COMPANY LAW IN EUROPE: RECENT DEVELOPMENTS

A survey of recent developments in core principles of companies regulation in selected national systems.

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CONTENTS

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EXECUTIVE SUMMARY

A) COMMENTARY

Any review of recent developments in national systems of companies regulation in Europe will show that the greatest legislative effort is expended in ensuring implementation of EU harmonisation measures. This has in the past stifled radical thinking about underlying aims and objectives, not merely in existing members of the Union, but also in those jurisdictions which hope to become EU participants in the future. However, in the past year or so there are signs that national jurisdictions are beginning to address fundamental core issues. This reflects part of a wider concern about corporate mobility and the relative competitiveness of systems of Company Law in Europe. As yet, this process of reappraisal has produced limited dividends in the form of concrete action but significant changes are on the horizon. This survey of recent developments has thrown up a number of innovations worthy of closer consideration by the Company Law Reform Group. A number of other mechanisms are not of recent origin; some have a respectable antiquity. Nevertheless, they are identified in this paper for the sake of completeness.

Before summarising trends and themes a few cautionary notes should be entered. Firstly the issue of what is a *core* topic for the purposes of the Review does create difficulties. In our study we have sought to be as inclusive as possible; thus issues relating to corporate insolvency and corporate governance are covered simply because they are inextricably linked to the problems of the core in companies regulation.

A perusal of our survey of national jurisdictions discloses that there are indeed *families* of companies regulation operating within Europe. The German model has been influential in Austria, Switzerland and to a lesser extent in The Netherlands. The French tradition has influenced a number of jurisdictions, including Belgium, Spain, Portugal, Italy, Greece and Turkey (to some extent). There is a common heritage to companies regulation in the Scandinavian countries. Finally there is the Anglo-Saxon model as typified by the UK and Ireland.

Another point to note concerns the concept of the public company. In the UK we tend to think of this as representing the very largest of enterprises and statistically this comprises some 1% of all registered companies (about 12,000 in total) . The public company in Europe is a much more commonly used vehicle. It is fairly selectively employed in jurisdictions such as Germany (where there are only some 4000) but once one moves through France (160,000) and the Latin systems (e.g. the total in Spain nears 250,000) one finds that statistically it is often used by much smaller businesses and sometimes more extensively that the private company. Having said that, the pattern on the Continent is that often only a very small percentage of public companies are actually listed on the appropriate stock exchange. The reasons for this may be related to company law, but they often reflect cultural differences and divergences in the tax/ social welfare systems. A failure to appreciate this differential usage can create problems when devising regulatory strategies.

Finally, the issue of share ownership and diversity of participation must be noted. In the UK holdings in public companies do reflect quite a broad range of participants. On the Continent it is quite common to find within the public company a single shareholder with overwhelming control. Thus the public company in some senses reflects aspects of the closed corporation.

Business structures

On a superficial level European jurisdictions offer a wider range of business options (whether corporate or non corporate) than is found in English law. Recent developments in Europe merely underscore that fact with specialist corporate structures being introduced in a number of jurisdictions (e.g. France and Spain). That initial impression can however be misleading because there is often less flexibility on offer within these designated options than one would find in Anglo-American models.

This lack of flexibility in the main corporate models (particularly apparent in Germany, and to a lesser extent, France) is now being tackled in many continental jurisdictions. A trend in favour of deregulatory measures is becoming apparent. Thus Germany enacted a number of deregulatory measures for small stock corporations in 1993. In the UK summary financial statements could be said to reflect a similar policy Likewise Denmark has done much to deregulate its law on private companies as a result of 1996 legislation. French law has devised a new flexible public company structure (SAS) designed to encourage joint ventures. The main thrust of the Marini Report in France is encouraging entrepreneurs by offering them greater flexibility. In Finland proposals are on the table to deregulate private companies.

Although the balance of developments favours deregulation the pattern is not uniform. In certain areas, notably with regard to corporate governance/ shareholder rights in public listed companies, the thrust of reform favours *increased* regulation and the creation of predetermined rights as opposed to relying on judicial protection. The reforms for public listed companies in Italy enacted in 1998 attest to this.

Separate regimes for public and private companies.

This pattern of formal and distinct regulatory regimes is replicated in many European jurisdictions. Separate statutes are used in a number of legal systems - for example, Germany, Denmark, Spain and Norway.

Countries like the UK which have a single legislative base are France, Finland, Sweden, Switzerland, Turkey and Ireland, though even within these jurisdiction the fault lines are becoming clearer.

Other formal distinctions operate in companies regulation. Size of company (irrespective of technical status) is increasingly used in Europe to determine whether a supervisory board is to be used (see for example The Netherlands). Whether a company is listed or not may determine which laws apply (as in the case of Italy).

Regulatory enforcement strategies

In the same way that there is a head of steam in favour of deregulation so questions are being asked as to the most effective sanctions and methods of enforcement. Certainly the Marini Report in France favours moves towards decriminalisation of infringements of company law. In Ireland this issue was a central concern of a Working Party set up in July 1998.

Some jurisdictions believe that auditors could play a greater role in enforcement. In Sweden proposals are now enacted requiring auditors to resign and blow the whistle in the event of suspected economic crime. This goes further than the whistleblowing duty introduced into English law (see SI 1994 Nos 524, 525, 526 and 449) for a limited range of banking, investment and insurance companies in the early 1990s in the wake of the Bingham Report on the BCCI Affair (*Inquiry into the Supervision of the Bank of Credit and Commerce International*, 1992). Ireland appears to be moving in this same direction. Limited whistleblowing obligations also operate in The Netherlands and France.

Formation procedures.

Most jurisdictions opt for a single constitutional document. Having said that incorporation procedures can be more complex and time consuming than in the UK (see Switzerland and the Netherlands for example). Formal use of lawyers as notaries seems to be a common trait. In some jurisdictions (see Sweden and Turkey) two modes of incorporation have operated - these are the so called successive and simultaneous methods. Of these the latter is becoming more popular. The date of the award of legal personality may also be deferred until the deed of incorporation has been filed and capital requirements fulfilled; this may expose the promoters to wider risks of liability. Generally speaking the issue of the status of the company in the period of formation and the liability of promoters is of much greater concern on the Continent than in the UK. It was not a surprise that the First Company Law Harmoinisation Directive identified this as an area for early coordinated reform.

The use of off the peg companies is not a peculiarly English phenomenon - this surely indicates some dissatisfaction with established incorporation procedures. Ireland has recognised the need for quick incorporation procedures. Its 10 day guaranteed incorporation model is likely to receive future legislative backing.

Generally speaking there is little in European company law of attraction in terms of offering ideas on effective incorporation models.

Use of new technology

Corporate regulators in Europe are beginning to exploit new technologies to facilitate disclosure, registration of documents and completion of share transfers. Paperless share systems for public quoted companies have been introduced not merely in the UK but also in countries such as Belgium. Moreover, in Denmark notifications can now be effected on line. In Norway electronic share registration systems have been introduced in 1997 with a central state registry being employed.

The issue of the use of information technology was a central theme in the European Commission's conference on *Company Law and the Single Market* in December 1997. The leading exponent of this issue is Professor Ulrich Noack. According to this commentator the need to standardise the storage and access to companies information was highlighted as a necessary step in the process of establishing a single capital market with shareholders coming increasingly from further afield. Thus moves should be made towards the use of videoconferencing techniques for the holding of company meetings simultaneously in several locations. Shareholder communication should be facilitated electronically. Digital technology should be reflected by changes in formal company processes. Professor Noack stresses the importance of access to companies information by electronic means and also to the importance of standardising information at a European level. He points to the EDGAR system (Electronic Data Gathering Analysis and Retrieval) which has worked effectively in the USA since its introduction in May 1996. As far as the UK is concerned some moves have been made in this directions with Companies House introducing an electronic filing system in October 1998 and an expriment about to commence in the City whereby institutional investors can cast their votes electronically.

<u>Minimum capital requirements for companies</u>.

Public companies in the EU are obliged to have minimum authorised capital levels. For many traditions this merely reflected the state of play before the Second Directive. Countries outside the EU (such as Switzerland and Turkey) also use minimum capital strategies in public companies as a means of protecting creditors.

Minimum capital is a matter of choice for jurisdictions regulating private companies. However, it is the norm in continental Europe. Sweden has recently doubled its minimum share capital for private companies, though this change has been traumatic for the business community and the implementation period has had to be extended. Finland, a new entrant to the EU has also substantially increased minimum capital requirements, though seven years leeway has been granted for compliance by existing companies. By way of contrast Denmark has recently *reduced* its minimum capital requirement for private companies.

Apart from the UK and Ireland all European jurisdictions under review appear to impose minimum capital requirements for private companies.

Indeed minimum capital requirements are frequently bolstered by mandatory capital reserves to be built up incrementally out of net profits (see Spain. Portugal and Turkey for example). Moreover draconian procedures exist obliging directors to place companies in liquidation if the level of assets falls below a specified proportion of the share capital. At the moment under English law the only requirement on directors in the event of a serious loss of capital (falling short of rendering the company insolvent) is to call an EGM (see Companies Act 1985 section 142).

Most EU jurisdictions operate controls on share repurchases/ financial assistance, as they are required to do by the Second Directive. The rules here vary, but a treasury share facility (up to 10% of the total shares) is on offer in many jurisdictions. France has just introduced such a change in its law and the UK is already making steps to move in this same direction.

Shares and share transfers

The most notable aspect of this area of law is the abolition of share certificates in the context of private companies. Instead participation or quotas are reflected by book entries - see here France, Greece, Italy, Portugal, Spain, Denmark, Netherlands and Germany (to some extent).

Paperless shares are increasing in popularity. Belgium has recently introduced such as a system for public quoted companies.

The use of central state registries to handle the business of transfers of shares is becoming more common. Note the so called VPC share dealing system in Sweden and the new electronic transfer facility in Norway. The curious share certification systems operated in The Netherlands and Belgium are also worthy of study here. Under these schemes shares are transferred to a trust office which issues depositary receipts in exchange. The interest of the shareholders becomes purely economic.

Some jurisdictions have minimum participation levels (especially in private companies), but these as increasingly seen as a barrier to the small investor. Note the changes in Germany here.

The advent of the euro has served as an opportunity for many jurisdictions to rethink their approach to share denomination. Accordingly a number which did not permit no par value shares have decided to change their policy (e..g. France and Finland).

Corporate capacity.

Most jurisdictions still require companies to state their business purposes on incorporation. The *ultra vires* rule, substantially undermined by the First Harmonisation Directive, still lingers on in attenuated form in Belgium and Switzerland. There is little sign of European jurisdictions adopting the North American idea of giving companies full powers of a natural person.

Board structures and corporate governance.

There is less consensus here. The two tier structure, pioneered in countries such as Germany, Austria and the Netherlands is well established, though is increasingly coming under attack for the inability of the supervisory board to exert effective control over the management. Two tier boards are used for public companies in Denmark and they are optional for such companies in Finland. The two tier model does not necessarily always travel well. Witness the experience in France where the supervisory board is optional with the result that businesses have voted with their feet and spurned the opportunity to use it.

In jurisdictions that permit supervisory boards they are sometimes not allowed for private companies - Finland. More usually the use of an supervisory board for private companies is a matter of choice provided the company can be classified as small (see Germany and Austria).

Variants on the supervisory board system are found in certain European systems. Italy for example has a single board of management, but a key role is played by the board of statutory auditors (*a fortiori* after the 1998 changes for listed companies). In Portugal the committee of auditors appears to fulfil a similar role. Statutory auditors are also employed in Turkey.

Unitary boards are used in Belgium, Greece, Ireland, Spain, Switzerland and Turkey (for private companies with less than 20 members).

Whatever board model is used the approach on the Continent towards composition and size is more prescriptive than is the case in the UK.

The issue of corporate governance was very much to the fore in the European Commission conference on *Company Law and The Single Market* which was held in Brussels in December 1997.

<u>Shareholder rights</u>.

A constant theme in the 1990s has been the improvement of shareholder rights. The methodologies used however do differ. Some jurisdictions prefer to advance such rights through the supervisory board and there have been a number of refinements to make these more effective. Shareholder rights can vary from private to public company and from listed to non-listed company.

Other jurisdictions make use of statutory rights. Some of these are well known such as the entitlement to call for an EGM. Others are less well known in English law such as the right to call for an inspection/ investigation and the right to demand information from directors. Perhaps the most striking example is the special audit procedure which was pioneered in Germany but has found its way into Austria and Switzerland. Information gleaned from such an audit is often the prelude to follow up litigation. Differences do exist with regard to the relevant level of support needed to activate these statutory rights. The figure of 10% is now the norm and increasingly this is reduced to 5% for shareholders in public companies (where recruiting support can be more difficult). Derivative actions, in some form or another, are found in many European systems though again specified levels of support need to be secured before the action can be brought. The problem of nuisance shareholder litigation has reared its head in a number of countries. Formal appraisal rights (i.e. the right to withdraw from the company at fair value on the occurrence of specified events, such as a radical change of business) have recently been introduced into Spanish law.

The UK increasingly relies on judicial discretion, now legitimated by section 459 of the Companies Act 1985. Derivative actions under English law are almost extinct, hence the proposal from the Law Commission in 1997 to remodel and revitalise them. In the context of disputes within a GmbH the German courts have played a key role in devising shareholder remedies. Italy adopted a similar policy by placing heavy reliance on the protective role of the courts, but in its 1998 reforms it appears to be moving more towards a system of fixed statutory entitlements. Switzerland is yet another jurisiction that has relied much on general principles developed by the courts, though it has introduced a wider range of statutory rights in recent times.

In some countries shareholders (such as Sweden) have more leverage over dividend yields. In Sweden holders of 10% of the share capital can force payment of a dividend up to half of the net profits. Other jurisdictions giving greater expectations to shareholders on dividends include Norway and Portugal. Having said that, in many of these countries the amount of money available for distribution is reduced by the obligation imposed on directors to establish mandatory capital reserves out of profits

One relative weaknesss in shareholder protection which is apparent in most European jurisidictions (as compared to the position in the US) is the absence of coordinated shareholder activist groups. The one notable exception is the French organisation known by its acronym as ADAM (*Association de Dence des Actionnaires Minoritaires*). This vacuum is made worse by the high degree of shareholder apathy in many European countries where public companies are dominated by single shareholders with the result that minorities see no point in exercising their right to vote.

Two other devices (which have emanated from US corporation law) deserve mention here. Proxy solicitation procedures which enable dissident shareholders to promulgate their proposals ore efffectively are to be introduced in Italy and The Netherlands. The cumulative voting system (which enhances shareholder power over the appointment of directors) has also been introduced into the Russian law of joint stock associations.

