

Introduction

1.1 On 4 March 1998 Margaret Beckett, then Secretary of State for Trade and Industry and President of the Board of Trade, announced the launch of a fundamental review of the framework of core company law. A Consultation Paper² was published on the same day to outline the nature of the problems which the Review was designed to address, its proposed objectives, and the scope and process envisaged.

1.2 Over the course of the Summer a Steering Group was appointed to manage the Review. A Consultative Committee was also appointed, and initial Working Group activity put in hand. The membership of all the groups that have been established as part of the Review is given at Annex A. Also listed at Annex A are other individuals who have provided material assistance or support to the Review.

1.3 The majority of British company law is contained in the Companies Act 1985³. In this Document, therefore, unless otherwise specified, references to the Act are to the Companies Act 1985, and references to parts, sections and schedules are references to parts, sections and schedules of that Act.

Purpose of this Document

1.4 The Consultation Paper envisaged an extended first phase. It noted (paragraph 7.4) that much of the detailed work would be carried out in Working Groups, but that it was essential to ensure that all individual Working Groups took forward their work within a common framework. It was proposed therefore that an initial consultation document would bring forward proposals for the overall strategic framework. These proposals would tackle not just substantive issues but also the structure and style of new legislation and how it might be made more accessible to non-specialists.

1.5 This Consultation Document responds to that challenge. It has the following main objectives.

2: Modern Company Law for a Competitive Economy – March 1998.

3: The Act does not apply to companies registered or incorporated in Northern Ireland – see section 745.

1.6 First, it describes the way in which the Review has started its work, and the proposed handling of the process from now on. It outlines the general principles and philosophy adopted for the exercise, as well as the practical arrangements for taking it forward.

1.7 Second, it comments in summary form on the essential backcloth to the Review, the European dimension and the way in which key overseas jurisdictions approach company law.

1.8 Third, it considers a number of key issues which are at the heart of this Review. In some cases it simply outlines the nature of the issue or problem in a manner which is designed helpfully to focus the wider discussion. On some of the major issues there are, not surprisingly, widely differing views as to the right way forward, though it is our clear impression that there is often less divergence in relation to practical solutions than there sometimes is in terms of broad philosophy. On certain subjects we sketch out the Steering Group's preliminary pre-disposition, again as a way of focusing and taking forward the debate. In these cases it must be emphasised that the Review is proceeding with an open mind; although the Steering Group is clear in its commitment to certain broad principles, there is no pre-judgement as to the practical conclusions to be drawn.

1.9 Fourth, the Document considers in a preliminary way matters of legislation, drafting, and the future machinery for reform. We are keen to emphasise that, as the Consultation Paper outlined, this Review is driven by the need to find practical solutions for the real world; thus the debate must be focused by the requirement to consider not just generalised aspirations but the way in which requirements should be expressed in statute, or otherwise.

Responses to the Consultation Paper

1.10 The Consultation Paper invited comments on the proposed review, and we were greatly encouraged by the response. The overwhelming majority of those who responded warmly welcomed the Review, and felt that it was long overdue – just two out of over 150 respondents thought that it was unnecessary – while many indicated a willingness to participate actively in the Review process, eg by joining or nominating representatives for Working Groups. The responses covered a wide range of issues, including both the Review itself (ie the objectives, the terms of reference and the proposed process) and specific company law issues. In November the

Department published a summary of the responses that had been received; copies of this document are available from the contact address or from the Department's Internet site, both given at paragraph 1.20 below. The names of the respondents to the March consultation are recorded in Annex B.

1.11 In so far as it is possible to draw consistent messages from such a large number of responses covering such a wide range of issues, the themes that seemed to be emerging from the comments made in response to the Consultation Paper were these:

- there was a considerable degree of support for making company law more accessible;
- there was a strong view that company law should make greater use of civil as opposed to criminal remedies;
- there was a wide view that a differential approach needed to be adopted to cater for the needs of different types of company, especially the small private firm;
- there were real doubts about the usefulness of the Annual General Meeting as currently provided for in company law;
- there was wide agreement that company law needed to be amended to allow greater use of electronic means of communication and storage of information;
- there was wide agreement on the case for revision of the provisions relating to a company's objects and powers;
- there was widespread concern that the capital maintenance regime was in need of thorough re-examination;
- there was agreement that the 'stakeholder' issue lay at the heart of the Review, though no consensus on the most appropriate approach;
- issues surrounding directors, and especially their duties and their pay, were the areas to attract most comment; and
- there was concern that company law is not well suited to groups of companies.

The Review's Terms of Reference

1.12 The Department of Trade and Industry ('the Department') Consultation Paper proposed (in paragraph 5.2) the following terms of reference for the Review:

- (i) To consider how core company law can be modernised in order to provide a simple, efficient and cost-effective framework for carrying out business activity which:
 - (a) permits the maximum amount of freedom and flexibility to those organising and directing the enterprise;
 - (b) at the same time protects, through regulation where necessary, the interests of those involved with the enterprise, including shareholders, creditors and employees; and
 - (c) is drafted in clear, concise and unambiguous language which can be readily understood by those involved in business enterprise.
- (ii) To consider whether company law, partnership law, and other legislation which establishes a legal form of business activity together provide an adequate choice of legal vehicle for business at all levels.
- (iii) To consider the proper relationship between company law and non-statutory standards of corporate behaviour.
- (iv) To review the extent to which foreign companies operating in Great Britain should be regulated under British company law.
- (v) To make recommendations accordingly.

The proposed terms of reference support, in turn, the objectives of the Review which were set out in paragraph 5.1 of the Paper: the competitiveness of British companies, an attractive regime for overseas companies, a proper balance of the interests of those concerned with companies in the context of straightforward, cost effective and fair regulation, and the promotion of consistency, predictability and transparency in company law. The Paper specifically sought comments on the proposed terms of reference.

1.13 We have reviewed these proposed terms against the background of both the comments that were submitted and the experience of the Review in its early stages. While a number of commentators offered suggestions for clarifying them, or for reflecting more fully the approach outlined in the Consultation Paper, we concluded that the proposed terms in the Consultation Paper corresponded with the Steering Group's thinking and the work we had in hand, and decided not to seek any change.

