

**“BETTER REGULATION IN EU COMPANY LAW”
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Full version of the speech of Anne Outin-Adam

INTRODUCTION

I manage the Legal Department of the Paris Chamber of Commerce and Industry. Before I start to give you details on my function, I would like to point up that **the CCIP represents more than 310.000 businesses** established in Paris and in its inner suburbs. In economic terms, these businesses account for 20% of national GDP.

You have all heard about the initiatives taken by Chambers regarding start-up aid and business development. Further than that (and this only concerns the CCIP), our Chamber **acts as the one of main spokesmen of the business world before the national and European public authorities**. In this respect, it defends the interests of all businesses, regardless of their size, being large, medium or small-sized businesses. In concrete terms, the French Government consults us on all topics related to business life, such as taxation, company law, electronic commerce (e-commerce), transport infrastructure, or even the environment...

I would also like to stress that **Pierre Simon, our President, is also President of Eurochambres**, which proves **our strong commitment to the European Union**. As a result, the CCIP gives its opinion on the legislation in preparation in Brussels, in order to ensure that all economic agents across Europe consider European legislation as a factor of competitiveness towards non-member countries.

I will end this introductory part emphasising that the legitimacy our positions derives from the fact that **we are constantly facing the high level of expertise of our jurists and economists, with the practical sensitiveness, experience and knowledge of our elected members, all being business managers**.

Consequently, **the teams that I drive participate directly in the law-making process both at the national and European level**. This double experience enables me to contemplate the national and European law-making process with detachment, and to identify the strengths and weaknesses of each of these processes.

Considering this experience, I will give you, **in a first part**, my opinion on the participation of Civil Society in the European law-making process, especially regarding company law. **In a second part**, I will talk about the effects of fostering competitiveness of business on the legislative action.

THEN, AS A FIRST PART, HOW TO GUARANTEE THE PARTICIPATION OF CIVIL SOCIETY IN THE POSITIVE LAW-MAKING PROCESS (Part I)

You all know that one of the “Strategic Objectives 2005-2009” proposed by the European Commission resides in the active participation of Civil Society in the European policy-making process. And **of course, as a Chamber of Commerce, we support the entrepreneurial culture of this Civil Society**. Indeed, I am thoroughly convinced that a confrontation between the different interests comprising our society is necessary to the right functioning of democracy. For example, in company law, a text can only be valid if it serves all the diverse

interests, that is, businesses, but also stakeholders among which consumers, employees and shareholders. But this applies to all other areas.

A “win-win” relationship can only be developed under these conditions. The final decision obviously belongs to the political power, but it must be based on the participation of Civil Society, through which democracy comes out strengthened.

I just want to point up that if Civil Society usually participates in the law-making process, it might as well initiate it. Indeed, this power of initiative belongs exclusively to the European Commission. But **the Commission can – and must – also reflect the views of EU citizens.** I’m thinking about the request made by businesses, mostly SMEs to develop an EPC Statute, in addition to the existing SE (“Societas Europea” – the European Company), that would be more adapted to their needs. The Commission heard our voice and included the issue among the 14 questions of its consultation on future priorities for Action Plan. It came out that 63.9% of the respondents were in favour of a proposal for a European Company Statute (EPC), as a tool providing advantages especially to the private companies, which may not be able to benefit from the European Company Statute. **If this type of company is created, we will thus be able to say that Civil Society initiated the process.** I will stop here, but I find this example particularly interesting.

The guiding principle of this first part will be organised chronologically. When is the right moment to intervene in the law-making process, in order to ensure that the voice of businesses has echoed through the European institutions ? Upstream, during, and downstream of the process.

A - FIRST OF ALL, UPSTREAM OF THE PROCESS. THIS PART DEALS WITH EXPERT GROUPS AND CONSULTATIONS

To start with, **particular mention goes to progress made**, under pressure from the Commission, to consult interested parties widely before proposing legislation. The method of drafting Green or White Papers is now firmly rooted, and the Commission has even developed other efficient consultation procedures, in particular on-line consultations via the web portal “Your voice” and, more recently, the creation of SME panels.

The Action Plan on Company Law and Corporate Governance is a perfect example. Indeed, right from the publication of the Jaap Winter Group report in November 2002, Civil Society has been closely associated to each stage of the plan, and for our part, we have replied to all the consultations launched in the field of company law.

