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# COMPANY LAW IN TURMOIL AND THE WAY TO GLOBAL COMPANY PRACTICE

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# COMPANY LAW IN TURMOIL AND THE WAY TO GLOBAL COMPANY PRACTICE

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**Abstract**

*In the first part of this paper, the point is argued that in practice, company law, at least as far as listed companies are concerned, is increasingly the product of international practice, which generally draws on American law and regulation. This effect is the consequence of the requirements imposed by the financial markets, by the existence of an international community of business leaders and advisors, etc. "Global Company Practice" may become increasingly important in real company life, notwithstanding the differences in regulation.*

*In the second part, a first and preliminary analysis is made of the potential extraterritorial effects of the new American regulations ( Sarbanes-Oxley Act, NYSE and Nasdaq corporate governance requirements) on European company practice. Increasingly integrated company practice may be the consequence. The voluntary nature which was so characteristic of the emergence of the „global company practice" is suffering heavily.*

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# COMPANY LAW IN TURMOIL AND THE WAY TO "GLOBAL COMPANY PRACTICE"

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**1.** These are challenging times for company lawyers. Much of their standard concepts and theories developed in the 1990s are being challenged under the recent confidence crisis that has pervaded the American company law system in the years 2001-02. These developments will, as is already the case in some countries, also affect European thinking and regulation in company law land.

The accidents that have occurred – and that continue to be discovered and investigated – have received much attention in the international press. We are still waiting for the results of the first systematic investigations to tell us what really went wrong. Future litigation will also shed some light on the causes of the collapses. One aspect however is already clear today: the present crisis is not only a result of fundamental economic developments, such as the economic cycle, but is also, and more deeply the consequence of a major collapse in the corporate governance mechanism taken as a whole.

**2**. What is striking with these recent events is the speed and depth of the transmission of the American crisis to the European scene. Although in general - and a few exceptions notwithstanding - the European companies - nor the Canadian, nor the Australian - have not been plagued by the ills that affect their American counterparts, the effect of the American confidence crisis has struck the European scene just as much as - and even worse than - the American home market. The fall in equities prices has been stronger in Europe than in the US. Especially the knock-on effect of the price plunge on both sides of the Atlantic has had a devastating effect on equities prices in Europe, due to the ties that exist between listed companies in Europe. This has been especially visible in the financial sector, more specifically in the insurance sector, where the association of banking and insurance in so-called "bank-insurance groups" has revealed the increased sensitivity of these groups to overall equity price gyrations. The same has happened to the valuation of holding companies, although there, due to different valuation rules, the effect is quite different. Comparable knock-on effects can be noticed in the sector of the investment companies: American mutual funds have been reported to sell equities at a pace rarely seen before, while European investment funds

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probably have been less sensitive to the confidence crisis. The effect on pension funds is also different, as in Europe, most pension funds play a limited, often complementary role.

**I.. Company law in competition.**

**3.** This interdependence of securities markets on both sides of the Atlantic is caused by numerous factors. The fundamental economic dependency of both economic systems is relatively limited: the imports or exports from and to Europe by the United States are, if not marginal, at least not dominant. Indeed, since many years, firms have established branches and subsidiaries in each other's economies, so that the trade currents can be kept down, thereby also offering protection against the risk of unpredictable foreign exchange fluctuations.

The ties between the two markets are mainly, but not exclusively, financial. Investors have been acquiring securities, mainly equity, in each other's systems, up to such a percentage that one could consider that these two markets as being substantially integrated. While European markets continue to be hampered by not being able to offer direct access to the US investors - hence the discussion on having trading screens directly installed with US brokers - US investors have not hesitated to diversify their portfolios by acquiring substantial stakes in European securities. US investment in Europe mainly concerns institutional investors. This feature is not without importance as these investors have urged European companies to adhere to US standards of corporate governance.

The opposite financial flow is even more impressive: European investors have acquired very substantial amounts of securities in the American markets, up to the point that one now witnesses clear sensitivity of the dollar/ euro exchange ratio to capital disinvestment movements.

