European Company Statute: Company Structure and Employee Involvement across EC Borders

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I. Introduction

In order to create a genuine internal market, the European Community (EC)\(^1\) recognized the need for harmonization of member states' laws and the creation of community-wide structures for cooperation.\(^2\) With the rising trend in mergers and restructurings, and the growing need for better cooperation in research and technology development, the EC is taking steps to harmonize company laws and facilitate industrial cooperation across borders. As part of its company law harmonization program, the EC adopted a number of directives to standardize registration, nullity, ultra vires, and public disclosure requirements,\(^3\) as well as establish share capital standards,\(^4\) facilitate mergers between companies in the same member state,\(^5\) and make accounting and auditing practices more uniform.\(^6\)

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\(^1\) The European Economic Community, commonly referred to as the “European Community,” today consists of twelve member states: Germany, Belgium, France, Italy, Luxembourg, The Netherlands, Denmark, Ireland, United Kingdom, Spain, and Portugal. Their legal relationship is founded in the Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty].


\(^3\) First Council Directive of 9 March 1968 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, with a view to making such safeguards equivalent throughout the Community, 11 J.O. COMM. EUR. (No. L 65) 8 (1968).


\(^4\) 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 the 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, 19 O.J. EUR. COMM. (No. L 26) 3 (1976).


Legislation is under negotiation to harmonize the structure of public limited companies, simplify cross-border mergers, and create a uniform code of conduct for takeovers.

Despite these efforts, most companies will continue to face burdensome legal and fiscal problems if they want to operate on a Community scale and take advantage of the potential market of 320 million consumers. For example, a company with establishments in several EC countries will have to deal with up to twelve different legal systems and tax codes. Its subsidiaries in other EC countries must conform to local reporting, tax, and labor laws. Competitors in the United States or Japan do not face these impediments and can draw from a wider base of human and financial resources. Companies in different member states seeking to merge also face psychological obstacles in selecting one corporate nationality over another for the resulting company.

Over twenty years ago the Commission of the European Communities (Commission) addressed some of these problems in its first proposal for a "European Company." The proposal envisioned a single legal structure by which companies of different member states could unite and bypass the various national company laws. The resulting European Company would incorporate under and be subject to a supranational body of law. The legislation was designed to facilitate cross-border cooperation and enhance transnational competition.


The Commission has considered drafts for a "proposal for a Ninth Directive on links between undertakings and in particular groups," but the draft has never been published or formally proposed by the Commission.


tiveness. The campaign for the creation of the internal market provided a new impetus for the idea of a “European Company” and prompted the Commission to submit a new proposal for the “Statute for a European Company” in 1989. The proposal may finally make the supranational company structure a reality.

II. History of the Proposals for a European Company

The EEC Treaty does not expressly provide for the creation of a pan-European company, however, the idea received support from the legal community as early as 1959. Professor Pieter Sanders and a panel of experts from the member states provided the Commission with a first draft for a “Societas Europea (SE)” in 1967. The Commission submitted its original proposal to the Council in 1970 and revised it in 1975. Both versions were cumbersome in detail and were ultimately abandoned because of the hotly contested worker participation provisions.

The White Paper of June 1985 marked the start of the campaign for creation of an internal market by 1992 and provided the impetus to “create a legal framework to facilitate cooperation between enterprises.” In 1986 the EC adopted the Single European
Act to facilitate adoption of measures in furtherance of its 1992 goals. One year later the European Council of Ministers (Council) encouraged the institutions to make "swift progress with regard to the company law adjustments required for the creation of a European company." The Commission announced its renewed effort to establish a European Company structure in a memorandum to the Council in 1988, in which it solicited comments from Parliament, member states, and both sides of industry.

The Commission's efforts culminated in a new proposal for a "Statute for a European Company" (Statute) in August 1989. The 1989 proposed Statute is simpler than previous versions and consists of two documents, a regulation dealing with the creation of a European Company (Regulation) and a directive describing the differing forms of worker participation (Directive). The proposal was strategically split into a Regulation and Directive to accelerate its adoption. The European Company provisions are in the form of a regulation and therefore would be directly applicable to all member states. As no implementing legislation is needed, any eligible companies independent of national laws, which makes it possible to concentrate substantial assets and compete with American and Japanese business..." Id.

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23 20 BULL. EUR. COMM. 6/87 (1987), at 8 (President's conclusions after European Council's meeting in Brussels June 29 and 30, 1987).
26 The 1989 proposal contains only 137 articles in the Regulation, and 13 articles in the Directive. Cf. supra note 18. Some of these articles have been deleted in the 1991 amendments.
29 The EEC Treaty states: "Regulations shall have a general application. They shall be binding in every respect and directly applicable in each Member State." EEC Treaty, supra note 1, art. 189, 298 U.N.T.S. at 79.
pany could opt to come under the Statute. The employee participation requirements are in the form of a directive thereby leaving the method of implementation open to the member states. Anticipating opposition stemming from member states’ vastly different labor law traditions, the Commission sought to offer greater flexibility in adapting the employee involvement schemes to the national systems.

The Regulation is designed to overcome the lack of uniformity among the member states’ company laws and provide a single European company structure. It offers companies operating in more than one EC country the opportunity to elect a Community system of incorporation in lieu of any one member state’s law to govern its transnational activities. It is not designed to override the various national systems, but rather to offer an attractive alternative for businesses operating on a Community scale. The option will be most useful to large public companies, but smaller companies will be able to qualify as well. In addition to the convenience of the Community-wide structure of incorporation, the Statute also contains tax incentives and disclosure and accounting advantages.

An important and controversial aspect of the proposed Company Statute is its “social dimension.” In order to form a European Company, the company must adopt one of the Directive’s three models of employee participation in the management and strategic development of the enterprise. Under the Directive, member states can limit the choice of participation models for companies registering its territory. Absent such limitation by a member state, a company can choose which of the three models of employee participation will best suit its needs. It is hoped that the flexible approach to employee participation in the European Company Statute will promote consensus on employee involvement in general and aid in the eventual adoption of the more comprehensive and more contested Fifth Directive on employee participation in public limited

50 See infra notes 90-101 and accompanying text discussing eligibility requirements.
51 Under the EEC Treaty, “Directives shall bind any Member State to which they are addressed, as to the result to be achieved, while leaving to domestic agencies a competence as to form and means.” EEC Treaty, supra note 1, art. 189, 298 U.N.T.S. at 79.
52 BULLETIN, supra note 25, at 7.
53 The drafters hoped to overcome what they described as “major psychological obstacles” by avoiding that companies be forced to choose the legal structure of any one particular state. Id.
54 Id. at 8.
55 See infra notes 102-05 and accompanying text discussing minimum capital requirements.
56 See infra notes 184-98 and accompanying text discussing tax incentives.
57 See infra notes 219-41 and accompanying text discussing employee involvement in SEs.
58 See BULLETIN, supra note 25, at 8.
59 Id. at 9.
60 Id.
In January 1991 the European Parliament (Parliament) held its First Reading of the European Company Statute. It approved the Commission's 1989 proposal and voted for a series of amendments. Taking many of Parliament's suggestions into account, the Commission amended its proposal in May 1991. The proposal is now before the Council, awaiting the adoption of a common position. The proposal will then be resubmitted to Parliament for a Second Reading before going to the Council for final action. If adopted, it will enter into force sometime after January 1, 1993.

This Comment will analyze the 1991 amended proposal for a Statute for a European Company. It discusses the regulation's key provisions for an EC-wide company structure and addresses some of the concerns over the accompanying Directive on employee involvement. At the outset, the Comment looks at the controversial legal bases of the Statute. The section which follows focuses on company structures in the European Community. It begins by describing the

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41 See Proposal for a Fifth Directive Founded on Article 54(3)(g) of the EEC Treaty Concerning the Structure of Public Limited Companies and the Powers and Obligations of Their Organs, 15 O.J. EUR. COMM. (No. C 131) 49 (1972), amended by 26 O.J. EUR. COMM. (No. C 240) 2 (1983), amended by 34 O.J. EUR. COMM. (No. C 7) 4 (1991). The proposed Fifth Directive is intended to harmonize the overall structure of limited liability companies in the EC. It sets out rules for general meetings, drawing up and auditing annual accounts, and corporate governance by a one-tier or two-tier board system. The most controversial aspect of the Fifth Directive is its emphasis on worker participation. It offers public limited companies a choice of three models for employee participation in corporate decision-making. For closer analysis, see English, supra note 25, at 1497-1512. Little action has been taken on the Fifth Directive in recent years, with the exception of an amendment made in January 1991 to reflect progress made on removing barriers to cross-border takeovers. See European Report, Business Brief No. 1628, European Information Service, Nov. 10, 1990.

42 The European Company Statute is subject to the new legislative procedure provided for under the Single European Act, called the "cooperation procedure." See Riesenfeld, The Single European Act, 13 HASTINGS INT'L & COMP. L. REV. 371, 376-77 (1990). The procedure enhances cooperation between the European Parliament and the Council and permits the Council to adopt legislation by a qualified majority. Commission proposals coming under the procedure are subject to two readings at the Parliament and Council. Id. at 376.


For the Commission's explanations of the 1991 amendments to the Regulation, see Explanatory Memorandum, COM(91) 174 final/2 -SYN 218 1-25 (May 28, 1991) [hereinafter Explanatory Memorandum to 1991 Regulation].


structures currently available and identifying the need for a European Company structure. Next, it surveys the major aspects of the proposed Regulation and points out ambiguities and points of contention. Part III addresses employee involvement in the European Community. It reviews the EC's problematic history with initiatives on worker participation and surveys the prospects for success of the current Directive. It discusses the models of worker participation in the Directive, highlights some of the provisions which Parliament requested be amended, and draws comparisons to recent legislation on a European Works Council. The section concludes with an overview of the contrasting traditions and reactions of Germany and Britain to EC worker participation initiatives. Finally, the Comment assesses the impact the Statute is likely to have, and suggests that despite its weaknesses, the Statute represents a major step forward in the EC's effort to promote European-wide industrial cooperation among companies and industrial democracy between companies and their employees.

III. Legal Basis of the Statute

The Commission's choice of legal basis for the European Company Statute caused great controversy when it was published in July 1989.\(^\text{46}\) Some viewed the Commission's choice as "cleverly exploiting obscurities" in the EEC Treaty to avoid a veto at the Council and increase its own powers.\(^\text{47}\) Although the original 1970 draft was based on article 235 of the EEC Treaty and required approval by unanimous vote of the Council, the 1989 proposal for the Regulation on the European Company Statute is based on article 100a and the Directive on worker participation is based on article 54(3)(g), both of which enabled the Commission to propose the Statute and Directive with a 75% majority vote of the Council. The American Chamber of Commerce also questioned the Statute's legal basis. Observations of the EC Committee of the American Chamber of Commerce in Belgium on the European Company Statute, May 21, 1990, §§ 13-16, at 4-5 [hereinafter American Chamber Observations]. See also Perell & Farren, The Proposed European Company Statute, ATLANTIC J. AM. CHAMBER OF COM. (U.K.) 17 (1991).