The Scope of the Review

1.14 The Consultation Paper also explained that the aim of the Review was the modernisation of *core* company law and that it would not be including within its remit either the Insolvency Acts or the regulation of Financial Services (paragraph 6.1), though it recognised that the boundaries were imprecise and care would be taken to ensure that the implications for other areas of changes which were being considered in relation to company law were taken fully into account. The Consultation Paper noted that the Review would extend neither to charity law, though it would be aware of the implications of changes for charitable companies (paragraph 6.5), nor to co-operatives (paragraph 6.6). We have progressed on this basis, though bearing in mind comments which emphasised the importance of ensuring that the Review did not so narrow its focus that it failed to take into account legislation or other regulation which fell outside 'core company law' but which had implications for, or was important in regard to, company law.

The Review and Other Relevant Developments

1.15 Concurrent with the Review there are in progress a range of other initiatives or developments which will, or could, have an impact on the issues to be addressed by the Review. The Department has, for instance, published consultation documents on Share Buybacks (May 1998 – URN 98/713), Limited Liability Partnerships (September 1998 – URN 98/874) and Shareholder Remedies (November 1998 – URN 98/994), as part of its continuing programme of maintenance of the regime while the longer term Review is in hand. The Law Commissions also have relevant work in train, on reviewing the law of partnership and on directors' conflicts of interests and the case for formulating a statutory statement of directors' duties (see Chapter 7 for more information on the latter project). In general, we hope that the conclusions of this work will

feed into the Review, though in some cases, such as the proposed Limited Liability Partnerships Bill, it is intended to implement particular reforms in advance of the outcome of the Review.

1.16 A further development of importance during the life of the Review has been the annexation of the Principles of Good Governance and Code of Best Practice (the ‘Combined Code’) to the Stock Exchange’s Listing Rules following the work of the three major committees (Cadbury, Greenbury and Hampel) that have studied corporate governance in recent years. The Department’s Consultation Paper argued that, in general, the issues dealt with under the new Code were more suitable for best practice than legislation and expressed the view that Government would not intend to replace such best practice by legal rules provided that it was seen to be working. It did, however, identify a number of areas which were not covered by the Code or where experience suggested that some legal underpinning might be necessary, such as directors’ duties and the conduct of annual general meetings. This subject has clear links both with the work done and proposed on Regulation and Boundaries of the Law (see Chapter 5.5) and with our proposals for future work on corporate governance issues (see Chapter 9, particularly 9.4-5).

The Consultation Process

1.17 We have been greatly encouraged by the willingness of key groups and individuals to participate in the Review. We hope that all those interested will take the time to read this Document and respond with their views on it. Although there may often be differences of view, the Steering Group is committed to ensuring that the outcome enjoys the widest possible support.

1.18 We believe that the issues raised in this document are of wide significance and importance for all concerned with our economic system, business people, economists and all those with an interest in issues of public policy, as well as company law professionals. Some of the subject matter and argument is inevitably technical, but we have striven to make the document accessible to all for whom it has relevance and we hope that it will reach such an audience. We would welcome comments from the widest readership possible.

1.19 This Consultation Document is the work of the Steering Group of the Company Law Review. It should be made clear that it does not represent the views of any particular individual

or group that has participated in the Review. Nor does it represent Government policy. The plan is that the Government will issue a White Paper in 2001 to outline its proposals on the basis of the output of the Review.

1.20 We would welcome comments on the issues raised in this Document. See the questions for consultation posed in the relevant Chapters, and summarised for ease of reference in Chapter 10. We are keen to allow sufficient time for consultation; in particular we appreciate that representative organisations require time to consult their membership fully. But the wider timetable means that we would be grateful for comments by 1 June 1999 if at all possible. Responses should be in writing and should be sent to:

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In order to promote the accessibility, openness and consensus referred to in paragraphs 1.17-1.18 above, and in accordance with the code of practice on open government, comments made on this Document may be made publicly available unless consultees specifically request otherwise. Additional copies of this Document may be obtained by telephoning 0171 215 0409; the Document is also available from the Review pages on the Department's Internet site (<http://www.dti.gov.uk/cld/review.htm>).

1.21 This is not the last opportunity to comment on any matter covered by the Review. For the intended future programme of consultation, some of it at high level and some on more detailed proposals, see Chapter 9, particularly paragraphs 9.12-14. However, comments at the level of generality appropriate for the different parts of this document are of great value at this stage, and will influence the next stages of the work.

2.1 In Chapter 1 we have set out the background, including our terms of reference. Here we describe the overall objectives adopted, the guiding principles set; and the approach so far.

A. OBJECTIVES

2.2 Our Terms of Reference and the March 1998 document set the aim of achieving *Modern Company Law for a Competitive Economy*, by a comprehensive and coherent review, setting an overall framework, rather than a patchwork reform.

Modern Law

2.3 We believe ‘modern’ law means law well fitted to meet current, and foreseeable future, needs. This may involve deregulation, but it is not restricted to deregulation; the objective is to suit the law to the needs of all participants, and of other relevant interests, rather than to reduce regulatory safeguards. Our focus is therefore on provisions which, in form or substance, no longer serve their proper purpose or which can be adjusted better to do so, and on needs for which there is currently no provision.

Law for a Competitive Economy

2.4 This is the predominant objective. We shall pursue policies to facilitate productive and creative activity in the economy in the most competitive and efficient⁴ way possible for the benefit of everyone, with appropriate freedom for managers and others controlling companies, ensuring that in order to maximise wealth and welfare, they are enabled to exercise their proper function in managing resources. It is not for the law to substitute for the business judgements involved, but to provide optimal conditions for their proper exercise. The importance of the law should be kept in perspective – companies should not, and typically do not, operate at the legal boundary but adopt a wide range of non-legal standards, including best practice. A competitive economy will rely as little as possible on costly and inflexible legal mechanisms. The most efficient law will often derive from well tried best practice or provide the best conditions for its

4: We use the term throughout this document, to mean maximum output and contribution to prosperity at minimum cost, rather than simple efficiency in the popular sense.

development. We recognise that the limited company form has proved over the last 150 years an outstandingly successful means for organising productive activity, deploying and protecting investment and allocating risks. It is critically important that that success should be preserved, and indeed enhanced, in the modern context. But it also needs to be recognised that a variety of forms work well in different jurisdictions. There is clearly room for improvement.

