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When European Integration meets Corporate Harmonisation.

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Introduction

The Corporate body, as traditionally recognised in the British and Irish jurisdictions, evolved during the industrial revolution of the 18th and 19th centuries. The first modern form of a company was described in the Joint Stock Companies Act 1856, with companies having being granted the privilege of limited liability a year earlier, under the Limited Liability Act 1855.[1] The company was designed to meet the requirements of the business culture prevalent in those jurisdictions at that time, with the resulting concepts and corporate design continuing to inform academic debate and legislative practices at the dawn of the 21st century.

Similarly, the corporate entities and legal persons which evolved in our EC partner member states were designed to meet the needs of their own particular jurisdictions and to counter the particular economic and political environment of their own time and place. The corporate entities, which now dominate the commercial landscape of Western Europe, are many and diverse. To date, corporations have been creatures of their own legal jurisdictions, and have not ventured abroad, to other jurisdictions, except perhaps in the guise of branches, with the more substantial aspects of international corporate behaviour being dealt with by way of a subsidiary being registered in the other country, and being wholly subject to the corporate law of that country. With the advent of globalisation, however, and with the growth in numbers of multinational companies, the international perspectives of corporate law have come to the fore. This development has been added to by the continuing drive at a European level for closer integration of the laws of the member states of the EC, pursuant to the European Community's objectives.

The European Community, pillar 1 of the European Union[2] is the source of the current programme for European Corporate harmonisation. The European integration dynamic is based on the Treaty of Rome 1957, as amended, whose overriding impetus has been;

1. the promotion of free movement of goods, persons, services and capital,
2. the development of a Common Commercial Policy, and,

[1] Stair Memorial Encyclopaedia, Butterworths.
[2] since the coming into force of the Maastricht Treaty 1992.

3. the development of European Competition Law, with many of the other policy areas currently being developed by the EC being seen as ancillary to the aforementioned policy objectives.[3]

Since the inception of the EC, the pace of European integration has been quickening rapidly, albeit from a slow start, with a wide range of matters, such as car number plates,[4] having been seen as fair game for the integration process, until the passing of the Maastricht Treaty in 1992,[5] which, for the first time, included within European Law, the principle of subsidiarity, with the allied principle of proportionality.

The concept of Subsidiarity is now enshrined, to the extent that it affects pillar 1 of the EC, in Article 5.[6] This article recognises that the Community must "act within the limits of the powers conferred upon it by the Treaty and the objectives assigned to it herein". The article goes on to say, however, that

"in areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore by reason of the scale of effects of the proposed action, be better achieved by the Community".

While this issue of whether the aforementioned article is legally enforceable, together with how best to prove a case under this article, as opposed to merely using it as an administrative or political tool, remains outstanding, the application of the concept of subsidiarity to the area of Corporate law is worth examining. While it may be within the exclusive competence of the EC to take measures in pursuit of the goals of free movement, the Common Commercial Policy, and in the development of a Competition policy, Corporate law harmonisation is not within the exclusive competence of the EC. To the extent that Corporate law harmonisation is within its competence, this is a shared competence with the member states, and any initiatives taken by the EC, after the coming into force of the Maastricht treaty, could be subject to the subsidiarity provision. This has been reflected in the writings of some academics,[7]

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[3] "*A Legal Analysis of Subsidiarity*", AG Toth in "*Legal issues of the Maastricht Treaty*", edited by O Keeffe and Twomey, Wiley Chancery, 1994.
[4] "*Subsidiary: Principle and Practice*", Tom Burns, Lecturer in Law, Napier Univeristy, (1995) Scots Law Times 67.
[5] Otherwise known as the Treaty on European Union 1992.
[6] Post Amsterdam.
[7] "*European Company Law –Towards Democracy?*" Charlotte Villiers, European Business Law Library, Ashgate, 1988.

and should be kept in mind when examining the possible future routes for development of the Company law harmonisation programme. It is interesting to note that the main corporate law harmonisation provisions currently enacted have all been enacted prior to the coming into force of the Maastricht treaty.

Harmonisation to date

The legal bases utilised for the EC corporate law harmonisation programme, which to date accounts for nine corporate law directives in force,[8] and four pending,[9] are the right of establishment provisions in the Treaty of Rome, Articles 43 to 48.[10] In addition, Article 293[11] provides for the enactment of provisions to facilitate the mutual recognition of, *inter alia*, companies, to include "the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between companies or firms governed by the laws of different countries". The transfer of a company from one jurisdiction to another became an issue in the *Daily Mail* case,[12] which will be referred to later.

