Business Law in Europe

Legal, tax and labour aspects of business operations in the ten European Community countries and Switzerland

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Legal, tax and labour aspects of business operations in the ten European Community countries and Switzerland

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General Contents

Introduction

This book is intended to serve as a guide to businessmen and their advisers, either from outside the Common Market or from within, who seek basic information on questions in three main fields: company law and related legal matters, taxation, and labour law. For those who wish to establish an enterprise or form a holding or financing company in one of the Member States of the Common Market (including Greece, of course) or Switzerland this guide offers a unique opportunity to compare conditions in the various countries in the three fields. This is facilitated by the strict adherence to one format for each national chapter. Those who are already present in one or more of the eleven countries will find a global answer to a number of practical questions that may arise. For detailed answers the local lawyer or other consultant remains indispensable.

The format is based on two different approaches the foreign investor may take: either he 'goes it alone', by way of establishing a branch, setting up a subsidiary or taking over an existing company, or he joins forces with another investor from within the host country or from outside. In the latter event there are a number of legal forms (jointly owned company, partnership, etc.) which may be used.

Company law, taxation and labour law in the Member States of the Common Market have over the last few years acquired an additional, common dimension. In each of these fields the European Communities have been and still are harmonizing the national law systems, and are even creating entirely new law. This fact alone justifies a full opening chapter on the European developments in these fields. But there is more to this. Since the laws of the Member States have been or will soon be 'harmonized' on quite a number of points, the editors have been able to deal with these points in the 'European' chapter rather than in each national chapter. Only to the extent the implementation of EEC-Directives has given rise to peculiarities in some Member State has special mention been made of the law covered by the Directives. This should be kept in mind when one reads the national chapters.

The authors of several chapters of this book are greatly indebted to Nicholas Paines, barrister in London and son of one of our members, for his assistance in translation and his useful comments.

With some minor exceptions, in particular with respect to the Luxembourg chapter and to the section on labour aspects in the Greek chapter, the book reflects the laws in effect as of January 1, 1982.

Association européenne d'études juridiques et fiscales, Paris, January 1982.

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FEDERAL REPUBLIC OF GERMANY (INCLUDING WEST BERLIN)

GREECE

IRELAND

ITALY

LUXEMBOURG

THE NETHERLANDS

Some Terms and Abbreviations

Although we are well aware of the impossibility of adequately translating many legal terms into English we have endeavoured to achieve some uniformity of terminology throughout this book. To this end we have generally followed the terminology of the English versions of official documents of the EC. The English and Irish authors have of course used their own terms. For an explanation of some terms of European law we refer to the chapter on Some Observations on the Law of the European Communities. A short explanation of some of the other terms may be useful.

- **Enterprise** = undertaking or business
- **Public company** is used for the equivalent of *société anonyme (SA), Aktiengesellschaft (AG), naamloze vennootschap (NV), società per azioni (SpA), Aktieselskab (A/S),* the English plc, *anonymos etairia (AE)*
- **Private company** is used for the equivalent of *société à responsabilité limitée (sàrl), Gesellschaft mit beschränkter Haftung (GmbH),* the Dutch *besloten vennootschap (BV),* the Belgian *société de personnes à responsabilité limitée (sprl)* or *personenvennootschap met beperkte aansprakelijkheid (pvba), società a responsabilità limitata (sarl), Anpartsselskab (ApS), etairia periorismenis efthinis (EPE)*
- **Partnership limited by shares** is used for the equivalent of *société en commandite par actions (SCA), Kommanditgesellschaft auf Aktien (KGaA), commanditaire vennootschap op aandelen* (in Belgium), *società in accomandita per azioni, Kommandit-Aktieselskab.*
- **Limited partnership** is used for the equivalent of *société en commandite simple, Kommanditgesellschaft (KG), commanditaire vennootschap (CV), società in accomandita semplice, Kommanditselskab, eterorrythmos etairia (EE)*
- **General partnership** is used for the equivalent of *société en nom collectif, offene Handelsgesellschaft (OHG), vennootschap onder firma (vof), società in nome collettivo, omorythmos etairia (OE)*
- **Group of companies** – the German *Konzern* (which may include entities other than companies)
- **Dominant enterprise** – the dominant (controlling) enterprise in a group of companies
- **Dependent enterprise** – the dependent (controlled) enterprise in a group of companies
- **Seat** – to some extent the equivalent of the British registered office
- **Statutes** – the equivalent of British Articles of Association

