

European Communities

EUROPEAN PARLIAMENT

Working Documents

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DOCUMENT 519/76

Report

drawn up on behalf of the Legal Affairs Committee

on the proposal from the Commission of the European Communities to the
Council (doc. 340/73) for a regulation on the European Cooperation Grouping
(ECG)

Rapporteur: Mr H. LAUTENSCHLAGER

PE 43.059/fin.

By letter of 22 January 1974 the President of the Council of the European Communities requested the European Parliament to deliver an opinion on the proposal from the Commission of the European Communities to the Council for a regulation on the European cooperation grouping.

On 11 October 1974 the President of the European Parliament referred this proposal to the Legal Affairs Committee as the committee responsible and to the Committee on Economic and Monetary Affairs for its opinion.

On 24 October 1974 the Legal Affairs Committee appointed Mr Lautenschlager rapporteur.

It considered the proposal at its meetings of 20 October 1975, 19 January, 26 February, 25 March, 20 September, 18 October and 20 December 1976.

At the last meeting the committee adopted the motion for a resolution together with the explanatory statement by 15 votes to 12.

Present: Sir Derek Walker-Smith, chairman; Mr Lautenschlager, rapporteur; Lord Ardwick, Mr Bangemann, Mr Bayerl, Mr Berkhouwer (deputizing for Mr Pianta), Mr Bouquerel, Mr Calewaert, Sir Geoffrey de Freitas, Mr Jahn (deputizing for Mr Poher), Mr Kavanagh (deputizing for Mr Espersen), Mr Masullo, Mr Memmel, Lord Murray of Gravesend, Mr Mursch (deputizing for Mr Riz), Mr Nyborg (deputizing for Mr Krieg), Mr Radoux (deputizing for Mr Zagari), Sir Brandon Rhys Williams, Mr Rivierez, Mr Santer, Mr Scelba, Mr Schmidt, Mr Schuijt, Mr Schwörer, Mr Shaw, Mr Tomney, Mr Walkhoff.

The opinion of the Committee on Economic and Monetary Affairs is attached.

The Legal Affairs Committee hereby submits to the European Parliament the following motion for a resolution, together with explanatory statement:

MOTION FOR A RESOLUTION

embodying the opinion of the European Parliament on the proposal from the Commission of the European Communities to the Council for a regulation on the European Cooperation Grouping (ECG).

The European Parliament,

- having regard to the proposal from the Commission of the European Communities to the Council¹,
- having been consulted by the Council pursuant to Article 235 of the EEC Treaty (Doc. 340/73),
- having regard to the report of the Legal Affairs Committee and the opinion of the Committee on Economic and Monetary Affairs (Doc. 519/76),

1. Notes that the purpose of this proposal for a regulation is to introduce into Community law a legal instrument facilitating in particular cooperation between small and medium-sized undertakings regardless of national frontiers;
2. Points out that the cooperation to be promoted must serve to make it easier for persons and companies carrying on business within the European Communities to adapt their activities to the conditions of the enlarged market;
3. Recalls that one of the main aims of the European Economic Community is to promote a harmonious development of economic activities by creating within the Common Market conditions similar to those on a domestic market;

¹OJ No. C 14, 15.2.1974, p.30

4. Considers this proposal to be a suitable instrument for the achievement of that aim provided that it is not improperly used for purposes contrary to the Treaty and that it safeguards the social rights of those concerned;
5. Stresses that the European cooperation grouping should be used only as an instrument of cooperation, for a limited period, between undertakings;
6. Requests the Commission to report to the European Parliament on the experience gained in the application of the European cooperation grouping;
7. Reserves the right to propose amendments to the regulation if these appear necessary, in particular in the light of abuses;
8. Approves this draft regulation subject to the following amendments;
9. Requests the Commission to make these amendments to its proposal pursuant to the second paragraph of Article 149 of the EEC Treaty;
10. Delivers this opinion without prejudice to further opinions which it may deliver in the event of major changes to the Commission's draft, and therefore regards its consultation by the Council as a continuous process lasting until the latter takes a final decision on this proposal;
11. Instructs its President to forward this resolution and the report of its committee to the Council and Commission of the European Communities.

Proposal for a
Council Regulation
(EEC) on the European
Cooperation Grouping (ECG)

Preamble: unchanged
Recitals: unchanged

Article 1

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| <p>1. European cooperation groupings may be formed by contract for a fixed term, upon and subject to the terms and conditions and in the manner and with the effects laid down by this regulation.</p> | <p>1. European cooperation groupings may be formed by contract for a <u>limited</u> period, upon and subject to the terms and conditions and in the manner and with the effects laid down by this regulation.</p> |
| <p>2. Where in respect of any matter no provision is made by this Regulation, the law applicable thereto shall be the law in force in the State where is situated the head office as specified by the contract forming the grouping.</p> | <p>2. Unchanged</p> |
| <p>3. A grouping shall, from the date of its registration as provided by Article 4(2) of this Regulation, have the capacity to enjoy and be bound by rights and obligations, to make contracts or accomplish other legal acts, and to sue and to be sued.</p> | <p>3. Unchanged</p> |

Article 2

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|---|--|
| <p>1. The purpose of groupings shall be to facilitate or develop the business of their members and to</p> | <p>1. The purpose of groupings shall be to facilitate or develop the business of their members and to improve or</p> |
|---|--|

¹ For full text see OJ No. C 14, 15.2.1974, page 30.

improve or increase the results of such business. Groupings shall not seek to make profits for themselves.

increase the results of such business.

