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Efforts Toward Harmonization of Business Laws Within the European Economic Community

Numerous provisions of the Treaty of Rome[1] call for "coordination,"[2] "elimination of distortion,"[3] "approximation"[4] or "harmonization"[5] with regard to laws and regulations within the member states of the European Economic Community. Although the terms vary, it is generally agreed[6] that they are conceptually the same: the purpose of each of these provisions is to facilitate trade within the Community and to create a working "common market" for goods and services through the elimination of possibly artificial barriers to trade. Some movement is sought from the traditional import-export situation to one in which companies trade and move freely regardless of national frontiers. The most complex area of harmonization that has developed since the Community's inception concerns the coordination of laws relating to business organizations. This article will discuss progress within the Community in eliminating conflicting business regulations and steps that the Community has taken toward creating a common corporate form for use within all of the Member States.[7]

One important factor in the harmonization effort within the Common

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[1]Treaty Establishing the European Economic Community (1957) [hereinafter cited as the Rome Treaty].

[2]Rome Treaty, Arts. 3(g) and 54(3) (g).

[3]Rome Treaty, Art. 101.

[4]Rome Treaty, Arts. 3(h) and 100.

[5]Professor Stein claims this term is used in the Treaty but I cannot find it. The term "assimilation" is also endemic in the literature. *See* Stein, Assimilation of National Laws as a Function of European Integration, 58 AM. J. INT'L. 1,5 (1964).

[6]*See e.g.*, E. Stein, HARMONIZATION OF EUROPEAN COMPANY LAWS: NATIONAL REFORM AND TRANSNATIONAL COORDINATION 11 (1971) [hereinafter cited as Stein].

[7]Efforts toward elimination of national barriers to trade exist, of course, in a whole host of other economic areas. Articles 100 through 102 of the Rome Treaty, for example, have been used as the basis for directives harmonizing national laws relating to standards and technical and industrial requirements. See P. SLOT, TECHNICAL AND ADMINISTRATIVE OBSTACLES TO TRADE IN THE EEC (1975) for an exhaustive treatment of the peculiarities of such attempts at harmonization within the Common Market.

Market is the trend toward assimilation of business laws that has occurred in Europe over the past fifty years. The process of national reform that has taken place within each of the Member States, irrespective of any impetus supplied by the European Economic Community (EEC) Treaty, has provided a core of uniformity around which the formal process of harmonization could proceed. Certain specifics of this common base need to be kept in mind when harmonization is being discussed and evaluated. Generally,[8] there is a two-tier administrative structure within European stock companies.[9] The typical duties of the American board of directors are split between an executive board and a supervisory council. The former in effect manages the company and the latter performs a supervisory and advisory role typically representing a variety of interests within the company.[10] Other important common corporate factors that are important include the principle of shareholder supremacy,[11] a move toward co-determination or worker participation in management,[12] the insistence on full subscription of capital and the predominance of bearer shares.[13] It is important to note that the framework just described, as well as the directives to be discussed below, is influenced very little by British and Irish procedures and practices. These relatively new members to the Community therefore will have to make an even greater adjustment in their national law than that which the other community members had to make to proceed with harmonization.

Within the Rome Treaty itself the most basic of the harmonization principles in the creation of a common market is the freedom of establishment: the right of a company of one state to set up branches or organize subsidiaries in other member states. And within these other states the establishing company or subsidiary needs to be free to enjoy the same rights and benefits enjoyed by local companies. These basic freedoms are spelled out in Articles 52 and 58 of the Treaty. A concomitant freedom is that a company should have the ability

[8]British and Irish company laws more closely resemble African forms. For a discussion of the integration of British corporate statutes into the Common Market framework, see Dalton, *Proposals for the Unification of Corporation Law in the European Economic Communty: Effect on the British Company,* 7 N.Y.U. J. INT'L L. & P. (1974).

[9]The terms "stock company" and "societe anonyme" refer generally to a corporation in the American sense and are usually distinguished from the "limited liability company" or the "societe a responsibilite limitee." This article deals principally with the harmonization of laws relating to stock companies.

