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COMPANY LAW AS A TOOL FOR COMPANIES IN THE EUROPE OF THE 21st CENTURY

FROM THE ENGLISH AND FRENCH PERSPECTIVES TO THE EUROPEAN PERSPECTIVES

COLLOQUIUM ... 6 DECEMBER 1999

Company law as a tool for companies in the Europe of the 21st century

OPENING

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,
M^{me} 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 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.

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.

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 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.

FRENCH PERSPECTIVES

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.– French company law has considerably developed over the last few years, and this development is in fact accelerating. The Law of 24 July 1966, applicable to the formation and running of commercial companies, aims to ensure a fair balance between the protection of the company's shareholders and creditors, as well as the dynamism of these companies. In reality, this text establishes a very voluminous, detailed and rigorous regulatory framework, breaches of which are often sanctioned by criminal provisions. Drafted mainly by lawyers, it only places limited confidence in entrepreneurs and, through the number of precautions established, is the echo of past difficulties and scandals.

This text has been strengthened by ensuring the protection of the interests of shareholders and third parties as a result of the transposition of European Directives taken in application of Article 54-(3)-(*g*) of the Treaty of Rome.

These regulations are applicable to all commercial companies regardless of their importance and whether they are closed or make public offerings by listing their securities.

Stock market regulations also apply to these listed companies, but at present, they have limited scope.

Although most French directors were cautious about regulations which appeared to them to be strict, formalistic and expensive, it did not seem to them that the question was a priority, at a time when the country was benefiting from great economic development and full employment. Their attitude changed profoundly when the recession appeared, hitting hard the economies of different countries, in particular France, and when international competition became very strong. Once litigation started, the criminal aspect of the regulations came to the fore, and appeared threatening.The public authorities took at least partial consideration of these wishes, and a series of limited reforms followed with the aim of relaxing certain rules relating to the formation and running of companies, as well as forestalling their difficulties.

Likewise, two new types of companies were created : a *société à responsabilité limitée unipersonnelle* (EURL) in order to take into account the fact that numerous small companies are directed only by a single person, as well as a *société par actions simplifiée* with a relaxed legal status, reserved solely for important companies.

However, above all, the public authorities tried to develop the stock market. It appeared to them that thanks to the stock market, companies would be able to find funds by placing their securities in order to face their difficulties and to develop. To this end, fundamental structural and operational amendments were made to the stock market.

The public authorities also undertook very strong action to lead individual investors to invest their savings in the financial markets. To encourage them, they granted them – at least in the

beginning – significant tax incentives. This action was crowned with success. Millions of investors made their way to the stock market, either directly or through the intermediary of collective investment undertakings.

However, it appeared necessary to ensure the protection of these investors. Regulations with an ever greater scope were therefore drawn up by the Ministry of Finance in conjunction with the stock market authorities and the *Commission des Opérations de Bourse* (COB), the latter being in charge of protecting savings investments.

The protection of holders of listed securities is henceforth essentially ensured by stock market regulations. Company law only presents a subsidiary interest for them. Moreover, they behave like investors who are liable to withdraw very quickly. Their status as shareholders, able to express themselves in General Meetings, barely motivates them, if at all.

Hence, the distinction between closed companies and open companies, *i.e.* those whose shares are traded on a regulated market, appears very clear in practice and more and more so in the regulatory framework. It is on the basis of this distinction that the following comments will be presented.

Closed companies : towards the « contractualisation » of the applicable law

Closed companies are usually small or medium sized companies, but they may also be important companies whose capital is held by a few shareholders. All these companies have one thing in common : they do not have shares listed on the stock market and they do not make public offerings.

These companies are subject to the Law of 24 July 1966 whose restrictive nature has already been highlighted, but which has been reformed on numerous occasions, as we have pointed out. Although these reforms moved towards a relaxation of the regulations, they were occasional and had a limited scope.

The great company law reform awaited by all the economic actors remains to be established, in order to ensure the « contractualisation » of law, its modernity and its decriminalisation. The public authorities committed themselves in this direction. To this effect, the Ministry of Justice set up a commission a few years ago composed of lawyers and practitioners which drew up a reform project after a broad consultation within the economic and financial sectors. This text has subsequently been improved. But it has still not been submitted to Parliament, since the Government considered that other projects should be given priority. At present, there is question of it being submitted at the beginning of the year 2000.

It should be pointed out that, at the same time, an important study on company law reform was carried out by Senator Marini.

Having waited for this reform for many years and disappointed at not seeing it take place, practitioners were all the more deeply, but pleasantly surprised – even if the method used did not seem to them to be the best – to see a text with revolutionary effect discretely adopted in July 1999.

