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"Well! I've often seen a cat without a grin," thought Alice; "but a grin without a cat! It's the most curious thing I ever saw in all my life!"[1]

By the end of this century there will probably come to be a new "governance" of Western Europe which will have a direct and monumental impact on the economic, social and political lives of some 400 million Europeans.[2] Accordingly, if it is a sound democratic principle that a

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1. L. CARROLL, ALICE'S ADVENTURES IN WONDERLAND 94 (1866).

2. *See, e.g.*, Mitchell, *The Governance of Europe—A New Dimension in International Relations*, in BRITAIN AND THE INTERNATIONAL SCENE (Heriot-Watt University Lectures 1971).

The term "European Community" in its full sense embraces the European Coal and Steel Community (ECSC), the European Economic Community (EEC), and the European Atomic Energy Community (Euratom). As used in this paper, however, "European Community" will be interchangeable with the EEC. The original members of the Community are: Belgium, France, Germany, Italy, Luxembourg, and the Netherlands. The three new acceding members are: Denmark, Ireland, and the United Kingdom. To gain some insight into the statistical dimensions of the Community the following figures (1970) may prove helpful:

people should have effective control over those decisions which determine their lives, then it is reasonable to conceive that a primary evolving concern for the European Community will be the restructuring of the economic and political power within this new "governance."[3]

Against this backdrop of Community development, the future role of the American enterprise in Europe must be determined.[4] As adroitly noted by Keynes some years ago, "[t]he world is *not* so governed from above that private and social interests always coincide."[5] Whether American direct investment will be significantly curtailed or restricted by official Community policy in the future, and whether the American firm will be asked to give more and take less, are political questions which ultimately must be faced in the 1970's by the European Community.[6]

2. (*Continued*)

	Community of Six	Community of Nine	USA
Area (thousand sq. mi.)	449	595	3600
Population (millions)	190	251	204
GNP ($ billion)	485	626	993.3
Exports ($ billion)	45.2	56*	43.2
Imports ($ billion)	45.6	62*	40.0
World Exports (%)	19.2	26*	18.4
World Imports (%)	18.3	29*	16.0

*Estimated

The figures have been taken from European Community Information Service, Press Release No. 8, Jan. 22, 1972, and corrected to reflect Norway's decision not to join the EEC.

3. As noted in the *Final Communiqué* of the Conference of the Heads of State or Governments and Ministers for Foreign Affairs of the Member States of the European Community held at The Hague, December 1 and 2, 1969,

> Over and above the technical and legal sides of the problems involved, the expiry of the transitional period at the end of the year has, therefore, acquired major political significance. Entry upon the final stage of the Common Market not only means confirming the irreversible nature of the work accomplished by the Communities, but also means paving the way for a United Europe capable of assuming its responsibilities in the world of tomorrow and of making a contribution commensurate with its traditions and its mission.

BULL. OF THE EUROPEAN COMMUNITIES, January 1970, at 12 [hereinafter cited as BULL. E.C.]. *See also Report of the Foreign Ministers of the Member States on the Problems of Political Unification (Davignon Report) of Oct. 27, 1970*, BULL. E.C., November, 1970, at 9, and *Report to the Council and Commission on the Realization by Stages of Economic and Monetary Union in the Community (Werner Report) of Oct. 8, 1970*, BULL. E.C., Supp. to No. 11, November 1970.

4. For a consideration of the extent of American direct investment in the EEC, *see Report on Transatlantic Direct Investment* (Rapporteurs: MM Haekkerup and Rohner), Eur. Consult. Ass., 23rd Sess., Doc. No. 2938, — Docs. — (1971). American direct investment in the original six members of the EEC has risen from 0.6 billion dollars in 1950 to over 10 billion dollars as of 1969, with such investment accounting for more than 14% of all new industrial development in the EEC.

5. J.M. KEYNES, ESSAYS IN PERSUASION 312 (1963).

6. *See* J.-J. SERVAN-SCHREIBER, THE AMERICAN CHALLENGE (1968); *Les investissements étranger en Europe* (Seminaire organisé par l'Institut d'Administration des Enterprises de l'Université de Paris, 1968).

Any present assessment of the compatibility of the American enterprise in Europe with the developing aims and policies of the European Community is not possible from a reading of any broad headlines coming out of Brussels. Such an evaluation must be patched together from the many separate and seemingly unrelated aspects of European integration, one of which could well be the proposal for a European-type company.[7] It is the purpose of this paper to outline the development of the European-type company concept, and to examine its structure and implications for American business interests operating or seeking to operate within the European Economic Community (EEC). It is the author's belief that despite the assertions about the inherent neutrality of American corporate power in Europe, and the contentions that American enterprise in Europe is more than paying its way,[8] there is developing in the EEC a "common attitude" toward American corporate presence.[9]

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7. For a consideration of the multiple factors that are involved in the formation of a coherent Community industrial policy *see* COMMISSION DES COMMUNAUTÉS EUROPÉENNES, COM No. 70, LA POLITIQUE INDUSTRIELLE DE LA COMMUNAUTÉ, MEMORANDUM DE LA COMMISSION AU COUNSEIL (1970).

8. *See, e.g.*, Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 HARV. L. REV. 739 (1970). For a general discussion of the supposedly neutral and benevolent nature of the large modern corporation, see Kaysen, *The Social Significance of the Modern Corporation*, AM. ECON. REV., May 1957, at 311; A.A. BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION (1954).

9. It was to the ever-growing and foreign economic power within the EEC that such thoughtful men as Robert Marjolin, former vice-president of the European Commission, began to address themselves in the early and mid-sixties. As commented by Marjolin: "We think that slowing down American direct investment in the industrially developed countries would also contribute to the general health of our economies. It would be useful if the Community countries adopted a common attitude on these transactions." EUROPEAN COMMUNITY, April 1965, at 5.

The primary institutions that govern the European Communities (EEC, ECSC and Euratom) have, since July 1, 1967, had the following common organs:

(1) *The Council of Ministers*: For a consideration of the more important matters of Community concern, the respective foreign ministers meet approximately once a month. The Treaty of Rome conceived of the Council as the principal decision-making organ in the Community.

(2) *The European Commission*: In the newly expanded Community, this Commission will consist of either 13 or 14 members selected for their general competence and independence. Assisted by a staff of over 5,000 "Eurocrats" the Commission is the prime initiator and formulator of Community actions and policies.

(3) *The European Assembly*: In the expanded Community, there will be a 198-member Assembly. Though the Treaty of Rome envisages the direct election of Assembly members, these members are presently selected by the various parliaments of the Member States. The Assembly, which meets monthly, has only minimal effective political powers.

(4) *The European Court of Justice*: The Court, sitting in Luxembourg, endeavors to ensure that the law is observed in the interpretation and implementation of the ECSC, EEC and Euratom treaties.

(5) *Committee of Permanent Representatives*: The Committee is composed of representatives of the Member States appointed by the Council to serve as a sort of liason between the Council and Commission.

Behind the apparently inoffensive and welcoming grin of the European-type company there does not necessarily await any greeting of substance for the American enterprise in the "wonderland" of a new European order.[10]

I

GENESIS OF THE IDEA FOR A EUROPEAN-TYPE COMPANY

The emergence of an interest in a European-type company found its driving force in the midst of post-war European endeavors for sustained cooperation and integration.[11] For example, the early 1950's saw the newly established Council of Europe considering the question of a "European Corporation,"[12] and saw the rise of a series of European international corporations instituted by treaty. These early efforts, however, did not produce any coordinated and realistic basis for future attempts toward forming a genuine European-type company.[13]

But, after the creation of the European Coal and Steel Community and the EEC made it evident that European integration was a practical

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10. A recent statement by the European Commission is indicative of the present mood of the Community:

> A list can be drawn up of the pros and cons of American investments. There is no denying that they spread economic prosperity and technological progress. They act as a stimulus to numerous European firms. But this progress is not, in the first instance of benefit to Europeans. As a number of cases have shown, as regards employment, research, defence or international trade relations (notably with state-trading countries) the policies of companies so formed remain, in the final analysis, the offshoot of industrial, and even political, headquarters situated outside this continent.

