

## Facilitating Transnational Business within the EEC: Progress to Date

Antonio Marchini-Camia

Follow this and additional works at: <http://scholarship.law.cornell.edu/cilj>

 Part of the [Law Commons](#)

---

### Recommended Citation

Marchini-Camia, Antonio (1970) "Facilitating Transnational Business within the EEC: Progress to Date," *Cornell International Law Journal*: Vol. 3: Iss. 1, Article 2.

Available at: <http://scholarship.law.cornell.edu/cilj/vol3/iss1/2>

This Article is brought to you for free and open access by Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell International Law Journal by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact [jmp8@cornell.edu](mailto:jmp8@cornell.edu).

# Facilitating Transnational Business Within The EEC: Progress To Date<sup>†</sup>

ANTONIO MARCHINI-CAMIA\*

## I. INTRODUCTION

Forty-seven years ago, on October 28, 1922, Mussolini marched on Rome and set up a fascist dictatorship in my country. A few years later Germany took the same political step. Nationalism, long the plague of Europe, reached a special degree of intensity and caused the European States to engage in a savage war, the second in just over twenty years.

Why this reference to past events? First, it is some indication of the progress that has been made: less than a quarter of a century after a bitter civil war, Europe now seems well on the road to unification. Second, long established nationalism explains why there is an economic and legislative structure in Europe with compartments which follow the political frontiers of the individual states and why this structure is so deep-rooted. It also explains why Europeans tend to identify the public interest with the interest of the state to which they belong much more than with that of Europe.

This introduction reveals a notable difference between the origins of European and American unification, and therefore limits the scope for comparison. In the United States, the establishment of a single market among the states coincided with the beginnings of industrial development, and the economic and legislative framework has naturally adjusted itself to the structure of the market. It also coincided with political integration. Thus, attachment to one's home state has never been as deep-rooted in Americans as in Europeans. In Europe, nationalism at the

---

<sup>†</sup>Adapted from a lecture delivered at The Cornell Law School on October 28, 1969.

\*Legal Adviser to the European Communities Commission; Visiting Scholar at The Harvard Law School Sponsored by a Harkness Fellowship (1969-70). The views he expresses are personal and do not necessarily represent those of the European Communities Commission.

state level has been—and unfortunately often still is—a considerable obstacle to establishing European “nationality.”

Two other points should be kept in mind before considering the specific topic of this paper. First, in Europe (by Europe I mean the six states of the European Economic Community, and when I shall mention America I mean only the United States) company law was created with the basic purpose of control; in America it was created—or rather it soon developed—to favor free operation of companies.

The second point is that, whereas the method of unification adopted by Europe is the same as that which has been used by the United States, namely the granting of specified powers to a supra-state authority while leaving residuary power to the states, a simple look at the United States Constitution and at the Rome Treaty shows that the amount of power which, in America, has been granted to the federal government is much greater than that given to the institutions of the European Communities.

## II. ENCOURAGING THE TRANSNATIONAL OR “EUROPEAN” COMPANIES

With these preliminaries in mind, let us examine the specific subject of this paper. The legal problems arising in enabling companies—or, more generally, firms—to operate on a multi-state scale are essentially three. The first is that of allowing companies of any state freedom to operate and move outside the state’s boundaries without discrimination as to country of origin. The second is that of encouraging firms to achieve a scale of operations in line with the size of the market. The third is a question of regulating their activities, particularly their organization and functioning, by means of rules which are as similar from one country to another as possible.

Let us consider these closely interconnected problems separately.

### A. FOREIGN OPERATIONS WITHOUT DISCRIMINATION

For a company to be able to take advantage of a broad interstate market, the first necessity is that it should not be discriminated against by reason of its state of origin. In other words, it should be able to choose the state in which it wishes to be incorporated. It should be recognized by states other than that of incorporation. It should be free to pursue any commercial activity in a state in which it is not established, that is, “free to supply services” in EEC terminology. It should be able to transfer headquarters to a state other than that in which the company is incorporated while maintaining the company’s identity, and be able to set

up in such a state an agency, subsidiary, or branch.<sup>1</sup> This is the meaning of "freedom of establishment" in EEC terminology. It is also necessary that the conflict of laws rule determining what state's law governs the legal capacity and the internal management of foreign companies be the same for all states.<sup>2</sup>

In the United States, where, as in Europe, company law has remained essentially the law of the State, the problem has been resolved mainly by three means: the Privileges and Immunities Clause of the United States Constitution, the doctrine of comity derived from common law, and the Interstate Commerce Clause of the Constitution.

The clause of the Constitution by which "the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States,"<sup>3</sup> guarantees United States citizens equal treatment in all the states of the Union and thus enables them to form companies in whichever state they wish, without discrimination as to origin.

Through the doctrine of comity, in the absence of any prohibitory law or rule of public policy, foreign corporations are entitled to enter a state and make any contract or transact any business therein falling within the scope of their lawful corporate powers, which are lawful for domestic corporations of like kind and character. Since the states have practically never denied foreign corporations recognition and the right to transact business or to create agencies or branches, the doctrine of comity has provided the American companies with freedom to supply services and freedom of establishment. Meanwhile their legal capacity and internal affairs remain subject to the law of the incorporating state.

By virtue of the power reserved to Congress by the Interstate Commerce Clause,<sup>4</sup> the essentially interstate activities of a foreign corporation which engages in interstate trade cannot be unduly restricted by the individual states with which it comes in contact.<sup>5</sup> Such an "inter-

---

1. The distinction between "agency," "branch" and "subsidiary" as adopted by the Treaty of Rome (art. 52 and art. 54 (3) (f)) depends on the different degree of autonomy of each. A subsidiary depends economically on the parent company, but has legal autonomy. In contrast, the lack of legal autonomy characterizes both the agency and the branch. The latter enjoys, however, a higher degree of factual autonomy than the former although the border line between agency and branch is far from settled. Because of the subsidiary's legal autonomy, it corresponds to the creation of a new company in another state.

2. The latter aspect could be considered part of the second problem referred to, that of applying similar rules to companies. It is dealt with it here because in practice it is closely related to freedom of establishment.

3. U.S. Const. art. IV, § 2.

4. U.S. Const. art. I, § 8, cl. 3.

5. 17 W. FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 8422 (rev. vol. 1960).

state" corporation's internal affairs are regulated by the state of incorporation. Such is not the practice in the law of the EEC Member States, all of which expressly regulate and limit in various ways the recognition, activity, and establishment of foreign companies.

Furthermore, in Europe the need is not to prevent the Member States from placing obstacles in the way of spontaneously growing interstate commerce, but to ensure that commerce which has long been confined within state boundaries, and has acquired the bad habit of conforming to the situation, may overcome both these barriers. It is therefore only to be expected that the arrangements chosen in Europe should be, as a rule, different from those in the United States.

What are these arrangements? As we have seen, offering the citizens of each state the possibility of forming a company in another state is a matter of the freedom of citizens and not of companies. As in United States law, which solves this problem by means of the Privileges and Immunities Clause in its Constitution, the EEC Treaty specifies in Article 52 that the freedom of establishment of persons provided by the Treaty includes the right to set up companies on an equal basis with the citizens of the state of incorporation.

