



*Convegni di studio di Adolfo Beria di Argentineo
su problemi attuali di diritto e procedura civile
della Fondazione Centro nazionale di prevenzione e difesa sociale*

XXVIII Convegno di studio su
**UNIONE EUROPEA: CONCORRENZA TRA IMPRESE
E CONCORRENZA TRA STATI**
Courmayeur, 19-20 settembre 2014
Complesso congressuale e cinematografico
Piazzale Monte Bianco

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Je veux remercier tout d'abord les organisateurs et en français parce que nous sommes dans le Val d'Aoste et donc c'est important. En plus, j'ai remarqué que beaucoup de personnes autour de moi parlent très bien français. J'ai donc un peu honte parce que je vais devoir faire mon intervention en anglais mais je vous demande de m'excuser. Je veux remercier encore en français les organisateurs de la conférence, notamment Paolo Montalenti, et Marco Ventoruzzo pour m'avoir proposé de venir.

So now I turn to English and I think we will have a lively debate because I have different views from what has just been said. I will make a short presentation and I will focus on one topic : company law and mostly non-listed company law, so the S.r.l., the smaller ones, the non-listed ones. Here, I would say, there are two phenomena which are taking place in Europe. One is, as it has been said, regulatory competition among Member States. It's true, but there is also another phenomenon, which is illustrated by what Italy just did by importing the French system of double voting right. There is also an increased circulation of models. So it is not only competition, it is also, in a sense, cooperation which is going on. Let me present these two points one by one.

First, competition, something we are all used to discuss. Regulatory competition in company law is not a good thing í I think it's an excellent thing. It is very positive. It has not led to a race to the bottom, like in the US. I think it has led to a race to modernization of company law in many Member States. I will take one example, which is the most obvious one: it is the case of the minimum legal capital. You all know of course in this room that in the UK you had 1-Euro private limited companies and there was pressure in Germany because in there to create a limited company (GmbH), you needed to have 25,000 Euros. So this was a big difference. However, you don't always need 25,000 Euros to set up a company. So what happened is that many UK limited companies had their real office in Munich. They were created in London just to get the one-Euro and they were active in Munich or Frankfurt or wherever in Germany. So the German legislator reduced the requirement from 25,000 Euros to 1 Euro in 2008 when he created the *Unternehmergeellschaft* (UG). This is the entrepreneurial company, something which is equivalent to what you had in Italy with the *S.r.l. a capitale ridotto*. They did this under competitive pressure, that's for sure, but what was the result ? Many view UG as a big success in Germany. Many UG have been created. There are no longer limited in the UK from Germany.

Let me give you another example, a short one, which is not on minimum capital. It's the case of competition between France and Holland, the Netherlands. In the 1990s, you had many French companies, groups, large groups, who would create joint ventures or subsidiaries not in France but in the Netherlands because the Dutch S.r.l., called the B.V., was very flexible. So we were losing business. The French business companies were really upset about this and said: "We need to have something better". So in 1994, and this is the 20th anniversary of this creation, we introduced the *Société par actions simplifiée* (SAS), a simplified public limited liability company. It has been a huge success. It had so much success that I remember meeting a Dutch colleague who is also a good friend and who said in substance: "We are jealous! We are jealous of you because it's better than ours". Then what happened? In 2012 the Dutch introduced the Flex B.V., which is inspired by the French S.A.S. So the result of competition between the legal orders has led to improvements of company law in France and in Holland. So I think it's a good thing. At the same time we should not overplay this competition. For instance, there is a study by Professor Christoph Teichmann from the University of Würzburg about the impact of *1-Euro Unternehmergeellschaft* in Bavaria compared to Austria. In Austria you need to have 35,000 Euros to create an GmbH. So the idea was: if it's 35,000 Euros, why wouldn't the Austrians create a GmbH in Bavaria, which is just across the border, for 1 Euro? Well, apparently they have done it, but not in masses, not so much. So for whatever reason if you move more than 50 km from the border people are more ready to pay 35,000 Euros. The people who have created UG from Austria live close to the border basically. So it means that if you are from Vienna, you are not going massively to create a UG. My point is that there is already competition, but it doesn't seem to play exactly the same way everywhere. Maybe it is not as strong as we sometime think. Anyway it has been positive.