U.S. Investments in Europe: A Memorandum from the Commission's Press Information Department, in Europe (Agence Internationale d'Information pour la Presse Luxembourg-Bruxelles), No. 591, August 26, 1970 [publication hereinafter cited as Europe].

11. *See* Calon, *La société internationale: elements d'une théorie générale*, 88 JOURNAL DU DROIT INTERNATIONAL 694 (1961); Gourrier, *La notion d'entreprise commun, les precédents, réalisation dans le domaine non nucléaire*, 2 RÉVUE TRIMESTRIELLE DROIT EUROPÉEN 383 (1966) [hereinafter cited as REV. TRIM. DR. EUR.].

12. In 1949 a proposal was made for the institution of a free economic sector of multinational scope which would be open to a limited number of corporations whose purpose was directly related to the production of necessary goods for the reconstruction of Europe. See J. RENAULD, DROIT EUROPÉEN DES SOCIÉTÉS 9.07 (1969). This was followed by a second proposal which would have limited access to a European company statute to private firms performing public works or services. Committee on Economic Questions, Creation of European Companies, Eur. Consult. Ass., 4th Sess., Doc. No. 71, 3 Docs. 833 (1952).

13. *See* Ficker, *A Project for a European Corporation*, 1970 J. BUS. L. 156, 158. After the Second World War some corporations were established, by multilateral conventions, for the purposes of meeting specific objectives (*i.e.*, the Mont Blanc Tunnel Exploitation Company, the International Company of the Mosell, the Saar-Lorraine Coal Company, and Eurochemic).

and workable proposition,[14] the concept of a European-type company took on a fresh significance. In 1959 the possibility and necessity for the creation of a European corporation was discussed in some detail at a Congress of French Notaries in Tours.[15] In the fall of that same year Professor Pieter Sanders brought the question to the forefront of European legal thought in his dedication lecture at the School of Economic Studies in Rotterdam.[16] In 1960 the Council of the Paris Bar made the subject of a European company the central topic of discussion at their conference of EEC countries.[17] The following year a Congress of the German Association of Comparative Law considered the problem at some length.[18] The EEC Commission also directed its attention to the idea; however, after receiving an unenthusiastic response in a canvas of the industrial federations within the EEC, it let the idea fade into the background for the next five years.[19]

A. The French Note

In an official note to the EEC Council of Ministers and Commission dated March 15, 1965, the French Government proposed the formation of a "commercial company of a European type," to be based on a Convention between the Member States of the EEC, which would lead to the creation and incorporation of a "uniform law" in these countries.[20] Recognizing the necessity of harmonizing laws within the EEC, the French saw their proposal as a means to "augment and accelerate" this process of harmonization. The permanent objective of their proposal

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14. The three treaties forming the basis of the European Communities are: Treaty Establishing the European Coal and Steel Community, *done* April 18, 1951, 261 U.N.T.S. 140; Treaty Establishing the European Economic Community, *done* March 25, 1957, 298 U.N.T.S. 3 [hereinafter cited as Treaty of Rome]; and Treaty Establishing the European Atomic Energy Community (EURATOM), *done* March 25, 1957, 298 U.N.T.S. 167.

15. Thibierge, *Le statut des sociétés étrangers*, in 1 Le Statut de l'Étranger et le Marché Commun, (1959), as presented at the 57th Congrès des Notaires de France, held in Tours.

16. *See* Sanders, *Vers une société anonyme européenne*, 1960 Droit Européen, No. 16, at 9.

17. See *Congrès international pour la création d'une société commerciale de type européen*, (Paris, June 16-18, 1960), 1960 Révue du Marché Commun, Supp. to No. 27. *See also* Willemetz, *Une société de type européen*, 1960 Révue du Marché Commun 38.

18. *See* Duden, *Internationale Aktiengesellschaft*, 27 Rabels Zeitschrift für Ausländisches und Internationales Privatrecht 89, 100 (1962).

19. *See* D. Thompson, The Proposal for a European Company 8-9 (1969).

20. For a text of the French note, see 2 Rev. Trim. Dr. Eur. 409 (1966). An English translation can be found in [1965-1969 Transfer Binder: New Developments] CCH Comm. Mkt. Rep. ¶ 9025.

was "the attainment of the general goals of the Treaty of Rome," and specifically the promotion of commerce and the facilitation of the right of establishment within the Community. The immediate objective was the encouragement of that degree of concentration of enterprises consistent with the preservation of competition.[21]

The practical advantages of this European-type company would be the furtherance of international business relations, the ability of medium-sized enterprises in the Member States to organize subsidiaries with identical bylaws in the other States, and the ability of the larger enterprises to exercise more effective control over the operations of their subsidiaries in other Member States. In addition, adoption of the French proposal was seen as encouragement for joint ventures for large-scale European projects, as encouragement for the creation of agencies for common studies by the enterprises of the different Member States, and as additional stimulus in European capital investments.[22]

In welcoming the French note, the EEC Commission clearly recognized that the "unspoken purpose of this proposal is to improve the competitive position of European enterprises in relation to those of third countries and to give them greater independence from the capital markets outside the Community."[23] The implicit thrust behind the French proposal must therefore be seen as a definite attempt to help insulate the EEC's industrial activity from the continually encroaching "American challenge."[24]

B. The Commission's Memorandum

A subsequent Commission Memorandum[25] was broadly concerned with facilitating commercial activities across national frontiers within the EEC.

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21. As noted by E. Stein, Harmonization of European Company Laws 432 (1971), it was the French Government's view that "concentration [was] the major means for combating American 'penetration'. . . ."

22. For a further discussion of the French note, see Foyer, *Proposition français de création d'une société de type européen*, 1965 Révue du Marché Commun 268.

23. *See* EEC Commission, *Memorandum on the Establishment of European Companies*, Bull. of the European Economic Community, Supp. to No. 9/10, September/October 1966, at 6 [hereinafter cited as *Commission Memorandum*].

24. As noted by Storm, *Statute of a Societas Europeae*, 5 Comm. Mkt. L. Rev. 265, 267 (1967-68):

> There is another reason for the formation of larger units. It is the constantly growing competition of huge enterprises from outside the Common Market, especially from the United States of America. Concern about this development seems to have been one of the main reasons for the French initiative of March, 1965.

25. *Commission Memorandum, supra* note 23.

Moreover, it hoped to foster desirable concentrations which would enable European enterprises to adjust to a vast European market, to the spread of technical progress, to the requirements of modern scientific research, and especially to international competition. The central tone of the Memorandum was that,

> [i]n the EEC the generally accepted view—and it is one which is frequently voiced but much less frequently substantiated—is that in the vital matter of size European enterprise is at a disadvantage, particularly as compared with its American rivals.[26]

In considering the various alternatives the Commission turned its attention to those provisions of the EEC Treaty which could provide a possible solution.[27] Following this examination, however, the Commission concluded that these specific articles of the EEC Treaty did not fill economic requirements and did not make it possible to achieve the unification of company law.[28]

Turning next to the French proposal for the adoption of a "uniform law" creating a European Company, the Commission found it to be "the first step toward a general harmonization of laws and [that it] would undoubtedly contribute to a simplification of commercial relations between Member States."[29] Yet despite its feigned neutrality, the Commission impliedly favored as a solution the establishment of a uniform company type under "European law." Such an approach would differ from the French plan because this form of European company would exist as a "European" legal form "side by side" with the various national laws, and it would come under the control of the European Court of Justice. Such a situation would run counter to the spirit of French attempts to keep the new corporate form within the individual legal structures of the countries within the EEC.[30]

As viewed by the Commission, the principal advantage of a company under "European law" would be the avoidance of problems related to a transfer of the corporate seat or to transnational mergers. At present,

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26. D. SWANN & D.L. MCLACHLAN, CONCENTRATION OR COMPETITION: A EUROPEAN DILEMMA? 7 (1967).

