

The société anonyme in France and the French Industrial Revolution, 1815-1848

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1. A historical background.

In France, business associations had always reflected the economic reality of the country. By means of these organizations, capital and men could join for any purpose, allowing people to invest their personal fortunes¹. Companies enjoyed freedom of contract until 1673, when the *Ordonnance du Commerce* of Louis XIV established that companies had to be subject to a fixed body of rules. These provisions recognised only two forms of *sociétés commerciales* (commercial companies), the *société en nom collectif* and the *société en commandite*². The legal system did not explicitly contemplate the large business association because of the limited sphere of commercial transactions existing at the time. Not only did the Ordinance of 1673 provide no provision relating to *sociétés par actions*, but also the main jurists seemed to ignore this subject³. The history of company law during the *Ancien Régime* (i.e. seventeenth and eighteenth century) was defined by the presence of a few privileged or chartered companies. The King actively intervened in the formation of these companies: the Crown conferred on them financial support by means of a sum paid in advance and granted them certain privileges, such as the monopoly over a territory, monopoly of exploitation, royal prerogatives, etc⁴. Consequently,

¹ C. COQUELIN, "Des sociétés commerciales en France et en Angleterre", in *Rivista delle Società*, XVII, (Milan, 1972), p. 1200.

² The former was an ordinary partnership in which all partners were fully and jointly liable for the firm's debts. The latter was an association in which, along with the partners who were fully responsible, there existed one or more partners (*en commandite* partners) who were held liable only to the extent of the amount of capital that they invested in the business.

³ Legal writers reproduced the royal edicts establishing large companies without adding any comment to them: H. LEVY BRUHL, *Histoire juridique des sociétés de commerce en France au XVII^e a XVIII^e siècles*, (Paris, 1928), p. 42.

⁴ «Tous ceci ne peu être octroyé que par voie législative: l'édit royal sert de charte de fondation et fixe le status de la société en même temps qu'il a lui accordé des privilèges. LEVY-BRUHL, *op. cit.*, p. 43 ff.

the King created companies to carry out public projects⁵, the management of which was vested in directors, who were appointed directly by the Crown. Progressively, since these new companies required large investments to carry on business, directors began to appeal to individual capitals⁶. Accordingly, powers of control over the management were conceded to the general meeting of shareholders. However, the large membership immediately transformed the right of each member to take part in the company's affairs from personal to impersonal. The requisite of «*intuitus personae*»⁷, which had been the chief characteristic of the sixteenth and seventeenth century company, was no longer to be found in the large business organization of the second half of the eighteenth century. This form of company was therefore to assume all the modern legal features of the *société anonyme*. The years of the *Ancien Régime* were also synonymous with great speculation connected with companies. The excessive speculation resulting from the disastrous experience of the Bank of John Law⁸ caused the French legislature to impose a strict control over the operations of the national Stock Exchange by means of the decree of the *Conseil d'Etat* of 24 September 1724. Accordingly, along with the power to grant charters, the authorities of the state introduced another form of intervention, namely, governmental control. Later on, at the beginning of the Revolution, benefiting from the administrative disorder, *sociétés commerciales* began to be established without any royal privilege. *Actions au porteur*, which had been prohibited after the bankruptcy of the Bank of Law, reappeared on

⁵ These companies had been created for the exploitation of the maritime routes by the great navigators of the fifteenth and sixteenth centuries. Although during the eighteenth century these organizations took on the legal form of chartered and privileged companies carrying on new business, which remained somehow linked to the maritime trade, they were still characterised by a limited development. A. LEFEBVRE-TEILLARD, *La Société Anonyme au XIX siècle*, (Paris, 1985), p. 2.

⁶ During the eighteenth century many companies for mining, canals, manufactures, etc. were formed. The large enterprise came into being but it needed a social form that corporation did not possess. Investors endeavoured to create a suitable means to carry on their businesses: clauses limiting members' liability were often inserted in the deeds of settlement and shares were usually transferable. These companies could not be compared to the chartered companies: the former lacked their own legal personality. G. RIPERT, *Aspects Juridique Du Capitalisme Moderne*, (Paris, 1951), p. 57.

⁷ In modern legal systems, the requisite of «*intuitus personae*» is a special characteristic of small businesses, where the individuality of the members takes on great relevance: it is in them that creditors and third parties place their trust. In contrast, large enterprises are defined by the amount of capital they possess, so that it is upon the assets of the company that economic operators rely for their transactions. For a detailed analysis of «*intuitus personae*» within large companies, see G. CAMERLYNCK, *De l'intuitus personae dans la Société Anonyme*, (Thèse pour le Doctorat), (Paris, 1929), *passim*.

⁸ In 1716, a banking company had been established by Law which purchased the privilege of the French East India Company and undertook all the general contracts of

the market in 1780, the *société en commandite par actions* was recognised⁹, and the *société anonyme* spread rapidly¹⁰. In April 1794, at the apogee of the Red Terror of Robespierre, this evolution was hampered. All the companies with transferable warrants to bearer were suppressed by a decree of the Revolution as they were regarded as dangerous to the new democratic society¹¹. However, this situation did not last very long because the Act of 30 November 1795 repealed any restrictions affecting companies. *Sociétés par actions* were re-established but no provisions for any specific rule concerning their constitution and their management was introduced¹². Yet the many abuses linked to share dealings called for the introduction of strict state control over companies¹³.

2. Gorneau's Bill: Les sociétés par actions

When the revolutionary social unrest began to quieten, *sociétés par actions* were officially introduced into French company law. The intention of Napoleon to break down the whole legal system into clear and easily comprehensible codes was the initial impetus for the process which led to the passing of the *Code de Commerce* of 1807. The first bill for the Code, which was drafted by the Parliamentary Commission, created in 1801 and chaired by a jurist named Gorneau, came about in the autarchic environment of the *blocus continental*, i.e., the prohibition of English imports to the Continent. This situation should have been advantageous for a rapid development of domestic business organizations. By contrast, the debut of *sociétés par actions* was quite modest. The Bill

the state. «All the state finances depended upon a commercial company: its shares immediately became very successful by increasing twenty times their original value. The circulation of shares doubled, the national wealth quadrupled, and immense fortunes were accumulated: credit had never been so blind and the share-dealings had never been so delirious. Eventually, around 1720, the system of Law collapsed because of its own excesses and it ruined France and its projectors». R.T. TROPLONG, *Commentaire du contrat de société*, (Brussels, 1843), p. 29.

⁹ It consisted of a partnership *en commandite*, the capital of which was divided into shares.

¹⁰ The Act of 2 March 1791 proclaimed «*liberté de l'industrie*», thus freeing *sociétés par actions* from state interference.

¹¹ In 1787, the King had long hesitated to grant the authorisation to the *Compagnie des Mines du Bourbonnais* because its capital was divided into warrants to bearer. LEFEBVRE, *op. cit.*, p. 7.

¹² RIPERT, *op. cit.*, p. 57

¹³ «*Trop souvent des associations mal combinées dans leur origine ou mal gérées dans leurs opérations, ont compromis la fortune des actionnaires et des administrateurs, altéré momentanément le crédit général, mis en péril la tranquillité publique*». Regnaud de Saint-Jean-d'Angély in his report before the *Corps législatif* on 1 September 1807.

The Bill presented one article only, namely, article 20¹⁴. It read: «*The société par actions is anonymous. It is not known but for a qualification relating to its object. Its capital is formed by a determined number of shares. It is managed by directors who are either shareholders or paid employees. It cannot be formed without the authorisation of the Government. Shareholders are liable only to the extent of the capital of their shares*». The brevity of article 20 revealed the state in which this kind of company presented itself to the authors. This association was regarded as the creation of a commercial practice which was not very well known to or acknowledged by the lawyers who represented the majority of the Commission. Gorneau's Bill described *sociétés par actions* without distinguishing between *sociétés anonymes* and *sociétés en commandite par actions*, which were to differ so much from one another in later decades. The absence of any distinction reflected the commercial reality of the time. Although this definition implied that associations could present different modes of carrying on business, it showed companies possessing certain common features. In this respect, the drafters of the *Code de Commerce* seem to have adopted the same legal attitude as English company law towards business associations. In England, too, companies were regarded as a comprehensive category presenting certain peculiar characteristics, i.e., large amounts of capital and transfer of shares. Within this definition, therefore, the type of company was exploited for various purposes according to the commercial and industrial needs of the system, thus representing a flexible means to be employed in the most profitable way.

3. The structure of companies and the *Conseil d'Etat*¹⁵.

At the cost of a small digression in our chronological exposition, it is interesting to note that the difficulty in elaborating a clear definition of the diverse kinds of company was not overcome even by the enactment of the Code of 1807. On 4 May 1808, the President of the *Bureau de Commerce* in his report on the deed of settlement of the «*Société de l'entreprise générale de messagerie*» emphasised this confusion. His report stressed that although the company had been established nominally as a *société en commandite*, it had all the characteristics of a *société anonyme*¹⁶. The difference between *sociétés anonymes*

¹⁴ The Commission based its proceedings on the ordinance of 1673, and on a reform bill of the latter which had been presented towards the end of the *Ancien Régime*, i.e., the Miromesnil Bill. H. LEVY-BRUHL "Les origines du Code de Commerce français", *Studi in memoria di Aldo Albertoni*, (Padua, 1938), vol. 3, pp. 219-224. For further details, see also M. REULOS, "Une source du Code de Commerce: le projet Miromesnil", *Revue trimestrielle de droit commercial*, (1948), Tome I pp. 224-229.

