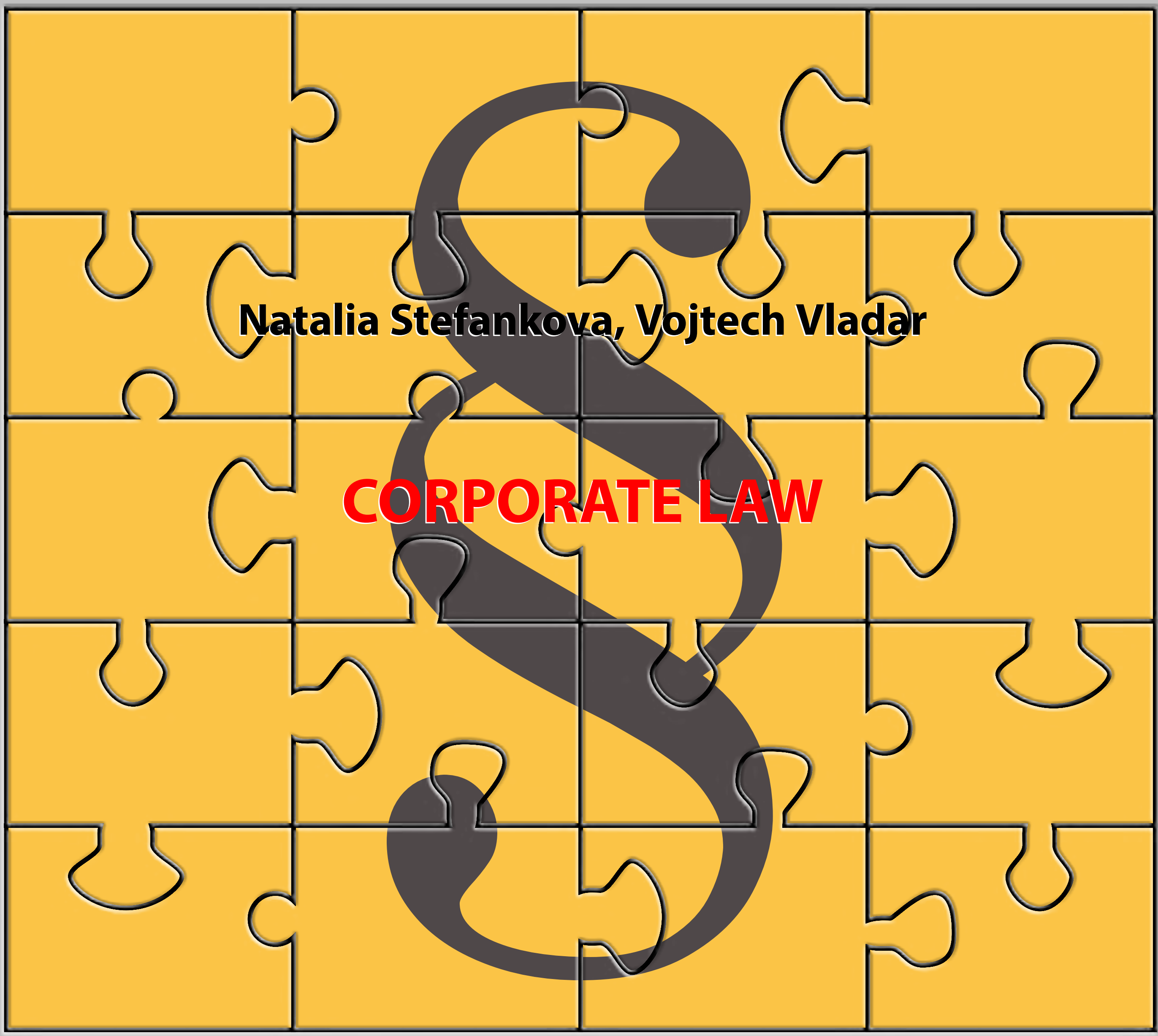
Trnavská univerzita v Trnave, Právnická fakulta

Inovatívne formy vzdelávania v transformujúcom sa univerzitnom vzdelávaní



Natalia Stefankova, Vojtech Vladar

CORPORATE LAW

Európska únia
Európsky sociálny fond

Operačný program VZDELÁVANIE

Operačný program: Vzdelávanie • Programové obdobie: 2007-2013 • Názov inštitúcie: Trnavská univerzita v Trnave, Právnická fakulta • Názov projektu: Inovatívne formy vzdelávania v transformujúcom sa univerzitnom vzdelávaní • ITMS projektu: 26110230028

Natalia Stefankova, Vojtech Vladar

CORPORATE LAW

Corporate Law

Authors:
© JUDr. Natália Štefanková, PhD., JUDr. Vojtech Vladár, PhD.

Reviewers:
JUDr. Monika Jurčová, PhD., JUDr. Marianna Novotná, PhD.

Published by:
© Trnavská univerzita v Trnave, Právnická fakulta, 2013

ISBN: 978-80-8082-724-3

Content

Foreword

A fully comprehensive, harmonised European Community company law is still a chimera. Europe, from a corporate law point of view, is more fragmented and has more borders than most non-Europeans would believe, despite the idea of the single market it should serve. The introduction of the European Company was meant to smooth the integration process and to overcome some of the obstacles that prevented companies having a European passport or operating across the various borders. By setting up this new form of company, it was hoped that a business should be able to restructure quickly and easily so as to take the best possible advantage of the trading opportunities offered by the Internal Market, and move its centre of administration without suffering some of the restrictions previously entailed.

1 Subject matter and functions of European company law

European company law is a cornerstone of the internal market. EU company law has evolved significantly over the last 40 years. The scope of EU harmonisation covers: the protection of interest of shareholders and others, the constitution and maintenance of public limited-liability companies' capital, takeover bids, branches disclosure, mergers and divisions, minimum rules for single-member private limited-liability companies, shareholders' rights and related areas such as financial reporting and accounting. Considerable work has also been accomplished on different legal forms such as the European Company (SE), the European Economic Interest Grouping (EEIG) and the European Cooperative Society (SCE).

In recent times, however, the adoption of European company law initiatives has become more difficult. These difficulties are, for example, illustrated by the lack of progress on some simplification initiatives and on the proposed statute of the European Private Company (SPE). Nevertheless, at the same time, the cross-border dimension of business has grown tremendously both from a company and from a consumer perspective.

The Treaty on the Functioning of the European Union provides the legal basis to adopt Directives harmonising EU company law (Article 50). That legal basis has been used for the adoption of Directives related to the disclosure of companies and their branches as well as the validity of their obligations and their nullity; the maintenance and alteration of the capital of public limited-liability companies; the merger and divisions of public limited-liability companies; and the single-member private limited-liability companies. It has also been used to adopt Directives concerning take-over bids, cross-border merger of companies and certain rights of shareholders of listed companies.

EU company law has been built on the basis of the distinction between public and private limited-liability companies. While some EU Directives apply to all company law forms, others focus on one type of company or the other. However, the reality has changed in the last years in particular to confer appropriate protection to public shareholders. A trend in some Member States is that public limited-liability companies are often used as legal form for listed companies while other large and medium-sized companies are private limited-liability companies. New hybrid company law forms have been designed in some Member States to grant further flexibility. Furthermore, the public-private distinction does not exist in all Member States.

Introduction: What and why is EU company law?

Why is company law important, and why does it merit more attention than 150 years ago when it was just one of the various forms of contracts? The answer is that the company is the organisational vehicle of the market economy. The days are gone when a personally-owned firm was the appropriate form for managing all kinds of enterprises. Through regulation of “legal persons”, legislators perform a double task and service in relation to economic life: they provide a solid tool, and they set limits. They protect conflicting interests and offer a conflict-saving or -solving framework. Thereby the law creates clarity and reliability, and induces market participants to create the trust without which no economic life can exist. When a company trades outside its home state, transparency and inspiring trust becomes even more central. Thus, company law is also a detailing of the fundamental principle of *pacta sunt servanda*.

European company law today stands in the midstream. There was a pause in legislative activities in the EU during the 1990’s. When the company law wagon arrived at the other side of the river, it found a landscape that had changed profoundly from what we have known for the last 120 years in Europe. Ancillary to this is that company law has evolved. That is, from something of interest only to government department specialists, a few law firms, professors, and industrial lobbyists, it has come to be a discipline surrounded by much public interest. This is underlined by the victory of the market economy during the 1990’s, by the public focus on corporate scandals, and in Europe the Lisbon process.

If we look at the developments during the last 40 years, some tendencies can be noted. The first is the increased tendency to use instruments other than directives: directly applicable regulations instead of directives, and non-binding recommendations (codes of conduct). The second is that the regulations and directives do not create a self-supporting regulatory system like the normative acts that we know from national law. Albeit the directives tend to be increasingly detailed, the subsidiarity principle (Article 5(2) of the EC Treaty) and political forces place limits upon the EU’s competencies and (thus) the quest for regulation or detail at EU level. A further limitation follows from Article 44(2)g of the Treaty, which indicates that harmonisation need not mean uniform rules, but mutually recognisable “equivalent” rules. But the market has a preference for clarity and efficiency, and thus for the use of regulations.

The decisive factors driving future EU company law are - the split between companies formed under EU law versus national, harmonised law, - the arrival of securities law in massive force,

- the rise of good governance questions, and
- the deregulation-reregulation trend for private companies.

To this should be added that some company law areas are covered by leges speciales, e.g. in financial services, energy, and transport. This is mirrored in EU law. Especially on financial enterprises the body of detailed directives is on the increase.

The EU’s efforts primarily target public and private limited companies. “Other” entities, legal persons and bodies corporate such as associations, cooperatives, associations, and partnerships are – rightly or wrongly – deemed less central to ever-closer integration in the EU. And certainly harmonisation would be more difficult due to larger differences in legal traditions than is the case for public and private companies.

What does company law deal with?

The 1980 Rome Convention on the law applicable to contracts describes company law in Article 1(1)e as follows:

"Questions governed by the law of companies and other bodies corporate or unincorporated such as the creation, by registration or otherwise, legal capacity, internal organization or winding up of companies and other bodies corporate or unincorporated and the personal liability of officers and members as such for the obligations of the company or body". From Article 44(2)g of the Treaty we learn that the rules should aim to protect creditors and third parties. The ECJ, on the publicity rules, has stated that these terms comprise all interested parties (Daihatsu, case C-96/97, 4.12.1997, and Commission versus Germany, case C-191/95, 29.9.1998)

Historically, company law protected shareholders and creditors, and clarified the competences of company organs. During the period 1930-90, minority shareholders (investors) came more into focus as the target of protective measures.

But the law also considers the "general interest", i.e. the public's interests, especially through publicity rules. Employees, too, benefit from modern company law, either by receiving special information, or by participating in the company's decision-making process.

Company law serves economic or industrial policy. The rules on reconstruction (merger, splitting, reorganisation, liquidation) should be read in that light. The same applies to group law (Konzernrecht) which treats a group of linked legal persons as being economically one unit.

Many of the rules also benefit the public policy interest at large, including the taxman and the financial press. In the case of quoted companies, the publicity rules of company and securities law consider the interests of market participants. As markets integrate, e.g. by international Stock Exchange mergers and by increasingly applying international standards on accounting, financial reporting, and clearing and settlement, the protected public and market is no longer just the national market, but the global market place. Major corporate scandals in the USA and EU at the beginning of our millennium demonstrate that breaches of company law can cause shockwaves in the global market economy.

In the present world of capital mobility, the law has become what can be called a competition parameter and a service to industry. A good and practical company law can attract companies. Sadly there are also countries that attract by bad laws – but in the EU area there is a qualitative common minimum standard at a rather high level thanks to harmonisation.

During the last decade, company law has become central in the debates on business ethics. This may become more emphatic and impact both contents and form of company regulation.

Companies or legal persons are classified in various ways. The starting point in EU law is Article 48 of the EC Treaty:

“Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

‘Companies or firms’ means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.” This is a very broad definition. We need to define which companies and bodies can benefit from the Treaty’s rules on establishment and services.

Article 48 is described in all books on establishment and services law, to which we refer. Only two features are mentioned here. The first is that profit-making means the same as “normally provided for remuneration” in Article 50 of the Treaty.

The second is that all member states have kinds of companies unknown elsewhere. They may not mean much in economic life, but they make it impossible to create a unified EU picture. Thus it is not decisive whether an entity is a “legal person” or not. In continental law the distinction between entities without or with legal personality traditionally played a big role, see also EC Treaty Article 281, under which “The Community shall have legal personality”.

The German partnership (OHG) does not have legal personality. Inversely, in Nordic and Common law this is regarded as a practical matter best dealt with ad hoc by the courts.

Outside recognition under Article 48 falls a mere economic entity. Thus, a group of companies (koncern) or a public department running an important public service cannot benefit from Article 48.

In practice, a variety of companies, bodies, and entities, corporate or incorporate participate in economic life. Most basic structures are common to all Member States.

The most practical distinction is companies with and without limited liability. In limited liability companies, all shareholders have their responsibility limited to the amount subscribed, but the regulatory approach varies between public and private limited companies.

It is difficult to define a private company otherwise than as a non-public limited liability company. The clearest difference from the public company is that the private company cannot solicit investments from the public or an undefined, wide circle of persons. Typically, the private company will have only few shareholders, who otherwise know each other. Thus there is little use for investor protection, but there may be a case for more elaborate creditor protection than for the public company.

There may be other entities with limited liability. This is the case for some economic associations and co-operatives. There are also commandite partnerships where one class of associates has limited responsibility, while the other class has full responsibility (but may itself be a limited liability company). Full personal liability is found in partnerships, be they civil or commercial, and in a number of associations and co-operatives. On this basis, companies could also be classified into personal and capital companies. This distinction is used in the directive of 1969 concerning indirect taxes on the raising of capital.

In future we may need to split the descriptions of limited liability companies into segments such as:

- National public companies.
- European (public) companies.
- European and national companies quoted on a regulated market.
- One-man private companies.
- Closed private companies.
- Other limited liability companies.
- Mother companies of group of companies.
- Companies under specific regulation by e.g. energy, financial services, or transport law.

As private and public limited liability companies are most important to the economy, and from the outset had basic “equivalence” from one member state to another, EU directives and the regulation on the European public company (SE, Regulation 2001/2157) concentrated on these. Outside limited liability companies, the EU has adopted two regulations on the European partnership (EEIG, 2137/85), and on the European co-operative company (SCE, 1435/2003).

There are basically two ways to structure statutory national company law. The method mostly used, even in countries with a code tradition, is a statutory act for each form of company. Outside this may be acts on specialised or horizontal matters such as registration, groups (konzern), reconstruction, and merger.

Another tradition is that of a commercial code, as known in the Baltic States. Here, you may begin with generalities on definitions, registration procedures, and common rules for all commercial companies. Then follow common rules for personal companies, and specialised ones for partnerships and commandite partnerships, common rules for capital companies and specific rules for public and private companies. The code finishes by horizontal rules on merger and other reconstruction, and on groups. Theoretically this can give a very coherent law. But it may be difficult to master and apply a comprehensive, intellectual rigour and to ensure coherence in every detail, and such slips in drafting may lead to contradictory provisions. This may also lead to regarding the various economic associations and co-operatives that lie outside the code, as something more marginal than their economic importance would justify.

Under the 4th, 7th, and 8th directives, Member States have taken annual accounting and auditing out of the company law framework. This tendency will be more obvious in the coming years, as more of this area will be regulated on the basis of international standards, especially from the International Accounting Standards Board (IASB)2 and the International Federation of Accountants (IFAC).

It is important to stress that the distinctions of 3.3 to 3.5 do not in themselves tell us much about the actual regulation of companies. They are primarily relevant for legislators and authors of textbooks who have to delimit their subject matter in a practical way. In future, a further difficulty for classification will be how to include companies created under EU regulations (SE, SCE, EEIG).

Many tend to forget that a company is basically a contract, and that the core of company law is private law. This is probably due to the large volume of today's normative acts on company law, and the active role of the Register in many Member States, including the Baltic and Nordic states. The first document is the constituting contract, and until the registration the company is just a contract.

Therefore the method for interpreting company law is that of contract law and not of public law. This applies also to company law rules in financial legislation. Banking and insurance acts are laws, which supplement the normal company law in areas where more is needed: constitution, capital adequacy, public control, and dissolution procedures.

Therefore it is healthy and correct when Article 3 of the Latvian Commercial Law reminds us that company law is intrinsically linked to the civil law area. The EU has added a further dimension. The general principles of EU law, and eventually of unwritten EU company law, will in future be added to the tools of European company lawyers.

Interstate company law must deal with a further subject: Which foreign companies it will or must recognize, i.e. permit before its courts and public authorities, and licence to exercise economic activities. In practice, there are three areas of recognition problems:

- Recognition of the existence of the legal entity and its right to take part in litigation,
- Recognition of its chosen legal form under home state law by the host state as equivalent to corresponding national forms, and
- Licence to engage in economic activities.

The first part, recognition of existence was to be provided in part from Article 48, in part from a convention to be concluded under Article 293. Under classic private international law this was a complicated topic. It constituted a major interest for legal scholars, and also a practical problem or barrier. For many years legal theory did not sufficiently take into account that Article 48 could be declared directly applicable, as we shall see with the Ûberseering case, cf. 4.9. A convention under Article 293 is no longer needed. In practice, this means that the "incorporation theory" of the UK and

Netherlands, and the corresponding "registration theory" of the Nordic countries prevail. A company exists if it has been registered in a public register, or otherwise incorporated under the laws of a Member State.

The second part, recognition of the home country company form as equivalent, arises because many laws limit access to certain trades to some defined forms of companies (typically, public and private companies, and cooperatives).

For public companies, the problem is minor. In the EU they are, due to tradition and harmonisation, essentially equivalent. For private companies, the variations are bigger, even on core questions. This formed the background for the Centros – Inspire Art decisions, cf. 4.9. The Centros case was about the huge difference in capital requirements in the UK and Denmark. The ECJs results can be summed up as follows:

- It cannot be presumed that Member States with "lenient" rules have substandard rules that could justify host countries in applying supplementary rules or refusing recognition of the form of company chosen under home office law.
- It is presumed that Member States have decent and equivalent laws. For other forms of companies, equivalence may be a bigger problem. However, in applying the SCE Regulation Member States must recognise cooperatives of other Member States.

The third part concerns foreign companies' access to and exercise of commercial activities in a host country. There is a widespread desire to try to apply host country law. The reasons given are to ensure a level playing field for competition, and to protect creditors, consumers, and the taxman. It is striking that the liberal countries Denmark and Netherlands used the same language in Centros and Inspire Art, as did the more restrictive Germany in the Überseering case.

EU establishment law permits this when the host country can justify it, and demonstrate that it is proportional and not realised by home country law. But it becomes a company law problem when the host country tries to realise this not by commercial regulation, but by applying in part its company law to a company governed by another company law. To run a company under 2-25 company laws evidently does not make sense. Thus the justification must be very convincing.

Trying to generalise, the Court seems to say that - harmonization, be it by EU normative acts or in any other way, and the possibilities of Member State cooperation must be taken into consideration, and a Member State wanting to impose its own law on the top of home company law has the burden of proof.

In retrospect a philosophical question arises: Why did it take so many years to arrive at this point, considering that this concerns fundamental rights under Articles 43 and 48 of the Treaty and Article 15(2) of the Charter on Fundamental Rights, and considering the right of due process of law under Article 6(1) of the European Human Rights Convention?

2 The sources of European company law

At the outset we must bear in mind that even without harmonisation, Member States' company laws have much in common, beginning with the heritage of the medieval trading systems. The problems of a company, especially of limited liability companies, are by their very nature alike in Member States, and there are not many solutions possible. The fact that the vantage point of this paper is EU law, should not make us forget the historical importance of the statutory company acts of some Member States such as France and Germany whose laws inspired most of continental Europe.

The legal history of Europe shows parallel developments in national company law, at the beginning of the 20th century, in the 1930's, the reform wave in the 1960's, which gave many states a modern starting point for their negotiations in Brussels, and the deregulation wave for private companies in the 1990's. The reforms in Eastern Europe during the last ten years constitute a further wave.

Thus from the outset there was much common ground. The biggest differences stem from links to the core civil law and the general legal system of the Member States. Only now is EU harmonisation beginning to penetrate into the general body of civil law.

The Treaty of Rome adds to this a double message of harmonisation and mutual recognition.

Historically, the mutual recognition track was first explored. But it ran out of steam around 1970, and is now overtaken by solutions from the ECJ.

The second track is harmonisation under Article 44(2)g by directives in order to protect creditors and third parties, by making protection "equivalent" – not identical – under national laws. The first directive was adopted in 1968, but harmonization had a "political" pause in the 1990's.

Originally the use of regulations or EU law-based companies was not foreseen. But discussion on the use of regulations had begun already in the mid 1960's, based on the use of Article 306. By the 1960's it was realised that the transposition of directives into national law caused considerable varieties in text and interpretation, and that regulation-based EU partnerships, EU public companies, and eventually an EU co-operative seemed more workable in cross-border relations. The saying of those days was that instead of repairing old houses by harmonisation we should build new ones by regulation.

Even though we speak in this paper about EU company law, it is important never to forget that the EU company law system is not – at any rate not yet – a self-supporting system in the way of national company law systems. You may compare the two systems to a semi-detached house – independent but intrinsically linked.

EU law has a double function. First through harmonisation it "equalises" the essentials of national laws in order to facilitate creation of the Single Market with an equivalent protection of shareholders, creditors, and third parties, including society at large. Second EU law works not only by harmonisation rules, but also through the ECJ's doctrines on loyal implementation and interpretation, and on the rank of EU law as lex superior and direct applicability. This means that to the company law directives and regulations must be added the role of the directly applicable provisions of the Treaty.

It is due to these functions – which create a kind of container or framework for national laws - that EU company law can qualify presently as a system. Remaining with the semi-detached house picture, EU law elements are found both as part of the structures, as well as throughout in the national house. EU law has a third role, in the scientific study of company law in Europe. It tends to help us Europe-wide to use language, definitions, and systems that are more alike than generations ago.

The picture may change, as regulations on European public companies and co-operatives become operational. This means that the double house is extended into a triple house. Thus EU law will increase visibly. But the national house still stands, and as EU law is found around in the national house, so is national law in the new EU house because the regulations contain on many matters a renvoi to (harmonised) national law. The difference between the older parts and the new house is that through the SE and SCE, EU company law becomes a system in its own right.

With this in mind, we can turn to the various sources of law by which the European Union strives to impact company law in Europe. By far the most important source of EU company law are the directives and regulations.

The first wave of harmonisation

The achievements of the EU in harmonisation are listed in Annex 1. The 1st directive was adopted in 1968, the 10th and the 13th directives in 2005. Eight date from the period 1976 to 1989.

In a political and historical perspective, this is a remarkable accomplishment. Some of their good consequences merit highlighting. First of all, legally-technically the directives are of good quality. In those days, as company law was lawyers' law of little political interest, the directives were well-prepared by, and reflected the opinio communis of the greatest names of Europe's universities, and the wording was lovingly cared for in the working groups.

Second, the directives meant a convergence not only in substantive law, but also in general legal thinking and terminology. Third, they caused Europeanization of research and publishing. In government offices, in law firms, and universities all over Europe, the basic text was the same. Increasingly, textbooks and Lehrbuecher and other research refer to the supranational legal framework. And with the Wise men's Report, the problems, the language, and the solutions tend to become Europe-wide.

Fourth, the directives also meant progress and improved protection. Several countries might claim to possess the world's best law. But when the 4th directive on annual accounting was adopted in 1978, it undoubtedly modernised all laws and brought EU legislation to the forefront of modernity world-wide. Over the years, the degree of detail in directives became visibly greaterand the preambles have grown manifold.

There are many reasons for that: We know each other better, we dare to go further. But when directives permit more than one method, it requires details to ensure that the methods are really equivalent. The eight articles in the 2nd directive on own shares may serve as an example.

(The short alternative was to forbid own shares, but that is not politically feasible. Today a more liberal alternative may enter the own share rules). But the increasing degree of detail also underlines that the Treaty and the ECJ allow the Council a wide discretion in judging what "equivalence" might require.

To this may be added that the ECJ in its first company law case insisted that directives must be implemented even if the changes were not foreseen when adopting the directive, and even if it might cause major practical consequences (in casu amending and re-registration of statutes), Case 32/74, Haaga, 12.11.1974.

From this period came only one small regulation from 1985 on European partnership – of modest practical implications.

In order to understand the harmonisation process, it is also important to ponder the proposals that failed and are (still) not adopted:

- Convention 1968 on mutual recognition of companies
- the proposed 5th directive on the structure of public companies.
- a draft 9th directive on material group law – konzernrecht.
- the first proposal for a 13th directive on take-over bids.

The three directives failed, principally because European industry did not like them. The most visible failure was the 13th directive that fell in Parliament in 2002 on a draw 273-273. It fell on a mixture of hostility from industry and the German government, because it wanted to do away with all the protective national mechanisms against so-called hostile takeover bids (such as "poison pills"). A slimmed-down directive was adopted in 2004. However, in a company law context the failure of the 5th and 9th directives is more conspicuous, because their subject-matter was an ambitious regulation of subjects that are considered politically important and belong to company law's core, notably shareholders' rights.

Normally the shelving of the 5th directive is attributed to a failure to resolve conflicts around the one-tier or two-tier management systems or employees' co-gestion where all wanted their own system or no system. But in the SE regulation they could be resolved. The fight against, e.g., multiple-vote shares and poison pills, and fairness to even small shareholders was equally important in the political evaluation.

The 9th directive was never formally proposed. The idea was to treat a group of companies as if they were they one enterprise, thus according protection to the whole group's creditors and minority shareholders. This is law in Germany and in Latvia, but there is a solid criticism of such formalistic solutions.

The directives of the 1970's were written for a stable world, where frequent politicised changes, and penetration of US ideas, appeared unlikely. In the 90's it became increasingly discussed whether the method hitherto used for harmonising needed rethinking. The Lisbon process, adopted by the European Council in 2000, affirmed that commercial law was important in the modernisation process. Company law had become a growth tool and a competition parameter. There was, however, also the question whether we did the right things and in the right way, because in the USA problems are solved differently.

All this was highlighted when the 13th directive on takeovers fell a year later in Parliament, whereas declared political will pushed the European Company – the SE – to the statute book.

The Commission reacted by creating a group of independent experts, mostly professors, the so-called "Wise Men's Group" or "de Winter Group". Upon its report of November 2002, the Commission in May 2003 presented an action plan for "modernising company law and enhancing corporate governance".

Corporate governance and the harmonisation measures of recent years

Note that the headline does not refer to directives of recent years, because regulations and non-binding soft law (incl. codes of conduct) play equal roles. The recent harvest of adopted rules consists of:

- a renewed 8th directive on accountants 2005.
- the 10th directive (international mergers), 2005.
- the 13th directive (takeovers), 2004.
- the European public company regulation (SE), 2001.
- the European co-operative regulation (SCE), 2003.
- the regulation on accounting in quoted companies, 2002.
- the two Commission recommendations on auditing, 2000 and 2002.
- the two Commission recommendations on directors, 2004.

The first observation is that directly applicable regulations are gaining ground. The SE and SCE regulations are spectacular achievements. Business finds it increasingly difficult to live with the implementation delays of directives or varying national methods of interpretation and implementation. Comparing the 350 articles of the SE drafts from the 1970's with the final regulation of about 100 articles, the difference is striking. In the 1970-drafts little was left to national laws and the company statutes. Outside constitution questions, the regulation has fewer rules than any known public company law. Instead the regulation refers either to the public company law of the country of registration, or to the statutes of the company.