27. *E.g.*, Treaty of Rome, *supra* note 14, Arts. 52-58, on establishment; Article 220, which provides such advantages as equal treatment of foreign persons under national laws, the abolition of double taxation within the Community, and the mutual recognition of enterprises throughout the Community; and from a financial and tax standpoint, Articles 67-73 and 99 and 100.

28. *Commission Memorandum, supra* note 23, at 13.

29. *Id.* at 16.

30. *See* Leleux, *Le rapprochement des législations dans la communauté economique européene*, 1968 CAHIER DE DROIT EUROPÉEN 129 [hereinafter cited as CAH. DR. EUR.].

under the existing national laws of the Member States of the EEC, each time a company transfers its corporate seat it must effectually wind up and begin anew. This subjects the company not only to a serious "psychological dilemma," but also to the practical financial burden of paying a varying capital tax upon dissolution on both the disclosed assets and the hidden reserves of the company.[31] The Commission stressed that a uniform company form under "European law" would solve such problems.

C. The Sanders Report

At the same time as its Memorandum was being prepared, the EEC Commission had invited Professor Pieter Sanders—Dean of the Law Faculty at Rotterdam and one of the original initiators of the idea for a European Company—to prepare and submit within a year a Draft Statute for a European-type company. With the assistance of a distinguished group of company law experts from the five other Member States, Professor Sanders completed the text of the Draft, along with a substantial comparative commentary on the general thrust of the Draft and the specific provisions therein, in January, 1967.[32] Essentially the Draft was to provide future discussions of this topic with *une base plus concrete,* however, the Commission was not bound by the Draft and did not claim responsibility for its contents.[33]

Highly ambitious in scope, the 195-article Sanders Draft is a remark-

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31. *See* R. Pennington, Companies in the Common Market (2d ed. 1970). Except for Italy whose company laws allow an enterprise to amalgamate with an enterprise in a foreign state without having first to wind up, this problem of payment of a capital tax would also be applicable in those cases involving a merger of enterprises from different states. For a discussion of the "psychological dilemma" caused to enterprises under the present European merger situation, see Leleux, *Faut-il créer la société commerciale européenne pour faciliter l'intégration économique dans la C.E.E.?*, 1968 Journal des Tribunaux 109.

32. *See* Commission des Communautés Européennes, Collection Études: Projet d'une Statut des Sociétés Anonymes Européennes (Séries Concurrence, 1967-69) [hereinafter cited as the Sanders Draft]. An English translation of the Sanders Draft was published in 1969 by Commerce Clearing House.

33. For a consideration of the Sanders Draft see, Chartier, *Vers une société de type européen*, 1967 Révue du Marché Commun 310; Lacan, *Pour une société anonyme de type européen*, 3 Rev. Trim. Dr. Eur. 319 (1967); Sanders, *The European Company*, 1968 J. Bus. L. 184; Scholten, *The European Company*, 5 Comm. Mkt. L. Rev. 9 (1967); E. Stein, *supra* note 21, at 447-80; D. Thompson, *supra* note 19; Van der Groeben, *Vers des sociétés anonymes européennes, necessité et possibilité de créer une société de type européen*, 3 Rev. Trim. Dr. Eur. 224 (1967). For a highly critical look at the Draft, see Mann, *The European Company*, 1970 Int'l & Comp. L.Q. 468, and Van Ryn, *Faut-il instituter la société européenne?*, 1967 Journal Tribunaux 377.

ably well drafted product, though "entirely traditional in its structures and attributes."[34] The Draft Statute is divided into thirteen titles, ten of which deal with such corporate problems as formation, shares and rights of shareholders, corporate organs, representation of employees in management, financial statements and reports, *groupes de sociétés* (concerns), modification of the articles of incorporation, winding up procedure, transformation, and merger.[35] Titles XII and XIII dealing with related matters of fiscal and criminal law were purposely left open for later examination by separate experts in these legal fields. The first title of the Draft was concerned with general provisions and supplied a working definition of the new *société anonyme européenne* (SE), the requirements and the procedure for the establishment of such a company, and the role of the European Court of Justice with regard to the SE.

After the submission of the Draft to the Commission, the topic was then referred to the Council of Ministers, which in turn entrusted the matter to the Committee of Permanent Representatives in Brussels. A mandate was given to the Committee and to a group of company law experts (again headed by Professor Sanders) to evaluate the feasibility of setting up a European company form in light of the Sanders Draft. As expected, this body reported that the concept of the SE was a viable one; however, it also crystallized certain basic questions for the Council of Ministers to consider, namely the questions of supranationality, access to the SE, employee participation ("co-determination"), and whether or not shares should consist solely of bearer shares or if some provision should be made for the Italian system of registered shares.[36]

After much heated debate with the Council of Ministers, the French Government announced on January 30, 1969, that it was withdrawing from further discussion of the proposal; the fate of the European company seemed to have been put to rest.[37] However, on June 24, 1970, the European company was given a new lease on life when the Commission forwarded its own draft (in the form of a Council regulation) to the Council.[38] The significance of this event was not only that a move toward

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34. *See* Mann, *supra* note 33, at 472: "The European Company as envisaged by him [Prof. Sanders] . . . does not substantially differ from the familiar institution existing almost everywhere."

35. SANDERS DRAFT, *supra* note 32, Tits. II-XI.

36. *See* E. STEIN, *supra* note 21, at 433-37.

37. *See* Europe, No. 264 (new series), January 31, 1969, at 4.

38. *See Proposition de Reglement (CEE) du Conseil fortant statut de la société anonyme européenne*; 13 E.E.C. J.O. C 124, at 1 (1970) [hereinafter cited as *Commis-*

the eventual establishment of a uniform corporate form was revived, but that this time the European Commission presented a working document for which it alone bore full responsibility.

II

HIGHLIGHTS OF THE COMMISSION'S DRAFT-REGULATION

The Commission has produced a 284-article Draft-Regulation, with limited commentary, based in large measure upon the earlier Sanders Draft. Though the commentary is far from being as comprehensive as that supplied by Professor Sanders, the Commission's document is, overall, a more thorough and precise product. The Commission has filled in many of the gaps left by the earlier draft (*e.g.*, tax and penal provisions), and has provided a working approach to such problems as the legal basis of the SE Statute,[39] accessibility to the SE, and the question of "co-determination." The Commission's Draft-Regulation has rendered to the Council of Ministers an official Community text on which to base final consideration and disposition of the matter. As seen by the Commission, the creation of a European-type company is an essential factor in achieving the conditions required for an internal and integrated European market; it "is meant to fill a gap in order to serve the aims of the Treaty [of Rome]."[40]

A. Nature and Significance of an SE

Despite some initial misapprehension,[41] the new legal form of the *Societas Europaea* was never conceived as an attempt to compete with and supersede the existing company forms under the municipal laws of

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sion's Draft-Regulation]. The English translation of the Draft-Regulation used herein is taken from Bull. E. C., Supp. to No. 8, August 1970.

39. While the legal basis of the SE Statute under the Sanders Draft would have been an international treaty under "European law" the Commission has seen fit in its draft to enact the Statute by means of a Council regulation pursuant to Article 235 of the Treaty of Rome. As provided for by Article 189 of the Treaty of Rome, ". . . [such a] regulation shall apply generally. It shall be binding in its entirety and take direct effect in each Member State." The use of a regulation as a legal basis for the SE Statute, instead of a treaty, would accordingly eliminate much of the confusion concerning the relation of the SE Statute and municipal law. By the *Commission's Draft-Regulation, supra* note 38, the SE Statute would have a truly European character. For further consideration, *see generally*, Ficker, *The Proposed Statute of a European Corporation*, 1971 J. Bus. L. 167.