Its activities shall be organically related to the business of its members. The aim of the grouping shall not be to make profits for itself and, in conformity with this principle, profits which actually accrue from the activities of the grouping shall rank proportionately as the profits of the members and shall be accounted for on this basis.

The object of a grouping shall be defined in the contract forming the grouping and must conform to the requirements of paragraph 2 below.

The object of a grouping shall be defined in the contract forming the grouping and must conform to the requirements of paragraph 2 below.

2. The activities of a grouping shall be limited to:

2. unchanged

- the provision of services exclusively to its members;
- the processing of goods, or the packaging of finished products, exclusively for the purposes of its members;

3. A grouping may not exercise management functions in respect of the business of its members.

3. unchanged

4. A grouping may not have more than 250 employees.

4. unchanged

Article 3 unchanged

Article 4

1. The contract forming a grouping shall designate the head office thereof, which must be situated within the Community.

The contract shall furthermore contain at least the following:

- (a) the name of the grouping;
- (b) the object for which the grouping is formed;
- (c) the names, and business names, if any, legal form, permanent address or registered office, and where appropriate the number and place of registration, of each member of the grouping;
- (d) the term for which grouping is formed.

2. The grouping shall be entered in a register designated for that purpose by the Member State where the head office is situated. The contract shall be filed at the time of registration; any subsequent amendments shall be filed also.

1. unchanged

2. The grouping shall be entered in a register designated for that purpose by the Member State where the head office is situated. The contract shall be filed at the time of registration; any subsequent amendments shall be filed also.

The matters referred to in paragraph 1 above shall be published in accordance with formalities to be adopted pursuant to Article 19 of this Regulation and any change in such matters shall be published in like manner. The same shall apply in respect of the names and addresses of the persons referred to in Article 7(1) of this Regulation and, where appropriate, the indication that they must act jointly.

3. Failing completion of the formalities of registration and publication required by this Regulation the matters which should be published may not be relied upon by administrative parties, who may however themselves rely on such matters.

The matters referred to in paragraph 1 above shall be published in accordance with formalities to be adopted pursuant to Article 19 of this Regulation and any change in such matters shall be published in like manner. The same shall apply in respect of the names and addresses of the persons referred to in Article 7(1) of this Regulation and, where appropriate, the indication that they must act jointly.

Notice of the formation of an ECG together with the date and place of publication shall be given in the Official Journal of the European Communities within one month of its appearance in the respective national publications.

3. unchanged.

Article 5 unchanged

Article 6

1. Subject to paragraphs 2 to 5 below and to Article 7 of this Regulation, the organs and the internal regulations of a grouping shall be determined by the contract. 1. unchanged

2. The widest powers to pass any resolution or execute or do any act or thing for the purpose of achieving the object of the grouping shall be vested in the members of the grouping in general meeting. 2. unchanged

3. Resolutions shall be passed in accordance with the provisions of the contract or of this Regulation. 3. unchanged

Unless otherwise provided by the contract, resolutions of the general meeting to amend the contract, for the winding up of the grouping before the expiry of the contractual term or for the extension of the term of the grouping shall be taken unanimously.

4. Each member shall have at least one vote. The contract may however give more than one vote to certain members. 4. unchanged

5. A general meeting shall be convened at the request of a manager of the grouping or of at least one quarter in number of the members of the grouping.

5. The contract may provide for decisions of the general meeting to be taken by written procedure on items explicitly stated in the contract with the exception of the decisions referred to in paragraph 3.

6. A general meeting shall be convened at the request of a manager of the European cooperation grouping or of at least two of its members.

Article 7

1. A grouping shall be managed by one or more natural persons appointed by the contract or by the general meeting.

1. unchanged

2. The acts of a manager shall be binding on the grouping as against third parties even where they do not fall within the objects of the grouping. The contract may however provide that the grouping may be validly bound only by two or more managers acting jointly. Any other limitation on their powers, whether under the contract or a decision of the general meeting, may not be relied upon against third parties, even if it is published.

2. The acts of a manager acting on behalf of an ECG, shall be binding on the grouping as against third parties even where they do not fall within the objects of the grouping. The contract may however provide that the grouping may be validly bound only by two or more managers acting jointly. Any other limitation on their powers, whether under the contract or a decision of the general meeting, may not be relied upon against third parties, even if it is published.