[10]*See* Conrad, *Company Laws of the European Communities from an American Viewpoint,* in THE HARMONISATION OF EUROPEAN COMPANY LAW 45 (C. Schmitthoff ed.) 1973 [hereinafter cited as Conrad].

[11]See e.g., Berger, *Shareholder Rights under the German Stock Company Law of 1965,* 38 FORDHAM L. REV. 687 (1970).

[12]*See e.g.,* Vagts, *Reforming the 'Modern' Corporation: Perspectives from the German,* 80 HARV. L. REV. 23 (1966).

[13]*See e.g.,* Conrad.

to move its seat of incorporation or home office and to merge across national boundaries without undue legal or procedural strictures. Once positioned within the Community, however, these basic rights have made it necessary for the Common Market to establish some degree of uniformity with regard to other corporate laws so that adequate protections will be available to the shareholders, creditors and suppliers of these potentially migratory enterprises.[14] It is of some importance that "freedom of establishment" can be exercised only by a national of a Member State that is already established in some sense within a Common Market country. This limitation highlights the regional nature of the organization.

Supplemental to the rules assuring freedom of establishment, and in addition to the concepts of "economic and monetary union"[15] and "common commercial policy,"[16] which are beyond the scope of this article, the Rome Treaty contains a number of other provisions intended to eliminate restrictions on company mobility and transnational business relations. Article 54(3)(g) of the Treaty states that the "Council and Commission shall carry out [the principle of freedom of establishment] . . . by coordinating to the necessary extent the safeguards which, for the protection of members and others, are required by Member States of companies or firms . . . with a view to making such safeguards equivalent throughout the Community." Similarly Article 100 supplies the legal basis for the Council to issue directives "for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market." This provision goes on specifically to contemplate the amendment of legislation within the Member States according to the concept of "approximation." A third provision of the Rome Treaty, Article 220, requires the Member States to "enter into negotiations with each other with a view to securing the mutual recognition of companies . . . , the retention of personality in the event of transfer of seat from one country to another, and the possibility of mergers between companies or firms governed by laws of different countries." Finally, on the basis of Article 235 the Commission has proposed

[14]Article 52 states that "restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished. . . ." Article 53 requires that Member States introduce no new restictions on the right of establishment. And Article 54(1) calls for the abolition (in stages) of existing restrictions on freedom of establishment in the Community.

[15]For a discussion of this topic, see Norton and Hansen, *Reflections Upon Economic and Monetary Union in the European Community,* 11 TEXAS INT'L L.J. 251 (1976); and deMan, *The Economic and Monetary Union After Four Years: Results and Prospects,* 12 C.M.L. REV. 193 (1975).

[16]See LaTallec, *The Common Commercial Policy of the EEC,* 21 Int'l & Comp. L.Q. 732 (1971); and Norton, *The Common Commercial Policy of the EEC: Developments in the Final Stage,* 6 VAND. J. TRANS'L L. 44 (1976).

regulations to establish a "European Company" as a means of attaining "one of the objectives of the Community."[17]

Pursuant to the above cited statutory mandates, the Commission, with the concurrence of the Council, has promulgated a number of directives, largely under Articles 54 and 100, to encourage and guide the harmonization process.[18] The process of evolving a directive is complex. It begins with approval by the Commission of a working group draft after review by interested nongovernmental groups. The Commission then sends the approved text to the Council of Ministers, which discusses it with the Economic and Social Council of the EEC and with the European Parliament. As spelled out in Articles 148 and 149 of the Rome Treaty, the Council may then adopt or reject the Commission's draft by a qualified majority vote; but if it wants to amend the draft it may do so only by a unanimous vote unless the Commission agrees to the amendment.[19]

The first of the directives on harmonization of business laws, and the only one currently in force, is First Directive No. 68/151 of March 9, 1968. This directive applies both to stock companies and to limited liability companies. It deals with three topics: disclosure, validity of commitments and nullity of a company. Article 2 of the First Directive requires that Member States ensure that companies organized under their laws make public the following documents: articles of incorporation or similar statutes and any amendments thereto, lists of persons who can bind the company in its relation with third parties, an annual account of the capital subscribed, the balance sheet and a profit and loss statement for each financial year. These documents are collected and housed in a central or commercial register for each state and are available to any member of the public at a small charge.[20]