2.5 We would stress in this context that we interpret our terms of reference as requiring us to propose reforms which promote a competitive economy by facilitating the operations of companies so as to maximise wealth and welfare as a whole. We have not regarded it as our function to make proposals as to how such benefits should be shared or allocated between different participants in the economy, on grounds of fairness, social justice or any similar criteria. Such questions are, of course, extremely important but we do not consider that they fall within the scope of this Review. It may well be the case (and indeed we believe it is likely to be) that our proposals will have the effect of creating fairer outcomes. But if that is so it will be because that is the result of our adopting the objective of achieving wealth and welfare creation overall, and not because fairness in itself is an objective for us.

Freedom and Abuse

2.6 This does not mean that the law should merely facilitate and secure freedom for management and controllers of companies. There is a trade-off between freedom and abuse, and between freedom and efficiency. Indeed abuse damages efficiency and the credibility of business and of the productive system. The optimal balance between freedom and risk of abuse is clearly a matter of judgement, to be worked out in the context of particular provisions. We also seek to ensure that appropriate high standards of conduct are maintained. Such standards are important components in promoting competitiveness and efficiency. They give rise to demands on management which must be recognised – both internal, from shareholders and others, and external – ensuring corporate activity responds also, to the maximum extent it efficiently can, to wider economic, environmental and social needs.

2.7 Some respondents have stressed that wider considerations, beyond relations between members, creditors and directors, (‘externalities’) are already properly and rightly dealt with by

specialised legislation bearing equally on all businesses, companies or not (e.g. employment, health and safety, consumer protection and environmental laws, the weight of which has increased substantially in recent years). We recognise the concern that introduction of extraneous considerations into rules governing continuing relationships within companies may prevent management from focusing on the key business of managing to generate wealth. But we also recognise that the corporate sector remains the most important component of the productive economy; the laws governing its constitution, management and accountability already recognise wider interests. Best practice often goes further. Companies can be viewed largely as contractual entities, created and controlled under agreements entered into by members and directors; but we do not accept that it follows that the law has no place in securing that they are operated so that a wider range of interests are met. It is a proper question of public policy whether company law is an appropriate vehicle to achieve this, and what constraints and conditions should be attached to corporate status and limited liability. But we believe that, in designing a legislative and broader framework to enable companies properly to respond, we should ensure wherever possible that the law enables both internal and external interests to be satisfied.

Comprehensive, Coherent Reform

2.8 Our task is also to ensure a comprehensive reform to produce a coherent framework. This contrasts with the current patchwork of largely facilitative core and prescriptive additions, accumulated as a result of episodic and reactive reform. Comprehensive reform is, in fact, essential to produce a competitive and efficient outcome.

2.9 The present law has many strengths and benefits, but does not measure up well against the objectives outlined above. Detailed examples emerge in Chapter 5. It fails in terms of responsiveness to the shape of modern businesses, and in the accessibility of the language in which it is expressed – relevant provisions sometimes being hard to find and understand and expensive to administer. Anti-abuse provisions may take the form of an unduly wide prohibition, sometimes introduced for broad or now superseded reasons, overlaid with complex exemptions, to which are attached a further layer of conditions and safeguards. The purpose may be reasonably clear in theory but may bear little relationship to modern commercial reality,

particularly in the context of the wide range of purposes to which the law is put. Elaborate prescriptive structures, such as the capital maintenance doctrine, have been built up on the back of theories which may now have only limited relevance. Legal obscurity may also lend support to outdated views, for example about the proper scope of managerial discretion.

The Importance of Change

2.10 These problems are exacerbated by more general changes. Today's markets and businesses are characterised by the following key trends.

Globalisation

2.11 The UK's economy is less and less insulated from wider influences. Inward investment has been of great importance⁵. The increasing openness of regional and international trading relationships reinforces the need for a low cost, speedy and efficient method of organisation of commercial activity, attractive to foreign undertakings and providing an optimal infrastructure for indigenous ones. The increasing international mobility of business and capital, the globalisation of brands and the ability of firms to operate internationally, without local incorporation, also raise the need to review systems for regulating overseas businesses operating in Great Britain. We have to recognise that it is increasingly possible that, if we make our law unduly prescriptive, inflexible, inaccessible or onerous, businesses will choose to incorporate elsewhere.

Europe

2.12 The UK's membership of the European Union has had two relevant consequences. The first, the increasing openness of the UK market and that of its EU partners, is part of the globalisation process. The second is that the UK has become party to the Community legal harmonisation programme, which is part of the single market enterprise. Continental European traditions are typically more prescriptive and regulatory than the UK's. This has led to some

5: 1994 statistics indicate that in UK manufacturing foreign owned firms accounted for 19% of employment, 26% of output and 30% of investment. See G Duffus and P Gooding: 'Globalisation: scope, issues and statistics', *Economic Trends* No 528 (1997).

difficulties in adjusting domestic British law, and the harmonisation programme does create some special problems in considering reforms. However, there has been some movement in the direction of the more open, contractual and transparency-based British approach, and there are indications of an increasing recognition of its value⁶. We respect the objectives of the harmonisation programme and will pay careful regard to the experience of continental partners in developing proposals for reform.

Changing Patterns of Regulation

2.13 Companies are now subject to a range of regulatory control beyond traditional company law. The Stock Exchange, Financial Services Authority, Takeover Panel, and accountancy bodies, all issue rules and exercise enforcement powers. Much of this has come about since the last major review of company law in the early 1960s. All these bodies are specialised and bring particular skills, but the resulting picture is inevitably more complex.

Information Technologies

2.14 Company law depends on, and in ultimate output very largely consists of, the accumulation and communication of information. The new systems for electronic communication and information management have the potential to transform the processes, and the substantive relationships, involved.

Changing Patterns of Ownership

2.15 The overwhelming majority of registered companies are small owner-managed businesses; of companies on the Companies House register, only 1% are public companies. In large companies, ownership (or at least control) has become increasingly concentrated, with

6: See for example, in France, the report of Senator Marini – La Modernisation du droit des sociétés, Documentation Française, Paris, 1996.

institutional investors⁷ holding around 80% of shares in UK companies⁸. The top ten institutions in 1996 accounted for approximately 25 per cent of stock market value, the top 20 for one-third, and top 50 institutions for half of stock market value. Across the market, the largest institutional investors are consistently companies' largest shareholders⁹. The growth in the influence of institutional investors has led in turn to the development of a more effective market in corporate control – a further non-legal constraint on the powers of managers. At the same time, over the last 15 years there has been significant growth in personal share ownership, much of it attributable to factors such as privatisations, demutualisations and employee share ownership schemes. The number of individuals in Great Britain holding shares directly rose from approximately 3 million in 1979 to 10 million in 1993¹⁰; a more recent estimate is that there were 15 million shareholders in Britain in October 1997¹¹.

