HARMONISATION OF EUROPEAN COMPANY LAWS creating a Common Market for Companies

The States founding the **European Economic Community** were seeking to "lay the foundations of an ever closer union among the peoples of Europe" by eliminating "the barriers which divide Europe" so as to achieve what they called "the essential objective of their efforts":

> "the constant improvement of the living and working conditions of their peoples."

They therefore established the EEC with the express task of promoting "a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it" [2].

In order to realise this economic and political undertaking the Community and its institutions were to engage in activities such as the elimination of customs duties and quantitative restrictions on imports and exports [3], the abolition of obstacles to freedom of movement of persons, services and capital [4], and "the approximation of laws of Member States to the extent required for the proper functioning of the common market."

These activities indicate that while the elimination of tariff barriers and the creation of a customs union are primary aims of the Treaty of Rome, they do not constitute the raison d'être of the Community: the Treaty is not merely a "désarmément douanier". [6]

The Treaty goes beyond a customs union and sets up a common market. In so doing it does not only abolish trade restrictions amongst

1. *Preamle, Treaty establishing the European Economic Community,* Rome, 25 March 1957. Unless otherwise stated, all references to Articles relate to *EEC Treaty*
2. Article 2.
3. Article 3(a).
4. Article 3(c).
5. Article 3(h).
6. RENAULD J., *Droit Europeen des Societes*, Vander, Bruxelles, 1969, at p.0.03.

the member states and adopts a common policy for trade with customs territories outside the union, but also, inter alia, seeks to establish free movement of labour and capital and to eliminate non tariff barriers to trade caused by diverse national legislation and policy. [7] Therefore, in creating the common market, the Treaty of Rome contemplates a coherent economic system designed to ensure conditions essentially akin to a national integrated market. [8]

In order to create and maintain this coherence, the Community institutions had to be given "de compéténces appartenant normalement aux organes des états membres, a fin d'assurer pour l'avenir, l'adoption progressive et le renouvellement de normes positives." [9] These powers included the capacity to eradicate those disparities in national laws, regulations or administrative practices which "constitute obstacles to economic intercourse which cannot be removed through other legal devices specifically authorised in the Treaty." [10]

It is in this latter context that approximation of laws has to be seen: an exerise by means of which the Community can overcome these *other* obstacles to "the proper functioning of the common market" [11] , a "supplementary device" to the other law-making processes of the EEC. [12]

The Treaty dedicates a special chapter to the Approximation of Laws, granting the Community Institutions a special mandate to put into pratice the principle enunciated in its article 3 (h): "the approximation of laws of Member States to the extent required for the proper functioning of the common market." [13]

Although specific reference is made to the approximation of laws in certain special sectors such as the working conditions of workers (Art.117), the freedom of establishment of persons (Art.54(3)), and distortions to the conditions of competition (Arts.101 and 102), the general mandate is found in Article 100 of the EEC Treaty:

> "The Council shall, acting unamimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market.
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> "The Assembly and the Economic and Social Committee shall be consulted in the case of directives whose implementation would,

7. WYATT D. and DASHWOOD A., *The Substantive Law of the EEC*, Sweet & Maxwell, London, 1982.
8. STEIN E, *Harmonisation of European Company Laws, National Reform and Transnational Coordination*, Bobb-Merrill, New York, 1971, at p. 6.
9. Renauld J., *op. cit.*, p. 0.04.
10. Stein E., *op. cit.*, p. 9.
11. Article 3(h).
12. Stein E. *op. cit.*, p. 7.
13. Article 3(h).

in one or more Member States, involve the amendment of legislation."

This Article represents a *catch-all* clause giving the Community Institutions a broad mandate for the assimilation of laws of member states, in the interests of the "proper functioning of the common market." [14] This mandate, and these objectives, are at the basis of the Community's initiatives in the harmonisation of the company laws of its member states.