- **Board (of Directors)** – when there is a single Board
- **Director** – member of a single Board
- **Managing Board** – Board of management, the members are executives
- **Member of the Managing Board** (not: Managing Director)
- **Managing Director** – Director of *GmbH, sàrl* or *pvba*
- **Supervisory Board** – *Aufsichtsrat, raad van commissarissen, conseil de surveillance* (Board of non-executive Directors)
- **Trade Register** – *Registre du commerce, Handelsregister*
- **Works Council** – *Conseil d'entreprise, Betriebsrat, ondernemingsraad*

Abbreviations

AG	–	Aktiengesellschaft
ApS	–	Anpartsselskab
A/S	–	Aktieselskab
BV	–	besloten vennootschap
CV	–	commanditaire vennootschap
EC	–	European Communities
ECR	–	Official reports of cases before the European Court of Justice
EE	–	eterorrythmos etairia
EEC	–	European Economic Community
EP	–	European Parliament
EPE	–	etairia periorismenis efthinis
ESC	–	Economic and Social Committee (of the European Communities)
EUA	–	European unit of account
GmbH	–	Gesellschaft mit beschränkter Haftung
KG	–	Kommanditgesellschaft
KGaA	–	Kommanditgesellschaft auf Aktien
K/S	–	Kommanditselskab
NV	–	naamloze vennootschap
OE	–	omorythmos etairia
OHG	–	offene Handelsgesellschaft
OJ	–	Official Journal of the European Communities
plc	–	public limited company
pvba	–	personenvennootschap met beperkte aansprakelijkheid
SA	–	société anonyme
sarl	–	società a responsabilità limitata
sàrl	–	société à responsabilité limitée
SCA	–	société en commandite par actions
SpA	–	società per azioni
Sprl	–	société de personnes à responsabilité limitée
vof	–	vennootschap onder firma

Some Observations on the Law of the European Communities

I. GENERAL OBSERVATIONS

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Member of the Rotterdam Bar

1. The first three chapters of this book are devoted to the law of the European Communities. Reading these chapters requires some basic knowledge of certain concepts of this law. In this chapter an attempt will be made to give some basic information to those who have no knowledge at all of the legal aspects of the EC. Of course this information will be incomplete and by that very fact to some extent misleading. However, the editors felt the reader might be better served with some sketchy information than with none at all.

2. European integration is based on three Treaties instituting the European Coal and Steel Community (ECSC), the European Economic Community (EEC), and the European Atomic Energy Community (Euratom) respectively. The EEC Treaty is the more general one, the other two are limited to specific sectors of the economy. The institutions created by those Treaties, the European Parliament (officially 'Assembly'), the Council, the Commission, and the Court of Justice, have been made common to all three Treaties. In the context of this book, only the EEC Treaty is relevant. Therefore, it is only to this Treaty that reference will be made.

3. The aims of the EEC are of an economic and political nature, for example to promote throughout the Community a harmonious development of economic activities. The Treaty mentions two means to attain these aims:
- the establishment of a Common Market, and
- the progressive approximation of the economic policies of the Member States.

4. The establishment of a Common Market comprises four elements:
- the free movement of goods;
- the free movement of persons;
- freedom of establishment and freedom to supply services; and
- the free movement of capital.

