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EU and national company law – fixation on attractiveness

Jan Cremers and Elwin Wolters

Report 120

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europaean trade union institute

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Overture

Apart from the presence of skilled labour, logistics and infrastructure, and host country location, all of which are seen as key factors determining business location decisions, companies weigh up a number of drivers when deciding in which country their registered office and/or head office should be located: national company law for the purpose of group restructuring or rationalising and harmonising the corporate structure of the cross-border group; the possibility of freely transferring the registered office; and tax minimisation possibilities.

The main messages in Communications from the European Union related to company law over the past decade have been ‘smart regulation’ and, a particular emphasis since 2008, ‘strategic action plans to reduce the administrative burden’.

The competitiveness of the European economy has been a central point of concern and, with the Better Regulation agenda, the European Commission has raised expectations, especially among SMEs. Better Regulation is seen as a dynamic process that is not just about drafting rules, but also includes the proper implementation and enforcement of the law by the Member States. In general, the justification for the Better Regulation agenda is the claim that regulatory frameworks in the EU are too unwieldy and complex. This is a major handicap on EU competitiveness, crippling European companies in relation not just to their US partners but also to emerging competitors.

The question is whether these arguments hold in the field of company law.

In the Member States’ national company law agendas the main worries are not related to the US or emerging competitors. After examining the various contributions to our inquiry we must conclude that the basic element of recent national reforms of company law has been the effort to outbid direct neighbours.

The deregulation policy that characterises current national and EU company law, as presented in our overview, appears to stimulate regime-shopping inside the European Union rather than to contribute to a more sustainable legal setting.

1. Background

After a decision-making process lasting 30 years, the EU Council agreed in December 2000 on the general principles for a Regulation on the Statute for a European Company (Societas Europaea, hereafter SE). The SE Regulation (EC 2157/2001) and the Council Directive supplementing the Statute for a European Company with regard to the involvement of employees (SE Directive 2001/86/EC) were adopted on 8 October 2001. In the slipstream of this, the Regulation on the European Cooperative Society (SCE) and the Directive on employee involvement in the SCE were concluded in July 2003. The SE legislation entered into force on 8 October 2004 and by mid-2007, all EU countries had transposed it into national law. The main purpose of the SE Statute was to enable companies to operate their businesses on a cross-border basis under the same EU corporate regime. Companies could move across borders in the EU by moving their registered seats and headquarters.

The SE Regulation required the European Commission to present a report on its application, including proposals for amendments where appropriate, five years after its entry into force. DG Internal Market and Services commissioned Ernst & Young to carry out a study that was finalised in December 2009 and published on the Commission's website in March 2010 (Ernst & Young, 2009). Furthermore, the European Commission launched an online consultation to test the outcome of the study (European Commission, 2010a), while at the same time organising a conference on the SE Statute. The aim of these activities was to examine the Ernst & Young findings and to provide the Commission with input on issues relevant for the assessment (European Commission, 2010b). As the discussion about the Ernst & Young report shows, there is a very mixed assessment of the importance of the SE for companies. The argument that it strengthens the European profile or identity of a company has slowly vanished from the scene, and if still present is basically used as a marketing tool.

In a critical assessment the ETUI and its SEEurope network formulated several comments that (so far) had been neglected in the debate on the effect and functioning of the SE Statute (see Cremers et al., 2010):

- Among the larger public listed companies mainly Germany-based multinationals have applied to change into an SE.
- Smaller companies, often family owned, have sought to optimise their corporate structure driven by the motivation to exclude the external controls required by national law.
- An 'SE business' initiated by incubators (mainly situated in the Czech

Republic) has shifted the SE onto the path of regime-shopping related to tax evasion or other financial motivations.

- A key point of the ETU's criticism was the creation of so-called empty and shelf SEs. It is not the intention of the SE Statute to create companies without economic activities or employees. The EC assessment fails to provide concrete answers to the question of why shelf SEs exist. The question does not concern the main advantages accruing to a company that buys a shelf SE, but rather what the EU intends to do to combat this violation of the spirit of the SE legislation: in other words, offering a European form of corporate governance and not an instrument for regime-shopping.
- Additional EU corporate law has been put in place, such as the cross-border merger directive, which also provides companies with the possibility of moving their company seat.
- ECJ judgments have had a strong impact on the debate, making it clear that locating the registered seat in one country and the administrative and real seat in another is fully in accordance with the basic rule of freedom of settlement; shelf SEs might serve this purpose.
- In some EU countries, national corporate law has been adjusted along the lines of the SE provisions, in particular, by providing the option with regard to company structure also at national level or by easing the rules on private firms in order to increase regime competition among Member States.
- The decision to opt for the SE Statute seems to have depended to a considerable extent on comparisons of the pros and cons of national regimes and the SE Statute and on 'regime-shopping' related to tax optimisation and other financial arguments.
- The most important regulatory issues taken into account by a company deciding in which country its registered office and/or headquarters are to be located are taxation, national company law, equity and debt restructuring facilities, and corporate restructuring facilities.
- EU policy promotes the idea of a Private Company Statute (SPE).

Meanwhile, some underlying assumptions have changed, notably:

- A fundamental debate on worker participation – achieved by a 'historic compromise' – has not been reopened, although the Ernst & Young report was an effort to do this through the backdoor.
- We can see a gradual cutting back of what has already been achieved, for example, by the cross-border merger directive: a higher threshold for mandatory negotiations on board-level participation in comparison to the SE, rising from 25 per cent to 33 per cent; introduction of a threshold of 500 instead of no threshold in the SE; negotiations may concern only participation; not consistent with regard to information and consultation.
- The EU Commission sees it as its objective to incorporate the ECJ cases mentioned above into EU corporate law.
- The business environment perspective is dominant in assessing corporate law; from that point of view, what matters is the identification of 'unnecessary administrative burdens', which should be removed; against

this background worker participation comes to the fore as a type of 'burden'.

- 'Simplification and deregulation' of European law establish other benchmarks that shift coordinates towards more technical objectives.

All in all, this formed the background for a basic survey of the interface between the EU and national company law provisions.

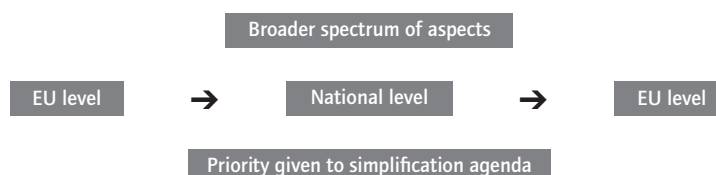
2. Objectives of the inquiry

The EU's objective in establishing the SE Regulation was to better meet companies' ever-changing needs. The Statute was supposed to help companies to do business more easily in Europe. The starting point for any comparison between the attractiveness of national company law and the SE Statute was the assumption that the SE could represent an interesting alternative to a domestic public limited liability company. This would be true in cases where there are major differences between the SE Statute and national rules and procedures. However, the SE Statute did not result in a uniform legal form across the EU.

The SE Statute contains several references to national law and behind its uniform facade, the SE Statute is governed mainly by national legislation in various forms. Different documents that were produced by European Commission Services note that in the majority of Member States the status accorded to an SE is little different from that of a domestic public limited liability company (European Commission, 2010b and 2010c).

A recent SEEurope survey collected information on the interface between EU and national law. The SEEurope experts were asked to analyse in their respective countries whether EU provisions had triggered changes in national legislation or whether there were indications of upcoming developments referring to or anticipating future EU legislation in this field. Vice versa, it is interesting to observe whether there are requirements with regard to EU/EEA-Member States that have to be addressed at the EU level and if yes, which ones in particular.

Figure 1 Interface between EU and national law



The aim was to compile critical developments in order to be able to make a substantial contribution to the EU discussion. It should be made clear that EU legislation (and the interaction between national and EU rules) in the field of corporate law should not invite or contribute to regime-shopping. In contrast, EU rules should include essentials that contribute to decent rules at national level. The race to the bottom cannot be the main objective of EU policy.

This report is based on country observations that were prepared by the SEEurope experts. Their input was formulated in accordance with a grid (see Annex 1).

The purpose was not to provide a complete overview of all recent changes in national company law regimes, as this would be far too ambitious. The investigations pinpointed a few items indicative of the relevance of changes in national company law. The focus was on the general characteristics of the changes.

The result is therefore not an exhaustive update. The envisaged changes were, for instance, changes with regard to the initial capital requirements (such as one-euro companies) and other capital position related issues; changes with regard to the balance of power and to liability (versus minority shareholders, creditors, workers); changes with regard to mandatory financial audits, registration and control; and, finally, changes with regard to arbitration, the protection of stakeholders and the settlement of disputes.

In recent years, the improvement of transparency and related items of disclosure and information have been put on the agenda. A last point that is particularly interesting for the SEEurope network is the involvement of different actors in the national debate.

In this summary, we provide an updated overview of the national situation (as of early 2011) in 25 EU Member States and two EEA countries. In Part 3, some overall and general findings are presented. Part 4 deals with the Better Regulation agenda and the question of whether there is evidence at national level for such an agenda. Part 5 is dedicated to the important national disputes on attractiveness and competitiveness, followed by an overview of the EU impact in Part 6. At the end of the report we reflect on the roles of different actors, including the role of the trade unions in this debate and with regard to the future agenda.

3. Changes in national company law – general findings

The SEEurope experts have reported on any major changes in company law in their country in the past decade. The basic legal models provided for public and private companies were in most countries very similar. This partially stems from the ‘one size fits all’ nature of the rules. As a result, the statutory framework has historically applied to one-person private companies as well as to large public companies. Public debates on company law reform and corporate governance codes have often focussed on the governance problems of large publicly held firms, and policymakers' recommendations traditionally pinpointed such firms. These reforms assumed that corporate structures and director-specific provisions matter. Listing rules developed for stock exchanges were often given statutory authority and required that public listed companies disclose how they had complied with the Corporate Governance Code, and explain in what instances they had not applied the code – referred to as 'comply or explain'. Private companies were encouraged to conform, and there was no requirement for disclosure of compliance.

However, most small firms and, in several countries, even many large companies are not listed. Non-listed companies, whether family-owned firms, group-owned firms, private equity and hedge funds, joint ventures and unlisted mass-privatised corporations and SMEs have particular problems. Innovations and changes in approaches to regulatory governance in non-listed companies will probably focus more on the protection of investors and creditors from managerial opportunism. An effective legal governance framework must offer different mechanisms and therefore the result is legal pluralism and a mixture of hard law and voluntary social norms.

The history of national and European company law-making and regulation has been marked in recent years by a growing diversity of interests and concerns. As a consequence, a hybrid and partially contradictory package of company rules has been developed. In general terms, as is expressed in the French contribution, the national changes range from the regulation necessary for disclosure and control to deregulation in order to improve the ‘business environment’. A plea for the strengthening of auditing principles (after the financial crisis) can go together with the creation of substantial exemption mechanisms for SMEs. Adequate registration is crucial for transparency and for control and enforcement of existing rules or the fight against ‘post-box companies’, but – according to the employers’ side – may obstruct or hinder the smooth functioning of business. Lowering the threshold of capital requirements is seen as a stimulus for innovative entrepreneurs, but at the same time creates possibilities for the establishment of fake businesses.

Based on the country observations we can list five crucial items of concern that have been discussed over the past decade:

(a) The balance of power and the interaction between the primary stakeholders

In general terms, the balance of power and interaction in the triangle of labour, capital and management has been modified in recent years in favour of the shareholders (in listed companies). The position of shareholders has been strengthened (for instance, in the Netherlands by the right to appoint and dismiss the supervisory board or the right of approval of strategic board decisions) and there has been more attention to the protection of minority shareholders. In some countries, the position of the supervisory board members has been modified (for instance, in Austria: more rights and more duties) or strengthened (in Germany with a law that strengthened the function of the supervisory board's advice and supervision). In several countries the legal position and responsibilities of directors have been reformulated with management being portrayed as having a first duty to protect shareholder value. The position of workers' representatives has not been an item apart from – very recently – in Poland and the Czech Republic where a weakening of workers' involvement has been announced.

(b) Transparency and disclosure

In some Western European countries, and especially those that were hit hard by the financial crisis, stronger rules on access to information and on transparency with regard to remuneration are being discussed, including legislation that provides the possibility of access to information on company loans to directors.

In Central and Eastern Europe such a debate seems to be lacking, however. The legislative process there over the past ten years has been completely dominated by the implementation of the 'acquis communautaire'. Besides, most CEE countries are still not (yet) a location for important financial institutions or other global players.

With regard to transparency and disclosure the country reports suggest that initiatives in the social field are mainly based on non-binding rules.

(c) Corporate governance issues

Corporate governance issues have been on the agenda since the late 1990s. However, the most prominent proponents on the business side keep stressing the voluntary character and wanting to stick to self-regulation. As a consequence, the only widespread forms of 'regulation' are the voluntary Corporate Governance Codes in their different national forms. So far, the European Commission has complied with this wish with a policy of non-binding recommendations and soft law.

