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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 Marín, 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 Confederation[1]—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.

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[1] Bull. EC 5-1988, point 1.1.4.

• This is the case with the proposal for a fifth Directive (proposed in 1972[1] and amended in 1983[2]), 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, subsidiairies).

• 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.

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[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 implementation 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.

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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 allow 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 long-standing 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

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[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] Brite[3]) 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 attemps to form new partnerships on a European scale.

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[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

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[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.