3. The name and address, or names and addresses, of the person or persons referred to above, and where appropriate an indication that they must act jointly, shall be published in accordance with the rules on publicity contained in Article 4 of this Regulation.

3. unchanged

Article 8

1. The contract may require the members to make contributions in cash, in kind or by way of services. It may also lay down the terms and conditions on which the members are to make contributions, where necessary, to meet any excess of expenditure over revenue. If no such provision is made by the contract, such terms and conditions shall be laid down by the general meeting, failing which such contribution shall be made in equal shares.

1. unchanged

2. Any assignment of a member's rights shall be subject to authorization by the general meeting. Unless otherwise expressly provided by the contract, such decision shall be taken unanimously by the members of the grouping and shall be published in accordance with the rules on publicity contained in Article 4 of this Regulation.

2. Any assignment of a member's rights shall be subject to authorization by the general meeting. Unless otherwise expressly provided by the contract, such decision shall be taken unanimously by the members of the grouping and shall be published in accordance with the rules on publicity contained in Article 4 of this regulation.

The assignment of only part of individual membership rights shall not be permitted.

3. A grouping may not issue debentures or invite investment by the public.

3. unchanged

Article 9

1. The members of a grouping shall be jointly and severally liable out of their own property for the debts thereof.

1. The members of a grouping shall be jointly (2 words deleted) and severally liable out of their own property for the debts thereof.
(Deletion in Italian text only.)

2. Creditors of the grouping may not proceed for repayment against an individual member unless they have first made a written demand for payment from the grouping and failed to obtain satisfaction.

2. Creditors of the grouping may not proceed for repayment against an individual member unless they have first made a formal demand for payment from the grouping. (5 words deleted).

3. If a member is proceeded against in respect of debts of the grouping he may rely on any defence which would be available to the grouping itself.

3. unchanged.

Articles 10 to 18 unchanged

Article 19

1. Member States shall take all necessary steps to ensure that the rules of this Regulation on publicity are applied.

They shall ensure that the matters referred to in Article 4(1), and any changes in such matters, and in addition any other matters which this Regulation requires to be publicized are published in the Official Journal for the publication of matters relating to companies in the State in which the grouping has its head office. They shall also ensure that all persons have access to the register designated under Article 4(2) of this Regulation and to the documents filed therein.

2. Member States shall take appropriate steps to penalize:

(a) the unlawful use of the description 'European Cooperation Grouping', or of any other expression likely to give rise to confusion therewith, by any grouping which is not constituted in accordance with the provisions of this Regulation.

(b) Any offence against Article 10.

1. Member States shall take all necessary steps to ensure that the rules of this Regulation on publicity are applied.

They shall ensure that the matters referred to in Article 4(1), and any changes in such matters, and in addition any other matters which this Regulation requires to be publicized, are published in the Official Journal for the publication of matters relating to companies in the State in which the grouping has its head office. They shall also ensure that all persons have access to the register designated under Article 4(2) of this Regulation and to the documents filed therein.

Member States shall take all necessary steps to transmit in good time to the appropriate organs of the European Communities the information to be published in the Official Journal of the European Communities pursuant to Article 4 of this Regulation.

2. unchanged.

Article 20 unchanged

EXPLANATORY STATEMENT

I. BACKGROUND

1. On 9 August 1971, Mr Armengaud and Mr Jozeau-Marigné submitted to the European Parliament a motion for a resolution embodying the proposal for a regulation defining the characteristics of economic interest groupings in the Community. On 25 August 1971 the Bureau of the European Parliament referred this motion for a resolution to the Legal Affairs Committee as the committee responsible and to the Committee on Economic and Monetary Affairs for its opinion.

Initially, on 30 September 1971, Mr KOCH was appointed rapporteur.

On 21 March 1973 Mr LAUTENSCHLAGER was appointed rapporteur on this motion for a resolution to replace Mr KOCH who had in the meantime ceased to be a member of the European Parliament.

2. The reason for this initiative was that, in addition to the proposal for a regulation concerning a European company under consideration by Parliament at that time, it was felt that provision should be made for a less rigid form of trans-frontier economic cooperation designed mainly for the needs of small and medium-sized undertakings. The authors of the draft took the French 'groupement d'intérêt économique' as their model and suggested that its legal structure should allow the participating undertakings to preserve their individuality and identity.

One of the main practical aims of the new legal entity was to facilitate trans-frontier cooperation by undertakings which are active in several states of the Community either directly or through subsidiaries. The active presence of these undertakings in each of the Community States would improve their competitive position relative to similar firms established in the same country. The cooperation envisaged would also help European undertakings to achieve technological progress.

3. The draft regulation submitted by Mr Armengaud and Mr Jozeau-Marigné comprised rules on the formation, operation and dissolution of the grouping and on relations between the grouping and its members.

4. On 21 December 1973, the Commission submitted to the Council a proposal for a regulation on the 'European cooperation grouping' (ECG)¹. In its memorandum on industrial policy in the Community² the Commission had already pointed to the success of the 'groupement d'intérêt économique'³, introduced in France in 1967, and announced that it would examine the possibility of incorporating this legal entity into Community law.