(d) Remuneration

As a result of the crisis, a heightened general debate on the limitation of remuneration practices (in both the private and the public sector) has been initiated in some Western European countries. However, our impression is

that, while this gives rise to a lot of public noise and media hype every now and then, there is little substantial legislation.

(e) Diversity¹

The issue of putting more women on the boards of public limited companies has been picked up most prominently in Norway. A law concerning state-owned and inter-municipal companies went into force in January 2004, with a two-year period of transition. It was expected that public limited companies would follow suit voluntarily, with the legal provision setting the norm, but not legally binding. But as public limited companies did not act in 2004 and 2005 the government decided to move to full enforcement and Norway imposed a quota in 2006. By the end of 2010 all companies included at least one woman on their board, while 83 per cent had more than three women. Spain, which introduced quotas in 2008, increased the number of women on boards by 67 per cent.²

Some European countries – such as Germany and Belgium – are considering the regulation of diversity if companies do not change voluntarily. This debate has not (yet) affected workers' participation at board level. However, in Norway the rules also apply to the board and, importantly, workers' representatives and shareholder representatives are counted as two different groups. Thus, female workers' representatives may not compensate for a lack of female shareholder representatives and vice versa (See Overview 1, p.24).

In 2006, in **Austria** the provisions on supervisory boards in cooperative companies were adapted to those of GmbH supervisory boards. This means more rights but also more tasks (transactions requiring approval) for supervisory board members in cooperative companies. A Code of Corporate Governance was implemented in 2004. The Code is based on voluntary self-regulation and covers the standards of good corporate management as well as the most important provisions of Austrian corporation law. This Code primarily applies to Austrian listed companies. In the past few years demands for more transparency (for example, management remuneration) have been shifted to the Code. Company law has been very much dominated by soft law, although only 50 per cent of Austrian listed companies accept the recommendations of the Code. There are a variety of reasons for this. For example, the capital market dominates the international debate on corporate governance. From this perspective proponents argue against binding rules because in their view the capital market itself acts as a sanction. They also feel vindicated by the EU, as the European Commission has made only recommendations and proposals for deregulation and flexibilisation, but no binding regulations in recent years.

1. The European Parliament in spring 2011 called on the European Commission, in a resolution, to submit a plan to bring about phased increases in gender diversity with the aim of achieving at least 40 per cent representation for each gender on the boards of directors of financial institutions (within a reasonable period).
2. See: <http://www.ft.com/cms/s/0/525d2ee4-cfff-11df-bb9e-00144feab49a.html#ixzz1HAQn3cGh>

In a new Act in **Belgium** it will be mandatory from 2012 to increase the share of women in the company board to at least one-third (in five years' time).

In **Bulgarian** company law many changes have been made during the past ten years. The reasons for these changes include economic transition, privatisation, restructuring and the establishment of a better business environment. EU accession and post-accession adaptation to the requirements of the Single Market have played an important role in these major changes in Bulgarian company law.

Bulgaria is trying to be more competitive and efficient. At the moment, it is one of the least competitive or efficient countries in the EU. Its negative image is debated mainly in the context of existing administrative barriers, registration problems, corruption and a poorly reformed and ineffective judicial system.

In 2006–2007, a task force for the preparation of a draft Code for Corporate Governance was established on the initiative of the Bulgarian Stock Exchange, in partnership with a number of government institutions, such as the Financial Supervision Commission (a body elected by parliament). The group was coordinated by the Centre for Economic Development and experts from government institutions, business and employers' associations, NGOs and the academic community have been involved. The Code was adopted in 2007. At the end of August 2009 the organisations and institutions decided to establish a National Commission for Corporate Governance. In September 2009 the Board of Directors of the Bulgarian Stock Exchange decided to implement a Code of Corporate Governance. For more than 20 companies and holding companies the code is to be compulsory because they applied for a stock market listing. For other companies whose stocks could be listed on the stock market and for other companies the National Code has an advisory character.

Company law regulations in the **Czech Republic** are concentrated in the Commercial Code (Act No. 513/1991 Coll.).³

The latest changes were mainly implemented in order to comply with the relevant EU directives. An issue debated before the elections in 2010 is the disclosure of the structure of public company shareholders. The Commercial Code makes it possible for public companies to issue shares as registered shares or as bearer shares. Bearer shares are transferable without restriction and the shareholder structure is unknown. The avowed intention to change this practice has not yet been realised.

A general reform of the whole private law system will lead to significant changes in the field of company law. The existing Commercial Code will probably be replaced by a new Company Law Act. This Act is being prepared together with the new Civil Code, representing the flagship of private law reform.

3. See: http://www.cnb.cz/en/legislation/leg_capital_market/download/commercial_code.pdf%20

As a result of legislative initiatives in 2009/2010 in **Denmark** the Public Companies Act and the Private Companies Act were combined into one Act. On 1 March 2010, the new Danish Companies Act came into force and a second phase will come into force on 1 March 2011. The Government had a number of different aims with these modifications. The main purpose of the Act was to bring Danish company law more in line with EU law through a reduction of the administrative burden and to attract foreign companies. Besides that the Act was meant to remove the strict requirements with regard to company structure and management.

The Act also implemented the Shareholders' Rights Directive. General shareholders' meetings can be held physically or electronically, and completely electronic general meetings, entirely replacing the physical general meeting, can be held if the general meeting agrees.

French company (or commercial) law is one of the pillars of the judicial system in France and the Civil Code in 1804 already provided rules concerning contractual obligations. In 1966 a reform of company law including more than 50 legal instruments took place. Since 2000 amendments have succeeded one another and every year there has been reform. This has resulted in a heterogeneous legal corpus with, on the one hand, rules concerning a planned or administered economy and, on the other, measures related to an open market economy. In this context, judges play an important role of interpreting the law (notably in the case of conflicts) and case law is very important in this area.

One of the last important reforms was introduced by the so-called NRE law (New Economic Regulation, 15 May 2001) aimed at improving and introducing higher ethical standards into (by enhancing transparency) the commercial world. In particular, annual reports must specify the total amount and benefits of all kinds that every corporate officer has received from the company and the companies it controls (C. art. L.225.102.1).

According to some, the evolution of French company law is always driven by three objectives: liberalisation, 'moralisation' and technical improvement. More recently, French company law reform has been dominated by the application of EU Regulations and Directives. This evolution has had an impact on the development of labour law, in particular the law on information, consultation and participation of workers.

National and European discussions debates triggered major reforms in **Germany** in many areas of company law. With regard to supervisory boards and employee board-level participation the debate on corporate governance is very important. The so-called KonTraG (Law on Monitoring and Transparency in Businesses), passed in 1998, strengthened the advisory and supervisory functions of the supervisory board. Among other things, the supervisory board became responsible for the assignment of the auditor. A commission on corporate governance, established in 1998, worked on a reform agenda. As a result, the TransPuG law (Transparency and Public Disclosure Act) of 2002

introduced further reforms by strengthening the information functions of the supervisory board and the rights of members. The Act introduced the obligation to draw up a list of essential corporate decisions which the management cannot implement until approved by the supervisory board. In addition, in 2002 a Code of Corporate Governance was passed. Entirely new in German company law, it created a model of soft law with a ‘comply or disclose/explain’ mechanism. In recent years, the debate has focused on directors’ remuneration and the consequences of the financial crisis. The necessary qualifications of supervisory board members (newly introduced financial experts in listed companies and new rules on expertise in financial institutions), as well as the question of diversity (especially women on the board) are subjects of current debate and of further relevance to codetermination. Finally, imposing more transparency in order to bring out into the open the proceedings of those seeking to stage takeover bids is on the agenda (‘sneak-attacks’, such as Schaeffeler/Conti or Porsche/VW, ACS/Hochtief).

Company law on limited companies in **Greece** dates back to 1920. There have been changes since then, in 1931 and in 1962. A wave of major and minor amendments in 1986 and throughout the 1990s were mainly related to adaptation to EU directives. During the past decade the major change occurred in 2007 through the reform of the legislation on public limited companies by law 3604/2007, mainly due to the need for harmonisation with EU Directives 2006/68 and 2003/58. This reform was also regarded as necessary in order to meet new market requirements. The changes with regard to shareholders’ rights include increased rights and flexibility on the part of shareholders to shape the statutes and operations of company bodies (for example, the possibility of teleconferencing for board meetings and flexibility with regard to general assemblies). It also strengthens minority rights with regard to the shaping of the agenda of general assemblies.

In **Ireland**, the only relevant legal changes were related to disclosure and the standardisation of accountancy, giving statutory recognition to international accounting standards and passing legislation giving additional powers to the Office of Corporate Enforcement to access information on company loans to directors. At the moment, corporate tax is an important issue of public debate, although all national actors regard it as a key element in the country’s economic attractiveness.

The so-called Vietti law represents the most important reform in **Italian** company law during the past decade. In January 2003, the centre-right government approved a reform of company law rules governing limited liability and joint-stock companies and cooperatives, which came into force in 2004. This law made it possible to set up joint-stock companies (SPAs), for an unlimited period, through a contract between partners or through a unilateral act. The main innovations introduced by the reform with regard to SPAs relate to their governance. Together with the traditional management and supervisory bodies (the board of directors or sole director and the board of auditors) the new rules provide for two other models; the ‘single’ model and

the ‘dual’ model. Employers have generally welcomed the reform, while trade unions consider it a missed opportunity for enhancing employee involvement.

Besides that, the Italian government approved a reform of Title V of the Civil Code, dating from 1942, which regulates stock companies and cooperatives. The reform redefines the characteristics of cooperatives and of the two main types of company: limited liability companies and joint stock companies.

During the past decade company law in **Latvia** has experienced major changes. The current Commercial Code was adopted in 2000 and entered into force in 2002. The law replaced the legislation applicable to commercial activities that was adopted during the 1990s after independence had been regained. In the course of the EU accession process, Latvian incorporated the EU company law directives and their drafts. This involved three main sections: general rules applicable to commercial activities, commercial entities and reorganisation of commercial entities. On 1 January 2010 the Commercial Code was complemented by a section governing commercial transactions (for example, between two commercial entities or between a commercial entity and another person) in general and containing specific rules for certain types of commercial transaction (for example, leasing and factoring, franchise agreements, commercial sale and purchase).

Trade unions and employers’ organisations are not really involved in the debate; the only actors directly interested in company law regulations are the board members/supervisory board members of companies since their liability towards the company is defined in the Commercial Code.

In 2007, a far-reaching draft bill on company law was introduced in **Luxembourg** and assessed by the Conseil d’Etat. This draft bill contained a reform of national company law and was limited to the sphere of actors involved in the definition and implementation process. The reason for this reform was to modernise existing legislation and to adapt it to legislative developments at the European level and to a highly competitive international environment.

In **Malta**, a whole series of changes has taken place, with several additional issues connected with company law regulated by laws other than the Companies Act (Chapter 386 of the Laws of Malta). The most significant amendments to the Companies Act since its enactment in 1995 were effected by the Set-Off and Netting on Insolvency Act 2003. Apart from making certain clarifications and correcting a few drafting and cross-referencing errors in the Companies Act, this Act introduced a considerable number of substantive amendments to that Act. The amending Act incorporated into the Companies Act, for instance, an entirely new provision setting out the general duties of directors. Although the duties listed in the new provision were to a large extent already incumbent upon directors under general principles of law, the statutory inclusion of these duties was welcome as it not only clarified the legal position but also highlighted the seriousness of directors’ responsibilities. The amending Act introduced a provision imposing upon directors the duty of informing the shareholders if their company was inexorably heading towards

insolvency. Other substantial changes were formulated in the field of information and disclosure. The Act granted further exemptions to very small companies, relieving them of the requirement to appoint auditors and to have their accounts audited.

A number of subsidiary laws have been passed over the past decade, such as the Companies Act (on Companies Carrying on Business of Insurance) Regulations, the Companies Act (European Economic Interest Grouping) Regulations, and the Companies Act (Investment Companies with Variable Share Capital) Regulations, which regulate particular aspects or particular types of companies.

There have been relatively few changes in company law in the past ten years in **the Netherlands**. The most important change took place in 2004. In that year the Dutch system of employee board-level representation was altered. The balance of power in so-called ‘structure’ public limited companies shifted from the supervisory board to the general meeting of shareholders (AGM). The main changes were:

- the right of the AGM to appoint and dismiss the supervisory board;
- the threshold for putting items on the agenda of the AGM was lowered to 1 per cent;
- the AGM was given the right of approval for major strategic board decisions.

Works councils’ right to nominate members of the supervisory board (an enhanced right for a maximum of one-third of supervisory board members) was strengthened, but their right to oppose the nomination of a new supervisory board member was lost. Since 1 July 2010, works councils have had the right to voice their opinion on several issues at the AGM of public limited companies. These issues are:

- the appointment and dismissal of members of the board of directors and the supervisory board;
- major strategic decisions that are covered by the right of approval of the AGM;
- (changes in) remuneration policy.

The AGM is not bound to follow the opinion of the works council.

