

THE MANAGEMENT ORGAN IN THE ARCHITECTURE OF THE EUROPEAN STRUCTURES FOR BUSINESS ASSOCIATION

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DOI: <https://doi.org/10.31410/EMAN.2020.129>

Abstract: Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) and Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), as well as other community acts, govern the legal status of the management organ with two-tier architecture of European structures for business association.

In this paper, it is concluded that the management organ shall be responsible for managing the appropriate organizational and legal entities. Therefore, it can carry out day-to-day management of the organization according to the decisions of the general assembly and the supervisory authority. It is stated that assigning day-to-day operational management to the CEOs, members of the management organ, can be defined as transferring certain aspects of their power, while keeping their right of making final decisions.

The collective character of the considered authority, carrying out its duties on the principle of collegiality, raises a line of questions, which are considered in this paper.

Subjects of study are also the horizontal and vertical relationships of the management organ, considering the representative power, as well as the different types of responsibilities. The discussed problems are in a relatively legal aspect of the legal regulations of the Member States.

Keywords: European Cooperative Society, European Company, Management organ, Administrative organ, Managing director.

1. INTRODUCTION

The regulatory framework of the management organ in the architecture of European structures of business associations at the Council level is designed by the following successively adopted legal acts: Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG), Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) and Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, as well as Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) and Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees. In many cases, those acts are referred to national legislations. That is why the legal regulation of the formation, functioning and winding up, liquidation, insolvency and cessation of payments are of a hybrid type.

2. LEGAL CHARACTERISTICS OF MANAGEMENT BODIES

The established regulatory legal framework for the European Economic Interest Grouping (EEIG) is specific. The organs of the grouping shall be the members and the manager or managers acting collectively. The grouping shall be managed by one or more individuals appointed

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in the contract for the formation of the grouping or by a decision of the members. No person may be a manager of a grouping, may belong to the administrative or management body of a company, may manage an undertaking or may act as a manager of the European Economic Interest Grouping:

- a) by virtue of the law applicable to the individual, or
- b) by virtue of the national law of the state in which the grouping is based, or
- c) by virtue of a judicial or administrative decision made or recognized in a member state.

In the case of groupings registered in a member state, the state may provide that legal entities may be managers under the condition that such a legal entity represent one or more individuals. If a member state exercises this option, it must provide that the representative or representatives shall be liable as if they were themselves managers of the groupings concerned.

The legal position of the management teams in the other two European corporate entities is different. These governing bodies are named differently depending on the form adopted in the statutes. In a European company [1] this is the management organ (two-tier system) or the administrative organ (one-tier system). In the European Cooperative Society [2] these are the management organ (two-tier system) or the administrative organ (one-tier system). These management units have a number of structurally defined identical commonalities. However, they have different legal characteristics.

The administrative organ at the one-tier system has a broader competence than the management organ in the two-tier system. The manner of their formation and constitution is also different. [3] The member or members of the administrative organ shall be appointed by the General meeting. The members of the administrative organ at the time of its foundation may, however, be appointed by the statute. The staff of the management organ is formed by the supervisory organ. This supervisory organ may make changes to it at any time, including such for expediency reasons when appropriate. The administrative organ in one-tier system has a wider range of powers compared to the former one.

The administrative organ at a one-tier system and the management organ in a two-tier system are executive and representative bodies of the company. [4] The supervisory organ may not by itself exercise the power to manage the grouping (art. 40 - 1). Council Regulation (EC) No 2157/2001 states *expressis verbis* that “the management organ shall be responsible for managing the SE”. Similar is the provision of Council Regulation (EC) No 1435/2003 stating that “the management organ shall be responsible for managing the SCE” (art.39 – 1), and “to discuss the progress and the foreseeable development of the SE’s business.” (art. 44 - 1) This jurisdiction affects all areas of the company’s activities. [5] With a view to the effective implementation of the established *ex lege* function, it is explicitly defined that the body meets periodically. The approach to determining the place of the administrative organ in the structure of the company is identical (art. 29 -1).

