

# THE EUROPEAN COMPANY (SOCIETAS EUROPAEA) – A SUCCESSFUL HARMONISATION OF CORPORATE GOVERNANCE IN THE EUROPEAN UNION?

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## Introduction

After more than three decades of disagreements, the European Union (EU) Council of Ministers finally adopted on 8 October 2001 the Regulation to establish a European Company Statute<sup>1</sup> and its related Directive concerning employee involvement in European Companies<sup>2</sup>. The formal adoption of the two amended texts is the result of the political agreement reached by the EU Council at the Nice Summit in France held in December 2000. The legislation is due to enter into force in 2004<sup>3</sup>.

The European Company or ‘*Societas Europaea*’ (SE) represents a “*major breakthrough*”<sup>4</sup> for companies operating within several EU Member States. Until now, such companies had to establish a whole net of subsidiaries throughout the territories in which they operate. Due to disparities between national legislations and the necessity of incorporating at least one legal entity for each country, cross-border operations have proved to be especially costly and time-consuming. Under the new SE Regulation, companies will have the option of setting up a single company under European law with a single set of rules and unified management and reporting systems.

The SE is considered by the Commission as a decisive step in the formation of a fully integrated market in the Community. Frits Bolkestein, the Internal Market

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1 Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), *Official Journal L* 294, 10/11/2001 P. 0001 – 0021 (‘SE Regulation’).

2 Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, *Official Journal L* 294, 10/11/2001 P. 0022 – 0032 (‘EP Directive’).

3 SE Regulation, art 70.

4 Doctor Maria Chetcuti Cauchi, ‘The Societas Europaea (European Company) as a New Corporate Vehicle’ *The European Company Statute*, (2001)  
<<http://www.chetcuticauchi.com/mcc/research/european-company-statute-1.htm>>.

Commissioner, stated that "[a]doption of the European Company Statute (...) is a practical step to encourage more companies to exploit cross-border opportunities and so to boost Europe's competitiveness"<sup>5</sup>. Anna Diamantopoulou, the Commissioner for Employment and Social Affairs, added that "[t]his tool is a fair wind for pan-European businesses" and "marks a clear staging post in the Lisbon strategy: to make the EU into the world's most competitive and cohesive place to live and do business"<sup>6</sup>.

Since the creation of the European Economic Community (EEC) by the 'Treaty of Rome' signed by the Six (Belgium, France, Germany, Italy, Luxembourg, Netherlands) on 25 March 1957, the Commission has continually pursued the objective of a free and non-discriminatory market through a harmonisation of Member States business association law. Significantly, the Commission's agenda reflects "a comprehensive concept of European corporation law" with an emphasis on "the internal affairs and the structure and organization of the corporation"<sup>7</sup>. As such, the core elements of corporate governance, notably the level of involvement of workers in the management of the company, the structure of the board, the duties of directors and rights of shareholders, have been designed in order to promote harmonisation within the Community. However, the most significant text in this area has never been adopted. The original proposal of the Fifth Directive in 1972<sup>8</sup>, dealing with the "internal structure" of the public company<sup>9</sup>, crystallised the opposition between countries such as England using the one-tier board system and excluding worker involvement in the management of the company and those such as Germany who wanted to keep their two-tier board system and the workers' participation. Despite subsequent amendments, the proposed Fifth Directive has always remained controversial, the "basic question" even becoming "whether the harmonisation pursuant to the Fifth Directive is necessary or at least desirable"<sup>10</sup>.

In line with the failure of the proposed Fifth Directive, the final adoption of the SE is also highly unlikely. In 1990, the SE was still described as a mere "ideal"<sup>11</sup>. In fact, the SE proposal involves the most controversial issues related to corporate

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5 The European Commission – Financial Reporting and Company Law 'European Company Statute: Commission welcomes formal adoption' (8 October 2001) <[http://europa.eu.int/comm/internal\\_market/en/company/company/news/01-1376.htm](http://europa.eu.int/comm/internal_market/en/company/company/news/01-1376.htm)>.

6 Ibid.

7 F.Werner Ebke, 'Company Law and the European Union: Centralized versus Decentralized Lawmaking' (1997) 31 *The International Lawyer* 961.

8 *Proposal for a Fifth Company Law Directive founded on article 54(3)(g) of the EEC Treaty concerning the structure of public limited companies and the powers and obligations of their organs*, 1972 E.C. Bull. Supp. 10 ('1972 Proposed Fifth Directive').

9 Dorresteijn et al, Kluwer Law and Taxation Publishers (eds), *European Corporate Law* (1994) 51.

10 Ibid.

11 Hervé Synet, 'Enfin la Société Européenne?' (1990) *Revue Trimestrielle de Droit Européen* 253.

governance harmonisation. The choice of the one-tier or two-tier board management is not limited to consideration of economic efficiency but also embraces cultural values. The same consideration exists for the level of participation of employees in the decision-making process of the company. Long-standing differences in the legal traditions of Member States make them unwilling to accept a European legal integration unless their national idiosyncracies are taken into consideration. Such a deadlock prior to the Nice Summit outlines the limits of both harmonisation and unification of laws in the EU. Regarding the SE, the Commission has tried to avoid these domestic obstacles by the creation of a supranational company rather than separate national harmonisation. But further at stake was the broader “*role of corporations in general, and the SE in particular, within European society*”<sup>12</sup>. Disagreements persisted and prevented the adoption of the SE until 2001, regardless of the procedural mechanism chosen.

Hence, the final agreement at the Nice Summit is the product of political compromises that have weakened the strength and extent of the SE Regulation. Considerable flexibility has been introduced, the level of employee participation in the management is subject to a separate Directive and many articles refer to national legislations. As a consequence, whether the SE 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*”<sup>13</sup> is arguable and remains to be seen in practice.

Yet, despite the extraordinary disparities of views between Member States throughout some thirty years of negotiations and oppositions, an agreement has been reached. As such, the SE Regulation provides a meaningful precedent for an understanding of harmonisation possibilities and limits in matters of corporate governance. To this end, Part I outlines the whole political process that led step by step to a compromise on the adoption of the SE Regulation and its related Directive. Part II sketches the texts finally agreed upon and especially points out the provisions relevant to corporate governance with a view to analyse the extent to which harmonisation has been effectively realised in the core elements of corporate governance in the SE.

## **Part 1 – Negotiation Processes Leading to the SE Form**

### **Genesis and First Proposals**

The idea of a trans-national corporate vehicle goes back to the turn of the twentieth century. In 1897, the Italian legal scholar Fedozzi already proposed the

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12 L.Terence Blackburn, ‘The *Societas Europea*: The evolving European Corporation Statute’ (1993) 61 *Fordham Law Review* 695, 698.

13 *SE Regulation*, Preamble (7).

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concept of a company submitted to a single statute with an international legal personality. After the Second World War, European States have by way of treaty set up some 'international' companies. The company 'Eurofima', responsible for the financing of railway materials, was created in this way by the Berne Convention signed on 20 October 1955 by fourteen European States. However, these companies have been created on a case-by-case basis, depending on the intervention of States and characterised by the differing nature of each company. Conversely, fundamental to the concept of a European company are the principles of status uniformity and state non-interference.

Some preliminary work to create a pan-European and uniform statute on companies was initiated by the Council of Europe in 1952<sup>14</sup>. The subsequent creation of the EEC in 1957 immediately generated various proposals for the concept of a European company. Paradoxically, the initiatives did not come from the business community but from practitioners and academics. In 1959, the idea was first put forward by Thibierge at the Fifty-seventh Congress of French Notaries who suggested the desirability "to adopt, by means of an international convention, a comprehensive company law, probably restricted to 'sociétés anonymes' as done previously in the field of international transportation"<sup>15</sup>. In the same year, Professor Pieter Sanders advocated further the concept in his inaugural speech at the Rotterdam School of Economics<sup>16</sup>. In June 1960, a congress "[f]or the creation of a European commercial company"<sup>17</sup> was held in Paris. On 15 March 1965, the French government recommended the opening of negotiations between the Member States aimed at the conclusion of a convention for the establishment of a European Commercial Company.

