I-1.6 : Corporate Law seen through the prism of Regulation: the Financial Services industry and investor protection

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ı France, *doyen* Ripert, who wrote the most eminent treatises on both Civil Law and Corporate Law[1], possessed a genius that led him to be the first law scholar to study the relationship between Corporate Law and the economic organization of capitalism. In this fundamental work, he highlighted the benefits of the *Société Anonyme[2]*: it's majority rule is a tribute to efficiency, and it's limitation of shareholders' liability to the amount of their capital invested produces an incentive to invest.[3] Ripert thereby studied law from an outsider's perspective. Nobody has ever denied the relationship between the economic structure of the corporation and the legal structure of the corporation, just as no jurist has ever denied the link between the commercial transaction and the contract. Precisely, Ripert gave a sort of evaluation, a way of understanding law from the outside, instead of discussing law from the inside by substituting what the law is for what one wishes it would be. Economics were external to Law, Law adapted itself to Economics, and Economics were not at the heart of Law.

'his is why, even though Corporate Law was careful to produce the most beneficial possible effects for the enterprise, the enterprise was exterior to the law. This explains the perturbation in law when the economic notion of the enterprise was required not to enlighten the law's mechanisms or to better assist lawmakers, but rather to break down its door and become part of its innermost workings.[4] Of course, the adoption of economics within law was less obvious in Corporate Law than in other branches of law, such as corporate bankruptcy law, labor law, or competition law, because Corporate Law remains a law of artificial forms desired by the law. Yet, the reality of the enterprise did manage to infiltrate Corporate Law, later and in a more progressive fashion. The question of naturalism in Corporate Law was introduced. Two opposing sides formed in French legal doctrine. One side believed that the Corporation only has legal existence and is subject to law because a power legitimate to create artificial legal realities (the lawmaker) allowed this to happen. We identify this school of thought as creating the thesis of the fictitiousness of corporations' legal personality. Technically, this implies that as soon as the legislator has created a type of corporation, each economic actor can use it and incorporate as many corporations as he wants; however, symmetrically, until the lawmaker has performed the act of sovereign will creating a

specific type of corporation, the economic actor cannot use that form of corporation, since the form is simply a 'fiction' and since the economic actor is not a political sovereign, he cannot use sovereign power to create reality. This conception is opposed to the school of thought that adheres to the theory of the 'reality of corporations' legal personality'. This school upholds that corporations are reflections of organizations that existed prior to the Law, which simply acknowledges their existence and technically permits them to perform legal acts of commerce. Because of this reality, the lawmaker simply authenticates a preexisting reality and therefore, if an economic operator wanted to incorporate a company whose corporate form was not yet created by the law, he could do so.

rofessor Dominique Schmidt strongly and paradoxically contributed to the strengthening of this new naturalism in Corporate Law, by showing that the true nature of Corporate Law is to propose techniques that are only valid when used as tools to further a legitimate interest. His work performed a sort of reversal of the debate between the tenets of the theses of the fiction and reality of legal personality. Truly, if you believe that legal personality is a reality, you identify it with the true nature of the thing expressed by the notion of legal personality, which causes the corporation to appear as a group of partners, whose existence is declared, but not instituted, by the law. The corporation makes sense by itself, without having to examine the nature of the group whose existence sufficed to engender the legal being. In this way, the Corporation is like the Body Politic, which emanates from social organization.[5] On the other hand, if you are inclined towards the idea of the artificiality of legal personality, the Corporation is a form that exists only at the pleasure of the lawmaker, and if it is necessary to identify its nature, you have to look outside of the enterprise itself.

herefore, the Corporation is the form created and superimposed upon an intrinsic nature, to which it confers an improved efficiency. More precisely, the Corporation is the instrument used to allow economic structures to access the Law's efficiency and to perform legal acts of commerce, which alone allow for trustworthy engagements.[6] Therefore, even the thesis of the fictitiousness of legal personality supposes that the corporation has an intrinsic nature, or a situation of interests that—in this case, in a mediate fashion—the notion of legal personality will fulfill. In the same way that the judge can be said to be the 'mouth of the law'— or in other words, the entity that does not create law, but rather gives it concrete expression—the Corporation can be seen as the mouth of the underlying organization, which is the union of associates or of the company. The Corporation 'gives reality'[7] to an organization. Thus, paradoxically, the more that one believes that legal personality is a fiction, the more one makes pertinent the object of which the Corporation is the instrument. The question itself must be changed, because it is necessary to determine what this object

is.[8]

or some authors, this object is the enterprise itself[9], which is allowed to perform legal acts of commerce by using the instrument of legal personality. Legal personality is therefore the means of giving legal power to the enterprise's actions, but is also the strategic means of establishing a financially successful organization.[10] Using this form of reasoning, Corporate Law becomes part of Economic Law. Dominique Schmidt, criticizing this perspective, believes that legal personality[11] is the instrument between investors, on one hand, and on the other hand, those who are in charge of making the investors' money work for them—the elected corporate officers.[12] In the time that has passed since the writings of these authors and ancient academic debates, economic crises have proven that the second school of thought was right, especially through the notion of "Corporate Governance".

:orporate Law cannot therefore be dissolved within a larger branch of law. Nonetheless, it is not autarchic, because Corporate Law only has meaning because of the natural, underlying relationship between investors and corporate officers. This relationship is both financial and reciprocal: the shareholder provides capital, and the officer provides the perspective of profit and the augmentation of the value of the title emitted to represent the capital provided, otherwise known as a share. With remarkable constancy, through his thesis and in his subsequent works, Dominique Schmidt not only took this financial relationship as a direct object of study, but also presented it from the beginning in terms of a power struggle, on one hand, and as an unbalanced relationship, on the other. Because of this, all of his works call for a legal system able to readjust this relationship, which presupposes that the lawmaker and the judge are aware of this irrefutable fact and that they have the will to interfere.

'his conception confers upon Corporate Law a regulatory function in a broader sense, meaning that it reconstructs a relationship according to methods and principles that compensate a natural imbalance, and permanently performs readjustment.[13] Even if we take Regulation in the strict sense of the word, meaning the equipment used to constitute markets upon an equilibrium between various heterogeneous principles,[14] here, the regulation of the market for financial instruments, this notion is leaving a stronger and stronger mark on Corporate Law.

