Cătălin-Silviu Săraru (ed.)

Studies of Business Law – Recent Developments and Perspectives

PL ACADEMIC RESEARCH

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Contributions to the International Conference
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Preface

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This volume contains the scientific papers presented at the Second International Conference "Perspectives of Business Law in the Third Millennium" that was held on 2 November 2012 at Bucharest University of Economic Studies, Romania. The conference is organized each year by the Department of Law at Bucharest University of Economic Studies together with the Society of Juridical and Administrative Sciences. More information about the conference can be found on the official website: www.businesslawconference.ro.

The scientific studies included in this volume are grouped into three chapters:

- *Recent developments and perspectives in the regulation of business law at European Union level.* The papers in this section refer to specific procedures for the adoption of regulations by the EU institutions, utility of the European company (Societas Europaea - SE); principles governing public procurement procedures, state aids that are incompatible with the internal market of the European Union, and combating discrimination at the workplace.
- *Transposition of European Union directives into national law.* The papers in this chapter provide a comparative view of various aspects of business law: the criminal liability of legal persons, protection against discrimination in a business environment, fiscal measures implemented during the crisis, sanctioning unfair contract terms, the role of European Works Councils; electronic money, combating late payments in commercial transactions, and transposing regulatory requirements into national law.
- *Recent developments and perspectives in the regulation of international business law.* This chapter includes papers on: the need to develop a common law on international bankruptcy, opinions about the importance of international commercial arbitration, transnational adhesion contracts, and contemporary challenges facing dignity at work.

This volume is aimed at practitioners, researchers, students and PhD candidates in juridical sciences, who are interested in recent developments and prospects for development in the field of business law at European and international level.

We thank all contributors and partners, and are confident that this volume will meet the needs for growing documentation and information of readers in the context of globalisation and the rise of dynamic elements in contemporary business law.

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RECENT DEVELOPMENTS AND PERSPECTIVES IN THE REGULATION OF BUSINESS LAW AT EUROPEAN UNION LEVEL

Special Procedures for the Adoption of EU Legal Acts

Lecturer Ioana-Nely MILITARU[1]

Abstract

The article is divided into three parts and Conclusions. The first part summarises institutions in EU legislative decision-making positions in the establishment of the European Communities, while part two addresses the procedures for adopting legal acts in their evolution. The third part presents the ordinary, special procedures and legal procedures for adopting non-legislative acts. Findings highlight how the Lisbon Treaty introduced new elements to the procedure.

Keywords: institution, ordinary procedure (co-decision), special procedures, decision making, legislative, advisory, cooperation, conciliation, consultation.

1. Institutions in EU decision-making positions

In the European Union, the process of adopting legal acts, and legislative or non-legislative decision-making – the so-called decision[2] process – mainly involves the European Parliament and the Council, Commission, European Council, while the Economic and Social Committee and the Committee of the Regions play an advisory role.

Since the establishment of the Community, the legislative powers of Parliament have evolved from their initial advisory role.

Since the introduction of the "budgetary treaties" in 1970 and 1975, involvement in the budgetary procedure has progressed, and budgeting competence in the European Company is now shared with the Council as specified in Art. 203 of the Treaty of the European Economic Community (TEC). By introducing the cooperation procedure in Article 6, the Single European Act (SEA) recognised the competence to adopt laws. The introduction of the co-decision procedure in the Maastricht Treaty (TMs) gave the European Parliament the same legislative powers as the Council. The Amsterdam Treaty then simplified the co-decision procedure; the Treaty of Nice promulgated the qualified majority for all Council actions, thus strengthening its position in the procedure for adopting Community legislation.

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2 See Dan Vataman, EU Law, Legal Universe Publishing, Bucharest, 2010, p 162.

The Lisbon Treaty made the co-decision procedure ordinary procedure in the European Union (Art. 289 Paragraph 1 of the Treaty on the Functioning of the European Union - TFEU), thus strengthening the status of the European Parliament - with the Council - as legislator. The Commission is the institution that initiates legislative acts in the European Union. Thus, Union legislative acts may only be adopted by Commission proposal, except where the Treaties provide otherwise. Other acts are adopted on proposal where the Treaties so provide (Art. 17 Para. 2 of the Treaty on the European Union - TEU). Also, the ordinary legislative procedure comprises joint adoption by the European Parliament (EP) and Council of a regulation, directive or decision on a proposal from the Commission (Article 289 TFEU).