Many see this as surrender to national law. However, this is only partly the case, because - national law has been harmonised through directives and ECJ jurisprudence, and - the law for quoted companies is further harmonised by the securities directives and international accounting and reporting standards. But the regulation also heralds a resurrection of the autonomy of the parties and to flexibility, because

- the parties can choose any of the 25 Member States as the registered seat, thereby also choosing their company law,
- the reference refers to the national public companies act as it stands for national companies. This implies a prohibition on issue of special rules for the SE, unless the regulation so authorises,
- the parties can choose between the two permissible management systems: the one-tier (UK) system or the two-tier (German) system, and
- the regulation accords formally and in reality a role to the statutes of the company.

Regulation 1606/2002 on accounting standards for quoted companies transfers the substance of legislative power on accounting of quoted companies to an international body, the International Accounting Standards Board (IASB), an association of national auditing associations of a number of countries – and under considerable pressure from the US standards (GAP) and the US administration. The EU legislative role is reduced to the Commission's right to veto a standard, as was the case on IASB 39 where banks persuaded the Commission to not make that standard mandatory in the EU. But we also saw that this creates problems for the EU in the global market.

To future historians, the most important development of recent years will be the corporate governance discussion. In the UK, the market is familiar with non-binding codes on best practice, and has a consultative body to oversee it, whereas it was an unfamiliar regulatory tool to continental thinking. The code idea therefore has changed the way in which Europeans think on company law regulation.

The first "formal" text in Europe was an OECD recommendation from 1999. Most member states have adopted a local code or codes. In Denmark the code was made by a private working group, but with the assistance of the Companies Registry and the Copenhagen Stock Exchange. And so will it be in Latvia where the code is a project of the Riga Stock Exchange, not the financial supervisors, nor even involving the Enterprise Registry.

The codes on corporate governance supplement the law on what should be the practise in decent and efficient companies on:

- Composition of the board - internal versus external members, and expertise versus "names".
- The role and work of the board, including the need for committees on remuneration, appointments, and auditing.
- The role of major and institutional shareholders - should they have and publish a policy on the way in which they intend to manage their investments?
- Remuneration of board members and directors.
- Transparency and conflicts of interest.
- Policy on risks, acquisitions, and own share programs.

Behind this lurks a core policy choice: In whose interest do we run the company, or how much can we accommodate other interests than shareholder interests? It seems that today more focus is accorded to the role and interests of the owners, i.e. the shareholders. But interests other than short-term interests fed by the daily stock exchange index should also be taken into account. The codes cannot be sanctioned in the same manner as normative acts. But they have the important principle of "explain or comply", and the financial press will be instrumental to sanctions from the market. In the long term, the codes will also impact the standard of bonus paterfamilias behaviour in contractual and tort liability. Till recently, no EU initiatives were planned. However, in 2004 the Commission became active in the corporate governance discussion. This led to the issue of the two recommendations on directors' remuneration and independence.

But the Commission went further by proposing to amend the accounting directives (4th and 7th dir) to enhance confidence in financial reporting. Board members should be collectively responsible for financial statements and key non-financial information. All companies must provide full information about off-balance sheet arrangements, including "Special Purpose Vehicles" which may be located offshore. Unlisted companies' transactions with related parties should be more transparent. And listed companies should issue an annual corporate governance statement, i.e. "comply or explain".

With this, and with the IASB and the OECD – and in future eventually the WTO - as central participants, the sources of company law and their interpretation now reside with authorities under varying jurisdictions, procedures, and interpretation principles. Thus the law has become polycentric.

Securities law

The accomplishments of recent years cannot be evaluated without including the securities area directives. Some of these rules, e.g. on major shareholders, could also be classified as company law, and are issued under Article 44(2)g of the Treaty. Others are more related to the regulation of the market. There is no general principle which in case of conflict with company law gives priority to securities law (or vice versa).

But it merits highlighting that securities law has impacted the extent to which the law protects shareholders. Earlier on, company law protected two types of shareholders rights:

- Administrative rights, meaning the right to attend the general meeting, to take the floor and to ask questions there, to submit proposals, and to vote, and
- Economic rights, such as the right to dividends, new issues of free shares, preferential subscription rights.

The focus of securities law is upon the protection of the shareholder in the regulated market, including the prospective shareholder. But this also changes the way in which company law looks upon these questions. Securities law extends the notion of shareholders' equality to their dealings in the regulated market. The 13th directive on takeover bids makes a single share of equal value with shares forming part of a majority holding.

Legislation of the present falls into two distinct groups. The first is reforming and completing the existing normative EU acts. The politically most important recent initiative is the new 8th directive, expected during 2005. The accounting scandals in the USA and EU (Enron, Tyco, Ahold, Parmelat etc.) revealed a number of problems in the regulation of the accounting profession, and also demonstrated that fallible accountants form a threat to the world economy. Public supervision, and the requirement of life-long learning and regular post-graduate upgrading may become a legal obligation. The Council in 2005 should adopt the 10th directive on international mergers, completing the 3rd, 6th and 13th directives.

After this, there is not much in the pipeline on formal rules. The draft regulation on economic associations is still pending before the Council. The Commission is working on a 14th directive on "change of legal form" (German: Umwandlung). This would be a natural initiative after the adoption of the 10th directive on cross-border mergers. These measures are related to the Lisbon process.

The second group concerns initiatives that can, in the medium term, totally restructure the means and ways of company law. The two great reforming tasks before us now concern corporate governance and capital requirements.

For decades, company law cases were extremely rare. But during the last 10 years, the Court of Justice became an important player in company law regulation. Some lacunas left by legislation have been filled in by the Court. The four judgments described in the following can illustrate this. They all fell like a bomb into national law.

The most innovative of these cases is Centros (C-212/97, 3.3, 1999). In the early 1990's, the capital requirements of the Danish private companies act were drastically increased. A private company would require about 27.000 Euro fully paid-up, before the company could be registered. Some Danes, in order to avoid this, constituted the UK private company Centros, which under UK law only required about 20 Euros, and whose declared objective was to do business in Denmark. They then asked the Danish companies register to register a branch of the UK company. The Register refused, citing the reason that the company avowedly wanted to avoid Danish law. The Court found that the company Centros was legal under UK law and thus entitled under Article 43 of the Treaty to have a branch in any other Member State. That the UK capital requirements differed from the Danish ones, did not qualify as a public policy exemption.

The Danish government further submitted that, as there was an uncontested intent to avoid Danish law, to require that the UK company also followed the Danish private companies act should be construed as a "purely internal Danish matter", and that Danish law was required to protect creditors and the taxman. (The latter argument was not recognized by company experts in Denmark.) The ECJ rejected them as disproportionate, as there are many other and better ways to protect creditors.

The Inspire Art (C-167/01, 30.9.2003) followed up Centros in a case on Dutch law: "The reasons for which a company chooses to be formed in a particular Member State are, save in the case of fraud, irrelevant with regard to application of the rules on freedom of establishment. The Court has also held that the fact that the company was formed in a particular Member State for the sole purpose of enjoying the benefit of more favourable legislation does not constitute abuse even if that company conducts its activities entirely or mainly in that second State. … the fact that a company does not conduct any business in the Member State in which it has its registered office and pursues its activities only or principally in the Member State where its branch is established is not sufficient to prove the existence of abuse or fraudulent conduct…."

The SCE Regulation illustrates that the way of thinking of the ECJ is applied also by the Council. Whereas the SE regulation refers to a well-developed body of national law with a basis in written normative acts - the rules for national public companies - the reference in the SCE regulation Article 9 to "as if it were a cooperative, formed in accordance with the law of the Member State in which it has its registered office" is theoretically clear, but practically ambiguous. Some countries have statutory law, but not so well developed as public companies laws. Some countries, e.g. Denmark, have only unwritten law, which must be recognised in all Member States.

Überseering (C-208/00, 5.11.2002) concerned an old way of denial of justice disguised as a question of private international law. According to continental case-law and long-standing legal theory, a company's legal capacity was determined by reference to the law applicable in the place where its actual centre of administration is established (siège réel), as opposed to the incorporation principle, by virtue of which legal capacity is determined in accordance with the law of the State in which the company is incorporated. The siège réel rule also applied where a company had been validly incorporated in another Member State and had subsequently transferred its actual centre of administration to Germany.

The company Überseering acquired a piece of land in Germany, which it used for business purposes. By contract Überseering engaged a company to refurbish some buildings. Überseering subsequently claimed that the work was defective. However, the German courts held that as a company incorporated under Netherlands law, Überseering did not have legal capacity in Germany and, consequently, under German law it did not enjoy rights nor could it be the subject of obligations or be a party to legal proceedings unless it had been reincorporated in Germany.

Until the ECJ declared Treaty Articles 43, 49 and 50 directly applicable in the 1970's, it was thought that this could only be changed by a convention under Article 293. Such a convention was agreed in 1968, but failed to be ratified.

However, the General Program on Establishment adopted by the Council in 1961 specified the right to be a party before the courts as part of that freedom. The Court stated:

"A necessary precondition for the exercise of the freedom of establishment is the recognition of those companies by any Member State in which they wish to establish themselves. Accordingly, it is not necessary for the Member States to adopt a convention on the mutual recognition of companies in order for companies meeting the conditions set out in Article 48 EC to exercise the freedom of establishment conferred on them by Articles 43 EC and 48 EC, which have been directly applicable since the transitional period came to an end. It follows that no argument that might justify limiting the full effect of those articles can be derived from the fact that no convention on the mutual recognition of companies has as yet been adopted on the basis of Article 293 EC."

The Golden shares cases, C 367/99 (Comm. versus Portugal), C-483/99 (Comm. versus France) and C-503/99 (Comm. versus Belgium), all dated June 4, 2002 set limits upon shares with special rights. Such shares make it possible to retain control of certain aspects of an ex-state enterprise that has been formally privatised.

In the Belgian case, Belgian law entitled the government, in the case of two energy enterprises, to use its "golden shares" to oppose: - any transfer, use as security or change in the intended destination of lines and conduits or of certain other strategic assets, and - second, certain management decisions regarded as contrary to the guidelines for the country's energy policy.

The Commission considered this a restriction on the movement of capital between Member States. The Court set out the limits for Member States as follows:

"It is necessary … to ascertain whether the legislation in issue enables the Member State concerned to ensure a minimum level of energy supplies in the event of a genuine and serious threat, and whether or not it goes beyond what is necessary for that purpose.

First of all, it should be noted that the regime in issue is one of opposition. It is predicated on the principle of respect for the decision-making autonomy of the undertaking concerned, inasmuch as, in each individual case, the exercise of control by the minister responsible requires an initiative on the part of the Government authorities. No prior approval is required. Moreover, in order for that power of opposition to be exercised, the public authorities are obliged to adhere to strict time-limits.

Next, the regime is limited to certain decisions concerning the strategic assets of the companies in question, including in particular the energy supply networks, and to such specific management decisions relating to those assets as may be called in question in any given case. Lastly, the Minister may intervene … only where there is a threat that the objectives of the energy policy may be compromised. Furthermore, … any such intervention must be supported by a formal statement of reasons and may be the subject of an effective review by the courts. The scheme therefore makes it possible to guarantee, on the basis of objective criteria which are subject to judicial review, the effective availability of the lines and conduits providing the main infrastructures for the domestic conveyance of energy products, as well as other infrastructures for the domestic conveyance and storage of gas, including unloading and cross-border facilities. … The Commission has not shown that less restrictive measures could have been taken to attain the objective pursued. …The legislation in issue is therefore justified by the objective of guaranteeing energy supplies in the event of a crisis."

Although France pursued the same objective (namely, to guarantee supplies of petroleum products in the event of a crisis), the Court considered that the French rules clearly went beyond what is necessary in order to attain the objective indicated. It found that the French provisions did not indicate the specific, objective circumstances in which prior authorisation or a right of opposition ex post facto would be granted or refused, and thus were contrary to the principle of legal certainty. Such lack of precision and such a wide discretionary power constituted a serious impairment of the fundamental principle of the free movement of capital.

The Portuguese rule provided for manifestly discriminatory treatment of investors from other Member States: its effect made it unlawful under the Treaty rules on free movement of capital.

The Lankhorst-Hohorst case (C-324/00, 12.12.2002) set aside German tax law rules on "thin capitalisation", because they distinguished between groups where the mother company was also established in Germany, and other groups where the daughter was established abroad. This was different treatment contravening Article 43 on establishment. This meant that Member States must either treat foreign mother companies as well as their own, or their own as harshly as foreign mother companies. Both solutions bring further practical complications into corporate tax law. These judgements – like the regulations on the SE and the SCE – are all based upon the presumption that Member States are civilised and equally civilised states. The background and reasoning can be found in general principles of EU law. The decisions rely on the non-discrimination rules of the chapters on establishment, services, capital, and taxation. But general principles of EU law, as established by the Court, may be equally relevant. The principles of loyalty, proportionality, efficiency, transparency and equal treatment explain why national law could not be upheld. To this is added the requirement of access to legal redress. These principles must also be read into the directives and regulations.

The ECJ's principles of mutual recognition and ad hoc interpretation raise the problem known in the US as "delawarisation". A country with an attractive law has the chance of becoming the country of registration of many companies that have otherwise little relation to that country. This leads directly to tax law.

Tax law often is a major component of business strategy. Thus no description of business law is perfect without including tax law. There are many directives that affect business in the EU concerning indirect taxes, notably the VAT system. But right from the beginning company taxes attracted attention and led to Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, (OJ 1969 L 249/25). This directive has the important effect that it hinders – together with the 1st company law directive – Member States from turning registration fees into indirect taxation, see case C-198/95, 2.12.1997, Fantask.

On transnational groups there are the following three directives:

- Council Directive 90/435 of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, (OJ L 1990 225/6)
- Council Directive 90/434 of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, (OJ 1990 L 225/1).
- Council Directive 2003/49 of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, (OJ 2003 L 157/49).

These directives may contain definitions of interest for company law. This must be supplemented by three reminders. The first is that within the framework of the requirements of establishment and services law, the ECJ has taken a substantial number of decisions on discriminatory tax law during the last 10 years.

The other is that low taxes can also be a problem, as they can distort competition. This is why there is a code of conduct on corporate tax law (OJ 1998 C 2/2). Estonia is considered the biggest sinner here. Tax authorities cooperate against tax avoiders. The most important rules are:

- Council Directive 77/799 of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336/15) ,
- Council Directive 91/308 of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, (OJ 1991 L 166/77),
- Council Directive 2003/48 of 3 June 2003 on taxation of savings income in the form of interest payments (OJ 2003 L 157/38).

Is there also unwritten EU company law?

The answer to this must to some extent be in the affirmative. The reasons for this are found in the general principle of interpretation. Words and notions can basically only have one meaning, to be ascertained by the methods of interpretation of EU law. And as EU company law grows into a system of mutually dependent elements, the need for creating coherence through unwritten law increases.

The first step in this process was the Marleasing doctrine, under which there is a general duty to interpret national law in the way that is most in conformity with EU law. The Marleasing case (case C-109/89, 13.11.1990) directly concerned company law, as it was about the nullity rules in the 1st company law directive which are closely linked to national contract law.

A good illustration of the problem of one or several permissible meanings of words could be Article 6 of the 2nd directive. Under this article the shareholders must pay up their subscription. But does paid-up in common law mean the same as the French notion, requiring the capital to be “liberé”. Thus Article 6 can either mean that each Member State can refer back to its normal commercial or civil law understanding, or that there should be only one understanding, to be found by normal EU interpretation methods.

But the question becomes more pertinent in cases where the directive introduces something that is new in relation to national law before implementation of the directive. Thus the accounting directives (4th and 7th) introduced both principles and methods so far unknown in most national laws. Here, the case for one common interpretation is strong. When asked a highly technical question on group accounting, (case C-234/94, Tomberger, 27.6.1996), the Court prefaced its answer as follows:

“With regard to Article 31 of the Fourth Directive, it should be borne in mind that the Fourth Directive seeks to coordinate national provisions concerning the presentation and content of annual accounts of certain types of companies (see the first recital of the preamble). In order to coordinate the content of annual accounts, the directive lays down the principle of the “true and fair view”, compliance with which is the primary objective of the directive. According to that principle, the annual accounts of the companies to which the Fourth Directive applies must give a true and fair view of their assets and liabilities, financial position and profit or loss (see the fourth recital in the preamble to the Fourth Directive and Article 2(3) and (5) thereof)."

The real area for an autonomous EU company law may be the area of regulations, see 5.3 below. But the results of the application and interpretation of regulations may affect the whole system by a "rub off" effect.

How should we read EU normative acts

Directives and regulations on company law differ from other directives and regulations by dealing with private law matters. Interpretation methods are basically those of contract law, and not from public law.

The first group are directives which harmonise areas of "classical" company law, e.g. the 2nd directive on capital and the 3rd directive on mergers. They deal with areas that to a large extent were "common ground" for law and theory in Member States. One of the important interpretation issues will then be, whether the notions which the directives use should have one and the same meaning applicable in all Member States, or may be understood as a renvoi to the corresponding national notions.6 An illustration of one or more permissible meanings of notions is Article 6 of the 2nd directive. Interpretation is complicated by the fact that these directives cannot be classified wholly as minimum or total harmonization directives. This must be decided by interpretation of each article.

The second group covers directives that introduce a new, common system. This is the case for the accounting and auditing directives. They benefit a wider group, and introduce new principles and methods. The most important example is the "true and fair view" as the overriding accounting principle. Here arguments for a common interpretation and application throughout the EU are strong. I refer to the reflection on general principles of the Tomberger case.

The third group concerns basically the regulations. The SE and SCE regulations put the need for uniform application of notions with renewed force. By their very nature the SE and SCE are transnational companies, and may well be quoted on several regulated markets. A higher degree of unitary understanding and interpretation must be read into the SE and SCE regulations. Otherwise third parties may encounter considerable insecurity in understanding and dealing with an SE or SCE, their functionality and effect utile could be undermined, and the incentives for forum shopping and "delawarisation" would increase. A further argument for unitary interpretation comes from companies that are quoted in more than one country. It may also be that over the years the ways of interpreting a SE's statutes, constituting or shareholders' agreement, and other documents adopted by or in such EU companies will begin to differ from the interpretation applied to corresponding documents from national public companies. In those cases, we have elements of an autonomous EU company law. But often we find the same notion in directives and in regulations. This may reinforce the arguments for one, common interpretation, especially on cross-frontier company law problems. However, there are also arguments for a more nuanced approach, notably in areas where there is a need for integrating the notions into the general body of property and contract law. An example may be Article 9 of the 1st Directive on the powers of the organs to bind the company. To this is linked an unwritten exception in the form of a renvoi to national contract law on contra bonos mores. Such rules vary in scope and effects. The ECJ has accepted that unwritten (company) law on disloyal behaviour by shareholders be compatible with the 2nd Directive, i.e. applied as an exception. The practical disadvantages of this are reduced by the duty of EUconforming interpretation under the Marleasing-doctrine.

There are relatively few ECJ judgments on company law proper, and many of these decisions concern matters that are not regarded as essential questions of company law. The few books on EU company law also spend a good part of their pages on adjacent areas, such as primary and secondary establishment and security law, and tax law cases.

The starting point is the wording … If we look at cases like Haaga or the Greek reconstruction cases, it is evident that it would have been much easier if the ECJ had permitted ″flexible″ constructions in stead of giving priority to the wording. Both cases created considerable practical problems. In Haaga, German (and UK) implementation of the 1st Directive was defective. The effect could be that all companies had to amend their statutes at a general meeting and reregister the amendments. This implied costs in billions for companies and public authorities. But the ECJ stuck to its normal stance that the practical consequences cannot dilute the wording. … but should be read in a way that creates a coherent company law. This is not astonishing in cases where the EU directives aim at being a coherent system, as was the case in Tomberger. At the present stage of harmonisation, most directives on substantive company law presuppose a national framework, in which they can be implemented, and which – within the limits of the Marleasing doctrine - has its own life.

An example of permissible integration can be found in the Greek Diamantis case. Inversely, the Centros case illustrates national means that go beyond the permissible. Another of the Greek cases illustrates that company law cannot be set aside by "reclassifying" a problem, or making a lex specialis: "It would mean that, in the event that the company found itself in a financial crisis, a shareholder could never rely on Article 25(1) of the Second Directive.

Consequently, the scope of that provision would be altered, whereas, according to the case-law cited above, the provision must remain applicable in such a situation."

And the directives should be read in an EU-loyal way. This follows from the general duty to implement Articles 10 and 249 of the Treaty. This is mentioned here, because a leading judgment on the duty of EU compatible interpretation of national law (Marleasing, C-1O6/89, 13.11.1990) concerned the nullity rules of the 1st directive.

There is in this an old conflict-of-law problem: Should we enforce the law of another Member State, if that law is not compatible with EU law? General principles and Marleasing would indicate that the answer is negative, but this now also follows from

SE Regulation Article 9(2).

Sanctions

The general EU law requires an efficient and loyal implementation and enforcement of EU law. Since much company law suffers from lack of efficient remedies, especially for minorities, the question is poignant. But when the ECJ had to decide whether Germany had implemented the publicity rules correctly, it restricted itself to finding that the German rules were inefficient and thus not "sanctions appropriées". The practical consequences were left to the Member State.

In an adjacent area, the ECJ recently affirmed this restraint. German financial supervision is – since it lost a compensation case – exercised "in the public interest" only which means that private individuals have no rights of compensation for faulty supervision. On this the ECJ stated:

"… it does not necessarily follow either from the existence of such [supervisory] obligations or from the fact that the objectives pursued by those directives also include the protection of depositors that those directives seek to confer rights on depositors in the event that their deposits are unavailable as a result of defective supervision on the part of the competent national authorities. … [T]he harmonisation … is restricted to that which is essential, necessary and sufficient to secure the mutual recognition of authorisations and of prudential supervision systems, making possible the granting of a single licence recognised throughout the Community and the application of the principle of home Member State prudential supervision. … [T]he coordination of the national rules on the liability of national authorities in respect of depositors in the event of defective supervision does not appear to be necessary to secure the results described … Moreover … it is not possible in a number of Member States for the national authorities responsible for supervising credit institutions to be liable in respect of individuals in the event of defective supervision. It has been submitted in particular that those rules are based on considerations related to the complexity of banking supervision, in the context of which the authorities are under an obligation to protect a plurality of interests, including more specifically the stability of the financial system," Case C-222/02, Paul et al, 12.10.2004.

In the directives on structural adjustment (the 3rd, 6th, 10th, and 13th directives), we avoided any specification of the basis for civil liability. If we substitute the reference in Paul to systemic stability with the protection of investors versus the business freedom of management, then there appears a reasoning that does not lend much support to shareholders and investors. Thus, this must wait until general tort and contract law has been harmonised.

Inversely, the directives may more readily be invoked in cases on invalidity, nullity, and the like, due to the principle on EU- compatible interpretation. The lack of harmonisation on private law remedies can be a problem in relation to the SE and

SCE Regulations. This may encourage forum shopping, which is permissible under the Centros-doctrine. To complete the picture, a case on criminal responsibility should be added: "According to that case-law, while the choice of penalties remains within their discretion, Member States must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive". But the directive could not justify retroactive increase of sanctions, (case C-387/02, Berlusconi.,3.5.2005).

Direct applicability

A generation ago, the legal situation appeared simple. Regulations were directly applicable, and thus "implementing" them was forbidden. Directives were not directly applicable, and required implementation Today the only certainty is that regulations are directly applicable, and that member States must implement directives. Due to the slimming of the SE and SCE-Regulations, they require supplementing, be it by renvoi to national public company law, by contractual autonomy, or by the duty of Member States to add supplementary legislation.

For directives, the Marleasing case created uncertainty. Some authors argue that the requirement of EU-conforming interpretation of national law equals direct applicability. And the only example of a directly applicable company law rule, Article 25(1) of the 2nd Directive, does not clarify the overall picture:

"It must be held in that connection that that provision is clearly and precisely worded and lays down, unconditionally, a rule enshrining the general principle that the general meeting has the power to decide upon increases in capital. The unconditional nature of that provision is not affected by the derogation provided for in Article 25(2) … That individual, clearly defined derogation does not leave Member States any possibility of making the principle of the power of the general meeting subject to any exceptions other than that for which express provision is made. … The same applies to Article 41(1) … Moreover, the fact that the Community legislature provided for precise, concrete derogations confirms the unconditional character of the principle set forth in Article 25(1) ... It is appropriate therefore to answer the national court by stating that Article 25(1) of the Second Directive may be relied upon by individuals against the public authorities before national courts. " (Karella, case C-19&20/90, 30.5.1990)

It could also be postulated that the increasing detailing of directives make them directly applicable. This argument concerns especially the publicity and accounting directives. Most rules of the 4th and 7th directives are drafted in a way that could make them directly applicable. The practical counter-argument would rely upon the many rules with alternatives or exceptions that give Member States a choice, even though it may be a limited freedom:

"However, the powers of the national authorities in this regard are restricted by the Directive. First, it is clear from the primary aim of the Directive that the annual accounts must give a true and fair view … Second, it is clear from Article 42(1) of the Directive that provisions for liabilities and charges may not exceed in amount the sums which are necessary. It follows that the valuation criteria laid down by the national authorities must comply with those two conditions." (DE+ES Baunternehmen, C-275/97, 14.9.1999). Karella was a case against a state before an administrative tribunal. The general line over decades is that the directives are not directly applicable: "Since a directive cannot of itself impose obligations on an individual, and cannot therefore be relied upon as such against such a person, there is no need to examine whether Article 6 of the First Directive … has direct effect." "In the specific context of a situation in which a directive is relied on against an individual by the authorities of a Member State within the context of criminal proceedings, the Court has ruled that a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive." The developments of recent years have made accounting and reporting standards from international organisations (IFAC and IASB) a primary source on accounting and auditing. For international groups it is a must or a legal duty under Regulation 1606/2002, and for other companies it is becoming good accounting and auditing practice.

IFAC and IASB have their own interpretation principles and organs. Thus central parts of company law are under a double system, i.e. polycentric law and interpretation systems. This creates an international obligation for the EU when applying the law of this area.

The ECJ added a Frankovitsch-reminder to this: "This finding is without prejudice to the possible applicability of the principle that Community law requires Member States to make good loss and damage caused to individuals by reason of their failure to transpose a directive or their failure to do so correctly."

3 Tendencies in modern company law

The role of legislation

I begin this section by presenting two modern thinkers. The first is Francis Fukuyama of the USA. The second is Hernando de Soto of Peru. They both (in The End of History and the Last Man, 1992; Trust, 1995; The Mystery of Capital, 2002) stress the role of commercial law. Even in poor countries, there is much more capital than we envisage. There may be more dollar notes in Russia than in the US. But that does not constitute a functioning market economy. That requires trust. Experience teaches that without a coherent and functioning legal system there can be no such thing as trust. From this we may deduce that there cannot be a well-functioning market unless our society has modern, high quality commercial law, and competent, efficient, and honest civil services and courts, i.e., a functioning legal system. This may indicate that, contrary to what is taught in constitutional law, the legislator is not only the voice of the public will. It is also a service provider that should see to it that good laws, courts, and civil services exist – and are constantly revised and upgraded. For there are no possibilities of a calm, static situation. It has been said that, due to structural changes, company law is moving from entity to enterprise law.

Thus, modern company law is not just about ordering, forbidding, and sanctioning. It is primarily about ways to make "economic man" behave in an honest, transparent, and efficient way. Modern commercial law works through persuasion, consensus, and inducements, rather than relying upon the criminal code.

These tendencies are accentuated when the national legislature becomes an implementing agency of the EU, OECD, WTO, IFAC, or IASB. It becomes an essential part of the competitive advantages or disadvantages of a state in fierce competition with others. Latvia cannot legislate that a Danish enterprise should prefer Latvia instead of Estonia. And today's markets are transparent and analysed and controlled at a higher level than Member States, by the experts of big business and the investigative financial press. Some think that bad laws are an attraction in emerging economies. It may be true that the dishonest are attracted by it. But whom do they benefit? For the rest of us, both the nice and the brutal ones, bad legislation will somehow somewhere be a costly millstone. That is why a proper analysis in any business planning includes an assessment of the legal environment of a prospective country.

