The Creation of the European Company

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At the end of 2001, efforts dating from the year 1952 for the creation of a European Company came to a conclusion. On October 8, 2001, the European Parliament and the Council of the European Union adopted by Regulation a European Company Statute[1] and a Directive on Employee Involvement.[2] Due to this legislation it will be possible to form European companies which will be able to operate and locate their registered office within the entire European Union (EU) without facing the difficulties which those companies have which have been formed under the laws of the Member States. The two authors outline the history of this harmonization and also discuss the options left to the Member States, which might make the practical implementation of the European Company Statute rather difficult.

I. INTRODUCTION: AGREEMENT ON THE EUROPEAN COMPANY

In a meeting on December 20, 2000, the Council of the European Union, after decades of disagreement, reached an accord on the European Company (Societas Europea, SE). The vision to create a pan-European, uniform statute on companies goes back to preliminary work

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1. Council Regulation (EC) No 2157/2001 of Oct. 2001 on the Statute for a European company, OJ L 294, 10/11/2001, at 1.

2. Council Directive 2001/86/EC of 8 Oct. 2001 supplementing the Statute for a European company with regard to the involvement of employees, OJ L 294, 10/11/2001, at 22.

by the Council of Europe in the year 1952, which was reintroduced into discussion seven years later by Dutch Professor Pieter Sanders. The speech he gave in October 1959, at the College of Economics in Rotterdam, was the beginning of a legislative tale of woe, which, after overcoming a number of obstacles, was recently brought to a successful conclusion.[3]

The resulting legislation makes it possible for European Companies to relocate their residence throughout Europe without dissolution and liquidation; the European Company Statute covers all Member States. European Companies will therefore be able to operate in different Member States and be active in the entire European Community on the basis of one uniform legal and administrative regulation. Meanwhile national companies still face problems if they want to migrate to another Member State, because today, the mutual recognition and relocation of the registered offices in Europe is still based on the rules of international private law. In practice, this often entails difficulties.

II. THE COMPANY LAW REGIME OF THE EU

Like the national legal systems as a whole, national company laws within the EU are increasingly influenced by European law. In this process—especially with regard to the functioning of the Internal Market—the harmonization of company law is of special importance, since, in the end, uniform general conditions for discrimination-free, Community-wide activities of companies in the Internal Market are essential to reach the goal of a European market. Only when companies and not just EU citizens are allowed to relocate their residences freely across Member State borders will it be possible to speak of a full implementation of the freedom of establishment guaranteed in article 43 et seq. of the EC Treaty. This goal requires similar general conditions in the Member States. This explains why the European Community has become so much more active in the area of company law than in other areas of private law.

3. For additional information on the European company law, see, for example, Charlotte Villiers, *European Company Law: Towards Democracy?* (Aldershot, England (etc.) Ashgate, Dartmouth 1998); Roger Blanpain (ed.), *Involvement of Employees in the European Union: European Work Council, the European Company Statute, Information and Consultation Rights* (Hague: Kluwer Law International 2002); Michael J. Oltmanns (ed.), *European Company Structures: A Guide to Establishing a Business Entity in a European Country* (London: Kluwer Law International 1998); Jean-Louis Joris, *Will the European Company Work?*, 21 INT'L FIN. L. REV. 19-23 (2002); *European Company Statute Adopted*, EUR. INDUS REL. REV. 21 (Jan. 2002); Andreas Schulz & Klaus Eicker, *The European Company Statute: The German View*, INTERTAX 2001, at 332.

The EU attempts to reach the goal of uniformity in company law on three different levels pre-defined in the EC Treaty: (A) harmonization of the differing national company law regimes; (B) adjustment of the national conflicts of law systems; and (C) creation of supranational company forms, of which the SE is the most important manifestation.

A. *Harmonization of Company Law*

Based on article 44, paragraph 2 g of the EC Treaty, the European Union has developed a program for the harmonization of the differing national company law regimes, in which an attempt is made to provide uniform standards of protection of creditors and shareholders. This program presently comprises fourteen directives, or proposals for directives,[4] and concerns issues of corporate disclosure requirements (Directives 1 and 11), incorporation of companies (Directives 1, 2, and 12), protection of the companies' capital (Directive 2), constitution of the companies (Directive 5), powers and obligations of company organs

