

Main [et al.], Lang, 2007); Schulze, R. (ed.), *Europäische Genossenschaft SCE: Handbuch*, (Baden-Baden, Nomos, 2004); id., 'Die Europäische Genossenschaft (SCE)', NZG 2004, 792; Siems/Rosenhäger/Herzog, 'Aller guten Dinge sind zwei: Lehren aus der Entwicklung der SE für die EPG', *Der Konzern* 2008, 393; id., 'The Protection of Creditors of a European Private Company (SPE)', (2011) 12 *EBOR* 147; Simon, 'La société par actions simplifiée et la proposition de création d'une société privée européenne', *Revue des sociétés* 2000, 263; Steinberger, 'Die Europäische Privatgesellschaft – Schaffung einer europaweiten Gesellschaftsform für kleine und mittlere Unternehmen im Binnenmarkt', *BB Suppl.* 2006/7, 27; Teichmann, 'European Parliament Calling for Legislative Action on the European Private Company', (2007) 4 *ECL* 122; Teichmann/Limner, 'Die Societas Privata Europaea (SPE) aus notarieller Sicht – eine Zwischenbilanz nach dem Votum des Europäischen Parlaments', *GmbHR* 2009, 537; Völter, *Der Lückenschluß im Statut der Europäischen Privatgesellschaft*, (Cologne, Schmidt, 2000); Vollmer, 'Der Europäische Verein', *ZHR* 157 (1993) 373; Vossius, 'Die Europäische Privatgesellschaft – Societas Europaea Privata', *EWS* 2007, 438; Wagner, *Der Europäische Verein – eine Gesellschaftsform europäischen oder mitgliedstaatlichen Rechts?*, (Baden-Baden, Nomos, 1999); Wicke, 'Die Euro-GmbH im "Wettbewerb der Rechtsordnungen"', *GmbHR* 2006, 356; Witz, 'Rechtsangleichung und supranationale Rechtsformen für die Unternehmensverfassung', *Festschrift für Schlechtriem* 1999, 27; Wulfers, 'Allgemeine Rechtsgrundsätze als ungeschriebenes Recht der supranationalen Gesellschaftsformen', *GPR* 2006, 106; see also comparative law references above in §3 N. 10.

1. The European Economic Interest Grouping (EEIG) is of **minor importance** for European company law – especially in the larger Member States (below §34 para. 2 et seq.); with two formations, the European Cooperative Society (SCE) has even been strikingly useless. The other supranational types of companies are still to come, although all European legislative bodies are in favour of adopting the Statute for a European Private Company (SPE), which is probably the only type which currently would seem to have the chance to be similarly successful as the European Company. As many core questions are, however, still highly disputed for the European Private Company, the moment of adoption remains difficult to forecast. More important still, a solid textual basis at least for the large part of the questions which could be taken for granted is still missing, namely the question of how intensity of the regulation at the EU level remains open. Adoption has been postponed already several times. There is therefore no room for more than a description of the basic outlines, especially because a more extensive description of the EEIG can be found in the substantial related literature and for the other types, it is still early enough to describe them more thoroughly in the next edition.¹

¹ It has to be stressed, however, that the hopes placed on the European Private Company, mainly from a labour market perspective, are high, because this type creates the majority of employment and also has the highest growth rate in this respect: see Hadding/Kießling, *WM* 2009, 145; (145); and already much earlier: Boucourechliev/EU-Commission (eds.), *Proposition*, 79 (note 19); de Kluiver, in: de Kluiver/van Gerven (eds.), *European Private Company*, 21 (21); Helms, *Europäische Privatgesellschaft*, 67; Hommelhoff, *WM* 1997, 2101 (2102 et seq.).

I. EUROPEAN ECONOMIC INTEREST GROUPING (EEIG) REGULATION)

1. History, Importance, and Interplay with National Laws

a) History and Importance

2. After having been proposed in the 1970s,² the EEIG was adopted in the mid-1980s.³ The various implementation laws followed mostly in the late 1980s, in Germany, for instance, in 1988.⁴ It is, however, **not a model for other supranational types**. It was not the first proposed – this was the European Company (above §33 para. 5–7). Furthermore it is no longer prominent: it had always been situated somewhere outside the mainstream of harmonisation dealing with the limited liability company, which the EEIG is not (below §34 para. 7) – it does not even need to have legal personality (Art. 1(3)).⁵ Even more importantly, following the adoption of the European Company Statute, the EEIG has not even remained the model for the core questions of supranationality in any number of areas. These include, the interplay between European law, national law and company statutes (the Regulation talks of a 'contract for the formation of a grouping'); or more generally the desirable intensity of EU law unification; applicable law; international elements as a requirement for formation; and the possibility of cross-border structural changes and, of course, the question of employee participation.