In the past ten years there have been several rulings by the Supreme Court, especially with regard to the power balance between shareholders and other stakeholders in the company. The Supreme Court has consistently upheld a stakeholder approach. However, there is no heated debate in the field of Dutch company law, other than on remuneration (in both the private and the public sector). In recent decades, several laws have been passed to give the AGM a stronger position with regard to management remuneration, especially in public companies. Remuneration policy has to be established by the AGM (this cannot be delegated to the board), and disclosure requirements

have been enhanced (both for the board as a whole and for individual board members).

On other issues, debate exists, but in many cases these have a rather technical character. Besides, several changes are pending. An important debate took place in the period before the legislative changes of October 2004, which resulted in an increase in the power of shareholders versus the management and the supervisory board.

In the 1990s, a corporate governance code was introduced. The code consists of a set of principles, elaborated in terms of so-called best practices. The preamble to the code explicitly states that companies should be run in the interests of all stakeholders. Listed companies are required to apply the code or explain why they do not (fully) comply. A monitoring committee investigates the extent to which companies comply on an annual basis.

Major changes in **Norwegian** company law were made in 1997 when the old company act was supplemented by a separate Act on public limited companies. The EEA Agreement and the need to adapt to EU Regulations was one of the (most important) reasons behind the reform.

Earlier regulations in the Public Limited Companies Act prohibited CEOs from serving as chairman of the board. Under a new regulation, CEOs must not be board members at all.

The best known and most controversial legislative change has been the regulation requiring that at least 40 per cent of the boards of public limited companies be women. In 2003, the proportion of women on the boards of public limited companies was a mere 7 per cent and less than 40 per cent in state-owned enterprises. The government therefore decided to act. A proposition was presented to parliament in spring 2003 to introduce a legal requirement of at least 40 per cent board membership for women. A law on state-owned and inter-municipal companies went into force in January 2004, with a two-year period of transition. It was expected that public limited companies would follow suit voluntarily, with the legal provision setting a norm, although not legally binding. Private PLCs were given two years to comply, but as they did not take action during 2004 and 2005 the government decided to move to full enforcement and Norway imposed a quota in 2006.

The Norwegian Corporate Governance Code, with its 'comply or explain' principle, has acquired 'legal status' of kind, even if the Code is drawn up (including future changes) by a private institution. In 2010, changes were made in order to improve governance practices.

On 28 January 2011, a proposal to reform accounting law was discussed at a public hearing. The proposal entails that large companies (ASA – public limited companies) must report on their social responsibilities in the annual report. These social responsibilities are all things a company does on a voluntary basis, such as integrate and secure transparency on human rights, workers' rights,

social rights and the environment and to combat corruption in their business strategies, in the day-to-day running of the company and in relation to the different stakeholders. The proposed CSR reporting must consist, at a minimum, of:

- company guidelines on CSR including procedures and standards;
- how the company is working to transform its guidelines into action;
- how the company regards the results of CSR activities and (if any) expectations of future initiatives.

The latest and most important legal act on company law in **Poland** is the Code of Commercial Companies that entered into force on 1 January 2001. This Code regulates the setting up, organisation, functioning, mergers, divisions and transformation of commercial companies. It also deals with commercial law aspects such as the legal status of the company and mergers and transformations. The Code also introduced a new legal form inspired by the German Kommanditgesellschaft auf Aktien (KGaA).

The registration and accountability of commercial companies are regulated by other legal acts, however. The Code of Commercial Companies has been updated fifteen times since 2001, all changes being based on the implementation of EU Directives.

The Polish government is not in favour of employee participation; as a matter of fact, the Polish Finance Ministry has prepared a draft law (5 August 2010) aimed at eliminating board-level participation in former state companies. One of the authors of the proposal stated that the obligatory employee participation does not correspond to the challenges of the modern world. The draft law has been heavily criticised by the trade union confederations Solidarnosc and OPZZ.

Over the past decade, the **Portuguese** Code of Commercial Companies has been subject to a total of fifteen amendments, in general with the objective of strengthening competitiveness, or simplifying or transposing European directives. This Code, which was published on 2 September 1986 by Decree-Law no. 262/86, adapted the national company law of Portugal to European legislation. Certain – mostly formal – aspects of company law are dealt with separately in the Commercial Registry Code and the Securities Code.

In 2010, the Portuguese Securities Market Commission (CMVM) revised its recommendations and regulations on corporate governance. Substantial changes concern the establishment and functioning of internal control and risk management systems, the independence assessment of non-executive members and the remuneration of board members. Variable elements of the remuneration of members of boards of directors carrying out executive duties shall be determined according to pre-established quantifiable criteria, taking into consideration the company's real growth and the growth generated for the shareholders, its long-term sustainability and the risks taken, as well as compliance with the rules applicable to the company's activity. The most

important innovation in the CMVM Regulation No. 1/2010 on the corporate governance of stock exchange quoted companies is a provision on remuneration disclosure. The issuers of shares admitted to trading on a regulated market, subject to Portuguese law, shall disclose in a report the remuneration policy for members of the board of directors and the supervisory board, pursuant to the provisions of Article 2 of Law No. 28/2009, together with:

- the annual remuneration of members of the abovementioned boards, in total and individually;
- fixed and variable remuneration, and as to the latter, the various components that comprise it, the portion that is deferred and the portion already paid;
- remuneration received from other parts of the group, in total and individually;
- the pension rights acquired in the relevant financial year.

The legislative framework in **Romania** contains diffuse provisions on corporate governance in various laws with all their amendments: the Company Law, the Commercial Code, the Law on the capital market, the Law on insolvency procedures, the Law on accounting, the Labour Code and so on. Furthermore, the Strategic Alliance of Business Associations (SABA), sponsored by the International Centre for Entrepreneurship in Romania, formulated a voluntary Corporate Governance Code (2002), listing recommended practices. The Bucharest Stock Exchange (BSE) in August 2001 created a virtual tier – the Plus tier – for listed companies: all companies that want to be included must commit themselves to introduce all the provisions of the Corporate Governance Code, a set of recommendations on corporate conduct and ethical rules elaborated by the BSE and renewed in 2008/2009, in their Memorandum of Association within three months, and eliminate everything that contravenes the Code.

Significant changes have been made in **Slovak** company law over the past decade. These changes concern, in particular, the functioning and operation of the Commercial Register: information on companies entered in the Commercial Register was further specified according to the requirements of European Directives.

Other changes have concerned the ability of companies to change legal form and the acquisition of their own shares by a joint stock company. New legislation also governs negotiations on and the composition of the workforce in cases of cross-border mergers.

Recent changes in **Spanish** corporate law include the New Companies Act (July 2010), the Structural Modifications Act (SMA) (end of 2009), a new Auditing Act (end of June 2010) and the Sustainable Economy Bill (approved by the government on 19 March 2010 and currently [spring 2011] under discussion in the Spanish parliament). The New Companies Act restates in a single legal text the regulations on public companies, limited liability companies and limited partnerships with share capital. The aim of the New

Companies Act is to bring more clarity and coherence into Spanish company law. It also reorganises the board of directors and reformulates directors' duties (duty of loyalty).

Another change is the laying down of a legal parameter related to directors' remuneration, for both limited liability and public companies. This parameter is determined each year by agreement of the general meeting in accordance with provisions established in the company statute.

The Equality Law of 2007 recommended that women hold 30 per cent of managerial positions in a company and there are some signs that, although progress is slow, the reform has had an impact.

The limited company – the joint-stock company – has become the typical form of corporation in **Sweden** since the late 1990s. Taking effect from 1 January 2006, Sweden has a new Companies Act (2005:551). Its predecessor dates from the mid-1970s (1975:1385). The new act does not involve any major changes vis-à-vis its predecessor; its main characteristic is continuity. The changes made in Swedish company law are to large extent adaptations to EU law.

The revision of **Swiss** company law is ongoing. The process is currently dominated by the political debate on how to deal with the financial crisis as many Swiss financial institutions were at the centre of the crashes (for instance, UBS).

Preparations for a revision of national company law started in 2001, and in 2007 the government sent a reform proposal to parliament. The purpose was threefold: to increase Switzerland's attractiveness as a seat for transnational companies, to adapt to changes in EU legislation and, finally, to improve corporate governance.

This process was successfully 'enriched' in 2008 by an initiative for a referendum that will focus on the limitation of remuneration practices, combined with the enforcement of shareholders' rights and increased transparency.

The main change in **UK** company law recently was the Companies Act 2006. This was a fundamental revision of company law, replacing most of the previous legislation. Several requirements were abolished and the directors' duties were reformulated. In the TUC's response to the underlying 2005 White Paper it was argued that directors should have responsibilities not just towards shareholders, but also towards a wider range of interests.

In addition, the Corporate Governance Code was revised in May 2010. The changes to this Code were a response to the governance failures revealed by the financial crisis. They apply to the 350 largest FTSE companies and the most significant change is the requirement, subject to 'comply or explain', that directors of these companies should stand for election annually.

Overview 1 Women in the company board

Country	Character	Content	Application	State of the art
Austria ^a	The government started a debate on a voluntary code; no sanctions are mentioned.	25 % women in 2013 and 35 % in 2018.	Companies in which the state holds a share of 50 % or more. The code should motivate private businesses to follow the example.	Currently under debate in parliament
Belgium ^b	The government proposed a quota. If listed companies do not comply after 5 years there will receive a fine. SMEs will have an extra 3 years.	30 % women by 2017	Listed companies and SMEs of which less than 50 % is quoted on the exchange.	Currently under debate in parliament
Denmark ^c	The government introduced a "comply or explain" code, which requires that diversity must be taken into account in all appointments.			2008
Finland ^d	A group of companies has established a Code that requires companies to comply or explain their appointments.	At least one woman on the board.	Listed companies in Finland.	From 2008
France ^e	Recently a law was approved. The sanctions for non-compliance are that nominations would be void and fees suspended for all board members.	20 % within 3 years, 40 % within 6 years for listed and 9 years for non-listed companies.	Listed and non-listed companies.	Law in 2011
Germany	Government, political parties and social partners started a debate about introducing legally binding diversity provisions in the existing Corporate Governance Code; when filling managerial positions in the enterprise the management Board shall take diversity into consideration and, in particular, aim for an appropriate consideration of women.	Monitoring of the implementation of legally binding provisions with different thresholds. Several other propositions by opposition (the Green Party: 40% for listed companies by 2017). IG Metall is the first trade union that has published internal guidelines (30% for trade union representatives on supervisory board).	German Corporate Governance Code for listed companies: they have to comply or explain.	Public debate
Italy ^f	The Italian lower house approved a bill for a quota.	1/3 of the board	Listed and state-owned companies	Pending

^a Austrian Independent, "Government introduces quota for females", 16 March 2011, URL: http://austrianindependent.com/news/Politics/2011-03-16/6739/Government_introduces_quota_for_females (last visited on: 28 March 2011).

^b De Morgen, "Quota voor vrouwelijke bestuurders goedgekeurd", 1 March 2011, URL: <http://www.demorgen.be/dm/nl/989/Binnenland/article/detail/1229858/2011/03/01/Quota-voor-vrouwelijke-bestuurders-goedgekeurd.dhtml> (last visited on: 28 March 2011).

^c UK Department for Business, Innovation and Skills (BIS) (2011) "Women on boards", p. 23, URL: <http://www.bis.gov.uk/assets/biscore/business-law/docs/w/11-745-women-on-boards.pdf>

^d European Professional Women's Network, "New Finnish Corporate Governance Code: Both genders represented on the board", URL: http://www.europeanpwn.net/index.php?article_id=713 (last visited on: 28 March 2011).

^e The Guardian, "French plan to force gender equality on boardrooms", 2 December 2009, URL: <http://www.guardian.co.uk/world/2009/dec/02/french-government-gender-equality-plan> & European Professional Women's Network, "French National Assembly Votes For Women on Boards", URL: http://www.europeanpwn.net/index.php?article_id=868 (last visited on: 28 March 2011).

^f Deloitte, "Women in the boardroom: A global perspective", January 2011, p. 11 URL: http://www.corpgov.deloitte.com/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/USEng/Documents/Nominating-Corporate%20Governance%20Committee/Board%20Composition%20and%20Recruitment/Women%20in%20the%20Boardroom_Deloitte_012011.pdf (last visited on: 28 March 2011).

Country	Character	Content	Application	State of the art
Luxembourg	A survey is launched to investigate if legislation is necessary. Currently there is no legislation or official quotas.			Public debate
Netherlands	The parliament has agreed with the governmental proposal of a quota for companies; they have to explain any non-compliance.	30% women, 30% man and 40% own choice in boards by 2016	Listed and non-listed companies	Pending
Norway	After a voluntary code the government introduced a law; business had to increase the number of women on their boards or face fines or even closure.	40 %	Private listed companies, including firms listed on the Oslo stock exchange.	Deadline 2005. Legislation effective in 2006.
Portugal	The government started a debate of a change of parity law		Public companies	Public debate
Poland	Corporate governance code	Balanced representation		
Spain ^g	Government introduced a law with quota, but there are no formal sanctions for non-compliance.	Minimum 40 % share for women by 2015	Public companies and listed firms with more than 250 employees	Law in 2007
Sweden	"Comply or explain" code	Parity		
United Kingdom ^h	A governmental Commission recommended that companies have to announce and report regularly to the shareholders their targets and plans.	At least 25% women on boards by 2013	Largest British companies	Targets for 2013 and 2015

^g Women on boards, p. 23.

