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A Key Element in the Unification of Europe: Harmonization of Company Law

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In today's world the far-reaching activities of the modern business enterprise can no longer be managed by a few individuals. Large-scale industry and commerce in Western nations are being gradually taken over by corporations. In these countries, the corporation has become widespread because it offers some very attractive features—in particular, limitation of legal liability of shareholders, and ease of access to private investors for capital needs. Western Europe has not escaped this trend, evidenced by the gradual take-over of family businesses by corporations after World War II; and it is now an economic fact that competition and the influx of American capital on the European market have made the "one-man" or "one-family" companies anachronisms, and replaced them with a generation of modern companies whose ancestors are frequently to be found in the United States.

From this socio-economic evolution developed a new surge of interest in company (especially corporate) law, which had for years been relatively dormant. There also arose a need for a general legal reorganization to tackle the increasingly complex economic situation. These movements have forced most of the European countries to revise their company laws to include legal rules and concepts more adapted to the changing situation.

By a statute of 1965, West Germany introduced important changes in the law on corporations and group enterprises ("Konzerns").[1] France

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[1]Law of September 6, 1965, (1965) BGB1.48.

recently undertook a complete reform of its corporate law by passing the Law of July 24, 1966, on commercial companies.[2] In the Netherlands there are two new laws in force concerning corporations.[3] In Italy, similar work is under way which could lead to substantial modification of existing legislation.[4] Finally, in Belgium, a government commission has announced that it is in favor of an extensive revision of the law, especially with respect to *sociétés anonymes* (*i.e.*, corporations).

The Treaty of Rome of March 25, 1957, which established the European Economic Community (hereinafter referred to as "the E.E.C." or "the Community"), greatly contributed to the growing importance of corporations and company law. The creation of a strongly competitive common market comprising France, West Germany, Italy and the three Benelux countries has led to new opportunities on an international scale and should considerably modify the structure of European enterprises in the future.

Whether as a question of internal growth, merger or cooperation between enterprises in the E.E.C., the new economic horizons are no longer limited by national boundaries, and this has had far-reaching repercussions on the national laws of each member state. This evolution had been anticipated by the Treaty of Rome which aims not only to create a customs union among the members state (*i.e.*, a "common market"), but also, and above all, to replace the former national markets by a unified economic and even political entity.[6]

As is well known, the goal of the Treaty of Rome is the gradual achievement of socio-economic conditions which will enable a European federation. The present institutional structure of the Community—namely, the existence of a supranational executive body in Brussels (the Commission) and of a legislative assembly in Strasbourg, albeit with limited powers—stands as evidence of this direction; however, member state governments admit that this paramount surrender of sovereignty will

[2]Law 66-537 of July 24, 1966, modified by Law of January 4, 1967; Decrees 67-236, on commercial companies and the Official Bulletin on Commercial News, and 67-237, on the Register of Commerce (Petits Codes Dalloz, "Code des Sociétés," Paris, 1971 ed.).

[3]Law of May 3, 1971, (1971) Staatsbl. 286, introducing the closely held company with limited liability ("besloten vennootschap met beperkte aansprakelijkheid") in Dutch commercial law, and Law of May 6, 1971, (1971) Staatsbl. 289, modifying the Commercial Code with respect to the corporate structure of share companies ("naamloze vennootschap").

[4]J. G. Renauld, *Réflexions sur l'évolution du droit des sociétés anonymes dans le Marché Commun*, LXVI, REVUE PRATIQUE DES SOCIÉTÉS, 117 (1967, Louvain).

[5]*Id.*; in the meantime, there have been new laws on the Register of Commerce, coordinated on July 20, 1964, and several amendments to the existing section of the Commercial Code dealing with commercial companies, namely with regard to changes of purpose clause and corporate form, statutory auditors and convertible debentures (*Codes Bruylant*, Brussels, 32nd ed.).

[6]Treaty of Rome, establishing the European Economic Community, Art. 3.

take place, if it takes place at all, only slowly and progressively as future needs require, in each specific sphere of public concern.

The authors of the Treaty of Rome realized that the attainment of the freedom of movement of persons and/or companies, goods, services, and capital (often referred to as "the four liberties") will be impossible as long as great discrepancies remain in the legislation of the different member states. For example, freedom of movement for companies cannot be contemplated until the member states have harmonized their various tax rates in order to assure truly equal fiscal treatment.[7] It is for this reason that the treaty not only seeks to eliminate the customs barriers to free movement, but also advocates "the approximation of the member states' respective national laws to the extent necessary for the functioning of the Community.[8]

It will take a great deal of time, however, to achieve this harmonization. Despite the fact that the E.E.C. Commission has rapidly drawn up numerous proposals, progress is braked by the double obstacle of first adoption by the E.E.C. Council of Ministers, and second, integration into the various national laws. The lawyers who lay the groundwork for legislative harmonization need the full support of governmental authorities who in the end are the holders of the decision-making power. Unfortunately, the desires of the politicians often prove to be vague and vacillating. This problem is exacerbated by centuries of history which have developed different brands of individualism in each country, and these differences make unified political results even more difficult than in instances where common traditions are shared by the legislators.

In addition, the expected entry of the United Kingdom, Denmark, Norway, and the Republic of Ireland into the Community will not facilitate the harmonization process. The partial initial unity of the laws of the present member states can be attributed to their common Napoleonic experience and, in any case, their tradition of written law and deductive reasoning. English law may disturb this unity, given its stress on court-made law and inductive reasoning.