Soft law - Self-regulation – Transparency - Control

From this redefined role of legislation there is but a short step to discussion about soft law and self-regulation. From a theoretical point of view, we might believe that increased use of soft law went hand in hand with a wider application of self-regulation. But in thecase of the auditing profession, scores of accounting norms are IASB or IFAC standards, completed on professional independence and quality by two Commission recommendations. However, enforcement requires the state to become implicated in the process by mandatory supervision.

There are several ways to look at this. Provided the law be good, it does not matter who issues it. But it does matter that it is properly enforced. In Europe, only the states can ensure full enforcement. Furthermore, enforcement enhances the transparency without which efficient competition, the crux of the well-functioning market, cannot occur.

Inversely, it seems to matter less whether soft law codes are national or international, private or public. What matters is the quality, the enforcement, and the capacity to update it at regular intervals. Experience shows that the chances of high quality are about the same. National fora may have an advantage in speed, but may be outweighed by the disadvantages of parallel national standards, and thus constitute an added cost.

The next decade may present us with problems when it comes to interpretation methods and interpretation mechanisms, because the forum for, and methods of, interpretation vary between a state, the EU, OECD, IFAC, and IASB. In future company law there are elements from all, working in parallel. This creates a kind of legal jigsaw called polycentric law.

There is yet insufficient experience of how this may work. The job of creating an intellectual order and a legal system out of this becomes the duty of the legal profession and the universities of the next decades.

Autonomy of the parties versus legal economy

When we look at the mass of mandatory law, we may say “yes, but”. But there are tendencies towards more contractual autonomy in modern company law. This answers two practical questions: First, how many imperative rules should we issue? Second, should we try to assist the parties by giving rules from which the statutes may deviate, i.e. helping the draftsmen if they forgot something, and freeing them from inventing statutes of hundreds of articles. This is a core argument of the advocates of legal economy.

Until the 1990’s the tendency was that the number of mandatory rules was on the increase. But this levelled off due to a change in the attitude to the needs of business.

The change is illustrated by the SE regulation. It leaves much to national law, but there is also room for deciding issues by the shareholders in the statutes. This is especially important for a company that is by nature multinational.

However, in practical terms, contractual autonomy becomes especially important in legislation on private companies. The legislator must ask itself whether it be likely that the legislature is able to foresee the presumptive needs of such business in greater detail, as there are several types of private companies:

- The one-man.
- The two-man.
- A small active group.
- Both active and passive participants.
- A big private company.

How can a statutory, normative act provide a solution to all these? And how can the written law cope with the need for rapid changes? Furthermore, contrary to public companies there is less need to protect (passive) investors. That is why there has been a tendency to reduce the number of mandatory rules in private companies' acts and concentrate on protection of creditors and society, especially stricter rules on capital insufficiency. The rest, the internal conflict solution rules, must be provided for by the statutes or shareholders' agreements.

This imposes a delicate burden of care upon lawyers. Old standards or paradigms must be reworked, and the problems relating to shareholder agreements need to be rethought. When persons from several cultures and various legal systems join up, a clearer solution on many issues should be spelled out, and when it comes to shareholder agreements it is important also to ponder that as a contract it should or can follow another law than the law of the country of registration.

Auditing and accounting regulations

Traditionally, rules on auditing and accounting of companies would be found in the companies act. But under influence of the voluminous 4th, 7th, and 8th directives, combined with a new perception of the nature of the subjects, they have been taken out for special legislation. Two recent developments have underpinned this development. One is the major scandals in the EU and USA. This has changed enforcement from purely private to public control of the annual accounts of quoted and major companies, and of the professionals (chartered accountants and similar professionals). The other is the arrival of international standards from IASB and IFAC. At the same time there has been an internationalisation of the major accounting companies.

The first EU security law directives date from the late 1970's. Since then the EU and national securities regulations have seen a massive growth. One of the consequences of this is a shift of emphasis. Securities law protects prospective buyers of shares, the intermediaries, and the market as such. As the takeover directive demonstrates, we now also protect shareholders' rights in the market place, i.e. acting outside and independently of the company framework.

Part of security law deals with publicity and transparency. This adds to the normal company law rules, including accounting and auditing. But some rules, such as the takeover requirement of the same price for a dominant block of shares and a single minority share, affect central company law concepts. Therefore the interface between company and securities law is a legal nomans' land with two competing regulators. In a recent Danish case, a buy-back obligation under the own shares policy conflicted with insider rules. And the question became a grave one: Was it a criminal abuse of insider knowledge that would send the bank's directors to jail for some years, or was it a loyal fulfilment of duties under contract and company law.

Financial supervisors normally possess sharper legal enforcement instruments. But it cannot be stated in general terms what will be the result of the lex generalis versus lex specialis principles between company and securities law. That must be decided on an ad hoc basis. The ECJ has held on several occasions that the procedural requirements of the 2nd directive must be observed in the case of restructuring of financial enterprises, see cases C-441/93 Pafitis, 12.3.1996 and C-367/96, Kefalis, 12.5.1998. These cases and the golden share cases (cf, 4.9) may indicate that other areas of law (energy, financial, or transport) cannot totally denaturize companies in such a way that they cannot function as private corporations.

Group law

Group law consists of material group law and accounting rules. It deals with a linked group of companies, dominated by a mother enterprise, as one economic entity. The most important economic and legal consequence of a group is that the consolidated accounts become of more interest to readers than the individual companies' accounts, because they present the true and fair economic situation after elimination of internal transactions. Group accounting under the 7th directive of 1982 is a complicated operation. It is further supplemented or superseded by the IASB standards. Under the revised 8th directive, group accounting will get formal primacy over individual companies' accounts. Group construction could also have consequences for the legal situation of creditors and minority shareholders of dependant companies. However, the extent of such "material group law" protection varies notably under Member States' laws. The most "complete" is the German, which is contested by business as being too cumbersome. Thus the idea of a directive on material group law appears presently to be a dead duck. But group law may seep in through corporate governance, securities law, tax law, and accounting rules.

The last point to take up under tendencies is the new thinking on capital requirements for limited liability companies. The traditional capital system for a public company, entrenched in the 2nd directive, works as follows: The statutes should indicate the formal "social capital" of the company. This capital should be wholly subscribed, and wholly or partly paid up before the company can be registered. The eventual rest is callable if the company decides. This is supplemented by the minimum requirement that the capital must at least be 25.000 Euros.

To protect this capital the law must contain a number of other rules on increase, reduction of capital, on own shares, dividends and loans to shareholders, and on liquidation, plus requirements of expert evaluation of considerations other than cash.

There are two ways of explaining traditional capital requirements. These can be seen as a guarantee for creditors. Alternatively, they are seen as the token of the participants' intent to run a proper business, and loss of (part of) capital rings the alarm bell for reconsideration or reconstruction. In the financial sector this is supplemented by the capital adequacy rules. The company must have an "own capital" or "solvency margin" that stands in a defined, percentual relation to the risks which the transactions (assets and/or debts) create. Under some national laws, the principle of adequate capital may follow from general principles of contract or tort law, or from express company law requirements. But they are not detailed as financial law requirement, and are thus left for the courts' future completing.

The critique of this system is inspired from the US experience, since most US states abolished the traditional capital requirements without experiencing problems. Among experts in (Northern) Europe there is a visible change in attitudes, and some reworking of the basic concepts of the 2nd directive in the direction of the US development is likely to take place within a decade. The core of the critique is that the capital requirements known for a century are insufficient. First, the minimum capital does not meet the argued needs for working capital in companies, nor does it afford a meaningful guarantee to creditors. Second, concentration on the formal capital requirements may drive other, and perhaps more efficient, means from the general parts of law, into obliteration (bankruptcy, contract, criminal, and tort). Third, it causes a creditor-centered thinking under which shareholder protection is pushed into a secondary position.

From the EU angle there is the question whether the 2nd directive created a real harmonization. Member States' rules still contain important differences, and under the Centros doctrine Member States must recognize these. It can also be observed that nobody today would advocate a 2nd directive such as a directive for private companies where the effects of the Centros doctrine may be more felt.

The Commission's reaction so far has been to study further. The recent proposal for amendments to the 2nd directive only contains some softening of the strict rules on distribution and valuation, combined with some improvements in minority protection.

A radical change would underline flexibility and contractual freedom in company law. The real legislative challenge would lie with establishing an efficient alternative protection or sanction, be it from bankruptcy, contract, or criminal law. In the USA, both criminal and civil liability may be considerable. European courts have been rather deferential to management outside cases of fraud. Therefore an upheaval of the present system would have to be accompanied by new approaches on investor protection, not only in law, but also in procedural remedies (e.g. reversal of the burden of proof, or class action), in the public authorities' role, and even more in attitude (industry, lawyers, accountants, and mostly the judiciary).

4 Company and company law

Companies' freedom of movement is the inspirational principle of the SE and its most attractive feature, and can be considered symbolic of the long-term view of 'Europe as one'. The concept of a European company should not be misinterpreted though: the European Company Statute has not created one unique variety of European Company; rather, it has led to a range of 27 different SEs through the European Union ("EU") according to the place of incorporation. This is because the European Company Statute provides only an incomplete set of uniform rules applying to the new legal form and it covers a limited range of issues, most of them only partially, often leaving options open to Member States or to companies themselves. This feature has left room for national elements to be added to the SE, and for domestic jurisdictions to have an informing and reshaping role in some significant matters regarding the operation of the SE, such as workers' participation.

It is up to the Member State to determine the degree of change, if any, that has to be brought about in its own concept of the Company Law model in order to fit into an integrating Europe and, on the contrary, which of the deeper structures of national core values and identities it wishes to preserve and why. Is there a common pattern in the implementation of the SE in the Member States, and if there is what it is, and has a European-oriented or home-oriented solution been preferred?

Using a functional comparative approach and having the Italian, German and English experience as the basis of the study, one can even have a clearer picture on the eventual role that national laws still have in shaping EC law. Plus, consideration will be given to whether the implementations follow, or depart from, recognisable features of the three countries' respective 'systems' of corporate governance, and how (and if) their national companies and company group structures have responded and were affected by these new pieces of legislation. The question is whether Europeanisation has had an effect upon the Italian, German and English governance models, at least in terms of the model they chose for a European instrument like the SE. And this leads to focus upon the harmonisation issue, or rather the convergence path of European company law: will the pressure of a European-wide economy force jurisdictions and companies to rethink their governance models to become more efficient? If the logical, initial hypothesis that every jurisdiction will follow its own system and will be looking inwards rather than outside to implement the SE is proven, then the answer to that question will be no; if, instead, the initial thesis is somehow wrong, one may need to re-evaluate the impact and the importance of the SE in the harmonisation process, and in fulfilling its aims.

Modern company law is often seen as matter of private law only, seeking efficient regulation of an instrument perceived to have as its only goal the profit-maximisation of shareholders. The fundamental freedoms of EU law are seen by some as an argument in favour of such a narrowing of the scope of company law and for restricting the room for encompassing other interests.

EU law is, however, not just about free movement and market integration. On a Treaty level, the general objectives of the EU have a strong legal significance, and the codification of the principle of sustainable development in Article 11 TFEU entails an all-encompassing legal duty to integrate environmental protection requirements in the policies and activities of the Union. What does this entail specifically for the regulation of companies?

Although we do see some signs of environmental integration in line with Article 11 TFEU and thereby progress towards sustainable development in some areas, the regulation of companies, these all-important components of our economies, has to a great extent been shielded. Discussing corporate social responsibility and reporting requirements is often the closest law-makers dare to get to considering regulating these entities so as to promote sustainable development. Without the contribution of companies we cannot hope to achieve the overarching global goal of a sustainable development. There are some glimmerings of hope, of green businesses and of socially responsible investment. Unfortunately, there is also a lot of box-ticking, marketing and greenwashing. In practice actions speak louder than words. In practice the focus is on economic growth and efficiency in a narrow and short-term sense, leading to environmental degradation, loss of biodiversity and dangerous climate change.

For EU company law, this requires a whole new and more holistic approach compared to the EU law focus of today. The argument for the holistic approach to company law in a sustainable development perspective may be summarised in three points: Firstly, we are very far from achieving the goal of a sustainable development; secondly, we need the contribution of companies to have any hopes of achieving the goal; thirdly, neither the voluntary contribution of companies nor the current legal framework regulating companies' environmental impact is sufficient. If we agree on those three points, I put forward that we have the basis for the following conclusion: Treaty law requires EU institutions first to identify the necessary steps to integrate the objective of contributing to a sustainable development into the decision-making of companies and second, to execute such steps. In other words: Article 11 TFEU provides the basis for a specific duty to act to reform EU company law so as to promote sustainable development.

Short Description of Slovak Company Law

The majority of Slovak business/commercial law is covered by the Commercial Code (Act No. 513/1991 as amended). Beside fundamental general provisions, the Act contains measures for the administration of a Commercial Register, economic competition, business companies and business contractual relations. The Code is the main source of business law, but some judgments serve as guidelines in instances where the Code is ambiguous. The Code regulates various enterprises, types of companies and contract law. Hand in hand with the Code is the Licences Act which governs conditions for entrepreneurial activity. Companies are regarded as legal persons and those wishing to establish a company sign a contract roughly equivalent to Articles of Association.

When a business entity is registered (this could be a sole trader, or company), their fields of activity are required to be registered and generally the company needs to get a licence for each field of activity (Licences Act). Some licences require the business owner to sit an examination before they can be granted (eg., Employment Agencies), or to have special qualifications (eg., official translator). A company is legally viable from its date of registration with the court.

Slovak Business Entities

Public Trading Company

The Slovak public trading company (*verejna obchodna spolocnos*t -"ver. obch. spol." or "v.o.s.") which is similar to a UK Partnership, is obliged to have two members, or partners who may be natural or non-natural (juristic) entities. The partners liable for the obligations of the company to the full extent of their own assets. They do not have to make an initial investment and each partner can bind the company unless they agree otherwise.

Limited Liability Company

The Slovak limited liability company (*spolocnos*t *s rucenim obmedzenym* - "spol", or "s.r.o.") is similar to the UK limited liability company whereby at least one person is required to establish it and it requires to have at least one member (shareholder). Capitalisation is a minimum of 200,000 SKK in money, movable, or immovable property. Members are only liable to the obligations of the company to the extent of their unpaid share capital. The members/shareholders may appoint a manager, or managers (executive) who are called Konatels. Directors must have a clean criminal record and must be natural persons. They need to produce criminal records which must be clean for Slovakia and their country of domicile.

The "s.r.o." is generally used for small and medium-sized enterprises in Slovakia and as such is similar to a UK limited company. However, its director, or 'Konatel', must be appointed by the court and has certain responsibilities to the court for its management.

Limited Partnership Company

The Slovak limited partnership company (*komanditna spolocnost* - "kom. spol." Or "k.s.") is similar to the s.r.o., however, at least 1 partner/member must have unlimited liability ("Complementary" and also, 1 partner must have capitalised it ("Commanditist"). Complementaries do not have to invest in the business as they are usually salaried partners. The Commanditists capitalising the partnership do not need to work in it and are the managers of the company unless this is agreed otherwise.

Joint Stock Company

Slovak joint stock companies (*akciova spolocnos*t - "akc. spol." or "a.s.") may be established by at least one juristic entity or two natural persons who must be members. It is required to have assets of at least 1-million SKK. The assets are divided into shares which can be given in book, or electronic form. The assets of the company are created by the members investments who own the shares in return.

The company is required to have the following institutions:-

- Board of Managers (*predstavenstvo*) - The members of the board perform a similar role to the 'board of directors' of a UK company. The board needs to have at least three members who can be either Slovak Citizens, or foreign nationals.
- The Supervisory Board - This board is also required to have at least three members. However a company with 50-plus employees needs to have 1/3 of the Supervisory Board nominated by the employees.

European Private Company

The European Private Company or Societas Privata Europaea (SPE) is an instrument presented by the European Commission with the aim of facilitating the establishment and operation of small and medium-sized enterprises (SMEs) in the Single Market. The features of this corporate vehicle distinguish it from other limited liability companies available to entrepreneurs in the Union. The European Private Company is designed to be widely accessible, easy to set up, cheap to run, and as uniform throughout the EU as possible, but also at the same time offering a great deal of flexibility to founders and shareholders to internally organise themselves. As with the Societas Europaea (SE), there are certain gaps in the SPE Statute, which prompt for the application of national laws. This solution could result in 27 different SPE forms in the EU, which will effectively lead to jurisdictional competition. Whether such competition would manifest into a 'race to the bottom' or it will lead to a conversion of the European corporate law and a creation of 'market-for-rules' that promotes economic growth, depends on what companies regard as a 'more favourable' system.

Recently, the European institutions have grasped the potential of the small and medium-sized enterprises and have placed them at the heart of the Lisbon Growth and Jobs Strategy Major European support programmes for 2007-2013 aim at the creation of a business-friendly environment for SMEs, which are the engine of Europe's economy. In November 2007 the Commission's communication on the Single Market for 21st century Europe observed that the Single Market has to deliver better results and tangible benefits to SMEs. Despite these actions, SMEs have still to realise their full potential on the Single Market, mainly as the legal frameworks which regulate their activities are "somewhat limiting" (Small Business Act for Europe, 2008) Private company law has been much less touched by harmonisation than laws regulating public companies. The emergence of the European Single Market, which promotes high levels of international trade and foreign direct investments, has supported an increased tendency amongst entrepreneurs to establish and operate multinational companies which are in turn regulated by legal frameworks that suit entrepreneurial needs. The recession that engulfed the economies of all Member States forced all entrepreneurs to look even harder for new markets, potential customers and trading partners far beyond their national borders.

Nevertheless, multinational companies are bound by the fact that each of their subsidiaries has its own national domicile, which in turn brings about numerous implications for cross- border business activities. A potential solution to this problem would be the creation of a 'multidomestic' company, characterised as a truly transnational legal entity. However, lack of political consensus within the EU as to the exact legal form of such entity delayed the emergence of such a company form until October 2001, when the Statute for a European company was finally introduced.

The emergence of the European Private Company as a viable corporate entity has to a larger extent been overshadowed by the prolonged development of the Societas Europaea (SE). A total of 30 years passed between the introduction of the first draft of the SE Statute (1970) and its final acceptance by the Member States at the summit of Nice in December 2000. The Regulation of the SE (Council Regulation (EC) No 2157/2001) and the corresponding Directive on the rights of employees of SEs (Council Directive 2001/86/EC) entered into force on 8 October 2001 and although subject to wide criticism at the time, the statute is considered a major breakthrough as it enabled European companies to merge across borders and to move their seat in different Member States without liquidation. Although broad consensus within the EU favoured an environment which promoted trade within the internal market, criticism of the EU statue for the SE centred on the fact that the reduction of articles within the SE Statute led to the application of existing national laws in areas where consensus agreement between Member States could not be achieved. This undermined the uniformity of the SE and meant the creation of different types of SE forms depending on the member state of incorporation.

Despite these drawbacks, the corporations have made use of the SE statute within the internal market, as opposed to the SMEs which are facing a rather fragmented and difficult to penetrate Single Market. The 'Small Business Act for Europe' (2008) is attempting to change the *status quo* and introduces the 'Think Small First' principle. It 'aims to improve the overall policy approach to entrepreneurship, to irreversibly anchor the "Think Small First" principle in policy making from regulation to public service, and to promote SMEs' growth by helping them tackle the remaining problems which hamper their development.' (EU Communication 394, 2008) After a series of modernisation initiatives by both the Member States and the European institutions directed primarily at larger entities, SMEs are finally going to be able to exploit the full potential of the Single Market through the European Private Company.

Overview of the Proposal on the Statue for European Private Company

A detailed overview of the proposal for SPE Statute would shed more light on the practical implications of the aforementioned concepts. The framework of the proposal is threefold, consisting of the general provisions of the regulation, the articles of association (Annex I) and the linking articles to the relevant provisions of the applicable national law. The latter are applicable to areas outside the scope of the two former parts, such as labour law, insolvency law or tax law. As a rule, the applicable national law shall be determined accordingly with the place where the SPE has its registered office, however the implications of this rule shall be observed below. According to the general provisions of the SPE Statute, the European Private Company is a limited-liability company, i.e. its owners have limited liability for the company's debts and obligation, to the extent of the amount they have subscribed for. The shares of the company are private and cannot be offered to the public or publicly traded. The SPE can be formed by one or more natural persons and/or legal entities under Article 54 TFEU, a concept promoted by the 12th EC Company Law Directive on the single member company (1989, OJL 395).

The SPE can be set up *ex nihilio* by one or more shareholders or by transformation, merger or division of an existing company without dissolution (Articles 3 and 5 of the Proposal for a Council Regulation on a European private company – Political agreement 10611/11 DRS 84 SOC 432). The name of the company shall be followed by the abbreviation 'SPE' pursuant to Article 6. Initially the proposal allowed for the registered office and central administration or principal place of business to be situated in different Member States, retaining the position held by the ECJ in the *Centros* judgment (Case C-212/97, Centros Ltd v Erhverus-og Selkabsstyrelsen [1999] ECR I- 1459). Nevertheless, some delegations, including Germany and Austria, prompted for a prohibition of separating the registered office and the central administration. Ultimately, the Compromise proposal of the Hungarian presidency decided that the matter should be resolved in accordance with the applicable national law. Nevertheless, this idea was once again dismissed by the German delegation and hence left the matter to be resolved at subsequent Council meetings.

One of the best features of the European Private Company is its flexibility and the freedom that shareholders have in shaping the company according to their own needs. This is implicitly expressed in the rather short number of general articles regulating the internal organization of the company and leaving most of the matters to be resolved in the articles of association by the shareholders.

Due to the major differences in the national regimes regarding financial assistance to third parties, the expulsion and withdrawal of members and the general duties and liabilities of directors, these matters shall be regulated by the relevant applicable national legislation. Corresponding with the latest practice in the United Kingdom (Companies Act, 2006), there is no obligation for the shareholders to hold physical general meetings, because decisions can be taken by written or electronic resolutions. Article 28(1) lists the matters that shall be decided by a resolution of the general assembly of the members, such as approval of annual accounts, change of capital, distributions, appointment and removal of directors and auditors, etc. Some of these decisions require a qualified majority of at least two-thirds of the total voting rights in the European Private Company (Article 28(1), points f, g, h, k, n and o), while others can be taken by a simple majority (Article 28(1), points d, e, i, j and o).

Nevertheless, all aforementioned matters can be resolved in a different way, if the shareholders decide to amend the general provisions within the articles of associations. However, this would require sophisticated legal advice, which in most cases is out of reach for the majority of small companies. One solution to this problem can be the drafting of different sets of model articles by professionals and scholars.

This has already been done by a small team from two universities, namely Exeter and Heidelberg, as envisaged by Article 13 and Schedule 1 of the CREDA/MEDEF Draft Regulation. They have defined two classes of potential companies, which would require different standard form articles, according to their function. The first class consists of the small owner-managed businesses incorporated by a few shareholders, operating as quasipartnership, which would like to have a central role in its management. Their presumed lack of financial instruments targeted at sophisticated legal advice, would be compensated by a flexible yet ready-made form of constitution, tailored to their needs. The second class of businesses would be entities with larger and more diverse group of participants, some of which would be more active in the day-to-day management of the company, others would play a passive role, but would nevertheless be involved financially within the business.

This scenario would require a more defined managerial organization, with defined obligations for issuing reports and instructions from and to the body of shareholders. Both options can be implemented, because, as Drury observes, the concept of the proposal is based on the British approach that everything is allowed unless the law strictly prohibits it, rather than limiting the constitution of a company to pre-defined norms permitted by the relevant law, such as in the German legal system.

There has been a slight decrease in the protection of information rights of the shareholders when comparing the Commission and the latest Presidency proposal. Initially, shareholders had the right to be informed of the company's affairs, the right to request a resolution and the right to request an independent expert (Commission's Proposal for the European Private Company, Articles 27-29). The Presidency proposal refines the text of the former rights, but excludes from the statute the latter. Hence, in case of allegations of serious breach of law or of the articles of association of the European Private Company, minority shareholders can no longer request the appointment of an independent expert, who shall have complete access to documents and records of the company in order to investigate the suspicions. Although, the articles of association can be complemented with such provisions, uninformed minority shareholders shall have fewer instruments to protect their own interests as shareholders do not therefore have the right to bring derivative actions against directors. Unanimous shareholder agreements are not implemented within the statute, regardless of their ability to confidentially protect the rights of minority shareholders.

This omission might be mitigated by the requirement for qualified majority votes on particular issues, according to Cheung (2008). The SPE Statute does not however allow shareholders to "squeeze-out" minority shareholders and the majority shareholders are not obliged to buy the shares of a minority shareholders and no provision exists regarding pre-emption rights in case of a capital increase or sale of shares. The management body of the SPE, namely the directors have the power to manage the SPE regarding all matters, except those required by the SPE

Statute, the articles of association or the applicable national law to be exercised by the shareholders (European Private Company Proposal on the European Private Company Article 27 1c) The management body can vary in its structure depending on the consent of the shareholders, reflected in the articles of association.

Different concepts regarding the management structure exist across the different EU Member States. These are exemplified in the German *GmbH* model of one or more managing directors, the Dutch dual management board, or the British administrative board. Such flexibility in defining the managerial structure will (it is proposed) make the European Private Company more recognizable to the entrepreneurs who rather than being limited by national legislation will have the freedom to structure the company as to maximise opportunities and competitive advantage.

Individuals that have been disqualified for serving as directors in any Member State cannot become directors of an SPE, thus preventing rogue directors from misusing the concept of freedom of establishment, by forming a company in one Member State, while trading in another, where he has been already disqualified. As mentioned earlier, provisions regulating the general director duties and liabilities have been removed from the latest revision of the statute and left to be governed by national law. This decision is considered to be inappropriate given the underlying idea of the legislator, to create a self-sufficient statute, with limited references to national law.

Admittedly, the area of law concerning director duties is neither overly controversial, nor rather inconsistent amid Member States so as to be unregulated by the statue. Nevertheless, the relatively small absolute number of shareholders in SMEs and their presumably low national diversification would reduce the negative impact of the lack of uniformity in director duties within the SPE Statute. Furthermore, even the initial proposal of the Commission, which imposed certain duties on directors of an SPE, was lacking precision compared to the statutory principles in the Companies Act 2006. The UK Act deals explicitly with the underlying requirements of a company's directors such as the duty to act within powers, to promote the success of the company, to exercise independent judgments, reasonable care, skill and diligence, to avoid conflicts of interest, not to accept benefits from third parties and to declare an interest in a proposed transaction or arrangement (Companies Act, 2006 subsection 171-177).

Another issue regulated only by the applicable national law is the taxation of the European Private Company. Its components consist of administrative and accounting formalities, multiple taxation, the practice of withholding tax and offsetting of cross-border losses. Conceptually the proposal ensures that the SPE would be subject to the same tax regulations as national companies, in accordance to the place of incorporation. In 2008 the Commission proposed to extend to the European Private Company the scope of three Directives, in order to ensure that companies formed as an SPE are not in a worse position than national legal forms. None of these directives, namely the Parent Subsidiary Directive Council Directive 90/435/EEC, the Merger Directive (Council Directive 2005/56/EC) and the Interest and Royalties Directive (Council Directive 2003/49/EC) have been amended to reach the goal set out by the Commission. However, such action can be expected to take place simultaneously with the adoption of the SPE Statute.