^h Women on boards, pp. 4-5.

4. The Better Regulation agenda

The EU's Better Regulation strategy has several components. First, the design and application of Better Regulation tools at EU level, notably the simplification of existing rules, including the reduction of administrative burdens and impact assessment. Second, the more consistent application of rules and principles throughout the EU by all regulators. Finally, the reinforcing of constructive dialogue between stakeholders and regulators at the EU and national levels.⁴

Next to evaluation, the use of 'fitness checks' has been introduced. The European Commission is merging its efforts to reduce the administrative burden with those to simplify legislation and has decided to resort more to stakeholder consultations and impact assessments as essential parts of the policymaking process. The Commission first drew up a 'simplification rolling programme', beginning with 100 simplification initiatives for 2005–2008. Since 2007, the simplification programme has been integrated into the Commission's legislative and work programme.

In the Commission work programmes of recent years some initiatives related to company law issues are explicitly mentioned. For instance, the simplification of the Accounting Directives with the objective of allowing Member States to exempt micro-entities from accounting requirements and of reviewing the Accounting Directives (4th and 7th Company Law Directives) to take account of the interests of small businesses, or the Directives on reporting and documentation requirements in the case of mergers and divisions. The proposals to reduce the translation and publication requirements of companies also fit in this scheme. The Commission has even justified the proposal for a Council Regulation on a European Private Company Statute with a reference to the simplification agenda (EC, 2009).⁵

At the same time, the Better Regulation principles have been used unsuccessfully by some Member States as arguments against new European legislation, notably as the EU proposal for the SPE was being formulated. The German Bundesrat, for instance, expressed doubts about the respect for subsidiarity and about whether the proposed harmonisation would achieve the set objectives. The Dutch Parliament asked for a clear justification of the legal basis: they wished to avoid a situation in which national rules prohibiting

4. See: http://ec.europa.eu/governance/better_regulation/brochure_en.htm

5. See: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0017:FIN:EN:PDF>

abuses could be bypassed by European rules and questioned the purported added value and the Commission's forecast about the effective use of the European private company (SPE). In its answer the Commission pointed out that including a cross-border requirement as a condition for setting up a European Private Company would be inconsistent with the objective of the proposal, notably to complete and improve the functioning of the Single Market and to make it more accessible for SMEs.

The question that we raised in our survey is whether there is any sign at national level of an ongoing simplification process along the lines of the EU strategy.

At national level we found several initiatives that do not necessarily fit in to the EU agenda, but nevertheless can be seen as efforts to simplify the 'business environment'.

National company law has been reassessed in the following areas:

- more and more exemptions for SMEs, for instance in the area of auditing standards, information and disclosure;
- flexible size of management structure;
- the introduction of 'alternative' forms of annual meetings (teleconferences, digital or other online communication);
- the introduction of unique information addresses ('one-stop shops') by the legislator;
- watering down of registration conditions and lowering of establishment thresholds, for instance capital requirements (this will be treated further in Section 5).

It is fairly obvious that several of these simplification measures conflict with the pursuit of transparent and effective regulation. Some administrative obligations are not only useful, but can also be indispensable to monitor legality; or they serve other purposes than direct business benefits. The relaxing of the registration requirements decreases the disclosure of information and opens the door to bogus practices and the misuse of legal persons and companies. Transparency is not improved by exemptions from (or by watering down) auditing standards.

The **Austrian** Ministry of Justice discussed with the social partners and auditing experts the need to simplify accounting standards for small and medium-sized enterprises. The result was that every company – in particular, limited liability companies – needs stringent regulations to protect creditors and the company itself. Therefore the preparation of a balance sheet, a profit and loss account and certain disclosures will remain essential. The proposals in the resulting non-paper are not likely to reduce the administrative burden and would lead to a significant loss of information. There was also a consensus that IFRS accounting for SMEs would not provide simplification, but on the contrary make things more difficult for SMEs.

In 2003, a Law on the Restriction of Government Regulations and Government Control of Businesses was passed in **Bulgaria** and the last amendments were made in 2007. The law restricted the number and kind of possible regulations (permissions, licenses, registrations and other things) and made the conditions of use of such regulations and the main requirements clearer and simpler.

Not all companies have to register at the Court of Registration, but at the State Registration Agency at the Ministry of Justice, which is easier and takes less time than the judicial procedure.

Simplification of company law and improvements of the business environment have been part of government programmes since 2000. Currently, there is also a programme for 'better regulation', which was amended in June 2010 by government decree. The programme was prepared in accordance with the suggestions of the business community and Bulgaria's Economic and Social Council.

Simplification in **Cyprus** relates to operational aspects, such as:

- development of the Company Registration System (eFiling);
- simplification of the tax compliance procedures to alleviate compliance costs for SMEs;
- facilitation of business transfers;
- revision of bankruptcy laws and improvements to rescue and restructuring procedures (a second chance for bankrupts);
- more e-communication between public authorities and SMEs (e-government);
- operation of one-stop shops.

In the **Czech Republic**, there is much support for the Better Regulation agenda, highlighting the removal of 'barriers', the reduction of administrative burdens, facilitating access to business and so on. This agenda will therefore undoubtedly influence the company law changes which are being prepared. Some well-intentioned efforts to reduce unnecessary administrative burdens connected with starting and running a business will probably be accepted or even welcomed by the trade unions. However, the unions will oppose any outcome that leads to the weakening of workers' rights or a reduction in transparency.

In general terms, the **Danish** government aims to create the most efficient business regulation in the EU. Better regulation means in this case that businesses can focus on growth instead of spending time on complying with burdensome government regulation. The government department for Better Business Regulation works to improve regulation in the following ways: stakeholder consultation, impact assessments, measurement of the administrative burdens on businesses, simplification and user-oriented innovation.

The **French** simplification provisions, adopted on 24 March 2004, aimed at simplifying the existing legal regime:

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- simplification of certain rules governing management;
 - reduction of the conditions imposed on businesses operating under lease, in particular the abolition of the obligation to have been a shopkeeper or craftsman for at least seven years to be able to run a lease operated business;
 - simplification of the conditions governing cooperatives of shopkeepers and craftsmen;
 - moderation of certain penalties in corporate law (linked to the decriminalisation of commercial law).

German company law is subject to ongoing reform, which is said to be a burden for companies. From this perspective the picture is not one of simplification of company law, at neither EU nor national level. However, the debates and reforms focussing strongly on the international competitiveness of German corporate law have led to simplifications in some legal areas. As a result of the ECJ decisions on freedom of establishment (particularly *Centros* 1999, *Überseering* 2002 and *Inspire Art* 2003) some feared a flood of British limited and other foreign legal forms into Germany. The ECJ decisions made it possible for companies to register in foreign legal forms, without having to found a German GmbH or AG. One prominent example is Air Berlin PLC. Some researchers counted some 35,000 British limited companies with a business registered in Germany by 2007. The vast majority of these are small craft or hair dressing businesses with only a few employees and do not affect board-level codetermination, because they do not reach the threshold of 500 employees.

With the MoMiG (Act on the Modernisation of GmbH Law and the Prevention of Abuse Act, 2008) a new form of a simplified GmbH was created for small start-up businesses: the entrepreneurial company with limited liability (Unternehmergeellschaft or UG). The UG does not have a minimum share capital requirement (25,000 euros for a regular GmbH), it can be founded by means of a simplified procedure and there are standard articles of association.

Currently, the **Greek** simplification agenda is based on the Memorandum on Economic and Financial Policy between Greece and the IMF, the EU and the ECB, which has been in operation since May 2010. In this context, the Memorandum provides that ‘The government will take measures to facilitate start-ups by making fully operational one-stop shops and eliminating unnecessary fees. On licensing, legislation will be adopted to simplify and accelerate authorisation for enterprises, industrial activities, and professions. Remaining restrictions on business activity and innovation will be identified and an action plan (‘Business Friendly Greece’) will be formulated to remove the most important ones’.

The changes with regard to shareholders’ rights refer to increased rights and flexibility on the part of shareholders to shape the company statute and the operations of company bodies (for example, possibility of teleconferencing with regard to board meetings and flexibility with regard to general assemblies). It also strengthens minority rights with regard to shaping the agenda of general

assemblies. The changes with regard to mandatory financial audits include a relaxation for small limited companies (turnover of up to 1 million euros) and stricter (standard) audits for larger companies.

The need to implement a balanced and systematic framework of rules regulating companies in **Italy** has gone together with a perceived need to loosen regulatory and administrative constraints, especially for limited liability companies (SRLs). The legislator's objective was to offer the myriad of SMEs, mainly family-managed and faced with expansion difficulties, a means of achieving competitive growth through access to national and international markets. According to the new rules on corporate governance, SRLs have the structure of a partnership. This means that their management will become easier and more independent. This company form is seen to be more appropriate to the structure of SMEs, as it simplifies management and decision-making procedures

On the basis of the Vietti law, joint-stock companies (SPAs) can be set up, for an unlimited period, through a contract between partners or unilaterally. The main innovations introduced by the SPA reform relate to their governance. SPAs will be able to adopt three governance models: next to the traditional management and supervisory bodies (the board of directors or sole director and board of auditors) the rules provide for two other models; the 'single' model and the 'dual' model. The tendency of the law is to reduce public supervision of corporate governance, leaving broad autonomy to management, but it does not confer a supervisory role on workers' representatives.

The Vietti initiative was important for cooperatives because it brought together in one law almost all the relevant norms.

There is some debate on the revision of company law in **Latvia**, for example, with a view to establishing a limited liability company. Overall, there are calls to make regulation and state control – for example, with regard to corporate documents, changes to company bodies and so on – more stringent. Smaller merchants and their trade associations are demanding simplification. At the same time, the OMX Nasdaq Riga is arguing that the shareholders' registers of all companies need to be held by one central depository, which, of course, would not simplify the recording of the shareholders from the company perspective.

The underlying 'simplification agenda' in **Luxembourg** is embedded in a general effort by the government, the employers' organisations and the professional associations (that is, the Chamber of Trade) to make companies more competitive and render company law more attractive, a recurrent argument that shaped the 2010 tripartite negotiations, triggering disagreement between the government and the social partners in general, on the one hand, and between the employers' organisations and the trade unions in particular, on the other.

The government resorted to the setting up of a single office (www.guichet.lu) – divided into sections for private citizens and companies – to bring the numerous services under one umbrella. Better regulation has also been implemented at the government level by the creation of the government *Département de la Simplification Administrative (DSA)*. This could affect future company law in the sense that laws within the framework of general legislative procedures will be verified if they meet better regulation objectives.

The **Maltese** Companies Act as originally enacted contained provisions enabling ‘small companies’ to draw up abridged balance sheets, profit and loss accounts and notes to the accounts. The 2003 Amending Act granted further exemptions to very small companies, exempting them from the requirement to appoint auditors and to have their accounts audited.

In the **Netherlands** the government set up the independent Advisory Board on Administrative Burdens in 2000. In 2003, the government relaunched regulatory reform as one of its top political priorities and developed a methodology to quantify administrative burdens – the Standard Cost Model – which is among the earliest systems to measure administrative burdens. This was probably one of the reasons why the country was selected for a survey of the effects of a better regulation agenda in 2006. The EU applied the Standard Cost Model in this survey as a tool to calculate business costs. In the conclusions of the survey company law does not figure among the things most affected by obligations generated by EU or national legislation.

In 2010, an initiative of the NHO – Confederation of **Norwegian** Enterprises (the largest employers’ federation in the private sector) – was taken up in order to simplify Norwegian company law. The main reason for simplification was to make sure that legal regulations are appropriate for SMEs. The government prefers that SMEs opt for the ‘limited company’ form (AS) rather than the NUF (Norwegian branch of a foreign company), which is becoming very popular among SMEs. The government wants to achieve this via a more competitive and attractive national company law. Besides a reduction in share capital the suggestions for simplifying the ‘limited company’ form (AS) include:

- softening of the rules on dividends (possible to pay out more often);
- softening of the rules on ‘company owned shares’ (no longer a 10 per cent limit);
- an end to requirements with regard to the number of directors (there need be only one);
- fewer requirements concerning the agenda of board meetings;
- abolition of requirement to have a CEO;
- abolition of requirements with regard to the agenda of the general assembly and opening up to ‘alternative’ general assemblies (telephone conferencing).

The trade unions have welcomed these initiatives because the NUF provides companies with several possibilities to bypass laws and agreements. However, the suggestion of the government to remove the duty to audit if the turnover

of the company is less than 5 million NOK (625,000 euros) was rejected by the trade unions.

The simplification agenda in **Poland** is being promoted by the government, which is trying to eliminate the barriers to starting a business. This is being encouraged by the employers' organisations. One of the things that has become easier is the registration of companies. In a new legislative proposal, approved in November 2010, private limited liability companies can register via an online registration system. This simplifies the registration procedure, because the electronic registration does not require a notary and takes place on the basis of the official form delivered to the court. The court of registration must issue a decision on the registration within one day. Confirmation of share capital should take place within seven days of registration.