In the area of company law, the British approach is quite different from that of the legislators on the continent. On the one hand, the British have conscientiously avoided complex systems of regulations and limitations,

[7]Under the Treaty of Rome, the Community's fiscal policy extends to three different areas: (a) the elimination of customs duties (Art. 12 to 17); (b) the equalization of income and indirect tax burdens (Art. 95 to 99); and (c) the abolition of double taxation (Art. 220). See J. Van Houtte, *Les dispositions fiscales*. DROIT DES COMMUNAUTÉS EUROPÉENNES, 869-79 (1969, Brussels, Coll. *Les Novelles*).

[8]Treaty of Rome, Art. 3.

and have relied heavily on disclosure of information and the influence of public opinion on company management. On the other hand, British law has increased the number of situations in which a court may intervene, and has granted the judge rather discretionary powers.[10]

It should be noted that attempts to reconcile the English and continental legal systems have not waited for the final outcome of negotiations concerning Britain's entry into the Community. In 1966, the British House of Lords made a cautious step toward abandoning the general policy of the courts to stand by precedent and not to disturb settled questions (*stare decisis*).[11] For their part, the six present member states now seem to lean, for example, toward the English concept of distribution of powers within a company.[12] If progress toward harmonization is slow, there is at least some progress.

Despite the problems posed by expanded membership, the present members have stated that the progress of the Community should not be slowed by the increase in membership. Their efforts to achieve the goals defined in the Treaty of Rome have continued while negotiations for the enlargement of the Community were in process. At present, they are simultaneously using three legal means to achieve complete freedom of action for companies established in the Community:

a) The harmonization of company law;

b) The coordination of rules of conflict of laws in order to allow companies of one member state which are established in another member state to enjoy the same rights and obligations as similar national companies despite different legal form;

c) The creation of a company under "Community law," called the

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[9]L. C. B. GOWER, THE PRINCIPLES OF MODERN COMPANY LAW, 30 (1954, London, 1st ed.), cited by P. Van Ommeslaghe, *infra*.

[10]P. Van Ommeslaghe, "Le régime des sociétés par actions et leur administration en droit comparé," 20 (1960, Brussels).

[11]G. Dworking, *Un adoucissement à la théorie du Stare Decisis à la Chambre des Lordes*, REVUE INTERNATIONALE DE DROIT COMPARÉ, 190-1 (1967, Paris), quotes (in French) the following decision of the Lords: "The Lords recognize, however, that adhering too rigorously to the rule of precedent may lead to injustice in a specific case, and also unduly prevent a steady evolution of the law. Therefore, they intend to amend their present practice and, while considering former decisions of this House as compulsory precedents, to deviate from an ancient ruling when deemed necessary." "The Lords, like most high judges, tend to be rather conservative"—Dworking wrote—"and it is presumable that they will not overrule precedents except in carefully selected cases." He concluded that "this modification constitutes an actual renounciation of the rule of precedent" even though "the change will be the exception rather than the rule."

[12]Proposed Statute for the European Company, Supplement to Bulletin 8-1970 of the European Communities. The board of directors has been made the principal corporate body, as opposed to the shareholders' meeting—as is the case in most European national laws.

European Company, which would be entirely independent of the national laws of the member states.

Theoretically, one observes that the combination of these methods works simultaneously toward the same goal. Many obstacles encountered with respect to the harmonization of company law bring attention to the problem of coordination of the rules of conflict of laws, or to the project on the European company, and vice versa. Thus, it is hoped to avoid the feeling of deadlock which would result from the failure of negotiations based on only one of the legal means mentioned above.

Harmonization of Company Law

A close examination of the member states' respective company laws reveals substantial differences which arise essentially because these countries do not always recognize the same legal corporate forms.[13] Furthermore, regulations concerning corresponding types of companies often differ greatly from one country to the next.[14] Among the difficulties which arise from this situation, the following should be mentioned:

a) International mergers are presently considered almost impossible;[15] thus, there is no other solution for national enterprises which wish to expand beyond national limits than to establish foreign subsidiaries, holding companies or branch operations;

b) The functioning of multinational companies is complicated by the lack of uniformity between the legal status of the parent company and that of its different subsidiaries and branches;

c) Different tax burdens in the various countries cause discrimination in the choice of the place of establishment, income and dividend policy, etc.[16]

[13]*E.g.*, the Dutch Law of May 3, 1971 (*supra* note 3) has just introduced in the Netherlands the concept of a closely held company with limited liability, similar to the "GmbH," "Sarl," or "Sprl" which have long been known in Germany, France and Belgium respectively.

[14]There are numerous instances, of which the Dutch Law of May 6, 1971, *supra* note 3, is only one example. Italy, for instance, does not recognize bearer shares, while all other member countries allow both bearer and registered shares (*see* 15, *infra*).

[15]B. Goldman, International Corporate Law, Report concerning cooperation between enterprises and mergers in the E.E.C., presented at the Paris Colloquium of October 26 - 28, 1967, 109 *Revue du Marché Commun*, 298 (1968, Paris). In addition to the obstacles to mergers in each of the Six national laws, it is worth mentioning that none of these laws regulates the specific question raised by the direct substitution of one legal entity for another in a different national legal system. Goldman notes that only a provision of international law could remedy this failing of the Six national laws concerned. *See also* J. G. Renauld, *Droit européen des sociétés*, 7.17 (1969, Brussels).

