

Michigan Journal of International Law

Volume 11 | Issue 4

1990

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Recommended Citation

Thomas E. Abeltshauser, *Towards a European Constitution of the Firm: Problems and Perspectives*, 11 MICH. J. INT'L L. 1235 (1990).

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TOWARDS A EUROPEAN CONSTITUTION OF THE FIRM: PROBLEMS AND PERSPECTIVES

Thomas E. Abeltshauer *

I. INTRODUCTION

The law concerning the constitution of the firm and the development of an EEC corporate law have been important issues at both the national and Community levels during the last twenty years. Due to the approval of the Single European Act¹ and the intention of the European legislator² to complete harmonization of the European internal market at the end of 1992,³ the harmonization projects concerning the constitution of the firm and a statute concerning the European Corporation ("Societas Europea" or "S.E.") are gaining new attention.⁴

This article will discuss in particular the proposed EEC directive on the harmonization of corporate structures as well as the proposed regulation of the Societas Europea. Initially, these proposals were strongly oriented toward German law. As such, a corporation had to have a managing board as well as a so-called supervisory board and a

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1. *Single European Act*, 30 O.J. EUR. COMM. (No. L 169) 1 (1987); BULL. EC, Supp. 2/86 (1986) [hereinafter *Single European Act*].

2. I will use the term "European Legislator" as follows: Unlike the legislative processes of the national legislatures of the Member States, the legislative process on the Community level is much more indirect. First, the EC Commission proposes legislative projects such as the harmonization of certain areas of corporate law. Second, the European Parliament and the EC Economic and Social Committee give their opinion on the proposal. Finally, the EC Council discusses the proposal, which can require several years of hard work. In the end, it is the Council which brings the proposal of a harmonization directive into force. "European Legislator" will refer then to a composite of EC lawmakers. See B. BEUTLER, B. BIEBER, J. PIPKORN & J. STREIL, *DIE EUROPÄISCHE GEMEINSCHAFT—RECHTSORDNUNG UND POLITIK* 105 (1987) [hereinafter *DIE EUROPÄISCHE GEMEINSCHAFT*]; E. STEIN, M. WÄLBRÖECK & P. HAY, *EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE* 30 (1963).

3. *Treaty Establishing the European Economic Community*, opened for signature Mar. 25, 1987, art. 8A, 298 U.N.T.S. 11 [hereinafter *EEC Treaty*] as amended by *Single European Act*, *supra* note 1, art. 13.

4. See, e.g., Lutter, *Europa und das Unternehmensrecht*, in *VORTRÄGE, REDEN UND BERICHTE AUS DEM EUROPA-INSTITUT DER UNIVERSITÄT DES SAARLANDES* 118 (1988); see also Abeltshauer, *Strukturalternativen für eine europäische Unternehmensverfassung*, in *EUROPÄISCHE INTEGRATION ALS HERAUSFORDERUNG DES RECHTS: MEHR MARKTRECHT, WENIGER EINZELGESETZE* 10 (1990).

general meeting of stockholders.⁵ Since the EEC Commission published the so-called "Green Paper,"⁶ which contains a comparative analysis of national legal systems' requirements for the structure of corporations and provisions for co-determination rights for employees at the board level, the new proposals concerning the constitution of the firm are taking different "structural options" into account. Accordingly, the fifth directive, the S.E. regulation and the special S.E. co-determination directive provide the national legislatures with a choice between several approximately equal options, thus fulfilling the principle of functional equivalence.

Even though this new approach was rather astonishing under a system of legal harmonization, it was necessary due to the very different legal, economic, historical and even ideological structures in the Member States which created difficulties for the harmonization of corporate law. For example, these problems appeared during the negotiations of the fourth and seventh directives which concerned the law regulating the financial statements of single as well as groups of corporations. The European legislator solved these problems by offering a variety of options to the Member States. Without these options, the directives would not have passed. Of course, it is questionable whether such an approach leads to real harmonization of national legal structures, or whether the European legislator instead freezes these structures only on a European level without any harmonizing effect in the future.

Taking this criticism into account, I will first discuss the proposed fifth directive and the proposed regulation of the *Societas Europea*. Second, I will address the general problem posed by the functions of European legal harmonization and ask whether the fifth directive and the S.E. regulation correspond with them. Finally, I will consider the question of whether a new approach to legal harmonization can be defined under the Single European Act, and how the fifth directive and the S.E. would be affected.

5. See, e.g., *Proposition d'une cinquième directive tendant à coordonner les garanties qui sont exigées dans les États membres, des sociétés, au sens de l'article 58 paragraphe 2 du traité, pour protéger les intérêts, tant des associés que des tiers en ce qui concerne la structure des sociétés anonymes ainsi que les pouvoirs et obligations de leurs organes*, 15 J.O. COMM. EUR. (No. C 131) 49 (1972); BULL. EC, Supp. 10/72 (1972) [hereinafter 1972 Proposal]; *Proposal for a Council regulation on the Statute for European Companies*, BULL. EC, Supp. 4/75 (1975) [hereinafter 1975 Proposal].

6. *Employee Participation and the Structure of Companies*, BULL. EC, Supp. 8/75 (1975) [hereinafter Green Paper]; see also the critical remarks of Däubler, *The Employee Participation Directive - A Realistic Utopia?*, 14 COMM. MKT. L. REV. 457 (1977).

II. LEGAL HARMONIZATION PROJECTS

A. *The 1972 Proposal of the Fifth Directive Concerning the Structure of Corporations in the Member States*

In 1972, the EEC Commission published the first proposal of a fifth directive regarding the structure of the stock corporation.⁷ Article 2 of this directive favored a dual supervisory structure for publicly held corporations, requiring them to set up three entities: a board for business management, a supervisory board and a general assembly of shareholders. Great Britain, Italy and France in particular did not agree with such a proposal because, in those Member States, a corporation's affairs were managed by a unified board. Such a board was of course divided into a controlling part on the one hand, and a managing or executive part on the other.

The Commission's proposal of co-determination rights for employees of the corporation posed another controversial issue. Under article 4 of this proposal, corporations with more than 500 employees had to provide co-determination rights in the supervisory board ranging up to one third of its seats.⁸ Beyond provision for employee representatives, article 2(2)(3) also opened the supervisory board to other representatives of the so-called "public or general interests."⁹

Apart from the supervisory board structure, article 2(3) of the proposal also offered the option of a so-called "cooptation system." Under this model, currently used in the Netherlands, the supervisory board has the power to nominate its own members. These members have to be neutral (e.g., outside experts); neither shareholders nor employees of the corporation may sit on the supervisory board. Of course, the corporation's shareholders and employees have a right to object to the nomination of a representative.

B. *The European Corporation — Societas Europea*

In 1975, the first proposal of a regulation concerning a European Stock Corporation also favored a supervisory structure and co-determination rights for employees and representatives of the public or general interest.¹⁰ The latter had to be co-opted by the shareholders' and

7. 1972 Proposal, *supra* note 5.

8. 1972 Proposal, *supra* note 5, at art. 4(2).

9. It is, of course, rather difficult to define exactly what kind of interests have to be taken into account under the term "public or general interests." See Pipkorn, *Zur Entwicklung des europäischen Gesellschafts- und Unternehmensrechts (II)*, 141 ZEITSCHRIFT FÜR DAS GESAMTE HANDELS- UND WIRTSCHAFTSRECHT [ZHR] 330, 366 (1977).

10. 1975 Proposal, *supra* note 5, at art. 74(a).

employees' representatives with a two-thirds majority vote.¹¹ A representative of the public interest had to have sufficient knowledge about business judgments and had to adopt a neutral stance. The function of such a pluralistic structure of the supervisory board was to legitimate the corporation's general business decisions in relation to society.¹² The corporation's employees had to choose their representatives unless they voted to decline representation in the supervisory board.¹³

Since the Commission published the second proposal in 1975, negotiations in the EEC Council have not been very successful. In particular, the differences of opinion between the Member States involved the proposed co-determination rights for employees and public interests as well as the supervisory board structure. Debate also centered upon whether it is necessary to integrate a special law concerning groups of corporations into the Statute, since such legal provisions are only known in Germany and Portugal.

The Commission published a new proposal in 1989.¹⁴ This one is very similar to the new proposal of a fifth directive, which is discussed in detail later. Under this new regime, the corporation can choose between a supervisory or unified board structure (between a dual or monistic structure).¹⁵ Co-determination rights are regulated by a special legal harmonization directive based on article 54(3)(g) of the EEC Treaty. Under this directive, the national legislatures, which have to transform the directive into national law, can choose between five different options of co-determination. These options provide: (I) participatory rights for employees in the supervisory board; (II) participatory rights for employees in the controlling part of the unified board; (III) the co-optation of new supervisory board members; (IV) the co-optation of directors sitting in the controlling part of a unified board; or (V) employee representatives on a special employee committee. If the employees and shareholders of the S.E. do not come to an agreement concerning co-determination rights, the corporation has to

11. See *id.* at arts. 74(a), 75.

12. Pipkorn, *supra* note 9, at 366. Pipkorn indicates that it is not possible to define "public interest" exactly, but it is necessary to relate the interpretation of the term narrowly to the subject of the corporation.

13. 1975 Proposal, *supra* note 5, at art. 138.

14. *Proposal for Council Regulation on the Statute for a European Company*, 32 O.J. EUR. COMM. (No. C 263) 41 (1989); E.C. COMM'N DOCS., COM(88) 268 final - SYN 218 [hereinafter 1989 Proposal]; *Proposal for a Council Directive complementing the Statute for a European company with regard to the involvement of employees in the European company*, 32 O.J. EUR. COMM. (No. C 263) 69 (1989); E.C. COMM'N DOCS., COM(89) 268 final - SYN 219; *Internal market and industrial cooperation—Statute for the European Company—Internal Market White Paper*, E.C. COMM'N DOCS., COM(88) 320 final, point 137 [hereinafter White Paper on the Statute for the European Company].

15. See Single European Act, *supra* note 1, at art. 62.

use a certain "standard model" under the law of the corporation's seat.¹⁶ This model must satisfy the highest standard and must guarantee at least the information and consultation rights under article 5(2) of the special directive supplementing the Statute.

When considering the complexity of legal harmonization in this field, the difficult negotiations between the Member States and the ongoing process of the European integration process, it naturally makes sense to shorten the former statute of 284 articles to the present 137 articles. It is also convenient to exclude provisions from the Statute concerning subjects which the European legislator already has harmonized or will harmonize in the future (e.g. employee rights on the plant level, taxation, legal provisions concerning corporate groups, accounting rules, etc.) because the Statute can refer to these directives or to national legal provisions which already have been harmonized.¹⁷ On the other hand, an immense number of new problems arise from the new proposal which could prevent the EEC Council from passing the Statute until the end of 1992 as planned.