\(^\text{48}\) Article 235 serves as a residual basis for legislation:

If any action by the Community appears necessary to achieve, in the functioning of the Common Market, one of the aims of the Community in cases where this Treaty has not provided for the requisite powers of action, the Council, acting by means of a unanimous vote on a proposal of the Commission and after the Assembly has been consulted, shall enact appropriate provisions.

EEC Treaty, supra note 1, at art. 235, at 91. This article has already served as the legal basis for one company law proposal, namely the European Economic Interest Grouping Regulation (EEIG), discussed infra notes 68-82 and accompanying text. See Carreau & Lee, supra note 24, at 505. It is important to note that the EEIG regulation was proposed in 1985, before the Single European Act amended the EEC Treaty.
which allow for qualified majority voting. The implications of which voting method is required are quite significant. If unanimity is required, any one member state has veto power over the legislation. Furthermore, the member states must be unanimous in order to change this method of voting. Thus, a statute’s prospects for passage may sometimes hinge on the Commission’s determination of its legal basis.

Until 1987 the vast majority of Council voting had to be unanimous. However, in 1987 the Single European Act amended the EEC Treaty and extended qualified majority voting to a number of areas relevant to the creation of an internal market. The Act added article 100a to authorize majority voting for harmonization measures “which have as their object the establishment and functioning of the internal market.” Commentators have questioned the Commission’s use of article 100a in the case of the Regulation for a European Company because the proposal aims to create a supranational body of law rather than to “approximate” national laws.

There is also concern that use of article 100a for a measure touching on tax and worker participation violates article 100a(2)’s exclusion of fiscal and labor matters. Such matters almost always

49 One commentator calls this the “Catch 1992.” THE ECONOMIST, supra note 47, at 39. The Council of Ministers can rarely “muster the unanimity to overrule the Commission’s choice . . . [and] usually accept [it].” Id.

50 Single European Act, 30 O.J. EUR. COMM. (No. L. 169) 1 (1987) (effective July 1, 1987). The Single European Act added articles 8a, 8b, and 8c to the EEC Treaty and confirmed the 1985 White Paper’s objective and timetable for completing the internal market. Article 8a states:

The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992, in accordance with the provisions of this Article and of Articles 8b, 8c, 28, 57(2), 59, 70(1), 84, 99, 100A and 100B and without prejudice to the other provisions of this Treaty.


51 The article reads as follows: 100a

1. By way of derogation from Article 100 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 8a. The Council shall, acting by a qualified majority on a proposal from the Commission in co-operation with the European Parliament and after Consulting the Economic and Social Committee, adopt the measures for 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.

2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.

Id.

52 See Abeltshauser, supra note 25, at 1239-41; Crossick, Wither the European Company Statute?, 140 N.L.J. 1799, 1799 (1990); American Chamber Observations, supra note 46, § 14, at 4; Perell & Farren, supra note 46, at 17.

53 Article 100a(2) excludes the following provisions from the Council’s qualified majority voting powers: “fiscal provisions, those relating to the free movement of persons [or] those relating to the rights and interests of employed persons.” Both Britain and
require unanimous Council decisions.\textsuperscript{54} The appropriateness of article 100a depends on whether the tax and employee participation provisions in the Regulation are seen as merely incidental to the company law proposal or whether they fall within article 100a(2)’s prohibition. Critics claim that article 235, a residual provision for Community objectives for which no other Treaty basis exists, provides the only appropriate basis for the Regulation.\textsuperscript{55}

The Commission’s use of article 54(3)(g) for the Directive on employee involvement has also been criticized. Article 54(3)(g) carries out the EEC Treaty’s right of establishment by authorizing Council directives to ensure that national company laws designed to protect “the interests of members and others” are not inconsistent.\textsuperscript{56} Although article 54 deals with freedom of establishment, the preamble of the Directive makes no mention of the freedom of establishment and the provisions on employee involvement are arguably more tied to company management than to company establishment.\textsuperscript{57} Furthermore, it is unclear whether the rights of employees are protected by the article. Professors Smit and Herzog propose that article 54(3)(g) is limited to the protection of shareholders and third parties such as creditors.\textsuperscript{58} Yet Professor Kolvenbach suggests that the language of article 54(3)(g) is broader and includes “creditors, customers, potential investors, and workers.”\textsuperscript{59}


\textsuperscript{56} EEC Treaty, supra note 1, art. 54(3)(g), at 39. Article 54(3)(g) provides for: coordinating, to the extent that is necessary and with a view to making them equivalent, the guarantees in Member States from companies within the meaning of Article 58, second paragraph, for the purpose of protecting the interests both of members of such companies and of third parties.

\textit{Id.}

Article 54(2) authorizes the use of majority voting for such harmonization measures. Article 54(2) states:

In order to implement the general programme or, if no such programme exists, to complete one stage towards the achievement of freedom of establishment for a specific activity, the Council, on a proposal of the Commission and after the Economic and Social Committee and the Assembly have been consulted, shall, until the end of the first stage by means of a unanimous vote and subsequently by means of a qualified majority vote, act by issuing directives.

EEC Treaty, supra note 1, art. 54(2).

The combination of these two articles has served as the foundation for the harmonization of company laws by directives. See Kolvenbach, supra note 25, at 710-17.

\textsuperscript{57} See American Chamber Observations, supra note 46, § 15. But see Abeltshauser, supra note 25, at 1249 (discussing arguments for a broader interpretation of article 54(3)(g)).

\textsuperscript{58} Smit & Herzog, supra note 15, § 54.04[f].

\textsuperscript{59} Kolvenbach, supra note 25, at 711.
Some commentators question whether the Directive's three models for employee participation are "functionally equivalent," as required by article 54(3)(g).\textsuperscript{60} The article is aimed at reducing disparity in member states' laws, yet the Directive offers flexibility in providing member states three considerably different models for employee participation. One can argue that the Directive does not make employee participation "equivalent throughout the Community" and therefore cannot be based on article 54(3)(g). Article 100 may provide an alternate legal basis for the Directive, but it has stricter procedural requirements than article 54.\textsuperscript{61} Otherwise, residual authority under article 235 remains available.\textsuperscript{62}

Member states can attempt to challenge the legal basis before the European Court of Justice.\textsuperscript{63} Yet the court has never once ruled against the Commission in a suit charging that the Commission exceeded its legislative authority.\textsuperscript{64} Private parties may also challenge the legal basis. For example, parties dealing with a European Company might attempt to avoid performance of a contract or pierce the limited liability by alleging that the SE's formation was defective due to the improper legal basis of the Statute.\textsuperscript{65}

IV. Company Structures

A. Structures Currently Available

At present, companies have limited options for cross-border cooperation. A complete assets merger is still practically impossible.\textsuperscript{66} The "legislation of certain Member States does not allow, or does not provide for, such mergers, and other Member States subject such operations to the unanimous approval of the shareholders of the

\textsuperscript{60} Abeltshauser, supra note 25, at 1241.

\textsuperscript{61} Smit & Herzog, supra note 15, § 54.04[f]. See also American Chamber Observations, supra note 46, § 15.

\textsuperscript{62} Britain believes that article 235 is the only appropriate basis for the Regulation and Directive. See DTI Consultative Document, supra note 53, at 8.

\textsuperscript{63} The Economist, supra note 47, at 39.

\textsuperscript{64} Id.

\textsuperscript{65} Id.

\textsuperscript{66} The proposed Tenth Company Law Directive is intended to make cross-border mergers more practical, but the proposal has not made much headway. Proposal for a Tenth Directive Based on Article 54(3)(g) of the Treaty Concerning Cross-Border Mergers of Public Limited Companies, 28 O.J. Eur. Comm. (No. C 23) 11 (1985). The proposed Tenth Directive supplies uniform rules for setting up a merger and specifies the applicable law for the contents of "draft terms of a cross-border merger," the protection of creditors, prior legal or administrative supervision of the legality of the merger, the date the merger becomes effective, civil liability of experts preparing and implementing the merger, and the circumstances under which the merger will be declared null. Id. at 13. See English, supra note 25, at 1488-94. The proposal received a First Reading in the Parliament, but the Council has not taken any further action. Coopers & Lybrand, Company Law, Euroscoope July 25, 1991, at 12 (available on Lexis).
Six years ago the EC created a cross-border partnership-like company structure for smaller companies called the European Economic Interest Grouping (EEIG). Larger companies have no equivalent structure and are forced to use inconvenient mechanisms such as the creation of holding companies and joint ventures to accomplish equivalent goals.

1. EEIG

In 1985, the Council created the EEIG as a new legal entity for non-public cross-border enterprises employing less than 500 employees. The EEIG Regulation took effect July 1, 1989, and within one year the Commission reported about eighty five different EEIGs had been formed. Although the availability of the entity is limited by its many qualifications, the EEIG can be especially useful to smaller companies who want to share the costs and risks of cross-border business.

An EEIG must have at least two members from different member states. It may not have more than 500 employees nor may it invite investment from the public. An EEIG can be formed by companies, firms, or other legal entities by entering into a written contract in accordance with the law of a member state. Once registered in a member state, the EEIG is governed by that state's labor and other national laws not covered in the regulation, but is free to operate in any of the EC countries without further registration. Furthermore, the EEIG is available only for limited purposes: "its purpose is not to make profits for itself . . . rather] [i]ts activity shall be related to the economic activities of its members and shall not be commercial activities like marketing, purchasing and import/export, 12 are in services ranging from audiovisual and transport to professional training and the financial sector, and 14 consist of groupings of professionals like law firms." Id.

For an overview of the EEIG usefulness and applicability under each of the twelve member state's national laws, see European Economic Interest Groupings, supra note 68.

69 Fin. Times, July 30, 1990, at 2. “More than half [the EEIGs formed] are in commercial activities like marketing, purchasing and import/export, 12 are in services ranging from audiovisual and transport to professional training and the financial sector, and 14 consist of groupings of professionals like law firms.” Id.
70 For an overview of the EEIG usefulness and applicability under each of the twelve member state's national laws, see European Economic Interest Groupings, supra note 68.
71 EEIG Regulation, supra note 68, art. 4.
72 Id. art. 3(2)(c).
73 Id. art. 23.
74 Id. art. 4(1)(a).
more than ancillary to those activities." Therefore, the EEIG is designed to carry on the present activities of the participants instead of providing a vehicle to begin new, unrelated activities.

The EEIG offers several advantages. If a company qualifies as an EEIG, its participants share risk as partnerships in most countries. They hold joint and several liability which can be apportioned in the formation contract. Another advantage of this structure is the flexibility of financing. An EEIG does not have to be formed with capital; it may use subscriptions or loans to finance its operations. A major disadvantage of the EEIG structure is the tax treatment. Profits will be taxed in the hands of its members under the rules of the home country. This may lead to disparate treatment of EEIG members under their various national tax systems.