¹⁵ This was the governmental board which was in charge of control, supervision and general surveillance of business associations.

¹⁶ In the same year, the Prefect of Paris advanced a similar observation: «*It seems to me*

and sociétés en commandite was one of degree rather than substance. The legal concept according to which «la société par actions rentre dans la classe des commandites» did not constitute a juridical error of interpretation. It reflected the fact that during the last few years of the ancien régime the company was a hybrid, somewhere between a partnership and a modern company¹⁷. Early nineteenth-century business organizations were based on the relations between partners and shareholders rather than on the separate entity of the company as a whole. The latter had no legal status and there was no distinction between the assets of the company and those of the partners. The amount of capital necessary to form a company was often unclear and not properly fixed; the capital was usually fixed only provisionally because the partners could unanimously decide to alter it once they had a clearer idea of the size of the enterprise and the number of members¹⁸. Accordingly, the increase of capital consisted mainly of calls upon existing shareholders rather than new subscribers. This description corresponded to companies which were composed of a few members whose relationships were still based on *intuitus personae*¹⁹. This practice corresponded well to the commercial reality of the time, but the uncertainty concerning the exact amount of capital was incompatible with the legal requirement to fix a real sum of capital which the *Conseil d'Etat* intended to offer to creditors. It was the practice of the *Conseil d'Etat* to refuse authorisation to companies that fixed their capital in a fictitious way. Not only did companies have to fix the amount of capital but also the amount of each share so as to determine the portion subscribed by each shareholder. By setting up rules about the subscription of capital, the government achieved an important result: it took upon itself the right to check the freedom and the secrecy of investments.

that the business organizations presently existing [...] belong to the three kinds provided by the Code, but they take the form of more than one kind at a time [...] By regarding itself as a société anonyme from the beginning, the Manufacture des Glaces applied for government authorisation. Later on, it was established as a partnership». LEFEBVRE-TEILLARD, *op. cit.*, p. 3.

¹⁷ For further details, see *Observations du tribunal de cassation, des tribunaux d'appel et des tribunaux et chambres de commerce sur le projet de Code de Commerce*, (Paris), *Imprimerie de la République an X*, Tome III, p. 130 and also, E.H. GARNIER-DESCHESNE, *Traité élémentaire de notariat public*, (Paris, 1808), *passim*.

¹⁸ In 1812, the «*Société Anonyme for the culture of the pastel*» was set up with a capital of 40,000 francs and the shareholders announced the intention to make up the sum necessary for the project if the subscriptions already existing were not sufficient. LEFEBVRE-TEILLARD, *op. cit.*, p. 118.

¹⁹ The legal confusion between company and partnership continued in England, too, even after the passing of the Companies Act of 1844. With respect to the provisions of this statute, John Stuart Mill stated: «[...] On compliance with a few simple conditions of publicity any body of persons ought to have the power of constituting themselves into a joint stock company or société en nom collectif...». J.S. MILL, *Principles of Political Economy*, Book V, chapter IX, (London 1848), p. 259.

4. *Sociétés anonymes* as «public» companies.

Despite the final result, the drafters of the Code had intended to distinguish *société anonymes* from partnerships. Whereas in partnerships partners were held liable by virtue of the fact that their names appeared in the title of the partnership, *sociétés anonymes* were based on the opposite principle. Since the shareholders' names were not included in the title of the firm, they could enjoy limited liability. Consequently, by the term *anonyme*, the French legislature intended to describe all those companies in which the names of the members were unknown to the public. This «innovation» caused a long debate before the enactment of the 1807 Code²⁰. The Commission of 1801 regarded *sociétés anonymes* as an «effective means to encourage large enterprises, to attract foreign investments, to associate misery, and almost poverty with the advantage of large speculations»²¹. Through companies individuals were able to contribute to the stock of the undertaking according to their speculative purposes. It was precisely because these associations involved large sums of capital and were formed by many investors that they were defined as «public». By contrast, in England the term «public» was long used to describe those companies which carried out a purpose that should have otherwise been realised by the state. It was only many years later that the same term was to designate companies which appealed to the market to raise capital.

5. Limited liability.

The French legislature also recognized the advantage of limiting shareholders' liability to the amount of capital invested: «[...] *Les actionnaires ne sont assujettis qu'à la perte du montant de leurs actions*»²². This principle had already been established to a certain extent by the *Ordonnance* of 1673 by which *commanditaires* could limit their responsibility in proportion to their investment in the enterprise.²³ Consequently, during the debates preceding the enactment of the Code of Commerce, the question whether to recognise limited liability of shareholders as with *commanditaires* arose.²⁴ The majority opinion seemed to

²⁰ «*Les sociétés méritaient de notre part une attention particulière; elles entretiennent dans le commerce une régularité plus grande, une compatibilité plus sévère*». LOCRÉ, *La Législation civile, commerciale et criminelle de la France*. (Paris, 1829), Tome XVII, Code de Commerce, Tome I, Discours Préliminaire Du projet de Code de Commerce de la Commission, p. 35.

²¹ F. GALGANO, *Storia del Diritto Commerciale*, (Bologna, 1976), p. 122.

²² LOCRÉ, *op. cit.*, p. 36.

²³ LEFEBVRE TEILARD, *op. cit.*, n. 31.

²⁴ The qualification of «*commandite*» that was attributed to certain companies aimed at emphasising the limited liability of some *actionnaires*, thus putting these two kinds of

be in favour of this proposal, both because *actionnaires* and *commanditaires* contributed to the enterprise and because they were usually important individuals. The limitation of responsibility was essential to encourage investors to advance their money for companies. The French economy was still chiefly founded on agriculture and there was no incentive to attract investments to commerce and industry except by limiting the risk of those who wanted to invest money in business enterprise.

6. Limited liability as the criterion for identifying *sociétés par actions*.

However, the government did not intend to renounce its role in the economy and, accordingly, counterbalanced limited liability with the mandatory requirement of authorisation. In 1803, most of the trade tribunals and boards which were called upon to send their observations to the *Conseil d'Etat* on the Bill of 1801 criticised government authorisation of *sociétés anonymes*²⁵. The Government replied that since private individuals were not willing to subject their affairs to the meddling interference of the authorities of the state, investors had to be encouraged to accept control of the central powers: limited liability was the reward for such sacrifice. Accordingly, the government was able to establish a system of checks and restrictions which were always justified by the special privilege that companies obtained. It followed that the drafters of the Code identified companies with the limitation of liability and not with the transfer of shares. This criterion was mainly inspired by the commercial practice of Paris where *sociétés par actions* who limited their members' liability represented the largest number of companies. This proposal contrasted with the practice existing in the provinces where companies were usually set up with unlimited liability: their activities were defined by the division of capital into transferable shares. The government's policy could only be regarded as an imposition which did not respond to the needs of most traders: limited liability was not sought as the fundamental condition to carry on business²⁶. According to this definition of *sociétés par actions*, although *sociétés en commandite par actions* were characterized by the transfer of shares like *sociétés anonymes*, the former were not subject to authorisation²⁷. The fact that some shareholders

partners on the same footing. In 1801, the same argument was used by Gomeau who clearly assimilated the *commanditaire* with the *actionnaire*: *Observations du tribunal de cassation*, etc., Tome I, p. 15.

²⁵ LEFEBVRE-TEILLARD, "L'intervention de l'Etat dans la constitution des sociétés anonymes (1807-1867)", *Revue Historique de droit français et étranger*, (1981), p. 383 ff.

²⁶ LEFEBVRE-TEILLARD, *La Société Anonyme*, *op. cit.*, p. 13.

²⁷ «Nous avons pensé que lorsque'une société présente une solidarité personnelle, elle doit être libre dans ses combinaisons comme dans ses effets. La garantie est dans le gérants, lorsqu'ils sont solidaires. Il n'en pas de même d'une société par actions qui est régie, sous un nom ou

were held liable for the company's debts was sufficient to classify them as *en commandite* partnership instead of companies.²⁸ This classification reflected the government's intention to regard the division of capital into transferable shares as a minor characteristic of companies without foreseeing the consequences of such a decision.²⁹ The enormous growth in the number of *sociétés en commandite par actions*, and the abuses which followed, showed that the Code of Commerce should have dealt with these companies differently³⁰.

7. *Sociétés par actions* or *sociétés anonymes*?

This legal confusion in the definition of *société par actions* was strengthened by several amendments which were introduced in the revised bill of the Code. Article 20 was amended so as to restrict the term of «*société par actions*» only to a particular type of company: «*The société par actions is not known but for a qualification relating to its object[...]*». Yet the wording of this section did not identify the criterion for defining a company as «*anonyme*» with the limitation of shareholders' liability. In contrast, the literal expression used by the drafters, i.e., *société par actions*, stressed that the chief criterion was still to be identified with share transferability. The *Code de Commerce*, which was enacted in 1807³¹, substituted the term *société anonyme* for *société par actions*.³² Although this substitution was insufficient for a company which was set up to carry on large-scale operations, it justified the most peculiar feature of French company law, namely, government authorisation.

une qualification relative, par des administrateurs [...]». GORNEAU, LEGRAS and VITAL-ROUX, *Révision du projet de Code de Commerce, précédée de l'analyse raisonnée des observations du tribunal de cassation, des tribunaux et conseils de commerce*, (Paris, year XI), p. 21.

²⁸ During the debate in the *Conseil d'État*, Section 39 of the bill relating to *sociétés en commandite* read as follows: «*Toute société en commandite pourra diviser son capital en actions sans être pour cela réputée société anonyme [...]*». In the definitive version of the Code of Commerce, *en commandite* partnerships were provided by Section 38: «*Le capital des sociétés en commandite pourra être aussi divisé en actions, sans aucune dérogation aux règles établies pour ce genre de sociétés*».