The relative amounts of both investment flows explain why the confidence crisis that mainly affected the US investors has more heavily affected European equity prices: US investors have obviously been more inclined to liquidate their overseas holdings, in favour of their domestic positions, leading to a relatively stronger decline in European equity prices. The relatively lower degree of liquidity of the European markets may also have contributed to this divergent price development.

**4.** Financial interdependence of European and American securities markets has also affected company law and practice in Europe: concepts, ideas, practices and techniques in Europe, and elsewhere, have moulded according to the way the dominant market has been dealing with similar

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issues. In a further stage of development, regulation has been affected by the US way of reasoning: first in self regulation - the numerous corporate governance codes could stand as an illustration for this trend - later in government regulation, where ideas and techniques such as audit committees, independent directors, proxy voting, insider dealing, take-over and anti-take-over devices have been introduced or at least discussed in different regulatory fora in Europe, initially on the basis of American practice and experiences, later enriched by an increasing number of European applications. Certain features of company law, and especially of company practice, have therefore become increasingly comparable. This is the more striking as some of the fundamental concepts where substantially different: the role of major blockholders, or the social function of the business enterprise, including co-determination, are characteristics in which the European business structure differs from its US and UK counterparts. Whatever these differences, an overarching pattern of a general company structure seems emerging: it is inspired – but only in part - by US practice, but amalgamates experiences originating in several economic and legal systems. It probably is still too early to talk about the "global company pattern", but signs are pointing into the direction of some "international company practice".

The phenomenon is even clearer in the field of securities market regulation and practice. Disclosure documents, such as prospectuses have widely borrowed from US practice, also under the pressure of the professional intermediaries intervening in the drafting of these documents (bankers, lawyers, accountants). Accounting practice has in the recent past been dominated by the debate about the possible use of US GAAP, at least for - but not exclusively limited to - companies that are listed or traded on US markets. This discussion is now superseded by the introduction of IAS, aiming at world-wide recognition of accounting standards. Corporate governance codes - often established at the initiative of the local exchanges - have borrowed from American techniques, sometimes directly, more frequently indirectly as being based on the authoritative UK model, the Cadbury Code. Less visible are internal company rules and practices dealing with price sensitive information, or with directors' dealings in company shares.

**5.** But even outside the limited world of companies listed on exchanges, or considering an application for listing, the influence of this emerging "international company practice" is visible. Here too, although in varying degrees, the influence of the dominant economic system is undeniable, leading to a still undefined "globalised, widely accepted business practice".

The drivers underlying this evolution towards a "globalised" practice are numerous. A significant role has to be attributed to the principal actors intervening in company life.

Managers of larger, listed or unlisted, firms often have accumulated their business experience in numerous, especially multinational, firms. Their international experience is highly

valued, especially if part of it has been the result of their employment by some of the world-wide operators.

The same can be said about the regular company advisors, such as management advisors, IT advisers, but also bankers or legal advisors. Most of these have been US educated or trained, and bring with them the much needed international experience and technical knowledge, which they will have to combine with local regulations and traditions.

Auditors, especially those of the few remaining international auditing firms are organised to apply international standards as developed by their world-wide organisation. The high concentration of auditing assignments to the remaining four international auditing firms will increase this tendency, up to the point that levels of expertise and knowledge are unachievable for auditors that do not belong to one of these four remaining firms. Here, one may identify the limits of effective competition and danger of concentration in the exercise of the international business practice, leading to a strengthening of this practice.

The "products" generated by these parties also have a tendency to become increasingly uniform, and inspired by the techniques, traditions and rules that are used in the predominant market. Merger agreements are drafted according to the models that are usual in the leading markets, essentially the UK and US markets. This point has also been made about the techniques used in securitisation schemes, where a new set of techniques, a new terminology and standard contracts have been developed, leading to what certain scholars have called a new contract law, comparable to the lex mercatoria. The same phenomenon is visible in other fields of business law, such as banking contract law.

**6.** This drive to "globalisation" or "internalisation" has also been sustained by the investors themselves, as the ultimate beneficiaries of the business efforts. The role of investors in publicly traded securities is well known. A similar, but necessarily weaker phenomenon is visible in the market for unlisted securities, e.g. in the venture capital market.

