International Conference KNOWLEDGE-BASED ORGANIZATION
Vol. XXVI No 2 2020

THE TWO-TIER SYSTEM OF THE EUROPEAN ECONOMIC STRUCTURES

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Abstract: *European Union acts empower cross-border economic association entities to determine the architecture of the emerging legal entities by themselves. As a manifestation of corporate democracy, the General Meeting, which is the highest authority of the company, can independently choose the form of management. It could be either a two-tier system (a supervisory body and a management body), or a one-tier system (an administrative body). To a certain extent, the choice is determined by the national laws on joint-stock companies and cooperatives. The subject of the analysis is the legal state of the two bodies in the two-tier system. The relationships between them are examined in the light of the European Union and the member states' legislative regulations. The management body shall be responsible for managing the company. The catalogue/list of its powers includes all the segments of possible activities in its entirety. The compendium of management competences covers issues of strategic development, long-term and medium-term planning, technical and technological problems, the organizational and functional structure, the implementation of the financial plan, etc. A member or members of the management body shall be appointed and removed by the supervisory body. The supervisory body shall supervise the work of the management body. It may not itself exercise the power to manage. The members of the supervisory body shall be appointed by the General Meeting.*

Keywords: European company, European Cooperative Society, supervisory organ, management organ, managing director

1. Introduction

The European company *(Societies European - SE)* and the European Cooperative Society *(Societies Cooperative European – SCE)* are new corporate entities from the viewpoint of the existing corporate typology. Their managerial structure is established in accordance with a number of EU documents such as: 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; 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.

They define two architectonic models for the emerging European transnational business associations. In the first one, in addition to the General meeting, two bodies are constituted, namely a supervisory organ and a management organ. This is why the system is defined as two-tier system (système dualiste, dualistisches system). In the one-tier system, apart from the General meeting, a single body is formed, namely

DOI: 10.2478/kbo-2020-0084

an administrative organ. This is the legal *facta concludensia*, which defines it as a one-tier system (système moniste, monistisches system).

2. Legal traits of the two-tier system

The European lawmaker has granted the right of the founding company to choose its governing structure independently [1]. The choice, however, is limited within the established imperative range.

It is possible that a start-up cooperative association or cooperative initially adopts one of the two systems and later on decide to move to the other one [2]. Community law does not address this legal situation. We believe that in this case it will be necessary to apply the national law of the country on whose territory their registered office is located. The provisions in the regulations presenting the legal basis for this assumption stipulate that when issues that are not (fully or partially) settled, the laws of the member state would apply depending on where the cooperative has been founded and where its headquarters are located.

The decision to switch from two-tier system to one-tier system or vice versa can only be taken by a general meeting. This right may not be delegated to another body of the company. The registered office may be transferred to another Member State only by a decision of a general meeting [3].

The two-tier system is adopted by such countries like Croatia, the Czech Republic, Germany, Estonia, Latvia, Lithuania, Netherlands, Poland and Slovakia. This system has traditionally been referred to as the German or dualistic system of government. It has received this designation since it was first established in the German Commercial law *(Allgemeines Deutsches Handelsgesetzbuch (ADHGB))*, adopted on 31 May 1861. The legally established structure became binding on the whole German Empire (*Deutsches Kaiserreich, officially Deutsches Reich)* by an Act of the Emperor *(Reichsgesetz)* of 16 April 1871.

The one-tier system is specific for Belgium, Cyprus, Ireland, Spain, Malta, Sweden and United Kingdom (UK). It is known as the English or American system of government, or as a monastic structure.

In recent years, a third group of countries has taken a mixed approach by allowing the cooperative companies and cooperatives concerned to choose one of the two existing systems for their governance structure. In this way, entities created by the first of the second model can function cumulatively. Such are Austria, Bulgaria, Croatia, Denmark, Finland, France, Greece, Hungary, Italy, Luxembourg, Portugal, Romania and Slovenia. This system is known as the French management system since it was first adopted in France in 1966 [4]. When calculating the three possible types of governance structure of the European entities it turns out that seven member states have adopted a one-tier system, nine - a two-tier system and fourteen - a mixed one. The regulations create a specific regime for new formations. For example, a European company or cooperative with its headquarters in Cyprus may adopt the dualistic system of governance, although the structure is unfamiliar to this member state, because its legal system provides only for a monastic structure. The Community act establishes this possibility only for cooperative entities, and their provisions in this part are not valid for other companies and cooperatives in Cyprus.

