

Internal market and industrial cooperation

Statute for the European company

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Summary

On 8 June 1988 the Commission adopted a memorandum from Mr Delors and Lord Cockfield, submitted in agreement with Mr Marin, Mr Matutes and Mr Schmidhuber, proposing a European Company Statute. The proposal is set out in a paper addressed to Parliament, the Council and the two sides of industry, who have six months in which to make known their views. At the end of that time, the Commission will draw up its legislative proposals.

As Mr Delors said at the 1987 Brussels European Council and recently reminded the two sides of industry—for example in the speech he made in Stockholm before the Congress of the European Trade Union Confederation¹—the Statute is essential to completion of the internal market in 1992, being designed to stimulate cooperation among business people and bring progress on the social front by providing a mechanism for worker participation along various lines.

A priority aim

A European market calls for a European company. This simple truth has not yet struck home. Thirty-one years after the signature of the Treaty of Rome, it is still impossible to set up a company under European law and bring together within a single legal entity production plants or service-rendering establishments located in more than one Community country.

There is no means of satisfying the growing need for cooperation between enterprises at the Community level or for the formation by merger of Europe-wide enterprises, a need which is highlighted by the success of the common research programmes (Esprit, Brite, Race). European firms are placed from the outset at a serious disadvantage compared with their American or Japanese competitors who can mobilize human and financial resources from a much wider base. This holds true for the whole of manufacturing industry, but even more so in the sensitive areas of high technology and finance where skills and capital are both needed in abundance.

It has, of course, been possible to form through financial links (acquisition of shareholdings, etc.) groups of companies operating in several countries. But is not their formation dictated most of the time by financial logic? The impossibility of creating a European form of production unit has given rise to multinational financial and stock exchange strategies. The takeover bid has thus become one of the main means of restructuring, sometimes causing turmoil within a company in so far as the procedures used rule out the consultation and involvement of workers, despite the fact that they are one of the keys to industrial success. A European company form would limit such excessive, and sometimes abusive, recourse to takeovers.

As the 1992 single market deadline approaches, and to ward off the threat from new competitors, there is an urgent need to ease the way for and promote industrial cooperation in Europe, permit the formation of European companies capable of facing up to their American or Japanese rivals and ensure the participation of all those concerned. This is the rationale of the Commission's new proposal aimed at the creation of a European Company Statute.

The proposal has its origins in the White Paper on completing the internal market and answers the call by the European Council in Brussels last year for swift progress by the Community institutions on the company law adjustments required for the creation of a European company.

How did the Commission go about its task?

Mr Delors and Lord Cockfield first of all asked themselves what approach, capable of speedy implementation, was simplest and best.

A false start

It soon became clear that the proposals currently before the Council and Parliament are unsuitable for this purpose as they require considerable refinement.

¹ Bull. EC 5-1988, point 1.1.4.

- This is the case with the proposal for a fifth Directive (proposed in 1972¹ and amended in 1983²), which aims at harmonizing the structure of public limited companies and makes provision for various systems of worker participation. Although a fair amount of progress has been made on the question of structure, the deliberations on worker participation have advanced at a much slower rate and no decision on the whole package is likely for another two to three years (with no guarantee of a favourable outcome).

- It is also the case with the proposal for a 10th Directive, designed to make possible cross-border mergers (the absorption by one company of another company situated in a different Member State).³ This proposal has now run up against a feeling in Parliament that it should be held back pending adoption of the fifth Directive and its provisions on worker participation.

The search for an effective and speedy method

Drawing the logical conclusions from this state of affairs, the Commission then cast the net wider in its search for the speediest method of overcoming—by appropriate legal means—the obstacles to cooperation between companies from different European countries.

These obstacles are basically five:

- The impossibility of carrying out cross-border mergers. The European Economic Interest Grouping will, of course, see the light of day in 1989, but its scope will be limited.⁴
- Tax complications, including the double taxation of business activities (parent company, subsidiaries).
- Differences in Member States' company law.
- The difficulties inherent in managing a group of companies as a single economic unit (notably as regards worker involvement) owing to the fact that many Member States do not recognize the group concept.
- The administrative difficulties inherent in setting up companies. Acquiring a knowledge of and applying the company law of

several countries can be a costly undertaking.

Mr Delors and Lord Cockfield felt that these obstacles could be overcome, given the right conditions, by placing at the disposal of business people a European Company Statute based perhaps in part on the European company proposal put forward in 1970 and revised in 1975.⁵

What the European Commission is now proposing

The text adopted today by the Commission is a memorandum which will be submitted—for a period of six months—to Parliament, the Council and the two sides of industry. Once it has their views, the Commission will present its legislative proposals.

The memorandum sets out the Commission's objectives and the principles which should underlie implementation of the new European Company Statute.

An instrument of cooperation in the large market

Transnational in its aims, the new Statute will allow the formation of European enterprises capable of gathering together human and financial resources located in several Community countries.

Simple and attractive from the tax angle

A company incorporated in this form will be taxed on an aggregate basis (under the tax law of the country in which its legal headquarters are situated), after adjustment for the profits and losses made by its establishments in different Member States. It is, as it were, the consolidated results of the group that will be taken into consideration.

