***CORPORATIONS AND THEIR GOVERNANCE BETWEEN HISTORY AND PRACTICE***

## INTRODUCTION

To talk about corporate governance means to talk about companies which are artificial persons created by law that often have a life beyond that of their members. The best definition of corporate governanance is probably the system by which companies are directed and controlled and that definition, in our view, applies to all companies and not just to the large corporations with dispersed shareholders which during the two last deacades gave rise to a vast literature and an intense debate on corporate governance.

This debate in fact started from the practical need to protect shareholders from abuses of managemennt in publicly listed companies with dispersed shareholdings which are normally called public companies in the US but which we prefer to call Berle-Means Corporations from the name of the authors who first described their charactestics in a famous book which is one of the classics of corporate governance (1).

In fact as some scandals in the recent years have shown quite clearly (from Enron to Parmalat) in some extreme cases corporate govenance can simply be defined as a way to protect shareholders against expropriation.

However, a potential conflict of interest between investors and managers, which in some cases can result in abuses or plain expropriation, is not at all new and in fact goes back to the origin of corporations. In other words the so called ‘agency problem’, already described by Adam Smith (‘hired managers would not bring the same anxious vigilance to their firm’s interests as owners-managers’) has existed since the origin of companies. It is for this reason that we want to first describe the orgin of the various form of companies and then analyze the current prevailing models of corporate governance.

## THE ORIGIN OF PARTNERSHIPS

### a) The General Partnership

The origin of partnerships goes back to the Middle Age and its cradle is to be found especially in Italy. At that time Italy was devided in many small states several of which were city states and more specifically merchants republics run by oligarchies which played a critical and fundamental role in the development of trade during the Middle Age. To evoke the names and histories of Venice, Florence and Genoa, just to mention the most important ones, is probably sufficient to describe this environment.
(It is probably interesting to note that both Venice and Genoa are considered, in Jacques Attali's last book, capitals of what he calls the global 'Ordre Marchand' of their time while Florence, in his opinion, never became such a capital simply because it did not have an harbour (2)).
It is in such an environment, where a class of international merchants was both economically and politically dominant, that the first forms of partnerships were developed in order to respond to the needs of these merchants to conduct their business activities not only individually but also, and in fact more often, in associated form.
These were the so called legal forms of the 'Compagnia' and the 'Commenda'.
The Compagnia originated especially in Tuscany during the 13th century (in 14th century France there were already texts which talked about 'compagnie a la mode toscane') and has its roots in the needs of the family businesses which were increasingly becoming larger and more internationalized.
Family and kinship are in fact the oldest and most pervasive forms of group behaviour also in business simply because transactions costs are lowered when they are based on trust (which we define as the willingness to be vulnerable) and therefore do not tipically require a strongly regulated environment.
Usually these partnerships, called Compagnie, were formed among members of the same family or of an enlarged clan of associated families and that is also confirmed by the origin of the name which comes from the latin words 'cum panis' and means the people who are sharing the same bread.
They were always formed for a defined period of time but were almost inevitably renewed and kept the name of the founding family which gave them a continuity and reputation that often spanned across several centuries.

That was certainly the case of the so called ‘Medieval Super Companies’ as an American historian recently called the Compagnie de Bardi, Peruzzi and Acciaioli (3) which dominated the economy of their time ( Florentine chronicler Villani called them ‘the columns of Christendom’) also thanks to a network of branches which were based in all the important trading centers not only of Europe but also in a larger area which comprised the Black Sea, Middle East and the North African regions.
It is however interesting to note that an agent of the Compagnia de Bardi started its famous manual written in the 14$^{th}$ century for contemporary traders (4) by talking about a trip to China which took one year and was apparently not so uncommon for merchants at that time.
In some respects these Super Companies can be considered the predecessors of the modern multinaltional enterprises. One aspect is certainly their geographical extension and presence which covered almost the entire globe then known and could be described as a first form of ‘globalization’ since it is fair to say that in the Middle Age there was already a trans-national economy that included most of Europe and some other parts of the world. The other aspect is their organization which is quite modern since it often included an Office of the Chairman (comprising the Chairman, the Director General and the Tresurer) and saw also the presence of external partners (non-family members) in the partnership thus creating some conflicts and tensions which we would describe today as being part of the large category of the corporate governance issues.
As widely known the Super Companies were declared bankrupt in 1343 when the King of England Edward the 3$^{rd}$ refused to honour his debts.
As a result of this painful experience the successors of the Super Companies, like for instance the Medici Bank, replaced the network of branches, that were geographically distant but still part of the same legal entity, with a network of separate partnerships each one of them controlled by either the main partnership or by the controlling family thus giving rise to a form of holding. Such a primitive holding was clearly the response to the problems created by the failure of branches which, since they were part of the a single legal entity, immediately affected the center and caused the insolvency of the whole company. But not even the holding was sufficient to resolve the agency problem as clearly shown, for instance, by the bankruptcy of the Bruges subsidiary of the Medici Bank caused by loans granted to Charles the Bold by the local director Tommaso Portinari

