THE REGULATION OF SECURITIES MARKETS IN WESTERN EUROPE

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We are all, of course, aware of the effort of the European Economic Community to develop common standards with respect to many aspects of securities regulation in the Community. And, as we all know, that effort has been characterized by snail-like slowness and great difficulty in securing acceptance and ultimate adoption of a limited number of standards designed to further that end. It is not unfashionable for critics to fault this process and this effort. However, when one surveys securities regulation in the common market countries, only then can a person begin to appreciate the enormity of the endeavor and cease wondering at the difficulty in securing agreement; rather, one must marvel that any agreement can be reached. It reminds one of Winston Churchill's famous remark, "One should not criticize the dancing bear for dancing awkwardly. Rather, one should praise it because it dances at all."

As the result of historical traditions, various cultures, conflicting ideologies, varied judgments, differing experiences, the relative power of various forces, and a host of other factors, the systems of securities regulation prevalent in Europe differ so markedly that it is virtually impossible to make any meaningful generalizations with regard to them.

Each of the countries has confronted much the same sort of problems. Each of the countries depends in significant measure upon private sources for capital; each has recognized the necessity of liquid markets to facilitate the raising of capital; each has recognized the desirability of distribution processes and trading markets characterized by integrity and freedom from manipulation; each has recognized some role for the government, albeit in many instances quite minimal, in protecting against dishonesty and manipulation. However, each of the countries has responded in its own unique way, and while there are resemblances among several of them, it cannot rightly be said that any one is a close copy of another.

I think it can be rightly said that in each of the countries one or more stock exchanges constitutes the focus of the securities regulatory system. One of the principal variations among the common market countries is the degree of autonomy that is afforded the exchange or exchanges. In some countries, the exchange has the final word with regard to the securities which are admitted to trading on it. Obviously this is a tremendously important power since, given the immaturity of the over-the-counter market in European countries, denial of trading on an exchange is a serious limit on investor liquidity. Similarly, many exchanges have the unrestricted right to determine who shall be admitted to membership on the exchange, and again this is an extremely valuable franchise which can be given or withheld, in some instances with total arbitrariness.

An example of exchanges that are relatively unfettered are the London Exchange and the exchanges in West Germany. At the other end of the spectrum perhaps is the Bourse in Paris which in many respects is constrained in its exercise of power by the Commission Des Operations De Bourse, a government body enjoying a degree of independence resembling that of the Securities and Exchange Commission in Washington and having considerable power with respect to the operations of securities markets and those engaged in them. The COB, of all the government agencies in Europe, most closely resembles the SEC, although its statutory powers appear to be less and, of course, given the fact that it came into existence only in 1967, it has not reached the maturity (or complexity) of its United States counterpart.

In one degree or another exchanges exist either because of governmental action or at a minimum because of governmental acquiescence. Thus, they in some measure have the sanction of government.

The exact nature of the relationship between the government and exchanges varies immensely. As a general rule exchanges are afforded a considerable measure of self-control and self-regulation, with minimal governmental interference.

The source of requirements for publicly held companies to make public disclosure in connection with offerings and on a continuous basis varies. For instance, in the United Kingdom the obligation with regard to public disclosure at the time of an offering has its source mainly in governmental requirements, but the obligations of continuous disclosure emanate from the London Stock Exchange. The requirements with regard to continuous disclosure also vary considerably: in some cases only an annual report is required to be circulated; in other cases semi-annual and quarterly reports are required. Somewhat more rarely episodic reporting, that is, reporting of specific events when they occur, is required.

In virtually all Western European countries there have developed fairly demanding standards for the preparation and auditing of financial statements. These standards are largely the outgrowth of voluntary endeavors on the part of the accounting profession, although occasionally there will be governmental intervention in some degree. I think it is fair to say that the financial statements of an issuer are at the heart of the disclosure process in virtually every country and additional disclosures are for the most part ancillary to them.