I –CORPORATE LAW HAS BECOME CONCERNED WITH CONFLICTS OF INTEREST AND COMBATS THEM USING REGULATORY LAW

:orporate Law was conceived as a system establishing procedures in order to allow decision to be taken in the most predictable, safe, and simple fashion, because internal corporate structures must mimic the structures by which human beings express their will. The question of interests was not directly addressed by the Law, with the notable exception of statutory agreements, doubtlessly because traditionally it was believed that individual interests were fulfilled by the nature of things, especially by the freedom and the power to vote. Today, the concern over interests is at the heart of the system, because interests are divergent and because individuals do not always possess the means to effectively fulfill their own interests.

'raditional Corporate Law is, in fact, a sort of horology, and in this sense is analogous to the trial in that it is an articulated ensemble of structures, scopes of activity, formulae, delays, and rules on legal publications and on how long documents must be kept in archives. It is a law of formalities. However, in the same way that classical authors were not unaware of the existence of the enterprises underlying legal personality,[15] the existence of stakeholders' concrete interests was not underestimated. Truly, the traditional conception of Corporate Law[16] is based upon the dual assumption that there is on one hand a "common interest" between the partners, which dispenses the Law from protecting them from one another, and on the other, that the divergence between the partners' interest and the corporate officers' systematically benefits the former, because of the partners' political weapon of revocation.

Let us begin by analyzing the interests of the partners' interests towards one another. The notion of common interest[17] is not self-evident because this interest is not provided by the nature of things, but rather, is a goal that is both safeguarded and fulfilled by the Law. Therefore, this common interest cannot be attained without the intervention of rules that construct this common interest and ensure that it is permanently maintained. Certainly, to take the French example, Article 1832, paragraph 1, of the French Civil Code[18] explicitly defines the Corporation as a contract, whose goal is to create a 'common undertaking', while Article 1833 of the same Civil Code[19] specifies that the 'corporation…must be incorporated in the common interest of its associates'. Dominique Schmidt inscribed the text of this law on the first page of his work on *Les conflits d'intérêts dans la société anonyme* [Conflicts of interests in the *Société Anonyme*]. But, the difference between an ordinary reading of these seminal articles for Corporate Law, and the reading performed by Dominique Schmidt is that Articles 1832 and 1833 are habitually seen as descriptive, while Dominique Schmidt posits that they are normative. If we follow him in his reasoning that Article 1833 is political, because it strives after a common interest, then Law must furnish the means needed for this

policy—a less precise, but more complex Law, than the aforementioned Law of mechanical and formal mechanisms.

When Article 1832 states that the Corporation relies upon a common undertaking, it seems to be stating the obvious. The law's simple reasoning allows the affirmation to accede to this logical status. Truly, unlike ordinary contracts, in which opposing interests adjust themselves to one another as best as possible, but in which one interest always wins out, and the other loses out, the principle of sharing losses and profits, associated with the prohibition of *leonina societas* clauses, means that when one wins, all win; when one loses, all lose. Therefore, according to this logic, no supplementary rule is needed to protect partners from one another, because when one of the partners acts in his own interest, his action automatically corresponds to the interest of the other partners.

This logic constitutes a mantra of Corporate Law. If it is true, therefore, it is not necessary to protect shareholders from one another, to keep them at a distance from one another, to regulate their relationships, since there is no need to consider the hypothesis of altruism and concern for others in order for everyone's interest to be fulfilled. It is necessary to consider the role of the corporate officer, but as long as corporate officers are also shareholders, one can be automatically certain that he will serve the interest of the other shareholders, because he will be pursuing his own interest. Thereby, the notion of loyalty is not required, because taking loyalty into consideration supposes that there is a divergence of interests, on one hand, and sufficient power to act contrary to the other's interests, on the other hand. Loyalty allows for restraining the strength that would allow a person not to pursue any other interest than his own. The very fact that the principle of loyalty is not gaining ground in Contract Law alone—the divergence between various parties' interests has always made it necessary to refer to the concept of good faith in the execution of an obligation—but also in Corporate Law, as shown by the incessant reminder of the purely financial character of the relationship between partners and corporate officers[20], and even by the emergence of the very category of the 'fiduciary contract'[21] are the signs of an implicit but necessary calling into question of the classical postulate. Loyalty is required only where there is a divergence of interest and when the person who must serve has the means not to fully do so.[22] However, the United States, remaining in the classical theory, esteem that the solely financial relationship between managers and minority shareholders does not have to be managed by the law. This results from the jurisprudence of the Supreme Court of the United States.[23]

Therefore, if Dominique Schmidt attached more importance to Article 1832 of the Civil Code than to all others, it is because he saw a situation that was not produced by nature, but that the Law is in charge of establishing, using

its normative power, in spite of nature. Truly, it is false to affirm that there is a shared interest between partners. There is no natural, single interest, because on one hand, the division of the profits made by the company is not limited to distributable profits, and because certain shareholders have the legal means to obtain a division of profits in their favor. This is not an abuse of the system: it is the system itself. The current financial crisis shows this on a larger scale: the financial system was not slightly damaged by a few crooks who used a strategy of regulatory gaming, but rather the system itself imploded, because it was constructed on inexact foundations, and a global regulatory solution is today being sought.

Therefore, within the system, unless this system is corrected by regulation, certain shareholders have effective voting rights, when these rights correspond to the largest quotient of the corporation's capital, while the others only have ineffectual rights: they are minority shareholders. Regulation is therefore the means to soften the brutality of this majority rule,[24] an efficient and savage rule.

Furthermore, the power of voting allows controlling shareholders to access corporate officers. Therefore, they possess the power to attain advantages, especially in terms of remuneration or institutional lifestyle, whereas minority shareholders do not. By behaving in this manner, the controlling associate diminishes the amount of dividends he will receive, but in return for direct and indirect advantages, which he in no way shares with minority associates. Since it has been demonstrated that associates do not naturally have a common interest, this interest must always be protected, even constructed. Let us return to Dominique Schimdt's words, always so deft because they are so simple: "Every company is fundamentally a power- and profit-sharing structure: sharing of power between managers and shareholders, as well as between the shareholders themselves: profit-sharing between the latter. This structure derives its strength from the common interest of its members and the weakness of its conflicts of interest."[25]

Thereby, the corporation is built not upon the *fact* of a common interest, but rather on the ambition for a common interest, an *ambition* that must be made reality by the Law, starting from a natural relationship which is the inverse: a conflict of interests between controlling shareholders and minority shareholders. In this way, the deed of partnership becomes an ordinary contract in that it is based on the balance between the divergent interests of various parties. Of course, there is no economic exchange[26], but there are divergent positions. Furthermore, the deed of partnership engenders an institution that functions using its internal corporate structures and whose life depends upon the initial deed of partnership. In this way, the initial divergence will continue to persist within the very internal workings of the corporation.[27]