¹ OJ C 131, 13.12.1972; Supplement 10/72 — Bull. EC.

² OJ C 240, 9.9.1983; Supplement 6/83 — Bull. EC.

³ OJ C 23, 25.1.1985; Supplement 3/85 — Bull. EC.

⁴ Supplement 3/87 — Bull. EC.

⁵ Supplements 8/70 and 4/75 — Bull. EC.

Modern from the social angle

The Statute will ensure worker participation along the lines of one of the following systems: a German-style regime of co-determination (election by the workers of part of the supervisory board); collective bargaining within a company to settle the arrangements governing participation; or participation through a body representing the workforce (such as a works council).

In order to facilitate the insertion of the European company into its legal environment, the Member States might restrict the choice further. Thus, for example, it would be open for the German authorities to require European companies formed in their territory, or the establishments in Germany of a European company with headquarters in another Member State, to practise a 'German' system of participation so that imple-

mentation of the Statute does not constitute a retrograde step on the social front in that Member State. Recourse to this system of three options was announced to the two sides of industry in recent speeches by Mr Delors.

A straightforward and practical legal instrument

As an optional instrument, the European Statute will coexist with the other national company forms, which will remain in being. It will give enterprises a wider choice.

*

A new Statute satisfying these criteria could be drawn up quickly. In this way, a major step would be taken towards creating the integrated European market of 1992.

Introduction

The Presidency's conclusions at the end of the European Council held in Brussels on 29 and 30 June 1987 called on the institutions concerned 'to make swift progress with regard to the company law adjustments required for the creation of a European company'.¹

The call by the European Council took up an important recommendation made in the Internal Market White Paper (point 137)² that by 1992 the Council should adopt the proposal for a Regulation on the Statute for European companies,³ which had been put forward in 1970 but had lain dormant for years, or an amended proposal to be put forward in 1988.

The purpose of the present memorandum is to set out the case for early action on the European Company Statute and to invite Parliament, the Council and the two sides of industry to express their views on the broad lines of this memorandum before the Commission makes a formal proposal.

Cross-frontier cooperation in the Community is not only an essential aspect of the creation of a genuine common market, it is at the same time absolutely vital if the Community's national enterprises in major industrial sectors are to maintain and improve a competitive market position, both at home and in the world at large.

The inevitable restructuring of European industry will be more efficiently achieved and necessary change more readily accepted if all the interests concerned are involved in and fully committed to the process. In particular the role of the social dialogue is a vital one; it is essential that the workers in the Community should be able to recognize the internal market as the one they have helped create and as one in which their interests are appropriately safeguarded.

Specific legal instruments providing means which enterprises can use to create new or combine existing cross-frontier operations on the basis of European rather than national law should further stimulate cooperation among enterprises. This should be particularly helpful in situations where entrepreneurs feel that national legislation does not al-

low them to set up and manage a Europe-wide enterprise in the most efficient way or to realize the potential economies of scale. Such legislation at the European level could at the same time pioneer worker involvement in the decision-making structures of European industry.

Making a European company form available to enterprises would meet a need which is growing steadily more pressing as the 1992 single market deadline approaches: operations to restructure companies and groups of companies are going to become more and more frequent over the next few years, and more and more often will be mounted across national borders. This process will take place whatever happens, being dictated by economic necessity and shaped by the choices of business people.

The public authorities for their part have a duty to ease the way for operations of this kind, and to ensure that they can take place with the minimum of complexity and cost.

But there is a widening rift between the obvious economic need to restructure companies and the poor legal means available for the purpose, particularly where the companies involved come under different national laws.⁴ It is paradoxical, in particular, that it is impossible legally to merge companies from different Member States, and that takeover bids are the only means of carrying out the indispensable restructuring process at Community level.

The lack of legal means for transnational cooperation—and this includes the stalling of the proposed European Company Statute, which has not been looked at even at expert level since 1982—is the result of a longstanding difficulty which stems from differences in traditions regarding participation by workers in company decision-making: according to some, any such participation must be voluntary, while for others it must

¹ Bull. EC 6-1987, point 1.1.4 § 1.

² Bull. EC 6-1985, point 1.3.1 *et seq.*

³ OJ C 124, 10.10.1970; Supplement 8/70 — Bull. EC; Supplement 4/75 — Bull. EC.

⁴ 'Costliest of these barriers for transborder cooperative start-ups and managements appear to be the near absence of relevant European company and tax law'. Paolo Cecchini, 1992, *The European challenge*, p. 87.

be written into statutory law relating to enterprises.

Nevertheless, no satisfactory compromise has yet been found which would bridge the gap between the two basic attitudes: any legislative inroads by worker participation into company law would set a dangerous precedent, according to those who take the first view; while for those who take the second view, any new scheme which was not equivalent to their own domestic one might encourage companies from their countries to desert the existing forms for newly accessible ones, thought to involve lower costs.

The difficulty of moving forward on the fundamental issue of worker participation is a perennial problem in the harmonization of company law, and a bone of contention in the social dialogue.