*3. The EEIG must be seen in all Member States – except for Belgium and also France – as an **almost complete practical failure**. In Germany, for instance, there were about 326

² Proposals OJ 1974 C 14/30 and 1978 C 103/4; Opinions OJ 1977 C 163/17 (European Parliament) and 1975 C 108/46 (Economic and Social Committee).

³ Council Regulation (EEC) No 2137/85 of 25 July 85 on the European Economic Interest Grouping (EEIG), OJ 1985 L 199/1.

⁴ Survey on the transposing acts in the Member States: van Gerven/Aalders (eds.), *European Economic Interest Grouping*; Müller-Gugenberger/Schothöfer (eds.), *EWIV in Europa*, 277–849 (comparative law survey 179–191); Selbher/Manz (eds.), *Kommentar*, 223–686; for Germany: Gesetz zur Ausführung der EWG-Verordnung über die Europäische Wirtschaftliche Interessenvereinigung (EWIV-Ausführungsgesetz) of 14 April 1988, *BGBI.* 1988 I, 514; for the United Kingdom and France – besides the country reports, for instance in: van Gerven/Aalders (Woodland, 116 [France], Hickinbotham/Burnside, 252 [United Kingdom]); Burnside, 'EEIG – Implementation in the UK', (1990) 11 *The Company Lawyer*, 64; Hartard, *Europäische wirtschaftliche Interessenvereinigung*, For Italy: Del Giudice, 'Italy: The new legislation on European Economic Interest Groupings (EEIGs)', (1992) 7 *BJBEL* 89; for Germany: Weber-Rey, 'European economic interest groupings in Germany', (1993) 4 *I.C.C.L.R.*, 183.

⁵ For instance not in Germany, see §1 of the transposing Act (partnership in the sense of §§105–160 HGB). For a comparative law panorama see references preceding N. and also Dine, (1992) 13 *The Company Lawyer* 10 (12); Müller-Gugenberger/Schothöfer (eds.), *EWIV in Europa*, 182 (as in Germany otherwise only in Italy).

EEIGs in existence by the end of 2010,⁶ but about 1.016.442 private limited liability companies and 17583 PLCs, for which, therefore, the corpus of harmonisation had to be described much more substantially; viewed with respect to number of shareholders or turnover, the discrepancy (of about 1:310 and 1:55 respectively) is even more extreme. This lack of success is also due in good part to the characteristics of the EEIG, which can serve only as an ancillary tool (in more detail below §34 para. 8), and for this, a 'demanding' supranational type seemed apparently superfluous and perhaps even exaggerated.

b) Interplay Between the EEIG Statute, Law of the Seat and Formation Contract (Art. 2, 12)

4. The interplay between the different legal sources is regulated in brief in Art. 2 in conjunction with Art. 12. The EEIG Statute takes priority in application; gaps⁷ are filled by the national (company) law of the State where the Grouping has its seat, be it adopted specifically for the EEIG or in general. Which general law (i.e. the set for which type of company) applies is decided by the national legislature (in Germany for instance the law on partnerships), whereas the European Company Statute itself decides that this has to be the national law on PLCs. The EEIG (as well) may not be treated less favourably than the national parallel form.⁸ The seat is that chosen in the contract for the formation of a Grouping (siège statutaire), but with Art. 12 reducing this freedom (and the sanction is drastic, because otherwise the EEIG has to be wound up, see Art. 32(1)); the seat chosen can only be where the headquarters of the Grouping are situated – as in the seat theory (above §7 para. 6) – or the headquarters or principal place of business of one member is situated. The latter is understandable as a concept given the ancillary character of the EEIG. In fact, however, this gives virtually unlimited freedom of choice of law (including by taking in a dummy), but only within the Union (see below N. 22). This 'seat' law forms the national

law applicable to the EEIG in all respects, insofar as the EEIG Statute does not contain a rule. This is made explicit for the internal organisation of the EEIG; for third party relationships, the same has to apply,⁹ in this respect, however, the EEIG Statute is rather extensive and deals with the key questions. It is in line with general principles that questions of the capacity of the founders and the like do not follow the national law applicable to the EEIG but their own personal applicable law (Art. 2(1) – in parenthesis – and 11th Recital).¹⁰

5. Party autonomy is seen as a principle (4th Recital), with the formation contract taking priority both over the EEIG Statute and national law. The 8th Recital, however, also names national (!) public interest as its limit. And there is explicitly protection against circumvention (in Art. 3(2), below §34 para. 8). Mandatory law in the EEIG Statute, of course, is a limit to freedom in designing the formation contract, but with respect to national mandatory law, the question is more complex: if the EEIG Statute grants party autonomy itself in a certain question, this rule takes priority; otherwise, national (seat) law determines the limits of party autonomy.¹¹ Whether the former or the latter is the case is again a matter of interpretation. The question is, however, not as often of practical importance as under the European Company Statute, because national law also grants party autonomy much more liberally than in the law of the PLC (even in Germany).