5 The role of international private law

An interesting question arises as to whether the formation of legislation around the SE and especially the SPE is in fact a new legislative environment, which stands independently of the conflict of laws (law applicable and jurisdiction). Two characteristics of the novel company form may lead to the conclusion that rules of private international law do not affect its affairs. Namely, the fact that the creation and operation of the SPE should be governed by the same company rules in all Member States and the absence of any cross-border requirement, both of which are included in the content of a directly applicable regulation. The latter element would allow any natural person or legal entity to create an SPE without previous cross-border activity. However, political factors rendered unfeasible the adoption of a completely uniform SPE Statute, devoid of any references to national laws.

As pointed out by the Commission, such an autonomous SPE regime requires harmonisation of tax law and labour matters, where Member States are very reluctant to agree on common regulation.

There are two instruments for closing these legal gaps, namely by recourse to principles of European company law and common principles of Member State law or with reference to the applicable national law of the Member States, defined by the registered office of the SPE. Once again political acceptability plays vital role in balancing the level of implementation of these instruments within the SPE Statute. Some Member States fear that recourse to the underdeveloped framework of European company law would result in disproportionate legal uncertainty. However, the total of legally uncertain issues would not be greater compared to the cases which resort to each national law.

In line of his observations, the rejection of the Compromise proposal of the Hungarian presidency might be rendered as positive by reason of postponing a project for SPE Statute that overly gives recourse to national laws even regarding less controversial areas of law. In any case, the provisions of the SPE Statute that assign both expressly or implicitly a number of issues to the national laws of the Member States might need to be supplemented by private international law rules, based on Community or national law. This dualistic approach is underpinned by a doctrinal subdivision of the articles within the statute, where some refer to national laws in accordance with EC law, while others give recourse to national laws not being affected by the EC law.

Whether the statute refers merely to the internal laws of the home Member State or it also includes the conflict of laws rules of the latter is an issue unanswered by the legislative environment surrounding the European Private Company. The private international law is likely to become an indispensable tool complementing the SPE Statute. There are two categories of matters that necessitate the referral to the *lex societatis*, the first of which is subjected to the application of national laws, such as the liability of directors. In some cases, private international rules would determine the law applicable concerning directors of companies that have relocated their principal place of business in another Member State. Such directors would most likely operate in the host member state, hence, the key elements of their wrongdoings would occur there. The application of national laws of the Member State, where the company has its registered office should be rendered inappropriate in such cases. Moreover, the liability of directors has been excluded from the scope of the Rome II Regulation (EC Regulation 864/2007 OJ L 199/40).

Therefore, the national conflict of laws rules would determine the outcome of such issues. The second category includes matters such as contractual agreements between founders preceding the formation of the SPE, voting agreement between shareholders, rights *in personam* and rights *in rem* regarding the transfer of shares in an SPE, etc. In defining the law applicable regarding these areas of law, conflict of laws rules would be indispensable.

The allocation of jurisdiction in disputes regarding an SPE shall be subjected to the *lex fori* principle, namely that the appropriate court to hear the case would match the registered seat of the company. However, this principle cannot be applied to matters falling in the second category defined above, which presupposes recourse to special jurisdiction rules concerning contractual obligations, tort, ownership and transfer of company securities. In such cases it is necessary to read the SPE Statute in conjunction with the jurisdiction rules of Brussels Regulation 44/2001 (Brussels I). However, this Regulation cannot be applicable to internal disputes concerning the formation, constitution, functioning and dissolution of an SPE, simply because the wording of the legislation does not include European juristic persons, such as the European Private Company. This is another aspect of the Community law that should undergo modernization in order to promote legal certainty towards the European Private Company.

It can be concluded that the legislation around the SPE and formerly the SE cannot be applied without reference to the conflict of laws principles, despite the attempt by the European Commission to introduce a uniform business vehicle. What underpinned this outcome is the emphasis on cross-border activity placed by the legislator when drafting the statutes of supranational entities.

6 The application of national laws on the European Private Company in the context of freedom of establishment

The recent developments in the case law of the ECJ have influenced the situation of companies active on the internal market and wishing to engage in cross-border activities. Likewise, the cases of *Centros*, *Überseering*, *Inspire Art* and *Sevic Systems* have marginalized some advantages of the initial SPE Statute, which allows for the separation of statutory and administrative seat. The practical implications of these judgments are namely the option of transferring the registered seat of a company in another Member State without subsequent liquidation.

This gives incentive to the entrepreneurs to use familiar national company forms in cross-border activities. A British limited company can create its German, Dutch or Swedish subsidiaries in the form of Ltd. However, this does not undermine all advantages of the European Private Company, if we assume however that the final statute allows for the separation of registered seat and principal place of business. Creditors and customers of the British limited from the foreign markets would be less confident in interacting with the foreign company. This negative effect would be quashed with the creation of the SPE. Furthermore, according to Article 36(1) of the SPE Statute, as presented by the Commission, the transfer of the registered office does not alter the identity of the European Private Company, neither does it require the winding-up and liquidation of the company. What results from this transfer is a change in the applicable national law. Another possibility for the entrepreneurs deriving from the freedom of establishment doctrine is the free choice of company law applicable to their businesses. As was already pointed out, British limited companies can be freely incorporated with the sole purpose of operating on the German market, thus avoiding stricter rules of the host Member State. However, formation and management of a pseudo-foreign legal entity requires extensive knowledge of the regulatory framework applicable to it. This leads to increased costs for consultations concerning contract, tort, company or tax law. Hence, the wider choice of company forms to entrepreneurs comes at a higher cost that can be circumvented if a uniform supranational legal entity for SMEs in the face of the European Private Company is introduced.

The proposal of the Commission prompted for the separation of the registered office and the principle place of business. Although, this proposal was rendered rational by most delegation, the German delegation was of the opinion that the European

Private Company should not be granted such freedom. Because of the unexpected position of the German delegation, expressed on 30th of May 2011 at a meeting of the Competitiveness Council, there are yet no thorough repercussions either by scholars, or by political observers. The Commission and the Presidency proposal prompted for the separation of the registered office and the principle place of business.

However, the latter proposal observed that it is necessary to prevent the use of the European Private Company to circumvent legitimate legal requirements of Member States. It is important to note, that the rationale behind this amendment is not strictly contradicting the *Inspire Art* judgment, where the Court observed that *'the sole purpose of enjoying the benefit of more favourable legislation does not constitute abuse.'*

Abusive behaviour cannot be rendered *per se*, therefore it has to be put in a perspective *vis-à-vis* its economic and social impact. There are still some regulatory gaps within the statute, which compromise its unanimous adoption, such as the employee participation issues in the event of transferring the registered office. The Compromise proposal technically did not resolve any of the main outstanding issues, which were left to the discretion of the Member States (Articles 7, 19 and 35 of the Compromise proposal for the European Private Company). This would segregate the Member States into two groups, namely these requiring the registered office and central administration to be in the same country (*siege real* or *effektiver Verwaltungssitz)* and those, allowing the registered office and the principal place of business in two different countries (the incorporation doctrine). There is a tendency in the EU of a shift from the real seat to the incorporation theory. This was the case in Hungary, whose government materialized this tendency with the Act on Business Organisations 2007 that entered into force on 1st September 2007. Even the strongest proponent of the real seat theory - Germany, has seriously considered opting for the incorporation theory. The motive for this change was to give German companies the same flexibility as the companies from other Member States enjoy, i.e. using their national form (e.g. GmbH) to conduct their business outside the national territory.

Referring to the main point, the outcome of deregulating the company's seat issue would lead to lack of uniformity of the SPE Statute and legal uncertainty regarding the applicable national law. Leaving the issue of the SPE seat to be resolved by national law would undermine the image of the European Private Company and would promote "forum-shopping", which is incompatible with the idea of the SPE as a uniform supranational legal entity. Therefore, it is more appropriate to consider the other two options, namely the permission or prohibition of separation of registered office and central administration. After all, the former concept has been at the very heart of the SPE Proposal, while the latter have been implemented within the SE statute.

The initial proposal for the seat of the SPE has two aspects. First, it does not require the registered office and the principal place of business of an SPE to be located in the same Member State. Hence, the transfer of the registered office to another country would not require the simultaneous transfer of the principal place of business and *vice versa*.

The concept of freedom of establishment does not confer the right to companies to transfer its registered office without dissolution in the home state and a subsequent setting up of a new company in the host state. This operation is not an acceptable option for entrepreneurs, because of the heavy tax burdens arising from it. There is another technical solution, which requires the creation of a company in the host state, which takes over the company in the home state, according to Directive 2005/56/EC (2005) regulating cross-border mergers.

Nevertheless, this option renders disproportionate especially regarding SMEs. Even if the SPE Statute enables the transfer of the registered office, its effectiveness remains doubtful. If the (tax) Merger Directive (Council Directive 90/435/EEC [1990]) does not cover the transfer of the registered office of the SPE, than the latter would result in taxation of the unrealised capital gains on the assets which remain effectively connected with a permanent establishment of the SPE in the home country (Article 10b). In this case, the transfer would be rendered as unduly cumbersome.

Considering the aforementioned developments in the case law of the ECJ, it seems reasonable to expect that the final SPE Statue would enable the separation of registered office and head office within the EU. However, the reluctant delegations can be influenced to accept that model only if appropriate measures are introduced that would protect the interests of various stakeholders and in particular the employees. There are other reasons which render the allowance of separation as the better option for the SPE. Determining the applicable law simply by defining the registered office does not lead to any errors in law. Applying the real seat doctrine in order to establish the applicable law might be very difficult, especially when dealing with the location of the head office of an international company, such as the European Private Company. The separation of registered and head office would enable SPEs to register subsidiaries in a Member State, which company law regime seems mostly suitable or well-known, whilst transferring the head offices of each subsidiary in different Member States, where they prefer to conduct business. In this way all company forms would be governed by one company law regime, which significantly reduces the costs of legal aid. As mentioned earlier, the German delegation discarded the option to separate the registered and head office of the SPE and required the opposite approach to be implemented within the statute. This method impedes the mobility of the company, because it cannot transfer its registered seat while retaining the position of the principal place of administration. In addition to that, the company is not allowed to transfer solely the head office in another Member State. Such impediments greatly hinder corporate mobility, whilst increasing the state control over companies active on their territory.

These Member States do not want to have a weakened fiscal control due to lack of transparency of information about SPEs registered in other countries. Another discrepancy arises from the fact that some Member States allow their companies to freely separate the head and registered offices. If the statute does not allow that, the SPE would be put in disadvantage towards companies from countries with laxer regulation. Taking in account the case law of the ECJ, it is clear that such requirement contradicts the jurisprudence of the court and violates EC law. Any such measures can be allowed to exist in the legal order only if they pursue a legitimate objective in the public interest, are appropriate to ensuring the attainment of that objective and do not go beyond what is necessary to attain it – a concept also knows as the *Gebhard* test. If we create a fictional scenario, the objective of the rule according to the German delegation would be employee protection. However, the ECJ has stated that the freedom of establishment can be impeded only in rarely exceptional cases on a case-by-case basis. Therefore, any general and abstract reasoning shall be rendered inappropriate. An abstract prohibition on the separation of registered and head office could not pass the *Gebhard* test, because it does not take in account any individual analysis on a single abusive situation. Finally, prohibiting the location of an SPE's head office and registered office in different Member States would be discriminatory *vis-à-vis* companies formed under some national laws.

7 Transfer of Company´s Seat under EU Law

The harmonisation of company law has long been a goal of the European Union. Questions concerning the freedom of establishment have always been both a central and controversial area of European law. The European Court of Justice has decided in favour of the freedom of establishment of EU companies establishing themselves in other Member States in several cases since Centros in 1999, resulting in a discernible and consistent line of authority. The Court has made clear that Member States have to allow companies that have been incorporated in other Member States to freely enter their territory, according to the rules under which they have been formed in their state of origin.

But the decisions have left other important questions open to doubt. The purpose of this article is to examine the consequences of these judgments, not only for European company law, but for related legal areas as well. The paper addresses this issue by giving a short overview on the freedom of establishment under the Treaty Establishing the European Community and on the existing European theories about the transfer of a company's seat. It then analyses the European Court of Justice cases and their implications. The article argues that the pressure on national legislators that arises from the judgments helps to keep European company law attractive to investors. It concludes that an increased mobility of companies within Europe is necessary if Europe is to remain competitive on an international level, even if the price of this is the abolition of some traditional domestic legal principles.

Company law reforms are on the agenda of many countries, especially within the European Union (EU). Harmonisation of corporate law has been on the European agenda for at least 35 years, mandated by article 220 of the Treaty Establishing the European Community (the EC Treaty) of 25 March 1957. 1 Some progress has been made, but it has been slow. For instance the *Societas Europaea* (*SE*) – the European company – has been available since autumn 2004 after it was first proposed in 1970.

The main driving forces behind efforts to reform and harmonise existing corporate laws are similar in every nation: the pressures of globalisation and competition, the growth of the shareholder population, and the emergence of new technologies and industries. All of these factors require companies to become increasingly flexible, not only economically and strategically, but also geographically, if they want to be competitive. However, the approaches to deal with these new challenges differ considerably.

The transfer of a company's seat has been the subject of controversy in European company law for decades. Only very few Member States' company laws provide for companies registered in their territories to transfer their registered office to another Member State while remaining the same legal person. For example, this is possible under Italian and Portuguese laws, as long as the operation also is possible under the law of the future home state. French law allows a transfer subject to international agreements that do not exist, while German law excludes the possibility outright. The fundamental gap in European company law systems is based partly on the tension between the incorporation theory on the one hand and the real seat theory on the other hand. As a consequence, companies were prevented from enjoying the same freedom of establishment as natural persons.

This article analyses the scope of articles 43 and 48 of the Treaty Establishing the European Community concerning the freedom of establishment of companies and then looks at the basic differences between the two criteria used to determine a company's parentage. The analysis is based on the essential case law from the European Court of Justice (ECJ) regarding the freedom of establishment for companies and encompasses consequences for company law as well as related legal areas. Attempts to harmonise company law on a legislative level, such as the European Company Regulation and the proposed Fourteenth Directive, will be briefly considered. The article argues that an increased mobility of companies within Europe is necessary if Europe is to remain competitive on the international level, even if the price for this is the abolition of some traditional domestic legal principles.

Freedom of establishment

The freedom of establishment is a central pillar of the European Union, and is guaranteed as a fundamental right. Freedom of establishment is vital to eliminate barriers that national borders and different national regulations create to the free movement of goods, services, capital and business life in general. When a national regulation is considered to be not in accordance with a principle of the Treaty on European Union, or there is uncertainty concerning the interpretation of the Treaty, *inter alia*, national courts have the opportunity to make a referral order to the ECJ under article 234 of the Treaty establishing the European Community. Article 48 is supplemented by article 294, 6 which provides that EU citizens shall be able to freely place capital by buying shares of companies in all Members States. The immediate purpose of this freedom is firstly, to remove the barriers that national laws pose to entrepreneurial and organisational skills of Member States' nationals and companies, and secondly, in a broader context, to advance the effective utilisation of available resources throughout the EU.

Conflict rules

Incorporation Theory

According to the incorporation theory the law governing the activities of a company is the law of the state in which the company has been incorporated. 8 Founders of a company are therefore able to choose the law that will regulate the company's statute. This theory was founded in England in shall also apply to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self- employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter relating to capital.

Article 48

Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

"Companies or firms" means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are nonprofitmaking.

This view prevails for example, in the United Kingdom, Ireland, Finland, Sweden, the United States and Switzerland. Following this theory a company established according to the law of the state of incorporation will also be attributed with a legal personality, and all the rights and liabilities of a corporate existence, in other states. Thus, if the administrative centre or the statute seat of a company were relocated to a state that applied the incorporation theory, this company would be fully recognised there.

However, even in states that apply it, the incorporation theory is curtailed by creditor and shareholder protection regulations, for instance by supervision measures under administrative regulations in the United Kingdom, or by special rules for pseudo-foreign companies in the United States. Pseudo-foreign companies are "incorporated in one state and transacting all or most of their business in another state."

In *Western Airlines Inc v Sobieski* a Californian court applied Californian law to the benefit of Californian shareholders to a company that although incorporated in Delaware, was doing most of its business in California.

In the United Kingdom, Part XXIII of the Companies Act 1985 provides for certain disclosure requirements for overseas companies, similar to the information required of a British company upon formation. Foreign companies in the United Kingdom are also governed by certain parts of the Financial Services Act 1986, by some sections of the Insolvency Act 1986, by the City Code on Takeovers and Mergers, and under certain circumstances by the provisions relating to fraudulent and wrongful trading.

Proponents of this theory argue that the main benefit is legal certainty, because the statute seat of a company is easily ascertainable. In addition, it encourages the mobility of companies operating internationally.

Real Seat Theory

The "real seat" theory does not apply the law of the state where a company was founded, but stipulates that the law of the state where the company actually has its head office or real seat is authoritative. This theory evolved in France and Germany in the nineteenth century, primarily to keep French companies from reincorporating in Britain and Belgium. It is based on the consideration that the law of the state economically and politically most affected by the company's activities should apply. Proponents of the real seat theory argue that the incorporation theory facilitates the creation of mere letterbox companies with the consequence that government authorities cannot control business transactions properly.

Generally, the head office or "real seat" can be defined as the place of central control where the fundamental governance decisions are effectively transformed into on-going managerial acts. It is sometimes difficult to determine the company's real seat, especially if the company has no active business at the time of the relocation. However, under this theory a company can have only one head office, or seat. Applying the real seat principle, a relocation of a company's seat to another country would lead to the application of the law of the state the company moves to. The moving company, for example a limited liability company, has to comply with the regulations at the new seat concerning the comparable national company form. If the limited liability company does not adhere to the national regulations it will not be recognised as a legal body, consequently having no limited liability and no legal capacity. A reincorporation under the law of the new seat would be necessary.

Apart from the academic debate it has to be noted that relocation under the real seat theory with perpetuation of the company form is more expensive for the entrepreneur because of the taxes that are incurred. Under this theory there are two ways to set up the necessary new company abroad. One possibility is to establish a new company in the other Member State, which then acquires all the shares of the old company by trading its own shares, or by buying them. Alternatively, all assets may be transferred from the old to the new company. Either way the old company's shareholders, or the company itself, usually have to pay taxes for the "gained profits" from the transfer of the shares or assets.

To sum up, the incorporation theory allows the founders to freely choose the legal system they think most appropriate and to develop activities in other states without losing the initial status of a company. The company is recognised in other jurisdictions according to the rules applicable in the state of origin. In contrast, the real seat theory enables national jurisdictions to protect their markets from pseudo-foreign companies by denying their legal status.

Cases

Centros

The ECJ has had occasion to rule on the freedom of establishment for companies in a number of cases. In the first decision the ECJ in effect denied a Danish authority the right to refuse to register a branch of a company validly incorporated in the United Kingdom, but which had neither conducted business nor had its seat in the United Kingdom, as a matter of freedom of establishment.

A Danish couple, residing in Denmark, founded and registered Centros Ltd, according to United Kingdom corporate rules in 1992. 25 The company never intended to conduct business in the United Kingdom; the owners only wanted to operate their business in Denmark. For this reason the owners applied for registration of a branch in Denmark. The Trade and Companies Board (*Erhvervs og Selskabsstyrelsen*) refused to register Centros in Denmark, because Centros had not traded in the United Kingdom, so that effectively its main office (and not just a branch office) would be in Denmark. In other words the Danish authorities argued that, according to the real seat principle, Danish law should apply. On that basis, the Trade and Companies Board argued that Centros would be subject to Danish law and accordingly had to comply with national rules. The ECJ did not accept these arguments.

The ECJ held that article 52 (now 43) applied because Centros had been incorporated in the United Kingdom, where it had its registered office and sought to set up a branch in another Member State, thereby exercising the right of freedom of establishment. The fact that Centros had been set up with the sole aim of carrying out business in another state was of no relevance. The ECJ found that incorporation in a Member State whose rules of company law seem least restrictive, and setting up branches in another Member State, cannot in itself constitute an abuse of the right of establishment. To pursue activities only in a Member State where a branch is established "is not sufficient to prove the existence of abuse or fraudulent conduct." Furthermore, national measures restricting the right of establishment are only justifiable if they are not discriminatory, justified by imperative requirements in the general interest, proportional and involve the minimum possible amount of intervention. Thus, the refusal to register the branch office of a company with a registered office in another Member State would amount to a breach of both articles 52 (now 43) and 58 (now 48).

Überseering

In a long awaited judgment, the ECJ has ruled that it is incompatible with the freedom of establishment for a Member State to deny a company formed in another Member State, which moves its real seat to this Member State, legal capacity and the standing to sue or be sued in court.

Überseering BV, a company incorporated under Dutch law, 31 had its primary seat in the Netherlands. The German cadastral register regarded it as the owner of a hotel. Überseering assigned a company to redevelop the buildings and claimed afterwards that the work was defective. Meanwhile, two German citizens had acquired all the shares in the plaintiff. Since then the company had its real seat in Germany. Consistent with German case law and prevailing opinion, the *Landgericht* (District Court) dismissed the action brought by Überseering due to procedural inadmissibility. It held that the plaintiff, as a company under Dutch law, with its real seat in Germany, had no legal capacity and no standing to sue under German law, because it was not (re) formed under German law. The *Oberlandesgericht* (High District Court) upheld the decision.

The case went to the *Bundesgerichtshof* (German Federal Court of Justice*)* on appeal. The prevailing case law of the *Bundesgerichtshof* at the time denied legal capacity, and hence the capacity to sue or be sued before a German court, to companies formed under foreign law, which subsequently moved their real seats to Germany, unless these companies reincorporated under German law. The *Bundesgerichtshof* during the appeal decided to stay proceedings and referred the case to the ECJ under article 234 of the EC Treaty.

The ECJ reaffirmed the principle established in *Centros* that companies incorporated in a Member State are entitled to carry on their business in another. A necessary precondition for such exercises of freedom of establishment is that those companies be recognised by any Member State in which they choose to establish themselves. The supporters of the real seat principle relied on the *dicta* of the ECJ in the *Daily Mail* case, which they claimed supported the view that a company exists only by virtue of the domestic law, which in turn determines that company's legal capacity and functioning.

This interpretation was rejected by the ECJ. *Daily Mail* was held to be irrelevant, dealing as it did with a wholly unrelated relationship between the home state and a company that intended to transfer its centre of administration to another Member State to avoid taxation in the original home state.

The ECJ found that the German position effectively required a company to be reincorporated in Germany before its rights could be enforced, and was "therefore tantamount to outright negation of freedom of establishment." The Court also rejected the argument that the restriction of establishment was justified by the overriding requirements of general interest. However, the ECJ stated:

It is not inconceivable that overriding requirements relating to the general interest, such *as the protection of the interests of creditors, minority shareholders, employees and even the taxation authorities, may, in certain circumstances and subject to certain conditions, justify restrictions on freedom of establishment.*

The ECJ also held that if a company incorporated in one Member State exercises its freedom of establishment in another Member State, this state is required to recognise the company's legal capacity under the laws of the State of incorporation.

Following the ECJ judgment, the *Bundesgerichtshof* overruled the decisions of the *Landgericht* and the *OLG Düsseldorf* in 2003, deciding that Überseering BV had legal capacity and the right to sue in German courts. The case was remanded to the *Oberlandersgericht*.

Inspire Act

In recent decisions, the ECJ has continued to rule in favour of the freedom of establishment by holding that rules submitting foreign companies to the company law of the host state were inconsistent with EC law. Inspire Art Ltd was a company founded in the United Kingdom. Immediately after its formation the company started operating in the Netherlands, where its sole shareholder and director lived. No business was ever conducted in the United Kingdom and the shareholder only intended to take advantage of the liberal rules of British company law. A company branch was then registered with the Amsterdam Chamber of Commerce without indicating that Inspire Art was a pseudo-foreign company. Such an indication, however, was necessary according to the *Wet op de formeel buitenlandse vennootschappen* (*WFBV).* As a "formally foreign company", Inspire Art Ltd was obliged to comply with the provisions of articles 2 to 5 *WFBV* that, besides numerous further disclosure requirements, stipulated a minimum capital. According to *WFBV,* the company's subscribed capital had to be at least equal to the minimum amount that article 178 *Burgerlijk Wetboek* required for Dutch companies with limited liability, being 18,000 EUR. If minimum capital requirements are not met, Dutch law holds company directors liable as joint and several debtors for the company's debts.

The *Kantongerecht Amsterdam* (Amsterdam District Court) held in its decision in 2001 that Inspire Art Ltd was a pseudoforeign company within the meaning of article 1 *WFBV* and referred the case to the ECJ for a preliminary ruling on whether the *WFBV* regulations were consistent with the EC Treaty.

The ECJ again decided clearly in favour of the freedom of establishment. The Court ruled that article 1 *WFBV*, stating that Dutch branches of pseudo-foreign companies must disclose that they are pseudo-foreign companies, was in breach of the Eleventh Council Directive, because the latter did not permit any disclosure rules going beyond the rules contained in it. The ECJ reasoned that since the Directive gave the Member States discretion to introduce specifically enumerated additional disclosure requirements, the listing of potential disclosure requirements in article 2 of the Directive is exhaustive. The Court held that a requirement corresponding to the Dutch provision could be found in neither the list of the obligatory requirements nor of the facultative disclosure requirements of the Eleventh Council Directive and was therefore inconsistent with EC law. Given this fact, the Court deduced that justification of such provisions was not possible. The Court held that the provision requiring pseudo-foreign companies to have capital at least equivalent to the minimum capital prescribed for Dutch limited liability companies to exclude the personal liability of their directors, constituted a violation of the freedom of establishment. Such a provision could not be justified by public interest because neither article 46 of the EC Treaty, nor the protection of creditors, the prevention of an improper recourse to freedom of establishment, the enforcement of fairness in business dealings, nor the efficiency of tax inspections could be invoked in this case.

The Court pointed out that Inspire Art Ltd held itself out to be a foreign and not a Dutch company, and therefore its creditors were sufficiently informed that it was subject to provisions other than those applying to a limited liability company formed under Dutch law.

The ECJ further concluded that the incompatibility of the minimum capital provisions with the freedom of establishment inevitably resulted in the relevant sanctions being incompatible with Community law as well, and that no further examination was necessary in this respect. To form a company for the purpose of circumventing national laws regarding minimum capital is not sufficient Eleventh Council Directive (EEC) 89/666 Concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State [1989] OJ L395.

Consequences of the Judgements

The Real Seat Principle

One shortcoming of the ECJ judgments is that they do not contain a clear statement about the different conflict of laws rules for companies in Europe. The discussion and flood of publications after each judgment are due to the fact that there was no definite pronouncement concerning the real seat principle. The ECJ decisions are solely based on arguments relating to the freedom rights provided by the EC Treaty. The cases fail to deal expressly either with conflict of laws rules, or with company law as such. Nevertheless, the aforementioned cases constitute important landmarks on the road towards the free circulation of companies in Europe.

After the *Centros* decision the contrast between the real seat principle and the incorporation principle became more controversial. In countries applying the real seat principle academic debate flourished about the extent to which the ECJ decision undermined the real seat doctrine. Scholars argued that the decision was far from ground breaking, rather reaffirming the parallel prevalence of the theories of real seat and of incorporation. For example, Kindler stated: "The judgment has no relevance for Member States that apply the real seat theory." Characterising Centros Ltd as a national company would be justified by the common practice of these states, which is to connect the nationality of a company with the place where the company's real seat is located. But the *Centros* case was more far reaching than some courts and commentators from states applying the real seat doctrine realised. Other scholars greeted the decision as a rejection of the real seat principle, concluding that it contradicts the general policy of freedom of establishment under the EC Treaty.

The *Überseering* rulings fitted well with *Centros*. After *Überseering* voices clamoured more insistently that the real seat principle was inconsistent with the freedom of establishment under EU law. However, it was argued that the real seat principle could still be applied as long as the pseudo-foreign company's legal capacity, but not limited liability, was recognised, which could be achieved if a foreign company was treated as a *Gesellschaft bürgerlichen Rechts* (*GbR*). It appeared that the measures under fire were all measures to protect national economies and jurisdictions against pseudo-foreign companies.