The Modern Asset Mix

2.16 The pattern of productive activity, in many sectors of the economy, is shifting to become increasingly human resource – and knowledge – based. This is of particular importance for the UK, which has no future as a low wage, low productivity economy, producing low value added products. The traditional model of the company, as envisaged in the key Gladstone reforms of 1844 to 1862, derives from the railway age, of a high fixed asset enterprise, run by managers on behalf of a wide body of investors and dependent on a largely undifferentiated 'commodity' labour force.

2.17 Asset structures are changing, and becoming increasingly 'soft', in the sense that a significant proportion of the value, or capacity, of a business is to be found in intangibles, rather than in tangible assets such as buildings and machinery. Some of these are familiar – the skills of

7: Many such investors hold shares in a fiduciary capacity, yet others have ownership, but are using funds provided by customers, and others are controlled by trustees, who may represent retail investors or pensioners. We intend to assess these patterns of ownership in the next phase of our work through Working Group F – see Chapter 8. But the point here is essentially about concentration of control.

8: See The Committee on Corporate Governance, Final Report, January 1998, section 5.1.

9: OECD Economic Surveys, United Kingdom, 1998, published by the OECD, Paris.

10: Central Statistical Office, 'Social Trends 1996', chart 5.23

11: ProShare (UK) Ltd, 'Individual Share Ownership – Facts and Figures', 1997. This also estimates that the proportion of the adult population owning shares has grown from 9% in 1979 to 20% in 1994.

the workforce are particularly important (labour now being a resource which requires specific training, development and mutual commitment); other examples are the skills of management in combining work force, key assets, and often external resources from suppliers of goods and services, into productive teams, and traditional intellectual activities, such as research and development. More recently developed forms of intangibles, such as marketing and other reputational activity, can create an ethos and brand-image which confers competitive advantage. Global brands are major assets which can change hands at high prices. In some sectors regulatory expertise or international experience may be a key, hard won advantage. Even businesses with a high fixed and tangible asset component depend on effective deployment of such 'soft' assets.

2.18 For quoted companies much of the value of such 'soft' assets may be reflected in the difference between market and book value (in extreme cases book value may even be negative). But British law fails satisfactorily to capture such assets, to enable assessment by investors and others, or to secure accountability of management for stewardship. Traditional reporting requirements focus on historic experience and tangible assets and not prospective opportunities and risks and human and intellectual investment. These weaknesses bear also on our objectives in paragraphs 2.6 and 2.7 above.

The Importance of Small and Closely-held Companies

2.19 Small and closely-held firms play a major role in the UK economy – see paragraph 5.2.2 and Annex D for some key statistics. The evidence suggests that small firms are the main job creators. For instance, statistics available to the Department show that between 1989 and 1991 over 90% of additional jobs created were in firms with fewer than 10 employees even though they accounted for only 18% of total employment in 1989. Government has often expressed the view that small businesses are crucial to UK's competitiveness and lie at the heart of its economic strategy. Company law, however, makes little attempt to respond to the peculiar needs of small firms, either in accessibility and simplicity of operation or in substantive provision. The start up and development of such businesses is a particularly important process for which the law should provide an optimal climate.

B. GUIDING PRINCIPLES

2.20 With these points in mind, we have sought to develop guiding principles for the Review.

Facilitation of Transactions – a Presumption Against Prescription

2.21 First, the need for companies to be responsive to change, to leave space for developing best practice and to enable competitive efficiency leads us to seek maximum scope for freedom of activity for participants. A key role of company law is as a means of facilitating the operation of market forces, through contractual and other mutual relationships. These operate in markets and other arenas where accountability ('transparency') enables effective assertion of claims by external interests and appropriate response by managements and members (or shareholders)¹². The key markets include capital markets and markets for managerial skills and corporate control. Other arenas of accountability are those where a broader range of influences is brought to bear, informed by company law reporting requirements and other information. Companies respond to such pressures, expressed typically through pressure groups and the media, in order to sustain the reputation and credibility on which commercial success depends. A range of interrelated contracts and other relationships thus enables demands and claims to be efficiently met. This process however depends critically on adequacy of information through transparency in relationships, between all participants and parties concerned.

2.22 We therefore conclude that freedom of contract and exchange in the broadest sense, supported by transparency requirements, should be the approach wherever possible. The law should acknowledge the diversity of economic activity and provide participants with the means to devise the best legal solution for themselves exercising their own commercial and other judgement and freedom of choice within the network of non-legal constraints and pressures described.

2.23 This presumption must yield, however, where markets and informal pressures combined with transparency cannot be expected to work; this may happen because participants lack the market power, skill or resources to contract effectively. Such prescriptive intervention must of

12: We use the terms 'member' and 'shareholder' to refer to the position of investors holding shares. In using either term we intend to beg no questions as to what the status of such a participant should be under a reformed regime.

course be justified in terms of the costs and benefits and the effectiveness of the protections conferred. In this context the flexibility of civil enforcement, with costs borne by the wrong-doer, has great advantages over criminal sanctions, which require public resource which is already overstretched¹³. However even civil enforcement may be expensive and inefficient¹⁴. This suggests that where detailed prescription is nevertheless justified the sensitive application of 'self regulatory'¹⁵ rules will often be a preferable approach where available in effective form.

Accessibility-Ease of Use and Identification of the Law

2.24 The complexity and inaccessibility of the law mean that even elementary issues are often regarded as material for experts, and even non-specialist lawyers and other professionals cannot always find their way around. Competitiveness requires the minimum complexity and maximum accessibility, both in terms of the substance of the law and the way in which it is communicated. The final output of reform is words on paper. It must be as easy as possible to find out which requirements apply and what they mean. This has implications both for substance and language used and for the way in which it is assembled and arranged. Sometimes the law must provide for complex situations (many company transactions are inevitably subtle and complicated). But this legitimate need of the few should not result in cost and confusion to the majority. In addition, sensitive use of a variety of communications media may help to reduce the difficulties¹⁶.

