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Company Law in Europe and European Company Law

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Introduction

The story of company law in the European Community has been quite a successful one. Starting from the early sixties, the Community started an ambitious programme, in the course of which almost all aspects of company law would be included in the Community's harmonisation efforts. The subject was sliced in numerous smaller items, each planned to give rise to a directive. These company law directives have been known under their numbers: 10 have been adopted, in a series that runs up to fourteen. In addition, numerous directives have been issued in the field of capital market law. Although not directly dealing with company law, in the traditional sense, these directives have a significant impact on the behaviour of the largest companies, those that have their securities traded on the public markets. One should further also refer to specific measures dealing with the regulation of financial markets (banking, insurance, investment funds, investment firms), and to the measures that are addressing issues of what can be referred to as enterprise law (European enterprise council, collective redundancies, transfer of undertakings, employer's insolvency)[1].

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1 See for text collections: LUTTER (ed), *Europäisches Unternehmensrecht*, *ZGR* Sonderheft, 4th ed., 1995, also including tax measures; HOPT and WYMEERSCH (eds) *European Company and Financial law*, de Gruyter, Berlin, 2nd.ed., 1994. For comments: EDWARDS, V., *EC Company Law*, Oxford EC Library, 1999; WERLAUFF, E., *EC Company Law, The common denominator for business undertakings in 12 states*, 1993; also the Introduction to the first edition of HOPT and WYMEERSCH, *European Company and Financial law*, de Gruyter, 1999.

1. The Treaty provisions

1 The Treaty contains three anchor provisions as far as company law is concerned; the first two have been left unchanged in the successive revisions of the treaty.

First and foremost, art. 54 (3) (g), which is part of the Title III on the „freedom of persons, services and capital", under its chapter 2. This article, renumbered 44 (3)(g) provides:

> 44.2 The Council and the Commission shall carry out the duties devolving upon them under the preceding provisions – i.e. the abolition of restrictions on the freedom of establishment of nationals of a member state in the territory of other members states, [nt ew] –
>
> ....
>
> (g) by co-ordinating 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 within the meaning of the second paragraph of Article 48 with a view of making such safeguards equivalent throughout the Community"

On the basis of this provision, the council could approve directives with a qualified majority.

In the same chapter, the Treaty identifies the entities that it considers beneficiaries of the freedom of establishment:

Paragraph 1 of art. 48 (ex 58) provides:

> „Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States."[2]

Article 220 – now 293 – puts forward a number of domains in which the member states were invited to negotiate separate treaties. These fields were, at that time, considered outside the scope of the harmonisation provision of the then article 54 (3)(g). Among the subjects mentioned in art. 220 one should recall the mutual recognition of companies, along with the cross border transfer of the seat and the cross border merger of the compa-

2 Paragraph 2 adds: ‚Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.

nies belonging to different jurisdictions. As, according to the draftsmen of the Treaty, the implementation of this provision would have required an international treaty, unanimous consent of the member states and of their parliaments would have been necessary.

A third provision calls our attention: article 100 and later 100A – now 94 and 95 – establish procedures, originally in article 100 with unanimity of the Member states, later at a qualified majority in article 100A, that aim at the approximation of such legislative and administrative provisions that „directly affect the establishment or functioning of the common market". Other procedures were introduced in art. 100A relating to provisions affecting the „internal market".

2 There has been ample discussion, especially in the early years of the Community, about the meaning of the powers thus conferred to the Council[3]. The exact meaning of art. 54(3)(g) was discussed at great length, especially as overlapping powers seemed to have been conferred in article 100. The discussion was exacerbated by the fact that two different directorates general were in charge of the implementation of each of the said articles. The discussion seems to have subsided mainly after the merger of the directorates[4]

According to one school, the Community had only limited powers to engage in co-ordinating[5] company law, the remainder being left to action under article 100. Action under article 54 (3) (g) would only be possible where existing regulations or practices would hamper companies to establish themselves in other states, provided also that the Community's intervention would lead to granting equivalent safeguards for the interests of members of these companies, and other parties affected.

The other tendency considered that all aspects of company law could come under the harmonisation powers: the purpose was to ensure that companies could function in all states under equivalent conditions and that

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3 See RENAULD, J. ‚Aspects de la coordination et du rapprochement des dispositions relatives aux sociétés' in *Europees vennootschapsrecht* 1968, 49 e.s. with further references to the sources at that time. For a more recent analysis: BUXBAUM, R.M. and HOPT, K.J., *Legal harmonization and the Business Enterprise*, de Gruyter, 1988, at 204 e.s.

4 See for details, EDWARDS, V., *EC Company law*, at 5; referring to STEIN, E. *Harmonization of European company law*, (1971).

5 The terminology was rather confusing: As LUTTER, nt. 1, p. 8 remarked, the use of the German word „Angleichung", although equally opaque, sufficed to obtain the approval of the German legal writers to start working on the actual co-ordination or approximation

they would offer equivalent safeguards to shareholders, creditors, and other parties alike[6].

Article 100 has never been invoked in company law directives, which were all based on art. 54 (3) (g). In the securities fields one can encounter various situations: art 100 A constitutes an often-invoked legal basis, along with art. 54(3)(g). But other articles have also been invoked: art. 57(2) for the Ucits directive, art. 54(2) for the directive on mutual recognition of listing particulars, and so on.

Today, forty years later, very much of this debate has been superseded, also because under the broad harmonisation powers granted under article 100 A, all company law directives could be adopted with a qualified majority. Harmonisation would therefore be considered an instrument for the realisation of the general objectives of the treaty, more specifically the establishment of an internal market (art. 3, c and h). That means that all measures that can contribute to facilitating companies to establish themselves, but also to facilitate trade in the markets of other member states could be considered as coming under the harmonisation provisions. Even directives that would essentially affect domestic company life, might be warranted as useful in protecting creditors – e.g. in the case of the directive on the single member company – or facilitating later cross border transactions – e.g. the third and sixth directives as a step-up for a later cross border merger directive.

3 The issue of recognition of companies originating from other member states deserves some further development. On the basis of art. 220 of the treaty, the original six members states had reached an agreement in 1968 on the mutual recognition of companies and legal persons. This treaty which has been ratified by five out of the then six member states has never entered into force: the Netherlands refused to ratify largely because in the meantime it had changed its legislation from the seat theory to the incorporation technique. Anyhow, the treaty built further on the already widely acknowledged recognition of foreign companies in the original six member states. It extended recognition to non-commercial companies, and to public entities with economic activity[7].

This 1968 treaty has been considered as adhering to the seat theory. After the accession of the three further member states in 1971, the discussion was not taken up again[8]. Today, it is generally considered abandoned.

6 Possibly referring to stakeholders.

7 See art. 1 and 2of the Treaty of 29 February 1968, the text of which is printed in LUTTER, fn. 1, at 69.

8 The UK and Ireland adopt the incorporation doctrine The same applies to Finland and Sweden, while the situation in Denmark is not very clear: see ANDERSEN, P. K. and

The reason for mentioning this treaty here is double. Although it never entered into force, it has not remained without effect: in states which have ratified the treaty, national case law has drawn arguments from the treaty and from its national ratification act, to give effect to certain of its rules in national law. So has the Belgian Cour de cassation allowed a foreign one man company – in fact a Liechtenstein Anstalt – to appear before the Belgian court, although being a one man company, its existence was considered contrary to Belgian public order as the latter was then conceived. Indeed, until a change of the law in 1978, Belgian law, like that of several other systems in the Latin tradition, analysed a company as a „contract" and therefore refused to recognize the validity of a one-man company. The Court admitted this plaintiff on the basis that the Belgian legislator by ratifying the Treaty, had admitted that foreign one-man companies should not be barred access on the sole reason that they had only one shareholder [9].

More striking however is the factual finding that over the last thirty years no difficulties have been encountered in any of the now fifteen member states with respect to the recognition of legal entities originating from other member states, provided that according to their applicable law, they were beneficiaries of rights and duties, and have legal personality. The question of recognition of foreign companies was therefore widely considered as obsolete[10]. And with this goes the justification for the 1968 treaty.

In 1999, the matter came up again with the Centros case[11], which is not directly a case of recognition, but of freedom of establishment: as far as freedom of establishment is concerned, member states would have to recognise each others companies, provided they meet the criteria of art. 48 (ex 58). The rule only extends to said freedom: it is open to debate whether it includes the right to move across the border without adapting to the entry's state regulations, or even without seeing the company dissolved by the exit state, at least in the hypothesis that both jurisdictions adhere to the siège réel doctrine.

This observation leads to a more general insight, that is that company law in Europe develops not only along the lines of EU guided harmonisation, but also under the factual pressures of developments in the Union and its internal market, including the competitive pressures to which compa-

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SÖRENSEN, K.E., ‚Free movement of companies from a Nordic perspective' (1999) 6 *Maastricht Journal of European and Comparative law*, at p. 58.

9 See Cour de Cassation, „Del Sol" case, 13 January 1978, *R.W.*, 1977–1978, 1942, nt. VAN BRUYSTEGEM; *A.C.*, 1978, 568; *R.C.J.B.*, 1979, 41, note L. F. GANSHOF.

10 See LUTTER, nt. 1, at 43 and at 696.

11 ECJ, 9 March 1999, C-212/97, ECR 1999, I-1459, for comments see fn. 105.

nies and jurisdictions are increasingly exposed. The law in action, although an ancillary force in the overall economic developments that it sustains, is often stronger than the law in the books.

4 In the late 1960s, even though the discussions about the interpretation of art. 54 (3)(g) were not resulting in a common view[12], the first proposals for harmonisation directives were prepared. The Commission had decided that large scale comparative research could usefully contribute to a better insight in the issues involved and to the solutions to be adopted.

Several research studies were assigned to the most famous company law professors of Europe: Würdinger, on the structure of the company, later the fifth directive; Van Ommeslaghe, on groups of companies[13], B. Goldman on the mutual recognition of foreign companies [14], or later Pennington, on takeovers. One should not forget to mention the group that took the project for a European Company Statute under its wings, i.e. P. Sanders, E. Arendt, E. von Caemmerer, L. Dabin, G. Marty, and G. Minervini.[15]

From these early works a long series of directive proposals emerged. They have been the subject of ample analysis and study[16]. However, these are not the only instruments that should be taken into account. In addition, the Community has adopted one regulation, on the EEIG, the European Economic Interest Group, that contains a substantially different approach to company law matters. Another major regulation is being prepared about the Societas Europaea, „the European company", the first proposal having been published in 1970[17].

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12 See the paper by HOUIN, R. ‚Le regime juridique des sociétés dans la Communauté Economique Européenne', *Revue trimestrielle de droit européen*, 1965, 11 and RODIERE, R. ‚L'harmonisation de legislations européennes dans le cadre de la C.E.E.', *Revue trimestrielle de droit européen*, 1965, 336.

13 P. VAN OMMESLAGHE, ‚Les groupes de sociétés', *Revue pratique des sociétés*, 1965, n° 5280, 153–252.

14 See B. GOLDMAN, ‚La reconnaissance mutuelle des sociétés dans la CEE', *Etudes offertes à Julliot de la Morandière*, 1964, 191.

15 According to Commission des Communautés européennes, Projet d'un statut des sociétés anonymes européennes, Série Concurrence, 1967, n° 6, préface.

16 See the books by LUTTER, EDWARDS and WERLAUFF in nt. 1.

17 See Voorstel voor een Statuut voor Europese Naamloze Vennootschappen, submitted to the Council on 30 June 1970, Bulletin, 8, supplement, 1970; and Amended proposal for a Regulation „Statute for European Companies", Bulletin of the European Communities, Suppl. 4/75.See further nr. 42 for the most recent stage of development.

2. *The Ambit of the Company Law Directives*

5 The directives are generally applicable to public companies limited, or to the equivalent forms in the member states (Société anonyme, società per azioni, naamloze vennootschap, Aktiengesellschaft, etc). These are by far the largest business enterprises and the impact of their activity on the internal market is the widest. However, de facto, the use of the different company forms is quite divergent among the member states: at the moment the first directives were published, Germany had only about 1000 Aktiengesellschaften. At present their number has increased substantially but is still considerably lower than what appears to be their number of equivalent forms in the other member states[18].

In several member states the private company limited can be considered as largely equivalent to the public company, except that its shares are not freely transferable. Other states consider this type of company as being more akin to the partnerships, although members enjoy limited liability. Although the internal organisation might be different, the external structure and behaviour of these companies is in fact largely identical to that of the public companies limited. Therefore, there were good arguments to treat both types of companies on the same footing.

The factual situation in the different directives is quite diverse: while the first, the fourth, the seventh and the eleventh directives are applicable both to the public and the private company types, the second, third, sixth apply only to the public company limited.

The 12th on the single-member company applies only to the private limited liability company, as this is the only form in which a one-man company is usually allowed.

In fact one should put a question mark beside the above used distinction between public and private companies, as being equivalent to the continental divide between SA en Sàrl. In the approach followed in the UK, the former are subspecies of the same single company form, the company limited by shares. Under the continental concept, the Sa and the Sàrl, although having many common features, are generally considered different company types. Moreover the differences between the SA and the Sàrl, or what

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18 For comparative figures, see WYMEERSCH, in ‚A Status Report on Corporate Governance Rules and Practices in Some Continental European States‘ in *Comparative Corporate Governance. The state of the art and emerging research*, HOPT, K.J., KANDA, H., ROE, M.J., WYMEERSCH, E., PRIGGE, S. (eds.), Clarendon Press, Oxford, at 1049. Recent figures about Germany: HANSEN, H., AG Report, ‚Zum Jahresende 2000: 10582 Aktiengesellschaften‘ in *AG*, 2001, 3, p. R67.

generally are considered equivalent national forms, vary appreciably from state to state.

The issue is far from merely technical. Member states have had ambivalent feelings as to the extension of some of the harmonised European rules to company types that are not explicitly viewed by the directives. Some member states have taken an activist stand, extending the European principles to all company types, at least those with limited liability. So e.g. is part of the capital formation and protection rules that are applicable to the French SA also applicable to the French Sàrl. Belgium has taken a more radical stand: it applies the rules equally to both SA and Sprl, and some of them even to the co-operative societies, although these are considered out of the scope of the harmonisation in other states. Therefore, the effects of the European harmonisation often extend beyond the horizon of the SA.

One can also understand why some member states that are critical of some of the European rules, will resist any attempt to extend the harmonisation across the board to all companies with limited liability[19].

When the Sàrl has not been submitted to all of the rules of the European harmonisation, this company type has played the role of a shelter, or some will say, of an evasion technique. The exemption of the Sàrl from the cumbersome rules of the Second Directive on financial assistance (art. 23) has opened up the possibility to organise useful transactions, such as management buy outs by interposing a Sàrl, there where the deal would be forbidden if done directly by an SA. This form of competition between company types deserves special mention. In some states it has been even more evident between the co-operative societies and the Sàrl, as both were, for practical purposes, largely equivalent[20].

The question has been raised whether it would not be preferable to develop European rules that would only address part of the viewed population, the one where with the greatest cross border „density". To a certain extent, this approach has already been followed as the accounting directives contain differentiated rules depending on the volume of the business, its turnover and the number of employees employed. However, if these

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19 This is especially the case with the extension of the Second directive to the private companies limited, a proposal that has been voiced in Germany as a technique to deal with the issues dealt with in the Centros case. See LUTTER, M. ‚Das Europäische Unternehmensrecht im 21. Jahrhundert', *ZGR* 2000, 1 and HIRTE, ‚Die aktienrechtliche Satzungsstrenge: Kapitalmarkt und sonstige Legitimationen versus Gestaltungsfreiheit', *ZGR Sonderheft 13,* 1998, 71–72.

20 See WYMEERSCH, ‚Kritische benadering en synthese van de besproken vennootschappen' in *Miskende vennootschapsvormen*, Koninklijke Federatie van Belgische Notarissen, Kluwer, Antwerpen, 1991, 153–180.

criteria allow differentiating the smaller companies from the very small ones, it does not allow for sufficient differentiation at the top end of the scale. Therefore, it would be advisable that the directives more closely follow the criterion of „listing": companies that have their securities listed on regulated markets would be subject to strengthened rules and obligations v.à.v. their investors[21]. The use of this criterion would allow deregulating for many of the intermediate class of companies, and result in a more level playing field between the national systems, where the use of the different corporate forms present divergent patterns. At the same time it would allow for a better junction with the rules flowing from the capital market directives.

3. *The instruments of European Company Law*

6 European company law is indirect company law: the Community rules are generally not directly applicable in the national legal systems. This feature is a consequence of the prevalent use of the „directive" as an instrument for implementing the provisions of the article 44(1) and 94–95.

The directive is the usual Community instrument in the company law field. As mentioned above, some – unsuccessful – attempts have been made to intervene by way of a treaty. In rare cases the Community has acted by regulation, the latter being directly applicable in the national legal orders. In the securities field, a recommendation has been adopted: it had the value of a programme for future harmonisation activity[22].

But the most used instrument is the directive[23]. As a consequence, European company law is not company law, not being directly applicable to the companies, but addressed to the Member States, who have to implement the directive into their national legal order. This duty of implementation is sometimes complex: there is no need to enact a regulation if the directive's provision is addressed to the state itself. Also the directive needs no implementing legislation if the national laws are already in conformity with the directive's provisions.

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21 In France and in Belgium, this criterion is supplemented by that of the companies that have issued securities to the public. As the number of companies that have issued securities to the public that have not been listed afterwards are marginal, it is proposed to leave that extension up to the member states.

22 LEMPEREUR, CL., ‚Le code de conduite européen concernant les transactions relative aux valeurs mobilières', *Rev.Dr.Int. Dr. Comparé*, 1978, 249–266.

23 See on the use of the different instruments in European Company law: HOPT, K., fn. 4, at 232 et seq.

This double-layered system of regulation has many advantages: in a multicultural, multilingual economic area it makes it possible to reach agreement on common principles without having to agree about the precise wording in the actually applicable provision[24]. It allows bridging the considerable differences in the legislative traditions of the member states. It further allows each state to use its own wording and language, as the directive only binds as to its result, not as to its forms and methods (art. 249).

The drawback of the use of directives is that – differently from a „regulation" – it does not result in uniform law. Looking at the national company law statutes, one will find numerous and sometimes considerable differences in the respective member states. It is up to the ECJ to check whether the member states have adequately implemented the directive and whether the goal put forward has been achieved. However the number of ECJ cases dealing with company law has been relative small[25].

There are several other reasons why directives do not result in uniform legal provisions. One of these is the frequently used technique of the „options", whereby member states may choose between several alternatives, each being considered equivalent in terms of ultimate harmonisation. It is well known that these „options" often are a way out of the deadlock during the discussions. They have been frequently used in the Fourth accounting directive, and have contributed to the perceived weakness of the European accounting system.

Another disturbing factor is the prevailing opinion – often explicitly mentioned in the directives – that these only introduce minimum standards, and that member states are free to go beyond the directive's provisions, by imposing stricter, more protective rules[26]. This attitude leads necessarily to reinforce the peculiarities of each of the legal systems, and constitutes a serious handicap in the accomplishment of the internal market.

The segmentation of the market may also be due to the abundant use – or extensive interpretation – by member states of the „general good exception"[27]. According to this rule, member states may allow restrictions in

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24 See also HOPT, fn. 4, at 233.

