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Company Law in the European Community: Toward Supranational Incorporation

David C. Donald*

I. Introduction

The limited liability corporation is the greatest single discovery of modern times. Even steam and electricity are less important than the limited liability company.

N.M. Butler

The architects of the "United Europe" have paid close attention to the evolution of the legal system in the United States. They have been attentive to the "research and development" that American legislatures, courts and universities devote to the quandaries of federalism and local sovereignty, and the related need for establishment of uniform commercial standards over geographical expanse. The result has been more than simple imitation. Indeed, in some areas the European Community ("EC" or "the Community") has surpassed the United States in designing tools for legal unity in the face of geographic and cultural diversity. Perhaps the United States will someday apply these tools, thus receiving a return benefit from the years that Europeans have devoted to their own legal "research and development."

The European law of business organizations is an evolving example of these efforts. For nearly three decades, European Community scholars and governments have been attempting to establish an organizational framework that would allow companies to operate in the various Member State markets without becoming expensively enmeshed within the various Member State laws. Some of the ideas

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2. One example of the kind of European study that I am referring to is, R. Buxbaum & K. Hopt, Legal Harmonization and the Business Enterprise (1988), which dedicates its first half to the "American experience" and its second to the "European attempt."

3. The project has been in gestation even longer than the Community. As Eric Stein
generated by these attempts are now being realized. As a practical matter, American corporations operating in Europe routinely become familiar with new measures as they approach adoption. Yet, American legal scholars should find the European project theoretically interesting as well: it is the first practical attempt to form a supranational system of business organization laws. Perhaps these European models will offer Americans a prototype or at least serve as a benchmark as the United States continues its own effort to perfect a single system containing fifty separate jurisdictions and fifty separate corporation laws.

Although the Community has been passing company law legislation for more than twenty years, previous efforts focused primarily on harmonizing Member State law. This harmonization of Member State company law is ongoing, and the recently adopted Twelfth Council Company Law Directive on single-member, private limited-liability companies is a good example of these efforts. This Directive coordinates the laws of the Member States to allow single-member close corporations to operate with limited liability in each jurisdiction. The Directive does not eliminate the requirement that companies be incorporated in each separate jurisdiction.

Other recent measures have begun to construct a “European law of business organizations” that allows business organizations to be formed under a “supranational” law, fixed at the Community level. These measures are a regulation to establish a “European Economic Interest Grouping” (EEIG) and the proposed European
Company Law Statute (consisting of a regulation and a directive). The EEIG Regulation allows the formation of something like a European partnership between existing EC firms and persons in different Member States. The Company Law Statute would allow larger corporations to incorporate under a single law, valid in all EC jurisdictions. Together, they would allow the formation of a business of almost any size and structure, and would allow it to function on a Community-wide scale, unobstructed by the differences between Member State laws.

This article will discuss these Community measures and outline their regulatory structures. Because the proposed European Company Law Statute is not yet law and because it remains hotly disputed, I will concentrate more on the arguments for and against the adoption of the Statute, and less on the details of registration and procedure that control its founding and operation.

This article attempts to present each piece of legislation completely and individually in answer to the practical need to know what the law is, and what it requires. Yet, these measures also constitute significant elements in a monumental project, and thus the article will also indicate how each piece fits into the whole developing framework of a European law of business organizations. The first section will discuss the Community's ongoing efforts to harmonize the company law of the Member States, using the recently adopted Twelfth Council Company Law Directive as an example. This first section will distinguish the project of harmonization from the enactment of supranational legislation. The second section will address the regulation that establishes the European Economic Interest Grouping. The third section will examine the controversial European Company Law Statute.

II. The Harmonization of National Law: Prelude to the "Supranational"

A. A Summary of Company Law Harmonization

1. The Treaty.—Companies based in one Member State of the European Community have the right, under the Treaty of Rome, to establish branches or subsidiaries in another Member State. This

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Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of an-
right of establishment would be restricted if the company laws of the Member States were incompatible with each other.\textsuperscript{12} For this reason, Article 54(3)(g) of the Treaty of Rome directs the Community to coordinate "the safeguards which, for the protection of the interests of members and others, are required by Member States of companies . . . with a view to making such safeguards equivalent throughout the Community."\textsuperscript{13} In accordance with this provision and Article 100 on the approximation of laws,\textsuperscript{14} the Community has passed a number of directives coordinating the company laws of the various Member States.\textsuperscript{15}

2. The Directives.—The First Council Directive, adopted in 1968, addresses all limited liability companies incorporated under the law of Community Member States.\textsuperscript{16} This directive provides a list of items, such as balance sheets and the names of responsible officers, that each corporation registered in a Member State must disclose to the public,\textsuperscript{17} and sets out the manner in which a corporation can be declared null.\textsuperscript{18} The Directive also in effect eliminates the corporation's defense of \textit{ultra vires} against the claims of third parties, except in the case of a published requirement that only joint action by officers may bind the company.\textsuperscript{19}

The Second Council Directive, adopted in 1976, establishes share capital requirements for all publicly held corporations, such as the German \textit{Aktiengesellschaft} or the French \textit{société anonyme}.\textsuperscript{20} It establishes a minimum base capital of 25,000 ECU,\textsuperscript{21} and restricts shareholder dividends to a sum equal to "the amount of the profits at the end of the last financial year plus any profits brought forward other Member State shall be abolished . . . .

12. For example, if a company were incorporated as a single member close corporation in one Member State and this form was not allowed by another Member State, a change of form would be required before this business could move into the second State.
14. Treaty of Rome, \textit{supra} note 11, art. 100, 298 U.N.T.S. at 54 provides that:
   The Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market.
15. This short section merely sketches the framework of the Community's harmonization of company law. For a more detailed treatment, see \textsc{Stein, supra} note 3 on the problems and policy of harmonization; \textsc{Dine, supra} note 1; and \textsc{G. Myles, EEC Brief, Vol. 2, Company Law} (1989).
18. \textit{Id.} arts. 10-12, at 11-12.
19. \textit{Id.} arts. 7-9, at 11.
21. \textit{Id.} art. 6(1), at 3.
and sums drawn from reserves available for this purpose, less any losses brought forward and sums placed to reserve in accordance with the law or the statutes."

The Third Council Directive, adopted in 1978, has harmonized some of the basic rules controlling mergers and acquisitions of publicly held companies. This Directive requires shareholder approval of mergers and acquisitions unless certain criteria of disclosure and opportunity to object are met. The Third Directive also provides for the protection of creditors' rights in the event of a merger or acquisition. The Sixth Council Directive, adopted in 1982, provides similar protection to shareholders and creditors in the event of a corporate division.

The Community has also adopted a number of measures to harmonize the presentation of annual accounts. The Fourth Council Directive applies to all limited liability companies and specifies a required form and content for the balance sheets and income statements of these companies. In 1983, the Seventh Council Directive extended similar requirements to corporate conglomerates by requiring a consolidated account for all of the company's subsidiaries. The minimum qualifications required of persons who audit these annual and consolidated accounts are set forth in The Eighth Council Directive, adopted in 1984.

The process of harmonization has gradually brought the company laws of the Member States closer together. However, the laws of the twelve Member States have remained twelve separate and distinct bodies of law. Through harmonizing directives, the Community does not enact a separate Community law, but rather sets points of reference toward which the law of Member States will converge. The Twelfth Council Directive (to which I refer as The Close Corporation Directive) seeks to harmonize the Member State laws regulat-
ing single-member, close corporations. The following section will discuss this directive in some detail both because it is a recent and important piece of Community company law legislation, and because it shows the extent to which Member States still control companies under the aegis of harmonizing directives. This discussion will serve as a background for presenting the two pieces of “supranational” legislation that are the primary objects of this Article.

III. The Harmonization of Close Corporation Law

A. Introduction

Many European sole proprietors seem to share President Butler’s estimation of the limited liability company (quoted at the beginning of this article), and have put the limited liability company to good use, especially on the European Continent. The Commission’s “research and development” has produced a cost-effective vehicle to ensure for the development of the limited liability company throughout the Community: The Twelfth Council Company Law Directive of 21 December 1989 on Single-Member, Private Limited-Liability Companies (“The Close Corporation Directive”). The Directive seeks to guarantee the presence of “a legal instrument allowing the limitation of liability of the individual entrepreneur throughout the Community.” The Directive limits itself to approximating Member State law to this end, and its “sole aim,” according to the tenth recital, “is to take account of the differences which currently exist in certain national laws.” The Directive supports the Commission’s action program for small and medium sized enterprises by helping to establish “an administrative environment which is sufficiently simple and open as not to handicap firms in terms of costs and profitability.”

Unlike the EEIG Regulation, the Close Corporation Directive does not establish a means for existing entrepreneurs to cooperate

corporation”) as an equivalent of the British, “private company limited by shares.” The Model Statutory Close Corporation Supplement to the Model Business Corporation Act § 3 (1984), defines a statutory close corporation simply as one that calls itself such and has 50 or fewer shareholders. In addition to having a small number of shareholders, (1) there is usually no ready market for the shares of a close corporation, and (2) there is substantial shareholder participation in management of the company. See, Donahue v. Rodd Electrotype Co., 387 Mass. App. Ct. 578, 586, 328 N.E.2d 505, 511 (1975), cited in H. Henn & J. Alexander, Laws of Corporations 705 n.26 (1983).

31. See supra note 1, and accompanying text.
33. Id. Ninth Recital, at 40.
34. Id. Tenth Recital, at 40.
across Member State borders, and unlike the European Company Statute, the Directive seeks to coordinate Member State law rather than provide a means of EC incorporation. The Close Corporation Directive establishes certain principles that the Member States will adopt in their treatment of incorporated, closely held business organizations like the British "private company limited by shares or guarantee," the French "société à responsabilité limitée," and the German "Gesellschaft mit beschränkter Haftung." Each of these forms may, and usually does, have more than one owner. The Close Corporation Directive ensures that closely held companies will enjoy limited liability even if all of the company's shares are all held by a single person. The Directive applies regardless of whether the company is initially formed by a single shareholder or comes to be so owned at some time after formation.

B. Community Law and Member State Law

1. Equivalent Provisions in Member State Law.—Because the Close Corporation Directive makes minor, coordinating adjustments to member state law, it is neither extensive nor complex. Indeed, it provides that Member States do not even need to enact legislation for the establishment of single-member companies. They are only required to provide some legal structure that would allow an individual enterprise to "set up an undertaking the liability of which is limited to a sum devoted to a stated activity," as long as the Member State's legislation establishes safeguards equivalent to those contained in the Directive. In addition, if a Member State allows a single individual to own a publicly listed corporation, the Directive will apply to this form of public corporation. The Directive is result-oriented and provides few specific procedural or formal requirements. As such, it does not streamline or simplify the procedural complexities of the corporation laws in the various Member States, but merely ensures that the States recognize a given business form and that they do so with specific safeguards.

2. Primary Requirements of the Directive.—The Directive's principal requirements are three safeguards concerning the registration of the sole shareholder, his capacity to convene the general meeting, and his dealings with the corporation. These safeguards are:

1. If a company comes to be wholly owned by any single

36. For a discussion of the legislative context surrounding these three measures see infra note 184 and accompanying text.
38. Id. art. 2(1), at 41.
39. Id. art. 7, at 41.
40. Id.
person, the fact of sole ownership, together with the owner's name, must be recorded in a public register or a private one that is accessible to the public.41

2. The sole shareholder will have full power as the general meeting of the company, but minutes must be kept of all decisions that are made,42 and

3. All contracts between the sole shareholder and the company — except those "operations concluded under normal conditions" must be recorded in the minutes or drawn up in writing.43

These three provisions constitute the Directive's primary additions to Member State law and will apply to all single-member, close corporations formed in the Community, except in two specific circumstances.

3. When Member State Law is Controlling.—Member state law will override the Close Corporation Directive in two situations. Member States may enact "special provisions or sanctions" different from those provided by the Directive when (1) "a natural person is the sole member of several companies," or when (2) "a single-member company or any other legal person is the sole member of a company."44 These situations are exempted from regulation under the Directive because they are forms of ownership that constitute business groupings,45 and the Community has not yet attempted to coordinate Member State law on business groupings.46

The Directive thus defers to Member State law either (1) when

41. Id. art. 3, at 41. Article 3 requires these to recorded either in "a register kept by the company and accessible to the public," or in accord with Article 3(1)-(2) of Directive 68/151/EEC. The latter requires that all required disclosures be recorded in a specific file, and that "[e]ach Member State open either a central register, a commercial register or a companies register, for each of the companies registered that are therein." 11 J.O. EUR. COMM. (No. L 65) art. 3(1)-(2) at 10 (1968), (trans. D.D.).