Portuguese Decree-Law no. 111/2005 of 8 July 2005 created a special regime for the immediate establishment of companies, called 'empresa na hora' ('company in no time'), which makes it possible to establish a private or a public limited company on the spot, at one desk, in a few minutes. This regime was later improved and extended by Decree-Law no. 247-B/2008 of 30 December 2008, which established the possibility to create a company, and also associations and branch offices, directly on the Internet.

Decree-Law no. 76-A/2006 of 29 March 2006, a huge reform package aimed at improving company law and reducing bureaucracy, increased the flexibility of the corporate governance models for public limited companies, offering the choice between the classic Portuguese structure ('modelo latino'), the German dual-tier system ('modelo germânico') and the Anglo-Saxon one-tier company ('modelo anglo-saxónico').

The possibility for a joint stock company to acquire its own shares and the conditions of such acquisition were enacted in **Slovakian** company law in 2002. Companies have the possibility to transform their legal status without the need to dissolve first. A new legal framework established in 2004 made it easier for companies to decide which company seat will be considered the registered seat, namely the address entered in the Commercial Register. The basis of the 'real seat' has been changed and is now where the company decides to register this seat. It does not matter whether or not the company performs real activities from the registered address.

After last year's election and subsequent change of government, many attempts to simplify company law have been initiated. The government has planned changes in the Slovak Commercial Code according to which mergers and divisions of joint-stock companies will be administratively less difficult. The amendments of the Commercial Code are supposed to simplify the requirements on the preparation and submission of written reports on the merger or division process of a joint-stock company by the statutory organ of the company. The information obligations of companies subject to merger or division will be simplified by enabling publication of these documents on the website of the companies concerned. The National Council has to approve these changes.

At the end of 2010, the Ministry of the Economy introduced a simplification proposal with regard to the Slovak business environment that contains 25 steps. The most important proposals are:

- the creation of one trade licence for all activities coming under so-called ‘free licences’;
- a reduction of the registered capital of some legal entities (the registered capital of a limited liability company is to be 1 euro);
- an increase in the threshold governing whether a company has to pay tax in advance.

The simplification agenda for company law in **Sweden** has so far resulted in abolition of the duty of audit for smaller companies, with effect from 1 November 2010. The companies concerned are those with no more than three employees, a net turnover not exceeding SEK 3 million and a balance-sheet total not exceeding SEK 1.5 million. Further simplifications of rules of accounting reports for small and medium-sized companies will take effect from 1 January 2011. This simplification agenda seems to be more in line with employers’ than with trade unions’ interests. Mandatory information was minimised in order to facilitate the formation of private companies. The possibility to fulfil obligations with e-services was extended.

The 2007 reform proposal in **Switzerland** aimed to simplify the creation of new companies and to make the national company law more flexible. One of the first decisions was to delete the existing obligation of a Swiss majority in the supervisory board. It is enough now to have one board member or manager of Swiss origin. Additionally it was made possible for just one founder, instead of the obligatory three, to create a limited liability company. Furthermore, the mandatory annual financial report was abolished for SMEs.

In a pending proposal it is envisaged that annual general meetings can take place outside the country’s territory and/or by digital or video sessions.

Some proposals in the field of corporate governance will lead to the widening of the possibility to initiate a general shareholder meeting, by lowering existing thresholds.

Simplicity was a key objective in the **UK**, as the introduction to the White Paper on Company Law Reform published in 2005 makes clear. In particular, the British government sought to make things simpler for smaller companies, arguing that much previous legislation had been framed for large enterprises. The 2006 legislation tried to look first at what was necessary for small businesses, before producing rules for larger ones, adopting the so-called ‘Think Small First Approach’. The White Paper described the objectives of the change in the following terms:

We are committed to creating a modern, enabling and robust framework for our companies. We are determined to ensure that our system of company law and corporate governance is one which:

- facilitates enterprise by making it easy to set up and grow a business;
- encourages the efficient allocation of capital by giving confidence to investors;
- promotes long-term company performance through shareholder engagement and effective dialogue between business and investors; and
- maintains the UK's position as one of the most attractive places in the world to set up and run a business.⁶

The final list of measures introduced by the Companies Act 2006 is lengthy and includes the following:

- removal of the requirement for directors' residential addresses to be included in material filed at Companies House (the UK company register);
- reduction in the length of time allowed for filing accounts at Companies House (from 10 months to 9 months for private companies and 7 months to 6 months for public companies – from year end);
- removal of the requirement to submit information on shareholder addresses for most companies;
- removal of the need for private companies to hold annual general meetings;
- removal of the requirement for private companies to have a company secretary (even before this change there was no requirement for the company secretary in a private company, unlike in a public company, to be legally qualified);
- codification of directors' duties – this did not change the law but brought it together in a single place;
- making electronic communications easier for quoted companies by reducing the requirement for documents to be sent as hard copy;
- new requirement for quoted companies to produce a business review looking at trends affecting future business development, environmental information, employee, social and community matters affecting the company, and the essential contractual arrangements;
- new information rights in quoted companies for indirect investors, such as pension fund trustees;
- provision of new model articles of association in simple English, designed for smaller companies; and
- introduction of the possibility of reaching agreements with auditors, limiting their liability – this potentially reduces the cost of auditing.

Bodies representing employers widely supported the changes. For example, in its response to the 2005 White Paper on company law reform the CBI (the main employers' body) said that they supported the modernisation of UK company law and simplification of regulatory requirements to make company law more accessible and less bureaucratic for all types and sizes of company, and their directors and shareholders. The Institute of Directors, which is more

6. Company Law Reform, March 2005, UK.

representative of smaller companies, took a slightly more nuanced approach, responding to the 2005 White Paper that there was a danger that the company form could become devalued by directors of private companies being subject to insufficient checks and balances to ensure that they are alert to their accountability to all their owners, and responsibilities to others as epitomised by the concept of ‘enlightened shareholder value’ that forms the basis of the proposed statutory basis of directors’ duties.

5. Attractiveness and competitiveness

Since the early 1990s, European countries have sought to attract and keep companies by lowering corporation tax rates. This downward trend has resulted in substantially lower tax levels. According to the OECD Tax Database and the World Tax Database the average rates in the 'old' EU Member States fell from around 42 per cent in 1980 to 28 per cent in 2009. Corporate tax in the CEE countries ended even lower, at just 19 per cent in 2009.¹ As a result, countries are constantly seeking to underbid one another.

The question that we must raise here is whether a similar process could take place in the field of company law. Although there are indications that the entrance of foreign company forms at the national level is increasing in, for instance, Germany, partly stimulated by recent ECJ rulings on freedom of establishment, we cannot conclude that this is a growing trend.

In some countries, the search for more attractive and competitive national legal forms is motivated by a desire to find a response to the British limited company (Ltd.) form. The Ltd has no capital requirements and can be established in any Member State. Some Member States take the view that it is important to create more competitive legal forms to prevent the widespread use of this British legal form. Other Member States have taken measures to anticipate the eventual loss of companies with a national legal form as a consequence of the upcoming SPE Regulation.

Two major developments in terms of company establishment are visible in almost all countries: the lowering of capital requirements and the simplification of the registration procedure.

Lowering of capital requirements

Overview 2 shows that, in several Member States, capital requirements for the establishment of companies have been lowered. Often mentioned among the reasons for this are the entrance of British limited companies (without any capital requirements) and the need to increase the attractiveness of national legal forms.

Overview 2 Capital requirements for private limited-liability companies

Country	Capital requirements (old)	Capital requirements (current, new or proposed) ^a	Background/Aim	Status
Austria	€ 35,000 ^b	€ 10,000	UK limited companies entering the market and increasing the attractiveness of domestic forms of association.	Pending
Belgium		€ 18,550 (#)		2006
Bulgaria	€ 2,500 ^c (#)	€ 2.5 ^d	SPE and increasing the attractiveness of domestic forms of association.	Pending
Cyprus		€ 2 (#)		2006
Czech Republic	€ 8,200 ^e (#)	€ 1 ^f	SPE and increasing the attractiveness of domestic forms of association.	Pending
Denmark		€ 11,000 (#)		2011
Estonia		€ 2,556 (#)		2006
Finland		€ 8,000 (#)		2006
France		€ 1 (#)		Adopted 2005
Germany	€ 10,000 (#)	€ 1 Unternehmergeellschaft (UG). ^g € 25.000 for regular GmbH	UK limited companies entering the market, European competitiveness and increasing the attractiveness of domestic forms of associations.	2008
Greece		€ 18,000 (#)		2006
Hungary	€ 11,760	€ 1,857 ^h		2006
Ireland		€ 1 (#)		2006
Italy		€ 10,000 (#)		2006
Latvia	€ 2,863 (#)	€ 1 ⁱ		May 2010
Lithuania		€ 2,896 (#)		2006
Luxembourg		€ 12,394 (#)		2006
Malta		€ 1,164 (#)		2006
Netherlands	€ 18,000	€ 0	UK limited companies entering the Dutch market and increasing the attractiveness of domestic forms of association.	Pending
Norway	€ 13,000 ^j	€ 3,750 ^k	Increasing the attractiveness of the AS form to avoid an influx of foreign company forms (NUF)	Pending

^a All data with # can be found in: European Commission (2008) 'Proposal for a Council Regulation on the Statute for a European Private Company (SPE). Impact assessment', SEC(2008) 2098, Brussels p. 7, URL: http://ec.europa.eu/internal_market/company/docs/epc/annex_impact_assesment_en.pdf (last visited on 28 March 2011).

^b A. Bernecker (2010) "A European Private Company. Is Europe's single legal form for SMEs close to approval?", Deutsch Bank Research, p. 5, URL: http://www.dbresearch.de/PROD/DBR_INTERNET_EN-PROD/PRODO000000000260277.PDF (last visited: 28 March 2011).

^c 5,000 Leva

^d 2 Bulgarian Leva

^e 200,000 CZK

^f 1 CZK

^g Applies only for small companies with less than 25.000 Euro nominal capital. Once the SME grows and has a nominal capital of 25.000 EUR, the provisions for the regular GmbH apply. Until that point is reached, the company has to grow the nominal capital by putting parts of the earnings into the nominal capital.

^h 500,000 HUF

ⁱ 1 Latvian Lat

^j 100,000 Norwegian Crones (NOK)

^k 30,000 Norwegian Crones (NOK)

Country	Capital requirements (old)	Capital requirements (current, new or proposed) ^a	Background/Aim	Status
Poland	€ 13,869 (#)	€ 1,255 ^l		2009
Portugal	€ 5,000	€ 1		April 2011
Romania ^m		€ 47		2010
Slovakia	€ 25,000	€ 5,000		January 2009
Slovenia		€ 8,757 (#)		2006
Spain	€ 3,006	€ 3,000 ⁿ	Rounded down because of the exchange rate between the peseta and the euro	
Sweden	€ 10,681(#)	€ 6,000		April 2010
Switzerland	€ 38,000 ^o	€ 0	Competitiveness	pending
United Kingdom ^p		€ 1.5		2006

^l 5,000 PLN

^m Bernecker (2010).

ⁿ Marcos (2011), pp. 41-42.

^o 50,000 CHF

^p Bernecker (2010).

Easier registration

Besides the capital requirements, simplification of the registration procedure is a popular measure to create a more attractive national legal form of association. Most changes are introduced in particular for SMEs and contain measures to simplify registration systems and license applications, restrict the number of regulations and reduce the number of rules with regard to supervisory boards and so on.

The fast track actions formulated by the European Commission to ease disclosure, registration and translation requirements are explicitly mentioned as key parts of the Action Programme on reducing administrative burdens in the European Union.⁷

The EU's reasoning in this area, as expressed in several Better Regulation documents, is simple and it seems that many countries follow the same reasoning: companies will benefit from reduced procedural requirements, as well as simplified and harmonised rules for accreditation, verification and registration. In addition, SMEs will benefit from reduced verification and reporting obligations and lower registration fees. However, intra-EU competition is not put forward as an argument in the relevant documents.

The lowering of requirements in order to boost one's position in the competitive rivalry between countries can be called into question. Lessons can be learned, for example, from the abovementioned beggar-thy-neighbour tax competition. The policy of reducing corporate tax has seriously impaired the ability of governments to respond effectively to the crisis, and to regulate their economies in a sustainable manner. Tax competition between countries that

⁷ See: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0141:FIN:en:PDF>

provides the possibility of relocating a company's headquarters to low-tax jurisdictions can easily lead to a race to the bottom, resulting in serious erosion all over Europe. Minimising costs to businesses on the basis of calculations of an alleged 'administrative burden' that takes no account of benefits for other stakeholders or the qualitative dimension of fundamental rights and provisions risks upsetting the traditional balance in European welfare states. Less regulation, therefore, is not necessarily better regulation.