After a few years of practise, I can tell that **consultation is a very efficient technique to move forward.** It enables citizens to question themselves on the need to implement policies, as well as on the most efficient method to meet the objective fixed by the Commission. At the same time, it enables to avoid the creation of useless rules, because overabundant, to underline precisely the general or technical aspects to modernise, and to think about the most adapted classic instrument. Consultation is also the best way to assess weaknesses and take them into account. Indeed, the debates surrounding the potential definition of the concept of shareholder (cf. the proposal for a Directive on the Exercise of Shareholders’ Rights) are a good example.

However, the purpose of our meeting is to go beyond this achievement and search for potential improvements. But first and foremost, please allow me to issue a warning. I would like to stress that too many consultations would hinder the process itself. It would thus become impossible to give relevant answers in time and mostly this democratic instrument would be quickly deprived of any interest and legitimacy.

Therefore, the CCIP proposes to establish minimum rules and standards for consultations, and for impact assessment.

- ✓ Regarding minimum rules and standards for consultations
 - A minimum consultation period of 12 weeks would improve notably the quality of answers;
 - There should be no consultation in July and August;
 - Questions should be as clear and concise as possible, and above all, should not have any influence whatsoever on the answer;
 - Open questions should become more systematic, in order to express the view of Civil Society;
 - Eventually, consultations should be more frequently translated in the three European working languages, that is, English, French and German. Although English is increasingly spoken in many European Member States, we must admit that Civil Society's participation is wider when documents are available in its mother tongue.

- ✓ In addition to these standards, we suggest to apply minimum rules for the assessment and processing of results to consultations
 - First of all, we believe that the Commission should not only display a list of answers on-line, but should also make an effective evaluation of their content, and summarise them. Certain consultations in the field of company law, have led to the publication of very detailed summaries. They constitute a very precious tool to us so we would like them to become systematic.
 - Moreover, the European Commission should acknowledge receipt of contributions, under the form of individual responses, when consultations are launched by experts.

These proposals become particularly important regarding certain recent evolutions. For example, two consultations directly led to the drafting of a recommendation, rather than to the drawing of a preparatory working paper (directive or regulation): the first one deals with directors' remuneration, and the second one with independent directors. However these two recommendations are effective sources of law. In other words, for this type of soft law, Civil Society can **only** express its views through consultations.

B- DURING THE PROCESS: ACTION BEFORE THE COUNCIL AND THE EUROPEAN PARLIAMENT

Obviously, we adopt the same traditional approach to make most of our proposals. We carry out **a first series of actions before our national public authorities**, so that they express our views at the European level via the COREPER or the Council of Ministers. In the same manner, **we have managed to establish close relationships with certain Members of the European Parliament**, which enables us to validate directly some of our proposals.

These methods are rather common, and **I will centre my point** on transparency regarding the debates launched by parliamentary committees, on the one hand; and regarding the Council's working methods, on the other hand.

First of all, we advocate more transparency in the work of parliamentary committees. In our country, the *Sénat* and the *Assemblée Nationale* publish their parliamentary reports and the record of discussions held by their committees, with a clear explanation of the ins and outs of each amendment. The discussions held in the *Assemblée Nationale* surrounding each amendment are also fully transparent and published on-line. I believe that European Parliament's reports are not clear enough to understand the reason for voting or rejecting an amendment. Therefore, the CCIP recommends more transparency in this field. Moreover, the Austrian Presidency recently expressed its will to publish Council's debates on the Council web site, which should also be done in Parliament.

Secondly, it would be relevant to be informed of the meetings held by the Council and the COREPER, and mostly of their agendas. For now, we are able to follow the work of the Council thanks to members of the different Permanent Representations in Brussels. Yet, the Council has developed a **new method which consists in drafting a note**, on major policy proposals, reflecting the positions of the Permanent Representations. We believe that this method **should be widespread**.

C - DOWNSTREAM OF THE PROCESS: THE PROCEDURE OF COMITOLOGY

You will all agree to say that the procedure of comitology has developed considerably. Yet, the CCIP considers that the role and the functioning of comitology committees are still vague and confused.

In this context, we propose to establish a legal framework for the competencies of these committees, which often claim legislative powers.