In publicly traded companies, investors are taking an increasingly proactive stand to influence management and boards to adhere to standards, - on governance, accounting, corporate social responsibility, referring i.a. to ethical conduct, sustainable growth or environmental behaviour - that are paying due attention to the long term interest of these investors. The role of institutional investors in shaping governance and influencing company decision-making has been sufficiently documented. The same can be said about organisations representing minority shareholders, whose legal position has been recognised in some regulations[1]. It suffices to say here that the American institutional investors, and minority defence organisations and their requirements have stood as a

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[1] E.g. in France.

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model for the proactive policies developed by similar organisations in Europe. A similar, although weaker drive is being developed with respect to the other aspects of corporate behaviour, as mentioned above. Here again, examples have been set mainly by organisations operating in the dominant economies[2]. Judicial enforcement has become more frequent that administrative[3], or voluntary, as was previously the case on the European continent.

Investors in not publicly traded companies, such as investors in venture capital, are also calling on internationally developed techniques to monitor their stake. So e.g. is financial reporting often based on the rules established by the European Venture Capital Association.

An element that is clearly visible but nevertheless very striking is the emerging use of a single business language. Multinational firms, whatever their home base, cannot continue to use their home language. De facto, English has become the internationally accepted business language, obliging non-English native speakers to use English as their common language to allow the organisation to take part in their exchange of ideas. This trend reinforces the previously mentioned ones, as it facilitates contacts with internationally active advisers.

**7**. How can this drive to internationalisation be situated against the background of company law remaining essentially a domestic matter? In most jurisdictions, company law remains a substantially local topic, being governed either by the law of incorporation or by that of the company's seat. Has not American company law remained largely local, i.e. state law? Does not the same apply to the European Union?

In the European Union a drive for harmonisation has been felt essentially in he first quarter century of the Union. It has been weakened these last years, in part as a consequence of the increasing internationalisation, leading to hesitations as to the necessity and to the direction of future harmonisation processes. This hesitation may be ascribed to the changes in opinion about the role of the business firm and about the fundamental organisational techniques[4]. Also, the philosophy of "harmonisation" is being criticised, as differences between the national company laws have continued to exist, and the expected economies of scale have not been achieved[5].

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[2] The movement for corporate social responsibility dates back to the early seventies, see GREEN, M. and MASSIE, R., The Big Business Reader, essays on Corporate America, 1980.

[3] One could refer here to the role played by securities market supervisors with respect to the development and enforcement of company law rules, such as the Belgian Commission bancaire, the French COB and the Italian Consob.

[4] E.g. on the existence of one or two tier boards, on the role of the shareholders, in general and on the "one share, one vote" rule.

[5] See for more details: WYMEERSCH, E., European Company Law and Company Law in Europe, 1st European Jurists Forum, Nomos Verlag, 87, (2001)

As a consequence, there has been insecurity as to the way forward, as to the prioritisation of the subjects to be tackled, but also as to the way to deal with them (e.g. self-regulation v. state regulation; directive v. regulation).

In the meantime, company practice - i.e. "de facto company law" - has moved more and more closely to an internationally widely accepted pattern. If German business leaders not only advocate but effectively introduce in leading companies - on a "de facto" basis - a management board chaired by a powerful CEO, rather than maintaining the mandatory two tier board, chaired by spokesmen, the decision is inspired and motivated by the will to mirror US business practices.

**8.** If a wide movement towards a single business pattern can be witnessed, the causes for this evolution deserve further scrutiny.

World-wide competition probably is the main factor: not so much the direct competition in the product markets, or in the labour markets, but mainly competition for the financial means, for the capital to be invested. Here competition relates both to volume and in price. The awareness of the impact of the securities markets on the financing conditions, but indirectly also on the financial position of the business leaders has increasingly lead to a mimicking of the successful formulae developed by their most successful counterparts. As most of the time these have been American, it seems logical that the American business model has been advocated as the most efficient. The long-lasting successful business cycle underpinning American business in the 1990s has contributed to the prestige of American firms and their status as model to be followed world-wide. Approaches followed by US firms - e.g. the firms' growth being due mainly to acquisitions, rather than through internal growth - is a pattern imitated by many European firms, often without any evidence of additional efficiency. These decisions were however taken on serious business grounds, among which the perception of the markets were essential. The need to be able to compete with sufficient weight in the international markets, the need to avoid that other parties take advantage of additional opportunities, or to avoid becoming dwarfed while competitors are increasing their impact on the markets, are often cited. Here again, the pace and direction of developments were dictated by the main competitor.