²⁹ During the debate in the *Conseil d'Etat* relating to the article 39 of the Bill for the Code of Commerce, which admitted the division of capital in shares for *sociétés en commandite*, Cambacérès successfully backed the abolition of the statement according to which *sociétés en commandite par actions* were not to be called *sociétés anonymes*. He observed that by introducing this phrase, the legal system would allow the formation of disguised *sociétés anonymes* without authorisation: in fact, the fears of the Chancellor were to become reality especially during the «*commandites mania*» of 1837-38.

³⁰ *Infra*, Section 20.

³¹ This bill came into force on 1 January 1808: the complete text of the Code is contained in LOCRE, *Esprit de Commerce*, (Paris, 1811), 2 vols., I, p. 97 ff.

³² In the *Conseil d'Etat*, Commissioner Regnaud, who was the drafter of the bill for the Code of Commerce, was not willing to abandon the name «*Société par actions*». During the debates, some members opposed his proposal by stating that the phrase «*par actions*»

8. Government authorisation: reasons for its application.

By establishing government authorisation, the Code did not have to contain many rules relating to *sociétés anonymes*. The check on *sociétés anonymes* which the public authorities carried out was a sufficient guarantee to the central powers. *Sociétés anonymes* could come into existence only by means of authorisation, which was by definition a public measure. It was the central administration that had to decide whether an association of this kind was advantageous or not to the public.³³ The *autorisation gouvernementale* provided by Section 37 of the Code was meant to be a legal measure, a means by which to control an institution, i.e., the *société anonyme*, which was regarded as necessary though dangerous. *Sociétés anonymes* were necessary because they collected large amounts of capital needed by both trade and industry. In particular, it was the only business organization capable of financing extremely large projects such as the construction of canals, bridges, railroads, etc.³⁴ Simultaneously, *sociétés anonymes* were deemed dangerous because shareholders' limited liability might cause the rise of a powerful concentration of wealth without any associated risk. From an economic point of view, unlimited liability was regarded as the safest guarantee for third parties and the public.³⁵ The French legislature intended to remove the temptation of using the *anonyme* form, the shares of which were freely transferable, in order to deceive honest individuals, thus jeopardising the security of commercial transactions. Accordingly, art. 37 of the Code provided that the company's draft charter had to be approved by the government. Nevertheless, economic reasons were not the only ones to give rise to distrust in companies. These organizations were feared because they might represent a political danger to the establishment, namely, they could easily become powerful monopolies. Therefore the government assumed the right to approve the soundness of the projects which were submitted to it for authorisation.³⁶

would not have marked clearly enough the characteristic of this third kind of company, given that even the capital of *sociétés en commandite* could be divided into *actions*. Such an argument, though laconic, convinced the members to choose the word *anonyme* and there is no other reason in the documents which was used to support it. B.V. ZAMBELLI, *Proposta analitica di un insegnamento sul diritto commerciale, sul diritto di credito e sul diritto marittimo privato, pubblico e internazionale degli Stati*, (Milan, 1846), II, p. 245.

³³ Procès-verbal du Conseil d'Etat, contenant la discussion du Code de Commerce, (Paris, 1813), p. 170.

³⁴ LEFEBVRE-TEILLARD, *op. cit.*, p. 21.

³⁵ In this respect, Fould, who was one of the promoters of the *Société Générale*, wrote in 1863: "Je crois aujourd'hui comme alors que la spéculation doit avoir pour limite et pour garantie la responsabilité individuelle[...] la garantie que le public trouve dans la responsabilité individuelle n'existe plus dans la société anonyme" Letter of 8 June 1863, quoted by B. GILLE, *Histoire des entreprises*, 8, (November 1961), p. 54.

³⁶ Procès-verbal, Conseil d'Etat, session of 15 January 1807. The Code de Commerce established that no bank could be formed without explicit government authorisation and

9. Extension of government authorisation.

Although it seemed that authorisation should only be granted to large companies «*qui pourraient avoir quelque connexité avec l'intérêt public*»,³⁷ the concept of public interest was soon to be interpreted differently. Some tribunals identified public interest with «*épargne publique*» (public savings): accordingly, those companies, i.e. all companies, which appealed to private individuals were to be subject to government authorisation.³⁸ This position reflected the difference between the French and English legal system. In England, only companies carrying out public works had to be granted authorisation because they performed, public utilities on behalf of the government. Accordingly, trading companies carrying out private projects were excluded from this privilege and were regulated by common law, which often sustained their development. In France, the Chancellor of the Empire, Cambacères, admitted that all enterprises needed surveillance.³⁹ Had *sociétés anonymes* carried on business with their own capital — he stated — authorisation would have not been necessary. By contrast, since these associations used the funds of many individuals the legislature regarded it as expedient that the «*autorité supérieure*» should check upon their activities.⁴⁰ Regnaud added that «*too often associations ill-conceived, or ill-managed in their operations had compromised shareholders' and directors' assets, temporarily altered general credit, and jeopardized public order*». ⁴¹ Accordingly, on the grounds of protecting the public it was urged that the cases in which the government

the *mines ou bouillères* (coal mines) were compelled to become *sociétés anonymes*. The Act of 1810 provided that any mine needed the authorisation of government before being exploited. By means of this concession, the government obliged mining companies to accept the presence of «*specialists*» directly trained by the central administration. R. SZRANKIEWICZ and J. BOUINEAU, *Histoire des Institutions 1750-1914*, (Paris, 1989), p. 353-354.

³⁷ In this respect, the tribunal of Geneva stated: «*In order to reconcile public and private interest, we propose that government intervention should be limited by the number of shareholders and by the capital. Therefore, for instance, authorisation shall not be necessary for all companies with less than two-hundred shareholders and in which the capital does not exceed one million (francs)*. *Observations*, Tome II, p. 399.

³⁸ *Observations*, Tome I, p. 163 (tribunal of Caen) or Tome III, p. 123 (tribunal of Nancy).

³⁹ «*L'ordre public est intéressé dans toute société qui se forme par actions, parce que, trop souvent, ces entreprises ne sont qu'un piège tendu à la crédulité des citoyens*». *Observations*, *op. cit.*, p. 399.

⁴⁰ Authorisation was defined as «*le codé entier de l'industrie*»: A. WOLOWSKY, *Des sociétés par actions*, in RLJ, (Paris, 1840), VIII, p. 186.

⁴¹ *Code de Commerce précédé des rapports faits au Corps législatif par les orateurs du Conseil d'Etat*, (Gênes, 1807), p. IX; *Exposé des motifs, Procès-verbal* of 5 September 1807, n. VIII, in LOCRÉ, *op. cit.*, p. 106.

had the right to withdraw its authorisation ought to be extended and not limited.⁴² Even those who supported some kind of limitation in the application of authorisation were eventually able to recognise the public function of this administrative measure. Cambacérès explained that authorisation was necessary to check the vexatious clauses often inserted in deeds by promoters.⁴³ A permanent administrative control over the constitution of companies was eventually introduced. Although this supervision was justified by reasons of market interest, such as the protection of creditors and third parties, its existence was mainly the result of a clear public policy. *Sociétés anonymes*, like all other entities had to be firmly in the hands of the government. Within a state, such as France, where the evolution had established that all the powers should be concentrated in the central government, companies and their transactions could not be exempted from such an interference.

10. Authorisation: from ancient royal grants to state intervention.

Although the Code of Commerce was intended to represent the new legal doctrines breaking with the *ancien régime*, the authorisation recalled, in some respects, the tradition of the Crown, the legal path that the *société anonyme* followed between the eighteenth and nineteenth century. Within the framework of the Napoleonic Codification, the transition from the ancient to the new legal system was «*extenuated by the provision requesting Government authorisation for the establishment of sociétés par actions*»⁴⁴ In vain, investment claimed freedom of contract: even though the *société anonyme* was recognised as an ordinary means to carry on business along with the other two kinds of company, it needed royal approval. The Code of 1807, therefore, remained faithful to the French legal tradition. The founding of *sociétés anonymes* was regarded as a privilege that only the government could grant because of the age-long jealousy of these large organizations, which were considered to be a state within

⁴² Articles 37 and 38 of the bill, which were discussed by the *Conseil d'Etat* during the session of 13 January 1807, read as follows: «*Art. 37. The government may withhold its authorisation, if it regards the object of enterprise as unrealistic or lacking in substance* ». «*Art. 38. The government may revoke its authorisation if the established by-laws are not complied with, if the capital which has been put forward is not paid up in the terms fixed, if the société goes bankrupt, if it is convicted for fraud or acts contrary to the bona fide of commerce*». These two articles, along with art. 36 of the bill, were withdrawn during the debate of 15 January 1807, and they did not appear in the last edition of the Code of Commerce of 1808. The intention of the French Legislature was not to extend government company affairs to an infinite extent: the Code limited authorisation to the establishment of *sociétés anonymes*.

⁴³ LEVY-BRUHL, *op. cit.*, pp. 52-53.

⁴⁴ GALGANO, *op. cit.*, p. 122 ff.