In principle, draft laws are the result of Commission initiatives. As an exception, Parliament may request the Commission to submit an appropriate proposal for adoption of a new act or amendment of an existing act (Article 225 TFEU[3]), or the initiative can come from other institutions or from Member States, in special proceedings (Article 289 TFEU). The European Council does not exercise legislative functions but has decision-making powers, adopting non-legislative Common Foreign and Security Policy legal acts under the TEU (Art. 24, Art. 31). The Economic and Social Committee (ESC) and the Committee of the Regions (CoR) fulfil advisory functions. In this regard, consultation of the ESC and CoR by the European Parliament, the Council or the Commission is compulsory where provided for in the Treaties, and in all cases where deemed appropriate by these institutions (Articles 304 and 307 TFEU).

2. Procedures used in adopting legal acts in the evolution of the European Union

Since the establishment of the Community, procedures have seen the following forms[4]: conciliation, cooperation, notification, consultation[5].

a) Conciliation procedure. Increasing the budgetary powers of Parliament meant that it needed to be associated more closely with development legislation that was likely to have an impact on the budgetary powers. For this reason, a "conciliation procedure" was introduced on 4 March 1975 by Joint Declaration

3 See Art. 42 Para. 1 of the Rules of Procedure.

4 In addition to budgetary powers. See Pierre Mathijsen, Compedium of European Law, ed. Seventh, Club Europe Publishing House, Bucharest, 2002, p 69 et seq.

5 "Consultation" is discussed in the section on the European Parliament, the advisory function of this institution, see in this respect, Ioana Nely Militaru, EU Law, ed. II, Legal Universe Publishing House, Bucharest, p 199 and seq.

of the Council and the European Commission[6] in order to empower the views of Parliament. The conciliation procedure was applied to proposals with notable financial implications and whose adoption was not required by existing provisions. If opposition to these acts arose between Parliament and the Commission's position or the opinion of the Council, a conciliation procedure could be established in a joint committee. The Conciliation Committee was composed of members of the Joint Council (or their representatives) and a delegation led by the President of the Parliament, while Commission participants oversaw agreement between the two institutions. If three months of conciliation failed to produce a new opinion or Parliament and the Council failed to reach a final decision, the Council had the last word[7]. Far from being enlarged[8] conciliation was restrained and finally replaced by cooperation and co-decision procedures.

b) The procedures for cooperation in making the right decisions. The procedure of "institutional cooperation"[9] was introduced by the Single European Act in order to facilitate the adoption of Single Market legislation (Art. 6 SEA) according to a strict schedule that ended in 1992. The Maastricht Treaty (TMs) was extended to new areas that were subsequently "deprived of all the profit of co-decision procedure[10]". Under the Lisbon Treaty, cooperation procedure was reconsidered in compliance with Art. 295 TFEU, according to which the European Parliament, the Council and the Commission shall consult each other and make arrangements to cooperate by common agreement. To this end, they may, in compliance with the Treaties, conclude inter-institutional agreements which may be binding.

c) The assent procedure was introduced by the Single European Act on association agreements[11] and applications for accession of new countries to the European Union [Art. 218 Para. 6 lit. a), i) TFEU, ex 300 TEC].

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6 OJEC, n C 89 of 22 March 1975.

7 Conciliation did not produce the expected results, "because it was not completed (either Council was to agree with the view of Parliament or a late decision), and was open despite the request of Parliament". The conciliation procedure only applied to a small part of the legislative domain, see D. Strasser, Travaux de concertation legislative, in *Les finances de L'Europe,* Éditions LABOR, Bruxelles, 1984, p. 572; Guy Isaac, Marc Blanquet, Droit communautaire general, 8 ed., Dalloz, Paris, 2001, p 77.

8 According to the second conciliation statement on 16 December 1981, Bull. EC 3/82.

9 See Cornelia Popescu, Fundamentals of Community institutional law, Economic Publishing House, Bucharest, 2003, pp. 132-133; Fabian Gyula, Institutional Law Community, Legal Sphere Publishing House, Bucharest, 2004, p 183 and 184 and Guy Isaac, Marc Blanquet, cited work, p 77.