40. Sanders, *The European Company on its Way*, 8 Comm. Met. L. Rev. 29, 30 (1971).

41. *See, e.g.*, Duden, *supra* note 18.

the Member States.[42] The legal form of the SE would serve as *une possibilité supplementaire* for the use of the European business sector and would exist alongside the present municipal corporate forms.[43] In effect the new form would be entirely optional, having no direct effect upon the corporate laws of the Member States. The SE, modeled upon those patterns of stock corporations already existing in the Six, would be of one form, identical and recognized throughout the EEC.[44]

The actual corporate structure of the SE is quite generally in line with the provisions of the Sanders Draft. The main disparities are in details rather than in substance. The Commission's Draft-Regulation has retained a tripartite internal corporate setup: *le Directoire* (managing board), *le Conseil de Surveillance* (the supervisory board), and *L'Assemblée Générale* (the shareholders' meeting).[45] Also, like the Sanders Draft, the Draft-Regulation has construed the importance of these corporate organs in light of the developments included in the 1966 French

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42. As noted in the SANDERS DRAFT, *supra* note 32, at 16:
> The author felt that it was essential to avoid placing the European stock corporation in a privileged position in relation to national stock corporations. If this were permitted, there would immediately be competition between the S.E. Statute and the national stock corporation laws. The author has tried to avoid such competition because the European stock corporation must not serve as a form of escape from national provisions that may be considered burdensome.

43. *See* Storm, *supra* note 24, at 266-67:
> The S.E. is not meant to replace any of these [municipal] companies. It is an additional species of the genus "limited company" which is offered to the business community to take it or leave it. The following point should be emphasized: municipal company law will not be directly affected by the SE Statute.

For a consideration of some of the possible indirect influences on national company law, *see* Scholten, *supra* note 33.

44. As defined in Article I-1 of the SANDERS DRAFT, *supra* note 32: "The European stock corporation, hereinafter designated as Societas Europaea (S.E.), is a company whose capital is divided into shares and whose obligations are limited to the company's assets, unless otherwise provided." As noted in the commentary to the Article, Professor Sanders states that the above definition of the SE "largely corresponds to the definition of a stock corporation found in the laws of all six countries. . . ."

The form of a limited company whose capital is divided into shares was chosen for several reasons: the limited company is the form most likely to be selected by an enterprise intending to do business on an European level; the limited company is best suited for the protection of the rights of third parties; and there is more familiarity with the features of the existing municipal forms of this particular limited company than any other corporate form. It should also be noted that the SE would always be "a commercial company regardless of the purpose," as there are important distinctions in France, Germany, Belgium, and Luxembourg between corporations formed under civil law and those formed under commercial law. For a consideration of the various types of corporate forms existing in the Member States of the European Community see R. PENNINGTON, *supra* note 31; G. ZAPHIRIOU, EUROPEAN BUSINESS LAW (1970) and J. RENAULD, DROIT EUROPÉEN DES SOCIÉTÉS (1969).

45. *See generally Commission's Draft-Regulation, supra* note 38, Tit. IV.

Law on Commercial Companies, by abandoning the mythical idea of the *souveraineté de l'assemblée générale.*[46] Under the principle that *tout pouvoir demande un contrôle,* the Commission's Draft has realistically focused on the managing board, which is where the greatest measure of power rests in an SE-size enterprise (*i.e.,* medium and large size enterprises). The Draft-Regulation, like the Sanders proposal, endeavors to ensure a very real counterweight to the powers of the managing board by taking meticulous care to safeguard the rights of shareholders.[47]

Under the Commission's Draft, the managing board is intended to play the *rôle moteur* in the management of the SE and in its corporate dealings with third parties; it is entrusted with all corporate powers not specifically delegated to the other organs of the SE.[48] However, substantial control over it is maintained by permanent and continuous supervision by the supervisory board and by an extension of the powers of the shareholders.[49] For example, the managing board is required to submit a quarterly report on corporate activities to the supervisory board.[50] Further, the supervisory board has unrestricted rights of inspection and access to corporate documents,[51] and has various powers with regard to

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46. See Loi du 24 Juillet 1966 (No. 66-537) Sur les Sociétés Commerciales, 1966 J.O. 6402, 1966 D.S.L. 265, as supplemented by Décret du 23 Mars 1967 (No. 67-236) Sur les Sociétés Commerciales, 1967 J.O. 2843, 1967 D.S.L. 137. For an analysis of the French legislation, *see* Didier, *The New French Legislation on Commercial Companies,* 1967 J. Bus. L. 78.

47. As noted in the commentary to the Sanders Draft, *supra* note 32, at 114: "It is no longer the shareholders' meeting that dominates companies the size of an S.E., if in fact it ever really did. The real power rests with the company's management. The idea of the 'sovereignty' of the shareholders' meeting has been completely abandoned." *Cf. Commission's Draft-Regulation, supra* note 38, Arts. 62-72.

48. The Board of Management is responsible for managing the affairs of the company. In most large undertakings it will be collective in character and thereby encourage the build-up of the team spirit required in the administration of contemporary business. The Board of Management will be the motivating force of the company and its means of contact with third parties.
Commission's Draft-Regulation, supra note 38, at 55.

49. *Commission's Draft-Regulation, supra* note 38, Arts. 73(1), 83. Although the Board of Management is left with considerable freedom with regard to the internal organization of the SE, the Supervisory Board "may at any time make regulations for the internal operation of the Board of Management." *Id.* Art. 64(2). Moreover, without affecting the rights of third parties, the Board of Management must seek prior authorization from the Supervisory Board in specified matters concerning the termination or transfer of the whole or substantial part of the enterprise, significant restrictions or extensions of the activities of the enterprises, substantial internal organizational changes, the establishment of long-term cooperation with other enterprises or the termination thereof, and any other managerial activities specified in the articles of incorporation. *Id.* Art. 66. Additionally, the Board of Management members are appointed by the Supervisory Board and when justified, they can be removed from office by the Supervisory Board. *Id.* Art. 63.

50. *Id.* Art. 68.

51. *Id.* Art. 78.

the preparation of company accounts and the institution of legal actions based on liability of the members of the managing board.[52] A member of the supervisory board represents the company in agreements between the company and a member of the board of management.[53] Finally, the most important function of the supervisory board is that it serves as an advisor to the managing board, though it may not directly intervene in the daily operation of the SE.[54]

The powers of the shareholders are also exhaustively defined. They have the ultimate power in the increase or reduction of corporate capital, the issue of convertible debentures, the appointment or dismissal of the managing board, the appointment of auditors, the allocation of annual profits, the modification of the articles of incorporation, the winding up of the company, the conversion of the company, the merger or transfer of all or a substantial part of corporate assets, and in the approval of various types of contracts binding on the SE.[55] In addition, detailed care has been given to protecting and guaranteeing their preemptive rights, their power to call for all necessary information for voting purposes, their right to be able to buy and sell shares at their discretion, and their right to safeguards against "inside dealings" by members of the managing board.[56] As one writer has commented, "the draft-regulation contains one of the most advanced corporation laws known today."[57]

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52. *Id.* Arts. 72, 211-214.
53. *Id.* Art. 73(3).
54. *Id.* Arts. 73(2), 73(3).
55. *Id.* Art. 83. As noted by the Commission in its commentary to the Article, the powers conferred are exhaustive, and the shareholders have only those specific powers which are conferred upon them by the Article.
56. *Id. See especially* Arts. 82, 90. As with the SANDERS DRAFT, *supra* note 32, the Commission's draft ensures a very real counterweight to the everyday corporate powers of the Board of Management by taking meticulous care in ensuring the rights of shareholders. As noted by Professor Sanders:

> Generally speaking, shareholders take little interest in the management of the company. Their interests center rather on the results and distribution of dividends . . . . The shareholders are more in need of appropriate protection of their interests [*e.g.*, preemptive rights, access to information] than of managerial powers.