Indeed, majority rule sacrifices certain interests to the power of others, even though these interests are contrary to one another. Traditional Corporate Law, because it still relies upon the naturalist illusion of a common interest, is not very interested in this question. The natural relationship between shareholders and corporate officers is of the same order. What the famous Agency Theory—but which would be more appropriately called 'theory of the mandate'—does is to highlight a reality that classical legal thought had already identified: corporate officers do not always pursue the same goals as shareholders, even though they depend on the shareholders for their power and they are given a mandate to serve their interests.[28] Today, this reality has becoming blinding and positive law is looking for all possible legal instruments to fight these conflicts of interest, which have been finally recognized within corporations, and within financial markets and credit rating agencies.[29]

To this problem, traditional law offers two solutions, the first is tautological but inexact, and the other is properly conceived, but inefficient. The first solution is to use the concept of a shared interest between shareholders. Indeed, the shareholders simply manage the company, and especially the largest shareholders (those who risk the most), in order that their concern for their own interests benefits passive shareholders from inconsiderate risk-taking and incites them to pursue the maximal amount of profit that they will then mechanically share with those who do not exercise management power. Therefore, the impossibility of permanently disassociating ownership from politics and the obligation to be a shareholder to access management positions are derived not so much from the idea that shareholders should be owners of the business, but rather, from a healthy conception of the exercise of power.

This might have been a pertinent solution in capitalism as it existed before the explosion of financial markets and would still be so if concentration remained the characteristic structure of capital. But, financial management has replaced wealth management. The dispersal of corporate shares, the limitless game of shareholder agreements, and the prowess with which legal personality is employed in organizational arabesques (the corporate structure of certain groups are a superb example of this), has allowed certain people to exercise decision-making power while running very low financial risk. The opacity of certain shares and the incapacity of markets to self-regulate[30], the danger of the multiplication of derivatives, and the deregulation of alternative financial markets[31] have greatly increased systemic risk. Therefore, external necessities for regulation have converged with internal necessities for regulation.

Concerning internal corporate organization, the director is no longer a 'significant' or 'majority' shareholder, except by coincidence[32]; the risk

attached to his decision is financially assumed by others (the multitude of investors). The disassociation between power and risk[33], increased by procedures whose incentive power has become perverted, such as stock options, on one hand, and the temporal disparity between the explosion of risk for investors compared to the immediately available advantages for corporate officers, on the other, have brought the conflict of interest between shareholders and corporate officers to the fore.

Certainly, traditional law had established a radical, almost miraculous solution: revocation. Therefore, the conflict of interest could be solved as soon as it appeared, by firing corporate officers. Providing officers with the daily power of administering the corporation, and shareholders with the exceptional power of getting rid of the former created equilibrium. Subjecting the director to the discretionary power of the shareholder over whom he usually exercises power incites the precarious director to exercise his power in a measured fashion. But, this mechanism does not work for two reasons. If the controlling shareholder is also the corporate director, which is logically required in order for the person who directs the company to be the same as the person who risks losing the most money[34], then the votes will never be enough for the director to be revoked.

Let us examine the hypothesis that the director is a minority shareholder and the other shareholders, particularly by using the mechanism of the joint action, have the effective power to revoke him, they must have good reason to want to do so. Truly, it is not because the Law does not demand that the revocation be justified that the revocation has no cause, and that it is not the situation of a situation or the observation of a behavior. *Ad nutum* revocation always has its reasons. Yet, the corporate officer holds information that might displease the shareholders, and we cannot assume that he would willingly provide them such information, even when ordered to do so by the Law, which is too general an instrument in this area. This is why economists have deemed the director of a company as benefiting from an 'informational annuity'[35].

The theme of the asymmetry of information is in this way common to markets and to corporations.[36] Asymmetry of information has engendered new economic theories[37] but the most classical political theories had already shed light on the fact that unshared knowledge is a source of power. The analogy is so strong between the government of a corporation and the government of a political community that Corporate Law has as much to learn from political philosophy as does economics. This evolution has led to the upheaval of Corporate Law: born from the idea of a natural single interest between shareholders, and of shareholders and corporate officers, it is now being rebuilt around power struggles that have to be regulated.

Let us return to the broader meaning of the word Regulation: the organization of relationships between persons of unequal strength, in order that, ballasted by the Law, these relations can redeploy themselves in a fairer manner. This traditional meaning of French regulation[38] is all the more legitimate here because it was adopted by the French Parliament in its desire to implement '*Nouvelle Régulations Economiques*' (NRE — New Economic Regulations), since the NRE Act of May 15, 2001 identified unequal power struggles on the markets and within corporations, and sought to make them more equal.[39] This is truly Regulation in its classic meaning of organizing relationships between various powers, without seeking to remove the original cause of the stakeholders' inequality. Truly, if imbalances in power were to be removed entirely, we would have to return to the regime of unanimous decision-making, which is not an option because the system would no longer be efficient and no decision could be taken.

There subsists, then, the situation in which a category of shareholders has a useful vote, and the other does not, in which corporate officers have the autonomy required not to pursue the interests that they were given a mandate to serve, and in which equilibrium must nevertheless be attained. However, equilibrium exists not only between various interests and positions, but also with regards to a goal or a value.

This goal, political by nature, can vary. It can mean forcing different shareholders' divergent interests to be fulfilled, including shareholders who lack the power to directly satisfy their own interests, because in their minority status, they cannot be shareholders and director at the same time. We might also consider that the corporation is not simply the legal structure created to manage the financial investment relationship, but in a less capitalistic vision of Corporate Law, it is the legal structure of the corporation itself[40], which engenders a more complex political goal: not simply the art of managing in the shareholders' best interests, but also in the workers' best interest—employees, as well as subcontractors, or even people working in dependent companies—, in equilibrium between two types of interests. If we set this political goal, Law could evolve by conferring, for example, rights quasi-analogous to those of shareholders on employees[41] or by encouraging employees to become shareholders. This promotes the economic vision of the corporation as a 'knot of contracts', regulation itself is close to this complex contractual conception.[42]

It is possible to have other sorts of conceptions about the corporation's political goal, especially by going beyond the analogy between the political and the commercial, and veritably merging these two areas. This implies that corporations have a role to play in the public political field and in developing this field, through education, fighting discrimination, protecting the environment, etc. Corporate Law thereby takes on new obligations, and

companies must provide information on their efforts in various areas, such as equality between men and women, a goal that should be promoted in the same way as it is in the political world.[43]

The question here is not one of the diversity of goals attributed to the corporation's activities and according to which the corporation's decisions should be evaluated, the essential is highlighting that by doing so, Corporate Law has become political and that consequently it can no longer be conceived as an ensemble of safe and simple forms, but rather as an ensemble of rules and decisions attempting to obtain the pursuit of various interests (determining what these interests are is an entirely separate question) that nature does not spontaneously provide for. All this, without renouncing majority rule.