6. National and EC/EU law rules on other than company law questions remain unaffected (for instance labour law, antitrust law and the law of prudential supervision).¹² In this respect, the EEIG does not extend party autonomy as against mandatory national law. One question outside company law is, however, decided by the Regulation itself, at least in principle: its members, rather than the Grouping, are taxed for profits made and losses must also be credited at the level of the members (Art. 40).¹³

6 See Roelofs, (2010) 7 ECI 142 (142); Funkat, 'Die praktische Akzeptanz der EWIV als Gesellschaft', EWS 1998, 122 (123–128); Neye, DB 1997, 861 (861) (half the number in Belgium and France); Klein-Blenkers, DB 1994, 2224 (2225); see also for the early perspectives: Kelly et al., *European Economic Interest Groupings – Commercial, legal and tax considerations*, (1990), 16 (survey of the most important existing EEIGs and their country of registration, as of May 1990; referring to the Case Study 'Vision 1250 EEIG' by Price Waterhouse Consultants). In the whole of Europe in the beginning of 2011 2072 EEIGs, out of which 306 already wound up again, registration numbers are clearly decreasing again, see <http://www.libertas-institut.com/de/EWIV/statistik.pdf>. Literature as well is virtually extinct today.

7 It has to be asked here in which questions the Regulation decides by not regulating the point (excluding national law regulation), and in which there rather is a gap in the EC/EU law regime. See on this question above §33 para 10 et seq. (European Company) and for the EEIG Israel, (1988) 9 *The Company Lawyer*, 14 (20–22); Bramig, *Zweck*, 132; Meyer-Landruith, *Europäische wirtschaftliche Interessenvereinigung*, 15–22.

8 See Art. 10 of the European Company Statute (above §33 para. 12), and in the EEIG Statute, for instance, Art. 32(3), but no general rule.

9 Different Dine, (1992) 13 *The Company Lawyer* 10 (15).

10 For the details see Dine, (1992) 13 *The Company Lawyer* 10 (11); seeing this as a special case however: Habersack, *Europäisches Gesellschaftsrecht*, §11 para. 1.

11 Israel, (1988) 9 *The Company Lawyer*, 14 (21); Meyer-Landruith, *Europäische wirtschaftliche Interessenvereinigung*, 29–31; agreeing Habersack, *Europäisches Gesellschaftsrecht*, §11 para. 2.

12 15th and 16th Recitals; on this issue, for instance, Israel, (1988) 9 *The Company Lawyer*, 14 (21 et seq.); v. d. Heydt/Frhr. v. Rechenberg, *Die Europäische Wirtschaftliche Interessenvereinigung*, 7; Rübesamen, *Die EWIV im deutschen und europäischen Wettbewerbsrecht*, (1995), 16.

13 On taxation from a German perspective v. d. Heydt/Frhr. v. Rechenberg, *Die Europäische Wirtschaftliche Interessenvereinigung*, 107–160; Knobbe-Keuk, 'Die EWIV im nationalen und internationalen Steuerrecht', EWS 1992, 1; more references in the German version of this book (*Europäisches Gesellschaftsrecht* [2004]), §30 N. 13; for the United Kingdom: Lall, (1993) *British Tax Review*, 134; Anderson, *European Economic Interest Groupings*, 113–118; for France: Woodland, in: van Gerven/Aalders (eds.), *European Economic Interest Grouping*, 116

2. Type of Company and Restriction of Possible Uses (Art. 1(2) and (3) and Art. 3, 23)

7. The EEIG as a type of business association has its roots in the French groupement d'intérêt économique¹⁴ – a type of syndicate or joint venture. Some rather formal characteristics are important in this respect and – quite important in practice – the description of the legitimate purpose of an EEIG. The former are to be found mainly in Art. 1(2) and (3). The Grouping (if validly founded) must have the capacity to be a bearer of rights and duties (legal capacity, including capacity to be a party in legal proceedings, Art. 1(2), 9th Recital). Partnerships typically have this capacity anyhow, for instance in Germany under §124 HGB.¹⁵ Conversely, legal personality is not prescribed by EC/EU law: national law is free to decide on this issue (Art. 1(3)). Other core characteristics of a limited liability company are missing anyway: the rules on the raising of capital and its protection and on limited liability (Art. 24, below §34 para. 22), and even administrative and pecuniary rights do not follow the ratio of capital contribution, at least not according to the (default) rule set out in EC/EU law (see Art. 17(1), 21(1)).¹⁶