42. 32 OJ. EUR. COMM. (No. L 395) art. 4, at 41. An early draft of the Directive prohibited the sole shareholder from delegating powers as the general meeting. This prohibition has been dropped to "simplify the functioning of the single-member company." Amended Proposal for a Twelfth Council Directive on Company Law Concerning Single-Member Private Limited Companies, COM (89) 193 final — SYN 135, at 4 [hereinafter Close Corporation Explanatory Memorandum].

43. 32 OJ. EUR. COMM. (No. L 395) art. 5, at 41.

44. Id. art. 2(2), at 41.

45. In the first instance, the legal or natural person would constitute a holding company for the various companies it owned. In the second, the close corporation would be the parent of a close corporation subsidiary.

46. As the Commission states in its Explanatory Memorandum accompanying the Directive:

The Commission's initial proposal had provided for special arrangements applicable to legal persons which are the sole member of a private limited company. After re-examining this matter, it has proved impossible to dissociate this specific problem from that of the law governing groups in general, [an area of law that] has not yet been fully harmonized at [the] European level.

Thus the Directive, "allows the Member States to impose restrictions with regard to legal persons, as some do already, whilst abandoning for the time being any notion of coordination
it provides an organizational form functionally similar to that which the Directive attempts to achieve, or (2) when the company in question is part of a group—an area that the Community has not yet decided to enter. Member State law will therefore be controlling in areas not addressed by Community Law or when it provides equivalent measures. It will also control the manner in which the company is structured, provided that it allows a single person to incorporate with limited liability.

IV. The Limits of Harmonization

Harmonization carries out the letter of Article 54(g)(3) of the Treaty of Rome through the coordination of the organizational forms and safeguards that each Member State imposes on companies incorporated within its jurisdiction. Harmonization of the laws regulating single-member, closed corporations only requires Member States to allow single persons to operate with limited liability while providing certain minimum safeguards to fight abuse—whether or not the specific form, the internal procedures, and other aspects of that Member State's company law differ greatly. Legal barriers to the establishment of single-member corporations are thus eliminated. Real barriers remain in the form of transaction costs for translating one national form of close corporation into another. Legal formality thus falls short of economic reality.

Law and economic reality, however, are rapidly converging in the European Community. The recently added Article 8a of the Treaty of Rome merges the economic and legal realms by declaring that "the Community shall adopt measures with the aim of progressively establishing the internal market . . . ." This provision emphasizes that Community legislation must now seek to create the economic reality of a single, internal market. Article 8a's declaration makes the Community's job much more difficult than eliminating barriers as they arise, for it must now aim for a goal that is difficult to define: At what point is a single, "internal market" really established? Accordingly, the Community must invent legal instruments to establish an internal market—instruments that have never before been put to use.

For trade in goods, the Community has introduced the concept of "mutual recognition" of other Member States' standards, to allow goods to cross borders unhindered by facially neutral, yet effectively
obstructive, technical standards. Because the law of business organizations defines the very existence of a “person” for purposes of a Member State’s legal system, the concept of mutual recognition is very difficult to apply to the area. An alternative would be some form of “negotiated mutual recognition” that would set up a supranational form of incorporation upon which every Member State can agree, rather than recognizing the company law of each Member State. This supranational incorporation would not replace Member State laws, but would rather provide an independent and neutral stratum upon which businesses can move from one Member State to another in a cost-effective manner. While purely intrastate commerce would continue to take place under the forms supplied by national corporation law, international activities could be conducted on the supranational stratum.

The European Economic Interest Grouping and the proposed European Company Law Statute are two such attempts to create a supranational law of business organizations in the Community. The following sections will address these measures in detail.

V. The European Economic Interest Grouping Regulation

A. Introduction

The European Economic Interest Grouping (EEIG) Regulation was enacted by the Council of Ministers on July 25, 1985, and became applicable to the Member States on July 1, 1989.

50. This tool, invented by the European Court of Justice in the famous Cassis de Dijon decision (Rewe-Zentral AG v. Bundesmonopolverwaltung fur Branntwein Case 120/78 E.C.R. 649 (1979)), has been extended to the provision of services in the form of a “single license,” as it has been applied, for example, to banking in the Community. See, The Second Council Directive of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC, 32 O.J. EUR. COMM. (No. L 386) 1 (1989). See also Golembe & Holland, supra note 5.

51. For example, if Belgium hosted corporations from the other eleven Member States, it would be forced to recognize 12 different forms of corporate existence that—although mostly similar—could differ enough in the details of incorporation and governance to create significant difficulties for the host state employees and investors.

52. As the seventh recital of the EEIG Regulation makes clear, “the Treaty does not provide the necessary powers for the creation of such a legal instrument,” and thus the Regulation is based on the supplementary powers granted by Article 235. 28 OJ. EUR. COMM. (No. L 199) Seventh Recital, at 1 (1985). This article of the Treaty of Rome provides:

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

Treaty of Rome, supra note 11, art. 235, 298 U.N.T.S. at 91. Enactment of the Single European Act means that the EEIG Regulation is probably now supported by Article 8a of the Treaty. See infra note 176, and accompanying text.

53. The Regulation provides that it shall apply, “from 1 July 1989, with the exception of Articles 39, 41 and 42 which shall apply as from the entry into force of the Regulation.” 28 O.J. EUR. COMM. (No. L 199) art. 43, at 9. These excepted articles set out the Member State's
The closest American parallel to the EEIG would be a partnership form that allowed—or even required—the partners to reside in different states. In its 1974 proposal, the Commission described the EEIG as "a new legal instrument, primarily a creature of Community law, which is intended to enable cooperation to take place between undertakings established under the law of different Member States." The Regulation facilitates cooperation between entities or persons already established or doing business in different Member States rather than establishing a new organization with an independent business and clientele. Further, it prohibits the EEIG from becoming a holding company for these entities or persons. As Gaillard, Carreau and Lee explain, "[the EEIG] is a mere assistant to the activity of its members, for whom it could not substitute. As such, the EEIG offers precious possibilities for Community enterprises to establish cross-border cooperation."

As an organizational form, the EEIG was influenced by the French "groupement d'intérêt économique," (economic interest grouping) that became an institution under French law in 1967. The Community has carried the economic interest grouping model to the EC level in order to provide an organizational form, "with simple rules for its formation and operation which are for the most part outside the national legal systems," in order to eliminate intra-Community "barriers and bring about more favorable conditions for cross-frontier contacts between undertakings." Because it is more of a network of individual persons and firms than an entity in itself, the EEIG structure is analogous to the partnership form under American law.

The EEIG resembles a partnership in several ways. Profits flow...
directly to and are taxed as income of the members, not the EEIG. The members are jointly and severally liable for all obligations of the EEIG. Assignment of membership or admission of a new member requires unanimous approval of the EEIG’s members. Members do not enter the grouping as a way of beginning involvement in the business which the EEIG was set up to facilitate, but enter as “going concerns” in that business.

As part of the developing network of European Company Law, the EEIG fulfills the function of a partnership. The EEIG Regulation adds a supranational complement to the Close Corporation Directive by providing a means through which such corporations can link up with similar corporations in other Member States. It stops short of the centralized corporate structure of the proposed Company Law Statute, which would create a European corporation recognized in every Member State.

To summarize, the EEIG Regulation attempts to facilitate contact between existing firms or individuals engaged in businesses in different Member States. The grouping that it establishes is more a facilitating network than an independent entity. This will become even more evident as this article turns to a discussion of what an EEIG may and may not do, how it is formed, the structure of its governance and management, and the manner in which an EEIG is wound up.

VI. The Powers and Restrictions of the EEIG Form

A. Powers

Because an EEIG is meant to facilitate the action of its members and not replace them, its powers are limited to those necessary for this type of activity. As a minimum of powers necessary for independent functioning, the EEIG will “have the capacity, in its own name, to have rights and obligations of all kinds, to make contracts or accomplish other legal acts, and to be sued.” In the Explanatory Memorandum to its 1974 EEIG Regulation Proposal, the Commission listed a number of the business activities that it thought an

61. 28 O.J. EUR. COMM. (No. L 199) arts. 21, 40, at 6, 9.
62. Id. art. 24, at 7.
63. Id. arts. 22, 26, at 6, 7.
64. Id. art. 4, at 3. While this is not a legal requirement of partnership, it is a practical fact that most “partners” bring professional skill to the partnership and do not learn their trade after joining the organization.
65. I do not mean to say that the two measures are interdependent, but that they could be jointly applied by businesses to facilitate transnational activity.
66. See infra note 92 and accompanying text.
67. See infra note 75 and accompanying text.
68. 28 O.J. EUR. COMM. (No. L 199) art. 1(2), at 2.
EEIG would be well equipped to perform. These activities include serving as a common purchasing or sales office or as an agent to conclude contracts for EEIG members, providing the dimension at which businesses can achieve an economy of scale in the provision of services, and coordinating research and development. The Memorandum also states that the EEIG should be able to “purchase and process goods, provided that this is done exclusively for the account of its members.”

Beyond the specific, legal capacities and the list of suggested activities, the Regulation does not clearly establish the positive powers of the EEIG. Indeed, even the final decision as to whether the EEIG has full “legal personality” is left to the Member State where the EEIG is registered. The Commission explained that while the “grouping must be able to take a normal part in the business life of the Community,” giving it full “legal personality” would be problematic because this expression has a different scope and different consequences, depending on the Member State one looks at. Because the legal status of business organizations varies in different Member States, and because the status of “legal personality” contains a number of distinct attributes of capacity, the Commission has decided to endow the EEIG with only those capacity attributes that are necessary for it to achieve its central object. The EEIG Regulation allows the Member States to confer full, “legal personality” on the EEIG if they so choose.

This relatively fine distinction shows just how careful the Commission has been to create a network between companies or individuals rather than to establish an independent company which, by its central position, could come to coordinate and control the activities of its members. This care is further evidenced by the significant number of restrictions and prohibitions that are used to delimit the EEIG.

69. EEIG Explanatory Memorandum, supra note 54, at 20-21.
70. Id.
71. Id. at 21.
72. 28 O.J. EUR. COMM. (No. L 199) art. 1(3), at 2.
73. EEIG Explanatory Memorandum, supra note 54, at 19.
74. [If in Germany, for example, one consequence of legal personality is that the legal person concerned must be subject to the tax rules of the general law on firms and companies, whilst the regulation provides for the grouping to be subject to particular rules on tax.]

By avoiding the use of the expression “legal personality,” the Regulation cuts through all doctrinal controversies as to the meaning and consequences thereof, and prevents the differences in legal rules which could arise therefrom.
B. Restrictions on the EEIG's Activity

Article 3 articulates the EEIG's *raison d'etre*, and then provides a long list of prohibitions hemming in an EEIG's activity. Article 3(1) states:

1. The purpose of a grouping shall be to *facilitate or develop* the economic activities of its members and to *improve or increase* the results of those activities; its purpose is *not to make profits for itself*.

Its activity shall be related to the economic activities of its members and *must not be more than ancillary* to those activities.75

The EEIG is meant to supplement existing businesses, and by its supranational nature, to "facilitate," "develop," "improve," or "increase" the activities of its members while remaining "ancillary" to them. Because this power of supplementing without supplanting establishes a boundary that is difficult to administer, Article 3 adds the bright line test that the EEIG must not "make profits for itself."76 This guideline at least ensures that the EEIG will not become a distinct profit motivated entity that could eventually eclipse the individual activity of its members. The prohibition against independent profit taking is reinforced by the command of Article 23 that "[n]o grouping may invite investment by the public."77 The EEIG's financing thus flows from its members, and its profits, in turn, flow directly to those members.

The list of restrictions contained in the second part of Article 3 further limits the EEIG's powers.78 The EEIG must not, even indirectly, manage the affairs of its members or any other entity.79 It must not take any shareholdings in its members, and may hold shares in other companies only to serve the group's object and only on behalf of its members.80 An EEIG may employ no more than 500 persons,81 and it may not be a member of another EEIG.82 The restrictions on the EEIG's profit, size, and ability to develop into a holding company are accompanied by the more customary type of prudential safeguards against the use of an EEIG to circumvent national legislation. Thus the EEIG Regulation provides that, if pro-

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75. 28 O.J. EUR. Comm. (No. L 199) art. 3(1), at 2-3 (emphasis added).
76. Id.
77. Id. art. 23, at 6.
78. Id. art. 3(2), at 3.
79. Id. art. 3(2)(a), at 3.
80. Id. art. 3(2)(b), at 3.
81. Id. art. 3(2)(e), at 3.
82. Id. art. 3(2)(e), at 3.
hibited by Member State law, the EEIG may not make loans or transfer property to a director of a company or any person connected with him.  