A significant step forward was made in 1966 with the direct intervention in the process of the European Commission. On 22 April 1966, it presented a Memorandum on the creation of a European Commercial Company<sup>18</sup>. In this document, the Commission settled a first issue relating to the legal mechanism that would introduce the European Commercial Company in the Community. France was arguing in favour of a uniform law to be adopted not at a European level but by each Member State in its own legislation. Nonetheless, such a law would not have had any primacy on the other domestic laws. The Commission rejected this option in favour of a supranational mechanism at the European level by way of Regulation. Therefore, it clearly appeared that the goal was not to achieve harmonization or unification of national company laws, but "to bypass

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14 Andreas Kellerhals and Dirk Truten, 'The Creation of the European Company' (2002) 17 *The Tulane European and Civil Law Forum* 72.

15 Dominique Carreau and L. William Lee, 'Doing Business in the European Internal Market : Towards A European Company Law' (1989) 9 *Northwestern School of Law Journal of International Law & Business* 501.

16 Cauchi, above n 4.

17 "Pour la création d'une société commerciale européenne", my translation.

18 Cauchi, above n 4.

*them entirely using a separate supra-national form of organization*<sup>19</sup>. As outlined by Professor Sanders, the idea was to constitute “*a company not subject to the national company law of the country involved, but to a uniform European company law, applicable directly in all the Member States alongside the national company law*”<sup>20</sup>. As a result, the Company would be fully European and introduced equally in all Member States regardless of the domestic economic, legal or cultural resistances.

The Commission also set up a working group of experts, chaired by Professor Sanders, to analyse the feasibility of such a corporate vehicle and to draw up a first preliminary draft of the statute. During the drafting process, divergences already arose concerning “*the liberalization of the use of bearer shares and, more importantly, increased worker participation in corporate governance*”<sup>21</sup>. Nevertheless, the group of experts finalised their work in 1967 and on 30 June 1970, the Commission finally issued its proposal for a European corporation statute<sup>22</sup>.

## **Oppositions and Divergences Within Corporate Governance Core Principles**

Three different legal traditions coexist within the Community since its creation in 1957: the common law system, the civil law system and the Scandinavian law system<sup>23</sup>. Further, each country has its own idiosyncracies that reflect its own culture and corresponding different structures of economy.

The German corporate governance model has a dual board structure; a management board and a supervisory board in which employees are represented. The two-tier structure reflects the traditional and large scale involvement of banks in almost every large corporation with a view to “*long-term stability*” and to “*a different corporate policy than simply maximizing the profit as would be done for a pure financial shareholder*”<sup>24</sup>. Further, involvement of workers in the supervisory board has generated more consideration for social and financial responsibilities of the company<sup>25</sup>. Other countries however originally strongly refused importation of the two-tier board management mainly because it did not fit their culture. From an Italian point of view, some workers argued that

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19 Blackburn, above n 12, 697.

20 Pieter Sanders, quoted in Blackburn, footnote n 4, above n 12.

21 Carreau and Lee, above n 15, 502.

22 *Proposal for a Council Regulation embodying a Statute for European Companies*, 3 Bull. Eur Comm. Supp. 8/70 (‘1970 Proposed Regulation’).

23 Blackburn, above n 12, 702-703.

24 Patrick Speeckaert, ‘Corporate Governance in Europe’ (1997) 2 *Fordham Finance Securities & Tax Law Forum* 31, 34.

25 Ibid.

employee representatives may “*fail to defend the interests of the working class (...) if they are required to give consideration to the interests of the company*”<sup>26</sup>. Similarly, other observers have argued that the fragmentation of the trade union structure in England would make employee representatives unable to effectively participate in a supervisory function and would lead to excessive rivalry between trade unions<sup>27</sup>.

Another area of disputes in corporate governance concerns the subject of director liability. The traditional British view has developed a “*company-based system*” that relied primarily on the market to monitor and discipline firms<sup>28</sup>. From this perspective, the operation of the board of directors was conceived as the key element for efficient management. Therefore, directors’ duties have specifically extended whereas remedies available to other stakeholders, such as creditors or shareholders, have remained limited. This restrictive approach reflects “*simply that the interests of the controllers of companies were placed higher than the interests of investors*”<sup>29</sup>. Conversely, the original vague and broad formulation of the Italian legislation on directors’ liabilities has made them liable “*only in cases of evident gross negligence*”. But in the same time, more precise legal provisions have been provided for the protection of minority shareholders<sup>30</sup>. Thus, even within the one-tier board system, different trends have developed among Member States.

In line with the draft of the working group chaired by Professor Sanders, the 1970 proposal aimed at creating a “*full set of standard provisions*” to govern directly “*the founding, structure, operation and winding up*” of the SE under European law<sup>31</sup>. Therefore, the resulting statute comprising 284 articles and four annexes was rigid and dealt with almost every aspect of a company’s existence. Yet, no consensus existed among the Member States on the main characteristics of the SE and the 1970 Proposal failed to take into account diversity among existing legislations in the Community. The draft immediately faced a number of objections mainly focused on employee participation in the supervisory and decision-making processes of a SE<sup>32</sup>. In 1970, compulsory representation of employees in the management of companies had been introduced only in Germany<sup>33</sup> and was still totally unknown in other Member States. At the same

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26 Blackburn, above n 12, 748.

27 Ibid.

28 Erik Berglöf, ‘Reforming Corporate Governance: Redirecting the European Agenda’ in SS Cohen and G Boyd (eds), *Corporate Governance and Globalisation* (2000) ch 8, 258.

29 Luigi A Bianchi *et al*, Harm-Jan De Kluiver and Walter Van Gerven (eds), *The European Private Company?* (1995) 68.

30 Ibid 50.

31 Ibid 6-7.

32 Blackburn, above n 12, 698.

33 Paul M. Storm, ‘A New Impulse Towards a European Company’ (1971) 26 *Business Law* 1443, 1446.

time, Germany would have refused to agree to a SE structure less protective of the interests of workers. Conflicts also arose in connection with regulation of groups of companies and tax issues. More generally, overregulation led to several oppositions among Member States.

On 30 June 1975, the Commission issued a second proposal that adopted a number of proposed amendments made by the European Parliament in various fields including the employee participation in management. Nevertheless, Member States were still unable to reach consensus on a number of significant areas and work on the SE was suspended in 1982. In 1989, the Commission proposed a new draft constituted of two separate but coordinated pieces of legislation. The basic issues of “*creation, funding, financial structure, management, accounting, tax, and dissolution as they relate to the SE*”<sup>34</sup> were subject to the Commission’s Proposal for a Council Regulation<sup>35</sup> subsequently amended in 1991<sup>36</sup>, whereas the issue of employee participation was separately addressed in the Commission’s Proposal for a Council Directive<sup>37</sup> also amended in 1991<sup>38</sup>. The underlying concept was to leave the sensitive issue of workers’ involvement in the corporate governance of the SE to domestic implementation. The Commission also opted for greater flexibility to reach an agreement of all Member States. Some controversial legal issues were excluded and others subject to options to be decided by national legislators. Before analysing the merits and limits of such flexibility, it is interesting to draw a parallel with the successful approach that led in 1985 to adoption of a Regulation for a European Economic Interest Grouping Regulation (EEIG)<sup>39</sup>.

### The European Economic Interest Grouping Precedent

The EEIG is of significant importance. It constituted the first supranational company form created in the Community. Further, the consensus reached in 1985 intervened at a time where discussions on the SE had been totally suspended.

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34 Ibid 701.

35 *Proposal for a Council Regulation on the Statute for a European company*, 1989 Official Journal (C 263) 41 (*1989 Proposed Regulation*).

36 *Amended proposal for a Council Regulation on the Statute for a European Company*, 1991 Official Journal (C 176) 1 (*1991 Proposed Regulation*).

37 *Proposal for a Council Directive complementing the Statute for a European company with regard to the involvement of employees in the European company*, 1989 Official Journal (C 263) 69 (*1989 Proposed Directive*).

38 *Amended proposal for a Council Directive complementing the Statute for a European Company with regard to the involvement of employees in the European Company*, 1991 Official Journal (C 138) 8 (*1991 Proposed Directive*).