[16]J. G. Renauld, *op. cit.* note 15, 2.76.

At present, a foreign company which decides to set up a subsidiary in one of the member states must not only furnish the guaranties required under the law of its own place of incorporation, but also those required by the national law of the country where the subsidiary will be established. The obligation to abide by several legislations, possibly conflicting, constitutes a serious hindrance to the freedom of establishment envisaged by the Treaty of Rome. This same problem has existed, and still exists to some extent, in the United States, where companies may be subject to a plethora of state corporate laws. However, the legal diversity in the United States is not altogether similar to the situation in Europe, because of the existence in the United States of other unifying factors such as a federal tax system and a single capital market.[17]

The scope of action of the Community in this field is framed in Article 54-3(g) of the Treaty of Rome which gives to the E.E.C. Council of Ministers the power to issue *directives* to coordinate "to the extent that it is necessary and with a view to making them equivalent, the guaranties which are required from companies in member states . . . in order to protect the interests both of the members of such companies and of third parties." In making its goal the protection of shareholders and third parties, this article sets the tone for the proposals on harmonization.

Despite its restrictive direct subject matter, it is possible to interpret Article 54-3(g) loosely, so as to apply it to company law as a whole.[18] Work based on this article has led to publication by the E.E.C. authorities, of a series of directives or proposals relative to national companies. These texts and works are listed below:

—The first directive, dated March 9, 1968, is tripartite.[19] Part one deals with the reporting requirements for corporations and covers three areas: methods of reporting, information to be published, and penalties incurred for insufficient disclosure.[20] Part two discusses the validity of contractual obligations; this includes questions of authority to represent corporations vis-à-vis third parties, including the effect of *ultra vires* undertakings, the

[17]P. LELEUX, CORPORATION LAW IN THE U.S. and in the E.E.C., COMMON MARKET LAW REVIEW, 164 (1967 -68, London).

[18]Y. Loussouarn, *Les sociétés dans la C.E.E.*, 140 REVUE DU MARCHÉ COMMUN, 69 (1971, Paris). *Contra* J. G. Renauld, *op. cit.* note 15, 8.39.

[19]Official Gazette of the European Communities (1968) (hereinafter cited as O.G.E.C.), No. L 65/8, of March 14, 8. P. Van Ommeslaghe, "La première directive due Conseil du 9 mars 1968 en matière de sociétés," 5 *Cahiers de Droit Européen*, 495 -563, and 6 *Cahiers de Droit Européen*, 619 -665 (1969, Brussels). F. Perret, "Coordination du droit des sociétés en Europe, la première directive de la C.E.E. en matière de sociétés et le droit suisse," 3 *Études suisses de droit européen*, 108 p. (1970, Geneva).

[20]Directive of March 9, 1968, Art. 2 to 6.

legal effect of an invalid nomination of a person or corporate body with authority to represent a corporation when such nomination has been officially published, and rules applicable to commitments made in the name of a corporation in formation.[21] Part three of this directive limits the circumstances leading to nullity of incorporation so as to safeguard the rights of third parties.[22]

Since 1968, other draft directives have been put forward, but have not yet been formally accepted by the E.E.C. Council of Ministers.

—The proposed second directive deals with incorporation of companies, safeguarding the share capital, and increases and reductions of share capital.[23]

—The proposed third directive concerns mergers of corporations within the same country.[24] Its prime objective is to introduce the concept of merger into local legislation, such as in the Netherlands where mergers are unknown,[25] in order to pave the way for a common legislation on international mergers.

—The proposed fourth directive on annual accounts and proposed fifth directive covering internal management, supervision and control structures for corporations, are under preliminary discussion.[26]

Preliminary reports and texts are being prepared on other important issues, such as general shareholders' meetings, stocks shares, dissolution and liquidation of corporations, and groups of companies.[27]

The E.E.C. Economic and Social Committee recently issued its opinion concerning the Commission's second and third draft directives. On the whole, it approved the tenor of the projects, and viewed them as essential to the achievement of greater competitiveness and corporate integration within the E.E.C. However, its comments and remarks underline the difficulties of conciliating various interests involved. With respect to the proposed second directive, the Committee suggested that it should not

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[21]*Id.*, Art. 7 to 9.

[22]*Id.*, Art. 9 to 12.

[23](1970) O.G.E.C., No. C/48, of April 24, 8.

[24](1970) O.G.E.C., No. C/89, of July 14, 20.

[25]Van Owen & Van Leeuwe, "La fusion des sociétés anonymes en droit néerlandais," IV *Rapports au Colloque International de Droit Européen,* 108 (1962, Brussels). Dutch practice has nevertheless developed the "aandelenfusie" procedure whereby the entire stock of the absorbed company is contributed to the entire capital of the absorbing company. Both legal entities, however, continue in existence.

[26]D. Vignes, "L'harmonisation des législations, les travaux effectués et ceux en cours," 100 *Revue du Marché Commun,* 195 (1967, Paris). J. G. Renauld, *op cit.* note 4, 119. E. Cerexhe, "Les Communautés européennes au terme de la période transitoire," XXX *Annales de Droit,* 144 (1970, Louvain).