Competition in the markets necessarily leads to the development of the same tools, and, if possible, of even more efficient tools. The comparison with a war situation is striking: competitors want to have at least the same weapons. Flexible merger regulations, open take-over markets, a wide choice of financing instruments, performance linked remuneration can be cited as examples. If

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possible, firms will request or develop an even more favourable treatment, to be able to outwit their competitors[6].

**9.** Competition between the business firms necessarily influences the attitude regulators and supervisors will take if confronted with the same issues. In the field of company law, there are traditionally no supervisors in charge of checking the implementation of the law: this is taken care of by the judiciary, on the basis of an ex post review. In the field of securities, under the aegis of the "protection of the investor", an ex ante review often is required. Here securities supervisors have frequently been involved in applying company law, accounting and disclosure rules. In many jurisdictions they have been involved in checking whether company conduct was in conformity with not only the legal rules, but also the more general precepts of protection of the investors, with principles of ethical business conduct and the efficient functioning of the markets. Many of the practice rules that were developed by securities supervisors have later been incorporated in statutes[7]. These statutes often were applicable, not only to listed companies, but to all companies in general[8]

Company law in general, and its implementation by securities regulators has not been insensitive to the above mentioned competition aspects: rules on share buy backs have been applied in a more flexible way, rules on pre-emptive rights on share issues were more easily set aside to facilitate company financing, accounting for goodwill was applied more constructively[9]

It will therefore not be surprising that securities regulators in several European jurisdictions have been a important source of company law, initially by way of soft law. In the American securities regulation, which is federal and thus different from company law, no similar development has taken place, except for the recent changes.

Theoretically the dividing line between company law and securities regulation often is being determined as relating to listed v. unlisted companies. In reality it is a fluid one: rules aimed at listed companies are often declared applicable to unlisted ones. Or the latter companies often voluntarily adhere to the higher standards set for the most important, listed companies (IAS being an example). Competition for excellence sometimes applies.

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[6] See e.g. the discussion on accounting treatment of acquisition goodwill, where the European approach, at least in some member states, followed a more aggressive stand. By setting off acquisition goodwill against own funds, the management was able to present more favourable ratios to investors, and hence support the share price.

[7] Several of the Second company law rules originated in supervisory practice.

[8] Sometimes including the private companies, or even co-operative societies.

[9] See footnote 6.

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**10.** The abovementioned developments have mainly addressed the rulemaking process applicable to listed companies that are operating under the strains of international competition, essentially in the international financial markets.

One may also draw attention to similar phenomena at the level of unlisted firms. These are not always the smaller ones. In Europe e.g., in many economic systems, the state or public bodies own or participate in major business firms. The organisational patterns followed are usually borrowed from the private business firm: board structure, internal and external supervision will generally follow the patterns used by private firms, even more as public authorities increasingly call on private sector managers to manage these firms. Sometimes specific issues have to be met, such as the continuing control by the state of its dominant influence of the firm.[10] The limits of the public interest allowing such control have been newly defined by the European Court of Justice, as far as "golden shares" are concerned[11].

Looking at the legal framework applicable to state owned business, one will probably find that regulators have been inspired more by the organisational patterns of private sectors firms, than by the examples set by their colleagues in other jurisdictions. Indirectly, the dripping through effect of international business practice will hence take place as a consequence of the role of the private business firm as an organisational model. Audit committees, independent directors and other paraphernalia of corporate governance pop up, even in firms that were previously state administrations, governed essentially by public law.

