty, but in the end we settled for the fairly open formula of " They shall be liable ... for breach of their duties and the standard of diligence reasonably required in the conduct of business. ". In terms of seeking a remedy for breach of these duties, individual shareholders may bring an action against the relevant officers for any losses suffered on a personal basis, as they can in France. Following the path of the majority of European jurisdictions, we have agreed that shareholders representing 10% of the capital may bring an action on behalf of the company. This brief avoidance of the problems of *Foss v Harbottle* may seem like a cop out, but does give a realistic prospect of broad acceptance in the EU as a whole.

5. Shareholders and Minority Protection

In this area a balancing act needed to be performed between a number of potentially conflicting forces. On the one hand we wished to create as much freedom and flexibility as possible to encourage use of this form. On the other we wished to provide what was felt to be as realistic a protection for the minority shareholders as possible, while not providing too many avenues which could lead to the break-up or self-destruction of the company. Because of the essentially close company nature of the entity which we were creating we needed to make it clear that the shareholders could, if they wished, restrict the free right of a member to transfer their shares, usually by requiring the approval of some group or body within the company e.g. management or shareholders meeting.

Minority protection can take many forms, usually in combination. There can be rules relating to the provision of information from which minority shareholders can deduce that they are being oppressed, there can be rules enabling minority shareholders to enforce directors' duties and rules giving some statutory remedy for oppression. The draft Regulation has all of these elements and more. In terms of granting shareholders access to information, they must be informed of all collective decisions taken by the general meeting, and are to be allowed access to the company's principal management documents. Shareholders may also submit questions in writing which the company's officers shall be bound to answer. If no answer is forthcoming shareholders are given the right to petition the court for the appointment of a special auditor to report on certain acts of the management. This concept of appointing an *expert de minorité* is found in both French and German law.

As I have mentioned, shareholders holding 10% of the capital or the votes may bring an action against the company's officers for recovery of damage suffered by the company because of breaches of duty by the management.

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A remedy may be provided in the articles themselves under which shareholders may claim to have their shares acquired in the circumstances and under the procedure specified in the articles. Another more forceful exit route is given by the Regulation which provides for any shareholder to petition the Court for the compulsory acquisition of their shares in certain defined circumstances including :

- a significant change in the articles,
- transfer of the company's assets to another company,
- a substantial change in the company's business or
- an unjustified withholding of distributions on their shares.

The drafting team did not want to be too liberal in providing an exit route because of fears that the most timid or even prudent shareholder might use it to bail out as soon as things began to get tough, and not stick with the venture that they had agreed to participate in. The boot was also put on the other foot by including provision for a majority to remove a minority shareholder who has become unacceptable because such a shareholder has seriously damaged the company's interests, or because their continuance as a shareholder is detrimental to the proper operation of the company. These rules were borrowed from Dutch private company law.

If a shareholder finds a potential purchaser for their shares who is unacceptable to the others the Regulation states that the articles “ **shall** determine the manner of withdrawal of a shareholder to whom approval is denied. ”. A price fixing mechanism must be provided which allows a disaffected member to leave the company by selling their shares at a reasonable value. Such an exit route is found in French law.

6. Capital, Accounts and Economic Credibility

These topics can be linked because they express different but possibly complementary approaches to the protection of third parties dealing with a company. Having a minimum capital is still seen by many jurisdictions as providing some assurance to potential creditors. However, the efficacy of this device is doubted by many commentators, especially this one. Having access to information on a company's accounts can help a third party to evaluate the risks associated with extending credit to that company. Having both mechanisms might help to engender confidence in the European Private Company as a serious business form.

We agreed to include a minimum capital because so many Civil Law systems are still wedded to the idea and would not readily accept a new company form in their territory which lacked it, and also because of the need to reassure Member States that all of their companies will not flee to the European Private Company overnight to avoid this requirement. We have Centros very much in mind. The minimum capital chosen is, as I have said 25,000 Euros. The incorporation of a European Private Company is not something that should be undertaken lightly or frivolously, and we see the minimum capital at this level as a sufficient barrier for this purpose. Despite scepticism over the ability of a minimum capital to provide an effective guarantee for the company's creditors, there was general agreement on the application of rules for the **maintenance** of the company's capital once it has been subscribed. This could operate to boost the confidence of third parties dealing with the European Private Company. These rules should be at least up to the standard of those set out in the Second Directive. In fact, in an effort to create an atmosphere of economic credibility and rectitude the rules in the Regulation go further.