One basic problem concerns the statutory basis of the new proposal. The former proposals were based on article 235 of the EEC Treaty. Now the Commission is using the new article 100A which is strongly connected with articles 8A and 8B of the EEC Treaty and the Single European Act.¹⁸ Article 8A regulates the integration process creating a Single European Market by December 31, 1992. Within this framework article 100A regulates the harmonization of legal rules in the field of private and public law so that the Single European Market can be established. Contrary to article 100, which demands a

16. 1989 Proposal, *supra* note 14, at art. 6(13).

17. The European legislator has already harmonized the following subject matters: The First Directive of March 9, 1968, (Publicity Directive) deals primarily with the uniformity of minimum disclosure provisions for company information, both as provided in the commercial register and in the press, 14 O.J. EUR. COMM. (No. L 65) 8 (1968); the Second Directive of December 13, 1976, (Capital Directive) deals with conditions of establishment and the minimum or stated capital of stock corporations, 20 O.J. EUR. COMM. (No. L 26) 1 (1976); the Third Directive of October 9, 1978, (Merger Directive) deals with the merger of stock corporations, 21 O.J. EUR. COMM. (No. L 295) 36 (1978); the Fourth Directive of July 25, 1978, (Accounts Directive) regulates accounting, balance sheets and the content and publication of the annual report of all kinds of limited corporations, 21 O.J. EUR. COMM. (No. L 222) 11 (1978); the Sixth Directive of December 17, 1982, (Corporate Split-Up Directive) concerns the splitting-up of stock corporations through takeovers and re-incorporations, 25 O.J. EUR. COMM. (No. L 278) 47 (1982); the Seventh Directive of June 13, 1983, (Groups of Companies Accounts Directive) complements the Fourth Directive by setting up the common framework for the annual reports of groups of companies, notably transnational corporations, 26 O.J. EUR. COMM. (No. L 193) 1 (1983); the Eighth Directive of April 10, 1984, (Auditor Directive) deals with the admission and qualification of auditors, 27 O.J. EUR. COMM. (No. L 126) 20 (1984); the Regulation of July 25, 1985, (The European Economic Interest Grouping) provides for the creation of a flexible legal association form for transnational cooperation, 28 O.J. EUR. COMM. (No. L 199) 1 (1985).

18. See *supra* note 1.

unanimous vote, "legal measures" under article 100A can pass with a majority vote.

Even if the new statute concerning a European stock corporation will serve as an important element in establishing a Single European Market, it is questionable whether the regulation proposed is a "legal harmonization measure" as contemplated by article 100A(1) of the EEC Treaty. Until now, the Commission has used "directives"¹⁹ to harmonize national law. Directives are legal instruments with which the European legislator can approximate a certain subject matter (e.g., publication requirements of a corporation, accounting rules for single corporations as well as groups of companies, take-over rules, etc.). The harmonization process itself does not "unify" a certain field of law; it only prescribes a certain standard which the national legislatures must integrate into their national legal systems. Yet the Commission also has the option to unify law by using a regulation.²⁰ Regulations are directly effective; they are addressed to the Community's citizens rather than to national legislatures.

Article 100A gives the Commission the opportunity to harmonize law by using not only directives but also regulations. Until now, it has not been very clear whether such a regulation is different from the normal regulation mentioned above, or whether the European legislator created a new type of regulation under article 100A. There are several critical legal opinions concerning this issue.²¹ Even the Commission declared that the directive should have priority under article 100A, in that the article refers to legal harmonization and not to unification.²²

Another question arises as to whether the modification of the statutory basis and the fact that the Commission regulates the co-determination issue with a special harmonization directive²³ is nothing more than a legislative trick for avoiding the unanimous vote under article 235 of the EEC Treaty. Article 54(3)(g) of the EEC Treaty, as well as the new article 100A, provide that a majority vote is sufficient to bring

19. See EEC Treaty, *supra* note 3, at art. 189.

20. *Id.*

21. See, e.g., Pescatore, *Some Critical Remarks on the 'Single European Act'*, 24 COMM. MKT. L. REV. 9 (1987).

22. DIE EUROPÄISCHE GEMEINSCHAFT, *supra* note 2, at 379; Abeltshauser, *Der neue Statutvorschlag für eine Europäische Aktiengesellschaft - Formelle und materielle rechtliche Probleme in DIE AKTIENGESELLSCHAFT* (1990) [hereinafter Abeltshauser, *Statutvorschlag*]; T. ABELTSHAUSER, STRUKTURALTERNATIVEN FÜR EINE EUROPÄISCHE UNTERNEHMENSVERFASSUNG 53 (1990) [hereinafter ABELTSHAUSER, STRUKTURALTERNATIVEN]; Schwartz, *30 Jahre Rechtsangleichung*, in *EINE ORDNUNGSPOLITIK FÜR EUROPA - FESTSCHRIFT FÜR H. VON DER GROEBEN* 333, 365 (E. Mestmäcker, H. Moller & H. Schwartz eds. 1987).

23. See EEC Treaty, *supra* note 3, at art. 54(3)(g).

a directive or a regulation into force. Therefore, the simple modification of the statutory basis for the S.E. regulation, together with the separate directive based now on article 54(3)(g) concerning co-determination rights for employees of a S.E., would probably mean a misuse of the legal form.

The special S.E. co-determination directive is of course a problem in itself. Why do we need such a special directive in addition to the fifth directive if the Commission refers to already existing directives and national law concerning other issues like accounting rules, merger requirements or the law regulating groups of companies?²⁴ Even if we accept such a directive, the "option solution" which features different models of employee participation raises the question whether these models are "functionally equivalent," which would of course be necessary under the harmonization principle of the EEC Treaty.²⁵ Since these options are very similar to the options under the new fifth directive, as we shall see later, they do not conform to the basic principle of EC harmonization.

C. *The New Proposal of a Fifth Directive Concerning the Structure of the Corporation*

One of the most interesting projects concerning the harmonization of the corporation's constitution is the new proposal of a fifth directive. After the EEC Commission did not succeed with the 1972 proposal, which was strongly influenced by German law, it submitted a special comparative study, the "Green Paper," in 1975.²⁶ Since very different models of corporate structure exist in the Member States, the Green Paper focused on the issue of legal harmonization in the field of the corporation's structure and employees' co-determination rights.²⁷ The differences which exist are based on very different political, historical and cultural backgrounds. As a result, a single European model of the firm's constitution would have been too inflexible. Therefore, in developing a new proposal, the Commission considered different versions of corporate structures and co-determination rights. The new proposal offered these options for a certain period of time. The Commission still had in mind only one major option for harmonizing the

24. See, e.g., 1989 Proposal, *supra* note 14, at arts. 7(1)(b), 8(1), 9, 14, 17(3).

25. Concerning this basic principle, see ABELTSHAUSER, *STRUKTURALTERNATIVEN*, *supra* note 22, at 52.

26. See Green Paper, *supra* note 6; see also the critical remarks of Däubler, *supra* note 6.

27. The issues addressed included supervisory versus board structure, different rules concerning the rights and duties of the directors, and very different approaches to participation rights for employees.

constitution of the firm after expiration of the period. The transition period was necessary, however, to facilitate the entire harmonization process based on one specific version of corporate structure and co-determination rights.²⁸ According to the Green Paper's proposals, the European Parliament requested alternative corporate structures and co-determination systems in its official statement concerning the new proposal of a fifth directive.²⁹

Thus, the European legislator is using two new methods of legal harmonization by both offering different options as to legal structure and by referring to a far greater extent to national legal systems. The first is exhibited in several directives concerning corporate law. By employing this method, the European legislator proposes certain options which are somewhat similar to national laws and functionally equivalent. This is the case with the fifth, fourth and seventh directives. The second method directly recognizes national laws as functionally equivalent. Such a method is based on article 100B of the EEC Treaty.

Finally, the EEC Commission published a new proposal of a fifth directive in 1983 which follows the proposals of the Green Paper and the statement of the European Parliament.³⁰ The proposed options concerning the structure of the corporation and co-determination rights for employees and the public interest should be functionally equivalent and be in force for a period of at least five years.³¹ Chapter II of the new proposal provides that the Member States can choose between a supervisory or a unified board model.³² Chapter III provides special rules for the supervisory board option. The board must

28. See Document of the EC Commission No. III/11/1978-DE; Proposal of the Commission in the Green Paper, *supra* note 6, at 43. Under this proposition, a corporation should have an optional unified board or supervisory board structure with certain participation rights for employees. As an alternative to these options, the national legislatures should also have the opportunity to choose a special employee committee or a collective agreement system which allows employers and employees to agree on one of the proposed co-determination models. The time of transition should make it possible to test the different models and to determine one single constitution of the firm. See also Hopt, *Grundprobleme der Mitbestimmung in Europa*, 13 ZEITSCHRIFT FÜR ARBEIT 207 (1982); Abeltshauser, *Neuere Entwicklungen im Recht der europäischen Unternehmensverfassung und das Problem gesellschaftsrechtlicher Rechtsangleichung*, in ZERP, ERÖFFNUNGSVERANSTALTUNG DES ZERP, APRIL 21-22, 1983 - REDEN UND BEITRÄGE 141, 146 (1983) [hereinafter Abeltshauser, ZERP ERÖFFNUNGSVERANSTALTUNG].

29. Before a Commission proposal for a new directive or regulation goes officially to the EC Council, the European Parliament and the Economic and Social Committee have to give their opinions on these proposals. See E. STEIN, M. WAELBROECK & P. HAY, *supra* note 2, at 45, 51; E. STEIN, M. WAELBROECK, P. HAY & J. WEILER, *EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVES* 11 (Supp. 1985).

30. 26 O.J. EUR. COMM. (No. C 240) 2 (1983); BULL. EC, Supp. 6/83 (1983) [hereinafter 1983 Proposal].

31. *Id.* at art. 63(c)(1).

32. *Id.* at art. 4(2).

manage the corporation's affairs under the control of the supervisory board. The unified board model is open for co-determination rights if the corporation has more than 1000 employees.³³ Article 4(1) states that the corporation also must consider employees of subsidiaries in this calculation. The general meeting of the corporation has the right to nominate two-thirds of the seats of the supervisory board. One-third of the seats are provided for employee representatives. But the national legislatures should also have the right to provide the latter group with a maximum of half of the supervisory board seats. In such a case, the legislatures should of course ensure that the shareholders' representatives keep a slight majority, e.g., by a double voting right for the chairman of the supervisory board. Article 4(c) provides another option under which the supervisory board members can nominate new members by co-optation.

Apart from these two options, article 4 allows the organization of an independent employee committee which has certain information and consultation rights.³⁴ These rights also include affairs which the supervisory board or the controlling part of the unified board must approve under article 12. The members of the employee committee are not bound to act in the "interest of the enterprise,"³⁵ but they are bound by a duty of care and a duty of loyalty.³⁶

Article 4(e) offers another alternative in which the corporation or an employers' association can regulate co-determination by a special collective agreement with the employees of the corporation or with an employees' association. The co-determination model chosen under such an agreement must be one of the above-mentioned alternatives. If the parties to the collective agreement are unable to find a solution, one of the other options enters into force automatically.³⁷

Decisions of the management board which require approval by the

33. *Id.*

34. *Id.* at arts. 4(d) and 11.