Jean-Jacques Caussain.– Up until the law of 12 July 1999 which Mr. Bézard has just referred to, the only forms of private limited companies available to a private business were :

- the *société anonyme* (SA) which is subject to very cumbersome regulations leaving very little room for contractual provisions and
- the *société à responsabilité limitée* (SARL) which is subject to various statutory provisions most of them being similar to those applicable to the SA.
- The *société par actions simplifiée* (SAS) which has only existed since the Law of 3 January 1994, but was not widely available because it was restricted to corporate entities, having a minimum share capital of 1,500,000 F, or to state-owned institutions.

The Law of 12 July 1999 has lifted this restriction. As a result anyone, whether an individual or a legal entity, can now be a shareholder of an SAS whose main characteristics are the following:

- The SAS is a company limited by shares (*société par actions*) ; it can be set up by one or more shareholders, each being liable only to the extent of the contribution made. Its share capital is at least 250,000FRF (half of which must be paid upon formation of the company). It must also have a statutory auditor (*commissaire aux comptes*).
- The SAS is a private company. Thus, it may not issue securities to the public, and its shares must be registered under the name of their owner.
- The SAS is formed by « contract ». Thus its articles of association enjoy great freedom in the organisation of powers within the company and the conditions under which shares are transferred.

As regards the organisation of the SAS, the law contains several provisions regarding the shareholders' decisions and the management. Fundamental decisions must be taken collectively by the shareholders, namely operations relating to: share capital (increase or decrease), merger, hive-off, liquidation, appointment of auditors, approval of annual accounts, allocation of dividends, and change to the corporate form and any amendment to clauses relating to transfer of shares.

Apart from these statutory provisions, parties enjoy almost total freedom in setting out the rules applicable to collective decisions. The articles of association of an SAS may provide, for instance, that:

- a meeting may be called by notice at any time by one or more shareholders or even by a third party (a banker, or a lawyer...);
- the meeting may be held by telephone conference call, video conference or written consultation;
- any shareholder may place a draft resolution on the agenda;
- the quorum may be reduced or removed and that the majority may vary depending on the type of decision;
- the voting rights may be reduced or increased (by introducing classes of shares with multiple voting rights or a right of veto in favour of a particular shareholder).

The above examples may seem obvious to a UK audience, but this degree of flexibility does not exist in the SA or SARL.

As regards to the management of the company, the articles are equally flexible. The only statutory office under law is that of the President (*Président*) who is vested with the widest powers

to act in all circumstances on behalf of the company (within the ambit of the objects clause of the company) and any limitation on such authority is not binding against a third party. In addition, the shareholders have the possibility, if they wish, of appointing managers (*dirigeants*). Together, the President and the managers may constitute a single decision making body acting collectively (supervisory board, management board, committee, etc.) or else be organised differently. As with the collective decisions of shareholders, the decision-making process of such boards or committees may be freely determined under the articles of association, in particular with respect to the quorum, representation, majority and the procedural validity of meetings.

The final feature of the SAS relates to the clauses pertaining to the transfer of shares. The legal provisions governing the SAS favours the insertion of any shareholders' agreement into the articles of association and strengthens the legal effect of such agreement. The articles of association may in particular contain the following clauses:

- standstill clause prohibiting the transfer of shares by the shareholders for a fixed period with a maximum of 10 years;
- that transfers to third parties or between shareholders must have prior approval by the President, a board or a shareholder.

Any sale of shares completed in breach of such clauses will be null and void.

The articles may also provide for the exclusion of a shareholder under certain conditions.

Since it is now accessible to anyone, the SAS, because of its flexibility, should become very popular in the near future and should be the ideal vehicle for the setting up of closed companies. One can assume that it will replace progressively the SA and the SARL and become the French equivalent of a UK private limited company.

Pierre Bézard.– The SAS has led French law to take a decisive step towards « contractualisation ». Nevertheless the reform of the law of commercial companies has not lost its importance and its urgency. This development towards « contractualisation » should be permitted for all types of companies.

Closed companies should be subject to more relaxed and flexible regulations enabling their founding members and shareholders to determine for themselves the solutions applicable to their running in the Articles of Association.

The criminal framework should be greatly relaxed : only several provisions should be retained, concerning particularly serious offences.

Moreover, one may also consider that the solutions to be established by the Fifth European Directive relating to the structure of public limited companies – the establishment of which is still being awaited – could constitute the only mandatory rules to be retained in domestic regulations. Reflections relating to a European company may also be very useful in the elaboration of domestic law.