25 For an overview, see V. EDWARDS, *EC Company Law*, Oxford University Press, 1999, at XXVII.

26 This being linked to the adoption of the lowest common denominator, see HOPT, fn. 4, at 235.

27 See for an extensive study of the general good exception in the area of financial services: TISON, M., *De Interne Markt voor Banken Beleggingsdiensten*, Antwerp, In-

their national legal order to be maintained, or that may even prevail over the directive's provisions, if they serve to achieve the public policy objective that the member states have lawfully put forward. In the field of investor protection member states have been rather inventive to list numerous rules as belonging to the general good. The ECJ has accepted that these exceptions can be upheld even with respect to the freedom of establishment of companies[28]. The outcome is an often unjustified segmentation of the markets.

7 Being addressed to Member States, not to companies directly, directives do not provide directly enforceable rights to the companies, to investors or other stakeholders, which the directive has in mind. Enforcement of the directives is, as a matter of the Treaty, the task of the Commission (art 226) or of other member states (art. 227). Ultimately, the ECJ decides. National jurisdictions, deciding in last instance, are obliged to submit all cases of interpretation of the directives to the ECJ, although increasingly – and regrettably – some national jurisdictions refuse to do on the basis of the „acte clair“ technique.

Although in principle individuals have no right to invoke the directive, it being addressed to the Member states, the directive is not without effect as far as their legal position is concerned. First, the directive is directly applicable in the relations between a state or public authority, and a private party: this is called vertical direct effect[29], and may be of importance in the securities field, where issuers deal with state supervisory bodies. But the ECJ has up to now denied horizontal direct effect to the directives: investors could therefore not claim against a company that it violates the rules of the directive[30]. Furthermore, on the basis of the idea that the implementation is a duty of the member state, the Court has held states civilly liable

tersentia, 1999 and ‚What is „general good“ in EU Financial Services Law?‘, *L.I.E.I.*, 1997/1, pp. 1–57.

28 Also in the Centros decision, ECJ, 9 March 1999, C-212/97, ECR 1999, I-1459 at § 24: Case 115/78 *Knoors* (1979) ECR 399, § 25 and Case C-61/89 *Bouchoucha* (1990) ECR I-3551, § 14.

29 See Greek cases in VANESSA EDWARDS, *EC Company Law*, Oxford University Press, 1999, Ch III, art 25–29 Sec Dir.

30 The landmark decision of the European Court of Justice concerning horizontal direct effect is the *Marshall* decision (Case 152/84 *Marshall v. Southampton and South-West Hampshire Area Health Authority* (1986) ECR 723), see also Case C-91/92 *Faccini dori v Recreb* (1994) ECR I-3325 and Case C-192/94 *El Corte Inglés v Blàzquez Rivero* (1996) ECR I-1281. But this position is being increasingly weakened: see ECJ, C 443-98, of 26 September 2000, *Unilever Italia SpA v.Central Food SpA*, EuZW, 2001, 153, with comments by GUNDEL.

for not implementing a directive in time[31]. Finally even between private parties, national statutes have to be interpreted in a sense that is in conformity with the purpose of the directive.[32]

8 It has often been claimed that the harmonisation of company law in Europe has suffered from too many rigidities. These are due to the long process of preparation of the directives – often 10 to 15 years – which makes it unworkable to change the directive's wording once it has been adopted[33]. „Petrification" is, according to Vanessa Edwards[34], less bad than one could fear: she points to the amendments that have been introduced in the second, fourth and the listing particulars directive. She further points to art. 202 (ex 145) whereby the Council can confer implementing powers to the Commission. More recently, the „comitology" technique has been further refined, allowing the appointment of specialised committees to whom regulatory powers can be delegated[35].

In the securities field, the recent Lamfalussy Report proposed to draw on the comitology technique to ensure that the principles that have been adopted by the Council, are adequately and swiftly translated in workable provisions for further implementation by the member states. There are good arguments to follow a similar approach in some of the more technical company law matters[36].

9 There have been several generations of directives and proposals for directives in the field of company law and capital market law. The following list aims at giving an overview of the Community's efforts in this field: therefore both adopted directives and proposals for directives or other instruments are included.

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31 Joined Cases C 46 and 48/93 *Brasserie du Pêcheur and Factortame* (1996) ECR I-1029 and Case C-392/93 *The Queen v HM Treasury, ex p British Telecommunications* (1996) ECR I-1631.

32 The *Marleasing* case C-106/89 *Marleasing v La Comercial Internacional de Alimentaciòn* (1990) ECR I-4135.

33 See HOPT, fn. 4, 235 e.s. 243, 265

34 EDWARDS, fn. 1, at 11

35 See Council Decision, 28 June 1999, OJEC, L. 184 of 17 July 1999, 23–26; compare the proposal made in the Lamfalussy report „Initial Report of the Committee of Wise Men on the Regulation of the European Securities Markets", http://europa.eu.int/comm/internal_market/en/finances/general/lamfalussy.htm.

36 The technical rules on electronic voting in the general meeting, or on proxy solicitation could be mentioned as an example, see WYMEERSCH, ‚The use of ICT in Company law', in FERRARINI, (ed) *Europe in the age of the Euro*, to be published.

Company Law

1° 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 (68/151/EEC)[37]

2° 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)[38]

3° 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)[39]

4° Fourth Council Directive of 25 July 1978 based on Article (3) (g) of the Treaty on annual accounts of certain types of companies (78/660/EEC)[40]

5° Amended Proposal of 20 November 1991 for a Fifth Directive based on Article 54 of the EEC Treaty concerning the structure of public limited companies and the powers and obligations of their organs (COM (91) 372 final)[41]

6° Sixth Council Directive of 17 December 1982 based on Article 54 (3) (g) of the Treaty, concerning the division of public limited liability companies (82/891/EEC)[42]

7° Seventh Council Directive of 13 June 1983 based on Article 54 (3) (g) of the Treaty on consolidated accounts (83/349/EEC)[43]

8° Eighth Council Directive of 10 April 1984 based on Article 54 (3) (g) of the Treaty on the approval of persons responsible for carrying out the statutory audits of accounting documents (84/253/EEC)[44]

9° Amended predraft for a Ninth Directive on groups of companies (not published)

37 OJ L 65, 14.3.1968, 8–12.
38 OJ L 26, 31.1.1977, 1–13.
39 OJ L 295, 20.10.1978, 36–43.
40 OJ L 222, 14.8.1978, 11–31.
41 OJ C 321, 30.11.91, 9.
42 OJ L 348, 31.12.1982, 47–54.
43 OJ L 193, 18.7.1983, 1–17.
44 OJ L 126, 12.5.1984, 20–26.

10° Proposal of 14 January 1985 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)[45]

11° Eleventh Council Directive of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of companies governed by the law of another State (89/666/EEC)[46]

12° Twelfth Company Law Directive of 21 December 1989 on single-member private limited-liability companies (89/667/EEC)[47]

13° Amended Proposal for a Thirteenth Directive of the European Parliament and of the Council on company law, concerning take-over bids[48]

14° Council Directive of 8 November 1990 amending Directive 78/660/EEC on annual accounts and Directive 83/349/EEC on consolidated accounts as concerns the exemptions for small and medium-sized companies and the publication of accounts in ecus (90/604/EEC)[49]

15° Council Directive of 8 November 1990 amending Directive 78/660/EEC on annual accounts and Directive 83/349/EEC on consolidated accounts as regards the scope of those Directives (90/605/EEC)[50]

16° Predraft for a directive on the liquidation of companies[51]

17° Predraft for a fourteenth directive on the transfer of the seat[52]

Other instruments

18° European Convention on the Mutual Recognition of Companies and Legal Persons[53]

19° Council Regulation 2137/85 EEC of 25 July 1985 on the European Economic Interest grouping [54]

20° Draft Council Regulation on the Statute for a European Company[55]

45 OJ C 23, 25.1.1985, 11–15.
46 OJ L 395, 30.12.1989, 36–39.
47 OJ L 395, 30.12.1989, 40–42.
48 On June 21, 2000 a common position was adopted by the Council: downloadable from http://www.europarl.eu.int/commonpositions/2000/default_en.htm, procedure number COD 1995/0341.
49 OJ L 317, 16.11.1990, 57–59.
50 OJ L 317, 16.11.1990, 60–62.
51 See Doc. Comm. (85) 310, final.
52 Not officially published; *ZGR*, 1999, 157; *ZIP*, 1997.
53 Commission Bulletin 2/69.
54 OJ L 199 of 31 July 1985, 1
55 Latest version February 1, 2001.

21°Draft Council Directive supplementing the Statute for a European Company with regard to the involvement of employees[56]

Capital Market Law

1° Commission Recommendation of 25 July 1977 concerning a European code of conduct relating to transactions in transferable securities (77/534/EEC)[57]

2° Council Directive of 5 March 1979 coordinating the conditions for the admission of securities to official stock exchange listing (79/279/EEC)[58]

3° Council Directive of 17 March 1980 coordinating the requirements for the drawing up, scrutiny an distribution of the listing particulars to be published for the admission of securities to the official stock exchange listing (80/390/EEC)[59]

4° Council Directive of 5 February 1982 on information to be published on a regular basis by companies the shares of which have been admitted to official stock-exchange listing (82/121/EEC)[60]

5° Council Directive of 3 March 1982 amending Directive 79/279/EEC coordinating the conditions for the admission of securities to official stock exchange listing and Directive 80/390/EEC coordinating the requirements for the drawing up, scrutiny an distribution of the listing particulars to be published for the admission of securities to the official stock exchange listing (82/148/EEC)[61]

6° Council Directive of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (85/611/EEC)[62]

7° Council Recommendation of 20 December 1985, concerning the second paragraph of Article 25 (1) of Directive 85/611/EEC (85/612/EEC)[63]

8° Council Directive of 22 June 1987 amending Directive 80/390/EEC coordinating the requirements for the drawing up, scrutiny an distribution

56 Latest version February 1, 2001
57 OJ L 212, 20.8.1977, 37–43.
58 OJ L 66, 16.3.1979, 21–32.
59 OJ L 100, 17.4.1980, 1–26.
60 OJ L 48, 20.2.1982, 26–26.
61 OJ L 62, 5.3.1982, 22–33.
62 OJ L 375, 31.12.1985, 3–18.
63 OJ L 375, 31.12.1985, 19.

of the listing particulars to be published for the admission of securities to the official stock exchange listing (87/345/EEC)[64]

9° Council Directive of 22 March 1988 amending, as regards the investment policies of certain UCITS, Directive 80/390/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (88/220/EEC)[65]

10° Council Directive of 12 December 1988 on the information to be published when a major holding in a listed company is acquired or disposed of (88/627/EEC)[66]

11° Council Directive of 17 April 1989 coordinating the requirements for the drawing-up, scrutiny and distribution of the prospectus to be published when transferable securities are offered to the public (89/298/EEC)[67]

12° Council Directive of 13 November 1989 coordinating regulations on insider dealing (89/592/EEC)[68]

13° Council Directive of 23 April 1990 amending Directive 80/390/EEC in respect of the mutual recognition of public-offer prospectuses as stock exchanges listing particulars (90/200/EEC)[69]

14° Council Directive of 30 May 1994 amending Directive 80/390/EEC coordinating the requirements for the drawing up, scrutiny an distribution of the listing particulars to be published for the admission of securities to the official stock exchange listing with regard to the obligation to publish listing particulars (94/18/EEC)[70]

15° Council Directive 98/26 of 19 May 1998 on settlement finality in payment and securities settlement systems[71]

10 Apart from directives, the other European regulatory tools have rarely been used. As already mentioned the experience with international treaties has been disappointing. Recommendations on company law have not been published, differently from the securities field.[72]

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64 OJ L 185, 4.7.1987, 81–83.
65 OJ L 100, 19.4.1988, 31–32.
66 OJ L 348, 17.12.1988, 62–65.
67 OJ L 124, 5.5.1989, 8–15.
68 OJ L 334, 18.11.1989, 30–32.
69 OJ L 112, 3.5.1990, 24–25.
70 OJ L 135, 31.5.1994, 1–4.
71 OJ L 166, 11.6. 1998, 45–50.
72 The 1977 Commission Recommendation 77/534/EEC of 25 July 1977 concerning a European Code of Conduct relating to Transactions in transferable securities, OJEC, L 212, of 20.8.1977; this recommendation has been mentioned in national case law to

The regulation deserves special mention. According to art. 249, the regulation is binding in its entirety and directly applicable in all Member States. It constitutes a much more heavy-handed intervention in the States' legal order; Therefore the Community has been careful not to use this instrument in traditional company law, but only in fields where new legal instruments have been introduced. The European Economic Interest Grouping, a new form of „company", was introduced by regulation[73]. The same is planned for the European Company or SE, the corpus of which will be the subject of a regulation while the specific rules on co-determination will be introduced by way of a directive[74]. By using the regulation, the Community also ensures that these new company forms will have to be recognised in all members states, and that its characteristics and rights and privileges are and remain beyond the scope of the State's intervention.

A private proposal has been published to introduce a specific type of private company limited, a „société privée européenne" by way of a regulation[75].

4. The role of the European directives in the Community's Policies

11 Looking at the directives – both adopted and proposed – from the angle of the policies of the Community, one could first analyse them on the basis of the articles of the Treaty pursuant to which they have been enacted.

Art. 44 (3)(g) being part of the rules on freedom of establishment, the directives could be expected to first aim for the liberalisation of cross border establishment of companies in Europe. Article 95 (ex 100 A) broadens the perspective to the „approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market".

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interpret some of the general obligations to which directors of companies are held: see Trib. Bruxelles, 24 July 1978, *T.B.H.*, 1979, 386.

73 See Council regulation 2137/85/EEC of 25 July 1985, on the European Economic Interest Grouping (EEIG), OJEC, L 199, of 31 July 1985. Whether the group is a company or not has been left to the decision of the member states: Belgium e.g; has, after some hesitation, decided for incorporation of the EIG in its national company law. One could argue that this qualification also applies to the EEIG, on the basis of art. 2, L. 12 July 1989, as modified by L. 7 May 1999.

74 For more details see infra nr. 42 e.s.

75 See Gazette du Palais, numéro spécial, nr. 17, 24 September 1998; CCIP/CNPF, *Société Privée Européenne*, September 1998; TIMMERMAN, L. ‚Een plan voor een Europese BV', *Ondernemingsrecht* 1999, 159.

In the first mentioned provision, the powers conferred are more clearly geared to liberalisation in the sense that cross border establishment, transactions and relationships will be more directly affected. Being part of the Treaty rules on freedom of establishment, one could argue that art. 44 (3) (g) does not confer the power to co-ordinate all provisions of company law, across the board, but only those matters that impact on the establishment of companies and firms, and therefore are more related to cross border subjects. Purely internal matters such as the internal structure of the corporation, corporate governance issues, the relationship between shareholders, or between shareholders and directors, and other similar matters, would be beyond the scope of this provision. This is also the reason why this provision could not offer the legal basis for an all-encompassing harmonisation of the company law of the member states. The Community could not intervene except to the extent that such intervention is useful to the liberalisation of cross border establishment.

The second Treaty, in art. 100 and 100 A (now art. 94–95), confers considerably broader powers as it allows the Community to adopt directives in all matters – and not only in company law – provided these are related or contribute to the functioning of the internal market. On that basis one could argue that a more intensive harmonisation of company law belongs to the objectives pursued by these provisions. If, as was ably stated by Marcus Lutter[76], Europe is on the way of creating a common body of ideas, concepts, principles, and even rules that are common to each of the member states, this evolution towards a common core of company law rule would be the further, but not the ultimate step to company law harmonisation in Europe. Although this evolution would go a long way towards creating a „uniform" company law, uniform rules could only be achieved as a consequence of a long-term evolution. In the meantime the principal stepping-stones have been laid. Lutter has stated his views in graphic terms characteristic of his writing style „the European enterprise law is developing from separate parts, from sandbanks and dunes, which will more and more grow together to islands which will already seek access to the firm shores of the mainland".[77]

12 These two approaches are essentially different, but not contradictory. While the first focuses on a policy of liberalisation, of removing barriers to cross border relations, transactions, or establishment, and therefore would be focusing more on an item by item harmonisation, the second starts from

76 LUTTER, fn. 20, *ZGR* 2000, 1, comparing the present status of harmonisation to a „torso".

77 LUTTER, fn. 1, at 4.

an overall approach and attempts to harmonise company law in general, by slicing the subject in sub-items, where the rules are regrouped not according to their cross border features, but according to their function in company law in general. Sub-items that are very likely to affect cross border relations are not dealt with if they belong to a chapter in which harmonisation, for some reason or another, could not yet be achieved. The reverse is also true: subjects that have a low content of cross border features would nevertheless be included in the harmonisation, if the overall subject was likely to obtain the member States' approval.

An example will illustrate this analysis. The third and sixth directives are undoubtedly useful instruments from the angle of domestic company law. The rules have been introduced by most of the member states, although it is not clear to what extent these are being effectively applied. The cross border content of these rules is rather low: these directives have therefore been justified on the basis of their contribution to facilitating the directive on cross border mergers, indeed a more crucial item in the liberalisation of the markets. Agreement could be reached on the third and sixth directive without too much difficulty. The rules were introduced, often by literally copying the directive's provision in the national company statutes. Uniform law, or some sort of it, was created, and in that sense, company law in Europe moved a degree further on the scale of uniform company law.

Examples in the other sense are also numerous: today, it is beyond discussion that cross border voting, and more generally exercise of shareholder rights constitutes one of the highest priorities on the harmonisation list. Little to nothing has been done in this field: voting procedures were left to the fifth directive, which can be considered abandoned after having been on the table for a quarter of a century, or more. By focusing on harmonising large chapters of a future „consolidated harmonised company statute", necessary rules of company law that might exercise a significant contribution on integration and free establishment have been postponed for the longer term.

The foregoing analysis is not to be considered as a criticism: it only wants to expose the different approaches that have, or could have been followed in the process of harmonisation of company law.

13 From the overview of the subjects that have been dealt with in the entire list of the directives, it seems clear that the Community has conceived its harmonisation activities from an all encompassing concept, whereby the whole body of company law was divided in different subjects, each of these being the theme of a specific directive. At the end of the programme, all if not the vast majority of company law rules would have been harmo-

nised[78]. Therefore, European harmonisation was a technique that, although not amounting to uniform legislation – what would have been contrary to the notion of co-ordinating, or approximation, as used in the treaty – went a long way on the road of having all states adopt laws that would have been largely uniform all across the Community.
This scheme did materialise, but only up to a certain point, and then it ran aground for several reasons.

One of these reasons is of a substantive nature. As long as harmonisation dealt with external company life – protection of third parties, company accounts, legal capital – states were able to agree on common rules, as these also were more likely to affect interstate relations. However, once the harmonisation efforts moved into the field of internal company life, opposition became stiffer, and this prevented the adoption of the fifth, the ninth and other directives[79], all dealing with the relations between shareholders, directors and other parties in the internal company governance relations. This resistance was comprehensible: by intervening in the internal relation within companies, the Community would have affected the control structures that existed in the different economies, and hence opened up these companies for international pressures. Time was not ripe for this kind of overture. The internal company structures were at that moment still very different, although largely unknown. The historical battle that has been fought over co-determination – and it is still not over – can be seen as an example of the unwillingness of the member states to let the community tamper with the internal power structures. But the same can be said of several other rules, which the member states obviously left out for later controversy, such as the „one share, one vote" rule, or the need to introduce two tier boards[80], or more recently the pre-bid anti-takeover defences The ninth directive on groups of companies illustrates the same line of reasoning: while all member states were developing group law in practice[81], both in the judicial and administrative case law, the large companies were showing clear unwillingness to let this much feared sub-

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78 There have been proposals to harmonise even the rules on the issuance of bonds, obviously never released, or on the dissolution and liquidation of companies, mentioned in LUTTER, *Europäisches Unternehmensrecht*, at 299.