10 See Guy Isaac and Marc Blanquet, cited work, p 77.

11 The Treaty of Nice has maintained this procedure.

By using the phrase "with the approval of the European Parliament", both the Treaty of Maastricht and now the Treaty of Lisbon assent procedure have been extended to other areas, such as:

- European citizenship (Art. 19 TEU ex 13 TEC);
- agreements establishing a specific institutional framework by organising co-operation procedures, agreements with important budgetary implications for the Union, agreements in areas where ordinary legislative procedure applies, or the special legislative procedure, agreement on EU accession to the European Convention on Human Rights and Fundamental Freedoms (Art. 218 Para. 6 lit. a), ii, iii, iv, v, TFEU, ex 300 TEC)[12];
- rules for the election of members of Parliament if the Council determines necessary provisions on uniform voting for the election of the European Parliament by direct universal suffrage (Art. 223 TFEU, ex 190 TEC);
- or on detection of a serious risk of fundamental rights breaches in a member country (Art. 7 Para. 1 TEU was 7 TMs). The assent procedure obligates the Council, not only to ask the opinion of the European Parliament before making a decision, but also to take into account the Parliament's position, otherwise the act is not adopted[13].

Nowadays, conciliation, cooperation, advising and consulting, are more associated with some EU institutions exercising functions which contribute to the adoption of legal acts. Since the new treaties came into force, these principles have been subjected to numerous adaptations and replacements, ultimately producing the following:

- conciliation has been replaced by the cooperation and co-decision procedure;
- cooperation is expressly provided in a single provision of the TFEU, encouraging, in this sense, the adoption of institutional arrangements that can be binding under Art. 295;
- consultation is expressly provided through the functions of the European Parliament, according to Art. 14 TEU, although, in principle, the advisory functions associated with the adoption of legal acts belong to the Economic and Social Committee and the Committee of the Regions (Article 300 TFEU). Although the European Parliament (EP) is consulted, the institution is not bound by its opinion,
- endorsement of the advisory function of the EP; this time, however, the institution requesting the opinion is obliged to take account of "EP opinion".

12 According to Art. 90 of the Rules of Procedure.

13 See Dan Vataman, Union Law ..., cited work, p 169.

3. The adoption of legal acts in the EU according to the Lisbon Treaty

Currently, EU legal acts are legislative and non-legislative.

The adoption of legislative acts of the European Union corresponds to the legislative function which is exercised, in principle, equally by the European Parliament and the Council. Pursuant to Art. 289 TFEU, these two institutions adopt the following two procedures:

- ordinary legislative procedure, so-called co-decision procedure, which consists of joint adoption by the European Parliament and the Council of a legislative act (regulation, directive or decision) as proposed by the Commission. This procedure is defined in Art. 294 TFEU;
- special legislative procedure, which consists of the adoption of a legislative act (regulation, directive or decision) by the European Parliament with the participation of the Council, or by the Council with the participation of the Parliament, at the initiative of a group of Member States (Art. 7 Paras. 1 and 3 TEU and Art. 11 Para. 3 TEU[14]) or the European Parliament (Article 225 TFEU), on the recommendation of the ECB (Article 129 paragraph. 4 TFEU) or at the request of the CJEU (Article 252 TFEU) or EIB (Article 308 TFEU).

A standard procedure for adopting non-legislative acts is not provided, nor for the adoption of legislation under special procedures. For the ordinary procedure, as we have seen, there are rules laid down in the TFEU, such as the budgetary procedure.

3.1. Ordinary legislative procedure, regulated by Art. 294 TFEU, was introduced by the Maastricht Treaty by modifying the Treaty establishing the European Community (TEC).

The procedure was extended by the Treaty of Amsterdam[15], while the Treaty of Nice extended the co-decision procedure, substituting some cooperation and

14 Treaty refers to the corresponding third initiative "a significant number of Member States".

15 The number of cases falling under the co-decision procedure increased from 15 to 37, of which 11 were previously subject to the cooperation procedure (e.g. Art. 12, 15 Para. 4, 175 Para. 1, 179 TEU), two to consultation procedure (Article 46 and 47 (2) TEU), 8 fell under new provisions introduced by the TA (e.g. Art. 135, 141 Para. 3, 255 Para. 2, 286 Para. 2 TEU). See Guy Isaac, Mark Blanquet, cited work, p. 77, and C. Reich, Le traité

consultation procedures. These substitutions "accounted for more than half of EU legislative activity". The co-decision procedure strengthens European Parliament legislative power – the procedures of acting by qualified majority and employing inter-institutional negotiations – introduced by the procedure of co-operation between Parliament, Council and Commission.