To summarize, the following is a checklist of the activities from which the EEIG is restricted:

1. Drawing profits for itself;
2. managing its members or other entities;
3. taking a shareholding in its members;
4. employing more than 500 persons;
5. making transfers or loans to company directors in violation of member state law;
6. becoming a member of another EEIG; and
7. inviting investment from the public.

VII. Formation of an EEIG

A. Eligible Members

The EEIG form is intended to allow existing businesses or persons residing in different Member States to cooperate across national borders and thereby facilitate the development of a single European market. Following this intended purpose, persons or business organizations that seek membership in an EEIG must meet three conditions.

First, they must be European companies or persons. The category of companies is quite broad, but is explicitly restricted to entities registered in the Community. It includes “companies or firms within the meaning of the second paragraph of Article 58 of the Treaty,” which includes almost all for-profit organizations, “and other legal bodies governed by public or private law, which have been formed in accordance with the law of a Member State and which have their registered or statutory office and central administration in the Community.” This provision should allow the subsidiary of an American corporation to join an EEIG, provided it is independently incorporated and registered under the law of the Member

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83. Id. art. 3(2)(d), at 3.
84. Id. art. 3, at 2-3.
85. Id.
86. Id. art. 4, at 3.
87. “Only the following may be members . . . companies or firms . . . formed in accordance with the law of a Member State and which have their registered or statutory office and central administration in the Community.” Id. art. 4(1)(a), at 3.
88. The Treaty of Rome provides:

‘Companies or firms’ means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profitmaking.

Treaty of Rome, supra note 11, art. 58, 298 U.N.T.S. at 40.
89. 28 O.J. EUR. COMM. (No. L 199) art. 4(1)(a), at 3.
State where it is located, but would exclude from membership branches or offices that are not so formed under Member State law.

Natural persons wishing to join an EEIG must “carry on [an] industrial, commercial, craft or agricultural activity or . . . provide professional or other services in the Community.” The EEIG Regulation provides no details as to how long or to what extent an individual must be involved in such activities before becoming eligible for membership in an EEIG. However, the thrust of the requirement is clear: the Regulation seeks to establish a means for existing European firms to cooperate and only the administration of the Regulation will clarify the exact boundaries of “European.”

1. Diversity.—The contracting members, in addition to being European, must establish at least a minimal diversity of citizenship. That is, at least two members of an EEIG must be from different Member States. The residence of a company for this purpose is in the Member State where the company has its central administration. The residence of natural persons will be in the Member State where they “carry on their principal activities.” The EEIG Regulation specifically provides that diversity between the residence of one company and the residence of one natural person is sufficient for setting up an EEIG.

B. The Founding Contract

1. Substantive Provisions.—An EEIG is established through a founding contract. The members are all parties to this contract and have “unlimited joint and several liability for [the EEIG’s] debts and other liabilities of whatever nature.” Ultimate control of the EEIG will flow from the general meetings of the contracting members. The contract may unequally weight the votes that members cast at this meeting, “provided that no one member holds a majority of the votes.” If no provision for the weighting of votes is made, each member will have one vote. The EEIG Regulation provides

90. Id. emphasis added.
91. Because companies must be formed according to the law of a Member State, be registered in that Member State, and have their central administration in the Community, a natural person carrying on business in the Community should be expected at least to have his or her central office in the Community.
92. 28 O.J. EUR. COMM. (No. L 199) art. 4, at 3.
93. Id. art. 4(2)(a), at 3.
94. Id. art. 4(2)(b), at 3.
95. Id. art. 4(2)(c), at 3.
96. “[P]arties intending to form a grouping must conclude a contract . . . .” Id. art. 1(1), at 2.
97. Id. art. 24(1), at 7.
98. Id. art. 16, at 5.
99. Id. art. 17(1), at 5.
100. Id.
that the EEIG will consist of members and management, but stipulates that the contract may provide for other organs through which to direct the EEIG and if the contract so provides, "it shall determine their powers." The contract determines the proportions in which profits from and contributions to the EEIG are made and each member will be responsible for his proportion of the amount by which expenditures of the EEIG exceed income. The contract may also contain a provision requiring the signature of two or more of the EEIG's managers in order to bind the EEIG in obligations to third parties. This is the only valid restriction that can be made on the management's ability to bind the grouping vis-a-vis third parties.

2. Member State Law and the Founding Contract.—The contract itself will be subject to the law of the Member State where the EEIG has its official address, and if the Member State has territories with separate legal systems, the law of the territory where the EEIG’s address is located will apply. For reasons of public interest, any Member State may restrict participation in an EEIG to specific “classes of natural persons, companies, firms or other legal bodies.” The Member State may also limit to twenty the number of members that can join an EEIG.

3. Mandatory Contractual Provisions.—The founding contract must contain the following information:

1. The name of the grouping together with "EEIG" or "European Economic Interest Grouping;"
2. the official address of the grouping;
3. the object for which the grouping is formed;
4. the number of members, and for each member of the grouping:
   a. the name or business name,
   b. the legal form, and
   c. the permanent address or registered office.
5. the duration of the grouping if not indefinite.

C. Required Filings and Published Notifications

1. Filings.—An EEIG must register in the Member State

101. Id. art. 16(1), at 5.
102. Id. art. 21, at 6.
103. Id. art. 20(2), at 6.
104. Id.
105. In the United Kingdom, for example, Scottish law would control the contract of an EEIG with its official address in Scotland. Id. art. 2, at 2.
106. Id. art. 4(4), at 3.
107. Id. art. 4(3), at 3.
108. Id. art. 5, at 3.
where it has its official address,\footnote{109} and file its founding contract with
the registry that the Member State establishes for this purpose.\footnote{110} If
an EEIG forms a "grouping establishment," such as a branch office
in another Member State, it must register in that Member State and
file copies of all documents it has filed in the Member State where it
has its official address.\footnote{111} Thus, in each Member State where it sets
up a permanent establishment, an EEIG must register and file the
following:

1. Any amendments to the founding contract and changes
to the group's composition;
2. a notice of setting up or closing of any establishments;
3. judicial decisions declaring the grouping's nullity;
4. a notice of appointment or termination of managers,
their names, whether they must act jointly to bind the grouping,
and any other information required by the Member State;
5. a notice of a member's assignment of any portion of his
or her participation in the grouping;
6. a notice of a winding up, whether voluntary or by judi-
cial order;
7. a notice of the appointment of liquidators, their names
and any other information required by the Member State;
8. a notice of the conclusion of liquidation;
9. a notice of any proposal to transfer the grouping's official
address; and
10. any agreement exempting new members from liability
for the obligations incurred by the grouping prior to this mem-
ber's entry.\footnote{112}

The Member States are directed to set up a registry for the above
documents and notices, to establish a procedure for filing, to ensure
public access to and copies of these filed documents and notices, and
to levy any necessary administrative fees to offset the cost of filing
and copies provided to the public.\footnote{113} The Member States are also
directed to provide for the publication of the appropriate notices in
their national, official gazettes, and that the information to be pub-
lished in the \textit{Official Journal of the European Communities} be for-
warded to the proper Community office in a timely manner.\footnote{114}

2. \textit{Required Publications}.—The EEIG Regulation requires
that the EEIG publish certain information in both the national ga-
zette of the Member State where the EEIG is registered and the Official Journal of the European Communities. The following information must be published in the national gazette of the Member State where the EEIG is registered:

1. The name of the grouping together with “EEIG” or “European Economic Interest Grouping;”
2. the official address of the grouping;
3. the object for which the grouping is formed;
4. the number of members, and for each member of the grouping:
   a. name or business name,
   b. legal form,
   c. permanent address or registered office;
5. the duration of the grouping if not indefinite;
6. the number, date and place of registration as well as notice of the termination of that registration; and
7. all those items which must be filed in the Member State registry under Article 7 (excluding amendments to the contract).

The EEIG must also publish a “[n]otice that a grouping has been formed or that the liquidation of a grouping has been concluded” in the Official Journal. The notice must state the number, the date, and the place of registration and the place, and the title of the publication in the national gazette. The EEIG may rely upon all documents and notices published in the manner designated by the Regulation as against third parties “under the conditions laid down by the national law applicable,” and Community law.

VIII. Governance and Management of the EEIG

A. Governance

The EEIG Regulation provides that “[s]ubject to the provision of this Regulation, the law applicable . . . to the internal organization of a grouping shall be the internal law of the state in which the official address is situated . . . .” Thus, the law of the Member State in which the EEIG plans to locate its permanent address will

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115. See infra notes 116-18 and accompanying text.
116. 28 O.J. Eur. Comm. (No. L 199) art. 8, at 4. The items referred to in #7 may be published in either full or abstract form.
117. Id. art. 11, at 4.
118. Id.
119. Id. art. 9, at 4.
120. Id. art. 2(1), at 2. Article 2(2) provides that if a Member State is divided into territorial units—for example, Scotland inside of the United Kingdom—then the law of the territorial unit where the EEIG resides will control.
be of great importance to the governance of the EEIG's internal affairs. The following section addresses the preemptive sections of the Regulation that will control the EEIG's operations regardless of the EEIG's location, as well as the provisions which direct the manner in which Member States apply their own law to the EEIG.

1. The General Meeting.—At the general meeting, the members exercise ultimate control over the EEIG; the members, “acting as a body, may take any decision for the purpose of achieving the objects of the grouping.” 121 The EEIG will call a general meeting at the request of either a member or a manager. 122 As mentioned above, each member will have one vote at the general meeting, unless the EEIG contract provides otherwise. 123 The contract may distribute votes unequally, “provided that no one member holds a majority of the votes.” 124 If not addressed in the founding contract, members must make decisions unanimously. 125 The contract, however, may establish its own “conditions for a quorum and for a majority” that will result in binding decisions, as long as the Regulation does not require them to be made unanimously. 126 The Regulation requires unanimity for decisions that 1) alter the grouping's object; 2) alter the votes allotted to each member; 3) alter the conditions for decisionmaking; 4) extend the duration of a grouping beyond that fixed in its founding contract; 5) alter any member's contribution to the grouping's financing; 6) alter any member's obligations unless otherwise provided in the founding contract; or 7) make any other alteration to the founding contract, unless provided for in the contract itself. 127

Informed decisionmaking requires that members have access to all information “concerning the grouping's business and to inspect the grouping's books and business records.” 128 The manager or managers of the EEIG have a duty to supply members with this information. 129

B. Management of the EEIG

The Regulation provides that the members and the “manager or managers” direct an EEIG. Alternatively, the EEIG can institute

121. Id. art. 16(2), at 5.
122. Id. art. 17(4), at 6.
123. Id.
124. Id. art. 17(1), at 5.
125. Id. art. 17(3), at 6.
126. Id.
127. Id. art. 17(2), at 5.
128. Id. art. 18, at 6.
129. Id.
other organs and determine their powers. Unless such other organs are established, the Regulation envisions management through “one or more natural persons” appointed in the founding contract or by subsequent decision of the members. If the “conditions for the appointment and removal of the manager or managers” are not laid out in the founding contract, the members may determine these conditions by unanimous decision.

If the law of the Member State provides that legal persons may manage an EEIG, it must also provide that “such legal persons designate one or more natural persons” as representatives and that these representatives shall be “liable as if they were themselves managers of the groupings concerned.” However, neither a natural nor a legal person may become the manager of an EEIG if that person is prohibited by law from managing or belonging to the administrative organ of the EEIG by either: (1) the law applicable to him, (2) the law of the Member State where the EEIG has its official office, or (3) a judicial or administrative decision “made or recognized in a Member State.”

Only the manager(s) may represent the EEIG in dealings with third parties. The sole limitation that may be placed on the manager's representative capacity is a provision that no agreement will bind the EEIG unless performed by two or more managers acting together. This provision would be effective only if published in the official gazette of the Member State where the EEIG is registered, and printed on all letters and forms used by the EEIG. No other limitation may be placed on the manager(s). Even the ultra vires actions of the managers will bind the EEIG with respect to third parties, unless the EEIG can demonstrate that the third parties knew or should have known that the manager was acting without authority.