Id. at 114-15. It should also be noted that Article 85 of the *Commission's Draft-Regulation, supra* note 38, provides for the protection of the rights of certain minority shareholders in requesting meetings and placing items on the agenda. The general supervision of the rights of all shareholders is left in the hands of the appropriate national courts.
57. Storm, *A New Impulse Towards a European Company*, 26 THE BUS. LAWYER 1446 (1971). On the nature and scope of the Commission's Draft-Regulation, *see also* Saint-Esteben, *La proposition d'un statut des sociétés anonymés européennes présentée par la Commission au Conseil le 30 Juin 1970*, 7 REV. TRIM. DR. EUR. 62 (1971); Van Ryn, *Le projet de statut des sociétés européennes*, 7 REV. TRIM. DR. EUR. 563 (1971); Keutgen & Huyo, *Demain la Société Européenne*, 1971 J. TRIBUNAUX 485.

B. Accessibility

One of the most controversial aspects of the debate surrounding the European-type company, and one of the most relevant considerations for the American enterprise, is that of accessibility to the SE form. This question has both significant intra- and extra-Community ramifications.[58]

On the intra-Community level, the French Government's argument has been that the conditions of access to the SE should not be more severe than those presently existing in the Member States—every local European enterprise should be afforded an equal opportunity of becoming an SE.[59] Countering this approach is the German Government's attitude that there must first exist certain *internationale Tatsbestände* (certain international factors) before access should be given;[60] otherwise the SE would become a device for entrepreneurial expediency rather than for set economic objectives. The Germans also fear that broad access might place the SE in competition with municipal law.

The Draft-Regulation, like the Sanders Draft, only permits pre-existing joint-stock companies as founders of an SE. Though no set period of previous corporate existence is required, only stock companies "incorporated under the law of a Member State and of which not less than two are subject to different national laws may establish an SE by merger or by formation of a holding company or joint subsidiary."[61] Since no *international factors* would be present in a situation permitting the transformation of a single national corporation into an SE, this has been excluded as a possibility by the Commission.[62] However, to offset this

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58. The first, if not the foremost, among the unresolved "hard core" issues is the question what type of enterprise should be admitted to incorporation under the European law and under what circumstances. . . . For some authors and perhaps also for some of the Governments concerned, the very "raison d'etre" of the new institution [the SE] may depend upon the way this hotly disputed issue is resolved.

E. Stein, *supra* note 21, at 455.

59. *See* Foyer, *Proposition français de création d'une société de type européen*, 1965 Révue Marché Commun 268.

60. *See* Gessler, *Grundfragen der Europäischer Handelsgesellschaft*, 1967 Betriebsberater 381. Professor Gessler has proposed the following criteria of access: if an enterprise has establishments or subsidiaries in states of the Community other than the one where it has its corporate seat; if an enterprise participates in other enterprises having their corporate seats outside the home state of the company; if there are quotations on the stock exchanges of two or more Member States of the Community. With such criteria it is felt that there would be an assurance that an enterprise would have sufficient "European" aspects to merit the use of the SE form.

61. *Commission's Draft-Regulation, supra* note 38, Art. 2. *Cf.* the Sanders Draft, *supra* note 32, Art. I-3(1).

62. *See* Bull. E. C., August 1970, at 75-76. By Article 3 of the *Commission's Draft-*

restriction, the Commission has followed the French plan, and extended access to the SE form to medium-size firms involved in European operations. This has been accomplished by requiring a lesser amount of capital for formation of an SE than that stated in the Sanders Draft.[63] In effect, the Commission, while actually moving closer to the German position, has tried to propose a compromise to foster intra-Community accessibility.

Considering whether non-EEC enterprises should be permitted to avail themselves of the SE form, Professor Sanders has clearly stated that, "[t]he European company is, first of all, meant for the business world of the Common Market."[64] For "economic reasons" the Sanders Draft did not totally preclude foreign utilization of the SE form,[65] but the Commission's Draft has taken a stricter view of the matter. Finding it essential that all companies involved in the formation of an SE be completely under the jurisdiction of the EEC, the Draft-Regulation precludes any direct foreign use of the SE form.[66] As the SE can only be formed by stock companies incorporated under the laws of a Member State, the only way a foreign firm could indirectly participate in the SE would be through a wholly owned subsidiary incorporated within the EEC.[67]

The Commission's draft has significantly deviated from the Sanders Draft concerning the question of foreign access to the SE form.[68] This

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Regulation, supra note 38, an SE already in existence may itself form an SE subsidiary or merge with other SE's or with stock companies incorporated under the national law of a Member State.

63. The minimum capital requirement for the formation of an SE is 500,000 units of accounts (which roughly correspond to the gold-parity of the United States dollar in 1934) in the case of merger or creation of a holding company, 250,000 units of accounts in the case of the establishment of a joint subsidiary, and 100,000 units of account in the case of the establishment of a subsidiary by an existing SE. *Commission's Draft-Regulation, supra* note 38, Art. 4. The ECC Savings Bank's suggestions on the capital requirements for the SE, in contrast, indicate a feeling that the European Court of Justice should be able to grant exemptions to the requirements, and that there should not be different capital limits for the cases of mergers and the formation of subsidiaries. Europe, No. 958 (new series), January 8, 1972 at 8.

For the capital requirements found in the municipal corporate laws in the Community see R. PENNINGTON, *supra* note 31, and see the SANDERS DRAFT, *supra* note 32, Art. I-3(2).

64. Sanders, *The European Company*, 1968, J. BUS. L. 184, 193.

65. *See* the SANDERS DRAFT, *supra* note 32, at 10. By Article I-2(1)(b), a European stock corporation may be formed by "stock corporations which are established in a state that is not a member of the European Economic Community and which has been engaged in economic activities for the last three fiscal years prior to the application to record the S.E."

66. *Commission's Draft-Regulation, supra* note 38, Art. 2.

67. *See* Storm, *A New Impulse Towards a European Company, supra* note 57, at 1448.

68. *Compare Commission's Draft-Regulation, supra* note 38, Arts. 2 & 3 *with* the SANDERS DRAFT, *supra* note 32, Arts. I-2 & I-3. For a report of the debate on the subject of access to the SE see Europe, No. 250 (new series), January 13, 1969, at 3.

shift is perhaps indicative of a growing protectionist approach against non-EEC enterprises. Whether the EEC will move even closer in the future to the French concept of a "truly European enterprise" still remains to be seen.[69]

C. Co-determination: Employee Participation[70]

The notion of representation of employees within the corporate organs of the SE is peculiarly a product of German experience (*Mitbestimmung*).[71] In Germany, except for family companies with fewer than 500 employees, all stock corporations (*Aktiengesellschaft*) must provide for the election, by the firm's employees, of one-third of the representatives on the supervisory board (*Aufsichtsrat*),[72] and, in the area of coal and steel, employee representation is even greater.[73] Co-determination does not exist in the company laws of the other Member States, except in France where a much watered-down version exists (co-gestion).[74]

In commenting on whether co-determination should have a place in the European-type company, one writer has remarked that

> [t]he problem is a political one. It is closely connected to the determination as to who should have access to the European corporation. Legal solutions may be worked out. The main difficulties lie in the differences of labour law regulations in the member states and in the divergent opinions of the different national labour unions on this problem. All solutions have to respect one principle: neither should the economic and social development of the Common Market be hampered nor one member state be excluded from a common and necessary economic development.[75]

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69. *See* E. Stein, *supra* note 21, at 458-60.