The Amsterdam Treaty accelerated the co-decision procedure to make it possible for a Community legislative act to be adopted at first reading, if everyone involved in the process agreed, thus strengthening Parliament's involvement in the pre-legislative phase of decision making[16]. In this respect, the three institutions – the European Parliament, Council and Commission – adopted a Joint Declaration on practical new approaches to co-decision procedure (1999)[17] that replaced the Interinstitutional Agreement of 21 October 1993, which was considered to be quite cumbersome and complex. Although this procedure extended to seven provisions of the EC Treaty, namely Art. 13, 62, 63, 65, 157, 159 and 191, the Treaty of Nice did not establish and shift to qualified majority voting when adopting co-decision. Also, common agricultural policy legislative measures adopted by a qualified majority did not fall under the co-decision procedure.

Through the Lisbon Treaty, "co-decision" has become the ordinary legislative procedure for the adoption of EU legislation.

Ordinary legislative procedure is an original combination that includes:

- technocratic proposals from the Commission, which obtains technical advice from experts from all Member States;
- Parliament representing EU citizens of participating Member States;
- Council, which represents governments of the Member States, and acts by qualified majority (according to Art. 294 TFEU, ex 251 TEC).

3.2. Special legislative procedure

The Treaties provided for a special legislative procedure in some cases for the adoption of legislation by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, or by a group of Member States, or by the European Parliament on recommendation of the European Central Bank, Court of Justice or European Investment Bank

d'Amsterdam et le champ d'application de la procédure de codécision, RMC, 1997, p. 665; L. Descot, L'affermissement du Parlement européen par la traité d'Amsterdam, l'exemple de la codécision, TPD, 1998, p. 38; O. Manolache, Treaty of Community law, ed. V, C. H. Beck Publishing House, Bucharest, 2006, p 201.

16 See O. Manolache, cited work, p 103.

17 OJEC, N. L. 148/1 from 28 May 1999.

(Article 289 TFEU). Special legislative procedure differs from ordinary legislative procedure in that:

- Parliament and Council work together, but each individually (e.g. Articles 19, 21, 25, 33, 64 Para. 3, 65 Para. 4, 81 Para. 3, Para. 82. 2, 83 Para. 1, 86 Para. 1, 87 Para. 3, 89, 108, Para. 2, 113, 115, 126 Para. 14, 127 Para. 6, 140 Para. 3, 311, 312 and other TFEU);
- the initiative driving a legislative act does not come from the Commission, but from another institution or a group of Member States (e.g. Articles 65 Para. 4, 108 Para. 2, 129, 252, 308, all TFEU).

If the provisions of the TFEU provide for legislative acts to be adopted by the Council in accordance with a special legislative procedure, the European Council may adopt a decision authorising the adoption of such acts in accordance with the ordinary legislative procedure (Art. 48 Para. 7 Para. 2 TEU).

Special legislative procedures are not covered by standard rules in the treaties, but are governed by different rules for each of the cases provided for in the Treaties. And in the special legislative procedure, the Council and the Parliament are still involved in passing legislation that is subject to different rules from those governing ordinary legislative procedure:

- in most cases, special legislative procedure requires unanimity in the Council and consultation of the Parliament (for example, Articles 21, 33, 64, 81 TFEU);
- in some cases, this implies unanimity in the Council and approval by the EP (e.g. Articles 19, 25, 82 Para. 2, 86 Para. 1 TFEU);
- there are also several cases where the Council votes by qualified majority and the European Parliament is only consulted (e.g. Articles 223 Para. 2, 226, 228, all TFEU);
- there is also a special legislative procedure for the adoption of the annual budget of the EU, which is based on the usual procedure but has been specially adapted to the particular characteristics of the budget process (qualified majority in the Council under Art. 314 TFEU).

3.3. Procedures for the adoption of non-legislative acts

Any action taken by the European Union through a – special or ordinary – legislative procedure is a "legislative act" (Art. 289 Para. 3 TFEU). Conversely, any measure that is not adopted by this procedure is a non-legislative act. In addition to the theoretical implications, the distinction between legislative and non-legislative acts also has practical implications, for example the European

Parliament and the Council shall meet in public when debating and voting on draft legislative acts, not being forced to do this when they discuss non-legislative acts (Art. 15 Para. 1 TFEU).

Non-legislative acts have their legal basis both in the Treaties (primary legislation) and in secondary legislation (derived).