In this intra-EU competition a crucial role is played by the ECJ's rulings on freedom of establishment. According to the ECJ it constitutes a restriction on the freedom of establishment when a Member State ('host' State) refuses to recognise the legality of a company formed in accordance with the law of another Member State in which it has its registered office on the ground that the company has moved its centre of administration to the host State and when the effect of this refusal of recognition is that the foreign company cannot bring legal proceedings to defend its rights under a contract in the host State unless it is reincorporated under the law of that State. The ECJ has ruled that the freedom of establishment requires the recognition of foreign companies established in accordance with the law of another Member State. It is not the purpose of this report to go into the details of these disputes, but it is obvious that the potential impact of the ECJ rulings on national workers' participation principles is substantial. In Germany in particular the consequences of these rulings for board-level participation rules are hot topics of debate and a whole range of positions has been formulated concerning whether it is possible for EU Member States to develop national protective legislation in this regard. The full consequences have not been finally clarified.

After the ECJ cases *Centros*, *Überseering* and *Inspire Art* the debate started on whether a 'Delaware-like' scenario could develop in the EU.

The US state of Delaware is trying to attract (re)incorporations with advantageous corporate legislation. If more US states introduce such measures a race to the bottom might commence.

The fear is that the abovementioned ECJ cases will lead to an equivalent of the Delaware scenario in the EU. As seen in this report the first steps of this regulatory competition between Member States are already visible. In order to attract companies from other European countries the ultimate goal is to become the country with the most corporate benefits.

With regard to the debate on a Statute for a Private Company (SPE) and the ECJ cases *Überseering* and *Inspire Art* there is strong pressure in **Austria** to make the national private limited company (GmbH) more competitive by reducing the minimum capital required from 35,000 to 10,000 euros and to make it possible to have the registered seat and company headquarters in different locations, resulting in a change from the real seat principle to the incorporation principle. The interest groups behind the reform are the Chamber of Commerce, industry and business consultants. The Ministry of Justice, which is responsible for the reform, largely supports the measures,

however. Together with the trade unions the Chamber of Labour has opposed these proposals from the beginning, arguing that the reform has enormous negative consequences with regard to corporate taxation and creditor protection. The introduction of the incorporation principle could also undermine workers' participation. If a company founded in Austria transfers its headquarters to another country – for instance, neighbouring Hungary – the latter must accept Austrian company law, although it is not clear whether they would also have to accept Austrian codetermination regulations. The Ministry of Social Affairs, which is responsible for Austrian codetermination, has expressed some reservations about the planned reform. The reform is currently in abeyance and the relevant ministries are waiting for a decision from the government. With regard to the reform of the limited company (GmbH-Reform) its proponents' arguments are as follows:

- There is strong competition between legal systems in Europe. English limited companies are entering the Austrian market.
- The SPE will have minimum capital of less than 10,000 euros, endangering the existence of the GmbH.
- The high minimum capital of the GmbH is a disadvantage for Austrian companies in international competition.
- A change from the real seat principle to the incorporation principle would be cost-saving for companies that want to operate abroad.

Tax law in **Bulgaria** has been amended, including the implementation of a 10 per cent 'flat' tax for both companies and individuals. There have also been significant reductions in social contributions since 2000, especially with regard to pension funds (by more than 8 per cent), but also the unemployment insurance fund (more than 2 per cent). At the same time, contributions to the health insurance fund were increased by 2 per cent.

Recently, some new initiatives were taken. By means of amendments to the Commercial Code, the capital necessary for the registration of a new enterprise was reduced from 5,000 leva to 2 leva, again probably taking account of the new Statute on the European Private Company.

Cyprus has been and aims to continue to be a frontrunner with regard to 'improved national company law' regimes. Taxation is the main means to this end, but the English legal tradition is another. Therefore, moves to harmonise corporate taxation in the EU are viewed with concern in Cyprus. The legal industry is a key driver in maintaining the need for an 'improved company law environment'. For instance, they have supported the establishment of SEs, typically promoting it for tax purposes. The low national tax rate of 10 per cent and the existence of a large number of dual taxation treaties make Cyprus the best choice for the formation of an SE. Maintaining and improving the country's attractiveness (taxation regime and the stability of the financial and banking sector) for investors is a major issue.

In the **Czech Republic** competitiveness and attractiveness are cornerstones of the expected changes in corporate law.

The Commercial Code prescribes a minimum registered capital of CZK 200,000 (approximately 8,330 euros) for a limited company (s.r.o.). In order to simplify company law and facilitate business activity, the government has introduced a proposal to make it possible to establish a limited company with just 1 CZK registered capital. In addition, Czech tax law offer many opportunities for tax optimisation and corporate tax has been lowered several times. The current rate is 19 per cent. Further reform is pending. The proposal to establish a 'Single Collection Point' is intended to unify all the taxes and fees paid by companies (employers) into just one 'general' tax collected by one institution and distributed for health insurance, social security (including retirement insurance) and other purposes within the national budget.

With regard to workers' participation and mandatory workers' representation in supervisory boards the proposed new Corporate Law Act could have serious consequences. Currently, one-third of supervisory board members must be elected by employees in a public company (a.s.) that employs more than 50 employees (Art. 200 of the Commercial Code). Most of the biggest employers in the Czech Republic operate as public companies and therefore this form of workers' representation at board level is widespread. The new proposal labels this workers' right unnecessary and anti-competitive.

In **Denmark**, the employers' organisations (Confederation of Danish Industries and others) have expressed a wish for more flexibility, lower company taxation and so on. The discussion has been fairly traditional, expressing a wish for a more liberal agenda.

The major interest for the trade unions has been to protect the right to board-level representation. In Denmark, this right does not depend on the chosen management type.

The aim of the Danish debureaucratisation plan is to intensify efforts to reduce inconvenience and bureaucracy and to create better conditions for growth.

The debureaucratisation plan presents 33 selected initiatives, grouped into four areas:

- (i) Better conditions for start-ups and for running businesses.
- (ii) Easy access to regulatory authorities.
- (iii) Less and simplified reporting.
- (iv) Efficient and focused inspections.

In the new Danish Company Act the capital requirements for private limited companies were set at a minimum of DKK 80,000 (11,000 euros).

The main purposes of the **French** law for enterprise promotion ('Loi Dutreil', August 2003) were to:

- make business start-ups simple and quick and accessible to all;

- facilitate the transition between the status of employee and that of entrepreneur.
- finance economic initiative;
- give new companies a social underpinning;
- facilitate the development and transformation of companies.

Since the adoption of this law, it has been possible to establish a company in France like a SARL or an EURL (single person company with limited liability) for only 1 euro.

The law to promote small and medium-sized enterprises adopted in 2005 pursues the same objectives as the previous law on enterprise promotion and is aimed at supporting the growth of SMEs. Access to capital for SMEs is in line with the proposals contained in the 2010 Communication of the European Commission on the Single Market.

A law on financial security passed in 2003 is aimed at enhancing the moral dimension of corporate governance in a context of fair competition. It contains obligations of transparency regarding corporate governance information that the directors' of limited companies must respect. It was adopted after scandals such as Enron in the USA, Vivendi Universal in France and Parmalat in Italy.

The law adopted in 2005 on the safeguarding of companies allows the management to declare before a court that the company is in difficulties before it becomes insolvent. The idea is to facilitate financial recovery. These laws share the common objective of making French commercial law more attractive in terms of competitiveness.

The MoMiG reforms made it possible for **German** companies to locate their administrative headquarters independently of their registered domicile and thus to retain the German legal form of GmbH or AG when doing business abroad. This measure can be seen as a response to the influx of foreign legal forms, with the aim of making the GmbH and the AG more competitive and creating a level playing field for German legal forms. The idea is that German company groups can retain a German legal form for their foreign subsidiaries. German codetermination is not directly affected by this step because the Codetermination Act remains applicable to the employees in Germany. However, the trade unions opposed this step for political reasons. They argued that promoting the separation of the registered office and the headquarters is beneficial only if, at the same time, foreign legal forms (Ltd. and so on) are covered by German codetermination legislation when conducting business mainly in Germany and setting up their administrative headquarters in Germany.

The question of attractiveness to investors is a major issue in **Greece**. However, it is not related to any aspect of employee rights incorporated in company law. It must be noted that the 'national' simplification agenda is not related to the European one (for example, workers participations in the SE) because in private company law there has never been any such provision. See also paragraph 5.

Since 1 May 2010, the concept of a private limited liability company with share capital of LVL 1 has existed in the **Latvian** Commercial Code. The possibility of establishing private limited liability companies on this basis is open to private persons acting simultaneously as shareholders and board members, provided their number does not exceed five.

Whereas trade unions in **Luxemburg** take a critical view of the competitiveness issue put forward by the employers' organisations, the latter would opt for a less intricate and more attractive company law agenda – for example, with regard to the procedure for establishing companies – with the objective of enhancing competitiveness. The Chamber of Trade puts the focus on the liberalisation of establishment procedures for companies, stressing, for instance, that company establishment should be based solely on professional integrity.

Still pending in the **Netherlands** is the law on the so-called 'flex-BV' (BV means 'private limited company'). This bill follows the example of other EU countries, doing away with a lot of fairly strict legal provisions. Under the new law, shareholders have much more freedom to shape the structure of the company. Capital protection as a means of creditor protection is largely replaced by a system of liability in case of misuse of the company to the detriment of creditors. There is no longer a minimum capital requirement (18,000 euros at present). The law will also bring changes in the regulation of disputes, making it easier to solve conflicts between shareholders in private limited companies.

In November 2010, a new **Polish** legislative proposal was approved which is to provide an opportunity for private limited liability companies to register via an online registration system. This simplifies the registration procedure because electronic registration does not require a notary and will take place based on the official form delivered to the court. The court of registration must deliver a decision on registration within one day. Proof of the share capital contribution must be provided within seven days of registration. – The Commercial Code introduced a new legal form inspired by the German *Kommanditgesellschaft auf Aktien* (KGaA). The registration and liability of commercial companies are regulated by other legal acts.

The most frequently used forms of association in **Romania** are the limited liability company (SRL) and the joint stock company (SA). For the administration of the SA the shareholders may choose between two systems: the single-tier or the dual-tier system. The capital requirements for the SRL are approximately 50 euros. For an SA, however, it amounts to 25,000 euros. Because of their low initial capital requirement and fewer administrative requirements limited liability companies are the most popular vehicles among local and foreign investors for carrying out business activities in Romania.

The minimum legal capital requirements in **Spain** were not changed fundamentally in the New Companies Act, merely rounded off public companies (from 60,101.21 euros to 60,100 euros) and limited liability

companies (from 3,005.06 euros to 3,000 euros). However, the draft Sustainable Economy Bill is aimed at making the rules on creating companies more efficient and cheaper by speeding up the establishment procedure. Electronic registration procedures are to be introduced and notaries' and registrars' fees capped. New companies are exempt from the tax levied on company formation. The Bill also allows companies to publish their announcements and notices (for instance, related to general shareholder meetings) on their website or to announce them by electronic means.

With these new provisions the government is responding to the criticisms of Spanish regulations on business formation, which has regularly been considered one of the things discouraging and slowing down the establishment of companies and businesses, especially in comparison to other countries (Marcos, 2011, p. 45).

The minimum share capital for private limited companies in **Sweden** has been SEK 50,000 since April 2010 (previously it was SEK 100,000). The purpose of this reduction is to facilitate the creation of private companies. For public limited companies, however, it remains SEK 500,000. The Swedish Ministry of Justice considered establishing a new form of association for smaller private limited companies, but the investigator came to the conclusion that there is no need, as the recent changes in Swedish company law brought the rules into line with recent developments in other jurisdictions.

The explicit aim of the 2007 reform proposal in **Switzerland** was deregulation and more flexibility in order to maintain and improve Switzerland's attractiveness as a business location. As a result of the crisis, however, public indignation has been mobilised against exorbitant remuneration practices and financial speculation. This has contributed to modifications bringing in more transparency and better control mechanisms. A planned referendum is feared by the business community and sympathetic political parties as it could lead to stricter rules than in the EU and therefore 'damage Switzerland's position as an attractive location for the headquarters of transnational companies'.

The consultation process in the **UK**, which led up to the Companies Act 2006, was extensive, beginning with the Company Law Review in 1998. From the start, the government made it clear that competitiveness was important and that it wanted to maintain the UK's position as one of the most attractive places in the world to set up and run a business: 'We are determined to ensure that we have a framework of company law which is up-to-date, competitive and designed for the next century [this was published in 1998], a framework which facilitates enterprise and promotes transparency and fair dealing.'⁸

8. Foreword by then government minister Margaret Beckett to the initial company law reform document *Modern Law for a Competitive Economy*, March 1998.

6. Impact of legislative developments in the EU

Almost all observers stress that legislative developments in the EU have had the strongest influence on national debates. It is important to note, however, that the range of impact is fairly wide.

Company law in the 'old' Member States often goes back to the early stages of capitalism, with a subsequent history of constant modification and transnational interaction. EU developments were inspired by national changes and the founding fathers of the European Community were, of course, 'biased' by the national models they knew or wanted to 'defend'. In that respect we can observe mutual interaction and input. The UK is a special case: EU company rules are expected there to be helpful in freeing up the market in other Member States, which should encourage cross-border activity and make it more transparent. One clear effect has been that some national rules and traditions have come under fire.