This means that we have to consider what gives power. Of course, corporate officers derive their power from the fact that they express the corporation's will and engage its liability. But, in a less legalistic perspective, power is derived from possessing information. Everything converges towards this fact: we are in an information- and knowledge-based economy, and the Law makes the value of information ever stronger, especially by enhancing intellectual property rules. Yet, corporate officers have information at their disposal, and especially information on their own behavior, in itself and with regards to the goals they pursue. This makes them the masters of the game. This is why the mortal enemy of all systems is conflicts of interest: this is not a moral, but rather a systemic consideration. Regulation must revolve around the notion of conflict of interest. Establishing equilibrium will be achieved *a priori*, using transparence, and *a posteriori,* using liability.[44] The adoption of such a regulatory approach is dependent upon the welcome that the class action will have in French law, it is often proposed, and often delayed: similarly, such a test will be judged by the Supreme Court when it decides whether or not a North American court of law can hear a class action engaged against a foreign company. While North American positive law and economic doctrine leaves corporate officers a large margin of maneuver in their decision making power—and even if these officers generally affirm that their only concern is the pursuit of shareholders', and not stakeholders', interests—the system insists that the power of one shareholder to sue in the name of the corporation against a corporate officer, known as an *Ut Singuli* action, is the best defense against misuse of power.[45] This study has the advantage of comparing the manner that the United States and Europe apprehend the question. We should not be astonished to see that in the United States, there is great confidence in using the judge as a regulator, while in the European approach, especially the French approach, the judge is not an authority figure, and the organization of power makes no place for him.

The liability of corporate officers is not new in and of itself, because it is the natural consequence of autonomously exercising power in the pursuit of another's interests. The movement is, rather, characterized by a will for greater effectiveness, which justifies the attribution of the right to act in a court of law to people whose interests must be protected, or who the lawmaker has designated as being an agent of legality. This movement does not simply express concern for these interests, but rather shows the idea that the perspective of liability incites corporate officers to be prudent. Thereby, the *a posteriori* becomes *a priori* thanks to corporate officers' anticipative calculations. Furthermore, in order to act before a court of law and demand accountability, it is necessary to have information, doubts, and suspicions, which refers the *a posteriori* declaration of liability to the *a priori* need for information and transparency. Corporate Law in practice intertwines and puts these two places in time into a circular motion.

Of course, classic law gives shareholders the right to information, made reality by assemblies themselves, but also by the documents transmitted to shareholders during these meetings, or available to them beforehand, and by their right to ask questions. But information is like access rights: you have to have access to access, right to rights, and informed about what it is necessary to be informed about.[46] Yet, what should questions be asked about? Where should the basic information be sought out in order to have the desire to know more?

To resolve this primary difficulty in information asymmetry, Corporate Law, especially through the French NRE Act (*cf. above*), uses a key instrument of regulation: transparency.[47] Transparency differs from information in that it is not necessary to request to be informed. Therefore, transparency can be the obligation of corporate officers to spontaneously inform, or more radically, following the idea of the glass house, give a constant view of the wealth, decisions, decision making procedures, and the reasons for such decisions, etc. Transparency becomes the modality thanks to which decision-making liberty can be preserved, regulation thereby allowing economic liberalism to survive. Therefore, the justified refusal to regulate the amount of salary given to managers does not mean that it is not necessary to provide greater transparency in the advantages attributed to them.[48]

Moreover, regulation of power struggles can take on the form of a new requirement, natural in appearance only: the understandability of information. Truly, in a pragmatic regression, it is only useful to have information at one's disposal, whenever needed without having to ask for it, in order to dispose of it, i.e. draw consequences from it, for example, the decision to sue the corporate officer, or the refusal of a capital increase, or the insertion of new resolutions on the minutes of a shareholders' meeting. But having information at one's disposal means also being able to

understand such information. This is what is at stake in the new regulation of corporate power struggles: not information, but the ability to master such information, which means being able to understand it.

Yet, as it has so often been shown when it comes to transparency: the more information one has, the less mastery one has over this information, the more difficult it becomes to distinguish between the pertinent and the irrelevant, and it becomes impossible to correlate the different data. An excess of information is what deprives people of their power to act. We will not return to the time when information on corporations and markets was simple, because this simplicity was not only due to the fact that companies were relatively small and dealt with a narrow scope of activities, but also because they didn't have truly financial activities, meaning that they had not yet integrated the markets into their internal structure, and finally, because they were both relatively connected to the so-called real economy, while remaining independent. Today, the interdependence of markets, the financiarization of the economy, and the complexity of corporate structures, all exclude a return to such simplicity, where it was enough to provide information for this information to be understood.

Therefore, it is no longer enough to make the information available, or even to make it transparent to brake the informational ranks and establish equilibrium between minority shareholders and corporate officers, whose interests are opposed. If we truly want to conceive Corporate Law through Regulation, we must construct systems in terms of intelligibility and effective access to information. We note that in this case, we return to the same technical problem facing engineers and the industrial world in terms of access to a telecommunication or energy transport network, which shows the great unity of Regulatory Law, and to what extent Corporate Law is an illustration of this fact. However, network industries should never be opposed to the financial industry, as, alas! we do all too often because of historical reasons.