For companies already incorporated the primary concern was that they should be recognized by states other than the state of incorporation. Without this recognition, a company cannot transact business, as such, in a foreign state and *a fortiori* cannot set up there. Such recognition is guaranteed by a convention between the six Member States of the Community<sup>6</sup> based on Article 220 and signed in Brussels on February 29, 1968.<sup>7</sup>

---

6. The usefulness of such a convention exists even if we admit that recognition of companies was implied in arts. 58 and 66 of the EEC Treaty, notwithstanding the fact that such recognition was already applied by the Member State of the Community. Recognition has been the object of an international convention among a larger number of states sponsored by The Hague Conference on Private International Law and signed in the Hague on June 1, 1956.

It is well settled that arts. 58 and 66 of the EEC Treaty, by analogizing companies to natural persons for the purpose of applying the provisions on the right of establishment and on free supply of services imply, as a necessary consequence, that such companies are, or must be, recognized. But these articles could not be sufficient, since they indicate the scope of application of recognition, but do not set out the legal details, that is, conditions and effects of recognition and scope of public order exceptions. Recognition is far from being the same in the law of all Member States. Thus, if a state had submitted recognition of foreign companies to the same conditions applied to recognition of domestic companies, this would have not been a violation of the principle of non-discrimination which characterizes the right of establishment and supply of services as provided by the EEC Treaty.

It is also well settled that recognition as applied by the Member States in the absence of an applicable convention is both precarious and unsatisfactory. It is precarious because it is based on bilateral conventions which are incomplete and contain denunciation clauses and on internal laws might be unilaterally modified or restrictively construed.

While recognition is a necessary condition for transacting business in a foreign state, it may not be sufficient to enable a company to operate on an equal footing with the companies of that state. For this reason

---

The present rules of recognition are also unsatisfactory because they usually do not include within their scope the legal persons under public law (which are instead covered by art. 58 of the Treaty) and do not provide for a uniform choice of laws rule, and because they attach different consequences to divergence between seat of incorporation and actual seat, and finally because they allow the scope of public order to be unilaterally assessed.

It is not possible to rely on the Hague convention because it does not apply to the legal persons under public law which, as we saw, are included in the scope of art. 58 of the EEC Treaty. While adopting in principle the choice of laws rule of the state of incorporation, it allows each state whose laws contain the *siège réel* rule not to recognize companies incorporated by other states but having their *siège réel* in its territory or in the territory of another state adopting the same choice of laws rule. This power to refuse recognition would be incompatible with the right of establishment as provided by art. 58 of the EEC Treaty.

7. The convention, which must be ratified by all of the six contracting states in order to become effective, contains the following features:

The *scope of application* includes companies under civil or commercial law, even if without legal personality, and legal persons, even if not companies. However, the latter must be engaged in an economic activity normally conducted for compensation. This condition has appeared to be preferable to the one laid down by art. 58 of the EEC Treaty (covering non-profit-making organizations) since it includes entities which do not realize benefits and redistribute them among members. It is also preferable to a simple requirement of exercising economic activity since this would not have clearly included non-profit economic activities such as a charity institution providing lodgings.

With regard to the *conditions for recognition*, it should be noted that the companies or legal persons have to be constituted in conformity with the law of a contracting state. (This condition corresponds to the first of the two conditions laid down in art. 58.) Moreover, they must have their registration office in the territories to which the convention applies. (This second condition corresponds to the first of the 3 alternatives included in the second condition required by art. 58; the two other alternatives indicated by that article — to be managed or to have the main establishment in a contracting state — have been dropped as practically useless since according to the laws of the six member states, whenever a company or legal person is constituted in one of them, its registered office must be in that same state.) However, every state is allowed to declare that it will apply instead the conflict of laws rule of actual seat (*siège réel*), but only as to companies or legal persons which have their actual seat in its territory. Only imperative state law provisions come under this exception. The supplementary provisions cannot be applied unless the company's charter does not provide otherwise or unless the company has not actually exercised its activity for a reasonable time in the chartering state. The actual seat is defined as the place where the central administration of the company or of the legal person is located (in accordance with the Hague Convention and the internal law of those states which adopt such rule of conflict.)

Each contracting state, moreover, can refuse to recognize companies or legal persons the actual seat of which is located outside the territories to which the convention applies if they do not have a genuine link with the economy of one of such territories. This rule follows with the provisions of the 1961 general programs for the abolition of restrictions on freedom of establishment and of freedom to provide services (1 CCH COMM. MKT. REP. ¶ 1355 *et seq.* and ¶ 1545 *et seq.*). The beneficiaries of these freedoms do not include those companies which have only their registered office in the Community and whose activities do not show an effective and continuous link with the economy of a Member State.

the drafters of the Treaty specified in Article 66 (in connection with Articles 59 *et seq.*) that companies established in a Member State enjoy the right to pursue, in other Community States, activities of an industrial and commercial character under the same conditions as are imposed by the host state on its own nationals.

Likewise, recognition is not sufficient to guarantee freedom of establishment. The Treaty (Article 58 read with Articles 52 *et seq.*) therefore places on the Member States the obligation of permitting the establishment of companies incorporated in other Member States, without discrimination *vis-a-vis* local companies.<sup>8</sup>

Because the domestic law of the Member State nearly always requires that foreign companies intending to transfer their registered offices to another Member State be dissolved and incorporated once again under the law of the host state, a further step was needed to facilitate establishment by way of transferring the company's registered office to another Member State. The principle of non-discrimination between domestic and foreign companies — the basic principle of freedom of establishment — does not in itself overrule the re-incorporation requirement.

It was necessary, therefore, to guarantee the maintenance of the legal personality of a company transferring its headquarters from one Member State to another. Article 220, which, as we have seen, provides for a convention on the recognition of companies, deals with this problem. It

---

In regard to the *effects of recognition*, it should be noted that the companies or legal persons shall have such capacities as are accorded to them by the incorporating state with two possible exceptions. First, states may apply the imperative and, under certain conditions, also the supplementary provisions of their law to companies or legal persons having their actual seat in their territory. Second, each contracting state can withhold from companies or legal persons such powers that it does not accord to companies or legal persons of similar kind subject to its own law. (It cannot, however, deny a company the capacities to have rights and obligations, to enter into contracts or engage in other legal acts, and to sue and be sued.)

Finally, it is worthy of note that the traditional principle by which a state may refrain from recognition in order to protect its public order has been limited both in its scope and its content. The public order rule can apply only to companies or legal persons violating such public order through their purpose, objective, or activity actually exercised, not to those violating it through the rules governing their structure and functioning. Moreover, the public order referred to cannot be other than that within the meaning of private international law and any rule or principle violating the EEC Treaty cannot be deemed to be a part of public order.