The realization of these 'four freedoms' must be supplemented by the approximation of national laws in many areas. Such approximation may also be required for the proper functioning of the Common Market, now it has been

established. In addition, differences between national laws may distort the conditions of competition between enterprises and persons in different Member States. The elimination of these differences may to some extent be achieved by the approximation (usually called 'harmonization') of national laws. Harmonization is effected on the basis of 'Directives' adopted by the Council of the EC. The concept of 'Directive' will be dealt with in item 13 *infra*.

5. Both the establishment and the functioning of the Common Market could be seriously impaired by obstacles to free competition. This is why the Treaty contains rules for the protection of competition, which give the Community institutions, in particular the Commission, extensive powers to adopt Regulations[1] and to formulate Decisions.[1] Competition is one of the areas in which the Community could develop its own policy and it cannot be denied that it has readily taken the opportunity. So much has been written about this subject and it is so comprehensive that the editors of this book have decided not to include it, except for a short exposé of the impact of European competition law and policy on joint ventures, an important phenomenon in the context of this book. See Section II of this Chapter.

6. The 'progressive approximation of the economic policies of the Member States' cannot be considered separately from the social policy of the Member States. This policy is of course primarily concerned with employment, wages and social security, but also with all other employment conditions. It is in respect of such conditions that a number of Directives have been adopted. Some of these are dealt with in the Chapter on European Social Law. In addition, Article 119 of the EEC Treaty provides for equal pay for men and women. This provision has given rise to important case-law of the European Court of Justice (see item 8 *infra*).

7. The aforegoing shows that there are *various sources of Community law*. To begin with, there is the Treaty. Then there are the various acts of the Community institutions as provided in Article 189 of the EEC Treaty (Regulations, Directives, Decisions, Recommendations and Opinions).[2] In addition, there are international conventions by which the Community is bound. Last but not least there is the case-law of the Court of Justice which is essential for the development of Community law and, indeed, for the whole process of integration. It is the Court which has pointed out that the Community constitutes a *new legal order* for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which are not

1. These concepts will be dealt with in items 12 and 14 *infra*.
2. In addition to these official acts there are 'programmes', 'declarations', 'resolutions', etc. adopted by the European Council (Heads of Government and Foreign Ministers of the Member States and President and Vice-President of the Commission), 'the representatives of the Member States in Council' or simply the representatives of the governments. These measures are taken without the procedures of the Treaty being observed and cannot be reviewed by the Court of Justice, but are nevertheless in fact often very important instruments laying down Community policies.

only the Member States as such but also their nationals. The Treaty is more than the traditional convention which merely creates mutual obligations between the contracting states. In this new legal order a very prominent role is played by general principles of law, including fundamental human rights, as well as by the so-called 'secondary Community law', that is the law created by the Community institutions. Another characteristic of Community law is the extensive organisational and procedural provisions which have been made to supplement, elaborate, amend, apply and enforce it.

8. Certain provisions of the EEC Treaty have *direct effect*. This means that they are capable of creating individual rights which national courts must protect. These provisions include, among many others, Article 48 (free movement of workers), 52 and 53 (freedom of establishment) and 59 and 62 (freedom to supply services), all derivatives of Article 7 which lays down one of the Treaty's fundamental principles, the prohibition of discrimination based on nationality, Articles 85 and 86 (competition) and Article 119 (see item 6 *supra*). In most cases the provision which has direct effect is clearly addressed to the Member States and consequently the individual rights which form the other side of the obligations imposed upon the States can be relied upon only against the States. This is the so-called 'vertical direct effect'. However, in a number of cases the Court of Justice has given 'horizontal direct effect' (i.e. effect as between individuals or firms) to Treaty provisions which were addressed to the Member States. Thus the Court decided that the prohibition of discrimination laid down in Articles 7, 48 and 59 applies not only to governmental agencies but also to collective labour agreements and other collective arrangements for the supply of services[3], so that a cyclist and a soccer player could invoke this prohibition against their associations who discriminated against nationals of other Member States. As to Article 119, the Court decided that the prohibition of discrimination between male and female employees did not only apply to government acts but also to all collective labour agreements and even to contracts between individuals.[4] It should be noted, however, that the Court has so far only recognized horizontal direct effect of provisions which it characterized as principles of Community law.