The European Corporate harmonisation programme has been classified by academics,[13] into four generations,[14] with some of the directives being precise in their requirements, and others taking a minimalist approach. The first generation of directives[15] is perceived as being prescriptive, having been heavily influenced by the Germanic style of law making. The second generation of directives[16] attempted to facilitate the "different approaches of the Member States and business

[8] See Schedule attached hereto.
[9] The draft fifth directive, the per-draft ninth, draft tenth and draft thirteenth directive.
[10] Ex. Articles 52 to 58 EC Treaty.
[11] Formerly Article 220 EC Treaty.
[12] *R* v. *HM Treasury and others ex parte. Daily Mail and General Trust plc*. [1989] 1 All ER 328.
[13] Op. Cit. Footnote no. 7.
[14] As per Heinrich Siedentopf, "*The Implementation of directives in the Member States*" in Heinrich Siedentopf and Jaques Ziller (eds.) "*Making European Policies work: The Implementation of Community Legislation n the Member Sates, Vol. 1*" (Sage, London, 1988,) 169, at pp. 172-73, quoted in "*European Company Law –Towards Democracy?*" Charlotte Villiers, European Business Law Library, 1988.
[15] The First and Second Corporate Law directives.
[16] To include the Accounts directives, while the Third and Sixth directives tend to show the characteristics of the first generation, rather than the second generation of directives. See "*European Company Law –Towards Democracy?*" Charlotte Villiers, European Business Law Library

practices" with the "German influence" becoming "less obvious".[17] The third generation of directives have been classified as being the "new approach directives",[18] with a focusing on "what is to be achieved rather than how" that was to be achieved. The "third generation" tend to be fairly short, as in the case of the Twelfth Directive, which contains only nine articles, leaving details to be fleshed out by way of national implementation by the member states.[19] The latest generation is the "fourth generation" of directives, which encompass the draft thirteenth directive on take-overs,[20] having being referred to as "framework directives".

A difference in approach amongst the directives can however been identified, with the third and sixth directives, both being classified in the same generation, but exhibiting radically differing approaches. The third directive, dealing with mergers, "goes beyond co-ordinating existing laws",[21] while the sixth directive, dealing with divisions of companies, is not even obligatory,[22] and if implemented by a member state, merely co-ordinates national provisions.[23]

It is worth noting that while "companies" covered by Article 58 of the EC Treaty is broad in scope,[24] the harmonisation programme has evidenced a keen interest, firstly, in public limited companies and secondly in private limited companies.[25] With the sole exception of the twelfth company law directive, all the directives have either been exclusively concerned with public limited companies,[26] or both public and private limited companies.[27] Other types of companies, such as unlimited companies, have not been addressed at all.

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[17] Op. Cit. Footnote no. 7.
[18] Ibid.
[19] Ibid.
[20] of the 16th February 1989, [1985] OJ C 64/8.
[21] Op. Cit. footnote no. 7.
[22] this apparently has been accounted for by Adolfo Sequeria Martin in "*La Fusion y La Escision: Tercera y Sexta Directivas*" in E Garcia de Enterria et al (eds), "*Tratado de Derecho Comunitario Europeo, vol III*" (Civitas, Madrid, 1986) 27, at p. 29 (quoted by Charlotte Villers in "*European Company Law –Towards Democracy?*" European Business Law Library, 1988, on the basis that "The non-imperative character of the Sixth Directive is influenced by the fact that divisions are much more scarcely implemented in practice, and their tax implications as well as their theoretical distinctions would make it much more difficult to impose them in an obligatory manner".
[23] Op. Cit. Footnote no. 7.
[24] "not being restricted to specific legal structures or to specific categories of owners and shareholders", in "*The Commission's Programme for Company Law Harmonisation: The Winding Road to a Uniform European Company Law?*" Gisbert Wolff, "*EC Financial Market Regulation and Company Law*", Mads Andences and Stephen Kenyon-Stade, Sweet and Maxwell, 1993.
[25] Ibid.
[26] Second, Third and sixth directives.
[27] First, forth and seventh directives.

While it is recognised that different national standards may "impair comparability, increase the cost of cross-border transactions, and impede establishment or distort competition",[28] necessitating some form of harmonisation, the current European Corporation programme, while utilising directives, appears to have not merely a harmonisation effect, but often results in an upwards harmonisation, or unification of particular areas of law pertaining to companies. While some academics believe that the use of directives, as opposed to regulations, of itself, "reflects a desire to accommodate the different economic and cultural contexts" [29] of the various jurisdictions within the EC, Schmitthoff's perceives[30] that the directives have been written in such a way as to lead to the "virtual unification of national company laws under the guise of harmonisation."[31]

It is necessary to observe that the European Commission does not have the authority to pursue the unification of the laws with respect to companies, as an end objective, but rather any harmonisation "should be directed towards achieving the Treaty's objectives".[32] In so doing any such initiatives taken after the coming into force of the Maastricht Treaty will be subject to the principle of subsidiarity currently enshrines in Article 5 of the EC treaty.