State⁴⁵. This policy was perfectly in line with the legal view according to which companies were regarded as juridical fictions. These legal entities were the artificial creations of the government which granted them legal status. The Code of 1807 did not recognise any distinct legal figure, unless the administrative authorities created it. Ultimately, the growth of *sociétés anonymes* derived from the positive willingness of government authorities to sanction them.⁴⁶

11. The circulars of the Minister of the Interior.

Section 37 of the Code did not itself invest public authorities with control over the management of *sociétés anonymes*. Government authorisation took on a different meaning with the circulars of the Minister of the Interior. The procedure and the nature of administrative authorisation was expressed in the circular issued on 23 December 1807, before the Code of Commerce came into force.⁴⁷ This *instruction* established conditions relating to the drafting of petitions presented to the *Conseil d'Etat* for authorisation.⁴⁸ Not only did the provisions of this circular state the general features that *sociétés anonymes* had to possess, but the first clause also extended jurisdiction over companies. The *société anonyme* had to be known by the local prefect and by the central police administration of Paris.⁴⁹ However, it was the fourth clause of the Circular which stipulated when authorisation was to be granted. Apart from the

⁴⁵ P. LEROY-BEAULIEU, "Les sociétés anonymes en Angleterre et en Italie", *Revue des deux Mondes*, LXXXIV, (1869), 1 December, p. 731.

⁴⁶ R. SALEILLES, *De la personnalité juridique, Histoire et théories*, 2nd edn., (Paris, 1922). In the 1830s and 1840s a new legal body of doctrines, which regarded the legal characters of *sociétés anonymes* as based on freedom of contract rather than on state concession, was part of a more general tendency of revision of legal interpretations. Since the Code of Commerce had not provided for any kind of legal figure, the French jurists built the conception of the *personnalité morale* on the provisions of the Civil Code and of the Civil Procedure which attributed to *sociétés* a certain degree of juridical status. DUVERGIER, *Du contrat de société*, in *Le droit civil français* par Toullier, V, (Paris, 1839), p. 448 ff; Troplong, *op. cit.*, p. 29 ff.

⁴⁷ LOCÉ, in his *Esprit du Code de Commerce* (p. 152), referred the aforesaid Circular to another date, namely, 16 January 1808, thus creating a false reference which many legal writers and jurists have been quoting until the present time.

⁴⁸ For further details, see E. VINCENS, *Exposition raisonnée de la législation commerciale et examen critique du Code de commerce*, (Paris, 1834), I, pp. 324-360.

⁴⁹ The central administration of Paris was to gain more and more importance within the regime of authorisation: companies' promoters had to concentrate their efforts at the Parisian stage of the procedure when their deeds were submitted to the Minister of Interior and the Council of State. In this respect, prefects were to be deprived of those powers that the Circular of 1807 had conferred on them. In 1846, the «*ingénieurs des mines*», charged with writing up an expert's report, criticised the fact that the authorities

usefulness and soundness of the business, the prefects also had to approve the «qualities and morality» of the individuals who were involved in the enterprise. Both in England and France, Crown officers and Parliament wished to make sure that the proposed company would have a certain usefulness, would possess a certain amount of initial capital and would carry on a business that would be beneficial to the public. By the circular of 1807, the French government established that the personal characteristics of the projectors were also to be evaluated before the ultimate fiat would be conceded. This control was not exercised by a commercial authority, such as the Chamber of Commerce, but by the prefects who represented the administrative and bureaucratic power of the state. The formalities relating to the establishment of *sociétés anonymes* were included among the numerous functions that were already ascribed to the prefects. Accordingly, the procedure for obtaining authorisation was very long because the examination of a company's petition was naturally added to the endless list of situations which required the legal approbation of the prefect. The procedure could last on average between 12 and 18 months: the «*Société for the construction of three bridges over the river Seine*», which was set up in 1808, was authorised only in 1829! This condition was definitely detrimental to the growth of *sociétés anonymes* in France.⁵⁰ What was the legal significance of *autorisation gouvernementale*? «*La société anonyme ne peut exister qu'avec l'autorisation du gouvernement*»: the wording of Section 37 of the Code attracted the attention of many jurists and legal writers, especially the verb «*exister*». Not only did authorisation apply to newly-formed companies, but also to those already existing at the time of the promulgation of the Code. This followed the literal interpretation given by Section 7 of the circular of 23 December 1807: «*The sociétés anonymes which are at present existing are bound, under penalty of interdiction, to apply to the government for authorisation according to the same provisions established by the present circular*». ⁵¹ Accordingly, no company could be conducted without special concession from the central authorities. It followed that the public interpreted government authorisation as a privilege, as it had been during the *ancien régime*. ⁵² This idea was so well rooted that the circular of 22 October 1817 needed to clarify that the authorisation of His

of Paris had taken upon themselves the right to grant concessions for the coal-mines of Layon and Loire: *Dossiers d'autorisation des sociétés minières et métallurgiques*, in «Final Report of the Minister of Public Works (*Travaux Publics*)», 29 June 1846.

⁵⁰ The first ten years following the promulgation of the Code of Commerce saw as many as thirteen *sociétés anonymes* recorded in the *Bulletin des Lois*: C.E. FREEDEMAN, "Joint Stock Business Organization in France, 1807-1867", *Business History Review*, 36 (1965), p. 188. The total number of authorised companies during the years 1807-1867 was 651. For further details, see LEFEBVRE-TEILLARD, *L'intervention de l'Etat*, *op. cit.*, p. 413 ff.

⁵¹ LEFEBVRE-TEILLARD, *La société anonyme*, *op. cit.*, p. 35.

⁵² During the first years after the passing of the Code, numerous petitions were accompanied by bribes to the members of the Council of State.

Majesty was not a privilege. The Minister stated that authorisation was granted because of the type of *société anonyme* and not because of the branch of industry that the promoters intended to exploit. The government recognised that *sociétés anonymes* could fulfil any purpose. Consequently, the limited number of companies which were formed under the provisions of the Code of Commerce was not so much due to restrictions about the operations that could be carried out as to the cumbersome procedure to obtain government authorisation.⁵³ This concept was reinforced by the *instruction* of 9 April 1819 which clearly stated that authorisation was not a pure and simple formality, thus strengthening the belief that authorisation was a mere updated version of the ancient royal grants⁵⁴. This circular openly contradicted the statement which the government had made two years before. Authorisation as well as limited liability was to remain a special prerogative to be granted only in particular cases at the discretion of the central authorities.

12. Government authorisation under the Restoration.

Was authorisation to be granted once and for all, or could the government revoke it? During the years of the Restoration, and under the Bourbon Regime which followed the Congress of Vienna of 1814-15, authorisation was subject to further restrictions. What had been a «reserve» disposition in the hands of the Napoleonic administration, became the means for a planned and hostile policy against *sociétés anonymes*.⁵⁵ Authorisation was a suitable means to check credit and capital so that the *noblesse* could have at its disposal a way of controlling the mobility of the national wealth. The mandatory requirement of authorisation sanctioning the recognition of the draft charter was reinforced by an *ordonnance* of the *Conseil d'Etat* of 25 June 1817. If the government made some changes to the company's original charter, the members of the company could not but accept such modifications.⁵⁶ The power of the authorities to alter the provisions in the company deed was based on the same principle underlying the law on authorisation itself. Given that *sociétés anonymes* could not come into legal existence without public sanction, the same authority which granted approval had to be allocated the power to take upon itself the right to modify the conditions upon which its «juridical creature» was based. Through the two circulars of 1817-1818 and particularly through the restrictive practice of the

⁵³ J.M. PARDESSIJS, *Cours de Droit Commercial*, (Paris, 1857), p. 136.

⁵⁴ DALLOZ, *Répertoire méthodique et alphabétique de législation, de doctrine et de jurisprudence*, XL, (Paris, 1859), p. 380.

⁵⁵ UNGARI, *op. cit.*, p. 43.

⁵⁶ *Les modifications apportées par le gouvernement aux statuts délibérés par une société anonyme, sont obligatoires pour les sociétaires comme les statuts mêmes*; DEVILLENEUVE-CARETTE, *Recueil Général des Lois et des Arrêts*, V, 1815-1818, (Paris, 1842), II, p. 300.

Minister of the Interior, *sociétés anonymes* were again subject to the administrative *bon plaisir* of the previous century.⁵⁷ Although both circulars tended to strengthen the intervention of the government authorities in the constitution of *sociétés anonymes*, the earlier circular differed from the later one. This dissimilarity was to play an important role in the ensuing years of debate on the repeal of government authorisation. The circular dated 22 October 1817 sanctioned the principle according to which *sociétés anonymes* had to supply many guarantees before receiving the seal of government.⁵⁸ Existing joint capital and professional directors were regarded as the only guarantees that *sociétés anonymes* could offer to creditors as well as to their shareholders. Authorisation was not granted until the authorities had verified the existence of

⁵⁷ TABLE I shows the yearly number of *sociétés anonymes* formed between 1808 and 1867: this data is taken from LEFEBVRE, *op. cit.*, p. 65.

TABLE I

1808	6	1823	8	1838	27	1853	22
1809	1	1824	9	1839	9	1854	35
1810	0	1825	6	1840	10	1855	19
1811	1	1826	13	1841	14	1856	13
1812	2	1827	8	1842	16	1857	6
1813	0	1828	11	1843	12	1858	11
1814	0	1829	14	1844	21	1859	10
1815	1	1830	8	1845	28	1860	12
1816	3	1831	11	1846	17	1861	8
1817	5	1832	8	1847	9	1862	11
1818	10	1833	3	1848	11	1863	24
1819	5	1834	11	1849	10	1864	12
1820	8	1835	13	1850	8	1865	12
1821	6	1836	13	1851	2	1866	9
1822	14	1837	28	1852	18	1867	7

Merchants and traders preferred partnerships to companies: in 1847, there were 1,952 *sociétés en nom collectif*, 408 simple *commandites*, 239 *commandites par actions* and 14 *sociétés anonymes*. In 1862, on the eve of partial freedom of association, which was to be introduced by the Act of 1863 relating to *Sociétés à responsabilité limitée*, there were 2,986 *sociétés en nom collectif*, 543 simple *commandites*, 116 *commandites par actions* and 12 *sociétés anonymes*.