35. *Id.* at art. 10(a)(2)(1). The so-called "interest of the enterprise" is a concept which differs slightly from the "interest of the corporation." The "interest of the enterprise" should include not only the interest of the shareholders of the corporation but also the interests of the employees working in the corporation and public or general interests. As we will see later, the interest of the enterprise is a concept which is subject to very different opinions in the legal literature throughout Europe. Especially in Germany, the discussion became very sophisticated under the new Co-Determination Act of 1976. Concerning the German discussion, see T.BRINKMANN, *UNTERNEHMENSINTERESSE UND UNTERNEHMENSRECHTSSTRUKTUR* 36-39 (Frankfurter Wissenschaftsrechtliche Studien No. 1 1983); A. GROSSMANN, *UNTERNEHMENSZIELE IM AKTIENRECHT* 12-15, 32-35, 61-62, 162-63 (Abhandlungen zum deutschen und europäischen Handels- und Wirtschaftsrecht No. 29, 1980); see also the very critical remarks of C. SCHMIDT-LEITHOFF, *DIE VERANTWORTUNG DER UNTERNEHMENSLEITUNG* 45 (1989).

36. See 1983 Proposal, *supra* note 30, at art. 10(a)(2)(2).

37. *Id.* at art. 4(b).

supervisory board or the controlling side of the board are treated the same as in the former proposal of a fifth directive. The Member States have to regulate the civil liability of the unified board as well as the supervisory board members.³⁸ Such a liability has to be joint and several and cannot be limited in amount, with the exception that a board member can prove his innocence. But the delegation of authority to a lower management level or to other board members does not avoid liability under the directive. Board members remain liable even if the supervisory board or the controlling part of the board approves a certain action. The same principle is applicable in the case where the shareholders' meeting approves the action or gives certain instructions to the board member.

Finally, article 21(a) provides for another option for the structure of the corporation and co-determination rights. Under this option, the Member States can choose a unified board structure, providing for both executive directors, who represent the corporation and are occupied with its daily affairs, and controlling directors. The whole system should be functionally equivalent to the supervisory model. This becomes apparent when looking at the formal differentiation between the executive and the controlling part of the board, a situation which qualifies as a *de facto* dual structure of the unified board. The number of controlling directors must be divisible by three. These directors have to nominate the executive directors.³⁹ Under article 21(a)(2), big corporations have to nominate a special employee director. Co-determination rights have to follow the same principles as in the supervisory board model.⁴⁰ Therefore, employees of the corporation receive participation rights in the controlling part of the board.⁴¹ Under the unified board structure, it is also possible to provide co-determination rights in a special employee committee⁴² or to choose between different co-determination models using a collective agreement. Rights and duties of the board members or the members of the special employee committee should be the same as under the supervisory board model.

In contrast to the opinion of the European Parliament, the Commission proposal would regulate certain situations concerning groups of companies. Article 63(b) determines certain exceptions with respect to the control of corporations for integrating the subsidiaries into the system of co-determination of the fifth directive. Articles 10(a)(2)

38. *Id.* at art. 14(1).

39. *Id.* at art. 21(a)(1)(b).

40. *Id.* at art. 21(b).

41. *Id.* at art. 21(d).

42. *Id.* at art. 21(b)(2).

and 21(q)(2) which address the "interest of the enterprise" do not apply to these subsidiaries. The directive does not apply to holding companies either. Under article 63(b)(1)(a), controlling companies of multinational groups of companies can be excluded from the fifth directive if the corporation's purpose is to merely coordinate the financing transactions of the subsidiaries. The fifth directive does not apply to subsidiaries of groups of companies if the employees of these subsidiaries receive the rights provided by the fifth directive directly from the controlling corporation. Under article 63(b)(2)(b), exceptions are possible for article 12 (approval of certain management decisions by the controlling or the supervisory board), article 14 (civil liability) and article 21(s) (delegation of power by the administrative organ concerning certain operations).

III. FUNCTIONAL ANALYSIS OF LEGAL HARMONIZATION IN THE FIELD OF CORPORATE LAW

The second step of evaluating the new proposal of the EEC Commission is an analysis of the functions of harmonizing law in general. This will lead to a new strategy of legal harmonization in Europe, and then to a final assessment of the fifth directive, the special S.E. co-determination directive and the structural provisions of the S.E. statute.

A. *The Statutory Basis*

In establishing the European Economic Community,⁴³ the first Member States created a supranational contractual system which was not only unique concerning its general programs,⁴⁴ but also in relation to its legal dimensions.⁴⁵ For instance, the EC has law-making authority under the EEC Treaty.⁴⁶ Under article 145, in relation to articles 2 and 3 of the EEC Treaty,⁴⁷ the EC Council has authority not

43. The term "EC" encompasses the European Coal and Steel Community ("ECSC") established on April 18, 1951, the European Economic Community ("EEC") and the European Atomic Energy Community established on March 25, 1957.

44. The general goal of the EC is the abolition of trade barriers between Member States and the establishment of the freedom of movement for goods, services, persons and capital throughout Europe. EEC Treaty, *supra* note 3, at art. 3; *see also* DIE EUROPÄISCHE GEMEINSCHAFT, *supra* note 2, at 37.

45. Ehlermann, *Die Rolle des Rechts und der Juristen in der Gemeinschaft*, in ZERP ERÖFFNUNGSVERANSTALTUNG 45 (1983); M. LUTTER, KAPITAL, SICHERUNG DER KAPITALAUFBRINGUNG UND KAPITALERHALTUNG IN DEN AKTIEN - UND GMBH - RECHTEN DER EWG § I, 1 (1964).

46. EEC Treaty, *supra* note 3, at art. 145.

47. The goals mentioned under article 2 of the EEC Treaty include the development of European economic activities, economic stability, increased standard of living, a continuous and balanced expansion and closer relations between Member States through the establishment of a

only to coordinate the economic policy of the Member States but also to decide on proposals of the Commission concerning legal harmonization directives and regulations. The Treaty, as well as the law made in accordance with the Treaty, is directly valid and applicable.

The enforcement of the goals mentioned in articles 2 and 3 of the EEC Treaty requires a broad harmonization of national law. Article 3(h) in particular requires national legal provisions to be harmonized as far as such harmonization is necessary to the functioning of the Common Market. Therefore, legal harmonization is strongly related to the extent of integration already obtained in the EC and therefore has a so-called dynamic character which corresponds to the dynamic character of the integration goals of the EC.⁴⁸

The statutory basis for article 3(h) harmonization is article 100, as well as articles 100A, 100B and 189, para. 3 of the EEC Treaty. Article 54(3)(g) of the EEC Treaty in particular regulates the legal harmonization of corporate law.⁴⁹ The EC uses the directive,⁵⁰ the regulation⁵¹ and agreements under international law⁵² to harmonize national law. In doing so the EC not only creates a flexible supranational legal framework,⁵³ but also considers very different historical, political and ideological traditions in the Member States.

In the following section we will discuss principles under which the Member States have integrated legal harmonization into the EEC Treaty and how these principles have changed functionally during the integration process.

B. Functions

In the beginning of the European harmonization process, legal harmonization was one element of a very broad concept of functional in-

Common Market and the coordination of the economic policies of the Member States. EEC Treaty, *supra* note 3, at art. 2.

48. The "dynamic character" concept means that European integration is an ongoing process. Therefore, legal harmonization projects have to refer to the level of European integration already achieved at that moment. DIE EUROPÄISCHE GEMEINSCHAFT, *supra* note 2, at 344; Timmermanns, *Die Rechtsangleichung im Gesellschaftsrecht — Eine integrations- und rechtspolitische Analyse*, 48 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT [RABELSZ] 48 (1984); Däubler, *supra* note 6, at 465.

49. T. ABELTSHAUSER & J. PIPKORN, ZUR ENTWICKLUNG DES EUROPÄISCHEN GESELLSCHAFTS- UND UNTERNEHMENSRECHTS 25 (European University Institute Working paper No. 85/167, 1985).

50. EEC Treaty, *supra* note 3, at art. 189(3).

51. *Id.* at art. 189(2).

52. *Id.* at art. 220.

53. Concerning the concept of "supranationalism," see E. STEIN, M. WAELBROECK & P. HAY, *supra* note 2, at 20; Weiler, *The Community System: The Dual Character of Supranationalism*, 1 Y.B. EUR. L. 267, 271-73 (1981).

tegration.⁵⁴ Contrary to the pluralistic concept of integration in which a community of states communicates about and cooperates in the resolution of problems, functional concepts aspire to an international community, which prevails over national states in certain technical areas converted to a supranational and harmonized level. Under this concept, certain constraints will finally lead to the organization of functional units on an international level. The so-called "neo-functionalism" even reaches beyond this concept. Here, collective decisions of supranational institutions are the result of the integration process. Member States must also transfer a certain part of their decision-making authority to these institutions.⁵⁵ In the context of increasing international economic relations and international competition, those specific pressures can be absorbed in part by a necessary internationalization of production structures and opening up of a large market inside Europe for those companies which are still nationally based. Consequently, "spill-over" effects would guarantee political unity and integration over a long period of time. It was expected that cooperation would also become necessary later as a result of the interdependence of non-controversial and controversial areas, i.e., integration would progress automatically, once the growth of supranational tasks⁵⁶ resulted in supranational institutions which have to increasingly intervene in the political decision-making process and thus need political powers (namely the process of political integration).⁵⁷

Economically, the integration process of a pure free-trade zone, which provides simply for the elimination of customs, duties and other trade barriers between the Member States, was expected to develop further toward full integration with standardization of policies and political institutions via the Customs Union (a common external tariff), a Common Market (mobility of production factors) and an Economic Union (harmonization of economic policies).⁵⁸

The integration concept of the European Community is based on the principles of market parity, economic freedom and freedom of competition, and was derived from neo-liberal concepts of order until the mid-1970's.⁵⁹ Production factors were to be released from their

54. DIE EUROPÄISCHE GEMEINSCHAFT, *supra* note 2, at 58; Behrens, *Integrationstheorie*, 45 RABELSZ 8 (1981); K. NAGELS & A. SORGE, *INDUSTRIELLE DEMOKRATIE IN EUROPA* 30 (1977); M. CAPPELLETTI, M. SECCOMBE & J. WEILER, *INTEGRATION THROUGH LAW*, Bd. 1, 3.

55. Behrens, *supra* note 54, at 22.

56. Concerning this term, see Weiler, *supra* note 53, at 268.

57. K. NAGELS & A. SORGE, *supra* 54, at 30.

58. Behrens, *supra* note 54, at 30.

59. F. MARX, *FUNKTIONEN UND GRENZEN DER RECHTSANGLEICHUNG NACH ART. 100*

national chains in order to create an internal European market. A general legal framework⁶⁰ was assigned the task of creating a European competition system and of guaranteeing freedom and equality of competition. This freeing of economic forces can in some ways be compared to the transition from the guild to the market system in the 19th century.⁶¹ In this system, free competition was intended to be an independently functioning mechanism for allocation, guidance and distribution, thereby determining the best possible application of production factors and production results for meeting future needs.