79 Such as the cross border merger and seat transfer directives.

80 Which was part of the proposed Fifth directive, but never adopted as it contained the obligation to organise co-determination.

81 An overview is to be found in WYMEERSCH (ed) *Groups of companies in EEC*, de Gruyter, 1993, where a status questionis of these developments was signed up for a certain number of member states. See also the comparative studies edited by LUTTER, *Konzerrecht im Ausland*, de Gruyter, 1994.

ject being governed by statutory provisions, whether imposed by a „foreign“ regulator, or even by their more familiar domestic legislator[82].

14 By attempting to harmonise large, essential parts of company law, the Community might have succeeded in creating a body of law that would have come quite close to the uniform codes as are known in the United States. It would not have been a private codification, with the advantages of flexibility, non-binding character and instigation to competition[83].

To a certain extent, a largely identical body of law has been created[84]. It is undeniable that many provisions of company law have been introduced in the different member states in almost identical terms. For purposes of comparative study this greatly facilitates the task of company law scholars. Once one recognizes a subject in one's own legal system, it become possible to conjecture that more or less similar rules apply in the other jurisdiction, or at least that the solution cannot be radically different. In that sense the comparative study of company law that previously remained limited to the comparison of the provisions of the laws, is not further meaningful, but must go beyond, to the underlying mobiles of company conduct. This explains, at least in part, the interest, even among lawyers, of the subject of corporate governance, and to the economic analysis of company law rules[85].

But the harmonisation remains partial. After a first wave of harmonisation measures (1960–1980s), company law is again moving further apart[86]. Starting from the mid 80s, under the pressure of the then economic crisis, legislators have introduced all kinds of new provisions, to stimulate economic activity[87], to involve employees in company decision making[88], to

82 See the example in France, PARIENTE, M., GUYON, Y., *Les groupes de sociétés, aspects juridique, social, comptable et fiscal*, Paris, Litec, 1993.Stiff oposition put an early end to the French Cousté proposal: for an analysis, see Paillusseau, J. Les groupes de sociétés: analyse du droit positif français et perspectives de réforme, in: Commission Droit et Cie des Affaires, Univ Liège, Les groupes de sociétés, Nijhoff, The Hague, 1973, 139.

83 EBKE made a call for a private codification of company law: W.F. EBKE, „Company Law and the European Union: Centralized versus Decentralized Lawmaking“, *The International Lawyer* 1997, 961–986.

84 See the observations by LUTTER fn. 20, *ZGR*, 2000, 1.

85 See e.g. FLEISCHER, H., ‚Grundfragen der ökonomischen Theorie im Gesellschafts- und Kapitalsmarktrecht‘, *ZGR*, 2001, 1

86 This observation was already made in 1988 by HOPT, fn. 4.

87 See the special company law rules developed in legislation supporting specific economic sectors e.g. in the textile production sector, see: SCHRANS, G. ‚De invoering van non-voting shares in de textielsector. Een regeling van economisch privaatrecht‘, *Liber Amicorum Frédéric Dumon*, Kluwer, Antwerpen, 1983, 1386 p.

88 Several states, such as Luxembourg, introduced co-decision under economic pressure.

protect companies against foreign take-overs[89], to combat the „fraudulent use“ of companies[90]; and more in general to pursue their domestic economic policies. This centrifugal movement has gone along with a lack of further support for the pursuit of more harmonisation by the European authorities. As few new perspectives for further harmonisation were coming forward from Brussels, the momentum was lost, and defeatism set in, even the staunchest defenders of a European company law becoming disheartened. The accession of additional member states also can be mentioned as a factor of dilution of the „acquis harmonisé“.

15 In all of these debates, a fundamental question should be put on the agenda again and again: what do companies in Europe need in terms of company law? What is therefore the purpose of the harmonisation effort? Has this purpose received an adequate answer in the past harmonisation activities?

From a general point of view, the purpose of harmonising company law is to ensure that companies can establish themselves all over the Union, thereby creating a „common market“ for their products and services. Companies should be able to achieve this objective in a maximally flexible way, without any handicaps or restrictions due to the cross border nature of their establishment, and at a minimal expense. In an ideal European area, it should be as easy to do business in another state, as it is today to do business in another province, département, Land, or county.

In practice this objective has not been achieved: one sees that multinational groups do not establish themselves directly, as the same legal person, in the other members states, but most of the time prefer to create separate subsidiaries, thereby incurring considerable initial and recurring expenses, but also without taking advantage of any of the purported benefits of company law harmonisation. Company law harmonisation has obviously not obviated the need for the setting up of intricate networks of separate legal entities, with all the rigidities and costs that this choice ensues. Although companies in general have been very enthusiast for the harmonisation of company law, it is doubtful whether they reaped all the benefits that could have flown from the harmonisation as it has been conceived. In fact companies have been behaving rationally: anecdotal evidence reveals that establishing a subsidiary is much more expeditious, less costly, and less burdensome than establishing a branch.

89 One could mention the Belgian law of 3 March 1989 and the RD 8 November 1989; later the L. 1991.

90 See the Dutch anti-abuse laws: the law of 4 June 1981 (Stb. 370), the law of 21 May 1986 (Stb. 276) and the law of 16 May 1986 (Stb. 275).

As a consequence European companies incur significant handicaps in terms of costs, complexity and risks. A striking comparison can be drawn with the American situation: companies obviously encounter very little resistance for branching in other states. No need to organise separate entities, with separate boards, with complex rules on group law, with separate disclosure and accounting rules, etc. The proposal for a European company might do away with some of these handicaps, but not with the need for registering and maintaining branches, nor with the considerable tax disincentives.

16 The motives for companies choosing to establish themselves under the form of a subsidiary – rather than as a branch – are numerous, and often very specific. No empirical research on this topic is known to us. Legal restrictions or impediments on establishment are a first one. The 11th directive may have „harmonised" the conditions for establishing branches in other states, the remaining obligations are still important, and are at least in some member states, considered a significant handicap on cross border establishment. A proposal to reform these rules will be taken up again in the context of the SLIM proposals[91].

There may be excellent reasons for maintaining subsidiaries as separate entities: the subsidiary is considered a resident of the host country where it is formed or established and therefore will be more readily accepted in contacts with local government, with the unions, etc. Also states may sometimes impose the need to adapt to local conditions: the „general good exception", although applicable also in the company law field[92], has however remained rare to non-existent. The need to associate local partners and not to appear as a foreign company may motivate the choice for a subsidiary. Often the subsidiary was pre-existent to the inclusion in the group, and it would be more cumbersome to dismantle it, than to continue to run the business under the form of a separate legal entity. This is especially true if minority shareholders are involved. A subsidiary further offers the possibility to sell or merge the business without having to go through the cumbersome procedure of a sale of assets. There are also management reasons for maintaining separate legal entities, such as better control of charges, separate accounting and evaluation, better identifiable local management, etc. But most of these features could be achieved by a branch as well. Here, like in many other fields, taxes may play a significant role. If the foreign business is run as a subsidiary, the group can take advantage of

91 See further nr. 29.
92 See the Centros case, fn. 28.

lower taxes to which the subsidiary is subject, while the branch would be taxed at the highest rate of the home or the host country [93].

Anyhow, notwithstanding the considerable charges flowing from the existence of separate legal entities[94], most companies, even within Europe, obviously hesitate to convert their foreign activities into branches of the parent company.

One could argue that the existence of a harmonised company law in Europe is a significant advantage for cross border establishment even by way of establishing a subsidiary. The existence of more or less similar laws makes it easier to access the other legal order. The legal requirements are more or less the same; moreover specific rules (e.g. in the first directive) have been enacted to avoid risks due to the cross border nature of the company's business.

These arguments gave no response to the real needs of these companies. That the rules are comparable gives them some idea about the meaning of the rules, but does not suffice to take justified business decisions. Hence local lawyers, auditors, experts have to be contracted for. Separate charters remain necessary, to be drafted according to the national traditions. Disclosure and accounting are governed by local rules, regulations and traditions. For specific transactions, such as the flotation of additional shares, the issue of other financial instruments, the repurchase of shares, although the broad conditions of the directives give some information as to the direction in which national regulation may go, nobody will take the risk to base decisions on the approximate knowledge of a foreign legal system one may have on the basis of the mere knowledge of the directives.

To conclude this analysis: company law harmonisation has rendered company law more accessible, but falls short of yielding the benefits companies could expect to derive from it. Therefore the action should change direction.

5. Comparison with the capital market directives

17 At this stage it is useful to look at contiguous fields of harmonisation. In part these measures relate to specialised areas of regulation and are addressed to specific enterprises, such as banks, investment firms, investment funds, insurance companies and other specialised financial activities.

93 A planned directive of 6 December 1990 aimed at allowing certain types of deduction of losses of branches from the profits of the company.

94 The argument is officially mentioned as one of the reasons for introducing the European Company Law Statute.

These directives often contain rules of company law that are however exclusively addressed to firms active in financial activities.

More important as being applicable across the board are the directives and other measures dealing with the securities markets. In these, one finds numerous rules applicable to companies whose securities are traded on stock exchanges and other regulated markets. These rules have an indirect impact on the structure of these companies and govern the additional disclosures that have to be made. In addition they contain rules that apply mainly, although not essentially to the managers and other persons directing these companies, such as the insider trading rules. Special investment vehicles, often organised under company form, and usually referred to as „ucits“ should be added to the list. These directives span a period of time going from the late seventies to the early nineties. Here too, further progress has been difficult, as is evidenced by the most recent harmonisation attempt, the „take-over directive“[95].

Historically, the securities markets directives have been started later than the company law harmonisation endeavours: a useful starting point would be the Segré report, 1968. Here too, the subject has been divided in a series of detailed measures, which gave rise to a sequence of directives over a period of 20 years.

18 Originally the approach to regulation in the capital market directives was quite similar to that of the company law directives[96]. In both cases detailed regulations were enacted that would apply in each case, almost vertically. Equivalence of safeguards for investors and markets was sought by imposing identical – or almost – identical safeguards. The conditions for admission to stock exchanges would be spelled out in great detail so that companies would find an easier access to other trading floors, without however that access being guaranteed. The prospectus directives were based on the idea that as prospectus requirements would be the same in all member states, there would be no need for an additional vetting of the information if securities were floated in several member states: a single prospectus could be used and would easily be approved by the authorities in all states, as requirements would be largely identical. This approach did not work: authorities in each of the states applied their own requirements, and submitted the flotation to a new, although sometimes simplified, vet-

95 Although labelled thirteenth company law directive, it is undeniable that this directive is addressed to the companies traded on the securities markets.

96 See for an overview of the policies followed over time: WYMEERSCH, ‚The EU Directives on Financial Disclosure‘, *European Financial Services Law*, 1996, 34; also ‚L'activité de la Commission européenne en matière de valeurs mobilières‘. *Journal Droit international des affaires*, Paris, nr. 1, 1988.

ting procedure. Finally, the solution was found in the mutual recognition technique: a prospectus approved in one member state was deemed to meet the requirements in the other states. This concept reflected significant evolutions in the liberalisation of the trade in goods and services. According to „mutual recognition", securities could be offered to the public without much additional administrative procedures. In practice, restrictions often remain; member states require notification, and impose additional requirements relating to their local marketing and distribution rules. The „general good exception" allows states to limit access, or impose additional burdens. In practice, even today, it regularly happens that securities issues bypass states where the procedures would take too much time, or be too cumbersome[97]. The primary European securities market is still not fully integrated.

Historically, the 1985 UCITS directives was the first to start with the „mutual recognition" technique, at least in the field of financial regulation. Ucits, legally offered to investors in one market, could be offered in all other markets, and its internal legal organisation will be recognised as fit for investment purposes. Exceptions continue to exist as to marketing rules, and other disclosure rules[98].

Mutual recognition was later extended to prospectuses as well, first to listing and to some extent, to public offering prospectuses as well[99]. Mutual recognition, and the idea of the European passport, is one of the central key techniques in the directives on banking supervision and the regulation of investment firms. In both fields, it has been relatively successful, although restrictions based on the „general good exception" remain numerous and cumbersome.

The complaints about the low level of integration in the European securities markets are in part due to these different restrictions. A more radical application of the mutual recognition technique could certainly help to alleviate the problem: information that has been considered satisfactory in the home market should also be considered sufficient in the other markets. This approach is nothing new: it is followed in the markets for goods and services, and has lead to a series of important ECJ cases. In the securities field, it is amazing to compare the restrictions that are imposed in the pri-

97 See for example THIEFFRY G., ‚The Case for a European Securities Commission' at the Cambridge Conference on Financial Regulation (July 2000), to be published in E. FERRAN en C GOODHART (eds.), *Regulating Financial Services and Markets in the Twenty First Century*, Oxford, Hart Publishing, 2001.

98 See art. 44 e.s. of the Ucits directive 85/611/EEC, of 20 December 1985.

99 See art. 24 a and b of the Directive 80/390: EEC of 17 March 1980; comp. the complex system in Directive 89/298/EEC of 17 April 1989.

mary market, when securities are offered to the public, and the lack of comparable „safeguards“ in the secondary market, when securities are offered for sale on the stock exchange. A policy of unrelenting mutual recognition would moreover increase the competition between systems. However, Europe remains afraid of regulatory competition, and prefers central rule making. The recent Wise Men's proposal has not taken a different stand.

19 There is a striking difference between the harmonisation path followed in the company law field and that of capital market regulations. What can be learned from this difference?

Company law harmonisation has been conceived as less transaction-oriented, more focusing on the institution of the company itself. The closest similarity could be found in the Ucits directive, where harmonisation has been achieved by enacting detailed rules, many of which concern the organisation of the „investment fund“ itself.

The securities directives have been most successful in the area of cross border transactions: after laying down a certain mutually accepted level of minimum regulation, directives are essentially based on mutual recognition. In the field of prospectuses this feature is striking; originally, the directives mandated the same minimum information to be disclosed in all member states, mostly by way of imposing a standard schedule to be followed in the prospectus. It led to a certain uniformity in the presentation of the prospectuses, today largely overtaken by developments in the international markets.

Once that level of agreement was reached, the basis was laid for building confidence among the securities supervisors in the quality of foreign prospectuses, and more generally in each other's supervisory activity. Cross border transactions could henceforth be handled on a mutual recognition basis. But even today, supervisors sometimes complain about the standards of supervision as applied in other states, leading to some form of competition – and underbidding – between supervisors, in fact between market centres. In the meantime, the rules of the game have been set. A conclusion might be: after a confidence-inspiring, minimum level of regulation has been set, directives can adequately start dealing with cross border issues, which most directly affect European integration.

20. In the company law field too, some successful measures were adopted that directly relate to cross border transactions, especially, to cross border trade.

The first directive has had a beneficial influence on cross border trade, in the sense that it removed a number of traditional hurdles that in former times would have scared traders from dealing with unknown foreign firms.

This directive contains valuable rules on which the build up of the confidence process among business firms trading on a Europe wide scale could be established. So e.g. is there no further need to check the powers of representation that have been granted to company organs, nor is any fear justified that companies would back out of transactions on that basis that the deal was „ultra vires", or that the company would be annulled for some obscure reason. The initial disclosures to be made on establishing the firm, but, equally important, the obligation to disclose annual accounts were also mapped out in this directive.

At the other end of the spectrum, directives have been enacted that could only with some imagination be positioned in a perspective of securing cross boarder relations: this observation applies especially to the third and sixth directives relating to mergers, and to the division of companies. Here the link with cross border transactions and the liberalisation of the European internal markets is rather remote: as already mentioned, it was mainly because these directives were considered stepping stones for a later, and still not adopted directive – or other measure – on cross border mergers that the third and sixth directives could find a justification.

For the future development of company law in Europe there may be good reasons for looking more closely at the cross border content of the measures to be proposed. In some cases, it will be quite obvious: cross border disclosures, establishment of branches, exercise of voting rights and other shareholder privileges, cross border take-overs. More intricate subjects are the traditional themes of „transfer of the seat" „cross border mergers and transfer of business firms". In some of these fields, „mutual recognition", as an efficient and widely accepted standard for European regulation could play a useful role.

6. The role of competition

21 Company law is a far from static body: it is constantly in evolution, whether by subsequent changes in the statutes, by new rules or regulations imposed from different other sources, or by the mere business practice as developed in the securities markets. As a consequence, company law today is substantially different from what it was in the sixties when the original harmonisation plans were mapped out.

Harmonisation has not prevented governments from enacting new provisions. Often these new rules concerned exactly the field in which harmonisation was forthcoming. This move could sometimes be seen as a preemptive strike, or as a lever to have a bigger say in the harmonisation negotiations, but it often was a response to an urgent need as directives usually required a very long preparation time.

Numerous changes in the national company statutes have been brought about by independent forces, as a response to specific needs that were not tackled by any planned directive provision. In the Netherlands, e.g. there has been considerable debate on the „abuse of the company form", especially to defraud creditors[100]. Several laws have been adopted to combat this type of fraud, a subject on which the Community was not planning to undertake any action. Similar cases could be mentioned in the field of anti-take-over protections[101].

22 Company law is increasingly governed by other sources of regulation, including self-regulation. The listing conditions of some stock exchanges have constituted major sources of law, especially in the UK[102]. But official recommendations [103], or even the recommendation practice of market supervisors, such as the Belgian Banking and Finance Commission, the French Cob, or the Italian Consob constitute new sources of company law. The corporate governance recommendations, originating from diverse legal sources, still have considerable influence on business practice.

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100 This subject is linked to the incorporation theory, as followed in the Netherlands. The Dutch law on „pseudo foreign corporations" was adopted in 1998 (L. 17 December 1997, applicably to companies that exercise all or almost all of their business activities in the Netherlands and have no real link with the state in which they have been incorporated). See further: VAN SOLINGE, (1999) *Ondernemingsrecht*, at p. 117 and SCHUTTE-VEENSTRA, (1999) *Ondernemingsrecht*, at p. 227, deeming this law incompatible with the Treaty provisions.

101 On the subject in general see: K. GEENS and J.M.M. MAEIJER, *Defensive measures against Hostile Takeovers in the Common Market*, Dordrecht, Nijhoff, 1990, 230 p. In French law: A. VIANDIER, *OPA, OPE et garantie de cours*, 1999, n° 320, p. 57 e.s. and 320, 339; FLEURIET and ALLAN, *Les OPA en France*, 1991, p. 111 e.s.; G. BARSI, ‚Les OPA en France', *Droit et pratique*, 1988, 113 e.s.; TH. BONNEAU and L. FAUGÉROLAS, *Les offres publiques*, 1999, 91 e.s. Also: COURET, HIRIGOYEN ET CABY, *Les OPA*, 1992, AGNELET, Viarnaud GEOFFROY, *OPA et stratégie anti-OPA: une approche internationale*, 1989; LOYETTE ET GIDE, *Les offres publiques d'achat, étude juridique des OPA et des OPE*, 1971; in German law: K.J. HOPT, Präventivmassnahmen zur Abwehr von Übernahme- und Beteiligungsversuchen, FS Heinsius, *W.M.* 1991, Sonderheft, Sept. 1991, 22.and comp. the later developments under the KonTraG, HOMMELHOFF, P., ‚Corporate Governance nach dem KonTraG', *AG*, 1998, 249–259; in Belgium, the changes in the companies act of 1991 were already a reaction to the 1989 take-over attempt on the Société générale de Belgique.