The Importance of Harmonisation of Company Laws

One of the assumptions on which the European Economic Community is founded is that every member state has "a free market sector in the structure of its national economy." [15] Within this sector the company stands out as "the primary form of business organisation". [16] Companies operating in a free market have been described as "elements moteurs de l'économie, agents immediats de cette expansion continue et de ce progrès social que le Traité veut promouvoir." [17] These corporations "have become the principal buyers and sellers of goods, the major borrowers and lenders of capital, and the most significant developers, and users of new technology. They are the main producers of wealth, and as employers, they have an immediate impact on the lives of large numbers of the Community citizens." [18] In short, in a Community which is predominantly highly industrialised, the modern corporation dominating "the Industrial System" [19] is an institution "of strategic importance in relation to the economic and social systems of the Community. [20]

Since the corporation has become a major propagator of wealth in the economies of the Treaty states, its adaptation to the realities of the Common Market is necessary if the Community is to meet its "essential objective" of "the constant improvement of the living and working conditions" of its citizens [21] . Given that companies are incorporated under a specific national system, significant disparities between the laws governing companies in member states may prevent them from exploiting fully the potential of an enlarged

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14. *Ibid.*
15. SCHMITTHOFF C.M., *Company Law and the EEC*, in *The Three Banks Review*, Edinburgh, 1978, no. 118, pp65-79.
16. *Ibid.*
17. Renauld, *op. cit.*, p.0.05.
18. COMMISSION of the European Communities, Green Paper on (*Employee Participation and Company Structure)*, hereinafter referred to as **The Green Paper**, *Bulletin of the European Communities, Supplement* 8/75, p. 107, at p.7
19. GALBRAITH J.K., *The New Industrial State*, Penguin, 1967. The author explains that: "Nearly all communications, nearly all production and distribution of electric power, much transportation most manufacturing and mining, a substantial share of the retail trade and a considerable amount of entertainment are conducted or provided by large firms...This is the part of the economy which automatically, we identify with the modern industrial society" : p.28 and "It will be convenient...to have a name for the part of the economy which is characterized by the large corporations ..... I shall refer to it as the Industrial System." : pg.29.
20. Galbraith J.K., *op. cit.*, at p.82.
21. *Preamble, Treaty of Rome*, 1957.

market. In a *Common Market for companies,* corporations in Europe must be able to operate, within this expanded market, with the same ease and substantially under the same conditions, as in any one of the member states.

Thus, in the Community, "les sociétés doivent pouvoir choisir leur lien d'implémentation en fonction de considérations d'ordre economique et non pas en fonction des dispositions de la loi sur les sociétés" [22] : a company incorporated in any member state must, therefore, be accorded equal treatment with national companies.[23]. To exploit to the full the opportunities provided by a transnational market, these companies must be able to carry out "a broadening of (their) capital base, combination of firms by means of acquisition, of controlling shareholdings or mergers at domestic or Community level, or possibly a transfer of the registered office from one Member State to another", [24] with the same ease of operation as in a national market. Unless Community law provides companies with this necessary juridical environment, they may, in their cross-frontier activities, come across disheartening, perhaps insurmountable, barriers.

These differences in company laws may mean that a corporation "cannot normally transfer from one Member State to another without a drastic dissolution and reconstruction" or that it is "incapable of merging with a company incorporated in another Member State." [25]. Moreover, as Schmitthoff explains, "if the common market is to be more than a customs union, it must be founded on a single capital market in which capital can move freely from the investor to the companies without national let and hindrance." [26]. Such a "common investments situation presupposes that the companies quoted at the stock exchanges and bourses of the Community have essentially the same organisational structure and are subject to similar publicity requirements concerning their accounts and other information."[27]

The assimilation of the organisational structure of corporations within the Common Market is not only important in the creation of "a common investment situation" but also, as is shown by the *Hoesch-Hoogevens case*,[28] in facilitating the reshaping of enterprises on a transnational basis. At the very heart of this structure is the question of workers' participation and the diversity in the legislation of the Member States on this matter.