The establishment of a contractual company law would make the Courts' role essential. They would be led to construct this company law, on the basis of disputes submitted to them as well as in view of the practice and in light of legal authorities. The Courts would do so by reference to the great principles of contractual compliance, loyalty, transparency and equality of

treatment. Moreover, for several years, French case-law has initiated this development by making ever more frequent references to these concepts which are too often hidden by the complexity and volume of the regulations currently applicable. Indeed, simple formal compliance with texts does not necessarily establish that their underlying fundamental principles have been observed.

Companies whose securities are listed : strengthening of the applicable law

The situation of companies whose securities are listed is developing in a fundamentally different manner from that of closed companies. This is because they bring numerous investors together, either directly or through the intermediary of collective investment vehicles and because their protection should be ensured. This is also because they may be the subject of severe stock market battles during public offers and it is a question of ensuring that they take place correctly.

It is true that listed companies are subject to the Law of 24 July 1966 in that they have the status of *sociétés anonymes*, they therefore benefit from the development which will relax this text. But in reality, the regulatory framework applicable to them, whether through stock market regulations or company law, is being strengthened.

As regards issues and transactions concerning them, listed companies fall mainly within stock market regulations. But company law has been the echo of these regulations and this development, and has provided it with a legal basis. This applies to the determination of securities, information on the acquisition of significant shareholdings, the definition of the concept of control etc...

The regulations applicable to listed securities aim to treat them like savings products and to ensure the protection of investors by only allowing them to be offered quality products, *i.e.* those likely to be easily traded and profitable. These regulations also aim to ensure full and rapid information for investors as soon as an important event likely to affect the value of securities occurs. They also lay down a strict penalty for directors and other people referred to in the text in the event of insider trading, price manipulation or misleading information. These regulations also establish provisions, moreover often amended, in the field of public offers, but also enabling or obliging public repurchase offers for minority shareholders in certain specific cases.

These regulations are drawn up by the Minister in charge of the Economy and Finance in close co-operation with the *Conseil des Marchés Financiers* (CMF) and the *Commission des Opérations de Bourse*. These two institutions carefully supervise their application. Furthermore, their role is not only to sanction breaches but also to prevent them.

The very important role played by the Court of Appeal of Paris, the only Court having jurisdiction, and the Commercial Chamber of the *Cour de Cassation* (Supreme Civil Court) upon appeal, should also be emphasized. A number of important proceedings have been submitted to them regarding disputes brought by the stock market authorities. On these occasions, without hindering the essential, beneficial action of these authorities, these jurisdictions have ensured that not only the rules of procedure have been complied with, in particular concerning compliance with the adversarial principle (*contradictoire*) – but also those concerning the legal merits.

It is also very important to stress that over and above the securities and transactions related thereto, the stock market authorities are ever more interested in the issuers themselves, more specifically the status of their directors. This is without doubt a source of development of company law at the initiative of the stock market. The example of corporate governance which we shall deal with shortly is significant.

Therefore, an undeniable reinforcement of the texts and controls may be noted in relation to the regulations applicable to listed companies. This solution is justified by the protection of investors and their equal treatment in stock market battles.

However, these regulations should not develop into an excessive formalism and should not distance French solutions from a European and worldwide movement towards unification. It does not seem that this last concern is justified as we shall now explain.

Jean-Jacques Caussain.– The starting point of corporate governance in the United Kingdom was the report issued in 1992 by the Cadbury committee which recommended that all quoted companies should comply with a Code of Best Practice and publish in their annual report the extent of their compliance with the Code during the year. It was followed, in 1995, by a report of another committee chaired by Sir Richard Greenbury on directors' remuneration. In 1998, the Hampel Committee put together a combined code taking into account these two reports and making its own recommendations. This code has been appended by the Stock Exchange to the Listing Rules. More recently, the Turnbull report on Risk Management has provided directors with guidance on the combined code.

France also has been, and is still, concerned by the issue of Corporate Governance which we call "*le gouvernement d'entreprise*". The privatisation of numerous companies and the globalisation of financial markets has made it necessary for listed companies to adapt to this new environment. Today more than 40% of the capitalisation of the CAC 40 are held by foreign investors who expect the principles of Corporate Governance to be applied in France. This issue has been the subject of two important reports.