*8. The limitation in purpose is to be found in Art. 3 and 23, first described in principle (Art. 3(1)), then specified in important aspects (Art. 3(2), 23). The activities of the EEIG may, according to Art. 3(1),¹⁷ only facilitate the activities of its members (their creation,

extension and enhancement); while the EEIG may make its own profits (as can be seen from Art. 21(1), this may not be its purpose (Art. 3(1)). The Preamble stresses this at the very outset (5th Recital). It is then specified in various respects (Art. 3(2)): key decisions to be taken by the members may not be delegated to the EEIG (Art. 3(2)(a)), and it may not hold shares in any of its members (Art. 3(2)(b), no holding functions).¹⁸ Prohibitions or precepts which apply to the members are not to be circumvented; this is explicitly regulated for employee participation (Art. 3(2)(c))¹⁹ and for loans granted to managers and other transactions having the potential of conflicts of interests (Art. 3(2)(d)) and is also a general rule (see Art. 38). Moreover, group structures do not seem to be necessary for ancillary functions and are therefore completely excluded between EEIGs (Art. 3(2)(e))²⁰ – as is the raising of capital on capital markets (Art. 23).

*9. The need for a new type of instrument for cross-border commerce (typically with less legal certainty in the beginning) would seem to have been rather small, including because of these restrictions of purpose. The gains ascribed today to the use of a European Company (§37 para. 5–7) can hardly be attained by the use of an EEIG. Uniform presence in the whole of the European market is not really important with respect to ancillary activities; cross-border mobility does not seem particularly important with respect to this type of association (and it seems indeed to be weak, below §34 para. 16). Since national law is in any case quite important for filling the gaps, the argument that a neutral platform could do away with psychological problems is also weak; they should be minor anyhow in the case of syndicates, joint ventures and the like (see above N. 17). Finally, worker participation is typically located at the level of the members themselves – a fact which reduces the advantage of having party autonomy in this respect at the EU Level.

3. Formation of the EEIG and Transfer of Seat (Art. 4–14)

a) Founders and the International Element (Art. 4)

10. The requirements for formation are described in Art. 1(1), second subparagraph (formation contract and registration; below b and c) and Art. 4 (possible founders).

¹⁸ Keegan, (1991) *JBL* 457 (458); Bramig, *Zweck*, 204 et seq.; Habersack, *Europäisches Gesellschaftsrecht*, §11 para. 15; Selbher/Manz (eds.), *Kommentar*, Art. 3 para. 21–27. However, acquisition of shareholdings is otherwise possible as long as this does not change the character of the EEIG as a tool mainly for serving the aims of the partners.

¹⁹ The reason is that employee participation, in Germany, applied when a threshold of 500 employees was reached: see Bramig, *Zweck*, 206; Müller-Gugenberger/Schotthöfer (eds.), *EWIV in Europa*, 201 et seq.; v.d. Heydt/Erh. v. Rechenberg, *Die Europäische Wirtschaftliche Interessenvereinigung*, 22 et seq.

²⁰ On the law of groups of the EEIG as far as it is possible apart from this prohibition: Burkhalter, *Die Europäische Wirtschaftliche Interessenvereinigung (EWIV) und ihre konzernrechtlichen Beziehungen*, (1998); Rinze, *Unternehmensverbund*.

(131 et seq.); on international tax aspects (conflict of tax laws): Haelterman, 'International Tax Aspects of the EEIG', in: van Gerven/Aalders (eds.), *ibid.*, 58.

¹⁴ Woodland, in: van Gerven/Aalders (eds.), *European Economic Interest Groupings*, 116 (117 et seq.); Lemeunier, *Groupement*, 5; Abmeier, *NJW* 1986, 2987 (2987); Köhl, *Einfluß*, 1.

¹⁵ Comparative law references above N. 4, especially Müller-Gugenberger/Schotthöfer (eds.), *EWIV in Europa*, 182; for France and the United Kingdom Hartard, *Europäische wirtschaftliche Interessenvereinigung*; for the UK in particular: Keegan, (1991) *JBL* 457 (459); for France in particular: Woodland, in: van Gerven/Aalders (eds.), *European Economic Interest Groupings*, 116 (122); this is so as of 2000 also with respect to the simple partnership in German law, see references above §7 N. 51.

¹⁶ These are the core characteristics of limited liability companies: Kraakman et al., *The Anatomy of Corporate Law*, 5–15; Rauser/Veil, *Kapitalgesellschaften*, §1 para. 3; also Windbichler, *Gesellschaftsrecht*, §2 para. 18; for voting power as well Schmidt, *Gesellschaftsrecht*, 606 et seq.; on the dispute as to whether capital can be chosen by the parties as the criterion for the extent of voting power see below N. 33.