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22. VON DER GROEBEN, membre de la Commission des Communautes europeennes, *Debats du Parlement europeen, Annexe Journal officiel des Communautes europeenes*, No 119, seance du jeudi 27 novembre 1969, at p.153. The Community, therefore, is not encouraging the development of a "Delaware" situation, in which corporations are concentrated in one member-state because of legal advantages offered by that particular company law regime.
23. COMMISSION of the European Ecnomic Community, Memorandum submitted to the Council on 22 April 1966, *Supplement to Bulletin* no.9/10-1966 pp.20, at p.5.
24. Ibid.
25. *The Green Paper*, op. cit., at p.8.
26. SCHMITTHOFF C.M., *The Future of the European Company Law Scene*, pp.3-27, at p.7 in Schmitthoff C.M. ed.,
27. *Ibid.*
28. *Infra.*

An examination of the merger between the German Hoesch AG and the Dutch Koninklijke Nederlandsch Hoogovens en Staalfabrieken NV will illustrate further the practical and real value of harmonisation of company laws and especially of "the laws regulating the role of employees in the decision-making structures of copanies" in facilitating "the restructuring of enterprises within the Community on an international basis." [29]

The reasons for the merger of these two steel-producing companies lay in the fact that both of them were facing rising costs in production while sale prices remained basically constant. The introduction of new methods of production would reduce the production costs, but their introduction required enormous investment. Consequently, these new methods could not be adopted by small or medium-sized corporations and even larger European steel enterprises would meet with dificulties. [30]

Moreover, while Hoesch was situated inland, Hoogovens had a coastal site with port facilities and therefore while one was within easy reach of the Community market, the other could offer harbour facilities to large bulk-carriers conveying high quality ore and coal directly to the production centres. Merger would therefore mean that production and sales could take place at the most favourable locations: coke, cast-iron and steel in ingots would be produced in the Dutch coastal site, while sheet and other semi-finished products would be produced in the inland centres in the Federal Republic. Hoogovens would export about sixty percent of its products while Hoesch would concentrate its sales in the Community. The *Hoesch-Hoogovens case* provides us with a concrete example of advantages deriving from the integration of European enterprises: enlarged financial assets, exploitation of new techonology, a more effective use of the enlarged transnational market.

A *straight* merger in which the firms would join through the transfer of their assets was not desireable, not only because of the tax obstacles that this entailed but also because cross-frontier merger meant that the absorbed company acquired the nationality of the acquiring company. The equality of the enterprises and other business factors favoured the retention of the companies' respective national identities. Could they not, therefore, create a new management company to function as a central management unit for the new enterprise group? The greatest obstacle to this was the fact that the German employees demanded that a new company of this type have a Supervisory Council in which they would have equal representation: this strructure was unfamiliar to the Dutch and could not be incorporated on a legal basis as in the Federal Republic. For this model to succeed, the lawyers of both companies had to find a solution which was aceptable to all concerned parties and clearly possible under Dutch law since it had generally been agreed that the Management company should be registered in the Netherlands.

29. *The Green Paper,* op. cit., at p. 8.
30. WOLF Anton-Ludewijk de, *Some legal aspects of the Hoesch-Hoogovens Merger, in Droit et Pratique du Commerce International* Paris, Tome, 2, No 3, September 1976, pp. 395-420. Information about the Hoesch-Hoogovens merger and the legal issues involved is derived from this comprehensive article.

The solution was arrived at after "long negotiations and discussions" [31] , and involved the invention of legal procedures which ensured the nomination and appiontment of worker representatives in the Supervisory Council of the new management company, Estel NV. Estel's Board was to be made up of twelve Dutch and twelve German members, each national group made up of three types of representatives: those representing the shareholders, those representing the workers, and a group of 'neutrals'. However, under the prevailing Dutch law, the nomination and election of all members of Estel NV's Supervisory Council fell within the sole competence of Estel's shareholders - including the nomination and election of the worker representatives! This discrepancy between the Dutch and German laws was solved by the shareholders of Estel NV undertaking to accept the contractual obligation to appoint the worker representatives of the Supervisory Council in accordance with the expressed wishes of the Works Councils of Hoogovens and Hoesch. Other discrepancies were also solved by such undertakings of contractual obligations by the shareholders. [32] Of course this solution was only possible because in both the Dutch and German company law systems the shareholders are free to enter into agreements about their voting rights. Had this principle not existed in both legal systems, would the creativity of the companies' lawyers have been sufficient to overcome the many serious obstacles?