VIÉNOT REPORT I

The first report was issued in July 1995 by a committee that was set up by the CNPF (former name of the MEDEF) and the AFEP and which was chaired by Mr. Marc Viénot, chairman of the Société Générale at that time. This report contained various recommendations (which are certainly familiar to you) regarding the board of listed companies and more particularly:

- The setting up of specialised committees:
  - audit committee
  - remuneration committee
  - appointment committee
- The new status of directors providing for:
  - limitation of the number of positions as director held by the same individual
  - restrictions on reciprocal directorships
  - appointment of independent directors
  - limitation of the number of executive directors on the same board
- Directors' charter which contains various requirements

A few years after the delivery of this first report, it appeared that three-fourths of the companies listed of the CAC 40 had put into place an audit committee and a remuneration committee, but according to some observers these committees had not always been sufficiently efficient, and there were not enough independent directors sitting on the boards of French listed companies.

VIÉNOT REPORT II

Taking into account these criticisms, and also being inspired by the propositions set out in the various reports published in the UK, a second Viénot report on *Le gouvernement d'entreprise* was published in July 1999. It is rich in a number of recommendations:

1. Separation of the offices of Chairman and Chief Executive officer

This was one of the main recommendations of the Cadbury Report and is now included in the combined code and is followed by the companies listed in the United Kingdom.

Under French law, the positions of Chairman (*président*) and Chief Executive Officer (*directeur général*) are statutorily linked together and must be exercised by the same person (the "Pdg"). The second Viénot Report is in favour of an amendment to the law on commercial companies which would permit this separation, but the system would remain optional and left to the board's discretion. A draft bill has been prepared by the Ministry of Justice along these lines.

It must also be mentioned that French law already offers an alternative with the dualist system of *directoire* (management committee) and *conseil de surveillance* (supervisory board) which is the French equivalent of the German system of *Vorstand* and *Aufsichstrat*. This structure provides for a clear distinction between executive directors who sit in the *directoire* and non executive directors who sit in the *conseil de surveillance*. Almost 25% of the companies of the CAC 40 have now adopted the two-tier structure.

2. Disclosure of the remuneration granted to corporate officers and directors

In the UK, since the publication of the Greenbury Report, such information must be now contained in the annual report of listed companies. The second Viénot Report also recommends that the annual reports of listed companies should include a chapter on such remuneration. In contrast with the UK, such disclosure should only relate to the aggregate amount of remuneration of all kinds paid to such corporate officers and should not apply to the individual remuneration of each officer. Actually, the Viénot committee considers individual remuneration to be a private matter, and expressed the view that investors are only interested in the ratio between the management global remuneration and the results of the company.

3. Disclosure of share option schemes

The information on such schemes should be detailed and contained in the annual report, but it should not give details on each beneficiary of such options.

4. Details on directors

The annual report of listed companies should give more details on their directors : biographical notice, number of shares held, directorships in other listed companies, memberships of committees, etc.

5. Operation of the board of directors

At least one-third of the members of the board should be independent directors and identified as such in the annual report. Proper and sufficient information should be given to the members of the board, and directors would be bound to request appropriate information. Moreover, the directors' attendance at board meetings should be mentioned in the annual report.

6. Operation of the committees

- Independent directors should represent:
  - at least one-third of the members of the audit committee and of the appointment committee
  - at least half of the members of the remuneration committee.

- The audit committee should submit a report to the board of directors every year.

7. Financial disclosure

- Listed companies should publish as soon as available annual accounts (ex., one month to publish provisional accounts)

Finally, it should be stressed that the recommendations made in the two Viénot Reports are not compulsory. Thus, there are no sanctions in case of non compliance by a listed company with any of these recommendations. Contrary to the UK where the Combined Code is annexed to the Listing Rules, such recommendations are not yet annexed to the *règlement général* of the *Conseil des Marchés Financiers* (CMF) which is the professional authority of the French Stock Exchange. However, the Viénot committee has considered it necessary for listed companies to specify clearly in their annual report compliance with the recommendations of the two Viénot reports, and if applicable, reasons for non compliance.

Pierre Bézard.– In conclusion, it may firstly be emphasised that under French law an ever clearer distinction is appearing between the law applicable to closed companies and that relating to companies with listed securities. The law applicable to closed companies is becoming ever more contractual. The freedom of the founder members and shareholders is hence increasing : they will be subject to less restrictions and their commercial and industrial approach will be facilitated. On the contrary, the law applicable to companies whose securities are listed is being reinforced and the control to which they are subject is stricter. This solution is justified by the protection of investors.

It may next be noted that French law, subject to various sources leading to a certain level of unification, is drawing nearer to the laws of other western countries in particular those of England and Wales. As far as closed companies are concerned, the relaxation of written law brings to light the ethical principles expected of directors, as it is the case in Common Law countries which are moving towards written law through the application of Directives.