Via these conjugated movements, Corporate Law appears to be principally a problem of information regulation, in order to make sure that information leads to understanding. Because of this, not only do accounting standards take on greater importance[49] than rules on internal corporate structures, but also we observe a change in internal structures in order to obtain good corporate regulation. Truly, the most important people are no longer those who take decisions or carry them out, nor even those who provide information, but rather those who make the information understandable and who approve the information: auditors, financial analysts, or financial markets authorities. The importance of these actors is a sign that regulation, in the strict sense of the word, meaning market regulation, is entering into Corporate Law.
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II –CORPORATE LAW HAS BECOME CONCERNED WITH DESPOTISM AND COMBATS IT USING REGULATORY LAW

Structures or organizations that are unique to financial markets have provided most of the new thought and rules for Corporate Law. However, at first glance, financial market regulation seems foreign to Corporate Law, because the corporation is a 'black box' for the markets, or at least, the financial markets only know publicly traded corporations, while Corporate Law is founded upon the *summa divisio* between joint-stock companies / partnerships.[50] Precisely and moreover, all corporations are not publicly traded, even though the imperative of equitable relationships is common to all of them. This concern is just as imperious in privately held corporations, and especially when such corporations are hidden. But the distinction between regulation for markets and governance for corporations is beginning to dissolve. This is a recent and necessary evolution. Furthermore, financial markets are *de facto* spearheading the reflections upon corporate functioning, which means that the publicly traded company is paradoxically becoming the ordinary model for companies. What is good for the publicly traded company is now good for all companies.

However, at first glance, companies look for funding on financial markets. In this, the market is supposed to be external to the company, just as is the bank that gives a loan. Similarly, the market is a place where goods are exchanged, and if we were to assimilate financial markets law to a traditional branch of law, it would be the law of property.[51] To take an example, the law of public offers is entirely subject to stock market regulation, because it concerns operations using stocks. Therefore, in a first perspective, not only is the internal functioning of corporations distinct from market regulation, but furthermore, the financial market itself confirms this affirmation because the value of stocks is linked to the value of assets, and the mechanism of listing groups of companies has made corporations as individual legal persons indifferent, and gives pertinence to the masses of assets[52] put at the service of economic activities, which is what the notion of a 'group' refers to, even though French Corporate Law continues to deny legal personality to groups.

The disappearance of the distinction between 'financial markets regulation' and corporate governance is, however, in progress. This is due not only to the fact that the financial market puts power within the grasp of the person

able to pay for a public offer, but also because the financial market is efficient only because it is capable of obtaining, testing, and analyzing information on companies, in order to determine the fair value of its shares.[53] Companies are themselves the source of the information that the market processes. Certainly, at this stage, it is easy to distinguish between the internal structure of a corporation (its decision-making process) and its external functioning, which means the information it provides to the market.

However, the investor and the shareholder are often two different terms for the same person: the information given to the shareholder, in an internal perspective, is identical to the information provided to the investor, in an external perspective. Of course, in a classical perspective, the shareholder uses this information politically, since he participates in the common corporate adventure; while the investor uses this information financially, since he evaluates the perspectives of return on his investment. But, the traditional distinction between the political and the financial has become dubious. In one direction, from the financial to the political, the only effective political right a minority shareholder has to react to management that displeases him is to leave the company by selling his shares—which is using his financial rights. In the other direction, from the political to the financial, the evaluation of the perspectives on return on investment consists in anticipating the company's future performance—which means evaluating the political decisions that will shape its future.

Furthermore, the market must benefit from trustworthy information, which primarily comes from corporate officers. Because of this, financial market regulation must have direct access to the very way that internal corporate structures function, and make sure that corporate officers do not succumb to the temptation of keeping information to themselves, in order to use it for their personal profit, or hide or mismanage a conflict of interest. Security and transparency of the financial market is a goal in and of itself, and was the subject of the French Act of August 2, 1989 relating to the transparency and security of the financial market, just as was the American Sarbanes-Oxley Act of July 31, 2002, and depends on the proper organization of the fashion in which corporate decisions are made. Therefore, even though the internal operation of the corporation used to be indifferent, it has become essential, because it is an indicator of the trust that can be vested in corporate officers.

The Corporation has become porous to the financial market. This means that if one wants to politically construct an efficient and unified financial market, as is the European Union's current ambition, it is not as urgent to create a single financial markets authority as it is to obtain coherent and efficient rules for the internal organization of publicly traded corporations. Institutions had started this process while the 'iron was cold', or before the

financial crisis, because even while the idea of a single financial markets regulator was hardly popular[54], the European Commission's General Directorate for the Internal Market had launched a 'plan' for action for the modernization of corporations and the improvement of corporate governance on May 21, 2003. Of course, the financial crisis engendered an overreaction, and institutions desire to 'strike the iron while it is hot' by creating a single, European financial markets regulation authority in order to ensure the necessary reactivity in case of a new banking crisis, whose systemic effects from one member state to the other might be catastrophic.

The French Act of August 1, 2003 relating to financial security took this porosity between financial markets regulation and the proper balance of power, or information, between shareholders and corporate officers into account, investor confidence being the link between the two. In order for the financial market to function on trustworthy information, and in order for investors to have confidence, the corporation must function correctly. Therefore, there must be convergence between financial market regulation, which tends towards security, and governance of legal persons and groups, which tends towards pursuing shareholders' interests. This is why the financial markets regulatory authority adopts rules on corporate governance.

In these conditions, the essential thing is to organize this porosity, by regulating the passage of information between its source (corporate officers) and its recipient (financial markets). For this, the market needs to understand the information provided and believe this information. When the French *Commission des opérations bancaires* (COB — Banking Transactions Authority) punished auditors for providing financial markets with false information for certifying inexact documents, a judgment approved by the Court of Appeals of Paris in a March 7, 2000 decision[55], the market authority reminded the auditor of his sole responsibility: ensuring the proper functioning of financial markets. Furthermore, when the Act of August 1st, 2003 established strong links between the *Autorité des Marchés Financiers* (French Financial Markets Authority) and the *Haut Conseil du Commissariat aux Comptes* (French High Council of Auditors), it institutionalized this porosity between internal workings and external workings; between regulation and governance.

If financial markets regulation is in charge of investor confidence, it must make sure that information is trustworthy. In order to accomplish this, the market primarily relies upon financial intermediation by investment banks, who are able to test the information. For this, secondarily, these establishments rely upon specialists: financial analysts. But this double-embedded structure—financial analysts in banks, and banks in markets—is not exact. In reality, the market has rapidly become the direct interlocutor

for financial analysts. The market has made them intermediaries, which creates a new sort of intermediation, the intermediation of the trustworthiness of information, which we might call 'the intermediation of trust'.