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Bearing in mind the protection given to third parties by the publication of accounts, despite the fact that they can fall rapidly out of date, we agreed that the European Private Company must comply with the European Union's rules on the publication of the accounts for private companies.

7. Employee Participation

The area of employee participation proved to be a little controversial, as might be expected given its history in the European Company Statute. It is provided in the draft Regulation., that the rules relating to disclosure to and consultation of the employees should be determined by the law applicable to the registered office of the European Private Company. Each State would be able to go its own way, but this could, in my view, lead to undesirable diversity between different jurisdictions and fifteen different types of European Private Company and perhaps to unwelcome episodes of jurisdiction shopping. An alternative would be to provide a threshold limit on the number of employees that a European Private Company can have, perhaps using the successful EEIG rules as a precedent. That number is open to discussion but it is worth noting that 99.8% of the businesses in the EU have less than 250 employees.

8. Insolvency

Insolvency presented a completely different set of problems, and wisely I feel we simply referred this to the law applicable to companies of parallel type in the Member States.

9. Governing Law

The desire of the drafting team to avoid reference to the various national company laws as subsidiary laws was very strong. The Regulation has taken a very tough line on this point and lays down a hierarchy of rules governing the European Private Company. We begin obviously with the Regulation itself and then refer to the provisions of the company's articles which are not inconsistent with the Regulation. Anything governed by the Regulation may never be subject to the application of the law of the Member States, even with respect to those points which it does not settle expressly. Instead the general principles of the Regulation, the general principles of Community company law (in so far as these can be determined) and the general principles common to the national laws are then applied in turn by the judge in order to form the basis of a solution to the relevant problem. National laws, as such, can only be applied where the Regulation expressly refers to them, as it does for example in the case of accounting rules and insolvency provision. The thinking of the majority of the drafting group was that the danger from the reference out of key areas of European Private Company law with the potential for the creation of 15 types of such company outweighed the difficulties that judges would be faced with in their search for an appropriate solution. Judges would thus be forced to come up with solutions in keeping with the concepts inherent in the European Private Company project.

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The European Private Company - Model Articles

Andrew HICKS
(Andrew Hicks, Solicitor, Senior Lecturer at the University of Exeter was not present at the colloquium. His contribution was read by R. Drury)

The purpose of this talk is to describe briefly the proposed Model Articles of Association for the European Private Company. Article 13 of the draft Regulation envisages the inclusion in its first schedule of standard-form articles of association. Two sets of model articles have now been drafted by Andrew Hicks and myself working with Professor Peter Hommelhoff and Diemar Helms of Heidelberg.

1. Advantages and Difficulties

We are convinced that the European Private Company has much to offer the small business sector of the European economy, not least in this country where it is particularly vibrant ;.it offers entrepreneurs full flexibility to structure the organisation of their company as they wish ;.it gives them full freedom of contract in drafting their articles of association.

But there are possible difficulties for launching and gaining acceptance of a new European form of company ;

- it is unfamiliar : promoters of an EPC will be entering relatively uncharted waters ;
- it could impose additional costs on startups : drafting new forms of articles without any precedents would be expensive work. These costs and uncertainty can be minimised by annexing to the Regulation a choice of model articles that incorporators are free to adopt, vary or even ignore.

2. Special Importance of Model Forms

Producing model articles right from the beginning is perhaps particularly important for the European Private Company for a number of reasons.

First of all the Regulation itself, the primary legislation for the EPC, is relatively brief. It leaves the members of the company broad scope for defining how the company is to be run.

Secondly a number of provisions of the Regulation require certain specified matters to be put in the articles.

And thirdly, article 12 of the Regulation defines the Governing law which applies to the EPC. It is intended :

- to assure uniformity between EPCs incorporated in different jurisdictions and
- to minimise reference to distinctive national laws.

The uniformity of the European Company free of reference to national law is of course essential and perhaps one of its most desirable features. However, it places the onus on the incorporators to define their relationships fully within comprehensive and effective articles of association.

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It seems likely that the model forms, will be widely used. If so, this should usefully supplement the legal principles supplied by the Regulation and should also help to establish a uniform way or ways in which EPCs are structured

3. Comparison with Table A

In this country we are very familiar with the statutory Table A model articles of association. These are of long standing and are widely followed by most small companies. This experience illustrates how model articles can have a harmonising effect on the style of association agreement.