In the two-tier system, there are a supervisory organ and a management organ that are collective bodies. The analysis of the member states' regulatory frameworks for the management body members reveals that fifteen countries have established a minimum number of members and five have provided for a maximum one. The Bulgarian Commercial Law states that the management body consists of at least three but not more than 10 individuals. The legal situation in Finland is (1 – 5), France (3 – 18), Germany (3 – 9, 15, 21), Hungary (9 – 11) and the Czech Republic (3 – 18) is

identical. 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. They are three for staff of 1000 people. Similar requirements are also available in the German legislation providing for a broad participation of employees in management [5].
The legal framework regarding the supervisory organ and the management organ is heterogeneous [6]. The regulations define the main characteristics of the companies concerned. In addition, on a number of issues there are references to the national legislations.
Inaugurating a two-tier system in countries that have adopted only one-tier system is a competitive normative advantage as the establishing company may choose one of them at its discretion [7]. The new option also has a beneficial effect on the law regulations in individual countries. Only two years after the adoption of Council Regulation (EC) No 2157/2001, Italy established the two-tier system of management of joint-stock companies in its national legislation [8].
Council Regulation (EC) No 2157/2001 explicitly states that the management organ shall be responsible for managing the SE *(responsable de la gestion de la SE)* (Art.39-1) [9]. The legal and technical version used to define the administrative organ in the one-tier system is different. It states: “the administrative organ shall manage the SCE”.
The distinction drawn by the community lawmaker is fully justified. The administrative organ manages all activities of SE. The catalogue of its managerial competences includes all sectoral and functional segments of the activity of the European corporate body. It has managerial competence in the complete set of the management functions such as planning, organizing, managing, controlling and regulating the company. None of these components has been removed from the package of its powers. Indeed, executive members exercise some functions, but they are members of the governing body and are on an equal footing with their non-executive counterparts. Therefore, the characteristic of the management organ is appropriately defined by the expression "shall manage".
The situation with the two-tier system is different. It consists of two bodies: one with clearly defined managerial competences like these of the management body, while the other is a specially created supervisory body, which is an organizational and legal establishment with superintendent functions [10]. It is explicitly stated that the latter supervises the work of the management body. Governance as a single process involves certain functions, among which control occupies a special place. In this case, this management control power is removed from the nomenclature of the management body activities. It participates in the governance, but does not exercise one of its constituent management functions, namely the control. It is therefore justified that the management body *shall be responsible for managing* and not *shall manage* the company. It is for this reason that the Regulation stipulates that the supervisory body should supervise the work of the management body. It is specifically stated that it may not itself exercise the power to manage *(ne peut exercer lui-même le pouvoir de gestion de la SE)* (Art. 40 – 1).

Regulations make it possible that a member state may provide that a managing director or managing directors shall be responsible for the current management under the same conditions as for public limited-liability companies that have registered offices on the member state's territory. In this situation *a contrario*, the rest of the management complex will remain under the authority of the management body. There is no legal definition of the content of the term "current management". The problem arises in a legal hypothesis when there is no similar wording in the national shareholder law and how it will operate, provided that the Regulation explicitly states "under the same conditions".

The option to appoint executive members of the management organ was adopted by Belgium, Bulgaria, Greece, Denmark, Estonia, Spain, Latvia, Luxembourg, Poland, Slovenia, Hungary, Finland, France, Croatia, the Czech Republic and Sweden. The Commerce Act of Bulgaria (Art. 224 - 4) enables a management body of the 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) [11], etc.

Together with the management organ, the two-tier management system also provides for a supervisory organ [12]. The regulation defines its most essential features. The regulation clearly distinguishes between the legal position of the supervisory organ and the management organ. As its name implies, the supervisory body superintends the work of the management body. This supervisory function belongs to the organ as a collective body, not to each of its members. Practically, it implements only one component of the whole governance complex of the company's actions. In this way, the supervisory organ cannot exercise the entire managerial complex. Therefore, it is inadmissible for them to give binding instructions and orders to the management body responsible for managing the company.

The nature of the supervisory organ's competence does not enable it to represent the company to third parties. It does not have the representative power to carry out any transaction under the Civil law regime. The contracts the supervisory organ concludes on behalf of and at the expense of the company are considered invalid.

The supervisory organ represents the company only in relation with the management body. This is explicitly stated in the Bulgarian law [13], in the German law [14], etc.

No person may at the same time be a member of both the management organ and the supervisory organ. The supervisory organ may, however, nominate one of its members to act as a member of the management organ in the event of a vacancy. During such a period, the functions of the person concerned as a member of the supervisory organ shall be suspended. A member state may impose a time limit on such a period. The number of members of the supervisory organ or the rules for determining it shall be laid down in the Statutes. A Member state may, however, stipulate the number of members of the supervisory organ for SEs registered on its territory or a minimum and/or a maximum one. The supervisory organ may undertake or arrange for any investigations necessary for the performance of its duties (Art. 39 and Art.40).

Conclusions

The regulatory framework of the two-tier system in the architecture of joint-stock companies and cooperatives forms the necessary legal and economic preconditions for unfolding the company democracy and for the creation of an optimal social climate for the functioning of the European structures for business association. This helps to fully harmonize the national laws of the member states in the field of cooperative law. This mechanism will help to reorient the European Semester towards achieving the UN Sustainable Development goals by 2030.

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