against the clear orders of Cosimo de Medici not to grant loans to princes which Portinari disregarded simply because of his own personal political agenda.
Another fairly modern feature of these partnerships was their ability to collectively finance the enterprise by accepting deposits from third parties in a manner which fully justifies and explains the name of their owners as merchant-bankers; these deposits or debts were called ‘sovraccorpo’ to distinguish them from the so called ‘corpo’ or equity.
According to some sources there were more then one hundred ‘compagnie’ in $14^{th}$ century Florence (5). It is certainly thanks to their economic activities and the wealth they generated that their owners, the merchant-bankers, built their palaces and villas and sponsored the artwork of the Renaissance. Their activities were also responsible for a first globalization and to a large extent for the birth of the capitalist spirit and more broadly of what we would call today the modern business men as one writer of the time used to say there was no man who was held in social esteem and consideration in Florence who had not spent many years trading and living abroad and had not come back home with substantial wealth.

b) The Limited Partnership

While Central Italy saw the birth of what we call today the General Parternship, the maritime cities of Venice and Genoa gave birth to the Limited Partnership. The so called Commenda was in fact created to finance shipping expeditions and most probably was born as an alternative to the traditional loan just to circumvent the Catholic Church ban on usury. Here the potential conflict of interest between the investors and managers was even more evident because while the limited partner stayed home (‘stans’) the unlimited partner navigated and had the total control on the maritime expedition and on the way the business was run (‘tractator’).
We find the ‘Commenda’ or ‘Societas Maris’ first of all in Genoa where the investors typically provided the capital to the merchant for a single voyage and profits were shared with ¾ for the merchant and ¼ for the investor.
The ‘Collegantia’ was instead more common in the Adriatic trade centers of Venice and Ragusa. Here the investors normally provided 2/3 of the capital while the merchant provided both 1/3 of the capital plus labour (therefore this venture was also called ‘bilaterale’) and the profits were

equally shared while the loss was devided in proportion to the capital contribution.
We would like to underline that the commenda contract, which had the same original economic function of limiting liability as the shares of the a limited company have today, evolved historically both into the modern contract of ‘associazione in partecipazione, or ‘participatio’ or stille (tacit) gesellschaft’ and also into the so called ‘società in accomandita’ or ‘societè en commandite’ or ‘kommandit gesellschaft’.
The latter was probably first regulated again in Florence with a law originally promulgated in 1408 and then revised in 1495 which governed what it described as the ‘compagnia per via d’accomandita’ officially allowing the co-hexistence in the same legal entity of both limited and unlimited liability partners.
This also confirmed the risk of the agency problem in this type of partnerships since the managers had full legal control of the capital entrusted to the partnership by the partners with limited liability.
One can probably note here an evolution from the more traditional family business firm (the ‘Compagnia’) dictated by the increasing need to include strangers as investors that determined a new phase in the history of companies and created the basis for the birth of the joint stock company.

## THE ORIGIN OF THE JOINT STOCK COMPANY

### a) The VOC predecessors

According to Levin Goldschmidt (6) modern limited liability companies found their origin in the Italian practice of the so called ‘Compera delle Imposte’ which was in fact a form of transfer of titles of public debt. Especially in Genoa the loans granted to the State were denominated ‘mons’ (mountain) or ‘maone’ and were devided into equal parts called ‘loca’ representated by certificates. The loca holders formed an association, called ‘societas comperarum’, with the tasks of collecting the taxes often transferred to the Maona, managing the assets also given to the Maona as guarantee and, most important of all, making sure that the loans were repaid by the State.