Article 9 of the First Directive largely does away with the doctrine of *ultra vires.* It states that "Acts done by the organs of the company shall be binding upon it even if those acts are not within the objects of the company, unless

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[17]The movement toward harmonization has sparked a sizeable literature over the years. The difference in perspective are extensive. *See, e.g.*, Dalton, *Proposals for the Unification of Corporation Law in the European Economic Community: Effect on the British Company,* 7 N.Y.U. J. INT'L L. & P. 59 (1974); Hahn, *Functional Limits of Multinational Enterprises,"* 7 N.Y.U. J. Int'l L. & P. 475, 479-83 (1974); Berger, *Harmonization of Company Law under the Common Market Treaty,* 4 CREIGHTON L. REV. 205 (1971); and Didier, Lukoff & Waleffe, *A Key Element in the Unification of Europe: Harmonization of Company Law,* 6 INT'L LAW. 615 (1972).

[18]The various directives are exhaustively discussed in Ficker, *The EEC Directives on Company Law Harmonization,* in HARMONISATION OF EUROPEAN COMPANY LAW 66 (C. Schmitthoff ed.) 1973.

[19]For a quite detailed discussion of the promulgatory and review process as it occurred with respect to the First Directive, see Stein at 195-235.

[20]Art. 3 of First Directive.

such acts exceed the powers that the law confers or allows to be conferred on these organs."[21]

Finally, the First Directive provides, in discussing a principle not recognized in American law, that the "laws of the Member States may not provide for the nullity of companies," except on very narrowly circumscribed grounds, such as failure to file documents similar to articles of incorporation. This Community procedure is a marked change from the usual practice in civil law countries of declaring the nullity of a company upon a broad range of grounds.

Over the past eight years a number of other directives have been proposed in draft form by the Commission, but until recently none had been approved by the Council. These directives, though not in effect, are nevertheless important because they act not only as an indication of the direction in which Community Law is likely to gravitate but also as a positive force on current business practices of operating companies.

The Second Directive, proposed in April of 1970 was adopted on December 16, 1976, and must be given effect within the Member States prior to January 1, 1979. It deals only with stock companies and seeks to establish uniform rules concerning the formation, maintenance, increase and reduction of share capital. This directive requires a minimum capital of 25,000 European units of account and would bar smaller companies from using this general corporate form. Further, it provides, as a means of preserving a company's solvency, that dividends may only be paid out of realized profits and only if the assets of the company are greater than the amount of share capital and nontransferable reserves. Finally, to increase capital the directive requires that all previously subscribed shares be fully paid before a company may increase its capital.

The draft of the Third Directive was also proposed in 1970. It deals with harmonization of the law of mergers. For purposes of this directive (and as a means of limiting the types of situations to be regulated) "merger" is defined in the directive to apply only to transfers of all assets and obligations between two or more companies by the issuance of shares of the surviving company to the shareholders of the disappearing company or companies. By defining the term "merger" in this way, the directive ensures the continuation of the business and avoids entanglement in situations where one debtor is merely substituted for another. One item of particular interest in the Third Directive is the requirement in Article 6 that the worker representatives of the companies in question be consulted prior to effectuation of a merger. Under this provi-

[21]The provision goes on to allow an exception to the stated rule where the company proves that the third party knew that the act in question was outside the company's stated purposes. Art. 9(1) of First Directive. The doctrine has been wholly done away with in Germany.

sion workers are not given a veto power over a proposed combination but are allowed to make a presentation to the stockholders meeting considering the proposed amalgamation.

In 1972 the Commission proposed drafts of a Fourth and a Fifth Directive. The Fourth Directive sought to harmonize the material provisions on disclosure, the procedural aspects of which were dealt with in the First Directive. By its terms the Fourth Directive would be applicable to limited liability companies as well as stock companies, with increased levels of disclosure applying to the companies depending upon their structure or economic size.[22] Among the substantive problems dealt with by the directive is that of valuation of assets. Generally,. only realized profits may be included in financial statements, but all risks have to be taken into consideration. Also adopted is the principle of "historical costs" to value the different items on the balance sheet.