On 7 February 1974 the President of the European Parliament referred this proposal for a regulation on the European Cooperation Grouping to the Committee on Economic and Monetary Affairs as the committee responsible and to the Legal Affairs Committee for its opinion. At the latter's meeting on 20 February 1974 Mr LAUTENSCHLAGER was also appointed draftsman of the opinion on the proposal for a regulation.

5. Subsequently, in June 1974, a discussion was held between representatives of the Committee on Economic and Monetary Affairs and the Legal Affairs Committee with a view to making the latter responsible for both documents on the European Cooperation Grouping and requesting the opinion of the Committee on Economic and Monetary Affairs.

By letter of 11 October 1974 from the President of the European Parliament, the ~~Legal Affairs Committee~~ was then declared the Committee responsible for both documents.

6. At its meeting of 24 October 1974 the Legal Affairs Committee appointed Mr LAUTENSCHLAGER rapporteur on both documents. Subsequently, on 20 October 1975, Mr Jozeau-Marigné withdrew his draft.

¹ Doc. 340/73

² Doc. EP 15/1970-71, pages 24 and 147

³ 'Ordonnance' No. 67-821 of 23 September 1967, Official Journal of 28 September 1967, pages 9537 et seq.

II. THE COMMISSION'S PROPOSAL

(a) General

7. The main considerations underlying the Commission's proposal are as follows:

The introduction of an instrument based on Community law is designed to facilitate cooperation between enterprises which are subject to the legislation of different Member States.

In the explanatory memorandum of its proposal the Commission rightly points out that these aims could in principle be achieved by the traditional methods of company law, in particular by purchasing each other's shares, by merger, etc, but that such forms of cooperation must always be governed by a national legal system.

In the Commission's view the parties concerned are affected by psychological barriers against the application of national legal systems to companies operating at an international level.

The cooperation grouping to be set up at Community level is designed to eliminate these barriers. This would be a step towards the creation of a common internal market as stipulated in Articles 2 and 3 of the EEC Treaty.

8. The proposal for a regulation contains the following main provisions:

- An ECG must comprise, at least two companies subject to legal systems of different Member States. Natural persons operating a commercial, small craft or other industrial undertaking or an agricultural undertaking and subject to legal systems of different Member States can also join together in an ECG. Grouping may also consist of natural persons and companies (Article 3).
- The purpose of the ECG is to facilitate and develop the business of its members (Article 2(1)).
- The ECG may not have more than 250 employees (Article 2(4)).
- The activities of a grouping shall be limited to the provision of services exclusively to its members and the processing of goods or the packaging of finished products exclusively for the purposes of its members (Article 2(2)).

- The ECG shall not acquire full legal personality vis-à-vis third parties until entered into a register designated for that purpose by the Member State where its head office is situated (Article 4(2) and (3)).
 - The ECG shall acquire legal capacity on registration (Article 1 (3)).
 - The members of the ECG shall be jointly and severally liable out of their own property for the debts of the grouping (Article 9 (1)).
 - The decision-making body of the grouping shall be the general meeting of members (Article 6 (2)).
 - The members shall be taxed on any profits of the ECG.
 - The grouping shall be wound up:
 - upon expiry of its term,
 - upon the attainment or extinction of its object,
 - if the number of members falls below two (Article 13 (1)), and
 - for other reasons (Article 13 (2) and (3)).
9. The Commission bases its proposal on Article 235 of the EEC Treaty.

(b) Comments on the Commission's proposal

10. The following comments may be made on the individual articles of the Commission's proposal:

Article 1

The Commission's proposal provides that European cooperation groupings may be formed 'for a fixed term', but at the same time permits the general meeting to extend the duration of cooperation. It is easy to predict that such a vague formulation will lead to the formation of European cooperation groupings for purposes that are anything but specific and definite. This considerably increases the danger of evasion of existing safeguards under company law designed to protect employees and third parties, and to foster competition.

It is therefore recommended that a limited term be placed on the existence of a European cooperation grouping.

Article 2

The ban on profit-making by European cooperation groupings should be made more explicit than it is in the Commission's text. To this end the Legal Affairs Committee proposes an alteration to Article 2(1).

Article 4

Regrettably, the Commission has abandoned its proposal for a Community Commercial Register and now proposes that European cooperation groupings be entered in registers designated by the Member States in which the head offices are situated. This does not guarantee sufficient availability of information at Community level. If the Commission will not return to its previous proposal, the Member States must at least be placed under an obligation to publish details of the registration of a European cooperation grouping in the Official Journal of the European Communities. Only in this way can broad dissemination of this information be guaranteed at Community level.

Article 6

It seems desirable, for the smooth operation of the ECG, to provide for certain decisions of the general meeting to be taken by written procedure.

In the interests of the protection of minorities, it should be possible for as few as two members to convene a general meeting.