The Maona di Chio (Mediterreanean island close to Turkey were mastic came from) and di Focea (another island were a chemical fixative called alun was extracted) also called  the Moana dei Giustiniani (which lasted for more then two centuries from 1346 to 1566) was probably the oldest colonial company when considering that the Genoese Rupublic gave to the Maona, as security for debt, the usufruct on the two islands of Chio and Focea as well as some trade priviledges. At its peak this Maona had about 600 loca holders (shareholders), a governance structure with a Council of 40 members, used to distribute dividends and also developed a secondary market for the tranfer of loca.
Among the joint stock company predecessors, or entities which fall in a sort of intermediate category, the Genoese Banco di San Giorgio (1407-1805) defined by Machiavelli as a state within the state (‘dominus et status’) was probably the most important one. Here again the State debts were secured by tax receivables and by the usufruct on colonies such a Corsica. The governance structure was represented by a small executuve council of 8 protectors (who owned at least 100 loca each), a large council made up of 480 stockholders (who owned at least 10 loca each), 20 attorneys-in-fact and again, like the Maona dei Giustiniani, there were dividends based on the cash flow received from the Banco and a fairly well developed secondary market for the ‘loca’.
It is clear that the last two features were the main similarities with the joint stock company but in the end both the Maone and the Banco remained organizations of creditors.

## b) The VOC

In reality the first geat example of a  widely held joint stock company with limited liability and tradable shares is represented by the Dutch United East India Company (known as VOC from its Dutch name, Vereenigde Oost-Indische Compagnie ). It was created in 1602 and was in fact a case of ‘genetic mutation’ from the previously known  limited partnership model. Therefore it is quite interesting to follow the steps of such a genetic mutation.
It all started in 1594 when nine merchants from Amsterdam created the Far Lands Company with the objective to circumvent the Portugese monopoly

on the Asian spice trade. The nine merchants became the directors of the company and held personal liability. The other investors were merely shareholders and the venture had limited life, in fact it was dissolved at the end of the voyage (merchandise and ship sold, personnell fired).
The Far Lands Company was therefore estabilished on a temporary basis, lasting only for the duration of a single voyage, just like the old Commenda.
Between 1595 and 1601 eight other companies with similar objectives were created in the United Provinces. All of them were asked to merge by the Dutch Parliament (Staten Generaal) and in 1602 the United East India Company was formed and was granted the monopoly on trade to Asia and even the right to wage war.
The VOC initial charter remained provisionally valid until 1623 since also this venture was initially conceived as a limited term partnership, with the objective to liquidate and distribute dividends after twenty years, but in fact it lasted for more then two centuries. The differences with the previous known forms of partnership were essentially two: a) it was no longer a venture just set up for the time of a single voyage; b) the directors were no longer personally liable for the companies debts (principle of limited liability).
The initial capital stock was never increased but its shares became tradable and its subsequent additional financial needs were satisfied with loans, both private and public. This much longer duration, together with the broad power of the directors, the lack of information to the other shareholders and the lack of reimbursement upon completion of each voyage, gave the VOC an oligarghic character and created conflicts between the directors and the shareholders also described in critical pamphlets which were published at the time.
In addition the originally foreseen liquidation after twenty years became impossible because of the permanent military investments the company had to make and this originally unforseen permanent feature reinforced the agency problem.
We can see here the effects of the northern European model of subcontracting imperialism to companies which, according to some authors (7), proved more successful then the southern European model (notably in Spain) were the crown directly sponsored economic imperialism.

Initially there were 76 directors which were then reduced to 60 but all of them were appointed for life and they were all merchants close to govenmental circles chosen by the municipal council of each one of the six founding chambers.
There was then a Board of 17 directors composed of representatives of the six chambers who were selected on the basis of a rotating system.
These were the so called Gentlemen XVII who met three times a year together with a group of nine representatives of the main shareholders which was created after 1623 and constituted in fact a sort of supervisory board introduced to respond to the above mentioned shareholder criticism but small shareholders still had no voice in it. The main role of this supervisory board was of course to check the accounts which were first prepared every ten years and then every four years to finally end up with yearly accounts.
The compensation of the directors was initially on a commission basis (at the beginning one per cent of the ship outfitting plus one per cent of the proceeds and after 1622 only one per cent on the returns) but after 1647 it became a fixed amount.
The Gentlemen XVII were concerned with the general policy of the company similarly to a modern board and also had a permanent secretary called counsel as well as various special committees, including a remuneration and audit committee.