The potential emergence of "culture", pursuant to Article 151 EC, as a fully-fledged legal concept could also have a bearing on corporate culture in the context of harmonisation. The ECJ has already utilised the culture concept in other contexts, such as in the protection of the French film industry from the provisions dealing with the free movement of goods in the Cinéthèque case,[33] and the Federación de Distribuidores Cinematográficos[34] case. Given that the concept of culture, which was inserted by Article 128 TEU also appears in the Amsterdam Treaty, could indicate that this is a concept which is waiting in the wings.

Equally, any move to respect the subsidiarity provisions must avoid creating a repetition of the "Delaware effect" suffered in the United States, which arose as a result of incomplete uniformity of the states laws.

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[28] Ibid.
[29] Op. Cit. Footnote no. 7.
[30] quoted by Villiers, Op. Cit. Footnote no. 7.
[31] Clive M. Schmitthoff (ed.) "*The Harmonisation of European Company Law*" (UKNCCL, London, 1973)
[32] Op. Cit. Footnote no. 7.
[33] Joined Cases 60 and 61/84 *Cinetheque* v. *Generation Nationale des Cinemas Francais* [1985] ECR 2603 [1986] 1 CMLR 365.
[34] *Federación de Distribuidores Cinematográficos* v *Estado Español et Unión de Productores de Cine y Televisión*, Case C-17/92.

The *Daily Mail* judgement[35] is a case in point. To date there appears to have been no "pronounced or observable "Delaware effect" across Member States" of the EC, but as has been pointed out be Wolf, "the tightening of requirements imposed upon pubic limited companies may well have increased the attractiveness of private limited companies, especially for small and medium-sized undertakings."[36]

The Fifth and Thirteenth directives

The most ambitious aspects of the European Corporate harmonisation programme to date, are those directives which are not yet in force, namely the proposed fifth, ninth, tenth and thirteenth directives.[37] Both the fifth and thirteenth directives have proven to be highly controversial, and have gone through many draft stages, with the ninth and tenth barely getting off the starting blocks. These draft directives are highly ambitious, with their aim being to introduce into some member states the corporate culture of other member state, and there in lies the problem.

The draft fifth corporate law directive contains within it many controversial issues, amongst them the mandatory introduction of the "one share, one vote" principle.[38] The most controversial aspect however, is the proposed participation of workers in the decision making process of the company.[39] The objective of the fifth company law directive is to "require employee participation in public limited companies which (alone or with subsidiaries) employ 1,000 or more persons." This representation of employees by way of worker directors, works councils, or by way of "a system established by collective agreement".[40] The directive initially required a two-tier management structure, following the Germanic tradition, with the company being "managed by a management organ

[35] *R* v. *HM Treasury and others ex parte. Daily Mail and General Trust plc*. [1989] 1 All ER 328.
[36] Op. Cit. Footnote no. 24.
[37] The draft fifth directive seeks to regulate the structure of companies, to include the issue of worker participation, the pre-draft ninth directive proposes to deal with the transparency of relationships between enterprises, and the tenth draft directive deals with the transparency in mergers and acquisitions throughout the Community, by extending the application of the 3rd directive to cross border mergers and acquisitions.
[38] Op. Cit. Footnote no. 24.
[39] Ibid.
[40] CCH – British Company Law and Practice, 1997 CCH Editions Limited.(CD Rom)

under the supervision of a supervisory organ".[41] The third draft of this directive, however, has made allowances for the unicameral board of directors in use within the UK and Ireland.

The draft tenth directive on cross-border mergers by public limited companies has only ever reached the first reading in the European Parliament, due to its parallel requirements for worker participation,[42] while the proposed ninth directive, on the transparency of relationships between enterprises, has suffered an ever worse fate, having only reached the pre-draft stage.