If we follow this evolution, auditors, financial analysts, and credit rating agencies, even though they are formally distinct from one another, should be subject to the same obligations, because they all ensure this new function of being intermediaries of trust, and the market now drastically needs them. Indeed, when information was relatively simple and therefore understandable, it could be tested by each individual investor. Today, through an astonishing regression, the market no longer attempts to directly process information by itself, but rather tries to find trustworthy people in order to trust their evaluation of the information.[56] Of course, such trust could because of these peoples' ability, but according to the theory of cognitive mimetism, it could simply be that others do the same thing as 'those who know'. But the regression continues because hardly anybody checks the credentials of financial analysts—this seems to be a detour that the market no longer has time to take—and confidence is simply placed in the professional title that the person bears. The market takes 'the intermediary of trust's' word for it.

This regression is constituted not only by the trust placed in a professional title, which is seen as not only necessary, but sufficient in and of itself—the title of financial analyst or auditor—, even though the world of titles is usually what the market is opposed to. This can be explained by the fact that showering the market with information contributes to make this information incomprehensible. Financial market regulation therefore falls upon these intermediaries who attest to the trustworthiness of information and make them understandable, therefore usable, therefore useful. This is why financial market authorities are concerned with internal corporate structures, to the extent that such analysis is being conducted publicly and confidentiality is becoming an almost foreign notion to Corporate Law, brushed aside by the principle of transparency. This explains the major reform of the Financial Security Act, which makes the internal audit almost analogous to the external audit.

Therefore, financial market regulation increases control over corporate officers and readjusts conflictual relationships within corporations, but achieves this at the cost of regulatory notions such as transparency. Because information must be trustworthy, and the investor must be protected, market authorities have become directly concerned with the Agency relationship. Obligations for declarations and for transparency are means to diminish the nefarious effects of conflicts of interest that burden the director of a company, but they are simply procedural rules, and

nothing more than a palliative.

A more *a priori* and more radical solution would be to remove conflicts of interest, by requiring that the board of directors be mostly, or even exclusively, made up of independent administrators. From a Corporate Law perspective, the proposition is absurd, even sacrilegious, because it challenges the idea that shareholders should govern the company since they bear its financial risk. The intimacy between risk and power is thereby broken. If the idea persists, especially in the United States, it is because it is a regulatory notion: by composing the board of directors of independent people, whose distinction would be their ability, skills, and knowledge, we transform this body into an impartial one—since the officers are no longer shareholders—and a competent one, both internal to the corporation and as disinterested as though it were external to it. By doing this, we enshrine the regulatory authority as the ideal organizational model for good decision-making! Internal corporate structures should be modeled according to this example.

We understand how much financial markets regulation has impacted corporate governance, both by showing how important it is, and by changing its traditional understanding. The resonance of theories on good financial market regulation for corporate governance tightly links proper corporate governance to checks-and-balances, and protection of owners of financial instruments. However, current reflections upon governance should focus more on privately held companies. We can conceptually justify that regulation of corporate relationships should only occur within publicly traded companies and not in others, either because they are seen as structurally different from one another, or because they do not require the heavy legal framework needed when stocks are publicly traded. But, confining the porosity of external regulation and internal governance to publicly traded companies is based upon contingent explanations: the financial market has alone brought about organizations that are sufficiently structured in order to allow us to reflect upon their governance. Therefore, market consultation methods are only available to financial market authorities, and the European Commission's communications simply contain a summary of the authorities' contributions[57], which, consequently, dries up other forms of reflection. However, if we return to our concern over protecting minority shareholders, there can be no single solution for all companies, because the crucial element resides in majority rule, which is not affected by the fact that the company is privately held or publicly traded. The migration begins.[58]

If we conclude that market regulation's rules do not simply influence corporate governance, but improve it by improving information, for example, we must encourage companies to list themselves, as an indirect

way of improving corporate governance. To take just one example, the liquidity of the financial market allows a shareholder to sell his shares if corporate officers' behavior does not please him. We have seen that the exercise of this financial power to sell shares is the most efficient of political rights[59]. It is necessary to give minority shareholders in unlisted companies the power to easily sell their shares. This shows the interaction between market regulation and corporate governance, even within privately held companies. This interaction is just at its beginning.

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[1]Ripert, Georges, Roblot, René, by Vogel, Louis, *Traité de droit de droit commercial*, Tome 1, Vol.1, 2nd ed., LGDJ, 2001 ;
Planiol, Marcel, Ripert, Georges, Boulanger, Jean, *Traité élémentaire de droit civil,* Vol. 1, 5th ed., LGDJ, 1949.

[2] Editor's note : roughly equivalent to a Public Limited Company, the *Société Anonyme* is a form of Limited Liability Corporation in French Law.

[3]*Aspects juridiques du capitalisme moderne,* Sirey, 1951. For a more historical perspective, cf.: Braudel, Fernand, *Civilisation matérielle, économie et capitalisme* and especially the third tome, *Le temps du Monde,* Librairie Armand Colin, reprinted in paperback format – Références, 1979.

[4]Didier, Paul, *Droit commercial,* Tome 1, *Introduction, l'entreprise, l'entreprise individuelle*, 3rd ed., coll. « Thèmis », PUF, 1999, p. 105 s.

[5]On the pertinence and implications of understanding the corporation using political society as a reference, either attractive or repulsive, cf. Frison-Roche, Marie-Anne, 'Droit des sociétés et principe de gouvernement', *in Liber Amicorum Guy Horsmans*, Bruylant, 2004, p. 461-470. .

[6]For the same demonstration made via an economics and management approach, cf. Bruslerie, Hubert de la, *L'Entreprise et le Contrat : Jeu et Enjeux,* Col. Gestion, Economica, 2010.

[7] To use the verb (*réaliser*) used by Henri Motulsky to express the way that legal provisions become concrete rights thanks to judgements (*Prinicpes d'une réalisation méthodique du droit privé. La théorie des éléments des droits subjectifs*, Sirey, 1948, reprinted by Dalloz, 2002).

[8]This is why Dominique Schmidt asked the question in terms of finalities: 'La finalité du pouvoir dans les sociétés cotées', JCP E, 1996, *Cahier de l'entreprise 4*/1996.

[9]Cf. especially Paillusseau Jean, *La société anonyme, technique d'organisation de l'entreprise*, Sirey, 1967. For a more moderate interpretation, cf, Mercadal Barthélémy,'La notion d'entreprise' in *Les activités et les biens de l'entreprise*, Mélanges Derruppé Jean, Joly/Litec, 1991, p. 9-16.