## OTHER EAST INDIA COMPANIES

Another notable case was the English East India Company which was formed in 1599 and lasted until 1874. It had a more simple governing structure since it was run by a General Court of shareholders and a Court of directors (24) elected by the General Court. It became 'an empire within the empire' but in general it is known for being more democratic then the VOC vis-a-vis its shareholders and in fact it never had a supervisory board as the VOC. That was probably due to the fact that the shareholder basis was much more homogenous then the VOC and that the main jobs were primarily filled by the sons of the major shareholders to the point that they were referring to the firm as 'the family'. It was also less aggressive then the VOC which actually drove the English company out of the Spice Islands and forced it to focus more on India.

It is interesting to note that in the meantime Italy, which had been in the forefront of the creation of company law for several centuries, was now copying the new Dutch model as a consequence of the fact the Italy had moved from the center to a more pheripheral economic position compared to the first half of the millennium when its merchant cities dominated Mediterreanean trades. In Genoa, for instance, a trading company called Compagnia di Nostra Signora della Libertà was formed in 1638 and was called a 'compagnia all'olandese'(formed in the Dutch way). But it was only in 1647 that the same shareholders of the previous entity created the Genoese East India Company to trade with the East Indies and also with the aim to resurrect the old great Genoese maritime traditions.
There were also Dutch interests involved in its creation since in fact the ships were secretely built in the Netherlands and the sailors were primarily Dutch and that simply because Genoa did not have these technical capabilities anymore. Only two vessels were built and sent to Sumatra but they were immediately captured by the Dutch fleet on April 26, 1649 and that event marked the end of the activities of this company only two years later after its creation.

## THE ELIMINATION OF THE CHARTER AND THE LLC

We have examined until now the birth process of the three main types of companies which still exist today, namely the general partnership, the limited partnership and the joint stock company. In fact in the French Napoleonic Code de Commerce of 1807 only three types of companies were foreseen: the 'societè en nom collectif' , the 'societè en commandite', and the 'societè anonyme' but the latter still required a charter to be formed and therefore active governmant involvement. As a result business people stuck to partnerships simply because they did not like bringing the state into their private affairs. That explains the success of a new form of business which also made available to entrepreneurs in the Code de Commerce of 1807, namely a partnership with transferable shares, the 'societè en commandite par actions'. In fact in the early 1850s some twenty English firms were estabilished in France as commandites par actions. To solve this problem England transformed a priviledge into a right with the Joint Stock Companies Act of 1856 and eliminated the charter. In 1863 France also abolished the need of an administrative

authorization and allowed business people to freely estabilsh joint stock companies.
Germany did the same in 1870 but even more importantly in 1892 it enacted the new form of the Limited Liability Company (LLC or GmbH in German ) which was then copied by many European and Latin American countries.
The LLC was in fact an interesting hybrid of the joint stock company and the partnership since it enjoyed both the limited liability and the juristic personality of the first but, like the second, was also based on the 'intuitus personae' thanks to the controlled admission of new members and dissolution upon the death of one of its members.
In 1977 the State of Wyoming was the first among the US States to introduce a true LLC modeled after the German GmbH.

## TWO SYSTEMS OF CORPORATE GOVERNANANCE

As we have seen there is an historical difference between the Dutch (and also the similar German system) and the English model of corporate governance as defined at the beginning of this article which has its roots in the different historical experiences of the two countries especially in the management of their colonial ventures. So while England saw the development of the one board or one-tier system, in the Netherlands and also in Germany the two boards or two-tier system became the prevailing model.

## THE ONE-TIER SYSTEM

In the one-tier system all directors share the same responsibility and exercise both the direction and control functions. If the trust can be considered the basis of English company law, then the directors can be seen as trustees who need to act with the same duties of care and loyalty Equity also makes it impossible to derive a personal gain from the trust and directors need to promote the success of the company to the benefits of the shareholders as a whole (but since 1980 also consider the interests of the employees).