In sum, the EEIG represents a first step towards promoting cross-border cooperation in the field of company law. One EEIG expert explained that the structure is likely to be used for "'low risk' agency run businesses like lawyers, accountants, [public relations] companies; 'high risk,' high value projects such as equipment financing and big construction projects; and 'low risk horizontal groupings' within legal groups of European companies which might provide common transport or research and development services on an EC-wide basis." Two large European television companies have already taken advantage of the EEIG structure in order to promote high definition televisions. Other consortia in the service area have also expressed interest in forming an EEIG. Nonetheless, its utility is very limited by the eligibility and purpose requirements. Although it provides unprecedented flexibility and convenience for smaller companies, it cannot promote large-scale Community-wide cooperation.

2. Holding Companies, Joint Ventures

Currently, large public companies with cross-frontier operations cannot form EEIGs and are left with inconvenient options such as creating a holding company or joint venture. In both instances the cooperating companies retain their separate legal identities.

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76 EEIG Regulation, supra note 68, art. 3(1).
77 Id. arts. 24, 26(2).
78 Id.
79 Id. arts. 20, 40.
81 Fin. Times, July 5, 1989, at 35. The companies are Philips and Thompson.
82 Id.
83 Memorandum, supra note 24, at 12. Companies wishing to merge would form a financial holding company made up of the shareholders of the subholding companies in each of the operations' states. Then assets would be transferred within this group of companies. For example, if companies A and B wanted to join forces, their organization might look as follows:
These options also require application of two or more legal systems and raise serious tax disincentives.\textsuperscript{85} Such "associated companies" face double taxation "if the profits of one of the companies have been adjusted upwards by the tax authorities in one state without a corresponding downward adjustment in the country in which the other company is located."\textsuperscript{86} Also, there are numerous bilateral treaties in effect exempting foreign profits and foreign losses from taxation in the home state. Companies cannot offset losses by branches abroad even if they are making profits in the home state. Some analysts blame the failure of some early European joint ventures on this lack of cross-border tax consolidation.\textsuperscript{87} Others point out that the "Delaware effect," whereby companies chose headquar-

\begin{figure}
\centering
\includegraphics[width=\textwidth]{diagram.png}
\caption{Diagram of Holding Company made up of shareholders of A and B}
\end{figure}

\textsuperscript{84} The joint venture differs from other business undertakings by two or more persons in that it is usually formed to carry out a particular venture, dissolving upon the completion thereof. No formality is usually required. Principals of partnership law are somewhat applicable, although there is sometimes said to be no general mutual agency. The parties to a joint venture are in a fiduciary relationship. Liability is unlimited. Absent characteristics of an "association," a joint venture is usually taxable as a partnership. H. Henn & J. Alexander, Laws of Corporations and Other Business Enterprises, § 49 (3d ed. 1983).

If companies A and B formed a joint venture their relationship would look as follows:

\begin{figure}
\centering
\includegraphics[width=\textwidth]{joint_venture.png}
\caption{Diagram of Joint Venture}
\end{figure}

\textsuperscript{85} Memorandum, supra note 24, at 10.

\textsuperscript{86} Id.

\textsuperscript{87} Fin. Times, May 15, 1989, at 6. The experience of Gevaert and Bayer, who once jointly-owned Afga-Gevaert is illustrative: Bayer and Gevaert were for 14 years the joint mother companies of the two Afga-Gevaert companies, one in Belgium, and one in Germany. But they faced an impossible situation in the early 1980s when the German company was making heavy losses that could not be set off against the equally heavy profits of the Belgian company. "On its profits, the Belgian company had to pay 53 percent local corporation tax, a further 20 percent withholding tax on its dividends, leaving only one third of profit left, out of which to give capital increases to the loss-making German company." Had Afga-Gevaert been allowed to consolidate its accounts, its German losses would have reduced or eliminated its Belgian tax bill.

\textit{Id.} (quoting Mr. Andre Leysen, head of Gevaert).
ters mainly for tax reasons, is a likely result if tax provisions are not included in a supranational company structure.  

B. Proposed Regulation for a European Company

The Regulation is designed to simplify cross-border reorganization options and overcome "psychological difficulties" inherent in having to choose one member state's legal system to govern operations in other states. The Regulation would enable parties to form a public, limited liability legal entity at the Community level. It envisions an EC company structure which would be more widely available than the EEIG structure and offers certain tax incentives. It is the most significant structure designed to promote large-scale cross-border cooperation between companies to date.

1. SE Eligibility

Under the proposed Regulation, companies with activities in different EC countries would be able to combine to create a single legal entity called a "Societas Europea (SE)." Creation of an SE entity would be completely optional and would co-exist with national company laws. The Regulation requires at least two entities (this includes companies as well as most types of public and private legal entities) to form an SE. In order to be eligible, an entity must have its registered office and central administration in the Community, possess a cross-border dimension, and fulfill minimum capital requirements.

The founding entities must have both their registered offices

88 Companies operating EC-wide frequently decide to incorporate in countries such as Luxembourg, which offer national tax advantages. European Parliament Gives Initial Approval to Proposal for European Company Status, INT’L TRADE REP. (BNA) No. 5, at 172 (Jan. 30, 1991).

89 BULLETIN, supra note 25, at 38.

90 1991 Amended Regulation, supra note 44, at 3. For example, an SE formed by companies A and B might look as follows:*

\[ \text{European Company} \]

\[ \begin{array}{c}
A' \ B' \\
A'' \ B'' \\
A''' \ B'''
\end{array} \]

*reprinted from Memorandum, supra note 13, at 12.

The initials "SE" must precede or follow the name of a European Company to identify it and also distinguish it from public limited companies incorporated under national law. See 1991 Amended Regulation, supra note 44, arts. 1, 11.

91 1991 Amended Regulation, supra note 44, art. 2. The Regulation is available to entities which article 58 of the EEC Treaty broadly defines as "companies": "The term ‘companies’ shall mean companies under civil or commercial law including cooperative companies and other legal parties under public or private law, with the exception of non-profit-making companies." EEC Treaty, supra note 1, art. 58.
and "central administration" in the Community.\textsuperscript{92} This requirement may restrict access for non-EC companies with subsidiaries in the EC, if the Commission determines that its "central administration" is not in the EC. Yet, "[e]ven with this restriction, a non-EC corporation could form a European Company joint subsidiary with an EC-limited company which was a wholly-owned subsidiary of the non-EC company . . . [thereafter] the EC subsidiary could transfer its shares in the European joint subsidiary to the non-EC corporation."\textsuperscript{93} The American Chamber of Commerce and the Union of Industrial and Employers' Confederations of Europe (UNICE) have urged the Commission to change the requirement to enable companies with either their registered office or their central administration in the EC to be eligible to form an SE.\textsuperscript{94} However, neither Parliament nor the Commission has taken any action on these suggestions.

As amended, the Regulation lists a broad range of EC entities which have a sufficient "cross border dimension" to form an SE: public limited companies, private limited companies, other legal entities governed by public or private law, and other SEs. Public limited companies having their central administration in different member states can form an SE by merging or by forming a holding company.\textsuperscript{95} Public limited companies with a subsidiary or branch office in a member state other than that of their central administration can also form an SE by forming a holding company.\textsuperscript{96} The 1989 proposal required that at least two of the founding entities have their central administrations in different member states; now having a subsidiary or branch in a different member state will suffice. The 1991 amendments also allow a public limited company of a single member state to transform itself into an SE if it has a subsidiary or branch in another member state.\textsuperscript{97}

The most substantial change of the 1991 amendments enables smaller, private limited companies to form an SE. Private limited

\footnotesize{\begin{itemize}
  \item \textsuperscript{92} 1991 Amended Regulation, supra note 44, art. 2(1), (2). "Central administration" is roughly equivalent to "nerve center" in U.S. law.
  \item \textsuperscript{93} U.S. DEPARTMENT OF COMMERCE, COMMENTARY ON THE STATUTE FOR THE EUROPEAN COMPANY 71-72 (1990).
  \item \textsuperscript{94} A main concern the American Chamber was that "EC subsidiaries of non-EC companies should have equal access to the [European Company Statute]." American Chamber Observations, supra note 46, at §§ 6, 7, at 3. See Farren, Company Law Issues: The European Company Statute and Parliament's Opinion, paper presented at American Chamber of Commerce (U.K.) Seminar, London, England, March 5, 1991, at 2 [hereinafter Company Law Issues].
  \item \textsuperscript{95} 1991 Amended Regulation, supra note 44, art. 2(1).
  \item \textsuperscript{96} Id. art. 2(1)(a).
  \item \textsuperscript{97} Id. art. 2(3). See also Parliament First Reading, supra note 43, amendment 9.
\end{itemize}}
companies account for a major proportion of economic activity in the Community and Parliament urged the Commission to widen the access of the SE to include these companies. Article 2(1)(a) now permits private limited companies to form an SE by forming a holding company if "at least two of them have their central administration in different member states, or have a subsidiary or a branch office in a member state other than that of their central administration." Otherwise, any legal entity governed by public or private law can form an SE by forming a joint subsidiary subject to the same conditions as formation of a holding company. Finally, an SE itself can combine with other SEs to form an SE and an SE may also set up one or more subsidiaries in the SE form.

Another important consideration in SE eligibility is the minimum capital requirement. SEs must have minimum subscribed capitalization of ECU 100,000, twenty-five percent of which needs to be paid up front. This requirement was reduced from the 1975 draft's minimum of ECU 250,000 "to make it easier for small businesses to take advantage of the Statute." SEs engaged in certain types of activity, such as banking and insurance, would remain subject to any greater capital requirements under the laws of the member state where they are registered.

2. SE Formation

The amended Regulation sets forth four methods of formation: merger, creation of an SE holding company, creation of a joint subsidiary, and conversion of a public limited company. Participants in these formation schemes are called "founder companies," meaning those meeting the eligibility requirements outlined in the preceding section. The Regulation draws a further distinction in

98 Parliament First Reading, supra note 43, amendment 7. See also Commentary to 1989 Regulation, supra note 27, art. 2.
99 1991 Amended Regulation, supra note 44, art. 2(1a).
100 Id. art. 2(3).
101 Id. art. 3. The 1989 proposal prevented SEs from setting up SE subsidiaries "to avoid the creation of 'cascades' of SEs." Commentary to 1989 Regulation, supra note 27, art. 3(3). The Commission reversed its position at the request of Parliament. See Parliament First Reading, supra note 43, amendments 10, 11.
102 1991 Amended Regulation, supra note 44, art. 4(1). This is about $130,000. The 1991 amendments made clear that "the minimum capital was the minimum subscribed capital, that is to say the capital which the founder companies have undertaken to provide rather than the assets of the company, which will fluctuate constantly." Explanatory Memorandum to 1991 Regulation, supra note 44, art. 4, at 2.
103 1991 Amended Regulation, supra note 44, art. 38 (2); Commentary to 1989 Regulation, supra note 27, art. 4.
104 Commentary to 1989 Regulation, supra note 27, art. 4.
105 1991 Amended Regulation, supra note 44, art. 4(2).
106 Id. title II, arts. 12-37a.
107 Id. art. 12. This term was devised to encompass all the types of eligible entities, not just public limited companies. See Commentary to 1989 Regulation, supra note 27, art. 12.
that only public limited companies can avail themselves of the merger, holding company, or conversion methods of formation, whereas both public and private entities can form an SE by the joint subsidiary method. Thus, it is expected that SEs will be most frequently formed by the joint subsidiary method.

a. Merger

Formation by merger entails the “winding up” of the founder companies by transferring all of the assets and liabilities to the SE in exchange for shares. The merger process is based on the proposed Tenth Directive on cross-border mergers. The shares of the founder company are wound up or liquidated in a non-judicial way. Shareholders of the founder companies are then given the option to receive shares in the SE or to receive up to ten percent of the shares’ nominal value in cash. The merger has the effect of transferring all of the assets and liabilities of the founder companies to the SE (which can be relied upon as against third parties), making the shareholders of the founder companies the new shareholders of the SE and rendering the founder companies defunct. The founder companies must draw up “draft terms of merger” to be voted upon at the general meeting. The shareholders of each of the founder companies must approve the draft terms of merger and the instrument of incorporation in accordance with article 7 of the Third Directive on national mergers and have the right to inspect documents in accordance with article 11 of the Third Directive. Creditors and security holders of the founder companies are protected by the applicable law of the member state.