39 *Council Regulation No. 2137/85 of 25 July 1985 on the European Economic Interest Grouping*, 28 Official Journal Comm. Eur. (No. L 199) 1 (1985) (*EEIG Regulation*).

The preamble of the EEIG Regulation clearly outlines the European nature of the EEIG. Indeed, the EEIG is presented as an “appropriate Community legal instrument” for an effective cooperation among “natural persons, companies, firms and other legal bodies” in a view to increase “unity” of the “single market” of the Community<sup>40</sup>. Furthermore, the Regulation mechanism makes it directly applicable without further national interferences in its implementation.

Nevertheless, a considerable degree of flexibility has been introduced in the EEIG Regulation. Autonomy has been left to members of the EEIG to adapt its structure and procedures in various areas. The objective pursued is the “*grouping’s ability to adapt to economic conditions [which] must be guaranteed by the considerable freedom for its members in their contractual relations and the internal organization of the grouping*”<sup>41</sup>. Furthermore, this flexibility corresponds to the specific cooperative nature of the EEIG and has been conceived as a precondition of its practical success. Secondly, EEIG Regulation has also left space for domestic variations in its implementation on the ground of a “*State’s public interest*”<sup>42</sup>. To take one example, “[w]here a grouping carries on any activity in a Member State in contravention of that State’s public interest, a competent authority of that State may prohibit that activity”<sup>43</sup>. Unlike the first level of flexibility, this criterion does not address any specific business concern. Further, it is non-definable and may lead to substantial and non-predictable variations among Member States. As such, it could have seriously undermined the success of the European EEIG form in the business community.

Yet, the EEIG has been relatively successful. The Regulation required Member States to adopt adequate measures to enable the creation of an EEIG by mid-1989<sup>44</sup>. Despite late adoption of this legislation by Spain and Italy in 1991, the number of EEIG set up in the Community revealed a constant growth. About 500 EEIG were in existence by mid-1994<sup>45</sup>, 888 by end-1997<sup>46</sup>. Even if these figures may be said “*moderate*”<sup>47</sup>, EEIG Regulation is a conclusive experience. Indeed, the EEIG form has been used in various sectors, “*most frequently (...) as a means of providing services for its members or third parties followed by distribution, research and production*”<sup>48</sup>. Furthermore, flexibility has made this form appropriate given that it facilitates greater co-operation and is especially

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40 *EEIG Regulation*, Preamble.

41 *Ibid.*

42 *Ibid* arts 32.3 and 38.

43 *Ibid* art 38.

44 *Ibid* art 43.

45 Dorresteijn *et al*, above n 9, 135.

46 Institute of Advanced Legal Studies Centre for Corporate Law and Practice, Barry A K Rider and Mads Andenas (eds), *Developments in European Company Law- Volume 2/1997: The Quest for an Ideal Legal Form for Small Businesses* (1999) 91.

47 *Ibid*, 142.

48 Information provided by the Commission, *G.E.I.E., liste des constitutions, Bruxelles, le 2 août 1994*, cited in Dorresteijn *et al*, above n 9, 142.



“accessible to small and medium enterprises”<sup>49</sup>. Concessions of the EEIG Regulation in the name of national ‘public interest’ generated valid criticisms. Nevertheless, they created the conditions of the consensus necessary for the final adoption of the draft. On that aspect, the EEIG Regulation set a meaningful precedent on the path leading to the SE.

## Past Approaches: 1989 and 1991 Proposed Regulations

### *Employee Participation in the Management of the SE*

In the 1970 and 1975 drafts, provisions for workers involvement were part of the Regulation itself and set out precisely some proportions to be respected in the management boards. The 1989 and 1991 proposals adopted a totally different approach in this area.

Firstly, the new texts transferred the employee participation provisions from the Regulation to a separate Directive. The Regulation and the Directive were closely connected and an SE could not be registered until it had chosen a model of worker participation permitted by the domestic legislation of the State of registration<sup>50</sup>. However, such a shift has been criticised in so far as a directive has a more limited impact, only “binding, as to the result to be achieved, upon each Member State to which it is addressed” and leaving “to the national authorities the choice of form and methods”<sup>51</sup>. Therefore, the final outcome of a Directive mainly “depends on how [it is] implemented into national law and how [its] observance is dealt with”<sup>52</sup>, as opposed to a Regulation, which is “binding in its entirety and directly applicable in all Member States”<sup>53</sup>.

Secondly, the new draft allows for considerable flexibility. On a primary level, an SE can decide its own structure of worker participation among three models: “employee representation on the board of a company, the creation of a separate consultative body of employees, or the adoption of a negotiated system of worker participation in management”<sup>54</sup>. This third option based on the Swedish system of labour participation<sup>55</sup> was criticised as reducing the involvement of workers to a mere consultative function. But it was also the least disruptive to existing legislations and had more potential to overcome resistance of Member States such as the United Kingdom. On a second level, flexibility was given to Member States

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49 Dorresteijn *et al.*, above n 9, 142.

50 *1991 Proposed Regulation*, arts 8(3) and 24a(3).

51 *Consolidated Version of the Treaty Establishing the European Community*, Official Journal C 340, 10 November 1997, pp. 173-308 (*EC Treaty*), art 249.

52 Dorresteijn *et al.*, above n 9, 31.

53 *Ibid.*

54 Blackburn, above n 12, 746.

55 Carreau and Lee, above n 15, 509.

to allow them a discretionary choice as to whether to restrict or not the choice of models available.

More than simply a dual level of flexibility, the 1991 Proposed Directive represented a significant departure from the initial goal of the Commission to reach uniformity in this area. The possibility left to Member States to go as far as to mandate one single model of workers participation for the SE registered in their territory could create “*not only diversity, but in all probability, an absolute conflict in member state law governing SEs*”<sup>56</sup>.

### ***Management Board Structure***

The Commission has come a long way since the 1970 Proposed Regulation that imposed the two-tier board system<sup>57</sup>. Regarding public limited companies, the 1972 Proposed Fifth Directive contained a similar provision<sup>58</sup> and faced strong opposition, notably by United Kingdom. As a result, the Proposed Fifth Directive was amended a first time in 1983 in order to authorise a Member State to provide public limited companies with the opportunity of using the one-tier board system instead of the two-tier form<sup>59</sup>. In a similar manner, both 1989 and 1991 Proposed Regulations opted for greater flexibility. The 1989 Proposed Regulation required Member States to give their domestic private companies the choice between the two forms of corporate governance<sup>60</sup>. The amended 1991 Proposed Regulation also authorised a Member State to oblige SEs registered in its territory to adopt only one management structure<sup>61</sup>.

The new 1989 and 1991 Proposed Regulations provided flexibility with the aim of taking into account the variety of needs and interests that an SE could pursue through its preference for one specific management structure. However, the last amendment in 1991 was especially inappropriate for the European character of the SE, giving potential primacy to national legislatures over the founders themselves of the SE. Such a provision was representative of the will to reach a political agreement regardless of its impact. On a practical level, this amendment seriously undermined the usefulness of the SE form. A Member State could impose the one-tier structure and another Member State the two-tier structure. As a result, an SE would not be able to move freely between these two Member States, such a transfer requiring first a whole restructuring of its management organs. On a conceptual level, what remains of the European uniform character of

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<sup>56</sup> Blackburn, above n 12, 755.

<sup>57</sup> *1970 Proposed Regulation*, arts 62-82.

<sup>58</sup> *1972 Proposed Fifth Directive*, art 2.

<sup>59</sup> *Amended Proposal for a Fifth Company Law Directive Founded on Article 54(3)(g) of the EEC Treaty Concerning the Structure of Public Limited Companies and the Powers and Obligations of Their Organs*, 1983 Official Journal (C 240), art 2.

<sup>60</sup> *1989 Proposed Regulation*, art 61.

<sup>61</sup> *1991 Proposed Regulation*, art 61.

the SE? Combined with the similar possibility offered to Member States to mandate one specific model of workers participation, the 1991 Proposed Regulation could result in various national regimes, each with its own domestic characters. It would be possible then to distinguish between “*German SEs, French SEs, and even Northern Ireland SEs*”<sup>62</sup>.