Following *Inspire Art* there was at least wide consensus that the real seat principle no longer applied to cases where companies moved to another Member State. Commentators realised that from a freedom of establishment perspective it would make no difference whether the legal consequence of unlimited liability would arise *ipso jure*, as it would under the German approach, or from the registration as a pseudo-foreign company under Dutch law. Consequently, companies of other Member States have to be acknowledged as "a whole", not just in their legal capacity.

The judgments call for mutual recognition of companies' legal personalities by way of judicial practice of Member States' courts. This may cause legislative activity to bring about overdue harmonisation of company law in the EU and the abolition of obstacles for a free internal market for companies.

Justifiable Exceptions

When the ECJ examined whether the Danish restrictions in *Centros* were justified, it found that imperative requirements in general might be a possible justification for Member States to confine the freedom of establishment. The Court set out and reaffirmed in the subsequent cases four conditions under which a restriction of the freedom of establishment might be justified: the restricting measure must be applied in a non-discriminatory way, justified by imperative requirements in the public interest, able to achieve the object, and necessary and proportionate.

1 Minimum capital

The Danish measures were dismissed because the Court held they were neither suitable nor proportionate for attaining these aims. The Court held that the Danish practice did not effectively protect creditors, because "if the company concerned had conducted business in the United Kingdom, its branch would have been registered in Denmark, even though Danish creditors might have been equally exposed to risk." The question remains what kind of measures can be justified? It goes to the core of an important debate in European company law, concerning how to protect creditors from the risk arising out of limited liability. The Danish authorities argued that the minimum capital requirement promotes the protection of public and private creditors. Public creditors like tax authorities or social insurance institutions cannot demand securities to hedge receivables, and therefore have to be protected by laws controlling the solvency of companies. Minimum capital requirements are said to reduce the risk of fraudulent bankruptcy, or bankruptcy due to capital that was initially inadequate, and thus protect private creditors as well. In contrast, the ECJ held Danish creditors were also exposed to the same risks when dealing with United Kingdom companies which trade in the United Kingdom and Denmark. Further, the Court reasoned that Centros was evidently established as a limited company under British law, and its creditors were sufficiently informed that Danish regulations did not apply.

This reasoning is questionable because it requires business people of all levels to be familiar with various company laws throughout the EU. It also fails to take into consideration the fact that private limited companies from different Member States may have the same appellation but different amounts of minimum capital. For example, private limited companies under Austrian and under German law are both called *Gesellschaft mit beschränkter Haftung* (*GmbH*). The Austrian company is required to have a minimum capital of EUR 35,000, while the German counterpart is only required to have a minimum capital of EUR 25,000. A Swiss private limited company can operate under the same name and is required to have a minimum capital of about EUR 13,000.

However, lawyers, especially from Austria and Germany, expressed concern that the findings of the ECJ would make the company laws of jurisdictions requiring a minimum capital redundant. The continental European idea of minimum capital is that a shareholder has to pay a certain amount into the company in order to gain limited liability. Further rules ought to secure that that capital is preserved throughout the company's existence to ensure the company has sufficient funds to start and carry out its business. But these rules might be considered ineffective. In comparison, English company lawyers traditionally tend to regard minimum capital for private limited companies as ineffective for creditor protection, even harmful for the economy, because they prevent companies from being established. Furthermore, scholars argue that minimum capital requirements should not depend solely on the type of company, whether it is a private or a public company, but on the level of risk the company undertakes. This seems a sound argument but the inherent practical problems should not be underestimated, because it is very difficult to assess the level of risk of a business from an *ex ante* perspective. Markets alter very quickly, and a change in the company's policies or management might affect the minimum capital.

Ultimately, a minimum capital requirement at the time the company commences trading does not guarantee any particular level of assets being available for the creditors at a later date. Over time effective creditor protection decreases because of the erosion of capital in the course of trading. For this reason AngloAmerican legislations and their corporate lawyers rely on rules requiring directors to take creditors' interests into account as the company heads towards insolvency. The debate will probably continue but it has already lost its practical relevance. Following the ECJ findings in *Centros,* the *Oberster Gerichtshof* (Austrian Supreme Court) in 1999 allowed Austrian citizens to register branches of private limited companies under United Kingdom law in Austria, even if they did not carry out any business in the United Kingdom.

For governments within the EU it is no longer possible to keep "cheap" limited liability companies out of their jurisdictions and economies. Bearing the aforementioned criticism in mind, the abolition of the minimum capital requirement seems not to be a great disadvantage for creditors, since it has, among other shortcomings, never guaranteed any assets in case of insolvency.

2 Threatening insolvency

It remains unclear whether the duty to commence insolvency proceedings in time can be imposed on directors and managers of pseudo-foreign companies as an overriding reason of creditor protection in the general interest. Particularly questionable is the penalty that German company law, for example, imposes for belated application for insolvency proceedings. In cases of culpably late insolvency proceedings directors face criminal punishments which may include imprisonment. Some Member States have similar regulations, but when the matter concerns directors of companies governed by the company law of other Member States this might be an illegal penal analogy. Penal analogies generally contradict the principle of *nulla poena sine lege* (no punishment without law) and are therefore forbidden in most jurisdictions. For this reason an application of the special rules seems to be barred. A possible alternative would be to bring a claim under the liability principles of general tort law, which would only lead to monetary penalties.

3 Code termination

The participation of employees might be another possible exception courts could consider as a justified limitation to companies' freedom of establishment. In Germany particularly, this is a highly political topic and the domestic government is likely to try to impose the regulations on any company that operates in Germany.

4 Individual abuse

At this point the only clear justifiable restriction on the freedom of establishment concerns the establishment of foreign companies with fraudulent intent, whereas having the sole intention of circumventing minimum capital requirements is insufficient. 81 Fraudulent abuse of the freedom of establishment for companies would have to be verified individually in every single case. A possible example could be the withdrawal of assets from a company by a shareholder without compensation, causing the economic breakdown of the company. Some commentators argue that it would be consistent with the freedom of establishment to apply liability regulations from domestic company law to foreign companies in cases like this. However, governments may define a restriction on the freedom of establishment. It can be inferred from ECJ rulings that the Court will uphold a strict standard, and place considerable emphasis on the proportionality requirement.

8 Fourteenth Council Directive

The preamble of the pending Fourteenth Council Directive on the transfer of the registered office of a company from one Member State to another with a change of applicable law notes that "the objective of making it possible for a registered office to be transferred cannot be satisfactory achieved by the Member States in isolation". The proposal was an attempt by the Council to address this issue in 1997, but it has not yet been implemented and does not involve harmonising the different conflict of laws rules. Member States applying the real seat principle can continue to do so, and Member States applying the foundation theory can also continue to do so.

The Directive's aim is to enable a company to transfer its registered office from one Member State to another while retaining its original legal personality, enabling a cross-border relocation without winding up, but changing the law applicable to the company. After the transfer, the company will be subject to the law of the host country. The proposal only covers companies with share capital, because these are the only companies that have legal personality in all Member States. It does not address consequences for taxation, which will affect the former home state. The proposal appears redundant after the latest ECJ judgments concerning companies' freedom of establishment. The rules established by the ECJ go much further than the Directive's proposed regulations. In comparison, the ECJ approach does not require a change in the law governing the company. This means less bureaucratic work and less costs for the moving company.

Company Law Shopping

One crucial consequence of the abovementioned ECJ judgments is that founders within the EU are now free to choose the company law they prefer. The question that arises from this fact is: will the private limited company under United Kingdom law supersede the private limited companies under the law of other Member States? In the United States the incorporation principle applies between the States in the Federation. In practice, the State of Delaware has become most attractive for incorporating companies. It is disputed whether it is due entirely to the lax company law of Delaware, or whether other factors also come into play. There is, at least, a consensus that lenient corporate law is one reason for the large number of companies registered in Delaware. For example, Delaware corporate law allows the possibility of the elimination of directors' liability for negligence. Liberal rules also allow changing the choice of the law under which the company should be subsequently established. This has led to a situation where more than half a million companies are incorporated in Delaware, including almost 60 per cent of the Fortune 500 and 50 per cent of the companies listed on the New York Stock Exchange.

This sensation, known as the "Delaware effect", concerns mainly listed companies. Since the Second Company Law Directive provides for a minimum capital of EUR 25,000 and capital maintenance for public limited companies, as distinct from private limited companies, where there is no such requirement under EU law, the incentive of not having to pay in a certain amount of capital does not apply to public companies. A situation like that in the United States is unlikely to occur to the same degree in the EU. For example, the Plc under United Kingdom law requires a minimum capital of GBP 50,000 (approximately EUR 75,000) and the *Aktiengesellschaft* (*AG*) requires EUR 50,000. Scholars also bring forward the argument that a company targeting institutional investors cannot afford to be incorporated under a legal system that falls short of the basic rules of shareholder and stakeholder protection. Even if cross-border legal advice is easily available and English is the main business language, different languages, and legal and cultural traditions might in addition decelerate the effect to a certain degree.

These arguments apply mainly for bigger businesses in the form of public limited companies. For smaller businesses in the form of private limited companies, the race has already begun. The private limited company is an important vehicle, especially for medium seized businesses. For example, in October 2003 there were about 800,000 private limited companies registered in Germany, but only 4000 public limited companies of which less than 800 were quoted on the stock exchange.

For smaller businesses it is quite an incentive not to have to pay in a minimum capital in the start-up phase. Since shares of private limited companies are not usually publicly traded, the reputation of the governing corporate law is not as important in attracting investors. Certainly, the ECJ decisions will lead to some competition among company laws which will invariably result in some forced harmonisation of EU law.

The private limited company under United Kingdom law will become, or already is, an export bestseller. For example, the number of companies founded every two weeks under United Kingdom law increased from an average of 5,500 to 7,000 immediately following the *Überseering* decision. French legislators have already reacted to the "corporate law challenge". By introducing the one euro *SARL* in August 2003 France made available a legal form without a minimum capital, comparable to the private limited company under United Kingdom law, thereby preventing emigration of domestic companies to the United Kingdom, and securing the application of French law and its future design. Minimum capital requirements are only one factor in the decision about which company law to choose. Other factors include disclosure requirements, directors' liabilities and lower incorporation fees. The rules regulating the relationship between management and shareholders are another important consideration. For example, the Netherlands has, like Delaware in the United States, some management preferring rules. For instance, managers are allowed to control large amounts of votes by placing the shares in company owned trusts. This practice is usually forbidden in other jurisdictions.

In the United States there is discussion whether it is necessary to expand federal regulations to protect shareholders and to avoid a "race to the bottom". Proponents of a federal regulation argue that managers generally decide where to incorporate or reincorporate. The state with the most lenient corporate laws concerning duties of managers will be favoured. Shareholders may be poorly informed about the changes to their rights following the change in applicable company law as a result of the relocation of the company's seat. Opponents object that market forces will prevent managers from seeking incorporation in states with laws that are harmful to investors and allow the management to trick shareholders. 99 They argue that managers will incorporate in a country whose corporate laws are most efficient from the shareholders' point of view. According to these commentators, Delaware does not attract companies because its laws are lax, but because they are efficient. As indicated below, there are some difficulties with this point of view.

United States federal courts are consistently more rigorous than the courts of Delaware when applying the same basic legal standards. From a manager's point of view, Delaware is attractive because of its antitakeover statutes, the possibility of the exclusion of negligence liability and its cursory examination of merger, spinoff or recapitalisation decisions.

Some scholars argue that the public image of a company may be enhanced if it is established in a state with strict rules, to signal to the market that the company is a reliable business partner. This might be true in a few cases, but, as the example of Delaware shows, it will not be decisive for the majority. Some corporations will take advantage of the opportunity to (re) incorporate in a foreign Member State. In Europe the number of rules that serve third parties or stakeholders will decrease because they are a hindrance to competitiveness, but it is still within the EU's mandate to regulate these matters. The late developments will, in any case, not lead to a situation similar to that in the United States, since it is likely that established businesses, big ones in particular, will stay where they are. The number of important factors to be considered when deciding where to incorporate is not as high in the EU as in the United States, and the benefits of incorporating in one state as opposed to another are also of less consequence.

Treatment of Companies from Non Member States

Recognition of foreign companies is not only a problem within the EU. Since the ECJ only has a mandate to judge matters between EU Member States, the handling of companies that were established in non-Member States is still the responsibility of national courts as long as there is no EU regulation dealing with this issue. As article 48 of the EC Treaty states, a company must be established under the law of a Member State and have its "registered office" or "central administration" or "principal place of business" within Europe to enjoy the rights and privileges of the EC Treaty.

After *Überseering* the *Bundesgerichtshof* issued another judgment, concerning the legal capacity of a corporation that was established in the United States. Because of the Treaty of Friendship, Commerce and Navigation between the United States and Germany of 29 October 1954, the Court held that a company established in the United States has legal capacity in Germany no matter where its real seat is located. The *Bundesgerichtshof* usually applied, according to German international company law, the real seat principle, but stated that it is possible to depart from this doctrine if there is a treaty in force. Article XXV of the United States – German Treaty, *inter alia*, guarantees national and most favoured nation treatment for companies constituted within the territory of either party. In its judgment, the *Bundesgerichtshof* cited the *Überseering* decision of the ECJ and followed its argumentation, leading to the conclusion that the *Bundesgerichtshof* will apply the rules on freedom of establishment set out by the ECJ to companies established in a non-Member State if there is a treaty in force with the state of incorporation that guarantees national or most favoured nation treatment. This is a step towards free movement of companies outside the EU. Sooner or later national courts in the EU will apply the foundation principle to all companies immigrating into a Member State. As this is a political discussion, bearing in mind the disputes concerning minimum capital or codetermination, which will be addressed later, most European legislators will need some time to accept and implement the inevitable.

Findings

The EU is intended to be based on mutual trust and respect. Keeping this in mind, the aforementioned judgments and the resulting consequences are a huge step forward. There is no reason to assume that the laws of one Member State are inferior to the laws of other Member States. Once a company has been lawfully established it may carry out business elsewhere. Since business people and company founders have the right to choose in practice, what best meets their needs will prevail.

The freedom of establishment under the current definition of the ECJ still does not cover the freedom to move away from a certain Member State; the freedom to emigrate.

In *Daily Mail* the ECJ reasoned that emigration is not a cross-border issue. Accordingly, it is left to national jurisdictions to deal with emigration issues, meaning national regulators can still impose substantial restrictions on domestic companies, and thus hamper the free movement of companies within Europe. This is somewhat inconsistent with the broad understanding of the freedom of establishment on which the ECJ has based its decision in the aforementioned cases, and with the freedom of movement of natural persons. So far this seems to be more of a potential problem depending on how the ECJ interprets future emigration cases and if the Court is willing to decline the *Daily Mail* approach.

The freedom of movement of individuals is the point of reference in article 48 that says “companies … shall … be treated in the same way as natural persons who are nationals of Member States.” In *Überseering* the ECJ drew a parallel between the freedom of establishment and the rules relating to the free movement of capital. The free movement of capital under the Treaty requires free movement both ways, in and out of a Member State. Strict application of this thought would lead to equal treatment of cases of emigration and immigration of companies. To achieve a community wide freedom of establishment the restraints for companies that want to emigrate to another Member State must also be abolished. It appears that the ECJ was unwilling to contradict its own findings in the earlier *Daily Mail* decision. It remains to be seen how the ECJ will handle this problem in future decisions.

Other Consequences

Tax Law

The possibility of saving taxes has great appeal for companies intending to establish in a certain state. Government revenues from incorporation fees, additional fees for amendments, and annual franchise taxes are important in the United States. More than 20 per cent of all tax revenues in Delaware result from this. The fees and taxes in Delaware do not differ considerably from those in other parts of the United States. So, while fees and taxes are no incentive for companies, they are for the State’s government. This might be seen as an incentive for European governments to install a lax corporate law to attract companies to establish in their countries. However, in Europe, unlike in the United States, Member States do not earn significant amounts of money from incorporating *Daily Mail*. Furthermore, tax has its own legal regime autonomous from corporate law. Corporate income tax varies within the EU. However, since the place of central management and control is decisive for the taxation of companies in both countries that apply the real seat principle and countries that apply the incorporation theory, the ECJ judgments did not offer new opportunities as regards taxes. Furthermore, there are double tax treaties throughout the EU.

After the ECJ’s *Centros* decision, the Danish Parliament adopted a law that takes advantage of the real seat principle being applicable in tax law. The act introduced a new minimum capital requirement embodied in tax law for companies operating in Denmark. It applies to companies registered in Denmark, but also to companies with their real seat in Denmark. Either way, companies must put up a guarantee of DKK110,000 in favour of the Danish tax office, or state that the company at the time of registration with the Danish tax authorities has net assets of at least DKK 125,000, which is the amount of the minimum capital required for a private limited company under Danish law. Neither guarantee, nor capital statement is necessary if at least one natural person is fully liable. This example shows that governments with a long lasting minimum capital tradition are unwilling to give up this measure and are looking for ways to circumvent the *Centros* decision.

It remains to be seen whether this minimum capital requirement under the tax law regime will be contested and if so, whether the ECJ will see it as being consistent with the freedom of establishment. According to the ECJ's broad understanding of the freedom of establishment and its strict application of the necessity and proportionality requirements, it seems unlikely that the ECJ would allow the Danish regulation.

Codetermination

One of the most controversial issues for European company law harmonisation has been the extent of codetermination. Thus, the question of employee participation in management remains an important factor for the decision of where to incorporate, as long as the Fifth Council Directive regarding unitary board structures and the question of whether employee representation on one board should be mandatory is still pending.

From 1972 to 1988, three different drafts of this Directive have been issued.

The Directive has not been adopted, mainly because of substantial differences in the degree of worker participation, since it basically tried to stipulate mandatory employee participation for companies of all Member States with more than 500 employees. Codetermination is understood by promoters to benefit society as a whole by taking into account employee interests for structural and strategic management decisions. Opponents argue codetermination reduces shareholder value, since it is an additional burden for managers and requires time consuming negotiations within the company.

Codetermination does not necessarily affect establishing a company, therefore it is not an essential feature of company law, but it affects certain company forms like the *AG* and it can also affect other company forms, if these companies exceed a threshold of employees. Since codetermination laws supersede company law in Germany, it is an important consideration when establishing a company in Germany. Usually the supervisory board consists of a mixture of shareholder and labour representatives. If the Codetermination Act applies, the supervisory board must consist of one half shareholders and one half employee representatives. For this reason, founders and moving companies seek to avoid codetermination requirements.

After the ECJ decisions it remains unclear whether restrictions of the freedom of establishment can be reconciled with the interests of employees. From a national point of view the question is: can a company that moves from one Member State to another be forced to comply with the codetermination regulations of the new home state? That would require some types of corporations to appoint employees' representatives to the board of directors. The German laws that govern codetermination expressly address German company forms such as the *GmbH* and the *AG*, illustrating that the legislature did not anticipate the extension of German codetermination onto foreign company forms. Attempts to circumvent codetermination regulations might be unsuccessful, because some scholars support an analogy of German worker participation for pseudo-foreign companies.

It is argued that this regulatory gap was neither intended, nor foreseen, by the legislature; therefore German regulations could be applied to pseudo-foreign companies because that would govern only the same issue. It is questionable whether this analogy is consistent with the ECJ understanding of the freedom of establishment. Additionally, the topic of codetermination is highly controversial and scholars increasingly doubt its usefulness.

An extension of codetermination faces not only legal but also practical problems. The German

Codetermination regulations as regards the *AG* are bound to a two tier board system, because the *Aufsichtsrat* (supervisory board) is where the participating employees act. This second nonexecutive board is not available in the Anglo-American corporate law system. What, for instance, if a company with a unitary board transfers its seat to a country where the two tier structure is mandatory, and codetermination is organised within the supervisory board, and codetermination may be rendered applicable to this company, but not the rule mandating the two tier system? The example of German codetermination rules highlights the problems from the ECJ judgments. Corporate law cannot be looked at in isolation; it is rather interlinked with several other legal areas, such as labour law. As long as European legislators are unable or reluctant to harmonise their laws generally, the consequences and difficulties that arise from the different corporate structures and various governance systems are far reaching and partly unclear. Codetermination still seems possible, since the ECJ has stated that the protection of workers' rights might be, under certain circumstances, a justification for a curtailing of the freedom of establishment.

In this case national legislators have to adjust their codetermination laws to further international scope. The current discussion about codetermination within the framework for the *Societas Europaea*, which will be discussed later, highlights how complicated this will be. However, it was possible to circumvent national codetermination regulations before the abovementioned ECJ judgments, for instance by engaging a partnership or a "real" foreign company administrated abroad. Codetermination also raises politically charged questions in relation to the self- understanding of workers and managers, and ethical questions over the fair sharing of power and control. There are (Recht und Wirtschaft, Heidelberg, 1996) 292 [*Internationales Gesellschaftsrecht*]: Zimmer changed his opinion after *Inspire Art,* considering the legal consequences of an analogous codetermination would be inappropriate for company forms with other corporate structures: already legal advisers that say business can now be done in Germany without having to adhere to German codetermination rules at the supervisory board level, simply by selecting a non-German company form.

Since the ECJ judgments do not guarantee a freedom to move out, companies established under legal regimes providing for codetermination cannot easily escape these regulations. Thus, the codetermination rules remain a stumbling block for European corporate law harmonisation and the free movement of companies within Europe.

Creditor Protection

Even before the ECJ judgments, the voices questioning whether minimum capital is an adequate measure of creditor protection were getting louder. The only existing European minimum capital requirements apply to public limited companies and the *Societas Europaea*. In some Member States there is a huge effort to make sure a private limited company has a certain amount of capital when it starts business, otherwise its executives are personally liable. But whether the minimum capital is EUR 3000 as it is in Spain, or EUR 35,000 as it is in Austria, neither guarantees a company's survival if the management or the market conditions turn out to be bad. Kindler, for example argues that the shift of the risk of insolvency in the case of undercapitalised foreign companies from shareholders to creditors is not part of the scope of protection of the freedom of establishment and for this reason cannot be decided by the ECJ cases. Technically he is right; the ECJ did not decide that a shift of the risk is necessary under the freedom of establishment. It decided solely that it is inconsistent with the freedom of establishment to impose domestic minimum capital requirements on companies that incorporate or reincorporate in another Member State. Accordingly, the criticised shift of risk is just a practical consequence and not a sentence, since founders and managers are now allowed to choose the company law they prefer.

It is no longer possible to use the real seat doctrine to protect national markets from companies established under company law of other Member States, but, as the Danish minimum capital requirement under tax law shows, Member States have already started to look for alternative ways to regulate pseudo-foreign companies.

European Company

The European Commission has been trying unsuccessfully for almost 35 years to implement an inter-European company. The *Societas Europaea* (*SE*), first proposed in 1970, finally became available on 8 October 2004. In absence of the Tenth and Fourteenth Directives, it is the first vehicle allowing companies to merge if they are established under, and governed by, the laws of different Member States.

Due to the reluctance of Member States' governments to give up their national corporate laws, the *SE* Regulation only sets out a general framework for the *SE*. According to article 7 of the Regulation for a European Company, the company's seat and the administrative centre have to be in the same Member State to ensure effective monitoring of the company by that Member State. This also applies to states that apply the foundation theory. Unlike under the real seat theory, the location of the company's seat and administrative centre would not affect the legal capacity of the company; nevertheless, it would cause an illegal situation under the *SE* Regulation for a company to have its registered seat and its administrative centre in different Member States. If a company does not comply with article 7, the final consequence will be the winding up of the company.

The regulation is a compromise between the foundation and the real seat theory, since the registered office cannot be moved unless the head office or central administration is also moved. This solution has somewhat limited the flexibility of the *SE* and seems to conflict with the ECJ's broad understanding of the freedom of establishment, because this regulation burdens companies in a way that hampers their freedom to move. At the moment this regulation must be accepted, but it remains to be seen whether it will be revised. At least in 2009 the current article 7 should be replaced by a more liberal regulation. Article 8 states that a company must prove it will adequately protect the interests of creditors and other rights holders before it can relocate its seat. However, the Regulation does not define what "adequate" protection means, so this requirement will cause new speculation and uncertainty.

Will all creditors and holders of other rights demand a choice of forum agreement to avoid suing abroad? In this case the relocation of the company seat will still be a complex and time consuming process, requiring a lot of legal advice.

Due to different degrees and systems of workers' participation in Member States, ranging from informing employees after decisions have been made to participation in the decision making itself, and the inability to reach a consensus in this area, the way to implement codetermination is left open, which will lead to a further diversity of *SE*s.

According to the Directive supplementing the Statute for a European Company with regard to the involvement of employees, a body of employee representatives from the companies involved in the transaction must negotiate about the future rights of the employees in the *SE* with the management of the companies subject to the transaction. The *SE* Directive contains highly complex rules on how the employees approve the agreement reached in such negotiations. Several participation models are possible: firstly, a model where employees form part of the supervisory board or the administrative board; secondly, a model where employees are represented by a separate body; and finally, other models to be agreed upon between the management or supervisory boards of the founder companies and the employees or their representatives in those companies, the level of information and consultation being the same as in the case of the second model. If negotiations fail to achieve an agreement, a European works council must be established, which has certain information and consultation rights. The general meeting may not approve the formation of an *SE* unless one of the several models of participation defined in the Directive has been chosen.

Furthermore, an intricate set of rules determines in which instances employees retain their rights to be represented via works councils or board representatives they had prior to the transaction establishing the *SE*. The rules on the employees' rights in an *SE* require a costly and time consuming procedure. They can also bring about some surprising results. For example, depending on where the employees are located, an *SE* with its headquarters in Ireland, thus subject in part to Irish corporate laws, may fall within the scope of the German codetermination rules. Such rules, on the other hand, do not necessarily apply to an *SE* located in Germany if most of its employees work outside of Germany.

The formation of an *SE* may thus be less attractive for companies likely to be subject to extensive employees' rights. All of this leads some lawyers to conclude that establishing an *SE* is too cumbersome and time consuming to become general practice. Another major criticism is that the *SE* has been designed for large enterprises. Arguably, a specific European Company should not be reserved for big businesses only when most businesses are small and medium sized enterprises (SMEs). There is arguably a specific need for a European structure to flexibly establish cross-border joint ventures for SMEs.

As a consequence of different board structures and various codetermination rules, there will not be a uniform *SE*, but a variety of *SE*s, still depending on the corporate and other laws of the Member States where the *SE*s have their registered office. What was initially planned as a supranational company form, independent of the national laws of the Member States, will ultimately be available in a diluted form, partly governed by European and partly by domestic law. The *SE* fails not only to regulate core company law issues but also important related areas such as taxation or insolvency. Due to Member States' unwillingness to forfeit national legislative sovereignty and traditional opinions concerning corporate structure and labour participation, the *SE* is not a single European company but rather a construction kit with various options to choose from. Although it has taken national negotiators much work to reach this little consensus, the importance of the final version of the *SE* will be mostly symbolic. Since the ECJ has interpreted the freedom of establishment for companies broadly, judicial reality has already overtaken legislation. One major benefit of the *SE* – the possibility to move across borders – has been achieved in advance by the ECJ for all companies. To make the *SE* attractive now, regulations concerning relocation of the seat and the centre of administration of the *SE* should be brought in line of the approach taken by the ECJ.

10 Corporate Governance

Corporate governance in the European Union countries is characterized by a process of integration fostered by the free circulation of capital, the introduction of the Euro as a common currency and the constitution of a unique European market. The aim to harmonize fiscal policy and corporate laws meets both general convergence forces and some persisting diversities. The perception is that a new culture that goes above specific national features is being developed. Nonetheless several cultural, institutional, historical and economic factors still affect corporate governance. In the existent literature only a few have engaged in European comparative company law, then we decided to give an innovative contribute by comparing some European companies and their legal requirements for this reason we decided to give an innovative contribute by comparing some European countries and their legal requirements.