108 1991 Amended Regulation, supra note 44, art. 2(1). Private companies would first have to form a public company under the laws of a member state. See Commentary to 1989 Regulation, supra note 27, art. 12.

109 1991 Amended Regulation, supra note 44, art. 2(2). This method is “open to all legal bodies governed by public or private law, whether or not they are in company form and indeed whether or not they have a legal personality, and regardless of whether they carry on a commercial activity or just an activity with an ultimate economic purpose.” BULLETIN, supra note 25, at 13.

110 1991 Amended Regulation, supra note 44, art. 17(1).

111 See supra note 8 and accompanying text.

112 1991 Amended Regulation, supra note 44, art. 17(1).

113 Id. art. 27.

114 Id. art. 18.

115 Id. art. 22.

116 Id.

117 Id. art. 23.

118 Id. art. 24.

119 Id. art. 24a.
has registered provide grounds for nullity; the merger can be declared null and void. The Regulation also provides a shortened merger procedure for a founder company which holds 90% or more of the shares in another founder company.

b. Holding Company

Founder companies can also form an SE by creating a holding company. Unlike a merger, formation of an SE holding company would have no effect on the existence of the founder companies. Formation of an SE under this method is conditioned upon the exchange of at least fifty one percent of the voting shares of the founding companies for shares in the SE holding company. The founder companies must draw up draft terms of formation specifying the requisite percentage of shares to be transferred to the SE and submit the terms to the general meeting of each founder company for approval.

Prior to the 1991 amendments, the Regulation required that all shares be exchanged, thus, the SE holding company would be the sole owner of shares in the founding companies. "As originally conceived, the operation would have involved a compulsory contribution of capital by shareholders who did not wish to take part - a situation contrary to the legal traditions of many countries." As amended, the shareholders have a period of three months from the general meeting to assign their shares to the SE; only if the requisite percentage of shares are assigned can an SE be formed.

c. Joint Subsidiary

The third method of SE formation involves creating a joint subsidiary. This method is not limited to public limited companies and is open to any legal entity governed by public or private law. It may also be used by one SE combining with another SE or by an SE to create a subsidiary in the form of an SE. The 1991 amendments simplified the procedure for forming an SE by the joint subsidiary method by deleting provisions about draft terms of the

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120 Id. art. 29.
121 Id. art. 30a.
122 Id. art. 31(1).
123 Id.
124 Id. art. 31(2). See also Parliament First Reading, supra note 43, amendment 40.
125 1991 Amended Regulation, supra note 44, art. 31(2), (3).
126 Commentary to 1989 Regulation, supra note 27, art. 31.
127 Explanatory Memorandum to 1991 Regulation, supra note 44, arts. 31, 32.
128 1991 Amended Regulation, supra note 44, art. 31a.
129 Id. art. 34.
130 Id. arts. 34, 2(2).
131 Id. arts. 3(2), (3).
formation and approval of formation.\textsuperscript{132}

d. Conversion of a Public Limited Company

The 1991 amendments add a fourth method of formation to allow public limited companies already incorporated under one member state and having a subsidiary or branch in another member state to transform themselves into SEs.\textsuperscript{133} This conversion does "not give rise to the company being wound up nor to a new legal person being created."\textsuperscript{134} The provision calls for the drawing up of draft terms of conversion which must be approved by a general meeting of the company.\textsuperscript{135}

3. Registered Office of the SE

The "statutes of the SE"\textsuperscript{136} must designate the place in the EC where the central administration is designated as the "registered office."\textsuperscript{137} This office will reflect the "siège réel," or true headquarters of the company, not merely its place of incorporation.\textsuperscript{138} The SE's registered office plays a crucial role because the Statute often makes the SE explicitly subject to the laws of the member state where it is registered or provides that those laws will apply when the Statute is not applicable.\textsuperscript{139}

The 1991 amendments address problems which might otherwise arise if an SE wishes to transfer its registered office. Usually transferring corporate headquarters from one member state to another would require first liquidating the company. Yet under the Regulation a transfer "will not result in the SE being wound up or in the creation of a new legal person."\textsuperscript{140} The Regulation only requires that an SE whose transfers involves a change in the member state law governing the SE publish notice of the transfer. If a transfer re-

\textsuperscript{132} 1989 Regulation, supra note 27, arts. 34, 35.
\textsuperscript{133} 1991 Amended Regulation, supra note 44, arts. 37a, 2(3). See also Parliament First Reading, supra note 43, amendment 9.
\textsuperscript{134} 1991 Amended Regulation, supra note 44, art. 37a.
\textsuperscript{135} Id.
\textsuperscript{136} The 1991 amendments define "statutes of the SE" as "both the instrument of incorporation and, where they are the object of a separate document, the statutes of the SE." Id. art. 4a.
\textsuperscript{137} Id. art. 5. An SE must register in the Member State where it has its registered office. Id. art. 8(1). The registration procedure is modeled after that for EEIGs, however, an SE cannot register until a model of employee involvement is selected according to procedures set out in the Directive. Id. art. 8(3). Notice that an SE has been formed or has transferred its registered office will be published in the Official Journal of the European Communities. Id. art. 10.
\textsuperscript{138} Commentary to 1989 Regulation, supra note 27, art. 5. See Smit & Herzog, supra note 15. Most member states use the siège réel concept, except for the Netherlands and the United Kingdom, who adhere to the principle of the place of incorporation. Id.
\textsuperscript{139} 1991 Amended Regulation, supra note 44, art. 7(2)(b).
\textsuperscript{140} Id. art. 5a(1).
\textsuperscript{141} Id. art. 5a(2).
sults in a change of the chosen method of employee involvement, the accompanying Directive ensures that "the model of participation which applied before the transfer may be changed only by the same process of negotiation [to select a model of participation] ... which ... must precede the formation of an SE." These amendments respond to concerns that an SE could change its registered office to avoid obligations imposed by the laws of the member state where it has its registered office, especially if the change is intentionally made to avoid a member state's restrictions on the choices for employee involvement.

4. Management Structure

The Regulation requires the SE to adopt one of two types of management structures: a management board and a supervisory board (two-tier system) or an administrative board (one-tier system). This provision reflects the dual governing body structures for public limited companies proposed by the Council in the amendment for the Fifth Directive. Although the founder companies can chose which of these structures will apply, the 1991 amendments allow the member state to restrict the choice of the SEs registered in its borders to one of the two alternatives. The Commission explained that this amendment "will permit greater reliance on national law in respect to the functioning of public limited companies." The SE's statutes must set forth the chosen management structure and provide for a general meeting of shareholders.

a. Two-Tier System

In a two-tier system, the management board has the power to manage and represent the SE. The statutes of the SE will designate the number of members on its management board. The members of the management board are appointed and removable by the supervisory board and must provide the supervisory board with information and respond to inquiries. The two boards are entirely separate and no member may serve on both boards at one time, except in the event of a vacancy on the management board. In that case, the supervisory board may nominate one of its members

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142 Explanatory Memorandum to 1991 Regulation, supra note 44, art. 5(a), referring to article 3(7) of the Directive.
143 1991 Amended Regulation, supra note 44, title IV, arts. 61-100.
144 Id. art. 61.
145 Explanatory Memorandum to 1991 Regulation, supra note 44, art. 61.
146 1991 Amended Regulation, supra note 44, art. 61.
147 Id. art. 62(1).
148 Id. art. 62(4).
149 Id. art. 62(2).
150 Id. art. 64.
151 Id. art. 62.
to fill the vacancy, during which time that member's supervisory board duties are suspended.\textsuperscript{152}

The supervisory board's role is to supervise the duties of the management board.\textsuperscript{153} The statutes of the SE provide the required number of members on the supervisory board, but a member state can specify the required number for SEs registered in its territory.\textsuperscript{154} The members of the first supervisory board may be appointed by the statutes of the SE.\textsuperscript{155} Otherwise, members are appointed and removed at the general meeting of shareholders,\textsuperscript{156} and, if article 4 of the Directive is applicable,\textsuperscript{157} between one third to one half of the board shall be appointed by the employees or the employees' representatives.\textsuperscript{158} This two-tier board system is based on the German dual system of corporate governance.\textsuperscript{159} When combined with the co-determination model of employee involvement under the Directive,\textsuperscript{160} the supervisory board and its employee members can play a substantial role in governing the SE.