The idea of providing model articles for the EPC is perhaps inspired by the British Table A. But it is different in principle. Table A applies to every new company as default articles, except to the extent that it is excluded by articles drafted and registered by its promoters ; But for the EPC it is not intended that model articles will apply automatically in default of articles being registered. On the contrary, promoters will be obliged to file articles ; they may simply choose to base their agreement on one of the Model Articles provided with the Regulation if they so wish.

4. Work So Far

We have now prepared two sets of Model Articles. These are in draft form for consultation and comment. Copies are obtainable from me at Exeter University by e-mail or fax.

Model A is for the smallest partnership type company.

Model B is for the perhaps larger company which may have some shareholders who are not actively involved as directors.

The drafting team were very conscious of the need to avoid merely trying to imitate our own national company structures. Instead we studied company constitutions from as many Member States as possible and took what seemed to be best and common practice from them. The forms are not therefore tied to any particular national tradition. While our aim was to come up with something reasonable familiar and widely acceptable, if we thought a novel idea was a good one we included it.

We therefore hope that the model articles for the EPC will be as good as typical practice and in some respects better ; remembering of course that incorporators are always free to include whatever they wish.

5. Description of the Model Forms

It now remains only to briefly describe the structure of Model A and Model B.

Model A is designed for the small family or partnership business. Many small companies have no outside investors but are set up and run by a small group of associates. In the English context they would all generally expect to be directors. Model A deals with this by saying that the company shall be managed by the shareholders. Thus every shareholder is automatically a member of the management board. Its decisions are made by majority vote, each person

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having one vote. This system runs in effect like a partnership, though a person having at least 20% of the shares can ask for a particular resolution to be decided on the basis of one vote per share.

A novel feature is that the members can unanimously appoint a manager or managers to act in their place for a fixed period. Thus for example if elderly founders of the company wanted to appoint outside managers, or more probably to retire and hand over management to their children, they can appoint them as managers.

This therefore gives the option to change from management by all the shareholders to management by a board of managers. If managers are appointed, certain decisions are referred to the shareholders in the usual way. Model A then specifies these matters, such as the appointment of managers, approval of accounts and altering the articles, which are then reserved for decision by the members.

In contrast, **Model B** is for a larger company including outside members who don't intend to take part in management. In this case the general meeting of shareholders is responsible for appointing and approving the actions of the management and for altering the constitution of the company. They can either appoint a manager or managers – this fits the style of the French *geran,* – or they can appoint a board of directors following the common law practice.

Both Model A and B have provisions on share capital, transfer of shares and preemption rights, shareholder rights generally, compulsory acquisition of shares, auditors and dispute resolution.

Many of these provisions are relatively familiar and must of course comply with the relevant harmonisation Directives.

Conclusion

Entrepreneurs incorporating an EPC will of course be free to adopt articles of whatever style they wish. But these model articles are of considerable importance to the efficient launch of the European Private Company.

We now look forward to feedback on the drafts that have been prepared to make them as appropriate as possible throughout the European Union.

TABLE RONDE animée par 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

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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

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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

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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

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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,
Président honoraire de la Chambre commerciale de la 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.

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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

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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

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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

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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

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on Financial Services identifies the areas where we believe that common action is needed. Let us start implementing them.

CONCLUSION

Lord Alexander of WEEDON,
Q.C., Former Chairman of Natwest Bank, Chancellor of Exeter University

May I begin immediately by disclaiming expertise in a topic that I think is one of fascination, on which many different views can be held, and which has far to go in its development but seems to me to be a most worthwhile concept to deliberate on and see whether there is as we go forward a market for it within Europe.

On the program I am labelled, my words are “conclusion”. That has a welcome ring. There is only me that stands between all of you and an apéritif, the other pleasure of the evening.

There once was a nineteenth century judge who said I have not been present during the argument but I agree with all of you and which has been expressed. I’ve only been able to hear the last really stimulating ¾ of an hour for which we are very grateful. So, I won’t attempt to summarise the conference.

I can’t resist saying that as a Director of Total, or Total-Elf as it is now becoming, and Administrator, I am much more impressed by the concept of worker participation than are others who practice the rubric of Anglo-Saxon capitalism under the simple word “shareholder value”. I think this much in what Lionel Jospin just said recently something along the lines: we want a market economy but not a market hegemony And somewhere I think we have to make certain that in our great corporations we do balance the interests of those who may exist.

There seem to me some very positive features of this conference. One is that it has wide ranging French-English support both legal and commercial. We would be the envy of those who are involved in the world of beef. And in a sense I welcome this harmony as an illustration that one does not always get highlighted in our curious British press that our 2 countries working together to the constructive goal of furthering trade and very hearten by the presence and participation of Karel Van Hulle and his interesting closing words.