Harmonisation of European Company Laws is intended to dispel these uncertainties and to simplify matters so as to ensure that differences in the company laws of member states do not hinder "the proper functioning of the common market." The Commission has commented that "the differences between the systems in force in different Member States ...(have) been overcome only with considerable difficulty and by the use of relatively complex legal devices." [33] The Hoogovens-Hoesch case is certainly an example of this.

How has Community law responded to these problems?

Achievements and Initiatives

In its Fifth General Report on the Activities of the Communities, the Commission commented that although "the general and special provisions in the Treaty lay down that legislation shall be harmonized", they "do not define with precision what is entailed." [34] The Community has therefore used these general and special provisions as the basis for a programme of harmonisation which is "both dynamic, in the sense that it must respond to all the

31. *Ibid.* at pp.410-411. "The co-mangement issue proved the most difficult to solve." : p.407.
32. Thus, for example, another problem arose with regard to the approval of the annual report of Estel NV: under German Law the approval was the competence of the Supervisory Council and shareholders had decisive powers in the matter. To solve this, the Board of Estel NV agreed contractually to present a draft of the annual report to its Supervisory Council for examination and approval and only then to send the report to the shareholders for their final consent. By the same contract, the shareholders committed themselves to take their final decisions in acordance with the Supervisory Council's views: Wolf, op. cit. at p.414.
33. *The Green Paper*, op. cit., at p.8.
34. COMMISSION of the European Communities, *Fifth General Report on the Activities*

needs of economic integration, and limited, in the sense that it cannot go beyond the *amount necessary* for such integration.'' [35]

Thus, following negotiations undertaken according to the provisions of Article 220, on 29 February 1968 the Member States signed the Convention on the mutual recognition of companies and bodies corporate. Article 220, in its third subsection states that:

> ''Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals: - the mutual recognition of companies or firms within the meaning of the second paragraph of Article 58, the retention of legal personality in the event of transfer of their seat from one country to another.''

According to the Convention, a company can only enjoy recognition if it has a legal connection with a Menber State. Thus, even if the company satisfies the test of having a ''statutory registered office'' in the territories to which the Convention applies [36] , a Contracting State can still not apply the Convention to it if the company has ''no genuine link with the economy of one of the said territories''. [37] Another feature of the Convention is the limitation of the scope and content of the Private Internationl Law ''public policy'' exception to recognition: the exception can only be invoked with regard to the object, purpose or activity actually pursued by a company. [38] Moreover under ''public policy'' the contracting state cannot include ''principles or rules contrary to the provisions of the Treaty'' establishing the EEC. [39] As a result of recognition the legal persons enjoy the same capacity as that of the law under which they are incorporated, subject to the recognizing state's right to refuse any specific rights and powers which it also denies legal persons of a corresponding type incorporated under its own law. [40]

The Convention was an important exercise in setting the pace for the development of coherent company law systems in the Member States. Although concluded ''for an indefinite period'' [41] , the Convention is not yet in effect because although signed by the six original Member States in 1968, it has not yet been ratified by the Netherlands. Moreover Great Britain, Eire, Denmark, Greece and other later adherents to the Treaties, are not yet signatories: indeed ''it has been argued that it was not necessary to have a Convention to ensure mutual recognition as this is in fact practiced within the Community and the Treaty requires equal treatment for Community Companies and

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of the Communities 1971, Febreary 1972, at p.119.

35. *Ibid.*
36. *CONVENTION on the Mutual Recognition of Companies and Bodies Corporate*, signed on 29 February 1968: Article 1.
37. *Ibid.*, Article 3.
38. *Ibid.*, Article 9.
39. *Ibid.*, Article 10.
40. *Ibid.*, Article 7.
41. *Ibid.*, Article 17.

firms." [42] In reality the Convention is important since it gives practical and specific expression to the above principles.