9. In order to have vertical direct effect, a provision of Community law (including the secondary law) must in principle meet several conditions:
- it must contain a clearly defined obligation of a Member State;
- it must not be subject to any condition;
- no implementing act of the Community institutions or of the Member State is required to make the obligation capable of being met; and
- no discretion must have been left to the Member State in deciding how to meet the obligation.

In principle, corresponding conditions apply for horizontal direct effect.

3. Cases 36-74 (Walrave and Koch/UCI and KNWU), ECR '74, p. 1405 and 13-76 (Donà/Mantero), ECR '76, p. 1333.
4. Case 43-75 (Defrenne/Sabena), ECR '76, p. 455.

10. In numerous decisions the Court of Justice has affirmed the *priority of Community law over national law*. This means that national courts must not apply any provision of national law which conflicts with any provision of the Treaty or of secondary Community law, irrespective of whether the national law dates from before or after the Community law provision. In this connection, Article 177 of the EEC Treaty, on preliminary rulings, is of vital importance, as will be set out in item 18 *infra*.

11. As stated above, Article 189 of the EEC Treaty provides for four instruments in which secondary Community law may be laid down. This does not mean that the Community institutions are free to choose which instrument to use to cover a specific subject. In most cases the Treaty sets this out precisely. In fact, the institutions have no power to adopt any Regulations or Directives unless in a specific field it has been expressly vested in them by the Treaty.

12. The *Regulation* is the most far-reaching instrument. It has general application, is binding in its entirety, and is directly applicable in each Member State. Unless expressly stated otherwise, it does not require any national measure to become binding upon everyone in the Community. In principle, it has *direct effect* as set out in items 8 and 9 *supra*. The Regulation is the instrument most provided for in the context of common policies (such as agriculture and competition), but it is also mentioned in the Chapter on the free movement of workers (see the Chapter on European Social Law).

13. The *Directive* is the most interesting instrument in the context of this book, since harmonization in the fields of company law, taxation and social law is exclusively effected by way of Directives.
Directives are always addressed to the Member States and they are binding upon them as to the result to be achieved, while the determination of the form and means by which the result is to be achieved remains within the competence of the Member States. Thus Member States may decide whether to implement the rules of a Directive by legislative or administrative acts. In practice, Directives are often rather detailed, thus leaving the States little freedom. Some provisions of Directives meet the conditions referred to in item 9 *supra* and have therefore been held to have direct effect.
In addition, national courts must see to it that the national legislator has not exceeded his discretion in implementing a Directive, and must not apply the implementing act to the extent that he may have done so.[5] As long as a Member State fails to implement a Directive, existing national law which is in conflict with the Directive must not be applied as against individuals or firms who act in accordance with the Directive.[6]
Up to July 1981 the Court of Justice had not yet had an opportunity to decide whether a Directive could produce horizontal direct effect. One could imagine that this would be the case with some Directives on Social Law which

5. Cases 51/76 (VNO), ECR '77, p. 113 and 38/77 (Enka), ECR '77, p. 2203.
6. Case 148/78 (Ratti), ECR '79, p. 1629.

elaborate certain fundamental principles laid down in the Treaty. It would be more difficult to accept such effect in the case of Directives on Company Law. In most cases the cohesion of all the provisions of such a Directive would oppose the recognition of such effect of one or more isolated provisions.

14. Decisions may be addressed to one or more Member States or to one or more legal or natural persons. They are binding in every respect on the addressees named therein. In the context of this book Decisions are of little importance since they are not used for the harmonization of national laws.

15. Recommendations and *Opinions* have no binding force. They cannot be reviewed by the Court of Justice, and are seldom formulated by any of the Community institutions in the fields covered by this book. For an exception, see the Chapter on European Company Law, item 77 (g).