⁵⁸ J.F. COLFAVRE, *Le droit commercial comparé de la France et l'Angleterre*, (Paris, 1863), p. 64.

these two conditions.⁵⁹ Once the guarantees given by the promoters were scrutinised, it was in the interest of the public to check that all the initial requirements and fundamental rules stated in the company's deed were complied with.⁶⁰ The interference of the central administration in company affairs was limited to the draft charter of the latter. The spirit of the circular of 1817 was defined by the will of the legislature to establish clearly the legal requisites that the company's deed had to possess to be lawful. It did not provide for permanent control over the operations of the company during its commercial existence. This was sanctioned by the circular of 11 July 1818. government interference evidently aimed at ensuring that the requirements which had justified the concession of authorisation were enforceable throughout the company's existence. This circular provided that the decree of authorisation should contain a clause stating that in the event of non-observance of the deed government authorisation could be revoked. The «*Compagnie du port du Havre*», which was authorised in 1818, was the first *société anonyme* to experience the new administrative practice.⁶¹ The ordinance of authorisation of this company included a clause which was to become common in French company law: «*We [the authorities] take upon ourselves the right to revoke our authorisation in case of violation of or non-compliance with the approved draft charter, without prejudice of the rights of third parties*». Yet the revocation of authorisation was rarely applied because of well-defined and realistic policy.⁶² After all, government authorities could not totally hamper industrial growth: such a check would inevitably have had repercussions on the whole political system.

The role of the *Conseil d'Etat*.

The intervention of the *Conseil d'Etat* in the legal affairs of *sociétés anonymes* was the logical consequence of government authorisation. The authorisation procedure limited considerably the importance of judicial decisions and gave the *Conseil d'Etat* great influence which eventually deprived ordinary courts of their

⁵⁹ This clause had been inserted in Section 37 of the first bill for the Code of 1807: *supra*, n. 41. Nevertheless, there was only one example in the *Bulletin des Lois*, in 1811, of refusal of authorisation: LEFEBVRE-TEILLARD, *op. cit.*, p. 40.

⁶⁰ DALLOZ, *op. cit.*, p. 689 ff.

⁶¹ The wider sphere of government interference gave the public authorities important powers to disapprove company operations. Moreover, the central administration also began to play the role of arbiter among members and between them and third parties. See DEVILLENEUVE-CARETTE, I, *op. cit.*, p. 283.

⁶² The total number of revocations numbered less than ten: they especially referred to *sociétés d'assurances mutuelles* (friendly societies). LEFEBVRE, *op. cit.*, p. 40.

role. By refining the deep-seated commercial practices, the judges of the Council of State elaborated a series of rules which were to guide the legal principles binding companies for a long time. Whereas the *Conseil d'Etat* tended to sanction only companies set up to carry out projects in the sphere of public utilities, it developed hostility towards those *sociétés anonymes* which carried on business that also ordinary associations were able to perform.⁶³ Authorisation was then regarded as a privilege reserved to a select few enterprises which were recommended because of great or unusual wealth. In practice, only these companies could apply to the *Conseil d'Etat* with reasonable chances of success.⁶⁴ Was this the legacy of a mercantilist past, which continued in the first half of the nineteenth century? The answer is to be found in the idea of «protectionism» that characterized this period. Government justified its intervention as the protection of small investors against the overpowerful rule of large companies. Even though such «protection» resulted in an utter distrust of companies at large, the *Conseil d'Etat* was convinced that in this way law and order was safeguarded against the troubles rising from speculation. Consequently, authorisation and the subsequent body of regulations reflected the government's power to control the accumulation of capital and to keep it within the sphere of those who supported the Crown. Whereas authorisation suited the commercial and industrial *petite bourgeoisie* of the first half of the nineteenth century, this measure was to be opposed by the great industrial bourgeoisie of the following decades. The increasing internationalisation of trade and industry led to a rejection of any meddling and hampering system aimed at checking their growth.

14. Difficulties relating to government authorisation.

In 1815, England was riding on the crest of the wave commercially, financially and industrially. In France, the economic system was still characterised by deep attachment to the land, making France an agricultural country which was slow and resistant to industrial development. French traders clung to the old domestic system and to small-scale manufacturing because they

⁶³ This idea was expressed in 1825, during the examination of the application presented by the glass-works Thuisson. On this occasion, the *Conseil d'Etat* affirmed: «[...] Toutes ces considérations ont fait penser que le gouvernement doit réserver le privilège des SA pour les sociétés commerciales qui ont pour objet de former des établissements d'utilité publique ou d'appeler le concours de capitaux importants». LEFEBVRE-TEILLARD, *op. cit.*, p. 55.

⁶⁴ Whereas in the first years after the passing of the Code of Commerce refusals of authorisation were almost none, the period 1840-44 saw 206 requests for authorisation examined by the Council, out of which 114 *anonymes* were eventually authorised.

were well suited to their actual resources. Furthermore, the long and tortuous procedure of authorisation offered no guarantee of final success for private individuals willing to set up a business. The requirements for the formation of a *société anonyme* were onerous for promoters. The fact that all capital had to be subscribed in advance, or if all shares were not subscribed at least 1/4 of the capital had to be paid up, immobilised large amounts of capital for a considerable time. Moreover, having fulfilled all the requirements to obtain authorisation, the promoters could not be sure that their petition would be approved by the *Conseil*⁶⁵. In this respect, the *Société Commanditaire de l'industrie*, which was promoted by a group of bankers and industrialists, failed to obtain authorisation in the 1820s. The *Conseil d'Etat* gave two main reasons for its refusal: firstly, the presence of foreign bankers among the promoters, and secondly, the large size of the capital (100,000,000 francs)⁶⁶. The authorities regarded this company as a real danger: the combination of foreign investors and a large amount of capital underlined the need for strict administrative control over the accumulation of wealth within the country. A foreign banking company of such proportions would have been an obstacle to the established economic system which was founded on companies rigorously formed and supervised directly by central government. Accordingly, the government was careful in granting this privilege to associations which might go beyond the reach of administrative control. The suspicion of the French authorities towards business organizations was also reflected in the public works sector. The Government greatly distrusted private initiative in public utilities: «*Private initiative seldom came to the assistance of the government and, when it did, seemed interested more in profits than in serving the nation*»⁶⁷. When compared to the English situation, this observation seems to generate the idea that in England, traders and investors undertook business to promote the «public good» rather than to profit out of their activity. Yet, it was this thirst for profits that gave England its remarkable system of public works. The legislative strategy of the English Parliament, therefore, was to support the initiative of private individuals

⁶⁵ M.A. JULLEN, *Revue encyclopédique*, 2nd ser., vol. XXXIX, (1828), pp. 41-44. Another example was the failure of the gigantic *Compagnie des Mines de la Loire* to obtain authorisation in the 1840's. For further details, see L.J. GRAS, *Histoire économique générale des mines de la Loire*, 2 vols., I, (Saint-Etienne, 1922), p. 307 ff.; *Journal des chemins de fer*, vol. IV (1847), p. 956, vol. VII (1848), pp. 52 and 496.

⁶⁶ A.L. DUNHAM, *The Industrial Revolution in France, 1815-1848*, (New York, 1955), p. 48.

⁶⁷ In this respect, the two meanings of the term «public» coincided: by encouraging the formation of business aggregations appealing to the general public for capital subscriptions, the English authorities exploited these combinations to carry out government functions. Accordingly, public interest and private profit formed a successful combination for English industrial and commercial growth during the nineteenth century.

who, by joining their capital, carried out public projects.⁶⁸ On the contrary in France, the Government opted to intervene directly by means of enterprises of its own rather than collaborate with individual enterprises which, in their turn, would have lessened the financial burden imposed on the government.

15. Railways: a comparison with England.

The French government always interfered with the construction, management and control of railways because it felt that it alone could protect national interests and guarantee sound construction and honest financing. Many historians regarded this intervention as positive because they believed that a bureaucratic government which planned its railroads and created a unified system was considered better than a system, as in England, in which «railroads were built as individual enterprises without any plan or guidance».⁶⁹ Yet in France, precisely because of Government intervention, there were years of delay and friction in carrying out these plans which hindered the development of trade and industry and greatly increased the cost of the railroad system for the nation. Here lies the main difference between the French and English systems⁷⁰: in England, intense competition allowed many individuals to invest their fortune in the shares of railway companies. By enabling private investors to employ their capital in railway projects, and, subsequently, by encouraging these investments, the English parliament interpreted the interests of the public. By contrast, in France, even when public opinion seemed to show some interest in carrying on profitable business, the government took upon itself the right to provide for them. For instance, the government tried to buy back the shares of some canal companies which might enable them to make greater profits in the future. This suspicious attitude of the central powers emerged clearly during the years 1825-1842. Despite the considerable sums of capital that railway companies had brought together, they needed much larger amounts of capital than any of their predecessors. The government showed little understanding of the problems confronting these companies. Not only did it grant concessions for a brief term and under rigorous and costly regulations, but it also enforced various kinds of taxes. The authorities sought in these measures to protect the public interest in a dictatorial spirit as if all the companies were made up of speculators and profiteers. Thus, many able financiers and sound investors were

⁶⁸ DUNHAM, *op. cit.* p. 69.