A breakthrough in this area now seems to be essential in the social dialogue; otherwise, vital elements in the construction of the single market may remain blocked for a long time.

It would therefore appear that the time has come to revive the proposal for another instrument of industrial cooperation, the European company, which would necessarily also bring progress on the social front.

The key to this revival is perfectly clear: it turns on a political consensus that avoids the extreme positions referred to above.

The Commission believes an equilibrium should be found between:

- on the one hand, the advantages offered to enterprises by a European Company Statute as a means for cooperation;
- on the other hand, the aspirations of workers for full participation in the decision-making processes of companies, given the essential contribution of workers towards realization of the internal market.

I — The need for greater cooperation

Cross-frontier cooperation of all kinds between firms and the emergence of genuinely European companies have now become imperative if European industry and commerce

is to be in a position to exploit the full benefits of the internal market.

In the 1960s the main justification advanced for cooperation within the Community was economic integration. This objective remains valid today. But there is now an even more pressing reason—namely that the Community's competitive position in world markets, both at home and abroad, is gravely at risk. Unless we manage to stimulate our industries to 'join forces', we cannot hope to keep up with our main competitors, the United States of America and Japan, let alone take the lead.

Economic cooperation used to be considered of predominant importance for traditional manufacturing industries. But it is now clear that such cooperation has become absolutely vital, especially for the high-technology industries and for companies which are highly specialized in financial services. Only through Community-level industrial cooperation will it be possible to bring together the large amounts of capital and technical know-how required to ensure competitiveness on world markets. It is for this reason that the Commission, to encourage intra-Community cooperation, has in recent years established a series of common research programmes (e.g. Esprit,¹ Race,² Brite³) at the pre-production stages, the effects of which would be multiplied by implementation through European companies.

The same need for cross-frontier cooperation is just as strong in the services sector, not least in the financial sector, where the financial conglomerates need to have a global presence and a strong capital base.

Industry and commerce understand perfectly what role they can and must play in this context. From the early days of the Community's existence, individual businesses have been attracted in principle to the greater potential for cross-border cooperation. Hoesch/Hoogovens, Agfa/Gevaert, Pirelli/Dunlop, Fokker/VFW are clear examples of attempts to form new partnerships on a European scale.

¹ OJ L 118, 6.5.1988; Bull. EC 4-1988, point 2.1.54.

² OJ L 16, 21.1.1988; Bull. EC 12-1987, point 2.1.71.

³ OJ L 59, 4.3.1988; Bull. EC 2-1988, point 2.1.35.

While economic reasons were partly responsible for the above partnerships breaking up, a more binding contract based on a (better suited) legal framework might well have saved the relationships. 'When things got rough, the temptation was pretty strong to walk away. If we had no other choice but to stay together, the compulsion to work, live and succeed together would have been much stronger' (Mr Rohwedder of Hoesch).

Other top European industrialists equally indicate that it is not lack of interest on the part of industry, but lack of an appropriate legal infrastructure which may often make industry back away from cross-border cooperation in the Community. Recent events show that, in the run-up to 1992, firms in the services sector are growing particularly anxious to find suitable partners to join in cross-frontier cooperation (e.g. in banking, insurance and civil aviation.)

Examples of present-day (so far successful) relationships of this sort can be found in the Airbus consortium (which recently announced it is considering changing its present legal form of a French-type economic interest grouping with the resulting need for unanimity on all decisions), Iveco (Fiat, MAN and others: multinational cooperation in the trucks industry) and ESS (European Silicon Structures), while the Channel Tunnel project also shows how a highly political as well as economically risky project can only stand a chance of getting off the ground if it is backed by multinational cooperation.

Cooperation is indispensable for the restructuring of the Community's industry. Companies with large amounts of capital are especially suited to engage in cross-frontier cooperation of this nature, but they will do so only if they have sufficient confidence in a successful outcome.

II — Obstacles to cross-frontier cooperation

The main obstacles in the way of cross-frontier cooperation are as follows:

1. The impossibility of carrying out cross-frontier mergers and similar operations.

Among a wide range of possible forms of industrial cooperation there are three main types which involve restructuring, with which this paper is concerned:

- participation in capital (majority and minority holdings);
- joint ventures;
- mergers and similar operations, involving the transfer of the assets and liabilities of the acquired company to the acquiring company.

Cross-frontier industrial cooperation between companies in different Member States can and does take place through the first two of these methods. Moreover, from the summer of 1989 companies wishing to do so will be able to make use of the European Economic Interest Grouping (EEIG)¹ for cross-border joint ventures. Cross-frontier mergers, however, are at this stage not legally possible.