Of greater significance to the approximation of company laws within the Community was the Council Directive of 9 March 1968 on the Coordination of general safeguards required of companies by the Member States.[43] This was the first of a series of directives to be enacted in the process of approximation of laws of the member states. The use of directives is especially apposite in the harmonisation programme because, unlike regulations which are "binding in their entirety," directives issued by the Council and the Commission are "binding as to the result to be achieved, upon each Member State to which it is addressed." Of their very nature, therefore, Directives are suited to harmonisation in that they "are not meant to be instruments of uniformity even if the same objective is aimed at when a directive is addressed to several states simultaneously." [44] Indeed this very approach is synonymous to the process of approximation which does not purport to produce the rigid uniformity generally imposed by regulations.

The First Directive, which is now in force in all the member states applies to public and private companies providing for coordination of general safeguards relating to disclosure, validity of obligations entered into on behalf of a company, and to the nullity of a company. The Directive sets out first of all, a minimum standard for disclosure of information by companies in the interests of third parties: the instruments of constitution and amendments thereto; financial data, such as the amount of subscribed capital, the balance sheet and the profit and loss account, for each financial year; particulars of persons participating in the control of the company or authorised to bind the company. [45] This "disclosure philosophy", as endorsed by Community law undoubtedly owes a lot to British company law. Indeed this principle of public accountability has been described as "the greatest - but not the only - contribution which British company law has made to the science of company law." [46] Another interesting feature of the First Directive is the way in which it seeks, in its own words, to protect third parties "by provisions which restrict to the greatest possible extent the grounds on which obligations entered into the name of the company are not valid."[47] It achieves this by such measures as providing that "acts done by the organs of the company shall be binding upon it even if those acts are not within the ob-

42. DEPARTMENT OF TRADE, Companies Division, *Harmonisation of Company Law in Europe, Timetable and Progress of Draft Directives and Other Proposals,* July 1980.
43. *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 of making such safeguards equivalent throughout the Community, (68/151/EEC), *Official Journal of the European Communities,* No. 1 65/8, 14 March 1968 pp.41-45, hereinafter referred to as the ***First Council Directive*** or simply the ***First Directive.***
44. LASOK and BRIDGE, *Law and Institutions of the European Communities,* Butterworths, London, Second Edition, 1976, at p.84.
45. *First Council Directive,* Article 2.
46. Schmitthoff C.M., *op. cit.,*at footnote 26.
47. *First Council Directive, Preamble,* para.10.

jects of the company''[48] and, although it subsequently allows Member States to make provision for the exception where ''the third party knew that the act was outside those objects or could not, in view of the circumstances, have been unaware of it'' [49] it makes proof of this incumbent on the company. [50] In the same vein it defines the grounds for declaring a company non-existant [51] specifically providing that nullity can only be ordered ''by decision of a court of law''.[52]

The Second Directive shows the Community paying special attention to the public limited liability companies because, in the words of the Preamble, ''their activities predominate in the economy of the Member States and frequently extend beyond their national boundaries.'' [53] This Directive, in fact, is aimed at this type of legal person and seeks to coordinate safeguards relating to the formation of public limited liability companies and the maintenance and alteration of their capital. It pursues the work started by the First Directive ''in the same spirit but enters on to more technical terrain,'' [54] and has forty-four considerably detailed Articles. Its major features include a minimum capital of 25,000 ECU, differentiation in name between public and private companies and the requirement to call a shareholders' meeting if accumulated losses exceed at most 50% of the subscribed capital. In particular the Directive ensures that anyone interested can acquaint himself with the basic particulars of the company, including the exact composition of its capital [55] ; it protects the creditors by regulating the reduction of capital by distribution to shareholders and ''by imposing limits on the company's right to acquire its own shares.'' [56] The provisions of this Directive were belatedly incorporated in the UK Companies Act 1980 which, inter alia, also enacted the Directive's requirements as to name and created the new term, public limited company, (plc) for ''a company limited by shares or limited by guarantee and having a share capital,'' which complies with the requirements. [57]