The "role of the law" was designed to be closely related to this concept of integration. If companies in a developing European industrial society were to be able to compete beyond their national borders⁶² and also with firms from overseas,⁶³ legal, administrative and tax barriers had to be removed. It was necessary to bring the European market structures and company structures still tied to national standards into conformity so that the common basis of economic freedom of movement, market equality and freedom of competition were not put at risk.⁶⁴ Particular importance was attached to the integration of national corporate laws, the basis of which is found in article 54(3)(g) of the EEC Treaty. According to this article, the rules which protect the interests of shareholders and third parties applied within the meaning of article 58, para. 2 of the EEC Treaty must be coordinated. This method should guarantee equivalence of the harmonized national rules. The managing function and organization should be mobilized

EWG-VERTRAG 137 (Schriften zum Wirtschafts-, Handels- und Industrierecht No. 14, 1976); R. TSCHÄNI, FUNKTIONSWANDEL DES GESELLSCHAFTSRECHTS 14 (1978).

60. Concerning the theoretical concept of a legal framework, see E. HOPPMANN, FUSIONSKONTROLLE 10 (Walter Eucken Institut, Vorträge und Aufsätze No. 38, 1972); F. v. HAYEK, FREIBURGER STUDIEN — GESAMMELTE AUFSÄTZE 47, 161 (1969).

61. R. TSCHÄNI, *supra* note 59, at 14; Joerges, *Vorüberlegungen zu einer Theorie des internationalen Wirtschaftsrechts*, 43 RABELSZ 12 (1979); F. FENDEL, INDUSTRIEPOLITIK DER EUROPÄISCHEN WIRTSCHAFTSGEMEINSCHAFT 609 (Saarbrücker Politikwissenschaft No. 3, J. Domes ed. 1981).

62. Lecourt, *Concentration et fusion d'entreprise, facteurs d'integration européenne?*, 1968 REVUE DU MARCHÉ COMMUNE 6, 10; T. ABELTSHAUSER, EUROPÄISCHE GMBH-FUSION UND UNTERNEHMENSVERFASSUNG 25 (1983); R. TSCHÄNI, *supra* note 59, at 14; EC Commission, *Problem der Unternehmenskonzentration im Gemeinsamen Markt*, WIRTSCHAFT UND WETTBEWERB 330 (1966).

63. J. BÄRMANN, EUROPÄISCHE INTEGRATION IM GESELLSCHAFTSRECHT 2 (1970).

64. In the past, there were a few European firms developing models of cooperation (Hoesch-Hoogovens, Agfa-Gevaert, etc.); see Bayer, *Horizontal Groups and Joint Ventures in Europe, Concepts and Reality*, in GROUPS OF COMPANIES IN EUROPEAN LAWS 3 (K. Hopt ed. 1982); Lutter, *Empfehlen sich für die Zusammenfassung europäischer Unternehmen neben oder statt der europäischen Handelsgesellschaft oder der internationalen Fusion weitere Möglichkeiten der Gestaltung auf dem Gebiete des Gesellschaftsrechts?*, in VERHANDLUNGEN DES ACHTUNDVIERZIGSTEN DEUTSCHEN JURISTENTZIGER, BAND I (GUTACHTEN), H1 (1970).

for the Community.⁶⁵

Although initially there was some uncertainty concerning the scope of application of article 54(3)(g), it may be assumed that this article cannot be restricted solely to questions of freedom of establishment.⁶⁶ In fact, according to general opinion today, article 54(3)(g) should be interpreted broadly, in close connection with the general clause of articles 100, 100A and 100B.⁶⁷ For example, Friedhelm Marx argues that articles 27, 54(3)(g), 56(2), 57(2), 99, 100 and 101 of the EEC Treaty constitute a norm within itself, which could be regarded as a legal institution of the EEC Treaty and which is correspondingly based on a uniform basic concept and therefore must assume a uniform function in the system established by the EEC Treaty.⁶⁸ Since the Single European Act came into force, we must now add articles 100A and 100B to this system.

This broad interpretation of article 54(3)(g) would lead to the harmonization of corporate law as a whole. The resulting laws subsequently could not be limited even by the concept of protective law under article 54(3)(g) of the EEC Treaty, since, if interpreted more precisely, all the rules of corporate law can also be regarded as protective rules in favor of either the shareholders or third parties, including employees.⁶⁹

The harmonization of law, however, was based not only on the principle of freedom of movement, but also on considerations of competition law. The general legal harmonization rules⁷⁰ are intended to eliminate unfair competition,⁷¹ restrictive trade practices⁷² and distortions of competition.⁷³ The proper functioning of the Common Mar-

65. R. TSCHÄNI, *supra* note 59, at 15; E. MESTMÄCKER, *EUROPÄISCHES WETTBEWERBSRECHT* 18 (1974); Everling, *Die Rechtsangleichung in der Europäischen Wirtschaftsgemeinschaft auf dem Gebiete des Niederlassungsrechts*, in *AKTUELLE FRAGEN DES EUROPÄISCHEN GEMEINSCHAFTSRECHTS, EUROPÄISCHES KOLLOQUIUM*, H 29, 60 (66). Concerning the concepts of legal harmonization in the field of corporate law, see R. BUXBAUM & K. HOPT, *LEGAL HARMONIZATION AND THE BUSINESS ENTERPRISE 192-95* (Integration Through Law: Europe and the American Federal Experience No. 2.4, M. Cappelletti, M. Seccombe & J. Weiler eds. 1988); Abeltshausen, *Book Review*, 35 *DIE AKTIENGESELLSCHAFT* 130 (1990) (reviewing R. BUXBAUM & K. HOPT, *LEGAL HARMONIZATION AND THE BUSINESS ENTERPRISE* (1988)).

66. Concerning the interpretation, see U. EVERLING, *DAS NIEDERLASSUNGSRECHT IM GEMEINSAMEN MARKT* 41 (1963); BÄRMANN, *supra* note 63, at 38.

67. Pipkorn, *Die Angleichung des europäischen Gesellschafts- und Unternehmensrechts*, 32 *WIRTSCHAFT UND RECHT, SONDERHEFT UNTERNEHMENSRECHT* 85, 93 (1980).

68. F. MARX, *supra* note 59, at 43; see also J. BÄRMANN, *supra* note 63, at 39; Pipkorn, *supra* note 9, at 511.

69. Pipkorn, *supra* note 9, at 513.

70. See EEC Treaty, *supra* note 3, at arts. 100-02.

71. *Id.* at art. 101.

72. *Id.* at art. 100.

73. See *id.* at arts. 101-02.

ket links the harmonization of law to the realization of economic freedom of movement, common or coordinated policies and fair competition within the Common Market.⁷⁴ Mestmäcker thus clarifies the functional relationship between the rule of law and the economic system, which constitutes one of the undisputed principles of harmonization of law in his eyes. Correspondingly, another functional area of the harmonization of corporate law and especially the law concerning the constitution of the firm is the pursuit and achievement of fair competition. The influence of this principle is manifested in the creation of uniform principles concerning disclosure and accounting.⁷⁵

C. *The Constitution of the Firm*

The study of legal harmonization in the field of the company's constitution is particularly interesting, since the Community touches deeply the fundamental values of the Member States. More legalization in the field of corporate structures has occurred.⁷⁶ An analysis of this harmonization project thus promises to provide a scale by which to measure the success of European integration and the limits of freedom of action within the community.

1. *The Constitution under Industrial Policy Perspectives of the Community*

The optimistic, theoretical promises and hopes of an automatic differentiation of the internal European market and European industrial structures did not materialize. European corporations and common strategies for the building up of a European industry developed only slowly. But an increasing awareness of threats from potential overseas competitors, as well as an increasing sensitivity to situations of economic crisis, led to the first proposals for medium-term economic planning in 1962, followed by plans for a European industrial policy in 1965. These plans, particularly the ideas arising from French plan-

74. E. MESTMÄCKER, *supra* note 65, at 98.

75. See *Seventh Council Directive of 13 June 1983 based on Article 54(3)(g) of the Treaty on consolidated accounts*, 26 O.J. EUR. COMM. (No. L 193) 1 (1983); *Fourth Council Directive of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies*, 21 O.J. EUR. COMM. (No. L 222) 11 (1978); *Première directive du Conseil, du 9 mars 1968, tendant à coordonner pour les rendre équivalentes, les garanties qui sont exigées, dans les États membres des sociétés au sens de l'article 58 deuxième alinea du traité pour protéger les intérêts tant des associés que des tiers*, 11 J.O. COMM. EUR. (No. L 65) 8 (1968); see also Lutter, *Rechtliches Gewicht und rechtspolitische Bedeutung der 4. Richtlinie*, in *RECHTSANGLEICHUNG NACH NEUEM RECHT* 3 (1980).

76. R. BUXBAUM & K. HOPT, *supra* note 65, at 250 (1988); Kübler, *Verrechtlichung von Unternehmensstrukturen*, in *VERRECHTLICHUNG VON WIRTSCHAFT, ARBEIT UND SOZIALER SOLIDARITÄT* 167 (F. Kübler ed. 1984).

ning principles described below, were initially met with extreme skepticism from the German side.⁷⁷

An EEC industrial policy which encourages the EEC Commission to achieve an active role with respect to and in the interest of all or a section of the industrial firms in the Community⁷⁸ has evolved clearly since 1967, in spite of initial contradictions.⁷⁹ The biggest problem, disagreement between France and West Germany, was settled when West Germany concurred that since European companies were not large enough, concentration was necessary.⁸⁰ Furthermore, the 1967-68 recession and the coal crisis sparked discussion of interventions by public authorities and of an overall economic policy control. The European economic system could no longer be conceived of as a legal order which is privately organized and simply protected by government. The responsibility for the functioning of external trade comes back to the political and administrative system, while the nationality of economic policy actions escapes from control by legal criteria of conventional provenance.⁸¹

In 1970, the Commission submitted a voluminous memorandum on the industrial policy of the Community.⁸² In spite of considerable differences of opinion between the Member States concerning the emphasis to be placed on the structural or sectoral aspects of such a policy, the EEC Council finally succeeded in 1973 in passing a resolution concerning the industrial policy of the Community together with a program of action for common measures.⁸³ Today the industrial policy of the Community is part of a general economic policy which contains guidelines for medium-term economic policy through programs drawn up by the Council and by representatives of the governments of the Member States meeting in the Council.⁸⁴ The basic principles of this industrial policy aim, among other objectives, to create a uniform

77. F. FENDEL, *supra* note 61, at 145; *see also*, EUROPÄISCHES GEWERKSCHAFTSINSTITUT, INDUSTRIEPOLITIK IN WESTEUROPA (1981) (a comparative study of the varying conceptions of industrial policy in the Member States).