2. Tax problems, such as:

(a) obstacles resulting from:

- taxation of hidden reserves (capital gains, 'plus-values') among the assets of the absorbed company at the time of international mergers or similar operations; the very high tax cost may deter enterprises from such cross-frontier cooperation;
- double taxation of dividends distributed by a subsidiary to its parent company situated in another Member State, in particular in the form of withholding taxes;
- economic double taxation which may arise from cross-frontier transactions between 'associated' companies, if the profits of one of the two companies have been adjusted upwards by the tax authorities of one Member State without a corresponding downward adjustment in the country in which the other company is located;

(b) distortions of the decision where to establish a company in the Community by the different corporation tax systems and different rules for the determination of taxable profits, which may place enterprises in Member States applying a less attractive system or less favourable tax base rules at a competitive disadvantage.

¹ OJ L 199, 31.7.1985; Supplement 3/87 — Bull. EC.

3. Prevailing differences in company law between different Member States; despite harmonization, differences in local law and administrative practices will remain. Coordination of national laws is not meant to eliminate the existence of the different national systems in the Community.

4. The difficulties under present company law in virtually all Member States of managing a group of enterprises as a single economic unit rather than in the interests of its individual component companies. The lack of recognition in many Member States of the 'groups' phenomenon continues to make such cooperation across frontiers too complex, too burdensome and thus too risky.

5. Administrative difficulties of various sorts, surrounding the establishment of companies. Naturally, entrepreneurs are not as familiar with foreign requirements as with those of their own national system. This inevitably poses psychological difficulties for effective cooperation across borders.

III — Action at Community level to facilitate cross-frontier cooperation

A number of proposals are already under discussion in the Council to remove or reduce some of these obstacles. In particular:

- the proposed 10th Directive on cross-frontier mergers, put forward in 1985;¹
- the three Directives tax 'package', which covers the tax treatment of mergers and similar operations,² the tax treatment of parents-subsidiaries,² and an arbitration procedure which would eliminate double taxation arising from transactions between 'associated' companies.³

More generally, as regards the harmonization of company taxation, the Commission proposed back in 1975 harmonization of corporation tax systems on the basis of the 'partial imputation system' (with bands for the rates of tax credit and of corporation tax).⁴ The Commission is also preparing another proposal for harmonization of the determination of taxable profits. These proposals will reduce tax distortions, in particular those leading to the location of headquarters purely for tax reasons.

Taken together these proposals provide a suitable response to the problems listed at (1) and (2) of Chapter II above and when adopted will help ease some of the practical difficulties for undertakings wishing to cooperate. The Commission therefore urges the Council and Parliament to adopt them as rapidly as possible. In addition, progress on the Statute for the European company, containing uniform provisions, could have a favourable effect on the progress of some directives concerning the harmonization of company law, in particular the proposal for a 10th Directive (cross-frontier mergers)¹ which has reached a deadlock in Parliament.

None of the proposals mentioned above, however, deals with the problems mentioned in Chapter II at (3) and (4), namely differences in company law from one Member State to another and the 'group management' problem. Also the current complexity and delays in establishing new companies (see (5) above) is not solved by the above proposals.

Although it provides a valuable framework for cross-frontier cooperation (joint ventures) between, in particular, smaller companies, the Regulation on the European Economic Interest Grouping (EEIG) adopted in 1985 is not enough to encourage large-scale cross-frontier cooperation.

Additional Community instruments, particularly in the company law sphere, are therefore required.

IV — Company law harmonization and the European Company Statute

The Commission's company law programme combines two approaches:

- The traditional approach of coordination of company law, aimed at making equivalent the various national laws, is a long-term affair owing to its necessarily perfectionist nature. Although sometimes producing positive

¹ OJ C 23, 25.1.1985; Supplement 3/85 — Bull. EC.

² OJ C 39, 22.3.1969.

³ OJ C 301, 21.12.1976.

⁴ OJ C 253, 5. 11.1975; Supplement 10/75 — Bull. EC.

results (e.g. harmonization of accounts), it seems to be losing momentum; moreover, it scarcely seems to play a decisive part in the definition of large firms' international strategies (for a more detailed discussion of the harmonization programme, see Annex I).

- The creation of a European industrial base means making available to industrial groups a type of transnational company, independent of national laws, which makes it possible to concentrate substantial assets and compete with American and Japanese businesses, hence the proposal put forward in 1970, and amended in 1975, for a European Company Statute.¹

V — General nature of the Statute

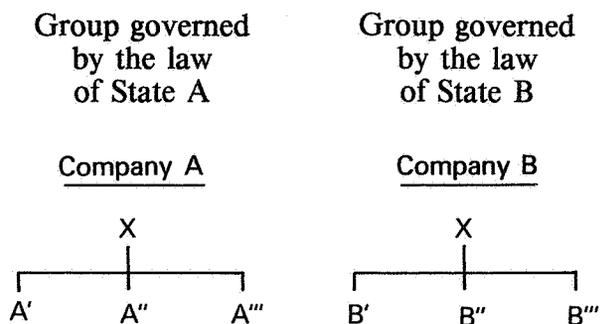
The Statute, even after any simplification, will have to cover all the various aspects of modern company law. This is unavoidable if on the one hand it is to provide companies with an additional option to those available under national law and on the other at least the same kinds of interests as under national law need to be sufficiently protected, so as to avoid the risk that the Statute might be used by companies to 'migrate' to it to avoid more stringent national systems.