C. Admission and Withdrawal of Members

A decision to admit new members must be unanimous. Each

130. Id. art. 16(1), at 5.
131. Id. art. 19(1), at 6.
132. Id. art. 19(3), at 6.
133. Id. art. 19(2), at 6. The Regulation does not explain to what extent managers, as opposed to members—who are jointly and severally liable, are personally liable for their actions.
134. Id. art. 19(1), at 6.
135. Id. art. 20(1), at 6.
136. Id. art. 20(1), (2), at 6.
137. Id. arts. 20(2), 25(d), at 6,7.
138. Publication of the EEIG's object as stated in the founding contract will not be dispositive evidence that a third party had knowledge that management's action was ultra vires. Id. art. 20(1), at 6.
139. Id. art. 26(1), at 7.
new member will be jointly and severally liable for all debts and obligations of the EEIG, including those arising before his or her membership, unless the contract or the instrument of admission exempts him from liability for these pre-existing obligations.\(^{140}\) A new member may rely upon such an exemption against third parties only if the exemption is duly published.\(^{141}\)

The Regulation allows members to assign all or part of their share of the grouping, but such an assignment requires unanimous approval by the other members.\(^{142}\) A member may also use his or her share as security for debts but, unless the founding contract states otherwise, only with the grouping’s unanimous approval.\(^{143}\) Use of the share as security for a debt will never result in the holder of the security interest thereby gaining membership to the EEIG.\(^{144}\)

A member may leave the grouping through the above-mentioned assignment of share, through a simple withdrawal, by expulsion, or by death.\(^{145}\) It is important to note that loss of membership will occur if a member no longer satisfies the conditions for membership discussed above.\(^{146}\) That is, if the member is no longer engaged in business within the Community (if a natural person), or registered with its central administration in the Community (if a business entity), then loss of membership will occur.\(^{147}\) Unless other conditions for withdrawal are set out in the founding contract, the Regulation provides that a member may withdraw either with unanimous approval of the members or for “just and proper grounds.”\(^{148}\)

Unless otherwise provided in the contract, a member may be expelled if a majority of the members seek a judicial order to expel him, and the court finds that the member has “seriously fail[ed] in his obligations” or “threatens to cause serious disruption in the operation of the grouping.”\(^{149}\)

Upon the death of a member, “no person may become a member in [the decedent’s] place except under the conditions laid down in the founding contract or, failing that, with the unanimous agreement of the remaining members.”\(^{150}\)

A five year limit on liability runs from the date a member leaves the EEIG on all debts and obligations incurred by the EEIG.

\(^{140}\) Id. art. 26(2), at 7.
\(^{141}\) Id.
\(^{142}\) Id. art. 22(1), at 6.
\(^{143}\) Id. art. 22(2), at 6.
\(^{144}\) Id.
\(^{145}\) Id. arts. 22, 27, 28, at 6-7.
\(^{146}\) See supra notes 85-95, and accompanying text. The provision establishing this requirement is Article 28(1), 28 O.J. EUR. COMM. (No. L 199) art. 28(1), at 7.
\(^{147}\) Id. art. 4(1), at 3.
\(^{148}\) Id. art. 27(1), at 7.
\(^{149}\) Id. art. 27(2), at 7. The contract may limit the power of expulsion. Id.
\(^{150}\) Id. art. 28(2), at 7.
when the person was a member of the grouping.\textsuperscript{151} The fact of the member's departure from the EEIG must be published to begin the five-year clock, and this limitation will replace any longer period existing in Member State law.\textsuperscript{152} The Regulation provides that the value of a departing member's share and obligations shall be determined according to "the assets and liabilities of the grouping as they stand when he ceases to belong to it."\textsuperscript{153} The Regulation does not directly apply this rule of evaluation to the case of an assignment of a member's share in the grouping.\textsuperscript{154} Such an assignment would presumably have a negotiated, market value.

IX. Winding Up an EEIG

An EEIG may be wound up either upon the unanimous decision of its members or by a court order.\textsuperscript{155} A member, a "concerned person," or a competent authority can ask the court to order an EEIG to be wound up if: (1) the grouping has seriously violated the Regulation or (2) a Member State has provided such redress for an EEIG's contravention of "public interest," and such interest is violated, provided that (3) the EEIG's affairs cannot "be put in order before the court has delivered a substantive ruling."\textsuperscript{156} A court could order that an EEIG be involuntarily shut down if it no longer has its official address in the Community, lacks sufficient diversity of citizenship, or violates the Regulation, for example, by taking profits for itself.\textsuperscript{157} The Member State may provide the court with the power to shut down an EEIG on grounds of "public interest" only if a similar remedy exists for "registered companies or other legal bodies" that are subject to the Member State's law.\textsuperscript{158}

The members themselves, acting unanimously, may wind up their grouping in the following instances: if (1) the EEIG's expiration date or any other condition for termination has occurred; (2) the EEIG has accomplished the object for which it was formed, or this object would be impossible to pursue any further; or (3) the EEIG no longer meets the diversity requirements of the Regulation.\textsuperscript{159}

The winding up of an EEIG will entail its liquidation, and the liquidation, whether the winding up is voluntary or involuntary, will be governed by Member State law.\textsuperscript{160}

\textsuperscript{151} Id. art. 37(1), at 8.
\textsuperscript{152} Id.
\textsuperscript{153} Id. art. 33, at 8.
\textsuperscript{154} Id. art. 22, at 6.
\textsuperscript{155} Id. arts. 31, 32, at 7-8.
\textsuperscript{156} Id. art. 32(1), at 8.
\textsuperscript{157} These are violations of articles 12, 3, and 31(3). See id.
\textsuperscript{158} Id. art. 32(3), at 8.
\textsuperscript{159} Id. art. 31, at 7-8.
\textsuperscript{160} Id. art. 35, at 8.
X. Conclusion: The EEIG as a Component of European Company Law

The EEIG form offers existing European companies and professionals a means of joining forces with their counterparts in other Member States. The transaction costs of setting up an EEIG—the drafting of a contract, registration, and appointment of management—should be relatively small, and other considerations will dictate the choice of the EEIG form. The type, size, and nature of the business and its strategic planning should be significant factors.

The EEIG Regulation is thus a good choice as the first piece of "supranational company law" to be adopted. It allows European companies, hitherto limited to one Member State, to set up an international network while their strategy for the Single Market is evolving. Importantly, it allows companies to do so with minimal reorganization and low transaction costs. The EEIG Regulation should also allow the various subsidiaries of a single American parent—each incorporated in a different Member State—to coordinate their activities through an EEIG subsidiary. Beyond the initial stage of coordination, however; the companies may begin to desire more central control over their operations. The European Company Law Statute, which is the subject of the next section, would supply a structure for such centralized control.

XI. The European Company Law Statute

A. Introduction

The proposed European Company Law Statute would offer a form of supranational incorporation, recognized in every Member State. It would establish an alternative to incorporation under the existing company laws of the twelve Member States (which would, however, remain in effect). The statute consists of a regulation and a directive. The statute's regulation provides detailed rules for setting up, financing, and operating a European company, or "Societas Europea" (SE), as the statute refers to it.\(^\text{161}\) The accompanying directive addresses the difficult problem of employee participation in the SE's decisionmaking.\(^\text{162}\) Because Council regulations are fully and directly enforceable in each Member State, while directives only

\(^{161}\) Article 1 of the Regulation reads, "Companies may be formed throughout the Community in the form of a European public limited company (Societas Europea, "SE") on the conditions and in the manner set out in this Regulation." Proposal for a Council Regulation on the Statute for a European Company, 32 O.J. EUR. COMM. (No. C 263) art. 1, at 42 (1989) [hereinafter SE Regulation].

bind the Member State to the specified end and not the means used to achieve this end.\textsuperscript{166} The splitting of the proposed statute marks a necessity for compromise on the delicate problem of labor participation in company management. The "splitting of the proposal," however, provides flexibility only regarding the means by which Member States will implement the measure. While the directive form eliminates some conflict, it does not offer a complete escape from the difficult and contentious problem of labor participation: No SE may be formed unless the Member State where the SE will be registered adopts and implements the Directive.\textsuperscript{164}

B. History

Because of significant divergences between the corporation laws of the Member States—especially the extent to which employees should participate in corporate governance, the road to a European company law statute has been difficult.\textsuperscript{166} The project has existed almost since the beginning of the Community.\textsuperscript{166} The first draft of a European company law statute was created by legal scholars to meet the exigencies of an increasingly international market. Stein, Hay and Waelbroeck describe the scholarly foundation and the resulting appointment by the Commission of an expert panel on company law in 1965:

The idea of a European Company was launched by a Dutch scholar, Professor Pieter Sanders. He had in mind an additional, novel organizational form which would coexist with companies incorporated under national company laws, thus offering a choice. The idea, which gathered support particularly in France, was taken up by the Commission. Professor Sanders was asked to draft a "statute," which became the basis of the Proposed Statute for the European Company, submitted to the Council on

\begin{itemize}
\item \textsuperscript{163} The Treaty of Rome provides:
  A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
  A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authority the choice of form and methods.

Treaty of Rome, supra note 11, art. 189, 298 U.N.T.S. at 79.

\item \textsuperscript{164} SE Regulation, supra note 161, art. 136, at 68.

\item \textsuperscript{165} Pessimistically put, "the codetermination (worker participation) proposal within the draft, together with other factors, accounts for the total political failure of the draft so far." R. BUXBAUM & K. HOFF, supra note 2, at 260.

\item \textsuperscript{166} As Eric Stein notes, "the suggestion for a commercial European company emerged in 1959 almost simultaneously in Tours at a meeting of French notaries and in Rotterdam where Professor Sanders . . . delivered his well known, imaginative inaugural lecture." Stein, supra note 3, 430-31. Greg Myles tells us the gentleman who introduced the idea in Tours was a M. Thibierge. See G. MYLES, EEC BRIEF, Vol. 2, Co. Law—SEs, A(i) (1989). As I explain below, it seems that although the notion can be claimed both by the French and the Dutch, the need was stressed most by the French and the idea was formulated by Professor Sanders's task force.
\end{itemize}
June 30, 1970. A new draft reflecting the opinions of the European Parliament and the Economic and Social Committee was approved by the Commission and submitted to the Council five years later.\textsuperscript{167}

Although the idea of a European Company was not new, the Commission's appointment of an expert panel and Professor Sanders' resulting proposal was a response to a detailed request from France.\textsuperscript{168} Buxbaum and Hopt point out that the European expansion of U.S. multinationals contributed to France's concern: "[A]fter numerous U.S. acquisitions of European firms, and in particular after the legal difficulties of European mergers (e.g., the Agfa-Gevaert merger)," the French Government put forward this proposal, seeking to create a corporate form in which European Community companies could more readily compete with the American corporations entering Europe.\textsuperscript{169} Absent a European company law, corporations with activities throughout the Community must pay the transaction costs of dealing with a different law in every Member State.

C. The Costs of 12 Different Company Laws

Even large, pan-European consortiums like Airbus Industrie remain based in one European country, and must cope with the difficulties and transaction costs of complying with each country's company law. Another example is the English Channel tunnel which, as the Wall Street Journal has pointed out, "has been hobbled by the lack of European company laws. Lacking the legal means to establish a single transnational company without a French or British identity, the project's backers had to set up a complex joint venture."\textsuperscript{170} Although the adoption of the EEIG Regulation has allowed companies in different Member States to cooperate more easily, the central difficulty of dealing with twelve different systems of company law remains. Carreau and Lee succinctly present some of the costs of operating within a number of different, national jurisdictions:

Although companies have been able to collaborate across

\textsuperscript{167} E. STEIN, P. HAY & M. WAELBROECK, EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE 647 (1976). The original proposal was published in BULL. E.C. Supp. 8/70, and although the form of a "Convention" between the Member States was originally contemplated, the statute took form as a regulation when submitted to the Council in 1975 (published at BULL. E.C. Supp. 4/1975).

\textsuperscript{168} Dominique Carreau and William L. Lee explain that, "[t]he movement to produce a uniform European corporate law gained momentum when France, on March 15, 1965, transmitted to the other Member States an official memorandum suggesting that a detailed study be undertaken by experts working closely with the Commission." Carreau & Lee, Towards a European Company Law, 9 NW. J. INT'L LAW & BUS. 501, 502 (1989).

\textsuperscript{169} R. BUFXBAUM & K. HOPT, supra note 2, at 244.

\textsuperscript{170} Hemp, Pan-European Ventures Face Difficulties, Wall St. J., Apr. 1, 1986, at 36, col. 2.
frontiers through joint ventures and cross-shareholdings, formal
mergers have been impossible because of the legal and tax ob-
stances involved. A cross-border merger entails a loss of legal
personality and a change of nationality by the acquired company
and, thus, requires unanimous shareholder consent. The current
taxation of capital gains following the acquisition of the non-
surviving corporation also serves as a significant tax obstacle.
These barriers have essentially precluded cross-border mergers,
and corporations have been forced to resort to less appealing
forms of economic cooperation, such as holding companies or
joint ventures.171

The Community has adopted measures to remedy the tax treat-
ment of non-surviving corporations in cross-border mergers.172 Yet,
other obstacles such as increased transaction costs and an inability to
consolidate profits still block the efficiency of European, multina-
tional corporations. The Regulation would greatly reduce these
expenses.