2.25 The current structure of the law is essentially based on the needs of the large company with a wide shareholding. Special exemptions and derogations are allowed for smaller and more informally managed entities. In general however the same law (aggregated by reference to broad topics, such as share capital, accounts and audit, or meetings and resolutions) applies to all companies whether large or small, public or private. The fact that most company law is irrelevant

13: There are, for instance, over 140 criminal offences under the Act. While there were 4,959 prosecutions under the Act in 1997/98, 96% of these concerned two offences only, failure to deliver accounts under section 241(3) and 243(1) and failure to deliver annual returns under section 365(3); and the remaining 4% of prosecutions were spread over only a further 11 offences. Companies in 1997/98, HMSO, October 1998, Tables D2 and D3.

14: In some cases the law actually requires advance approval, or licensing, by the court of often relatively straightforward company transactions- see the discussion of capital reductions in Chapter 5.4 below.

15: For a discussion of so-called 'self regulation' see Chapter 5.5, below.

16: We recognise the case for extending the range of choice as to the legal vehicles and institutions available. However, a trade-off against simplicity and accessibility must be taken account of.

to the vast majority of users leads us, like many respondents to the document in March 1998, to incline to favour radical restructuring of the legislation, treating the small company as the basic entity and adding on the relevant requirements for exceptional, larger and more sophisticated entities in further discrete layers. The work of the Working Group on small firms supports this view.

Regulatory Boundaries – Proper Jurisdictions

2.26 Rule making and enforcement should be assigned to the most suitable body among the various regulatory jurisdictions which operate in this field. Overlaps, duplications and conflicts should be avoided. Separation of the rules for the major companies subject to such jurisdictions may help to achieve this.

C. THE APPROACH ADOPTED

2.27 The above objectives and guiding principles have set the context in which we have approached the first stage of the Review.

Key Issues and Working Groups

2.28 Our first task was to identify priority issues for early work. We set up working groups on eight key issues, led by members of the Steering Group to ensure coherence, and made up, typically, of two or three other Steering Group members, plus three or four experts drawn from academic circles, the business community, and the professions – see Annex A. We are very grateful to participants, who have given scarce and valuable time and expertise, and to many others whose offers we have declined at this stage for logistical reasons and under pressure of time. It will emerge below that there remains plenty of work to be done and we hope that these offers will remain open for the next stage. The key issues chosen were selected because of their wide importance for the Review and/or because they seemed promising areas in which to begin. Their selection was endorsed by the Consultative Committee. The output is tentative in most cases and should be regarded as provisional; final decisions depend on this and other consultation and on the impact of decisions in areas not yet addressed.

Needs, Consequences and Facts

2.29 If the Review is to achieve efficient outcomes, we would argue that it must avoid the piecemeal, issue-driven and self-referential approach. It should be driven by factual research into the mismatch between existing rules and practices and commercial needs and by a fact-based, objective economic assessment of the likely consequences of the various options. The cost of reform is itself an important factor, which may well rule out proposals which look attractive in the abstract. But the factual research required for such a 'scientific' approach requires long lead times which were not manageable in the first phase of our work; moreover research needs to be well aimed and focused if it is to have real value. It therefore seemed better to ensure that people with a range of expertise, and with access to relevant networks of other experts, and thus with access to a range of empirical material, should participate in appropriate working groups. We believe this has worked well. The extent to which further research and analysis is desirable to inform work and validate conclusions is discussed in Chapter 9.

International Competitiveness and the Comparative Approach

2.30 A wide range of company law reform projects have been conducted in recent years in the Commonwealth, North America and Continental Europe. We have found much of value in the thinking which emerges. We intend that as a result of the Review British law should rank with the best in the world. It is therefore essential to learn all that we can from these initiatives. In some cases we have been fortunate enough to have experts in foreign systems on working groups; in other cases we have had meetings, or exchanges by correspondence, with experts based overseas. Care must be taken to avoid unthinking adoption of ideas which depend for their effectiveness on the environment in which they have been developed; but many of the more radical reforms have been tried and tested for some years in advanced economies with common law traditions like our own and their success there has given us confidence in them. We have also noted and learned from some failures. In all cases we have been immensely grateful to those who have provided material and advice. Their names appear in Annex A.

Eight Key Issues

2.31 Among the topics for the initial working groups we selected two overarching issues—first, *the scope of company law*, which draws in discussions about so-called ‘stakeholders’, but also offers a basis for evaluating the whole of our other work; and second, the problems of *the small, or closely-held, company*. We chose the different jurisdictions of the various *regulatory and ‘self-regulatory’ bodies* concerned and the *international aspects* of the law as two further areas of general applicability. We also selected three areas of traditional and technical company law: the first was *company formation*, perhaps a logical starting point, but also an area of importance to firms in start-up mode and a useful area in which to test radical simplification; closely associated with this is *company powers*, which concerns the authority of agents and validity of transactions, including the ‘ultra vires’ rule which still raises important practical problems. The third technical area was ‘*capital maintenance*’, a complex field containing some difficult and closely interrelated provisions. Finally, we chose to explore the issues relating to *electronic communications and information*.

Accounting and Reporting

2.32 Accounting and reporting issues also deserve early attention – not least because we see strong attractions in the traditional UK view that transparency combined with commercial freedom is the best approach wherever possible. However, it seemed premature to set up a working group in this area, which was likely to be heavily influenced by the outcome of other work. On the other hand we think it desirable to invite responses now on what are to be regarded as the key issues. We have spelled these out, as we see them with the benefit of advice from the leading accounting bodies and others, in Chapter 6. We hope that these responses will help to focus and prioritise the work of a Working Group on this subject in the next phase. The nature of any new regime and the weight it can carry will be critical for the overall balance of reform.

Governance - Constitutional Rules, etc

2.33 This heading covers another critical component of the Review – the closely interrelated rules governing the respective functions, powers and duties, both collective and individual, of

those who exercise authority and control within the company's constitutional structure. These comprise the directors (executive and non-executive), members, auditors and other officers. This is probably the most difficult, important and wide ranging of the areas we have yet to cover. Our approach will depend heavily on the outcome of our work on the scope of the law, but important work by the Law Commissions on 'self-dealing' by directors (Part X of the Act) and on the possibilities for restating directors' duties will also be of great value as an input. The Law Commissions' work is covered in Chapter 7.

European Union Law, Human Rights and Comparative Material

2.34 The other main components in our work during the first stage have been research mapping the relevant European law, which binds and constrains us (subject of course to amendment), and comparative research, ensuring that the Review has the means to be fully aware of the relevant material. This work is described in Chapters 3 and 4.