48. *Ibid.*, Article 9.
49. *Ibid.*
50. *Ibid.*
51. *Ibid.*, Article 11.
52. *Ibid.*
53. *SECOND COUNCIL DIRECTIVE* of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent. (77/91/EEC), *Official Journal of the European Communities,* No L 26/1, 31 January, 1977, hereinafter referred to as the ***Second Directive.***
54. COMMISSION of the European Communities, Explanatory Note attached to the original draft of 5 March 1970: COM (70) 232 Final. The note's introduction is also found in HUNNINGS N.M. ed., *Commercial Laws of Europe,* Vol. 1, European Law Centre Ltd,1978, pp. 339, at p.83.
55. *Second Directive, Preamble,* para. 7; Also Price Waterhouse, *EC Bulletin;* May/June 1986, *Harmonization Status Report on Company Law and Business Related Subjects.*
56. *Ibid.*, para. 8.
57. *THE COMPANIES ACT 1980,* Part I, sectio I. This Act implements, in the United Kingdom, the provisions of the *Second Directive,* albeit much later than the prescribed final date of December 1978,.
As a result of the Companies Act, ''distinctive names or descriptions have to be adopted by public and private companies'' and PLC is used to distinguish the public companies form the private. (Schmitthoff, *op. cit.*, at footnote 15).

In its Third Directive the Community deals with the specific issue of mergers of public limited liability companies which are both subject to the laws of the same Member State. [58] It deals with total merger and does not cater for cases where shares of one company are acquired by another but without transfer of assets and liabilities from one to the other. The Directive is extensive in its regulation of "internal" mergers [59] and provides for the protection of shareholders [60], creditors [61], and employees [62] while acknowledging that other rights of workers in such situations are regulated by another Directive. [63] In coordinating the merger rules of company laws of the member states the Third Directive paves the way for "international mergers": mergers between companies subject to the laws of different states. Indeed the international merger situation (as in Hoesch-Hoogovens - supra) is catered for by the Draft Tenth Directive on international mergers, applying to mergers of public companies of different Member States. In its content it is closely related to the Third Directive. [64]

In the same year the Fourth Directive was also adopted. This Directive, which applies to private and to public companies alike, (except banks and insurance companies), deals primarily with the annual statement of accounts and one of its achievements is the cooridination of different methods of valuation "to ensure that annual accounts disclose comparable and equivalent information." [65]

The Sixth Directive, adopted in December 1982, is designed to complement the Third Directive on mergers by providing for a situation where a public company, without going into liquidation, divides and transfers to more than one other company, all its assets and liabilities in exchange for the issue of shares in those companies which will be transferred to the shareholders of the company being divided. [66]

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58. *THIRD COUNCIL DIRECTIVE* of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies (78/855/EEC).
59. Merger by acquisition (Chapter 2); Merger by formation of a new company (Chapter 3); Acquisition of one company by another which holds ninety per cent or more of its shares (Chapter 4); Other operations treated as mergers (Chapter 5).
60. *Third Council Directive: Preamble* at para. 9; and various Articles such as Art. 3.2; Art. 4.2; Art. 7; Art. 8; Art 11.
61. *Ibid.*, at Preamble para. 11 and at various Articles such as Art. 13.
62. *Ibid.*, at Preamble para. 10 and at Art. 12.
63. *Ibid.*, Article 12 refers directly to *Directive* 77/187/EEC; "Protection of the rights of employees of each of the merging companies shall be regulated in accordance with Directive 77/187/EEC". The *Business Transfer (Employee' Rights) Directive* 1977 which applies to the "transfer of an undertaking business or part of a business to another employer as a result of a legal transfer or merger" (Art. 1), protects employee's rights arising from the contract of employment or collective agreement or similar arrangements (Arts. 3,4,5) and provides for the employees' to be informed and consulted about such issues as the reasons for the transfer and the legal, economic and social implications of such transfer.
64. *DRAFT TENTH DIRECTIVE ON INTERNATIONAL MERGERS* OJ 1985 C23 see also *DRAFT CONVENTION ON INTERNATIONAL MERGERS,* published as *Suppl.* 13/73 to the *Bulletin of the European Communities.*
65. *FOURTH COUNCIL DIRECTIVE* of 25 July 1978 based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies (78/660/EEC), *Preamble,* para. 10.