<u>Directors' liabilities</u>.

The trend both in termsof legislation and judicial innovation has been towards increased risks of personal liability. One commentator[1] has described this as a core issue in European private company law. To some extent this has been alleviated by making available business rescue models to directors of distressed companies. Management facing hard choices in a situation where their company is in financial difficulties are presented with the "stick and the carrot" strategy. Sweden offers a typical model here with the requirement to call an EGM (similar to CA 1985 s.142) but an obligation to put the company in liquidation if the difficulty is not resolved within 8 months of the EGM. There is a similar obligation imposed on directors in Denmark, though the period for rectification there is six months. A mandatory liquidation mechanism operates in Finland with directors being given one year to achieve the necessary financial improvement. Austria and Denmark also have variants on the theme.

<u>Corporate/business restructuring</u>.

In the 1990s many European jurisdictions have introduced significant developments in this field - for example Belgium, Austria, Ireland, Sweden, France and Switzerland.

Apart from introducing new rescue procedures for distressed companies a number of systems have sought to facilitate demergers and other forms of division. In so doing they have gone beyond the requirements of the Sixth EC Harmonisation Directive. Germany has introduced an interesting model in its 1994 Transformation Law facilitating metamorphosis from non corporate to corporate forms. The necessary changes in company law have been linked to the vital reform of associated tax laws. New conversion models have also been adopted in The Netherlands, Spain and Greece.

Groups of companies

This has been an area of little activity. Germany has a sophisticated law on groups but most European jurisdictions have not been minded to borrow it, largely because of its inflexibility. Having said that, in 1998 Hungary adopted rules on groups which owe much to the German tradition. Ireland has introduced changes in this area in 1990 with the inspiration coming not from Europe but rather New Zealand (note here the rules on contribution and pooling orders for insolvent companies).

Dissolution procedures.

Denmark has introduced a simple method of dissolving solvent private companies by the mere filing of a declaration. Belgium introduced rules for dissolving dormant companies in 1995, though a court order is still required.

Open door policies

Jurisdictions adopt various methods to make corporate vehicles attractive to overseas investors. One technique is to permit foreign currencies to be used for nominal share values. Luxembourg has a long tradition in this regard.

Clearly the issue of freedom of establishment is central to the concept of the Single Market. However this issue has a much wider relevance in that all economies in the developed world are seeking to remove formal or cultural barriers in the competition to attract inward investment. Thus, indirect forms of discrimination in companies regulation (such as residence requirements for directors) are increasingly being discarded.

Reform : practical considerations

There have been a number of significant reforms in core matters (particularly with regard to minimum capital sizes). In view of the difficulties faced by established companies it has been necessary to allow generous transitional arrangements. Periods between 3-7 years have been allowed. In some cases existing companies have been exempted from the requirement to make changes.

B) JURISDICTIONAL HIGHLIGHTS

Austria - 1997 Reorganisations Law imposes duty on directors to pursue reorganisation or else risk personal liability. 1998 Takeover Law.

Belgium - Minimum capital requirements doubled as from 1996. Introduction in 1997 of new corporate rescue procedure (judicial receivership).

Denmark - Private Companies Act 1996 deregulates small companies by reducing minimum capital requirement and introducing greater flexibility on board structures.

Finland - complete restructuring of public/ private companies by 1997 Act. Proposals to aid SMEs in 1998.

France - key changes in 1994 on new form of company for joint ventures and corporate rescue. Marini Report in 1996 proposes fundamental changes largely of deregulatory nature. 1998 reforms including introduction of no par value shares and greater opportunity to undertake share buybacks..

Germany - significant deregulation of small AGs in 1994. Transformation Act 1995 on restructuring and major Insolvency Act in 1997. 1998 legislation to promote corporate governance andtransparency.

Greece - some changes in changes 1995 particularly with regard to public companies.

Ireland - major reforms in 1990 on directors' duties, corporate rescue, etc. Company Law Review in 1994 - legislation awaited. Takeover Panel Act 1997. Ongoing review of enforcement strategies.

Italy - major changes in the law relating to governance of public listed companies in 1998 with a general improvement of shareholder rights in such companies.

Luxembourg - no significant changes to report

Netherlands - no significant changes. Review of corporate governance by Amsterdam Stock Exchange in 1996.

Norway - 1997 major structural changes in companies. Electronic registration system introduced.

Portugal - some changes to report in 1996 with regard to supervisory board and company secretary.

Spain - 1995 reforms to private company law designed to promote deregulation and enhance the growing popularity of such companies.

Sweden - minimum share capital doubled in 1995. Business Reorganisations Act (corporate rescue). Ongoing fundamental review carried out by a standing reform body.

Switzerland - major core reforms in 1992. Little of significance since then apart from enhancing the rights of participation holders (non voting shareholders) in 1997.

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FOOTNOTES

1. Harm-Jan De Kluiver, Europe and The Private Company: An Introduction in Harm Jan De Kluiver and Walter Van Gerven (eds) **The European Private Company** (1995, Kluwer) p. 21.

AUSTRIA

1. Background

The basic law on limited liability companies in Austria is to be found in the Limited Liability Company Act (GmbH) and the Stock Corporation Act (AG). Austria is thus clearly influenced by German law of business organisations. Austria joined the EU with effect from 1995.

The private company in Austria is termed the *Gessellschaft mit beschrankter Haftung* (GmbH). Originally authorised by a law of 1906 this form of company is now designed to offer flexibility for the smaller type of enterprise. The process of forming a GmbH is relatively simple. Again there should be articles of association dealing with name, registered office, capital and business objects. A minimum capital of AS500,000 is specified and the minimum individual holding is AS 1000. Share certificates are rarely used to denote participation. The management is vested in the *geschaftsfuhrer*. In some cases involving substantial businesses (share capital in excess of AS1 million, 300+ employees, 50+ shareholders) a supervisory board is required, but this is not an essential requirement for every private company. Although a supervisory board must have at least three members the law specifies no maximum (though the articles can do this). To this minimum of three must be added at least two employee representatives. Members of the supervisory board can be dismissed if the holders of 10% of the shares demand it. The holders of 10% of the shares can demand a special audit. A works council may also be required for a Gmbh.

A public limited company (*Aktiengessellschaft*, or AG) (*kapitalgesellschaft*). The governing statute here is the Austrian Companies Act 1965. As part of the formation process articles of association must be drafted. These will deal with name, registered office, business purpose and share capital. A minimum capital of AS1,000,000 is required for an AG. Shares must have a fixed nominal value and various fixed nominal values are specified in the legislation. Share repurchases are only permitted under limited conditions.

The AG adopts the German model of a two tier board as a matter of requirement. Thus there is a management board (*vorstand*) and a supervisory board (*aufsichtsrat*). Members of the management board are appointed by the supervisory board for a maximum five year term of office, though re-election is possible. The size of the supervisory board depends upon the size of the registered share capital - the rules here are very prescriptive. Its maximum membership can vary between 7-20 members, though to this can be added members appointed by the works council (set up under the Labour Relations Law 1974). The employee representatives can amount to up to one third of the supervisory board. Generally supervisory board members are elected by shareholders for up to four years. The supervisory board reviews the activities of the management board and is also responsible for controlling the auditors. Auditor liability is capped at AS5,000,000 by the Accounting Act. The holders of 5% of the shares can force the convening of an EGM. a 10% level of support is required to call for a special audit

2. Recent developments in core principles

As a new member of the EU Austria is making a number of changes in its core rules to facilitate the implementation of the EC Company Law Harmonisation Directives

In 1993 a law was passed (Companies (Amendment) Act 1993) which facilitated demergers, divisions and transfer of assets by public companies.

A recent reform that typifies world trends in companies regulation concerns the law on corporate rescue. A new court based rescue procedure involving the appointment of a reorganisation auditor to report on and make proposals with respect to the company was introduced in 1997. Although not in itself a core issue, the fact that the 1997 Reorganisations Act (*Unternehmensreorganisationgesetz*) imposes in section 22 an obligation on directors of a company experiencing financial difficulties to take advantage of rehabilitation procedures in circumstances where the equity ratio falls below 8% shows how core matters can be affected by wider developments. Under this new legislation directors are obliged to invoke this procedure if the financial criterion outlined above is encountered. This procedure does not as such involve a moratorium but if company officers fail to undertake this reorganisation and the company is declared insolvent within 2 years they can be held jointly and severally liable up to a maximum of AS 1 million for each director for the debts of the company.

3. Future reform

The new Takeover Act will come into force on January 1 1999. It is expected that many of the rules will mirror those in the Draft 13th EU Directive. Provisions will be made for mandatory offers and the establishment of a Takeover Panel.

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BELGIUM

1. Background

The foundation of Belgian Company Law is the Belgian Law on Commercial Companies (Royal Decree November 30 1935) (as amended in 1991) which provides the content for the Commercial Code Book I Title IX.

Private companies (BVBA/SPRL) must have a minimum capital of BF750,000, a third of which must be paid up on the day of incorporation. The minimum par value of a share used to be fixed at BF1000 but this requirement was dropped by the 1995 Act. It is estimated that there are some 189,000 private companies registered. Single person private companies are possible and there are just over 2000 of these in existence. Bearer shares are not permitted. Restrictions are imposed on share transfers in such companies; at least three quarters of the votes cast at a GM are required to approve a transfer. The issue of bonds was absolutely prohibited, some though relaxation was offered in 1991 for registered bonds. The management of such companies is vested in the managers (*zaakvoerders*/ *gerants*) who enjoy strong security of tenure. Corporate directors are not allowed. The holders of 1% of the shares in a BV can institute a derivative action. A BV can acquire up to 10% of its own shares in defined circumstances.

Belgium has some 140,000 public companies (NV/ SA), though only a very small percentage of these are quoted on the stock exchange (about 130!). The 1935 Law was amended significantly in 1995. A charter is required for incorporation purposes (this would include information on such matters as the name, business objects, registered office and share capital) as are certain documents relating to the financial plans and status of the proposed company. The charter has to be put before a notary public. The finance plan details proposals for the next two years. This is a confidential document and will only become relevant if the company collapses within 2 years in which case the court will have regard to it if issues of liability arise. The minimum capital for a public company was increased from BF1,250,000 to BF2,500,000 as from July 1 1996, though existing public companies are given five years to comply. Personal sanctions will be imposed on directors who fail to meet this deadline: they will be liable for any shortfall from the specified minimum. Once prepared the deed of incorporation must be filed and the company only acquires personality from this filing date. A minimum of two members is required. Share certificates are used to denote ownership; shares may be either registered or bearer. No par value shares can be used for public companies in Belgium; indeed, they are the norm. Shares are freely transferable but shareholders can agree to restrictions on share transfer. The effect of transfers in breach of such restrictions is not clear.

If the capital falls below half of the authorised minimum the directors must call an EGM within 2 months, but there is no mandatory liquidation procedure at this stage. However if the assets fall below 25% of the value of the share capital liquidation must be embarked upon. Failure to comply with the above procedures exposes directors to personal risk.; they will be presumed to be responsible for resulting loss to creditors.

There is an *ultra vires* rule which can bind third parties who are aware of the transgression.

Share repurchases are only permitted if stringent conditions are met. Since 1984 they have been subject to the bar on financial assistance for the purpose of share acquisitions subject to the exceptions permitted by Art 23 of the Second EC Company Law Harmonisation Directive. Subsidiaries can own shares in parent companies up to a maximum of 10% of the voting rights.

The management is vested in a unitary board which should normally have a minimum of three directors (*bestuurders*/ *administrateurs*) . Corporate directors are possible. Directors can hold office for a maximum of 6 years before offering themselves for re-election. Although there is no supervisory board structure, works councils may exist (they were authorised in 1948) and where such a works council has been set up a special auditor must be appointed to report to it.   Larger companies (whether a BV or NV) must appoint a supervisory director (*commissaire-reviseur*) whose role is to act as an in-house auditor/watchdog.
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The holders of 20% of the share capital can requisition an EGM. Members rights can be provided for through shareholder agreements; the former rule that such agreements could only last for five years has been dropped. Since 1991 the holders of 1% of the shares can institute a derivative action if the majority of shareholders refuse to sue, though they risk liability in costs if they choose this option. The holders of 1% of the shares can also ask for a special audit of the company’s books.   Shareholders can, subject to certain controls specified in the legislation, enter binding voting agreements.

Other companies enjoying limited liability are cooperative companies (CVBA/SCRL) (these date back to the 19th century and must have a minimum capital of BF 750,000) and the EEIG (which was introduced in 1989). Single person private companies (EBVA/SPRLU) were admitted in 1987.   As a result of the 1995 changes Belgian law provides for the creation of companies with a social motive (VSO/FSS). These are profit making enterprises where the profits are not returned to the participators but rather allocated to the specified social purpose (e.g. an environmental protection programme).

There is a wide range of partnership options, some of which involve the partnership firm enjoying separate personality.

2. <u>Recent developments</u>

By the Law of June 29 1993 new procedures were introduced (implementing the 3rd and 6th Directives) for mergers and divisions. The legislature also took the opportunity to enact rules governing the nullity of decisions of general meeting in the event of procedural irregularity.

The 1935 Law was further amended in 1995 (Act of April 13 1995) and there is still a five year transition period in operation for the increase of capital of public companies.

Apart from increasing the minimum capital of a public company and authorising companies with a social purpose the 1995 Act made a number of important reforms:

- postponing time of incorporation from execution of deed of incorporation until date of filing with Commercial Court Registry

- a paperless share system was established for public quoted companies.

- a procedure was introduced to combat deadlocks within companies. The holders of at least 30% of the shares can apply to the court to have other shareholders transfer their shares to them if there are serious reasons. In such a case the court will often consider a counter petition by the opposing shareholder. No minimum shareholding is required to seek a buyout and the court can order this option if there are good reasons.

- new corporate governance mechanisms were also established for public listed companies. Two and not three directos will suffice to form a board.   Board decisions can be taken informally in emergency cases. In cases where a board is faced with a possible conflict of interest it must set up a panel of independent directors to report on the matter, though the procedures for dealing with conflicts of interest are considerably relaxed for SMEs. As yet there is no reported case law on how this new conflicts of interest regime will work and considerable uncertainty exists as to its effect.

- the 1995 Act also introduced a dissolution procedure for dormant companies which had not traded for three years. Such companies could be dissolved by order of the court.