This solution also has the advantage of eliminating the arithmetical problem which could arise if an ECG consisted, for example, of seven members. The present wording (meeting to be convened by one quarter of the members) does not make it clear whether a single member may call a meeting or whether two are necessary.

Article 7

Paragraph 2 of this article concerns the effect on third parties of acts by the managers of an ECG. For the better protection of the interests of third parties your committee proposes a stipulation that the acts of a manager, when performed on behalf of the grouping shall be binding on a grouping as against third parties.

Article 8

Paragraph 2 should make it clear that the assignment in part of of individual members' rights (e.g. voting rights, holdings) is not permitted. This would protect the ECG from manipulation by individual members.

Article 9

Paragraph 1 of this article concerns the liability of members of an ECG. Your committee agrees with its provisions, but considers that the expression 'illimitatamente' /in the Italian version/ should be deleted as irrelevant.

Paragraph 2 concerns proceedings for repayment by creditors against an ECG. In your committee's view, the activities of the ECG will be subject to the legal system of the Member State where its head office is situated. There is no need, therefore, to stipulate in the text under consideration details of the procedure of formal demand for repayment, which could not, in any case, be comprehensively defined. It is therefore proposed that the paragraph be correspondingly amended.

Article 19

The proposed amendment to this article is a necessary result of the amendment to Article 4, which is designed to guarantee minimum publicity of the relevant information in the Official Journal of the European Communities.

III. PROTECTION OF THE EMPLOYEES' INTERESTS

11. The proposed regulation does not contain any provisions designed to safeguard the rights and interests of employees of companies intending to form an ECG. For this reason the Legal Affairs Committee's rapporteur had proposed a supplementary amendment aimed at

- ensuring that the employees of the companies concerned would have the right to advance notification;
- providing for a negotiation procedure between the representatives of the employees and the management bodies of the companies concerned in cases where the representatives of the employees consider that the formation of an ECG would be likely to affect adversely the employees' interests;
- providing for an arbitration procedure in the event of failure to reach agreement in these negotiations.

The rapporteur had also proposed a supplementary amendment designed to safeguard the employees' interests in the event of an ECG being wound up. This amendment provided for

- the conclusion of an agreement on measures to be taken in favour of the employees (social plan) in the event of an ECG being wound up, before the decision to wind up is taken by the general meeting of the members of the ECG;
- the implementation, where no agreement is reached on the social plan, of the provisions in force for mergers, takeovers and amalgamations of companies in the Member State in which the ECG has its head office.

These amendments were, however, rejected by the Legal Affairs Committee by a small majority on the grounds that the rights of employees are adequately safeguarded by Member States' national legislations and that, since the regulation stipulates that the ECG cannot make profits for itself, it is not in a position to finance a social plan.

A large minority, on the other hand, insisted on the need for Community regulations to safeguard the employees, in view of the fact that the ECG had been set up by Community legislation as an instrument of cooperation between undertakings; for they wished to ensure that the national legislation to be applied to the employees was not the one most disadvantageous to them.

IV. SUMMARY

12. In conclusion, it should be emphasized that trans-frontier cooperation, particularly between small and medium-sized undertakings should be promoted by the Community. The instruments created for this purpose must obviously fulfil certain fundamental conditions. In particular:

- European cooperation groupings must not be open exclusively to small and medium-sized undertakings;
- Steps must be taken to ensure that the ECG's do not pursue independent economic activities and make profits;
- The ECG's must not be misused to conceal profits or to evade other company law provisions;
- The objectives of each ECG must be clearly defined;

- The activities of the ECG's must not in any way detract from the effectiveness of existing provisions for the protection of workers in the Member States and at Community level;

- The ECG's must not in any way circumvent Community provisions safeguarding competition.

The Commission should, therefore, take into account the above requirements in drafting the final text.

13. With these reservations, and the amendments proposed to the present text, the Commission's proposal can be adopted.

OPINION of the Committee on Economic and Monetary Affairs

Draftsman: Mr W. SCHOLTEN

On 22 February 1974 the Committee on Economic and Monetary Affairs appointed Mr Scholten draftsman.

It considered the draft opinion at its meetings of 6/7 June, 3/4 October, 6/7 November 1974 and 8/9 January 1975 and adopted it unanimously on 8/9 January 1975.

Present: Mr Lange, chairman; Mr Notenboom and Sir Brandon Rhys Williams, vice-chairmen; Mr Artzinger, Mr Delmotte, Mr Leenhardt, Mr Leonardi, Mr Normanton, Lord Reay and Mr Scholten.

OPINION of the Committee on Economic and Monetary Affairs

Draftsman: Mr W. SCHOLTEN

1. In one Member State very favourable experience has been gained with a legal instrument that permits a flexible grouping for a fixed term of the activities of undertakings which nevertheless remain independent: the 'groupement d'intérêt économique' in France certainly seems to have been a success.