Despite the delays incurred in the adoption of important texts and reasons, European law is also a powerful unifying element. As for closed companies, unification is clearly progressing rapidly.

Finally, it may be said that under French law, decisions of the Courts will play an ever more essential role. Hence, as regards closed companies, when confronted with the diminishing importance of texts, it will fall to case-law to facilitate the adoption of coherent solutions adapted to the reality. For listed companies, case-law will continue to keep a watchful eye on the application of regulations by the stock market authorities and will thus constitute a true stock market law.

On the eve of the year 2000, may we take this opportunity to express the wish that all countries will have high quality regulations applicable to companies. High quality means that they take into consideration interests which should be protected, but flexibly, without unjustified restrictions. Undertakings must be able to fully dispose of dynamism capable of creating wealth to be fairly distributed. Without strong undertakings, there are no prosperous economies and no efficient State policies.

A final wish : may these States have an efficient Justice system which is aware of what is at stake and which, by a shared confident approach of not only Judges but also all lawyers : practitioners, advisors and teachers, establishes efficient decisions adapted to economic realities.

ENGLISH PERSPECTIVES

M. Daniel PRENTICE,
Professor, University of Oxford

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

EUROPEAN PERPECTIVES : INITIATIVES IN FAVOR OF A EUROPEAN LAW COMPANY

The draft of the European Commission : the European company

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.

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

Which is the remaining point to bc solved ?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

First amendment :

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

Second amendment :

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

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

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

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

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

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

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

But in any case :

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

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

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

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

These directives could be adopted at a qualified majority.

CONCLUSIONS

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

First point

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

Second Point

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

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

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

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

Thirdpoint

In this context my final phrase will be my hope that the ECS will be adopted very quickly, so that we can see if close companies do really need a specific statute. We must bear in mind that

after so many years we are still waiting for the adoption of the other European statutes on the « Cooperatives – Mutualities and Associations » proposed by the Commission a long time ago.

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

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

The draft produced by business : the European Private Company

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

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

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

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

I – The choice of private company

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

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

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

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

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

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

II – The principles of a European private company status

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

The European private company should :

be accessible to everyone

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

be integrated into domestic law.

1. A form which is accessible to everyone

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

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

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

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

2. Balance between security and flexibility

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

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

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

3. Integration into domestic law

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

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

Beyond the discussion of the 38 Articles submitted to your wisdom, these general rules, which reflect a certain modesty in the project, appear to me to be essential for its success. Respectful of the state of law in Europe, both as it currently stands and is foreseeable in the

medium term, it is thus likely to be widely used, leading to a common regime, favourable to thousands of firms of all categories within the Union.

The draft produced by business : the European Private Company

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.

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.

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.

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.

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.

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.

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.

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 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.

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

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

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

intervals. It leads to frequent changes in national company law. The business community does not like this. Opposition against such an approach has been growing since a number of years.

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

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

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

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

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

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

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

- In the Action Plan on Financial Services, we have announced that we will come forward with an amended proposal for a 10th Directive on cross-border mergers and with a proposal for a 14th Directive on the transfer of the corporate seat. These proposals are linked to the proposal on the Statute for a European Company. However, if no progress is made on the

Statute, the Commission might envisage making these proposals any way for companies which are not subject to worker participation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Joëlle SIMON,
Directeur des Affaires juridiques, MEDEF

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

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

   The European private company is much inspired by the SAS.

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

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

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

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

Michael BUTCHER,
General Counsel of Vivendi UK

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

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

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

So, this, I think, brings me to my final point which is linked to these three questions. Question one and question 3, I would link in this way. Which is: Why have a company? What is the principal benefit to an entrepreneur? It is because if it goes bust, he doesn't or she doesn't lose their entire fortune, their family's wealth and so on. So actually, the state and the community is conferring a great benefit on an entrepreneur and a business person by allowing them to have this escape and this is the reason why there are additional duties put upon people, in these circumstances. What has happened over the years, is that lawyers have developed more and more complex L.O.R.E not just L.A.W around this, around company law, and it's time to get back to some simple principles like honesty, fairness, reasonability; because business people understand these concepts. And there is a phoney certainty in having lots of rules because when it comes to it, there is always another rule that you could look at. Business people sit around a table pondering the ins and outs of the rules but in the end they actually

settle what they are going to do by whether it is honest, fair, reasonable or sensible. So, why not just go for that to start off with?

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

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

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

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

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

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

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

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

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 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 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.