As a legal instrument for transnational cooperation and restructuring, the European Company Statute will have to possess certain qualities if it is to be attractive to firms:

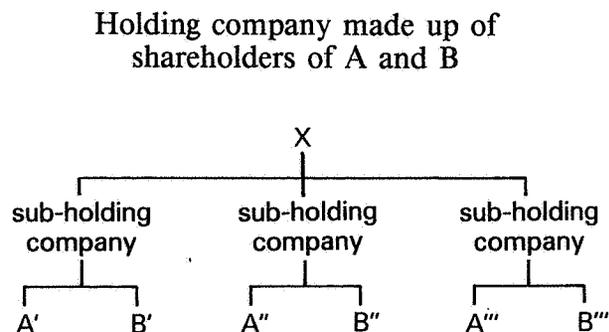
- In the first place, it will have to overcome the current legal difficulties which are inherent in associations or mergers between companies or groups from different Member States and constitute a valid alternative to the techniques currently used (continuation of existing companies and the creation of holding companies which control them).

The following example is deliberately very simple:

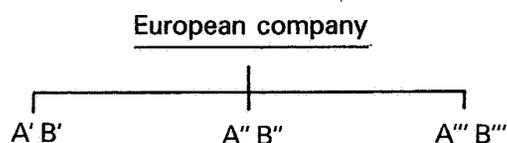
(a) let us imagine that two groups merge their activities because they complement each other and on account of the economies of scale secured by merging together their three respective subsidiaries which pursue the same activities:



(b) because of the current impossibility, from a legal standpoint (consent of 100% of shareholders under most national laws) and from the standpoint of taxation (the companies which are acquired have to be wound up), of cross-frontier mergers between companies, the simplest organization plan which meets the wishes of those directing or managing the companies is, at present, the following:



(c) the alternative of the European company would afford considerable simplification:



- The tax status of a European company will have to be consistent with the logic which underlies it; established in order to combine activities across frontiers under the aegis of a single legal entity, its taxable income will have to be calculated taking into account foreign losses.

- Lastly, the Statute will have to be sufficiently simple to use. In this regard, it should be noted that the proposed Statute

¹ A history of the Statute is set out in Annex II.

currently before the Council could be amended and simplified to a fairly considerable degree, especially concerning the provisions which are the subject of harmonization measures that have been adopted or are in course of preparation (accounts, mergers, etc.) or which could be dealt with by a reference to national law (groups, winding-up, liquidation, bankruptcy, etc.). Indeed, the provisions of the Statute can now be based on a background of national laws which is sufficiently harmonized to allow for the introduction of uniform and simplified rules.

VI — Specific issues associated with the European Company Statute

A number of specific issues would need to be addressed in such a Statute:

- (a) coexistence with national systems of company law;
- (b) worker participation;
- (c) information and consultation of workers;
- (d) the problem of groups;
- (e) tax treatment.

(a) Coexistence with national systems of company law

The Statute is to establish a single system of company law, totally independent of national systems. In order to do this, it may have to introduce provisions or solutions for legal problems which differ from those arising in national law or which do not exist in any Member State's legislation.

This should not be a cause for concern, since the Statute will be entirely optional, provided that the boundary line between the provisions of the Statute and the ordinary provisions of national law is drawn clearly. The adoption of the Regulation on the European Economic Interest Grouping (EEIG) shows that this type of coexistence is possible.

(b) Worker participation

Evidently, the European Company Statute must lay down rules governing the partici-

tion of workers in the structure and decision-making process of the European company.¹ This is essential, since a multinational company carrying out its business in the Community in accordance with different national legislations has to comply with a whole range of different arrangements as regards the role of employees within the company. In addition, worker participation already plays an important part in everyday industrial relations in a growing number of Member States.

Industry has indicated in the past that while basically welcoming the European company concept it has difficulty in accepting a statute which includes a system of worker participation. Trade union representatives, particularly from Member States that have worker participation systems at national level, strongly argue in favour of such a system in the European company; in other Member States, the position of trade unionists is somewhat reluctant. At the political level, the European Parliament nevertheless gave worker participation in the Statute its strong support.

The proposal for the European Company Statute has always contained provisions governing worker participation. In the Commission's view, worker participation is essential not just as a matter of social rights, but as an instrument for promoting the smooth running and success of the enterprise through promoting stable relationships between managers and employees in the workplace. The Commission, therefore, continues to see worker participation as an integral element of the European Company Statute. The continuing support in the European Parliament also demonstrates that the Statute would be incomplete without provisions on this point.

¹ This participation will not be organized at day-to-day management level, but rather at supervisory level and at the level of the development of the company's strategy. In accordance with the participation schemes set out below, worker participation would be either through a separate supervisory body (dualist structure), or in a single board of directors in which the management and supervisory functions are clearly determined (monist structure), or in a separate body representing the workers quite distinct from the company organs.