\textit{b. One-Tier System}

In a one-tier system, the administrative board ensures the management of and represents the SE.\textsuperscript{161} The statutes of the SE shall set the number of members on the administrative board.\textsuperscript{162} Members are appointed and removed at the general meeting of shareholders, and if article 4 of the Directive is applicable,\textsuperscript{163} the administrative board must have at least three members and between one third to one half of them shall be appointed by the employees or the employees' representatives.\textsuperscript{164}

The administrative board can delegate its managerial functions

\begin{itemize}
\item \textsuperscript{152} Id. art. 62(3).
\item \textsuperscript{153} Id. art. 63(1).
\item \textsuperscript{154} Id. art. 63(3).
\item \textsuperscript{155} Id. art. 63(2).
\item \textsuperscript{156} Id.
\item \textsuperscript{157} See infra notes 258-63 and accompanying text discussing "supervisory board or administrative board" model of employee involvement.
\item \textsuperscript{158} 1991 Amended Regulation, supra note 44, art. 63(2), and 1991 Amended Directive, supra note 44, art. 4. The 1991 amendments make clear that the chairman of the supervisory board will be chosen from the shareholder appointed board members. 1991 Amended Regulation, supra note 44, art. 65(1); Explanatory Memorandum to 1991 Regulation, supra note 44, at 17.
\item \textsuperscript{159} See English, supra note 25, at 1498-503.
\item \textsuperscript{160} See infra notes 258-63 and accompanying text.
\item \textsuperscript{161} 1991 Amended Regulation, supra note 44, art. 66(1).
\item \textsuperscript{162} Id. art. 66(1)(a).
\item \textsuperscript{163} See infra notes 258-63 and accompanying text discussing "supervisory board or administrative board" model of employee involvement.
\item \textsuperscript{164} 1991 Amended Regulation, supra note 44, art. 66(3). As with the supervisory board, the chairman of the administrative board will be chosen from the shareholder appointed board members. Id. art. 67(a); Explanatory Memorandum to 1991 Regulation, supra note 44, at 17.
\end{itemize}
to one or more of its members as an executive board. The administrative board can also delegate certain responsibilities to non-board members if authorized by the statutes or decided at the general meeting. This delegation to executive members would operate much like the two-tier structure, where the executive members would be supervised by the administrative board. The full board's supervision entails the executives reporting to and providing information to the non-executive board members. Under this system, the non-executive members of the administrative board clearly have more power. The Regulation states that the scope of the delegated responsibilities can be conditioned in the statutes and that the delegation can be revoked at any time.

c. Article 72

Both systems are subject to some common rules on the rights, duties, and liabilities of the board members. Among these rules is a provision requiring prior authorization for implementation of important decisions. Article 72 requires the management board of a two-tier system or the executive members of the administrative board to obtain authorization from the supervisory board or the full administrative board before taking action on certain matters of company strategy and development. The article sets out certain operations which would require prior authorization:

(a) any investment project requiring an amount more than the percentage of subscribed capital fixed in accordance with subparagraph (e);
(b) the setting up, acquisition, disposal or closing down of undertakings, businesses or parts of businesses where the purchase price or disposal proceeds account for more than the percentage of subscribed capital fixed in accordance with subparagraph (e);
(c) the raising or granting of loans, the issue of debt securities and the assumption of liabilities of a third party or suretyship for a third party where the total money value in each case is more than the percentage of subscribed capital fixed in accordance with subparagraph (e);
(d) the conclusion of supply and performance contracts where the total turnover provided for therein is more than for the previous financial year fixed in accordance with subparagraph (e);
(e) the percentage referred to in subparagraphs (a) to (d) shall be

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165 1991 Amended Regulation, supra note 44, art. 66(2).
166 Id. art. 66(2).
167 Commentary to 1989 Regulation, supra note 27, art. 66.
168 Id. art. 67.
169 1991 Amended Regulation, supra note 44, art. 66(2).
170 See, e.g., id. arts. 68 (terms of office), 69 (conditions of membership), 72 (operations requiring prior authorization), 74 (rights and obligations), 76 (quorum, majority), 77 (civil liability).
171 Id. art. 72.
172 Id.; Commentary to 1989 Regulation, supra note 27, art. 72.
determined by the statutes of the SE. It shall not be less than 5%, nor more than 25%.\textsuperscript{173}

This list is non-exclusive and the SE may set out additional decisions requiring prior approval in its own statutes.\textsuperscript{174} The 1991 amendments allow member states to align the provisions governing SEs registered in its territory with those applicable to public limited companies under its national law.\textsuperscript{175} Furthermore, member states can allow the supervisory or administrative board of the SEs registered in its territory to choose to come under the national law provisions instead of those in article 72.\textsuperscript{176}

Article 72 has been the source of considerable criticism because of its nexus with the worker participation provisions in the Directive.\textsuperscript{177} The “important” decisions listed in article 72 are also those entitling the employees to be informed and consulted under the Directive.\textsuperscript{178} Depending on the model of worker participation selected by the SE, any article 72 decision “may be effected only after [the employees have] been informed and consulted.”\textsuperscript{179} Both article 72 of the Regulation and articles 5 and 6 of the Directive are ambiguous as to when the respective “prior authorization” and employee “information and consultation” must occur.\textsuperscript{180} The 1989 proposal required that the interaction occur “before implementation.” Parliament addressed this ambiguity and suggested that employees “be informed, without delay, and consulted at a suitably early stage . . . before any [article 72 decision is taken] . . . and to have access to documents relating thereto.”\textsuperscript{181} The Commission chose not to adopt the language suggested by Parliament, thus it appears the interaction could still occur after the decision but before implementation.

Commentators have leveled criticisms against article 72 similar to those directed against the Directive on worker participation. Critics generally argue that the authorization and consultation procedures are likely to bog down decision-making and prevent

\textsuperscript{173} 1991 Amended Regulation, supra note 44, art. 72(1).
\textsuperscript{174} Id. art. 72(2).
\textsuperscript{175} Id. art. 72(3).
\textsuperscript{176} Id. art. 72(4).
\textsuperscript{177} See Company Law Issues, supra note 94, at 5.
\textsuperscript{178} 1991 Amended Directive, supra note 44, arts. 5(2)(d) & 6(2)(c).
\textsuperscript{179} Id. art. 72(2).
\textsuperscript{179} Id. The employee rights to consultation and information apply when the “separate body” (Directive, art. 5) or collective bargaining (Directive, art. 6) models of employee participation are selected under the Directive. When co-determination (article 4) is selected, the employees are represented on the supervisory board itself, and thus do not need special consultation. The Commentary to article 4 states that “the power to authorize certain operations (listed in article 72 of the Regulation) will rest with a majority of the members . . . [the] minority will be informed and consulted . . . [and] be able to express its view, even if it is not in a position to decide on the operation itself.” Commentary to 1989 Directive, supra note 28, at art. 4.
\textsuperscript{180} Company Law Issues, supra note 94, at 5.
\textsuperscript{181} Parliament First Reading, supra note 43, art. (5)(2)(c), at 103.
management from responding quickly to changes in the business environment. They allege that such procedures will tie the hands of managers and threaten competitiveness of SEs.

5. Tax Incentives

The main incentive for companies to incorporate as European entities are the tax provisions. Although an SE will be subject to the laws of the member state in which it is registered, the Regulation allows SE parent companies to deduct the losses from "permanent establishments" (or branches) in member states or non-member states from their taxable income in the state where the SE is registered. This provision will protect the SE by altering the present treatment under some bi-lateral treaties which exempt foreign profits and losses from taxation in the home state. The Statute allows profits from abroad to be included in taxable income up to the amount of the losses from abroad. This provision is designed to protect member states from being denied tax on profits up to the amount of deducted losses.

The Statute's tax scheme is designed to reflect an SE's pan-European activity and legal status. Although the tax provisions generally appeal to businesses, member state governments may be reluctant to allow any inroads on their tax sovereignty. At present, most member states (except Britain, Ireland, and in limited cases France) do not allow deductions of foreign losses. Some fear that the provisions do nothing to prevent companies operating in heavily taxed countries from using the offset to cut their tax bills if they move to another country. Others raised initial objections that the Statute discriminates against non-SE companies. In re-

182 See UNICE Position, supra note 94, § 27, at 6 (provisions "could lead to a bureaucratization of relations between management . . . and the supervisory board"); American Chamber Observations, supra note 46, §§ 33-34, at 7 (information and consultation of article 72 decisions must not amount to a right of veto and management should be able to "override the obligation altogether . . . in certain cases of urgent commercial need").
183 Company Law Issues, supra note 94, at 5.
184 See 1991 Amended Regulation, supra note 44, title IX, art. 133.
185 Id. art. 133(1).
187 1991 Amended Regulation, supra note 44, art. 133(2).
188 Memorandum, supra note 24, at 12.
189 See id.
190 Fin. Times, July 5, 1989, at 35. See, e.g., DTI Consultative Document, supra note 53. The British government sees the "centralized harmonization as unnecessary and potentially harmful . . . [and believes] [m]arket forces will bring about such harmonization as is necessary." Id. at 9. Cf. Fin. Times, March 5, 1990. Labor groups in Britain support the tax measures in the Statute, in hopes this will provide incentives to industry to increase employee involvement. Id.
191 Memorandum, supra note 24, at 16.
193 UNICE Position, supra note 94, § 15, at 3; American Chamber Observations, supra note 46, § 6, at 3.
sponse the Commission proposed a directive in November 1990 with analogous tax provisions to apply to all businesses.194

Parliament voted to drop the favorable tax treatment currently offered in the proposal.195 It prefers that tax harmonization occur through the forthcoming Directives which would be applicable to all companies.196 Furthermore, Parliament expressed doubts as to the legality of the proposed Regulation’s legal basis (article 100a) if the tax provisions were left in the proposal.197 Fiscal policy is usually based on articles 95 to 99 of the EEC Treaty and requires unanimous voting.198 However, the Commission decided not to make any amendments to the 1989 tax provisions.

6. Accounting and Disclosure

The Statute also offers SEs simplified accounting and disclosure provisions.199 The provisions require SEs to "draw up annual accounts comprising the balance sheet, the profit and loss account and notes on the accounts,"200 and to "draw up an annual report which must include at least a fair review of the company’s business and of its position."201 Although the Fourth Directive (annual accounts)202 and the Seventh Directive (consolidated accounts)203 will apply to SEs, the Statute provides some exemptions and modifications. It would make the more liberal options in the accounting Directives

196 After more than twenty years of discussion, the EC is now beginning to make substantial progress in company tax harmonization. In July 1990 the Council adopted a series of three tax directives. The first aims to make mergers more feasible by allowing deferral of the capital gains tax on the assets of the absorbed company until the assets are realized through break up or liquidation. The second eliminates double taxation of dividend transfers between parent companies and subsidiaries in different member states by exempting such payments from withholding tax. The third directive creates a standing committee to arbitrate transfer pricing and double taxation disputes. Company Tax Relief Obtained, 2 EURECOM: MONTHLY BULL. EUR. ECON. & FIN. NEWS, July 1990, at 1.

In November 1990 the Commission proposed two more directives to remove disincentives to company restructuring across the EC. One proposal extends the exemption from withholding tax on dividend transfers to transfers of royalties and interest payments between parent companies and subsidiaries in different EC countries. The other proposal allows companies to offset losses from subsidiaries abroad against profits in the parent company’s home state. EC Tax Commissioner Introduces Proposals to Lift Barriers to Company Restructuring, 7 Int’l Trade Rep. (BNA) 1842 (Dec. 5, 1990).

197 Id.
200 Id. art. 101(1).
201 Id. art. 102(1).
available to SEs. Yet under the Statute a member state will not be able to impose additional disclosure requirements beyond those in the Directives.204 This has raised criticism from governments who currently require more disclosure by their own corporations than do the Directives.205 Some are concerned that the liberal disclosure requirements of the Statute would make the SE a vehicle to operate with minimum disclosure.206

Banks and insurance companies are exempted from the liberalized disclosure modifications available for other SEs.207 The Statute specifically requires banks and insurance companies to comply with national laws implementing the Directive on bank accounts208 and the proposed Directive on accounts of insurance companies.209 As to the SEs there would be no differential accounting and disclosure treatment within a member state.