[27]P. Van Ommeslaghe, *op. cit.* note 19, 502.

enter into force before the proposed fourth directive, which will introduce uniform definitions for accounting terms used in annual accounts.[28] As for the proposed fourth directive, the Committee recommended that plans of merger should indicate the economic motives and targets of the merger and that full information should be disclosed to members of the personnel to the same extent as to shareholders, so that they may communicate their views to the shareholders' meeting which will decide on the proposed merger.[29] This so-called "participation" of labor in essential company decisions is generally a rather controversial aspect of recent legislative reforms.

To summarize these directives, it appears that the scope of the current harmonization covers a growing number of fields within corporate law. The Community has decided to work out separate texts to achieve complete harmonization. It is often noted—as the European Economic and Social Committee mentioned—that the enforcement of partial modifications into the member states' national laws, one after the other, might prove to be inimical to the security of legal relations, and that it might be preferable to group the proposals in a single set of regulations, with a single effective date. It is possible that this disadvantage of the series of partial measures will be circumvented by providing for simultaneous passage and effective dates of several of the directives.[30]

In the area of corporate taxation, two Commission proposals are in the process of being adopted.[31] One concerns the fiscal régime applicable to mergers, spin-offs and fixed asset contributions of companies in different member states. The other deals with the fiscal régime applicable to parent companies and their subsidiaries located in different member states. Three main concerns are covered in this last proposal—(a) the avoidance of economic double taxation to exempt the parent company from corporate tax on the profits which it receives from its subsidiaries, (b) the exemption from withholding at source on dividends received from subsidiaries, and (c) the possibility for parent companies to adopt a system of consolidated tax reporting.

Similar harmonization work is under way in the area of multinational companies formed by share acquisitions of other companies which are not liquidated after the operation. The work accomplished is not as advanced as on the national level where, at present, such legislation exists in Ger-

[28]E.E.C. Document CES 339/71 of May 26, 1971.

[29]E.E.C. Document CES 340/71 of May 27, 1971.

[30](1971) O.G.E.C., No. C/88, of September 6. *See also* P. Van Ommeslaghe, *op. cit.* note 19, 502.

[31](1969) O.G.E.C., No. C/39, of March 22, 1-6 and 7-12.

many ("Verbundene Unternehmen")[32] and to a lesser extent in France ("groupements d'intérêt économique").[33] The following four fundamental problems remain to be solved in this area:

(1) The situation of the minority shareholders of the acquired companies;

(2) The position of creditors of the acquired companies;

(3) The status of directors of the acquired companies when the interests of the acquiring company are contrary to those of the acquired company; and

(4) The reporting requirements for acquisition agreements.

While the laws applicable in France and in Germany may be taken as examples for the future harmonization of the rules applicable to groups of enterprises, the E.E.C. authorities for their part have outlined a tentative system in their draft European Company Statute which is referred to below. It is clear that the present discrepancy between member states having strict regulations in this regard, and those having no rules at all constitutes a severe danger and distortion; a danger insofar as the protection of acquired companies, their minority shareholders and creditors is only imperfectly organized, and a distortion, because multinational companies may wish to avoid Germany solely because of the legal responsibilities related to the exercises of control, or, conversely, flow into Germany because the exercise of control is recognized and regulated there. In either case, the desirable integration of European enterprises would be artificially oriented to the detriment of the legitimate interests of minority shareholders and creditors. It is generally felt that the Community has a duty to use its power under Article 54-3(g) to eliminate the present situation.[34]

In conclusion, the harmonization of company law undertaken within the Community simultaneously attacks extremely diverse problems.

A special legal status for corporations is about to be created which would break away from the usual categories of contract law. Reforms are now at an advanced stage because the E.E.C. Commission is unhindered by nationalistic feelings and thus has been able to introduce directives and submit proposals in a short span of time. Only lack of political approval by the national governments represented in the E.E.C. Council of Ministers explains the delay for the implementation of these reforms. The hesitations and varying positions of the member states show the different degrees in

[32]"Aktiengesetz," §§ 15 to 19.

[33]Ordinance 67-821 of September 23, 1967, (1967) J. O. of September 28. This text provides for the first time a legal framework for related intercompany cooperation.

[34]B. Goldman, *op. cit.* note 15, 310-6.

the desire for reform, rather than a divergence of concepts, and it can be hoped that once the preparatory work has been completed, the member states will allow the reforms to take effect as a package.

These reforms, however, will be more suited to accumulations of large amounts of capital and depersonalized enterprises.[35] Small and medium-size enterprises are likely to feel ill at ease in this new legal framework which is obviously not designed for them. The choice is clear. Either company law in Europe will be gradually adapted to suit them better, or a different type of company will be created especially for them. There is no indication that the Community authorities have tried to solve this probelm or are even aware of it. The difficulties presently encountered by these small enterprises will have to become more acute before a solution can be put forward for them.

Harmonization of the Rules of Conflict of Laws

Article 220-3 of the Treaty of Rome states that "member states shall, insofar as necessary, engage in negotiations with each other with a view of ensuring for the benefit of their nationals . . . the mutual recognition of companies . . . , the maintenance of their legal personality in cases where the registered office is transferred from one country to another, and the possibility for companies subject to the national law of different member states to merge. . . ."

This clause enables the E.E.C. to use another method to achieve harmonization in case of delay or failure of the directives based on Article 54-3(g) initiated by the E.E.C. authorities.