102 See for one example that is significant in matters of group law: WYMEERSCH, ‚Comment le droit pourrait aborder certains groupes de sociétés', in *Mélanges offerts à Pierre Van Ommeslaghe*, Bruylant, 2000, 703–729.

103 E.g. in the field of corporate governance, where market supervisors, stock exchanges, employers' committees, mixed groups of business interests, or university professors have been at the basis of practice rules.

Finally, company law is real life: therefore traditions, techniques, path dependence, but also market practice are significant ingredients of the developments of company law. This becomes increasingly visible as far as the influence of international practice is concerned: prospectuses in Europe, even for domestic securities issues, correspond increasingly to international practice, which is more and more inspired by American practice. Its increasing concern with liability – and thus an interest for disclaimers – can be used as a yardstick for this evolution. The markets serve as the transmission belt, the underwriting banks, the lawyers and auditors as the engines behind this example of advancing globalisation.

23 Analysing the numerous effects of competition on company law, several levels of reasoning must be distinguished. These also correspond to different levels of organisation.

For the large, stock exchange listed companies, competition means that adhesion to „generally accepted principles for listed companies" is an essential condition to be able to access the markets and to obtain financing at internationally acceptable conditions. For these companies, competition will lead to equalising the applicable rules and norms, thereby often exceeding the minimum standards that have been laid down in the state's regulations, including the harmonisation directives. Examples abound, pointing to both stricter regulation and lowering existing restrictions: the use of IAS[104], the use of share buy-backs, the spreading of corporate governance recommendations are a few examples of fields where the directives either did not offer any guidelines, or fell short of taking into account recent developments in international business practice, but were nevertheless governed by market practices.

For unlisted firms, competition may be less powerful, less visible but is equally present: firms emigrate to obtain a more favourable treatment, whether for taxes, but also for applicable company law. So e.g. are Dutch BV's very much praised in business practice because the applicable company law regime is very flexible, and the tax status predictable. Belgian businesses go to the Netherlands to create „administratiekantoren", a technique comparable to voting trusts, to avoid losing control of the company, even after the shares have been sold to third parties[105].

The Centros case illustrates the strength of the competition argument at the level of incorporation. It involved Danish citizens, setting up a private

104 See: VAN DER TAS, ‚Internationale jaarrekingsregels veroveren Nederland', *Ondernemingsrecht*, 2000, 372.

105 This technique continued to be practised even after the Belgian law, in competition with its Dutch neighbour, introduced a similar technique, which was however technically inferior.

company limited with a minimum capital of £ 100. This is permissible in the UK because the second directive has not imposed a minimum capital to private companies limited. The company, named Centros ltd, exercised no business activity in the UK: it applied for registration in Denmark, which was refused on the basis that it would have to meet Danish standards on minimum capital, purportedly an essential safeguard for the protection of Danish creditors. Upon reference to the ECJ, the Court held that the treaty rules on freedom of establishment did not prevent a company that was lawfully formed under the jurisdiction of one member state to establish itself in another state. The latter state may not impose additional requirements except on the basis of the general good exception. The lower degree of creditor protection, due to the minimum legal capital, was not considered a sufficient reason for barring access on that ground, as branches of UK firms, with an equally low capital, could lawfully trade in Denmark.

Although the real meaning of the case is still controversial, awaiting further cases to be decided by the Court, there have been several voices stating that Centros introduced a new era of competition between company law systems in the Union[106]. Some have even gone so far as to state that

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106 Among the numerous comments, only a few ones can be mentioned here: LEIBLE, *NZG*, 1999, at p. 298 and 302; ROTH, ‚Gründungstheorie: Ist der Damm gebrochen?‘, *ZIP*, 1999, at p. 861; ULMER, „Schutzinstrumente gegen die Gefahren aus der Geschäftstätigkeit inländischer Zweigniederlassungen von Kapitalgesellschaften mit fiktivem Auslandssitz“, *JZ* 1999, 662; E. WERLAUFF, „Centros aus dänischer Sicht“, *ZIP* 1999, 867; DE WULF, ‚Brievenbusvennootschappen, vrij vestigingsrecht en werkelijke zetelleer‘ (1999) *Vennootschap en Fiscaliteit*, 3; DE WULF, ‚Centros: vrijheid van vestiging zonder race to the bottom (1999) *Ondernemingsrecht*, 321; WYMEERSCH, ‚Centros: a Landmark Decision in European Company Law‘ in TH. BAUMS, K.J. HOPT & N. HORN (eds.), *Corporations, Capital Markets and Business in the law*, Kluwer Law international 1, 2000, 629; SANDROCK, ‚Centros, ein Etappensieg für die Überlagerungstheorie‘ (1999) *ZGR*, 732; EBKE, ‚Das Centros-Urteil des EUGH und seine Relevanz für das deutsche Internationale Gesellschaftsrecht‘ (1999) *JZ*, 656; J. SEDEMUND/F.L.HAUSMANN, note in *Betriebsberater* 1999, 810; W. MEILICKE, note in *Der Betrieb* 1999, 627; H.W. Neye, Kurzkommentar in *EwiR* 1999, 259; J.C. CASACANTE, note in *RIW* 1999, 450; R. FREITAG, „Der Wettbewerb der Rechtsordnungen im internationalen Gesellschaftsrecht“ *EuZW* 1999, 269; B. HÖFLING, „Die Centros-Entscheidung des EuGH – auf dem Weg zu einer Überlagerungstheorie für Europa“, *Der Betrieb* 1999, 1206; P. KINDLER, „Niederlassungsfreiheit für Scheinauslandgesellschaften?“, *NJW* 1999, 1993; J.-P. DOM, „Société à l'étranger et succursale chez soi: le *law shopping* communautaire“, *Bull. Joly soc.* 1999, 708; DEGUÉE, „„Forum Shopping“, usage ou abus de la liberté d'établissement‘, *Rev.pratique des scoiétés*, 2000, 42, CERIONI, L., ‚A Possible Turning Point in the Development of EC Company Law: The Centros Case‘, *ICCLJ*, 2000, 2, p. 165; M. MENJUCQ, ‚Transfert international de siège social: état du droit positif‘, *J.C.P.*, E., 1999 n° 41, p. 1617; MICHELER, ‚The impact of the Centros case on European company laws‘, *Co. Law*, 2000, 21, 179;

the case would give preference to the incorporation theory over the seat theory, and that therefore even according to the present state of legislation, companies could transfer their seat without losing the benefit of their legal personality. These points will not be argued here.

24 From the viewpoint of the creation of a European company law, Centros contains several lessons that are worthwhile to be considered.

By recognising that companies can enjoy freedom of establishment even if they have only nominally been established in one of the member states, Centros leads to introducing competition between company law systems and even between legal orders within Europe. The founders of a company can go shopping for the lowest price. Theoretically at least, legal systems with more flexible, less demanding requirements will therefore attract more companies. This creates incentives to the formation of new business ventures. The flexibility of a legal system reduces the cost of financing, as parties may choose for the most efficient structure.

Other legal systems will feel unhappy about this form of competition that drives away their own entrepreneurs to foreign incorporation. Hence these regulators could follow several courses of action. Some are pleading for extending harmonisation, by introducing at least minimum standards so as to avoid „unhealthy" competition to go on. The first requests for extending the Second company law directive to the private companies limited have been heard shortly after the Centros case was delivered[107]. By so doing these proposals would further restrict competition between the systems, unhealthy for the future development of company law.

Harmonisation appears here as an instrument that reduces the impact of competition between legal systems. It is increasingly challenged by pressure from the securities markets

25 Another approach would be to adapt to competition, and offer an even lower price. This would result in the much dreaded „race to the bottom", whereby legal systems underbid each other[108]. There are clear examples of this phenomenon, the most famous one being the withholding tax on interest income from securities and other financial assets. In that field, competition has lead to a zero taxation, several member states being a tax para-

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XANTHAKI, ‚Centros: is this really the end for the theory of the siege reel?', *Co. Law*, 2000, 22, 2; OMAR, ‚Centros revisited: assessing the impact on corporate organization in Europe', *International Company and Commercial Law Review*, 11, 2000, 407; LOOIJESTIJN-CLEARIE, ‚Centros Ltd – A complete U-turn in the Right of Establishment for Companies', *ICLQ*, 2000.

107 LUTTER, fn. 20, *ZGR*, 2000, at 20; HIRTE mentioned supra fn 19

108 The „race to the bottom" argument was developed by CARY and EISENBERG in *Corporations, cases and materials* (7th edition) at p. 125.

dise for the tax payers of its neighbouring state, but not for its own residents.

In company law, the American case of Delaware is often mentioned: according to some, Delaware is offering the lowest threshold to incorporation, and therefore is most successful in attracting companies, especially the largest ones. Many leading scholars have strongly contested that Delaware is using a lower standard in company law matters: other states have tried to compete with an identical statutes, but were not successful. Empirical research shows that the preference for Delaware as a place for incorporation is due to the superior character of Delaware law, including the generally recognised high quality of its case law, – product of the most sophisticated judiciary in these matters and a highly specialised bar – that sets the standards for corporate law all over the United States, and is highly regarded world-wide. More likely than a race for laxity, there is a race for excellence going on: otherwise the securities markets would have imposed a financial penalty on companies choosing a less reliable legal system[109].

In Europe, to some extent, one could apply the same argument; different however is that in most states, company law contains less enabling, more mandatory provisions than is the case in US corporate law, while in some states, especially in Germany, the law on corporations (AGs) is regarded as almost entirely mandatory[110]. Competition between the systems most clearly affects the listed companies: here again the American situation is different as many more companies are listed, or traded in the public markets, which is still exceptional in Europe.

Also for unlisted companies, charter competition will exercise less influence than in the US: differences in language, legal tradition and familiarity with the systems will prevent shareholders to shop around, except for the very simplest forms, like the UK private company limited, or for very specific features such as the availability of strong anti-take-over measures[111], particular governance features, e.g. the availability of a two tier board, or the permissible use of bearer shares.

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109 The arguments in support of the competitive position of Delaware have been analysed by ROMANO, *The Genius of American Corporate Law* (1993); idem: ‚The State Competition Debate in Corporate Law‘ (1987) 8 *Cardozo L.R.*, 709.

110 See about the subject, the comparative studies published in LUTTER and WIEDEMANN (eds) ‚Gestaltungsfreiheit im Gesellschaftsrecht‘, in *ZGR*, Sonderheft 13, 1998.

111 See for the Gucci decisions: Ondernemingskamer 3 and 4 March 1999, *TWS* 1999, 246–250, note S.M. BARTMAN, 246–250, and CA Amsterdam 27 May 1999, *Bull. Joly Bourse* 1999, 375–392, nt. D. SCHMIDT, *Bull. Joly Sociétés* 1999, 874–878, nt. SCHMIDT, and comments S.M. BARTMAN, „De rol van de ondernemingskamer bij overnamegeschillen“, *TVVS* 1999, 138–v141; HR 27 September 2000,

One can assume that except for these particular purposes, differences in company law at present have, statistically at least, no significant effect on the choice for a specific place of incorporation. Differently form the U.S., there are in Europe no empirical studies on the effect of company law on the market for „corporate charters“. This is a subject that calls for further research.

26 The relationship between harmonisation and competition is a complex one that deserves to be further explored. Theoretically at least, the more harmonisation, the less room there will be for competition: while harmonisation is likely to stifle competition, increased competition does not necessarily lead to less harmonisation, as the market will drive to more optimal forms of business organisation, and therefore to more uniform regulations[112]. The drive to more uniform rules will flow from several sources: legislators are prevented from imposing rules or offering models that are clearly more burdensome than those applicable in their neighbouring states, companies will be restricted in their choices under the influence of the securities markets, while the lenders will calculate an additional risk premium if confronted with un-transparent, or even unfamiliar corporate structures.

The paradox could be described as follows: the more mandated harmonisation, the less competition, the more effective competition, the more harmonisation through the market.

27 From the viewpoint of the European harmonisation, the foregoing analysis would lead to the idea that the priorities of the harmonisation programme should focus not so much on substantive company law issues, as was the case in the past, but on those techniques that contribute to the competition between the legal systems. From that perspective, the subject matters on the harmonisation shopping list can be easily defined: highest on the priority list are those measures that stifle cross boarder competition, especially because there are no rules, or no clear rules on the cross border aspects of the subject. Resistance of the member states to accept cross border competition should be overcome: the market for corporate charters, like for any other product or services in the Union, should not remain protected against the Union's liberalisation measures. The role of the harmonisation directives should therefore be to find solutions to the impediments and strive to abolish these restrictions.

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http://www.rechtspraak.nl/hoge_raad; see also the availability of Foundations or Stiftungen for private purposes, see the forthcoming studies edited by HOPT, to be published in EBOR.

112 For some of these ideas see WYMEERSCH, ‚Veränderungen im Gesellschaftsrecht, Ursachen und Entwicklungslinien‘, *ZGR*, 2001, to be published.

To be more concrete, the fields in which action is called for with the highest priority are all dealing with the cross border aspects of the law or regulations.

By introducing clear guidelines for the cross border transfer of the seat, the possibility for companies to choose for the most optimal business form will be increased. Regulators that maintain unduly restrictive requirements will suffer by losing their regulated population, and thus see their economic function threatened.

Cross border mergers will have a similar effect: by not allowing for a community-wide policy for these transactions, the markets remain fragmented. Some member states remain outside the movement, leading to less than economically optimal solutions. In fact these transactions are taking place: not so much in terms of full mergers, but of – probably less efficient – financial mergers, with the co-determination issues sorted out in an individually negotiated manner [113].

Directly linked is the need to allow for bi-national horizontal groups: the absence of an adapted framework, in derogation of some of the rules of the existing directives, has been a factor of weakness in setting up these groups, that aim at realising a real „merger between equals“[114].

The establishment of branches should be greatly facilitated. Apart form tax measures, which are beyond the scope of the present paper, the 11th directive should be fundamentally reviewed. A new directive should start from the proposition that the establishment of a branch would not trigger any additional obligation. There should be no additional registration at the local registry, nor any additional disclosure to be made, as disclosures have already been made at the registry of the head office. The SLIM working party made some specific proposals on that point. A slight concession should be made for the use of language: appropriate translation of com-

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113 On these bi-national horizontal groups, see K. BYTTEBIER and A. VERROKEN, „Grensoverschrijdende ondernemingsamenwerking“, *Studiecentrum Ondernemingsgroepen* 1994, 515 p.; also in English by the same authors: *Structuring international cooperation between enterprises,* London, Graham and TROTMAN, 1995; on the in the meantime fully integrated group Dexia, see K. BYTTEBIER and A. VERROKEN, „De binationale, horizontale groep Gemeentekrediet – Crédit local de France (Dexia)“, *Vennootschapsrecht en Fiscaliteit* 1997, 243 en 401; an equally complex schema was used in the Daimler-Chrysler case Th. BAUMS, „Transnational quasi-mergers in German corporate law: The Daimler-Chrysler case“, *TVVS* 1998, 217. More recently the Aventis deal (ex Hoechst-Rhône-Poulenc).

114 See on that issue: WYMEERSCH, Some aspects of Cross border co-operation between business enterprises, Cologne Colloquium 2000, in HORN (ed) *Cross Border Cooperation,* to be published.

pany disclosures should be secured for those companies that engage, not only in cross border establishment, but also in cross border trade.

The exercise of voting rights on a cross border basis should also be facilitated to increase the competition in the securities market, allowing institutional investors to take part in the voting process and indirectly stimulate the corporate governance debate. In fact this issue should be broadened to the entire functioning of the general meeting.

Companies that are listed are held to substantial obligations in terms of financial disclosure. Here also the basic idea would be that what is good for the home or principal market where the securities are traded, will be sufficient for all other markets. No additional disclosures or procedures should be necessary: trading facilities for listed companies should be widely opened[115]. In case of multi-state securities offerings, only one supervisory body should be involved, and disclosures made under the regime of that supervisor will suffice for having the securities offered all over the Community. The same should apply for all subsequent disclosures.

The Statute for a European Company, to be analysed hereafter, offers solutions to several of the issues mentioned above. The scope of the ideas underlying the Statute should be broadened to all types of companies. Only then will the internal market for companies really be opened up.

7. *Recent Trends and Proposals*

28 Recently a certain number of significant developments have taken place in the fields of harmonisation of company law. Some of these go into the direction that has been highlighted above. Therefore it is useful to examine some of these evolutions somewhat more in detail.

1. The Simpler legislation for the Internal Market initiative (SLIM) (1999).
2. The European Company Statute (2001)
3. The Proposal for de 14th company law directive (1988)
4. The 2001 Action plan of the Commission

115 Provided sufficient disclosure is insured and links between markets facilitate arbitrage.

7.1 The Simpler legislation for the Internal Market initiative (SLIM) (1999)

Introduction

29 The SLIM action (Simpler legislation for the Single Market) is the result of an initiative of the Commission, taken in May 1996, aimed at analysing the fields in which the legislation relating to the internal market can be simplified. In several previous stages of the project diverse fields of legislation have been scrutinised, including, insurance regulations, social security, and diplomas, ornamental plants, dangerous goods and many others. By choosing the subject for a SLIM action, the Commission takes into consideration the fear that the legislation might impose excessive administrative burdens on business as a result of over-complexity, while the SLIM methodology would bring added value.[116]

The ambit of the working party's assignment that proposed the report was limited to the First and the Second Company Law Directives. Its mandate concerned only the simplification of the directives, not a complete overhaul, nor proposals to render the system more efficient but more complex. Nor was it the party's mandate to propose alternative systems, or draft provisions for later directives[117].

1. The First Company Law Directive and the disclosure policy

30 This directive contains, apart form a number of important legal principles (representation of the company, no ultra vires doctrine, nullity of the company) organisational rules dealing with the disclosures that companies have to make upon formation, or later during their existence (annual accounts and other information). At the time the directive was conceived, these disclosures were organised at the local commercial registries. In some states the information was centralised (e.g. in the United Kingdom). Filing procedures are quite different: in some states, almost no supervision is exercised, while in other states the court has to authenticate the document, while in some this type of vetting is one of the essential moments in

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116 See for further details about the Commission policies, Simpler Legislation for the Single Market (SLIM) Extension to a Fourth Phase, SEC (1998) 1944, dated 16 November 1998.

117 See for the report of the SLIM working party: www.law.rug.ac.be/fli/WP/ WYMEERSCH: ‚European Company Law: The „Simpler Legislation for the Internal Market" (SLIM) – Initiative of the EU Commission', *Nordisk Tidsskrift*, November 2000/2, 126–134 for a critical analysis: SCHUTTE VEENSTRA and GEPKEN-JAGER, New Directions In European Company Law, *Onderneminsgrecht* 1999, 271.

the supervision of the validity of the documents filed and of the transaction itself.