### ***Exclusion of Certain Controversial Legal Issues***

Unlike the first drafts of 1970 and 1975, the 1989 and 1991 Proposed Regulations did not include specific provisions concerning SEs operating in a group of companies. Strong disparities of views existed in this area. Germany had recognised the concept of ‘group’ with a correlative specific legislation. Conversely, countries like England had always strictly considered each company as a legally and independent entity therefore refusing any legal recognition of a ‘group’ of companies. The Commission decided to avoid the settlement of these issues and declared in 1988 that it was “*open to question (...) whether the European Company Statute is the proper place to create a body of rules governing groups*”<sup>63</sup>.

Similarly, the Commission abandoned its efforts for a consensus on the very controversial taxation issues. As a result, the 1991 Proposed Regulation provided no taxation regime specific to an SE and its provisions dealing with losses from foreign establishments had a very limited impact, “*generally (...) not chang[ing] the law that would have been applicable if the SE had remained a national company*”<sup>64</sup>.

### ***Legal Basis of the SE Statute***

The first proposals of 1970 and 1975 were based on ex-article 235 of the EC Treaty which authorised the Council to “*take appropriate measures*” when the “*Treaty ha[d] not provided the necessary powers*” to attain “*one of the objectives of the Community*” for the realisation of the common market. Under ex-article 235, unanimity was imposed for adoption of such measures<sup>65</sup>. In 1970, the Community was composed of only six Member States. However, the Proposed Regulation immediately provoked intractable oppositions due to the sensitive political issues dealt with. Successive waves of accession starting in 1973 rendered consensus completely unlikely. Therefore, the initial Proposed Regulations were divided into two parts, each of them using a mechanism that did not require unanimity any more for its formal adoption.

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62 Blackburn, above n 12, 770.

63 *Statute for the European Company: Commission Memorandum to Parliament, the Council and the Two Sides of Industry* (1988), Bull. Eur. Comm., supp. 3/88, 20.

64 Blackburn, above n 12, 769.

65 *EC Treaty*, art 308.

Regarding the 1989 and 1991 Proposed Directives on worker participation, a “*qualified majority*”<sup>66</sup> of the Council would be sufficient. Yet, this new source of authority was challenged by some Member States as being in contradiction with the Maastricht Treaty signed in 1992 and already in preparation in 1991. The Maastricht provisions addressed, *inter alia*, social policies and under the amended EC Treaty, qualified majority would be sufficient for directives dealing with “*information and consultation of workers*” but unanimity required in the area of “*representation and collective defence of the interests of workers (...), including co-determination*”<sup>67</sup>. Thus, a controversy arose among Member States on the appropriate legal basis to be given to the Directive.

Regarding the SE itself, the 1989 and 1991 Proposed Regulations were now based on ex-article 100-A of the EC Treaty which required only a qualified majority for the Council measures aimed at the “*approximation*” of national regulations in the fields of “*establishment and functioning of the internal market*”<sup>68</sup>. However, the SE form was an entirely new concept in all Member States and had to be created separately from the existing company forms. Strictly speaking, any ‘approximation’ process could be held. Further, ex-article 100-A expressly excludes fiscal provisions<sup>69</sup> whereas the 1989 and 1991 Proposed Regulations still retained some attenuated fiscal measures. So United Kingdom specifically opposed their adoption until removal of fiscal provisions.

Therefore, the shift towards new legal basis produced the paradoxical result to create new areas of oppositions and debates between Member States.

### **Outcomes of the 1989 and 1991 Drafts and Subsequent Strategies**

In its work on the 1989 and 1991 drafts, the Commission aimed to reconcile conflicting views on the basic structure and management of the SE. Practically, the new proposals increased the flexibility of provisions, affording optional systems, specifically subjecting some areas of regulation to national choices or domestic legislations and excluding problematic issues. However, flexibility marked a fundamental shift with the result that the hitherto understood concept of a unified SE was no longer valid<sup>70</sup>. From a theoretical point of view, the attempts to create a company form wholly governed by European law “*ha[d] not only failed to date, but w[ould] also fail in the future*”<sup>71</sup>.

Yet, this move towards flexibility has been in no way sufficient to overcome the resistance of certain Member States. Again, worker participation has remained

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66 Ibid arts 44 and 251.

67 Ibid art 137.

68 Ibid art 95.

69 Ibid art 95-2.

70 Blackburn, above n 12, 770.

71 Ibid, 772.

the most problematic area. More generally, motives of blockages were numerous as illustrated by controversies related to the appropriate legal basis in the EC Treaty for the Proposed Regulation and its related Directive. Similarly, discussions continued on “*cross-border mergers, registration and disclosure requirements, taxation, auditing and accounting treatment and insolvency*”<sup>72</sup>. As a result, a new draft was produced in 1996 with further areas excluded from the 1991 Proposed Regulation and sent back to national laws. But worker involvement remained the key issue of the negotiations and no agreement could be reached so long as this question was not settled. In order to resolve this incessant issue, the Commission set up a group of experts in 1996 directed towards finding a compromise on worker participation in the SE. Their conclusions in the so-called ‘Davignan Report’ directly inspired a new draft of Directive in 1997 which gave primacy to negotiations between employers and workers in order to determine the appropriate process of worker participation in the management of the company. In case of failure of negotiations, a set of default reference rules was provided in the Directive. These principles permitted Member States in 1997 to overcome their conflicting views, except for Spain, still opposed at that time to any notion of participation<sup>73</sup>.

Despite recurrent negative predictions on the outcome of negotiations on the SE, the “*pragmatic and compromise-oriented approach*”<sup>74</sup> has been successful and both texts were agreed by the Council in 2001. A combination of diverse factors has led to this consensus among Member States.

The most obvious element consists of the very substantial modifications made to the original version. The final Directive has completely abandoned the mandatory system of worker participation and relies primarily on negotiations to determine their level of involvement. Similarly, the Regulation has dismissed any view to constitute an exhaustive SE statute and has simply excluded from its provisions sensitive issues such as “*taxation, competition, intellectual property or insolvency*”<sup>75</sup>.

The Commission has also played a constant leading role in this process. One of its objectives was obviously to reinforce the building process of a free market on a Community-wide basis through the creation of a company form “*with a European dimension*”<sup>76</sup>. Another of the Commission’s goals was to increase significantly EU’s competitiveness. In 1996, the absence of an SE form was estimated to cost European business thirty billion ECU per year<sup>77</sup>.

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72 Cauchi, above n 4.

73 Ibid.

74 Kellerhals and Truten, above n 14, 81.

75 *SE Regulation*, Preamble (20).

76 *SE Regulation*, Preamble (7).

77 *The European Commission – Financial Reporting and Company Law* ‘The European Company’ (8 October 2001)

Finally, the broad-scale harmonisation program pursued by company law directives has facilitated the negotiations for the design of the SE. Beginning with the adoption of the First Directive in 1968<sup>78</sup>, the Commission's program has achieved significant results in various areas of national company laws<sup>79</sup>. Therefore, exclusions from the SE Regulation of certain sensitive issues were more readily acceptable in so far as they did not represent an absolute concession but left these areas to a separate on-going or future process of national harmonisation by means of Directives. Even the impact of the Proposed Fifth Directive, generating early discussions and negotiations on corporate governance models and internal structures of company, must not be underestimated. Paradoxically, by revealing its limited potential, the harmonisation process has also been an impetus for the adoption of the SE Regulation. Indeed, the successive drafts of directives have afforded more and more discretion to Member States. Some commentators outline this trend and refer to the draft of the Thirteenth Directive published in November 1997 drawn up "*under the principles of subsidiarity and proportionality*" and therefore limited to "*principles which should be applied by the Member States according to their national systems and their cultural contexts*"<sup>80</sup>. Thus, a directive may in fact result in domestic conflicting implementations rather than harmonisation. Combined with persistent oppositions to adoption of certain proposals, the harmonisation outcome of directives remains limited and the Commission recognised in 1988 that such process "*even if pursued to the maximum extent, will not bring about complete unity of the national condition under which enterprises are allowed to undertake their business*"<sup>81</sup>. As a consequence, the need for an SE Regulation as a directly and equally applicable tool in the Community has been constantly reinforced.