The Takeovers and Acquisitions (Amendment) Decree 1997 amends the 1989 Decree on the same subject . Applicable only to public companies this new law will facilitate compulsory purchase of shares by shareholders already owning 95% of the voting equity.

In 1997 new legislation was introduced to facilitate the rescue of distressed companies. Under the Judicial Receivership Act 1997 (which replaces a system introduced in 1946) a new court based rescue procedure (judicial composition, coupled with a 6 month moratorium on payments) is established.

The 1935 Law of Commercial Undertakings was amended by the Compulsory Purchase of Shares (Amendment) Act 1998 the purpose of which is to clarify the application of compulsory purchase provisions to public companies whose share capital is or was open to the public.

In 1998 Belgium, copying a model available in The Netherlands, introduced a system of *share certification*. Under this mechanism a shareholder can transfer his shares to a legal entity which will then issue certificates or depositary receipts to the individual concerned. These certificates confer rights to dividend but the primary rights of the shareholder are exercised by the legal entity.

3. Future reform

The issue of corporate governance is still under review. There are peculiar problems here in that some 68% of listed companies are controlled by a single (or joint) shareholder. In December 1998 two self regulatory codes devised by the Brussels Stock Exchange and the Banking and Finance Commission were published in a single document, though the degree of coordination between these codes leaves something to be desired. Esentially these proposals take the form of constructive guidance rather than mandatory direction. The key aims are to promote transparency, integrity and responsibility. The relationship between the board and the executive managers must be clearly defined. There should be a majority of non executives on the board. Remuneration committees should be set up and run by non executives. More information should be published by companies on the corporate governance system operating within their own company. Particular attention should be paid to describing the relationship between the board and dominating shareholder. At present there is no indication that these codes are to be given the force of law.

Provision has been made for the switch to EMU. Concessions are granted to companies from some of the formal rules in companies legislating by permitting share capital to be redenominated in euros. This can be decided upon by the board without requiring a full general meeting.

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DENMARK

1. Background

The basic division here is between public stock corporations (*Aktieselskab* or A/S) and the private limited company (*Anpartsselskab* or ApS). Both types of company must be registered at the Commerce and Companies Agency. Public stock corporations have their legislative base in the Companies Act 1973 (Law No. 370)(as amended), whereas the basic regulatory framework for private companies is the Private Companies Act 1996 (Law No. 545).

There are common rules relating to many aspects of each type of company. Objects must be specified on incorporation, as must be the name, share capital and location of registered office. The process of incorporation can take time:hence the practice of buying companies off the shelf is common.

The rules on company accounts/ audit for both types of company are to be found in the Company Accounts Act 1994 (No. 574) as amended in by statute in 1996 (No. 526)

Under the Public Companies Act public companies have a two tier management structure consisting of a supervisory board of directors and a management organ. There must be at least three members of the supervisory board and companies cannot be appointed board members. Tenure is for one year, but a director can be reelected. Provision is made for employee representation for companies with more than 35 employees - up to one-third of the supervisory board can be employee representatives. The day to day running of the company is the hands of the managers who are appointed by the board of directors for that purpose. However, dividend yields are ultimately determined by the supervisory board. A managing director is required for a public company. Provision may also be made in the articles of association for a committee of shareholders.

Public companies can only be created after a general meeting of a constituting meeting of shareholders. A public stock corporation can have a single shareholder. Shares do not have to have minimum par values (unless it is a listed company in which case a minimum of 100 Dkr is required), but a minimum share capital of 500,000 Dkr is specified. Public stock corporations can acquire their own shares subject to certain preconditions being satisfied. Only a maximum of 10% of shares can be acquired in this way. The rules relating to acquisitions by private companies are much stricter.

For both types of company directors are required to act in a proactive manner in the event of a serious loss of capital. For a public company this is defined as a loss of 50% and for a private company this means a diminution of 40%. In both cases the shareholders must be informed by the supervisory board at an EGM and if the matter cannot be rectified the company should be dissolved. If the directors fail to push for dissolution the authorities can intervene. If a dissolution is not sought directors can also incur personal liability to third parties such as creditors.

The holders of 10% of shares can force an EGM, require a special audit or commence a derivative action.   If the majority of members wish to ratify a breach of duty by directors a 10% minority can pursue legal proceedings at their own risk. An inspection can be sought if 25% of the shareholders support it. A squeeze out can be effected by the holders of 90% of the company's shares; the court plays no protective role here.

2. Recent developments

Rules relating to listed companies were modified by the Stock Exchange Act 1993. A prohibition on insider dealing exists.

The 1996 legislation governing private companies (which repeals the 1973 Act) is designed to promote greater flexibility for this type of company. It is very much designed to cater for the needs of the small business. For example, there is a range of options on board structures (including the right to dispense with a supervisory board if there are less than 35 employees or even to abandon a formal board of directors) and shareholder consent can be obtained without the need for formal general meetings. The constitution (memorandum and articles) can be amended by two-thirds majority. Formerly there were residence requirements for directors of a Danish company; these have been removed. On the other hand, there is less flexibility for divisions in such a company (the law on public companies offers greater choice here). Moreover the strict rules on share repurchases are maintained for private companies.

Shareholders do not actually receive share certificates to reflect their capital contribution and thus interests cannot readily be transferred. The minimum capital of a private company is now fixed at 125,000 Dkr (having previously been Dkr 200,000). Special transitional provisions (including tax concessions) have been enacted to cater for this change. The 1996 legislation also introduces a simplified procedure for dissolving such companies provided they are solvent; this can be achieved by the mere filing of a declaration supported by all of the shareholders.

3. Future reform

We are not aware of any imminent changes in Danish companies legislation.

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FINLAND

1. Background

The Finnish Companies Act 1978 (Act 78/734) (as amended) provides the basic foundation for Company law in Finland. This legislation is supplemented by the Securities Act 1989 and the Audting Act 1994. For many years there was a single model for the limited liability company (*Osakeyhtio*, or Oy). This type of business organisation was required to have a minimum share capital of 15,000 Mk. Onerous nationality requirements, which effectively excluded non Scandinavians from the right to found a company, were much to the fore. As much of Finnish Company Law has recently been modified since EU admission in 1995 the basics will be considered under the following heading.

2. Recent developments

Finland is in the process of adopting the EC Company Law Harmonisation Directives. Thus far much of this implementation has been effected by Act 145/ 1997. The effect of this legislative (operative from September 1 1997) was to introduce the well known EU distinction between public (*julkinen osakeyhtio*) and private companies. Public companies are required to have a minimum capital of 500,000 Mk, whereas a figure of 50,000 Mk is specified for private companies. A single shareholder will suffice. A transitional period of seven years has been laid down to enable existing companies to comply.

To incorporate a company a memorandum and articles of association are required. The articles will specify the name, objects, registered office and share capital.

A range of board structures is possible for public companies, but a supervisory board cannot be established for private companies with a capital of less than 500000 Mk. The holders of 10% of shares can compel the calling of an EGM, seek a special audit, institute a derivative action or force a distribution up to half of the amount of the net distributable profits. The holders of 90% of the shares can seek a buyout of a minority.

Private companies are permitted to acquire their own shares. Public companies can do this up to a maximum of 5% of the total share capital.

Creditor protection rules include the common provision requiring directors to act in the event of a serious loss of capital. If the equity of shareholders has fallen to below one half of the stated capital directors must call an EGM to consider liquidation. If this is not resolved upon the directors have a year to raise the equity to one half of the registered share capital or else the company must be placed in liquidation.

The old system of registered shares using share certificates was abolished for listed companies in 1993. In its place a book entry system of share transfer was substituted. Formerly the Helsinki Stock Exchange operated a share clearing system but in late 1995 this operation was privatised and transferred to the Finnish Central Securities

Depository. The 1997 reforms also opened up the possibility for a wider range of securities to be issued including subordinated stock and non voting preference shares. The Finns have also recently addressed the implications of EMU for share capital regimes.

In 1996 a joint commitee of the Chamber of Commerce and CBI published a report on corporate governance. Procedures relating to the appointment of directors should be clarified. Divisions of responsibility on the board should be reduced to writing and included in the annual report.

In March 1998 the government used secondary legislation to revise the rules governing listing particulars. In July 1998 draft legislation was unveiled dealing with disclosure of share interests at various 5% thresholds.   Insider dealing had been made illegal in 1989.

3. Future reform

A number of significant reforms are on the horizon. In June 1998 a government report into the impact of companies legislation on SMEs called for greater deregulation of the law relating to private companies. This should permit company meetings to be conducted on a more informal basis with greater use being made of unanimous consent procedures. Curbs on maximum voting rights should be relaxed. Moreover the government should assist the incorporation process by drafting model documentation. However the suggestion that minimum capital levels should be reduced was rejected.

With the advent of the euro Finland will permit no par value shares to be issued.

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FRANCE

1. Background

The French approach to companies regulation is traditionally more imperative than the Anglo-Saxon governing philosophy. Strict and detailed regulatory rules are favoured in preference to *laissez faire* contractual flexibility.

The public company in France is termed the *Societe Anonyme* (SA). The regulatory regime governing public companies in France is to be found in the Law of July 24 1966 (Law 66/537) and the implementing decree of March 23 1967 (Decree 67/236).

Public companies in France are much more common than in comparable jurisdictions. It is estimated that there are more than 170,000 SAs registered. The public company is thus not the sole preserve of the larger French enterprise. It is believed that this is due to French social security law that denies employee benefits to owner/ managers in private companies (see Hicks, Drury and Smallcombe, Alternative Company Structures for the Small Business, (1995) *ACCA Research Report* No 42 at 31).

A basic minimum share capital of 250,000 FF is fixed by law, though if the SA sells its shares to the public this figure is increased to 1,500,000 FF. In addition to this minimum capital companies are obliged to establish a capital reserve which must be built up at the rate of 5% of the annual net profits until an amount representing 10% of the authorised share capital is reached. A minimum of 7 shareholders is required for an SA and no maximum is imposed. Individual shares do not have to have a minimum value attached to them. To secure registration as an SA memorandum and articles must be prepared. Share transfer in such companies is uncomplicated. Unusually for European companies regulation, a fixed term of 99 years is specified for the duration of public companies, though this can be extended by shareholder resolution. Only public companies are permitted to engage in certain types of business activity, such as investment and the undertaking of real estate projects.

Board structures may either be unitary in nature (the traditional system) or of the two tier variety involving a supervisory board. Where the unitary structure is followed a minimum of 3 and maximum of 12 directors (or 15 for a listed company) is specified. This figure can rise to 24 in the immediate aftermath of a merger. The maximum term of office is 6 years. Non voting members known as *censors* can be appointed to oversee the conduct of the board. Statutory auditors are also used for supervisory purposes. Traditionally a shareholder owning more than 50% f the shares can appoint all board members; there is no provision for minority representation.

The optional two tier structure (which was imported from Germany in 1966 and must be authorised by the constitution of the company) has not proved popular with the French business community. It is adopted in less than 10% of public companies and recent registrations show that it is becoming more unpopular. The company name must reflect the fact that the two tier model is in operation. In cases involving a two tier structure the role of the supervisory board (*Conseil e Surveillance*) is to oversee the activities of the board of directors (*Directoire*). A maximum of 24 is fixed for the supervisory board and the minimum membership is three. In this two tier structure the *directoire* can have a maximum of 5 managerial directors (or 7 if it is a listed company). Members only can sit on the supervisory board but this limitation does not apply to the *directoire*. Employees can be represented on the *directoire* but not on the supervisory board. Workers committees are established for enterprises employing more than 50 workers. These were first provided for in 1945.

Minority shareholders owning 5% or more of the share capital can bring actions on behalf of the company and have resolutions put before the general meeting. The holders of 10% of the shares can demand information from the company and/or apply to the court for an investigation at the hands of an independent expert. The holders of 95% of the shares can squeeze out a minority and provided the procedural rules are observed that minority has no right of objection. Conversely a minority can enforce a right to be bought out.

As a general rule the SA is not permitted to acquire its own shares, though exceptions to this bar are permitted. These exceptions were widened in 1998 to permit buybacks up to 10% of the total shares issued. Similar rules apply to financial assistance on company share purchases.

Public companies which are listed on the Paris bourse ae subject to additional regulation made by a committee of the *Commisssion des Operations de Bourse* (COB). Set up in 1967 (Ord. 67-833, September 28 1967) this body maintains a key supervisory role. Its committee (formerly the CBV, but now the CMF) has devised rules governing tender offers and conversions from public to private company status. Listed companies are permitted to own up to 10% of their own shares.

French company law makes considerable use of criminal offences as a regulatory tool. A good example of this is the offence of misusing corporate property. Payment of false dividends is also a crime, as is the unauthorised issue of bonds.

A separate regime is provided for the private company (*Societe a Responsabilite Limitee,* or abbreviated as SARL). Again the basic law (which was first enacted in 1925) is contained in the Law of July 24 1966, though with additional detail furnished by the Decree of March 23 1967.

A fixed timescale of 99 years is specified for a SARL A maximum membership of 50 is imposed and a minimum share capital of 50,000 FF must exist. Individual shares used to be required to have a nominal value of at least 100FF but this requirement was discarded in 1994. Share certificates as such are not used: rather ownership and prticipation is reflected by book entries. Transfer of share interests is restricted; the consent of the holders of three-quarters in value of the company's shares must first be obtained. Bond issues are not permitted. Private companies are required to register articles which deal with objects, name, registered office, capital, etc.

A single member variation on the private company is the EURL (*Enterprise Unipersonnelle a Responsabilite Limite*), and this has been available since 1985.

Normally a SARL will adopt a unitary board model, though it is possible to have a supervisory board. The managers, or *gerants*, have responsibility for the day to day running of the company. A *gerant* cannot be a corporation. If the *gerant* is a majority shareholder he does not rank as an employee for tax/ social welfare benefit purposes. Shareholders representing 10% of the capital can bring a derivative action. Holders of 25% of the capital can request an EGM. Amendments to the constitution require a 75% majority.

A private company whose net assets exceeds FF5 million can be converted to a public company if a simple majority of shareholders so wish. They must wait for 2 financial years to be completed before this can happen. Conversion to an SNC (unlimited company) or limited partnership requires unanimity.

This period in the late 1960s was a key period for companies regulation. It was in this period (1967) that France became the first European jurisdiction to introduce legal regulation of insider dealing. It also introduced in 1967 the *groupement d'interet economique*, which provided the model for the EEIG. The European refinement (the GEIE) was introduced in 1985.

Administrative aspects of the registration of companies are governed by the Company Formation Decree 1991 which places supervisory responsibilities on the *prefet* of the local department.