In theory there are three main approaches which could be considered for dealing with worker participation in the Statute:

1. the model laid down in the Statute itself (supervisory board composed one third of shareholders' representatives, one third of workers' representatives and one third of members coopted by these two groups and representing general interests);

2. the rule of the country of establishment (but with protection for the 'acquired rights' of workers in branches in Member States with workers' participation legislation);

3. a choice from the principal schemes provided in the fifth company law Directive:

- workers elect no less than one third and no more than half of the members of the supervisory board (German system);

- worker participation through a body representing the employees, quite separate from the company organs. This body is entitled to be regularly informed about the progress of the company's business, and to request reports on some of the company's activities; in addition, it has the right, *vis-à-vis* the supervisory body (or the management body), to be informed and consulted prior to any meeting of such body; in this connection the body representing the employees is to receive all the information concerning the agenda of the meeting in question. In some consultations, if the body in question does not share the opinion expressed by the workers, it is to inform them of its reasons;

- worker participation through collectively agreed systems, to be agreed upon within the company.

Approach 1, which is an amendment made by Parliament to the initial proposal, probably represents the most developed and ambitious form of participation. However, this approach has not yet been applied in any Member State despite the expectations to which it gave rise. It therefore seems difficult to retain such approach at this stage, either as a single model or as one of the schemes proposed. Besides, companies have always expressed the most serious reservations in respect of this approach. Nevertheless, at this stage it seems unrealistic to make this the only possible model.

Approach 2 runs counter to the basic idea of the European company being independent from major legal ties with any national system, governed exclusively by the Statute, since it would lead to the emergence of European companies which are distinguishable on the basis of varying national characteristics. This may form a psychological impediment in particular to European companies being formed through cross-frontier mergers.

Moreover, this approach will risk migration of companies to what will be seen as the least stringent national system.

This is why the Commission has reached the conclusion that the system of worker participation, inherent in the European Company Statute, must necessarily satisfy certain conditions which appear to be fulfilled in approach 3:

- It must be based on the principles governing the participatory systems in the States that have developed them and at the same time it must be flexible enough to allow for a consensus to be reached between the social partners.

- It does not have to be uniform. It would be appropriate to allow companies a choice between different schemes which reflect the accepted practices in most Member States, such choice being subject to consultation with the workers who will be affected by the scheme chosen. These schemes could be the following:

- (i) that which provides that the workers elect no less than one third and no more than half of the members of the supervisory board (German system);

- (ii) that which provides for the participation of the workers through a body representing the company employees, which is quite separate from the company's organs;

- (iii) that which provides for the participation of the workers through collectively agreed systems, to be agreed upon within the company.

It could nevertheless be specified, so as to make it easier for the European company to suit the legal environment in which it operates, that the Member States could restrict the choice. In this way they would no longer need to fear that companies constituted in

accordance with their national laws might use the European Company Statute in order to avoid provisions of national law concerning worker participation. Thus, for example, the German authorities would be free to prefer European companies, where formed on German territory, to apply a German participatory system.

Furthermore, worker participation need not be introduced if the workers of the company are against it, for without their support the system cannot work. This can be ensured in principle either by making worker participation obligatory for the European company unless the workers of the European company vote against it, or by making worker participation in the European company dependent on a request to that effect from the workforce. Besides, the scheme finally chosen will apply only to the European company and not to any companies which may be linked to such European company.

(c) Social dialogue and information and consultation of workers

The workers of the European company should benefit from the same information and consultation rights as are enjoyed by other firms in the Community. The existing Community Directives in this context,¹ as well as the results of the Val Duchesse social dialogue, naturally apply fully to the European company as much as to any other enterprise in the Community. Further developments in these fields, applicable to companies in the Community, will also cover European companies.

The inclusion of more stringent rules in the Statute itself is not desirable at this stage. Whether such rules should be included, e.g. with regard to 'Works Councils' as provided for in the Commission's amended proposal, should be resolved in the wider context of the social dialogue.

Meanwhile, what could be written into the future European Company Statute is that a European meeting place be provided by the European company so as to permit an assessment of its development by its various constituent parts.

(d) The group problem

The 'group problem' arises from the fact that while groups of companies represent the most widespread form of enterprise cooperation, they still constitute a *de facto* situation in company law. Except in Germany and Portugal, the Member States' law is based on the principle of a company's economic independence, an idea which is not always easy to reconcile with the degree of concentration that now exists. The economic requirements of groups are indeed often in conflict with the legal principle of company independence.

The problem arises specifically within the framework of a European Company Statute because two of the means of constituting a European company (creation of a holding company or a joint subsidiary) automatically entail the formation of a group of companies, thereby raising the problem of relations between the European company and its subsidiaries.

The aim of the original draft of the European Company Statute was to enable those setting up a European company to opt for a special group status, which would facilitate management of the company as a single economic unit, while at the same time ensuring appropriate protection for interests of third parties (e.g. minority shareholders and creditors).

It is open to question, however, whether the European Company Statute is the proper place to create a body of rules governing groups.

(e) Tax treatment

In principle, the European company will be subject to the tax laws of the State in which it is domiciled, in the same way as any other company. This means that bilateral agreements against double taxation made by the

¹ Council Directive of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies (OJ L 48, 22.2.1975); Council Directive of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJ L 61, 5.3.1977).