¹⁷ On the elements of this rough description see in more detail: Israel, (1988) 9 *The Company Lawyer*, 14 (14 et seq.); Keegan, (1991) *JBL* 457 (458); Linnane, (1990) 1 *EBLR*, 38 (38); Brindl-mayer/Förschle/Hense/Lenhard, *EWIV*, 4–6; Habersack, *Europäisches Gesellschaftsrecht*, §11 para. 5, 13–16; Köhl, *Einfluß*, 422–425; Selbher/Manz (eds.), *Kommentar*, Art. 3 para. 2–14; monograph by Bramig, *Zweck*, especially 139–207. Use for the liberal professions is much discussed, mainly for law firms: see Anderson, *European Economic Interest Groupings*, 29 et seq.; Kelly et al., *European Economic Interest Groupings – Commercial, legal and tax considerations*, 18–21; Grüniger, *DB* 1990, 1449; Hauschka/Erh. v. Salfeld, *DSR* 1991, 1083; Marx, *AnwBl.* 1997, 241; Zuck, *NJW* 1990, 954. More than half of all EEIGs which can be attributed to one sector are related to law firms, auditing and consulting firms, mainly in Brussels: Funkat, *EWS* 1998, 122 (126).

*11. As explained in the 6th Recital, the range of possible founders was to be as open as possible. First, the **range of possible types of business association** (Art. 4(1)) includes not only profit-making associations within the meaning of Art. 54 TFEU, already a large range anyhow (above §7 para. 16), but also all associations governed by private and as well public law and this, already by EU law decision, then includes (and always included) simple partnerships.²¹ The sole requirement is that the headquarters be situated somewhere in the Union²² and also, if national law does not so preclude, the *siège statutaire* or the registered seat. Natural persons even need only have part of their business in the Union, and in this respect, probably only earnings – not profitability – can be required, since even the mere provision of services has been stated to suffice. Participation of partners from third countries is problematic.²³ Questions regarding the capacity of the members are – of course – dealt with by their personal applicable law (above §34 para. 4).

*12. The real limits to the range of founders stem from the **requirement that there be an international element** (Art. 4(2)): at least two founders have to have their main point of reference in two different Member States, for companies the headquarters being this reference point and for natural persons their principal area of (business) activities. This requirement has to be met continuously (Art. 31(3), 32(1)).

*13. National law may impose **limits** as to numbers (if there are more than 20 members, Art. 4(3)) and for particular sectors (Art. 4(4)) in which the public interest may exclude the use of an EEIG. With respect to that public interest, although there is a certain power of discretion it is not unlimited.²⁴

b) Formation Contract and Party Autonomy (Art. 5)

14. The **minimum content** of the formation contract is regulated by Art. 5. According to Art. 5(a), the words 'European Economic Interest Grouping' or the abbreviation 'EEIG' must be used in the name; for all other questions of the business name, national law applies.²⁵ The **freedom to design the formation**

contract (with its limits) has been discussed with the question of applicable law (above §34 para. 4 et seq.).

c) Registration, Disclosure and Validity (Art. 6–11, 15, 39)

15. The EEIG can be said to have been **validly founded only when registered** (Art. 1(1), second subparagraph). Registration (with examination) and publication (Art. 6–9, 39) at the seat (*siège statutaire*) are regulated in Art. 2 and 12 as in the First Directive, and that of branches as in the Eleventh Directive,²⁶ although there is no limited liability in the case of the EEIG (see Art. 24), and limited liability had been the justification of regulation in the First and Eleventh Directives. The same is true for the regime on good faith protection (Art. 9). Moreover, the formation of the EEIG has to be published Europe-wide in the Official Journal of the European Union (Art. 11). While the **grounds for nullity** are not circumscribed narrowly (as was the case in the First Directive), nullity can again be declared only by a court decision (with good faith protection) and only producing its effects for the future, i.e. *ex nunc* (Art. 15).

d) Transfer of Seat and Other Cross-Border Structural Changes (Art. 12–14)

16. The **cross-border transfer of seat** (within the Union) does not affect the identity of the EEIG and, if given, its legal personality (Art. 13, 14), but changes the applicable national law if the *siège statutaire* within the meaning of Art. 2 and 12 is transferred across borders (see moreover Art. 13). In this case, Art. 14 requires a transfer proposal and unanimity.²⁷ Again, an adaptation by amendment of the formation contract is needed (serves as the 'pivot' between old and new applicable law, see above §27 para. 20, §37 para. 38). **Other cases of cross-border structural change** are not mentioned. It probably has to be accepted, at least to the extent possible for the parallel domestic forms (which is often rather reduced). Nor is tax law of the transfer of seat harmonised, which can lead to a taxation of hidden reserves and the like (with the members), because the EEIG is to be seen as an establishment of its members and the transfer of seat thus has to be characterised as a transfer of establishment.²⁸

²⁶ See on both issues Habersack, *Europäisches Gesellschaftsrecht*, §11 para. 8; Israel, (1988) 9 *The Company Lawyer*, 14 (17); Linnane, (1990) 1 *EBLR*, 38 (38); Müller-Guggenberger/Schothöfer (eds.), *EWIV in Europa*, 180; on these regimes see above §8 para. 36–44 and §26 para. 12 et seq.