In 1971 two French Members - Mr Jozeau-Marigné and the late Mr Armengaud - submitted a proposal¹ to the European Parliament for the introduction of a legal instrument similar to the 'groupement d'intérêt économique' in the Community. The proposal for a regulation on the European Cooperation Grouping (ECG) is the outcome of these ideas, although the Commission proposals differ, even on basic points, as will be seen below.

The ECG is designed to enable undertakings from different Member States to cooperate on a contractual basis while retaining their independence. The activities of the ECG are restricted to the provision of services and the processing of goods exclusively on behalf of its members. It serves as a link between the economic activities of its members and should not in principle seek to make profits for itself.

Small and medium-sized undertakings are particularly in need of a legal instrument of this kind to enable them to concentrate certain activities. They can of course decide to form a partnership, but in practice this seems too far-reaching an instrument for forms of cooperation which are to continue for only a limited period or involve only part of the activities of the undertakings concerned. What is required is a legal instrument giving authority to act. Rights and duties can be transferred to the ECG. However, the term 'legal personality' is not used in the proposal because it does not mean the same in all the Member States.

The fact that the 'groupement d'intérêt économique' in France appears to have been very successful does not in itself mean that the ECG is assured of the same success in a Community context. The formation of an ECG will bring its members problems as well as advantages, as the following shows.

Field of application

2. One of the dangers of the ECG is that its members will use it for a purpose other than that for which it is intended. The possible applications of the ECG must therefore be limited. Articles 2 and 3 contain provisions to this effect. It

¹Doc. 108/71

is, however, doubtful whether these provisions can prevent abuse altogether.

The Economic and Monetary Affairs Committee wondered whether the ECG should not also be open to the liberal professions. In theory, it is quite conceivable that in certain situations this legal form would be useful to practitioners of the liberal professions wishing to engage in trans-frontier cooperation, but the practical use of such an extension of the field of application of the draft regulation would be limited. On the other hand, there is a considerable disadvantage. In certain Member States there are specific regulations regarding the liberal professions, which it might be possible to evade by setting up an ECG, and which in any case raise major practical problems. Weighing the one consideration against the other, the Economic and Monetary Affairs Committee makes no proposal for an amendment on this point.

Liability to third parties

3. For its members an ECG is by no means entirely without risk; on the contrary, they are jointly and severally liable out of their own property for the debts of the grouping (Article 9(1)). It may well be that this provision, which offers third parties considerable protection, will stand in the way of the large-scale application of the legal instrument. Small undertakings insufficiently familiar with how business is done in other countries will as a rule be reluctant to cooperate with undertakings in other Member States in an ECG.

Subsidiary law

4. Only the bare essentials are dealt with in the proposal for a regulation. While this in itself accords with the flexible character of the proposed legal instrument, it does mean that, when necessary, recourse will have to be made to the law of the country in which the head office of the grouping is situated (Article 1(2)). A national court will then be guided by national legislation governing forms of cooperation comparable with the ECG.

In addition, the Member States can, however, also 'draw up original rules' for the ECG.¹ This may have far-reaching effects. It will be possible for a Member State, for example, to introduce strict obligations or rules as regards publicity in connection with the possibility of appealing against the procedure described in Article 12(2). The regulation should accurately define what action the Member States may still take.

¹Explanatory memorandum, Article 1, item 2.4

Competition rules

5. The Community's competition rules should be applicable in full to any contract like that concluded when an ECG is formed. The new legal instrument proposed by the Commission must not be allowed to violate these rules.

Tax arrangements

6. In principle, the ECG should not be designed to make a profit. This is a correct point of departure. But in practice, profits will be made in a number of cases. The regulation must take this into account, in particular as regards taxation of such profits. Article 20 lays down the rules for taxation. Under these provisions, the ECG is not regarded as a legal personality for tax purposes. To keep the tax provisions governing the ECG as simple as possible, any profits will be attributed to the members of the grouping in exactly the same way as if it were a company; the same should also be true of profits retained by the ECG in the form of reserves. The members of the grouping should be taxed on such profits as soon as they accrue. Any other practice would result in a serious distortion of competition. Article 20 of the regulation is a provision of imperative Community tax law, binding on the Member States. This means that when the proposal for a regulation on the ECG now under consideration has been adopted by the Council, tax on ECG profits (whether distributed or retained) will have to be levied in the Member State or States where the members of the grouping are established or resident, (subject to provisions for the avoidance of double taxation) even if the system of taxation, as laid down in Article 20, has not - or not yet - been incorporated in the national tax legislation of the Member State or States concerned and even if the system prescribed in Article 20 should be at variance with national laws. To avoid misunderstandings, it would be advisable to explain these points carefully in the explanatory memorandum.

The Commission stipulates that the tax administrations¹ must use all means at their disposal to ensure that services rendered by the grouping to its members are invoiced to them at cost price. This is not, however, the task of the tax administrations, many of which are already overworked.