⁶⁹ D. SALOMON, *Railways in England and in France*, (London, 1847), p. 25.

⁷⁰ DUNHAM, *op. cit.*, p. 70.

excluded from railroad construction and, again, the development of *sociétés anonymes* was checked.⁷¹

16. Economic growth and government attitudes.

As to the other sectors of production, after 1832 industrial growth quickened, the denomination of each share diminished, purchase and sale of stock became easier and there was a great increase in the securities listed on the *Bourse* of Paris. There was also a marked acceleration in the increase of supply of both French and foreign capital for investment in industrial enterprises as well as public utilities. It followed, of course, that the number of persons to be investigated by the authorities increased enormously; yet this situation did not cause an increase in government authorisations.⁷² In contrast, the government authorities were very concerned about the increase in speculative activity and sincerely felt that the regulations governing incorporation should be tightened rather than relaxed.⁷³ Large enterprises were carried on by *sociétés anonymes*, the number of which, anyway, was ridiculous⁷⁴ when compared with other forms of association.

The main fields in which *sociétés anonymes* exercised their influence were insurance, public works, transportation and mines, as shown in Table III⁷⁵. While *sociétés anonymes* gradually developed in all fields where industrial

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TABLE II
Shows the number of business organisations
formed in France from the year 1840 to 1850:

1840	2,156	
1841	2,247	
1842	2,308	
1843	2,395	
1844	2,367	Of these 19,285 <i>en nom collectif</i>
1845	2,758	4,001 <i>en commandite</i>
1846	2,747	1,983 <i>en commandite par actions</i>
1847	2,613	221 <i>sociétés anonymes</i>
1848	1,511	
1849	1,959	
1850	2,429	
	25,490	

⁷² In 1832 and 1833 only eleven *sociétés anonymes* were authorised.

⁷³ In 1837-38, there were 751 *commandites*, compared to 651 *anonymes* authorised in sixty years!

development required large investments of capital, this form of company did not emerge in the textile manufacturing sector. This was still dominated by ancient and traditional methods of production which were linked to the rural environment of the country.⁷⁶ The lack of *sociétés anonymes* in manufacturing was also due to the fact that *all* associations consisting of more than twenty people were subject to government authorisation.⁷⁷ This circumstance did not encourage small traders and investors to go through a long procedure after which they might fail to obtain the official seal. Despite the suspicious attitude of central government towards companies and the marked individualism of the average manufacturer, between 1815 and 1848, the size of business organizations tended to increase and their capital tended to increase even more. In this respect, according to one author, company organisation in France was not delayed or seriously hindered either by the government or by public

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TABLE III
Division by branches of activity, 1807-1848.

Insurance	89	
fire		49
life		23
agriculture		14
Public works:	78	
canals and waterways		18
Transportation:	68	
railways		31
Mines, quarries and metallurgy:	46	
mines alone		14
quarries		4
Banks and credit establishments	16	
Public services (water and lighting)	15	
Textiles	10	
Glass-works	9	
Paper-manufacturing	8	
Sugar-refineries	7	
Entertainment	7	
Property	5	
Chemicals	3	
Miscellaneous	28	
Total	389	

As far as the comparison with England is concerned, whereas in 1825-26, in France, only nineteen companies were authorised, in England the number of incorporations was 328. In 1835-36, these figures did not change very much: in England, there were 251 incorporated companies, while in France there were twenty-six authorised *sociétés anonymes*.

opinion. He believed that it almost kept up with the needs of industry and trade.⁷⁸ However, this author does not seem to attribute any responsibility for the historical development of company law: if neither public opinion nor the government were to be blamed, who then was to be held liable? Did the few government authorisations not prove the case? Was it not the result of the wide discretionary powers held by the government which turned down many applications from company promoters? The fact was that both the government and public opinion put up strong opposition to the establishing of companies with large capitals. The authorities of the state had to control the development of these organisations as they represented «political dangers» to the *status quo*, while the community defended individualism in trade. Eventually, industrial and commercial growth was caused by the increasing trust in the potential of the unincorporated company form. In the face of the many obstacles which blocked into the several attempts to establish *sociétés anonymes*, investors engaged a company form which would be easily suitable for their needs. The *fièvre* of *sociétés en commandite* of the 1830s was to emphasise the growth of the «spirit of association» of French businessmen: the central authorities were to remain alone in their battle against *sociétés anonymes*.

17. *La société en commandite par actions*: its development.

French investors endeavoured to break through the numerous hindrances that the law established. They found the means to achieve this result in the legal system itself: the *société en commandite par actions*.⁷⁹ Even though the drafters of the Code had intended this kind of company to be applied to smaller enterprises compared with those carried on by *sociétés anonymes*, *sociétés en commandite par*

⁷⁵ C. FOHLEN, «La concentration dans l'industrie textile française au milieu du XIX^e siècle», *Revue d'histoire moderne et contemporaine*, (1955), p. 51.

⁷⁶ Section 291 of the Penal Code of 1810 read as follows: «No association of more than twenty people [...] shall be formed without the agreement of the government and according to the conditions that the public authorities decide to impose on the company».

⁷⁷ DUNHAM, *op. cit.*, p. 43.

⁷⁸ In the description of French company law, *sociétés en commandite par actions* are sometimes referred to as «companies» and sometimes as «partnerships». This legal confusion derives from the fact that this specific kind of association presented the features of both partnerships and of companies, namely, unlimited liability and division of capital into shares.

⁷⁹ Also Troubat attributed the growth of *commandites* in France to the lack of incorporation: «The present advanced state of [...] the manufacturing and commercial enterprise could not have been met without this expansion of the old contrivance, unless indeed charters of incorporation should have been more profusely granted by the governments». F.J. TROUBAT, *The Law of Commandatory and Limited Partnership in the United States*, (Philadelphia, 1853), Preface, p. IX.

actions were soon applied to vast enterprises. The Code of Commerce of 1807 dedicated only one article to this form of company, i.e., Section 38, which read as follows: «Le capital des sociétés en commandite pourra être aussi divisé en actions sans aucune autre dérogation aux règles établies pour ce genre de sociétés». The *société en commandite par actions*, as well as the *société anonyme*, therefore, was allowed to divide its capital into transferable shares. However, the former differed from the latter because it did not need authorisation. This fact brought about a great surge in the number of *sociétés en commandite par actions*.⁸⁰ In Paris and in the whole of France, traders did not consider these associations for their internal structure or particular implicit features but in virtue of the fact that they enabled investors to avoid the costly and long procedure connected to the constitution of *sociétés anonymes*. Thus, the *société en commandite par actions* became, contrary to its nature, the main commercial means by which to carry on business.⁸¹ Skilful managers and investors repeatedly resorted to this form of company for speculative purposes. During the first three decades of the nineteenth century, by means of subtle and well-drafted deeds, which permitted sleeping partners to avoid the legal prohibition from taking part in the management of the *société*,⁸² commercial practice devised a new form of company. This eventually became a disguised *anonyme* which could reap all the advantages of the latter without being subject to the constant surveillance of government *commissaires*.

18. The part played by *sociétés anonymes*.

This situation partly arose from the structure of the *sociétés anonymes* in the first decades of the nineteenth century. These associations often numbered only a few members and directors and thus resembled ordinary partnerships.⁸³

⁸⁰ In this respect, Coquelin stated: «Et voilà comment la commandite est devenue, contre sa nature, le mode presque universel de l'association commerciale». C. COQUELIN, 'Des sociétés commerciales en France et en Angleterre', *Rivista delle società*, XVII, (Milan, 1972), p. 1214.

⁸¹ According to Sections 27 and 28 of the Code *en commandite* partners could not legally take part in the management of the company. In case of intervention, they would lose their privilege and, accordingly, be regarded as ordinary partners, thus being subject to unlimited liability.

⁸² On 13 August 1848, the extraordinary general meeting of the *Marq-en-Baroeul Company* modified its deed of settlement with five shareholders, who represented eighteen votes out of a total of twenty-three. LEFEBVRE-TEILLARD, *op. cit.*, p. 47.

⁸³ This issue was settled by the decision *Armand, Lecomte et Cie*, of the Commercial Tribunal of Paris in 1830 and confirmed by the Court of Appeal of Paris on 7 February 1832. This decision paved the way for the *commandite* to be used for large enterprises, thus endowing France with two *quasi* corporate forms of organization. On that occasion, the judges declared that *commandites par actions* had to be regarded as companies: «[...] A limited partnership in regard to special partners is not an association of persons, but of capital, for their names do not appear in the partnership style. It is sufficient that there be one or more partners responsible in *solido*». Thus, MALEPEYRE and JOURDAIN, *Des Sociétés*

The legal differences between *commandites*, which were classified under partnerships, and *anonymes* were thus not very evident: the possibility for *commandites* to issue shares to bearer,⁸⁴ and the broad judicial interpretation of Sections 27 and 28 of the Code were all factors which contributed to narrowing the small gap that already existed between *commandites* and *anonymes*. The former metamorphosed into *sociétés anonymes* without authorisation, as Cambacérès had foreseen.⁸⁵ By keeping the division of capital in shares for *commandites*, the Code allowed these associations to organize themselves like *sociétés par actions* in the *Ancien Régime*. The «reform» of the Code of Commerce, therefore, was a check: in France, as well as in England, the ingenuity of investors and entrepreneurs enabled them to develop a commercial means that the legislators had intended to eliminate.⁸⁶ On the one hand, by means of the *société en commandite par actions*, investors desirous of using their capital and avoiding the endless system of authorisation could benefit from limited liability.⁸⁷ On the other hand, skilful individuals and industrious managers could become the *gérants* (managing partners) of these companies, thus gaining complete control over the transactions and engagements of the company.⁸⁸

Commerciales, (Paris, 1843), pp. 145-6. The judges of the Court of Appeal did nothing but reaffirm a principle that had been long established during the *ancien régime*: *sociétés en commandite* could divide their capital into shares to bearer.