It had been envisaged that the draft fifth company law directive would be complimented by the European Works Council Directive 1994,[43] which has already entered into force pursuant to the European Labour law programme. However, with the delay in the implementation of the fifth corporate law directive, and with no enactment date currently in sight, the resulting half way harmonisation of law in a specific area may of itself hamper the "restructuring of industries within the internal market and reduce the mobility of companies."[44]

The draft thirteenth directive on Take-Overs

The proposed thirteenth corporate law directive deals with company take-overs, and falls into the fourth generation of directives referred to earlier. In compliance with the requirements of subsidiarity it sets out principles, leaving to the member states the manner of their application in accordance with "their national systems and their cultural contexts".[45] It straddles what in some jurisdictions is classified as company law, but in other jurisdictions is classified as securities law. The thirteenth directive emanates from the commission's unit which deals with "company law, industrial democracy and accounting standards" while the complimentary issue of insider trading is covered by way of a directive which emanates from the "Commission's unit covering stock markets and securities".[46]

[41] "*Corporate Law The European Dimension*", Forward by the Right Honourable The Lord Mackay of Clashfern, the Lord Chancellor, Butterworths 1991.
[42] Op. Cit. Footnote no. 24.
[43] Council Directive 94/45/EC of 22 September 1994.
[44] Op. Cit. Footnote no. 24.
[45] Op. Cit. Footnote no. 7.
[46] Op. Cit. Footnote no. 24.

The proposed directive has to be evaluated in the context of the differing cultures of the EC, which has resulted in the predominance of company take-overs occurring within the United Kingdom, with other member states of the EC utilise a “fusion model for amalgamation of companies”.[47] Other differences in corporate cultures between the UK and most of the rest of Europe need to be taken into account. On mainland Europe issues such as the relatively small number of companies listed on the various national stock exchanges, the “ small proportion of shares that are publicly traded”, with most shares being “retained in private hands”, the greater use of bearer shares, together with the “greater use of debt financing” and “relatively little equity financing”[48] result in an imbalance in impact of the draft thirteenth directive on the member states of the EC.

The thirteenth directive attempts to harmonise an activity which predominantly occurs within the United Kingdom, and whose implementation would make the work of the City’s Take-over panel effectively redundant. Much of the academic debate within the United Kingdom in this area has concerned the relative merits and demerits of the Take-over panel *vis a vis* the proposed provisions of the thirteenth directive. The City Take-over panel, a self-regulatory system for the city’s take-over code, covers “take-over and merger transactions, however effected”,[49] where “the acquisition candidate is a public corporation, listed or unlisted, and considered resident in the United Kingdom, the Channel Islands or the Isle of Man, or actually resident in the Irish Republic and listed on the Stock Exchange or its Unlisted Securities Market.[50]

While the proposed draft directive is modelled on the UK Take-over code,[51] albeit with some structural weakness, which could yet be addressed, the directive, by its nature, proposes to provide a regulatory system based on the rule of law. The Code, in contrast has always operated in a non-legal context, while recognising pursuant to *Datafin*[52] and *Guinness*,[53] the need to be subject to judicial review. It provides a

[47] “*The Draft thirteenth EC Directive on Take-overs*”: L.S. Sealy in “*EC Financial Market Regulation and Company Law*”, Mads Andences and Stephen Kenyon-Slade Sweet and Maxwell, 1993
[48] Ibid.
[49] City Code, Introduction, paragraph 4(a) and (b).
[50] “*The Proposed Thirteenth Directive on Take-overs: Unravelling the United Kingdom’s Self-Regulatory Success?*” Dr. Stephen Kenyon-Slade and Mads Andenas, in “*EC Financial Market Regulation and Company Law*”, Mads Andences and Stephen Kenyon-Slade Sweet and Maxwell, 1993
[51] Op. Cit. Footnote no. 47.
[52] *R. v. Panel on Take-overs and Mergers, ex p. Datafin plc* [1987] QB 815 .
[53] *R.* v. *Panel on Take-overs and Mergers, ex p. Guinness plc* [1990] 1 QB 140.

quicker, cheaper, and more flexible method of regulation,[54] which could not be matched by a system "based on legal rulings".[55] This flexibility is particularly of relevance in the context of hostile take-over bids, often effected by way of dawn raids. Concern has been expressed that the implementation of the draft thirteenth directive could give rise to litigation being utilised as a delaying tactic in take-over situations. [56]

The proposal of the draft thirteenth directive, when examined through the lens of the subsidiarity provisions of Article 5 exhibit some serious flaws. National provisions for regulating take-overs are already in place within the UK, to cover both internal take-over situations, and the take-over of a UK company by a non-UK company. It can therefore be argued that it would be incorrect to say that "the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community".[57] It is respectfully suggested that the proposed thirteenth directive, along with the fifth, ninth and tenth directives, now fall foul of the subsidiarity provisions, and that the programme of Corporate Harmonisation has reached an awkward, if not insurmountable road block. The question of whether the British government wishes to make UK companies more vulnerable to hostile take-overs than the companies on mainland Europe is, of course, a separate issue. [58] By way of an aside, the potential future argument of differing corporate cultures could, at some point in the future, come into play in this situation.