In such an environment the agency problem can be solved in two ways: a legal action started by the shareholders (principal or derivative) or personal sanctions against the directors (dismissal, disqualification).
So, in essence, in the one-tier system both executive and non-executive directors share the responsibility for both direction and control.
This system has also been followed by other countries such a Switzerland, Belgium and Delaware (US) where a company can be managed ‘by or under’ the direction of a board of directors.
Since this system was developed in the Anglo-Saxon world it has been used by the Berle-Means Corporations where family had withdrawn from corporate governance and where the managerial revolution had brought professional managers to the fore.
In fact in the US the Great Depression razed what was left of family capitalism in the large corporations and the democratization of shareholding between the two wars was also heavily pushed by the Progressive Movement against the so called ‘Robber Barons’. The US Courts activism did the rest especially in those cases where courts ordered companies to break up (for instance in 1957 the Supreme Court ordered the Du Pont family to sell its equity block in GM to prevent the Du Pont Company from obtaining an ‘illegal preference over its competitors in the sale to GM of its products’).

## THE TWO-TIER SYSTEM

Dual board structure was introduced in Germany in 1870 to replace the charter and protect both the shareholders and the public at large.
In this system the Supervisory Board (‘Aussichtsrat’) exercises a control role both on behalf of the shareholders and of society in general thus representing various stakeholders and especially the employees and its composition is primarily dictated by the rules of the so called co-determination (‘Mitbestimmung’).
We see here the clear difference between shareholders and stakeholders capitalism: while in the English tradition the company is just a group of shareholders, in the German tradition the Unternehmen (Undertaking) is seen more as an institution with its own life. The main stakeholders are the workers and the banks but in the shareholders law of 1937 it was in fact the Reich with the introduction of the so called ‘Fuehrenprinzip’.

Especially the German universal banks played a very important role in the development of German capitalism which is often described as a form of bank capitalism because the so called Haus Bank not only is the main source of financing but its representatives sit in the Supervisory Board and it also plays a decisive role in the decision making process with a wide use of the proxy voting powers.
This system has been recently the object of severe criticysm especially because of the large composition of the Supervisory Board, its cosy relations with trade unions (see the recent VW and Siemens scandals) the fact that workers sitting in the Supervisory Board are unlikely to control their bosses, the risk of loss of confidentiality and also the risk of insider trading.
But the system has also been used in a positive way by family businesses wanting to separate ownership from control and in any case Germany had to introduce the one-tier system with the implementation of the European Company into its legal system.

The two-tier system has also been adopted in the Netherlands where it was actually born as we have seen. There the system was even more radical because in the so called ‘structure companies’ the selection of Supervisory Board members was done by cooptation since 1971 thereby creating a sort of self-perpetuating Supervisory Board. There were also strong anti-takeover defences until recently.
Under a new recent law the Supervisory Board members need to be appointed by shareholders and workers must also be represented (one third of the members) but in general remain more muted than in Germany. Finally it is known that in the Netherlands bankers traditionally played a secondary role compared to Germany.

In France the two-tier system (‘conseil de surveillance’) was introduced in 1966 as an alernative to the traditional one-tier system although it should be noted that in practice the Management Board (‘directoire’) in this system can become pretty similar to a ‘direction general delegee’ in the traditional one-tier system.

In Italy a decree of 17-01-03 reformed company law and introduced the two-tier system (‘sistema dualistico’) as an optional alternative to the one-

tier system (‘sistema monistico’) and to the more traditional Italian system (‘directors and statutory auditors’).
It is still unclear if the two-tier system will be used in Italy by family controlled pyamidal groups but it has started to be used by the new bank groups resulting from the recent banking mergers.

IS THERE A BETTER SYSTEM?

As we have seen the two-tier system has been heavily criticized for the reasons we have already mentioned but we are more of the opinion that each system has its pros and cons since the two-tier system is probably more suitable for a long term strategy while the one-tier is evidently more flexible.
May be this is the reason why countries like France and Italy ( but also in the EU with the European Company) have adopted a solution ‘a la carte’ rather than imposing a single model. This is probably also the consequence of two decisions of the European Court of Justice (Centros and Inspire Art) which now allow EU citizens to choose where to incorporate. These decisions could also raise the question if we are going to have a EU Member State which would become a sort of European Delaware but the ‘a la carte’ solution is probably there to conjure against such an outcome.
In general we could say that the two-tier system could be best used in the following cases:
-in generational transition in order to test the ability of the new generation while maintaining control in the hands of the old one (like in the Michelin, Peugeot and Calvet cases),
-in family businesses to insert a professional management team and to implement a separation of ownership and control;
-in some restructuring cases as those due to mergers (see recent Italian banks mergers),
-in other M&A cases such as when a family business is acquired and the status or the know-how of the family members is still crucial for the success of the business;
-in cases of change of management where the old management becomes part of the supervisory board (but beware of the risks which have clearly emerged in some recent German scandals);
-in state owned or partly privatized companies (e.g. ST Microelectronics).