What's the role of the EU legislator in this area? I think the role of the EU legislator is - as he has done before - to create some minimum standards across the EU, like the Merger Directive, the directive on representation of the company, but basically he should focus on cross-border issues and try to improve the access of companies to cross-border markets, so cross-border mergers. He should take care of transfer of seat, which unfortunately is now a non-starter in Europe because of too many oppositions. Yesterday we mentioned the Shareholder Rights Directive and the issue of double voting rights. As I mentioned, in France it's hard to get a double voting right if your shares are held in a bank account in Italy because you will appear as nominee and, I guess, the same thing is going to happen in Italy if you are a French shareholder. Maybe you will not get the double voting right in Italy because if you have your bank account in France your shareholding will not show up. This is a clear case for intervention by the EU legislator. The reform of the Shareholder Rights Directive deals with this but I'm not sure they really realize the problems. The directive has not been adopted yet. It would be nice to have some provisions to make sure that when you are a shareholder based in another Member State, you can still get the double vote. The Alps should not be a border for getting this.

The last example of what the EU legislator is doing, and is doing right, is the proposal for a single member company, which was published in April 2014. So what is it? It's an harmonised S.r.l. basically, a single-person S.r.l. It's targeted harmonisation. It does not take anything from anybody. Why? Because Italy can keep its S.r.l., but just needs to add an harmonised S.r.l., nothing more than this. And what's the advantage of this? Well, if you have an harmonised S.r.l. in Europe on targeted issues, it means that as an SME you can cross the Alps and create an S.r.l. in France without having to know French law basically because it's going to be harmonized. So it's a passport to help SMEs, not the big firms. Big firms can pay lawyers to create companies abroad. It's a passport to help small firms create subsidiaries in France and export, so this is a cross-border issue, it's not a national issue. If today you want to create an S.r.l. in Slovenia, do you know how to do this? I don't know either. Slovenia is just across the border of Italy, but I don't know how to do it. The same thing if you want to go to France. With this SMC proposal you would be able to create very easily and understand very well your foreign S.r.l because it would be harmonized on the essential points.

Now, second point shortly: circulation of models. There is competition, which I think is bringing positive results in this area, but there is also circulation of models. This is not new. What I think is new is that it's accelerating. It's going much faster than it used to be. If you take French company law, it has always been influenced by someone. French company law in the 17th century? It was Italian company law, I have to say. It went from Torino to Lyon and then from Lyon to Paris. In the 19th century French company law was inspired by the UK. In the 20th century it was inspired by Germany. So models have always circulated. France has also the S.à.r.l. It's the German GmbH basically that the Austrians took very shortly afterwards, France in 1925, and then Belgium, the Netherlands, everybody took this. So people have been shopping around. Each country in Europe is a laboratory for reforms. That's good. We should keep this because good ideas are taken from one place or the other. And let's take the double voting right which was just introduced in Italy. Well, that in France dates back to 1933, as it was said yesterday by Professor Spolidoro and this is something that now you are importing. However, actually I have to say I have doubts because maybe when we got it in 1933 we were inspired by the Italians. Anyway, things are moving all the time.

What I notice now is that this movement is much faster. It's going much, much faster. And also with regard to capital requirements. When in Italy you had the *S.r.l. a capitale ridotto o semplificata*, you didn't do it because of regulatory competition. You did it because you saw it was good to create jobs. And why did you get the inspiration? Maybe, I guess, you got it from the French experience because in France in 2003 we introduced the S.à.r.l. with 1 Euro and what happened? Nothing ! It was not the end of the world. These companies were created, usually they had 3,000 Euros as minimum capital, and they don't get into insolvency more than the others, maybe even less. Why? Because if you have only 3,000 Euro capital, no bank is going to lend you anything, so you have a

balance sheet which is pure equity, the best one you can dream of. So the only way you can go bust is if you don't pay your taxes or don't make business, but your default rate is not going to be higher than the others. So the French experience was positive and I guess this influenced the Germans in 2008 and of course now the Italians are also looking at this. There is brainstorming going on everywhere and everybody is looking at the others. So I think this is positive.

As a conclusion I will say that there are areas in Europe where I think that we need to be more integrated, such for instance as the banking union because in the banking sector we have a single market. So I fully support the banking union. It's a great step forward, but there are other areas, like company law, where I think we need to have cautiousness. We all have traditions. Each country is a laboratory, so let's keep this laboratory alive because it's inspiring and people get inspiration from other countries. Europe is not just about competition, Europe is also about cooperation and inspiration among Member States. Thank you.

Merci, Professeur Conac.