We suggest to:

- Indicate the criteria for the selection of experts, and mostly who creates them and how;
- Facilitate the access to the list of experts comprising these committees;
- Ensure that their opinion reflect the views of the general interest, and not only those of the groups represented;
- Regularly make and publish an update of their composition;
- Indicate the geographical origin of experts (EU nationals or not);
- Draft a charter on the conditions to become an expert.

I WILL NOW COME TO MY SECOND PART : HOW TO FOSTER COMPETITIVENESS OF THE EU MARKET THROUGH THE LEGISLATIVE ACTION? (Part II)

For lack of time, this part has only been briefly covered orally.

To do so, we must first determine the scope of EU action, then choose the right instruments.

A - FIRST OF ALL, I WILL TALK ABOUT THE RELEVANCE OF EU LEGISLATIVE ACTION

The Report of the EU High-level group of Company law experts, known as "Winter Group Report", which perfectly meets the objectives of the Lisbon Strategy, has clearly stated that Company law in the European Union must, above all, **"foster efficiency and competitiveness of business"**.

Regarding this objective, we believe that the relevance of the Community action must follow four main guidelines:

- 1) **First of all, we believe that the Commission's action regarding cross-boarder issues is taken for granted.** These issues may concern EU take-over bids, the movement of European companies and of capital, or even the cross-boarder exercise of voting rights, the creation of the European Company (known formally by its Latin name of "Societas Europae") or even a European Private Company.
- 2) **Secondly, Community intervention is justified when it comes to reconsider, that is simplify and increase the flexibility of existing European mechanisms, which efficiency in terms of competitiveness is further questioned.** The amendment of the second Directive on Companies' capital formation, maintenance and alteration follows the same line, since it re-examines certain obligations and/or restrictions now considered too rigid or too repressive by companies.
- 3) **Thirdly, the Commission plans to create a high level of playing field between companies intervening on the European market, in order to reduce competition distortions and to limit "forum-shopping".** But things aren't so simple. Indeed, the Commission often justifies its intervention on the ground that there is a patchwork of national laws regarding very specific issues (for example, the deadline to convene General Meetings). It thus advocates harmonisation at Community level. But then, there is a tendency to align the laws of all Member States with the most restrictive law. **Therefore, is the Commission intervention still justified regarding the issue of competitiveness?**

The CCIP merely intends to recall that the Community legislature must always meet **one simple requirement, that is, do not inundate businesses with excessively detailed and formalistic obligations that would hinder their start-ups and development, contrary to the objectives set up by the Lisbon Strategy.**

- 4) **Eventually, just as Commissioner Mc Creevy pointed out, a major part of the measures proposed by the Action Plan 2003, is strictly related to the need to bring back confidence among investors in order to ensure the right functioning of the European capital market.** But it must be done carefully and moderately: once confidence is restored, the priorities fixed by the Community legislature must be adjusted. **In other words, any new obligation (including a "mere" obligation of transparency), must be examined with regard to its impact on the competitiveness of business:** What is the cost of a report? Can we impose it on businesses? Does it apply to all businesses, including SMEs, or only to publicly traded companies? How much does it cost to inform shareholders? Can shareholders obtain information from other similar sources, mostly from public sources?

B - THIS ISSUE IS SIMILAR TO THAT ESTABLISHING A BOUNDARY LINE BETWEEN BINDING REGULATIONS, SUCH AS DIRECTIVES, AND "SOFT LAWS", ON WHICH I WILL CONCLUDE MY SPEECH

The CCIP advocates **the supremacy of primary legislation**, which fully guarantees that the principles of democracy and transparency are applied, **when it comes to frame or to create European structures.**

On the contrary, secondary instruments must only be used to complement "primary" legislation, which can thus be lightened and adopted more quickly. Moreover, secondary instruments such as recommendations, standard texts or plans on best practices, are more soft on businesses, and their content can be easily modified. As a result, they involve more

flexibility. Especially in a competitive world where the examination of business practices is often made public, where recommendations rely on codes of ethics, and where the publication of plans on best practices **are all very efficient methods**. Despite their legally binding character, these instruments contribute to align European agents with the best practise. This approach strengthens the co-ordination between European regulators and actors, which favours acceptability of these “standards”.

Here is the “win-win” relationship I referred to at the beginning of my speech: the European institutions have managed to create and maintain this relationship in a rather complex political context, and I am deeply grateful for that.