The Fifth Directive discusses regulations concerning the corporate structure of stock companies.[23] The directive requires, among other things, the compulsory introduction of a dualistic board system,[24] and worker representation on the new supervisory council if the company employs more than 500 persons. Pursuant to a Green Paper published in 1975,[25] the Commission has made it clear that, while it still considers both of these provisions necessary, it is willing to consider amendments to its proposal and to permit a transition period for experimenting with various formulations.[26]

Two other directives on harmonization of business laws have been issued by the Commission.[27] The Sixth Directive seeks to solve the problems of the vary-

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[22]Generally all of the rules in this Directive apply to public companies. For private companies the rules vary depending on size. Private companies with a balance sheet total of more than one million units of account, a cash flow of more than two million units of account and with more than 100 workers must meet all of the disclosure requirements. Private companies with a balance sheet total of 100,000 units of account or less, a cash flow of no more than 200,000 units and no more than twenty workers may be exempted by national provisions from the publication of profit and loss statements and a long form balance sheet.

[23]For a broad-ranging discussion of the Fifth Directive, see the two parts of Lang, *The Fifth EEC Directive on the Harmonization of Company Law,* 12 C.M.L. REV. 155 (1975) and 12 C.M.L. REV. 325 (1975); also see Conlon, *Industrial Democracy and the EEC Company Law: A Review of the Draft Fifth Directive,* 24 INT'L & COMP. L.Q. 348 (1975).

[24]*See* text at notes 9 and 10 *supra.*

[25]Employee Participation and Company Structure in the European Community (COM (75) 570 final, Luxembourg, Nov. 12, 1975).

[26]During any period of transition the Member States would be obligated to effectuate the two-tier management system on an optional basis so that companies would have a choice of structure. With regard to employee participation in company management, a compromise level of workers' committees outside company organs (but having some interaction with them) has been proposed. Under this interim arrangement, a majority of the employees of a company could vote to give up their representation on any management board.

[27]The Sixth Directive was first proposed by the Commission on October 5, 1972, and an amended version thereof was submitted to the Council on December 1, 1975. The Seventh Directive was submitted by the Commission to the Council on April 28, 1976.

ing amounts of information available to investors concerning companies in the different Member States. This directive would standardize the contents of prospectuses available to investors regardless of the issuer's domicile or legal status. The restriction would only apply to the initial issuance of the shares.

The Seventh Directive concerns the growing European problem of "groups" of companies,"[28] where the management of member companies is coordinated in such a way that a dominant company controls the interest of all the others. The resulting group obscures the economic potential or status of the individual companies. The purpose of this directive is to make sure that companies within the Community publish comparable information in order to provide maximum protection for shareholders, employees and third parties.

The use of directives as a means of harmonizing business laws and procedures of the Member States is not an unambiguous success. The failure to put into effect the list of draft directives promulgated after the effective date of the First Directive indicates some dissatisfaction with this procedure. The use of directives, however, has the advantage of being less rigid than the adoption of uniform laws in Member States "in that it often allows the states to maintain stricter requirements and other peculiarly national idiosyncrasies as long as they meet the prescribed minimum standards, and it also gives national parliaments a choice of the legal form of implementation into domestic law."[29] While the latter of these two points has some merit, the flexibility argument is simplistic. Most of the directives are in fact sufficiently detailed that national legislatures are left little leeway for experimentation. Moreover, the slight differences that have been allowed are sufficient to do away with much of the benefit that would have attended uniformity of laws. As noted by a number of writers,[30] the harmonization of company laws has proved to be much more difficult and to consume much more time than had originally been envisioned. The main cause of this delay, even more than any of the technical problems mentioned previously, is the continued reluctance of national groups to give up any of the peculiarities of their own laws and systems.