The implementation of EU legislation has brought new elements which previously did not figure on national agendas. The introduction of a free choice between a single- or a dual-tier corporate governance system, for example, has clearly been instigated widely as a result of EU debates and deliberations.

The 'new' Member States all had to implement the *acquis communautaire* (often from scratch) and therefore had less influence to the developed model.⁹ Candidate countries had to deal with Chapter 5 (now Chapter 6) of the screening guide of the *acquis* dedicated to company law. The company law *acquis* includes rules on the formation, registration, merger and division of companies.

In the area of financial reporting, the *acquis* specifies rules for the presentation of annual and consolidated accounts, including simplified rules for small and medium-sized enterprises. The application of International Accounting Standards is mandatory for some public interest entities. In addition, the *acquis* specifies rules for the approval, professional integrity and independence of statutory audits (European Commission, 2005).

In **Austria**, a Takeover Act has been in force since 1999 in relation to listed Austrian companies. In line with international legislation and codes of practice,

9. An overview of the chapters of the *acquis* is provided in How does a country join the EU? <http://ec.europa.eu/enlargement>

the Act contains principles and rules for voluntary and mandatory bids. The Takeover Act Reform in 2006 incorporated the definition of a ‘controlling interest’. An interest is generally presumed to be controlling if 30 per cent of the voting stock of a target company is directly or indirectly held by an individual or a legal entity. The acquisition of voting rights not exceeding 30 per cent will in no case trigger a mandatory bid (‘safe harbour’). The minimum price for shares in the target company in a mandatory or a voluntary offer aimed at the acquisition of a controlling interest shall be the higher of (i) the average share price traded on the stock exchange during the six months immediately preceding the acquisition of the controlling interest or (ii) the highest price paid by the bidder during the past 12 months (‘minimum offer price’). Before the Takeover Act 2006, this minimum offer price could be reduced by 15 per cent. The Takeover Commission is an independent body responsible for supervising public bids.

The Austrian implementation of the Shareholder Rights Directive into national law 2009 has led to more information rights for shareholders: for example, the possibility to ask questions related to items on the agenda of the general meeting and to have them answered; new methods of communication, such as using modern technology to make information instantly accessible, creating the legal conditions for electronic participation in the general meeting.

With regard to the SPE, Austria is critical. This concerns the legal framework (minimum capital, registered seat and the cross-border element) and employee participation. With regard to national transposition of the Cross-Border Directive there is no experience with regard to the meaning and usefulness of the Directive.

In the **Danish** context European company law does not seem to have had a negative influence on employee board-level representation. In the debate (2008/2009) on a new company law in Denmark some critical remarks were expressed about this issue. However, the discussion on workers’ board-level representation was very limited. When the SPE proposal was discussed in the European Council, there was some public debate. The Danish (liberal) government and a majority in the Parliament supported the proposal. Since then, the debate has faded away.

The **French** company law No. 2008-649 of 3 July 2008 is aimed at the adaptation of French company law to EU law. The law provides for rules on the application in France of the Community Regulation on the European Company and the European Cooperative. Title II of this law concerns the application of the European Company Regulation: the law provides for the possibility of taking action against the Public Prosecutor (Procureur de la république) if he rejects a decision to transfer the seat of the enterprise in the public interest. Title III concerns the provisions on the European Cooperative. The text modifies Law No. 47-1775 of 10 September 1947 concerning, in particular, the conditions for the acquisition or transfer of legal personality. It is also aimed at modifying or adapting provisions of the financial and monetary code and of the rural code in case of European Cooperatives which engage in

credit-related activities or presenting an agricultural institution. Title IV brings greater precision to the law on national cooperatives, tending towards rationalisation.

With regard to rules related to the transposition into French law of the Cross-Border Merger Directive, the Consolidated Accounts of Companies (Accounting) Directive and the Corporate Governance Directive, Title V deals with the transposition of Directive 2006/46/CE modifying the fourth and seventh Accounting Directives and the Corporate Governance Directive. Title V introduces the principle according to which the report produced by the company chair must specify the code of corporate governance which the company chose to adopt or, if not, the practices of corporate governance adopted by the company as a supplement to the requirements provided by law. On the other hand, the code of commerce is amended in order to make possible trans-border mergers. The labour code is also modified to take into account the rules on workers' participation. Simplification measures also exist with regard to mergers at national level.

Finally, Title VI aims to extend measures related to national mergers and to governance to countries overseas. It authorises the government to take necessary measures for the transposition of Directive 2006/43/CE concerning the legal control of company accounts.

European Directives have had a significant impact on the reform agenda of **German** company law. The particular field of takeover law is just one example. The Takeover Act (WpÜG) came into affect in 2002, aimed at coordinating takeover procedures. Several other EU Directives have given rise to modifications.

One major demand from the employers' side linked to the EU agenda is the introduction of the SPE. The employers argue that the SPE is necessary if small and medium-sized companies are to be competitive in the EU. According to them, groups of companies in particular should have the chance to use the same legal system for foreign subsidiaries. Apart from minimum capital standards codetermination is the crucial point in this debate. The DGB strongly opposes the possibility of separating the SPE's registered office and administrative headquarters. In combination with a threshold for negotiations and standard rules this possibility would make it possible to freely bypass codetermination because, in general, the system of the country of domicile (for example, the UK) could apply even if the administrative headquarters and many employees were located in Germany. Furthermore, the DGB opposes high thresholds for codetermination, especially regarding the necessary percentage of employees affected (one-third in case of transfer of seat, half in case of setting up an SPE) triggering negotiations and the standard rules. Moreover, the trade unions are demanding rules not only on board-level codetermination but also on cross-border information and consultation, as in an SE works council. The unions fear that companies will use this legal form in order to avoid codetermination since it is even easier than in the case of an SE or in questionable constructions with foreign legal forms.

EU directives have set the agenda for changes in **Greece** since the mid-1980s. The 'national standpoint' may be described as a need to catch up with targets and objectives arising from the previous Lisbon Strategy that had not been met. With regard to current matters it is a pity that the policy stance has been shaped in terms of 'policy takers', not of 'policy makers'. To change this coordinated action would be needed on the part of union officials and MEPs.

Although **Italian** trade union organisations have demanded that national law be brought into line with EU directives, so far the government has not taken any measures to overcome the discrepancies between national and European law. This has not yet had any practical impact as no SEs have been set up under Italian law. Also, at the moment there is no indication that Italian companies are interested in opting for the SE form.

A recent law on the cross-border mergers of limited liability companies was not publicly debated in **Luxembourg**. EU legislation on company law was further consolidated in March 2009 with the implementation of the European cooperative society and the relevant law on workers' participation. As regards discussions on the introduction of a Statute for Private Companies (SPE), the Ministry of Medium-Sized Companies launched an assessment of the Statute in the context of the 2008 Small Business Act (Ministry Report, 2009).

In 2007, the Cross-Border Mergers Directive was implemented in company law in the **Netherlands**. One may doubt whether Paragraph 16 on workers' participation has been implemented correctly in Art. 2:333k of the Dutch Civil Code. It can be argued that in some cases the negotiation process can be skipped too easily. There is a chance that the Commission will start an infraction procedure against the Netherlands.

Division: Only in 1998 was division (as the counterpart of merger) introduced into Dutch company law. The legislator closely followed the sixth Directive on Company Law. Mergers (third Directive) were introduced in 1984.

European Company and European Cooperative Society: In 2005, the SE Statute and Directive were implemented; implementation of the SCE Statute and Directive took place in 2006. The Statutes have been implemented through separate implementation laws and the Directives in the Act on employees' Involvement (Wet rol werknemers).

Securities law has made progress over the past ten years, in large part due to European legislation. The main act in the Netherlands is the Act on Financial Supervision (Wet financieel toezicht, Wft), integrating many formerly separate laws and implementing several European directives. The Wft covers many different subjects, including:

- regulation of the financial sector;
- issuing of shares;
- information on the holding of significant portions of shares in listed companies;

- insider trading;
- public bids, including obligatory bids when the threshold of 30 per cent share ownership is crossed.

In **Spain**, the Directive on employee involvement in the SCE was transposed together with the legislation on employee involvement in the SE in 2006. The transposition of the Regulation on SCEs took until spring 2011, although no significant modifications were introduced. The SCE implementation has introduced the dual (two-tier) corporate governance system as a novelty in Spanish company law.

As already noted, the changes in **Swedish** company law are to large extent adaptations to EU law.

EU developments have not had a major influence on the debate on company law reform in the **UK**. There is no evidence that EU directives or ECJ decisions have played a key role in this reform, although a number of directives were implemented during the period when company law reform was being discussed and implemented. In general, the UK government has been sympathetic towards the liberalising approach of the European Commission, but more because of the impact it will have in other EU states than because of its impact in the UK.

European company law is not putting national provisions on employee involvement under pressure in the UK. There are no national provisions on employee board-level participation, and other forms of involvement, information, consultation and negotiation are not directly linked to company law.

There is very little interest in the SPE. A government consultation on the issue in 2008 attracted only 14 responses. One reason for the lack of interest, as the government pointed out in its response to the consultation, is that the SPE form is unlikely to be a significantly more attractive form than the UK private company form, as the costs of setting up a private company in the UK are already low.

The accession to the EU and post-accession adaptation of the requirements of the common EU market played an important role in the major changes in **Bulgarian** company law. The EU *acquis communautaire* regarding company law required many changes, including with regard to copyright, accounting rules, legislation on contractual obligations and also the provisions on multinational companies, group of companies and European SEs. Because of the abovementioned EU requirements many amendments were made, including to: the Commercial Code; the Law on Cooperatives; the Law on contractual Obligations; and the Law on Patents. Many amendments were also made in tax law, insurance law and labour law.

According to BIA, the European private company should be established either by one or by more than one shareholder and their relations should be established according to an agreement among them. Also some common EU

rules on taxation are necessary. The BIA supports the establishment of common EU standards on workers' involvement in the European Private Company.

There are no officially expressed opinions concerning negative aspects of the transposition and implementation of European company law. In fact, European company law has introduced a number of new features into Bulgarian company and labour law, especially provisions on participation in supervisory and management boards which could be used for European Companies and European Cooperative Societies registered in Bulgaria, as national law does not have any provisions on participation. From this perspective one could say that the existence of the European company law has not put national provisions on employee involvement under pressure.

To be blunt, EU directives have been the main driver in **Cyprus** for changes in company law since 2003. Even before joining in 2004 Cyprus had had in operation an international business environment functioning as a favourable corporate tax regime for more than 30 years. Any major changes in company law have been related to harmonisation with EU directives.

In the **Czech Republic**, the adaptation of national law to EU law may be regarded as the main driver for company law changes implemented in the past few years.

As already mentioned, new changes are being prepared and EU proposals discussed at the EU level are among the key sources of inspiration of Czech legislators.

For example, the proposal to introduce the '1 CZK company' is explained and motivated in the explanatory report of the new Corporate Law Act on the basis of the pattern laid down by the SPE proposal. The SE does not seem to be the subject of a wider discussion, despite the enormous number of SEs founded in the Czech Republic as shelf companies.

In the **Maltese** report it is concluded that a combination of criteria played an important role in the various amendments to Company Law. The need to comply with EU Directives, coupled with a simplification agenda on the part of the authorities and efforts to ensure Malta's competitiveness in the financial services sector, have all contributed to the various changes taking place over the past decade.

Since 2004, all amendments to the Code of Commercial Companies in **Poland** were based on EU Directives. These Directives concerned the simplification of company law (lower capital requirements and single access point for registration), increases in competitiveness (elimination of formalities concerning single-person companies) and, recently, the protection of minority shareholders.

Certain ECJ cases have had an impact on Polish company law, especially those that could make the Polish model more attractive for national undertakings

and foreign investors. The ECJ cases concerned are those that guarantee the mobility of companies, the introduction of the choice of corporate governance structure (one- and two-tier) and the reform of corporate capital structure.

In Poland, there is little interest in SEs because of the high initial share capital needed in comparison with national public limited liability companies (most Polish companies are SMEs), the complex coexistence of national and European rules and more stringent rules on employee involvement.

In order to integrate the EU *acquis* the **Romanian** Company Law 31/1990 was amended in 2006. The amendments did not lead to substantial changes but were intended to provide investors with clearer guidelines and to get in line with the single market rules. It was meant to clarify directors' rights and duties, to increase shareholder protection and to harmonise provisions related to mergers and acquisitions

With a view to implementing the Regulation and Directive on SEs, a special Law on the SE was adopted in **Latvia** in 2005. The Law on the SE copies some of the provisions of the EU SE Regulation and refers a number of issues – for example, governance of the SE – to the Commercial Code.

European company law did not really put national provisions on employee involvement under pressure because there are few such provisions.

Since **Slovakia** joined the EU on 1 May 2004, the requirement of mandatory registration of foreign natural persons residing in EU or OECD member states in the Commercial Register as a precondition for undertaking business in Slovakia has been abolished.