As a symbol of this new consensus, the legal basis of both texts has been modified and relies again on article 308 of the EC Treaty which constituted the original

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<[http://europa.eu.int/comm/internal\\_market/en/company/company/news/ecompanyfaq.htm#3](http://europa.eu.int/comm/internal_market/en/company/company/news/ecompanyfaq.htm#3)>.

78 *First Council Directive of 9 March 1968 on co-ordination 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*, (EEC) 68/151, OJ 1968 L 65/8.

79 See, eg, disclosure of information, validity of obligations entered into by a company and nullity of a company (*First Directive*), capital of public companies (*Second Directive*), mergers and divisions of public limited liability companies (*Third and Sixth Directives*), accounts and audit (*Fourth, Seventh and Eighth Directives*), disclosure requirements with respect to branches of companies (*Eleventh Directive*) and single-member private limited-liability companies (*Twelfth Directive*)

80 Charlotte Villiers, European Business Law Library (ed) *European Company Law – Towards Democracy?* (1998) 49.

81 Carreau and Lee, above n 15, 504.

source of authority<sup>82</sup> of the 1970 and 1975 Proposed Regulations. Article 308 requiring unanimity of the Council is indicative of the strong political commitment of all Member States to the SE Regulation and its related Directive closing more than thirty years of negotiations. Spain, the last State to oppose any kind of worker involvement in the SE management, finally agreed to the Directive provisions and political agreement was reached at the Nice Summit of the Council in December 2000. The two pieces of legislation were subsequently presented to the Parliament for consultation and formally adopted by the Council on 8 October 2001.

Obviously, this tortuous path to adoption has considerably weakened the strength and extent of the SE status. Commentators are highly sceptical as to whether these texts have the potential to create a truly European company form and whether the business community will be able to resort to the SE form. In line with these expectations and critics, this argument will now analyse the content of the SE Regulation and its related Directive with a focus on issues related to the SE corporate governance model as finally agreed.

## **Part II – SE Final Status: Potentialities and Weaknesses.**

### **General Characteristics of the SE**

#### ***Company Form and Capital***

The SE can only be set up in the form of a “*European public limited-liability company*”<sup>83</sup>. Its structure comprises a general meeting of shareholders and managerial board(s)<sup>84</sup>. It has a fixed capital of 120,000 Euros minimum<sup>85</sup> divided into shares<sup>86</sup>. This amount contrasts with the capital requirements set out in the 1970 Proposed Regulation which required 500,000 ECU for SEs formed through a merger or a holding company, and 250,000 ECU for those formed by creation of a joint subsidiary. This moderation reflects the choice to afford “*small and medium-sized undertakings to form SEs*”<sup>87</sup> and to make the SE form more widely available. Each shareholder is liable for no more than the amount subscribed<sup>88</sup>.

The other issues relating to “*maintenance and changes of the capital of the SE (...) together with its shares, bonds and other similar securities*” are simply submitted to the domestic legislations governing public limited companies in the Member

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82 *EC Treaty*, ex-article 235.

83 *SE Regulation*, art 1.1.

84 *Ibid* art 38.

85 *Ibid* art 4.2.

86 *Ibid* art 1.2.

87 *Ibid* Preamble (13).

88 *Ibid* art 1.2.

State of registration of the SE<sup>89</sup>. Due to the variations in the laws of the member states, founders of an SE may face uncertainty and confusion in their choice of the State of registration of the SE, the Second Directive providing only a limited degree of harmonisation in this area<sup>90</sup>.

### ***Requirements on founders and incorporation mechanisms***

In 1970, the SE form was conceived as a tool for economic concentration and therefore only available to public limited companies. This conception has prevailed until the 1989 Proposed Regulation. Subsequently, the Commission, following a recommendation made by the European Parliament<sup>91</sup>, has opened more widely the recourse to the SE form. Nevertheless, access to the SE form remains narrowly defined. Even if a relatively low level of capital is sufficient to set up an SE, only already-existing companies can have resort to this company form. Moreover, there are only four means available to create an SE, each of them with specified conditions<sup>92</sup>.

First, an SE can be formed through the merger of at least two public limited companies registered in two different Member States.

An SE can also be in the form of a holding company of at least two public or private limited companies that have their registered offices in different Member States or have subsidiaries and branch offices in Member States other than that of the registered office.

Under the same conditions, an SE can be established as a common subsidiary. This option is available to all companies or firms organized under the civil or commercial law of a member state, including cooperative societies, and various forms of partnerships.

Finally, an SE can be formed through conversion of a public limited company registered within the Community “*if for at least two years it has had a subsidiary company governed by the law of another Member State*”<sup>93</sup>.

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89 Ibid art 5.

90 *Second Council Directive of 13 December 1976 77/91/EEC on co-ordination 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*, Official Journal 1977 26 31.1.77, 1.

91 Blackburn, above n 12, 718.

92 *SE Regulation*, art 2.

93 Ibid art 2.4.



A certain degree of flexibility has been introduced in the current procedures. Medium-size companies that often operate under the private limited form are not precluded any more from setting up an SE. Furthermore, the diversity requirement imposed on founding companies has been relaxed. Location of branch offices or subsidiaries in other Member States can be sufficient to comply with the SE Regulation and no requirement is imposed on present activities of founders. Therefore, their activity can be exclusively concentrated on the territory of one single Member State provided that they are registered in different Member States or simply have subsidiaries in the Community.

### ***Registration of the SE***

No European register has been created and each SE will be registered on the same register as companies set up under national law<sup>94</sup>. However, registration of each SE has to be published in the Official Journal of the European Communities<sup>95</sup>.

Formal registration of the SE entails significant consequences. First, acquisition of legal personality coincides with the registration date<sup>96</sup>. More significantly, the state of registration will determine the national law applicable to the SE on a number of matters such as taxation and group regulation. Due to the “*striking*”<sup>97</sup> diversity remaining between the domestic legislations, it would be highly profitable for companies to form an SE and obtain its registration in another Member State with a reduced taxation. This company migration would produce a so-called ‘race to the bottom’ or ‘Delaware effect’ urging Member States to offer even more favourable legislations in order to attract SEs on their territory. To prevent such phenomenon, the 1970 proposed Regulation created a “*truly non-national form of business organization*”<sup>98</sup>. The draft directly provided an exhaustive status and the place of registration was devoid of any practical consideration. But, as previously exposed, the final SE Regulation relies heavily on domestic legislations. To prevent any fictive registration, the SE Regulation requires the SE to register “*in the same Member State as its head office*”<sup>99</sup>. But this ‘real seat rule’ only reduces risks of company migration for reasons of opportunity<sup>100</sup>. The SE, as a supranational company, can easily relocate within the Community without dissolution or liquidation<sup>101</sup> and without effect upon its identity. The only fundamental requirement remains to relocate the head office in

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94 *SE Regulation*, art 13.

95 *Ibid* art 14.

96 *Ibid* art 16.

97 Clark D. Stith ‘Federalism and Company Law: A “Race to the Bottom” in the European Community’ 79 *Georgetown Law Journal* 1581, 1593.

98 Blackburn, above n 12, 726.

99 *SE Regulation*, art 7.

100 Stith, above n 97, 1618.

101 *SE Regulation*, art 8.1.

this new state. Nevertheless, adaptations necessary to comply with new different set of laws may have a dissuasive effect<sup>102</sup>.

Pragmatism is the underlying factor in the requirements established by the SE Regulation on capital, incorporation procedures, founding companies and registration. On the one hand, the Commission has been willing to make this European company form attractive for the business community. On the other, this same pragmatism has urged the Commission to maintain as far as possible the European character of the SE, so that to reduce as far as possible risks of company migrations within the EU.

### **Management and Control Under the SE**

This argument focuses on the process of direction within the SE, the relationship between the board of directors and management and the regimes of accountability. These issues have been the most difficult ones to settle along with worker participation and the final text reveals a high degree of compromise made of three elements.