**11.** In the segment of the smaller firms, the integrating effect of the international capital markets and the competitive forces that underpin these markets, is less visible. This does however not mean that rule-making relating to these companies is not influenced by similar competitive forces. Law makers compete against each other to obtain the favour of business firms, and the related added value that these may represent. Here, one comes across the conflict between competition between regulations, and European harmonisation.

Looking at the European scene, different forces are at play. On the one hand, European harmonisation has introduced a pattern of rules that are largely, but not entire similar. On the other hand national regulators continue to develop their own regulations according to their perceived needs. National initiatives often are inspired by competitive drivers: in order to allow firms operating from their own jurisdiction to be more competitive, regulators have invented new sets of regulations, or even new company types, some even by passing European directives[12]. Also, regulators have

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[10] See WYMEERSCH, in FS Merchiers, where the application of corporate governance techniques to the central operator in the power sector is analysed.

[11] Here one meets the subject of golden shares, see the recent decisions of the ECJ.

[12] See the rules on the société par actions, to which the European directives were obviously not applicable.

borrowed from their colleagues regulatory techniques that had proved effective in the jurisdiction of origin, allowing regulators to benefit form the experience acquired in the latter jurisdictions, and even avoid some of the deficiencies that may have existed there[13].

National regulators responsible for general company law are -some more than others- aware of the competitive aspects of their legislative action. This awareness can be expected to prevent national regulators from enacting regulations that would excessively restricts the freedoms granted to the business firms subject to their jurisdiction. Too strict regulations will force firms to emigrate, while considerably more flexible regulation will attract firms. The rules on the minimum capital can be cited as an example: the Centros case illustrates that firms look at minimum incorporation expenses, and therefore prefer to incorporate in jurisdictions with a minimum capital requirement.

Often, the fear is expressed that competition between regulations will lower the applicable standards: harmonisation is then required to introduce a minimum floor, offering the necessary guarantees for firms operating, especially on a cross border basis. The argument has a certain validity, but should be used with care. Firms that want to be successful in business have no interest in presenting themselves to their clients, or to their creditors as offering insufficient guarantees. The markets, e.g. their bankers, or suppliers will require additional guarantees, often as additional capital. Hence, upwards competition will play a role. Transparency is an essential preliminary for this type of competition to take place. It is questionable to what extent fraudulent will be prevented from operating by company law techniques.

## II. Changing perspectives

**12.** The recent turmoil in the American, and to a lesser extent in the European, securities markets, is likely to challenge a good part of the accepted wisdom concerning company governance, reporting and internal control. Boards, independent directors, audit committees, auditors, accounting rules have been proved rather ineffective in making the corporate system fail proof.

New regulations have been enacted in the United States, as a direct response to these highly disturbing findings. An in depth analysis of the causes and consequences cannot be undertaken here. It will suffice to point to some of the most significant new rules and analyse to what extent these might affect European company law and practice.

The new American regulations are of different orders: first comes the Sarbanes-Oxley Act, signed by the President on July 30, 2002, which changes the Securities Exchange Act of 1934 and is therefore applicable to all companies with more than 500 shareholders ( so-called “public”

13 See the rules of Belgian companies law on mandatory repurchase, which have been borrowed from similar Dutch

companies). This Act calls for a series of implementing measures to be enacted by the SEC, which at the moment of writing are still unknown.

In addition to these statutory measures the two main market operators - the NYSE and NASDAQ - have also published new requirements applicable for companies the securities of which are traded on their markets.

All three regulations are applicable starting from August 2002, although implementation for specific rules may start at a later date.

**13.** Reviewing both the Sarbanes -Oxley Act and the NYSE rules, one could summarise their contribution to long term company law innovation as being essentially an exercise in the strengthening and deepening of the existing pattern, rather than its fundamental review**.** Both documents essentially reinforce the composition of the existing bodies within the company, clarify and strengthen their competencies, and add numerous disclosures of certain transactions that had given rise to public criticism, and sometimes outcry.

It seems interesting to witness that securities regulation is once more overtaking company law in dealing with public companies' conduct. The same phenomenon has been witnessed frequently in Europe.