The Seventh Directive adopted in June 1983 governs the consolidation of financial statements when the parent or the subsidiary undertaking is established either as a public or a private company limited by shares or by guarantee. Consolidated financial statements are required when the parent company holds the majority of voting rights in, or has the right to appoint / remove a majority of the members of the administrative, management or supervisory board of, or in virtue of a contract has a right to exercise a dominant influence over, its subsidiary. The Directive deals in detail with this matter of consolidation of statements providing also for the possibility of exemptions in particular cases. Member States have to implement the Directive by modifying their national legislation before January 1st 1988. [66]

A year later, in 1984, the Eight Directive was adopted. This deals specifically with the professional requirements of persons entitled to carry out statutory audits within the Community and therefore sets "standards" of a European nature for this profession. [67]

Other Directives are in the pipeline including a Ninth Directive on the law on groups of companies (protecting minority interests, employees and creditors in a dependant company) [68] ; the Tenth Directive on International Mergers; the Eleventh Directive on the Disclosure Requirements of branches of companies; a Directive on the Accounts of Insurance Companies; another Directive on the Accounts of Banks and yet another on the Information and Consultation of Workers in groups of Companies (the Vredeling Proposal). [69]

These achievements and proposals reveal the steady progress in harmonisation of laws by means of what Schmitthoff calls "*salami tactics*": "one slice of national company laws after another will be harmonised, uniform minimum standards will be established in the national company laws of the Community with respect to all important areas." [70] All this has been, and is being, achieved, not without difficulty. [71]

As we have seen, the corporation is the prime promoter of economic wealth in the Member States. This is especially true of the limited liability company with a share capital which "is the typical form adopted by the majority of the Community's most important commercial enterprises." [72] Therefore, Community measures which impinge on this particular feature of the legal regime of the Member States must "respect national susceptibilities". [73] The

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66. PRICE WATERHOUSE, *EC Bulletin,* No 74 May/June 1986, pp. 11 at p.3.
67. *Ibid.*
68. *Ibid.*
69. *Ibid.*
70. Schmitthoff, *op. cit.,* at footnote 26 Supra.
71. Thus, for example, the *Second Directive* was implemented in May 1980, a year and a half past the expiry of the council's December 1978 deadline. (see TINNION J. *The Companies Act 1980,*with annotations and text of the *Second Directive,* at the Introduction.) Also, doubts have been expressed as to whether s.9 of the *European Communities Act* 1972 effectively implements the provisions of the *First Directive.* See also an article on this and other issues, by FARRAR & POWLES, in *Modern Law Review,* May 1973.
72. *Green Paper,* op. cit. at footnote 18 supra.
73. Schmnitthoff *op, cit.* at footnote 26, supra.

draftsmen of the Treaty of Rome were careful in referring to "approximation" and not to "unification", and then only to approximation "to the extent required for the proper functioning of the common market". [74] The same caution is visible in the wording of Article 54(g), on which the mentioned Directives are based: one of the methods by means of which the Community is authorised to realise the right of establishment in the common market is "by coordinating *to the necessary extent* the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms .... with a view to making such safeguards equivalent throughout the Community." [75] Moreover such measures are only to be taken by means of Directives issued by the Council "on a proposal from the Commission, and (only) after consulting the Ecomomic and Social Committee and the Assembly." [76]

Treading in this circumspect manner, the Community has taken other, sometimes bolder, initiatives besides the Directives that have been summarily described above. Indeed it has even presented its own alternative company law regime, at least with regard to the limited liability company, in the form of the proposed Regulation embodying a Statute for the European Company. The Community proposes to issue this regulation in virtue of the powers granted it, in Article 235 of the Treaty:

> "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take the appropriate measures."