The complete text of the convention appears in 2 CCH COMM. MKT. REP. ¶ 6083 *et seq.*

8. The technique used by the Treaty for a progressive realization of free establishment and free supply of services consists of forbidding the Member States from introducing new restrictions (arts. 53 and 62) and of providing for gradual abolition of the existing ones (arts. 54 and 63) while leaving some room for exception (arts. 55 and 56). The conditions and pace of such abolition have been fixed by General Programmes adopted by the Council of Ministers on December 18, 1961. See 1 CCH COMM. MKT. REP. ¶ 1335 *et seq.* and ¶ 1545 *et seq.*

provides for a further convention to permit companies to be transferred from one Member State to another without having to terminate and then resume their legal personality.<sup>9</sup>

There remains the problem of uniformly deciding in all the Member States what will be the law governing the internal affairs of companies operating or established in a state other than the state of incorporation. Law in the Community countries, unlike United States law, normally gives the criterion of the actual seat (*siège réel*) or "nerve center" of the business precedence over the place of incorporation. There is a growing tendency, however, to abandon this rule and adopt that of place of incorporation, even where the registered office and *siège réel* are not the same.<sup>10</sup>

We may conclude this first point by saying that as a result of the EEC Treaty, it is or soon<sup>11</sup> will be possible to set up companies in the

The techniques of immediate standstill, progressive abolition and possible exceptions are often used by the Treaty (*see* art. 12 *et seq.* concerning custom duties, art. 31 *et seq.* concerning quantitative restrictions to trade, art. 37 in regard to state monopolies, and art. 67 *et seq.* concerning movement of capital).

9. This convention has not yet been prepared.

10. First, by law (as of July 25, 1959) the Netherlands has replaced the doctrine of the *siège réel* with that of the place of incorporation (or registered office).

Second, as already mentioned (*see* note 7 *supra*), on recognition of companies the EEC convention has fixed the principle that the existence and the legal capacity of a company depend on the law of the incorporating state. It is true that this convention refers only to the existence and capacity of the company, without regard to the exercise of its rights. It grants to each state power to apply its own law to the activities of companies having their *siège réel* in its territory. But such power is limited to the imperative rules of the state. Supplementary rules normally cannot be applied. Above all, since the private international law in Europe has been traditionally regulated by similar standards, it is quite probable that the establishment of a single rule applying the registered office criterion to the former areas will soon extend to the latter.

Finally, the replacement of the *siège réel* rule by the place of incorporation rule will be made easier by the fact that in Europe the cases where these two places are different are very rare. This trend is being encouraged by the progressive harmonization of the company laws of the Community states.

11. In spite of the amount of work done by the EEC, much remains to be done to achieve free supply of services and free establishment. Therefore, these freedoms were not completely realized by December 31, 1969, the end of the transitional period. What will be the legal consequences of this? The question does not concern only establishment and supply of services; it must be answered by interpreting art. 8(7) of the Treaty.

First, the disregard of the deadline provided by the Treaty does not necessarily imply a prolongation of the transitional period; art. 8(7) does not fix *conditions* to be fulfilled before the ending of such a period, but rather indicates the accompanying *consequences*. This seems to stem from the fact that art. 8(7) follows a provision fixing the maximum duration of the transitional period (art. 8(6)) and cannot be considered as providing criteria to justify its prolongation.

Secondly, it is difficult to believe that art. 8(7) could terminate the transitional period in relation to certain matters and not to others, since it refers expressly to "all the rules" and "all the measures."

Thirdly, it seems wrong to interpret art. 8(7) as implying that, after the end of the



Member State of one's choice. A company already incorporated will be able to enjoy the right

(i) to have its existence and capacity recognized by all the Member States (and therefore to conclude contracts, acquire property, sue or be sued, etc., in all the states),

(ii) to conduct, even in Member States other than that in which it is established, commercial, industrial and other activities on an equal footing with the companies of those states,

(iii) to establish agencies, branches, or subsidiaries in a Member State other than that in which it has its headquarters, on an equal footing with local companies,

(iv) to transfer its registered office abroad in the Community without loss of legal personality, and

(v) to have its internal affairs governed by the law of the state of incorporation even where it transacts business or establishes itself in a state other than that of incorporation. There may be some exceptions if the state of incorporation is not the same as that in which it has its *siège réel*. However, these exceptions are tending to disappear.

The first of the three main problems, namely, that of allowing companies freedom to transact business and move where they wish outside the frontiers of the state of origin, seems to have been solved in the European Community, or is well on the way to being solved.<sup>12</sup>

---

transitional period, the Community institutions will lack the power to complete what has not been accomplished during that period. This would be contrary to the *raison d'être* of art. 8 (7) which is to achieve such completion. On the similar problem of the transitional period of the European Coal and Steel Community, see the Conclusions of Advocate General Lagrange in Cases 2 to 18/58, 6 RECUEIL DE LA JURISPRUDENCE DE LA COUR 424, 432.)

The theory that arts. 52 and 59 will become self-executing at the end of the transitional period to the extent that they have not been implemented before then (*see, e.g.,* 9 Comm. Mkt. L.R. 96 (1969)) probably also has to be discarded, since a provision cannot be self-executing when its application, as is here the case, depends on acts by the Community institutions.

The legal consequences of not having respected the deadlines fixed by the Treaty will be to render the concerned Community institutions liable for failure to act and to expose them to condemnation by the Court of Justice (*see* arts. 175, 176 and 215 (2) of the EEC Treaty).

12. By October 15, 1969, 32 directives had been issued by the Council, 25 on abolition of restrictions, 5 applying a transitional system (*see* General Program for the Abolition of Restrictions on Freedom of Establishment, Tit. V, paras. 2 and 3, and General Program for the Abolition of Restrictions to Provide Services, Tit. VI, paras. 2 and 3), and 2 directives dealt with coordination (*see* arts. 54 (3) (g), 56 (2), 57 (2), and 66 of the EEC Treaty).

In brief, the situation is the following:

a. Trade: This area has been, for the most part, freed. (A sector is considered "freed" when a directive compelling the states to suppress restrictions has been issued.) The only exceptions are barbers, door-to-door salesmen and some personal services for which proposals of directives are being drafted, and the wholesale trade of coal

The European solution might even have some advantages over the American system. First, the right of a company incorporated by one of

---

and medicines. This last category, however, has been the subject of a proposed directive transmitted by the Commission to the Council (1969 E.E.C. J.O. C54/1 (28 April 1969)).

b. Industry and artisan activities: The latest directive in this section was issued March 13, 1969 (1969 E.E.C. J.O. L68/4 (19 March 1969)) and concerned prospecting and drilling of petroleum and natural gas. The sector is freed with the exception of the manufacturing of medicines.

c. Agriculture: This sector has been freed as far as services are concerned; the restrictions on establishment not yet abolished will be prohibited by two directives the proposals for which have already been transmitted to the Council (1969 E.E.C. J.O. C39/10 *et. seq.* (22 March 1969)). Hunting and fishing however, have not yet been freed.

d. Transport and services incidental to transport: This sector has not yet been freed. However, two proposals of directives concerning some services incidental to transport, such as storage and customs inspection are being examined by the Council. Three proposals for directives concerning the establishment of highway and water transporters of goods and passengers are to be transmitted to the Council.

e. Public works contracts: This sector has not yet been freed. However, a proposal for a directive concerning participation of entrepreneurs in the award of real estate works is being examined by the Council. (In addition a proposal for a directive, based on art. 100 of the Treaty, designed to approximate legislative provisions on public works contracting, is being examined by the Council.)