The makeover of corporate governance in Europe is an interesting but fragmentary picture. The institutional layouts and most of the practices of corporate governance present diversity and homogeneity in the same time. In recent years European corporate governance law has set out on the journey of innovation with the aim of better integrate into international markets. As a consequence of globalization, numerous European countries have transformed their corporate laws and financial market regulations. Jeffers (2005) suggests that corporate governance convergence amid European countries is boosted by different forces, the most important are the free circulation of capital and the introduction of the Euro as a common currency as well as the constitution of a unique European market that leads to a bigger competitive environment. Through this reorganization progression, a new culture among companies is being developed that goes above specific national features. According to Jeffers (2005) diverse factors affect corporate governance. In particular the establishment of common prudential rules (that is, rules designed to limit risk taking by investors), the usage of international norms of accounting, and, in Europe, the aim to harmonize fiscal policy and corporate laws. On these latter laws, in addition to general convergence forces, there are some persisting diversities. Cernat (2004) comments that the future convergence into a unique European corporate governance model is thwarted by the current diversity of national corporate governance models and the presence of different EU decision-making procedures. Conversely the European Court of Justice (ECJ) rules have made cross-border mobility in incorporation in the European Union easier. Becht et al (2006) have analysed how deregulation and the costs of regulation have affected the location decisions of firms. They found that incorporation costs, especially those due to minimum capital requirements and delays in incorporation, have significant influences on firms' location decisions. Their results confirm that when a firm has to choose between different legal systems, the price is relevant and that cross-border incorporation has encouraged regulatory competition between EU member states to offer lowcost corporate law. Moreover, Khanna et al (2006) have analysed cross-sectional data and tested the hypothesis that similarity in corporate governance between two countries is correlated with economic integration between those countries. The authors conclude that globalization may have encouraged the adoption of some common corporate governance standards but that there is little evidence that these standards have been implemented. What we wanted to explore is the convergence of the corporate governance law in European countries and we decided to do so by a comparative law analysis. As Hopt (2006) notices, only a few have engaged in comparative company law work (see for example Barca & Becht, 2001; Kraakman et al, 2004; Albert-Roulhac & Breen, 2005). Most of the existent standard company law documents and treatises are restricted to national law and seldom directed to the European company law harmonization. Furthermore we noted that recently, more comparative company law work on the European context is being done. Since the influence of international networks and academic journals on this topic is going to increase in the future, we decided to give an innovative contribute by comparing some European companies and their legal requirements.

The Law Requirements Country By Country

We will consider now, each of the nine board of directors' composition aspects that we have analyzed for the ten European countries that compose our sample. The Employees' representation is mandatory -when certain conditions regarding the number of employees are met- on the supervisory boards of Germany, Austria and France (for France, if the unitary system is implemented, the employees' representation is required on the board). In all the other countries analyzed this type of representation is not required. Such representation on boards offers precious first-hand operational knowledge for board decision-making. The authors found that labour representation helps monitor and reduces agency costs; the governance effectiveness obtained through the requirement of employee representation is high and there is good co-ordination between all the company's parties in the firm.

Regarding the minimum or maximum number of members on the board, each country's laws refer to this but different rules are applied. From a theoretical point of view, the experts affirm that, in general, boards with a small number of members are more desirable because in large groups individual responsibility tends to dissolve. The board members' liability is indeed connected with the size of the board. Additionally, many authors claim that excessively large boards can be ineffective in terms of teamwork and communication. Larger boards can lead to difficulties in the co-ordination of board meetings and may inhibit the full participation of each member. On the other hand, boards should be big enough to offer adequate resources to govern. Indeed, the board of directors has to be seen as a team in which persons with different skills, experiences and backgrounds meet together to deal with complex problems.

Moreover, board size is affected by the number of committees (if the company needs to have different committees the board size can be bigger), the workload for the board and the ownership structure. For the abovementioned reasons concerning board size, we suggest that the optimal size is impossible to identify as it depends on a company's characteristics and goals. There is no consensus in the literature on the relationship between board size and performance in the case of general samples. The lack of consensus about the relationship between board size and performance can be attributed to the fact that too many variables interact in determining the performance of a company and it is necessary to consider the complexity of each of them.

We believe that all members of the board should retire at a certain age, which is up to each board to determine. Unfortunately amid the analysed countries, few boards set retirement ages: France, Ireland and the United Kingdom. In France SA's unless otherwise specified in the company articles, no more than 1/3 of the board of directors and of the supervisory board can consist of directors of over seventy years of age while the chairman of the board of directors, the general manager and the members of the management board must not be over sixty-five years of age. Ireland's directors of public company must retire from office at 70 unless the shareholders approve their continuation in office. In the UK directors of public companies must retire at the age of 70 unless shareholders approve their appointment or continuation in office. Under the UK's proposed reforms (expected to be brought into force by 2008) the 70 years restrictions will be removed and there will be a new requirement that the minimum age of directors is 16. Nonetheless, having a director's age limitation is one of the criteria generally used by corporate governance and board rating systems. Indeed, the presence of an age limit improves the corporate governance effectiveness because it helps guarantee a proper turnover on the board.

With regard to independent directors, we considered board composition (obligation to include non-executive or independent members), the recognition of non-executive or independent figures within the board, and the definition of independence. Relating to the last two points, for the most part in the countries analyzed, both the recognition of non-executive or independent members and the definition of independence is provided either by the law or by the codes).

Nonetheless, in France and in Portugal, this definition does not exist or there is no consensus on it. In the literature the effect of outsider-dominated boards on performance is controversial. Greater representation of outside directors on the board results in a negative impact on firm performance. Some authors found a negative relationship between a higher proportion of independent directors and performance or firm value. Other scholars affirm that there is virtually no relationship between board composition and firm performance.

We believe that inconclusiveness of these results' is due to the fact that finding the right mix of independent and non-independent directors is a very complex issue.

On the one hand, the inclusion of insiders in the board may be useful because they have access to information relevant in assessing both strategic and managerial performance. On the other hand, independent directors can bring external skills and competencies to the company and have an important role to play, chiefly in those fields where conflicts of interest may arise (i.e. financial control, nomination and remuneration). Almost all rating systems pay attention to board independence. To conclude, the proper balance inside the board may depend on the company's characteristics (company structure, size, age etc.) and needs: the board of directors should pursue a balance between executive directors, shareholders' representatives and outside independent directors. In the legal rules index building process we decided to give 1 point in all the cases where either the law or the codes dealt with the directors' independence issue. Even if the codes are not coercive we consider their influence on the independence topic is important as the law.

The prohibition of appointment of the chairman as CEO of the same company is another issue that we have taken into account. Other than Austria, France and Germany, the law does not forbid appointing the chairman as CEO. Austrian and German laws instead explicitly require the strict separation of the roles of the management board and supervisory board in these two countries the only model that can be implemented is the two-tiered one. In France the position of chairman is separated from the position of general manager in principle but the board can decide to give the two functions to the same person. The separation of the roles of CEO and chairman reduces the power of the CEO and the potential for management to dominate the board. It has to be recognized, however, that when the CEO also serves as the chairman, his or her role-duality provides unified firm leadership, builds trust and stimulates the motivation to perform.

With regard to law requirements for terms of appointment, all the countries other than Portugal (where no limits are defined) fix either by law or by codes some terms of appointment. We consider this as an element that improves the quality of corporate governance. The importance of establishing the length of a term is stressed by many authors. The precise length of a director's term depends on a number of unique factors that are not only connected with the company's characteristics but also with the individual business' characteristics. In one sense, fixed terms of service have to be long enough to allow the sharing of knowledge among all members and to provide a long-term perspective on the running of the company. In another sense, they have to be short enough to permit the board to be effective and ready to adapt to new scenarios. The fact that the law prescribes some terms of appointment is enfeebled by the possibility, allowed for by the same law, of re-electing the same director. We gave one point to the cases in which the law prescribes terms of appointments and 0.5 point to the cases in which the prescription is by codes.

The role of directors as owners is another point that we analyzed. We wanted to investigate whether the law allows for directors to be owners or not. We found that in every country directors are allowed but not required to own shares in the company. The only case in which directors and members of the supervisory board have to own at least one share in the company is France. This information shows that ownership by directors is not considered as a danger for the company. In fact, in the literature it is recognized that having owners as directors can positively affect performance.

We have defined some features of boards of directors and we have considered how they are regulated. The relationship between board of directors composition and corporate governance quality have been discussed. Some divergences emerged among these ten European countries, for example on the employees' representation on the board, on the number of directors and on independence recognition. Germany and Austria a have the highest legal rules indices, Portugal has the lowest, the interesting finding is that even if the UK and Ireland belong to the common law legal family, their legal rules index have the same value as the Spain's legal rules index and their values are similar to a good part of the romanistic legal family countries. This could support our idea that a new culture among companies is being developed that goes above specific national features. On board of directors composition and on what makes a good board of directors, there is not always homogeneous theoretical support. This facet and the fact that some cultural and historical differences remain strong can explain the law divergences that we found. More research has to be done on this topic, and it would be interesting to extend the analysis to all the members of the European Union.

Cross-border conversion of companies in the EU: the impact of the VALE judgement

The VALE judgement of the Court of Justice of the European Union has made it clear that the right to cross-border conversions is protected by the freedom of establishment, and should therefore be facilitated by the Member States. In addition, the Court introduced the principles of equivalence and effectiveness in the area of EU company law, thereby giving some guidelines about how the procedures for cross-border conversions should be enacted in the two Member States involved. However, a close examination reveals that these principles, although helpful in some ways, are also very open to interpretation and many questions are still left unanswered. The two main issues are

that the rules governing domestic conversion are not always suitable for cross-border conversions and

that there is likely to be a lack of coordination of the rules in the different Member States which will cause problems for a successful conversion. Especially to overcome the later problem a revival of the work on a 14th Company Law Directive would prove helpful.

In July 2012 the Court of Justice of the European Union (Court) passed its latest decision concerning the free movement of companies. Given that earlier cases on the free movement of companies are often controversial and creating a complicated puzzle where some types of free movements are safeguarded by EU law and some are not, any new decision is awaited with excitement.

One of the early influential cases concerning the companies' right of freedom of establishment is the frequently cited Daily Mail case. Though many of the findings and observations of the Court in the Daily Mail have been marginalized, some findings of the Court are still applicable today. The most notable of these findings is that companies, contrary to natural persons, are 'creatures of national law' and 'exist only by virtue of the varying national legislation which determines their incorporation and functioning.' As a consequence, companies cannot rely on the freedom of establishment to move their real seat away from the Member State of incorporation. Daily Mail thus started the debate concerning the different connecting factors enforced by Member States. After a decade-long pause in the judicial activity concerning the freedom of establishment the breakthrough in the development in this area of EU company law was brought forth by Centros, Überseering7 and Inspire Art.8 These cases signified a 'retreat from the high water mark' of the findings of the Daily Mail case and were focusing on the question to what extent Member States have freedom to determine the status of companies incorporated in other Member States and the question when companies can rely on the freedom of establishment guaranteed by EU law. In Centros the Court argued that the status of the company is to be determined by the Member State of incorporation and should be recognized by the host Member State as well.10 It has to be noted, however, that in Centros both Member States concerned were following the incorporation doctrine. Hence the case did not concern the conflicting choice of law rules. The answer to the question whether this finding would still remain valid in a case where one of the Member States involved was following the real seat doctrine came in the subsequent Überseering case, where the Court made it clear that a host Member State cannot enforce the real seat theory against a company incorporated in a Member State that uses the incorporation theory. Several commentators observe that thereby the Court in Überseering fundamentally changed conflicts of corporate laws within the EU. Thus, it became obvious that Member States are not free to decide about the non-existence of companies validly incorporated under the law of other Member States. The consequence of these judgements was that it became possible to incorporate a company in any Member State applying the incorporation theory and set up business in any other Member State as a branch. Member States where the branch is situated have to accept that they can do only little to regulate these branches. On the other hand, it was also apparent that for companies incorporated in Member States adhering to the real seat doctrine it is much more complicated to carry on business activity in another Member State. Therefore, the attention of practitioners and, as a consequence, of the Court seems to have shifted toward other methods for companies to carry on business activity in another Member State: cross-border movements involving some form of transformation.

The first in this line of cases, the SEVIC case, deals with cross-border mergers. Although the Court provides that difference of treatment between the merger of two or more domestic companies and two or more companies, at least one of which is not domestic, constitutes a restriction of the freedom of establishment, it also clarifies that there can be imperative reasons in the public interest on the basis of which Member States are justified in restricting the freedom of establishment. The Court, however, failed to address how specifically such cross-border merger should take place, e.g. which procedures should govern these mergers. It is Interesting to note that the SEVIC case allows cross-border mergers if such mergers are allowed in a national setting, and consequently, the Court already here indicated that Member States should allow cross-border restructuring and transformation to the same extent as they allow internal transactions. However, the impact of the case was dimmed by the fact that the Cross-border merger Directive was passed with only one month's difference of the judgement, and as a consequence most Member States seemed to assume that implementing this directive made up for compliance with SEVIC.

Therefore few Member States adopted rules on, for instance, cross-border transformation in the form of transfer of seat.20 Maybe Member States decided to wait for the adoption of the 14th Company Law Directive on transfer of seat, but the Commission chose not to press this directive, pointing out that they would await the effects of the Cross-border Merger Directive and the Court's judgements.

Thus, the ball was once again with the Court and the next notable case concerning cross-border transformations was Cartesio. Although the factual basis of Cartesio is not concerned with cross-border conversion, since the company in the case was incorporated in Hungary and wished to move its seat from Hungary to Italy without changing the applicable law, the Court goes on to address the situation in which a company transfers its seat together with 'an attendant change as regards the national law applicable.'

In such cases the Member State of origin is not justified in preventing the company to convert into a company governed by the law of another Member State (host state), to the extent that such a conversion is permitted by the law of the host Member State.

It is interesting to note that the Member State of origin is not even justified to require the winding-up or liquidation of the company, which constitutes an obvious break from the findings in Daily Mail.

Again, the Court failed to address in detail how the Member State of origin and the host Member State should facilitate such transactions. Therefore, again the Member States seem not to have taken positive steps to allow for cross-border conversion, and with this the scene was set for the Court's judgement in the VALE case.

The factual basis and the main findings in VALE

The case relates to the other aforementioned line of cases concerning cross-border restructuring of companies. Indeed, the Court's argument in VALE starts where the findings in Cartesio concerning cross-border conversion left off.

The case concerns an Italian company, VALE Costruzioni Srl. (VALE Costruzioni) a company validly incorporated under Italian law and registered in the Rome commercial register. After the decision of the company to transfer its seat to Hungary in order to continue carrying on business activity there and simultaneously reincorporating under Hungarian law, the company was removed from the Rome commercial register. By this removal VALE Costruzioni seized to exist, albeit the Italian Government pointed out that the removal could be annulled with a retroactive effect.

The cross-border movement in this case cannot be regarded as simple transfer of the company's seat, because it was intended to entail change of applicable law as well. Thus, it is better characterized as, at least an attempt of, a 'cross-border conversion'. After the decision of VALE Costruzioni to commence a cross-border conversion the representatives adopted the articles of association of VALE Építési Kft. (VALE Építési) in compliance with Hungarian law and paid up the required share capital under Hungarian law.

Thereafter, the representative of VALE Építési applied for registration in Hungary at the Budapest Metropolitan Court, acting as Court of Corporate Registration for the registration of VALE Építési.

The application stated that VALE Costruzioni was the predecessor in law to VALE Építési and asked for the registration of this fact. The application for registration was rejected and following an appeal the Regional Court of Appeal of Budapest upheld the rejection.

It stated that a company incorporated and registered in Italy cannot, by virtue of Hungarian company law, transfer its seat to Hungary and obtain registration there in the requested form. It also stated that a company not previously registered in Hungary cannot be listed as a predecessor in law. Following VALE Építési's appeal on a point of law before the Supreme Court, the Supreme Court referred the question to the Court.

The Court first address an argument presented by Hungary and other Member States according to which legislation on conversion of companies does not fall within the scope of Article 49 because it leads to the incorporation of a company in the host Member State. The underlying reasoning being that it is for Hungarian law to decide how companies should be incorporated. The Court rejects this argument. It points out that Member States have the power to define the connecting factor required of a company. But the fact that Member States should permit a cross-border conversion does not infringe this power 'nor that State's determination of the rules governing the incorporation and functioning of the company resulting from a cross-border conversion'. Thus, according to the Court a Member State should allow for cross-border conversion, but the host Member State is still free to determine the connecting factor required for such a company. The Court then addresses the question whether the Hungarian law poses a restriction on the freedom of establishment. Firstly, the Court notes that Article 49 presupposes an actual establishment and the pursuit of genuine economic activity in the host Member States. However, there is nothing in the present case that suggests that VALE Építési will not actually seek to establish itself in Hungary. Since Hungarian law allows for conversions of companies which already have their seats in the country the fact that they do not allow for cross-border conversions constitutes a restriction on the freedom of establishment. This difference in treatment between domestic and cross-border conversion cannot be justified by the fact that there is no harmonisation governing such transactions. To some extent reasons in the public interest, such as the protection of the interests of creditors, minority shareholders and employees, the preservation of the effectiveness of fiscal supervision can justify a different treatment of domestic and cross-border conversions. However, such a justification is lacking in the present case since Hungarian law in a general manner precludes cross-border conversions.

The Court then addressed the issues that Hungarian law did not allow the new Hungarian company to use the former Italian company as 'predecessor in law'. The Court pointed out that since there is no secondary law addressing how cross-border conversion should take place it is up to national law in the Member State of origin and the host Member State to govern the process. Such national laws must comply with Article 49 TFEU, and the Court points out several requirements which national law must fulfil. First, Member States which make provisions for crossborder conversions must grant the same possibility to companies governed by the law of another Member State.46 Second, even though the detailed procedural rules are a matter for national law, the principle of equivalence and principle of effectiveness must be applied.

Taking these guiding principles into account the Court noted that it cannot be called into question that Hungary is allowed to apply the rules on national conversions governing the incorporation and functioning of the company. More specifically Hungary can require a company to draw up lists of assets and liability and property inventories before the conversion.48 On the other hand, the refusal to record the Italian company as 'predecessor in law' did not comply with the principle of equivalence if such a record of a predecessor is possible to make in a domestic conversion.

Next the Court spelled out how the principle of effectiveness affected national law. The principle of effectiveness means that host Member State rules and practices are not allowed to 'render impossible in practice or excessively difficult the exercise' of the rights conferred by the free movement of establishment. The practical effect of this principle is discussed by the Court in relation to the documents obtained by the predecessor company from the Italian authorities during the deregistration procedure. Here the Court proclaims that the host Member State must take due account of these documents,52 since these constitute an 'indispensable link between the registration procedure in the Member State of origin and that in the host Member State', enabling the cross-border conversion in practice. More specifically in this case the Court rules that the practice of the Hungarian authorities to refuse taking into account such documents in a general manner is contrary to the freedom of establishment. The host Member State is obliged to take due account of the documents issued by the authorities of the Member State of origin, despite that such an obligation would not be covered by the principle of equivalence. The principle of effectiveness is complementary to the principle of equivalence and seems to extend the host Member State's obligation in making cross-border conversions possible to account for the inherent differences in national and cross-border conversions.

The implications of the judgement

In VALE the Court seems to have interpreted articles 49 TFEU and 54 TFEU as providing a firm legal basis for the right of cross-border conversions within the EU for all companies in a general manner, clarifying its earlier hypothetical reflections in SEVIC and Cartesio. Simultaneously, it also proclaimed that restricting the right of companies to convert cross-border is only permitted for the host Member State on the basis of overriding reasons in the public interest. The real innovation of the Court lies in providing guiding principles on how the cross-border conversion should take place by the introduction of the principles of equivalence and effectiveness in this area. These principles are certainly not new to EU law, and not even entirely new to this area of EU company law. As pointed out above in section 3, in SEVIC the Court has indicated that rules for domestic mergers should also be applicable to cross-border mergers. Admittedly, the Court in SEVIC has not used the term 'equivalence' and the complementary principle of effectiveness is completely lacking in that case.

The principle of equivalence means that national procedural rules designated to ensure the protection of rights acquired under EU law should be governed by domestic law of the Member State provided those are not less favourable than those governing similar domestic situations. The principle of effectiveness furthermore requires that such procedural rules are not allowed to render impossible in practice or excessively impede the exercise of the rights acquired under EU law. Thus, whereas the principle of equivalence ensures that the Member State should use its existing rules on domestic conversion as a starting point, the principle of effectiveness may force Member States to deviate or adapt their domestic rules if that is necessary to make cross-border conversions possible. These principles have been used by the Court in its case law inter alia concerning right to damages and the right to recover unlawfully levied charges.

By virtue of these principles the company wishing to convert cross-border should be able to rely on the rules of the host Member State applicable to similar domestic conversions. This sounds, at first, rather clear and simple, but the introduction of the principles of equivalence and effectiveness in the area of EU company law in relation to cross-border conversions raises very difficult issues, both in terms of core company law and other legal areas, such as for example tax law. The principles of equivalence and effectiveness, in lack of supporting secondary legislation are extremely vague. One might even ask whether they solve the question how a cross-border conversion can take place or create further issues and uncertainties in this area. To illustrate this point a few of the main issues raised by the judgement will be discussed.

The first issue is related to what kind of domestic conversion exactly should the cross-border conversion be treated equivalently with. In this case an Italian limited liability company intended to be converted into a Hungarian limited liability company.59 However, Hungarian law does not contain the possibility of a limited liability company 'converting' into the same type of company, and it is not likely that other Member States' company laws contain the possibility of such transformation either. Thus, strictly speaking, the principle of equivalence cannot be applied. This could mean that companies cannot convert cross-border into the equivalent company forms, only into other company forms, which have equivalent company transformations in a national setting of the host Member State. Obviously, such a reading of the findings in VALE are untenable, as the facts in the VALE case demonstrates that a conversion from a private company in one Member State into a private company in another Member State should be protected. Strictly speaking, this conclusion does not follow from the principle of equivalence, and must, thus, be contributed to the principle of effectiveness.

For a conversion to take place it must be a condition that the particular kind of conversion is possible according to the rules of the host Member State.60 Different Member States allow different types of conversions, but it is common to have rules on conversions from a private limited company to a public limited company and vice versa, as well as conversions involving limited partnerships and co-operatives. More uncommon are rules on the conversion involving partnerships and limited liability corporate forms as well as foundations and limited liability corporate forms. It is less clear whether the particular kind of conversions should also be allowed in the Member State of origin. Let us take the situation where a private limited company wants to convert into a co-operative, and this is possible according to the company law rules found in the host Member State. Should the fact that such conversions are not governed by legal rules in the Member State of origin hinder whether the conversion can take place? As the Member State of origin will normally have other rules allowing the conversion of a private limited company into other corporate forms, the Member State of origin may just apply these rules by analogy.

Admittedly, the Member State of origin may argue that a conversion into a co-operative raises special issues, and for instance may require special rules on minority shareholder and creditor protection. If so, they may argue that they are not happy about allowing such conversion and since they have not allowed such conversion in a domestic setting they should not be forced to do so in a cross-border setting. Again, it raises the question whether compliance with the principle of equivalence is sufficient or whether the principle of effectiveness requires the Member State of origin to adapt their rules to allow conversions not known to them.

The impact of the judgement seems not to be limited to conversions, as it could also cover other types of corporate reorganisations given that such reorganisations exist in a similar form in both the Member States involved. Most obviously this would cover the division of companies which is a type of transaction that exists in several Member States. But there may be other forms of reorganisations which will also be made possible in a cross-border setting.

The second issue is related to the protection of the interests of creditors, minority shareholders and employees. It is not quite certain if the company law rules of the Member State of origin, the host Member State, or both simultaneously are to be applied. On the one hand, the Court clearly states that Hungarian legal provisions on the requirements to draw up lists of assets and liabilities and property inventories can be applied. Hence the Court seems to confirm clearly that the host Member State's company law provisions related to company conversions apply, some of which are aiming to protect the interests of creditors, minority shareholders and employees. At the same time, the Court also provides that the host Member State's authorities must take due account of the documents obtained from the authorities of the Member State of origin in relation to the conversion. However, in order to obtain such documents, the predecessor company has to comply with measures of the company law of the Member State of origin, some of which may be in place to protect the interests of creditors, minority shareholders and employees. Thus, indirectly the Court seems to enable the Member State of origin as well to apply its own company law rules applicable to company conversions. Besides, the fact that parallel application of two company laws can lead to a rather lengthy and costly process, it may also be outright impossible for the company to follow both company laws' provisions. Seemingly, the principle of effectiveness could take care of this problem, but the question which company law should yield remains open. Further, it is interesting to reflect on the fact that even if both Member States' company law rules on creditor and minority shareholder protection are to be applied, these rules may still not provide adequate protection to creditors and shareholders of the predecessor company, since these measures are typically designed for national setups. For example, in this case, the publication obligation of the converting company in the Hungarian Corporate Gazette is not likely to afford much protection for the Italian creditors. Neither does the right of the creditors of the predecessor company to claim guarantee from the new company within 30 days of the publication of the formation of the new company.68 Thus there may be a need to introduce rules providing for an additional protection in cross-border conversions, but it is unclear how far the host Member State and the Member State of origin can go in imposing such measures on the basis of overriding reasons in the public interest'. The Court seems to accept that special protection may be required, but on the other hand, the principle of effectiveness implies that Member States may not make it too difficult to undertake such cross-border conversions.

As pointed out above, it is possible in context of a cross-border conversion that the company law rules of both the Member State of origin and the host Member State apply simultaneously. This may cause an additional and unexpected burden for minority shareholders of the predecessor company. For example, Hungarian company law provides that shareholders of the predecessor company, if they are not becoming shareholders of the new company, are liable, at least to the extent of their share capital contributions, for the obligations of the predecessor company which are not settled by the new company, for five years after the conversion. Transposed to this case, this means that the original Italian shareholders of the predecessor company incorporated and operating under Italian law may become liable for certain debts if not settled by the new company even though they as minority shareholders may have voted against the convergence. Obviously, this may cause dubious legal obligations and further uncertainty around cross-border conversions.

The third issue related to core company law, but stemming from the lack of procedural coordination between the Member State authorities was picked up by Advocate General Jääskinen. This relates to the question when the predecessor company should be removed from the corporate register of the Member State of origin and when the new company should come into existence and be registered under the law of the host Member State. Advocate General Jääskinen points out in his opinion that the predecessor company should still continue to exist at the legal birth of the new company, both under the host Member State law in VALE, the law of the Member State of origin and the corresponding EU law. For this reason there needs to be coordination between different Member State authorities, otherwise they might 'drop the egg' between the removal of the predecessor company from the register and the registration of the new company, since as set forth above companies are 'creatures of national law' and exist only by virtue of the national law.74 The facts in VALE illustrate this problem. As set forth above, the VALE Costruzioni was removed from the Rome commercial register prior to the application for registration of VALE Építési in Hungary.75 Thus, in this period VALE Costruzioni did not legally exist any longer, and VALE Építési did not exist yet. Luckily, the Hungarian courts regarded the application as a new company formation, thus granted VALE Építési the status of 'company in formation', which grants limited capacity to the company, before the final registration.

This is how VALE Építési was capable of starting the litigation about its registration. However, if the principle of equivalence was applied and the movement was regarded as cross-border conversion by the Hungarian courts, the situation would have been completely different. According to the Hungarian Act on Business Associations of 2006 a transforming new company cannot operate as company in formation, since the predecessor company should still be in existence. This would have meant in this case that, technically, neither the predecessor Italian company, nor the new Hungarian company existed due to the lack of coordination between the provisions of the two legal systems. In such a situation it is uncertain how the principles of equivalence and effectiveness should be applied to mitigate or remove the pitfalls due to the lack of coordination.