Corporate governance

Another issue which is currently being debated at an international level is the issue of Corporate Governance. The current debate has been reflected in the UN Draft Code of Conduct on Transnational Corporations 1982.[59] This document operated by way of a preliminary examination as to the nature of companies, recognising that the models developed to meet the needs of the Industrial Revolution of the 18th and 19th centuries

[54] This is very important in the context of dawn raids, where time is of the essence.
[55] Op. Cit. Footnote no. 47.
[56] Op. Cit. Footnote no. 47.
[57] Article 5 EC Treaty.
[58] Op. Cit. Footnote no. 47.
[59] in effect a resolution of the UN General Assembly, initiated by the UN Commission of Transnational Corporations, with the UN Centre on Transnational Corporations acting as its secretariat.

no longer satisfactorily meet the needs of society or business on the verge of the 21st century.

Corporations are still artificial legal entities umbilical tied to one legal jurisdiction, owned by shareholders, who appoint directors, whose sole overriding objective is to make money, albeit within the confines imposed by the legal jurisdiction to which they are tied. An examination into the nature of the obligation a company is perceived to owe, or is felt it should owe to "shareholders, workers, creditors, consumers and the public at large",[60] recognising that a company is a creation of law, granted the privileges of incorporation by a State, which cannot be left to override valid competing claims from other sectors of society. As one academic has put it so eloquently,

"What .. we are afraid of is that this powerful machine, which so successfully grinds out the goods we want, seems to be running without any discernible controls. The young lad mastering the technique of his bicycle may legitimately shout with pride "Look Ma, no hands" but is this the appropriate motto for a corporate society?"[61]

It is possible that the European Community, which is particularly sensitive to international law developments, will, at some stage attempt to reflect the development of thinking in this area through its corporate harmonisation programme, and member states which are less radical in outlook, may come under pressure to amend their legislative provisions accordingly, although such attempts could also come under scrutiny from a subsidiarity context.

Daily Mail

The current situation of European Corporate Law harmonisation, of itself, is throwing up some interesting arguments, some of which have already come to court in the guise of *R* v. *HM Treasury and others ex parte. Daily Mail and General Trust plc.*[62] This case was an attempt by

60 Allen, "*Socialising the Company*". Referred to in "*Perspectives of Corporate Governance*", Dr Saleem Sheikh and Professor SK Chatterjee, in "*Corporate Governance & Corporate Control*", Saleem Sheikh and William Rees, Cavendish Publishing Limited, 1995.

61 Mason, "*The Corporation in Modern Society*" referred to in "*Perspective on Corporate Governance*", Dr Saleem Sheikh and Pofessor SK Chatterjee, in "*Corporate Governance & Corporate Control*" Saleem Sheikh and William Rees, Cavendish Publishing Limited, 1995.

62 [1989] 1 All ER 328.

the Daily Mail newspaper to exploit the lower taxation rates applicable to Corporate Capital Gains in the Netherlands, at the expense of the British Inland Revenue.

The Daily Mail case arose from a valiant attempt to utilise the provisions of the EC Treaty, namely Articles 43[63] read in conjunction with Article 48 EC.[64] The argument in this case was that a legal person[65] is equally entitled as a natural person to exercise the right to free movement within the European Community.[66] Accordingly the Daily Mail plc, having being registered in the UK, should have the right, without any controls, to move to the Netherlands to work. This situation would be facilitated by reason of the fact that the UK recognised a company on the basis of its siege statutaire,[67] while the Dutch authorities utilised the siege real test, for taxation purposes,[68] (while also utilising the siege statutaire for Corporate Law purposes). However, UK fiscal law requires a company to have its centre of management and control within the UK, while Dutch law will allow a company to establish itself in the Netherlands by locating its central management and control there, without being registered in that country, and thereby acquiring Dutch nationality.

The ECJ heard the matter by way of, what was then, an Article 177[69] reference from the High Court in London. The ECJ found that in the present state of Community law, the current numbered Articles 43 and 48 of the EC Treaty, conferred no right on a company incorporated under the legislation of a member sate and having its registered office there to transfer its central management and control to another member state.[70] It would appear therefore that EC secondary law does not as yet facilitate that which is clearly provided for in the EC treaty. Equally, the ECJ utilised the term, "present state of Community law". The possibility of Community law developing to permit such an operation at some time in the future is not ruled out.