[10]Champaud Claude, *Le pouvoir de concentration de la société par actions*, coll. « Bibliothèque de droit commercial », Sirey, 1962.

[11]For his criticism, cf. Schmidt, Dominique, *Les conflits d'intérêts dans la société anonyme*, Coll. « Pratique des affaires », 2nd ed, Joly, 2004, n°11, p. 12 and following.
[12]*Ibidem*, n°15, p. 24 : « ...la personne morale est un procédé technique, ce qui signifie que, gouvernée par les actionnaires et les dirigeants sociaux, elle est à leur service » [“…legal personality is a technical procedure, which means that, governed by shareholders and corporate officers, it is at their service”].
[13]On these general characteristics of régulation cf. for example « Tutelles et régulations comparées », in *Services publics comparés en Europe: exception française, exigence européenne,* work performed by the Marc Bloch class of the Ecole Nationale d’Administration, tome 2. p. 486-561, La Documentation Française, 1997, p. 535. Especially as concerns the necessity for Corporate Law to permanently readjust particulièrement, sur la nécessité d'un droit des sociétés visant à rééquilibrer en permanence lesrapports entre les mandataires puissants et les associés ne disposant que de pouvoirs résiduels ; Frison-Roche, Marie-Anne La loi sur les Nouvelles régulations économiques -, D. 200l, chron.,
p. 1930-1933 ; Schmidt, Dominique;« Le droit des sociétés a-t-il été intégré par la loi NRE dans la logique de la régulation? *», in Droit de La régulation.' questions d'actualité.* N° spéc. *LPA, 3* juin 2002, p.26-28.
[14]Frison-Roche, Marie-Anne, Définition du droit de la régulation économique, *Recueil Dalloz*, *chroniques* 2004, p.126-129.
[15]Cf. above, n°s 1 and following.
[16]Cf. aforementioned *Les conflits d’intérêts dans 1es sociétés anonymes*.
[17]Cf. for example ‘Rapport de synthèse’, in *Actionnaires et dirigeants: où se situera demain le pouvoir dans les sociétés cotées ?*, Cahier de droit de l'entreprise, 4/1996, p. 25-27.
[18]Article 1832-1 of the *Code Civil* : « La société est instituée par deux ou plusieurs personnes qui conviennent par un contrat d'affecter à une entreprise commune des biens ou leur industrie en vue de partager le bénéfice ou de profiter de l'économie qui pourra en résulter. » [A corporation is established by two or more persons who agree by contract to allocate property or labor to a common undertaking in order to share the profit or benefit from the savings which could result therefrom]

[19] Article 1833 of the *Code Civil* : « Toute société doit avoir un objet licite et être constituée dans l’intérêt commun des associés. » [Every corporation must have a licit purpose and must be incorporated in the common interest of its associates.]
[20]Bonfils, Sébastien, *Le droit des obligations dans l'intermédiation financière*, coll. « Droit et Economie », LGDJ, 2005.
[21]Sur cette nécessaire autonomie de cette notion de loyauté et de confiance qui postule qu’à l’état de nature, il y a déloyauté, défiance et conflit d’intérêt, voir : Frison-Roche, Marie-Anne, Considération générale sur la confiance, in *La confiance au cœur de l’industrie des services*

financiers, Edition Y Blais 2009. Voir cependant la position du professeur Winter Ralf, ci-dessous.

[22]On the necessary autonomy of the notion of loyalty and confidence that posits that in a natural state, there is disloyalty, defiance, and conflicts of interest, see: Frison-Roche, Marie-Anne, 'Considération générale sur la confiance', in *La confiance au cœur de l'industrie des services financiers*, Edition Y Blais 2009. See, however, the position of Professor Winter, Ralph, below.

[23]*Santa Fe Indus, Inc. v. Green*, 97 S. Ct. 1292, 1303-04, 1977. See more generally Winter, Ralph. K. Jr., State Law, Shareholder Protection, and the Theory of the Corporation, *Journal of Legal Studies*, 6, 251, 1977, p. 251-292. For this author, the explanation of this jurisprudential position is above all pragmatic, because the protection of minority shareholders, at the expense of the freedom of corporate officers, would lead to capital flight, the law thereby becoming unproductive, and increasing economic inefficiencies and reducing the ability of the corporation to attract capital. This transfers Corporate Law back to the economic analysis of law.

[24]Schmidt, Dominique, Le droit des sociétés a-t-il été intégré par la loi NRE dans la logique de la régulation?, previously cited, p. 26.

[25]*«* Toute société est fondamentalement une structure de partage du pouvoir et du profit: partage du pouvoir entre dirigeants et actionnaires, ainsi qu'entre actionnaires eux-mêmes : partage du profit entre ces derniers. Cette structure tire sa force de l'intérêt commun de ses membres et sa faiblesse des conflits d'intérêts » *Les conflits d'intérêts dans la société anonyme*, previously cited in footnote n° 17, p. 27.

[26]Didier, Paul, Brèves notes sur le contrat-organisation, in *L'avenir du droit*, Mélanges François Terré, Dalloz/PUF/Juris-classeurs, 1999,
p-635-642

[27]Didier, Paul, Le contrat sans l'échange, in *L'échange des consentements,* n° spéc. RJ com, 1995. V. aussi Libchaber, Rémy, « la société, contrat spécial », *in Prospectives du droit économique*, Mélanges Michel Jeantis. Dalloz, 1999, p. 281-289.

[28]On Agency Theory, cf. especially Couret, Alain Le gouvernement d'entreprise, la *corporate governance*, Dalloz, 1995, chron. p. 163 s. ; Didier,Paul, Théorie économique et droit des sociétés, *in Droit et vie des affaires*, Mélanges Alain Sayag, Litec, 1997, p. 227-241 ;. Ponsard, Jean-Pierre (dir.), *La montée en puissance des fonds d'investissement, Quels enjeux pour les entreprises ?*, Documentation française. 2002.

[29]Sève, Margot, *Regulatory Law Review* (*RLR)*, 2010, II-.6.8.

[30]Aglietta, Michel, Rébérioux, Antoine, *Crise et rénovation de la finance*, Odile Jacob, 2009)

[31]Report from Pierre Fleuriot to the French Minister for the Economy, Industry and Employment on the Review of the Markets in the Financial Instrument directive (MIF) February 2010, France, *Regulatory Law Review (RLR),* 2010 III-2.4)

[32]This is why, first of all, we tend to distinguish sole-proprietor types of

corporations, because they are run by those who also own almost all the shares of the company, or even most of the company's assets, which leads them naturally towards prudent management and an anticipated concern for the succession of corporate officers. This also explains the importance that banking regulation accords to the legal notion of 'majority shareholder', required by the regulator, and which allows him to know, beyond corporate officers, who he should address within the financial establishment when a systemic risk is identified, because the proper correspondent must be found, and a procedure for recapitalization must be established.