7. Items Not Covered

The Statute spells out certain areas which are not covered by the Regulation. These include: "(i) social security and employment law, (ii) taxation and competition law, (iii) intellectual property law, [and] (iv) insolvency law."210 Community law and member states' laws are applicable in these areas. At the request of Parliament,211 the Commission's 1991 amendments clarified the order of precedence of the laws applicable to SEs: (1) the Regulation, (2) where expressly authorized in the Regulation, the statutes of the SE, (3) the laws of the member state where the SE is registered, (4) the statutes of the SE (those provisions in accordance with the laws governing public limited companies in the member state where it is registered).212 The current proposal represents a significant change from earlier proposals which completely precluded application of member state law.213

The Commission pointed out that the laws of the member states will

204 DTI Consultative Document, supra note 53, annex E, at 1.
205 For example, a British public limited company would be required to disclose more information than an SE registered in Great Britain. Id. See (British) Companies Act of 1985 (schedules 4-7) and Companies Act of 1989.
206 See INSTITUTE OF CHARTERED ACCOUNTANTS OF ENGLAND & WALES, RESPONSE TO DTI CONSULTATIVE DOCUMENT (March 1990).
207 1991 Amended Regulation, supra note 44, art. 113.
210 1991 Amended Regulation, supra note 44, introduction.
211 See Parliament First Reading, supra note 43, art. 7, at 77.
212 1991 Amended Regulation, supra note 44, art. 7(1).
213 Several commentators describe the current proposal's references to national law as "escapism." See Ellis & Storm, supra note 19, at 55. They argue that "the Commission tries to avoid such thorny problems as those connected with groups of companies and taxation. Of course this does not solve those problems. It rather exacerbates them in view of the great differences between national laws." Id.
become more and more harmonized through Council directives and now refers SEs to the applicable law of the member state where it has its registered office.\textsuperscript{214} No doubt the Commission hopes references to national law will make the Statute more palpable to the member states, especially in areas such as taxation, winding up, and liquidation.

On the other hand, commentators have criticized the Statute generally as leaving too much open to national laws.\textsuperscript{215} They point out that the gaps in the legislation to be filled in by national laws undermine its utility as a Community-wide structure.\textsuperscript{216} It is argued that non-EC companies will have difficulty in applying some areas of the various member states’ laws for their SE subsidiaries.\textsuperscript{217} Ironically, earlier drafts were criticized as being too complex because they attempted to deal with a wide range of technical issues such as insolvency and winding up.\textsuperscript{218} Perhaps the Commission’s decision to leave certain technical items to member states’ laws should be viewed as a pragmatic approach since it does nothing to preclude harmonization of these areas through subsequent EC legislation and may ensure sooner adoption of a structural foundation for cross-border cooperation.

V. Employee Involvement

A. EC History of Employee Involvement

The EC has long supported the idea of a “social dimension”\textsuperscript{219} to the Common Market. The major legislation in this area is the Social Charter\textsuperscript{220} with its accompanying Social Action Programme\textsuperscript{221} which sets forth measures to implement the rights discussed in the

\textsuperscript{214} Commentary to 1989 Regulation, supra note 27, at art. 7.
\textsuperscript{216} Ellis & Storm, supra note 19, at 56.
\textsuperscript{218} Carreau & Lee, supra note 24, at 502 n.9.

The Charter provides a bill of twelve rights to EC workers: free movement, fair pay, improved working conditions, social protection, collective bargaining, vocational training, equal treatment between men and women, worker consultation and participation in management, health and safety protection in the workplace, protection of children and adolescents, protection of the aged, and protection of the handicapped. See Dowling, Worker
Charter. These documents contain a variety of provisions for community-wide social rights in areas such as social security, minimum wage, worker participation and consultation, pension benefits, mutual recognition for technical qualifications, health and safety standards, part-time labor benefits, parental leave, and vocational training.\textsuperscript{222} Most of the provisions, except laws on health and safety and on vocational training,\textsuperscript{223} require unanimity in the Council of Ministers.\textsuperscript{224} At present the Charter is far from creating legally enforceable social rights. The Charter would not be binding as would a regulation or directive, but would create "a political obligation."\textsuperscript{225} At the EC Summit in December 1989 the Council "adopted" the Charter over Britain's veto.\textsuperscript{226} As a result, there is dispute as to the legality of the Charter's adoption and the weight member states must give it.\textsuperscript{227} The Commission hopes to get around some of Britain's opposition to the social dimension by including the worker participation provisions in the proposed Directive in the European Company Statute which can be adopted by a qualified majority of Council Ministers.\textsuperscript{228}

The current worker participation provisions in the Statute are protégées of the infamous "Vredeling" Directive\textsuperscript{229} and the Fifth Directive.\textsuperscript{230} The Vredeling proposal would have required EC employ-
ers and non-EC multinationals to inform workers on issues such as the company’s financial situation and strategy and to consult workers before taking action which would have affected them significantly.\textsuperscript{231} Soon after the proposal was published in 1980, it received overwhelming criticism from member states\textsuperscript{232} and commentators\textsuperscript{233} and was abandoned in 1986.

While the Vredeling Directive only dealt with information and consultation, the Fifth Directive was meant to bring worker participation into the company’s structure.\textsuperscript{234} The Fifth Directive provides employees with supervisory rights in management with a preference for a two-tier board structure.\textsuperscript{235} The Fifth Directive would require public limited liability companies of 1,000 or more workers to adopt one of four models of worker participation.\textsuperscript{236} Its models are almost analogous to those now contained in the proposed Statute for a European Company. The crucial difference is that the SE structure and its attendant worker participation requirements are optional, whereas the Fifth Directive’s requirements would be mandatory. For the time being, the Commission and Council have decided to set


\textsuperscript{231} Carreau \& Lee, supra note 24, at 510.

\textsuperscript{232} See, e.g., Britain, \textit{Income Data Services, IDS Study: Vredeling & The Fifth}, No. 313 (1984). The British Government stated that “the introduction of Community-wide legislation in this area would contribute nothing to the establishment of the common market in goods and services, but would increase employers’ costs and damage the competitive position of industry in the Community.” \textit{Id.} at 16.

\textsuperscript{233} See, e.g., \textit{Transnationals and EEC Law}, 98 EUR. INDUS. REL. 21, 21-23 (1982). The employer’s confusion, UNICE, criticized the plan as “neither necessary nor useful.” \textit{Id.} at 22. Employer members of the Economic and Social Committee called the draft “a rigid Community instrument, imposing identical provisions everywhere, [and] would disrupt existing relations without any justification.” \textit{Id.} The United States introduced three bills aimed at limiting the impact of the Vredeling draft on U.S. multinationals operating in Europe. \textit{Id.} at 23. The Council of American Chambers of Commerce, Europe and Mediterranean (EUROMED) strongly criticized the draft as “creat[ing] an institutional structure for virtually endless delaying tactics, during which corporate decisions cannot be implemented.” \textit{Id.}


\textsuperscript{235} Hopt, supra note 230, at 1345; Hadden, \textit{Employee Participation — What Future for the German Model?}, 5 COMPANY LAW. 250, 250 (1982).

\textsuperscript{236} Hopt, supra note 230, at 1346.
aside the Fifth Directive and focus on the worker participation provisions in the Statute.\textsuperscript{237} It is hoped that the agreed upon framework of the Statute could then be applied to the Fifth Directive and increase its likelihood for passage.\textsuperscript{238} This puts additional pressure on the EC to secure adoption of the Company Statute in the near future.

The Statute for the European Company has contained provisions relating to worker participation since its inception in 1970.\textsuperscript{239} In the memorandum issued one year prior to the proposed Statute's publication the Commission reiterated its "view [that] worker participation is essential not just as a matter of social rights, but as an instrument for promoting the smooth running and success of the enterprise through promoting stable relationships between managers and employees in the workplace."\textsuperscript{240} The Parliament has continuously supported the Commission's stance on worker participation.\textsuperscript{241}

\textbf{B. Proposed Directive on Employee Involvement}

The Statute directs member states to "take the necessary measures to enable employees of the SE to participate in the supervision and strategic development of the SE in accordance with the provisions of this Directive."\textsuperscript{242} The Directive provides three models of employee involvement and a procedure to ensure that an SE cannot be formed without adopting one of these models.\textsuperscript{243} The member states can decide how the models will be applied to SEs registering within its borders\textsuperscript{244} and can restrict the choice of models available in its country.\textsuperscript{245} This provides some flexibility to the member states to shape the methods of employee involvement in ways appropriate to their national tradition of labor relations.

Given the member states' determination as to suitable national forms of employee involvement, the management boards or administrative boards of the founder companies and the representatives of the employees will try to reach an agreement as to which model will be applied in the SE.\textsuperscript{246} The 1991 amendments provide that their

\textsuperscript{237} In September 1990, the Council announced that it was "leaving to one side" its discussions on the Fifth Directive until agreement was reached on the employee participation provisions in the Statute for the European Company. Perell & Farren, \textit{supra} note 46, at 17.

\textsuperscript{238} \textit{Id.}

\textsuperscript{239} \textit{Memorandum, supra} note 24, at 13.

\textsuperscript{240} \textit{Id.}

\textsuperscript{241} The Parliament even voted for an amendment to the initial proposal which would have mandated the supervisory board structure. This structure is available as one of three options in the current proposal and is generally considered the most participatory. \textit{See id.}, at 14.

\textsuperscript{242} \textit{1991 Amended Directive, supra} note 44, art. 2.

\textsuperscript{243} \textit{Id.} art. 3(2).

\textsuperscript{244} \textit{Id.} art. 3(4).

\textsuperscript{245} \textit{Id.} art. 3(5).

\textsuperscript{246} \textit{Id.} art. 3. The 1991 amendments set out the procedure that management and the
negotiations "shall consider the legal, economic and social consequences of the formation of the SE and any measures to be taken with respect to the employees in order to arrive at an agreement on the model of participation which is to apply to the SE." If an agreement is reached, the text will be submitted to the general meeting called to approve the formation of the SE. The shareholders must ratify the agreement before the SE can be registered. If no agreement can be reached, the employees shall state in writing "why . . . the formation of the SE is contrary to the employees' interests and what measures should be taken with respect to the employees." This writing, together with a report by the management or administrative boards of the founder companies, will be submitted to the general meeting called to approve the formation of the SE. In this case, the shareholders have the ultimate power to choose the model of participation. The model can subsequently be changed only if the board and the employees so agree.