Firstly, operational goals underlying the SE form have urged the Commission to preserve the European character of the SE, so that this new economic instrument would retain sufficient potential to improve EU's competitiveness. Similarly, operational goals have advocated that some flexibility be left to the founders themselves in order to make the SE form attractive to the business community.

Secondly, protective goals have brought to the forefront those state systems that protect workers' interests, rights of creditors and minority shareholders. As a result, an increasing reliance is conferred on domestic legislations in a view to maintain the level of protection peculiar to each Member State.

Thirdly, as the result of a difficult political compromise, the texts allow Member States to impose some requirements on the SEs that will be registered in their territory. To that end, certain provisions of the SE Regulation are made optional, a discretionary choice being left to Member States to decide their final implementation.

### ***Management Systems Available***

Unlike the 1991 Proposed Regulation that arguably authorised a Member State to impose one only management structure to SEs registered in its territory, the final SE Regulation leaves the founders of the SE the decision to establish "*either a supervisory organ and a management organ (two-tier system) or an administrative organ (one-tier system)*"<sup>103</sup>. This flexibility gives more attractiveness to the SE

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102 Blackburn, above n 12, 726.

103 *SE Regulation*, art 38(b).

form. At the time of formation, the founding companies will be able to choose the management structure that suits better their interests. In case of subsequent transfer of its head office into another Member State, an SE will have the possibility to keep its board structure regardless of the new state of registration. However, a compromise has been necessary in order to overcome opposition of Member States that impose one specific board structure to their national public limited companies. As a result, the SE Regulation authorises Member States in which only one system has been afforded to public limited companies to “*adopt the appropriate measures in relation to SEs*”<sup>104</sup>, that is in practice to implement only the model previously used in that Member State.

Under the monistic system, an “*administrative organ*” manages the SE<sup>105</sup>. This managerial body (whose members are directly appointed by the general meeting<sup>106</sup>) represents the company and may delegate the day-to-day management to one or several of its members<sup>107</sup>.

According to the dualistic system, the “*management organ*” carries out the business of the SE<sup>108</sup> whereas a “*supervisory organ*” (whose members are directly appointed by the general meeting<sup>109</sup>) controls its work<sup>110</sup>. The management board represents the SE and can enter obligations with third parties. But it has also to report regularly to the supervisory board on the SE’s business and must respond its enquiries<sup>111</sup>. Furthermore, its members are appointed and removed by the supervisory board<sup>112</sup>. However, a fundamental distinction of tasks remains between the two organs and the supervisory board does “*not itself exercise the power to manage the SE*”<sup>113</sup>.

In both systems, nomination power of the general meeting is expressly subject to the possible national laws that permit minority of shareholders or other persons or authorities to appoint some of the members of a company organ. As a result, national companies that are willing to set up an SE will have no difficulty to continue their activity in this new company form. Not only the SE Regulation allows these companies to carry on their business under the same management structure, but it also replicates at the SE level the previous national specificities<sup>114</sup>. Flexibility may facilitate the recourse to the SE form but this

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104 Ibid arts 43.4 and 39-5.

105 Ibid art 43.1.

106 Ibid art 43.3.

107 Ibid art 43.1.

108 Ibid art 38(b).

109 Ibid art 40.2.

110 Ibid art 40.

111 Ibid art 41.

112 Ibid art 39.2 (SE Regulation also allows a Member State to require or permit the SEs to transfer this power of nomination and removal to the general assembly).

113 Ibid art 40.

114 Blackburn, above n 12, 738.

reliance on national laws will also alter uniformity of the SE status according to its place of registration.

### ***Operation of the Boards***

The SE Regulation leaves greater space to the founding companies to adapt the operation of boards to their needs or preferences. To adopt a decision, the SE Regulation requires for each organ a quorum of “*at least half of the members of the board (...) present or represented*” and a majority of these members for adoption of decisions<sup>115</sup>. But quorum and majority can be made stricter by the statutes. In case of a tie, “*the chairman of each organ shall have a casting vote*”. Again, except “*where half of the supervisory organ consists of employees' representatives*”<sup>116</sup>, this rule may be defeated by the statutes of the company<sup>117</sup>. However, this flexibility is attenuated by protection given to the workers' interests in the dualistic system. Indeed, the SE Regulation does not prejudice possible national regimes more favourable to workers' interests for what concerns their participation in supervisory organs. In such a case, the SE Regulation authorises a Member State in which employee participation is already ensured to provide “*that the supervisory organ's quorum and decision-making [are] subject to the rules applicable (...) to public limited-liability companies [in] the Member State concerned*”<sup>118</sup>.

Similar flexibility is organised by the SE Regulation about delimitation of powers between the different organs and directors of the SE. Unlike the 1991 Proposed Regulation that required authorisation of the supervisory or administrative boards for specific decisions such as those related to investment projects taken by the management organ (in the dualistic system) or delegate directors (in the monistic model), the final SE Regulation leaves entire discretion to the SE's statutes<sup>119</sup>. But once again, national specificities are taken into account. Therefore, a Member State may “*provide that in the two-tier system the supervisory organ may itself make certain categories of transactions subject to authorisation*”<sup>120</sup> or directly “*determine the categories of transactions which must at least be indicated in the statutes of SEs registered within its territory*”<sup>121</sup>.

### ***Duties and Liabilities of Directors***

Because of the failure of the proposed Fifth Directive, harmonisation has not occurred and defining unified rules on SE directors' liabilities could have been a

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115 Ibid art 50.1.

116 Ibid art 50.2.

117 Ibid art 50.2.

118 Ibid art 50.3.

119 Ibid art 48.1.

120 Ibid art 48.1.

121 Ibid art 48.2.

difficult task. The 1989 and 1991 Proposed Regulations have indeed provoked discussions on the appropriate criterion to adopt. In the 1989 proposed Regulation, directors were “*liable (...) [for] wrongful acts committed in carrying out their duties*”<sup>122</sup>. The subsequent 1991 draft referred then to “*breach of obligations*”<sup>123</sup>. The Commission argued that its purpose was only to clarify the terms of the 1989 text<sup>124</sup> but some analysed this new criteria as expanding the liabilities of directors, the notion of ‘breach’ entailing liability for both intentional and negligent conducts. The notion of breach remains in the final SE Regulation that provides that “[*m]embers of an SE's management, supervisory and administrative organs shall be liable (...) 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*”<sup>125</sup>.

Paradoxically, this area has not been problematic in the last stages of negotiations. Despite variations in the legislations of Member States, the SE Regulation has the merit of clarifying this issue. Moreover, the SE Regulation does not create new types of liabilities. In the 1989 Proposed Regulation, directors were made liable to creditors in specific circumstances where no Member State had such liability in existence for their national companies. The SE Regulation adopts another approach and liabilities of directors are now organised “*in accordance with the provisions applicable to public limited-liability companies in the Member State*” of registration<sup>126</sup>. This reliance on national legislation represented an acceptable compromise to all Member States.

### ***Rights and Powers of Shareholders***

The general meeting has a residual power in the sense that most of decisions are directly taken by the managerial board(s). Remaining under its authority are the matters for which it has “*sole responsibility*” as provided by the SE Regulation or by the legislation of the Member State of registration<sup>127</sup>. These areas cover, *inter alia*, amendments to the SE's statutes<sup>128</sup>, transfer of the registered office to another Member State<sup>129</sup>, appointment of the members of the supervisory board in the dualistic system<sup>130</sup> or those of the administrative organ in the monistic system<sup>131</sup>.

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122 1989 Proposed Regulation, art. 78(4).

123 1991 Proposed Regulation, art. 78.

124 Blackburn, above n 12, 731.

125 Ibid art 51.

126 Ibid art 51.

127 Ibid art 52.

128 Ibid art 59.1.

129 Ibid art 8.

130 Ibid art 40.2.

131 Ibid art 43.3.

The SE Regulation goes further and also includes in the power of the general meeting “*matters for which responsibility is given to the general meeting of a public limited-liability company governed by the law of the Member State [of registration], either by the law of that Member State or by the SE's statutes in accordance with that law*”<sup>132</sup>. This compromise was necessary to obtain agreement of all Member States but significantly weakens the European character of the SE form. SEs registered in two different Member States are likely to have different matters submitted to authority of the general meeting.