Harmonization of business laws and thus of company mobility within the Common Market is also promoted through the adoption of specific conventions. These European conventions are established within the framework of the Community and are linked with its institutions, particularly through the

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[28]For a discussion of the "groups of Companies" issue, prior to the issuance of the draft directive, see Derom, *The EEC Approach to Groups of Companies,* 16 VA. J. INT'L L. 565 (1976).

[29]Stein, *Harmonization of European Company Laws,* 37 LAW & CONTEMP. PROB. 318, 325 (1972).

[30]See Vogelaar, *The Approximation of the Laws of Member States Under the Treaty of Rome,* 12 C.M.L. REV. 211, 224-29 (1975), and Stein, *Harmonization of European Company Laws,* 37 LAW & CONTEMP. PROB. 318, 326 (1972).

Court of Justice. The conventions are typically adopted by the Member States on different dates and in accordance with their national constitutions as with other international treaties.

The most important of the European conventions established to date is the Convention on Mutual Recognition of Companies.[31] This Convention arose (1) out of the mandate in Article 220 of the Rome Treaty for the Member States to "enter into negotiations . . . [for] the mutual recognition of companies"; and (2) out of the practical need to eliminate the confusion between the rules governing recognition of the "real seat" and the place of incorporation. The rule adopted by the Convention, at least in Article 1, is the same as that used in the United States (place of incorporation governs), even though the matter is clouded somewhat by later provisions.[32]

Conventions on jurisdiction and enforcement of judgments have been made effective,[33] and a Convention on Bankruptcy has been proposed.[34] Other conventions on the remaining matters raised in Article 220 of the Rome Treaty (mergers and transfers of registered offices) have been promulgated in draft form but have not yet moved beyond consideration by the Commission.

A third rather broad method of seeking some level of harmonization within the Common Market is the development of a peculiarly "European company" as opposed to one organized under the laws of any one of the Member States. This move can be analogized to some extent to recent efforts in the United States to fashion a federal incorporation statute.[35] The idea of a European company can be seen as both a reaction to American business pressures in Europe (the "American Challenge")[36] and as a recognition that directives might not suffice to solve all problems of European business integration. The

[31]CONVENTION ON THE MUTUAL RECOGNITION OF COMPANIES AND BODIES CORPORATE (Feb. 29, 1968), Bull. E.C. Supp. 2/69.

[32]Articles 3 and 4 of the Convention upset the clarity of Article 1 by creating exceptions to its general rule. Article 3 allows states to avoid applying the Convention to companies which have their real registered office outside the territories to which the Convention applies, if such companies "have no genuine link" with the economy of the stated territories. Article 4 allows states to exempt companies having their real registered offices on its territory, even if these companies are organized in a Member State of the Community, if the Articles of Incorporation expressly so permit by reference to the law of a particular state.

[33]CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF CIVIL AND COMMERCIAL JUDGMENTS (Sept. 27, 1968), Bull. E.C. Supp. 2/69. *See also* Carl, *The Common Market Judgment Convention—Its Threat and Challenge to Americans,* 8 INT'L LAW. 446 (1974).

[34]See Hunter, *The Draft Bankruptcy Convention of the European Economic Communities,* 21 INT'L & COMP. L.Q. 682 (1972); and Nadelmann, *Rehabilitating International Bankruptcy Law: Lessons Taught by Herstatt and Company,* 52 N.Y.U. L. REV. 1, 27-32 (1977).

[35]*See e.g.,* Cary, *Federalism and Corporate Law: Reflections Upon Delaware,* 83 YALE L.J. 663 (1974); and R. Nader, M. Green and J. Seligman, CONSTITUTIONALIZING THE CORPORATION: THE CASE FOR THE FEDERAL CHARTERING OF GIANT CORPORATIONS (1976).

[36]*See e.g.,* Rainer, *The Proposed Statute for a European Company,* 10 TEXAS INT'L L.J. 90, 91 (1975).

proposal was originally that of Professor Pieter Sanders of Holland[37] and was intended to complement rather than replace more traditional company forms. As envisioned by Professor Sanders the new organization would be a supranational one incorporated under Community law with the European Court ruling as to its uniform application. Many of the usual conflicts-of-laws and transfer of seat problems would be obviated under this arrangement.