On the contrary the one-tier system could be more appropriate in one of the following cases:
-for holding companies;
-for companies acting in rapid growth industries where flexibility and rapidity of decisions is a must;
-for companies growing rapidly for different reasons then those mentioned above;
-to seek quotation in markets which require such a system (i.e. NYSE);
-for group of companies, where the board members of the parent can sit in the supervisory board of the subsidiaries.

## THE RECENT TRENDS IN CORPORATE GOVERNANCE

The debate which has taken place especially during the last two decades has been largely influenced by the Anglo-Saxon experience (UK and US) primarily because of the managerial revolution which took place during the first part of the last century especially in the US and which gave birth to the mentioned Berle-Means Corporations with their separation of ownership and management.
In the UK it all started with the Cadbury Report in the early nineties and the new trend towards the protection of shareholders value which produced initially to the Code of Best Practice and more recently the Combined Code.
The English self-regulation practice and its basic 'comply or explain' principle have also heavily influenced the practice in the rest of Europe and elsewhere also via the OECD Principles of Corporate Governance which were approved in the late nineties and have been slightly reviewed after the recent corporate scandals.
But we cannot ignore the fact that the Anglo-Saxon practice has also seen a completely new trend with the approval of the Sorbane-Oxley Act of 2002 with its more rigid requirements and expensive burdens imposed on companies especially due to the famous section 404 on internal controls to the point that the SEC has recently agreed to relax the interpretation of this rule.

But the debate on corporate governance has recently expanded to include also companies with different control patterns, i.e. majority control and blocking minorities with the realization that the study of corporate governance should include the analyses of all systems by which companies are directed and controlled.
In that line we should remember the OECD Guidelines for State-Owned Companes where political patronage can inflict inferior governance as the State tend to act as a substitute of financial markets. Similarly there have been recent discussions on possible OECD Recommendations for Non-Listed Companies perhaps following a trend which saw the approval of a specific code for non-listed companies in countries like Belgium (Code Buysse).
The real question is if the Berle-Means Corporation is the most advanced model which everybody will follow. In fact there is no evidence of a natural and wide-spread transition from family capitalism to managerial capitalism and the reality is that the corporate gevernance model prevailing in each country reflects the type of capitalism which developed in that country that is clearly the result of the historical development of that country where culture and ideologies also played an important role.
It is however true that recently all models seem to move in the same general direction (both in the market based system as well as in the block-holder based system) and that such a trend has the following key features:
-a better protection of minority shareholders;
-an increased accountability and independence of directors;
-more efficient control systems (both internal and external).
Nothwithstanding this common trend the Berle-Means Corporation remains a typical feature of the managerial capitalism of the the Anglo-Saxon countries, where it is supported by a solid legal protection of shareholders' rights and a strong and indipendent judiciary system while the stakeholders based large firms are more common in countries where trade unions and financial istitutions play a crucial role in the economic system. Conversely family capitalism seems to be more conducive to other experiences like the industrial districts in Italy, the Japanese keiretsu and the Korean chaebol or even the Chinese private companies (various types of firms, mainly small and medium, often with a single dominant individual and part of a clan or network).
While the separation of ownership and management is often considered as indication of superior corporate governance environment, it can't be

excluded that such a separation can in theory take place in all the capitalist systems (e.g. managers do not necessarily need to be subservient to oligarchic family dynasties especially if these become part of a more self-confident estabilishment rather than remain insecure oligarchies).
The reality is more a combination of the various systems in each country combination which, at least in Europe, is now reinforced by the legal 'a la carte' solutions mentioned above.
This combination of systems is also reinforced by the overlap of two apparently conflicting trends like the shareholders value doctrine and the corporate social responsibility debate which are forcing both legal systems and individual companies to go into apparently conflicting directions.