State of domicile with other Member States or with non-member countries will apply equally to the European company.

In addition, the amended proposal for a Regulation contains attractive provisions for enterprises which derogate from the normal tax treatment (Title XII, Section Three, Articles 278 and 281). These provisions lay down the conditions under which losses suffered by permanent establishments of the European company situated in another Member State, or by foreign subsidiaries, may be deducted from the profits in the Member State of residence.

These provisions would in most cases represent a considerable improvement on the present position. Indeed, as far as the losses of these permanent establishments are con-

cerned, the deduction of foreign losses is at present only possible in those Member States which, like the United Kingdom and Ireland, apply the method of deducting the foreign tax, or which, like France, permit the application of the 'world profit system' under certain conditions. As for subsidiaries, most Member States do not allow the deduction of the losses of either national or foreign subsidiaries.

It would not appear advisable to lay down other tax provisions benefiting the European company and derogating from normal tax treatment. Indeed, such derogations would cause considerable imbalance which would be particularly harmful to small and medium-sized enterprises which are hardly likely to opt for incorporation in European company form.

Conclusions

The revitalized European Company Statute would be:

- an optional instrument from the point of view of enterprises, which would be entirely free to choose whether or not to operate in this form;
- transnational in outlook, its object being to overcome the present legal difficulties inherent in associations or mergers between companies from different Member States;
- attractive from the taxation angle, because of the possibility of imputing losses incurred by foreign subsidiaries and permanent establishments;
- a step forward on the social front, providing a mechanism for worker participation;

- a symbol of and incitement to symbiosis between the different company law traditions of Western Europe.

The Council, Parliament and the two sides of industry are requested to express their views on the present memorandum, and particularly on the three following key questions, before the end of the year:

- the principle of an optional Statute,
- the independence of such Statute of national laws,
- the inclusion of the three schemes for worker participation.

After examination of these views, the Commission could make a formal proposal concerning the Statute for the European company at the beginning of 1989.

Annex I

Company law harmonization and the European Company Statute

The Commission's company law programme contains two approaches. Firstly, the approach based on Article 54(3)(g) of the EEC Treaty, to coordinate the company laws of the Member States by way of directives. A substantial framework has already been established,¹ even if some important issues are still to be covered by future directives already proposed or on the drafting board.

One of these of particular importance in this context is the fifth company law Directive, proposed in 1972;² an amended proposal was introduced in 1983 in which the fundamental points of the opinion of the European Parliament were taken on board.³

This proposed Directive seeks mainly to lay down binding rules for all public limited companies regarding their internal structure and decision-making, including composition of supervisory and management boards, and to establish provisions for various equivalent models for worker participation at least for companies above a certain size (1 000 workers).

The proposed Directive is currently in its second reading in the Council. With regard to the questions of 'structure' it would seem the groundwork for a decision at political level is by and large done; on the worker participation provisions we are far less advanced, despite progress in this context since 1972 at national level and despite the more flexible approach to this topic in the amended proposal.⁴ It will probably not be until the end of the third reading, within two to three years, before adoption at political level of the complete fifth Directive could be finally assessed.

Coordination, even if pursued to the maximum extent, will not bring about complete unity of the national conditions under which enterprises are allowed to undertake their business.

This may not hinder much the individual enterprise operating in another Member State than that of its origin. It can complicate cross-frontier cooperation by enter-

prises, as participating companies will have to deal with various national legal systems which have maintained national characteristics.

Therefore, the Commission proposed to complete its company law programme with a second approach: the setting up of a single legal framework at Community level, independent from (although not alien to) the—coordinated—national company laws. This second approach, based on Article 235 of the Treaty, would provide national companies with an additional, and thus optional, legal framework for cross-border industrial cooperation, that would circumvent the difficulties and complexities resulting from having to take account of multiple national legal systems. The Commission proposed two Regulations: the Regulation on the European Economic Interest Grouping, adopted by the Council in July 1985 and applicable from 1 July 1989, and the Regulation on the Statute for the European company, introduced in 1970 (amended in 1975), on which negotiations in Council were suspended in 1982. The Statute is further described in Annex II below.

To enhance cross-border cooperation between enterprises, it will be necessary to assess to what extent the first approach of following a continued coordination exercise will help solve outstanding obstacles and to what extent the second approach will be a necessary and feasible alternative.

¹ First Council Directive of 9 March 1968 (OJ L 65, 14.3.1968); second Council Directive of 13 December 1976 (OJ L 26, 31.1.1977); third Council Directive of 9 October 1978 (OJ L 295, 20.10.1978); fourth Council Directive of 25 July 1978 (OJ L 222, 14.8.1978); sixth Council Directive of 17 December 1982 (OJ L 378, 31.12.1982); seventh Council Directive of 13 June 1983 (OJ L 193, 18.7.1983); eighth Council Directive of 10 April 1984 (OJ L 126, 12.5.1984).

² OJ C 131, 13.12.1972; Supplement 10/72 — Bull. EC.

³ OJ C 240, 9.9.1983; Supplement 6/83 — Bull. EC.