⁸⁴ Some court decisions contributed to assimilate *commandites par actions* with *sociétés anonymes*. The Tribunal of Colmar (4 February 1819) ruled that *commanditaires* had the power to appoint, of their own choice, the agents of the company. The Tribunal of Bordeaux (7 June 1842) recognised that *commanditaires* were allowed to control the books and the cash of the company. Furthermore, the Court of Paris (11 November 1848) established that *commanditaires* were given the power to dismiss and replace the *gérants*. On that occasion, the judges declared that this power was lawful and it did not represent «aucune atteinte aux principes de la commandite». The *Conseil de surveillance* that set up by the Act of 1856 intended to continue the same practice: the possibility for capitalists to interfere with the conduct of the business.

⁸⁵ In 1830, the law still ignored the existence of the *société en commandite par actions* as a separate class of companies, limiting its definition to Section 38 of the Code of Commerce.

⁸⁶ This form of association was used as a permanent means when authorisation was refused and as a temporary one before the latter was granted. The fact that *sociétés en commandite par actions* were employed as a substitute for the lack of authorisation showed that French investors aimed mainly to establish *société anonymes* rather than *commandites*.

⁸⁷ Many legal writers of the time, and not only the French, considered the presence of these *gérants* as essential to the carrying on of business, even more than incorporation grants. For instance, an American lawyer wrote: «And even then, such charters would have not been appropriate for the management of some of the colossal *commandite* associations that now flourish in France and Belgium. In them, the hand and voice of the largely interested general partner are indispensable». TROUBAT, *op. cit.*, p. IX. For a positive comment on the role of *gérants*, see also DELANGLE, *Des Sociétés Commerciales*, 2 vols., (Paris, 1843), Preface, pp. LXVII-LXVIII.

19. The role of *gérants* and *en commandite* partners.

The abuses that sociétés *en commandite par actions* caused were related mainly to the excess of power that *gérants* could attain. They were often described, and rightly so, as the veritable dictators of the enterprise: shareholders could only exercise an imperfect surveillance over management because if they had participated in policy making, they would have lost their limited liability.⁸⁹ *Gérants* were almost irremovable from office and other partners had little to say in the entire conduct of the company itself. *Gérants*, in their turn, maintained that since they were fully liable for the company's debts, the powers that they claimed were a just compensation for the risks they ran. After 1830, this situation began to change: limited partners were able to take part in the management of the company.⁹⁰ To avoid the restrictions imposed on *commanditaires*, these partners began to make use of «men of straw» (*gérants de paille*) and to devise elaborate and subtle clauses to be inserted in the deeds of settlement. In practice, these companies were put on the same footing as *sociétés anonymes*.⁹¹ Dunham argued that France, with her small individualistic manufacturers and her fear of large enterprises was the first of the great countries of modern Europe to use extensively this valuable legal institution which was more useful and flexible than any possessed at that time by the powerful British Empire.⁹² Without misinterpreting the notable role of *commandites par actions*, it must be said that this observation does not completely

⁸⁸ HORACE SAY, Des Sociétés Commerciales en France et en Angleterre, in *Journal des économistes*, 2nd series, vol. II (1854), pp. 349-350.

⁸⁹ The requirement that the name of the firm had to consist of the names of one or more of the responsible partners (e.g., *Jean Bérard et Cie.*) was apparently unsatisfactory for company promoters, for in the 1830s the larger *commandites* were using designations reserved by law for *anonymes* only, such as *Caisse du Commerce et de l'Industrie de Lyon*.

⁹⁰ P. UNGARI, *Profilo storico delle anonime in Italia*, (Rome, 1978), p. 44.

⁹¹ DUNHAM, *op. cit.*, p. 12.

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TABLE IV

Number of *commandites* formed between 1833 and 1837, their capital (expressed in francs) and their shares:

YEAR	No.	CAPITAL	SHARES
1833	55	15,010,000	28,135
1834	84	79,848,000	58,549
1835	106	45,508,000	47,000
1836	216	156,845,000	373,278
1837	288	361,139,000	586,479

reflect reality. Although English traders did not in principle benefit from limited liability, they adapted the joint stock company form to any kind of business. Moreover, the practice of advancing money to partnerships was well rooted amongst investors. By means of these agreements small investors could place their money in an undertaking without taking part in its management. In England, the prospects of gain were so high that wealthy individuals did not regard theoretical unlimited liability as a serious danger to their investments.

20. The boom of the 1830s: the bill of 1838.

The number of *sociétés en commandite par actions* that were formed annually in France and their total capital shows that difficulties and abuses did not deter these companies.

According to the communications that the Tribunal of Commerce of Paris received from the district of Seine in 1837, the number of *sociétés en commandite par actions* formed before 1830 was small, but the boom of the 1830s witnessed a real explosion in their number.⁹³ From 1826 to 1837, 1039 *commandites* were set up and during the «*fièvre des commandites*» in 1838, only eighteen *sociétés anonymes* were formed out of a total number of 1026 *sociétés par actions*.⁹⁴ In 1837, a Commission was appointed to draft a bill regarding *sociétés par actions*, namely, both *en commandite par actions* and *anonymes*. Immediately, the Commissioners urged that *sociétés en commandite par actions* also be subject to government authorisation because, in their opinion, this measure would be a stimulus for *bona fide* companies and a check on fraudulent associations. Eventually, the Commissioners abandoned this proposal but, even so, their final report recommended depriving these companies of the option to divide their capital into shares.⁹⁵ This proposal was taken up in February and in March

⁹³ Between 1826 and 1837, 1,106 *commandites par actions* were registered at the Tribunal of Commerce in Paris alone, as compared to 138 commercial *anonymes* for all of France. M. LEGENTIL, «Rapport fait au nom de la Commission chargée d'examiner le projet de loi sur les sociétés en commandite et anonyme», *LE MONITEUR UNIVERSEL* (25 April 1838), p. 1010.

⁹⁴ UNGARI, *op. cit.* p. 44. In 1838, a Committee of the Chamber of Deputies reported that the capital of the *commandites par actions* formed in the Paris area during the period 1826-1837 amounted to approximately three times as much as that of *sociétés anonymes*. Yet the Committee also underlined that a large number of these companies never got beyond the project stage for lack of funds and another large number realised only a small part of their calls. *LE MONITEUR UNIVERSEL* (25 April 1838), p. 1010.

⁹⁵ The *exposé de motifs* of the Bill drafted by the aforesaid Committee described the actions of unscrupulous promoters: «The promoter of a company alone, or with a small number of associates, drafts the charter. He stipulates excessive privileges for his own profit. All the shares are subscribed by his creatures.[...] The seduced shareholder comes running to subscribe only to find all the shares are subscribed, but he is allowed to acquire some at a 25%

1838 by a government bill and a bill of Parliament respectively. The reactions to these bills were extremely vehement. It was urged that to refuse such companies the option to subdivide capital into shares *commandites* or to proscribe it after it had been granted «merely because frauds had been committed, not upon creditors, but upon the parties themselves by some of their associates», was to paralyse the contract of association.⁹⁶ This «*brutale mais significative*» reaction caused Parliament to reject both bills.⁹⁷ In a commercial world which was still linked to the concept of individual responsibility, the *société en commandite* offered a safe guarantee to creditors and third parties which the legislature could not ignore. On the other hand, this form of company appealed also to the capital owned by the *noblesse*: had the aristocracy been subject to unlimited liability, they would not have been willing to invest their fortune in trade.⁹⁸

21. A comparison between England and France.

In France, as well as in England, the commercial world used an economic instrument which differed from the “official” one that the legal system was willing to sanction. English joint-stock companies and French *sociétés en commandite par actions* developed from statutory restrictions. In England, the Bubble Act had prohibited the formation of unincorporated companies, while the French legislature subjected the constitution of *sociétés anonymes* to government authorisation. Although one may discern a certain similarity between English and French company law, such an analysis also reveals a diametrically-opposed tendency in the former. English investors and traders developed a commercial instrument that the legal system had not provided for: unincorporated joint-stock companies were regarded as partnerships. They could not be formed with limited liability unless specifically so authorised by a charter or an Act of Parliament. Accordingly, English company law was defined by the commercial means which the class of entrepreneurs created among many legal difficulties. By contrast, in France, by employing the *société*

premium. Ask him what he has bought, the name of the gérant, the type and nature of the enterprise and he doesn't know. He knows only the market quotation and dreams only of what that quotation will be tomorrow». LE MONITEUR UNIVERSEL, (25 April 1838), p. 1011.

⁹⁶ WOLOWSKI, *Des Sociétés par actions*, (Paris, 1838), pp. 19-21.

⁹⁷ «*Supprimez en France la commandite par actions, que restera-t-il de l'association en grand?*». COQUELIN, *op. cit.*, p. 1218.