The Purpose of this Chapter

3.1 In this Chapter we set out the legal framework under European Union Law and the European Convention on Human Rights ('ECHR') which constrain and shape the options open to the UK in this field.

Company Law Directives

3.2 The main constraint arises from the Directives adopted under Article 54 of the Treaty in pursuance of the EC programme for the harmonisation of company law. In legal terms a Directive requires a Member State to enact into its law its specific substantive requirements. Member States are not allowed to enact their own provisions in breach of these requirements, though the Directive may permit Member States to make additional provision in the particular area. (The Second Company Law Directive, for example, requires that a public company has a minimum subscribed capital, but permits Member States to require higher amounts for their own companies).

3.3 The main Directives adopted under this programme are summarised in Annex C. In brief:

- the First Directive requires various details – eg a company's constitution and the amount of capital subscribed – to be disclosed in a public register;
- the Second Directive lays down minimum requirements on the formation of public companies and maintenance of their share capital;
- the Fourth and Seventh Directives require the preparation and publication of accounts and contain provisions regarding the content of accounts; and
- the Eleventh Directive imposes minimum and maximum requirements for branches established in a Member State by limited companies formed in another, or in a third, country.

3.4 Unless agreement can be obtained to their amendment, substantive requirements of the Directives must be maintained whatever views may be as to their merits. The rules in the Second Directive are a particular constraint for the Review, preventing, for example, the issue of 'true' no par value shares. The Fourth Directive may also prove a constraint in that it would appear to rule out a radical re-evaluation of the need for annual accounts in the case of small companies.

3.5 The European Commission is sympathetic to the case for updating the Directives, but points out that amendments will require the agreement of other Member States. Clearly UK proposals for change will not make headway unless they receive the backing of others. The Department has begun the process of bilateral discussions with other Member States to see if there is common ground. It may also be possible to take advantage of the forthcoming review of the Second Directive under the SLIM process (Simpler Legislation in the Internal Market), and the Department hopes that the Commission's proposal for a Company Law Forum will soon be implemented as this will provide the opportunity to debate company law issues among Member States as a whole.

The EC Treaty

3.6 Another constraint on the legislative powers of the UK as a Member State is the right to freedom of establishment under Article 52 of the EC Treaty. This defines the boundary of what are acceptable Member State legislative or administrative measures within the single market. Broadly speaking the UK must not discriminate – whether overtly or covertly, directly or indirectly – against an individual, company or firm which wishes to move within the EU. Non-discrimination encompasses all barriers or burdens which would make the cross-border activities more difficult or less attractive, unless those barriers or burdens are proportionate to some legitimate public interest requiring protection and are 'objectively justifiable'.

3.7 The above constraint needs to be recognised, but is not expected to be a problem for us. A charge of failure to respect rights of establishment would be most likely to arise if the UK were to adopt relatively strict rules (compared to other Member States) and seek to impose them on those in other Member States seeking to operate in the UK (cf. the *Centros* case, currently

pending in the European Court of Justice¹⁷). However, as the emphasis of the Review is on ensuring the UK's company law regime makes the UK an attractive place to do business, this does not seem likely.

European Convention On Human Rights

3.8 Finally, it should be noted that the rights granted under the ECHR (summarised in Annex C), such as the right to freedom of association and to peaceful enjoyment of possessions, impose constraints on the scope and substance of the UK legislation, while other provisions impose constraints on the way the corporate regulatory system may operate. The ECHR operates as a boundary setting device, rather like Article 52, and rights conferred can be restricted or abridged only where the action taken is for a legitimate purpose under the ECHR and the means are proportional to the ends. Again, this constraint needs to be recognised, but it is only likely to be a problem were the UK to adopt stringent regulatory or structural measures affecting the rights of companies and of participants in companies as described in Annex C.

17: C212/97 opinion of Advocate General La Pergola presented 16 July 1998. (Available in Italian at ECJ website – europa.eu.int/cj/en/index.htm)

4.1 We attach great importance to learning from the experience of other countries as we develop proposals for reform, as indeed was foreshadowed in the March 1998 Consultation Paper. With this in mind we commissioned two comparative surveys, one from Professor Cally Jordan, building on her comparative work for the Hong Kong review which was completed in 1997, and a second, focusing particularly on recent developments in Continental Europe, from the Centre for Law and Business at the University of Manchester. Space prevents us reproducing these surveys in full. They can however be downloaded from the Review's Internet site (see paragraph 1.20).

4.2 Here we attempt to provide a brief indication of the recent developments in company law reform in other countries, which are likely to be of most value and relevance. Caution is needed in assessing and adopting comparative developments as their success is frequently dependent on their context in the overseas jurisdiction. However, many Commonwealth jurisdictions have, at least until recently, operated systems of company regulation and administration very like ours and we share many institutional values with the USA. We concentrate therefore on the Commonwealth and the USA, where there has also been most activity recently, with some reference to Continental Europe.

Commonwealth Developments

4.3 Until the 1970s Commonwealth countries tended to follow British company law and most countries and jurisdictions adopted our 1948 or 1927 Act. However, beginning with the Canada Business Corporations Act (CBCA) in 1975, there has been a trend towards radical reappraisal and simplification along largely American lines.

Canada

4.4 The CBCA closely followed a draft proposed by the three-man Dickerson Committee in 1974. Canadian law in most jurisdictions already departed from British precedents in many respects, deriving from the letters patent rather than the deed of settlement model which was the basis of the Gladstone reforms in 1844 to 1862. But Dickerson took a much more radical approach, following the enabling philosophy of the US Model Business Corporations Act, whilst

adding some distinctively British provisions, in particular for minority protection (including a broad ‘oppression’ remedy). Key developments were – abolition of the distinction between public and private companies; abolition of share par values and authorised share capital limits, and simplification, but not complete removal, of the capital maintenance regime; enabling of single shareholder corporations; abolition of the ultra vires doctrine (companies to have all the powers of a natural person); codification of directors’ duties and liabilities and of the law on dividends; enabling the purchase by a company of its own shares; provision for a company to change its jurisdiction; and creation of a statutory derivative action on US lines. Accounting rules were removed from the legislation and subjected to professional regulation. An elective regime was provided enabling elimination of formalities by unanimous shareholder resolution. The legislation adopted a simple style, relying on general propositions simply expressed, contrasting with the highly detailed and prescriptive approach to which British lawyers and other users are now accustomed.