1. Three Models of Worker Participation

The Directive's three possible models of employee involvement are: (1) participation in supervisory or administrative boards; representation through a separate body; and (3) other models agreed upon by the management and employees. These models are intended to involve employees in the supervision and strategic development of the SE, but not in the day-to-day running of the firm.

a. Supervisory Board or Administrative Board

The first model assures employees minority representation on the supervisory board (in a two-tier board system) or on the adminis-
trative board (in a one-tier board system).\textsuperscript{258} Employees will be able to appoint or remove between one-third and one-half of the board members and the shareholders (who would otherwise elect the entire board) will appoint or remove the remaining two-thirds to one-half of the board members.\textsuperscript{259} As an alternative, the board members will be appointed or removed by the board itself, with the nomination or objection of the shareholders and employees.\textsuperscript{260} All board members will enjoy the same rights and obligations, regardless of whether selected by the employees or the shareholders.\textsuperscript{261} It is noteworthy that “decisions requiring prior authorization” under article 72 of the Regulation must be authorized by a majority of the board, and under this model, the employees will never have the majority. Nonetheless, the commentary states that the minority of the board is entitled to be informed and consulted on the decision.\textsuperscript{262} In the event of deadlock, the 1991 amendments provide that a chairman of the board appointed by the general meeting of shareholders will be able to cast the deciding vote.\textsuperscript{263}

\textit{b. Separate Body}

The second model provides for employee representation in a body separate from the governing body.\textsuperscript{264} All employees of the SE and its branches are entitled to elect and serve in this representative capacity.\textsuperscript{265} The separate body is entitled to receive the same information which the supervisory board receives from the management board in a two-tier board system and the administrative board receives from those to whom it has delegated certain management duties.\textsuperscript{266} Thus, “[t]he management board or the administrative board of the SE shall at least every three months inform the separate body of the progress of the SE’s business and of its prospects taking ac-

\textsuperscript{258} \textit{1991 Amended Directive, supra note 44, art. 4.}
\textsuperscript{259} \textit{Id. art. 4(I). This option is based on the German system of co-determination. Under German law, co-determination (“Mitbestimmung”) applies to companies with more than 500 workers. Gesetz über die Mitbestimmung der Arbeitnehmer, 4 May 1976, Bundesgesetzblatt 1976, Teil I 1155. See generally, W. Kolvenbach & P. Hanau, \textit{Federal Republic of Germany, in HANDBOOK ON EUROPEAN EMPLOYEE CO-MANAGEMENT} (1989) [hereinafter HANDBOOK].}
\textsuperscript{260} \textit{1991 Amended Directive, supra note 44, art. 4(II) (variation is based on the Dutch system of co-optation).}
\textsuperscript{261} \textit{Commentary to 1989 Directive, supra note 28, art. 4. Article 74 of the Regulation entitles each board member to “the same rights and obligations, without prejudice . . . .” 1991 Amended Regulation, supra note 44, art. 74.}
\textsuperscript{262} \textit{Commentary to 1989 Directive, supra note 28, art. 4.}
\textsuperscript{263} \textit{1991 Amended Regulation, supra note 44, art. 76(3)(a), art. 65(supervisory board), art. 67(a)(administrative board). See Explanatory Memorandum to 1991 Directive, supra note 44, art. 5, at 3.}
\textsuperscript{264} \textit{1991 Amended Directive, supra note 44, art. 5. This model is based on the Franco-Italian systems. See generally HANDBOOK, supra note 259 (chapters on France & Italy).}
\textsuperscript{265} \textit{Commentary to 1989 Directive, supra note 28, art. 5.}
\textsuperscript{266} \textit{Explanatory Memorandum to 1991 Directive, supra note 44, art. 5, at 3. See 1991 Amended Regulation, supra note 44, art. 64(supervisory board); art. 67(administrative board).}
count of any information on any undertakings controlled by the SE which might have an appreciable impact on the progress of the SE's business.” The board shall “without delay supply to the separate body any information which may have significant implications for the SE’s situation.” The separate body may demand information on “any matter concerning conditions of employment” and demand “to examine all documents submitted to the general meeting.” Also, the decisions listed in article 72 of the Regulation “may be effected only after the separate body has been informed and consulted.” Beyond these basic rights, the member states can continue to offer rights presently available or confer additional rights on employees’ representatives under national laws.

c. Other Models

The third model allows for collective bargaining between labor and management to determine other forms of employee involvement. At a minimum, the employees or their representatives will be entitled to the same information and consultation referred to in the separate body model. This model also binds the employees to “observe the necessary discretion in relation to any confidential information.” If the bargaining parties cannot reach an agreement, the member state where the SE is registered can offer a “standard model . . . [which] shall guarantee for the employees at least the rights of information and consultation provided for by this Article.” This method of last resort appears to open the door to na-

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268 Id. art. 5(2)(a).
269 Id. art. 5(2)(b).
270 Id. art. 5(2)(c).
271 Id. art. 5(2)(d).
272 Id. arts. 5; 10; Explanatory Memorandum to 1991 Directive, supra note 44, art. 5. The Commission pledged that:

274 1991 Amended Directive, supra note 44, art. 6(2)(a)-(d).
275 1991 Amended Directive, supra note 44, art. 6(4). Their obligation to confidentiality continues “even after their duties have ceased.” Id.
276 Id. art. 6(8). The 1989 proposal required that “[the standard model] shall be in conformity with the most advanced national practices and shall ensure employees at least the rights to information and consultation provided for by this Article.” 1989 Directive, supra note 28, art. 6(8). The Commission explained this deletion in the current proposal:
tional legislation on employee participation.\(^{277}\)

2. Parliament's Amendments to the Directive

Parliament takes an even more liberal approach to worker participation than the Commission. This is evidenced by the series of over thirty amendments proposed by the Parliament's Committee on Legal Affairs and Citizens' Rights,\(^{278}\) the majority of which were actually adopted by the Parliament.\(^{279}\) The amendments were designed to strengthen worker participation in decision-making and increase representational rights. The Commission heeded many of Parliament's suggestions in drafting the current proposal,\(^{280}\) yet some of the more progressive suggestions were left untouched.

a. Arbitration

The Commission rejected Parliament's amendment providing for arbitration of disputes between employers and workers before a non-judicial agency in the member state where the SE has its registered office.\(^{281}\) The amendment allowed employers and workers to arbitrate a wide range of aspects of worker participation.\(^{282}\) Earlier Commission proposals called for an arbitration board composed of employees and management,\(^{283}\) but until the amendment the idea of dispute settlement by a third party had not been suggested. Given

\[^{277}\text{"it would have been difficult to apply, given the very rapid developments in the national practices in the field." Explanatory Memorandum to 1991 Directive, supra note 44, art. 6, at 4.}\]

\[^{278}\text{The Commentary explains that the Commission reluctantly accepted this "standard model" provision, and only on the condition that employees be entitled to all rights under the Directive, including those on quarterly information (article 6(2)(a)), and information and consultation provisions for decisions listed under article 72 of the Regulation (article 6(2)(b)). Commentary to 1989 Directive, supra note 28, at art. 6.}\]


\[^{281}\text{Among the Parliament amendments adopted by the Commission is a provision to set up a Contact Committee to "facilitate ... application of this directive ... [and] advise the Commission, if necessary, on additions or amendments to this directive." 1991 Amended Directive, supra note 44, art. 11a(1); Parliament First Reading, supra note 45, new art. 1lc(1) (amendment 29). The Committee will be "composed of representatives of the Member States, of the social partners and of the Commission" and chaired by a representative of the Commission. 1991 Amended Directive, supra note 44, art. 11a(2); Parliament First Reading, supra note 43, new art. 1lc(2)(amendment 29).}\]

\[^{282}\text{Parliament First Reading, supra note 43, new art. 11(b) (amendment 28). Arbitration would occur "before a non-judicial agency responsible for ensuring the proper application of national labour law." Id.}\]

\[^{283}\text{See id.}\]

\[^{284}\text{1975 Amended Proposal, supra note 18, arts. 126-29, at 64-65. See Kolvenbach, supra note 25, at 768.}\]
that employee-management negotiations play a crucial role in the creation of an SE, the Commission was understandably reluctant to allow third party intervention.

b. European Works Council

Parliament also included a series of amendments for the formation of a European Works Council (EWC) in SEs. These amendments provide for employee participation at the shop floor level for matters concerning more than one establishment not located in the same member state. Both the 1970 and 1975 Commission proposals contained provisions similar to those suggested by Parliament. An EWC would co-exist with national employees’ representative bodies and deal with problems which arise from the European dimension of the SE. Every SE or subsidiary with establishments in at least two countries employing over 100 workers in each would be required to form an EWC. The EWC would intervene in employer-worker disputes concerning cross-national matters which cannot be settled by employees or representatives within the establishment. The EWC would have the right to receive quarterly reports dealing with the employment situation in the SE, production and investment, rationalization projects, production and working methods, and “any other fact or project which may have an appreciable effect on the interests of workers of the SE and of undertakings controlled by the SE.” The EWC would also be consulted on any decision concerning vocational training programs, the intro-

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285 Employee participation can occur at various levels of the company structure. The term “shop floor level” is used to indicate those forms of participation from below, as institutionalized in factories by a works councils, “shop stewards” (Britain), “comités d’entreprise” (France), “Betriebsrat” (Germany), etc. See generally General Section, in HANDBOOK, supra note 259, at 12-20.

286 Parliament First Reading, supra note 43, amendment 24, new art. 10a, at 108.

287 The early Commission proposals provided for the formation of European Works Councils composed of employee representatives from the SEs various establishments throughout the Community. The 1975 proposal granted the EWC certain information and consultation rights. 1975 Amended Proposal, supra note 18, arts. 120-25. The management board would have to seek agreement from the EWC in order to make decisions of particular importance to workers. Id. arts. 123-25. See also HANDBOOK, supra note 259, at 765-67.

288 Parliament First Reading, supra note 43, new art. 10(2) (amendment No. 23)(the 1975 Proposal had set the threshold number of workers in foreign establishments at 50).

289 Id. new art. 10(a), at 108.

290 Id. new art. 10(b)(3), at 108.
duction of new technologies, closure or transfer of establishments, substantial reduction of activities of the SE, and substantial organizational changes within the SE.291

3. Draft Directive on European Works Councils in Community-Scale Undertakings or Groups of Undertakings

Although the Commission did not adopt Parliament’s ideas for an EWC in the current proposal for a European Company Statute, it drafted a separate directive on the establishment of an EWC in Community-scale undertakings or groups of undertakings.292 The draft Directive allows employees to participate at the shop floor level in decisions which are likely to affect them, yet are made outside the member state where they are employed. The draft Directive on EWCs is designed “to improve the provision of information to and the consultation of employees”293 in “[undertakings] with at least 1,000 employees within the Community and at least two establishments [or group undertakings] in different Member States each of which employs at least 100 employees within the Community.”294 Thus, the Commission’s draft Directive on EWCs seeks to harmonize the level of information and consultation which large EC-wide companies would provide their employees in different member states.