⁹⁸ Ricard, one of the most eminent French novelists of the period, thus made one of his characters, the Marquis of Grands-Fonds, say: «*Like many of my co-religionists in politics, [...] I occupy myself with high industrial interests. Industry exploited on a magnificent scale, is now a potent means for recruiting creatures and for taking a high stand in the country. Blessed be that first gentleman who, after the infamies of 1830, conceived the idea of spurring the old nobility into these ways*». TROUBAT, *op cit.*, p. IX.

en commandite, businessmen and investors exploited a type of company that the legislature itself had established. By means of this type of company, entrepreneurs were able to reap all the advantages of the *société anonyme*: *commandites* were adopted as a "refuge" rather than as a proper and desired company form. The Act of 1867 was to sanction this aptitude: when the French legislature established complete freedom of incorporation, company law was to evolve on the basis of the *société anonyme* and not the *commandite*. The reason for such legal confusion between these two kinds of business association is to be found in the spirit of the legislature of 1807. While the Code of Commerce established a body of fixed rules relating to *sociétés anonymes*, simultaneously it also ambiguously defined *sociétés en commandite par actions*. Within such ambiguity, the courts of law were given ample freedom to interpret the few sections concerning those companies. In France as well as in England, therefore, companies developed their modern features through the constant evolution of legal interpretations. The work of the English common law judges and of the French tribunals helped to link two systems of company law, which would otherwise have appeared so different that even the idea of comparing them would be pretentious.

22. The 1830s and the 1840s: The Authorisation system under attack

The bills of 1837-38 were defeated partly because of the role that French doctrine played in legal discussions. On that occasion, the whole legal system concerning companies was subject to strong criticism. Yet the final attack against the regime of authorisation in the name of freedom of contract was not launched at that time. This came with the publication of Coquelin's famous work which has already been mentioned several times⁹⁹. This author argued that associations were the natural expressions of a society that was willing to undertake new paths in its search for progress¹⁰⁰. Coquelin was convinced that businessmen and investors needed wide freedom of contract to perform their tasks and that any attempt to check such initiative would be against the nature of every individual. Accordingly, the author considered the three fixed forms of company that the Code of 1807 had established as in total opposition to the development of a free civil and commercial society. Not only had the French legislature provided for three kinds of business association, but it had also clothed them with a large number of detailed and minute conditions. Indeed, this situation contradicted the principle according to which associations were

⁹⁹ This work marked a corner-stone in the history of the nineteenth century continental company law: the article, which was published in the prestigious *Revue des Deux Mondes*, was, at the same time, the first paper relating to comparative company law and the most explicit «*j'accuse*» against the regime of authorisation in France.

¹⁰⁰ COQUELIN, *op. cit.*, p. 1195.

the outcome of a natural act which provided spontaneously for the rules to be respected by the parties. It followed that companies were not so much checked by the actual provisions of the Code as by the regime of authorisation and the distrust of central government.

23. Sociétés anonymes and authorisation.

Coquelin considered the *société anonyme* as the best type of company for industrial development¹⁰¹. Indeed, had the *société anonyme* not been subject to rigorous government authorisation, it would have been reckoned the best commercial means to accumulate large amounts of capital. It was precisely against this administrative measure that Coquelin and the defenders of free-trade policy (*laissez-faire*) launched their "j'accuse". They argued that *sociétés anonymes* had to be left to the complete discretion of their projectors. Indeed, the fact that commercial practice employed the *en commandite* form was the best evidence of the complete failure of the regime of authorisation. If the legislature of 1807 had intended to establish such a measure with a spirit of prevention and wisdom, its ambition failed before the facts of every-day experience. The growth of companies during the first half of the nineteenth century was characterized by endless attempts to by-pass the numerous restrictions of the law. Authorisation was subject to many criticisms not only from a legal but also from a merely economic point view. It was argued that it prevented individuals from playing the role they were supposed to do. According to free-trade principles it was the public who should approve the purpose and the success of the undertaking which required capital. By contrast, authorisation altered this natural state of things: the main role was played by state authorities on which the ultimate decision depended. Judgment about the economic viability of the enterprise was taken away from the commercial world of transactions and delegated to the *Conseil d'Etat*. Legal doctrine opposed this practice on the ground that the *Conseil d'Etat* had little knowledge of commercial matters because it was burdened with many other public duties. The mandatory requirement of government authorisation was also criticized: the promoters of a company's scheme had to appeal both to investors for the funds necessary to set up the undertaking and to the government for authorisation. The problem lay in deciding which body to appeal to first: the investors or the government? When a company's promoters applied to the *Conseil d'Etat* for authorisation, they were compelled to possess a sum of subscribed capital. Simultaneously, promoters were aware that investors would give their financial support to the enterprise only if the company had obtained authorisation. The long procedure became a counter-productive formula which inevitably prevented the immediate investment of capital, thus impoverishing

¹⁰¹ *Ibid.*, p. 1204.

the economy in the near future. Investors were willing to place their money in undertakings which were expected to produce ready profits. Authorisation was, therefore, a considerable obstacle to the exigencies of a quick return. Moreover, Coquelin did not hesitate to appraise completely the arguments on which the Code of 1807 had based government authorisation. Whereas the legislature had maintained that it was necessary because *sociétés anonymes* were a new commercial means, Coquelin argued that for this very reason these associations deserved particular attention and support from the state. Coquelin also attacked authorisation from another point of view: he opposed those who argued for the need of authorisation only because of shareholders' limited liability and regarded the latter as "*dérivé de la nature des choses*" and the "*juste application du droit*"¹⁰². He believed that full responsibility should be rightly given to the members of ordinary partnerships in which the main characteristic was the role of the individuals. However, the *société anonyme* was established on another principle: individuals joined this kind of company willing to dispose of a certain share of the stock that was transferable by its own nature. They were aware that they could not exercise strict control over the company's management which was vested in directors. Transfer of shares and management performed by persons who were not shareholders demanded a legal and commercial guarantee for the latter. Investors were thus assured by limited liability, which compelled them to be answerable for the company's debts only to the extent of their shares. Coquelin, therefore, did not consider the absence of responsibility to be a favour provided by the law but a natural consequence of the organization of *sociétés anonymes*.

24. A comparison with England.

The spirit with which the French legal writers attacked the contemporary system of authorisation was sustained by the English experience. In England, despite the legal non-recognition of company forms other than chartered and statutory, associations enjoyed a wide freedom of contract without any prescribed formality¹⁰³. *Bona fide* associations prevented the commercial system from deteriorating into anarchy: traders and investors could rely on an established world of secure transactions. Whereas in France the legislature seemed to prefer the status quo, in England, company law was defined by the increasing mobility of forms, means and resources, which made the French rules appear to be anti-commerce itself. The differences existing between France and England were related originally to the legal definition of "association". The English system regarded the contract of association as free by definition: the

¹⁰² *Ibid*, p. 1227.

¹⁰³ «*La loi anglaise est sage en cela qu'elle laisse quelque chose à faire au génie de l'homme [...]*». COQUELIN, *op. cit.*, p. 1219.

legislature only recognised forms which were established by commercial practice. In France, the law determined all features relating to business associations. It followed that the division of capital into shares was permitted only for *sociétés en commandite* and *anonymes*, while in England this possibility was available to all companies, save if otherwise stated. In this respect, Coquelin praised the choice of the English legal system for considering unincorporated joint stock companies not as a particular kind of association but as a natural extension of partnerships. On the other hand, the author did not ignore that such an interpretation was precisely the cause of many difficulties. Accordingly, he directed his strongest criticism towards English company law because of the lack of distinction between ordinary partnerships and companies as to members' liability. Coquelin defined the principle of unlimited liability as "*non seulement rigoureuse, mais injuste*"¹⁰⁴. He considered unlimited liability to be applicable only to those partnerships in which the relationships between the members were close and in which the latter actively took part in the management of the concern. The extension of this principle to large companies, in which shareholders ignored the existence of each other and in which management was entrusted to a selected board of directors, was interpreted as a plain injustice¹⁰⁵. Against this situation, the French jurists often praised the equity of their legal system by stressing the advantages of limited liability in *commandites*¹⁰⁶. The granting of limited liability to companies was held to be the most important conquest of the commercial world. The doctrine argued that if the powers of the public authorities had been limited and defined, the French legal system would have produced the best legislation in the world¹⁰⁷. Yet there were too many doubts for the French system to represent the best model of European company law. The only company form in which limited liability was extended to all shareholders, i.e., the *société anonyme*, was subject to meddling and heavy interference. Coquelin was aware of this and did not have any hesitation in recognising its inferiority to England. Despite unlimited liability and the many abuses, he could not but recognise that English associations were prospering both in large-scale business and ordinary trade. By comparison, Coquelin affirmed that French business organizations vegetated. The author argued that the legal precautions that the system had established were an "*even greater abuse than the violation of some principles of law*"¹⁰⁸. In contrast, English company law was rightly deemed the result of the combined efforts of legislation and of *hommes d'affaires* who were concerned about the practical outcome of their decisions rather than about the application of principles. Moreover,

¹⁰⁴ *Ibid*, p. 1231.

¹⁰⁵ *Loc. cit. contra*, Mr. Baring in HANSARD, (1852), CXIX, p. 685.

¹⁰⁶ «*Rendons justice à la loi française, elle l'emporte ici de beaucoup sur celle des Anglais*». COQUELIN, *op. cit.*, p. 1223.

¹⁰⁷ *Ibid*, p. 1221.

¹⁰⁸ *Ibid*, p. 1232.

limited liability fell within this aptitude: the legislature never imposed a general prohibition, but it evaluated, case by case, the circumstances in which the "violation of the principle" of unlimited liability could be tolerated. In such an examination, the state authorities appear ultimately to uphold the various choices of traders and entrepreneurs.