f. Technical professions: This sector has not yet been freed. However, three proposals for directives on abolition of restrictions, coordination and mutual recognition of diplomas for architects are now being examined by the Council. Proposals concerning agronomist engineers and accountants are well on the way to completion. Moreover, proposals on technical activities of research, creation, and application have been recently submitted to the Council (1969 E.E.C. J.O. C99/1 (30 July 1969)).

g. Medical professions: This sector has not yet been freed. Proposals of directives concerning physicians and dentists as well as retail sale of medicines have been submitted to the Council (1969 E.E.C. J.O. C54/1 (28 April 1969)). Proposals concerning veterinarians, opticians, physiotherapists, and nurses have been drafted.

h. Legal profession: This sector has not yet been freed but a directive concerning attorneys included under "supply of services" has recently been transmitted to the Council (1969 E.E.C. J.O. C78/1 (20 June 1969)). Other proposals concerning fiscal counsels have been drafted.

i. Cultural professions: This sector has been partially freed with respect to motion pictures. In this same field a proposal of directives has been transmitted to the Council (1969 E.E.C. J.O. C108/8 (22 August 1969)) and others are being drafted. A proposal for a directive on the press is being examined by the Council. Proposals concerning recreation services, mainly sports instructors, are being drafted.

j. Companies: A first directive on the coordination of company laws (publicity requirements, validity of company obligations and nullity of the company) was issued by the Council March 9, 1968 (1969 E.E.C. J.O. L65/8 (14 March 1969)). Two other proposals will soon be transmitted to the Council (domestic mergers and guarantees concerning formation, maintenance, and changes of the capital of *sociétés anonymes*). Several other proposals for directives are being drafted. They concern the yearly accounts of companies, the structure and allocation of authority among organs of *sociétés anonymes*. Other proposals are being studied concerning securities, dissolution, and liquidation of *sociétés anonymes*, *groupements de sociétés* and harmonization of laws concerning companies other than *sociétés anonymes*.

k. Insurance: Reinsurance and retrocession have been freed. In the field of direct insurance other than life insurance, the proposal for a first directive coordinating conditions of access and exercise and a proposal on abolition of restrictions to estab-

the Community states to pursue an activity or to transfer its headquarters abroad or to open branches there without discrimination as to origin admits of no exceptions in the Community, while in the United States the individual states retain, in theory at least, the power to discriminate between a domestic corporation and a foreign corporation where the latter does not qualify for the protection of the Interstate Commerce Clause. However, virtually all corporations qualify. Second, while the current trends in the European Community will eventually lead to a single conflict of laws rule concerning the internal affairs of a company, in the United States the original national acceptance of a single conflict rule is likely to have to admit some exceptions.

This is naturally so since in Europe the very existence of the rule giving priority to the *siège réel* over the nominal headquarters wherever the two did not coincide, has tended to obviate its practical application; company practice to make the two coincide generally has resulted. This fact, together with the progressive harmonization of company law throughout the Community, is now tending to make the place of incorporation sufficient, by itself, to determine the law applicable for regulation of internal corporate affairs.

In America, on the contrary, the conflict of laws rule whereby the "personal" or internal law of the company is the law of the state of incorporation may be resisted because it has led to the adoption by some states of rules to favor management rather than shareholders. A rule which prevents a state from adequately protecting its resident shareholders from a company conducting most of its business within the state may be difficult to accept.<sup>13</sup> However, it is likely that the courts would federalize the present conflict of laws rule, if the threat to its uniform application was to become serious. The United States Constitution, and especially its Full Faith and Credit Clause, could well be construed to achieve this goal. Of course, such a threat would be obviated if the

---

ishment are being examined by the Council. Several other proposals are being drafted, mainly, in the field of direct insurance other than life insurance. These concern coordination of insurance contracts, fixing a private international law rule, coordinating conditions of access and exercise, abolition of restrictions on supply of services, abolition of restrictions on establishment of insurance agencies and setting a transitional system for the insurance producers profession. In the field of direct insurance on life, the proposal of a first directive on coordination of conditions of access and exercise is near completion, as is a proposal to abolish frontier control within the Community, and one regarding international automobile insurance (green card).

1. Banks: This sector has not yet been freed. A proposal for a directive on abolition of restrictions to establishment and supply of services is being examined by the Council. Another proposal on coordination is being studied by the Commission.

13. Sometimes states enact provisions regulating internal affairs of foreign corporations (e.g., the New York Business Corporations Law, which imposes liability upon the directors and officers of a foreign corporation doing business in the state of New York for violating that state's requirements in such matters as the declaration of dividends,

harmonization of state company laws turned out to be more successful than it has been up until now.

#### B. ENCOURAGING GREATER COMPANY SIZE

The abolition of discrimination based on the state of origin and the subsequent freedom to operate and to establish across state boundaries is not sufficient to implement the much-hoped-for multi-state activity of companies in Europe. First, a branch or subsidiary created in another state has to cope with a foreign environment which is different from the domestic one. It has to cope in particular with a different system of taxation and with different rules of access to the capital market. Second, the need for an effort toward geographic expansion has arisen simultaneously with the need for technological renewal. Facing both these challenges has turned out to be too hard a task for the great majority of companies and has often served as a good excuse to avoid either of them. Aside from these objective reasons, there is, of course, in Europe the always-present psychological force of tradition. This, perhaps, also explains why the corporations of Europe, when willing to expand, have often preferred to turn to an American company rather than to a company from another European country. The American company has been, as a rule, able to offer richer capital, better technological advantages and greater managerial skill. Most often the United States company allows the European company to keep its nationality and, at least apparently, its autonomy. An American corporation would appear to a Belgian, for instance, as less foreign than a French, Italian or Dutch corporation. Freedom of supply of services and of establishment being thus inadequate, we come to the second of the three great problems in facilitating transnational business within the Common Market, namely, the problem of directly encouraging enterprises to achieve a more adequate size.<sup>14</sup>

One of the areas in which the necessity of intervention is greatly felt is that of interstate mergers of companies.<sup>15</sup> These mergers are at present

---

making of loans to stockholders, etc. (N.Y. Bus. Corp. Law §§ 1317 and 719 (McKinney 1969)).

14. "The adjustment of the size of enterprises to the technical and economic conditions of modern production, to the possibilities offered by a common market to mass-produce, and to the challenge of increasing competition within the Community and world market represents for the Community a goal of decisive significance" (FIRST MEDIUM-TERM ECONOMIC POLICY PROGRAM, adopted by the Council on April 11, 1969, 10 E.E.C. J.O. 1543 (1967)). See also the SECOND MEDIUM-TERM ECONOMIC POLICY PROGRAM adopted by the Council on May 12, 1969, in particular Ch. II, para. 4 *et seq.* (1969 E.E.C. J.O. L129/17 *et seq.* (30 May 1969)).