Corporate insolvency law in France is based upon the 1984 Prevention of Difficulties Act (Law 84/148, March 1 1984) and 1985 Insolvency Law (Law 85-98, 26 January 1985) (as amended by the 1994 reforms). Generally speaking French insolvency law is pro debtor and seeks to protect the enterprise even to the extent of undermining creditor rights.

2. Recent developments

Apart from measures designed to implement EU Directives, such as the Commercial Companies and Accounting Obligations Decree 1994 (which implements EC Directives 90/604 and 605) there have been a number of developments to note.

Significant changes in French company law were introduced in 1994. The Businesses (Prevention of Hardship) Act 1994 came into force on October 1 1994. It seeks to redress the balance on corporate insolvency by restoring to creditors certain protections taken away from them in 1984.

The *Societe par Actions Simplifee* (SAS) was introduced by the Companies Simplified Public Company) (Amendment) Act 1994 (Law of January 3 1994) with the particular view of promoting joint ventures and enhancing managerial flexibility. There must be at least two shareholders and these must be legal entities having capital of at least FF1,500,000. A minimum capital of 250,000 FF is specified for this type of limited company and its shares cannot be made available to the public.

In 1994 reforms were also made in corporate insolvency law to address the issue of corporate rescue procedures and shifted he balance back from corporate debtors to a more pro creditor stance. Under the Insolvency Law (Law 94-148, 10 June 1994) measures were introduced to facilitate compromises involving claims against corporate dentors. New procedures were introduced to facilitate the speedy liquidation of hopelessly insolvent companies. Creditors' rights are enhanced by promoting the role of monitors who will observe the administration of an insolvent company.

Like many other European company law systems the potential range of liabilities facing directors is growing with the result that the use of indemnity insurance is more prevalent.

3. Future reforms

In July 1995 a general review of issues relating to corporate governance of public listed companies in France was published. The Vienot Report is a fairly conservative document relying heaviliy upon self regulatory techniques and resisting chages in core company law principles.

In the following year a report of much greater radicalism and importance was published. In 1996 the Marini Report on The Modernising of Company Law (July 13 1996) called for the introduction of greater flexibility into French Company Law to promote its relative competitiveness in the international business community. The conclusion of the Marini Report was that French company law was too rigid and gave too high a priority to the protection of the public interest and too little weight to the need for entrepreneurs to be given an opportunity to design business structures best suited to their needs. This is particularly important when one remembers that the SA is used by a wide range of businesses. Furthermore, the tax regime was also deemed unfavourable and this may explain the increasing number of French businesses choosing to reregister in other European jurisdictions.

In particular a system that allows companies themselves to convert into alternative structures was recommended. It was also suggested that minimum capital requirements should be doubled so that in future the minimum capital of a SARL should be increased to FF100,000, whilst the minimum for all SAs should be FF500,000 with this figure rising to FF3,000,000 for those SAs inviting public subscription.

Another strategy favoured by Marini was the replacement of many criminal sanctions by civil penalties. This is part of a wider policy favouring self regulation of companies through their shareholders. It is even suggested that in some cases institutional investors be *obliged* to vote in general meetings! At the time of writing these proposals were still awaiting implmentation.

French corporate insolvency law is likely to experience further changes in the next few years as the insolvency practitioner comes under closer scrutiny.

In a partial effort to implement some of the Marini proposals in June 1998 a Bill was published recommending significant changes in the law governing private companies.

The 1998 Bill also dealt with aspects of the law relating to public companies. Thus the minimum of 7 members was scheduled for abolition. The fate of this Bill is unclear simply because the Marini proposals have attracted significant controversy. In any case this Bill is unlikely to progress to law before the Autumn of 1999.

The law relating to listed SAs was however modified by the Law 98/546 (July 2 1998). This confers on such companies the freedom to buy back up to 10% of their shares. No par value shares are also made available. Apart from dealing with core issues this legislation makes a number of changes in taxation, financial services law and the regulation of the securities markets.

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GERMANY

1. Background

Germany has largely separate regulatory regimes for the AG (A*ktiengessellschaft*) (public company) and GmbH (G*essellschaft mit beschrankter Haftung*) (private company). Of the two vehicles the GmbH is the senior, and indeed it has become a model for private companies within Europe. There are now over 600,000 GmbH registered in Germany, as compared to approximately 4000 AGs.

The GmbH Act (originally enacted in 1892, but now in amended form) states that the GmbH has a minimum capital of 50,000DM and is not obliged (unlike an AG) to set aside an additional legal reserve. Each shareholder must have a minimum capital participation of DM500. A single shareholder can (since 1980) now form a GmbH and this structure is often used by large businesses which form the single shareholder. There is no maximum number of shareholders. Share certificates are not always used; interests can be transferred by book entries. The GmbH usually operates with a management structure centred upon one or more managing directors (*geschaftsfuhren*) who are responsible to a general meeting unless there are more than 500 employees in which case a supervisory board is required. The process of incorporating a GmbH is more less formal than the steps required to set up an AG. A single constitutional document is required; there is no separate memorandum and articles of association as in English law. Legal personality is acquired on registration in the Commercial Register. There is no *ultra vires* rule in operation. The holders of 10% of the shares can force an EGM. Generally the rights of minority shareholders are less explicit than in the case of an AG. However the German courts have been very creative in developing a right to withdraw from the company (*austritt*) or even a right to expel other shareholders (*ausschliebung*) in certain circumstances. These circumstances do not necessarily have to relate to the company's affairs but can be in respect of a deteoriating personal relationship.

The public company is governed by the 1965 Stock Corporation Act (as amended) and the statistics show that more than 3000 are registered. The AG is very much designed for the large scale enterprise; hence the formal rules on management structures. The public company (or AG) must have a minimum capital of 100,000 DM and must in addition maintain a reserve of 10% of its capital out of profits. Directors are under a personal duty to maintain specified capital levels; if they fail to do so they may be liable to creditors. It used to be the case that there had to be five founder shareholders but that requirement has recently been dropped; a single shareholder will (since 1994) now suffice. The minimum nominal share is now 5DM (having been reduced from 50DM by the Second German Financial Market Promotion Law of 1994 in an effort to appeal to small investors) . Voting rights are multiplied according to the nominal value of the shares held. Shares are not always freely transferable; it is common for the constitution of an AG to give the board of management discretion to refuse to register a proposed transfer (the *Vinkulierung* feature). Bearer shares are common.

An AG will have a two tier board structure consisting of a board of management (*vorstand*) and a supervisory board (*aufsichtsrat*). The latter represents shareholder and employee interests. This concept dates back to the 1930s when the idea that the exclusive role of the company was to maximise shareholder wealth was questioned; the idea of the enterprise with diverse stakeholders came to the fore. If there are more than 2000 employees both groups enjoy equal representation under the Co Determination Act of 1976 (*Mitbestimmungsgesetz*). A formula is set down for determining the size of the supervisory board; this depends upon share capital proportions and numbers of employees). The average size is believed to be just over 13 members; comparatively large. Members of the board of management are appointed for up to a five year term of office by the supervisory board. One often finds that the formal rights of shareholders acting individually are limited. This is because shareholders are expected to make use of the supervisory board facility to air their grievances. Strict duties are imposed on the board of management including the duty not to compete. Similar responsibilities are fixed for the supervisory board but the prohibition against competition does not operate here. Members of the supervisory board can only be removed by members with 75% of the shares (unless the articles specify 51%, which is the case in many German public companies). It has been held in a recent case that where the supervisory board discovers that the management is in breach of its duties it *must* pursue legal proceedings.

Concerns have been expressed about the effectiveness of supervisory boards. They tend only to meet quarterly and individuals can sit on a number of such boards (up to a maximum of 10). This combination, coupled with the fact that the remuneration on offer is meagre, does not encourage close supervision.

If the majority of shareholders wish to ratify a breach of duty by directors the holders of 10% of the shares can frustrate such a waiver. Although there is no derivative action as such in Germany the holders of 10% of the shares can compel the company to bring an action against wrongdoers or to seek the dismissal of supervisory board members/ replace auditors. To require an EGM only 5% support is needed

German company law also allows 10% of the shareholders to seek a special audit (*sonderprufung*). This is a remedy which dates back to 1897 and is characteristic of this jurisdiction.

There is no formal squeeze out procedure but the same result may be achieved via reorganisation. Conversely a minority shareholder can compel a buyout if a shareholder has acquired 755 of the capital or is in a position to control appointments to the board.

The directors retain discretion to keep back 50% of the net profits to be used for reinvestment purposes; this reserve cannot be use for dividends. Purchase of its own shares by an AG is permitted in very limited circumstances.

If there is a loss of 50% of the share capital the managing director must notify shareholders. Liquidation should be considered; the managing director is exposed to personal liability if corrective action is not taken and the company then fails. A maximum of 3 weeks is specified for corrective action if an improvement in the capital position cannot be secured.

For both types of company bearer shares are in common use.

Works councils are optional for enterprises with more than 5 employees. The protection of employee representatives in Germany is more usually effected through the supervisory board.

2. Recent developments

One interesting reform is embodied in the Companies (Time-Limits for Liability of Owners and Partners) Act 1994. This deals with the ongoing liability of former owners of a business who sell the business to a new owner. A five year limitation period is fixed.

In 1995 a new Securities Regulation Act was passed outlawing insider dealing and enhancng disclosure rules on the acquisition of share interests. A new voluntary Takeover Code (*Uebernahmekodex*) took effect on January 1 1998.

An Act was passed in 1994 to deregulate companies law for small stock corporations. Under this new law (effective from 1/1/95) single member AGs were allowed and many of the formal procedures governing company meetings relaxed. Shareholders' entitlement to seek dividends were improved by limiting the right of directors to hold back funds for reinvestment. Employee participation rights for companies with less than 500 employees have been watered down.

Preemption rights for shareholders were also watered down in cases of capital increases by an amendment to the AG Act effective from July 2 1994.

The Transformation Act 1995 (and associated tax legislation) enables business enterprises to change their legal status with relative ease and with minimal adverse fiscal consequences. The ownership of the enterprise is deemed not to change. Under this initiative mergers and divisions are made easier as are conversions from corporate to non corporate forms (and vice versa). The conversion of companies into limited partnerships is one possibility to note here. These conversion arrangements are important bearing in mind the large number of partnership options currently available under German law.

German insolvency legislation has recently been codified. Under the new unified Insolvency Law (effective from 1/1/99) new procedures are specified and creditor rights remodelled. The reorganisation procedures contain a debtor in possesion feature and thus reflect a US influence.

The Corporate Control and Transparency Act 1998 coupled with the Raising of Capital Act 1998 make a number of changes promoting transparency through accounting rules and facilitating share transactions through tax changes. Under the former Act on the corporate governance this indirectly will make some reduction in the maximum number of diretorships that can be held by one individual. Directors duties are clarified particularly in the area of risk management. The holders of 5% of the shares (or shares worth DM 2 million of stated capital) can bring liability actions against directors. Duties of auditors are firmed up and the demarcation between he roles of auditors and supervisory board clarified.

3. Future reform

German Company Law has had to address the advent of the euro. Thus under the Euro Introductory Law which will enter into force on January 1 1999 the minimum nominal capital of an AG is to be 50,000 euros will the minimum par value of a share being 1 euro. For the GmbH the minimum capital is set at 25,000 euros with each shareholder contributing a minimum of 100 euros. Companies formed during the transition period (i.e. up to December 31 2001) can chose whether to denominate their capital in euros or DM. Companies formed thereafter must denominate shares only in euros. Companies formed prior to December 31 1998 do not have to convert to euros unless restructuring capital. Therefore the DM will remain a feature of company share capital structures for many years to come.

The issue of corporate governance has been considered by policy makers in Germany. Generally the feeling is that shareholder rights need to be improved. Under a 1996 Draft Act shareholders owning 5% of the shares can seek the appointment of a special representative who can investigate and sue directors if appropriate.

Likely changes in the future include relaxing the rules on share repurchases by stock corporations.

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GREECE

1. Background

Greece, which joined the EC in 1981, follows the basic distinction between limited liability companies or *Eteria Periorismenis Efthinis* (private), which are known by the acronym EPE, and public companies (*Anonimos Eteria* or SA). Greek companies regulation is heavily French influenced.

The basic law governing private companies is Law 3190/1955. The minimum capital for an EPE is DRS 3,000,000 (a substantial increase on the pre 1992 figure of 200,000 DRS). To form a private company articles of association have to be drafted which contain standard material on name, business objects, share capital, registered office, etc. A fixed duration must be specified. Shares as such are not issued: instead participation is through notional capital interests which must be of a minimum DRS10,000. Transfer of interests is usually restricted by the articles. Normally a unitary board structure is adopted; but the articles may provide for a supervisory board. Shareholders enjoy a certain degree of guaranteed dividend depending upon the balance sheet of the company unless the constitution of the company restricts that right. The court has power to dissolve an EPE on application of the holders of 10% of the shares if serious complaints are established.

Single member private companies were introduced in 1993 by Presidential Decree 279/93.

Public companies are governed by Law 2190/1920, as amended. An SA is required to have a minimum paid up capital of DRS 10,000,000 (which was double the pre 1992 amount) and a fixed duration (normally 30 or 50 years). The members can extend this life span. Shares are issued which can either be registered or bearer. The nominal value of each share must be between 100 and 30,000 drachmae. Share repurchases by the company are rarely permitted.

Normally a unitary board model is followed. The directors enjoy full managerial powers and can act outside the objects of the company. Such acts will be binding on the company unless the third party was aware of the transgression. The board must meet at least once a month. A system of statutory in house auditors applies in addition to the standard independent audit each year.

The holders of 5% of the shares can force an EGM, require information from directors or seek an investigation.

A mandatory capital reserve must be established by using 5% of the net annual profits. Of the residual profits some 35% must at least be used for distribution purposes. There is a mandatory liquidation provision for serious losses of capital; an EGM must be called to decide on liquidation or to reduce the share capital where the assets have fallen below half of the value of the stated capital.

2. Recent developments

In 1993 the law relating to mergers and other transformations was modified.

Under Law 2339/1995 a number of reforms were made to the 1920 Law. The procedure for the amendment of the constitution of a public company was simplified by removing the need for a notarial deed. Shareholders in public companies were afforded better information rights. Procedures for changes in share capital were modified and the rules governing the board of directors were updated. Fines were imposed for late submission of information to the Ministry of Commerce. The 1995 Law also introduced new procedures for converting public companies into private companies and partnerships. A commission was established to offer advice on practical aspects of the law relating to private companies.