⁴ The proposal does not provide for a single model, but offers a series of four options from which Member States' legislators and companies themselves could choose. Furthermore, Member States will be permitted not to impose worker participation in a particular company where its workers are themselves opposed to it.

Pros and cons of further company law harmonization

For a proper functioning of the (internal) market it is desirable that all those having to deal with public companies in the Community (shareholders, creditors and workers) can trust they are dealing with broadly the same legal structure and have everywhere in the Community equivalent rights. A situation of that nature obviously will have a significant positive effect on the readiness to engage in cross-frontier cooperation in the Community, as this will then be based for all participants on more or less familiar legal norms. It will at the same time provide a solid basis for the improvement of the social dialogue in the Community through worker participation, even if the form in which worker participation is realized may continue to differ between Member States.

On the other hand many argue that harmonization is not a *sine qua non* for the achievement of the internal market. (There is, for instance, no single system of company law in the USA, but the different corporate systems can be used all over the USA.) Furthermore, the historical diversity of Member States' legislation and experience has its own advantages ('competition between rules') and widens the choices open to both companies and individuals in a variety of different working environments available to them.

In the Commission's view harmonization remains a valid objective for the future which it would wish to continue to pursue. Harmonization is unlikely, however, to provide an immediate solution to problems of cross-frontier cooperation or to bring early progress in the social dialogue.

Annex II

The Statute for the European company: historical background

(a) The idea

The idea for a European company structure was first launched by French legal practitioners in 1959. Given its clear potential for stimulating European industrial cooperation as well as for providing an example of how the Community could be made a reality in everyday life, the Commission took on the idea and set up a group of national experts from the (then six) Member States to investigate the possibilities. This group, in 1967, prepared in no time a concept for a possible Commission proposal. The concept covered all traditional aspects of company law.

(b) The Commission's proposal

The Commission's initial proposal adopted in 1970 both in format and in substance is to a large extent a reproduction of the 1967 'concept'. In addition, the Commission considered that involving the workers in the process of industrial restructuring was a prerequisite to its success and that therefore the Statute should include also provisions on worker participation. Apart from these being seen as necessary with a view to the establishing of the common market, it was also considered politically necessary to include such provisions, given the developments in the company law of certain Member States relating to the mandatory involvement of the workers in the management structure and the decision-making process of companies.

(c) The advisory institutions

- The Economic and Social Committee (ESC)

Even if on a number of points there were entirely opposing views among the various ESC groups, on the various subjects contained in the draft Statute there were varying majorities within the ESC supporting the proposal.

As a result, therefore, the ESC was able in 1972 to give a favourable opinion on the draft as a whole.¹

- The European Parliament

In December 1972 Parliament was to discuss the report drawn up by its Legal Committee on the Commission's Statute proposal. However, in view of the large number of amendments tabled at the time (but more likely also in view of the first enlargement of the Community being just a couple of weeks away) the House decided not to embark on a discussion of the report, but to refer the amendments to its Legal Committee.

A supplementary report was then drawn up, with the participation of Members coming from the new Member States, in June 1974. Parliament discussed and adopted this report in July 1974.²

The gist of both reports was the same. As in the 1972 report, the new report also contained a draft resolution which was very favourable to the Commission's Statute proposal.

A good deal of amendments were suggested, of which those relating to the chapter on the participation of workers in the supervisory board, from a political viewpoint, were the most important ones.

While the Commission in its original draft Statute had proposed the idea of a supervisory board consisting of Members of which 'at least one third (and at most one half)' were chosen by the workers and all others by the shareholders, Parliament introduced the idea of a tripartite system (one third chosen by the workers, one third by the shareholders and one third coopted by these together). It also made suggestions with regard to the compulsory Works Council and the procedures for the election of the worker representatives.

These suggestions were adopted in Parliament with widespread support.

In view of that support, the Commission decided to take these suggestions fully on

¹ OJ C 131, 13.12.1972.

² OJ C 93, 7.8.1974.

board; it incorporated Parliament's ideas (almost) verbatim in the text of its subsequent amended proposal, produced in 1975.

Recent discussions in Parliament on the proposed 10th Directive seem to confirm that the House continues to look favourably on initiatives concerning the involvement of the workers.

(d) The Council

The Commission transmitted its proposal to the Council by letter of 30 June 1975.

For technical discussions of this proposal the Council appointed an *ad hoc* Working Party which started its work in 1976. Between 1976 and 1982 the *ad hoc* Working Party worked its way through the first reading of the proposal. The discussions developed in a constructive and rather positive atmosphere, but were suspended in 1982 when completion of the first reading was made dependent on 'seeing Commission proposals for harmonization of Member States' legislation on groups of companies'.

Negotiations in Council have since 1982 not yet been resumed.

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Statute for the European company

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The purpose of this Commission memorandum is to set out the conditions on which swift progress might be made in adjusting company law in such a way as to facilitate the formation of a European company. Once the Commission has received the views of Parliament, the Council and the two sides of industry on the broad lines of its memorandum, it will be in a position to make a formal proposal early in 1989.