15. "[The] realization [of the adjustment of the size of enterprises] should be encouraged by the removal of the artificial obstacles to mergers of enterprises — created

practically unknown in Europe.<sup>16</sup> The laws of the European states make them impossible, or at least exceedingly difficult, by stating that they represent, for the absorbed company, a change of nationality which normally requires unanimous approval of the shareholders. Mergers are also held to imply, besides dissolution, the liquidation of the absorbed company (the latter being especially important as to the taxation effects).<sup>17</sup>

The instruments provided by the Treaty to cope with the company law's difficulties with international mergers are Article 220, and, as far as fiscal difficulties are concerned, Article 100.<sup>18</sup>

Article 220, as we have seen, foresees a certain number of international conventions among which, in addition to the above mentioned conventions on recognition of companies and on maintenance of legal personality, is a convention on international mergers, presently under preparation. As it appears from the main provisions of the incomplete draft, the convention will be designed to render international mergers possible and to regulate them to some extent by uniform rules, both of conflict of laws and of substantive law.

---

mainly by tax and company law — and by facilitating desirable mergers, i.e., mergers whereby the enterprises' productivity would be increased and their competitive position improved" (FIRST MEDIUM-TERM ECONOMIC POLICY PROGRAM, *see supra* note 17 at 1543/67). *See also* SECOND MEDIUM-TERM ECONOMIC POLICY PROGRAM, Ch. II paras. 13 and 14, at 129/24 and 129/25).

16. Besides mergers, other methods of concentration exist which preserve the autonomous legal existence of each of the involved companies while creating a more or less close-knit economic entity (in Holland, where the law does not allow mergers, these methods are the only possible way to achieve concentration). In fact, one of the few forms of concentration presently possible and quite common at the international level is for a company to acquire a holding in another. However, mergers enjoy the favor of European authorities. This is so because adequate legislation to cope with such groups of related companies (KONZERNRECHT in German, DROIT DES GROUPEMENTS DE SOCIÉTÉS in French) is lacking in Europe (except in Germany: AKTIENGESETZ of September 6, 1965) and because the merger seems to create a more clear-cut situation both for public authorities and for investors. Also it offers a lighter and more efficient management structure if the size of the resulting economic entity is not too large. Moreover, the acquisition of a holding in another company is not without difficulties, especially in the taxation field. It often happens that profits that have already been taxed to the controlled company are taxed a second time to the parent company when they are distributed from the former to the latter. A proposal for a directive (based on art. 100 of the Treaty) to solve this problem by setting up a common system of taxation was submitted to the Council by the Commission on January 15, 1969 (*see* text of the draft directive in 1 CCH COMM. MKT. REP. ¶ 3316).

17. *See* Mailander, *Mergers and Acquisition in the EEC*, 1 N.Y.U.J. INT'L L. & POL. 19 (1968) and Conrad, *Corporate Fusion in the Common Market*, 14 AM. J. COMP. L. 573 (1966).

18. Again we find overlapping areas among the three previously mentioned problems, in this case between the problem of concentration and the problem of harmonizing legislation. In fact harmonization favors concentration, and the Treaty provisions encouraging concentration often operate through harmonization of laws, as in arts. 100 and 220.

The convention will specify that these mergers, either in the form of absorption of one company by another or in the creation of a new company replacing two or more dissolved ones, involve dissolution of the concerned companies without liquidation. The regulation of mergers will be directed mainly towards guaranteeing the protection of shareholders, creditors, and employees while preventing small, dissenting, shareholder minorities from being able to impede the merger.<sup>19</sup>

Fiscal difficulties are dealt with on the basis of Article 100, the Treaty's general provision for approximation of state laws. These fiscal difficulties are essentially two. The first relates to the treatment of a capital or "hidden reserves" gain, that is, the difference between actual value and book value of the transferred assets. Since the interstate merger is considered as a liquidation of the acquired company, this gain — usually very large — is taxed when the merger takes place.

The second major fiscal difficulty is represented by the taxation of the profits of a company's foreign branch. (Normally the absorbed company becomes a branch of the absorbing or consolidated one.) Profits are subjected to double taxation, that is, they are taxed in both the state where the parent company is incorporated and in the state where the branch is located. Double taxation is sometimes avoided by international conventions effecting a renunciation by the state where the parent is located

---

19. These goals will be pursued in the following manner: 1) before the merger, mainly by requiring an assessment by independent experts of the conditions under which the merger is expected to take place — such as share exchange ratio — and by a full and adequately timed disclosure of the situation of concerned companies and on the merger itself; 2) in the merger decision, by conflict of laws rules, possibly favoring choice of the state law offering more guarantees, and also by fixing a ceiling to the maximum percentage of votes which may be required by state laws as necessary to the decision; 3) after the merger has been voted by the assemblies of the concerned companies, by recognizing the right of the dissenting shareholders to be reimbursed for their shares (following predetermined assessment criteria and provided such right is exercised within short limits of time) and by granting to the creditors of the disappearing company (and possibly also those of the absorbing or new company) the right to oppose the decision or to be given adequate guarantees; 4) as far as the conditions, delays and publicity under which the merger decision can take effect are concerned, by deciding, mainly through conflict of laws rules, what formalities must be followed before the merger can take effect (*e.g.*, submitting the merger to judicial or administrative control of lawfulness or requiring that it be certified by authentic act); and 5) with regard to the effects of the merger, besides transferring the assets from the disappearing company to the absorbing or new one, the convention deals mainly with the merger's effects on contracts made by one of the merging companies which become impossible or exceedingly difficult to be executed because of the merger. (Possible solutions might be payment of damages by the absorbing or new company, reformation of the contract, or simply a conflict of laws rule. The convention also concerns the workers of the disappearing company who may be employed by the absorbing or new company but whose rights will remain regulated by the same law as before the merger. When transfer in another country becomes necessary, these workers can either accept it without changes as to the law regulating their rights, or leave the company on favorable terms.

of the claim to tax the profits of its foreign subsidiary. Such procedure is not satisfactory, both because the concerned company cannot deduct from its taxable profits the possible losses of its foreign branch and because centralization of taxation in the country where the parent is situated appears to be more consistent with an economic union such as the EEC wants to be.

By a proposal for a directive submitted to the Council on January 15, 1969,<sup>20</sup> the Commission has suggested the following solutions. They are inspired by the principle of "tax neutrality." According to the principle, inside an economic union the choice between investing domestically or investing abroad must not be dictated by fiscal considerations, but only by purely economic ones.

As to the taxation of "hidden reserves," the draft directive provides a tax deferment (as it is already applied by Member States to domestic mergers) each time the absorbed company becomes a foreign branch. However, the acquired assets must be carried on the books of the branch in its home state and movable property may not be moved outside such state.