The management and the administrative organ have different names in the official languages of each member state depending on their historical legal tradition.

The administrative organ at one-tier system and the management organ at the two-tier system may delegate the day-to-day management and representation of the company to the CEO or CEOs under the same conditions as for the same companies established [6] in the Member

States. These executive council members have the legal status of legal representatives and possess a specific legal standing [7].

The members of the administrative organ at one-tier system are elected by the General meeting of the shareholders. This is an exclusive authority and it cannot be delegated. However, the members of the firstly constituted management organ after the startup of the company may be appointed by Statute (art. 43 – 3). In line with the Latin provision *Nulla regula sine exceptione* there is an exception to the established rule stating that the Regulation does not affect the operation of a national rule that allows the minority shareholders or other persons and authorities to elect some of the members of the body concerned (art. 47 - 4). This rule applies irrespective of the conditions for employed participation in the management of the company as defined in Council Directive 2001/86/EC and Council Directive 2003/72/EC.

The collective structure of the body, the prompt implementation of the necessary management actions and the need for highly specialized professional qualifications have made it possible for a member state, which is established in accordance with the national law [8], to appoint an Executive director or Executive directors to be responsible for the day-to-day management under the same conditions as the relevant companies with a registered office on the territory of that country [9]. Therefore, it is a matter of forming an operational management that performs planning, organizing, leading, coordinating and controlling functions for the efficient running of the company's activity [10]. This possibility is one of the main similarities of the one-tier management system and the two-tier structure.

The option to appoint executive members of the management organ (two-tier system) or the administrative organ (one-tier system) was accepted by Belgium, Bulgaria, Greece, Denmark, Estonia, Spain, Latvia, Luxembourg, Poland, Slovenia, Hungary, Finland, France, Croatia, Czech Republic and Sweden. The Commerce Act in Bulgaria (art. 224 - 4) enables an administrative body, respectively a management body of companies based in the country, to delegate the management of the company to one or more executive directors selected from among its members and to settle their remuneration. It also establishes the restriction stating that the number of executive members may not be greater than the number of the other members. A similar regime is established in Code de commerce de France. It envisages that each of the aforementioned bodies can elect a CEO and their deputies (art. L 225-51-1). Some conditions for this choice are formulated: he or she must be an individual (art. L. 225-51-2); one individual shall not perform the function of CEO or their deputy for more than one term when the company's headquarters is based in France (art. L. 225-51-6), etc.

The Corporate Governance Code, June 2010 - A.2 of Great Britain states that the two bodies may appoint a CEO and CEOs. The members of the non-executive bodies should assist in the implementation of the strategy adopted by the company and ensure that its tactical objectives are achieved. The CEO shall not be Chairman of the governance body. If the organ decides that it is necessary for it to perform both functions simultaneously, a consensus of the majority of the shareholders shall be reached (A.3.1).

It is also apparent from the name that the executive members of the bodies concerned carry out enforcement activities, i.e., perform the day-to-day management of the company according to the decisions of the General meeting [11]. It is an integral component of the overall management of the European company (EC).

The activities of the executive members are regulated by law. A new legal relationship is emerging between the CEO or the CEOs on the one hand, and the company, on the other. The generated legal fact is complex and involves two actions: either choosing from the management organ (two-tier system) or the administrative organ (one-tier system) with the agreement of the corresponding person. The election of the General Meeting will proceed according to its approved working rules. Only individuals holding the status of „shareholder” or „cooperator” [12] can participate in it. Therefore, the individuals who have handed over cash or other substitutable property under concluded loan agreements (creditors) to the company, as well as the real estate lenders etc., cannot vote.

After their election the executive members acquire a new legal status. A new twofold legal situation arises. On the one hand, they are members of the management or the administrative body, and on the other they are assigned and perform specific management functions. A new management legal relationship is emerging between the managing authority and the elected members. The created relationship is not independent. Legally it is inextricably linked to the legal relationship that has arisen before. Therefore, it is subsidiary (accessory) in nature. In case when an executive member of the board terminates their participation in the executive management due to voluntary resignation, only the executive relation will be abolished, but the existing legal membership relation will remain in force. The executive relationship will also terminate upon its unilateral termination by the above-mentioned authorities, which may take place at any time. In this sense, the dismissal of the Executive Director from that capacity will be, on the one hand, an extinguishing legal fact with respect to the executive legal relationship and, on the other, a changing legal event for their membership.