[63] Formerly Article 52 EC
[64] Formerly Article 58 EC.
[65] As long as it is not a non-profit making entity.
[66] Pursuant to EC Council Directive 73/148.
[67] Recognition of a Company as being within the jurisdiction by reason of it being registered within the jurisdiction.
[68] Recognition of a Company as being within the jurisdiction by reason of it having its principle place of business or centre of management within the jurisdiction.
[69] Currently an Article 234.
[70] And that EC Council Directive 73/148 conferred no right on a company to transfer its central management and control to another member state.

New corporate structures

As referred to earlier, the European Corporate Harmonisation programme appears to have encountered the principle of subsidiarity, and discovered that it has a problem. Certainly there has been little development in this area since the passing of the Maastricht treaty. The second area of European Corporate law requires some examination. The area of European Corporate structures, such as the existing European Economic Interest Groupings, or the proposed Societas Europea or European Company, has added a radical new dimension to, not only Corporate Law, but to European Law in general. Legal entities are being developed, which while requiring the jurisdiction of one member state to give them birth, once in existence, appear to inhabit a new legal jurisdiction, the supranational jurisdiction of the EC, and thereby exhibit capabilities, such as free movement, not available to legal entities more closely tied to a national jurisdiction. The ties with national jurisdictions have not been completely severed, but have been greatly loosened, and the potential impact of development of the current concepts could lead to a radical transformation of the European Corporate landscapes, particularly with regard to transnational corporations. Equally, as the European Corporate structures are, by virtue of their nature, validly "by reason of the scale or effects of the proposed action, be better achieved by the Community", they do not fall foul of the subsidiarity provisions.

EEIGs

One of these European structures is the EEIG, the European Economic Interest Grouping,[71] is a new legal entity, which can be utilised by both individuals and corporate entities. Based on the French GIEs,[72] this is the first legal entity to be governed by a uniform set of community rules, regardless of in which member state it is incorporated. Equally, the EEIG could be incorporated in one Member State, and conduce business exclusively in another member state. The EEIG is a legal entity composed of members exhibiting "economic multinationality", [73] i.e. conducting

[71] Introduced on the 25th July 1985 by Council Regulation (EEC) 2137/85, OJ L199, 31/7/85, page 1-9.
[72] The most well known internationally being Airbus and Ariane Espace.
[73]"*The European Economic Interest Grouping (EEIG) The First European Legal Vehicle for co-operation between enterprises*" by Dirk Van Gerven in "*European Economic Interest Groupings – The*

business in two different member states of the EC, utilising the "siege real" test rather than the "siege statutare" test.[74] A company, in order to be a member of an EEIG must both be incorporated in a member state of the EC, and have their central administration within the EC. For the benefit of German fiscal law, a distinction was been made between legal capacity of an EEIG, and legal personality. An EEIG has, under the regulation, legal capacity, but it is left to the individual member states to determine whether legal personality is to be granted. The UK implementing legislation[75] provides that the EEIG is to be a body corporate, with many of the features of a partnership, without actually being recognised as a partnership. It is not recognised as a European Company. Equally, the objects of an EEIG are to be very different from either a company or a partnership, with the thorny issue of the non-harmonisation of fiscal regimes being avoided, as the EEIG is transparent for tax purposes. While an EEIG is supposed to be set up to promote the interests of its members, and not with the purpose of making profits, it may make profits, which are only taxable in the hands of its members.[76]

While there are many detailed provisions dealing with the nature and capacity of an EEIG, from a European Integration perspective, one of the most interesting aspects of an EEIG is its mobility. The EEIG is the only non-natural legal entity currently enabled to exercise the right of free movement ostensibly granted to all legal entities by the EC Treaty. Under Council Regulation 2137/85, it is possible to transfer the official address of an EEIG from one member state to another without having to go through any winding up or re-incorporation processes, even though the applicable law will change in the process.

It is hoped that the creation of a legal entity utilising rules common to each Member State would enhance mobility of enterprises, albeit to a limited extent, together with "cross-frontier co-operation in the European Community",[77] thereby advancing the concept of a true single European market. This EEIG goes some way towards this objective while avoiding the problems being encountered by the proposed European Company, the "Societas Europea."

EEC Regulation and its application in the Member States of the European Community". Editors Dirk V.A. Gerven and Carel A.V. Aalders. Kluwer 1990.

[74] As utilised by the United Kingdom and Ireland.

[75] European Economic Interest Grouping Regulations 1989, SI 1989 No. 6380.

[76] Op. Cit. Footnote no. 73.

[77] Ibid.