As a first step toward replacing the principle of territorial taxation of the foreign branch with that of total taxation by the state where the parent company is located, the draft directive provides the concerned companies with the opportunity to elect the so-called "world profits" system of taxation. This means that, while the foreign branch continues to be taxed by the state where it is located, insofar as taxation by the parent company's home country is concerned, the company may choose between being taxed at the normal rate on the sole profits realized in that country, or being taxed on all its profits — including those of its foreign branch — but with deduction from the tax of the amount of any taxes paid abroad. Thus, whenever the foreign branch sustains losses, these can be deducted from the taxable profits in the country where the company has its main office. Since such losses are most likely to occur in the first years of the branch's operation, the "world profit" system tends to encourage creation of new foreign branches whether or not they stem from international mergers.<sup>21</sup>

The EEC Treaty provisions on competition are also capable of directly affecting the size of companies. They encourage formation of more powerful enterprises in three ways. First, they implicitly allow restraints on competition which are not agreements or concerted practices between

---

20. See text of the draft directive, 1 CCH COMM. MKT. REP. ¶ 3314.

21. For more details on the solutions suggested by the draft directive, see 1 CCH COMM. MKT. REP. ¶ 3313 where the basic explanations supplied by the Commission to the Council, when proposing the directive, have been reproduced.

enterprises, or even if they are agreements so long as they do not result in cartels (*ententes*) but merely in *concentrations*.<sup>22</sup> Second, they permit authorization of some competition restricting agreements among enterprises. Third, they permit within certain limits, an enterprise to have a dominant position in the market. Let us briefly consider different aspects of EEC antitrust law in relation to corresponding rules of American law.

In the first place, those agreements which aim to achieve concentration,<sup>23</sup> most commonly those for merger and acquisition of holdings,<sup>24</sup> do not fall within the scope of Article 85 of the EEC Treaty, at least according to the controversial interpretation given to the Article by the Commission.<sup>25</sup> Besides, whatever its interpretation, Article 85 covers only restrictions arising from express or silent agreement or concertation among enterprises. Hence, acquisition of control over a corporation

---

22. The difference between *ententes* and *concentrations* in EEC antitrust terminology is similar to that between loose-knit combination and close-knit integration in American antitrust terminology. An *entente* imposes on enterprises maintaining their autonomy a common behavior, whereas a *concentration*, by implying renunciation of economic independence and single economic direction, modifies the internal structure of the participating enterprises. The boundary between the two is, however, theoretically imprecise (see MEMORANDUM OF THE EEC COMMISSION (on the problem of concentration in the Common Market), Dec. 1, 1965 (Doc. § (65) 35000), pt. 3, para. A1); Translated into English as an Extra to CCH COMM. MKT. REP. (see CCH COMM. MKT. REP. ¶ 6902).

23. MEMORANDUM OF THE COMMISSION, see *supra* note 22, pt. 3, para. A1.

24. *Id.*

25. MEMORANDUM OF THE EEC COMMISSION, *supra* note 22, pt. 3, para. C. The reasons given by the Commission in favor of this interpretation of art. 85 are essentially the following:

*Ententes* are normally detrimental to public interest (except in special cases) while the opposite is true for *concentrations*. The excess of power on the market, decisive in assessing a *concentration* does not necessarily apply to forbid an *entente*. Applying art. 85 both to *ententes* and to *concentrations* would thus lead to the abolishment of either too few *ententes* or too many *concentrations*.

The criteria of art. 85 (3) allowing exemption from the application of art. 85 (1) are inappropriate for *concentrations*. It is impossible to assess satisfactorily *a priori* — as can normally be done for the *ententes* — whether the *concentrations* will or will not have the beneficial effects required by art. 85 (3). Besides, art. 85 (3) provides that only indispensable restrictions can be exempted. Since *concentrations* result in the complete suppression of competition among concerned enterprises, it would be difficult to prove that the benefits foreseen by art. 85 (3) could not have been achieved by any other means.

Since the exemption from the art. 85 (1) prohibition depends on the existence of the art. 85 (3) benefits, such an exemption must be necessarily limited in time and subject to withdrawal. But such provisional exemption would be inadequate as applied to *concentrations*, which cause definitive modifications in the enterprise's ownership and therefore have to be either permanently authorized or permanently forbidden.

The remedy provided by art. 85 (2) is inappropriate for *concentrations* to the extent that it could eliminate the concentrated enterprise without recreating the former unconcentrated ones. The appropriate remedy for *concentrations* is not nullification but deconcentration.



achieved through purchase of shares is allowed. In American antitrust law, by contrast, the difference between cartels and concentrations has not prevented the latter from falling within the scope of Section 1 of the Sherman Act. On the contrary, application of this section to mergers seems to have been recently revitalized. Moreover, by virtue of Sections 7 and 8 of the Clayton Act, American law is equipped with specific provisions to deal with any form of concentration.

Second, the EEC Treaty, while generally forbidding every kind of restrictive agreements or concerted practices among enterprises (Art. 85 (1)), grants to the Commission the power to authorize, by an exception, those which have redeemable value (Art. 85 (3)). Certainly, the possibility of being granted an exception is limited by the stipulation that the agreement must not eliminate a substantial portion of competition. Also the agreement must be indispensable in order to reach either an improvement in production or in distribution or technical or economic progress. But there is little doubt that such exemption power does allow the Commission, which is a body equipped for technical and economic assessments, to consider, within certain limits, the possible social benefits of agreements restricting competition. In United States antitrust law, flexibility is achieved through the so-called "rule of reason." This rule, in contrast with Article 85 (3) of the EEC Treaty does not exempt particular restrictions but allows the law to be construed as inapplicable to them. The limits of the "rule of reason" do not appear to be built into its concept — rather they stem from judicial self-restraint and "per se" rules. At present, however, they seem to leave less room for assessment of the restrictions' social benefit than is left by Article 85 (3) of the EEC Treaty. While the "rule of reason" may cover grounds that do not fall within the scope of Article 85 (3),<sup>26</sup> the latter probably provides for more flexibility.

Third, as previously stated, the dominant market position enjoyed by an enterprise is tolerated by the Treaty (Article 86), which condemns only the improper exploitation of such a position.<sup>27</sup> The American antitrust law, in contrast, while not condemning monopoly "per se," condemns monopolization or monopoly plus unlawful intent.<sup>28</sup> The limits of a lawful activity for an enterprise enjoying a dominant position ap-

---

26. On the problem of whether there is room in the EEC antitrust law for a "rule of reason" besides the exemption power provided by art. 85 (3), see R. JOLIET, *THE RULE OF REASON IN ANTITRUST LAW* (1967).

27. Improper exploitation, according to the EEC Commission (MEMORANDUM, *supra* note 22, pt. 3, para. 25) is behavior objectively contrary to the achievement of EEC Treaty goals.

28. REPORT OF THE U.S. ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 43 (U.S. Govt. Print. Off. 1955).

pear to be much narrower than the European law's concept of "improper exploitation."<sup>29</sup>

Because of the toleration provided by Article 86 of dominant positions insofar as they are not abused, the "attempt or combination to monopolize" expressly condemned under American law (Sherman Act, Sec. 2) does not constitute an offense under Community law.<sup>30</sup> Of course, if the methods used by enterprises in this attempt are unlawful restrictive agreements under Article 85 (1), they are condemned as such, regardless of their intent to monopolize. Similarly, if monopolization is actually achieved, this can be considered an "improper exploitation" under Article 86. However, in this case, the enterprise's behavior is condemned because of the situation it has created, not because of its specific intent.<sup>31</sup>

Let us note, at this point, that a further encouragement to integration can stem from the very fact that the regime applied by the Treaty to the cartels is more severe than that applied to dominant positions.