3. Future reform

We are not aware of any significant reforms in the pipeline, though a committee has been set up to codify the laws on public offers. Some legislation on relaxing share transfer restrictions in private companies may also be enacted..

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IRELAND

1. <u>Background</u>

Irish Company Law had its origins in English law and until 1963 it was based upon UK statutes which predated independence (namely the 1908 Companies Consolidation Act, as amended). The Companies Act 1963 (still the core statute) bore much similarity to the UK 1948 Act, though it did contain a number of innovations recommended by the Irish Cox Committee (1958) . It also made use of the work of the UK Jenkins Committee (1962, Cmnd 1742). For example, a ratification facility for preincorporation contracts was introduced by section 37 of the 1963 Act. Similarly the rules governing financial assistance in share purchases (CA 1963 s. 60) are more flexible than those found in the UK, even after the reforms of 1981.

An illustration of the continued usage in Ireland of provisions mirrored by the UK 1948 Act is to be found in section 205 of the 1963 Act which offers relief to shareholders against oppression. This provision was not a perfect match for the English counterpart. There were significant procedural difficulties and the absurd rule (now discarded in the UK) requiring proof that it was just and equitable to wind up the company was never adopted. This provision was reviewed by the Supreme Court in **Irish Press v Ingersoll Irish Publications** [1995] 2 ILRM 270 where the limitations of the remedies on offer to minority shareholders in a section 205 petition were exposed. Having said that, there is a reluctance to strike out a section 205 petition merely because the petitioner may be bought out by invoking domestic procedures; those internal valuation mechanisms may not adquately protect the petitioner.

Since the Companies Amendment Act 1983 which implemented the Second EC Directive) Ireland has followed the standard division between public (plc or cpt) and private companies (Ltd or Teo). According to official figures released in 1998 there are some 17,345 private companies registered as compared to a mere 151 public companies, though statistically there was an increase of 41% of the latter category over the previous 12 months. The basic core regimes reflects much that is found in English law. Memorandum and articles of association provide the constitution of the company and form a statutory contract with members (s. 25 CA 1963). Companies are required to have an objects clause and a watered down version of the *ultra vires* rule therefore applies. Management is vested in the board of directors and a unitary board structure is the norm. The practice of buying companies “off the peg” so much a feature of UK practice, is also prevalent in Ireland.

A public company must have at least seven shareholders and a minimum paid up share capital of IR £30,000.

There is no minimum share capital specified for private companies (unless a restriction order applies - see below) but a maximum of 50 shareholders is specified. The share capital maintenance doctrine is observed, though exceptions enable companies to buy their own shares (subject to specified preconditions) or to offer financial assistance towards share acquisitions (again subject to tight regulation). Private companies enjoy greater freedom in these areas. The ban on subsidiaries acquiring shares in holding companies does not apply in its full rigour in Ireland. Irish companies can hold up to 10% of their capital in "Treasury shares".

The face of Irish Company Law changed greatly as a result of its entry into the Common Market. For example the major changes in the area of company share capital which were required to be made by he Second Directive were brought into play by the Companies (Amendment) Act 1983. Similar Amendment Acts were enacted in 1977, 1982 and 1986

More recently significant changes in Company Law were introduced by the 1990. These changes could not be regarded as EU derived, but rather reflect independent action on critical policy issues. The Companies (Amendment) Act 1990 introduced the court examiner procedure designed to offer a lifeline to companies in distress. This legislation was hurried through the Irish legislature to cater or the difficulties facing the beef industry in the wake of the UN embargo on Iraq, a major beef importer from Ireland. Under this procedure an application can be made to the court for the appointment of an examiner to mount a rescue. The moratorium is more extensive than is imposed by the English administration order procedure and also protects personally to some extent. Notwithstanding the examiner's appointment the directors may retain some control of the business - this mirrors aspects of the much criticised Chapter 11 procedure under the US Bankruptcy Code. Controversially, incumbent receivers appointed within 3 days of the petition may be displaced.

The Companies Act 1990 was a more general piece of legislation which dealt with company inspections, directors duties, disclosure of interests in shares, insider dealing, miscellaneous matters connected with winding up, disqualification of directors, receiverships, accounts and audit and amendments to arrange of matters found in earlier legislation.

One of the significant changes in 1990 was the advent of reckless trading liability for company directors (section 297A Companies Act 1963). Apart from the terminological difference this concept has much in common with the UK law on wrongful trading. There are however a number of significant differences, the most important of which is the availability of the right of action to receivers, examiners and creditors. This represents a considerable advance on the restrictions imposed by English law.

Another area of reform pioneered in Ireland concerns the treatment of groups of companies. The general approach in Ireland mirrors that of English law: companies within groups are to be treated as distinct legal entities - see **Allied Irish Coal v Powell Duffryn International Fuels** [1997] 1 ILRM 306 **.** However, models pioneered in New Zealand opening up the possibility for contribution orders (CA 1990 s. 140) to be made against parent companies in the liquidation of subsidiaries and the pooling of group assets/ liabilities on winding up (s. 141) have been adopted. Unfortunately, there is no evidence of these provisions being used by the Irish courts.

The Irish law relating to restrictions/ disqualifications imposed on directors may also be a model worthy of consideration as it does differ significantly from the UK regime. Under section 150 a *restriction* may be imposed on a director. This involves a qualified prohibition being imposed upon an individual's future use of limited liability companies in the wake of a corporate collapse occurring within the previous 12 months where the individual was a director (or shadow director). In essence such an individual will be automatically be prohibited by the court from being involved as a director with a limited liability company for the next five years unless certain conditions are satisfied. These conditions relate to share capital. Thus if the involvement is with a public company a minimum of IR£100,000 must be maintained whereas the corresponding figure for a private company is IR£20,000. Capital maintenance rules are applied more rigorously to section 150 companies, particularly with regard to financial assistance. The court can lift the restriction if the director can show that he was not to blame for the earlier corporate failure. Criminal and civil sanctions are imposed for a breach of a restriction order including the imposition of an automatic and total five year *disqualification*. Any salary drawn by a director acting in breach of a restriction order may be recovered and personal liability for the debts of the second company may be imposed. One problem with this procedure is that little information is given as to how the case will come before the court in the first place - no formal obligations are imposed on liquidators to report. Hence by definition the court is only likly to have he issue raised before it in a case of compulsory liquidation - an anomaly raised recently by Shanley J in **La Moselle Clothing Ltd v Soualhi** [1998] 2 ILRM 345. In spite of this *lacuna* a number of such orders are being made - see for example **Re Mantruck Services Ltd** [1997] 1 IR 340. There are no formal comparators to restriction orders under English law, though the same result may be achieved by the creative use of judicial discretion in a leave application under section 17 of the Company Directors Disqualification Act 1986.

Section 160 provides for *disqualification* - i.e. complete denial of access to limited liability companies. The distinction here is between mandatory disqualifications (a five year ban which is imposed by the court for offences of dishonesty involving companies) and discretionary disqualifications for unspecified periods for various defaults including breach of duty, unfitness, reckless trading, etc. In the case of mandatory disqualifications the onus is on the director to apply to the court to get the ban lifted. Discretionary disqualifications require an application to be made to the court by the liquidator, receiver, examiner, creditors, employees, etc. The range of applicants is thus much wider than in English law. Criminal penalties exist for breach of a disqualification and moreover the period of disqualification is automatically extended for another 10 years. Generally the Irish rules on restriction/ disqualification are more draconian than their English counterparts.

2. <u>Recent developments</u>

There have been few major changes in core principles of Company Law since the 1990 Act. Single member private companies were admitted in 1994. Dematerialisation of shares was introduced by regulation in 1996; the provisions here mirror those found in English law. Changes have been made in electoral legislation with regard to political donations by companies.

The Irish Stock Exchange secured its independence from the London Stock Exchange by the Stock Exchange Act 1995 Irish takeover law was put on a statutory footing by the Irish Takeover Panel Act 1997 which set up a Takeover Panel and provided a statutory base for the Code (general principles and rules).

Works councils were introduced as a result of the implementation of the EU Works Council Directive. Companies (or groups of companies) with more than 1000 employees in the EU and at least 150 in two Member States are obliged to set up works councils. Employee representation at board level for state controlled companies has been provided for since 1977.

3. Future reform

In 1993-94 a Small Business Task Force reviewed a number of areas of law (including companies regulation) with a view to relaxing regulatory burdens on small businesses. A number of recommendations were made which were then considered by a wider review of companies legislation. In February 1995 the Company Law Review Committee in its first report considered proposals for reform of various aspects of Irish company law. The issues relating to small businesses were addressed. Thus it was agreed that the mandatory audit requirement should be removed from companies having a turnover of less than IR£100K. A scheme which had been operating informally under which incorporation could be guaranteed within 10 days was to be given public support an a higher profile. The main focus of attention was the court examiner regime with a number of suggestions to change the law to allay the concerns of banks. These concerns centred on the fact that examinerships were being initiated without them being given a proper opportunity to make representations and the costs of the examinership were diluting their security rights. It was suggested that the procedure governing the appointment of examiners be tightened up; a reasonable prospect of success should be established and this should be supported by reference to a report from independent accountants (as in the UK). However the system of companies inspections was also reviewed as was the director disqualification regime; on the latter the main proposal was to invest more resources in the administration of the system to ensure that more cases came to light. The proposal was for the setting up of a specialist state funded disqualification unit. Generally the committee seemed to have more confidence in disqualification, as opposed to restriction, when it came to controlling rogue directors. At the time of writing this report legislation is still awaited on the proposals of the Review Group.

A further development occurred in August 1998 with the establishment of a Working Group on Company Law Compliance and Enforcement. As the name of this group suggests, the focus will be less upon substantive matters and more upon ensuring that existing regulatory mechanisms are properly enforced. In particular this body will review the respective roles of the courts, the government ministries, companies registration services and the criminal prosecution services. A cost/ benefit analysis of methods of enforcement will also be undertaken. The report is expected to be released shortly and may lead to legislation in 1999.

A 1999 Companies Amendment Bill is anticipated shortly. Possible subject areas to be covered include abolishing the audit requirement for small companies with a turnovr of less than IR£100K, changes in the examinership procedure and tightening up the law on company formation (particularly in the context of non resident companies) by applying some of the principles relating to the investigation of suspected money laundering to formation agents.

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ITALY

1. Background

The foundation of Company Law in Italy is the Civil Code (1942). To form a company an instrument of incorporation comprising articles of association is required. A fixed period of incorporation must be specified, as must the objects of the company. All shares (which must be registered) have a par value. There are restrictions on share repurchases.

Private companies in Italy are characterised as *societa a responsibilita limitata* (Srl). There are about 50,000 of these companies registered. A minimum share capital of 20 million lire is specified (Art 2474 Civil Code). Such companies cannot issue share certificates or debentures - the interest of members is determined by their entry in the register of equity holders (a so called quota arrangement) . Small private companies enjoy concessions on the statutory audit.

Public companies (*societa per azioni*, or SpA). The minimum capital here is fixed at 200 million lire (Art 2327 Civil Code). This is a relatively low sum and hence this type of company is very popular (there are some 57,000 public companies registered). If the company is to have a share capital in excess of 10 billion lire the consent of the Treasury is required. Directors can hold office for a maximum of three years. All public companies are required to have a committee of statutory auditors (*collegio sindacale*). These are appointed by shareholders for up to three years and they are responsible for maintaining the company's accounts in compliance with the law. They also have a general role in overseeing management and can be held personally liable for losses caused by their failure to carry our their duties. Although not formally described as a supervisory board increasingly this body is assuming that characteristic. The 1998 changes noted below for listed companies merely reinforces that observation. Independent external auditors must since Law Decree 1975/136 review these accounts.

Special rules exist for public companies owned by the state and in the process of privatisation (law 474/1994). Single member companies were introduced by the Private Limited Liability Companies with a Sole Shareholder Decree 1993 (March 3 1993).

Superficially, a unitary board structure is adopted for all types of company but the increasing importance of the board of statutory auditors undermines that impression.. Directors of private companies can hold office indefinitely but, as noted above, a three year limit is placed upon directors of public companies.

Although generally speaking there are few statutory rules protecting minority shareholders, the holders of 10% of the capital can petition the local court to get it to investigate the affairs of the company where irregularities are suspected. A group of 20% of shareholders can call an EGM. Until recently, no formal rules existed to provide for derivative actions or to facilitate squeeze outs. The courts are however protective of minorities by using general concepts such as good faith and fairness. Thus the Supreme Court has allowed shareholders to bring actions to annul resolutions that violate their rights where principles of good faith and fair play have not been observed.

Directors are obliged to call an EGM if a loss exceeding one third of the capital has resulted in the share capital falling below the minimum capital levels specified above. The company must then either reduce its capital or make arrangements for a reorganisation.

The system of corporate regulation in Italy rests heavily upon the activities of the state regulator CONSOB which in 1974 was given wide regulatory/ supervisory powers.

2. Recent developments

The early 1990s witnessed a glut of companies legislation as Italy belatedly implemented a number of EU Harmonisation Directives with the regulation of takeovers, mergers and insider dealing being particularly prominent. In 1991 new rules on mergers were introduced and the criminalisation of insider dealing occurred. Under Law 147/92 new rules governing takeovers were promulgated but these were revised again in 1998 (see below). The EEIG was also introduced in this period.

A significant change that had more to do with domestic requirements (and in particular the importance of combatting money laundering) was effected in 1993 in relation to the transfer of quotas in private companies. Under Law 313/1993 any such transfer must be recorded in a public registry to promote transparency and to prevent private companies being used for illicit purposes.

In 1995 CONSOB recommended significant changes in company law to promote corporate governance. These changes were reflected in the 1998 legislation noted below. In the meantime CONSOB laid down guidelines to improve the governance of Italian listed companies. One central element in these guidelines was the need for clearer information to be passed to the board of directors from the executives. A greater role for the board of statutory auditors was proposed.

The major change in core companies regulation came in 1998. Much of the background work was carried out by a committee chaired by Professor Draghi, Director General of the Italian Treasury. Under Law 58/1998 (the so-called *Testo Unico* or consolidated law) the regulation of public listed companies was completely revised with a view to promoting corporate governance. It should be noted here that of the 57,000 public companies in Italy only some 200 are listed. The main changes introduced (with effect from July 1 1998) is the reinforcement of the supervisory role of the board of statutory auditors. Their role is more clearly defined and is more focused upon general supervision of management and less on checking the accounts. They should ensure that the constitution is being observed and the directors are carrying out their duties. There should be a minimum of 5 statutory auditors with a strong representation of minority shareholders. Equally the role of external auditors with regard to the accounts is reinforced. A formal squeeze out procedure is introduced in favour of shareholders owning 98% of the capital.