The SE Regulation provides usual mechanisms protecting shareholders' interests. As a general rule, shareholders have power to elect members of the administrative or administrative board and retain authority on the most fundamental decisions for the company. Specific protection is also afforded to minority shareholders. A minority of at least 10% of an SE's subscribed capital may request a general meeting and draw up its agenda<sup>133</sup>. If this meeting is not held, they may request “*the competent judicial or administrative authority (...) to order that a general meeting be convened*” in a specific period of time<sup>134</sup>. Due to the possible large size of an SE, a 10% threshold may be especially hard to reach for minority shareholders. An appropriate flexibility is left here to “*the SE's statutes or national legislation [to] provide for a smaller proportion under the same conditions as those applicable to public limited-liability companies*”<sup>135</sup>.

However, unlike earlier proposals, the role of shareholders in the SE has been diminished. For instance, regulation of proxy voting has simply been excluded whereas organisation and conduct of general meetings along with voting procedures are simply referred to the national law governing public limited companies in the Member State of registration<sup>136</sup>. As a result, remaining variations among national legislations may produce uncertainty and insecurity for those having resort to the SE.

In a broader perspective, all provisions of the SE Regulation that deal with management and control of the company show a similar trend towards flexibility but also possible disparities according to the place of registration within the Community. Only minimum harmonisation has been achieved. Such outcome is unlikely to result in company migration looking for laxity but may rather have a dissuasive effect against those who endeavour to form an SE.

## **Employee Involvement**

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132 Ibid art 52.

133 Ibid art 55.1.

134 Ibid art 55.3.

135 Ibid art 55.1.

136 Ibid art 53.

This area has proved to be the major obstacle to the final agreement. The proposed drafts have been hugely modified throughout the negotiations, shifting from a mandatory system to an entire negotiable process. The new EP Directive gives primacy to the agreement reached through open negotiations between the management of the company and a “*special negotiating body representative of the employees*”<sup>137</sup>. Subsidiary models are provided only in the case of failure of the negotiations.

Despite this high level of flexibility, the EP Directive has not abandoned its protective goal towards employees’ interests. In its Preamble, the EP Directive lays down the minimal threshold of “[i]nformation and consultation procedures at trans-national level” “*in all cases of creation of an SE*”<sup>138</sup>. Further, the EP Directive has the “*fundamental principle and stated aim (...) to secure employees’ acquired rights as regards involvement in company decisions*”<sup>139</sup>. As a general rule, nothing in the EP Directive shall prejudice “*the existing rights to involvement of employees provided for by national legislation and/or practice in the Member States as enjoyed by employees of the SE and its subsidiaries and establishments*”<sup>140</sup>. This protective dimension of the EP Directive is also inserted in the various stages of the negotiation process.

Because the fundamental basis of the text relies on open negotiations between employees and management, great autonomy is granted to these parties on their way to an arrangement “*for the involvement of the employees within the SE*”<sup>141</sup>. However, in the case of an SE established by transformation, the EP Directive requires the agreement to maintain “*at least the same level of all elements of employee involvement as the ones existing within the company to be transformed*”<sup>142</sup>.

In the case of unsuccessful negotiations, the EP Directive distinguishes two possible outcomes with related provisions for the guarantee of employee involvement.

First, the special negotiating body can decide to “*rely on the rules on information and consultation of employees in force in the Member States where the SE has employees*”<sup>143</sup> therefore deliberately terminating or not opening negotiations. This provision does not extend to the case of participation regimes. In order not to undermine employee’s acquired rights, the EP Directive excludes from this

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137 *EP Directive*, art 3.2.

138 *Ibid* Preamble (6).

139 *Ibid* Preamble (18).

140 *Ibid* art 13.3.

141 *Ibid* art 4.1.

142 *Ibid* art 4.4.

143 *Ibid* art 3.6.

mechanism SEs “*established by way of transformation if there is participation in the company to be transformed*”<sup>144</sup>.

Second, the period of negotiations may expire with no agreement concluded. In such a case, the EP Directive refers to a set of “*standard rules on employee involvement*”<sup>145</sup> defined in the Annex. But here appears the greatest weakness of the EP Directive. These subsidiary rules exclusively refer to information and consultation procedures as long as there is no workers' participation in the founding companies before the creation of the SE. As a result, employee participation is made compulsory only in the following specific circumstances:

- In the case of an SE set up by transformation, where the rules of a Member State relating to employee participation in the administrative or supervisory body already apply to the company transformed into an SE<sup>146</sup>.
- In the case of an SE established as a holding company or as a subsidiary, when fifty percent of the employees were already involved in a workers' participation model<sup>147</sup>.
- In the case of an SE formed through a merger, when twenty-five percent of the employees already were part of a workers' participation regime before the merger<sup>148</sup>.

This last case has been the most problematic and remained unsettled prior to the Nice Summit in December 2000. The political compromise has been quite radical. Indeed, the final draft now authorises a Member State not to apply this part of the Directive dealing with employees participation to SEs established through a merger. In exchange, these SEs can be registered in that Member State only if an agreement is concluded between employees and management or when no employees were covered by participation rules before the formation of the SE.

Diversity and flexibility have become the key elements of the EP Directive. As recognised in the Preamble of the EP Directive, “*the great diversity of rules and practices existing in the Member States (...) makes it inadvisable to set up a single European model of employee involvement applicable to the SE*”<sup>149</sup>. But in this process, the Commission has given up any coherent view on workers involvement and has only tried to accommodate conflicting interests of Member States mainly

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144 Ibid art 3.6.

145 Ibid art 7 and Annex.

146 Ibid art 7.2(a).

147 Ibid art 7.2(c).

148 Ibid art 7.2(b).

149 Ibid Preamble (5).



interested in perpetuating their own local traditions<sup>150</sup>. As a result, the EP Directive is characterised by complexity and confusion.

In the same time, employees have become confined to a marginal role in the management of the company and participation rights have been severely reduced. The EP Directive may not provide significant progress for protection of workers interests.

A very unfortunate result is that the State of registration gains even more importance both for the SE and its employees. For instance, some German companies could try to escape their traditional rules on employee participation by forming an SE abroad with foreign companies of the Community that do not apply a similar protective regime<sup>151</sup>. Combined with the variations that will exist in the management structures, an SE may have also difficulty when transferring its head office to another Member State, as such a move would require a complete process of adaptation within the SE. Further, both location and transfer of head office may become a political issue due to the considerable positive or negative impact on employees' rights. As such, the EP Directive undermines the potential of the SE form.

### **Conclusion – Future of the SE Status**

The political price for an agreement on the SE status has proved to be high. Diluted provisions, numerous references to national legislation, discretionary choices left to Member States, all have weakened the significance of the final text. Practically, attempts to create a wholly European company form have failed. However, the SE form may be relatively successful if considered as part of a dynamic process.

Entering into force in 2004, the realisation of an SE status represents a significant achievement. Notwithstanding all mentioned criticisms, the SE will help to develop further multinational companies at a European level. For example, an American company could choose to invest in an existing SE in order to avoid possible hostility associated with foreign investments. Similarly, German companies with subsidiaries in the EU may decide to set up an SE to expand their activity in other Member States under such a neutral SE label. The SE could also be a useful instrument for cross-frontier mergers and a partial remedy to the unsuccessful negotiations of the Tenth Directive dealing with facilitation and

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150 Blackburn, above n 12, 768.

151 Karsten Engsig Sorensen and Mette Neville, 'Corporate migration in the European Union: an analysis of the proposed 14th EC company law directive on the transfer of the registered office of a company from one member state to another with a change of applicable law' (2000) 6 *Columbia University Journal of European Law* 181, 205.

simplification of merger procedures in the EU<sup>152</sup>. Finally, the SE form is an undeniable step toward full integration in the EU market of daily operations within a simplified company structure that offers, if compared to a group of national companies, lower costs, increased freedom of movement and more efficiency in the management.