16. Regulations may be adopted by the Council or by the Commission, depending upon the Treaty. If they are adopted by the Council they must have been proposed by the Commission and the Council must have consulted the European Parliament and the Economic and Social Committee.
As to the adoption of Directives, reference is made to items 6 to 9 of the Chapter on European Company Law.

17. The role of the *Court of Justice* in maintaining, interpreting and developing Community law cannot be overestimated. The Court acts in quite a number of capacities, including that of administrative court, reviewing the legality of Community acts and adjudicating claims for damages caused by wrongful Community acts. In the context of this book, two capacities should be mentioned in particular.

18. First and foremost, *Article 177* of the EEC Treaty entrusts the Court with the task of giving *preliminary rulings*, at the request of national courts, on the interpretation of the Treaty and the validity and interpretation of acts of the Community institutions. A request to that effect *may* be made by any court or tribunal of a Member State before which such a question is raised, if it considers that a decision on the question is necessary to enable it to give judgment. However, if such a question is raised in a case before a national court from whose judgments no appeal lies, that court *must* refer the question to the Court of Justice.
Thus the Court has given a large number of preliminary rulings which have had a profound impact on the business community within the EC. These rulings are the result of a certain team-work between the national courts and the Court of Justice. The latter does not act, at least not in this capacity, as a court of appeals or a 'cour de cassation', but only as the body with final authority which gives answers to certain questions of Community law which may have been raised in a dispute between individuals not necessarily seeming at first sight to have anything to do with the Community. It follows from the aforegoing that the national courts also play an important part in the application of Community law. It is in these courts that the great majority of litigation involving Community law takes place.

The interpretation of acts of the Community institutions includes the interpretation of Directives. Persons whose rights or interests are affected by a national law implementing a Directive, or even by a State's failure to implement it, can turn to their national courts in order to get a decision prohibiting the application of their national law to the extent it is in conflict with the Directive. If, in deciding whether there is such a conflict, a national court is faced with a question concerning the interpretation of the Directive, it may (or must) refer the question to the Court of Justice. Proceedings before the Court are relatively speedy: a preliminary ruling is usually given within 12 months, in which period the parties to the litigation, the Commission, the Council and all the Member States are given an opportunity to submit their observations to the Court.

19. The other capacity in which the Court acts and which should be highlighted here finds its origin in *Article 169* of the EEC Treaty. According to this provision the Commission shall, if it considers that a *Member State has failed to fulfil any of its obligations under the Treaty*, give a 'reasoned opinion' on the matter after giving such a State the opportunity to submit its observations. If the Member State does not comply with the terms of the opinion within the period laid down by the Commission, the latter may refer the matter to the Court of Justice. The other Member States may do the same (but in practice seldom do) after having referred the matter to the Commission without the desired effect (Article 170). If the Court finds that the Member State has failed to fulfil its obligations under the Treaty, the Member State will have to take the measures required for the implementation of the Court's judgment. If it does not do so, the other Member States may take reprisals, as long as these do not violate Community law.
These procedures are mentioned here with a view to the fact that the Member States often fail to implement harmonization Directives within the prescribed time. The Commission has in fact initiated many proceedings based on Article 169. This action has in nearly all cases been successful in that the Member State concerned either complied before the Court gave its decision or did so fairly soon afterwards.

20. In concluding this brief survey mention should be made of a *source of semi-Community law*, the Conventions between the Member States based on Article 220 of the EEC Treaty or in some other way connected with the EC.

21. The most important Convention in this respect is the *Convention of 27th September 1968 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.* When it came into force between the six original Member States on 1st Februari 1973 it effectively abolished the frontiers between these States as far as the jurisdiction of national courts and the recognition and enforcement of their decisions on the said matters are concerned. The impact of the Convention is felt increasingly by practising lawyers in the original Member States. Meanwhile, on 9th October 1978 a *Convention of Accession* of Denmark, Ireland and the UK to the Convention was signed, but in January 1982 it looked as if this Convention would not enter into force until 1983 or 1984. The Convention of Accession contains quite a number of amendments to the original Convention.