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4. First Council Directive 68/151/EEC of 9 Mar. 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (OJ L 065, 14/03/1968, p. 8); Second Council Directive 77/91/EEC of 13 Dec. 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ L 026, 31/01/1977, S. 1); Third Council Directive 78/855/EEC of 9 Oct. 1978 based on article 54(3)(g) of the Treaty concerning mergers of public limited liability companies (OJ L 295, 20/10/1978, p. 1); Fourth Council Directive 78/660/EEC of 25 July 1978 based on article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (OJ L 222, 14/08/1978, p. 11); Amended proposal for a Fifth Directive founded on article 54(3)(G) of the Treaty concerning the structure of public limited companies and the powers and obligations of their organs (OJ C 240, 09/09/1983, p.2); Sixth Council Directive 82/891/EEC of 17 Dec. 1982 based on article 54(3)(g) of the Treaty, concerning the division of public limited liability companies (OJ L 378, 31/12/1982, p. 47); Seventh Council Directive 83/349/EEC of 13 June 1983 based on the article 54(3)(g) of the Treaty on consolidated accounts (OJ L 193, 18/07/1983, p. 1); Eighth Council Directive 84/253/EEC of 10 Apr. 1984 based on article 54(3)(g) of the Treaty on the approval of persons responsible for carrying out the statutory audits of accounting documents (OJ L 126, 12/05/1984, p. 20); Proposal for a Tenth Directive of the Council based on article 54(3)(g) of the Treaty concerning cross-border mergers of public limited companies (OJ C 023, 25/01/1985, p. 11); Eleventh Council Directive 89/666/EEC of 21 Dec. 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State (OJ L 395, 30/12/1989, p. 36); Twelfth Council Company Law Directive 89/667/EEC of 21 Dec. 1989 on single-member private limited-liability companies (OJ L 395, 30/12/1989, p. 40); Proposal for a Thirteenth European Parliament and Council Directive on company law concerning takeover bids (OJ C 162, 06/06/1996, p. 5); Proposal for a Fourteenth Directive on Liquidation (unofficially published in LUTTER, EUROPÄISCHES UNTERNEHMENSRECHT 302 ff.

(Directives 1 and 5), codetermination of employee representatives (Directive 5), position of shareholders (Directives 2 and 5), financial accounting in individual companies (Directives 4, 5, and 8), merger and split up of companies (Directives 3 and 6), dissolution and liquidation (Directive 14) as well as regulations relating to groups of companies (Directives 7, 9, and 13). The implementation of this company law harmonization program was begun in 1968 with the Directive on Corporate Disclosure Requirements and, at this writing, has still not been completed.

B. Adjustment of the International Private Law of the Member States

It falls within the scope of competence of the EU to amend the international private law rules of its Member States in the company law area, so that these national provisions are in line with the EC Treaty. In this context, the issues of the Community-wide recognition of the legal person status of companies, the cross-border relocation of their registered offices and mergers are still not adequately resolved. There are various reasons for this which cannot be expanded upon in this context. In this regard, the crucial precedent today is still the 1988 decision of the European Court of Justice (ECJ) in the *Daily Mail* case.[5] In this decision, the ECJ interpreted the principle of freedom of establishment regulated in articles 43 and 48 of the EC Treaty to mean that companies, formed under national law, are not allowed to preserve their character as companies of the Member State of their incorporation when relocating their headquarters to another Member State. Moreover, according to the Court's jurisprudence, the relevant regulatory competence remains with the Member States. The fact that Germany and Austria particularly continue to follow restrictive and, in terms of approach, not very liberal concepts of international company law and that the ECJ has recognized this legal situation up to now as being in conformity with EC law leads, in practice, to an obstacle for companies that would like to operate in the entire Internal Market.

In the meantime, however, a trend towards the overcoming these inadequate structures has been developing. The ECJ itself adopted in 1999 in a widely discussed decision a more liberal approach[6]. Thus, the ECJ will have to review its widely-criticized *Daily Mail* decision on the occasion of a preliminary ruling sought by the German Federal Court

5. European Court Reports 5483 (1988).
6. European Court Reports I 1459 (1999).

(BGH) on March 30, 2000. A decision in this case is expected in fall 2002.

C. *The Creation of EU Company Forms*

On a third level, the European Union has the legal competence to create its own supranational company forms to ease cross-border economic operations and free companies formed thereunder from national legal regulation. Behind this lies the idea that it cannot be sufficient in an Internal Market to solely adjust national company law, but rather that the cross-border operational companies must be completely unhampered by the question of which Member State company law offers the most advantageous legal status. The Common Market only becomes a true Internal Market if basically all existing barriers for free trade between the Member States are removed.