From this brief comparison of United States and Community laws, we may conclude that the latter tolerates loose-knit arrangements and, even more, close-knit integration to a much higher degree than the former. This, of course, may be justified simply by the fact that there is much more concentration in the United States than in Europe, and therefore, much more need for firm control.

### C. HARMONIZATION OF NATIONAL COMPANY LAWS

The third problem in any attempt to facilitate the operation of companies of a transnational scale is that of applying to companies laws that differ as little as possible. In theory two methods are possible. One consists of "approximating" the legislation in force in the various states. The other is to by-pass such legislation by enacting new laws at the supra-state level. In the United States, both methods have been used.

The American Bar Association and the American Law Institute have been active in matters of harmonizing state legislation by means of the model and uniform acts. We also must not forget the unifying role played by the law of those states, particularly Delaware, which, taking advantage of the conflict of laws rule which makes the law of the place

---

29. See, e.g., *U.S. v. Alcoa*, 148 F. 2d 416 (2d Cir. 1945).

30. According to the experts consulted by the Commission on the scope of art. 86, concentrations directed toward acquiring or extending a dominant position must not be considered *per se* as improper exploitation under art. 86 (MEMORANDUM OF THE COMMISSION, *supra* note 25, pt. 3, para. 4).

31. MEMORANDUM OF THE COMMISSION, *supra* note 23, para. 26.

of incorporation prevail over that of the center of activities, have attracted a high percentage of the largest American corporations. The advantages offered initially by such laws have grown with time because of the increased security which the large corpus of case law has provided for businessmen.

Attempts to generalize the setting up of federal companies — a device permitted by the Constitution but rarely used — have not been successful. It may be that such attempts would have been revived if one of the objectives of these efforts, namely that of finding a remedy for insufficient state supervision of companies and unsatisfactory protection of investors had not been achieved by the federal regulation of securities.

In the European Community we have a quite different picture. First, the draftsmen of the EEC Treaty, in contrast with the authors of the American constitution, have not provided the Community institutions with the power to create a "federal" company law. Instead of taking the shortcut of "federal" legislation, they preferred to embark upon the longer and technically more difficult path of gradual harmonization of existing legislation, which the states were politically more willing to accept. Of course, it must be kept in mind that the starting points of Europe and the United States were substantially different. In Europe, the existing legal structure at the state level was, and is, far more complex than that which characterized the American states when they federated.

The main instrument provided by the EEC Treaty to the Community institutions to navigate in the wide and rough sea of company law harmonization is Article 54 (3) (g).<sup>32</sup> This article provides for co-ordination of the guarantees demanded in Member States for the purpose of protecting both shareholders and creditors by means of directives issued by the Council on a proposal of the Commission. Even if limited to these guarantees, the scope of this article is very wide indeed. In fact, the *raison d'être* of the European company laws is control of the companies for the sake of public interest, which is, to a great extent, the protection of shareholders and creditors. Leaving aside the question of whether such control is, by modern standards, adequate, it appears that

---

32. Article 100, the general provision on approximation of legislations, can also be applied to coordination of company laws (admittedly there is no practical difference among such words as approximation, co-ordination or harmonization). But, insofar as a specific provision is provided by the Treaty, preference is naturally given to it instead of to the general one. This is especially so with regard to art. 54 (3) (g). According to this article, the Council, after the expiration of the first stage of the transitional period, may act by means of a qualified majority vote (whereas art. 100 requires unanimity). The dispute between supporters of a narrow interpretation of such article and adherents to a broader construction seems to have been resolved in favor of the latter (*see note 34 supra*).

co-ordinating the provisions protecting members of the company and third parties means, in fact, dealing with the largest part of company law.<sup>33</sup>

Taking a pragmatic approach, the Commission has initiated its task by giving attention to such matters as publicity, validity of agreements made in the name of the company and possible nullifications of these companies which we call *sociétés de capitaux*, meaning stock companies, companies limited by shares, and limited liability companies. The first directive was issued by the Council some years after, on March 9, 1968.<sup>34</sup> This directive provides for minimum requirement and harmonized organization of publicity, as well as for common basic principles on validity of company obligations and for possible nullification of the company.

Other areas are being studied by the Commission with regard especially to the *société anonyme* which, in practice, is our most important type of company. The studies seek, in particular, to find ways to harmonize the guarantees related to the creation and maintenance of the assets of the company, as well as to increases and reductions of capital and to harmonize the systems of companies, the guarantees requested in case of a domestic merger, and the annual accounting documents. It will then be necessary to harmonize the rules affecting securities and the dissolution and liquidation of the companies.

Confronted with the delays and difficulties of harmonization on the one hand, and the urgency of the need of encouraging multi-state activity of companies on the other, some observers have started to wonder whether it would not be better to take a short-cut.

---

33. Two interpretations of art. 54 (3) (g) have been offered to determine its scope. The first, arguing both from the insertion of this article in the Chapter of the Treaty dealing with the right of establishment and from the difference between the voting majority required by it and the unanimity required by art. 100, concluded that the scope of art. 54 (3) (g) was limited to those specific cases where an abnormal situation was the direct consequence of the right of establishment. Thus if country X encourages establishment of branches of companies of country Y, but offers lesser guarantees to creditors than country Y does, it might happen that once many branches of Y companies have been created in X the difficulties met by people dealing in X with such branches would make it necessary to co-ordinate guaranties offered by X and Y. Among the supporters of this interpretation, see especially Venema, *Coordinate van het vennootschapsrecht der E.E.G. — Staten*, in the Dutch review, 1965 DE NAAMLooZE VENNOOTSCHAP 53 *et seq.* (The French translation appears under the title *Coordination du droit des sociétés dans la CEE*, in the Italian review, 1965 RIVISTA DELLE SOCIETA 55 (July 1965)).

The broader interpretation, in contrast, considers that art. 54 (3) (g) is to be applied to removal also if such indirect obstacles as legal indefiniteness and encouragement to establish in countries with laxer laws are eliminated. The Council, in the first directive based on art. 54 (3) (g) (*see note 35 supra*) seems to have adopted the broader interpretation.

34. The full text of the directive appears in 1 CCH COMM. MKT. REP. 1355 *et seq.*

It is clear that the treaty, in contrast with the United States Constitution, does not provide a supra-state authority with the power to create federally incorporated companies. But what cannot be done on the basis of the Treaty of Rome can always be accomplished by the traditional method of a specific international convention.<sup>35</sup> The idea of a "European-type company" was thus born.<sup>36</sup>

The United States had long been considering the idea of a general statute of federal corporations, which would not meet constitutional obstacles. This idea was never successful and now seems to be dead without any hope of resurrection. However, the American idea was only

---

35. It is possible to choose among the three main forms of international conventions. The international convention could require each contracting state to enact as a state law a set of uniform rules following a model provided by an annex to the convention. The European company would thus be a new form of company under each state law. This is the solution suggested by France when she proposed the creation of a European corporation (see MEMORANDUM OF THE FRENCH GOVERNMENT ON THE CREATION OF A EUROPEAN-TYPE COMMERCIAL COMPANY, submitted to the EEC March 15, 1965, 2 CCH COMM. MKT. REP. ¶ 9025).

