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The Status of the Law on Stock Companies in Central and Eastern-Europe: Facing the Challenge to Enter the European Union and Implement European Company Law

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Abstract:
Most of the countries that are candidates for EU membership are from Central and Eastern Europe. Although their company laws are generally rooted in the Western (and Central) European legal tradition, the influence of Communism has also left a mark on their corporate law regimes. These regimes have recently undergone major changes, and the European Commission has declared that they are now largely in conformity

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with EU standards. As to rules concerning corporate governance in stock companies, European company law still leaves ample scope for national particularities. Central and Eastern European laws concerning stock companies allow for a great variety of different organisational structures, including pure two-tier systems, mixed systems and systems that provide a choice between one-tier and two-tier systems.

1. Introduction

Of the thirteen countries that have applied to become members of the European Union, ten are from Central and Eastern Europe: Estonia, Latvia, Lithuania, Bulgaria, Poland, Romania, the Czech Republic, Slovakia, Hungary and Slovenia.[1] The negotiation process with the first wave of applicant countries (the Czech Republic, Estonia, Hungary, Poland, Slovenia and Cyprus) started in the spring of 1998.[2] In the autumn of 1999, the Commission advised the EU member states to open negotiations with Romania, Slovakia, Latvia, Lithuania, Bulgaria and Malta. The objective of the Accession Partnerships (adopted in March 1998 and amended in December 1999 and 2002) is to enshrine in law the working priorities defined in the Commission's opinion on the applications for membership.[3]

In the autumn of 2002, the Commission advised the EU member states to close negotiations with Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia. This first group of new member states should join the European Union in time for the June 2004 elections to the European Parliament.[4]

The Accession Partnerships, which were launched on 15 March 1998, provide a uniform framework for basic policy areas. One of the policy areas in which the *acquis communautaire* is to be adopted is company law. Within the

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[1] In addition to the above-mentioned ten countries, Malta, Cyprus and Turkey have also applied to become EU members. See <http://europa.eu.int/comm/enlargement/enlargement.htm>.

[2] The first Accession Partnership was launched in March 1998 and revised in November 2001, see <http://www.europa.eu.int/comm/enlargement/report2001/aplt_en.pdf>. See also Kalss, 'Gesellschaftsrecht in den Ländern Mittel- und Osteuropas', 6 *ZGR* (2000) p. 820; Kalss, 'Die Auswirkungen von Centros auf die mittel- und osteuropäischen Staaten', in *'Centros' und die Beitrittswerber*, Fowi Arbeitspapier (2002).

[3] The Accession Partnerships create a framework for a range of policy instruments to support candidate countries as they prepare for membership. The Commission has undertaken to submit a report to the European Council each year on the progress made by each of the applicant countries.

[4] *Towards the Enlarged Union*, Strategy Paper and Report of the European Commission on the progress towards accession by each of the candidate countries, Brussels, 9 October 2002, COM (2002) 700 final, p. 22. See also <http://europa.eu.int/comm/enlargement/enlargement.htm>.

last few years, therefore, the candidate countries have thoroughly reformed their company laws in order to bring them into accordance with European company law. As observed by the Commission, Eastern European company law is now largely in conformity with the *acquis*. As a result, Chapter 5 of the Association Agreements (i.e. on company law) was provisionally closed with all candidate countries.[5]

Most of the member states have taken Western European standards into consideration when amending their company laws. This is due to the fact that the stock company is 'a child of Western Europe'.[6] Some candidate countries have the same legal roots as the member states, because their histories are so deeply intertwined. In the Czech Republic, the legal system was practically identical to that of Austria until 1950.[7] Lawyers sometimes recommended the use of German and Austrian literature to create their own legal norms.[8] Most Central and Eastern European company law can be traced back to the German (and Austrian) or French legal tradition. However, the creation of more recent regulations was driven mainly by economic forces, market needs[9] and the political and historical context, in accordance with the theory of path dependency as applied to company law and corporate governance. In Western Europe, company law has developed continuously for the last 150 years, while Communism interrupted the continuous development of company law in Central and Eastern Europe. Only a decade ago, Central and Eastern European countries started to reform their legal systems and privatise state-owned enterprises. With respect to such privatisations, the Commission has noted that the candidate countries have made impressive progress and have already reached a level comparable to the European Union.[10] The latest push for reform was triggered by the prospect of accession to the European Union. During the last 24 months, the parliaments of all the candidate countries have adopted a large amount of commercial and company law. The Commission considers the candidate countries to be functioning market economies. Company law is an important factor in this regard. Whereas company law is only one element of the overall economy in Anglo-American countries, it is of utmost importance in Central and Eastern Europe. This is related – among other things – to the issue