In several member states, the systems of disclosure have been greatly modernised, especially by the use of modern data systems. Although in most states the initial information is still transmitted and filed in writing, there is a possibility, or an obligation to file the information in electronic form as well. In some states this filing takes place through telecommunication lines, in others by way of a diskette, often after the original document has been scanned.

Dissemination of the information is often made available in printed form: this is relatively to very expensive, cumbersome, and not very efficient. Electronic dissemination by or at the commercial registry has been introduced in several states[118].

There is a clear need not only to update the directive in this respect, especially to allow more broadly for the use of electronic processing and dissemination, but also to conceive anew the organisation of the information facilities in the internal market.

31 At present the disclosure takes place at the local registry where the company is located or where it has its registered office. If the company has established branches in other states, the information, often translated, has to be filed at the registry in that state as well. The information to be filed at these „branch" registries is detailed in the 11th company law directive of December 21, 1989: although less voluminous than the one filed at the main, home state registry, it is nevertheless still substantial. Moreover, administrative requirements such as the obligation to have the documents translated by an official translator, or to have them checked and authenticated by the tribunal, constitute cumbersome and expensive procedures. After some time, it is expected that all company documents to be officially published will be made available in electronic form, and if possible will be filed at the registry in the same format. Whether parts of the original, such as the charter, or the list of company representatives, would still have to be a printed is left to the member states.

The SLIM working party proposed to recommended substantial changes to the present system, mainly relying on the existing information technology, including the Internet.

Several disclosure patterns could be followed: one could simply automate the existing registries, and link these through the Internet. This pat-

118 E.g. the annual accounts of all Belgian companies with limited liability are made available i.a. under CD-rom format and widely accessible to the public.

tern is being tested in the Commercial Business Registry Project. Whether one would need a central registry, or a mere search engine for locating existing disclosures at one of the national registries, is open for discussion. A more decentralised framework could also be defended in the name of subsidiarity, whereby each company would disclose the mandated information on its own website, the role of the registry being confined to verifying whether the compulsory disclosures have effectively been made, in due time and in the right format. The role of the official registry would further include the organisation of the linkage between the websites that the individual companies themselves would make available for public consultation. The registry would facilitate access to the individual sites (a website of websites).

In both cases the information could be retrieved from the registry, or from the company's website. That would render both central and secondary or „branch" disclosures totally superfluous. Upon opening foreign branches, creditors and other stakeholders could easily refer to the disclosures made at the „home" state registry or website. Translations will be necessary: they could be prepared by the companies themselves – often better equipped than anybody else to cope with translation problems. The role of the host state registry would be to supervise the adequacy of the translation.

What information is to be disclosed would have to be determined, in general terms, at the level of the Union. But as disclosure at the home state is usually more demanding than any additional branch disclosure, the list of the 11th directive would only relate to the documents that have to be made available in translation. The states would have to supervise whether the necessary disclosures are made. This supervision would include whether the information is available in the languages of the states in which the company is operating. In addition however, companies should be free to disclose additional information, whether of a legal or commercial nature. There are good reasons to supporting this approach, as one often sees companies volunteering to disclose additional financial information. In that case, equal access to the supplementary information should be guaranteed. Markets may offer incentives to companies with a better, more efficient disclosure policy.

32 Once this approach on primary disclosure has been agreed upon, the same framework could be followed for organising financial disclosure in general. By pooling different types of disclosure on the single website of a company, one could attempt to consolidate the disclosures (prospectuses, annual report, interim disclosure, ad hoc disclosure, and others) which often repeat the same information, into one single mould, and make the entire system better integrated, more coherent, less expensive but ultimately more efficient. Indeed one can see that even today, it still is very difficult to collect the different items of disclosure that companies make available, and also to have an integrated and a historical view. Moreover companies will increasingly be faced with information originating from third parties, such as investment analysts. The website of some companies already offer interesting information on conference calls the company's directors have made with investment analysts, or to questions raised by shareholders and investors. References to reports by independent analysts would be very useful. A new approach to privileged or inside information will hence become necessary. Finally, a word can be said about the „chat corners" and the discussion forums on which information about the company is being exchanged. These may be a source of great abuse. According to some recommendations at least, it is preferable that the company would be involved in hosting these chat corners, without necessarily intervening in the discussion, but also to be able to detect in time if libellous information is being circulated[119].

The role of the supervisors would also have to adapt: it would control whether the necessary information has been put on the website, and whether this was done in due time.

2. The Second company law directive on legal capital

33 Where the First Directive mainly deals with issues of disclosure, the second directive contains very far-reaching rules of substantive law. These rules impose, as a common denominator, the requirement for companies with limited liability, to provide for a legal capital[120]. The rules are applicable to public companies limited only (of the AG or SA type), which may seem illogical as private companies limited (of the GmbH or Sàrl type) or even co-operative companies in some jurisdictions enjoy similar privileges of limitation of liability for their shareholders. The philosophy relating to the legal capital mainly originates from German legal thinking of the 1950s and 60's, and was considered the most adequate safeguard against

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119 See WYSOCKI, P.D., ‚Investor relations and Stock Message boards. Who is chatting about your company on the Web?‘ *Investors relations Quarterly*, Oct 1999; ‚Cheap talk on the Web: The determinants of Postings on Stock Messages Boards‘, http://eres.bus.umich.edu/docs/facname.html; B.A. BELL, ‚Dealing with the „Cybersmear"‘, New York J., April 19, 1999.

120 For a comprehensive comparative overview of the implementation of the Second Directive, see SCHUTTE-VEENSTRA, J.N. *Harmonisatie van het kapitaalbeschermingsrecht in de EG*, Kluwer, 1991, 348 p.

shifting the risk of trading under a regime of limited liability to the creditors. The directive is clearly „creditor-oriented".

In the meantime, the requirement for a legal capital has become the subject of criticism[121]. Some consider that the requirement has not prevented companies to fail, while the minimum capital – which has not been adapted since the 1970's – constitutes a mere optical safeguard for creditors. They further argue that American companies, and UK private companies limited function without any legal capital requirement. Creditors can be equally or even better protected by using other tools, based on financial disclosure by the debtor company, or by intervention of third parties[122].

Criticism is also being addressed to the specific rules contained in the directive. Some of these rules have been experienced as being particularly cumbersome and often unjustified. When shares of the company are actively traded, the need for external, „expert" valuations of shares being contributed to form the capital will usually serve no economic purpose: the expert rightly will conclude that the market price is the right basis of valuation. Rules aimed at the protection of shareholders by granting preferential subscription privileges often work counterproductive: the company will suffer additional expenses (e.g. underwriting fees) and loss of financial value (as a consequence of a likely discount) if the shares cannot be placed directly at the market price[123]. Share repurchases are submitted to severe restrictions by the directive: however, in today's' financial markets they play a useful rule for returning excess cash to shareholders without a negative tax impact. These transactions should then be encouraged, rather than slowed down. The rules on financial assistance – introduced at the request of the United Kingdom in the 1973 negotiations of the directive – are something like a puzzle[124]: financial assistance to a third party to acquire shares in the company does not affect the situation of the company. The transaction may affect the company if the debtor is unable to repay the loan, but this is a matter of decision by the board. There may be

121 Mainly from KÜBLER: ‚Aktienrechtsform und Unternehmenverfassung', *AG*, 1994, 141; KÜBLER, MENDELSON AND MUNDHEIM, ‚Die Kosten des rechtsökonomische Analyse des amerikanischen Erfahrungsmaterials', *AG*, 1990, 461.

122 Credit insurance, rating agencies.

123 See for an analysis of some of the practices, WYMEERSCH ‚Das Bezugsrecht der alten Aktionäre in der Europäische Gemeinschaft', *Die Aktiengesellschaft*, 1998, nr. 8, 382–393; E. FERRAN, ‚Legal Capital Rules under the Pressure of the Securities Markets – The Case for Reform, as illustrated by the UK Equity Markets', in Siena Conference, to be published.

124 See WYMEERSCH, ‚Article 23 of the second company law directive: the prohibition on financial assistance to acquire shares of the company', *Festschrift für U. Drobnig*, Mohr Siebeck, Tübingen, 1998, 725–748.

issues of conflict of interests involved, but these should then be dealt with under that heading, not by an outright prohibition. The regulation, as it now stands, prevents useful MBO's from being realised. The cost of the prohibition is considerable and, as recognised in the UK, unjustified[125].

34 The SLIM working party did not enter into the theoretical discussion whether the legal capital requirement should be maintained at all[126]. Many consider the capital requirement as a useful – although often insufficient – price to be paid for the privilege of limited liability. It also constitutes a break on frivolous formation of business enterprises with shareholders being protected against the consequences of their ill-considered plans. It finally serves as a reference point for a certain number of decisions – especially limiting distributions to the distributable net assets – see art. 15 of the directive – which helps to protect the creditors against the directors siphoning off financial substance in favour of the shareholders. Ultimately, the discussion concerning the legal capital is essentially related to the question whether company law should protect the shareholder, rather than the creditor. It is well know that American company law essentially protects the shareholder, while European company law is more aimed at protecting the creditors. Whether this balance of interests is the right one, is the subject of a fundamental debate, in which the role of corporate finance, insolvency law, but also wider societal interests, such as the interests of the employees, and of the credit institutions, come into play.

In the light of these considerations the SLIM working party reviewed only some of the provisions of the Second Directive, limiting itself to those that were considered most cumbersome in actual practice.

The items singled out can be grouped under the heading of taking better account of the influences of the securities markets. The presence of active and reliable securities markets are indeed the major factor of difference between the times the directive was framed and today.

35 The rules on and the function of „legal capital" present radically different features depending on the legal system analysed. In the US, Canada, and Australia[127], legal capital plays only a limited role: the notion of

125 See the Modern Company Law for a Competitive Economy, Company Formation and Capital Maintenance, Oct. 1999, A Consultation Document, Company Raw Reform, vol. 3.

126 The UK Company Law Review pointed out that „major creditors attach relatively little importance to the amount of a company's capital, compared with other indications of its creditworthiness; for many companies, the amount of share capital subscribed is in any case minimal" § 17.

127 FORD, AUSTIN and RAMSAY, *Ford's Principles of Corporations law*, § 20310 (Butterworths, 9th ed).

shareholders' equity, aggregating capital, surplus or reserves and other element of own funds is the criterion used for determining the position of shareholders versus creditors. Creditor protection is based, not on the notion of the capital, but on other techniques, such as covenants imposed by creditors, or rating techniques.

In Europe, as a consequence of the Second directive, but also in other jurisdictions, such as Japan, the legal capital of a company continues to play a central role, both in terms of creditor protection and for determining the relative position of the shareholders. Strict rules on capital go along with provisions on disclosure of annual accounts, even for the smaller companies. But numerous other rules are linked in one way or another to the concept of the capital as the central yardstick for creditor protection and for safeguarding the position of the shareholders and investors.

The European concept has recently been criticised in legal writing[128]. It is considered too rigid, sometimes superfluous, and counterproductive for the efficient managing of modern companies, especially of the listed ones. Part of this criticism has been taken into consideration at the level of the European Union: the SLIM working party that was commissioned for reviewing the first and second directive made a number of proposals that would reduce the relative burden of the capital provisions in the second directive. These proposals have been well received in several member states and are now the subject of further discussion at the level of the state's experts.

Whatever the outcome of these discussions, the usefulness of the legal capital itself will continue to be contested. The driving engine behind this development is once more the increasingly important role of the securities markets and the comparison with the regulation and requirements as applicable or practised in the United States. In most American jurisdictions, companies function without a legal capital, at least without this capital being a reference point for any regulation. Therefore also this debate can be situated on the background of the drive for more convergence in the regulatory requirements especially for larger companies.

It seems useful to try to develop a few of these points of criticism and attempt an evaluation of their relative value. The second directive will be followed as a guide.

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128 See KÜBLER fn. 112; E. FERRAN, fn. 124; see in that sense: L. ENRIQUES, ‚As simple as it may be: the case against the Second Company Law Directive Provisions on Legal Capital', Bologna 2000.

3. The technique of the minimum capital

36 The amount of the minimum capital, fixed at 25.000 euro is widely considered too small for offering any protection to creditors[129]. In cases of compulsory liquidation, such as bankruptcy, creditors most of the time find little relief in so small an amount of capital. Banks usually request additional guarantees, whether from the company itself, or from its shareholders. Commercial creditors increasingly use reservation of title or similar techniques. In the financial sector, the notion of capital as such is not used, but the larger notion of „own funds“ is used instead, and there the requirements are fixed in function of the company's business. If own fund requirements are imposed for firms engaged in non-financial business, the markets, both the share markets as the creditors, will determine their position in function of other criteria, among which the legal capital rarely plays any role. In addition, only the public limited companies, supposedly the largest companies, are subject to this rule, but not the private companies. This difference leads to regulatory arbitrage with is best highlighted in the Centros case[130].

This criticism may however be further refined: for small companies, the requirement of an initial capital may be a brake, not on setting up new businesses, but on shielding the businessman from shifting the risks of his business to his creditors. There is some evidence that the absence of capital is reflected in a higher propensity to become insolvent[131]. Therefore, an argument could be made for requiring an initial capital that would only be applicable to the smallest firms organised in the form of a limited liability company. The larger firms would in that hypothesis be exempted. At present the Second directive requests exactly the opposite.

4. The shares with nominal value

37 Most European states have shares with a nominal value, being the amount of the initial contribution that has, in accounting terms, been booked to the capital account. It does not necessarily reflect the shareholder's contribution. At the initial formation, the significance of this figure is doubtful, as it merely serves to determine the relative position of the shareholders. After some time it becomes misleading, as the actual value

129 Comp. Belgium (2500000 Bef or 62500 Euro), Italy (200.000.000 lire or 10.330 Euro) Germany (100.000 DEM or 50.000 Euro) against Netherlands (100.000DFL or 45.450 Euro) or £50.000 in the UK.

130 See Centros case, ECJ, Case C-212/97, § 35, 9 March 1999; for comments see fn. 99.

131 WYMEERSCH, ‚Kritische benadering en synthese van de besproken vennootschappen‘, in *Miskende vennootschapsvormen*, Kluwer, 1991; at 170.

of the shares has no relationship with the nominal value. Stating the nominal value confers the wrong message: at some time in the past the market prices on some stock exchanges were quoted in percentages of the original nominal value. This confusing technique has happily been abandoned.

The directive allows shares without nominal value: here the concept of nominal value is not stated in the company's charter but is the result of a calculation, dividing the nominal capital by the number of shares issued. This figure is not disclosed, so that it cannot be considered misleading. But the actual meaning of the „accountable par" is far from clear.

In both cases there are considerable problems of a technical nature: when additional shares have to be issued, these cannot be sold under the nominal value, [132] or under the „accountable par". If due to a fall in market price the new shares have to be placed under the nominal value, the said prohibition would request that the capital first be reduced, exposing the company to claims from creditors to be paid right away[133]. The regime is less stringent with shares with an accountable par, depending on the states that have introduced that technique[134].

The situation becomes more complicated if the voting rights attached to the shares are linked to the capital contribution these shares represent, as is the case in some statutes. Here it has been argued – and whether that argument convinces is beyond the ambit of the present paper – that the voting rights remain fixed, once and for all, in relation to the proportion the share represents in the capital. In case of an issue of shares at a price above the initial capital contribution, or of an issue under the par value, the rule would lead to recognising different voting rights depending on the contribution of each share to the capital.

The discussion on the usefulness of nominal value and accounting par value as legal techniques was also put on the agenda of the SLIM working party, but due to time constraints, these items had to be postponed for further analysis.

The technique followed in other legal systems is much simpler: the shares are valued, irrespective of their contribution to the capital, in terms of a percentage of the overall value of the company. Each share representing a certain percentage of the company, the price at which additional shares could be floated will be used as a basis for calculating the market value of the company, divided by the number of shares. Voting rights will

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132 Art. 8 (1) of the Second directive.

133 According to art. 32, Second directive.

134 E.g. Belgium, art. 606 2° (ex art. 33 bis, § 6) Companies Code; Luxembourg, art 26-5, L. 10 August 1915; France: art. 225-128 Companies Code.

be equal, unless the law allows derogating from the one share, one vote rule. In that case, the charter provision will determine the number of shares, irrespective of any reference to the capital.

5. Pre-emptive rights

38 Pre-emptive rights give present shareholders a preference for acquiring newly issued shares. This is useful if – as is often the case – the new shares are issued at a discount v.à.v. market value, as otherwise the financial value of their shares would be diluted. Significant shareholders also have an interest to be first offered the shares: they will be able to maintain their relative position in the company. In theory at least, controlling shareholders could take a more distant attitude: as they can decide whether new shares will be issued, they could in any case influence to whom the shares would be offered for subscription.
In today's financial markets, the attitude taken towards pre-emptive rights is rather differentiated. If the shares are issued to institutional investors, in a block, at full market value, there is not need to protect the investors, as there will be no dilution. If the shares are issued at a discount, or if there is no readily available market price, there are good reasons for applying pre-emptive rights.

The SLIM working party proposed to simplify the rules on pre-emptive rights, and render issues by listed companies possible at full market value without having to apply the expensive and cumbersome procedures of the pre-emptive offering of securities.

6. Valuation by experts

39 The directive provides that contributions in kind should be valued by an independent expert: this expert shall value the contribution and „state whether the values arrived at... correspond at least to the number and nominal value, of where there is no nominal value, to the accountable par and where appropriate, to the premium on the shares to be issued for them“[135]. This independent third party valuation constitutes a safeguard against the founding shareholders inflating the value of their contribution, to the detriment of the creditors. The procedure is cumbersome, and expensive.

135 See art. 10, Second directive.

Apart from the theoretical argument whether any valuation of the contribution will protect creditors[136], it has often been argued that in some cases these expert valuations add no value to the formation process, and therefore should be abandoned. This is especially the case if the assets contributed have been fully and effectively valued at regular market prices. In case of listed or regularly traded securities being contributed, one could be doubtful of any expert valuation that would arrive at a figure different from the one appearing from the market price. Therefore it has been proposed to do away with the expert valuation requirement if the assets can be valued on the basis of a price as determined in liquid and regularly functioning markets. This point is of special importance in case of share for share take-over bids, when a listed company offers its shares in exchange for the target's shares.

The rationale of the rule could be extended to other cases, when assets are valued at their market price, e.g. in the accounts of a company. Contribution of these assets would not necessarily call for an additional valuation, if the accounting valuation is reflecting their fair value and has been regularly audited. It might be useful to check to what extent this simplified valuation requirement would converge with the IAS valuation rules.

The SLIM working party formulated a proposal in the stated sense: if assets have been valued in a recent financial statement of a company, is there a reason for proceeding to an additional expert valuation if these assets are being contributed, provided the valuation has been effected in the same perspective?"[137]

7. Share buy-backs

40 In today's financial markets, share buy-backs are among the standard tools for companies disposing of their excess cash, and avoid the market sanctioning the company for not returning the cash to the shareholders. In financial terms buy-backs are merely an alternative to dividends: in both cases the funds are returned to the shareholders, so as to enable them to freely diversify their risks better than any company management could ever do. Therefore, buy-backs should follow the same rules as applicable to dividends: if one adheres to the technique of legal capital, shares can be

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136 And whether that protection should not be more readily pursued by the valuation in the annual accounts.