D. The Regulation’s Foundation in the Treaty

Because the SE Regulation would create a form of business en-
terprise valid in all twelve Member States rather than using the
more traditional means of harmonizing the existing laws of the
Member States, it has been argued that the Council lacks sufficient
powers under the Treaty to pass the Regulation.173 This argument
will probably fail if made to the European Court of Justice. The SE
Regulation is based on Article 8a of the Treaty of Rome, which pro-
vides that “[t]he Community shall adopt measures with the aim of pro-
gressively establishing the internal market . . . .”174 The First
Recital of the Regulation states that:

Whereas the completion of the internal market within the

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173. Peter Pantaleo raises the objection that, “the Regulation . . . purportedly is based on Article 100A of the Treaty of Rome . . . . The purpose of 100A is the ‘approximation of national laws.’ The draft . . . Statute actually aims at quite another thing.” Pantaleo, The European Company Law as an Instrument of Social Policy, 1.6 J. EUR. Bus. 50 (1990). There are a number of problems with this argument. First, the Regulation is based on Article 8a, not 100a. Second, Article 8a is not limited to approximation of laws, and states that, “[t]he Community shall adopt measures with the aim of progressively establishing the internal market . . . .” and because this is the aim of the Regulation, the Article is thus probably sufficient base for its enactment. Third, and merely for the sake of accuracy, although Article 100 addresses the approximation of law, the purpose of Article 100a is to establish when a qualified majority, rather than unanimity is necessary for a Council action. Because the Regulation addresses both labor and fiscal matters, it would have to be unanimously approved by the Council, and if it is so approved, Article 100a(2) will be satisfied. See Treaty of Rome, supra note 11, art. 100a(2).
174. Treaty of Rome, supra note 11, art. 8a.
period set by Article 8a of the Treaty, and the improvement it must bring about in the economic and social situation throughout the Community, mean not only that barriers to trade must be removed but also that the structures of production must be adopted to the Community dimension; for this purpose it is essential that companies whose business is not limited to satisfying purely local needs should be able to plan and carry out the reorganization of their business on a Community scale.\textsuperscript{176}

Under Article 8a, measures which seek progressively to establish the internal market are not only justified, but are also mandated.\textsuperscript{176} The goal of a single internal market applies not only to the free movement of goods, but also to persons, services, and capital.\textsuperscript{177} The Regulation seeks to adapt the "structures of production" to the single market.

Thus, the only way to defeat the Regulation's foundation in the Treaty would be to show either (1) that adopting the "structures of production" to the internal market is not necessary to the establishment of this market, or (2) that the creation of an independent entity is an unjustified manner of adopting these structures of production to the internal market.

The second argument is probably the strongest, but it is not strong enough to succeed. The Treaty gives the Council power to adopt regulations.\textsuperscript{176} Regulations, by their nature, establish independent Community law that is directly applicable in the Member States.\textsuperscript{179} As such, they do not merely set out coordinates toward which Member State law should move, but act as supranational legislation. Therefore, if the Council is correct in finding that the SE Regulation facilitates the creation of structures of production that serve the establishment of the single market as mandated by Article 8a, the legislation need not be restricted to the form of a harmonizing directive.

Moreover, even before the Single European Act\textsuperscript{180} added Article 8a to the Treaty, the Council had already adopted the European Economic Interest Grouping Regulation, which is legally similar to the SE Regulation in that it sets up a supranational business structure.\textsuperscript{181} The EEIG Regulation was based on the residual powers

\begin{itemize}
\item \textsuperscript{175} SE Regulation, \emph{supra} note 161, First Recital, at 41.
\item \textsuperscript{176} The Treaty states that "the Community \textit{shall} adopt measures . . . ." Treaty of Rome, \emph{supra} note 11, art. 8a (emphasis added).
\item \textsuperscript{177} These are the "four freedoms" guaranteed by the Treaty, prescribed in Part Two of the Treaty, entitled "Foundations of the Community." \textit{See} Treaty of Rome, \emph{supra} note 11, arts. 9-73, 298 U.N.T.S. at 18-44.
\item \textsuperscript{178} Id. art. 189.
\item \textsuperscript{179} Id.
\item \textsuperscript{180} The Single European Act, 30 O.J. EUR. COMM. (No. L 169) 1 (1987).
\item \textsuperscript{181} \textit{See} Section V, \emph{supra}.
\end{itemize}
granted by Article 235, which the Community can invoke when necessary to attain "one of the objectives of the Community" and if the "[T]reaty has not provided the necessary powers."\(^{182}\) Both the SE Regulation and the EEIG Regulation establish Community law rather than seeking harmonization of Member State law. Therefore, even if it were determined that Article 8a does not grant the power to issue such a regulation, the important Community objective of facilitating corporate activity unimpeded by national borders should allow the residual power of Article 235 to sufficiently ground the SE Regulation in the Treaty.\(^{183}\)

**E. The Legislative Context**

The Commission's 1989 proposal thus followed the adoption of the European Economic Interest Grouping Regulation,\(^{184}\) and only slightly preceded the adoption of the Twelfth Council Company Law Directive on single-member private limited-liability companies.\(^{185}\) If adopted, it would substantially complete the framework for a European business enterprise. Within the completed framework, each Member State would allow sole proprietors to incorporate into an organization providing limited liability. European companies and persons would be able to cooperate across borders in something like a pan-European partnership, and larger corporations would be able to establish themselves in a single, corporate form throughout the Community. The resulting framework would substantially reduce transaction costs and structural barriers to a company's operation.

\(^{182}\) The Treaty of Rome provides:

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


\(^{183}\) If based on Article 235, an argument against the Regulation would be that an EC corporate law does not fall "in the course of the operation of the common market," but deals with establishing something beyond the four freedoms. There is, however, no reason to believe that this argument would be favored over the Council's and Commission's finding that the "structures of production" are important to the market just as is the flow of goods produced by these "structures." If the Court agreed with this finding, even if the Regulation were not supported by Article 8a, then Article 235 will support the regulation, provided that it is found necessary to one of the Community's objectives. The European Court of Justice has addressed the scope of Article 235 in Hauptzollamt Bremerhaven v. Massey-Ferguson, Case 8/73 (1973) ECR 897, and Commission v. Council, Case 45/86, March 26 (1987). See Hartley's discussion of Article 235 in *T.C. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 106-109 (1988).

\(^{184}\) The EEIG Regulation was adopted on July 25, 1985. *See supra* note 52 and accompanying text.

\(^{185}\) This directive was enacted on December 21, 1989. *See supra* note 32 and accompanying text.
across Member State borders. The first two elements have become reality, and the third may or may not join them soon.

These measures fit into the existing network of Community legislation on disclosure,¹⁸⁶ share capital,¹⁸⁷ annual accounts,¹⁸⁸ mergers,¹⁸⁹ and divisions,¹⁹⁰ and will be regulated by other Council directives and regulations on such matters as antitrust.¹⁹¹ The whole is an evolving legislative framework for structuring business enterprises at the EC level. The law of the Member States regulates matters not covered by this framework of directives and regulations. Thus, the developing system will present a grid of European law, with the spaces between this grid to be filled in by the appropriate law of each Member State.

This section will address the general structural qualities, formation, and system of corporate governance of the SE. Two aspects of the SE Regulation are especially important and will be addressed in the last two sections of this article. First and most challenging is the Regulation’s attempt to offer models of employee participation in the SE’s management that are acceptable to all Member States.¹⁹² The second point is the tax scheme under which the Regulation allows an SE’s central establishment to claim a tax offset for the aggregate losses of all of its “permanent establishments” or branches in another Member State or non-Member State.¹⁹³

XII. An Overview of the European Company Law Statute

A. Generally

The SE Regulation provides for either a publicly or closely held corporate form with legal personality and limited shareholders’ liability which all “commercial companies” can use to obtain a legal personality that is recognized in all EC Member States.¹⁹⁴ Subject to the SE Regulation, an SE is to have “the same rights, powers, and obligations as a public limited liability company incorporated under national law.”¹⁹⁵

The Commission has explained that, “[o]n grounds of legal certainty and for technical reasons it has not been possible to make provision for the conversion into an SE of a company incorporated

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¹⁸⁶. See supra note 17 and accompanying text.
¹⁸⁷. See supra note 20 and accompanying text.
¹⁸⁸. See supra notes 27-28 and accompanying text.
¹⁸⁹. See supra note 23 and accompanying text.
¹⁹⁰. See supra note 26 and accompanying text.
¹⁹². See Section XIV, infra.
¹⁹³. See Section XV, infra.
¹⁹⁴. SE Regulation, supra note 161, art. 1, at 42-43.
¹⁹⁵. Id. art. 7(4), at 44.
under national law and having branches in several Member States.”

Thus, no single company, unless it is already in the form of an SE, can found an SE without seeking at least one co-founder.

Once two or more founder companies are established, the Regulation allows an SE to be formed by either merger, the formation of a holding company, or the formation of a subsidiary. Public corporations may form an SE by merging, forming a joint subsidiary, or establishing a holding company, provided that (1) the participating corporations are incorporated under the laws of a Member State, (2) these corporations have their registered office and central administration within the Community, and (3) at least two of the participating corporations have their central administrations in different Member States. Other legal entities such as closely-held corporations and partnerships may form an SE only by creating a joint subsidiary, and only if they meet the three criteria of incorporation, location of the “registered office,” and diversity of the Member States where their central administrations are located.

An SE can participate with a partner in forming a second SE in any of these ways. An SE may also act alone to set up a wholly owned subsidiary in the form of an SE. Its registered office must be within the Community and at the same location as its central administration.

It is important to note that an SE subsidiary may

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197. This will require some two-step procedures for multinational companies with a network of branches in various Member States to turn their company into an SE without seeking a partner: the branches—as opposed to separately incorporated subsidiaries—would, together, still constitute only a single entity, requiring the corporation to first split off part of its operations into a separate corporation before merging back into an SE. This process of division can be accomplished under the Sixth Council Directive “concerning the division of public limited liability companies.” The Directive allows a company to transfer all its assets into newly formed companies and thereby divide the company into two or more without going through a winding up process. The Sixth Council Directive of 17 December 1982 based on Article 54(3)(g) of the Treaty, concerning the division of public limited liability companies, 25 O.J. EUR. COMM. (No. L 378) 47 (1982).

198. See Section XIII, infra on the formation of an SE.

199. SE Regulation, supra note 161, art. 2, at 43.

200. The proposed Regulation defines the group of entities that may form a joint, SE subsidiary as: “Companies or firms within the meaning of the second paragraph or Article 58 of the Treaty and other legal bodies governed by public or private law which have been formed in accordance with the law of a Member State.” Id. art. 2(2), at 43. Article 58 of the Treaty includes: “Companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profitmaking.” Treaty of Rome, supra note 11, art. 58, 298 U.N.T.S. at 40. The category, “other legal persons governed by public or private law, save for those which are non-profitmaking,” would seem to include for-profit close corporations and partnerships.

201. SE Regulation, supra note 161, art. 2(2), at 43.

202. Id. art. 3(1)-(2), at 43.

203. Id. art. 3(3), at 43.

204. Id. art. 3(1), at 43.
not, in turn, set up another SE subsidiary.\textsuperscript{206} The Commission explains that this prohibition attempts “to avoid the creation of ‘cascades’ of SEs.”\textsuperscript{206}

SEs may be small corporations, with a required capital of only ECU 100,000 (the ECU denomination is mandatory), at least twenty-five percent paid up.\textsuperscript{207} However, if the SE is an insurance institution, it will still be subject to the minimum capital requirements of the Member State in which it has its registered office and if it is a credit institution, it will be subject to the higher capital requirements for such institutions under EC law.\textsuperscript{208}

An SE will be required to establish its registered office in the Member State where its central administration is located. In Europe, the place of registration must also be the company’s “siège réel,” or “real seat,” if the SE intends to have this Member State’s law apply to those areas left to national law by the Regulation.\textsuperscript{208} Unlike the United States, where a token office in the state of incorporation is enough to secure the application of the state’s law to the corporation’s internal affairs, the Community follows the “siège réel” theory, according to which a state of registration should also be the state from which the company is really controlled if the corporation expects the law of the state of registration to apply to its internal affairs.\textsuperscript{210} Thus, one should not expect an SE to be registered in one place and have its real headquarters located elsewhere.

\textbf{B. The SE Regulation and National Law}

The Commission has chosen not to provide for every aspect of the SE’s establishment, operation, and liquidation in an attempt to avoid a “too extensive, detailed and inflexible” company law.\textsuperscript{211} Instead, the Regulation establishes a hierarchy of applicable law: first, its express language; second, its general principles; and third, the law of the Member State where the SE is registered.