Many changes in Slovak company law emerged from the requirements of EU legislation. The amendment of the Commercial Code, approved in summer 2005, brought many small but very useful changes. First, it was laid down that, besides the managing director, the statutory body of a foreign legal entity or branch of a foreign legal entity registered in the Commercial Register would also be entitled to act on behalf of such foreign entity. Furthermore, the amendment to the Commercial Code introduced changes regarding the calculation of default interest.

New legislation enables the cross-border merger of one or more Slovak companies with a foreign company or with several foreign companies located on the territory of another member state.

It is generally recognised that the most important factor in **Norway** with regard to legislative changes has probably been the implementation of various EU directives.

Company law, in theory, does not figure on the list of approximately 100 bilateral agreements that **Switzerland** and the EU have signed. However, the 2007 reform proposal can be seen as a (partial) answer to legislative

developments in the EU. The proposal foresees the anticipation and adoption of the basic elements of several directives (protection of rights of shareholders, disclosure, the Capital Directive and annual accounts). Possible differences with regard to EU law largely concern flexible solutions that go beyond EU rules. Implementation of the SE rules is not envisaged.

7. Final remarks

In some Member States trade unions and employers' federations obviously disagree about the introduction of more simplified national company legislation and the instigation of more competition between Member States.

In other Member States, however, trade unions are not interested in issues regarding company law, focusing instead on working conditions and labour law or similar topics.

Besides this division between Member States, there is also a major difference between Member States where a heated public debate is taking place (for example, Poland) and Member States where there is no such debate (the Netherlands), besides countries where the social partners agree with the government on certain topics (Norway). To provide an impression of the differences mentioned we have given some examples in the previous parts of the report.

One question we still have to deal with concerns whether there is a serious risk of regime-shopping. Or is this merely an (unintended) side effect of the legislative process?

The position of the European Commission in this regard is not of much help. For instance, the Czech Republic is leading the way in SE formation, with more SEs on its commercial register than any other EU country and businessmen familiar with the law on the sale of shelf companies have not hesitated to provide interested buyers with such ready-made SEs. The question, of course, should not be what the main advantages are for a company to buy a shelf SE, but rather what the Commission intends to do to combat this violation of the spirit of the SE legislation. The Commission's reasoning, which we encountered as we developed our criticisms of the production of shelf SEs – that is, SEs with no activities or employees, usually set up by specialist company providers for the purpose of selling them on to interested buyers – is very simple: the creation of shelf SEs by specialist providers in certain countries can be explained by the fact that making shelf companies available for sale is common there. Besides, according to the European Commission services, it is perfectly legal to create empty national limited companies.

A well-governed company should be accountable and transparent to its employees, its shareholders and other stakeholders.

If competitiveness and attractiveness become the key messages of the agenda for European company lawmaking, it risks promoting a beggar-thy-neighbour policy in the Member States. It will guide Member States towards reforms of their national legislation which promote rent-seeking at other countries' expense. Domestic company law reform could then easily lead to a patchy process of transnational legal pluralism. The outcome is predictable: less specific protection of various stakeholders (minority shareholders, creditors and so on), dilution of workers' participation, fewer requirements with regard to registration, no capital requirements and more and more exemptions from the legislation in force. The EU Better Regulation policy may not intended to be – and must not be allowed to become – an instrument for putting national regulations in competition with each other. Key areas for possible reform and simplification have to be tackled without jeopardising essential guarantees for transparency.

Analyses that label workers rights as burdensome and press for administrative cost reductions to enable companies to achieve the same production level with less manpower are not of much help. First, they fail to see that these rights are fundamental rights, enshrined in the various Treaties. Second, they are already biased in their wording: which stakeholder's perspective is used to calculate social costs? Third, the narrow focus on labour costs of several studies in this area do not do justice to other costs that are seen as 'normal' in an organisation – for instance, what about the use of external business consultants (or are these just providing services?)

The crisis has demonstrated the limits of some corporate governance practices and has forced a rethink with regard to the finality of this governance in a context of corporate social responsibility. The question of whose interests a business corporation is intended to serve should be at the heart of EU policy in this area. Otherwise, it is time to analyse the burdensome effects of capital. Cost-effective and efficient competition cannot do without fairness and social justice.

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Annex 1: List of topics

Topic	Specific questions
Change in national company law?	<ul style="list-style-type: none"> – Have there been any major changes in company law in your country in the past decade? If yes, please summarise briefly what the main changes were. – Did any of the following factors play an important role in the revision? If so, provide a brief explanation (see below for more detailed questions) <ol style="list-style-type: none"> 1. Simplification of company law 2. Making national corporate law more competitive 3. EU directives and ECJ decisions
Simplification agenda	<ul style="list-style-type: none"> – Is there any evidence of a 'simplification agenda' for preparing changes in national company law? – Which interest groups use this agenda to carry forward arguments for changes? – Which positions take trade unions – in contrast to employers?
Making national corporate law competitive	<ul style="list-style-type: none"> – Is there a pressing interest from the national standpoint to urge the promotion of new bills in the field of EU company law? In particular, is this true for demanding for a Statute for private companies (SPE)? – Do you notice a debate or expression of experiences concerning the meaning and usefulness of being provided with the national transposition of the cross-border directive since Dec 2009? If yes, please describe. – What is the role of the ECJ cases on the freedom of settlement including the conclusions regarding the location of the company seat in the national debate on the necessity of the improvement of national company law? – Do have the trade unions a position about the issue? If yes, please explain. – Which role plays legal industries to direct the discussion in one or another direction?
Impacts from EU company law and anticipating issues from the EU debate	<ul style="list-style-type: none"> – Adaptation according to requirements of cross-border operating companies: Which arguments you hear in this regard aiming to anticipate or to follow considerations from discussions at EU level? – To which extend you see any consideration in your country of the main purpose of the EU Commission to making the SE more attractive for companies? – Is the fact of the enormous amount of shelf SEs an issue of public or business debate in your country? Do you see dynamics to address this as a problem to the EU Commission? – Do you see a notable resistance in your country because looking ahead building of a negative image of the country regarding attractiveness for investors? If yes, please specify the structure of such a debate. – Does the existence of European company law put national provisions on employee involvement under pressure? If yes, please describe the positions and suggestions for changes? In this case, how does the resistance of employees and trade unions against potential undermining or watering down their achieved rights looks like?

Annex 2: EU and national company law in the Ernst & Young report

The Ernst & Young report “Study on the operation and the impacts of the Statute for a European Company” assesses the first five years of SE Regulation. In the intra Member States analysis the SE is compared with the national public limited-liability form. One of the main conclusions is that provisions of the Regulation make the SE in certain areas more attractive than the national public limited-liability form.

Compulsory provisions of the SE Regulation provide for instance the possibility to move the registered office freely throughout the EU/EEA. In several countries it is not possible to transfer the national public limited-liability companies (such as Austria, Bulgaria, Denmark, Finland, Germany, Greece, Hungary, Latvia, Norway, Poland, Portugal, Slovakia and United Kingdom). In other Member States it is possible (Czech Republic, Estonia, Netherlands, Romania, Spain, Sweden and Slovenia) and in others laxer rules for the SE apply (Belgium, Cyprus, France, Italy and Luxembourg). The formation of a merger or a holding is in several countries more stringent¹ under the SE rules, while in others the SE rules are less stringent² than the national PLC rules. The protection of various stakeholders (such as public authorities, minority shareholders, holders of securities and bonds, and creditors of the company) has often been strengthening in countries with a more stringent SE regime. Certain introduced measures are the ability for minority shareholders to be bought out of their shares and the possibility to block a merger if the public prosecutor has objections.

Other differences include the possibility to hold the first general shareholder’s meeting of an SE at any time in the 18 months following incorporation management in Belgium, Bulgaria, Czech Republic, Hungary and the Netherlands. In some countries more favourable rules are provided for the SE in case of a vacancy of board members. A member of the supervisory board may be appointed to that vacant position between six months or one year.³ Another flexible option for the organisation and management of SEs is that there is no maximum or minimum number of members in the board of directors or the supervisory board in certain countries.⁴ Such a requirement exists for national public limited-liability companies (for example: at least three members of the board of directors / at least one member of the board of directors in the case of a sole shareholder and at least three supervisory board members). However, in the Netherlands more stringent requirements for the supervisory board for SEs exists as a minimum of three members is required;

1. Austria, Belgium, Bulgaria, Denmark, Greece, France, Poland, Portugal, Latvia, Netherlands, Spain, Slovenia.

2. Cyprus, Germany, Netherlands.

3. Cyprus, Czech Republic, Estonia, Hungary, Norway and Slovakia

4. Czech Republic, Italy, Latvia and Luxembourg

a requirement that does not exist for national public limited-liability companies.

A final difference is the possibility for an SE to adopt both corporate governance structures (one- or two-tier). Certain countries only prescribe one corporate governance structure for their national public limited-liability companies.

Several Member States have taken specific measures when the Regulation was implemented. These specific measures are mentioned below.

In **Belgium** it is possible for the Minister of the Economy to oppose the transfer of the registered office of an SE. However, some provisions regarding the general meeting of shareholders are more flexible for an SE. These provisions are as follows:

- The possibility for one or more shareholders holding together 10 percent of the subscribed capital to request that the SE convenes a general meeting and to place items on the agenda. The percentage is higher (20 percent) for national public limited-liability companies.
- The SE Regulation grants a casting vote to the chair of the corporate bodies of an SE. This rule does not exist with regard to national public limited-liability companies (although it can be included in the association articles).
- A simple majority may be enough, provided the conditions laid down by law are fulfilled, for the amendment of the articles of association of an SE, whereas the statutory quorum applicable to national public limited-liability companies is more binding and stringent (qualified majority of 3/4 or 4/5).

In **Cyprus** the national competent authorities have the possibility to oppose the formation of an SE by merger on grounds of public interest.

A significant difference in the **Czech Republic** between an SE and the national legal form is the minimum registered capital that is, respectively €120,000 and € 80,000.

The provisions for the SE formation in **France** are similar to those of the PLC. A difference between the two forms is that, in the case of a PLC, a unanimous decision of the shareholders is needed regarding the transfer of registered office. In an SE this can be decided via a two-thirds majority of the votes cast at an extraordinary general meeting of shareholders. However, the creditors and the public prosecutor may lodge objections to the transfer.

In **Germany** more flexible rules exist in SEs for more individual information rights on the part of the members of the supervisory board.

Greece stakeholders obtained more rights with regard to their ability to oppose the transfer of the SE's registered office. The company must purchase the shares of the involved shareholders, if there is sufficient reason to do so. Moreover, the SE must prove that the interests of creditors and holders of other

rights are sufficiently protected. Nonetheless, SE conditions to transfer the seat are more favourable than those with regard to the national PLC. If a national PLC wants to transfer the seat, the company has to be liquidated first. The government has encouraged the creation of SEs or investments from foreign companies with specific tax measures and benefits.

If a **Hungarian** PLC wants to transfer the seat outside the country the PLC must first be wound up, which does not apply to a Hungarian SE. Nevertheless, minority shareholders have extended protection. Majority shareholders see the incorporation of the SE in Hungary as more complex and burdensome than that of a national PLC.

In **Italy** the only special deviation can be found in the possibility for one or more shareholders together holding 10 per cent of the subscribed capital to request that one or more additional items be put on the agenda of any general meetings of shareholders.

In **Latvia** one specific provision for the SE is that under the one-tier system the management organ must be elected by the shareholders' meeting. Another divergence between the national PLC and the SE is that the legislator has not implemented the option concerning the convening rights for minority shareholders holding less than 10 per cent of an SE's subscribed capital, while the rules applicable to public limited-liability companies allow shareholders together representing 5 per cent of the share capital to request the convening of a general meeting.

The conditions pertaining to the formation of an SE in the **Netherlands** are in part more flexible but in part more stringent than with regard to the national PLC. The SE rules for the formation of a common holding company are more stringent, because of the higher minimum capital requirements and the necessary approval of shareholders. Extra protection rules are being implemented for various stakeholders in case of an SE transfer of seat outside the Netherlands. Favourable rules for an SE include the possibility of amending the articles of SE association by an absolute majority of the votes cast with at least half of an SE's subscribed capital represented.

The higher minimum share capital of € 120,000 required to establish an SE is the only difference between the **Romanian** PLC and SE.

The **Swedish** legislator has extended the protection of various stakeholders (such as public authorities, creditors and holders of other rights) in the case of a cross-border transfer of seat. Besides that, appropriate measures have been adopted related to rules with regard to the board of directors, and new rules on supervision have been adopted. The two-tier corporate governance structure is available only for the SE.

It is not possible for a PLC in the **United Kingdom** to transfer the registered office to another Member State without winding up the UK operations and re-registering in another Member State, whereas the SE rules provide this

opportunity. However, if an SE transfers its seat various provisions apply that ensure the protection of stakeholders (for example, creditors and shareholders). The Secretary of State may also oppose any transfer in order to protect the public interest. Decisions to oppose a transfer are subject to judicial review.

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