4.5 The CBCA was followed in the provincial legislations of most Canadian provinces, in particular in Ontario, (though not in Nova Scotia or British Columbia, which continue to show significant similarities with older variants of British law), and is widely regarded as having stood the test of time extremely well. Industry Canada is now reviewing the Act in a number of detailed areas, paying attention to the case for recreating a distinction between public and private companies, for close corporation legislation on US lines, to the law on directors’ liability and indemnity and to ‘financial assistance’ provisions (Commonwealth countries have largely adopted this British concern, finding the resulting rules no less troublesome than we have – a concern not shared by any US jurisdiction).

New Zealand

4.6 New Zealand followed British company law until 1994 when it adopted a new Act heavily influenced by the Canadian approach. In 1986 the New Zealand Law Commission had been asked to review the Companies Act 1955 (which largely followed our 1948 Act) and to report on the form and content of a new Act. The resulting report proposed a radical departure from existing company law. The Act was to be fundamentally simplified, abolishing the

distinction between public and private companies and leaving many specialist provisions for securities legislation (which had been separated in 1978). Par value shares were abolished and capital maintenance rules simplified in favour of solvency certification (including a much simplified regime for financial assistance). Company formation was simplified with abolition of requirements to file a constitution; a presumption in favour of unlimited capacity was introduced and limitations on capacity ceased to affect validity of transactions. The requirement of a company secretary was abolished. Written resolutions signed by shareholders with 75% of the votes were made valid, enabling annual meetings to be omitted. Directors' duties were codified at a high level of generality. Special provision was made to enable a dissenting minority to demand a buy-out with provision for court relief and arbitration on price. This regime operated concurrently with the 1955 Act for a transitional period, but existing companies which had not reregistered were then deemed to have done so to bring them into conformity with the new rules, particularly on share capital and constitutions.

4.7 Controversially, the New Zealand government decided not to follow its Law Commission's proposals on a few key issues, most importantly by not abolishing the rule which confers contractual character on the relationship between the company and its members (the Law Commission preferred to follow the North American concept of status deriving from statute)¹⁸, and by retaining rules restraining in some circumstances the shareholder's absolute right to exercise his vote and creating a statutory duty of directors to act for a proper purpose.

Australia

4.8 Australian company law began to diverge from its English roots in the 1960s. Early departures included the single member subsidiary and successful abolition of the *ultra vires* doctrine, obviating the need for objects in the memorandum of association. In the subsequent period Australian legislation was complicated by disputes between the federal and state governments about jurisdiction. These were, however, largely resolved by the Corporations Law which came into force on 1 January 1991. This Law is recognisably derived from the British tradition but is even longer and appears more detailed in style than the British Companies Act.

¹⁸: compare section 14.

However it covers insolvency, takeovers, prospectuses and financial services as well as company law. Considerable energy has been devoted to a programme of simplification and up-dating, beginning in 1993 with the Corporate Law Simplification Task Force led by the Attorney General and more recently the Corporate Law Economic Reform Program (CLERP) under the Treasury. This was announced in 1997 and is a comprehensive programme of reform of Australia's business laws. Two major amending Acts have resulted – the First Corporate Law Simplification Act 1995 and the Company Law Review Act (previously the Second Corporate Law Simplification Bill) 1998.

4.9 The 1995 Act began by repealing the Close Corporations Act of 1989, an Act which had never been brought into operation but which was intended to create a new vehicle for small businesses analogous to the South African Act of 1984 (see 5.2, below). The Act of 1989 had been criticised variously as too radical, too closely integrated into the existing regime, too complex, and unlikely to be utilised. However the 1995 Act made major relaxations for small companies, including enabling single member companies, providing accounting exemptions and providing a small business guide which set out in the legislation, though in non-mandatory form, explanatory material as to legal requirements for small companies. It also liberalised share buybacks and relaxed requirements on company registers, abolishing the register of directors, for example.

4.10 The Company Law Review Act of 1998 continued the process of reform. It provided for formation without the need to have a constitution (the obligation to file a constitution having been abolished some years previously); simplified the processes of directors' and members' meetings; facilitated the use of electronic technology for meetings; and amended members' rights to call, and put resolutions to, the general meeting (conferring rights on holders of 5% of the votes or 100 members entitled to vote). On share capital, par values and limits on authorised capital were abolished with share premium and capital redemption reserves being subsumed into share capital; capital reductions were permitted without court approval; the prohibition of financial assistance was much simplified with such assistance which does not create material prejudice (not defined) being permitted, as is financial assistance which is approved by shareholders. Further provisions relieved companies of the administrative burdens of paper filing and payment obligations by the adoption of electronic means, and gave some relief from the annual return obligation for proprietary companies where the relevant information has not changed.

4.11 The Australian CLERP program continues in the Corporate Law Economic Reform Bill 1998, covering accounting standards, fund-raising, corporate governance, and directors' duties. Such duties were codified in the 1991 Act, which included, for example, criminal sanctions for breaches of fiduciary duty in circumstances of deception. The Bill refines the obligations in some detail, incorporating a 'business judgement' rule to offer directors a 'safe harbour' from liability for breaches of duty of care and diligence in relation to honest, informed and 'rational' business judgements. The Bill also expressly allows directors to rely on advice or information provided by experts when making decisions as long as the directors believe on reasonable grounds that the person relied upon is reliable and competent.

South Africa and Hong Kong

4.12 South Africa too has now commenced a general review of its Companies Acts, but for the time being the most interesting feature of its legislation is the 1984 South Africa Close Corporations Act, discussed in detail in Chapter 5 below. Hong Kong has also completed a review of company law and proposals to adopt legislation very close in style and content to the Canadian and New Zealand approach have been made, but are still under consideration.

USA

4.13 Company law is a matter of state competence in the USA and state laws vary considerably, though there is federal jurisdiction over securities regulation which extends into areas which we traditionally regard as part of company law, in particular proxy regulation and disclosure. The Model Business Corporations Act (MBCA) was adopted by the American Bar Association in 1946 and revised in 1984. This, together with the American Law Institute Principles of Corporate Governance (in 1994) and the fact that the states' practice tends also to be led by practice in New York, California and in particular Delaware, which provides the most competitive service for incorporation and adjudication in company law matters, has encouraged a considerable level of uniformity of practice between the states. Nevertheless states do compete for incorporations and in the case of Delaware, for example, there is a heavy state dependency on the revenues derived from incorporation and ongoing administration of companies.