²⁷ On the detailed parallel regime in the (envisaged) 14th Directive (transfer plan, report, resolution, no independent scrutiny, but public control before registration) and on the need for protection and the safeguards see above §27 para. 15–23. The Directive, however, requires only a qualified majority, i.e. a regime which is modelled on the law of limited liability companies and potentially of partnerships with publicly dispersed membership.

²⁸ A violation of the spirit of the Regulation: Neye, *DB* 1997, 861 (863); see also Brindlmayer/Förschle/Hense/Lenhard, *EWIV*, 60 et seq.; Knobbe-Keuk, *EWS* 1992, 1 (2 et seq.) (EEIG as

²¹ See Israel, (1988) 9 *The Company Lawyer*, 14 (16) (also joint research bodies). For Germany, for instance, Habersack, *Europäisches Gesellschaftsrecht*, §11 para 11 (with further references); in detail Bach, 'Die BGB-Gesellschaft als Mitglied einer Europäischen Wirtschaftlichen Interessenvereinigung (EWIV)', *BB* 1990, 1432.

²² Israel, (1988) 9 *The Company Lawyer*, 14 (16); Habersack, *Europäisches Gesellschaftsrecht*, §11 para. 12; Müller-Guggenberger, *EWS* 1994, 346 (346); Selberr/Manz (eds.), *Kommentar*, Art. 4 para. 6–8.

²³ On this area Zahorka, 'Die Teilnahme von Drittstaatenunternehmen an einer EWIV', *EuZW* 1994, 201; also Israel, (1988) 9 *The Company Lawyer*, 14 (16).

²⁴ On this possibility (which refers only to special sectors): Gleichmann, *ZHR* 149 (1985) 633 (640); also Habersack, *Europäisches Gesellschaftsrecht*, §11 para. 11.

²⁵ ECJ case C-402/96 *EITO* [1997] ECR I-7515 (7527 et seq., para. 19–23). And for the question whether a limitation of liability has to be indicated (as in Germany in §19 para. 2 HGB): Müller-Guggenberger, 'Die Firma der Europäischen wirtschaftlichen Interessenvereinigung (EWIV)', *BB* 1989, 1922.

4. *Structure and Current Business Operation*

a) Organs, Powers and Representation (Art. 16, 19 et seq., 23, 25)

17. The EEIG has at least two organs, one managing organ and the 'members acting collectively', and, if the formation contract so provides, still others (Art. 16(1)). The partners acting collectively constitute the highest organ, with unlimited decision-making power (Art. 16(2), in more detail below c), but without the power to represent the EEIG. With respect to management, there is a rule on appointment (Art. 19), but mainly one on representation (Art. 20), which in all important aspects is identical to that contained in the First Directive, i.e. a rule which is again aimed at legal certainty for third parties.²⁹

*18. Likewise, the indications to be given on business correspondence or other means of communication in business relationships (Art. 25) are equivalent to those prescribed by the First Directive. Thus, the disclosure system of the First Directive – items to be disclosed, access to information (register, publication and indications on means of business communication) and effects of disclosure – also applies completely to the EEIG although the latter's structural elements are quite different. The prohibition on raising capital on capital markets (Art. 23) has been discussed in conjunction with the limitations of purpose (above §34 para. 8).

b) Members (Art. 22, 26–30, 33 et seq., 37)

19. The membership structure in the EEIG is protected by restraints on disposal: membership can be assigned to another or given as security only with the consent of all partners (Art. 22), and the same is true for the admission of new members (Art. 26, also Art. 28(2)). The rule seems to be mandatory, i.e. that consent is possible only in the case in question and not in advance (Art. 27 e contrario); the model would then be that the partners can accept the departure of existing partners in the abstract, but not the admission of new partners (different only in the case of admission by inheritance, Art. 28(2)). This rule is laid down for the explicit withdrawal of one partner, who, in the absence of such consent (or an imperative reason) may withdraw only if all partners agree (Art. 27). In addition, a partner ceases to belong to the EEIG when he dies and – under national law – in the event of going into insolvency or being wound up (Art. 28), and can also be expelled by the other partners on the basis of a provision in the formation contract or in the case of imperative reasons, although such expulsion

an undertaking). See for the regime applying to the transfer of seat of limited liability companies above §27 para. 29–31.