Even if complete uniformity of company law cannot be achieved, the member states thus agree to recognize companies incorporated under the law of another member state in spite of different legal forms, and to accord to them, when exercising international activities, the same fundamental rights as those granted to their national companies.[36] This means, in effect, harmonization of the E.E.C. member states' rules of conflict of laws instead of their internal laws.[37]

[35]On this subject, J. G. Renauld, *op. cit.* note 4, 153.

[36]These rights are moving in a different legal area from those stemming from the freedom of establishment. They include, among others, capacity to be titular of rights and obligations, to pass contracts, to appear before a court, to acquire real property, etc. *See* U. Everling, *The Right of Establishment in the Common Market*, CCH COMMON MARKET REPORTS, 70, § 312 (1964, New York); H. Battifol, "Traité élémentaire de droit international privé," 245, § 203 (1959, Paris, 3rd ed.); and Van Boxom, "Rechtsvergelijkendestudie over de nationaliteit der vennootschappen" (1964, Brussels).

[37]The mutual recognition of corporations, coupled with the rights provided for by the E.E.C. Treaty provisions on establishment, renders the status of companiesof a member state,

Article 220-3 sets out three different targets for harmonization in this respect:

A. Mutual Recognition of Companies

As mentioned earlier, one of the principal objectives of the Treaty of Rome, can be defined as the achievement of the four liberties of movement between member states—free movement of goods, services, capital and people and/or companies. It is impossible, however, to allow corporations free movement (commonly called "the right of establishment") without ensuring recognition of their legal existence, following comprehensive, certain and uniform rules.[38]

Much progress has been made in this area. This has at present culminated in an Agreement on the Mutual Recognition of Companies and Legal Entities, signed in Brussels on February 29, 1968.[39] Under Article 1 of this Agreement, "companies having their statutory office in one of the territories to which the . . . Agreement applies, and incorporated under the law of a member state which accords them (legal) rights and obligations, will be automatically recognized."

However, pursuant to Article 4, companies which have their statutory office within the Community, but their real headquarters in a third country (*e.g.*, in the United States) may be refused recognition if their activities are not sufficiently connected to the economy of a member state. The notion of "close connection" (*lien sérieux*), which remains undefined, leaves room

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which want to establish itself in another member state, more favorable than that of U.S. companies desiring to move from one state in the U.S. to another. It avoids the obligation provided under U.S. law, in most cases, to obtain an authorization for doing business (except for interstate business) in another state than that of the company's incorporation. *See* P. LELEUX, *op. cit.* note 17, 133 and footnotes.

[38]Most authors feel that the E.E.C. Treaty provisions concerning the right of establishment involve, albeit imperfectly, such recognition. *See* U. Everling, *op. cit.* note 36, 70; E. Cerexhe, "La reconnaissance mutuelle des sociétés et personnes morales dans la C.E.E.," 110 *Revue du Marché Commun,* 580 (1968, Paris); Wohlfart, Everling, Glaesner & Sprung, "Die Europaësche Wirtschaftsgemeinschaft, Kommentar zum Vertrag;; (1960, Berlin—Frankfurt). *Compare with* Beitzke, "Anerkennung und Sitzverlegung von Gesellschaften und Juristischen Personen E.W.G.—Bereich," *Zeitschrift für das gesamte Handelsrecht und Konkursrecht,* 1 and foll. (1964,

[39]Supplement to Bulletin 2-1969 of the E.E.C. This Agreement, however, has only been ratified by Belgium, France and Italy; ratification by Germany, Luxembourg and the Netherlands is still pending. For comments, see B. Goldman, *The Convention between the Member States of the E.E.C. on the Mutual Recognition of Companies and Legal Persons,* VI COMMON MARKET LAW REVIEW, 104-28 (1968-69, London); E. Cerexhe, *op. cit.* note 38, 578-90; Van der Grinten, "Erkenning van vennootschappen in de E.E.G.," 201 and foll. (1966, Dordrecht); Houin, "Le régime juridique des sociétés dans la C.E.E.," *Revue Trimestrielle de Droit Européen,* 20 and foll. (1965, Paris); Capoto Capotorti, "Il problema del reciproquo riconoscimento delle societa nella C.E.E.," Revista delle Societa, 969 and foll. (1966).

for subjective interpretation. It is an open door for protectionism, for example, with respect to European subsidiaries of American companies. There are already some indications of protectionist feelings, although it is too soon to know whether this will become a dominant reaction within the E.E.C.

B. Maintenance of Legal Status in Case of Transfer of the Statutory Office from One Country to Another

The international transfer of a company's statutory office has always created serious problems: does a company incorporated under the law of one country continue to exist in such country, although it has acquired the nationality of another country through the transfer of its statutory office?[40] In Germany and in the Benelux countries, such transfer causes the dissolution of the company. On the contrary, in France and in Italy, if the shareholders unanimously accept the transfer, the company will continue to exist after a change of nationality. However, unanimity seems practically impossible to obtain. Furthermore, there are tax implications; in each of the present member states, a company which transfers its statutory office abroad is taxed at the rate applied in case of dissolution of the company.

Despite the fact that Article 220-3 of the Treaty of Rome encourages negotiations on this subject, nothing has yet been done. One can only hope that the E.E.C. authorities will not be content to ensure merely the legal survival of the company in case of transfer, but will also try to facilitate transfers.