137 SLIM Report: „no expert opinion is necessary if the assets have been the subject of an independent valuation provided that these valuation reports are sufficiently recent and reliable (e.g. not older than 3 months), these reports have been established in the same perspective of valuation and there have occurred no major changes with respect to the assets contributed".

bought back – as dividends can be distributed – up to the amount of the distributable net assets.

Traditionally the legal requirements for being authorised to repurchase own shares are very strict: the idea behind this restrictive attitude is that by repurchasing shares, the company may jeopardise the creditors' rights against the company, and indirectly annihilate the legal capital as a guarantee for creditors. However that reasoning would not apply if the maximum amount that could be used for buying back is limited to the distributable net assets, which – save for the tax consequences – could be distributed under the form of dividends as well.

As buy-backs may be contrary to equal treatment of shareholders, one has widely admitted that repurchasing on the open securities market should take account of that requirement. Unanimous consent of the shareholders could be considered as equivalent.

The SLIM working party made a proposal in that sense, mainly limited to listed companies.

8. The prohibition of „financial assistance“

41 The rules prohibiting financial assistance by a company to a shareholders or to a third party in order to enable these beneficiaries to acquire shares of the company have been introduced over Europe as a consequence of their inclusion, at the demand of he United Kingdom, in the Second directive. The rule applies to direct credit, or to guarantees given by the company for loans to purchasers of its shares.

These rules have been a drag on numerous transactions, especially management buy-outs. Lawyers have been called upon to imagine techniques to avoid the rule to be applicable: it has been reported that this practice represents a considerable sum of lawyers' income in London city. In some jurisdictions, apart from the nullity of the transactions, the rule is enforced even by criminal sanctions. Banks are very loath to engage in transactions that might come close to a violation of this provision.

The rule is amazing in many respects: if the board would be granting a loan to an insolvent debtor, this might constitute a breach of its duty of care but the loans itself would not be prohibited. If the debtor of the loan is solvent, there is no reason for prohibiting the beneficiary acquiring shares. Does it make difference if he substitutes own funds with moneys obtained from the company?

If the beneficiary of the loan would be a director of the company, there is reason to apply the rules on conflicts on interest, if any. But according to the prevailing regulation, the prohibition applies even if the directors of the company are acting in perfect good faith, or without any conflicting interest.

If the funds were distributed by way of a dividend or a share buy-back, there would be no objection. Why then deal with loans more harshly, the more as these maintain the creditors' asset base?

42 The attitude of the EU member states towards this prohibition is quite diverse. Some states apply the prohibition to all companies, both public and private. Other states limit the rule to public companies limited, and fully or partially exempt private companies. By converting the company into a private company, one could easily escape the prohibition. In some legislations, adhering to the creditor protection argument, the prohibition is limited to the non distributable own funds. If the company could have distributed the same funds by way of a dividend, there is – a fortiori – no reason for imposing restrictions if the funds are to be repaid by the recipient.

A more radical attitude would be to abolish the prohibition outright: it is a stump stick, attacking what may be a problem in certain cases with a remedy that is by no means proportionate to the objective. The rules on director's duties could more adequately solve this type of problems, rather than any blunt prohibition.

43 The conclusion of this overview of the issues arising under the heading of the legal capital is a relatively simple one: it is necessary to revise the rules on legal capital and to assess their relevance in terms of economic benefits or burdens. In any case a considerable simplification is necessary. A guiding thought might be that in today's financial markets the guarantees that were supposed to be derived from the rules on legal capital are largely achieved by the sanctions of the markets. But also for unlisted shares, question marks can be put to many of the strict regulations on legal capital. These questions marks however often relate more to the national implementing regulations than to the European directive.

The Commission has started discussions on the mentioned proposals and hopes to come forward, later in 2001 with amendments to the directives.

7.2 The draft proposal for a 14th Directive on the Transfer of the Seat

44 The harmonisation of the rules that govern the transfer of the seat of a company is a subject that is receiving renewed attention, especially after the ECJ took a rather liberal attitude in the Centros case. The subject was already mentioned in art. 293 (ex 220) of the Treaty, in a sense that the member states were invited, as far as was necessary, to open negotiations with respect to „the retention of legal personality in the event of transfer of their seat from one country to another".[138]

In 1993 the Commission invited the consulting firm KPMG to draw up a report on company migration[139]. This study came up with two proposals for the subject of the seat transfer, the first one making a clear choice for the incorporation theory[140] while the second proposal contained a preliminary draft directive governing the transfer without dissolution, but without touching on the controversy between the two legal theories[141]. In 1998, it was announced that the Commission would propose a draft 14[th] directive to the Council on the seat transfer. This proposal, aspects of which will be analysed hereafter, has however not yet been tabled[142].

The draft proposal for a 14[th] directive contains only a limited harmonisation: it deals only with the transfer of the „registered office" or „address as mentioned in the charter"(„siège statutaire") from one state to another, and not with the transfer of the head office which, according to the siège réel theory, would entail a change of applicable law. The latter question has on purpose been left out of the directive to avoid the insoluble controversy between the two theories. Therefore, the siège réel theory has been maintained in those states that continue to adhere to it, and its implementation has to take place according to the siège réel theory[143]. To that purpose the directive contains the provisions that the entry state may provide that the registration may be refused if the head office would not be established

138 Art 220(293): „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 48, the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between companies or firms governed by the laws of different countries;"

139 Study on Transfer of the Head office of a company from One Member State to Another, carried out by KPMG European Business Centre, Luxembourg, 1993.

140 See especially the rule according to which the „company transferring its siège réel.... shall retain its official registered address in the state of incorporation". And the applicable law will remain that of its registered address. (art 3.2 of the first proposal).

141 For comments see BELLINGWOUT, J. ‚Company migration in motion, The KPMG Report 1993', in WOUTERS and SCHNEIDER (eds) *Current Issues of Cross-Border Establishment of Companies in the European Union*, 1995, at 81.

142 It has been published in *ZGR*, 1999, 157, and in *ZIP*, 1997, 1721, along with the other reports of the Bonn Symposium on Grensüberschreitende Sitzverlegung von Gesellschaften in Europa, *ZGR*, 1999, 1–164; for a firsthand commentary, DI MARCO, G., ‚Der Vorschlag der Kommission für eine 14. Richtlinie – Stand und Perspektiven', in *ZGR*, 1999, 3.

143 SCHMIDT, K., ‚Sitzverlegungrichtlinie, Freizügigkeit und Gesellschaftspraxis', *ZGR*, 1999, at 34.

in the same state, thereby allowing the siège réel doctrine to be cast aside[144].

45 The directive would mainly address questions that apparently are procedural ones, linked to the necessary safeguards for shareholders and creditors in case of deregistration. Under present legislation, this deregistration in one state, with re-registration in another would in many states be „impossible": so e.g. does French law allow a company to deregister under the conditions determined by international treaty, but no such treaty has ever been concluded[145]. In other states it leads to the dissolution of the company in the exit state, with the need to reincorporate in the entry state. The directive would give companies the right to proceed to deregistration and re-registration and oblige national laws to introduce an appropriate procedure. In theory, a change of the said office would not affect the legal status of the company in the siège réel jurisdictions: this hinges upon the presence of the „head office" or better the „siège réel" within its territory. As it is not expected that member states will change their conflicts of law system, and that the siège réel states will all of a sudden be convinced to change to the incorporation theory, companies that want to transfer their „registered office" or „siège statutaire" in the other systems would have to maintain a schizophrenic situation: they would be bound to abide to the law of their head office, although being „registered" in another state. In practice the directive would constitute greater freedom for the companies originating in incorporation states, as these could emigrate to both incorporation and siège réel states – provided the latter willing to admit them – while the companies from siège réel states would be excluded from the benefits of the directive, as in any case the jurisdiction of the „siège réel" state would prevail.

In the published proposal it was still undecided whether the directive would only be applicable to the companies limited by shares (SA and Sàrl), as for these company law harmonisation is sufficiently advanced. This was also the wish of most of the member states.[146]

The directive introduces the principle that the member states should take all the necessary measures to allow companies to transfer their seat to another state, without affecting the legal existence of that company, nor the formation of a new legal entity. [147]

144 Art. 12, 3 of the proposal.

145 See COZIAN and VIANDIER, *Droit des sociétés*, 10th Ed., 1997, 109, n° 295 bis

146 NEYE, H.W., ‚Die Vorstellungen des Bundesregierung zum Vorschlag einer 14. Richtlinie', *ZGR*, 1999, at 14.

147 Art 3.

46 The directive contains detailed regulations on the procedure to be followed with respect to a seat transfer. This can be summarised as follows:

- the board of the company draws up a transfer plan, containing the identification to the proposed seat, the changes to be brought about in the company's charter, and new company's name and the timetable for the transfer. Special mention deserves the statement of the board about the type of co-determination to be adopted, at least when the employees were already represented in the board of the company;
- the board draws up a special report in which the consequences of the proposed transfer are explained and justified, and the consequences for shareholders and employees explained;
- both plan and report are open for inspection for all shareholders, creditors and employee representatives one month before the general meeting;
- the general meeting of shareholders will decide about the transfer, with at least a 2/3rd majority;
- provisions aiming at the protection of the shareholders that have opposed the transfer, may be enacted by the member state. One will mainly expect a withdrawal right.
- creditors will be protected by a provision that is similar to the one applicable in case of a decrease of the legal capital[148]

The seat transfer becomes effective once it has been filed at the companies' registry. This registration is subject to a communication by the registry or other competent body that the transfer has been decided in the exit state according to the applicable provisions, and that the formalities in the entry state have been complied with. The new seat can be opposed to third parties after having been duly disclosed in the entry state.

The directive contains only a partial regulation of the subject of the transfer of the seat: the essential tax rules and labour law rules – especially on co-determination – have not been included. Here the opposition in some states obviously remains very strong[149].

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148 Art. 32 of the second directive.

149 See HEINZE, M., ‚Arbeitsrechtliche Probleme bei der grenzüberschreitenden Sitzverlegung in der Europäischen Gemeinschaft', *ZGR*, 1999, 54. and HÜGER, H. ‚Steuerrechtliche Hindernisse bei der internationalen Sitzverlegung', *ZGR*, 1999, 71.

7.3 The „Societas Europeae“

47 No subject in company law has required more efforts, involved more man-hours and received more attention than the Statute for a European Company or „Societas Europaea“ (SE).

The project initially was a very ambitious one: to create a new company form that could operate without any additional formalities all over Europe.

According to the preambles to the 1970 and the 1975 proposals the SE was initially seen as an instrument for the „structural reorganisation“ of industry in Europe, „in order to ensure that the enlarged market will operate similarly to a domestic market“. This „structural reorganisation“ presupposes the possibility of combining the potential of existing undertakings in a number of Member states by rationalisation and merger,...“. The existing techniques „do not dispense with the necessity of adopting a specific national legal system to invest an economically European undertaking with the legal status essential to a commercial company“. And further: the sole solution capable of effecting both economic and legal unity of the European undertaking is.. the formation ... of companies wholly subject only to a specific legal system that is directly applicable in all Member States, thereby freeing this company form ... from any legal tie to this or that particular country“. It should also be mentioned that from the outset, no European fiscal system was envisaged, as this would constitute a discrimination against national companies, but allowance was made for setting off the losses of branches or subsidiaries.

After having been on the discussion table for more than 30 years, an agreement was finally reached at the Nice summit in December 2000 on the co-determination regime, the stumbling block that held up any agreement. It is expected that the final instrument will be approved in the summer of 2001[150].

1. The choice for a regulation

48 As the original proposal for a SE, the present one is based on article 308 (ex 235) of the Treaty. It will adopt the form of a regulation.

A regulation presents the advantages of not needing any further implementation in the national legal orders: the SE will exist by virtue of the regulation. Also being directly and equally applicable all over the Community, the SE will by and large have the same features all over Europe. Also, some disputes about the interpretation of the regulation ultimately

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150 The following analysis is based on the February 1st 2001 draft version of the Regulation and the Directive.

will have to be submitted to the European court, leading to a more uniform interpretation. These advantages are in part set off by the numerous references the regulation contains to the national law: here differences will exist both between the states, and within the state, as far as the specific rules on formation of an SE are concerned. As both domestic and European companies will have to be treated the same way, the national regulators will not be able to discriminate against the SE as far as its charter provisions are concerned[151]. There should be „no disproportionate restrictions on the formation or on the transfer of the registered office of an SE" warns the 5th recital.

2. The formation of the SE

49 The SE should essentially contain an element of cross border establishment: it will not be directly accessible to companies located in the same member states. Also there is no direct access to the SE regime[152]: only companies that have been in existence for some time will be able to take part in the formation of an SE. One could question why the SE has not been made directly accessible: this would have increased the competitive pressure on the national regulators. In fact both requirements will easily be met in practice, so that they cannot be regarded as imposing a really significant restriction.

Originally the SE was conceived as addressed to the largest companies or groups only. The access threshold in terms of minimum capital at a relatively low, although somewhat higher figure in comparison with the existing requirements: it was fixed at 120000 Euro [153]. Also the SE should necessarily be of the public company type (or SA, AG, SpA, etc. as the case may be). The name remains that of the SE.

According to the proposed regulation, there are four ways to form an SE

1. by merger of existing companies, all of which must be of the public company or SA type[154]
2. by forming a holding company, with participation of companies in whether the SA or the Sàrl form

151 See art. 9 (c) of the regulation.

152 Except for subsidiaries of an SE: art. 3(2).

153 To be compared with 100.000 euro in Germany, 10.330 euro in Italy, 62500 euro in Belgium or 37.500 euro in France.

154 The reason for limiting the procedure to public companies seems to be that the 3rd directive, on which the regulation further relies, only applied to public companies.

3. by forming a subsidiary SE by existing companies of different states, or „by other legal bodies governed by public or private law“, provided at least two of them had a subsidiary or a branch in another states[155]
4. by conversion of an existing company, provided it has a subsidiary in another member state
5. by forming a subsidiary SE by an existing SE [156]

In each case an element of national diversity is required: the merging companies, necessarily „public companies“ have to belong to different legal orders; the same applies to the constituent companies of the holding SE[157], or to the subsidiary SE, the legal status of the parents should belong to at least two different legal orders. In case of conversion, the SE should have a subsidiary in another state. The only exception is the one in which an existing SE forms another one, which will be its subsidiary.

The SE is open to certain Third State companies, along with EU companies, at least if the member state so provides [158]

3. The applicable law

50 The question of the applicable law has been the subject of much discussion. In the 1970 original statute, the company would have not been subject to the law of any of the member states. The company would in the first place be governed by the European Company Statute. Questions that were not explicitly regulated in the Statute, but were dealt with in the Statute would be decided, first according to the general principles on which the Statute was based, secondly, on the common rules or common general principles of the legal systems of the member states. Finally, questions falling outside the scope of the statute would be governed by the national law applicable to the specific case.

The prominent role played by this undefined European, at least not national, legal order was considered one of the significant features in the build-up the SE Statute. [159]. It was much applauded by the comparative law specialists a1t that time, as the dawn of a new European legal order, leading to a genuine „common European company law“. This approach has fortunately not been upheld in the later versions of the proposed SE

155 Art. 2 (3) for further details.

156 Art. 3, (2) and this may be a one-member public company.

157 These may be both public and private companies.

158 The restrictions of art. 2(5) would apply: the company should have at least its registered office in the Union, and have a real and continuous link with a member state's economy.

159 It was found in the 1970 and 1975 version of the proposed statute, but not anymore in the 1991 version.

statute: it would have been a source of confusion, and widespread insecurity. Moreover, the present approach reinforces the competition between the regulations of the member states.

According to the latest proposal, the SE shall be regarded as a public limited liability company governed by the law of the Member State in which it has its registered office. The same technique referring to the state of the registered office was already found in the EEIG Regulation of 1985. Art. 9 lists the sources of law to which reference is to be made for the application to the SE:

- first to the SE Regulation
- second: to the company's statutes to the extent expressly authorised by the regulation

or with respect to subjects not covered by the Regulation, to

(i) the national laws as adopted by member states[160] in implementation of Community measures, relating specifically to SE's and which should be in accordance with the EU directives;
(ii) the provisions of the Member State's laws which would apply to all public limited companies;
(iii) the provisions of its statutes.[161]

It is still unclear whether the national states will have to enact specific laws dealing with the SE: it seems likely that general company law will be considered applicable. Also, if a member state would enact divergent regulation, at least if more flexible for its own companies, might create a preferential treatment that might be open for criticism on the basis of an unjustified unequal treatment.

4. The application of the „real seat" doctrine

51 The SE should have its „registered office"[162] and its „head office" in the Community, and in the same Member state [163]. It will be governed by the law of the Member State where it has its registered office. In addition its registered office shall be located in the same Member state as its head

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160 And not by that member states: this would mean that still some idea of a common European company law has been maintained.

161 Art 9.

162 The traditional ambiguity about this notion is also found in the regulation: the „registered office" is in French the „siège statutaire" a not equivalent concept.

163 Art. 7. That state may impose that its SE s keep their registered office at the place of the head office, what is stricter than the normal „siège réel" rule, but already practiced in the banking directives. See Art. 6(2) Directive 2000/12 as initially introduced by the so-called BCCI-directive.

office. A member state may impose the condition that both registered office and head office be located in the same place. [164] If these conditions are not complied with, the company is exposed to compulsory dissolution and liquidation [165] The regulation therefore applies a reinforced „siège réel" technique. In practice, flexibility is achieved by allowing the seat to be transferred.

According to the Preamble, although the regulation applies the real seat doctrine, this is „without prejudice to Member states' laws and does not pre-empt choices to be made for other Community texts on company law"[166]

5. Transfer of the seat

52 The regulation contains a detailed set of rules relating to the transfer of the seat. These rules are directly inspired by the proposed 14th directive. However, as these rules probably reflect a later state of drafting, there are a few differences, e.g. with respect to the „competent authorities" being entitled to oppose a seat transfer and this in the public interest [167]

6. Substantive issues

53 The Regulation on the one hand contains a considerable number of proper rules, e.g. on the structure of the board, or the functioning of the general meeting, but also refers for further detailed provisions to the law of the member states where the company has its registered office.

Only a few of these require special mention, as being different from national traditions:

- mergers cannot be annulled once the SE has been registered[168]
- the company's choice[169] for a one or for a two-tier board[170]
- the mandatory election of the supervisory body's member by the general meeting, but the Dutch co-determination system, which is based on co-optation, could be maintained[171]. The same applies to the members of the board of directors in the one tier system.

164 Art. 7.
165 See Art. 64 for further details.
166 Recital 28.
167 Art. 8, § 14, Regulation.
168 Art 30, al. 1.
169 And not that of the member state.
170 Art 38(b).
171 On the basis of art. 47 (3).

– re-conversion from SE to a domestic public company status.[172]

7. Co-determination issues

54 This has been the stumbling block for the adoption of the Statute for at least 30 years. The compromise solution that was finally worked out in December 2000, in Nice, is based on a complex set of rules that could be briefly summarised as follows.