The agreed SE status is itself a dynamic process open to amendments. The EP Directive has to be reviewed by the Commission before 8 October 2007 in order to propose “*suitable amendments to the Council where necessary*”<sup>153</sup>. Similarly, the SE Regulation will be subject to review by the Commission concerning “*proposals for amendments, where appropriate*”<sup>154</sup>. The potential for review is most important in the following areas; the modification of the real seat rule, the expansion of the definition of merger as agreed in the current draft and the departure from the principle of non-discrimination between SEs and national public limited companies<sup>155</sup>.

Introduction of the SE form is also part of a broader on-going process of harmonisation in company law. Together with the first proposals of the SE, the concept of a European private company form has also been discussed, focusing instead on small and medium sized business<sup>156</sup>. Within this trend, other supranational forms have been proposed, such as a European Association<sup>157</sup>, a European Cooperative Society<sup>158</sup> and a European Mutual Society<sup>159</sup>. Another approach has more recently been developed in line with the views expressed by a group of experts set up “*to provide recommendations for a modern regulatory European company law framework*”<sup>160</sup>. The mandate of this group was subsequently extended in 2002 to include “*issues related to corporate governance:*

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152 *Proposal for a Tenth Council Directive based on Article 54(3)(g) of the Treaty concerning cross-border mergers of public limited companies* COM(84) 727 final Official Journal 1985, C 23.

153 *EP Directive*, art 15.

154 *SE Regulation*, art 69.

155 *Ibid* art 69(a), (b) and (d).

156 Professor Dr Konrad Zweigert and Berthold Goldman, Council of Europe – Strasbourg (ed) *Report on the possibility of harmonising Member States’ legislation on private limited companies (or similar bodies) (sociétés à responsabilités limitées)* (1969).

157 *Proposal for a Council Regulation (EEC) on the Statute for a European Association* Official Journal C 099, 21/04/1992, at 1.

158 *Proposal for a Council Regulation (EEC) on the Statute for a European Cooperative Society* Official Journal C 099, 21/04/1992, 17.

159 *Proposal for a Council Regulation (EEC) on the Statute for a European Mutual Society* Official Journal C 099, 21/04/1992, 40.

160 The European Commission – Financial Reporting and Company Law ‘A Modern Regulatory Framework for Company Law in Europe: Final Report of the High Level Group of Company Law Experts’ (4 Novembre 2002)  
<[http://europa.eu.int/comm/internal\\_market/en/company/company/modern/index.htm](http://europa.eu.int/comm/internal_market/en/company/company/modern/index.htm)>.

*the role of non-executive and supervisory directors, management remuneration, the responsibility of management for financial statements, and auditing practices*<sup>161</sup>. Its report, presented to the Commission on 4 November 2002, does not call for a single European code of corporate governance but advocates a co-ordination process led by the EU and realised at the national level through domestic laws, rules and codes in order to facilitate “convergence and mutual learning”<sup>162</sup>. They further recommend that such process should be entirely “voluntary and non-binding”<sup>163</sup>. At first sight, this new strategy represents a retreat with a predictable outcome that will only generate partial and unsatisfactory standardisation. Yet this pragmatic approach is also the most workable in the sensitive areas involving corporate governance issues. The final SE status, shifting from a mandatory model to a choice-orientated system, has put an end to decades of difficult discussions and is indicative of the potential of a more flexible approach. Interestingly, OECD principles of corporate governance<sup>164</sup> may also contribute to this co-ordination process. Considering that EU Member States are all parties to OECD, the stated principles covering wide areas such as shareholders’ rights, responsibilities of the board, disclosure and transparency could prove to be useful common guidelines.

Furthermore, new economic forces have recently emerged in the Community and may lead to the convergence of corporate governance practices. Institutional shareholders such as pension funds are becoming larger and operate not only directly at the European level but also in all key sectors of the economy due to the current privatisation process occurring in EU<sup>165</sup>. Further, future entrance to the EU of former Eastern countries, whose economy has been fully privatised, accentuates the presence of these institutional shareholders. This increasing market pressure will substantially modify the German enterprise-based system in which open markets as forces of corporate governance were almost completely absent<sup>166</sup>. As a result, corporate governance may gradually evolve to a more standardised practice throughout the Community. Obviously, this phenomenon will be a very progressive one<sup>167</sup>. For instance, any attempt to substantially alter the German codetermination system is unlikely to be successful in the foreseeable future due to persistent opposition from labour unions<sup>168</sup>.

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161 Ibid.

162 Ibid, Press Release.

163 Ibid.

164 *The OECD Guidelines for Multinational Enterprises – revision 2000*, OECD, <<http://www.oecd.org/pdf/M000015000/M00015419.pdf>>.

165 Speeckaert, above n 24, 33.

166 Stefan Prigge, ‘A Survey of German Corporate Governance’ in K.J. Hopt, H. Kanda, M.J. Roe, E. Wymeersch and S. Prigge (eds) *European Company Law* (1998) 243.

167 Roberta S Karmel, ‘The Case For A European Securities Commission’ (1999) 38 *Columbia Journal of Transnational Law* 9, 18.

168 Katharina Pistor, ‘A Survey of German Corporate Governance’ in Margaret M. Blair and Mark J. Roe (eds) *Employee and Corporate Governance* (1999) ch 5, 296.

The SE status has been sharply criticised as relying excessively on national legislations, therefore undermining the European character of the company and leading to a possible ‘race to the bottom’ in legislations of the Member States. It is true that the SE Statute only covers classic areas of company law and still refers to the law of the state of registration for the non-regulated subjects. Moreover, national law is made primarily applicable to areas of accounts, dissolution, liquidation and insolvency. As a result, migration of companies looking for a favourable taxation or social regime is likely to occur after the entry into force of the SE Regulation in 2004. However, technical and cultural barriers should make this phenomenon marginal. In any event, directives remain an irreplaceable mechanism to eliminate national disparities in areas not yet harmonised such as insolvency, and the Commission’s harmonisation program should be pursued as fully complementary to the success of the SE form.

The SE status has also been presented as allowing too much flexibility on the management structure and level of worker involvement. But is a fixed set of rules necessary or even desirable on these matters? It is important to keep in mind that corporate governance remains first of all “a ‘means’ and not an ‘end’ in itself”<sup>169</sup>. As such, it represents only a “framework”<sup>170</sup> in which companies operate. Due to the cultural diversity throughout EU, contrasted practices of corporate governance are unavoidable. Not allowing some flexibility to companies would have been a denial of such reality and the final SE Regulation reflects the fact that the European single market is more “a free market than a centrally-planned economy”<sup>171</sup>.

On 1 May 2004, ten more States should become member of the EU. In the same year, the SE form will become available for European companies that are willing to operate freely in this extremely wide area. Despite all the imperfections remaining in the text, the SE status is an extraordinary opportunity for European business operators and should be successful even if improvements remain necessary in the course of future reviews. At the same time, the SE status gives unions and social representatives a central role in the negotiation of employee involvement. As such, it may help social partners to develop closer coordination strategy in their collective bargaining, preventing the “downward pressure on wages and conditions”<sup>172</sup> of work that may become relevant with the future membership of Eastern countries in which social protection is still low. Thus,

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169 Chetcuti Cauchi, ‘Corporate Governance under the Proposed European Company Statute’ (2001) *The European Company Statute*  
<[http://www.chetcuticauchi.com/mcc/research/corporate-governance.htm#\\_Toc6293376](http://www.chetcuticauchi.com/mcc/research/corporate-governance.htm#_Toc6293376)>.

170 Ibid.

171 David A Levy in *Acquis Communautaire*, Chapter 5: Company Law,  
<<http://www.mic.org.mt/chapters/Company%20Law.htm>>.

172 Marco Biagi ‘Toward a new European corporatism?: the role of social partners in Europe: from dialogue to partnership’ (1999) 20 *Comparative Labor Law & Policy Journal* 485, 494-495.

despite its failings, the SE form conserves, at its core, some potential to increase both the competitiveness of European companies and social protection.

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<[http://europa.eu.int/comm/internal\\_market/en/company/company/news/ecompanyfaq.htm#3](http://europa.eu.int/comm/internal_market/en/company/company/news/ecompanyfaq.htm#3)>.
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