70. *See generally* Lyon-Caen, *La représentation des intérests des travailleurs dans les sociétés européennes*, 7 Rev. Trim. Dr. Eur. 473 (1971).

71. *See* Vagts, *Reforming the "Modern" Corporation: Perspectives from the German*, 80 Harv. L. Rev. 23 (1966).

72. *See* Betriebsverfassungsgesetz §§ 76-77 (C.H. Beck 1953). In contrast to the French system of "participation," the employee representatives share the same rights as any other member of the *Aufsichtsrat* (Supervisory Board).

73. *Mitbestimmungsgesetz* of May 21, 1951, [1951] BGBl. I 347. Here the employee representatives must constitute 50% of the Supervisory Board, and there is a neutral president. In addition, the employees are empowered to elect an *Arbeitsdirektor* (Labor Representative) to sit as a full participating member on the *Vorstand* (Board of Management). The *Mitbestimmungsgesetz* of Aug. 7, 1956, extends "co-determination" to holding companies in the iron, steel, and coal industries.

74. *See* Article 3 of the Ordonnance du 22 Février 1945 (No. 45-280), Institutuant des Comités d'Entreprises, *as amended* Loi du 16 Mai 1946 (No. 46-1065), 1946 J.O. 4251, 1946 D.L. 227, *as amended*, Décret du 24 Juin 1960 (No. 60-606), 1960 J.O. 5816, 1960 D.S.L. 231, *as amended*, Loi du 18 Juin 1966 (No. 66-427), 1966 J.O. 5267, 1966 D.S.L. 297.

75. Ficker, *supra* note 13, at 169.

It was apparently left for the Commission to resolve this troublesome situation within the conditions existing in the Member States.[76]

The Commission has, however, come up with a highly comprehensive, innovative and non-neutral approach, one which it sees as "indispensable if the way to [the] constructive co-operation between employers and workers [which] it feels [is] necessary in European firms is to be opened up."[77] Recognizing the legal and factual relationship of the worker with the enterprise and the need to ensure the protection of the worker's legitimate interests, the Commission has concluded that the SE should embrace the concept of co-determination as one of the legal means in encouraging cooperation between workers and management and between the workers in the different Member States.[78]

In great detail, the Commission's Draft-Regulation proposes to deal with the question of worker participation on three fronts: (1) by the creation of a new body called the European Works Council (*comité européen d'entreprise*), which would represent the workers in each establishment in those cases where the SE has establishments in more than one EEC state,[79] (2) through the presence of employee representatives on the supervisory board of the SE,[80] and (3) through the possibility

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76. For the details of the complex compromise treatment of the question of how to neutralize the problem of "co-determination," see the SANDERS DRAFT, *supra* note 32, Article V *et seq.*, which sets out a course of three variant approaches. For a critique see Lyon-Caen, *Contribution a l'etude des modes de représentation des intérêts des travailleurs dans le cadre des sociétés anonymes européennes* (Séries Concurrence, 1970-10).

77. BULL. E.C., August 1970, at 78.

78. *Commission's Draft-Regulation, supra* note 38, Tit. V, Arts. 100-142.

79. *Id.* Arts. 100-136. In every SE having establishments in more than one Member State there must exist a European Works Council (EWC). The EWC shall be elected and except in specific cases it shall exist alongside any other existing works council formed in the SE according to the relevant national laws. *Id.* Arts. 101, 105. By Article 120(3) the EWC shall be informed by the Board of Management "of every event of importance" concerning the functioning of the enterprise; by Article 122 of the EWC may request from the Board of Management information on any matter it deems of importance, and it may subsequently render an "opinion" on the matter in question. Further, by Articles 124 and 125, the Board of Management must consult with the EWC before deciding certain matters (*e.g.*, job evaluations, substantial organizational changes within the enterprise); and by Article 123, the Board of Management must obtain prior approval from the EWC in various other matters (*e.g.*, promotions, dismissal rules).

In effect, the Commission has proposed a new corporate institution which would possess specific and real powers of investigation, consultation and approval within the decision-making apparatus of the SE.

80. *Id.* Arts. 137-145. Unlike the complex equation of the SANDERS DRAFT, *supra* note 32, the Commission has generally provided for a fixed minimum representation of workers (one-third of the members of the Supervisory Board) unless the articles of

of concluding collective agreements between the SE and the labor unions represented within the SE.[81] Though the Commission's draft has presented a complete regulation concerning the labor aspects involved in the operation of an SE, it nevertheless "demands quite a lot of imagination from the reader to visualize how this system will work out in practice." As further noted by Professor Sanders, "[t]he last word on this subject has certainly not been said."[82]

D. Role of the European Court of Justice

To help ensure the desired "European" character of the SE, the Commission's Draft-Regulation, like the Sanders Draft, has given a central role to the Court of Justice at Luxembourg. At the same time it has tried to preserve as much as possible the competency of the municipal courts in this area; however, in the event of any conflict between national and Community law, Community law will take precedence.[83] In order to guarantee uniformity of status, the Draft-Regulation provides that,

> [i]t is imperative that the founding of the European company be subject to a system of registration at a central registry, under legal control, to eliminate any possibility of invalidity of the company after incorporation; [that] one specific European legal body should be seised of this control in order to avoid discrepancies of judgment in the scrutiny of deeds and documents prepared by the founders; and [that] the requisite authority should naturally be vested in the judicial body of the Communities, the Court of Justice of the European Communities.[84]

Under the Draft-Regulation, the Court of Justice will provide the desired uniformity and control in the formation of the SE by control over the registration procedure.[85] The Court will have a further and continuing role in providing a uniform interpretation of the SE Regulation through the procedure of granting preliminary rulings.[86]

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incorporation provide for a higher percentage. However, if two-thirds of the employees of the SE object to the principle of "co-determination" then no worker representatives will be placed on the Supervisory Board.

81. *Id.* Arts. 146-147.

82. Sanders, *supra* note 40, at 38.

83. On supremacy in Community law, *see* Costa v. E.N.E.L., Case No. 6-64, 10 Recueil de la Jurisprudence 1141 (1964).

84. *See Commission's Draft-Regulation, supra* note 38, Preamble.

85. *Id.* Arts. 17, 19.

86. Article 177 of the Treaty of Rome, *supra* note 14, at 76, provides for a preliminary ruling on the interpretation of the SE Regulation. Where such a question "is raised before any court or tribunal of one on the Member States, that court or tribunal may, if it considers that a decision on the question is necessary to enable

The basis of the Court of Justice's role in supervising the application and interpretation of the SE Regulation would stem from the general principles of the Treaty of Rome and from the Regulation itself.[87] In matters of interpretation by municipal courts or by the European Court of Justice itself, the Commission's Draft-Regulation distinguishes three sources of applicable law. In those matters directly or indirectly governed by the final SE Regulation, disposition shall be made in accordance with the provisions of the Regulation; failing this, the general principles upon which the Regulation is based will be used; and failing this, the rules and general principles common to laws of the Member States will be used as the basis for disposition. In those matters concerning the SE which are not governed by the Regulation the relevant municipal law shall apply.[88] As stated by the Commission,

> [t]he Statute [Draft-Regulation] thus endeavours to define the boundaries to the concept of matter governed by this Statute. This concept, like all other rules of the Statute, is itself made subject to interpretation by the Court of the European Communities.[89]

The role of the Court of Justice in the functioning of the SE Regulation is seen by the Commission as a most significant and crucial one. The Commission is in fact proposing a uniform solution on a supranational level, that is, a uniform Council of Ministers Regulation as the legal basis of the SE Statute and a uniform interpretation of the Regulation provided by the Court at Luxembourg. In this light, the Commission's Draft-Regulation must be seen as a conscious contribution to the continuing development of Community law.[90]

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it to give judgment, request the Court of Justice to give a ruling thereon," and where such a question "is raised in a case pending before a court or tribunal of a Member State, from whose decisions there is no possibility of appeal under internal law, that court or tribunal shall be bound to bring the matter before the Court of Justice."