²⁹ Habersack, *Europäisches Gesellschaftsrecht*, §11 para. 22; Israel, (1988) 9 *The Company Lawyer*, 14 (18); Keegan, (1991) *JBL* 457 (459 et seq.); Selbherr/Manz (eds.), *Kommentar*, Art. 20 para. 9.

can occur only by a court decision unless there is a provision in the contract to the contrary (Art. 27(2)).

20. The legal consequences are that all these events leave the EEIG intact, unless there is a provision to the contrary in the formation contract, and it is continued with the other partners, including any additional ones who have validly joined (Art. 30). The new partners are liable for all debts, provisions to the contrary being impossible (Art. 24, see below §34 para. 22), except for debts incurred before the admission of the partner.³⁰ Partners who leave are still liable for all debts, provisions to the contrary again being impossible, if these debts had already 'arisen' (Art. 34). It is astonishing that no reference is made to Art. 8 et seq. Many authors also want to include any further debts from long-term contracts if the contract was concluded before membership ceased.³¹ For all these debts, however, a specific limitation period has been established which national law has to fix at five years at the most (Art. 37).

c) Rights, Duties and Liability of Members (Art. 17 et seq., 21, 24, 33 et seq., 37)

21. Each partner has the same administrative rights, namely the same voting rights and an extensive information right (Art. 18).³² Voting rights can be modified; it would seem that capital contribution could be decided to be the relevant criterion,³³ but with a mandatory cap at 50% (Art. 17(1)). Resolutions on the issues named in Art. 17(2)(a–e) have to be taken unanimously in any case, otherwise, only provided there is no provision to the contrary, in the formation contract (Art. 17(2)(f) and (g) and Art. 17(3), second sentence). All partners have a right to call for a meeting (Art. 17(4)).

*22. Each partner also has the same pecuniary rights, namely with respect to the distribution of profits, unless there is a provision to the contrary in the formation contract (Art. 21(1)). The same has to apply also to the proceeds from winding up or – if one

³⁰ Not for debts arising after admission even if they result from acts already taken before (for instance from long-term contracts with reiterated obligations). On this and on the registration of any limitation of liability see Israel, (1988) 9 *The Company Lawyer*, 14 (20); Keegan, (1991) *JBL* 457 (460); van Gerven, in: van Gerven/Aalders (eds.), *European Economic Interest Grouping*, 36; Habersack, *Europäisches Gesellschaftsrecht*, §11 para. 33 et seq.; Selbherr/Manz (eds.), *Kommentar*, Art. 26 para. 6 et seq.

³¹ Habersack, *Europäisches Gesellschaftsrecht*, §11 para. 35 et seq.; Selbherr/Manz (eds.), *Kommentar*, Art. 34 para. 4.

³² On this principle Israel, (1988) 9 *The Company Lawyer*, 14 (18); Keegan, (1991) *JBL* 457 (459); van Gerven, in: van Gerven/Aalders (eds.), *European Economic Interest Grouping*, 25 et seq.; Lentner, *Gesellschaftsrecht*, 122–124; Selbherr/Manz (eds.), *Kommentar*, Art. 18 para. 1–11.

³³ In this sense also Israel, (1988) 9 *The Company Lawyer*, 14 (18); Selbherr/Manz (eds.), *Kommentar*, Art. 17 para. 3 (with further references, quite common all over Europe); different Meyer-Landruith, *Europäische wirtschaftliche Interessenvereinigung*, 39.

partner ceases to belong – to his settlement balance (Art. 33), unless there is a provision to the contrary.³⁴ The same also applies to a duty to carry losses (Art. 21(2) and Art. 33, first subparagraph). Personal liability (Art. 24) is in any case joint and several, unlimited and mandatory³⁵ (though subsidiary) and can be waived only by individual agreement with each creditor.

d) Questions Outside Company Law (Art. 38, 40)

23. Questions other than those of company law are regulated in the EEIG Regulation only in one case: profits are **taxed** not with the Grouping, but with the members, and losses are to be credited here as well (Art. 40).³⁶ **All other questions** are dealt with in national law – explicitly in this sense, the 15th and 16th Recitals, which list the most important neighbouring areas. However, the design of the EEIG was expressly chosen such that **employee participation** typically was not a problem (above §34 para. 8).