Examples of non-legislative acts that are based on Treaties, (the TEU and TFEU) include:

- Article 74 TFEU on administrative[18] cooperation in which the Council adopts measures on proposal from the Commission and after consulting the European Parliament. Given that the Treaty does not provide for measures to be adopted by legislative procedure, they are therefore non-legislative acts;
- Article 81.3 Para. 2 TFEU, according to which the Council may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by ordinary legislative procedure. The Council is therefore not obliged to adopt by legislative procedure in this area.
- A series of non-legislative acts have been adopted by the European Council, for example:
  - Art. 86 Para. 4 TFEU, according to which the institution may adopt a decision to extend the powers of the European Public Prosecutor.
  - Art. 24 Para. 1(2) and Art. 31 Para. 1, both TEU, on Common Foreign and Security Policy, stipulating that the "adoption of legislative acts shall be excluded" in the area of CFSP and therefore decisions in this area by the Council and the European Council are non-legislative acts.

The Council acted by qualified majority on a proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, in accordance with Art. 215 TFEU. In this regard, the Council adopted "restrictive measures" required on penalties related to CFSP against natural or legal persons, groups or state entities.

The examples mentioned above show that there are no rules for the procedure to adopt non-legislative acts because:

- the Commission – an institution with legislative initiative in principle under Art. 86 Para. 4 TFEU – only has an advisory role;
- in some cases the Commission is informed, but not consulted (Article 215 TFEU), in other cases it is consulted (Art. 74 TFEU);

18 Appropriate "Area of Freedom, Security and Justice" (formerly Pillar II of the EU JHA, later, by the Treaty of Amsterdam, CPJP).

- since TEU provisions exclude the use of CFSP legislation, all measures in this area are non-legislative,
- the European Council adopted a decision amending all or part of the provisions of Part III of the TFEU (Article 48 Para. 3 TEU). The Council shall act unanimously after consulting the EP and the Commission and the ECB, in the case of institutional changes in the monetary area. The Council shall act according to the rules above, and within the simplified treaty revision procedure (Article 48 Para. 6 TEU);
- when negotiating and approving agreements between the European Union and third countries or international organisations (Article 218 TFEU), the Council shall adopt the decision concluding the agreement, in some cases after approval by the EP and in others after consulting the EP.

Non-legislative acts adopted under secondary legislation or secondary legislation are: implementing acts and delegated acts. Their legal basis is as follows:

- 291 TFEU, according to which, if uniform conditions are necessary for implementing legally binding acts of the EU, those acts (the base) confer jurisdiction on the Commission, or – in specific cases duly justified and in cases provided for by Art. 24 and 26 TEU – the Council[19]. It is up to the legislature, while fully respecting the criteria laid down in the TFEU, to decide in each case whether to give powers to the Commission in accordance with Art. 291 Para. 2 of that Treaty. To date, the exercise of implementing powers by the Commission is governed by Council Decision 1999/468/EC.
- 290 TFEU, which introduces delegated acts pursuant to the Lisbon Treaty. According to this article, EU legislation may delegate to the Commission the power to adopt generally applicable non-legislative acts to supplement or amend certain non-essential elements of the act.

Does not are general rules governing the procedure for adopting delegated acts, unless a Commission Communication of 9 December 2009 establishing a model for legislation that could be adapted on a case by case basis[20]. In this case, the Commission Communication considers that

> "delegation may be considered a means of better regulation, which seeks to ensure that legislation can remain simple and be completed and updated without the need to

19 See Regulation (EU) 182/2011 of the EP and the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms Member States to control the exercise of implementing powers by the Commission (J Of L. 055, 28.02.2011, p 013-018).

20 COM (2010), C 81 E / 6, from 15.03.2011.

resort to repeated legislative procedures, legislature may also retain critical skills and responsibility" (Preamble, lit. H).

There is no general rule for the adoption of delegated acts in that Communication (the letter I), thus

"Article 290 TFEU does not contain a legal basis for the adoption of a horizontal instrument laying down the rules and general principles applicable to the delegation because those conditions must therefore be determined in each basic act (act of legislative nature, a.n.)".

4. Conclusions

Through the Lisbon Treaty, co-decision procedure has become ordinary procedure in the European Union (Art. 289 Para. 1 TFEU), with the legislative function being shared between the European Parliament and the Council.

Further, the legislative powers of the European Parliament are indicated by the special regulation adopting legal acts of the Union, namely the specific cases provided for in the Treaties in respect of the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the Council with the participation of the European Parliament (Article 289 Para. 2 TFEU). Note that the TEU, when enumerating the functions of the Parliament, begins by specifying that "The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions" (Article 14 TEU).