However, in the United States, company law is essentially a subject that belongs to the competence of the States. Hence one could probably qualify this development as a further involvement of federal law in company matters. Is this a step to a federal company law? The technical answer will probably be negative, as the rules are applicable only to companies subject to the Securities Exchange Act – i.e. public companies with more than 500 shareholders filing reports with the SEC [14] – and to listed companies.

**14.** A subject on which there has been and will continue to be extensive discussion relates to the application of these new rules to non-US companies. It would seem that the Sarbanes-Oxley Act is considered applicable to non-US companies with securities, including ADR's, on US exchanges. If that reading were upheld, it would result in rendering a substantial part of the new US regulation applicable outside the United States. A new, and most significant step would have been taken on the road towards internationally "accepted" rules of company law.

The same reasoning does not apply to the rules of the NYSE, which due to their self-regulatory character would call for adequate explanation in case the foreign issuer is unable to meet the NYSE requirements. An express exemption has been provided, requesting non-US companies to

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law.

[14] Companies with more than $10 million in assets whose securities are held by more than 500 owners must file annual and other periodic reports.

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disclose any significant way in which their corporate governance practices differ from the ones mandated by the NYSE.

Apart from direct application due to the presence of the issuer on the US securities markets, indirect application should also be mentioned. Some of the rules of the Sarbanes-Oxley Act apply to auditors and auditing firms, including the auditing firm partners active outside the American jurisdictions. Rules prohibiting the provision of non-audit services by the audit firm will also affect the foreign partners of the same firm. The same may apply to lawyers.[15]

Another issue concerns sanctioning: very heavy fines are attached to violations of the Sarbanes-Oxley Act, while liabilities of directors and auditors will be significantly increased. The risk of litigation will increase considerably. Will foreign issuers also be affected?

The scope of the new regulation is a subject that needs to be clarified. Press reports have indicated that the European Commissioner in charge of the Internal market, Mr. Bolkestein, has already made the necessary representations in Washington. Whether these will be effective, only time will tell.

**15**. It would be beyond the scope of the present paper to attempt a thorough analysis of the new rules and to determine which rules are likely to affect international company practice, or may eventually lead to being adopted either in European, or in national company law regulations. Only a few of the rules that may affect European practice will be mentioned here.

a) the auditors.

The position of auditors has been at the core of the malpractices that were revealed. Hence the Sarbanes-Oxley Act provides that

– although audit firms may be appointed for a longer period of time, there should be rotation of the partners in charge of the audit (lead partner) and for the audit review partner;

– non-audit services should be procured from other firms than the auditing firm; this will probably lead to a split within the international audit firms that will affect the European practice, where a more flexible approach has been advocated in the European Recommendation;

– tax services by audit firms have to be submitted to prior approval of the audit committee and must be disclosed.

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[15] Attorneys will be obliged to report violations of the securities laws, and of fiduciary duties, to the company's general counsel, or to the CEO. In the absence of remedial action, the latter will have to report the matter tot the audit committee. The rule will be sanctioned by refusing licence to appear before the SEC.

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It seems likely that on these three items international practice will be directly affected: as the remaining four international audit firms have substantial activities in the US, they will have to adopt the stricter American requirements for their operations world-wide. In fact, these firms were already familiar with this type of extraterritorial application of the American requirements.

b) Company directors

**16.** Several of the provisions of the new Act will directly affect non-US issuers.
The certification of the annual accounts by directors of US companies has attracted considerable attention during the first half of August 2002. According to the Sarbenes-Oxley Act, this certification requirement will apply to all public filings. On the European side, the issues mainly concerned the extraterritorial application of the new requirement.

CEO's and CFO's of European companies have in most cases felt obliged, after much hesitation, to attest the accuracy of their annual accounts, although divergent legal opinions were circulated on this topic. The issue may not necessarily be related to the intrinsic accuracy of the accounts, as according to national law, annual accounts often are signed by the members of the board of directors. Costs of implementation, and risks of liability essentially motivated European CEOs to attempt to obtain an exemption from the SEC. At the moment of writing it is becoming increasingly likely that CEO's and CFO's of European companies will submit to the certification requirement. To the extent that issuers of listed securities have opted for taking advantage the US markets through a listing, it seems acceptable that they should also adhere to the practices that are considered necessary for the correct functioning of these markets. On the other hand, it remains to be seen whether this requirement will reduce non-US issuers' interest for listing on US markets.