4.14 This interstate competition has led to a conspicuous trend towards laws which are attractive to company management, favouring directors in ways which, to British eyes at least, seem unfavourable to shareholders. Examples include generous provisions enabling directors to be indemnified against liability for breach of duty, a generous business judgement rule and, prompted by the impact of the ‘corporate raider’, junk bond financed, and widely perceived to be excessive, takeover boom of the 1980s, a move in many jurisdictions to enable directors to prevent takeovers (including by institutional ‘poison pills’) by appealing to the interests of a range of ‘stakeholder’ constituencies. These provisions (some of which are clearly ‘pluralist’ in our terms – i.e. enable directors to favour outside interests at the expense of shareholders in the terms of 5.1 below) have been criticised as a means of enabling management to resist the disciplines of the market in corporate control, promoted by state legislatures eager to prevent takeovers which remove management, and perhaps also productive activity, from the local jurisdiction¹⁹. The overall result is a set of laws which appear to favour management at the expense of shareholders as compared with the balance in our law; the competition to attract incorporations in this way has been characterised as a ‘race to the bottom’, or ‘law for sale’. However various studies seeking to determine whether this has led to a fall off in actual performance of corporations, with consequent damage to the interests of stockholders in terms of stock prices, have shown little or no convincing evidence of this²⁰. It appears that it is an open question whether the greater flexibility for managers conferred by modern US laws has in practice added value for shareholders.

4.15 US state laws exhibit high levels of flexibility in other substantive areas. For example in Delaware it is possible to provide for parts of the proceeds of a capital issue to be distributable, and there are extensive provisions enabling informal operation and decision-making in small companies. There has also been a needs-oriented development in the variety of available corporate forms, including versions of the close company and limited liability company. The latter permits highly flexible organisation through shareholder agreements, but has as its main

19: See ABA, Committee on Corporate Laws, (1990) 45 Business Law, 2253 on such ‘constituency’ statutes, then in force in 25 states, analysing the extent to which they enable boards to favour others at the expense of stockholders, advocating a rule of interpretation that they do not and rejecting the case for incorporation of similar provision in the MBCA.

20: See ‘State Competition for Corporate Charters’ in R Romano: Foundations of Corporate Law, Oxford University Press, 1993. It should also be noted that this trend in state corporations laws is balanced by a strong pro-shareholder trend in federal securities regulation.

advantage tax transparency analogous to UK rules for partnerships. The features of the limited liability company are examined in more detail in Chapter 5 below. California tends to adopt a more interventionist approach than other states, particularly in relation to ‘foreign’ corporations – see paragraph 5.6.16 below.

Continental Europe

4.16 The law of the European Union relating to companies has already been described in Chapter 3. We are concerned here with the laws of Member States. There is no doubt that the most highly developed and elaborate of these is that of Germany, which has in turn had a major influence on other countries, eg the French legislation of 1966 and the early European Community harmonisation programme.

4.17 Continental commercial corporate forms are characterised by a division between ‘share companies’, (ie sociétés anonymes (SAs), Aktiengesellschaften (AGs), etc) and ‘limited liability companies’, (ie sociétés à responsabilité limitée (SARLs), Gesellschaften mit beschränkter Haftung (GmbHs), etc). The former (referred to here as SAs), which correspond broadly to our public companies, with power to raise funds publicly, have highly detailed and prescriptive regimes, covering for example capital structure, board structure and other internal rules, while the latter (‘SARLs’), which are regarded as broadly corresponding to our private companies, typically limit the number of members and have a much more flexible internal regime, with the more personal registered ‘participatory interests’ as opposed to the shares, often in bearer form, of the SA. In most European countries both SAs and SARLs have minimum capital requirements and strict capital maintenance regimes.

4.18 Important characteristics of the larger German AGs and GmbHs, include the split board structure, with a supervisory board composed 50% of employee, and 50% shareholder, representatives (‘co-determination’), but with a chairman entitled to cast his deciding vote on behalf of shareholders. Highly prescriptive rules as to composition lead to this board being very large and unwieldy in the case of larger companies. It is responsible for a prescribed list of strategic decisions, for supervision of audit and for appointment and dismissal of the members of

the management board, which is responsible for day to day management of the enterprise. The duty of directors to the company is more broadly expressed than in Britain to include employees and the public interest, but we understand that the ultimate control of shareholders leads to little, if any, difference in outcomes on enforcement of this duty in practice. German AG law includes also a highly complex and distinctive regime for groups, enabling holding companies to exercise control over groups of companies in the ‘group interest’ by means of a group contract, and requiring compensatory payments to outside minority shareholders (and to subsidiary companies in the case of a ‘de facto’ group) (‘Konzernrecht’). Split boards with employee participation have been introduced into French SA law as an optional structure in addition to the traditional single board, but are little used.

4.19 More recently in 1994 France introduced the Société par Actions Simplifiée, a much more flexible SA form intended to facilitate the formation and operation of joint ventures. In 1996 Senator Marini was invited by the French Prime Minister to review French company law and in the subsequent report the senator took the view that the current inflexibility of French law, which he attributed in large measure to the German influence on the law of 1966, now constituted a major encumbrance in global capital markets. The report recommended the adoption of a more enabling regime with ‘contractualisation’ of many of the rigidities through shareholder agreements on more Anglo-Saxon lines. In late 1998, following the Marini Report²¹, a new bill was introduced in France, designed to simplify the law and make it more flexible, with fewer mandatory provisions and penal sanctions and greater minority protections and responsiveness to capital markets. We understand that the case for a broad review of corporate law is widely recognised in France.

4.20 The Netherlands adopts its own distinctive co-determination regime, for larger SA and SARL type companies (NVs and BVs), involving the co-option by the supervisory board itself of its members. The board is obliged by law to act in the interest of the company and its business as a whole, and there are no ‘employee representatives’ or ‘shareholder representatives’ as such. However, both the Works Council and the General Meeting of shareholders may object to a

21: See the footnote to paragraph 2.12.

candidate; similarly both Works Council and shareholders may apply to the court for dismissal of a supervisory board member. The Netherlands system is currently under review with consideration being given to strengthening the role of the General Meeting of shareholders. As in Germany, the supervisory board exercises a number of rights which we confer on general meetings – eg appointing and dismissing management board members and approving strategic decisions on investments, mergers, etc.

4.21 Generally there has been significantly less reform activity recently in Continental Europe than in Common Law jurisdictions.