Better coordination between different Member State authorities is also necessary because of purely procedural reasons, bringing us to the fourth issue. Under Hungarian law there is no possibility for the applicant company to submit its application for conversion to the regional Court of Corporate Register79 to which the new company will belong. The predecessor company has to submit its application to the regional Court of Corporate Register to which it belongs. Applying this rule to the VALE case, we find that according to Hungarian law VALE Costruzioni should have applied for cross-border conversion at the Rome corporate register; the Rome corporate register should have decided on the matter on basis of Hungarian law, registered VALE Építési in the Hungarian corporate register, and sent the corporate files to the regional Court of Corporate Registration in Hungary under which VALE Építési was intended to belong. An unlikely scenario. At the same time, it clearly shows the need for coordination between the different Member States on their rules and practices in this area of company law.

The fifth issue relates to the connecting factors. The Court stresses that the host Member State may determine the connecting factor for the company under incorporation.82 Thus, the host Member State may enforce a real seat requirement if they apply the real seat theory. It is less clear whether the Member State of origin can enforce a real seat requirement to the extent that they deny deleting the company from their register as long as the company continues to have its real seat in the Member State. If this was possible, a Member State may apply the real seat theory to hinder that companies in that state can convert into, for instance, a UK company without moving their real seat to the UK. However, it must be assumed that the Member State of origin cannot apply the real seat theory in this way. Since the company is in the process of changing applicable law, it must be for the host Member State to decide on the connecting factor required for the future.83 This is supported by the fact that the Court only stresses that the host Member State has this right in the VALE case. Also in Cartesio the Court stresses that while a Member State of origin can enforce real seat requirements against companies incorporated in that Member State, the situation is different if the company is moving its real seat abroad and wants to change the applicable law (e.g. convert). Thus, in the situation where a conversion is under way the Member State of origin cannot oppose this.

As the sixth issue, it should be considered whether the fact that the Court stresses that only actual establishment and the pursue of genuine economic activities can make it possible for the Member State of origin to deny a company the right to undergo a conversion if the real seat of the company is not moved out of that Member State. The Court found that the freedom of establishment would be applicable if VALE's activities are not restricted to Italy and that the company will actually seek to establish itself in Hungary.86 Thus, for there to be a real establishment the company does not need to move its real seat to Hungary. It would be sufficient that in other ways it has some connection with Hungary. But the really interesting question is whether the fact that a company is registered in another Member State after the conversion and formally has its registered office and a mail box office there is sufficient if all the activities of the company are carried out in the Member State of origin. In the Centros case the Court seemed to think that registration and thus only a formal link to the Member State of incorporation is sufficient, but in the Cadbury Schweppes case the Court established that the question whether there is an actual establishment should be 'based on objective factors which are ascertainable by third parties with regard, in particular, to the extent to which the [company's] physically exists in terms of premises, staff and equipment.'

If the later test is used, it does not seem likely that it would be sufficient that a company has a mail box office in the host Member State. Therefore, due to this ambiguousness in the case law it must be expected that the Court will soon have to rule on this issue once again to clarify whether the Member State of origin can deny a company the right to convert if there is only a very formal link (registration) to the host Member State.

This latest judgement of the Court has made it clear that the right to cross-border conversions is protected by the freedom of establishment, and should therefore be allowed to the extent that such conversions are allowed under the national law of the host Member State and facilitated by both Member States involved. This has already been implied in previous judgements, but it seems that most Member States and even the Commission were waiting for the Court to make a clearer stand on this issue. In addition, the Court expressly introduced the principles of equivalence and effectiveness in the area of EU company law, thereby creating the theoretical framework for crossborder conversions. However, as pointed out these principles, although helpful in some ways, are also very open to interpretation; hence, many questions are still left unanswered and many practical issues remain unresolved.

It is certain that this judgement will require most Member States to amend their legal systems and practices. For those Member States whose company laws are operating on the basis of the formalistic 'numerous clausus' principle determining company formation and transformation, amending their legal systems is a definite must. Also, many Member States may think that crossborder conversions require a better protection of creditors, minority shareholders and employees, and therefore they see a need to adopt special rules on cross-border reorganisations.

However, as it was demonstrated above, amending the company law rules of the Member States to accommodate cross-border conversions does little good without coordination between the different national provisions. Member States need to coordinate with each other in order to create an efficient system enabling cross-border conversions, not only from a company law perspective, but also from a tax law perspective. Even though Member States involved must work bona fide to overcome this lack of coordination it must be expected that in practice it may prove to be very difficult to carry through cross-border conversions and other restructuring, since precise guidelines for solving conflicts are lacking. Accordingly, the best way may be EU level harmonisation in the area.

Societas Europea – Council Regulation

COUNCIL REGULATION (EC) NO 2157/2001

OF 8 OCTOBER 2001

ON THE STATUTE FOR A EUROPEAN COMPANY (SE)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 308 thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the European Parliament(2),

Having regard to the opinion of the Economic and Social Committee(3),

Whereas:

(1) The completion of the internal market and the improvement it brings about in the economic and social situation throughout the Community mean not only that barriers to trade must be removed, but also that the structures of production must be adapted to the Community dimension. For that purpose it is essential that companies the business of which is not limited to satisfying purely local needs should be able to plan and carry out the reorganisation of their business on a Community scale.

(2) Such reorganisation presupposes that existing companies from different Member States are given the option of combining their potential by means of mergers. Such operations can be carried out only with due regard to the rules of competition laid down in the Treaty.

(3) Restructuring and cooperation operations involving companies from different Member States give rise to legal and psychological difficulties and tax problems. The approximation of Member States' company law by means of Directives based on Article 44 of the Treaty can overcome some of those difficulties. Such approximation does not, however, release companies governed by different legal systems from the obligation to choose a form of company governed by a particular national law.

(4) The legal framework within which business must be carried on in the Community is still based largely on national laws and therefore no longer corresponds to the economic framework within which it must develop if the objectives set out in Article 18 of the Treaty are to be achieved. That situation forms a considerable obstacle to the creation of

groups of companies from different Member States.

(5) Member States are obliged to ensure that the provisions applicable to European companies under this Regulation do not result either in discrimination arising out of unjustified different treatment of European companies compared with public limited-liability companies or in disproportionate restrictions on the formation of a European company or on the transfer of its registered office.

(6) It is essential to ensure as far as possible that the economic unit and the legal unit of business in the Community coincide. For that purpose, provision should be made for the creation, side by side with companies governed by a particular national law, of companies formed and carrying on business under the law created by a Community Regulation directly applicable in all Member States.

(7) The provisions of such a Regulation will permit the creation and management of companies with a European dimension, free from the obstacles arising from the disparity and the limited territorial application of national company law.

(8) The Statute for a European public limited-liability company (hereafter referred to as “SE”) is among the measures to be adopted by the Council before 1992 listed in the Commission’s White Paper on completing the internal market, approved by the European Council that met in Milan in June 1985. The European Council that met in Brussels in 1987 expressed the wish to see such a Statute created swiftly.

(9) Since the Commission’s submission in 1970 of a proposal for a Regulation on the Statute for a European public limited-liability company, amended in 1975, work on the approximation of national company law has made substantial progress, so that on those points where the functioning of an SE does not need uniform Community rules reference may be made to the law governing public limited-liability companies in the Member State where it has its registered office.

(10) Without prejudice to any economic needs that may arise in the future, if the essential objective of legal rules governing SEs is to be attained, it must be possible at least to create such a company as a means both of enabling companies from different Member States to merge or to create a holding company and of enabling companies and other legal persons carrying on economic activities and governed by the laws of different Member States to form joint subsidiaries.

(11) In the same context it should be possible for a public limited-liability company with a registered office and head office within the Community to transform itself into an SE without going into liquidation, provided it has a subsidiary in a Member State other than that of its registered office.

(12) National provisions applying to public limited-liability companies that offer their securities to the public and to securities transactions should also apply where an SE is formed by means of an offer of securities to the public and to SEs wishing to utilise such financial instruments.

(13) The SE itself must take the form of a company with share capital, that being the form most suited, in terms of both financing and management, to the needs of a company carrying on business on a European scale. In order to ensure that such companies are of reasonable size, a minimum amount of capital should be set so that they have sufficient assets without making it difficult for small and medium-sized undertakings to form SEs.

(14) An SE must be efficiently managed and properly supervised. It must be borne in mind that there are at present in the Community two different systems for the ad-

ministration of public limited-liability companies. Although an SE should be allowed to choose between the two systems, the respective responsibilities of those responsible for management and those responsible for supervision should be clearly defined.

(15) Under the rules and general principles of private international law, where one undertaking controls another governed by a different legal system, its ensuing rights and obligations as regards the protection of minority shareholders and third parties are governed by the law governing the controlled undertaking, without prejudice to the obligations imposed on the controlling undertaking by its own law, for example the requirement to prepare consolidated accounts.

(16) Without prejudice to the consequences of any subsequent coordination of the laws of the Member States, specific rules for SEs are not at present required in this field. The rules and general principles of private international law should therefore be applied both where an SE exercises control and where it is the controlled company.

(17) The rule thus applicable where an SE is controlled by another undertaking should be specified, and for this purpose reference should be made to the law governing public limited-liability companies in the Member State in which the SE has its registered office.

(18) Each Member State must be required to apply the sanctions applicable to public limited-liability companies governed by its law in respect of infringements of this Regulation.

(19) The rules on the involvement of employees in the European company are laid down in Directive 2001/86/EC(4), and those provisions thus form an indissociable complement to this Regulation and must be applied concomitantly.

(20) This Regulation does not cover other areas of law such as taxation, competition, intellectual property or insolvency. The provisions of the Member States' law and of Community law are therefore applicable in the above areas and in other areas not covered by this Regulation.

(21) Directive 2001/86/EC is designed to ensure that employees have a right of involvement in issues and decisions affecting the life of their SE. Other social and labour legislation questions, in particular the right of employees to information and consultation as regulated in the Member States, are governed by the national provisions applicable, under the same conditions, to public limited-liability companies.

(22) The entry into force of this Regulation must be deferred so that each Member State may incorporate into its national law the provisions of Directive 2001/86/EC and set up in advance the necessary machinery for the formation and operation of SEs with registered offices within its territory, so that the Regulation and the Directive may be applied concomitantly.

(23) A company the head office of which is not in the Community should be allowed to participate in the formation of an SE provided that company is formed under the law of a Member State, has its registered office in that Member State and has a real and continuous link with a Member State's economy according to the principles established in the 1962 General Programme for the abolition of restrictions on freedom of establishment. Such a link exists in particular if a company has an establishment in that Member State and conducts operations therefrom.

(24) The SE should be enabled to transfer its registered office to another Member State. Adequate protection of the interests of minority shareholders who oppose the transfer, of creditors and of holders of other rights should be proportionate. Such transfer should

not affect the rights originating before the transfer.

(25) This Regulation is without prejudice to any provision which may be inserted in the 1968 Brussels Convention or in any text adopted by Member States or by the Council to replace such Convention, relating to the rules of jurisdiction applicable in the case of transfer of the registered offices of a public limited-liability company from one Member State to another.

(26) Activities by financial institutions are regulated by specific directives and the national law implementing those directives and additional national rules regulating those activities apply in full to an SE.

(27) In view of the specific Community character of an SE, the "real seat" arrangement adopted by this Regulation in respect of SEs is without prejudice to Member States' laws and does not pre-empt any choices to be made for other Community texts on company law.

(28) The Treaty does not provide, for the adoption of this Regulation, powers of action other than those of Article 308 thereof.

(29) Since the objectives of the intended action, as outlined above, cannot be adequately attained by the Member States in as much as a European public limited-liability company is being established at European level and can therefore, because of the scale and impact of such company, be better attained at Community level, the Community may take measures in accordance with the principle of subsidiarity enshrined in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in the said Article, this Regulation does not go beyond what is necessary to attain these objectives,

HAS ADOPTED THIS REGULATION:

TITLE I

GENERAL PROVISIONS

Article 1

1. A company may be set up within the territory of the Community in the form of a European public limited-liability company (Societas Europaea or SE) on the conditions and in the manner laid down in this Regulation.
2. The capital of an SE shall be divided into shares. No shareholder shall be liable for more than the amount he has subscribed.
3. An SE shall have legal personality.
4. Employee involvement in an SE shall be governed by the provisions of Directive 2001/86/EC.

Article 2

1. Public limited-liability companies such as referred to in Annex I, formed under the law of a Member State, with registered offices and head offices within the Community may form an SE by means of a merger provided that at least two of them are governed by the law of different Member States.
2. Public and private limited-liability companies such as referred to in Annex II,

formed under the law of a Member State, with registered offices and head offices within the Community may promote the formation of a holding SE provided that each of at least two of them:

a) is governed by the law of a different Member State, or
b) has for at least two years had a subsidiary company governed by the law of another Member State or a branch situated in another Member State.

3. Companies and firms within the meaning of the second paragraph of Article 48 of the Treaty and other legal bodies governed by public or private law, formed under the law of a Member State, with registered offices and head offices within the Community may form a subsidiary SE by subscribing for its shares, provided that each of at least two of them:
   a) is governed by the law of a different Member State, or
   b) has for at least two years had a subsidiary company governed by the law of another Member State or a branch situated in another Member State.
4. A public limited-liability company, formed under the law of a Member State, which has its registered office and head office within the Community may be transformed into an SE if for at least two years it has had a subsidiary company governed by the law of another Member State.
5. A Member State may provide that a company the head office of which is not in the Community may participate in the formation of an SE provided that company is formed under the law of a Member State, has its registered office in that Member State and has a real and continuous link with a Member State's economy.

Article 3

1. For the purposes of Article 2(1), (2) and (3), an SE shall be regarded as a public limited-liability company governed by the law of the Member State in which it has its registered office.
2. An SE may itself set up one or more subsidiaries in the form of SEs. The provisions of the law of the Member State in which a subsidiary SE has its registered office that require a public limited-liability company to have more than one shareholder shall not apply in the case of the subsidiary SE. The provisions of national law implementing the twelfth Council Company Law Directive (89/667/EEC) of 21 December 1989 on single-member private limited-liability companies(5) shall apply to SEs mutatis mutandis.

Article 4

1. The capital of an SE shall be expressed in euro.
2. The subscribed capital shall not be less than EUR 120000.
3. The laws of a Member State requiring a greater subscribed capital for companies carrying on certain types of activity shall apply to SEs with registered offices in that Member State.

Article 5

Subject to Article 4(1) and (2), the capital of an SE, its maintenance and changes thereto, together with its shares, bonds and other similar securities shall be governed by the provisions which would apply to a public limited-liability company with a registered office in the Member State in which the SE is registered.

Article 6

For the purposes of this Regulation, "the statutes of the SE" shall mean both the instrument of incorporation and, where they are the subject of a separate document, the statutes of the SE.

Article 7

The registered office of an SE shall be located within the Community, in the same Member State as its head office. A Member State may in addition impose on SEs registered in its territory the obligation of locating their head office and their registered office in the same place.

Article 8

1. The registered office of an SE may be transferred to another Member State in accordance with paragraphs 2 to 13. Such a transfer shall not result in the winding up of the SE or in the creation of a new legal person.
2. The management or administrative organ shall draw up a transfer proposal and publicise it in accordance with Article 13, without prejudice to any additional forms of publication provided for by the Member State of the registered office. That proposal shall state the current name, registered office and number of the SE and shall cover:
   a) the proposed registered office of the SE;
   b) the proposed statutes of the SE including, where appropriate, its new name;
   c) any implication the transfer may have on employees' involvement;
   d) the proposed transfer timetable;
   e) any rights provided for the protection of shareholders and/or creditors.
3. The management or administrative organ shall draw up a report explaining and justifying the legal and economic aspects of the transfer and explaining the implications of the transfer for shareholders, creditors and employees.
4. An SE's shareholders and creditors shall be entitled, at least one month before the general meeting called upon to decide on the transfer, to examine at the SE's registered office the transfer proposal and the report drawn up pursuant to paragraph 3 and, on request, to obtain copies of those documents free of charge.
5. A Member State may, in the case of SEs registered within its territory, adopt provisions designed to ensure appropriate protection for minority shareholders who oppose a transfer.
6. No decision to transfer may be taken for two months after publication of the proposal. Such a decision shall be taken as laid down in Article 59.
7. Before the competent authority issues the certificate mentioned in paragraph 8, the SE shall satisfy it that, in respect of any liabilities arising prior to the publication of the transfer proposal, the interests of creditors and holders of other rights in respect of the SE (including those of public bodies) have been adequately protected in accordance with requirements laid down by the Member State where the SE has its

registered office prior to the transfer.

A Member State may extend the application of the first subparagraph to liabilities that arise (or may arise) prior to the transfer.

The first and second subparagraphs shall be without prejudice to the application to SEs of the national legislation of Member States concerning the satisfaction or securing of payments to public bodies.

8. In the Member State in which an SE has its registered office the court, notary or other competent authority shall issue a certificate attesting to the completion of the acts and formalities to be accomplished before the transfer.
9. The new registration may not be effected until the certificate referred to in paragraph 8 has been submitted, and evidence produced that the formalities required for registration in the country of the new registered office have been completed.
10. The transfer of an SE's registered office and the consequent amendment of its statutes shall take effect on the date on which the SE is registered, in accordance with Article 12, in the register for its new registered office.
11. When the SE's new registration has been effected, the registry for its new registration shall notify the registry for its old registration. Deletion of the old registration shall be effected on receipt of that notification, but not before.
12. The new registration and the deletion of the old registration shall be publicised in the Member States concerned in accordance with Article 13.
13. On publication of an SE's new registration, the new registered office may be relied on as against third parties. However, as long as the deletion of the SE's registration from the register for its previous registered office has not been publicised, third parties may continue to rely on the previous registered office unless the SE proves that such third parties were aware of the new registered office.
14. The laws of a Member State may provide that, as regards SEs registered in that Member State, the transfer of a registered office which would result in a change of the law applicable shall not take effect if any of that Member State's competent authorities opposes it within the two-month period referred to in paragraph 6. Such opposition may be based only on grounds of public interest.

Where an SE is supervised by a national financial supervisory authority according to Community directives the right to oppose the change of registered office applies to this authority as well.

Review by a judicial authority shall be possible.

15. An SE may not transfer its registered office if proceedings for winding up, liquidation, insolvency or suspension of payments or other similar proceedings have been brought against it.
16. An SE which has transferred its registered office to another Member State shall be considered, in respect of any cause of action arising prior to the transfer as determined in paragraph 10, as having its registered office in the Member States where the SE was registered prior to the transfer, even if the SE is sued after the transfer.

Article 9

1. An SE shall be governed:
   a) by this Regulation,
   b) where expressly authorised by this Regulation, by the provisions of its statutes

or

c) in the case of matters not regulated by this Regulation or, where matters are partly regulated by it, of those aspects not covered by it, by:
   i. the provisions of laws adopted by Member States in implementation of Community measures relating specifically to SEs;
   ii. the provisions of Member States' laws which would apply to a public limited-liability company formed in accordance with the law of the Member State in which the SE has its registered office;
   iii. the provisions of its statutes, in the same way as for a public limited-liability company formed in accordance with the law of the Member State in which the SE has its registered office.

2. The provisions of laws adopted by Member States specifically for the SE must be in accordance with Directives applicable to public limited-liability companies referred to in Annex I.
3. If the nature of the business carried out by an SE is regulated by specific provisions of national laws, those laws shall apply in full to the SE.

Article 10

Subject to this Regulation, an SE shall be treated in every Member State as if it were a public limited-liability company formed in accordance with the law of the Member State in which it has its registered office.

Article 11

1. The name of an SE shall be preceded or followed by the abbreviation SE.
2. Only SEs may include the abbreviation SE in their name.
3. Nevertheless, companies, firms and other legal entities registered in a Member State before the date of entry into force of this Regulation in the names of which the abbreviation SE appears shall not be required to alter their names.

Article 12

1. Every SE shall be registered in the Member State in which it has its registered office in a register designated by the law of that Member State in accordance with Article 3 of the first Council Directive (68/151/EEC) of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community(6).
2. An SE may not be registered unless an agreement on arrangements for employee involvement pursuant to Article 4 of Directive 2001/86/EC has been concluded, or a decision pursuant to Article 3(6) of the Directive has been taken, or the period for negotiations pursuant to Article 5 of the Directive has expired without an agreement having been concluded.
3. In order for an SE to be registered in a Member State which has made use of the option referred to in Article 7(3) of Directive 2001/86/EC, either an agreement pursuant to Article 4 of the Directive must have been concluded on the arrangements

for employee involvement, including participation, or none of the participating companies must have been governed by participation rules prior to the registration of the SE.

4. The statutes of the SE must not conflict at any time with the arrangements for employee involvement which have been so determined. Where new such arrangements determined pursuant to the Directive conflict with the existing statutes, the statutes shall to the extent necessary be amended.

In this case, a Member State may provide that the management organ or the administrative organ of the SE shall be entitled to proceed to amend the statutes without any further decision from the general shareholders meeting.

Article 13

Publication of the documents and particulars concerning an SE which must be publicised under this Regulation shall be effected in the manner laid down in the laws of the Member State in which the SE has its registered office in accordance with Directive 68/151/EEC.

Article 14

1. Notice of an SE's registration and of the deletion of such a registration shall be published for information purposes in the Official Journal of the European Communities after publication in accordance with Article 13. That notice shall state the name, number, date and place of registration of the SE, the date and place of publication and the title of publication, the registered office of the SE and its sector of activity.
2. Where the registered office of an SE is transferred in accordance with Article 8, notice shall be published giving the information provided for in paragraph 1, together with that relating to the new registration.
3. The particulars referred to in paragraph 1 shall be forwarded to the Office for Official Publications of the European Communities within one month of the publication referred to in Article 13.

TITLE II

FORMATION

SECTION 1

General

Article 15

1. Subject to this Regulation, the formation of an SE shall be governed by the law applicable to public limited-liability companies in the Member State in which the SE establishes its registered office.
2. The registration of an SE shall be publicised in accordance with Article 13.

Article 16

1. An SE shall acquire legal personality on the date on which it is registered in the register referred to in Article 12.
2. If acts have been performed in an SE's name before its registration in accordance with Article 12 and the SE does not assume the obligations arising out of such acts after its registration, the natural persons, companies, firms or other legal entities which performed those acts shall be jointly and severally liable therefor, without limit, in the absence of agreement to the contrary.

SECTION 2

Formation by merger

Article 17

1. An SE may be formed by means of a merger in accordance with Article 2(1).
2. Such a merger may be carried out in accordance with:
   a) the procedure for merger by acquisition laid down in Article 3(1) of the third Council Directive (78/855/EEC) of 9 October 1978 based on Article 54(3)(g) of the Treaty concerning mergers of public limited-liability companies(7) or
   b) the procedure for merger by the formation of a new company laid down in Article 4(1) of the said Directive.

   In the case of a merger by acquisition, the acquiring company shall take the form of an SE when the merger takes place. In the case of a merger by the formation of a new company, the SE shall be the newly formed company.

Article 18

For matters not covered by this section or, where a matter is partly covered by it, for aspects not covered by it, each company involved in the formation of an SE by merger shall be governed by the provisions of the law of the Member State to which it is subject that apply to mergers of public limited-liability companies in accordance with Directive 78/855/EEC.

Article 19

The laws of a Member State may provide that a company governed by the law of that Member State may not take part in the formation of an SE by merger if any of that Member State's competent authorities opposes it before the issue of the certificate referred to in Article 25(2).

Such opposition may be based only on grounds of public interest. Review by a judicial authority shall be possible.

Article 20

1. The management or administrative organs of merging companies shall draw up

draft terms of merger. The draft terms of merger shall include the following particulars:

a) the name and registered office of each of the merging companies together with those proposed for the SE;
b) the share-exchange ratio and the amount of any compensation;
c) the terms for the allotment of shares in the SE;
d) the date from which the holding of shares in the SE will entitle the holders to share in profits and any special conditions affecting that entitlement;
e) the date from which the transactions of the merging companies will be treated for accounting purposes as being those of the SE;
f) the rights conferred by the SE on the holders of shares to which special rights are attached and on the holders of securities other than shares, or the measures proposed concerning them;
g) any special advantage granted to the experts who examine the draft terms of merger or to members of the administrative, management, supervisory or controlling organs of the merging companies;
h) the statutes of the SE;
i) information on the procedures by which arrangements for employee involvement are determined pursuant to Directive 2001/86/EC.

2. The merging companies may include further items in the draft terms of merger.

Article 21

For each of the merging companies and subject to the additional requirements imposed by the Member State to which the company concerned is subject, the following particulars shall be published in the national gazette of that Member State:

a) the type, name and registered office of every merging company;
b) the register in which the documents referred to in Article 3(2) of Directive 68/151/EEC are filed in respect of each merging company, and the number of the entry in that register;
c) an indication of the arrangements made in accordance with Article 24 for the exercise of the rights of the creditors of the company in question and the address at which complete information on those arrangements may be obtained free of charge;
d) an indication of the arrangements made in accordance with Article 24 for the exercise of the rights of minority shareholders of the company in question and the address at which complete information on those arrangements may be obtained free of charge;
e) the name and registered office proposed for the SE.

Article 22

As an alternative to experts operating on behalf of each of the merging companies, one or more independent experts as defined in Article 10 of Directive 78/855/EEC, appointed for those purposes at the joint request of the companies by a judicial or administrative authority in the Member State of one of the merging companies or of the proposed SE, may examine the draft terms of merger and draw up a single report to all the shareholders.

The experts shall have the right to request from each of the merging companies any information they consider necessary to enable them to complete their function.

Article 23

1. The general meeting of each of the merging companies shall approve the draft terms of merger.
2. Employee involvement in the SE shall be decided pursuant to Directive 2001/86/EC. The general meetings of each of the merging companies may reserve the right to make registration of the SE conditional upon its express ratification of the arrangements so decided.

Article 24

1. The law of the Member State governing each merging company shall apply as in the case of a merger of public limited-liability companies, taking into account the cross-border nature of the merger, with regard to the protection of the interests of:
   a) creditors of the merging companies;
   b) holders of bonds of the merging companies;
   c) holders of securities, other than shares, which carry special rights in the merging companies.
2. A Member State may, in the case of the merging companies governed by its law, adopt provisions designed to ensure appropriate protection for minority shareholders who have opposed the merger.

Article 25

1. The legality of a merger shall be scrutinised, as regards the part of the procedure concerning each merging company, in accordance with the law on mergers of public limited-liability companies of the Member State to which the merging company is subject.
2. In each Member State concerned the court, notary or other competent authority shall issue a certificate conclusively attesting to the completion of the pre-merger acts and formalities.
3. If the law of a Member State to which a merging company is subject provides for a procedure to scrutinise and amend the share-exchange ratio, or a procedure to compensate minority shareholders, without preventing the registration of the merger, such procedures shall only apply if the other merging companies situated in Member States which do not provide for such procedure explicitly accept, when approving the draft terms of the merger in accordance with Article 23(1), the possibility for the shareholders of that merging company to have recourse to such procedure. In such cases, the court, notary or other competent authorities may issue the certificate referred to in paragraph 2 even if such a procedure has been commenced. The certificate must, however, indicate that the procedure is pending. The decision in the procedure shall be binding on the acquiring company and all its shareholders.

Article 26

1. The legality of a merger shall be scrutinised, as regards the part of the procedure concerning the completion of the merger and the formation of the SE, by the court,

notary or other authority competent in the Member State of the proposed registered office of the SE to scrutinise that aspect of the legality of mergers of public limited-liability companies.

2. To that end each merging company shall submit to the competent authority the certificate referred to in Article 25(2) within six months of its issue together with a copy of the draft terms of merger approved by that company.
3. The authority referred to in paragraph 1 shall in particular ensure that the merging companies have approved draft terms of merger in the same terms and that arrangements for employee involvement have been determined pursuant to Directive 2001/86/EC.
4. That authority shall also satisfy itself that the SE has been formed in accordance with the requirements of the law of the Member State in which it has its registered office in accordance with Article 15.