From a tax point of view, a tentative solution can be found in the draft European Company Statute. According to the Statute, European companies which have had their tax domicile in the same State for at least five years, will not be taxed on unrealized capital gains in event of transfer of their statutory office.

C. International Mergers

In Europe, as elsewhere, the increasing need for a mechanism for international mergers is a current concern. Five of the six member states of the E.E.C. legally recognize the concept of merger.[41] However, there are

[40]*See* Y. Loussouarn, "L'harmonisation dans les Communautés," 27 (1968, Brussels); Gide, Loyrette & Nouel, III "Dictionnaire du Marché Commun," at "Entreprise," § 42.

[41]*See* note 25 *supra*.

[42]German law recognizes internal mergers, but ignores international mergers. *See* Gessler, IV *Rapports au Colloque International de Droit Européen,* 41-4 (1961, Brussels). Under Belgian law, the merger of a Belgian comapny into a foreign company requires the unanimous consent of the shareholders. See J. Van Ryn, I "Principes de droit commercial,"

wide discrepancies between the rules pertaining to fusion,[42] and before international mergers can take place, there are seven objectives which must be attained:[43]

1) Merging companies must not be deemed to have been liquidated;

2) Merged or absorbed companies must legally disappear;

3) Total transfer of all assets and liabilities to the absorbing company or to the new company must be possible;

4) There must be freedom to exchange shares in the merged company for shares in the absorbing company or for cash;

5) Unanimous approval by the shareholders must not be required to permit a merger;

6) There must be strict regulation of the act of merger in order to avoid nullification of the merger; and

7) Accounting procedures must be uniform in order to render the merger figures meaningful.

Although most of these objectives were dealt with in the E.E.C. Commission's draft Statute on the European Company, one cannot ignore the fact that the harmonization of the rules of conflict of laws and the European Company Statute move in entirely different spheres. A merger agreement would concern only the problem of the passage from one national law to another, which entails a change of nationality. Since the European Company belongs to "Community law," independent of any nationality, the solutions found for the European Company would not be identical to those for international mergers of local companies.

Work begun in 1966 on international merger regulations has not yet been completed.[44] Apart from the legal difficulties encountered, numerous political obstacles have slowed progress considerably. Companies in Europe which feel incapable of competing with rivals usually choose to associate themselves with American partners rather than to merge with their European competitors. From 1961 to 1966, mergers among E.E.C. companies represented only 27% of the total number of mergers; since 1966 this trend has not undergone any substantial change. This is evidently detrimental to the internal strength of the Community.[45]

§ 799 (1954, Brussels). Luxembourg and French laws follow more or less a similar line. Finally, in Italy, international mergers are allowed, but the shareholders may withdraw if it is the Italian company which is absorbed (C. Civ., Art. 2437).

[43]W. Hauschild, 109 *Revue du Marche Commun*, 316-36 (1968, Paris); J. G. Renauld, *op. cit.* note 15, 7.15.

[44]Written question from Representative Vredeling to the E.E.C. Commission, (1971) O.G.E.C., No. C/50, of May 22, 10. Also, E. Cerexhe, *op. cit.* note 26, 117.

[45]Memorandum of the E.E.C. Commission to the Council of Ministers, "La politique industrielle de la Communauté," 92 (1970, Brussels).

The question which arises at this point is whether the advantages afforded international mergers should be reserved to companies which are "authentically" European.[46] As none of the member states wishes to be the first to express an overtly discriminatory attitude, this problem has been postponed.

The European Company

Since the beginning of this century, the idea of a European company has reappeared periodically; however, it has often been viewed with scepticism by businessmen and industrialists. The desire to create a European commercial company (otherwise referred to as the "S.E." or *Societas Europaea*) was first officially expressed by the French government in 1965. The French made a proposal to the governments of the other member states to discuss this problem in the E.E.C. Council of Ministers and to appoint a committee of government experts to draw up a uniform law which could be inserted in the legal systems of the member states.

The pressing problems concerning mergers contributed to the reappearance of this idea, and Community authorities finally organized a group of experts to work under the leadership of Professor P. Sanders of the Netherlands. In 1966, this group submitted a preliminary project based on the Treaty of Rome. This project and the ideas submitted later by the Permanent Representatives of the member states ultimately enabled the E.E.C. Commission to draw up a proposal, a "Regulation for the European Company Statute." It was submitted to the E.E.C. Council of Ministers on June 30, 1970.[47]

The Treaty of Rome offers two possibilities for creating this type of company, common for all member states, which would simultaneously and automatically entail the standardization of corporate laws and rules of conflict laws—a uniform law or a Community regulation.

Uniform Law

This type of law presents no particular difficulties. An international treaty would stipulate the terms and conditions of the new legal corporate form, and each state would introduce the text of the treaty into its own legislation.

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[46]B. Goldman, *op. cit.* note 15, 82.

[47](1970) O.G.E.C., No. C/50, of May 22, 10. Also, Supplement to Bulletin 8 - 1970 of the E.E.C. The Commission's proposal is hereinafter referred to as Draft Statute. For comments, see G. Keutgen & M. Huys, *Demain, la société européenne?*, 86 JOURNAL DES TRIBUNAUX, 485 -96 (1971, Brussels).