5. *Winding Up and Liquidation* (Art. 31–37)

24. Winding up and liquidation are regulated in Art. 31–37, with legal certainty being again paramount in the arrangement (effects only for the future, court decision or unanimous decision, protection of good faith) – once more as in the First Directive.³⁷ Liquidation is again subject to national law (Art. 35 para. 2). The regime in the event of insolvency has changed: today, Art. 36 has to be interpreted in the sense that insolvency proceedings follow the EC Insolvency Proceedings Regulation for the questions regulated there (mainly conflict of laws and conflicts of jurisdiction) and no longer national law.³⁸

³⁴ Agreements ex ante of a lump-sum compensation are unlawful (Art. 33(2)) but this, most authors hold, does not exclude compensation at book value: Habersack, *Europäisches Gesellschaftsrecht*, §11 para. 26; Meyer-Landrut, *Europäische wirtschaftliche Interessenvereinigung*, 73; Selberr/Manz (eds.), *Kommentar*, Art. 33 para. 12.

³⁵ 10th Recital, Israel, (1988) 9 *The Company Lawyer*, 14 (19 et seq.); van Gerven, in: van Gerven/Aalders (eds.), *European Economic Interest Grouping*, 35 et seq.; Habersack, *Europäisches Gesellschaftsrecht*, §11 para. 29; Lentner, *Gesellschaftsrecht*, 158; Selberr/Manz (eds.), *Kommentar*, Art. 24 para. 4. On liability (again mostly mandatory) in the case of admission to or withdrawal from the EEIG see above §34 para. 20.

³⁶ Also 14th Recital. On taxation see references above N. 13.

³⁷ In more detail Lemeunier, *Groupement*, 225 et seq.; Lentner, *Gesellschaftsrecht*, 140–147; Selberr/Manz (eds.), *Kommentar*, Art. 31/32, para. 1–43; van Gerven, in: van Gerven/Aalders (eds.), *European Economic Interest Grouping*, 44.

³⁸ Still different Schwarz, *Europäisches Gesellschaftsrecht*, para. 1084, 1303; and (without discussion) Habersack, *Europäisches Gesellschaftsrecht*, §11 para. 40.

II. PLANS FOR A EUROPEAN PRIVATE COMPANY DATES BACK TO COMPANY AND OTHER SUPRANATIONAL TYPES OF COMPANY

1. *European Private (Limited) Company*

a) Status of Preparatory Work

25. The project for a statute for a European Private Company dates back to preparatory drafts from the 90s.³⁹ Even those early drafts already concerned the private limited company, or, more generally, the type of limited company which was not designed for an unlimited number of members or which at least was not capable of raising (share) capital on capital markets (see Art. 2(1)(d) of the current Proposal and Art. 3(2a) of the Document of the Swedish Presidency [see below] and §1 para. 14). Whereas the (private) initiative had initially been welcomed only in business circles⁴⁰ and business law scholarship (hailing it as one of the highly innovative projects in core company law), it met for quite some time with considerable reservations within the EU Commission.⁴¹ However, a feasibility study was ordered.⁴² It distinguished different approaches for the regulation of SMEs within the Member States and considered various options for the way forward (harmonisation without a Statute vs. Statutes with different degrees of regulatory ‘density’). On this basis, Commissioner McCreavy announced a proposal on 3 October 2007. The EU Commission continued hearings and consultations from the end of 2007 onwards in order to identify the need for an initiative in this field and then – after obtaining clear results in favour of such a statute – prepared the current proposal for a regulation by the summer 2008 (Statute for a European Private Company, Société Privée Européenne [EPC

³⁹ Reprinted in Boucourechliev (ed.), *Propositions pour une société fermée européenne* (Office des Publications Officielles des Communautés Européennes, Luxembourg, 1997) and Boucourechliev/Hommelhoff (eds.), *Vorschläge*, 281; see as well previous edition of this book; on the history see Křeji, *Societas Privata Europaea*, para. 1 et seq.; Siems/Rosenhäger/Herzog, *Der Konzern* 2008, 393 (394).

⁴⁰ Press release of UNICE (Union of Industrial and Employers’ Confederations of Europe) of 9 April 1999, www.business-europe.eu; positive also the Economic and Social Committee in its Opinion of 21 March 2002, OJ 2002 C 125/100; mostly positive answers have apparently been received by the *High Level Group II*: see p. 127 and (for their own hesitant but positive judgement) p. 127 et seq.; also Hopt, *ZIP* 1998, 96 (103 et seq.); more reservations, for instance, still in the case of Ehrlicke, in: Hommelhoff/Helms (eds.), *Neue Wege*, 17; Witz, *Festschrift für Schlechtriem* 1999, 27 (37–40).

⁴¹ See, for instance, van Hulle, in: Hommelhoff/Helms (eds.), *Neue Wege*, VII, rejecting a possibility of founding such a company without clear elements of internationality (as in the other supranational types), and having reservations also on the issue of which sets of rules apply and the far-reaching party autonomy (on all this later in the text).

⁴² COM(2003) 284 final, 21–22, following the line of arguments advanced by the High Level Group (above).