The first supranational company form to be created was the 1985 European Economic Interest Grouping (EEIG). However, in practice, this supranational company form gained only limited importance, as it offers a framework exclusively for the cooperation of companies that continue to be legally independent. In particular, the purpose of such companies was not to realize profits through its own corporate activity, but rather to protect the economic activity of its members.

In addition to the creation of a European Company, a European Association,[7] a European Cooperative Society,[8] and a European Mutual Society[9] are also planned as further supranational company forms in the Community. The undisputed core element of the supranational company form is, however, the European Company, to be examined in more detail below.

III. DIFFICULTIES ENCOUNTERED BY IMPLEMENTING THE EUROPEAN COMPANY

Until recently, the newly-reached agreement on the legal form of the European Company faced considerable obstacles. The Community goal of harmonization was confronted with differently conceived national company laws, and the legislative process was dependent on pragmatic action and political compromise. Due to long-standing differences in the

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7. Proposal for a Council Regulation (EEC) on the Statute for a European Association (OJ C 099, 21/04/1992, at 1).

8. Proposal for a Council Regulation (EEC) on the Statute for a European Cooperative Society (OJ C 099, 21/04/1992, at 17).

9. Proposal for a Council Regulation (EEC) on the Statute for a European Mutual Society (OJ C 099, 21/04/1992, at 40).

legal traditions of the Member States, legal integration proved to be unfeasible unless national peculiarities were taken into consideration. The compromise character of Community law can often be seen, for instance, when Community legislators exclude controversial legal issues and refer to national law. Thus, the use of corresponding options and powers is left to the national legislators. The greater the number of options and the more Member States actually making use of them, the more the EU Member States fall short of the goal of harmonization of the laws. In the SE sphere, the central problem areas are the issues of workers' participation, subsidiarity, and the law relating to company groups and taxation.

The extent of the participation of the employees within the European Company proved to be the main obstacle to the adoption of secondary Community law by Member States. Germany, in particular, resisted efforts to introduce new regulations for the European Company, which would have been less far-reaching than existing German law relating to workers' participation. At the center of the German workers' participation model lie two acts. The Montan Workers' Participation Act of 1951 introduced the workers' right to have an equal number of members of the boards of directors, and the Workers' Participation Act of 1976 extended this right to all large companies. According to the latter statute, a board of directors with an equal number of employee and employer representatives is to be formed in a company established in the form of a joint stock company (*Aktiengesellschaft*) or a limited liability company (*Gesellschaft mit beschränkter Haftung*) employing over 2000 personnel. Although the German law is, in this respect, unique within the Community and could therefore not be a model for Community regulation because of the extensive rights of the employee representatives to participate in the managerial bodies of particular companies, various German governments with differing political orientation were unable, for socio-political reasons, to agree upon a SE Statute, wherein the standards on workers' participation remained below those of the German workers' participation laws. Therefore, the adoption of the SE Statute was delayed for decades.

The now-achieved agreement, in comparison to the rigid proposals of the past, provides flexible solutions. Although workers' participation continues to be an essential component of the legal form of the SE, in cross-border cases it no longer remains an unchangeable part of the company's constitution but becomes negotiable. Employers and employees will have the opportunity through negotiation to choose a workers' participation model tailored to the company's needs. Further details on this aspect are discussed below in Part IV.B.

In addition, difficulties in coming to an agreement arose also in connection with the regulation of groups of companies and tax issues. In the end, an agreement could only be reached by excluding these areas from the SE Statute. Therefore, the Statute is limited to the classic issues of company law regarding individual companies and still refers to the law of the state of the registered office in relation to the nonregulated subjects.

The principle of subsidiarity, first set forth in the Maastricht Treaty, threatened to grow into a special element of the resistance to harmonization. With its precept that harmonizing regulations on the Community level may only be adopted when, and only to the extent, that the Member States themselves are not able to do so, the principle of subsidiarity requires proof of "necessity" in order to realize the goals of the Community (art. 5 EC Treaty). Opinions differ on whether the subsidiarity principle actually limits the legislative powers of the Community in the field of company law. In general, the importance of the subsidiarity principle in this context should not, however, be overestimated. If the legal adjustment of company law issues proves to be necessary for the Internal Market (art. 3 para. 1 EC Treaty), it is fair to say that the subsidiarity principle cannot prevent legal harmonization.