The regulatory powers of CONSOB are enhanced and the board of statutory auditors are expected to blow the whistle to CONSOB if irregularities are unearthed.

The 1998 Act generally improves shareholder rights in listed companies. Shareholder agreements are formaly recognised provided they are publicly disclosed. The holders of 2% of the shares can require the board of statutory auditors to conduct specific investigations into particular matters and report back to the general meeting. The balance sheet can be challenged by 5% of the shares. The holders of 10% of the shares can ask for an EGM whereas 20% can force an EGM. Most important of all a derivative action procedure has been introduced which can be activated by 5% of the shareholders. Once a shareholder acquires 30% of the capital a bid must be made for the remaining shares. The US practice of proxy solicitation is recognised thouh the details of this mechanism have been left to CONSOB to define. This change is designed to promote shareholder activism. Postal voting proedures are also introduced.

Law 58/1998 also completely revises the rules governing tender offers in an effort to deregulate procedures but also to improve minority shaeholder protection. The holders of 95% of shares can now compulsorily acquire the remaining 5% of members who refuse a bid.

3. Future reform

The government is investigating the possibility of extending the changes noted immediately above to non listed public companies.

Measures will have to be introduced to cater for the euro but as yet there is no indication that the opportunity will be taken to admit no par value shares.

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LUXEMBOURG

1. Background

The basic legislation governing companies was enacted in 1915 (Law of August 15 1915). It has, of course, been amended since then, most notably to comply with EU harmonisation requirements. The incorporation process in Luxembourg requires a deed of incorporation and articles of association. The articles will cover such matters as the objects clause, name, registered office and share capital (which can be in any currency). Strict rules regulate share repurchases and there is an *ultra vires* rule, though this has lost much of is impact since 1972 with the introduction of suitable protection for innocent third parties. All companies use a unitary board structure (*conseil d'administration*) with the maximum term of office of a director being fixed at 6 years (though re-election is possible). If there are less than 25 members an AGM is not mandatory.

The public company, a very popular choice, in Luxembourg (SA) must have a minimum share capital of LFr 1,250,000 (or the equivalent in another currency). Shares must all have the same nominal value which must be at least Lfr 50. Non voting shares can be issued but such shares must be given preferential rights as to dividend and return of capital. Public companies can issue bearer shares. Foreign currencies can be used to denominate shares.

Private companies (Sarl) have a maximum of 40 shareholders. A minimum share capital of LFr 500,000 is specified and each share must have a minimum nominal value of Lfr 1000. Again foreign currencies can be used for the purposes of denomination. Significant restrictions on share transfer are imposed: transfers are only permitted if approved by 75% of the other shareholders.

There is a mandatory liquidation procedure in Luxembourg dealing with cases of serious loss of capital. Strict curbs apply to share repurchases and financial assistance.

A piece of legislation enacted in 1929 governs the operation of holding companies.

All companies undertaking business in Luxembourg require a licence from the state. The licensing process requires disclosure of documents relating to incorporation and details of the mangers.

2. Recent developments

Personal liability of directors for serious mismanagement was made more onerous by the Bankruptcy Law of July 21 1992 and this risk of liability cannot be insured against.

3. Future reforms

We are not aware of any significant changes in company law which may be enacted in the near future.

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NETHERLANDS

1. Background

Corporate law in The Netherlands is contained primarily in the Dutch Civil Code (Book 2), which was revised and updated in 1992. This Code is then amended by specific companies legislation.

The standard division between public and private companies is apparent in the Netherlands, having been formalised in that jurisdiction in 1971 largely in response to the need to create a limited liability company that was largely immune to the regulatory burdens imposed by the European Community Company Law Harmonisation programme..

Public companies (*De Naamloze Vennootschap*, or NV) must have a minimum paid capital of Nfl 100,000. Failure to maintain that level of capital must mean that the company will have to be dissolved. Public companies generally speaking are prohibited from offering financial assistance towards the purchase of their own shares. However, they are allowed to repurchase shares under certain conditions; they can maintain a system of treasury shares up to 10% of the total capital. Other characteristics include the ability to issue bearer shares.

Private companies (*De Besloten Vennootschap met Beperkte Aansprakelijheid*, or BV) do have to have a minimum paid up capital (fixed at Nfl 40,000) and are obliged to set up a capital reserve if the share capital fund falls below this authorised minimum. A BV is not permitted to issue bearer shares. Indeed share certificates are not used as evidence of share ownership. Again treasury shares are permitted; in this case up to 50% of the total capital. The rules on financial assistance are also more relaxed.

The procedure for forming either type of company is similar and cumbersome. The process involves the preparation and bureaucratic approval (by the Ministry of Justice) of a deed of incorporation plus creation of articles of association. Several weeks can elapse before a company is finally incorporated; in this period the company enjoys an immature form of legal identity and it can do business provided it adds “in formation” to its registered name. An *ultra vires* rule applies largely for internal purposes. Preincorporation contracts can be ratified, though ratification does not in all cases relieve the promoter of liability. Share capital maintenance rules apply to acquisition of own shares and breach of such rules exposes directors to personal liability.

One curious feature of Dutch companies regulation in the area of listed companies is the system whereby many company shares are transferred to a trust office (*administratiekantoor*), which then issues the holders with depositary receipts. In effect, this means that the votes attached to those shares are exercised by the trust office with the original shareholders retaining little more than a right to income. The effect of this arrangement is to maintain continuity of management because the trust office tends to exercise its votes with regard to the long term interests of the company and its stakeholders rather than simply to maximise shareholder wealth. This device also frustrates takeovers. It is believed that some 25% of Dutch listed companies exploit this mechanism and the Amsterdam Stock Exchange does provide some regulation of how these trust offices operate. For example, they require the trust office to be independent of the company whose shares are being converted in this way.

The normal board structure is unitary in nature. However, large Dutch companies (whether public or private) (termed *structuurvennootshap*) have been obliged since 1971 to have supervisory boards (*raad van commissarissen*). In order to fall within this category a company must have capital and reserves of at least Nfl 25 million, a works council to represent employee interests and the group in which the company is placed must employ at least 100 persons in the Netherlands. It is believed that half of the companies listed on the Amsterdam Stock Exchange fall within these criteria. Such companies require to be registered as such and within 3 years of registration such companies must establish a supervisory board. The supervisory board is responsible for appointing the board of management (*direcktie*) . Corporations can be members of the management board but not the supervisory board. The directors are under a duty to protect the interests of all stakeholders; they are not solely concerned with shareholder wealth maximisation. The fact that it is more difficult for a shareholder to directly influence appointments to the board means that hostile takeovers are more difficult for a hostile bidder to seize control. Defence measures to hostile takeovers (such as share capital increases) are deemed acceptable in Holland but legislation to combat heir use is proposed.

Minority shareholders do not have the right to bring a derivative action in the strict sense of the word but the holders of 10% of the shares can force an EGM or petition the court for an investigation. Shareholder resolutions can be effected informally without a proper meeting. Votes can be cast by telex, telegram or fax. The holders of 95% of the shares can buy out a minority by applying to the court. On such an application the court will normally allow the compulsory purchase to proceed unless there are exceptional circumstances.

Under legislation dating back to 1950 works councils (*ondernemingsraad*) are to be set up where a company has more than 34 employees. This body must be consulted on certain developments relating to the company. It can also apply to the court for an investigation in cases of suspected mismanagement. The European Works Council Directive has been implemented by an Act of 1997.

Directors (and shadow directors) are increasingly exposed to risk of personal liability under Dutch law. Since the late 1980s both the Directors' Liability Act and the Company Bankruptcy Act make directors liable for non payment by their companies of Crown debts and for deficiencies on insolvency if their improper or mismanagement has lead to the company being unable to meet its obligations. The Dutch courts in recent years have done much to give these new forms of statutory liability real impact.

In the Netherlands the EEIG is recognised (*sub nomine* the EESV, which was authorised in 1989). There are also non profit making associations (*vereniging*) and foundations designed for profit (*stiftung*). It is now possible to convert these latter organisations into limited companies.

2. Recent developments

A revised debtor protection law was introduced from the beginning of 1992. This offers a one month moratorium protecting debtor companies to enable them to arrange a rescue. In order to secure this protection an application must be made to the court.

The Major Holdings Disclosure Act 1996 implements EC directives and requires holdings of 5% (or multiples thereof) in the shares of listed public companies to be disclosed.

The Companies Demerger Act 1997 introduces a new Art 334 into Book 2 of the Civil Code by making provision for divisions, mergers and hive downs. This legislation in effect implements the Sixth EC Harmonisation Directive. It also opens up he possibility of transformations from one form of legal business entity to another.

The Company Accounts Act 1997 extends the general companies accounting regime to associations and foundations.

The popularity of the Netherlands as a base for multinational companies can give rise to problems. The Corporations (Private International Law) Act 1997 deals with the applicable law issue. The Foreign Registered Companies Act 1997 deals with foreign companies incorporated overseas but trading in The Netherlands. Apart from the usual requirements on registration of documents such companies must have a minimum share capital of at least the same amount as is required for a Dutch private company. This new regime is more heavily regulated than was the case previously

3. Future reforms

There is some evidence that a rethink is going on at present as to the direction of Dutch companies regulation. The system seems increasingly geared in such a way as to militate against shareholder interests in favour of the wider concept of the company with its various stakeholder interests. Concerns have been expresssed over the use of anti takeover devices and reforms have been tabled to override these in certain situations.

On June 25 1997 the Peters Report (the report of a Committee of the Amsterdam Stock Exchange) reviewed corporate governance. It made some 40 recommendations many of which have been voluntarily adopted by listed companies. Peters favoured self regulation as a means of aproaching problems of corporate governance. Many of the recommendations related to supervisory boards and in particular the need to promote transparency in their operation. Concerns were expressed about the availability of anti takeover devices in Dutch company law because it was feared that they might undermine a free capital market. The use of non voting shares was also criticised. The device of proxy solicitation was recommended for introduction.

In 1996 proposals were made to udatethe self regulatory mergers code.

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NORWAY

1. Background

Norway is not a member of the EU but it is part of the European Economic Area (EEA) (with effect from January 1 1995). For many years companies regulation was based on the Joint Stock Companies Act 1976 which prescribed a uniform minimum capital of NK 50,000. There were plans to replace this with a single piece of companies legislation in 1995 but instead a policy of differential legislative treatment for public and private companies was pursued.

Private companies in Norway are now regulated by the Companies Act 1997. A minimum share capital of Nkr 100,000 is required. Share certificates are not used; instead a quota system applies to denote participation. Companies with more than 30 employees must have employee representatives on the board (up to one-third of the board). Works councils are required if there are more than 200 employees. Board members are obliged to be domiciled within the EEA. Dividend yields are to be calculated by reference to audited accounts and shareholders can apply to the court to challenge the level of dividends fixed by directors. There are strict rules governing the maintenance of share capital including a provision requiring directors to call an EGM in the event of a loss of half of the share capital. At such an EGM the directors must either put forward a rescue package or ask for the company to be placed in liquidation. The holders of 10% of the shares can request an EGM or special audit. There are no deemed distribution provisions (unlike in Sweden)

The law on public companies is to be found in the Public Companies Act 1997. Many provisions mirror those found in the private company regime, though a minimum share capital of NK 1 million is fixed for such companies. A figure of three directors can be reduced to 2 if the share capital is less than NK 3 million. Under the 1997 legislation an electronic share registration system was introduced under which the share registration function is outsourced to a central state unit. This can be extended to non listed and private companies. The holders of 5% of the shares can convene an EGM; 10% support is required to secure a special audit.

Incorporation procedures are not unduly cumbersome. Incorporation within a week is still a possibility, but companies are still bought off the peg to speed matters up.

Although a unitary board is the norm in Norway there can be what is termed a company assembly which comprises shareholder and employee representatives (up to one-third). This assembly can exercise supervisory functions over the board. This option is used where the enterprise has more than 200 workers.

New regulatory procedures governing the acquisition of companies with more than 50 employees were introduced with effect from January 1 1995. The Norwegian Department of Trade must be notified of such an acquisition Normally the acquisition will be approved unless the public interest is jeopardised.

Where the State owns a majority of shares in a company the State Owned Enterprises Act 1991 applies.

2. Recent developments

Many of these have been summarised above in the form of the 1997 legislation.
The Securities Trading Act 1997 (Act No. 79) deals with disclosure of share interests and insider dealing.

3. Future reforms

We are not aware of any changes in core company law which may be enacted in the near future.

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PORTUGAL

1. Background

Companies regulation in Portugal is based upon the Companies Act 1986 (as amended). Portugal became a member of the European Communities in that same year and the EU influence was formative on this new system of companies regulation

The most common type of company found in Portugal is the limited liability company (*sociedades por quotas*), often denoted by the abbreviation *Limitada* or Lda.. This is a private company with a minimum share capital of 400,000 esc. Share certificates as such are not issued (participation is through quotas) and the minimum individual shareholding is 20,000 esc. Generally speaking a minimum of 2 members is required. The management is vested in the directors (*gerentes*) who remain under the control of the general meeting (assembly). A committee of auditors must be established for companies above a certain size. A compulsory reserve made up of tranches of 5% of the net profits each year must be built up until it reaches 20% of the amount of the share capital. Shareholders are entitled to receive a distribution of 50% of the net profits each year unless the constitution of the company or the holders of 75% of the shares reduce this amount. A private company cannot acquire its own shares unless it has twice the amount of consideration available as reserves.

Public, or joint stock companies (*sociedades anonimas*) (abbreviated as SA) are used by the larger enterprise. The minimum capital is 5 million esc and each share must have the same nominal value (minimum 1000 esc) . A minimum of 5 founder members is required. Alternative management structures are specified - a board of directors or a general board of directors may be established. Supervisory boards (*Conselho fiscal*) operate. Auditing arrangements depend upon which of these board structures is adopted. Directors, who hold office for a maximum of 4 years are required to lodge a bond (minimum value 500,000 escs) as a pledge of good behaviour. Shareholders entitlement to dividend is based upon the same rules as applicable to private companies. The holders of 5% of the shares can trigger an EGM, 10% can demand written answers from directors and 1% can inspect the books of the company. If the general meeting refuses to take legal action against directors the holders of 5% can sue (but at their own risk). The holders of 10% of the shares can secure new appointments to the audit committee. A public company can purchase up to 10% of its own shares.

Directors are personally liable if the company fails to pay certain taxes and social security contributions unles they can show that they were not responsible for this failure.