An alternative theory of the European company has over the years been suggested by France. Under this proposal, there would be established a form of uniform company with a particular set of legislative provisions which would then be enacted in identical form in each of the Member States. This proposal is obviously less novel and complex than the first alternative but might not solve as many of the usual problems in the long run.

Although proposals for a European Company Statute have appeared in a number of permutations, its current form (reflecting the views of the European Parliament and as approved by the Commission and submitted to the Council in 1975) contains many of the ideas discussed earlier as being part of the draft directives. Powers and duties will be divided between a management board and a supervisory council. The management board is the central body of the organization in that it will be concerned with day to day operation of the company and will have all powers not specifically assigned elsewhere. Certain of the management board's acts need prior authorization by the supervisory council. These include: (1) terminating or merging the business or a substantial part thereof, (2) substantial enlargement of the business of the organization and (3) establishment or termination of long-term contracts with other organizations. The list of matters upon which prior supervisory council approval is needed can be expanded in the organizing statute of the entity.

In addition to disapproving completely the doctrine of *ultra vires* and giving substantial powers to the stockholders at the annual general meeting of the company, the proposed European Company Statute currently provides for substantial worker participation in the operation of the business. This participation is to be on three levels: first, through the formation of a European Works Council representing all of the employees of the company with establishments in different Member States; second, through representation of the employees in the supervisory council; and third, through concluding collective agreements between the company and the trade unions represented within its establishments.

Under present arrangements the European Company Statute once approved by the Council, would be made effective in the form of regulations adopted

[37]For Professor Sanders' current thoughts on the European Company, see Sanders, *The European Company*, 6 GA. J. INT'L & COMP. L. 367 (1976).

under Article 235 of the Rome Treaty. This varies from the original proposal in which the Statute would be part of a convention as spelled out in Article 220.

One of the principal problems that a European Company Statute would face would be that it dealt only with company law. It is easy to see why a number of Member States have been reluctant to sponsor this new statute: it would not, at least as presently envisioned, be accompanied by uniform laws with regard to taxation,[38] labor practices or social security. There is for the most part no framework for these areas to parallel the one which would be enacted for company law.[39]

In this analysis of developments within the Common Market toward harmonization of laws it is clear that there are two processes at work. First, there is the process of coordinating such laws between the Member States and making them more uniform. The other trend which was probably not planned by the drafters of the Rome Treaty and which was not appreciated even five years ago[40] is that of reform of such laws as they become more similar. In particular increased protections for investors and creditors have accompanied the trend toward greater worker participation in business management. Perhaps these reforms and the others described above would not have occurred in any case despite the harmonization efforts of the EEC, but it appears that the dual trends of national tendencies and EEC requirements have strengthened each other and produced a deeper and longer lasting change than would have otherwise been the case. This change has occurred despite the inability of the Community to make the remaining draft directives into force. Harmonization is thus altering the national law-making process and is subtly fostering "a feeling of European solidarity which as yet is hardly strong enough to produce an overwhelming success."[41] Although law making within the EEC is at times a very tentative and shifting process, this analysis highlights the proposition that regional organizations (like the Common Market) may have become the major source of developing national law.

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[38]There has, however, been some recent movement toward devising directives dealing with harmonization of tax laws within the Member States. *See e.g.*, Chown, The Harmonisation of Corporation Tax in the EEC, 1976 BRIT. TAX. REV. 39 (1976); and Anschutz, *Harmonization of Direct Taxes in the European Economic Community*, 13 HARV. INT'L L.J. 1 (1972).

[39]It has been argued that the tax and social security problems attached to the European Company idea are largely political and that the European Company cannot therefore divorce itself from the nation-state framework. See Mann, *The European Company*, 19 INT'L & COMP. L.Q. 468 (1970).

[40]Professor Stein argued in 1971 that, "coordination or 'approximation' . . . is the avowed objective, *not* reform."

[41]Stein, *supra* note 6 at 77; *also see* Vogelaar, *The Approximation of the Laws of the Member States Under the Treaty of Rome*, 12 C.M.L. REV. 211 (1975).