Since the establishment of the European Community, the Council has retained its status as the main legislative body of the European Union. In this regard, the Council performs legislative functions, either individually, by special procedure acting unanimously in most cases (Art. 19, Art. 21, Art. 65, Art. 108, Art. 113 TFEU), or with a participating role only by the European Parliament, or jointly with the European Parliament, through the ordinary procedure (of co-decision).

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The European Company (Societas Europaea - SE), a Legal Instrument of Mobility for Companies in the European Union

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Abstract

According to the Treaties that established the European Union, the completion of the internal market represents an absolute priority in the construction of Europe. Guaranteeing companies' freedom of establishment is essential for accomplishing this major objective. Nevertheless, regulating a legal instrument for promoting European companies' movement in the European space encountered real resistance from the Member States. The European Company represents the first legal instrument provided by the communitarian legislator to companies willing to give their activities a cross-border character. Having an original legal status, this new type of structure marked the beginning of companies' movement on the single market. Beyond its contribution to the modernisation of communitarian companies' law, the European Company remains in itself an important legal instrument, albeit perfectible, for exercising the freedom of establishment for companies in the European Union.

Keywords: European Company, mobility, cross-border merger, seat transfer.

1. Introduction

The regulation initiative for a European type of company belonged to France. In 1966, Professor Sanders[2], together with experts from five other Member States, designed a project shaping the status of the incorporated European Company, a project adopted thereafter by the European Commission through the 1970 Regulation proposal[3].

The proposed status was inspired from the German law model of joint stock companies, known to be one of the most rigorous. Among the provisions borrowed from German law, there were also those concerning co-determination –

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2 The European Commission was the institution charging Professor Sanders, the dean of the Law Faculty in Rotterdam, together with other experts in the field, to come up with a project proposal. The document Etudes sur un projet de société anonyme européenne, Série Concurrence, 1967, was sent to the Council by the Commission in 1967.

3 The regulation proposal from 30 June 1970 regarding the status of the incorporated European Company, JOCE no. C. 124 on 10 October 1970.

the *Mitbestimmung*[4] model – a system under which employees are represented at the administrative level and contribute to the company's management. The objective for borrowing this model was to prevent unfair competition regarding social aspects. Due to the lack of standardisation in this matter, it was felt that the decision by the European Company on which Member State to choose for its registered office might be influenced by attempts to circumvent law systems that were familiar with the co-determination mechanism, at the expense of the employees' and the concerned states' interests.

Despite the strictness of the regulation and its innovative character, the 1970 proposal to introduce, together with the national categories of companies, a company model characterised by a fully transnational status, governed by a directly applicable regulation, and moreover inspired by the German law system, while excluding the application of domestic legislations, was not successful.

Actually it is well known that Member States are reluctant to adopt any initiative that implicitly involves relinquishing national sovereignty in favour of communitarian legal order.

Many other proposals have been submitted to the states, but none of them materialised in time.

It took Member States more than 30 years to give up their mistrust in the European Company. In 2000, at the Nice summit of the European Council, the Member States of the European Community agreed upon this new communitarian instrument following final identification of a solution concerning the employees.

On 8 October 2001, European Council Regulation no. 2157/2001 concerning the status of the European Company (SE)[5], and the 2001/86/EC Directive completing the former with regard to employee engagement[6], were unanimously adopted. Compared with the 1970 version, which contained about 300 articles, the 2001 text has only 70 articles, which made it easier to understand and apply.

The regulation was enforced on 8 October 2004[7], a date that represented the deadline by which Member States were obligated to transpose the 2001/86/EC Directive into national law.

Within the context of globalisation, adopting a normative act concerning European companies was considered highly important for ensuring cross-border

4 Mitbestimmung is the exact translation from German of co-determination.

5 Published in the Official Journal L 294/1 on 10 November 2001.

6 Published in the Official Journal L 294/1 on 10 November 2001.

7 According to Romanian law, the Emergency Ordinance of the Government no. 52/2008 published in the Official Journal no. 333/30 April 2008, the Romanian legislator adopted national norms to enforce the Regulation regarding European Companies by introducing a new title of the Law 31/1990, namely Title VII1 – the European Company.

movement and increasing companies' competitiveness within the European Union. In an optimistic perspective, Frits Bolkenstein[8], member of the European Commission at the time, declared that

> "the European Company will allow the development and the cross-border reorganisation of many companies, while avoiding endless bureaucracy and the costs engaged by the creation of a network of subsidiaries. This represents therefore a step forward in the effort of business integration on the national market, in the daily reality, and an incentive for a growing number of them to take advantage of this opportunity beyond national borders and thereby consolidate Europe's competitiveness according to the Lisbon objectives".