Worker participation

7. The proposed regulation does not contain a single provision on the rights of the workers to participate in the management of the grouping. Commenting on Article 1(2), the explanatory memorandum states that 'the provisions of national law relating to the creation of workers' representative bodies in the business establishment must be applied.'

¹ Doc. 340/73, p. 31

The formation of an ECG may, however, involve the transfer of a certain number of jobs from one Member State to another. Although this is limited to a maximum of 250 employees per ECG, there will be a real loss to them of their right to be consulted and informed if the head office is established in a Member State with less stringent rules on worker participation than those in force in Member States where one or more members of the grouping are established. On the other hand, it is not possible to solve the whole problem of worker participation law in the Member States by means of the regulation on the ECG. The question could, however, be examined whether the participation provided for in Articles 7 and 8 of the proposal for a directive on 'harmonization of the legislation of Member States on the retention of the rights and advantages of employees in the case of mergers, takeovers and amalgamations'¹ could also be applied to the ECG. The Economic and Monetary Affairs Committee requests the Legal Affairs Committee, as the committee responsible, to take this suggestion into account.

Remarks on some articles

8. Article 1(1) : The Commission sees the ECG primarily as an instrument of cooperation between undertakings in different Member States wishing to join forces for a set period with a specific objective in mind. Once this objective is achieved, the ECG has no right to continued existence and is therefore disbanded. It is therefore logical for the Commission to stipulate in Article 1 that the grouping is formed 'for a fixed term'. For practical and other reasons it would be preferable not to stipulate that the period of validity should be limited in advance in the contract. The words 'for a fixed term' should therefore be deleted.

Article 2(2): This provision contains a strict limitation of the activities of the ECG. It will not be easy to ensure that this provision is observed to the letter, even though there is the threat of the procedure described in Article 14 if Article 2 is contravened.

In addition, the term 'processing' of goods² is scarcely different from 'production', whereas the explanatory memorandum shows the Commission to have a much more limited sense in mind. The English word 'processing' also seems susceptible to numerous interpretations.

Article 2(3): The proposed regulation rightly excludes the possibility of the ECG acting as a kind of holding company.

¹ Doc. 149/74

² The equivalent Dutch term 'bewerking' is defined by Van Dale as 'work carried out on an object to make it suitable for a given purpose'.

Article 2(4): The limitation to 250 employees is completely arbitrary. Presumably the choice of this figure was partly governed by the thought that the regulation would thus be less likely to conflict with rules on worker participation.

Article 3(i): Undertakings from third countries may not become members of ECGs because the grouping is intended solely as a Community instrument for the benefit of undertakings in Member States. The question is whether this provision does not restrict the ECG's field of application unnecessarily.

The Dutch text of Article 3(1)(b) excludes certain service operations (e.g. transport and hotel and catering undertakings). This is presumably not the Commission's intention: it is therefore proposed that the word 'service' be inserted after 'commercial'.

The free professions, for which the ECG can hardly be of interest, are rightly excluded from using this legal instrument.

Article 3(2): This provision should be deleted since it may prevent the conclusion of otherwise perfectly acceptable EEC contracts.

Article 4(1)(4): This can be deleted (see remarks on Article (1)).

Article 7(1): It is not clear why a legal person should not be allowed to act as manager.

Article 12(2): The members of the grouping in general meeting may expel any member 'whose conduct disturbs the smooth running of the grouping'. This is a very vague criterion, which may well lead to disputes over correct interpretation. The expelled member may not accept the decision of his fellow-members and take the matter to court. The proposed regulation should therefore include rules which are applicable from the time the expulsion takes place to the time the court reaches its decision.

Article 20: In view of the possibly far-reaching implications of this tax provision, as explained in Paragraph 6, a very detailed explanation of this article should be given.

Conclusion

9. Progress on the harmonization of national company law is slow. The European Company is a legal instrument which, once it comes into force, will give prominence to certain forms of international cooperation between undertakings. In addition, small and medium-sized undertakings in particular have a need for a simple legal instrument that allows the flexible combination of the activities of undertakings in different Member States. The Commission's proposal for a regulation on the European Cooperation Grouping should therefore be approved. A number of aspects of the proposal are, however, in need of improvement.

ANNEX

Remarks made to the Committee on Economic and Monetary Affairs by the Commission representative on various forms of cooperation among undertakings; see also Item 6 of the agenda of the meeting of 6 and 7 November 1974 - 'European Cooperation Grouping - economic interest groups'.

There are many and varied forms of cooperation between undertakings in the Member States, ranging from simple cooperation agreements, through simple forms of civil law companies to, at the other end of the scale, structural cooperation in the form of joint undertakings. In such cases a number of undertakings wishing to carry out certain joint activities establish - jointly - a limited or joint stock company, which then operates as an independent undertaking. Its ownership is simply divided amongst several parties. For more structural cooperation of this type at European level we have instituted the European Company, and at some future date we may have a European limited liability company.