IV. THE REGULATION OF THE EUROPEAN COMPANY

The legal form of the European Company stems from two legal acts: the Regulation on a European Company Statute regulates the company law side, whereas the Amending Directive on Employee Involvement contains the rules of workers' participation. These two acts are inseparably interconnected and are regarded as a unity.

A. The Company Law Regulation

The European Company is a company that has a fixed capital of 120,000 euros minimum, divided into shares. The shareholders are liable for the obligations of the company only to the amount of shares they subscribed. The European Company has the status of a legal person. Its registered office must be located within the Community and must be identical with the location of its headquarters. A fundamental advantage of the European Company lies in the fact that a relocation of its registered office within the EU is easily possible without dissolution or liquidation and without effect upon its identity. As a supranational company, therefore, it is not formed on the basis of a Member State company statute.

It is important to know that the SE cannot be formed directly but has to emerge from already-existing (national) companies. The draft regulation sets forth a conclusive list of four means by which a European Company may be formed:

(1) Formation through *merger* of pre-existing national companies which have to be registered in different Member States.
(2) Formation through the establishment of a *holding company*. This form is open to all companies, including limited liability companies, that have their registered offices in different Member States or have subsidiaries and branch offices in Member States other than that of the registered office.
(3) Formation in the form of a common subsidiary through public or private law companies. The same conditions apply for this form of incorporation as for the incorporation through the establishment of a holding company.
(4) Formation through the conversion of a company under national law.

The formation of the SE complies with the law of the state of the registered office. The harmonization program for company law, however, essentially involves provisions that are adopted Europe-wide. Thus, there are uniform standards of protection, with reference to disclosure requirements, capital contributions, and liability for the obligations existing prior to the creation of the SE.

The capital contributions are regulated by the Second Directive: cash investments must reach twenty-five percent by the time of the registration of the SE and contributions in kind must be fully made within five years.

As corporate bodies, the SE Statute recognizes the general meeting of shareholders and the managerial board(s).

In accordance with the proposal for the Fifth Company Law Directive (Structure Directive), the SE Statute allows the founders to choose between a dualistic or a monistic management and supervision system. Under the dualistic system, the managerial body (executive board) carries out the business of the SE. The members of the managerial body represent the SE and can enter the company into obligations with third parties. They are appointed and can be removed by the company's supervisory body. However, if a member of the managerial body is no longer able to perform his/her functions, the supervisory body is entitled to appoint one of its members to take over the relevant managing activities. During this period, the person concerned may not exercise his/her office as a member of the supervisory body. According to the monistic system, the business of the SE is carried out by the managerial body. The members of the managerial body are authorized to enter the SE into obligations with third parties and to represent it in court. The managerial body may delegate the management of the company to one or several of its members. If the law of the state in which the company is founded contains no definite choice in favor of the monistic or dualistic system, the company is free to choose between either model.

The European Company is to prepare annual accounts, which must consist of the balance sheet, the profit and loss statement, and the appendix to the annual accounts, as well as a report on the business development and the situation of the company. Consolidated annual accounts must also be published.

For dissolution, liquidation, and insolvency, the national law is primarily applicable. In the case of relocation of the registered office outside of the Community, the SE shall be dissolved, if this is requested either by a relevant authority or by an involved party.

B. Directive on Employee Involvement

The solution to the issue of workers' participation rights is, in essential aspects, based on the results of a study that was compiled and presented by a group of experts in May 1997 under the chairmanship of the former President of the European Commission, Davignon. Although the report was positively received, it proved to be politically nonimplementable at the time. Until the Nice Summit in December 2000, all subsequent efforts failed, in particular due to the objections of Spain.

The crucial point of the Directive on Employee Involvement continues to be the idea of a solution based on open negotiations, already favored by the Davignon Report and anchored in the Directive on European Works Councils. Workers' participation should, according to this, be determined primarily through open negotiations between the management of the company and a special committee representing the employees of all affected companies. In the case of failure of the negotiations, subsidiary models are provided.

The details are as follows: The first part of the Directive regulates employee information and consultation in the SE regarding matters that affect the company, subsidiaries or plants. Employee information and consultation are exercised through a special representative body. These provisions, in accordance with the Directive on European Works

Councils, represent an essential element for future practice, which, until now, has always been overlooked in the discussions over workers' participation.