Creation of an EWC under the draft Directive is largely based on collective bargaining principles. Employees or central management can convene a meeting of a “special negotiating body,” composed of employees representatives from all establishments employing at least 100 people, and open negotiations for creation of an EWC.295 The employees’ representatives and the company’s central management296 will draw up a written agreement as to “[t]he nature, composition, competence and mode of operation of the EWC.”297 Each member state can allow the central management of undertakings in its territory to withhold disclosure of information which would “sub-

291 Parliament First Reading, supra note 43, new art. 10(d)(1)(a)-(e).
293 Id. art. 1.
294 Id. art. 2.
295 Id. art. 5(3).
296 In “community-scale groups of undertakings,” the employees will meet with the “controlling undertaking,” i.e., the shareholder or member of another company with corporate control. See id. art. 8.
297 Id. art. 5. The agreements shall include the terms set out in article 6(a)-(e).
stantially damage the interest of the undertaking concerned.’”298 In any event, member states must require EWC members to keep disclosed information in confidence.299

The parties can also agree not to set up an EWC, but certain minimum information and consultation requirements must be met.300 The minimum requirements include the right to meet with the central management at least once a year and be informed about “[the undertaking’s] structure, economic and financial situation, the probable development of the business and of production and sales, the employment situation and probable trend, and investment prospects.”301 The employees also have the right to be informed and consulted “about any management proposal likely to have serious consequences for the interests of the employees of the undertaking.”302 Information and consultation will concern matters which are likely to affect the undertaking as a whole or at least two of its establishments located in different member states.303 Management must bear the operating expenses of the EWC, including the cost of meeting facilities and travel and accommodation expenses of members of the EWC.304

Although the draft Directive relies on collective bargaining principles to establish an EWC, it mandates minimum information and consultation rights. The draft has been called a “mini-Vredeling” Directive and has already received a considerable amount of criticism.305 It is slated for implementation by the member states by December 31, 1992. If adopted on time, the draft Directive will be in place if the European Company Statute takes force on January 1, 1993, and apply to large SEs too. In contrast to the draft Directive, the European Company Statute takes the view that there is no need for a supranational system of shop floor level information and consultation to be imposed on SEs in particular.306 The European Com-

298 Id. art. 8(1).
299 Id. art. 8(2).
300 Id. art. 6(2).
301 Id. annex (1)(c).
302 Id. annex (1)(d).
303 Id. annex (1)(a).
304 Id. annex (1)(g).
pany Statute makes clear that its employee participation schemes will "in no way to detract from the rights enjoyed by employees' representatives in factories, plants, establishments in the Member States."\(^{307}\) Instead, the Statute's focus is on participation in the supervision and strategic development of the SE by participation at the board level, on a separate body, or by other methods determined by collective bargaining. Had the Commission mandated special shop floor participation provisions for SEs, opposition to the European Company Statute's already contested employee involvement provisions might have been even greater.

C. Opposing Traditions and Views

The European Company Statute's employee involvement provisions are causing heated debate across the EC and among other observers. The issue of worker participation/employee involvement\(^ {308}\) is politically charged by pressures from labor and industry.\(^ {309}\) It is also a source of great controversy among the member states who have very different traditions concerning worker participation.\(^ {310}\)

1. Germany

Germany has a longstanding history of worker involvement at both the shop floor and the board levels.\(^ {311}\) Early legislation provided for elected "worker committees" who represented both the employer and the workers and dealt with matters concerning work rules, social welfare institutions, and employer-employee disputes.\(^ {312}\) This early form of "co-determination" became characteristic of employee-employer relations in Germany. In 1905, the first compulsory system of worker committees were made mandatory in the mining industry, and by 1918, the worker committees became mandatory in every business employing more than twenty work-

\(^{307}\) Explanatory Memorandum to Directive, supra note 44, art. 10, at 6.

\(^{308}\) Recent legislation uses the "employee involvement" terminology because "worker participation" was thought to imply more stringent worker rights. This author uses the terms interchangeably, not intending one to be more loaded than the other.

\(^{309}\) For labor and union views, see Unions Fear EC May Dilute Worker-Director Proposals, Fin. Times, Dec. 9, 1988, at 12, col. 5 (European trade union leaders); Help Urged to Boost Employee Involvement, Fin. Times, Mar. 5, 1990, at 10, col. 3 (Industrial Society). For employers' and industry's views, see European Company Statute: Threatened by Thatcher, The Economist, June 3, 1989, at 68 (European Employers Federation (UNICE)); Fears Voiced Over European Draft on Worker Directors, Fin. Times, Mar. 9, 1990, at 13 (Engineering Employers Federation).


\(^{311}\) See Hanau, Federal Republic of Germany, in HANDBOOK, supra note 259, at 3-22 (shop floor level), 23-38 (board level). See also Wiedemann, Co-determination by Workers in German Enterprises, 28 Am. J. Comp. L. 79, 81-83 (plant level), 79-81 (enterprise level)(1980).

\(^{312}\) Hanau, supra note 311, at 3.
Modern legislation provides for "works councils" to represent all employees in establishments with five or more full-time employees, regardless whether the employees are members of trade unions or not. The number of members, election procedure, and term of office is legislated in detail. Members are released from work duties without loss of pay, protected from dismissal, and bound to secrecy. The works council represents the employees in a wide range of social, personnel, and economic matters such as negotiations with employers about wages, factory conditions, and grievance disputes.  

German company law has developed as a two-tier board system (supervisory board and management board). Until co-determination laws were enacted, the supervisory board was appointed by shareholders. In 1922, the first legislation providing for employee representation on supervisory councils of companies was enacted. German co-determination subsequently evolved through experimentation with different models of worker representation on company boards. In 1976, Germany passed the Co-Determination Act which applies today. The Act provides for mandatory co-determination to companies with more than 2,000 employees (counting executive staff). It requires that one half of the supervisory board's members be elected by employees and one half by shareholders. The Act addresses the rights and duties of supervisory board members and gives individual members the right to demand certain information from the entire board. Thus, employee supervisory board members have extensive information and consultation rights.

In light of this tradition, Germany welcomes even the most liberal of the Statute's worker participation provisions. Germany was particularly concerned that the SE structure not become a vehicle to circumvent its national system of two-tier boards and

313 Id. at 3-4.
315 Hanau, supra note 311, at 24.
316 Id. at 23 (citing Reichgesetzblatt 209 (1922)).
317 See id. at 23-31, discussing legislation enacted in 1951 ("parity co-determination"), 1952 ("one-third determination"), and 1976 ("quasi-parity co-determination").
318 Gesetz über die Mitbestimmung der Arbeitnehmer, Bundesgesetzblatt, Teil I 1153 (1976).
320 Hanau, supra note 311, at 33.
321 Id. at 34.
322 Id. at 57-38.
Codetermination. The current proposal allows Germany to restrict the choice of worker participation models available to SEs registering in Germany to the codetermination model. Germany sees the worker participation provisions as useful in preventing “social dumping” — “competition from low-wage companies in member states with poor industrial democracy.”

2. Britain

Britain does not have a tradition of worker participation in corporate decision-making; it has historically dealt with employee-worker relations through the “shop steward” system and collective bargaining. The “shop steward” system is one of the earliest forms of interaction between an employer and his workers. Shop stewards were originally appointed by trade union members to collect fees. Over time their responsibilities increased to conducting negotiations between the trade union and the workers and, eventually, between trade unions and management. Today shop stewards function as shop floor representatives for the trade union members. They help solve grievances and negotiate collective bargaining agreements with management on behalf of trade union members.

The broader concept of “collective bargaining” has become the classic form of labor-management interaction in Britain. Collective bargaining refers to “negotiations between employers and the workforce whereby the workforce acts in concert and the employer meets with a collective will, and settles in a single agreement the principle upon which, for the time being, all workmen of a particular group, or class, or grade will be engaged.” Through collective bargaining, trade unions make demands for work condition, wages, working weeks, overtime rates, etc. An important characteristic of these systems is that they are entirely voluntary and that the level of worker input varies widely among industries and between firms in the same industry.

There is no history of worker representation on private corporate boards and, until recently, little interest. In 1977, the Bullock Report explored the various prospects of a system of industrial
democracy and concluded that employee participation on boards was desirable.\textsuperscript{334} The Bullock Report caused a great deal of controversy and was rejected by industry and the Government in favor of continued non-statutory, individualized cooperation between employers and employees.\textsuperscript{335}

Given this tradition based on voluntariness and individual employer-employee initiatives for cooperation, Britain opposes the worker participation provisions of the Statute.\textsuperscript{336} Britain particularly protests any mandatory forms of worker participation.\textsuperscript{337} Britain continues to insist that matters of employee involvement are best decided on a voluntary basis between employers and employees.\textsuperscript{338} Furthermore, Britain is wary of any EC measure which seems like "social engineering" and argues that such measures will unduly interfere with free market forces.\textsuperscript{339} Most member states disagree with Britain's views and support some form of industrial democracy at the EC level. Given the legal base of majority voting, it is unlikely that Britain will be able to rally enough opposition to defeat the statute on this basis alone.

VI. Conclusion

It is hard to make arguments against cooperation, convenience, and increased social rights, especially when the benefits they bring are completely voluntary. The European Company Statute is intended to promote industrial cooperation by enabling companies who opt for SE status to avoid the multiplicity of tax and reporting regulations of the various member states. The Regulation will offer an unprecedented company structure for large-scale cross-border activity and will be especially useful in facilitating research and technology cooperation. At the same time, it takes the view that company profit-maximization is compatible with social rights. The Directive aims to promote industrial democracy through a range of methods


\textsuperscript{338} DTI Consultative Document, supra note 53, at 9.

\textsuperscript{339} Fin. Times, Oct. 17, 1988, at 4, col. 1. Mrs. Thatcher commented on the EC's overall "social dimension": "We emphatically do not need new regulations which raise the cost of employment and make Europe's labour market less flexible." The Economist, Apr. 8, 1989, at 56. Yet the post-Thatcher government may be more amenable to the worker participation initiatives. Fin. Times, Jan. 23, 1991 ("British MEPs Shift on Worker Participation"). The House of Commons passed the proposed European Statute by a margin of 63-4. 92 Parl. Deb., H.C. (Ser.) 149 (1990).
for worker participation inspired by traditions developed in several of the EC nations. In addition, the advent of a single legal corporate entity for cross-border business activity represents an important step in the drive to create a single European market place.

It is easier to criticize the Statute for lack of clarity and comprehensiveness and to be suspicious of its inroads on managerial and national sovereignty, especially when its basis in law is questionable. On one hand, the Statute leaves many areas open, only to be filled in by existing national legislation. Presumably those opting for SE status do so to avoid the confusion of operating in multiple legal systems. Furthermore, the models of worker participation are far from analogous and may lead to different degrees of involvement depending on the member state's restriction of choices available to its SEs.\(^{340}\) If Germany and Britain can insist that all SEs registering within its borders follow the approach based on their own systems, then little is achieved by an EC initiative to promote social rights.\(^{341}\)

On the other hand, the Statute's eagerness to offer tax incentives and a progressive approach to employee involvement may be overstepping the legal authority for un unanimous Council action. Member states have been wary of allowing the EC to prescribe a social agenda for business relations in their nations. There is a lot to be said for the various European nations remaining laboratories for various approaches to company law and management-labor relations.\(^{342}\) The United States is a leading example that a single system of company legislation is not essential.

In sum, the European Company Statute can be criticized as doing "too little" and "too much" at the same time. But the European Community as an institution has been facing this kind of criticism from day one. Despite its present shortcomings, the Statute's aims are commendable. Of the European Company initiatives to date, its potential to have a positive impact on EC company law is quite good.

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\(^{341}\) See Ellis & Storm, supra note 19, at 56.

\(^{342}\) Memorandum, supra note 24, at 19.