This solution certainly marks a step forward from harmonization, for it would lead to standardization of the principal rules concerning the new type of company. Uniformity of rules would not only simplify the creation and control of subsidiaries, but also facilitate access to the capital market of each member state by providing shareholders and creditors with identical guaranties which are recognized by all. It would also enhance the legal security of commercial transactions, since the rules would be known to all parties involved.

The main drawback, however, is that a uniform law would leave the problem of the uniformity of legal interpretation unsolved because it would be applied by six different court systems. Moreover, this solution does not broach the problem of international mergers and transfers of statutory offices.

Community Regulation

Pursuant to Article 235 of the Treaty of Rome, a "regulation" approved unanimously by the E.E.C. Council of Ministers, and by a majority in the European Parliament, puts into effect a Community law which is immediately applicable in all the member states without ratification. This law is to be uniformly interpreted by the European Court of Justice in Luxembourg. Thus, its implementation does not require intervention of the different national parliaments of the member states and its interpretation is not left to the courts of each state.

Contrary to the original proposal of the French, the Community regulation was chosen by the E.E.C. Commission in its Draft Statute on the S.E. Companies which adopt S.E. status would thus lose their previous nationality and acquire Community "nationality." It is hoped that the principal effect will be to remove the feelings of nationalism with regard to mergers and the creation of subsidiaries. Today, in fact, when companies belonging to different member states wish to merge, a main problem is that of the location of their seat of business and, consequently, of nationality. Frequently, merging companies do not wish to have the new seat situated in a different country. These difficulties could be limited through application of the Statute.

In developing an S.E. status, the Community authorities drew up a series of rules which are basic for the understanding of the proposed Statute. They decided that the S.E. should have corporate form, that it should have a certain size, and a certain minimum capital, fully paid in.[48]

[48]Supplement to Bulletin 8-1970 of the E.E.C., Note of Intent, 6.

Moreover, the authors of this project strongly felt that the S.E. should not have a legal form which would be more advantageous than the corresponding form under national law. Otherwise, all national companies would be tempted to choose the Community form.[49] Consequently, in order to avoid discrimination between national companies and S.E.s, the Statute provides that S.E.s will remain subject to the fiscal legislation of the state where they have their principal seat of activities or management. This would mean that the most restrictive provisions of the respective national laws would have to be included in Community law.

The Community authorities finally decided that a separate court of justice for all of Europe would be essential to provide uniform control of the incorporation of S.E.s, and uniform interpretation of the Statute. The European Court of Justice in Luxembourg will be charged with this role. It will use the general principles which inspired the Statute as a basis for its interpretation and, where necessary, refer to the laws common to all the member states. However, since these principles of interpretation are completely new to Europe, the case law which will develop therefrom is unforeseeable, and likely to create some anxiety as to the legal security it is supposed to ensure.

The main aspects of the E.E.C. draft regulation on the European company can be summarized as follows:

A European company can be founded only by pre-existing limited liability companies incorporated in at least two different member states.[50] These companies can form an S.E. by merger, creation of a holding company or a common subsidiary.[51] The minimum capital requirement ranges from $100,000 to $500,000.[53] Thus, companies incorporated in the same member state and individuals are not allowed to form a European company.

All S.E.s must be registered with the European Register of Commerce,[53] which will be a department of the European Court of Justice. This procedure renders the S.E. legally operative and excludes the possibility of later claims of unlawful incorporation.[54]

The draft Statute provides for a separaion of powers into three types of decision-making or control bodies. The board of directors is responsible for managing the affairs of the company.[55] It will be the motivating force of the

[49] *Id.*, 7.
[50] Draft Statute, Art. 2.
[51] *Id.*, Art. 3.
[52] *Id.*, Art. 4.
[53] *Id.*, Art. 8 to 10.
[54] *Id.*
[55] *Id.*, Art. 64.

company and its means of contact with third parties. When the board is composed of only one or two members, they must be nationals of member states.[56] The members are appointed by the supervisory board,[57] to which they most regularly submit reports on the company's accounts and activities.[58]

The supervisory board is entrusted with the permanent control of the management of the S.E., and makes recommendations to the board of directors. It has an unlimited right of control.[59] The members of the supervisory board are appointed by the shareholders,[60] except for representatives of the employees who are entitled to one-third of the seats.[61]

To avoid conflict with the the supervisory board, the general shareholders' meeting has limited powers of decision which are fixed by the draft Statute.[62] However, it is the supreme body inside the company, for it can take all decisions essential to the existence of the company.

Representation of employees in S.E.s can be found on three levels: the supervisory board, as mentioned above, the European works council, found in every S.E. having establishments in more than one member state,[63] and the Group works council found in every S.E. which is the dominant enterprise of a group having establishments in several member States.[64]

The need for representation of employees in each establishment of the S.E. is not disputed in any member State. Representation will ensure that the interests of the employees are taken into consideration when conditions of work are being settled. Thus, close collaboration between management and the European works committee is heavily stressed in the Statute.