Since joining the EC much effort with regard to companies regulation in Portugal has been invested in implementing EU Directives. For example Decree- Law No 127/95 enacted Directives 90/604 and 605 with regard to consolidated accounts (use of ECU and accounts of limited liability partnerships).

In 1991 the Stock Exchange Commission was established to supervise the capital markets and to deal with such matters as insider trading.

2. Recent developments

In 1992 Portgual enacted unifying legislation (Law 132/92) which sought to adopt a coherent framework for restructuring insolvent companies. One interesting subsidiary aim of this legislation was the removal of preferential status from state debts.

The Companies Code was amended in 1996 (Law 257/96) to permit single member supervisory (or fiscal) boards using a sole accountant/ auditor who is allocated specific supervisory responsibilities. Previously such fiscal boards were required to have between 3 and five members. The sole auditor has the power to raise issues with the directors and if not satisfied with their response he can summon an EGM. Listed companies for the first time are expected to have a company secretary whose role is clearly defined. Most listed companies already use a company secretary. Greater responsibility was given to independent external auditors; this reflects a move away from the audit role being fulfilled internally. The rules governing company names, which previously were quite prescriptive are relaxed. The metod in which the company books are to be maintained is modrnised by moving away from handwritten ledgers to typed looseleaf records. Finally, single member (unipersonal) private companies were introduced as part of this reform package.

The Securities Code was revised in 1997.

3. Future reforms

We are not aware of any imminent developments in the area of reform of companies regulation.

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SPAIN

1. <u>Background</u>

The basic regulation of companies in Spain has undergone great changes in the past decade. Formal minimum capital requirements, unknown in the days before membership of the EU was secured (1986), have been introduced for public and private companies.

Private companies in Spain are termed *Sociedades de Responsibilad Limitada*, or SL. The term "limited liability companies" is also used to describe such enterprises. The governing legislation here now is the Law 2/1995 (March 23 1995) (which replaced a 1953 legislative framework). Formation occurs through registration of a public deed in the Commercial Register. Such companies are required to have a minimum share capital of 500,000 ptas. There used to be a maximum capital ceiling of 50 million Pta but this was abolished in the 1990s. A maximum of 50 shareholders used to be fixed but this was removed in 1995. A single shareholder will suffice for such a company. Participation interests do not take the form of shares represented by share certificates; instead the quota system is adopted. Interests are not freely transferable unless the articles so provide. In effect existing shareholders have the right of first refusal where interests are up for transfer. As a last resort the company can acquire such interests but they must be disposed of again within a year. Thus we have a classic close company regime.

Spain has a separate regime for public stock companies (*sociedades Anonima*, or SA) which is to be found in the Companies Act 1989 (Royal Decree 22 December 1989) (replacing the former 1951 regime). As with France the public company is widely used by the business community. Public companies can be created either via *simultaneous* incorporation (agreement by founders to take requisite shares) or by *successive* incorporation (public subscription); the former method is more common. Public companies (or share companies, as they are often labelled) must have a minimum share capital of at least 10 million Ptas. This share capital fund is to be augmented by compulsory setting up of a reserve out of profits so that it reaches 20% of the value of the nominal share capital. Annual payments of 10% of the net profits are required for these purposes. As an additional protection if the value of assets falls below one third of the share capital a mandatory liquidation procedure must be activated.

Listed public companies (in total there are barely 400) must have a minimum share capital of 200 million Ptas.

Shares are freely transferable. The law on public companies was amended in 1989 to permit non-voting shares to be issued. A unitary board model is followed in Spain. Shareholders are represented by proportion on the board. A five year maximum term of office is specified, though re-election may be possible. Many companies are run by a sole administrator who combines the roles of managing director and company secretary. Directors duties are framed in general terms by the governing legislation; there is a lack of specific detail , though there is some provision on conflicts of interest. Works councils have been a feature of this system since 1947. The holders of 5% of the shares can call an EGM (this applies both to public and private companies). Minority shareholders (again holding a 5% stake) can challenge resolutions on the grounds that they were void (illegal) or voidable (contrary to the company's constitution) but strict time limits apply (one year in the case of voidness and 40 days if only voidable). The holders of 5% of the capital can also prevent the majority of shareholders ratifying a breach of duty by directors and if necessary take action on behalf of the company.

Consolidated group accounts was provided for by Royal Decree 1815/1911.

In 1991 a new law was introduced governing public takeovers (Royal Decree 1197/1991, July 26 1991). The National Stock Exchange Commission (CNMV) is responsible for supervision of public offers.

Special rules exist for the transformation of public companies into private companies, or indeed, into non corporate enterprises.

2. <u>Recent developments</u>

In 1994 new legislation was passed governing what are known as surety companies. These are businesses designed to provide finance (by the provision of guarantees) for SMEs with no more than 250 employees. Tight controls exist with regard to the membership and objects pursued by such companies.

The law relating to private companies in Spain was substantially remodelled by the Law of March 24 1995. The effect of many of the changes introduced by this legislation has been noted above. This legislation reflects a growing interest in the use of private companies in Spain. The 1995 Act confers appraisal rights on shareholders (i.e. the right to be bought out in the event of fundamental changes, such as a change in the nature of the business). Procedures for the exclusion of shareholders are also introduced. New transformation options, including conversion into partnership modes are provided for. Directors are made personally liable for failing to act proactively in the event of the company encountering financial difficulties. Single member structures are allowed by the 1995 Act, though a special regulatory framework has been devised to accommodate potential difficulties that might flow from this concession. Accounting concessions are offered to private companies to reduce the regulatory burden and the requirement for an annual audit has been removed from smaller enterprises. A three year transitional period was fixed for these changes.

The Spanish government introduced relaxed accounting rules in 1996 for medium sized enterprises.

Criminal liability of directors was codified by the Penal Code amendments of 1996. Apart from fraud criminal liability can arise through abuse of power or denying shareholders and official bodies their legitmate rights to obtain information about the company. Shadow directors may be caught by these provsions.

An interesting development was brought about by Law 4/97 on Limited Liability Labour Companies. Under this consolidating legislation the previous rules in a 1986

Act are updated and extended beyond employee controlled public companies to private companies where workers are in control. This also reflects the growing popularity of the private company option in Spain. Such companies can only issue registered shares and preference shares are not permitted.

The law relating to the securities markets and listed companies was revised in 1998. The rules relating to insider trading were modified. In addition to criminal sanctions administrative penalties featuring fines and repayment of sums five times the profit earned may be imposed.

3. Future reforms

We have no information on imminent reforms. Progress is being made on drafting a corporate governance code of conduct but in the meantime individual companies have introduced their own voluntary procedures.

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SWEDEN

1. Background

Company law in Sweden was stable for many years with the Companies Act 1975 providing the basic framework. After membership of EFTA and then the EEA, entry into the European Union in 1995 has stimulated a latent trend in favour of the modification of Swedish Company Law and an increasing bifurcation between public and private companies.

Sweden enjoys a variety of business forms but the limited liability company (*aktiebolag*) is of great importance. The main statute governing companies in Sweden is the Companies Act 1975 (as amended). This legislation covers both types of company unless the contrary is stated.

Under the 1975 Act private companies were required to have a minimum share capital of SK 50,000, but this amount has been doubled recently (see below). Public companies are required to have a minimum capital of SK 500,000. Both of these sums are comparatively modest amounts.

Normally a minimum of three directors is required for the board (*styrelse*) but two will suffice if the share capital is less than SK1 million. For companies with a share capital of SK1 million a managing director (chief executive officer, *verkstallande direcktor*) must be appointed by the board.

Both types of company require a memorandum and articles of association. Traditionally two modes of incorporated have existed in Sweden for many years. The old established *successive* incorporation procedure has increasingly been replaced by *simultaneous* incorporation, which is less cumbersome. The use of off the peg companies still occurs in Sweden. The articles can permit shares to have differential rights but no share can enjoy a voting power more than 10 times the power of any other share. The old system of restricted shares (designed to discriminate against foreign investors) was scrapped in 1993. Where a company has less than 10 shareholders the members have a right to see the books.

A company can register part of its activities in the name of a subsidiary, but such a subsidiary does not possess separate legal personality.

Under a 1987 Act if a company has more than 25 employees two employee representatives are to be given places on the board. If there are more than 1000 employees this figure is increased to three representatives.

A system of a mandatory capital reserve applies. Companies must set aside 10% of their net profits until a reserve amounting to 20% of the value of the share capital is built up.   There are proposals to abolish this system because of the cnstraints placed upon dividend payments.

In Sweden special duties are imposed on directors of companies encountering financial difficulties. In the event of the shareholder equity falling to below 50% of the amount of the share capital directors are required to call an EGM and to present a special balance sheet (*kontrollbalansrakning*) before that meeting to enable it to consider liquidation. If this choice is not pursued the company has eight months to rehabilitate itself to the point where the equity is commensurate with the registered share capital the directors are obliged to petition for liquidation or risk personal liability for corporate debts accruing thereafter.

The holders of 10% of the share capital can compel the company to bring an action against directors for breach of duty though there is a one year limitation period which runs from the date when the shareholders received the accounts for the year covering the alleged wrong. Ratification by general meeting is possible in such cases but creditors and receivers can still pursue the matter.

Shareholders owning 10% of the capital can compel directors to declare a dividend equal to half of the year's net profits. The procedural rules on dividends are strict. Failure to comply with these rules may lead to a dividend having to be repaid.

The holders of 10% of the shares can seek the appointment of a special examiner or ask for a special audit.

Sweden has since the 1930s maintained a strict bar on share repurchases and financial assistance in share acquisitions but changes have recently been recommended in this area (see below).

The so-called Leo Act in 1987 (1987/464) created special minority rights for investors in listed companies. These are designed to stop controllers increasing their power by further share issues to associates. Any such issue will require the support of 90% of the shareholders. It seems likely that this self standing statutory regime will soon be incorporated into mainstream companies legislation.

Insider Trading was prohibited by an Act of 1990, though this legislation was modified with effect from January 1 1997.

An unusual feature of company law in Sweden concerms the role of the so-called VPC company (*vardepapperscentralen*). This is a company whose function is to operate a service whereby shares can be recorded and transferred through a central registrar system maintained by the state. Other company information matters can be dealt with - e.g. sending out the annual return and details of dividend payment. In effect it is a frm of outsourcing of administrative functions by companies. This securities clearing scheme is used by larger companies because of the economies of scale. The vpc company used to enjoy a monopoly in running this scheme but this was abolished as from January 1 1999 as Sweden is moving towards a general scheme for the public registration and transfer of secuities.

Commercial activities by foreign companies are governed by the Foreign Branches Act 1992.

2. Recent developments

Over the past two years it has proved necessary for Sweden to introduce the EU Company Law Harmonisation Directives. The Company Law Committee thus recommended that the First, Second, Third and Twelfth Directive should be implemented with effect from January 1 1995. Special provisions would be required to enact the Third Directive on mergers as a completely new regulatory framework would be required. The Swedish Annual Reports Act 1995 represents an attempt to implement the Fourth and Seventh EC directives.

Globalisation may necessitate other changes in Swedish company law. Thus the current requirement that one-half of directors of a Swedish company must be resident in the EEA (a typical feature of Scandinavian law) will have to be dropped or amended to ensure that it does not operate in a such a way as to discourage inward investment.

Some changes can be attributed to domestic factors. Thus the minimum share capital for a private company has been doubled from SK50,000 to SK100,000. This substantial increase introduced in 1995 caused concerns within the Swedish business community and private companies were given until the end of 1998 to meet this new capital requirement. As an alternative special informal dissolution procedures were made available on a short term basis for those businesses that would be unable to meet this new threshold.

Sweden, like many developed jurisdictions, has introduced a new corporate rescue model (see Reorganisation of Business Act 1996, Law No. 764). This new law, which came into effect in September 1996, allows commercial companies (but not banks or insurance companies) to take advantage of a moratorium facility to rehabilitate themselves. The procedure involves a petition to the court and the appointment of an administrator (*rekonstruktor*) . The petitioner need not formally be insolvent; financial difficulty will suffice. Although the administrator is in overall control the directors retain day to day control of the business; as in Chapter 11 of the US Bankruptcy Code we have a “debtor in possession” regime. The administrator draws up a reorganisation plan and is responsible for reaching a settlement with creditors. The reorganisation period lasts for 3 months but the court can extend it to a maximum of one year.

In 1997 the rules relating to service of writs on limited companies were modified to facilitate litigation processses.

3. Future reforms

Swedish companies legislation has undergone a fundamental review in the 1990s. There is an active (and standing) committee which has reviewed many aspects of company law reform. Several authoritative reports have emanated from this body.

Apart from the 1993 Consolidation Act basic core principles have been reconsidered. This process lead to the publication of an official report in 1995 and subsequent government Bill (1997/98:99). Under the 1995 Report of the Swedish Company Law Committee shareholder rights were to be enhanced by removal of the possibility of special majority provisions blocking the removal of unpopular directors. Changes were proposed in the system of corporate governance by clarifying the responsibilities of directors. The limitation period for actions against directors was to be extended from 3 to 5 years. Auditors were to hold office for 4 years.

Reports of the Company Law Committee in 1997 have concentrated on issues relating to formation. The recommendation here favours simplification of the current procedures by permitting only the simultaneous incorporation method. In SOU 1997/22 improved flexibility on share transfers and acquisition by companies of their own shares (but up to a 10% limit in the case of public companies) was also recommended. In spite of these changes the procedures governing share repurchases are comparatively strict and require the support of the holders of two thirds of the shares in general meting. Preemption rights for shareholders in private companies were to be encouraged. The current law on dividend payments was seen as too cumbersome and some of the procedural hurdles were to be reduced. Procedures permitting the holders of 90% of the shares to buy out the minotiry were to be relaxed. Participating debentures, having been outlawed for some 65 years were recommended for rehabilitation. Some of these proposals have been adopted in draft legislation noted below.

Most European companies have a mandatory bid procedure - i.e. a regime under which a person who acquires a certain percentage of the company's shares is then obliged to make a ful bid. This has been the subject of some controversy in Sweden but in SOU 1997/22 the Company Law Committee refused to recommend its introduction.

Further changes are likely to be introduced into Swedish companies regulation as a result of proposition 1997/98:99. These changes (effective from 1/1/99) are designed to enhance shareholder participation through voting. The curious statutory rule restricting shareholders' right to vote to the maximum extent of 20% of the capital present at the meeting will be scrapped, though this change needs to be viewed in the light of the fact that, at present, this limitation can be dispensed with if the articles so provide. The duties of directors are to be clarified as is the relationship between the board and the managers. Whistleblowing duties will be imposed on auditors, requiring them to report suspected economic crimes to the regulatory authorities if the breaches in question are not immediately rectified. Under this regime auditors are also obliged to resign before reporting the mattter to the authorities. The rules governing share purchases by companies are likely to be liberalised.