A very heartening thing, if I may say so personally, about the involvement of Exeter University, was that our law school was quick to recognise the importance of European law and it continues to be a leader in exploring topics of importance to the future. The work of Robert Drury and Andrew Hicks in this area, which is summarised in the proposal for a European private company, seems to me to give certainly a valuable, insightful impulse and scope for thought, and I would only quote one sentence of the introduction. You don’t have to read very far in this paper published in the Journal of Business Law to get to the nub of it. One sentence about businesses within the European Union. “As they are able to use a single European currency, would it not also make sense if these businesses were able to use a single European structure?”

It seems to me that the advent of the Euro is a key economic development for Europe. Our continent has to be competitive not only against the outside world but internally. The Single Market must create an opportunity for good businesses and must be implemented in a way that sets it face wholly against both protectionism and barriers to people operating across borders. The Euro is a catalyst for change. I know it is fashionable in this country to say well look at

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what's happened to the exchange rate this year. But even the Times, perhaps I should say particularly the Times, had the wit to recognise this morning that it is a false issue in the debate whether the UK should join the Euro. Exchange rate stability and a basis for widening and deepening capital markets is most important and I think it's a pointer to what we want to try and achieve in the world of Corporate Governance and Corporate opportunity. Whenever we can we should help the market to serve business. All of us are well aware that multinationals operate across Europe, an instance of the value of the idea of creating a European public company. But today, we focus on a task of great importance to our economic dynamism.

We all know that medium and small size companies are a critical engine of economic growth and a creation of jobs in a continent that badly needs further job creation. I saw when I was in banking how, over virtually the whole decade I was there, that small and medium-size enterprises became increasingly the dynamo of growth, the dynamo of growth of jobs, of growth of domestic product. And I welcome very much the Europe private company initiative as a valuable supplement to the work that the European Union is doing with the project for the European company law statute. The private company approach could implement this work, complement it by providing a vehicle for smaller companies, which will not need the full panoply of regulation needed for a more public entity. I agree with what I think was the thought expressed from the platform. One must simply not over regulate in this area. But I do say it is being important in the 21st century Europe. It would help promote trade and act as a useful platform for inward investment into the European Union. Useful to multinationals establishing their European subsidiaries with the uniform management and reporting structure.

Nor it seems to me as there is surprise, there is support from across the European spectrum from the European employers confederation UNICE and the European association of Chambers of commerce Eurochambres. Because what we are looking at is part of an option of choice of companies. I think no one is suggesting, and I would certainly not suggest, that the European private company should be put forward as a mandatory scheme. I think that choice is vital just as in the US, companies have a choice in which State to incorporate and I think there are legitimate areas of proper competition that can be offered by individual States leaving it for investors to choose in regard to, for example, Spain.

Well, I might put off by the concerns expressed about minority shareholders. I think that should be a choice open. But equally I think one part of that choice should be the opportunity for companies who want to go into Spain, but may not particularly like, – we always pick on examples; I am not picking up Spain because I'm well used to people always picking up UK as an example of what's wrong in the European Union; so I am not picking up Spain but the opportunity of companies to go into Spain – to choose a European public law statute. I do see it as a worthwhile initiative. I do not believe that these initiatives come to flourish easily. I was Chairman of the Takeover Panel for 2 ½ years and incidentally may I say we didn't do a bad job in simple concepts like good faith, fairness reasonableness, openness, expressed as about four general principles with the detailed rules being only illustrative and also giving way to the general principles if they conflicted. But what I did see in my time as the Chairman of the panel is the first draft taken of a directive submitted for consideration. We tried to give what help we could in that area. An so having seen the beginning of that and knowing that it is still running now I am very conscious that within Europe these developments rightly take quite a long time.

But what we also have to balance that against is that since the Single Market, the advent of the Euro, Europe has a new opportunity of dynamism, which we'll need to take. If it seeks to set up private company which is over regulated with too high hurdles then I suspect it will fail. But to look to way in which it can give companies have an opportunity to trade across Europe under a

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simple company law statute, which places light burdens, clear burdens that can be understood by the shareholders who decide whether to join. I think that will be creating something that would give much needed as we said a few moments ago, flexibility to choice within Europe.

And now, having said that, I have a choice of going on, standing further between you and your drink and preventing the film starting in the cinema, or being flexible and applying common sense; and that I propose to do, and say thank you very much and thank you very much to all who've made such stimulating contributions to this conference and taken a very enlightening debate forward.

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