

**Legislating for a European Private Company:
How should the balance between the regulation, the articles of association and
national law be struck?**

Introduction

When legislating for the European Private Company, the boundaries between European and national law must be precisely drawn.

This poses four questions:

1. Why do we need a European Private Company?
2. Which legal areas do we want to legislate for?
3. What legislative objectives are we pursuing?
4. What is left for national law?

1. Why do we need a European Private Company?

The most important use for the EPC is the starting point for our considerations: the establishment of subsidiaries abroad. Many companies find by experience that there are still many differences between national jurisdictions. These differences cost money because they can only be recognised and overcome with the help of expensive legal advice.

It is a core principle of the European internal market that *crossing borders must not cause additional costs*.

We therefore need the European Private Company *side by side* with the national legal forms – not because the national systems are qualitatively inferior. The national company law of most states is good and should be retained; regulatory competition between the national systems is appreciated. We need, however, an additional option for the very reason that *national systems are different* and overcoming the differences costs small and medium sized companies too much time and money.

This leads to the second question:

2. Which legal areas do we want to legislate for?

Company law provides for the formation and organisation of a company. The EPC must be provided with European legislation for this area.

Other legal areas are also important; insolvency law, labour law, tax law. But we all know that unification of labour law, tax law and insolvency law is not possible at present. The differences between the Member States are too great and the interests at stake too powerful.

We must initially, therefore, concentrate on *company law*.

With two exceptions: there are *overlaps* with other legal areas which must be clarified at European level.

- firstly, employee co-determination
- secondly, the boundaries of insolvency law.

We will discuss how to deal with these issues this afternoon. But one thing is clear: clarity must be provided by European law.

3. What legislative objectives are we pursuing?

In order to bridge the differences between the jurisdictions, the clear conclusion is: the company law of the European Private Company must be the same Europe-wide. This can only be achieved by means of a *European Regulation* through which we achieve a single directly applicable legal text available in all official languages.

We must, however, differentiate between legal issues involved. Company law deals with

- the external relations of the company
- and the internal relations between the shareholders and the directors.

The *external relations* of the EPC must be catered for in the Regulation. This includes creditor protection. It also includes the obligation to disclose important information. Fortunately, the first, fourth and seventh Directives already deal with disclosure. A declaratory provision to the effect that the same Directives apply to the EPC as apply to the private limited company of national law, will therefore be adequate on this issue.

The *internal relations* between the shareholders and the relations to their directors can be left to contractual freedom. Many see this as contradicting the principle of uniformity. But this contradiction does not exist because firstly, uniformity is required only in external relations and secondly, it is precisely contractual freedom which offers the founders the possibility to tailor provisions for themselves which apply Europe-wide. The parent company in state A can provide its subsidiaries in states B, C and D with the same articles of association. This simplifies cross-border corporate governance and saves considerable costs compared with the administration of subsidiaries all of which have to follow different legal regulations.

And so to the last question:

4. What is left for national law?

My answer is: as far as company law is concerned, preferably nothing! In external relations, uniform European rules are required, internally, contractual freedom prevails.

But what happens if it is found that there is a *regulatory gap*? Three thoughts:

- Firstly, we must ensure that there are as few gaps as possible. The conflicts that typically arise within a small company are well known in the experience of national jurisdictions. These conflicts must be dealt with either in the Regulation or in the articles of association.
- Secondly, the Regulation should contain drafting tasks for the shareholders so that no important issues are forgotten in the articles of association. Model articles could be provided for assistance (see the statement of *Robert Drury*).

- Thirdly, not every individual case can be finally legislated for in the law or in the articles of association – think only of the variety of duties of the managing director. In these cases, general clauses (“*Generalklauseln*”) should be used in the European Regulation.

The general clause must be concretised in individual cases by the national courts. That will, initially, lead to non-uniform judgements. The interpretation of the national courts will, however, have a common point of reference in European law. In proceedings before national courts, the judgements of the courts of other states can be taken into account. In the medium term, therefore, a common resource of the court experience of all Member States will develop.

If we refer to national law to fill gaps, no exchange of experience will take place. As we all know, the courts prefer to pursue their normal course rather than take account of foreign precedents. In addition, the possibility of clear reference of cases to the European Court of Justice would be lacking.

I therefore urge that no resort to national law be permitted in the area of issues which belong to company law.

Thank you!