2. The legal status of the European Company (SE)

The European Company is an autonomous type of company created on European Union territory that takes the form of an incorporated European company without being a joint stock company in the strictest sense, and which is established under the conditions and by the means provided by Regulation no. 2157/2001. The legal regime of the European Company is a mixed one. The aspects which are not governed by the Regulation at issue are covered by the national provisions of the Member State where the European Company has its registered office, adopted in accordance with communitarian measures regarding SEs, in particular, or applicable to a joint stock company created according to the legal system of the Member State where the SE has its registered office[2].

The European Company's legal status is an original one, adapted to the interest provided by the regulation it is governed by. It is obvious that – from setting up to the moment of registration – this genuine legal entity demonstrates a series of particularities, some of which constitute totally new legal structures for characterising companies.

The regulation text contains rules concerning the creation and operation of the European Company, norms organising legal aspects such as means of constitution, legal form and company name, company capital, registered office, management and administration, publication formalities and the company's registration.

Ways of formation. Irrespective of the means of constitution, the creation of a European corporation is always based on the prior existence of some stock companies, subsidiaries or branches in at least two different states. As emphasised in an official report, "a European corporation cannot be created *ex nihilo*"[9].

8 Frits Bolkenstein was Commissioner for the Internal Market in 2004.

9 Noëlle Lenoir, La Societas Europaea ou SE: pour une Citoyenneté Européenne de l'Entreprise (2007), Rapports officiels.

At the same time, whichever the means of creation, the European corporation requires at least one foreign element.

Regulation no. 2157/2001 establishes four possible routes to creating a European corporation:

a) a European Company established by joining two or more cross-border joint stock companies, created under a Member State's legal system, with their head office and central management in the European Union if at least two of them are governed by the law of different Member States.

b) a holding European Company established by joint stock companies or by limited liability companies, with the head office and the central management on European territory, and which are situated in at least two different Member States or maintain a subsidiary governed by the law of another Member State or a branch on the territory of another Member State for at least two years.

c) establishment of a subsidiary European Company. According to the Regulation, all types of corporations with their head office and central management on European territory and situated in at least two different Member States or maintaining a subsidiary governed by the law of another Member State or a branch established on the territory of another Member State for at least two years can form a European corporation-type subsidiary.

d) transformation of an incorporated company into a European Company, if it was established under the law of a Member State, has its head office and central administration within the territory of the Community, and has been operating a branch in another Member State for at least two years.

Legal form. According to Article 3 of the Regulation, the legal form embraced by the European Company is that of an incorporated company, created in accordance with the law of the Member State in which the registered office is located. The European Company can create one or more subsidiaries under the form of single shareholder European companies, a situation in which national dispositions regarding single shareholder companies don't apply.

Company Denomination. To emphasise the identity of this new type of corporation, the Regulation provides that the name of the European Company has to be preceded or followed by the abbreviation SE – *Societas Europaea*.

Minimum subscribed capital. The European Company's share capital is expressed in euro, and cannot be less than 120,000 euro, as a rule. There are certain activities which represent an exception, in these cases the legislation where the European Company has established its head office with a share capital which exceeds this amount, and national laws thereby apply accordingly. As the exception is strictly interpreted and applied, it obviously won't apply when national norms expressly provide for a lesser amount of share capital than imposed by the Regulation when establishing certain types of companies.

As far as the use of the euro as benchmark currency is concerned in those Member States which haven't yet adopted the single currency, the share capital is expressed in the national currency, while maintaining the possibility for the European corporation to express its capital in euro.

Registered office. The office of the European corporation can be established in any of the Member States, provided that its central administration is located in that country, and can be transferred to another Member State. In fact, the possibility to transfer the office from the Member State where it was registered to another Member State is one of the main advantages of this kind of corporation.

However, establishing the registered office in one of the Member States does not imply automatic assumption of the nationality of that country, the European Company being essentially a legal entity that is superior to the Member States' national law systems.