Upon setting up an SE, there should be defined negotiation procedures between the future employer and the future employees of the SE. This procedure is strictly limited to a period of six months, within which an agreement should be reached. If no such agreement is found, the default rules of the directive will apply.

The negotiation procedure especially calls for organising a „negotiating body" composed of the representatives of the employees of the participating companies. The directive provides for refined rules on the appointment of the members of this body, as all employees of the groups involved should be represented.

This negotiating body will work out the applicable regime of involvement of employees. This results in either a regime of information and consultation, or a stringent regime of participation. The first is not controversial and exists in all European states. The discussion involved essentially the participation regime.

With respect to participation, the basic idea is that parties should negotiate, within the limited time frame of 6 months, on the applicable participation regime, and if they fail to do so, the default rules of the directive will apply. However, the minimum floor of the already existing level of participation in the companies that are involved should be respected. [173] If negotiations would tend to reduce the participating rights there will be a 2/3rds vote in the body needed, including 2/3rds of the employee representatives[174]. A similar vote is needed to decide „not to open negotiations or to terminate negotiations already opened". [175]

The default rule allows for a minimum regime of participation: it is the highest level that existed in the participating companies before they

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172 Art 66; but one wonders what would be the effect on the co-determination rules. Idem in case of a transfer of the seat.

173 There are refined criteria in the directive as to what percentage of companies should be involved before the default regime would be applicable: e.g. in case of a merger if a form of participation applied in one of the participating companies where at least half of the employees of all participating companies were involved: art. 7(2) (c).

174 The rule is more complex: for details see art. 3 (4)n.

175 Art 3(6), but this decision could be overturned at the earliest within 2 years.

adopted the SE regime. In case of transformation of an existing company into an SE, the same regime of participation will continue to apply. In the other cases the regime will be „equal to the highest proportion in force in the participating companies before registration of the SE".

If no participation existed in any of the participating companies, the SE will not be required to establish provisions for employee participation.

8. Taxation

55 The most important issue that has been left out from the present regulation concerns taxation. Much of the advantages of the unitary status of the SE would be destroyed under the prevailing tax rules. Therefore, and in the absence of taxation at the level of the Union at least the set off of losses from both subsidiaries and branches should be allowed. A more homogeneous solution would be to establish taxation on a consolidated basis[176]. Without including the tax issue, the SE may appear to many European businesses too costly an undertaking.

9. Is the SE the solution to Europe's company law deadlock?

56 The introduction of the SE in the legal systems of the European member states certainly constitutes a significant innovation. It settles at least some of the issues that were mentioned above as serious deficiencies of the Community's policy, viz. the lack of rules on the cross border merger and the transfer of the seat. As a consequence, one can expect the SE to stimulate competition between national legislators, as they will be afraid of loosing market share to their more company friendly neighbours.

Apart form the absence of an integrated tax status, some handicaps remain. The participation regime is very complex, and will lead to many question of interpretation. So e.g. is a negotiation on participation necessary, even if the transaction involves companies none of which is subject to a participation scheme. Although ultimately no participation will be mandatory[177], the mere requirement to organise consultation may constitute a powerful negotiating platform for employee representatives.

The main question remains: was it all worth it? Could one not have achieved the same result by allowing more freely domestic companies to branch out over Europe? Why not have followed the American scheme?

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176 See on the subject already Studiecentrum Ondernemingsgroepen, *De fiscaalrechtelijke erkenning van vennootschapsgroepen, La reconnaissance fiscale des groupes de sociétés*, 1989, 343 p.

177 See the Annex Part 3 Standard rules for participation, litt.b, Second §.

Especially as the burdensome requirement for registering branches have not been removed for the SE.

Only the future will tell whether the SE was necessary, useful, or merely a grand idea.

Company Law in Europe and European Company Law

EDDY WYMEERSCH

Summary

The purpose of this paper is to give a somewhat critical overview of the activities of the European Community in the field of company law.

1. The treaty provisions

In the field of company law, the European Community has mainly acted by way of harmonisation directives.

The provisions of the Treaty are well known: art. 44 (3)(g), 293 and more generally 94 and 95. In the early years of functioning of the Community there has been ample discussion on the ambit of the powers of the Commission. Two school of thought could be distinguished: those stating that the Community could intervene only to the extent that the harmonisation efforts could contribute to the better functioning of the internal market, thereby limiting the interventions to matters of a cross border nature, but not engaging in the creation of an almost uniform company statute. The other school paid more attention to substantive law issues, and therefore aimed at creating a largely comparable if not identical body of company law rules, without paying that much attention to the contribution these community rules would make to the development of the internal market. Implicitly, this split in opinions still exists today: where the latter school looks with satisfaction at the numerous rules that have been developed now that these rules cover a large part of company law, the former school of thought points to the still low degree of integration that companies have displayed in Europe. As evidence the former school points to the fact that most European groups establish themselves in other Member states not by opening branches – this is by making use of their primary right of establishment – but by creating subsidiaries, separate legal structures for which they call not on harmonised European, but on local, company law. Although according to the Treaty, subsidiaries are considered as another form of exercising the right of establishment, the creation of an internal market would be best served by allowing companies to operate directly all over Europe. Here the American model of cross border or „interstate“ establishment could be referred to.

The draftsmen of the Treaty were very aware of the problems that the creation of an internal market would likely have caused for the free circulation of companies; Therefore article 293 (ex 220) lists three company law subjects on which the Member States were invited, as far as necessary, to negotiate an international treaty, viz. the mutual recognition of companies, the transfer of the company seat, and the cross border merger. None of these have been adopted. All three relate to cross border issues that would have had an considerable impact on cross border establishment, and therefore on the creation of the internal market. The recognition of foreign companies was generally considered an obsolete theme, until the European Court, in its Centros decision, called attention to the issue, not in terms of recognition, but of freedom of establishment: it opened a serious breach in the restrictive attitude that some Member states have adopted in the past. Indirectly – and this is still controversial – the Court seems to have taken a stand on the age old dispute between the defenders of the „siège réel" theory and those of the „incorporation theory". This choice is far from politically neutral: while the „siège réel" is a restrictive technique against „abusive" acting of companies, the second is a more liberal theory, allowing companies to choose for the most adequate jurisdiction, and therefore inciting to competition, and hence arbitrage between jurisdictions. While the incorporation theory is more market integration friendly, the second might prevent integration to take place.

2. *The ambit of the company law directives*

The directives in the company law field are all applicable to the public limited liability companies by shares. Some of the directives also apply to the private companies limited. One could ask several questions in this respect: in practice, both types of companies are largely equivalent, except if a listing on the exchange is envisaged. The impact of the harmonisation is also substantially different: as in some Member States public companies are relatively rare, harmonisation only affects the largest economic entities, that have ample means to cope with the numerous obligations that have been imposed by the directives, while in other states, almost all companies would be affected. Would it not be more efficient to limit the harmonisation to the listed companies, in practice the most important ones, and therefore more easily integrate the capital market regulations in company law?

In the company law field, the most successful innovations relate to the cross border aspects of company life: the first directive aims at creating the essential safeguards for safe cross border contracting. The most important other cross border measures have been blocked by Member states out of fear to be submerged by foreign entities.

The company law directives do not create a European company law: being addressed to the Member States, there continues to be considerable differences between the national systems. These are increased due to the „option" technique, whereby a Member State may choose between different regulatory options that are considered equivalent. Also the directives generally call for a minimum level of harmonisation: Member states are at liberty to impose additional requirements. Finally, the „general good" reservation allows states to maintain their own regulations in fields that are considered essential for the protection of investors, shareholders, and other parties. Each of these techniques leads to further segmentation of the markets.

3. Comparison with the capital market directives

Similarly to the company law directives, the early capital market directives have followed a similar track: by fully harmonising the rules, it was expected that access to the markets would be facilitated. This did not materialise: the national regulators continued to impose their own requirements, although these had been to some extent harmonised. The breakthrough came with mutual recognition: financial disclosures made in one market would be considered satisfying the requirements in the other jurisdictions. However, restrictions were still maintained as relating to the „general good". The complaints about the low level of integration of the securities markets in the Union are due to the combined effect of these factors. Solutions could be found in a more radical application of the mutual recognition principle, leading to higher levels of competition between the systems. However, recent proposals for regulating the securities markets go in the opposite direction.

4. Competition

Company law is not only the product of regulation, it is also, and some rules primary are the result of the interaction of different forces, among which – largely – international business practice plays a significant role. These forces not always tend towards more harmonisation. Independent changes in some jurisdictions may increase the level of divergence, answering specific needs of the moment. Moreover soft law, including regulations by market supervisors have been very material in mapping out good conduct, especially good governance to be followed by the largest companies. International market practice are increasingly visible in the securities markets which serve as the vector for the transnational fertilisation of modern company law: here the directive lag behind. Competition will also be increased if the ECJ pursues its case law it seemed to have initiated in the Centros case: competition between the jurisdictions will result from the free circulation of companies over Europe.

Competition leads inevitably to the question whether it will result in a „race for laxity“, or rather will improve the quality of the law. The Delaware example comes to mind: rather than lowering the standards, the existence of a unique combination of a sufficiently flexible statute, of a very expert judiciary along with the securities markets' reliance on the balanced quality of the overall outcome has lead to the conclusion that rather than a race for laxity, a race for excellence is going on. Who will in Europe take the lead in that competition?

Regulatory competition conflicts, to a certain extent, with harmonisation: the more the rules are harmonised, there less room there is for competition. The paradox could be described as follows: the more mandated harmonisation, the less competition; the more effective competition, the more harmonisation through the market.

Rather than engaging in more substantive harmonisation it seems worthwhile that Europe would engage in measures that increase the level of competition. This can be done by mainly focusing on topics with a high content of cross border liberalisation. The traditional topics have been on the agenda for years: the transfer of the seat, cross border mergers, mutual recognition were already mentioned in the Treaty. More recently, some new items could be added: cross border exercising of voting rights, company disclosures including of financial statements in an international context, liberalisation of the regime applicable to establishing branches in other states.

The statute for a European Company will formulate answers to some of the question here mentioned..

5. *Recent Trends and Proposals*

Recently renewed attention has been given to some of the topics that were mentioned before, with special interest for the cross border issues, or for the impact of the securities markets.

a) *The Simpler Legislation for the Internal Market initiative (SLIM) (1999)*

Proposals were submitted to the Commission for simplifying the First and the Second company law directives. These proposals aim at adapting the first directive to the new era of Information and Communication Technology; while for the Second directive a new light is thrown on the issues dealt with in that directive by the dominant role played by the securities markets

b) *The Proposal for de 14th company law directive.(1998)*

The Commission also released a draft proposal for dealing with the transfer of the company seat: without taking a position as to the dispute confronting the Seat theory to the Incorporation theory, the Commission tries to establish practical rules for transferring in the company's seat from one to another Member State without dissolution of the company.

c) *The European Company Statute (2000)*

Now that finally the question of the workers participation regimes has been settled (at the Nice Summit, December 2000) the SE statute can finally be adopted: it will be a regulation containing the company law rules and a directive obliging Member states to make a choice between the different formulas offered.

More important from the point of view of the future of European company law is the opening up, for the first time, of company law to the forces of competition, by allowing companies to engage in essentially cross board transactions, such as deciding on a cross border merger, or transferring the seat.

The introduction of the SE will be the opening shot triggering the forces of regulatory competition between the Member States.

d) *The 2001 Action plan of the Commission (2001)*

The Commission announced a new action plan for 2001. At the moment of writing this has not yet been released.

Le droit des sociétés en Europe et le droit européen des sociétés

EDDY WYMEERSCH

Resumé

Le présent document a pour but de donner un aperçu quelque peu critique des activités de la Communauté européenne dans le domaine du droit des sociétés.

1. Les dispositions du Traité

Dans le domaine du droit des sociétés, la Communauté européenne a essentiellement exercé son action au moyen de directives d'harmonisation.

Les dispositions du Traité sont connues: l'art. 44 (3)(g), 293 et, plus généralement, 94 et 95. Au cours des premières années de fonctionnement de la Communauté, la portée des pouvoirs de la Commission a fait l'objet d'un vaste débat. Deux écoles de pensée s'affrontaient: ceux qui affirmaient que la Communauté ne peut intervenir que dans la mesure où les efforts d'harmonisation peuvent contribuer au meilleur fonctionnement du marché intérieur, limitant ainsi les interventions à des questions de nature transfrontalière, mais sans engagement dans la création d'un statut de société quasiment uniforme. L'autre école attachait davantage d'attention à des questions juridiques essentielles et aspirait donc à créer un ensemble comparable, si pas identique, de règles en matière de droit des sociétés, sans accorder trop d'attention à la contribution que ces règles communautaires apporterait au développement du marché intérieur. Implicitement, cette divergence d'opinions subsiste encore aujourd'hui: là où la deuxième école contemple avec satisfaction les nombreuses règles qui ont été mises en place maintenant que ces règles couvrent une grande partie du droit des sociétés, la première école de pensée souligne le faible degré d'intégration des sociétés en Europe. En guise de preuve, la première école attire l'attention sur le fait que la plupart des groupes européens s'établissent dans d'autres Etats membres non pas en ouvrant des succursales – c'est-à-dire en faisant usage de leur droit fondamental d'établissement – mais en créant des filiales, des structures juridiques séparées pour lesquelles elles ont recours non pas au droit européen harmonisé, mais au droit local des sociétés. Bien que, conformément au Traité, les filiales soient considérées comme une autre forme d'exercice du droit d'établissement, la création d'un marché intérieur serait mieux servie si l'on permettait aux sociétés d'opérer directement dans toute l'Europe. On pourrait se référer ici au modèle américain de l'établissement transfrontalier ou „inter-états".

Les auteurs du Traité étaient pleinement conscients des problèmes que la création d'un marché intérieur était susceptible de causer pour la libre circulation des sociétés. C'est pourquoi, l'article 293 (ex 220) énumère trois sujets en matière de droit des sociétés, sur lesquels les Etats membres étaient invités, autant que possible, à négocier un traité international, à savoir la reconnaissance mutuelle des sociétés, le transfert du siège de la société et la fusion transfrontalière. Aucun d'entre eux n'a été adopté. Tous font référence à des questions transfrontalières qui auraient pu avoir un impact considérable sur l'établissement transfrontalier et donc sur la création du marché intérieur. La reconnaissance des sociétés étrangères était généralement considérée comme une question dépassée, jusqu'au moment où la Cour européenne, dans sa décision Centros, a attiré l'attention sur la question, non pas en termes de reconnaissance, mais de liberté d'établissement. Cette décision a ouvert une sérieuse brèche dans l'attitude restrictive que certains Etats membres ont adoptée dans le passé. Indirectement – et cela demeure un sujet de controverse –, la Cour semble avoir pris position sur la sempiternelle opposition entre les défenseurs de la théorie du „siège réel" et ceux de la „théorie de la constitution". Ce choix est loin d'être neutre d'un point de vue politique: alors que le „siège réel" est une technique restrictive par rapport aux agissements „abusifs" des sociétés, la deuxième théorie est plus libérale et permet aux sociétés de choisir la juridiction la plus adéquate et donc de stimuler la concurrence et, par conséquent, l'arbitrage entre juridictions. Bien que la théorie de la constitution soit plus favorable à l'intégration du marché, la deuxième théorie pourrait faire obstacle à l'intégration.

2. La portée des directives en matière de droit des sociétés

Les directives existant dans le domaine du droit des sociétés sont toutes applicables aux sociétés publiques à responsabilité limitée par actions. Certaines directives s'appliquent également aux sociétés privées à responsabilité limitée. Plusieurs questions se posent à cet égard: en pratique, les deux types de sociétés sont sensiblement les mêmes, sauf si l'on envisage une introduction en bourse. L'impact de l'harmonisation est également sensiblement différent: étant donné que, dans certains Etats membres, les sociétés ouvertes au public sont relativement rares, l'harmonisation influe uniquement sur les plus grandes entités économiques, qui disposent de vastes moyens pour faire face aux nombreuses obligations qui ont été imposées par les directives, alors que dans d'autres états, la plupart des sociétés seraient concernées. Ne serait-il pas plus efficace de limiter l'harmonisation aux sociétés cotées en bourse, en pratique les plus importantes, et donc d'intégrer plus facilement les règles du marché financier dans le droit des sociétés?

Dans le domaine du droit des sociétés, les innovations les plus réussies concernent les aspects transfrontaliers de la vie des sociétés: la première directive vise à créer les garde-fous essentiels en vue de sécuriser la passation de marchés transfrontaliers. Les autres principales mesures transfrontalières ont été bloquées par les Etats membres, qui craignent d'être submergés par des entités étrangères.

Les directives sur le droit des sociétés ne créent pas un droit européen des sociétés: bien que traitées par les Etats membres, les différences entre systèmes nationaux subsistent. Ces différences sont encore accrues par la technique de „l'option" par laquelle un Etat membre peut choisir entre des options réglementaires différentes qui sont considérées comme équivalentes. De même, les directives requièrent généralement un niveau minimum d'harmonisation: les Etats membres ont la liberté d'imposer des exigences supplémentaires. Enfin, la réserve du „bien général" permet à des états de conserver leurs propres règles dans des domaines qui sont considérés comme essentiels pour la protection des investisseurs, des actionnaires et d'autres parties. Chacune de ces techniques conduit à une nouvelle segmentation des marchés.

3. Comparaison avec les directives relatives aux marchés financiers.

A l'instar des directives sur le droit des sociétés, les premières directives sur les marchés financiers ont suivi une orientation similaire: en harmonisant totalement les règles, on espérait que l'accès aux marchés serait facilité. Tel n'a pas été le cas: les organes régulateurs nationaux ont continué d'imposer leurs propres exigences, bien que celles-ci aient été harmonisées dans une certaine mesure. La percée est venue avec la reconnaissance mutuelle: les divulgations d'ordre financier faites sur un marché seraient considérées comme satisfaisant les exigences des autres juridictions. Cependant, les restrictions concernant le „bien général" ont subsisté. Les plaintes portant sur le faible niveau d'intégration des marchés des valeurs mobilières dans l'Union sont dues à l'effet combiné de ces facteurs. Une application plus radicale du principe de reconnaissance mutuelle permettrait de trouver des solutions, en conduisant à des niveaux de concurrence plus élevés entre les systèmes. Cependant, les propositions récentes de réglementation des marchés des valeurs mobilières vont dans le sens opposé.

4. Concurrence

Le droit des sociétés n'est pas seulement le produit de la réglementation, il est aussi, à l'instar de certaines règles, le résultat de l'interaction de forces différentes, parmi lesquelles les pratiques commerciales internationales jouent un rôle essentiel. Ces forces ne tendent pas toujours vers l'harmonisation. Des changements indépendants, intervenant dans certaines juridictions, peuvent accroître le niveau de divergence en réponse aux besoins spécifiques du moment. En outre, les lois „douces", y compris les réglementations imposées par les organes de surveillance du marché, ont joué un rôle très important dans l'élaboration de la bonne conduite, et en particulier la bonne gouvernance à suivre par les plus grandes sociétés. Les pratiques commerciales internationales apparaissent de plus en plus dans les marchés des valeurs mobilières qui servent de vecteur à la fertilisation transnationale du droit moderne des sociétés: dans ce domaine, la directive était à la traîne. La concurrence augmentera également si la CJCE applique la jurisprudence qu'elle semble avoir instaurée dans l'affaire Centros: la concurrence entre juridictions résultera de la libre circulation des sociétés en Europe.