87. Under the SANDERS DRAFT, *supra* note 32, Art. I-6(5), provision was made for the continental practice of *pourvoi dans l'intérêt de la loi* (an advisory opinion which does not prejudice the rights of the parties involved), whereby the *Avocat-Général* of the European Court may submit to the Court the question of whether the national court has violated any provision of the Statute which is adjudicable by the European Court. Such provision is not made under the *Commission's Draft-Regulation, supra* note 38, as recourse here can be had under Article 169 of the Treaty of Rome, *supra* note 14, at 75.

88. *Commission's Draft-Regulation, supra* note 38, Art. 7.

89. *Id.* at 15 (notes on Art. 7, para. 4).

90. On the nature of Community law, see generally A.W. GREEN, POLITICAL INTEGRATION BY JURISPRUDENCE (1969); E. STEIN & P. HAY, LAW AND INSTITUTIONS IN THE ATLANTIC AREA 133-230 (1963).

E. Certain Other Problems

Concerning the all-pervasive corporate problem of taxation, the Commission in large measure based its draft provisions on the two draft Directives regarding taxation which were forwarded to the Council of Ministers in January, 1969.[91] The Commission's approach to taxation of the SE rests on the premise of non-discrimination; the tax laws of the EEC must apply to the SE in the same manner as they apply to any other municipal company. The Commission has ruled out any special provisions favorable to the SE.[92]

In the formation of the SE, the Council Directive on indirect taxation is generally applicable. However, by the Commission's Draft-Regulation, the exchange of shares involved in the formation of an SE holding company does not give rise to any tax. In the event these shares are held by an enterprise, the new shares must then be shown in the balance sheet of the enterprise at the same value as the old shares.[93]

As set out in the Draft-Regulation, the SE shall, for purposes of taxation, be treated as a resident of the Member State in which the "center of its effective management" is located. In the event of a dispute arising on this point, the contending fiscal authorities may request that a final determination be made by the Court of Justice at Luxembourg. After a period of five years an SE may transfer its "center of effective management" to another Member State without incurring any tax on the transfer.[94]

A "permanent establishment"[95] would be taxed only in the state where it is located. If, during any tax period, a consolidated loss results from

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91. *See Draft Directive on the Common Taxation Arrangements Applicable to Mergers, the Splitting Up of Companies and the Transfer of Assets Taking Place Between Companies of Different Member States*, 12 E.E.C. J.O. C 39, at 1 (1969); *Draft Directive on the Common Taxation Arrangements Applicable to Parent Companies and Subsidiary Companies of Different Member States*, 12 E.E.C. J.O. C 39, at 7 (1969).

92. Special provisions would not only run counter to the principles of modern tax law, which tend to attach more importance to the function and business structure of undertakings than to its legal form, but would also deliberately create new sources of distortion and discrimination detrimental to free and effective competition and inconsistent with fiscal neutrality. *Commission's Draft-Regulation, supra* note 38, at 215.

93. *Id.* Art. 275.

94. *Id.* Arts. 276-277.

95. "The expression 'permanent establishment' means a fixed place of business at which an S.E. carries on its activities in whole or in part." *Id.* Art. 280. The Article also provides that a seat of management, a branch, a factory, a workshop, and other similar situations may constitute a "permanent establishment." *Id.*

the "permanent establishments" of an SE, that loss would be deductible from the taxable profits of the SE in the state in which it is a resident for tax purposes. Further, the "permanent establishments" which an SE has in a state other than its fiscal seat would not give rise to a greater tax by that state than those imposed there on other enterprises carrying on business of a similar nature.[96] Article 281 of the Commission's Draft-Regulation deals with the case of subsidiaries in which an SE holds at least 50% of the capital, these provisions being analogous to those of Article 278 regarding losses incurred by "permanent establishments."[97] Article 281 makes it possible to set-off profits and losses of enterprises which are legally distinct, yet part of a larger "economic unit." These provisions are, however, of "a provisional character [and] will have to be adapted to future developments and especially to further directives in this field."[98]

At a minimum, one sound lesson that can be drawn from the proposed SE tax provisions is that a European-type company may have more than one registered office without having more than one domicile for tax purposes. For various reasons, the Commission finds it imperative that an SE should have only one domicile for tax purposes, and that domicile is where the "center of effective management" is located.[99] If the SE tax provisions are read in conjunction with the draft Directives of 1969, it becomes evident that the Commission is committed to taking a firm stance against abuse of the corporate domicile for tax purposes; the Commission's attitude signals the end of the days of the "tax haven" in certain European countries.[100]

F. Related and Affiliated Companies

The Commission's Draft-Regulation raises the question of "groups of companies" (*i.e.*, related or affiliated companies which act as an economic unit, but which are legally distinct entities), a subject which has been

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96. *Id.* Arts. 278-279.

97. The present Article [Art. 281] makes it possible to set off losses and profits of undertakings which are legally independent. It thus seeks to substitute for the narrow legal concept of the taxpayer the wider economic concept of the "group of companies" which, although legally independent, nevertheless form an economic unit treated for tax purposes as one undertaking.

Id. at 223.

98. Sanders, *supra* note 40, at 43.

99. *See Commission's Draft-Regulation, supra* note 38, at 216-17.

100. *See generally* E. Stein, *supra* note 21, at 470-72. On the harmonization of European tax laws, *see* Vogellar, *Tax Harmonization in the European Community*, 7 Comm. Mkt. L. Rev. 323 (1970).

treated systematically only under German law.[101] The Commission starts from the premise that such "groups of companies" do exist, and then extends the provisions of the Draft-Regulation to any such group in which an SE is either directly or indirectly the controlled or controlling enterprise in the group. For the American enterprise, it is important to note that these provisions are applicable to non-Community enterprises as well as to Community ones.[102]

The Draft-Regulation seeks to establish a legal framework in which the interests of the groups of affiliated and related companies can be reconciled with those of minority shareholders and creditors. In this light, the management of the controlled enterprise of the "group" is obliged to follow the instructions of the controlling enterprise (whose registered office must be situated in one of the Member States), regardless of the interests of the controlled company. To protect the rights of the minority shareholders of a controlled company whose seat is in one of the Member States, provision is made for these shareholders to exchange their shares for shares of the controlling company (if it is an SE or limited company of one of the Member States) or to settle for a cash payment as soon as the company becomes a member of a "group." To help safeguard the rights of creditors, the Draft-Regulation provides that the controlling company is jointly and severally liable for all the obligations of the dependent undertakings. The Commission has also made provision for the publication of certain notices with regard to whether an SE forms part of a "group" or not.[103]

III

IMPLICATIONS FOR AMERICAN BUSINESS

A. Short-Term

Aside from a spark of initial curiosity, it is hard to conceive of a common SE form having any immediate advantages for the corporate activities of American enterprises in Europe (or the ones seeking to enter Europe). Even for European firms, the SE is a highly dubious creature. It is primarily geared to the needs of certain medium-sized firms wish-

101. *See* F. Jeunger & L. Schmidt, German Stock Corporation Act (1967).
102. *Commission's Draft-Regulation, supra* note 38, Art. 240.
103. *Id.* Arts. 223-240.

ing to expand within the European market.[104] For the large American multinational corporations, the SE offers no guaranteed solutions to the legal and economic problems now being handled on a day-to-day basis by the large staff of professional experts employed by these firms. In fact, if a large American firm were able to choose the SE form, the metaphorical balance sheet could well show that it had lost more flexibility of operation than it had gained. Scrutiny and control of the enterprise would in large measure come from the centralized bureaucracy of the EEC structure itself, with all the supranational implications that would entail. Gone would be the leverage now successfully utilized by the large American enterprise in playing off one Member State against another.[105]

In addition, the American enterprise would of necessity have to come to terms everywhere in the Community with such bothersome concepts as "co-determination,"[106] the Community's interpretation of what may or may not constitute the seat of corporate power and control, and the notion of "groups of companies." Concerning the SE form as facilitating mergers, this has never been an overriding obstacle for an American enterprise's penetration of European markets. The formation of subsidiary companies, holding companies, or agencies are part and parcel of the mastered experience of American corporate ingenuity.[107]

As soundly learned from experience in the United States, the creation of a federal-type corporate form is not crucial. What is crucial is the guarantee of such basic rights as freedom of establishment ("doing business"), the free movement of capital, and the mutual recognition of companies throughout the integrated market. Equally important are

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104. *Id.* Art. 2.