Concern has arisen in recent years over abuse of limited liability companies by individuals with criminal intentions who disguise their involvement through nominees or "front men". Accordingly, the Company Law Committee was asked to consider how best to combat this abuse. In its report in 1998, often described as the "Front Men Report" (SOU 1998/47), significant regulatory measures were proposed. Where a company requires a licence to engage in a particular trade the powers of the regulatory authorities were to be extended. The crteria governing the appointment ansd qualification of directors were to be tightened up. Any attempt by directors to confer authority on an outsider by means of a power of attorney was to be regulated by disclosure. Public registration for all shareholders, and not just those shareholders whose shares were dealt with under the VPC system, was also recommended.

Although Sweden will not be an early member of EMU it is taking steps to permit company accounts to be drawn up in euros.

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SWITZERLAND

1. Background

Although Switzerland is not a member of the EU nor the EEA it is a significant jurisdiction in terms of companies regulation. Its central geographical location and system of financial/ banking confidentiality attracts much capital and a variety of enterprises. The foundation of Swiss Corporate Law is the Code on Contractual Obligations (Third Section). This Code applies to public corporations (arts 620-763) and private limited companies (arts 772-827). It is quite restrictive. For example, companies are required to state their business objectives and an *ultra vires* rule applies. Public companies are more common than private companies.

Three members are required initially to form a public company but only two are needed for a private company incorporation. Once incorporated, public corporations are permitted to exist with a single member.

Private companies (GmbH) must have a minimum capital of SF 20,000 and a maximum which must not exceed SF2,000,000. Individual shareholders must hold a minimum of shares of nominal value SF 1,000. Private companies are comparatively rare in Switzerland; they tend to be favoured by German expatriates.

After some thirty years of deliberation major changes were introduced into the Swiss law of public companies with effect from July 1 1992. These reforms were designed to clarify directors' duties; promote shareholder rights and increase transparency through disclosure provisions. Under this Company Amendment Act 1991 a minimum share capital of SF100,000 is laid down for public corporations (AG/ SA) incorporated after January 1 1985. This represented a doubling of the previous amount. The minimum nominal value of a single share is now SF10 (reduced from SF100 to attract small shareholders). Existing public companies were given a five year transition period to adapt to the new framework.

The law on share capital was also deregulated under the 1991 Act. Companies are now permitted to buy back their own shares out of profits up to a maximum of 10% of the capital. This level can be increased to 20% if the purchase is necessary to protect the company from undesirable members, but the maximum 10% level must be restored within 2 years. Non voting shares are permitted and their rights clarified under the 1991/ 1992 changes.

Single tier board structures are followed. For public companies the majority of board members must be Swiss citizens resident in Switzerland. For private companies non Swiss citizens are acceptable provided resident in the jurisdiction

Traditionally the protection of shareholders rights was dependent upon the exercise of judicial discretion based upon general principles of fairness. Minority shareholder rights have been advanced since 1992 by enabling shareholders to request at general meeting a special audit (see art 697 CO) . If the meeting refuses to agree to this the holders of 10% of the shares can apply to the court to request a special audit (a concept imported in 1992 from Germany). The auditor's report may throw light on breaches of duty by the directors and enable actions to be brought against them for misfeasance. The 1992 reforms extended the period of notice required to call shareholder meetings from 10 to 20 days in the hope that this would improve participation rates. The holders of 10% of shares can force an EGM or seek a dissolution from the court in the event of oppression - the court here looks for evidence of systematic abuse. Any shareholder can bring a derivative action.

Improvements were made in company accounting to improve disclosure and transparency but Swiss law still does not require that accounts of public companies (unless listed on the Stock Exchange) provide a true and fair view of the financial position in the sense that this is understood in the context of international accounting standards..

One measure designed to promote creditor protection is the requirement for directors to report to the court in the event of the share capital being unable to cover the debts and the judge will then decide whether to put the company into bankruptcy.

A Swiss Takeover Code (a self regulatory model) was introduced in 1989.

2. Recent developments

The Code was amended under the 1991 Act with effect from July 1 1992 but a transitional period which expired on June 30 1997 was fixed. The effect of the 1991-92 reforms (mainly in the context of share capital changes) has been noted above. One reform not noted is the introduction of the concept of contingent share capital into Swiss corporate law. Contingent capital is basically convertible debt .

In 1997 further changes were introduced in the law governing joint stock companies. In particular the rights of *participation holders* (essentially non voting shareholders) were improved to place them more on a par with ordinary shareholders. These changes took effect in June 1997.

A new procedure for the reorganisation of financially troubled businesses was introduced on January 1 1997 as a result of the new Feeral Bankruptcy Code. This scheme seeks to facilitate reorganisations and workouts by allowing applications to be made to the court for the activation of a moratorium. A special trustee (*sachwalter*) is then appointed to oversee the preparation of the rescue plan which, if approved by the holders of two-thirds of the debt, becomes binding. The directors of the company remain in position subject to the supervision of the trustee. In essence this procedure bears many similarities to the Chapter 11 regime in the USA.

Changes introduced by the Stock Exchange and Securities Trading Act 1995 took effect at the beginning of 1998. These changes relate to disclosure of share interests in public companies and squeeze out procedures which permit the holders of 98% of the capital to acquire the remaining 2% by application to the court.

3. Future reforms

We are not aware of any major reforms on the horizon.

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MISCELLANEOUS JURISDICTIONS

In order to complete our survey it is appropriate to comment upon developments in a number of other European jurisdictions. Two constant themes are to be noted:

1. The desire of a number of jurisdictions to assimilate their systems of Company Law in preparation to join the EU
2. The development of capitalist systems of Company Law in jurisdictions moving away from former Communist law of enterprises

<u>LIECHTENSTEIN</u>

This jurisdiction provides a key role in European business topography. The country belatedly became a member of EFTA in 1991 and the EEA in 1995. A key feature of its legal system has been its ability to combine European/ continental legal traditions with Anglo American concepts. For example, it is one of a few continental states to admit the idea of a trust into its legal system. Liechtenstein is heavily influenced by developments in Switzerland (and to a lesser extent by Austrian law) and uses the Swiss franc as its local currency. The main legislation in the field of companies regulation is the Persons and Companies Act 1926.

The public company (denominated as AG or SA) is the most common corporate structure found in this jurisdiction. A minimum capital of 50,000 Swiss francs (or the equivalent in foreign currency) is required and the minimum par value is 0.01 Swiss francs. No par value shares are permitted in limited circumstances. Companies are required to have an objects clause and acts committed in breach of the objects cannot be enforced by a third party with notice of the breach. There are the usual restrictions upon share repurchases. No corporate seal is required. There are no nationality requirements for membership; the entire share capital can be held by foreigners but a licence will be required to undertake business and such a licence is only awarded to nationals .

Companies in Liechtenstein normally use the unitary board model, but a supervisory board may be established. Similarly, worker representation is a matter of option, not compulsion. The supreme organ in the public company is the general meeting who appoint the directors. The holders of 10% of the shares can requisition an EGM.

Although companies require an audit access to financial information about thefinances of a company in Liechtenstein is not freely available.

If the capital falls by two thirds and replacement is not possible the company must be put into liquidation. Failure to do this exposes the directors to personal liability in the event of claims by creditors.

Other business structures worthy of note are the establishment (*anstalt*), trust (*treuhandschaft*) and foundation (*stiftung*). An establishment consists of settled property under an entity enjoying legal personality.   The property must have a minimum value of SF30,000. The founder enjoys rights of management and control (unless vested in a board of directors) - these rights can be transferred and inherited. There are no shareholders or members.

A foundation is a similar entity arising out of the endowment of assets worth at least SF30,000. The assets of the foundation are separate from the personal assets of the founder; this can have important tax implications. Persons are nominated as the beneficiaries of the foundation.

A trust is recognised by the Persons and Companies Law of 1926 - in this sense it is unique in continental Europe (though the Marini Report in France calls for a similar recognition). Trust income can be accumulated for indefinite periods; there is no rule against perpetuities. The trust as such does not enjoy legal personality but it can be operated as a trust enterprise (registriertes treuunternehmen) and thereby become a legal entity governed by the Trust Enterprises Law of 1928. Liechtenstein has thus borrowed the model of the business trust from the USA.

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CZECH REPUBLIC

As one of the countries likely to enter the EU in the next wave the Czech Republic has made great strides to westernise its system of companies regulation..

The private company in the Czech Republic is called a limited liability company (spoll. s.r.o.). It has a minimum share capital of CZK 100,000 with the minimum individual participation being CZK 20,000.   In addition to this minimum capital a compulsory reserve fund must be created using 5% of the net profits until a reserve of 5% of the share capital is attained. A maximum of 50 members is specified. Unitary board structures are adopted unless the constitution provides for a supervisory board.

Public or joint stock companies are reqied to have a minimum capital of CZK1 million. They are designated as “*akc. spol*.” or “a.s.”. The two tier board structure, using a supervisory board is adopted. If there are more than 50 employees a third of this board must be made up of worker representatives. Provision is made for the establishment of a capital reserve fund.

In 1993 insolvency reforms were introduced to permit a three month moratorium to enable companies an opportunity to restructure.

The Czech Commercial Code was substantially amended in 1996 to facilitate business restructuring, including the conversion of companies from private to public. The new rules seek to underpin minority shareholder protection and to provide a more detailed regulatory regime for corporate restructuring.

The Securities Act 1992 was amended in 1998 (Law 15/98) to promote a transparent capital market.

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HUNGARY

Hungary is yet another jurisdiction looking to join the European Union in the near future.

A new Companies Act was enacted in 1998. This replaces the former regime governed by Acts of 1988 and 1991. One aim of the new regime is to facilitate the process of formation. Companies come into existence at date of registration and not from the date when the constitutional documents are signed. Failure by the authorities to register within 30 days will lead to the company's registration being automatically activated. One interesting aspect of the 1998 Act was to split public companies up into "open" and "closed" varieties. New rules are introduced to facilitate major share acquisitions. A compulsory purchase mechanism is made available subject to appropriate provision for minority shareholder protection. The Act also introduces new regulations on share buybacks and thse represent limitations on the previous law. Private companies may acquire up to 10% of their capital with the relevant figure for public companies being 5% - where treasury shares are acquired they must be resold within one year. A mandatory liquidation procedure was set in place to deal with falls in share capital. Finally, a regime on groups that deals in particular with the duties of controllers was introduced; that regime mirrors the German model.

Other forms of business organisation apart from limited companies are available under Hungarian law. The Civil Code (Legal Persons) (Amendment) Act 1993 regulates a range of associations having legal personality including public utility companies, societies and foundations.

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RUSSIA

In the 1990s Russia and many of the other former Soviet Republics made great strides towards resurrecting a western style system of company law. The first move was made by the Soviets in 1990 but with the break up of the USSR it has ben left to individual states to proceed. Essentially the system that is favoured is European in origin, though some US influence can be detected. Minimum share capital is specified (though the relevant figures are linked to wage levels and not currency) and par value shares are the norm. The formal distinction between public and private options is to the fore.

In 1995 the law of joint stock companies (i.e. public companies) was enacted. Key points to note include the use of cumulative voting procedures (which is mandatory for companies with more than 1000 members) and the adoption of a board of statutory auditors (along the lines of a number of other continental jurisdictions). Formal provision is made for informal board meeting (e.g. by use of the telephone). The holders of 10% of the shares can force an EGM. Unusually there is provision for parent companies to be held liable for the debts of subsidiaries if they are responsible for the insolvency. The aw on joint stock companies is further developed by the Securities Market Law of 1996 which regulates such matters as insider trading and requires companies with more than 500 shaeholders to outsource their share registration function to a competent professional organisation.

A further change was effected in 1998 with the introduction of the peoples enterprises option. This appears to be a corporate structure in which the workers own less than 49% of the capital.

A new law on private limited companies was enacted in 1998. This deals with a variety of aspects of private companies regulation including voting rights, appraisal rights and the right to seek the expulsion of disruptive members. Boards as such are not provided for; instead shareholders appoint managers to run the affairs of the company.

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<u>TURKEY</u>

The law of business organisations in Turkey is based upon the 1957 Commercial Code (as amended). This regime, which reflects distinct Swiss and French influences, recognises a range of business models including companies. The basic distinction is between the limited liability (or private) company (*limited sirket*) and the public limited company (*anonim sirket*).

The former are by far the more common choice for entrepreneurs. It is believed that there are some 360,000 private companies as opposed to 76,800 public companies. Of the latter group only 800 are listed on the Istanbul Stock Exchange. From this statistical profile it is clear that as with many other continental jurisdictions the public company is widely used and is not primarily a vehicle for attracting capital from the stock markets.

Private companies have a maximum of 50 members. Sngle member private companies have not been recognised. Share certificates are not used; in effect a quota system operates whereby the participation interest is represented by a multiple of a predetermined amount (25,000,000 TL). The constitution (*ana sozlesme*) is embodied in a single document; this differs from the model of having separate memorandum and articles. The constitution will contain the usual requirements of name, registered office, objects, capital, etc. A minimum capital of 500,000,000 TL is specified (this figure was increased in 1995). In practice the running of the company is vested in managers who act under the control of the general meeting. The French influence here is apparent. If there are more than 20 membrs a board of auditors will be required.

Public companies must have a minimum of 5 members. A minimum capital of 5,000,000,000 Turkish lire is specified (this amount was fixed in 1995). Successive or simultaneous incorporation procedures may be used, though the latter is more common. The Ministry of Justice must approve the incorporation. Share certificates are used and shares may be either registered or bearer. A unitary board structure is adopted, though a supervisory system of statutory auditors operates; these are in house auditors and not the external independent auditors that we have become accustomed to. Theie audit extends beyond mere financial checks and reflects a much wider supervisory function as to the legality of the operations conducted by the directors. Auditors may in certain cses be able to summon shareholder meetings.

Turkish companies must maintain a number of statutory reserves. The first reserve is to be built up out of 5% of the net profits each year until a figure equivalent to 20% of the share capital is reached. A second reserve should then be built up and ultimately these reserves should amount to 50% of the share capital.

Although objects are required to be specified for Turkish companies generous protection is afforded to bona fide outsiders who contract with the company.

The holders of 10% of the shares can call for an EGM to be summoned. The Ministry of Commerce can send a representative to company metings to obtain information on the company.

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