Basing itself on these 'extraordinary' powers the Community purports to issue a regulation containing "a complete code of company law, transnational and independent of the company laws of the Member States. Its 284 articles and four annexes contain nearly everything, including affective provisions aimed at minority protection." [77] The European Company or Societas Europaea lays down a minimum capital requirement which varies according to whether the S.E. is as a result of a full merger or the creation of a holding company, whether it is a joint venture or whether it is a subsidiary. It also has a two-tier board structure and workers' participation: the supervisory board is composed of equal numbers of representatives of shareholders, employees and persons "representing general interests." [78] Its essential feature, however, is that it has the status of a national company in each Member State of the Community and is not intended to replace existing national company laws but to exist alongside na-

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74. Article 3 (h)
75. Title III - Free Movement of Persons, Services and Capital, Chapter 2 - Right of Establishment, Art. 54 (3) (g)
76. Art. 54 (2)
77. Schmitthoff, *op. cit.*
78. See Proposed Regulation, OJ C 124/70; Proposed amendment, Comm. Doc. (75) 150 fin; European Parliament Opinion, OJ C 93/74.

tional company laws as harmonised by means of the Directives [79]. Indeed the legal existence of this alternative could have been a possible solution to the Hoesch-Hoogovens merger dilemma: the Societas Europaea has a European not a national identity and has also a developed form of workers' participation in decision-making. As we have seen these two problems were paramount in the negotiations which led to a complicated legal solution. [80] Progress on the Societas Europaea proposal is, not surprisingly, very slow. An ad hoc Council Working Group is examining the text of this complex Regulation. [81]

Another Community measure, vital to the achievement of a ''far-reaching harmonisation of the national company laws in the Community,'' is the proposed Fifth Directive on the structure of limited liability companies. This directive deals with the power-structure of the major form of business organisation in the Community and has been described as ''the most difficult problem besetting the path of harmonisation of European company laws.'' [82] This Directive in fact originally first proposed in 1972 has gone through various amendments over a period of more than ten years following the opinions of the Economic and Social Committee and of the European Parliament and an amended version of the Commission in 1983. The 'final' proposal is far removed from the Commission's original thoughts as expounded in the Green Paper of 1975 [83] and reflects changed political thinking and changes in the composition of political forces in the Community during the long period for which the Directive has been under consideration. Various options are now open to companies which employ more than 1000 persons. Companies can be structured either on the dualist (management board-supervisory council) or on the unitary (single administrative board) mould. Within this framework, employee participation can be, at the single administrative board or at the supervisory council level, made up of between one-third and one-half of the total number of members. Participation can alternatively also be achieved by the creation of a seperate body composed only of employee representatives. Even employee participation by means of systems agreed through collective bargaining satisfies the Directive's standards.

The high level of dilution of the original Commission proposals for the Fifth Directive are indicative of the comtroversial nature of this Directive. It is indeed a hard nut to crack since the idea of harmonisation of worker involvement in decision-making in industry strikes at the heart of the powers of capital and labour in Europe. It is not without reason that it took eleven years and various reports and opinions, and innumerable amendments for the 'final' version of this Directive to reach the Council late in 1983,where it currently languished.

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79. Schmitthoff, *op. cit.*
80. *Supra.*
81. Price Waterhouse *op. cit.* at footnote 66.
82. Schmitthoff, *op. cit.* at footnote 26 supra.
83. *Op. cit.* at footnote 18 supra.

The experience of the Fifth Directive reveals the difficult path of harmonisation especially when political thinking within Europe has not yet reached a required level of consensus throughout the various national societies, and therefore Community law on that issue cannot yet crystalise.

Harmonisation of company laws, like the process of harmonisation of laws in general, is a lengthy and laborious process, subject to the political, social and economic needs and pressures of the Member States. It reflects a "small steps" strategy which, though pedantic and slowmoving, steadily constructs the necessary Community law structure, and therefore constitutes a meaningful and real contribution to the ideal of European unity.

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