Societas Europea

There is currently a proposal on the table for a European Company, otherwise known as a Societas Europea.[78] The proposal is for a "free floating entity" not tied to the jurisdiction of any member state, but attached directly to the supra national jurisdiction created by the European Community.[79] The proposal was originally put forward in 1970, but due to the need to develop complex supporting mechanisms to enable such a legal entity to come into being, to include insolvency and taxation issues, the proposed Societas Europea is still on the drawing board. Like the proposed 5th directive, with respect to nationally based companies, the SE proposal utilises the worker participation model for corporate decision making.

As the current proposals stand, while the supranational jurisdiction is to give the European Company validity, the details of how the entity is to operate will be left to individual member states to fill in. As it is proposed that the European Company would be able to exercise free movement within the EC, once created, this proposal would appear to give rise to at least 15 varieties of Societas Europea inhabiting the supra national legal jurisdiction of the EC. The possibility of a Delaware effect increases greatly with the development of such a concept, requiring some harmonisation of the underlying corporate tax regimes, in order to avoid distortions in the market.

In contrast to the European Corporate harmonisation programme, there have been recent developments in the gestation of the SE. A Commission communication of the 14th November 1995 singled out the need to "re-examine the question of worker involvement in the European Company from a new angle".[80] This led to the setting up of an independent committee of experts, under Etienne Davignon,[81] which issued the Davignon report[82] in May 1997. This report recognised the ability of a successful SE to make a "major contribution to exploit more fully the potential of the European internal market and hence to making the European economy more competitive internationally". The need for a

[78] Proposal for a Council Regulation on the Statute of a European Company, OJ C 263 16.10.89, page 41.
[79] The mechanism of taxation of distributions from such a free floating entity would have to be addressed in order to make a Societas Europea an attractive vehicle for investment.
[80] The Davignon Report, May 1997.
[81] President of the Societe Generale de Belgique and former Vice-President of the European Commission.
[82] http://europa.eu.int/comm/dg05/soc-dial/labour/davignon/davien.htm

trans-national legal entity recognised by EC law is identified as a result of the "increasing gap between economic reality and legal reality as far as companies with European dimensions are concerned", giving rise to increasing complexity "particularly in terms of taxation and decision making structures."

The road for the successful birth of the SE is seen as keeping the SE independent from national corporate provisions, with a SE coming into being either;

1. by way of the merger of two companies,
2. the creation of a holding company, or,
3. the creation of a joint subsidiary.

The possibility of the transformation of a national company into a SE was not considered. It would appear therefore, that the committee of experts did not consider this to be a valid option. If an SE can be kept at arms length from national corporations, by permitting their creation in certain limited circumstances, then issues such as sufficient harmonisation of tax laws, etc., to facilitate the operation of the SE become less problematic.

The thorny issue of worker participation is dealt with in detail in the Davignon report, with the suggestion that each SE should individually negotiate its own worker participation provisions, recognising that none of the currently conflicting national provisions on the issue should be made mandatory for a trans-national entity such as an SE.

Current state of EC Law and the implications for doing business in Europe

Despite the promise of the EC treaty to provide for the free movement of legal persons across borders, pursuant to Article 43, read in conjunction with Article 48, and the provision within Article 293 EC,[83] these promises have not yet been fulfilled by way of secondary legislation, as evidenced in the *Daily Mail* case.[84] The corporate harmonisation programme initiated was ambitious in its objectives, but

[83] for procedures to retain "the legal personality" of a legal entity "in the event of transfer of their set from one country to another, and the possibility of mergers between companies or firms governed by the laws of different countries".
[84] Op. Cit. Footnote no. 35.

not withstanding the legislation passed to date which has smoothed out some of the jarring differences between Member States, there is still “no possible means of transferring” the seat of a company from one jurisdiction to another, or to “merge with companies established in an other Member State, or to bid for another company under commonly agreed rules".[85]

The European Corporate harmonisation programme has also been described as being “unification by a different name”,[86] which, despite the fears of the Delaware effect, is not in compliance with the subsidiarity provisions enshrined within the EC treaty since 1992. While unification of EC corporate law may certainly “increase transparency and reduce transaction costs”[87] this is not required by the internal market, nor provided for by the EC treaty. To the extent that the harmonisation programme is provided for, it is subject to the subsidiarity principle. Therefore companies operating solely within one jurisdiction with limited international business do not appear to be about to be subjected to further radical change by way of European corporate directive.

A much more promising future can be envisaged for the supra national legal entities. The EEIGs have already proven popular in certain areas of activity, with support being afforded to them by the Commission[88] under the REGIE programme.[89] It is possible that the EEIG as currently constituted could be further exploited, and perhaps developed to cover other aspects of trans-national operations.