The assignment of the operational management of the executive directors can be understood as delegation of certain powers to them by the two bodies, while maintaining their right of control. This is not about delegating competence. Rather, we are faced with a division of organizational and subject-matter responsibilities. This is also evidenced by the fact that the members of the bodies with executive and non-executive functions have the same rights and obligations, regardless of the internal distribution of functions (Art. 237 - Commerce Act of Bulgaria, art.234; Code de Commerce of Belgium, etc.)

The relationship created shares some common features with the “management organ - supervisory organ” attitude in the company’s two-tier management model. There are also some significant differences. The executive directors are appointed by the management body and they retain their core legal capacity as members of the management body, while the members of the supervisory body cannot be both members of the supervisory body and the management body of the same company.

The election of an executive member of the management or the administrative body does not make them a new body in the management structure of the company.

From a legal viewpoint, the managerial legal relationship, in addition to the original one, has similar features to the mandated legal relationship [13].

In cases where member states have not accepted this option such as Austria, Germany, Cyprus, the Netherlands, the United Kingdom, etc., the management is exercised collectively by the management body, respectively by the administrative body. That is why both of them are holders of collective responsibility.

The two bodies are constituted by the election of Chairman from among the company's members. Where one-half of the members are selected by the employees in application of the above-mentioned directives, only one person nominated by the General meeting of the shareholders or cooperators may be elected Chairman.

As a collective legal and organizational entity, the management organ or the administrative organ operates on the principle of collegiality. The regulations do not establish a required quorum and a required majority for a legitimate adoption of their acts. The regulation of this issue has been provided by the company's Statute. However, there is a requirement for the frequency of its meetings on a community level.

The management organ must meet at least once every three months at intervals specified in the Statute of the association (art. 44 - 1). This means that it should be assembled at least four times during the calendar year. The requirement is legally and economically justified, as the body in question manages the company. The meetings may be regular or emergency and the procedure for summoning them is regulated in the Statute. With a view to the effective participation of the members of the body in its meetings, their right to an access to the complete information on the issues discussed on the agenda as well as to the general activity of the company, have been legally granted [14].

Generally, the number of members of the management and/or the administrative organ and the rules for determining it are laid down in the Statutes. However, there is a possibility for a member state to set a minimum and, where necessary, a maximum number of members. Denmark, Estonia, Latvia, Slovakia, Slovenia and Sweden have accepted a minimum of three members; in the United Kingdom they are two, and in Poland - five. Other countries have established a minimum and maximum number: Bulgaria - three and nine; Germany - three and nine (15 and 21); Hungary - five and eleven; Finland - one and five; France three and eighteen etc. However, despite the autonomy granted to the company the Council Regulation (EC) No 2157/2001 stipulates that the management organ is composed of at least three members and the participation of employees in the management body is regulated in accordance with the supplementary Council Directive 2001/86 / EC with regard to the involvement of employees.

In order to actively involve the employees in the management of the company an appropriate number of their representatives in the management body is normatively determined in a number of cases. The Swedish legislation stipulates that for staff over 25 people, two representatives from the meetings of employees of the company should be included in the body, and for more than 1000 people they are three. Similar requirements are also available in the German legislation providing for broad participation of employees in management [15].

3. CONCLUSION

The governing bodies in the transnational entities under consideration play an important role in the process of enlarging and enriching the institutionalized European economic partnership. They contribute to the sustainable and intelligent economic development of these structures, to a more pragmatic and long-term approach in the planning of their activities, to acceleration of the integration processes between the member states and to completion of the common internal market. Based on *facta concludentia* and corporate democracy, they are refining their operational activities with a view to achieving optimal economic, technological, social and organizational results.

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