If the Regulation generally applies to but does not expressly mention a specific aspect of operation, this aspect will be regulated

\begin{itemize}
  \item\textsuperscript{205} Id. art. 3(3), at 43.
  \item\textsuperscript{206} SE Explanatory Memorandum, \textit{supra} note 196, at 5.
  \item\textsuperscript{207} SE Regulation, \textit{supra} note 161, art. 4(1), at 43, and art. 38, at 49.
  \item\textsuperscript{208} Id. art. 4(2)-(3), at 43.
  \item\textsuperscript{209} Id. art. 5, at 43.
  \item\textsuperscript{210} The European Court of Justice recently clarified that the law of the state where the corporation’s central office is located—not where it is incorporated—controls the latter’s internal affairs. See Ebke & Glockel, \textit{Regional Developments: European Corporate Law, 24 INT’L LAW} 239 (1990).
  \item\textsuperscript{211} SE Explanatory Memorandum, \textit{supra} note 196, at 7. The “revised” version of the Regulation originally introduced in 1975 was extremely detailed and sought to supplant, rather than supplement, Member State company law by providing for every aspect of company operation, formation of groups, and liquidation. See \textit{Statute for European Companies, BULL. EUR. COM. Supp} 4/75, at 1-223 (1975).
\end{itemize}
first by the general principles of the Regulation and if they do not address the matter, the law of the Member State in which the SE has its registered office will apply. If the Member State delegates authority over corporations to its individual federal states (or territorial units), the law of the appropriate federal state is controlling. If a matter is not covered, the Regulation states that “Community law and the law of the Member State shall apply to the SE.” This second rule provides no guideline for deciding when Community law and when that of the Member State will apply. Thus, the law which applies to matters not addressed by the Regulation will depend upon the existence of applicable Community law at the time the question arises, traditional principles of choice of law such as the interests of the Member State in that particular area, and the discretion of the court.

Although the SE will be supranational, it will not be a “super company,” and the Commission notes that “[t]he only privilege that the Statute confers on the SE is the Community character of its structure.” In addition to this supranational character, however, it will have the ability to consolidate taxable income. Beyond these special features, other law—either Member State or Community—will control the SE’s ability to perform certain kinds of regulated business, to borrow funds, to issue securities, to list securities on an exchange, and to compete with other firms. In addition, an SE must register in every state where it locates a branch, so as to comply with national securities and other disclosure laws. National law applies to determine the adequacy of consideration for paid-in capital, and national procedures are used to check the SE’s compliance with the Regulation’s rules on formation.

XIII. Formation

As mentioned above, the Regulation does not provide for the creation of an SE by corporate promoters ab initio, or through the

212. SE Regulation, supra note 161, art. 7(1)-(2), at 43.
213. Id. The provision establishing that the law of the territorial unit within a Member State control the SE—where appropriate—was included for the special case of the United Kingdom, “where Scottish law is different from that in force elsewhere.” SE Explanatory Memorandum, supra note 196, at 8.
214. SE Regulation, supra note 161, art. 7(3), at 44.
215. SE Explanatory Memorandum, supra note 196, at 8.
216. See Section XV, infra for the details of the Regulation’s tax measures.
217. SE Explanatory Memorandum, supra note 196, at 8.
218. Id. at 9. Although such registration still requires the SE to take account of the separation between Member States, it will be far simpler than separate incorporation in each state where it has a permanent establishment.
219. SE Regulation, supra note 161, art. 14, at 45.
220. Id. art. 15, at 45; see SE Explanatory Memorandum, supra note 196, at 11.
conversion of a single, multinational firm into an SE. Each method of formation will require the participation of more than one company, which the statute refers to as "founder companies." This will require some two-step procedures for multinational companies with a network of branches in various Member States to turn their company into an SE without seeking a partner. The branches—as opposed to separately incorporated subsidiaries—together would still constitute only a single entity, requiring the corporation first to split off part of its operations into a separate corporation before merging back into an SE. This process of division can be accomplished under the Sixth Council Directive concerning the division of public limited liability companies. This Directive allows a company to transfer all its assets into newly-formed companies and thereby divide the company into two or more companies without going through a winding up process. Once two or more companies are assembled, they may merge to become an SE, form an SE holding company, or form a joint subsidiary incorporated as an SE. An SE itself may be a founder company when it forms an SE subsidiary.

A. Merger into the SE Form

Only public corporations may merge into the SE form, and they may do so only if: (1) the merging corporations are incorporated under the laws of a Member State, (2) these corporations have their registered office and central administration within the Community, and (3) at least two of these corporations have their central administration in different Member States. The first two requirements obviously exclude American corporations, although they would allow European subsidiaries of these corporations—incorporated under the laws of an EC Member State and residents of the Community—to participate in the formation of an SE.

The Regulation provides that the merging companies "be wound up without going into liquidation and transfer to the SE all their assets and liabilities in exchange for the issue to their shareholders of shares in the SE and a cash payment, if any, not exceeding 10%
of the nominal value of the shares so issued, or where there is no nominal value, of their accounting par value." 229

The founding companies must draw up and publish the merger document according to the requirements of the Member States where they have their registered offices. 230 The administrative or management board of each founder company must compile a report explaining and defending the draft terms of the merger, particularly addressing the share exchange ratio. 231 The founder companies must also appoint independent experts to examine the draft terms and prepare a report for the shareholders. 232 The Regulation requires this report to pay special attention to the share exchange ratio and give an opinion on whether it is "fair and reasonable." 233 Member State law will regulate the protection of all creditors, 234 and the supervision of the merger itself. 235

The merger will have the following consequences: (1) all assets of the founder companies will be transferred to the SE; (2) all shareholders of the founder companies will become shareholders of the SE; and (3) the founder companies will cease to exist. 236 Each of the founder companies must publish the merger in accordance with the national law in the Member State where they are registered. 237

Article 24 of the Regulation provides for mandatory, judicial or administrative, preventative supervision of the legality of the merger. 238 If both the Member States where the founding companies are located and that state where the SE will establish its registered office have supervisory mechanisms, supervision by the founding companies' states may be carried out only after the SE's future host state has cleared the SE itself. 239 If one of the Member States of the founding companies require judicial supervision of a merger and another does not, the Regulation resolves the conflict by stating that the merger will be supervised in accordance with Member State law, giving effect to the Third Council Directive on the mergers of public limited liability companies. 240 The Third Directive provides that the minutes of the general meeting and the subsequent merger contract

render the sentence meaningful in English.

229. SE Regulation, supra note 161, art. 17, at 45.
230. Id. arts. 18, 19, at 45.
231. Id. art. 20, at 46.
232. Id. art. 21(1), at 46.
233. Id. art. 21(2), at 46.
234. Id. art. 23, at 46.
235. Id. art. 24, at 47.
236. Id. art. 27, at 47.
237. Id. art. 26, at 47.
238. Id. art. 24, at 47.
239. Id. art. 24(3), at 47.
must be "drawn up and certified in due legal form." National law will also determine whether a challenged merger can be declared null and void after its consummation, but such a declaration can only take place "where there has been no judicial or administrative preventative supervision of [the merger's] legality." In addition to this supervision, SE mergers could also be challenged under the newly-passed merger directive, according to which the Commission must investigate mergers with a "Community dimension" to discern whether they will "create or strengthen a dominant position as a result of which effective competition would be significantly impeded." The floor for this Regulation's applicability is high, requiring an aggregate turnover of ECU 5 billion worldwide for all the companies involved, and ECU 250 million in the Community alone for at least two of the companies. However, this floor might well be lowered when the Regulation is reevaluated in 1994, about the time one could expect the SE Regulation, if passed, to go into effect.

B. Creation of an SE Holding Company

Two publicly-held corporations located in different Member States could take advantage of the SE form by placing themselves under the control of a holding company incorporated as an SE. The holding company would establish exactly the type of centralized unity between preexisting entities in different Member States that is forbidden by the EEIG Regulation. The formation of a holding company under the SE Regulation requires that 100% of the stock of the founder companies be transferred to the holding company. This transfer will not require a winding up of the founder companies, and the Regulation provides that it will override any Member State law requiring the winding up of a company when all of its shares come into the hands of a single person.

Many of the other safeguards which apply to a merger also apply here: draft terms and a report thereon must be published for the shareholders, an expert report compiled and published, and the crea-

242. SE Regulation, supra note 161, art. 29, at 47.
244. Id. art. 1, at 3.
245. Id. art. 1(3), at 3.
246. SE Regulation, supra note 161, art. 2(1), at 43.
247. See supra note 68-74, and accompanying text.
248. SE Regulation, supra note 161, art. 31(1), at 48.
tion of the holding company approved at the general meeting.\textsuperscript{280} In addition, and unlike a merger into the SE form, when founder companies set up a holding company, the Regulation requires the management of these companies to consult with their employees and discuss the "legal, economic and employment implications of the formation of an SE holding company for the employees and any measures proposed to deal with them."\textsuperscript{281} Neither the formation of an SE through merger nor the formation of a joint, SE subsidiary contains such a requirement of management-employee consultation.\textsuperscript{282}

C. Formation of an SE Subsidiary

The possibility of forming a joint subsidiary is open to all "legal bodies governed by public or private law."\textsuperscript{283} Thus the option of subsidiary formation serves a much broader spectrum of businesses than the merger or holding company options, which are offered only to "public limited companies."\textsuperscript{284}

Under the Regulation, the national law of each founder company will regulate the drafting and approval of the terms, instrument of incorporation, and statute of the joint subsidiary.\textsuperscript{285} If two or more companies form an SE subsidiary and one of the participants is itself an SE, the creation of the subsidiary falls under the SE Regulation, and either the supervisory board or the administrative board as whole must approve the action.\textsuperscript{286} The formation, however, does not require a shareholder vote.\textsuperscript{287} An SE may, by itself, set up a subsidiary in the SE form and if it does so, the Regulation requires the same approval as if the SE were working with a partner.\textsuperscript{288}

D. The SE Form and Economic Policy

The proposed methods of forming an SE track the economic purpose of the Regulation. The Regulation would supply a "European" legal personality\textsuperscript{289} to companies growing into a multinational market. Although the ECU 100,000 required capital limit is quite low, it is clear that the Regulation is addressed primarily to larger, publicly-listed companies because it allows only public companies to

\textsuperscript{250} Id. art. 32, at 48.
\textsuperscript{251} Id. art. 33, at 48.
\textsuperscript{252} Id. arts. 17-30, 34-37, at 45-49.
\textsuperscript{253} Id. art. 2(2), at 43.
\textsuperscript{254} Id. art. 2(1), at 43.
\textsuperscript{255} Id. art. 35(1), at 48.
\textsuperscript{256} Id. arts. 35(3), 72(e), at 48-49, 56.
\textsuperscript{257} Id.
\textsuperscript{258} Id. arts. 36, 37, at 49.
\textsuperscript{259} Id. art. 1(4), at 43.
merge into or set up holding companies in the SE form.260 Yet the Regulation also allows other entities located in different Member States to share an SE subsidiary, the formation of which would be unrestricted by the differences between various national company laws.261 As the proposal now reads, corporate promoters could not establish an SE without working through some pre-existing European company.262 However, nothing prevents a promoter from setting up founding companies solely for the purpose of merging into an SE or subsuming them into an SE holding company. Indeed, the Sixth Company Law Directive will facilitate the division of an existing company into founder companies.263 Like the EEIG Regulation, the SE Regulation does not seek to replace Member State law, but seeks rather to supplement it.264 However, the supplement comes in the form of a new, supranational stratum that does not merely tie Member State companies together but allows these companies substantially to disengage themselves from national differences and operate at the Community level.

This supplemental function becomes most difficult when Member States' laws differ greatly, as they do on the question of how much power employees should have over the direction of the corporation. The SE proposal attempts to mediate these differences first, by using the directive form, which allows the Member States to use differing means as long as they are sufficient to implement the intended end, and second, by providing a series of options from which the Member States may choose a mode of employee-management cooperation. The following section discusses this Directive.