The more challenging concept of the Societas Europea, on the other hand, while showing some conceptual development, may prove to be a long term goal, with issues such as underlying European Corporate Tax harmonisation being required, even to the limited extent of dealing solely with the supranational corporate entity. For businesses currently engaged in large scale European business the distortion between the “economic reality and legal reality” as a result of the increasingly complexity “particularly in terms of taxation and decision-making structures”[90] will in the interim continue to be a fact of life, to the extent at least that an EEIG can not be utilised to remedy the situation. For corporate entities interested in pursuing the EEIG option, a visit the Commission’s web site is an essential starting point.

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[85] Op. Cit. Footnote no. 24.
[86] Op. Cit. Footnote no. 7, referring to Schmitthoff.
[87] Op. Cit. Footnote no. 24.
[88] By DG23, Enterprise Policy, Distributive Trades, Tourism and co-operatives.
[89] http://europa.eu.int/comm/dg23/gen-policy/regie-network/regie-network.html
[90] Davignon report, May 1997.

European Corporate Directives
and UK implementing legislation.

First Directive (Directive 68/151/EEC [1968] OJ L65/9) – *public disclosure requirements.*
Companies Act 1985, s. 18, 35, 35A, 36C, 42, 351(1), (2), (5)(a), 711 and Sch. 22 – originally European Communities Act 1972, s. 9.

Second directive (Directive 77/91/EEC [1977] OJ L26/1, amended by Directive 92/101, [1992] OJ L 347/64) – *raising and maintenance and alteration of the capital of plc's*
Certain rules requiring non-–discrimination as between shareholders and law requires that any new issues of shares must first be offered to the existing shareholders.
Minimum share capital of Public Companies c. £17,500 sterling.
Companies Act 1985, Pt. IV, V (except Ch. VIII) and VIII – formerly Companies Act 1980, Pt. I, II and III and Companies Act 1981, Pt. III.

Third directive (Directive 78/855/EEC [1978] OJ L295/36) – *Mergers and Acquisition of Companies.*
Companies (Mergers and Divisions) Regulations 1987 (SI 1987/1991) which inserted s. 427A into the Companies Act 1985.

Fourth directive (Directive 78/660/EEC [1978] OJ L222/11, amended by Council directive of November 27, 1984 revising the amounts expressed in ECU in the Fourth Council Directive, Directive 84/569, [1984] OJ L314/28) – *Standard balance sheet and profit and loss accounts. Minimum requirements re same to be noted to a Company's annual report.*
Companies Act 1985 Pt. VII – formerly Companies Act 1981, Pt. I (see also Partnerships and Unlimited Companies (Accounts) Regulations 1993 (SI 1993/1820).

Fifth Draft Directive (Commission's Third Amendment of November 20, 1991, to the Proposal for a Fifth Directive [1991] OJ C321/9) *seeks to regulate the structure of companies. Also question of worker supervision. Provides that all worker representatives are elected by secret ballot of the work force.*

Sixth directive (Directive 82/891/EEC [1982] OJ L378/47) – *re dividing plc's into different entities.*

Companies (Mergers and Divisions) Regulations 1987 (SI 1987/1991) which inserted s. 427A into the Companies Act 1985.

Seventh directive (Directive 83/349/EEC [1983] OJ L193/1) – *re consolidated accounts for groups of companies.*
Companies Act 1989, Pt. I amending Companies Act 1985, Pt. VII (see also Partnerships and Unlimited Companies (Accounts) Regulations 1993 (SI 1993/1820).

Eight directive (Directive 84/253/EEC OJ L126/20) – *Re common standards for Auditors and auditing of companies.*
Companies Act 1989, Pt. II.

Ninth (Pre – Draft) Directive – *re transparency of relationships between enterprises.*

Tenth Draft Directive (Commissions Proposal of January 8, 1985, [1985] OJ C23/11.)– *Re transparency in mergers and acquisitions throughout the Community. Extends the application of the 3rd directive to cross border mergers and acquisitions.*

Eleventh directive (Directive 89/666, [1989] OJ L395/36)
Companies Act 1985 (Disclosure of Branches and Bank Accounts) Regulations 1992 (SI 1992/3178) and Overseas Companies and Credit and Financial Institutions (Branch Disclosure) Regulations 1992 (SI 1992/3179) (also implemented bank branches directive (89/117)) – see pp. 3,788 and 3,790.

Twelfth directive (Directive 89/667, [1989] OJ L395/40)
Companies (Single Member Private Limited Companies) Regulations 1992 (SI 1992/1699).

Thirteenth Draft Directive – re take-overs Commission's Proposal of February 16, 1989 ([1985] OJ C 64/8).

See also the Accounts directives.