[33]For a broad analysis, cf. Schiller, Sophie, *Les limites de la liberté contractuelle en droit des sociétés*, coll. Bibliothèque de droit privé, t. 378, LGDJ, 2002.

[34] Cf. above n° 18.

[35]This informational annuity (*rente informationnelle*) was the justification for the Agency Theory, which is indissociable from the whole theoretical and practical movement of corporate governalnce. On this movement, cf. Brundney ; Victor, Corporate governance, agency costs, and the rhetoric of contract, *Columbia Law Review*, vol. 85, n°7, p. 1403-1444.

[36]Didier, Paul, Théorie économique et droit des sociétés, aforementioned.

[37]Cf. especially Bambey, G., Spremann, Klaus, *Agency Theorie, information and incentives*, 1987. Cf. also Dobson (dir.), *Applied Agency Theory*, 1993.

[38]Tutelles et régulations comparées, in *Services publics comparés en Europe : exception française, exigence européenne*, aforementioned.

[39]Frison-Roche, Marie-Anne, La loi sur les Nouvelles Régulations Economiques, aforementioned.

[40] Cf. above n° 5

[41] Especially when control of the corporation is modified, for example, during a public offer. This concern is évident in the French NRE Act. Cf. aforementioned Lafarge, Philippe, Prise de contrôle et intérêt des salariés, *in* Schmidt, Dominique (dir.), *La prise de contrôle,* n° spécial de la *Revue de Jurisprudence Commerciale,* 1998, p. 101-115. On the question of whether or not the form of the corporation integrating these concerns should be a particular form, and therefore circumscribed, or a more general form, freely adopted by associates in all types of corporations,v. *La Société Européenne,* n° spéc. *LPA,* mai 2004. On the articulation between various branches of law that this would engender between Corporate Law, Contract Law, and Labor Law, cf. Supiot, Alain (dir.), *Regards croisés sur le social,* Semaine sociale Lamy, suppl. n°1095, oct. 2002.

[42]Cf. Bruslerie, Hubert de la, aforementioned.

[43]On the sociological movement that this relies upon, especially on the question of promoting women within corporations and in society as a whole via this means, cf. Frison-Roche, Marie-Anne et Sève, René, (dir.), *Le droit au féminin,*n° spéc.*L'Année sociologique,* vol. 53, *2004/1.*

[44] This regulatory form of reasoning has been adopted in environmental matters using the notion of 'environmental liability' being developed in various pieces of European legislation, and many cases handed down by European Union courts of justice.

[45]Cf. especially the study performed by Jeswald W Salacuse, Corporate governance, Culture and convergence : corporations American Style or with a European Touch ? *Law and Business Review of the Americas*, vol. 9 n°33, 2003 p 33-62.

[46]On this question, cf. in a broader perspective, Frison-Roche, Marie-Anne, Le droit d'accès à l'information, ou le nouvel équilibre de la propriété, *in Mélanges Pierre Catala*, Litec, 2001, p. 759-770.

[47]Cf. Jean Carbonnier, who takes a critical distance towards this notion that seems to be him a 'completely controlled' corporation rather than a corporation in which freedom is allowed to develop, cf. the introduction of *La transparence*, previously cited. P. 9-18.

[48]Clement, Pascal, *Gouvernement d'entreprise : liberté, transparence, responsabilité. De l'autorégulation à la loi*, Rapport d'information n° 1270, A.N., décembre 2003.

[49]Hoarau Christian, la régulation comptable internationale, *in* Le Dolley, Erik, (dir.) *Les concepts émergents en droit des affaires*, Coll. « Droit et Economie », LGDJ ; 2010 p.103-122.

[50]As shown by Dominique Schmidt, the French Act of August 1, 2003 was not principally focused on Corporate Law, which makes him conclude that it did more harm than good, especially by reducing legal security (Les lois du Ier août 2003 et le droit des sociétés, Recueil Dalloz, Point de vue, 2003, p. 2618-2619).

[51]Jeantin, Michel, Le droit financier des biens, in *Prospectives de droit économique, Mélanges Michel Jeantin,* préc., p. 3-10. In that the progressive transformation of the 'stock' to a 'title' and then to a 'financial instrument' is very significant.

[52]Cf. on this point the very pertinent analysis conducted by Gérard Farjat, Entre les personnes et les choses, les centres d'intérêts, RTD civ., 2002, p 221 s.

[53]Bouthinon-Dumas, Hugues, *Le droit des sociétés cotées et le marché boursier - Etude des conditions juridiques de la détermination de la valeur de la société par le marché boursier*, Coll. « Droit et Economie », LGDJ, 2007.

[54]Frison-Roche, Marie-Anne, Les contours de l'Autorité des marchés financiers, *in* Vauplane, Hubert de, et Daigre, Jean-Jacques, (dir.), *Droit bancaire et financier*, Mélanges AEDBF, vol. IV, Revue Banque éditions 2004, P: 165-180.

[55]Court of Appeals of Paris, 1st Chamber, *H.*,*KPMG*., *RJDA*, 2000.

[56]On this idea according to which the Financial market is not simply built on trust, but is made up of intersubjective links, which are the true source of value, cf. especially Orléan, André, *Le pouvoir de la finance*, Odile Jacob, 1999 ; Giraud, Pierre-Noël, *Le commerce des promesses : petit traité sur la*

finance moderne, Le Seuil, 2001.

[57]The November 15, 2003 document synthesizing replies to the European Commission's General Directorate of the Internal Market on May 21, 2003, setting out the aforementioned 'action plan' on the 'modernization of corporate law and the promotion of good corporate governance in Europe', is a perfect example of this sort of 'idea drain' on corporate law by the authorities.

[58]On this movement, cf. Boizard, Martine, *la distinction de la société cotée et de la société non-cotée comme summa divisio du droit des sociétés*, thesis Paris II, 2002 ; Couret, Alain, Régulation financière, société cotées et sociétés non-cotées, in *Droit de la Régulation : question d'actualité*, préc., n°s 33 s., p 34 s.

[59] Cf. above n°40