78. F. FENDEL, *supra* note 61, at 163; R. HELLMANN, KOMMENTAR ZUM EWG-VERTRAG ANHANG C ABSCHNITT ZUR INDUSTRIEPOLITIK 3 (1983).

79. R. HELLMANN, *supra* note 78, at 5.

80. Lecourt, *supra* note 62, at 6.

81. Joerges, *supra* note 61, at 25.

82. EC COMMISSION, DIE INDUSTRIEPOLITIK DER GEMEINSCHAFT (1970) (Memorandum of the Commission); F. FENDEL, *supra* note 61, at 163.

83. 16 O.J. EUR. COMM. (No. C 177) 1 (1973); R. HELLMANN, *supra* note 78.

84. Concerning the legal nature, *see* DIE EUROPÄISCHE GEMEINSCHAFT, *supra* note 2, at 282; concerning the 5th program from July 1982, *see* J. PIPKORN, KOMMENTAR ZUM EWG-VERTRAG, VORBEM. ZU ART. 117-122 RDN. 44 (1981); Wilkinson, *Industrial Policy in the European Community*, in SCHRIFTEN DES ARBEITSKREISES EUROPÄISCHE INTEGRATION E.V. 31 (1987).

legal, tax and financial order, particularly the restructuring of corporations in order to create a common corporate market. This is to be achieved, apart from the application of European competition law, by specific projects of legal harmonization in fields of law which hitherto produced and partitioned national markets into watertight compartments, supplemented by law widely applied in the Community. Thus, the Commission formulated a political program addressed to corporations, which shifts from the principle of individual adaptation of companies to modified market structures.⁸⁵

The "functions" of legal harmonization of corporate law were altered by this development.⁸⁶ Corporate law directives and regulations lost their character as a general framework of rules of law. Instead, they became materially more and more bound within the formulated industrial policy program. The aim was to make it possible for corporations throughout the Community to work together with other such corporations, to make contracts, to establish firms or to merge with other companies, subject to conditions comparable to those with respect to formalities and security of law of individual States.⁸⁷ The "policy of the law" revealed itself with the integration of political aims into the legal harmonization programs.⁸⁸ Today the program of legal harmonization in the field of corporate law comprises industrial policy functions. A uniform company constitution can considerably facilitate cooperation between companies with different nationalities and very different board structures. Similar arguments are also used to support the harmonization of co-determination law. Such differences must be removed because they constitute an obstacle to the institution of Community regulations concerning international measures for reorganization and mutual interpenetration of companies.⁸⁹ Furthermore, considerable problems of the interpretation of individual legal institutions may occur which are closely linked to company constitutions: for example, certain legal obligations, the interest of the corporation, duties of care, loyalty and liability. A corresponding harmonization of these legal rules would appear to be appropriate in relation to the de-

85. See Mestmäcker, *Wettbewerbspolitik in der Industriegesellschaft*, in DIE SICHTBARE HAND DES RECHTS 125, 131, who does not agree with such a policy because it could contradict the basic principles of European competition law.

86. Lutter, *Die Entwicklung des Gesellschaftsrechts in Europa*, in 1975 EUROPARECHT 44, 49.

87. EC COMMISSION, *supra* note 82, at 140; Lutter, *supra* note 86, at 49.

88. Steindorff, *Wirtschaftsordnung und Steuerung durch Privatrecht?*, in FESTSCHRIFT FÜR L. RAISER 621 (1974); Steindorff, *Politik des Gesetzes als Auslegungsmastab im Wirtschaftsrecht*, in FESTSCHRIFT FÜR KARL LARENZ 217 (1973).

89. 1972 Proposal, *supra* note 5; White Paper, *supra* note 14, at 12; Däubler, *supra* note 6, at 463.

sired industrial cooperation.⁹⁰

2. *The Constitution under Competition and Social Policy Perspectives of the EEC*

In essence, European competition law and policy constitute an opposite pole to European industrial policy because the latter favors economic concentration in the way explained above while the former controls concentration by avoiding monopolistic European market structures. This polarization increases the importance of efforts to harmonize corporate law and the constitution of the firm. The former neo-liberal approach strongly related harmonization of corporate law to certain economic constitutional law structures.⁹¹ Today the national and the European legislator is confronted with a functional change in competition and corporate law. Considering this change, von der Groeben emphasizes⁹² that, according to the intention of the EEC Treaty, competition should not be understood as theoretical, complete competition in a transparent market with a polipolistic market structure, a view which in his opinion would be based only on a model theory with no practical value since economic concentration within the Community is increasing. Article 85 of the EEC Treaty protects the so-called "workable competition" model which is based on a functionalist understanding of competition. Accordingly, competition is then bound instrumentally within the objectives of a welfare state system in which economic functions (distribution of income, composition of supply, control of production, technical progress, etc.) are complemented by social policy objectives.⁹³ The optimum realization of these functions is accomplished with optimum intensity of competition, which, it is claimed, is achieved in the market form of broad oligopoly. In addition, article 85(3) also shows the relativity of the way in which principles are oriented purely toward competition. The declaration of exemption provided for under this article is subject

90. *A European Industrial Continuum*, BULL. EC, 10/81, at 20-21 (1981); *European Parliament (EEC) Resolution on Enterprises and Governments in International Economic Activity*, 24 O.J. EUR. COMM. (No. C 287) 25, 28 (1981); BULL. EC, Supp. 3/82 (1982).

91. Tschäni, *Gesellschafts- und Unternehmensverfassungsrecht im Lichte des Rechts der Wettbewerbsbeschränkungen*, in 32 WIRTSCHAFT UND RECHT, SONDERHEFT UNTERNEHMENSRECHT 62, 68 (1980); R. TSCHÄNI, *supra* note 59, at 68.

92. See comments on Article 85 in KOMMENTAR ZUM EWG VERTRAG (H. von der Groeben, H. von Boeckh, J. Thiesing & C.-D. Ehlermann 3d ed. 1983); EC Commission, 9. Bericht über die Wettbewerbspolitik 10.

93. Kantzenbach, *Die Funktionsfähigkeit des Wettbewerbs: weite Oligopole als Wettbewerbsbedingung*, in WETTBEWERBSTHEORIE 194, 194-97 (K. Herdzina ed. 1975); R. SCHOLZ, KONZENTRATIONSKONTROLLE UND GRUNDGESETZ 61 (Abhandlungen aus dem Gesamten Bürgerlichen Recht - Handelsrecht und Wirtschaftsrecht No. 43, 1971).

to exceptions for weak participants in the market in relation to certain goals of industrial, structural and middle class policies of the EEC.⁹⁴

European company constitution rules should therefore be subsumed under competition policy objectives,⁹⁵ since harmonization of company constitution rules and legal structures for co-determination rights means similar structural requirements and social cost burdens for companies operating in more than one country within the Community. This can prevent threatened distortions of competition, advance equality of competition and offer protection against a flood of co-determination — a fear created by the German situation.

In addition to the increasing influence of competition policies on European company law, the welfare state and social policies also develop a certain influence on this field of law. Social costs in the context of the discussion concerning article 117 of the EEC Treaty (rules concerning the social policy of the Community and the harmonization of social welfare provisions of the Member States) were initially regarded as being neutral for competition and company law. Only in exceptional cases did social differences appear relevant to competition and require a harmonization of law.⁹⁶ On the other hand, the Social Policy Action Program of the Community,⁹⁷ created in 1974, proves that just as much importance was attached to energetic measures in the social sphere as to the achievement of the economic and monetary union.⁹⁸ Correspondingly, there also are references to the necessity for co-determination rights in company decisions in the fourth program for the medium-term economic policy of the Community of March 14, 1977.⁹⁹

An essential problem of harmonization of company constitution law is posed by the rapidly increasing internationalization of produc-

94. D. THOMPSON, *DIE WETTBEWERBSPOLITIK IN DER EUROPÄISCHEN GEMEINSCHAFT* 21 (Walter Eucken Institute, Vorträge und Aufsätze No. 64, 1978); 25 O.J. EUR. COMM. (No. L 314) 34 (1982).

95. Pipkorn, *The Legal Framework of Employee Participation Methods on the National and International Level and Particularly Within the European Community*, in 1 SAGE, *ECONOMIC AND INDUSTRIAL DEMOCRACY* 99, 119 (1980); *Employee Participation and Company Structure*, BULL. EC, Supp. 8/75 (1975).

96. T. ABELTSHAUSER & J. PIPKORN, *supra* note 49, at 96.

97. Council (EEC) Resolution of 21 January 1974 concerning a social action programme, 17 O.J. EUR. COMM. (No. C 13) 1 (1974).

98. Pipkorn, *Die Bedeutung der Rechtsvergleichung für die Harmonisierung sozialrechtlicher Normen in den Europäischen Gemeinschaften*, in *SOZIALRECHTSVERGLEICH IM BEZUGSRAHMEN INTERNATIONALEN UND SUPRANATIONALEN RECHTS* 229, 239 (Schriftenreihe für Internationales und Vergleichendes Sozialrecht No. 2, H.F. Zacher ed. 1978).

99. Council (EEC) Decision of the Council and of the Representatives of the Governments of the Member States, Meeting Within the Council, of 14 March 1977 adopting the fourth medium-term economic policy programme, 20 O.J. EUR. COMM. (No. L 101) 1 (1977).

tion structures which caused completely new problems and conflicts for several social groups. There were no legal precautions against this development in the Member States, and today such precautions are evolving only hesitantly.¹⁰⁰

The harmonization of company constitution rules is further justified by the fact that the sphere of co-determination laws stops at the national frontiers of the Member States. Cases extending beyond national borders can thus not be handled uniformly, unless the companies concerned develop an independent private dispute settlement system, such as the cooperation model of Hoesch-Hoogovens.¹⁰¹ Of course, one must also realize that rules harmonized and transformed into national laws concerning the constitution of the firm and co-determination rights cannot extract themselves from the national legal order. Nonetheless, such a project helps to provide the basis for primary EEC law, and at the same time creates the possibility of uniform dispute resolution procedures throughout Europe.

IV. SPECIFIC PROBLEMS OF THE NEW FIFTH DIRECTIVE

Naturally there are many potential criticisms of the methods of harmonization of corporate law. As the process of European integration progressed, it became evident that the shifting over of broad functional spheres from the Member States to community organs would become increasingly difficult due to the implied loss of political decision-making power. Furthermore, doubts arose concerning the legitimation of the Council's authority, only very indirect, to establish rules while excluding the European Parliament.

Since the middle of the 1970's there has been increasing stagnation of the harmonization process in many areas of law. This stagnation was further enhanced by national economies that were shaken by crisis and by growing protectionist efforts. One consequence of the evident stagnation in the integration process, as noted by Nagels and Sorge, was the Commission's anticipation of separate national interests in its

100. Wanner & Peccei, *Management Decentralization and Worker Participation in a Multinational Company Context*, in *WORKERS PARTICIPATION IN AN INTERNATIONALIZED ECONOMY* 66 (1978).