Article 27

1. A merger and the simultaneous formation of an SE shall take effect on the date on which the SE is registered in accordance with Article 12.
2. The SE may not be registered until the formalities provided for in Articles 25 and 26 have been completed.

Article 28

For each of the merging companies the completion of the merger shall be publicised as laid down by the law of each Member State in accordance with Article 3 of Directive 68/151/EEC.

Article 29

1. A merger carried out as laid down in Article 17(2)(a) shall have the following consequences ipso jure and simultaneously:
   a) all the assets and liabilities of each company being acquired are transferred to the acquiring company;
   b) the shareholders of the company being acquired become shareholders of the acquiring company;
   c) the company being acquired ceases to exist;
   d) the acquiring company adopts the form of an SE.
2. A merger carried out as laid down in Article 17(2)(b) shall have the following consequences ipso jure and simultaneously:
   a) (a) all the assets and liabilities of the merging companies are transferred to the SE;
   b) (b) the shareholders of the merging companies become shareholders of the SE;
   c) (c) the merging companies cease to exist.
3. Where, in the case of a merger of public limited-liability companies, the law of a Member State requires the completion of any special formalities before the transfer of certain assets, rights and obligations by the merging companies becomes effective against third parties, those formalities shall apply and shall be carried out either by the merging companies or by the SE following its registration.

4. The rights and obligations of the participating companies on terms and conditions of employment arising from national law, practice and individual employment contracts or employment relationships and existing at the date of the registration shall, by reason of such registration be transferred to the SE upon its registration.

Article 30

A merger as provided for in Article 2(1) may not be declared null and void once the SE has been registered.

The absence of scrutiny of the legality of the merger pursuant to Articles 25 and 26 may be included among the grounds for the winding-up of the SE.

Article 31

1. Where a merger within the meaning of Article 17(2)(a) is carried out by a company which holds all the shares and other securities conferring the right to vote at general meetings of another company, neither Article 20(1)(b), (c) and (d), Article 29(1)(b) nor Article 22 shall apply. National law governing each merging company and mergers of public limited-liability companies in accordance with Article 24 of Directive 78/855/EEC shall nevertheless apply.
2. Where a merger by acquisition is carried out by a company which holds 90 % or more but not all of the shares and other securities conferring the right to vote at general meetings of another company, reports by the management or administrative body, reports by an independent expert or experts and the documents necessary for scrutiny shall be required only to the extent that the national law governing either the acquiring company or the company being acquired so requires.

Member States may, however, provide that this paragraph may apply where a company holds shares conferring 90 % or more but not all of the voting rights.

Section 3

Formation of a holding SE

Article 32

1. A holding SE may be formed in accordance with Article 2(2).

A company promoting the formation of a holding SE in accordance with Article 2(2) shall continue to exist.

2. The management or administrative organs of the companies which promote such an operation shall draw up, in the same terms, draft terms for the formation of the holding SE. The draft terms shall include a report explaining and justifying the legal and economic aspects of the formation and indicating the implications for the shareholders and for the employees of the adoption of the form of a holding SE. The draft terms shall also set out the particulars provided for in Article 20(1)(a), (b), (c), (f), (g), (h) and (i) and shall fix the minimum proportion of the shares in each of the companies promoting the operation which the shareholders must contribute to the formation of the holding SE. That proportion shall be shares conferring more than 50 % of the permanent voting rights.

3. For each of the companies promoting the operation, the draft terms for the formation of the holding SE shall be publicised in the manner laid down in each Member State's national law in accordance with Article 3 of Directive 68/151/EEC at least one month before the date of the general meeting called to decide thereon.
4. One or more experts independent of the companies promoting the operation, appointed or approved by a judicial or administrative authority in the Member State to which each company is subject in accordance with national provisions adopted in implementation of Directive 78/855/EEC, shall examine the draft terms of formation drawn up in accordance with paragraph 2 and draw up a written report for the shareholders of each company. By agreement between the companies promoting the operation, a single written report may be drawn up for the shareholders of all the companies by one or more independent experts, appointed or approved by a judicial or administrative authority in the Member State to which one of the companies promoting the operation or the proposed SE is subject in accordance with national provisions adopted in implementation of Directive 78/855/EEC.
5. The report shall indicate any particular difficulties of valuation and state whether the proposed share-exchange ratio is fair and reasonable, indicating the methods used to arrive at it and whether such methods are adequate in the case in question.
6. The general meeting of each company promoting the operation shall approve the draft terms of formation of the holding SE.

Employee involvement in the holding SE shall be decided pursuant to Directive 2001/86/EC. The general meetings of each company promoting the operation may reserve the right to make registration of the holding SE conditional upon its express ratification of the arrangements so decided.

7. These provisions shall apply mutatis mutandis to private limited-liability companies.

Article 33

1. The shareholders of the companies promoting such an operation shall have a period of three months in which to inform the promoting companies whether they intend to contribute their shares to the formation of the holding SE. That period shall begin on the date upon which the terms for the formation of the holding SE have been finally determined in accordance with Article 32.
2. The holding SE shall be formed only if, within the period referred to in paragraph 1, the shareholders of the companies promoting the operation have assigned the minimum proportion of shares in each company in accordance with the draft terms of formation and if all the other conditions are fulfilled.
3. If the conditions for the formation of the holding SE are all fulfilled in accordance with paragraph 2, that fact shall, in respect of each of the promoting companies, be publicised in the manner laid down in the national law governing each of those companies adopted in implementation of Article 3 of Directive 68/151/EEC.

Shareholders of the companies promoting the operation who have not indicated whether they intend to make their shares available to the promoting companies for the purpose of forming the holding SE within the period referred to in paragraph 1 shall have a further month in which to do so.

4. Shareholders who have contributed their securities to the formation of the SE shall

receive shares in the holding SE.

5. The holding SE may not be registered until it is shown that the formalities referred to in Article 32 have been completed and that the conditions referred to in paragraph 2 have been fulfilled.

Article 34

A Member State may, in the case of companies promoting such an operation, adopt provisions designed to ensure protection for minority shareholders who oppose the operation, creditors and employees.

SECTION 4

Formation of a subsidiary SE

Article 35

An SE may be formed in accordance with Article 2(3).

Article 36

Companies, firms and other legal entities participating in such an operation shall be subject to the provisions governing their participation in the formation of a subsidiary in the form of a public limited-liability company under national law.

SECTION 5

Conversion of an existing public limited-liability company into an SE

Article 37

1. An SE may be formed in accordance with Article 2(4).
2. Without prejudice to Article 12 the conversion of a public limited-liability company into an SE shall not result in the winding up of the company or in the creation of a new legal person.
3. The registered office may not be transferred from one Member State to another pursuant to Article 8 at the same time as the conversion is effected.
4. The management or administrative organ of the company in question shall draw up draft terms of conversion and a report explaining and justifying the legal and economic aspects of the conversion and indicating the implications for the shareholders and for the employees of the adoption of the form of an SE.
5. The draft terms of conversion shall be publicised in the manner laid down in each Member State's law in accordance with Article 3 of Directive 68/151/EEC at least one month before the general meeting called upon to decide thereon.
6. Before the general meeting referred to in paragraph 7 one or more independent experts appointed or approved, in accordance with the national provisions adopted in implementation of Article 10 of Directive 78/855/EEC, by a judicial or adminis-

trative authority in the Member State to which the company being converted into an SE is subject shall certify in compliance with Directive 77/91/EEC(8) mutatis mutandis that the company has net assets at least equivalent to its capital plus those reserves which must not be distributed under the law or the Statutes.

7. The general meeting of the company in question shall approve the draft terms of conversion together with the statutes of the SE. The decision of the general meeting shall be passed as laid down in the provisions of national law adopted in implementation of Article 7 of Directive 78/855/EEC.
8. Member States may condition a conversion to a favourable vote of a qualified majority or unanimity in the organ of the company to be converted within which employee participation is organised.
9. The rights and obligations of the company to be converted on terms and conditions of employment arising from national law, practice and individual employment contracts or employment relationships and existing at the date of the registration shall, by reason of such registration be transferred to the SE.

TITLE III

STRUCTURE OF THE SE

Article 38

Under the conditions laid down by this Regulation an SE shall comprise:

a) a general meeting of shareholders and
b) either a supervisory organ and a management organ (two-tier system) or an administrative organ (one-tier system) depending on the form adopted in the statutes.

SECTION 1

Two-tier system

Article 39

1. The management organ shall be responsible for managing the SE. A Member State may provide that a managing director or managing directors shall be responsible for the current management under the same conditions as for public limited-liability companies that have registered offices within that Member State's territory.
2. The member or members of the management organ shall be appointed and removed by the supervisory organ.

A Member State may, however, require or permit the statutes to provide that the member or members of the management organ shall be appointed and removed by the general meeting under the same conditions as for public limited-liability companies that have registered offices within its territory.

3. No person may at the same time be a member of both the management organ and the supervisory organ of the same SE. The supervisory organ may, however, nomi-

nate one of its members to act as a member of the management organ in the event of a vacancy. During such a period the functions of the person concerned as a member of the supervisory organ shall be suspended. A Member State may impose a time limit on such a period.

4. The number of members of the management organ or the rules for determining it shall be laid down in the SE's statutes. A Member State may, however, fix a minimum and/or a maximum number.
5. Where no provision is made for a two-tier system in relation to public limited-liability companies with registered offices within its territory, a Member State may adopt the appropriate measures in relation to SEs.

Article 40

1. The supervisory organ shall supervise the work of the management organ. It may not itself exercise the power to manage the SE.
2. The members of the supervisory organ shall be appointed by the general meeting. The members of the first supervisory organ may, however, be appointed by the statutes. This shall apply without prejudice to Article 47(4) or to any employee participation arrangements determined pursuant to Directive 2001/86/EC.
3. The number of members of the supervisory organ or the rules for determining it shall be laid down in the statutes. A Member State may, however, stipulate the number of members of the supervisory organ for SEs registered within its territory or a minimum and/or a maximum number.

Article 41

1. The management organ shall report to the supervisory organ at least once every three months on the progress and foreseeable development of the SE's business.
2. In addition to the regular information referred to in paragraph 1, the management organ shall promptly pass the supervisory organ any information on events likely to have an appreciable effect on the SE.
3. The supervisory organ may require the management organ to provide information of any kind which it needs to exercise supervision in accordance with Article 40(1). A Member State may provide that each member of the supervisory organ also be entitled to this facility.
4. The supervisory organ may undertake or arrange for any investigations necessary for the performance of its duties.
5. Each member of the supervisory organ shall be entitled to examine all information submitted to it.

Article 42

The supervisory organ shall elect a chairman from among its members. If half of the members are appointed by employees, only a member appointed by the general meeting of shareholders may be elected chairman.

SECTION 2

The one-tier system

Article 43

1. The administrative organ shall manage the SE. A Member State may provide that a managing director or managing directors shall be responsible for the day-to-day management under the same conditions as for public limited-liability companies that have registered offices within that Member State's territory.
2. The number of members of the administrative organ or the rules for determining it shall be laid down in the SE's statutes. A Member State may, however, set a minimum and, where necessary, a maximum number of members.
3. The administrative organ shall, however, consist of at least three members where employee participation is regulated in accordance with Directive 2001/86/EC.
4. The member or members of the administrative organ shall be appointed by the general meeting. The members of the first administrative organ may, however, be appointed by the statutes. This shall apply without prejudice to Article 47(4) or to any employee participation arrangements determined pursuant to Directive 2001/86/EC.
5. Where no provision is made for a one-tier system in relation to public limited-liability companies with registered offices within its territory, a Member State may adopt the appropriate measures in relation to SEs.

Article 44

1. The administrative organ shall meet at least once every three months at intervals laid down by the statutes to discuss the progress and foreseeable development of the SE's business.
2. Each member of the administrative organ shall be entitled to examine all information submitted to it.

Article 45

The administrative organ shall elect a chairman from among its members. If half of the members are appointed by employees, only a member appointed by the general meeting of shareholders may be elected chairman.

SECTION 3

Rules common to the one-tier and two-tier systems

Article 46

1. Members of company organs shall be appointed for a period laid down in the statutes not exceeding six years.
2. Subject to any restrictions laid down in the statutes, members may be reappointed once or more than once for the period determined in accordance with paragraph 1.

Article 47

1. An SE's statutes may permit a company or other legal entity to be a member of one of its organs, provided that the law applicable to public limited-liability companies in the Member State in which the SE's registered office is situated does not provide otherwise.

That company or other legal entity shall designate a natural person to exercise its functions on the organ in question.

2. No person may be a member of any SE organ or a representative of a member within the meaning of paragraph 1 who:
   a) is disqualified, under the law of the Member State in which the SE's registered office is situated, from serving on the corresponding organ of a public limited-liability company governed by the law of that Member State, or
   b) is disqualified from serving on the corresponding organ of a public limited-liability company governed by the law of a Member State owing to a judicial or administrative decision delivered in a Member State.
3. An SE's statutes may, in accordance with the law applicable to public limited-liability companies in the Member State in which the SE's registered office is situated, lay down special conditions of eligibility for members representing the shareholders.
4. This Regulation shall not affect national law permitting a minority of shareholders or other persons or authorities to appoint some of the members of a company organ.

Article 48

1. An SE's statutes shall list the categories of transactions which require authorisation of the management organ by the supervisory organ in the two-tier system or an express decision by the administrative organ in the one-tier system.

A Member State may, however, provide that in the two-tier system the supervisory organ may itself make certain categories of transactions subject to authorisation.

2. 2. A Member State may determine the categories of transactions which must at least be indicated in the statutes of SEs registered within its territory.

Article 49

The members of an SE's organs shall be under a duty, even after they have ceased to hold office, not to divulge any information which they have concerning the SE the disclosure of which might be prejudicial to the company's interests, except where such disclosure is required or permitted under national law provisions applicable to public limited-liability companies or is in the public interest.

Article 50

1. Unless otherwise provided by this Regulation or the statutes, the internal rules relating to quorums and decision-taking in SE organs shall be as follows:
   a) quorum: at least half of the members must be present or represented;
   b) decision-taking: a majority of the members present or represented.
2. Where there is no relevant provision in the statutes, the chairman of each organ shall have a casting vote in the event of a tie. There shall be no provision to the contrary in the statutes, however, where half of the supervisory organ consists of

employees' representatives.

3. Where employee participation is provided for in accordance with Directive 2001/86/EC, a Member State may provide that the supervisory organ's quorum and decision-making shall, by way of derogation from the provisions referred to in paragraphs 1 and 2, be subject to the rules applicable, under the same conditions, to public limited-liability companies governed by the law of the Member State concerned.

Article 51

Members of an SE's management, supervisory and administrative organs shall be liable, in accordance with the provisions applicable to public limited-liability companies in the Member State in which the SE's registered office is situated, for loss or damage sustained by the SE following any breach on their part of the legal, statutory or other obligations inherent in their duties.

SECTION 4

General meeting

Article 52

The general meeting shall decide on matters for which it is given sole responsibility by:

a) this Regulation or
b) the legislation of the Member State in which the SE's registered office is situated adopted in implementation of Directive 2001/86/EC.

Furthermore, the general meeting shall decide on matters for which responsibility is given to the general meeting of a public limited-liability company governed by the law of the Member State in which the SE's registered office is situated, either by the law of that Member State or by the SE's statutes in accordance with that law.

Article 53

Without prejudice to the rules laid down in this section, the organisation and conduct of general meetings together with voting procedures shall be governed by the law applicable to public limited-liability companies in the Member State in which the SE's registered office is situated.

Article 54

1. An SE shall hold a general meeting at least once each calendar year, within six months of the end of its financial year, unless the law of the Member State in which the SE's registered office is situated applicable to public limited-liability companies carrying on the same type of activity as the SE provides for more frequent meetings. A Member State may, however, provide that the first general meeting may be held at any time in the 18 months following an SE's incorporation.
2. General meetings may be convened at any time by the management organ, the administrative organ, the supervisory organ or any other organ or competent author-

ity in accordance with the national law applicable to public limited-liability companies in the Member State in which the SE's registered office is situated.

Article 55

1. One or more shareholders who together hold at least 10 % of an SE's subscribed capital may request the SE to convene a general meeting and draw up the agenda therefor; the SE's statutes or national legislation may provide for a smaller proportion under the same conditions as those applicable to public limited-liability companies.
2. The request that a general meeting be convened shall state the items to be put on the agenda.
3. If, following a request made under paragraph 1, a general meeting is not held in due time and, in any event, within two months, the competent judicial or administrative authority within the jurisdiction of which the SE's registered office is situated may order that a general meeting be convened within a given period or authorise either the shareholders who have requested it or their representatives to convene a general meeting. This shall be without prejudice to any national provisions which allow the shareholders themselves to convene general meetings.

Article 56

One or more shareholders who together hold at least 10 % of an SE's subscribed capital may request that one or more additional items be put on the agenda of any general meeting. The procedures and time limits applicable to such requests shall be laid down by the national law of the Member State in which the SE's registered office is situated or, failing that, by the SE's statutes. The above proportion may be reduced by the statutes or by the law of the Member State in which the SE's registered office is situated under the same conditions as are applicable to public limited-liability companies.

Article 57

Save where this Regulation or, failing that, the law applicable to public limited-liability companies in the Member State in which an SE's registered office is situated requires a larger majority, the general meeting's decisions shall be taken by a majority of the votes validly cast.

Article 58

The votes cast shall not include votes attaching to shares in respect of which the shareholder has not taken part in the vote or has abstained or has returned a blank or spoilt ballot paper.

Article 59

1. Amendment of an SE's statutes shall require a decision by the general meeting taken by a majority which may not be less than two thirds of the votes cast, unless the law applicable to public limited-liability companies in the Member State in which an SE's registered office is situated requires or permits a larger majority.
2. A Member State may, however, provide that where at least half of an SE's subscribed capital is represented, a simple majority of the votes referred to in paragraph 1 shall

suffice.

3. Amendments to an SE's statutes shall be publicised in accordance with Article 13.

Article 60

1. Where an SE has two or more classes of shares, every decision by the general meeting shall be subject to a separate vote by each class of shareholders whose class rights are affected thereby.
2. Where a decision by the general meeting requires the majority of votes specified in Article 59(1) or (2), that majority shall also be required for the separate vote by each class of shareholders whose class rights are affected by the decision.

TITLE IV

ANNUAL ACCOUNTS AND CONSOLIDATED ACCOUNTS

Article 61

Subject to Article 62 an SE shall be governed by the rules applicable to public limited-liability companies under the law of the Member State in which its registered office is situated as regards the preparation of its annual and, where appropriate, consolidated accounts including the accompanying annual report and the auditing and publication of those accounts.

Article 62

1. An SE which is a credit or financial institution shall be governed by the rules laid down in the national law of the Member State in which its registered office is situated in implementation of Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions(9) as regards the preparation of its annual and, where appropriate, consolidated accounts, including the accompanying annual report and the auditing and publication of those accounts.
2. An SE which is an insurance undertaking shall be governed by the rules laid down in the national law of the Member State in which its registered office is situated in implementation of Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings(10) as regards the preparation of its annual and, where appropriate, consolidated accounts including the accompanying annual report and the auditing and publication of those accounts.

TITLE V

WINDING UP, LIQUIDATION, INSOLVENCY AND CESSATION OF PAYMENTS

Article 63

As regards winding up, liquidation, insolvency, cessation of payments and similar procedures, an SE shall be governed by the legal provisions which would apply to a public limited-liability company formed in accordance with the law of the Member State in which its registered office is situated, including provisions relating to decision-making by the general meeting.

Article 64

1. When an SE no longer complies with the requirement laid down in Article 7, the Member State in which the SE's registered office is situated shall take appropriate measures to oblige the SE to regularise its position within a specified period either:
   a) by re-establishing its head office in the Member State in which its registered office is situated or
   b) by transferring the registered office by means of the procedure laid down in Article 8.
2. The Member State in which the SE's registered office is situated shall put in place the measures necessary to ensure that an SE which fails to regularise its position in accordance with paragraph 1 is liquidated.
3. The Member State in which the SE's registered office is situated shall set up a judicial remedy with regard to any established infringement of Article 7. That remedy shall have a suspensory effect on the procedures laid down in paragraphs 1 and 2.
4. Where it is established on the initiative of either the authorities or any interested party that an SE has its head office within the territory of a Member State in breach of Article 7, the authorities of that Member State shall immediately inform the Member State in which the SE's registered office is situated.

Article 65

Without prejudice to provisions of national law requiring additional publication, the initiation and termination of winding up, liquidation, insolvency or cessation of payment procedures and any decision to continue operating shall be publicised in accordance with Article 13.

Article 66

1. An SE may be converted into a public limited-liability company governed by the law of the Member State in which its registered office is situated. No decision on conversion may be taken before two years have elapsed since its registration or before the first two sets of annual accounts have been approved.
2. The conversion of an SE into a public limited-liability company shall not result in the winding up of the company or in the creation of a new legal person.
3. The management or administrative organ of the SE shall draw up draft terms of conversion and a report explaining and justifying the legal and economic aspects of the conversion and indicating the implications of the adoption of the public limited-liability company for the shareholders and for the employees.
4. The draft terms of conversion shall be publicised in the manner laid down in each Member State's law in accordance with Article 3 of Directive 68/151/EEC at least

one month before the general meeting called to decide thereon.

5. Before the general meeting referred to in paragraph 6, one or more independent experts appointed or approved, in accordance with the national provisions adopted in implementation of Article 10 of Directive 78/855/EEC, by a judicial or administrative authority in the Member State to which the SE being converted into a public limited-liability company is subject shall certify that the company has assets at least equivalent to its capital.
6. The general meeting of the SE shall approve the draft terms of conversion together with the statutes of the public limited-liability company. The decision of the general meeting shall be passed as laid down in the provisions of national law adopted in implementation of Article 7 of Directive 78/855/EEC.

TITLE VI

ADDITIONAL AND TRANSITIONAL PROVISIONS

Article 67

1. If and so long as the third phase of economic and monetary union (EMU) does not apply to it each Member State may make SEs with registered offices within its territory subject to the same provisions as apply to public limited-liability companies covered by its legislation as regards the expression of their capital. An SE may, in any case, express its capital in euro as well. In that event the national currency/euro conversion rate shall be that for the last day of the month preceding that of the formation of the SE.
2. If and so long as the third phase of EMU does not apply to the Member State in which an SE has its registered office, the SE may, however, prepare and publish its annual and, where appropriate, consolidated accounts in euro. The Member State may require that the SE's annual and, where appropriate, consolidated accounts be prepared and published in the national currency under the same conditions as those laid down for public limited-liability companies governed by the law of that Member State. This shall not prejudge the additional possibility for an SE of publishing its annual and, where appropriate, consolidated accounts in euro in accordance with Council Directive 90/604/EEC of 8 November 1990 amending Directive 78/60/EEC on annual accounts and Directive 83/349/EEC on consolidated accounts as concerns the exemptions for small and medium-sized companies and the publication of accounts in ecu(11).

TITLE VII

FINAL PROVISIONS

Article 68

1. The Member States shall make such provision as is appropriate to ensure the effec-

tive application of this Regulation.

2. Each Member State shall designate the competent authorities within the meaning of Articles 8, 25, 26, 54, 55 and 64. It shall inform the Commission and the other Member States accordingly.

Article 69

Five years at the latest after the entry into force of this Regulation, the Commission shall forward to the Council and the European Parliament a report on the application of the Regulation and proposals for amendments, where appropriate. The report shall, in particular, analyse the appropriateness of:

a) allowing the location of an SE's head office and registered office in different Member States;
b) broadening the concept of merger in Article 17(2) in order to admit also other types of merger than those defined in Articles 3(1) and 4(1) of Directive 78/855/EEC;
c) revising the jurisdiction clause in Article 8(16) in the light of any provision which may have been inserted in the 1968 Brussels Convention or in any text adopted by Member States or by the Council to replace such Convention;
d) allowing provisions in the statutes of an SE adopted by a Member State in execution of authorisations given to the Member States by this Regulation or laws adopted to ensure the effective application of this Regulation in respect to the SE which deviate from or are complementary to these laws, even when such provisions would not be authorised in the statutes of a public limited-liability company having its registered office in the Member State.

Article 70

This Regulation shall enter into force on 8 October 2004.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Luxembourg, 8 October 2001.

For the Council

The President

L. Onkelinx

(1) OJ C 263, 16.10.1989, p. 41 and OJ C 176, 8.7.1991, p. 1.

(2) Opinion of 4 September 2001 (not yet published in the Official Journal).

(3) OJ C 124, 21.5.1990, p. 34.

(4) See p. 22 of this Official Journal.

(5) OJ L 395, 30.12.1989, p. 40. Directive as last amended by the 1994 Act of Accession.

(6) OJ L 65, 14.3.1968, p. 8. Directive as last amended by the 1994 Act of Accession.

(7) OJ L 295, 20.10.1978, p. 36. Directive as last amended by the 1994 Act of Accession.

(8) Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ L 26, 31.1.1977, p. 1). Directive as last amended by the 1994 Act of Accession.

(9) OJ L 126, 26.5.2000, p. 1.

(10) OJ L 374, 31.12.1991, p. 7.

(11) OJ L 317, 16.11.1990, p. 57.

ANNEX I

PUBLIC LIMITED-LIABILITY COMPANIES REFERRED TO IN ARTICLE 2(1)

BELGIUM:	la société anonyme//de naamloze vennootschap
DENMARK:	aktieselskaber
GERMANY:	die Aktiengesellschaft
GREECE:	ανώνυμη εταιρία
SPAIN:	la sociedad anónima
FRANCE:	la société anonyme
IRELAND:	public companies limited by shares public companies limited by guarantee having a share capital
ITALY:	società per azioni
LUXEMBOURG:	la société anonyme
NETHERLANDS:	de naamloze vennootschap
AUSTRIA:	die Aktiengesellschaft
PORTUGAL:	a sociedade anónima de responsabilidade limitada
FINLAND:	julkinen osakeyhtiö//publikt aktiebolag
SWEDEN:	publikt aktiebolag
UNITED KINGDOM:	public companies limited by shares public companies limited by guarantee having a share capital

ANNEX II

PUBLIC AND PRIVATE LIMITED-LIABILITY COMPANIES REFERRED TO IN ARTICLE 2(2)

BELGIUM:	la société anonyme//de naamloze vennootschap, la société privée à responsabilité limitée//besloten vennootschap met beperkte aansprakelijkheid
DENMARK:	aktieselskaber, anpartselskaber
GERMANY:	die Aktiengesellschaft, die Gesellschaft mit beschränkter Haftung
GREECE:	ανώνυμη εταιρία εταιρία περιορισμένης ευθύνης
SPAIN:	la sociedad anónima, la sociedad de responsabilidad limitada
FRANCE:	la société anonyme, la société à responsabilité limitée
IRELAND:	public companies limited by shares, public companies limited by guarantee having a share capital, private companies limited by shares, private companies limited by guarantee having a share capital
ITALY:	società per azioni, società a responsabilità limitata

LUXEMBOURG:	la société anonyme, la société à responsabilité limitée
NETHERLANDS:	de naamloze vennootschap, de besloten vennootschap met beperkte aansprakelijkheid
AUSTRIA:	die Aktiengesellschaft, die Gesellschaft mit beschränkter Haftung
PORTUGAL:	a sociedade anónima de responsabilidade limitada, a sociedade por quotas de responsabilidade limitada
FINLAND:	osakeyhtiö aktiebolag
SWEDEN:	aktiebolag
UNITED KINGDOM:	public companies limited by shares, public companies limited by guarantee having a share capital, private companies limited by shares, private companies limited by guarantee having a share capital