Central management. Regardless of whether Member States apply the monist system or the dualist system, according to the Regulation, the central management of the European Company has to function in the same country where the company has established its head office. Moreover, Member States are allowed to establish their head office and central administration in the same place. As far as relocation of the central administration is concerned, the Regulation stipulates the Commission's obligation to submit to both the European Parliament and the Council a report analysing the opportunity to establish the European Company's central administration and head office in different Member States.

Double publication of the establishment of a European corporation. The establishment of a European Company is subject to two-fold publication: at both the national and European levels.

At the national level, publication is submitted to the legislation of the Member State where the European Company establishes its head office and results in the enforceability of the corporation establishment against third parties.

At the European level, the disclosure consists of a public notification for informative purposes, published in the Official Journal of the European Union and concerning the registration of the European Company.

The notification is communicated by the national register of the Member State where the head office is established, and contains information regarding the European Company's denomination, number, registration date and place, publishing date, place and title, head office and field of activity.

Legal entity. The European Company acquires status as a legal entity as soon as it is registered. The European Company is entered in the national register of the Member State where the company has established its head office; such registration can take place only after conclusion of an agreement governing em-

ployee co-determination and decision making according to Article 3, Para. 6 of the 2001/86/EC Directive, or if the negotiation period established by the Directive has expired without reaching an agreement.

3. Essential contributions of the European Company (SE) to company mobility in the internal market

3.1. Shaping a legal regime for cross-border mergers

The 2157/2001 Regulation regarding European Company status represents the first communitarian text providing companies in the European Member States with a set of material rules which have facilitated the establishment of the cross-border merger procedure.

Its merit increases as it marks an end to the long period of time when European companies were faced with numerous legal obstacles when trying to cross the borders of the states where their office or central administration was located.

In legal literature, the cross-border merger is considered the main legal instrument for establishing European Companies. Some authors even assert that the European Company was conceived as a facilitator for cross-border mergers in the European Union. Although such an assertion is hard to prove scientifically, it is certain that in practice more than half of the existing European Companies were established by merger.

Beyond all these opinions, we consider that the major asset of the Regulation regarding the status of the European Company lies in its contribution to the movement of companies, by shaping a legal regime for cross-border mergers.

Therefore, for the first time in the history of communitarian law, a normative act offers a definition of the cross-border merger and regulates its field of activity.

According to the Regulation, every stock company has to cumulatively meet two conditions in order to participate in a merger to establish a European Company: it must have been established according to the legislation of a Member State and it must have its head office in one of the Member States of the European Union.

To benefit from the legal regime established by the Regulation, companies merging to form a European Company cannot have their central management and head office in the same Member State.

What's more, according to Para. 23 of the Regulation, this kind of procedure is also accessible to companies established on behalf of the legislation of a Member State where their registered office is located, but whose decision-

making headquarters are outside the European Union, provided that the company at issue has substantial and continuous ties with the economy of a European country[10].

As far as the establishment of the merger is concerned, Article 17 asserts that the merger procedure must take place according to Article 3 and Article 4 of the Directive 78/855/CEE regarding internal mergers. As a consequence, the merger can take place:

- by absorption procedure, when the absorbing company takes the shape of a European Company and
- by establishing a new company, in which case the newly established company becomes a European Company.

Article 20 of the Regulation is considered to be truly innovative and crucial for crossing the traditional limits of cross-border mergers as it provides that the elements of the merger have to be mutually agreed by the companies involved in the merger project, and establishes the mandatory aspects of this one[11]. Introducing a substantive rule of law to unitarily regulate the content of the main document for the cross-border merger eliminates the inconveniences caused by the cumulative application of national legislations to the clauses of the merger contract.

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10 Such a connection exists, namely when a company has a functional unit in the country at issue.

11 According to Article 20, the merger project includes the following elements:
a) the name and registered office of each of the merging companies together with those proposed for the SE
b) the share-exchange ratio and the amount of any compensation
c) the terms for the allotment of shares in the SE
d) the date from which the holding of shares in the SE will entitle the holders to share in profits and any special conditions affecting that entitlement
e) the date from which the transactions of the merging companies will be treated for accounting purposes as being those of the SE
f) the rights conferred by the SE on the holders of shares to which special rights are attached and on the holders of securities other than shares, or the measures proposed concerning them
g) any special advantage granted to the experts who examine the draft terms of the merger or to members of the administrative, management, supervisory or controlling organs of the merging companies
h) the statutes of the SE
i) information on the procedure by which arrangements for employee involvement are determined pursuant to Directive 2001/86/EC.