101. H. Hofmann, *Mitbestimmung der Arbeitnehmer in Gesellschaftsorganen und grenzüberschreitende Unternehmenszusammenschlüsse in den Europäischen Gemeinschaften* 89 (1976) (unpublished dissertation, Friedrich-Wilhelms-Universität, Bonn); Ebenroth & Sura, *Transnationale Unternehmen und deutsches Mitbestimmungsgesetz*, 144 *ZEITSCHRIFT FÜR DAS GESAMTE HANDELS- UND WIRTSCHAFTSRECHT* 610 (1980); Lutter, *Mitbestimmungsprobleme im internationalen Konzern*, in *FESTSCHRIFT FÜR ZWEIFERT* 251 (1981); Grasmann, *Internationale Probleme der Mitbestimmung*, in *ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT* 317, 328 (1973); Däubler, *Mitbestimmung und Betriebsverfassung im internationalen Privatrecht*, 39 *RABELSZ* 444, 451 (1975).

submissions so that the Council could be met.¹⁰² Nagels and Sorge also noted that the Commission endeavored to support influential interest groups and made increasing use of these groups in order to avoid a decision-lag and to increase chances of a decision in the Council. With respect to accounting for the interests of influential lobbies, this criticism may seem exaggerated, because it is a widespread legislative practice to conduct hearings on the advisability and formulation of proposed legislation. The views of Nagels and Sorge should not be taken lightly, however, because their analysis of the decision-making process in the Council highlights the method of striking compromises and package deals in favor of the interests of individual Member States.¹⁰³

In European company law, the beginnings of these trends were already evident in the discussions concerning the third directive¹⁰⁴ on the harmonization of national merger law which integrated British legal ideas, manifesting a considerably more complicated system of norms in comparison with earlier proposals. Great problems occurred in the discussions concerning the fourth directive dealing with accounting law.¹⁰⁵ About 41 national legislative options are visible here,¹⁰⁶ although the professional associations of certified public accountants in the Member States work closely together and could influence the harmonization process to make national legislation as uniform as possible. Similar problems became evident in the directive concerning accounting principles in groups of companies, which after long and difficult negotiations recently passed the Council.¹⁰⁷ There were also sharp differences of opinion concerning the proposed Vredeling directive on the supplying of information to and consultation with employees of companies with a complex, and in particular, transnational structure.¹⁰⁸ A directive concerning groups of companies has been in preparation for more than 12 years and is still awaiting

102. See K. NAGELS & A. SORGE, *supra* note 54, at 35.

103. Everling, *Möglichkeiten und Grenzen der Rechtsangleichung in der Europäischen Gemeinschaft*, in Festschrift für R. Schmidt 165, 170 (1976).

104. *Third Council Directive of 9 October 1978 based on Article 54(3)(g) of the Treaty concerning mergers of public limited liability companies*, 21 O.J. EUR. COMM. (No. L 295) 36 (1978).

105. *Fourth Council Directive of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies*, 21 O.J. EUR. COMM. (No. L 222) 11 (1978).

106. Jonas, *Zur Problematik der 4. EG-Richtlinie (I)*, 29 DER BETRIEB 1361 (1978); Jonas, *Zur Problematik der 4. EG-Richtlinie (II)*, 29 DER BETRIEB, 1409 (1978); Timmermans, *supra* note 48, at 25.

107. 1983 Proposal, *supra* note 30.

108. *Commission (EEC) Proposal for a Council Directive on procedures for informing and consulting the employees of undertakings with complex structures, in particular transnational undertakings*, 23 O.J. EUR. COMM. (No. C 297) 3 (1980); BULL. EC, Supp. 3/80 (1980).

publication.¹⁰⁹

Another problem concerns the transformation of a directive into national law, a process which has proved to be extremely difficult and slow.¹¹⁰ In December 1982, the European Court of Justice found in the action brought by the Commission against Belgium, Ireland, Italy and Luxembourg for violation of the EEC Treaty, that on the grounds of article 169 those Member States had committed the said infringements of contract with respect to the second directive.¹¹¹ Finally, since the transformation of the first directive into national law, doubts have arisen in the Member States concerning the legal consequences. If the Council issues a directive under article 189, para. 1, of the EEC Treaty, then, according to article 189, para. 3, it binds any Member State at which it is aimed, in relation to the intended objective. It follows that national law, once brought into conformity, is no longer fully available to subsequent national legal reforms, insofar as such reforms contradict the objectives of the directive. Such reforms can only be made possible via a formal process of change of a directive by the European legislator or by a simplified process of adjustment.¹¹² Lutter points out that the cementing of corporate law stands in direct contradiction with needs for flexible, rapid adjustment and reform.¹¹³ The problems noted are also evident in projects for the harmonization of the constitution of the firm.

A. *Harmonization of Corporate Structures and Co-determination Rights*

The revision of the fifth directive is certainly to be welcomed with respect to the problems of legal harmonization in the field of the constitution of the firm and co-determination law. It is worth asking, however, to what extent these rules are subject to an option policy which favors individual Member State interests. Preference for such an option policy would result in a purely formal harmonization of company law, in which case one has to ask whether the demands of functional equivalence under the EEC Treaty are being met.

109. Document of the EC Commission No. III/1639/74 published in *Zeitschrift für das Gesellschafts- und Unternehmensrecht* 14/1985, at 446.

110. Schwartz, *Wege zur EG-Rechtsvereinheitlichung: Verordnungen der Europäischen Gemeinschaft oder Übereinkommen unter den Mitgliedstaaten?*, in *FESTSCHRIFT FÜR ERNST VON CAEMMERER* 1067, 1081 (1978).

111. See *Commission v. Italy*, 1982 E.C.R. 3547; *Commission v. Belgium*, 1982 E.C.R. 3555; *Commission v. Luxembourg*, 1982 E.C.R. 3565; *Commission v. Ireland*, 1982 E.C.R. 3573.

112. See *DIE EUROPÄISCHE GEMEINSCHAFT*, *supra* note 2, at 180, 347; Timmermans, *supra* note 48, at 28.

113. Lutter, *supra* note 86, at 52.

Examination of individual rules support the already mentioned pessimism. Of course, the declaration of the European Parliament, as well as the new Memorandum concerning the fifth directive, require the setting up of structural alternatives and in particular "equivalent" systems. Thus this framework in its concrete formulation also shifts from the concept of a transitional regulation, such as set up in the Green Paper, toward a uniform system of alternative models of corporate structure and co-determination rights to be set up in the future. The Commission chose the same method as in the new proposal of a Statute concerning the European public corporation mentioned above.

Also open to criticism are the proposed rules' requirement of the principle of "equivalence" and the Commission's more or less adherence to existing national rules in the field of corporate structure and participation rights of employees. The proposed supervisory board structure refers strongly to German and Dutch law. Correspondingly, co-determination rights are linked to the supervisory board.¹¹⁴ The parity between representatives of the shareholders, who should still keep the majority of votes, and employees on the supervisory board is also an existing principle in German law. The co-optation system of the directive derives from Dutch law.

The so-called employee committee regulated under articles 4(4) and 4(7) of the directive is based on principles of countervailing powers favored especially in Great Britain, Italy, Portugal and Belgium. The creation of co-determination rights by collective agreements should meet legal requirements in Italy, Spain or Greece.

The board system under article 21(a) *et seq.* of the directive considers corporate structures such as in Great Britain, Ireland, France, Italy and Spain. Even if these countries do not recognize co-determination rights in the board at this time, the Commission's proposal is similar to ideas found in the French and British discussion concerning a reform of the board which integrates certain participation rights for employees.¹¹⁵

As far as the principle of equivalence is concerned, it is true that the supervisory board system could be brought into functional harmony with the managing board model,¹¹⁶ but the rights of participa-

114. See 1972 Proposal, *supra* note 5, at art. 4.

115. See, e.g., Health and Safety at Work Act of 1974, which institutionalized employee committees at the plant level in Great Britain; concerning co-determination rights on the board level, see the Bullock Report from 1977; concerning the French discussion, see the Rapport Sudreau, LA REFORME DE L'ENTREPRISE (1975); see also Overrath, *Zur Unternehmensreform in Frankreich*, in ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT 373 (1976); see also the French Nationalization Act No. 83/155 (February 11, 1982).

116. Raiser, *Führungsstruktur und Mitbestimmung in der Europäischen Aktiengesellschaft*

tion and intervention of employees in the different models are considerably reduced with an independent body representing the employees which does not have rights and duties similar to those of a supervisory board or unified board under co-determination. Similar objections concern the very vaguely formulated option of setting up co-determination rights by collective agreements, because there is a choice between only one of the above-mentioned structural models. Furthermore, the possibility that company-related collective agreements could constitute an equivalent regulatory system is overlooked. Thus the proposal adopts requirements of the Green Paper which would make sense only if logically linked to the above-mentioned "transition period." At the same time, the risk of unwanted distortions of competition policy remains.

Fundamental reservations must also be expressed concerning the relationship between the legal basis and the intention of the EEC Treaty. It is true that hitherto our examination has shown that the harmonization of the company's constitution and co-determination structures is based upon article 54(3)(g) of the EEC Treaty. The focus, however, was upon models in which company organization was decisively influenced. The intention was to avoid disadvantages for companies resulting from different organizational requirements under article 52 of the EEC Treaty. In this case, co-determination rules were also to be taken into account in proposed legislation for harmonizing the structure of public corporations. The result turns out to be very different, because co-determination is practiced externally via collective agreement negotiations. It must therefore be asked in the future whether the fifth directive can still be based on article 54(3)(g). On the other hand, one could argue that the proposed system of collective agreement concerning co-determination rights automatically leads to a system of participation which is only linked to the supervisory or unified board of a corporation and therefore remains within boundaries of structural harmonization.

B. *The Interest of the "Enterprise"*

Further objections concern articles 10(a)(2) and 21(q)(2) of the proposed directive which regulate the so-called "interest of the enterprise." These rules, too, do not support the equivalence of the structural options. Under these rules, the members of the board and the supervisory or controlling part of the board must act in the best inter-

est of the enterprise, particularly the interest of the shareholders and the employees. As of today such a rule does not exist in the company law of any Member State. Even in West Germany the interest of the firm is merely the object of a very sophisticated legal discussion.¹¹⁷

Taking these problems into account, one must question the sensibility of regulating such an issue on a supranational level. Even if it turns out to be necessary, such a rule must of course apply not only to executive and controlling board members, but also to members of the employee committee proposed by the directive. Accordingly, it makes sense that the proposed statute of the *Societas Europa* refers only to the "interest of the corporation."