## WHERE IS EUROPE GOING?

In the EU company law and corporate governance initiatives, have also recently been re-vitalized.
The European Company Regulation was approved in 2001 after a debate which had lasted for more then thirty years and, as mentioned, it gives the choice between the one-tier and two-tier system.
In 2002 the High Level Group headed by Jaap Winter was created by Commissioner F. Bolkestein to unblock the impasse on the Takeovers Directive. This Group issued a report on issues related to takeover bids which finally brought to the approval of the 13$^{th}$ Directive on Takeover Bids on April 21, 2004.
The same Group issued a second report entitled 'Report on a Modern Regulatory Framework for Company Law in Europe' that formed the basis of an Action Plan ('Modernizing Company Law and Enhancing Corporate Governance in the EU- A Plan to Move Forward') which contained 24 initiatives divided in short, medium and long term ones.
In such a plan the main areas of action are: corporate governance, capital maintenance, groups, restructuring, the European Private Company and other EU legal forms, pyramids and transparency of national legal forms.
In essence strengthening shareholders rights, reinforcing protection for employees and creditors and increasing the efficiency and competitiveness of business are the main aims of this Action Plan.

The adoption of the Action Plan also brought to the creation of a European Forum to promote convergence among Member States and of an Advisory Group to share experiences and more specifically to strengthen shareholders rights and modernize company law.
In 2006 there was also a broad consultation on the future priorities of the Action Plan (closed on March 21, 2006) then followed by a public hearing which took place in Brussels on May 3, 2006 to discuss the outcome of such a consultation which focused on our main topics:1) shareholdes rights and obligations;2) modernization and simplification of EU company law; 3) responsibility of directors and internal control; 4) corporate mobility and restructuring.

## FINAL REMARKS

We have tried to make a short summary of the evolution of company law and corporate governance and probably our modest attempt to try to give a broad historical and comparative overview has caused this summary to be short and quite simplistic.
At the risk of being even more simplistic but keeping in mind that company law is just a part of commercial law we cannot avoid to mention two even more broad historical trends. One is the evolution of the notion of undertaking and the second is the widely recognized phenomenon of the emergence of a new Lex Mercatoria.
The Commercial Codes of the $19^{th}$ century (originally based on the concepts contained in the French Ordonnance de Commerce which was itself deriving from the medieval Lex Mercatoria) still focused on the commercial activity (the Italian Commercial Code described such an activity with a list of individual legal acts called 'atti di commercio') and still reflected the prevailing view that the entrepreneur was the merchant (in French Commercial Code called it 'negotiant'). With the industrial revolution, the emergence of large entrerprises and of the scientific production methods, the accent, also in the legal texts, moved towards the manufacturing activity and , for example, a confirmation of this trend can be found in the last Italian Civil Code which in the definition of entrepreneur contained in Art. 2082 first mentions the 'production' and only afterwards the commercial activity.

Today, outsourcing and the emergence of great distribution channels are putting again the non-manufacturing enterprise (as opposed to the enterprise where manufacturing is the main activity ) at the center of the scene. But this is a world which would have been quite familiar to the Florentine merchant bankers who, as we have seen, were behind the emergence of the first legal forms in company law.
Similary the so called 'financiarization' of the economy has brought to the ©equity funds that are making an extensive use of partnerships with a clear distinction of roles between general partners (GP) and limited partners (LP) (albeit the latter can also often benefit of the limitation of liability in the case of another hybrid solution, the Limited Liability Partnership, which emerged in the US in the early nineties).
Global markets and the renewed predominance of non-manufacturing (outsourcing) and financial activity over the pure manufacturing activity are also giving birth to a new Lex Mercatoria as a new international legal practice for the global business community. The sources of today's new Lex Mercatoria are also quite similar to the old one. In fact while in the Middle Age the Lex Mercatoria found its basis in the Statutes of the Guilds, the commercial uses and case law of commercial courts, today's sources of the new Lex Mercatoria are standard commercial practices (often developed by the legal departments of multinational corporations), commercial uses (like those developed by Unidroit) and case law of international arbitral tribunals.
So our conclusion at the end of this short pyndaric flight into the history and the more recent trends in the develpment of company law and corporate governance is in fact a question: aren't we going towards a future which looks pretty much like the world which saw the origin of both company law and commercial law?

***STEFANO PAOLO CATELANI***

NOTES

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