The representatives are granted rather large powers. They have the right to request extensive information on the S.E.'s general economic situation,[65] and in certain areas concerning the employment relationship they have a right of veto.[66] Any differences between the European works committee and the board of directors will be settled by arbitration.[67]

[56] *Id.*, Art. 63, 3°.
[57] *Id.*, Art. 63, 1°.
[58] *Id.*, Art. 73, 1°.
[59] *Id.*, Art. 73, 2°.
[60] *Id.*, Art. 75, 2°.
[61] *Id.*, Art. 137 to 145.
[62] *Id.*, Art. 83.
[63] *Id.*, Art. 100 to 127.
[64] *Id.*, Art. 130 to 136.
[65] *Id.*, Art. 119 to 145.
[66] *E.g.*, in matters relating to recruiting, promotion and dismissal of employees, fixing of terms of remuneration and introducing of new methods of computing remuneration, etc. Draft Statute, Art. 123.
[67] *Id.*, Art. 128 and 129.

The Statute also sets forth a series of rules concerning groups of companies.[68] The underlying principle is that the individual interests of the respective companies which make up a group are generally subordinated to the interests of the group as a whole. Consequently, related enterprises are considered under the Statute as forming an "integrated group" which should be managed, to a certain extent, according to standard principles. However, where there is no effective centralization of management, group companies are authorized to question the statutory presumption in the European Court of Justice in order not to be subject to the rules on integrated groups.[69]

The E.E.C. Commission's proposal to fix standard rules for group companies can be regarded as a weak point of the draft Statute. Group management practices differ greatly from group to group. In one group the dominated companies may be very rigidly controlled, while in another they may enjoy great freedom. Strict rules in this field would thus appear somewhat arbitrary. It should be noted here that European industrialists have voiced objections to this part of the Statute more than once.[70]

Although 1973 has often been mentioned as the effective date of the Statute[71] this seems doubtful in view of the number of legal and political problems which remain to be solved. The four most important points of controversy are the following:

1) REPRESENTATION OF EMPLOYEES

Employees' participation in company management has been experienced in Germany for some time.[72] The Netherlands have just adopted such legislation.[73] Other countries, however, have adopted an extremely wary attitude toward participation.[74] which is reinforced by hesitations even on the part of their trade unions.[75]

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[68]*Id.*, Art. 223 and 224.

[69]*Id.*, Art. 225.

[70]Namely, the International Chamber of Commerce (Doc. 225/Int. 166 of January 1971), the Société Générale de Belgique ("L'Echo de la Bourse" of February 26, 1971, Brussels), the Fédération des Industries Belges (M. Huys, "La société européenne," 25 *Industrie,* 17-20 (1971, Brussels), and the UNICE (Doc. 14 A. 4/22.GA.4 of March 12, 1971, Brussels).

[71]*See* P. Sanders, *The European Company on its Way,* 8 COMMON MARKET LAW REVIEW, 30 (1971, London).

[72]Law of September 6, 1965, (1965) BGBl. I, 347.

[73]Law of April 1, 1971. *See* P. Sanders, *Participation in Dutch Enterprises,* AMCHAM NEWS LETTER, 3-6 (September 1970, Amsterdam).

[74]*See* "Proposition de société anonyme européenne," E.E.C. Commission Doc., *Etudes,* 6 *Série Concurrence,* 76 (1967, Brussels).

[75]*See* J. Van Ryn, *Faut-il instituer la société europeénne?* 82 JOURNAL DES TRIBUNAUX, 377-9 (1967, Brussels).

It can easily be understood why Germany insists on having employees' representation as part of the requirements for the S.E. Otherwise, German companies would merely have to elect S.E. status to avoid this responsibility. A solution which would take the location of the statutory office into consideration might be decided, although this compromise would not really seem to satisfy any of the parties.

2) ACCESS

In the Statute, access to S.E. status is limited to large companies, incorporated in at least two different member states, which wish to merge, create a holding company or a common subsidiary, and which possess a relatively high capital. Certain countries, France in particular, would prefer that access be open to any company which fulfills the size requirement, regardless of whether the company in question has international activities.

Furthermore, France would prefer that access to S,E, status be reserved to companies which are truly owned by Europeans, and have their management center in the Community. This position, however, was not officially defined during the preparatory work on the Statute and does not seem to be widely shared. In fact, in the Statute, even if companies which are not nationals of one of the member states cannot create an S.E., nothing prevents them from establishing an S.E. by means of subsidiaries established within the Community.

3) FORM OF THE SHARES

Italy is the only member state which does not recognize bearer shares. For fiscal reasons, it hesitates to accept the desire of the other member states to allow shares of the S.E. to be in registered or bearer form.

4) FISCAL PROBLEMS

Some member states fear that the principal attraction of S.E. status would reside in a privileged tax situation, but they have not yet formulated distinct reactions to the problem. This matter will be one of the prime points of discussion at the time of the Statute's adoption.

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In conclusion, one can see that harmonization of European company law is a challenging and wide-ranging step in the economic unification of Europe. Nearly all federal governments in the world have undertaken the same work; few have brought it to an end. In the United States, the idea of a federal company has been proposed several times, but except for certain specific forms of companies which obtained federal status, *e.g.*, the Federal

National Mortgage Association, it always met with objections from state governments and the business community.

As mentioned at the beginning of this article, company law is the basis of the economic structure of the countries of the Western world. It is perhaps not difficult to understand some countries' attachment to traditional legislation as a symbol of national individuality. However, it is of paramount importance that the gap between economic realities and legal structures be reduced to a minimum. Even more, the law should pave the way for future economic and social objectives, and this is the aim of Community legislation. By giving up their peculiarities, harmonizing their national laws, and establishing a European company, it can be said that the Community will create more than just a work of legal significance—it will greatly advance the unity of Europe.