C. Harmonization of Liability Standards

Similar objections concern the duty of care and the duty of loyalty under articles 10(a)(2), 21(q)(2), 4(d)(3) and 21(e)(3) of the proposed directive. All members of the board, or the supervisory board, and the employee board must take care not to publish secret information they receive from the corporation. It could be questionable whether an employee representative should be bound by a similar duty of loyalty as a shareholder, but in most Member States such principles exist and should, therefore, be integrated into a legal harmonization project. The question of which information is secret and which is not is normally an issue of the interest of the corporation. As long as the proposed directive is using the term "interest of the enterprise," similar problems of interpretation arise. Also problematic is the fact that the employee board is not bound to such an interest under the directive, making it even more difficult to define exactly the duties of employee representatives.

V. ELEMENTS OF A NEW "STRATEGY" CONCERNING LEGAL HARMONIZATION

A. Narrow Approach

The relevance of a theory and method for the standardization, harmonization, approximation, coordination or unification of law¹¹⁸ may initially strike the convinced European as superfluous, since the EEC

117. T. BRINKMANN, *supra* note 35; A. GROßMANN, *supra* note 35; Raiser, *Das Unternehmensinteresse*, in Festschrift für R. Schmidt 101 (1976); Raiser, *Unternehmensziele und Unternehmensbegriff*, 144 ZEITSCHRIFT FÜR DAS GESAMTE HANDELS- UND GESELLSCHAFTSRECHT 206 (1980); C. SCHMIDT-LEITHOFF, *supra* note 35, at 45, 130.

118. Whether one has to use the term standardization, harmonization or coordination is not very clear under the EEC Treaty. See EEC Treaty *supra* note 3, at arts. 3(h), 100, 100a, 100b, 117 (concerning approximation), 54(3)(g), 56(2), 57(2) (concerning coordination), 99 (concerning harmonization); see also Gessler, *Ziele und Methoden der Harmonisierung des Gesellschaftsrechts*

Treaty after all guarantees and defines a related legal basis and a scope of application for many areas of law. For example, article 100 of the EEC Treaty, the basic rule concerning legal harmonization, is strongly related to the basic objects of the Treaty regulated under article 2. Since the Single European Act came into force, a similar relationship can be identified between articles 100A and 100B and article 8A, which particularly includes the establishment of a Single European Market. The basic objects of the Treaty also define the function, range and limits of legal harmonization. Concerning the function in particular, legal harmonization must, on the one hand, regulate differences between the legal systems of the Member States which could disturb the common policies mentioned above and, on the other, it must also promote the common interests.¹¹⁹ Therefore, we also could define legal harmonization as harmonization of interests in the Community. This would be the case if we redefine certain values of national legal rules on a supranational, European level.¹²⁰

It is also true that, considering the complexity of European integration, it may appear to be premature and irrelevant to judge too pessimistically the wide-ranging work done by EEC institutions in the field of legal harmonization. The major national codifications of legislation in the 19th century also went through a long ripening process,¹²¹ to some degree a result of a dialectical reciprocal relationship between law and social reality. Nevertheless, more account should be taken of the criticism of legal harmonization which points to the no longer recognizable inner relationship and link with the Common Market. In other words, it is questionable whether present legal harmonization projects are still following the prerequisites of article 100, particularly the requirements of equivalence and necessity, the principle of reasonableness, and direct influence on the establishment of a common market.¹²²

In Great Britain, the Select Committee on the European Community described certain deficiencies in the harmonization of European

der GmbH, in HARMONISIERUNG DES GESELLSCHAFTSRECHTS UND DES STEUERRECHTS DER GMBH IN EUROPA 9 (Centrale für GmbH ed. 1962).

119. B. LANGENHEINE, KOMMENTAR ZUM EWG-VERTRAG ZU ART. 100 RDN. 4 (E. Grabitz ed. 1988).

120. *Id.*

121. F. WIACKER, PRIVATRECHTSGESCHICHTE DER NEUZEIT UNTER BESONDERER BERÜCKSICHTIGUNG DER DEUTSCHEN ENTWICKLUNG 99, 458 (1967).

122. Bruha, *Rechtsangleichung in der Europäischen Wirtschaftsgemeinschaft - Deregulierung durch "Neue Strategie"?*, 46 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 1, 21 (1986); Weiler, *supra* note 53, at 267.

law in its report on the approximation of laws under article 100.¹²³ The committee relates these deficiencies to the lack of a general theory of legal harmonization which would provide criteria capable of achieving political consensus concerning the evaluation of the objectives and the extent of community activities.¹²⁴ The Committee would like to see the power of harmonizing law limited to economic purposes, unless specific political objectives of a closely related kind are concerned. The "dynamic character" of legal harmonization is rejected under the Committee's view in favor of a close direct relationship with the establishment and functioning of the Common Market. Finally, the Committee wants harmonization measures limited to the essential.

With this interpretation, the British view corresponds to the historical image of the EEC Treaty which suggests that the harmonization of law can only be undertaken for economic purposes. Legal harmonization is thus restricted to a narrow area of regulation and ensures rationality in the sense of security of law for supranational trade. Astonishingly, the Committee took a very positive view of efforts toward present legal harmonization on the basis of this method. Apart from a few exceptions (swimming pool water quality and protection of correspondence school students), all harmonization projects and directives were considered to be covered by article 100.

Krekeler¹²⁵ recognizes the problems of legal harmonization and also favors limitation to purely economic matters. Therefore he considers a broad interpretation of article 54(3)(g) of the EEC Treaty inappropriate. The creation of unified standards in corporate law for national and foreign corporations is completely adequate. In his opinion, further all-embracing regulatory mechanisms (in particular the European Company statute) would have, at best, an academic but not practical value.¹²⁶ Krekeler in fact pleads for a competition system for national laws following the U.S. model. At the same time, different conceivable levels of intensity of relations between a foreign company and a specific legal order should provide corresponding regulatory

123. 22nd Report of the Committee from April 18, 1978, at 131; 394 PARL. DEB., H.L. (5th ser.) 111 (1978).

124. Seidel, *Ziele und Ausmaß der Rechtsangleichung in der EWG — Zur britischen Auffassung*, 14 EUROPARECHT 171 (1979).

125. H. KREKELER, *WIRTSCHAFTLICHE INTEGRATION UND GESELLSCHAFTSRECHT — AMERIKANISCHE ERFAHRUNGEN UND EUROPÄISCHE IRRWEGE* 171 (1973).

126. There are similar opinions concerning the new proposal of an S.E. Statute. See, e.g., Hauschka, *Entwicklungslinien und Integrationsfragen der gesellschaftsrechtlichen Akttypen des Europäischen Gemeinschaftsrechts*, in *DIE AKTIENGESELLSCHAFT* 85, 94 (1990); Kallmeyer, *Die Europäische Aktiengesellschaft — Praktischer Nutzen und Mängel des Statuts*, in *DIE AKTIENGESELLSCHAFT* 103 (1990).

parts for the personnel statute.¹²⁷ As a result, he rejects the harmonization of co-determination law on the basis of this method.

More recent contributions to the theory of legal harmonization are based on an institutional level of considerations.¹²⁸ Institutions in this sense are regarded as norms which provide the framework for an interconnected area of life as the result of an automatic process of solidification. Friedhelm Marx provides a precise analysis of the systematic connection of articles 3(h) and 100, together with the respective special provisions like article 54(3)(g). From this analysis, he derives a guiding principle running through the history of legal harmonization, which he classifies in his conclusion as neo- or ordo-liberal. He then proceeds to analyze the failure of legal harmonization as a failure of the principal order forming the basis of the EEC Treaty.¹²⁹

In its result, the investigation is disappointing because Marx rescues himself by a retreat to the certain and still recognizable "core area" of legal harmonization using a restrictive interpretation. In doing so, in the final analysis, he remains caught up in the previously criticized neo-liberal model.

In order to reduce the complexity of control, it may appear to be useful and desirable to limit legal harmonization as narrowly as possible. So far, it is clear that the process of European integration is already very far advanced. In addition, the formulation of common policies (industrial, competition, social or export policies, and European political cooperation) must affect the legal measures taken for this process of integration and coordination. The rationality of legal harmonization is thus related not simply and solely to giving legal security to supranational trade, but also to the social settlement of new types of disputes which result from the internationalization of the Common Market.¹³⁰

Indeed, we could follow the British view insofar as a careful development of harmonization measures is to be supported, but insofar as this view also concerns the intensity of regulation and restriction to the so-called "essential," taking into account the structure of national laws, it would also appear to be too general. A theory of legal harmonization must be able to define criteria making it possible to more precisely determine what "essential" means. Krekeler's proposal to regulate at most the recognition of legal persons in national legal or-

127. H. KREKELER, *supra* note 125, at 221.

128. See F. MARX, *FUNKTIONEN UND GRENZEN DER RECHTSANGLEICHUNG NACH ART. 100 EWG-VERTRAG* (1976).

129. *Id.* at 137.

130. Seidel, *supra* note 124, at 180.

ders, in order to permit competition between these systems, does indeed appear attractive, but might well be detrimental to common policies. Linking several possibly overlapping and contradictory national legal systems would also appear unfeasible. The practice of international private law shows furthermore that each legal order claims priority of validity in the case of conflict, which according to Großfeld may lead to a falling apart of the applicable law in the respective states involved. The application of two legal orders to a single corporation would therefore appear to be practicable only insofar as these legal orders are approximately equivalent in their fundamentals and the legal nature of the corporation in the respective legal orders is characterized by at least similar principles.¹³¹ Inadequate harmonization or the creation of protective rights for shareholders, minority shareholders, creditors or employees could further result in a move away from legal systems with stricter social or competition policies.

In sum, legal harmonization appears to be unsuitable for a community interwoven not only on an economic level but also in all other sectors of social order. Proposals for an all or partially embracing "*ius commune*" in the sense of a unification of European law go in a different and often opposite direction. This includes the possibility of evolving uniform transnational legal structures which could promise decisive improvements in law, particularly on the international levels,¹³² and would also be subject to uniform rules of interpretation by the European Court of Justice. Apart from the fact that unification of law on the basis of the EEC Treaty constitutes only a partial aspect in relation to legal harmonization under article 100 of the EEC Treaty, unification of corporate structures and co-determination rights does not have a chance, according to the above analysis.

B. *Problem-oriented Harmonization*

Using a so-called typological method for analyzing legal harmonization under the EEC Treaty, Schmeder disagrees that the EEC Treaty should be based on a certain economic model because economic systems of the Member States based upon very different principles would avoid such an assumption. This becomes clear if we only compare the decentralized economic system in West Germany to the centralized economic system based on principles of *planification* in

131. Grossfeld, *Die Anerkennung der Rechtsfähigkeit juristischer Personen*, 31 RABELSZ 1, 37 (1967).

132. Neuhaus & Kropholler, *Rechtsvereinheitlichung - Rechtsverbesserung?*, 45 RABELSZ 73, 83 (1981); David, *The International Unification of Private Law*, in 2 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW (1971).

France. In this context, competition is certainly one of the most important, but not the only element of coordination in the Common Market.