The proposed European Cooperation Grouping can only be compared with the first type of group: those involving cooperation by contractual agreement and certain types of civil law company. These are forms which are flexible in their organization and constitution, allow the contracting parties a great deal of freedom in arranging modes of cooperation, require few binding regulations and virtually no capital resources.

The nearest thing to the European Cooperation Grouping is of course the French 'groupement d'intérêt économique'.

The need for a legal form of this kind was particularly urgent in France since the rules governing both other types of cooperation, namely the 'Association' on the one hand and the 'Société' on the other, are unusually severe and inflexible. The 'Association' permits only non-profit-making activities. The 'Société'; by contrast, insists upon activities intended to make a profit. Set against this, the limited liability company (GmbH) in the Federal Republic of Germany may be established for any purpose, lucrative or not. Between the French 'Association' on the one hand and the 'Société' on the other was a gap, and this 'groupement' was an attempt to bridge it. That was the basis for the setting up of the French 'groupement'. It is possible that at a later stage of its development tax factors also played a part; the tax authorities have until now undertaken no exhaustive investigations of the 'groupements'. It is apparent, at any rate, that this 'groupement' has enjoyed remarkable success in France. Over 5,000 'groupements' were registered up to the end of 1973.

Similar institutions are unknown in other Community countries. The basic company forms do of course permit flexible arrangements, but they do not permit legally binding action. The 'Association momentanée' is widespread in Belgium. It is based on a civil law company and there is nothing unusual about its structure. This 'Association momentanée' is employed in projects related to a specific scheme. For example, it is used in tendering for construction work, in cases where several undertakings are obliged to work together to submit a joint tender and may later have to carry out the project itself jointly.

This 'Association momentanée' is as a rule tied to a particular project and ceases to exist when the project is complete. It has no legal or business capacity. As usual in such civil law companies the participants have joint and unlimited liability.

The 'Arbeitsgemeinschaft' in the Federal Republic of Germany is very similar to the 'Association momentanée'. Legally speaking it is based on the civil law company, which is characterized by the association of a number of people with a common purpose. The definition of a common purpose is so broad under German law that this legal form can be used for practically anything. This type of company can also be used in the setting up of consortia for the issue of securities; a further example are profit-pooling agreements for managing or organizing groups of companies. Such civil law companies, for whatever purpose they are formed, possess neither legal nor business capacity and are thus legally powerless vis-à-vis third parties. Participants in such a company have joint and unlimited liability.

In Great Britain the nearest thing to the Cooperation Grouping is the 'partnership'. This is not a legal entity, although it does possess legal capacity in the sense that this term is understood in Germanic legal circles, i.e. a subdivision lying between business capacity and legal personality. It can be used for any purpose. Its field of application is in no way restricted.

The so-called 'Interessentskab' exists in Denmark. Members are fully and jointly liable. This form does not constitute a legal person, but does possess legal capacity in respect of third parties.

There are numerous similar forms in the Netherlands. One of the most important is the 'Stichting'. Like the German 'Stiftung', it was originally designed for administering a trust. Its considerable flexibility and its great structural elasticity, however, have led to its application, since the end of the forties, in other economic sectors, particularly in the running of sales and buying offices. A well-known example is the sales office of the Dutch Cement Industry, which has adopted this legal form.

Another Dutch form is the 'burgerlijke vennootschap', which, as in other countries such as Germany and Belgium, constitutes an association of several persons with a common purpose. It is not a legal person and as such has no legal capacity. Its members have joint and unlimited liability. It is less certain whether the 'Vennootschap onder Firma' is comparable to the Cooperation Grouping in its goals. This could almost be regarded as a kind of independent undertaking and not merely a function of the activity of its members, as is the case in a cooperation grouping.

In Italy we have the 'Consortio'. This has a particular form - the participants must consist of undertakings which belong to the same economic sector. The point is not solely to improve the operational capability of this sector by means of a particular legal form - the consortium remains under permanent State supervision and can, the moment it is used for purposes which do not fall under its terms of reference, be automatically dissolved. The organs of the State have far-reaching powers for intervention. Of course, Italy also possesses the simple company, the 'società semplice', but this is seldom used because complex disputes of a doctrinal nature tend to arise.

There is, then, clearly no shortage of possibilities for cooperation in the Member States themselves, at least as far as the number and types of forms is concerned. Common to nearly all of them is simplicity of structure and constitution, and joint liability of their members; however, most of them are unable to exist as legal entities. They are therefore unable to advertise themselves as such, conclude contracts or enter into commitments. However, these bodies are all national bodies, their jurisdiction extends only to the borders of the Member State concerned and they are not in fact suitable for Community-wide cooperation, even though members from other countries may of course participate in these groupings.

The Commission's initiative therefore intends to create a legal form which corresponds to the economic realities of the Common Market, with a view to supporting cooperation between undertakings and general commercial activity in this economic area. That is why the Commission has now proposed, in addition to the European Company, which is an instrument for structured cooperation, a Cooperation Grouping intended to make possible a flexible and simple form of cooperation among undertakings.