XIV. Corporate Governance and Employee Representation

A. Overview

The degree of employee influence on corporate governance in the Member States of the European Community ranges from the British system of negotiated union contracts to the German use of Mitbestimmung (Co-determination), in which employee representatives comprise fifty-percent of a supervisory board that appoints management. Because of this significant divergence, the Commission has had difficulties in finding a corporate governance structure acceptable to all.265 Its solution was to offer a menu of options from

260. See supra note 227 and accompanying text.
261. See supra note 253 and accompanying text.
262. See supra note 196 and accompanying text.
263. See supra note 223 and accompanying text.
264. The SE form will exist "side by side with companies governed by a particular national law." SE Regulation, supra note 161, Ninth Recital, at 41.
265. See supra note 165, and accompanying text.
which the Member States may choose. If the Member State where
an SE will have its registered office chooses more than one model,
the founder companies setting up an SE in that Member State are
free to implement any of the given forms in structuring the SE.\textsuperscript{266}
The models offered and the procedure for their adoption are set forth
in a Directive accompanying the SE Regulation.\textsuperscript{267} Title VI of the
Regulation itself provides the mechanics for running these govern-
ance structures once they are in place.\textsuperscript{268}

The Regulation allows SEs to be registered only in Member
States that have implemented its accompanying Council Directive
into their national law.\textsuperscript{269} The Directive presents three models of em-
ployee participation: two fixed schemata, and a third "other models"
choice that allows the creation of \textit{ad hoc} forms of employee-manage-
ment representation, or the resort to an existing national structure,
provided that the model adopted meets the minimum standards of
consultation and disclosure set out in the Directive.\textsuperscript{270} These three
models are borrowed, respectively, from the German system (em-
ployee representatives sit on the board), the Franco-Italian system
(separate, employee committees are established), and the Swedish
system (determined by employee collective bargaining).\textsuperscript{271} In each
case, the SE will be responsible for providing "the representatives
of the employees with such financial and material resources as enable
them to meet and perform their duties in an appropriate manner."\textsuperscript{272}

These three models of employee representation, however, are
not intended to place employees in positions of management, or to
involve them in "the day to day running of the firm."\textsuperscript{273} Rather, the
models seek to "enable employees of the SE to participate in the
supervision and strategic development of the SE."\textsuperscript{274} Such "strate-
gic" decisions address actions of long-term effect, such as plant clo-
sures; the sale of a substantial portion of the firm's assets; substantial
organizational changes or changes in the firm's business purpose; the
setting up of a subsidiary or a holding company; and long-term, in-
ter-company cooperation agreements that are "of importance to the

\begin{footnotes}
\footnote{266. \textit{Proposal for a Council Directive complementing the Statute for a European Com-
pany with regard to the involvement of employees in the European company}, 32 O.J. EUR.
\footnote{267. \textit{Id.} arts. 4-6, at 70.}
\footnote{268. SE Regulation, \textit{supra} note 161, arts. 62-100, at 54-61.}
\footnote{269. \textit{Id.} art. 136, at 68.}
\footnote{270. Employee Participation Directive, \textit{supra} note 266, arts. 4-6, at 70-71.}
\footnote{271. \textit{See Carreau \\& Lee, \textit{supra} note 168, at 509.}}
\footnote{272. Employee Participation Directive, \textit{supra} note 266, art. 9(1), at 71. As Peter
Pantelo points out, this provision is the opposite of "Section 8(a)(2) of the U.S. National
Labor Relations Act, which prohibits employers from providing financial or other support to
employee labor groups." Pantalo, \textit{supra} note 173.}
\footnote{273. SE Explanatory Memorandum, \textit{supra} note 196, at 56.}
\footnote{274. Employee Participation Directive, \textit{supra} note 266, art. 2, at 69.}
\end{footnotes}
activities of the SE."^{275} Regardless of which model of representation is chosen, if the SE plans to take any of these actions, the management must report these plans to the employees' representatives.^{276} One exception to the duty to report occurs when the information in question "might seriously jeopardize the interests of the SE or disrupt its projects," and the law of the Member State where the SE has its registered office allows the withholding of such information.^{277} In this case, the agreement establishing the SE's model of worker/management participation will allow such information to be withheld from employees and their representatives.^{278} As discussed below, it is not clear how much power the right to be "informed and consulted" confers on the employees' representatives in each case.

B. Models of Employee Participation and their Selection

1. Selection.—The Directive requires that each Member State choose one or more models of employee representation or provide a structure for employee input that satisfactorily informs employees or their representatives of the company's condition and strategic plans. The Member States "may restrict the choice of the models referred to in [the Directive] or make only one of these models compulsory for SE's having their registered office in its territory."^{279} The Member State will also determine the "manner in which the participation models shall be applied for SEs having their registered office in its registered territory."^{280} Thus, the Member State will choose both the structure and the procedure through which companies implement this structure. An SE must then select from among the series of options presented by the Member State in which the SE plans to have its registered office.^{281}

The management of the founding companies, their shareholders, and their employees will choose the final model that will actually be applied.^{282} The Directive provides that the management and administrative boards of the founding companies should seek agreement upon a model with the representatives of their employees, but states that "[w]here no agreement can be reached the management and administrative boards shall choose the model applicable to the SE."^{283} The Directive thus gives management the last say in choos-

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275. SE Regulation, supra note 161, art. 72, at 56.
276. Employee Participation Directive, supra note 266, arts. 5(2)(C), 6(2)(b), at 70.
277. Id. art. 6(3), at 70.
278. Id.
279. Id. art. 3, at 70.
280. Id. art. 3(4), at 70.
281. Id. art. 3(2), at 69.
282. Id. art. 3(1), at 69.
283. Id. emphasis added.
ing the model of employee representation it will use, subject, of course, to shareholder approval, for no SE can be formed without shareholder approval and the labor participation scheme is an integral part of the SE.\textsuperscript{284}

In the third, "other models" option, however, the Directive states that "where no agreement . . . [on an alternative to the previous two models] can be reached, a standard model, provided by the law of the [S]tate where the SE has its registered office, shall apply."\textsuperscript{285} Thus, in the absence of an agreement, a Member State’s standard model automatically applies. To avoid contradiction, one must assume that because the standard model provision is contained within the “other models” section, it refers to one of two cases: either a Member State has restricted founding companies to this third, “other models” section, or the management and employees of the founding companies have agreed to work within the “other models” option but could not agree on a specific form. Read in this way, the standard model provision would not contradict the principle that management may choose the model of representation if consultation with the employee’s representatives fails to reach an agreement. Rather, it would mean that once the choice is restricted to the “other models” category—either by the state or by a previous labor-management agreement, the failure to ultimately decide upon an "other model" would result in a default to a standard model.\textsuperscript{286}

Labor and management may together agree to change the model of employee representation. The shareholders must approve such a change at a general meeting.\textsuperscript{287} In addition to the powers that the Directive and Regulation confer on the employees’ representatives, the representatives will also have all the powers conferred upon them by Member State law.\textsuperscript{288} Regardless of the model chosen, the representatives of the employees of the founder companies will appoint the first set of employees’ representatives and then the employees of the SE itself will elect their next set of representatives.\textsuperscript{289} The first set of representatives will be appointed for a term not exceeding three years, and all succeeding representatives will serve for a maximum of six years.\textsuperscript{290}

2. Direct Employee Representation on the Board of Directors.—The most controversial model of employee participation from

\textsuperscript{284} SE Explanatory Memorandum, supra note 196, at 57.
\textsuperscript{285} Employee Participation Directive, supra note 266, art. 6(8), at 71.
\textsuperscript{286} Id.
\textsuperscript{287} Id. art. 3(3), at 70.
\textsuperscript{288} Id. art. 10, at 71.
\textsuperscript{289} Id. art. 8, at 71.
\textsuperscript{290} SE Regulation, supra note 161, art. 68, at 55.
an American perspective is that which places employee representatives on either a "supervisory board" which is separate from the SE's management board, or on a single board that manages the SE. If a single board is set up and shared by both management and labor representatives, the board is called an "administrative board." In a two-tiered board system, there is a "management board" and a "supervisory board," upon which employee representatives sit. Employee representatives would comprise at least one-third and no more than one-half of either the administrative or supervisory board. Under a two-tiered system, the supervisory board would appoint the members of the management board and supervise their work, but the supervisory board itself would not have the power to represent the SE in dealings with third parties.

If the law of the Member States does not allow shareholders or employee representatives to appoint board members, the Directive gives them the right to object to any board member appointed by the management, and that “[i]n such cases the appointment may not be made until an independent body established under public law has declared the objection inadmissible.”

The model providing direct employee representation on the management board or supervisory board is taken from the German system of Mitbestimmung (Co-determination), first implemented in 1922. German law provides labor representation in a two-tier board system for large, public corporations (Aktiengesellschaften) where a supervisory board appoints the members of a "management board" that runs the company. Half of the supervisory board is

291. Id. art. 66, at 55.
292. Id. arts. 62-63, at 54; Employee Participation Directive, supra note 266, art. 4, at 70.
293. Employee Participation Directive, supra note 266, art. 4, at 70.
294. SE Regulation, supra note 161, arts. 62(1)-(2), 63(1), at 54.
295. Employee Participation Directive, supra note 266, art. 4, at 70.
296. Gesetz über die Entsendung von Betriebsratsmitgliedern in den Aufsichtsrat (Act Regarding the Delegation of Shop Council Members to Supervisory Boards), of February 15, 1922 (RGBI. I, p. 209). In order to present the general concept, I am simplifying the German system of Mitbestimmung which is controlled by different pieces of legislation and appears in three primary forms. First, in the coal, iron and steel industry, labor representation falls under the Montan-Mitbestimmungsgesetz (Coal and Steel Co-determination Act) of 1951 which mandates an equal number of shareholder and labor representatives on the board, plus a tie-breaker "neutral member" chosen by both sides. A second form of representation falls under the Betriebsverfassungsgesetz (Works Constitution Act) of 1952, which applies to most forms of business organizations (except non-profit organizations) with more than 500 employees, and provides that employee representatives make up one third of all board members. The third form, under the Mitbestimmungsgesetz (Co-determination Act) of 1976 requires that, for all publicly held corporations with more than 2,000 employees, half the members of the board must be employee representatives. See The German Co-Determination Act, English-German Text, 18 (H. Schnedier & D. Kingsman eds. 1976); and W. Kolvenbach & P. Hanau, Handbook on European Employee Co-Management (1987).
297. The German Co-Determination Act, English-German Text, 10 (H. Schnedier & D. Kingsman eds. 1976).
comprised of labor representatives. This system has been successful in Germany, but it has also resulted in many companies choosing the alternative form of a close corporation known as Gesellschaft mit beschränkter Haftung (GmbH), because if a GmbH has 500 or fewer employees, it is not subject to "co-determination." 

Under the SE Regulation, if the one-tiered system offered in option one is used, employee representatives would constitute between one-third and one-half of the board. Thus, there would be no formal procedure for distributing information to employee representatives, except that members are present at board meetings and frankly discuss important matters. If a two-tiered system is chosen, the management board is separated from the supervisory board. The management must then (1) supply the supervisory board with quarterly reports on the condition and prospects of the SE and its holdings; (2) immediately inform the supervisory board chairman of important matters and events concerning the SE or its holdings; and (3) comply with any reasonable request for information or inspection made by the supervisory board.

The first option presents the strongest form of worker participation. It gives labor representatives direct voting power on the controlling institutions of the SE. As such, it would be a significant step if any Member State other than Germany chooses to offer only this model to founder companies or if Germany did not restrict SEs within its borders to a mandatory use of this model. The following two systems allow workers considerably less influence on the management of the SE.

3. Separate Boards for Labor Representatives.—The second option is for the SE to establish a separate body or a distinct board on which labor representatives will sit. The number of members on this separate, labor board and the "detailed rules governing their election or appointment," will be specified in the SE's articles of incorporation, "in consultation with the representatives of the employees of the founder companies in accordance with the laws or practices of the Member States." Thus, the composition and procedure
of this body is very flexible, subject only to the ability of labor, management, and shareholders to agree when they approve the SE's articles of incorporation, and to any requirements of the law of the Member State where the SE has its registered office.

The powers of the separate board are relatively vague. Unlike the direct representation system, representatives in the separate board system have no direct vote. Their primary right is to be "informed and consulted," but it is unclear whether this right to consultation gives the labor board any tangible power to determine the decisionmaking of the SE. Management must supply the labor board with quarterly reports on "the progress of the company's business, including that of undertakings controlled by it, and of its prospects." The labor board may demand reports or any information or documents concerning the company's business "where they are necessary for the performance of [the labor board's] duties." The labor board has a right to be informed and consulted before management implements any of the following actions:

1. Closing all or substantial parts of the SE's "establishments;"
2. Substantially reducing, extending or altering the activities of the SE;
3. Making substantial organizational changes within the SE;
4. Establishing or terminating important, long-term cooperation with other firms; or
5. Setting up a subsidiary or a holding company.