Since the trading in securities in most Western European countries is largely concentrated on exchanges, the “licensing” of those eligible to participate in securities activities is largely under the control of the exchanges, although in several countries government action is necessary.

As mentioned, the European Economic Community is engaged in a major endeavor to standardize certain of the practices with regard to securities in the common market. Most notably it has adopted standards with regard to the contents of prospectuses to be used in connection with public offerings of securities and certain standards with regard to accounting matters. Pending are proposals with regard to eligibility for exchange listing and certain other matters.

One of the recurring problems confronting securities regulators in all countries is that of takeovers. In varying degrees these activities are regulated. Probably the most comprehensive, and in many respects, in my estimation, the most effective, mechanism for the control of practices engaged in during takeovers is in the United Kingdom. There, at the behest of the Bank of England, the London Stock Exchange and other financial organizations, there was organized the Panel on Takeovers and Mergers. This body has no official status: its determinations are not enforceable in court and are binding only to the extent that parties to proceedings before it are willing to follow its directions. Of course, the informal sanctions are considerable and may consist of a refusal by merchant banks to deal, inability to list additional securities on the London Stock Exchange, a certain amount of disgrace in the eyes of peers and so on. The result of these informal sanctions has been universal compliance with the determinations of the Panel.

The Panel operates with a minimum of procedural niceties. Its rules, which are constantly updated and which are now in their fifth edition, detail with considerable precision the manner in which offerors and offerees should conduct themselves in the course of a takeover attempt. These rules govern not only the disclosures which should be made, but likewise are substantive and include such requirements as one that requires that if a party accumulates more than 30% of the stock of a target, then it must make an offer at a stipulated price to all remaining shareholders.

A recurrent problem in every country with securities trading activities is that of insider trading. We have discussed at some length the measures which prevail in the United States to inhibit this activity. In most countries where the problem has been addressed it has been dealt with as a criminal matter. Thus, recently in the United Kingdom and France statutes have been adopted which provide for criminal penalties in the event of insider trading. The approach characteristic of the United States, in which it is primarily dealt with as a civil matter, is a rarity rather than the rule. It is noteworthy that in the United Kingdom, before enactment of the criminal statute, various measures had been taken to discourage such activity, including disclosure requirements to expose to public criticism those who engaged in it. The effort to criminalize or in any other fashion through strong remedies discourage such trading was difficult and repeated efforts in Parliament foundered.

At least in some countries, if not throughout Western Europe, there appears to be a strong trend in the direction of stronger, more vigorous regulation of securities markets and transactions. As mentioned, the EEC continues to labor in an effort to develop uniform standards with respect to many aspects of securities trading and securities markets. Moreover, in the last decade and a half, Italy and France have established regulatory bodies with, by comparison with what preceded them, considerable power over securities markets and those participating in them. Recently, Professor James Gower at the behest of the United Kingdom Department of Trade, prepared an extensive analysis of the regulation of securities matters in the U.K. and concluded that the system needed strengthening in a number of ways. Occasionally there are heard voices in the U.K. urging the establishment of something resembling the Securities and Exchange Commission in the United States. Partially in response to these occasional rumblings the securities industry organized the Council on the Securities Industry several years ago to coordinate and strengthen self-regulatory efforts. The Panel on Takeovers and Mergers became a part of this organization and functions broadly under its supervision. While there may well be some strengthening of the regulatory scheme in Great Britain, I would regard it as extremely doubtful that they would move very close to duplicating the SEC.

Obviously what has gone before is nothing more than a thumbnail sketch of a very complicated and sometimes confusing scene. Each country has sought to deal with the complexities posed by public ownership of corporate securities in its own way and in a manner that is compatible with its economy, its history, its culture and its perceptions of the protections which the public needs, all without undue interference with the freedom of markets. A survey of these endeavors clearly indicates that each system has its strengths and its weaknesses and that what is compatible in one country is not necessarily suitable for another.