105. Under present conditions the American enterprise has a real opportunity to play off the various Member States against each other. For example, if entry into France would prove restrictive, a country like Belgium inevitably holds out open arms to the American enterprise (*e.g.*, Westinghouse's recent acquisition of Ateliers de Construction Electrique de Charleroi (ACEC) in Belgium). As noted by Gilbertson, *A Hospitable Home for Foreign Firms*, International Herald Tribune, Nov. 13, 1970, at 13: "Unlike their neighbours to the South and East, the Belgians have not reacted unfavorably to the incoming tide of U.S. corporations . . . . Public opinion as a whole has supported the welcoming policy of its Governments." Situations like this, inevitably, afford the American enterprise considerable bargaining flexibility. *See also* Europe, No. 681 (new series), November 6, 1970.

106. It appears that quite a few American subsidiaries have already had to grapple with co-determination. Many have undercapitalized to stay out of the requirements of the *Misbestimmungsgesetz*; others (*e.g.*, John Deere Co. in Düsseldorf) have found that there is no practical deterrent in the system except for greater disclosure requirements. *See* DeVries & Juenger, *Limited Liability Contract: the GmbH*, 64 COLUM. L. REV. 866 (1964).

107. *See Report on Transatlantic Direct Investment, supra* note 4. *See also The Eurocompany: Making It Easy To Go Multinational*, 239 ECONOMIST, June 12, 1971, at 46-47.

uniform and advantageous provisions for corporate taxation, for currency controls, and for securities regulations.[108] None of these crucial matters are dealt with by the proposed SE Draft-Regulation.

Concerning the practical and immediate advantages of the SE for the multinational corporation, Dr. F. A. Mann, in a very acute and devastating attack on the SE proposal, has stated that:

> Daily practice has failed to produce any evidence to the effect that there are gaps which could at present not be filled, that there is a need which could not be satisfied, that business men [*sic*] have experienced any substantial difficulty in practice. The truth of the matter is that such difficulties as there are (and they are real and substantial) stem from a source which the Draft Statute of a European Company law does not even touch, and which would continue even if it were accepted. . . . Anyone who has ever participated in practical discussions about these problems, anyone who has ever witnessed the business man's [*sic*] motives and reactions, anyone who has ever had to consider the interests of the investing public in connection with the enormous field of Eurodollar finance will agree that the absence of a European company has made no difference, that, indeed, questions of company law have attracted only a minimum of attention and that the available tools provided by company law have proved sufficient. . . . In the end one cannot help feeling that the discussion about a European company involves some exaggeration and disproportion.[109]

From Mann's vantage point, it would indeed be very hard to argue that the SE form would hold out any immediate practical significance to an American firm in the EEC.

B. Long-Term

On a more widely projected basis, the crucial significance of the proposed SE is precisely that this new corporate form is not intended for use by the American enterprise. Quite the contrary, the prime focus is for an essentially "European" usage, especially by medium-sized European firms seeking to expand on a European scale. The driving force behind the SE proposal is the development of practical situations which are conducive to the establishment of truly competitive European economies of scale, while keeping these situations within close Community control. In realistic terms, this means competitive with the large American multinational corporations.

In order to facilitate these objectives, this writer feels that during the coming decade American enterprise will come to face a series of formal controls from the EEC, both as to its entry and its actual manner of

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108. Leleux, *Corporation Law in the United States and in the E.E.C.*, 5 Comm. Mkt. L. Rev. 133 (1967-68).
109. Mann, *supra* note 33, at 479-80.

"doing business" therein. While a fully coordinated EEC policy toward foreign multinational corporations is not imminent, elements of such a developing attitude undoubtedly will be reflected in the various forthcoming Community directives on taxation, corporate reform, antitrust policy, and the program on free movement of capital, establishment and services. It will be essential for the corporate counsels of the American enterprises in Europe to keep abreast of developments in these areas and not to treat them as isolated and separate Community actions.

Of equal importance is what may be termed the "psychological" significance of the SE—not only as it may be for the EEC itself—but also for the many inferences it raises for American enterprises in Europe. In essence, the proposal for the SE provides a psychological spur to, and a forum for discussion on a Community level of, the overall corporate and economic problems facing Western Europe. For example, as a partial result of the broad discussion given to the SE during the 1960's, a proposed fifth directive on company law harmonization has recently been issued by the European Commission. This proposed directive anticipates approximation of the national corporate laws of the EEC Member States along lines largely similar to the SE Draft-Regulation's approach to the "dual" directorate, the extensive protection of shareholders' rights, employee's participation on the supervisory board, and the procedures for the drawing up and inspection of annual statements.[110]

The proposal for the SE does not attempt to supplant the basic need for the harmonization of the national company laws of the Member States and the necessity for the coordination of a genuinely European industrial and economic policy; it does, however, in a very real way serve as a handmaid toward the attainment of these goals.[111] Whether it be in the extension of the role of the European Court in European corporate matters, the interrelated need for the harmonization of national tax regulations (along with those on securities and exchange controls), the creation of competitive European economies of scale, or the debate over the very status of American enterprises within the EEC, the proposal for the SE provides the juncture point in dealing with these pressing problems fac-

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110. *See* Commission of the European Communities, *Fifth Directive on Company Law Harmonization Proposed, An Information Memo*, 2 CCH COMM. MKT. REP. ¶ 9532.

111. For a consideration of the overall significance of the European company to the attainment of a common EEC industrial policy *see* COMMISSION DES COMMUNAUTÉS EUROPÉNNES, COM No. 70, LA POLITIQUE INDUSTRIELLE DE LA COMMUNAUTÉ, MEMORANDUM DE LA COMMISSION AU CONSEIL (1970).

ing the EEC in the 1970's.[112] The significance of the SE for the American enterprise is, therefore, not from the aspect of personal use, but because the SE serves as a prime indicator of what the Community idea is all about.[113]

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112. "[F]or the convinced 'Europeans' the 'European company' offered both a new symbol and a new potential incentive for the lagging integration movement." E. STEIN, *supra* note 21, at 431.

113. This writer contends that a common attitude is developing toward the American enterprise in Europe, and that the debate behind the European Corporation is one of the prime indicators of the development of such a consensus. Other indicators also evidence this phenomenon: (1) the Convention Relating to the Mutual Recognition of Companies and Legal Persons (see 2 CCH COMM. MKT. REP. ¶¶ 6083-6107), Article 3 of which states that, if the relevant companies or legal persons do not have "a genuine link with the economy of one of these territories," the Member States may refuse to apply the Convention to such persons or companies; (2) the continuing debate on accessibility to the proposed European Patent Convention by non-EEC states (*see* M. van Empel, *European Patent Conventions*, 9 COMM. MKT. L. REV. 13 [1972]); (3) the current dispute concerning applicability of the freedom of establishment (Treaty of Rome, *supra* note 14, Arts. 52-58) to companies which may not have a "genuine link" with the Common Market; and (4) the general controversy over the role of the multinational firm in the Common Market (*see* 2 CCH COMM. MKT. REP., Report No. 189 [June 20, 1972]).