Se pose alors inévitablement la question de savoir si la concurrence se traduira par une „course au laxisme" ou améliorera au contraire la qualité de la loi. L'exemple du Delaware vient à l'esprit: plutôt que d'abaisser les critères, l'existence d'une combinaison unique d'un statut suffisamment flexible et d'un pouvoir judiciaire très compétent, associé à la dépendance des marchés des valeurs mobilières à l'égard de la qualité équilibrée des résultats globaux, a conduit à la conclusion que, plutôt que d'assister à une course au laxisme, nous assistons à une course à l'excellence. Qui, en Europe, prendra la tête dans cette concurrence?

La concurrence en matière de réglementation entre, dans une certaine mesure, en conflit avec l'harmonisation: plus les règles sont harmonisées, moins il y a de place pour la concurrence. Le paradoxe pourrait être décrit comme suit: plus l'harmonisation est imposée, moins il y a de concurrence; plus la concurrence est efficace, plus il y a d'harmonisation grâce au marché.

Plutôt que de s'engager sur la voie d'une harmonisation plus profonde, il semble intéressant que l'Europe prenne des mesures destinées à augmenter le niveau de concurrence. Il convient, pour ce faire, de mettre essentiellement l'accent sur des sujets à contenu élevé de libéralisation transfrontalière. Les sujets traditionnels sont à l'ordre du jour depuis des années: le transfert du siège, les fusions transfrontalières, la reconnaissance mutuelle étaient déjà mentionnés dans le Traité. Plus récemment, de nouveaux points ont été ajoutés: l'exercice transfrontalier des droits de vote, les communications des sociétés, y compris des comptes annuels dans un contexte international, la libéralisation du régime applicable à l'établissement de succursales dans d'autres états.

Le statut de la société européenne formulera des réponses à quelques-unes des questions mentionnées ici.

5. Tendances et propositions récentes

Les sujets mentionnés ci-avant ont récemment bénéficié d'un regain d'attention, avec un intérêt particulier pour les questions transfrontalières ou pour l'impact des marchés des valeurs mobilières.

a) L'initiative de simplification de la réglementation relative au marché intérieur (SLIM) (1989)

Des propositions ont été soumises à la Commission afin de simplifier la première et la deuxième directive sur le droit des sociétés. Ces propositions visent à adapter la première directive à la nouvelle ère des technologies de l'information et de la communication, tandis que la deuxième directive jette un nouvel éclairage sur les questions traitées dans cette directive par le rôle dominant joué par les marchés des valeurs mobilières.

b) La proposition relative à la 14e directive sur le droit des sociétés

La Commission a également publié un projet de proposition concernant le transfert du siège des sociétés: sans prendre position sur le différend concernant la théorie du siège par rapport à la théorie de la constitution, la Commission tente d'établir des règles pratiques concernant le transfert du siège des sociétés à partir d'un Etat membre vers un autre sans dissolution de la société.

c) Le statut de la société européenne (2000)

Maintenant que la question des régimes de participation des travailleurs a enfin été réglée (lors du Sommet de Nice, en décembre 2000), le statut de la société européenne peut enfin être adopté: il s'agira d'une réglementation contenant les règles de droit des sociétés et une directive obligeant les Etats membres à opérer un choix entre les différentes formules proposées.

Plus importante du point de vue de l'avenir du droit européen des sociétés est l'ouverture, pour la première fois, du droit des sociétés aux forces de la concurrence, en permettant aux sociétés d'effectuer des transactions essentiellement transfrontalières, telles que la décision portant sur une fusion transfrontalière ou le transfert du siège.

L'introduction de la SE marquera le signal d'ouverture déclenchant les forces de la concurrence en matière de réglementation entre les Etats membres.

d) Le plan d'action 2001 de la Commission (2001)

La Commission a annoncé un nouveau plan d'action pour 2001. Au moment où nous rédigeons ces lignes, le plan n'a pas encore été rendu public.

Gesellschaftsrecht in Europa und europäisches Gesellschaftsrecht

EDDY WYMEERSCH

Zusammenfassung

Ziel dieses Papiers ist ein kritischer Überblick über die Maßnahmen der Europäischen Gemeinschaft im Bereich Gesellschaftsrecht.

1. Die Vertragsbestimmungen

Die Europäische Union agierte im Bereich Gesellschaftsrecht bisher hauptsächlich durch Harmonisierungsrichtlinien.
Die Bestimmungen des Vertrags sind allgemein bekannt: Art. 44 (3) (g), 293 und im weiteren Sinne 94 und 95. In den ersten Jahren des Bestehens der Gemeinschaft kam es zu einer umfangreichen Diskussion über das Ausmaß der Zuständigkeiten der Kommission. Damals zeichneten sich zwei verschiedene Auffassungen ab: einerseits war man der Ansicht, dass die Gemeinschaft nur so weit intervenieren darf, wie sich Bemühungen zur Harmonisierung positiv auf die Funktionsweise des Binnenmarkts auswirken – wodurch ein solches Eingreifen auf grenzüberschreitende Angelegenheiten beschränkt war und Anstrengungen zur Schaffung eines einheitlichen Gesellschaftsstatus ausgeschlossen waren. Andere wiederum beschäftigten sich eher mit materiell rechtlichen Gesetzen und bemühten sich deswegen um die Schaffung eines weitgehend ähnlichen wenn nicht identischen Grundstocks gesellschaftsrechtlicher Regelungen – allerdings ohne lange darüber nachzudenken, inwiefern diese gemeinschaftlichen Regelungen zur Entwicklung des Binnenmarkts beitragen würden. Implizit bestehen diese unterschiedlichen Meinungen bis heute, denn während die Vertreter letzterer Auffassung die nun geschaffenen zahlreichen Regelungen, die einen großen Teil des Gesellschaftsrechts abdecken, begrüßen, verweisen die Vertreter erstgenannter Auffassung auf das immer noch niedrige Ausmaß der Integration, die Unternehmen in Europa verzeichnen. Mit Recht weisen Vertreter erstgenannter Auffassung daraufhin, dass sich die meisten europäischen Konzerne nicht durch die Eröffnung von Niederlassungen in anderen Mitgliedsstaaten ansiedeln – dies erfolgt durch Inanspruchnahme ihres unmittelbaren Rechts auf Niederlassung –, sondern durch die Gründung von Tochtergesellschaften mit separaten gesetzlichen Strukturen, bei denen sie sich nicht auf harmonisiertes europäisches, son-

dern auf lokales Gesellschaftsrecht berufen. Auch wenn Tochtergesellschaften nach Maßgabe des Vertrags als eine andere Möglichkeit angesehen werden, vom Niederlassungsrecht Gebrauch zu machen, wäre es für die Schaffung eines Binnenmarkts am besten, Unternehmen eine direkte Geschäftstätigkeit in ganz Europa zu gestatten. Hierbei könnte auf das amerikanische Modell einer grenz- oder „bundesstaatüberschreitenden" Niederlassung verwiesen werden.
Die Autoren des Vertrags wussten nur zu gut um die Probleme, die die Schaffung eines Binnenmarkts in Bezug auf die freie Niederlassung von Unternehmen wahrscheinlich verursacht hätte. Infolgedessen sind in Art. 293 (vormals 220) drei Themen zu Gesellschaftsrecht aufgeführt, zu denen die Mitgliedsstaaten – sofern notwendig – ein internationales Abkommen über gegenseitige Anerkennung von Unternehmen, Verlegung des Firmensitzes und grenzüberschreitende Fusionen aushandeln sollten. Keiner dieser Punkte wurde verabschiedet. Alle drei beziehen sich auf grenzüberschreitende Sachverhalte, die sich erheblich auf grenzüberschreitende Niederlassung und infolgedessen auf die Schaffung eines Binnenmarkts ausgewirkt hätten. Die Anerkennung ausländischer Unternehmen wurde im Allgemeinen als überholter Sachverhalt betrachtet, bis der Europäische Gerichtshof mit seiner Centros-Entscheidung das Thema in den Mittelpunkt des Interesses rückte. Dies bezog sich allerdings nicht auf die Anerkennung, sondern auf die Niederlassungsfreiheit, denn damit wurde mit der restriktiven Haltung einiger Mitgliedsstaaten aus der Vergangenheit entschieden gebrochen. Indirekt – und dies ist noch immer umstritten – scheint das Gericht zum alten Streit zwischen den Befürwortern der „siège réel-Theorie" und denjenigen der „incorporation theory“ Stellung bezogen zu haben. Diese Wahl ist bei weitem nicht politisch neutral, denn während es sich beim „siège réel“ um ein restriktives Verfahren gegen missbräuchliche Verhaltensweisen von Unternehmen handelt, stellt die Zweite eine liberalere Theorie dar, bei der Unternehmen die angemessenste Rechtsprechung selbst wählen können und folglich Wettbewerb und Schlichtung zwischen verschiedenen Rechtssystemen heraufbeschwören. Und während die *incorporation theory* eher einer Integrierung des Marktes zugute kommt, könnte eine solche Integrierung durch die Zweite verhindert werden.

2. *Tragweite der Gesellschaftsrechtsrichtlinien*

Die Richtlinien im Bereich Gesellschaftsrecht gelten allesamt für Aktiengesellschaften. Einige der Richtlinien beziehen sich auch für Gesellschaften mit beschränkter Haftung. In dieser Hinsicht könnten mehrere Fragen gestellt werden, denn in der Praxis sind beide Unternehmensformen weitestgehend identisch – es sei denn, es wird ein Börsengang vorbereitet. Auch die Auswirkungen der Harmonisierung unterscheiden sich grundsätzlich, denn da Aktiengesellschaften in einigen Mitgliedsstaaten selten sind, betrifft die Harmonisierung nur die größten wirtschaftlichen Einrichtungen, die über weit reichende Möglichkeiten zur Erfüllung der Auflagen durch die Richtlinie verfügen; dagegen wären in anderen Mitgliedsstaaten fast alle Unternehmen betroffen. Wäre es deswegen nicht effizienter, die Harmonisierung auf börsennotierte Unternehmen zu beschränken – die in der Praxis sowieso die meiste Bedeutung haben – und die Integrierung der Kapitalmarktverordnungen in das Gesellschaftsrecht dadurch zu erleichtern?

Im Bereich Gesellschaftsrecht beziehen sich die wirksamsten Neuerungen auf die grenzüberschreitenden Aspekte eines Unternehmens; danach zielt die erste Richtlinie auf die Schaffung eines grundsätzlichen Schutzes für sichere grenzüberschreitende Geschäftsvorgänge ab. Sonstige wichtige grenzüberschreitende Maßnahmen wurden von Mitgliedsstaaten aus Angst vor einer Flut ausländischer Unternehmen blockiert.

Durch die Gesellschaftsrechtsrichtlinien wird kein europäisches Gesellschaftsrecht geschaffen, denn weil sie sich auf die Mitgliedsstaaten beziehen, bestehen hinsichtlich der Rechtsvorschriften nach wie vor erhebliche Unterschiede. Diese werden durch die „technische Option" noch verstärkt, denn hierbei kann ein Mitgliedsstaat zwischen verschiedenen Regelungsoptionen, die als gleichwertig betrachtet werden, wählen. Überdies erfordern die Richtlinien im Allgemeinen ein Mindestmaß an Harmonisierung, zumal die Mitgliedsstaaten die Freiheit haben, zusätzliche Auflagen zu erlassen. Schließlich haben Staaten durch die so genannte "Allgemeingut-Klausel" das Recht, in Bereichen, die zum Schutz von Investoren, Aktionären und anderen Parteien als wichtig erachtet werden, ihre eigenen Verordnungen aufrechtzuerhalten. Jede dieser Vorgehensweisen führt zu einer weiteren Segmentierung der Märkte.

3. Vergleich mit den Kapitalmarktrichtlinien

Vergleichbar mit den Gesellschaftsrechtsrichtlinien wurde mit den ersten Kapitalmarktrichtlinien ein ähnlicher Zweck verfolgt; so wurde erwartet, dass der Zugang zu Märkten durch eine vollständige Harmonisierung von Regeln erleichtert würde. Diese Hoffnung erfüllte sich nicht, denn einzelstaatliche Aufsichtsbehörden erließen nach wie vor ihre eigenen Auflagen, obwohl diese bis zu einem gewissen Ausmaß harmonisiert worden waren. Der Durchbruch stellte sich erst bei der gegenseitigen Anerkennung ein, denn danach konnten mit Finanzbestimmungen eines bestimmten Marktes nun auch die Auflagen anderer Rechtsprechungen erfüllt werden. Einschränkungen, wie z. B. für die Allgemeingut-Klausel, blieben aber nach wie vor bestehen. Klagen über das niedrige Maß an Integrierung auf dem Wertpapiermarkt der Union sind auf die kombinierten Auswirkungen dieser Faktoren zurückzuführen. Lösungsmöglichkeiten bestünden in einer radikaleren Anwendung des Prinzips der gegenseitigen Anerkennung, was dann zu einem höheren Maß an Wettbewerb zwischen den Systemen führen würde. Allerdings gehen jüngste Vorschläge zur Regelung der Wertpapiermärkte genau in die entgegengesetzte Richtung.

4. Wettbewerb

Gesellschaftsrecht entsteht nicht nur durch Regulierung, sondern auch – und dies gilt insbesondere für einige Grundregeln – aus der Wechselwirkung verschiedener Kräfte, unter denen größtenteils internationale Geschäftspraktiken eine wesentliche Rolle spielen. Diese Kräfte tendieren nicht immer zu mehr Harmonisierung. Eigenmächtige Veränderungen in einigen Rechtsprechungen könnten das Ausmaß der Unterschiede weiter erhöhen und verschiedenen momentanen Anforderungen Rechnung tragen. Darüber hinaus haben sich durch „soft law" – darunter Verordnungen durch Marktaufsichtsbehörden – positive Verhaltensweisen sowie eine verantwortungsvolle Geschäftsführung bei den größten Unternehmen herauskristallisiert. Internationale Marktgewohnheiten zeichnen sich verstärkt auf Wertpapiermärkten ab, die als Katalysator einer länderübergreifenden Wirksamkeit modernen Gesellschaftsrechts auftreten – hier ist die Richtlinie im Rückstand. Ebenso wird sich der Wettbewerb verstärken, wenn der EuGH sein Präzedenzrecht fortsetzt, das er scheinbar mit der Centros-Entscheidung in Gang brachte; durch die freie Niederlassung von Unternehmen in Europa wird ein Wettbewerb zwischen den Rechtsprechungen entstehen.

Außerdem führt Wettbewerb unvermeidlich zu der Frage, ob hierbei eher ein Wettlauf um "Laxheit" einsetzt oder die Qualität der Gesetze verbessert wird. In diesem Zusammenhang kommt einem das Delaware-Beispiel in den Sinn, denn anstatt die Normen herabzusetzen, führte die Existenz einer einzigen Kombination eines ausreichend flexiblen Status bzw. eines kompetenten Gerichtswesens zusammen mit dem Vertrauen des Wertpapiermarktes in eine ausgewogene Bilanz zu der Schlussfolgerung, dass momentan kein Wettlauf um Laxheit, sondern vielmehr um Qualität im Gange ist. Wer in Europa wird bei diesem Wettbewerb die Oberhand gewinnen?

In gewisser Weise steht ein Wettbewerb um Regelungen einer Harmonisierung im Wege, denn je mehr Regeln harmonisiert werden, desto kleiner wird der Platz für Wettbewerb. Das Paradoxon könnte folgendermaßen umschrieben werden: je mehr eine Harmonisierung verordnet wird, desto weniger Wettbewerb findet statt; je intensiver der Wettbewerb ausfällt, desto mehr Harmonisierung vollzieht sich über den Markt.

Anstatt sich jetzt aber einer substanziellen Harmonisierung zu verschreiben, scheint Europa besser daran zu tun, Maßnahmen zur Erhöhung des Wettbewerbs zu erlassen. Dies kann durch eine Konzentration auf solche Aspekte erfolgen, die ein hohes Ausmaß an grenzüberschreitender Liberalisierung aufweisen. Traditionelle Aspekte werden bereits seit Jahren erörtert: so wurden Transfer des Firmensitzes, grenzüberschreitende Fusionen und gegenseitige Anerkennung im Abkommen bereits erwähnt. In jüngster Zeit konnten einige neue Aspekte hinzugefügt werden, wie z. B. die grenzüberschreitende Wahrnehmung von Stimmrechten, Veröffentlichungen der Unternehmen einschließlich einer Vermögensaufstellung vor internationalem Hintergrund und die Liberalisierung des bei der Gründung von Niederlassungen in anderen Staaten gültigen Systems.

Der Status einer europäischen Gesellschaft wird Antworten auf einige hier erwähnten Fragen geben.

5. Jüngste Trends und Vorschläge

Einige oben genannte Aspekte rückten kürzlich wieder in den Mittelpunkt des Interesses, wobei vor allem grenzüberschreitende Sachverhalte bzw. die Auswirkungen auf Wertpapiermärkte besonders interessant waren.

a) Initiative zur Vereinfachung der Rechtsvorschriften für den Binnenmarkt (SLIM) (1999)

Hierbei wurden der Kommission Vorschläge zur Vereinfachung der ersten und zweiten Gesellschaftsrechtsrichtlinie vorgelegt. Mit den Vorschlägen soll die erste Richtlinie an die neue Ära der Informations- und Kommunikationstechnologien angepasst werden. In der zweiten Richtlinie werden dagegen Aspekte im Zusammenhang mit der wichtigen Rolle der Wertpapiermärkte neu beleuchtet.

b) Vorschlag zur 14. Gesellschaftsrechtsrichtlinie (1998)

Die Kommission legte ebenfalls einen Vorschlagsentwurf zum Transfer des Firmensitzes vor; ohne im Streit zwischen der "Seat theory" und der "Incorporation theory" Stellung zu beziehen, versucht die Kommission praktische Regeln für den Transfer des Firmensitzes von einem Mitgliedsstaat in einen anderen ohne Auflösung des Unternehmens zu erlassen.

c) Der Status einer europäischen Aktiengesellschaft (2000)

Nachdem die Frage nach der Mitbestimmung der Arbeitnehmer auf dem Nizza-Gipfel vom Dezember 2000 geregelt wurde, kann der SE-Status letztendlich verabschiedet werden; dabei handelt es sich um eine Verordnung mit gesellschaftsrechtlichen Vorschriften und einer Richtlinie, durch die Mitgliedsstaaten zwischen verschiedenen Möglichkeiten auswählen müssen.

Im Hinblick auf die Zukunft des europäischen Gesellschaftsrechts ist die erstmalige Öffnung des Gesellschaftsrechts für einen Wettbewerb von noch größerer Bedeutung, indem dieses Unternehmen grenzüberschreitende Transaktionen ermöglicht, wie z. B. die Entscheidung hinsichtlich einer grenzüberschreitenden Fusion oder eines Firmensitzes.

Die Einführung des SE-Statuts wird den Startschuss zu einem Wettbewerb der Verordnungen zwischen den Mitgliedsstaaten darstellen.

d) Der 2001 Aktionsplan der Kommission

Die Kommission kündigte einen neuen Aktionsplan für 2001 an. Dieser war bei Redaktionsschluss jedoch noch nicht veröffentlicht.