A rather conspicuous provision relates to the prohibition to grant loans, under whatever form, to company officers and directors. The prohibition clearly refers to some of the abuses that have been discovered in the recent cases. As far as European practice is concerned, the statute in at least some jurisdictions[16] calls for a similar prohibition, while in most legal systems, in the absence of an outright prohibition, loans to directors are subject to specific rules and disclosures[17]. Here again, it seems not unlikely that the rule would be considered applicable to directors and officers of EU-issuers, and that the present disclosure will not suffice.

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[16] See s. 330 of the UK Companies Act 1985.

[17] See art L 225-43 of the French Commercial Code; see also § 89 of the German AG (authorisation of supervisory board).

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The prohibition may especially be significant if, contrary to the present formulation of the Act, controlling shareholders would be included, as this extension would greatly affect the relations with controlling shareholders, that are prevalent in the European business structure.

**17.** Reporting obligations with respect to equities held by directors, officers and 10% controlling shareholders have also been strengthened. In the future reporting will have to take place within 2 days of the transaction. European issuers often are not subject to similar reporting requirements in their home jurisdiction. It will in all likelihood be introduced as part of the future "market abuse" directive[18]. Here again, taking into account the easy public accessibility of this data, it seems unlikely that the two reporting requirements would be very much different: the most demanding market will set the pace.

Specific additional disclosures relating to the annual accounts have also been strengthened. Implicitly referring to the Enron case, off balance sheet liabilities have to be expressly mentioned, while material changes in the financial condition and significant company news has to be published at once. That off balance sheet accounting will be strengthened will not be regretted, as it is generally considered one of the - unfathomable - weaknesses of present accounting. However, to the extent that US accounting rules and practices would indirectly be rendered applicable, this would probably lead to a similar conflict as has been raised with respect to the application of US accounting rules.

C) Code of Ethics

**18.** Two requirements of the Sarbanes-Oxley Act call for softer measures, with whom companies can deal with on a "comply or explain"- basis. These measures relate to the requirement for boards to adopt a Code of Ethics, while the audit committee will have to contain at least one financial expert, who has to be expressly identified in the company's disclosures.

As some European companies have already adopted self-imposed "codes of good behaviour", while some have appointed an internal "ethics committee" it seems likely that those who have already taken action will be able to refer to the measures taken. Other companies will feel incited to follow suit.

As to the appointment of a financial expert among the Audit committees' members, this is a more delicate issue as liability may attach to this designation. Here again, the new US regulation will put considerable pressure on the international practice.

[18] See Draft Market abuse directive, art. 8

## Conclusion

**19.** In company law, as well as in securities regulation, the regulatory systems do no function in isolation: they are interdependent and are competing for market share. This feature is especially visible in the segment of listed companies that are competing for funds on the international financial markets. As a consequence company practice has to adapt to the requirements of the markets. Voluntary adherence to the best practice is considered necessary to convince investors to part with their money. Therefore companies volunteer to adopt the practices and rules that are best known to these investors, and create the least externalities v.à.v. their perception. Hence there is a strong tendency to mimic structures, behaviour and regulation. The numerous corporate governance codes also try to express this feature.

The recent events in the United States have put a new development on the forefront, which is more a reinforcement of an existing tendency than a wholly new phenomenon. The strong intervention of the public authorities in the securities market views to restore public confidence in the markets. Therefore the same discipline should be applicable to all issuers that solicit the public's favour. As a consequence the new rules, whether they be market rules, securities regulatory provisions, or even company law rules, are rendered applicable to all issuers, American and non-American alike. Here competition does not so much act as the more or less voluntary vector leading to equalisation of company provisions and practices, but is the result of companies' need for tapping the largest capital market. Competition is here again the fundamental driving force, although the transmission of the regulatory will is much more direct, and much more coercive than through the previously observed mere market mechanism. One could consider that a new step has been taken towards the creation of "global company practice".

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