In order to harmonize a certain subject matter methodologically one should first ask whether there are facts which have to be regulated on an international level. We could suppose that the coordination of corporate structures would fit under such a requirement because cooperation between different national corporations is a very important element of the European integration process. In a second step, one should compare different national legal rules which regulate these facts and analyze differences and common approaches. The problem, of course, is whether one should compare these rules only technically, harmonizing them in a last step on the basis of very abstract principles and values,¹³³ or whether one should first determine certain problems and the way in which the national legislatures regulate them. In the guiding congress on comparative law in 1900, Salleilles pointed out that it would be necessary to search for different solutions concerning a certain problem by using empirical methods. Salleilles himself proposed a 4-step method:

- Search for legal rules and principles in other national legal systems;
- Comparative analysis;
- Analysis of effects of these rules and principles;
- Transformation into one's own legal order or approximation of legal rules.¹³⁴

In addition, Zweigert and Kötz relate such an analysis to particular social needs and problems on the basis of functional comparative legal analysis. Therefore, the first question has to be asked in a functional way and the problem has to be defined without any link to national legal terms. Grossfeld also points out that it would be impossible to deal adequately with complex legal phenomena which are based on a certain cultural and historical development when using only a very technical method.¹³⁵

Following these functional approaches, a comparative study as part of a harmonization project should not only locate certain national rules and legal institutions but also look to the real social problems to

133. See the critical remarks of K. ZWIEGERT & H. KÖTZ, 1 EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG AUF DEM GEBIETE DES PRIVATRECHTS 4 (1984); Ziegert, *Juristische und soziologische Empirie des Rechts - Genese und Zukunft der Rechtsvergleichung als wissenschaftliches Problem des europäischen Rechts*, 45 RABELSZ 51, 59 (1981); Grossfeld, *Probleme der Rechtsvergleichung im Verhältnis Vereinigte Staaten von Amerika - Deutschland*, 39 RABELSZ 5 (1975).

134. Ziegert, *supra* note 133, at 61.

135. See Grossfeld, *supra* note 133, at 11.

be regulated and the effects such rules would have on a European level. Choosing such an approach probably leads to a method which has to take into account a sociological analysis of facts.¹³⁶ The methodological approach to such an analysis is of decisive importance to the identification of problems as well as the effects that such harmonized rules will have in the future.

Going a step further, Schmeder generally locates the main problem in different interests. A comparative analysis would have to search for certain interests and conflicts of interests as well as the way in which national legislatures control such conflicts. Concerning the constitution of the firm, we would therefore have to locate certain conflicts of interest which a legal harmonization project must take into account.¹³⁷

In the opinion of Friedman and Teubner, the general crisis of traditional legal concepts requires a new theory of legal harmonization.¹³⁸ The so-called "policy of law" manifests itself in the formal laws¹³⁹ and in increased state intervention. Former legal rules in the form of conditional programs would increasingly acquire the character of purpose-oriented programs. Unfortunately, Friedman and Teubner do not develop their approach any further. As it is, it is difficult to use these ideas for our problem. For example, questions arise as to which direction legal harmonization theory should develop in detail under such an approach, and what effects the approach would have. Isn't it possible that purpose-oriented rules lead to an expansion of legal harmonization, or could we relate harmonization of law to specific problems of the European integration process? Friedman and Teubner do not reply to these questions. But in summarizing the different functional approaches and the basic problems of legal harmonization (e.g., very expansive harmonization in detail, very complex negotiations in the EEC Council which take more and more time under the principle of unanimity and very broad interpretation of article 100), we could assume that it is necessary to search for a "new

136. Falke, Gessner & Höland, *Sozialwissenschaftliche Forschung als Vorstufe internationaler Rechtsvergleichung am Beispiel des Arbeitsrechts*, 45 RABELSZ 268 (1981); Bartels, *Rechtsvereinheitlichung zwischen unterschiedlichen Gesellschaftsordnungen*, 45 RABELSZ 106, 120 (1981); H. BARTELS, METHODE UND GEGENSTAND INTERSYSTEMARER RECHTSVERGLEICHUNG 123 (1982).

137. Börner, *Rechtsangleichung als Interessenangleichung — Die Wirtschafts- und Währungsunion*, in Festschrift für Kegel 381, 384 (1977).

138. Friedman & Teubner, *Legal Education and Legal Integration: European Hopes and American Experiences*, in 3 INTEGRATION THROUGH LAW 345 (1986).

139. M. WEBER, WIRTSCHAFT UND GESELLSCHAFT 503 (5th ed. 1980); Hart & Joerges, *Verbraucherrecht und Marktökonomik: Eine Kritik ordnungstheoretischer Eingrenzungen der Verbraucherpolitik*, in WIRTSCHAFTSRECHT ALS KRITIK DES PRIVATRECHTS 83 (1980).

strategy" of legal harmonization. In other words, we have to ask whether the process of identifying new harmonization projects and the method of designing the contents of a directive in order to avoid later problems of transformation into national law have to be redefined.¹⁴⁰

We have already assumed that legal harmonization projects should not be limited to economic issues of European integration because social conflicts also need to be taken into account. In addition, the Single European Act from 1986 deals with the social, consumer and environmental policies of the Community¹⁴¹ and looks to a high standard of harmonization in these areas.

Following these principles, deregulation which avoids very specific legal harmonization directives seems not to be in sight. Therefore, we have to ask whether one can localize other methodological approaches concerning legal harmonization in the so-called "White Paper" of the Commission¹⁴² or the Single European Act concerning articles 57(2), 70, 100A, 100B, 84(2), 118A, 130S and 8A.

The Commission proclaimed a first approach concerning a new harmonization method in the White Paper of 1985. A so-called "minimal or core harmonization" should replace the very broad and detailed harmonization.¹⁴³ Furthermore, legal harmonization of certain national rules should only be used in cases where it is not possible to recognize national rules as functionally equivalent.¹⁴⁴

Since the Single European Act came into force on July 1, 1987, we can find these principles in the reformed EEC Treaty, in particular articles 8A(1), 100A and 100B. Under article 100a(1), the Council can now decide over certain measures concerning legal harmonization and the establishment and the functioning of the Single European Market by a "majority vote." The Community should establish the Single European Market by December 31, 1992, under article 8a of the EEC Treaty.

Following these new principles, we could argue that future harmonization projects should in fact be related much more to core problems

140. Concerning the different steps of defining, formulating and transforming harmonization projects, see Müller-Graff, *Die Rechtsangleichung zur Verwirklichung des Binnenmarktes*, 24 *EUROPARECHT* 107 (1989).

141. See EEC Treaty, *supra* note 3, at art. 100a(3).

142. E.C. COMMISSION, *ESTABLISHING THE INTERNAL MARKET* (1985) (White Paper of the Commission for the European Council).

143. *Id.* at 61.

144. Bruha, *Rechtsangleichung in der Europäischen Wirtschaftsgemeinschaft - Deregulierung durch neue Strategie?*, *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [ZAÖRV]* 1, 7 (1986); Müller-Graff, *supra* note 140, at 111; Hayder, *Neue Wege der europäischen Rechtsangleichung? Die Auswirkungen der Einheitlichen Europäischen Akte von 1986*, 53 *RABELSZ* 622 (1989).

of the integration process than they have in the past. The principle of functional equivalence and the possibility of recognizing national legal rules on a European level could modify the type of directives in the sense that they could be de-legalized or discharged from complexity. Finally, the majority vote in the Council could accelerate the decision-making process remarkably.

Pescatore is more critical, pointing to very difficult problems in interpreting the term "Single European Market"¹⁴⁵ because the differences between a "Single European" and an "Internal Market" are not at all clear.¹⁴⁶ We can see similar problems of interpretation in the German literature concerning European law today. On one hand, one could argue that the term Single European Market includes a certain limitation compared to the Common Market. On the other hand, both terms might be defined as synonymous or as complementing one another.¹⁴⁷ In addition, article 100A requires "positively" the identification of harmonization measures.¹⁴⁸ One should ask, however, whether they would rather support a very detailed harmonization of law, or alternatively, what the limits of such a harmonization method should be.

Finally, one should ask whether so-called "functionally related harmonization measures" under article 100A(1) are a basic innovation in comparison to harmonization measures to be taken under article 100, which are also functionally related to the basic purposes of the Treaty. We might even argue that legal harmonization under article 100a is limited to purely economic aspects of the Single European Market. In addition, article 100A(2) leads to a curious dual character of the harmonization process. If we assume that the term of the Single European Market¹⁴⁹ concerns only economic aspects of integration and free trade, every harmonization project which does not concern these aspects would have to be based on article 100 which follows the old method of legal harmonization and requires unanimity.

145. See EEC Treaty, *supra* note 3, at arts. 8a and 100a.

146. See Pescatore, *Die "Einheitliche Europäische Akte" - Eine ernste Gefahr für den Gemeinsamen Markt*, 21 *EUROPARECHT* 153, 157 (1986); Pescatore, *Some Critical Remarks on the "Single European Act"*, 24 *COMM. MKT. L. REV.* 9 (1987).

147. See Müller-Graff, *supra* note 140, at 123; Hayder, *supra* note 144, at 635.

148. Concerning positive and negative integration, see N. REICH, *SCHUTZPOLITIK IN DER EUROPÄISCHEN GEMEINSCHAFT IM SPANNUNGSFELD VON RECHTSSCHUTZNORMEN UND INSTITUTIONELLER INTEGRATION* 20 (1988); N. REICH, *FÖRDERUNG UND SCHUTZ DIFFUSER INTERESSEN DURCH DIE EUROPÄISCHEN GEMEINSCHAFTEN* 42, 157 (1987); see also Müller-Graff, *supra* note 140, at 129.

149. See EEC Treaty, *supra* note 3, at art. 100a.

VI. CONCLUSIONS

As long as the fifth directive also concerns co-determination rights for employees of a corporation, the statutory basis has to be article 54(3)(g) of the EEC Treaty rather than article 100A, which explicitly excludes harmonization projects concerning the rights of employees. One proposal to facilitate negotiations concerning the fifth directive therefore would be to harmonize co-determination rights independently and exclusively by a special directive. By using such a method, the European legislator could base the fifth directive regarding only the structure of the corporation on article 100A. The advantage of this method would be to link these structural issues more closely with the establishment of the Single European Market in 1992. Another advantage of a special co-determination directive is that it could regulate not only participatory rights of employees but also other subject matters like information and consultation rights in groups of companies. It would also be possible to relate such a directive to the Statute of the European Corporation (*Societas Europea*), making it unnecessary to harmonize these questions by a special S.E. co-determination directive.

Nevertheless, future discussion in this area should consider whether the new strategy of legal harmonization under the Single European Act should not be one generally applicable to the whole process of harmonization of law in the Community. This also seems to be the basic concern of the Commission's White Paper. Therefore, the general problem posed by a new strategy of legal harmonization will be the difficulty of developing new criteria concerning the identification of problems requiring the harmonization of national rules, criteria for the design of these rules, and criteria for how to transform them later into national law.