The members of the labor board have an affirmative duty to "exercise a proper discretion in respect of information of a confidential nature concerning the SE," and this duty continues after they have ceased to hold office. The separate body thus has a right to be informed and consulted, and a duty to protect all information disclosed. One can safely assume that consultation at least entails the management's giving an open ear to recommendations of the labor board. Beyond this, the labor board's actual powers are not delimited. If the labor board has no power to enforce its own recommendations, the management's strongest arguments against consultation are (1) the danger of leaking sensitive information, (2) the cost of maintaining the board, and (3) the time-consuming and cumbersome

305. Id. art. 5(2)(c), at 70.
306. Id. art. 5(2)(a), at 70.
307. Id. art. 5(2)(b), at 70.
308. Id. art. 5(2)(c), at 70 referring to SE Regulation, supra note 161, art. 72, at 56.
309. Employee Participation Directive, supra note 266, art. 5(3), at 70, referring to SE Regulation, supra note 161, art. 74(3), at 56.
aspect of consultation.\textsuperscript{310}

This model was borrowed from the French and Italian systems. A look at its use in these systems confirms that the three dangers raised are the only real threats that "labor boards" will present to the management's control of the SE. In France, while the comité d'entreprise (workers representation committee) has an extensive right to be informed and make recommendations, it has veto power over management actions only in relatively minor decisions, such as the refusal to give an employee time off to attend a comité meeting or the dismissal of a worker's physician.\textsuperscript{311} Moreover, the management has an affirmative duty to make independent decisions on economic matters, even after consulting with the comité d'entreprise.\textsuperscript{312} In Italy, the commissione interna (internal commission), and the consiglia di fabbrica (factory councils) fulfill a role similar to the comité d'entreprise. They have a right to be informed and may advise management on such matters as working methods, safety, and the correct application of employment contracts; however, they have no power to force the management to adopt any suggestion.\textsuperscript{313}

Aside from the problems of confidentiality, expense, and a certain "cumbersome nature," the requirements of reporting and consultation contained in the second model of the SE Directive do not threaten to usurp management or shareholder control of the enterprise. The third option, or "other models" category follows a similar pattern.

4. Negotiated, Other Models.—The third option for employee representation allows labor and management to negotiate some form of employee representation, provided that certain minimum standards of disclosure and consultation are met. Negotiations will take place initially between the management (or administrative) boards and the employees (or their representatives) of founder companies.\textsuperscript{314} The agreement resulting from these negotiations may be for a fixed time, and may be renegotiated at the end of this period.\textsuperscript{315} This al-

\textsuperscript{310} One commentator, Peter Pantaleo, is primarily concerned with consultation's threat to stream-lined decisionmaking. He remarks: "In a competitive environment the lack of flexibility brought on by cumbersome consultation procedures could prove damaging to an enterprise." Pantaleo, \textit{supra} note 173, at 51.


\textsuperscript{312} \textit{Simeon \& Moque Borde, Doing Business in France} § 12.06[4](b)(ii) (1987).


\textsuperscript{314} Employee Participation Directive, \textit{supra} note 266, art. 6(1), at 70.

\textsuperscript{315} \textit{id.} art. 6(7), at 71.
allows a new structure to be put in place at the completion of the second round of negotiations. 316

A particular feature of this "other model" option is that a "standard model, provided by the law of the [s]tate where the SE has its registered office, shall apply to the SE," if labor and management fail to come to a final agreement on the form of representation. 317 This must be distinguished from the "tie breaker" provision that applies to the initial selection of a model among the options offered by a Member State. At that point, if labor and management fail to come to an agreement, management may break the tie and select the model of representation applicable to the SE. 318 Once the third model has been chosen, however, management is not free, in the absence of labor's consent, to structure a model of representation. Rather, a standard model provided by the law of the Member State where the SE is registered and containing the minimum disclosure and consultation guarantees, will apply.

Successful negotiations will allow the founders of the SE to structure the labor-management relationship in any way that does not violate the Member State's law as long as: (1) employee representatives are supplied with quarterly reports on the SE's condition and prospects, and (2) they are notified of any major business decisions which the SE's management plans to undertake, for example, plant closure, an asset sale, or a joint venture. 319 If negotiations produce a separate labor board resembling that of the second option, the labor representatives on this board must have the right to "require the management board or the administrative board to provide the information necessary for the performance of its duties." 320

As in the other two forms of representation, the employees' representatives must exercise discretion in the disclosure of any confidential information. 321 If the law of the Member State where the SE is registered permits, the management may withhold information from the employees' representatives whenever its disclosure "might

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316. Id.
317. Id. art. 6(8), at 71.
318.
[T]he participation of SE employees prescribed by Article 2 shall be determined in accordance with one of the models set out in Articles 4, 5 and 6 by means of an agreement concluded between the management boards . . . and the representatives of the employees of those companies . . . . Where no agreement can be reached the management and administrative board shall choose the model applicable to the SE.
Id. art. 3(1), at 69.
319. Id. art. 6(2), at 70. See note 308 and accompanying text for a complete list of the business decisions that trigger a requirement for informing and consulting labor representatives.
321. Id. art. 6(4), at 70.
C. Will the SE Regulation Fail Because of Labor Participation?

Most commentators agree that employee representation is the primary obstacle to the adoption of the SE Regulation. As Carreau and Lee state: "[D]espite the widespread support for the idea [of worker participation], the bitter and protracted controversies surrounding its implementation have caused this issue to become the principal stumbling block in the adoption process." A good example of the strong opposition to worker participation is contained in Bridget Montgomery's statement that, even were a labor government to come to power in Britain, the worker participation scheme would still be rejected, for "[t]he resistance to worker participation in Britain has historical roots that extend deep into her social and legal structure." Montgomery then offers a position that goes well beyond this cultural/historical impasse, stating that "[t]he spirit necessary for successful worker participation cannot be legislated." This is very strong opposition. To avoid the complications which surround defining the spirit of legislation or legislation of the spirit, one can turn to questions of pure efficiency: Does worker participation usurp shareholders' rights and lead to inefficiencies in the management of a corporation?

Here, also, there appears to be little agreement. Kolvenbach and Hanau assert that "[e]mpirical research has shown the fears of employers that co-determination [the most intrusive form of worker participation] would limit their ability to act to be unwarranted." On the other hand, Buxbaum and Hopt find mixed results on the efficacy of such employee representation for modern corporations—whether the representation be by direct presence on the board, or through some other body. They assert:

It is still unclear, for instance, whether participation has more drawbacks (creation of conflicts of interest for worker representatives on company bodies, threats to business secrecy, delays in decision-making, non-market influences on the content of

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322. Id. art. 6(5), at 70.
323. Carreau and Lee, supra note 168, at 508.
324. Montgomery, The European Community's Draft Fifth Directive: British Resistance and Community Procedures, 10 Comp. Labor L.J. 437 (1989). The Fifth Directive provides a selection of worker participation models that is much like that included in the SE proposal, and for this reason—as well as the generality of her point—I use her argument to represent opposition to worker participation in the SE proposal.
325. Id. at 451.
decisions), or more advantages (building trust between the social partners, greater company disclosure in the interest of the workers and the public, more careful decisions on basic company matters, and greater social justice). 327

It is therefore difficult to say whether the general desire for a European company law will overcome the national differences in labor law. The Treaty of Rome demands that legislation “relating to the rights and interests of employed persons” be enacted unanimously. 328 Thus, Britain, as Montgomery points out, will be able to block the SE proposal if it so chooses. 329 Yet, because most of the other Member States already require worker participation in one form or another, and because the proposal offers a flexible menu of options, there is still a possibility that the Community will leave behind its bitter controversies and reach a consensus. The road to this consensus is already being paved in another area—taxation—where principles contained in the SE Regulation are beginning to achieve significant acceptance among the Member States.

XV. Taxation

A. Fairness and Sovereignty in Multinational Taxation

An SE would have its central administration in one Member State, and probably have subsidiaries or branches (“permanent establishments”) in other Member States or non-Member States. Because each Member State has its own national tax regime, some form of tax consolidation would be necessary to tax the multinational SE as a single unit rather than as an aggregation of disparate entities. Separate taxation could force the SE to pay taxes on profits earned in the state of its central administration, although when taken as a whole, the corporation was incurring heavy losses throughout the Community. The SE Regulation attempts to avoid this problem by allowing an SE to offset the profits of its central administration by the losses of its “permanent establishments” (branches, but not subsidiaries) located in another Member State or non-Member State. 330

The Commission has long recognized the need for some method to eliminate the unfair tax burdens resulting from the action of separate and uncoordinated national tax regimes. In 1969, the Commis-

328. Treaty of Rome, supra note 11, art. 100(a)(2).
329. Montgomery, supra note 324, at 437.
330. SE Regulation, supra note 161, art. 133, at 67.
sion proposed a directive which sought to achieve a fair tax burden by either (1) eliminating double taxation on distributions from subsidiaries in one Member State to parents located in another or (2) allowing the corporation to consolidate the profits of the parent and its subsidiaries for tax purposes.331 The measure to eliminate double taxation on distributed profits has recently been adopted in a slightly altered form.332 At first, the consolidation provision was limited to an offset of losses incurred by branches of an SE and included in the SE Regulation.333 However, the Commission also plans to introduce this measure as a separate directive that will offer a similar offset to “all companies irrespective of legal status.”334

The Community’s willingness (after a twenty-one year hesitation) to enact a directive uniformly eliminating the double taxation of internationally distributed profits may indicate that the Member States have recognized the need to cede tax sovereignty in order to achieve international fairness and efficiency. If this commitment is strong enough to enact a directive allowing all Member State corporations to take offsets for the losses of their branches in other states, the SE Regulation’s provision will simply give the SE rights already guaranteed to companies incorporated under Member State law. If, however, the Member States have not come this far in their willingness to cede tax sovereignty, the SE Regulation’s tax provision may be an attractive half-step toward tax equity. This could make the Regulation’s offset provision the most attractive feature of the Company Law Statute.

B. The Regulation’s System of Offset and Recoupment

The Regulation provides that, if an SE has permanent establishments (branches) located in a country other than that where the SE has its registered office for tax purposes and these permanent establishments have an aggregate loss for a given tax year, the SE may use these losses to offset the taxable income of the SE in its host state for that tax year.335 Any aggregate profits from permanent es-

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333. SE Regulation, supra note 161, art. 133, at 67.
335. The Regulation provides:
Where an SE has one or more permanent establishments in a Member State or a non-member State, and the aggregation of the profits and losses for tax purposes of all such permanent establishments results in a net loss, that loss may be set against the profits of the SE in the State where it is a resident for tax purposes.
establishments in that second country or any other country during a subsequent tax year, however, must be applied to the taxable income of the SE in its host state up to the amount of the previous offset. The offset, then, offers the possibility of a tax deferral until the branches of the SE located in a different Member State or non-Member State produce a net profit.

For example, if an SE had its central administration in France and branches in Spain and the Netherlands, the following scenario could result under the SE Regulation: A 100 unit profit in France could be reduced to zero if the aggregate income for all of the branches located in Spain was a loss of 100 units for the same tax year. Because there was no previous offset, profits in the Netherlands for the same year would not be assessed to the SE. During the subsequent tax year, however, any profit in either Spain or the Netherlands would have to be added to the taxable income of the SE in France up to the 100 unit offset that was taken.

However, if in the following year the facilities in France produced a profit of 100 units and those in Spain a profit of 200 units, but those in the Netherlands produced a loss of 200 units, the taxable income in France could still be held to zero for this second tax year by first recouping the earlier offset and then taking a second offset: 100 (French profit) + 100 (offset recoup from Spain) + (200) (offset by Dutch losses) = zero. This would create the necessity to count 200 units of profit from either Spain or the Netherlands against taxable income in France during a subsequent tax year. In this manner, if the SE’s permanent facilities in other countries incur continual losses, and its central business in the country of registration remains profitable, the losses could be used to offset the profits for an indefinite period of time.

Member State law would be used to define taxable income and imputable losses. The Regulation also provides that if a Member State has eliminated double taxation by “allowing the SE to set the tax already paid by its permanent establishments against the tax due from it in respect of the profits realized by those permanent establishments,” the state need not implement this article of the regula-
Thus Member State tax credits may be used instead of this system of tax consolidation.

This tax treatment would be limited to SEs, and, if the Commission's separate proposal of similar treatment for all Member State companies is not adopted, it would be a strong incentive for companies to use the SE form.

XVI. Conclusion

The SE Regulation is the most experimental of the European company law measures proposed by the Commission. The EEIG Regulation, by comparison, merely establishes a network between existing, national enterprises, each incorporated or established under the law of the Member State where it is located. However, many of the directives and regulations that have been adopted in recent years were considered to be overstepping and controversial before the Community reached its present, centripetal momentum. The SE Regulation may also appear less controversial in the not too distant future. It would allow multinational enterprises to become supranational in structure while remaining subject to the prudential rules of each Member State. Thus, the transaction costs of dealing with twelve sets of company laws would be incurred only when necessary—to protect the national consumer, investor, and laborer from companies that would otherwise be distanced from the Member State's control.

Each of these measures—the one already adopted and the one being considered—fits into a gradually emerging system of company law that should, when the dust settles around the energetic restructuring, make business in Europe less expensive and more efficient. Perhaps it will even present a model from which the United States will be able to learn, as the two systems continue their parallel course of unification, liberalization, and growth.

338. Id. art. 133, at 68.