The international convention could also, by including the rules setting up the structure of the European corporation, create uniform law in all member states without the further step of requiring each to enact a uniform state law. This solution would have the advantage of guarantying direct application and supremacy of the European company rules in those countries where the state constitution provides for direct application of international law and for its supremacy over state laws (France, Belgium, the Netherlands, and Luxembourg).

Finally, the international convention could take the form of a complement to the EEC Treaty. This solution would create a European Company under European law. It was considered by the EEC Commission in its MEMORANDUM ON THE CREATION OF A EUROPEAN-TYPE COMMERCIAL COMPANY, submitted to the Council on April 22, 1966 (published in English as one of the extra pamphlets published by the CCH; see 2 CCH COMM. MKT. REP. ¶ 6902).

In contrast to what was believed at the beginning of the discussion on the European Company (see the above mentioned Memorandum of the Commission), it now appeared possible (whatever the form of international convention chosen) to achieve the goal for which the European Company has been conceived — creating a form of company identical in all EEC countries and allowing it to act on a Community scale.

The *Project d'un statut des sociétés anonymes européennes* drafted on the Commission's request by Professor Sanders (EEC COMMISSION, ETUDES, SERIE CONCURRENCE, no. 6, 1967) has in fact proven that such goal can be achieved even if the European-type company is created by uniform state laws. Each of these laws must grant to the European company, regardless of whether it has been chartered by that State or by any other Member State, the same legal capacity which the State grants to the *sociétés anonymes* chartered by it — the power to be constituted through the merger of companies chartered by different Member States, or through combining as a holding company or joint venture of companies chartered by different Member States, or by merger with companies chartered by other Member States.

36. Here again we find interconnections among the three basic problems indicated at the beginning of this discussion. The European-type Company is mentioned under the third problem because such a company constitutes a "short-cut" alternative to company laws harmonization. But it is also, as further indicated, a means to further establishment and to achieve concentration in member states other than the state of incorporation.

apparently similar to the infant European one. The effect of federal intervention, whether in the previously planned form of making federal incorporation the general rule or in the form it has actually taken of securities regulations, would be in the direction of more effective control. Thus, the idea of federal incorporation found very little sympathy among American businessmen. The European businessmen, in contrast, are backing the project of a European company. Critics, if any there be, are apt to consider it not as excessive, but as insufficient. This is not because the European businessmen are more social-minded than their American colleagues, but rather because the European company has been conceived not as an instrument to control the private sector more effectively, but rather as a tool to encourage its expansion.

We may wonder, however, whether a European company is really necessary. Why should we supply a short-cut in the field of company law if companies which decide to take it have to walk the longest way in the fields of taxation law and the capital market? Likewise, if and when harmonization of taxation and unity of capital market are achieved, what further need is there for a European company? Does not the American example show that when the tax law is, in essence, unified and the capital market a single one, companies find no serious trouble in engaging in multi-state activities, in spite of the remaining differences in state company laws?

These objections certainly carry weight. But if they are useful in reducing the importance of a European corporation, they nevertheless fail to provide conclusive evidence of its uselessness.

In fact, a "European-type company," distinguished by being subject to exactly the same company law rules in all Member States and being permitted both for purposes of its constitution and of its operation to act on a Community-wide scale, would facilitate both the foreign establishment of companies and their international concentration. Thus, establishment of a subsidiary in another Member State would be encouraged by the fact that such a subsidiary, if created in the form of a European company, would be regulated, in the foreign Member State, by a company law having the same content as that regulating the same type of company in the country of the parent company. Even absent the convention on maintenance of companies' legal personality in cases where the registered office is transferred from one country to another (anticipated by Article 220 of the EEC Treaty) the problem of such a transfer will not exist for the European company, since such a company will be able to act on a Community scale.

Even before the convention on international mergers (also anticipated by Article 220), these mergers would be possible if they result in the creation of a European company or if at least one of the merging companies is a European company. Even after such a convention has been

enacted, the choice of a European-type company would still offer the advantage that the company resulting from the merger would be subject to a company law common to the countries of all the merging companies, rather than to a specific national company law. Besides, deficiencies in the European company concept could well stimulate action directed toward the overall solution of taxation and financial problems for multi-state enterprises.

There is another argument in favor of the European corporation, perhaps even more important than the legal ones; that is the "psychological" argument. To a French entrepreneur it may make a psychological difference whether he operates in Italy under a French label or under a European one. The same psychological difference can be felt by those who do business with him. This is probably one of the reasons why, when taking advantage of freedom of establishment, European businessmen have usually preferred to create subsidiaries rather than branches. To be a foreigner in a foreign country, even under a non-discriminatory legal regime, has seemed to them, often not without reason, a much less favorable condition than acquiring for their enterprises abroad the nationality of the country of operation. This is even more true in the case of concentration. An Italian company which plans to merge with a French company may well see a difference between becoming a French or a European company.

The above rationale explains why the Commission advocates the creation of a European company. In spite of the delays interposed by the states, it is probable that a European company statute will finally be approved.

Whether or not the European corporation will then display a useful function depends on many factors. First, this depends on its creation being regarded as a limited objective, easier to attain and therefore preceding, but not delaying, the more important and yet more difficult goals of fiscal laws harmonization and capital market unification.

Success will also depend on whether the European company's rules will achieve and maintain a high degree of legal uniformity, and on whether such a company will be effectively permitted, for purposes both of its constitution and of its operation to act on a Community scale. This means that the scope of the European company's rules will have to be as wide as possible, so as to avoid frequent resort to supplementary law, and that the latter should preferably not be the municipal laws of the Member States. It means also that, if the European-type company has to be created through uniform state laws instead of under European law, it would be necessary to guarantee the maintenance of such legal uniformity by charging a centralized jurisdiction with the interpretation of those laws. It would also mean that the provisions regulating the European company should confer on it the greatest legal capacity pos-

sible even if incorporated by another Member State. These provisions should also allow the European company to be constituted by merger of companies from different Member States or as a holding or joint venture created by companies from different Member States. European companies should also have granted them the right to merge with companies incorporated by other Member States. In a word, the European company, even if created through state laws, should provide a truly European solution.

Third, much will depend on the content of the rules setting up the European company's legal structure. This structure should not result from the addition of the diverse states' provisions on *sociétés anonymes*; otherwise, it would become too complex and bothersome for businessmen to choose it.

Finally, success will depend on whether the European entrepreneurs will be able to overcome their nationalistic mentality and take advantage of this instrument to achieve multi-state activity. To be useful the European company should be used.

Thus, having mentioned it at the very beginning, we find again at the conclusion of this discussion the one persistent factor conditioning not only achievement of multi-state activity, but success of European integration as well, to be the mentality of the Europeans themselves. Indeed, this has been the main obstacle standing in the way of Europe's unification. Whether or not it will soon change remains the basic unknown quantity in European mathematics.

Let us not underestimate the force of tradition on Europeans. Human behavior is not always rational, European behavior no more than others'. If logic were the standard of action on the other side of the Atlantic, we should have long since had the United States of Europe.