The second part of the Directive concerns the workers' participation in management. First, a workers' participation regulation individually tailored to the company concerned is to be sought by way of open negotiations between the management of the company and the employee negotiation committee. In this context, the provision contained in the earlier version of the proposal for a directive, according to which the Member States may prescribe exclusively either the monistic or dualistic management model for the SE domiciled in their territory, was deleted. This will force some Member States, whose company law is based on one of the models, to amend their company law. If the negotiations definitively fail, subsidiary rules become applicable, which are linked to the different factors in the formation of the SE. Insofar as there was no workers' participation model in the founding companies before the creation of the European Company, these subsidiary rules exclusively refer to information and consultation procedures. If there were already mechanisms of workers' participation in one of the founding companies, the subsidiary rules make the workers' participation mandatory, but only under the following conditions:

> (1) The majority of the members representing the employees in the negotiations committee decide in favor of workers' participation.
> (2) The European Company evolved from a common subsidiary or holding company, in which fifty percent of the employees already were part of a workers' participation model.
> (3) The European Company was established through a merger and twenty-five percent of the employees already were part of a workers' participation model before the merger.

On these points, no agreement could ever be reached in the past. The compromise achieved on the occasion of the European Council of Nice indicates that a Member State does not have to apply the Workers' Participation Directive to a company formed through a merger. In this case, the SE can, however, only be registered if the management and employees agree upon a workers' participation model or if the employees, before the formation of the SE, had no workers' participation rights.

V. CONCLUSION

Today, it is no longer seriously disputed by anyone that a Community-wide harmonization of company law general rules is of outstanding importance for the realization of the Internal Market. A protracted discussion arose on the question of how this goal should be implemented under secondary Community law. Therefore, despite an existing basic consensus, only a step-by-step, pragmatic and compromise-oriented approach to harmonization appears to promise success in reconciling the differently conceived national company laws. A typical sign of this compromise is in evidence when the Community legislators leave open those legal issues in which no agreement could be achieved and, as a consequence, refer to national law. This procedure was particularly adequate for the Community legislation in the field of the European Company, since differing perceptions, particularly in the area of workers' participation, had hindered relevant Community legislation for many years.

By leaving it up to the national legislators to make use of their respective options and powers, the legislative standstill was indeed overcome, but the price that had to be paid was not insignificant: the greater the number of options and the more the Member States of the Community made use of them, the further they deviated from the original goal of legal harmonization. As a consequence, only a fragmentary harmonization of Community law regulation was achieved. This may perhaps point to the fact that the time for Community-wide regulation was not at hand because a common consensus was still lacking.

Because the Directive does not harmonize the Member States' workers' participation models, but makes them merely suitable for cross-border use, the question arises whether it actually will provide the practical benefits that the creators of the regulation promise. Among others, the following points seem to be unsatisfactory in regard to the practical implementation of the SE Statute:

(1) The numerus clausus of the SE forms of incorporation might cause difficulties for the merger of companies with differing legal structures.

(2) The mandatory multi-nationality of the founding companies limits a priori the circle of potentially participating companies.

(3) The Directive aims de facto exclusively at large companies, which already mostly have an international structure; in addition, a simpler European legal form, which aims at smaller and medium-sized companies, would be at least equally necessary.

(4) The abandonment of the goal of coherent regulation of the organization statute led to an unclear, confusing situation with regard to the law applicable to a specific company. The clarification of the respective relationship of European and national law requires significant advisory

costs. The failure to regulate the law relating to company groups appears particularly problematic since almost every SE will have a group structure.
(5) The attractiveness of the SE structure for companies will, not least, depend on the tax status of the SE; also on this, the European legislators are silent.

Despite these weaknesses, the new legal form certainly also offers opportunities, which should be used by the companies:

(1) Medium to long-term, a noticeable simplification of company structures and more efficient corporate dealings in the Internal Market can be achieved through the formation of an SE.
(2) Perhaps the most important advantage is that an identity-protecting relocation of the registered office within the EC will not require the company's undervalued property ("secret reserves") to be freshly valuated for taxation purposes under national law since the SE, as a supranational company, is not incorporated on the basis of national company law.
(3) The preference for a solution based on negotiations will also contribute to more flexibility where the issue of workers' participation is concerned. Precisely the regulation of workers' participation could, in the most favorable case, show that rigidly regulated regimes lose their attractiveness while regimes with flexibly-designed employee participation models become attractive to investors because of the good industrial relations associated with them.

As the next step, the national laws must be brought in line with the regulation and the provisions of the implemented Directive. The Member States have been given three years to accomplish this. Therefore, it should be possible to form the first European Company in 2004 at the earliest.