[5] See <http://europa.eu.int/comm/enlargement/negotiations/chapters/chap5>.

[6] According the vivid expression of the former Austrian Minister of Justice and great reformer Franz Klein in *Die neueren Entwicklungen in Verfassung und Recht der Aktiengesellschaft* (1904) p. 10; Kalss, 'Gesellschaftsrecht in den Ländern Mittel- und Osteuropas', 6 *ZGR* (2000) pp. 825, 833.

[7] See Kalss, loc. cit. n. 7, at p. 825.

[8] Ibid.

[9] S. Pistor, 'Patterns of Legal Change: Shareholder and Creditor Rights in Transition Economies', *EBOR* (2000) p. 59 ff.

[10] *Towards the Enlarged Union*, loc. cit. n. 5, at p. 16.

of ownership structure. Continental Europe is characterised by a limited flow of shares and a high concentration of ownership.[11] As a result, Continental European countries often lack fully functional capital markets,[12] which means they have to rely on company law.

The *Societas Europaea* (European Company) plays an important role in the candidate countries. Due to the fact that national legislatures must adopt certain provisions regarding the Regulation to establish a European Company Statute[13] by 2004 and implement the Directive concerning worker involvement in European Companies, candidate countries must take the Regulation into consideration when amending their company laws.[14] While the first draft of the Regulation contained more than 400 paragraphs, the most recent one seeks to establish a European Company Statute by means of just 70 articles and a supplementing directive. The Regulation thus only provides a framework for such a statute and otherwise refers to national laws on public companies. It also offers a choice between one-tier and two-tier management system. In other words, companies can choose either of the two systems, while the member states have to provide the necessary regulations. However, most of the member states and candidate countries employ either a one-tier or a two-tier board system. Only rarely do they offer domestic companies a choice between the two systems.[15] Due to the need for further reforms, it is important for present and future member states to examine different systems of corporate governance. So far, the organisation and corporate structure of companies have not been subject to the EU harmonisation. The Fifth Directive concerning the structure of public limited companies has not been adopted because of the controversy surrounding the issue of workers' representation and the broad variety of corporate governance systems. In this context, the adoption of the European Company Regulation may give a new incentive and have positive effects on national company law in general.[16]

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[11] See Becht and Mayer in Barca and Becht, *The Control of Corporate Europe*, p. 2.

[12] See further Kalss, loc. cit. n. 7, at p. 823.

[13] Council Regulation 2157/2001 of 8 October 2001, *OJ* 2001 L 294/1.

[14] See Teichmann, 'Die Einführung der Europäischen Aktiengesellschaft. Grundlagen der Ergänzung des europäischen Statuts durch den deutschen Gesetzgeber', *ZGR* (2002) p. 392 et seq.

[15] In France, companies have a choice. See the chapter on France in Arlt et al., 'The *Societas Europaea* in Relation to the Public Corporations of Five Member States (France, Italy, Netherlands, Spain and Austria)', 4 *EBOR* (2002).

[16] P. Doralt, 'Die Anpassung an das Europäische Gesellschaftsrecht in den mittel- und osteuropäischen Beitrittsländern und deren Bedeutung für die Corporate Governance', in *Festschrift Otto Oberhammer* (1999) p. 3. Before the adoption of the European Company Regulation, Doralt stated that the lack of a unified corporate structure might change once the Council Regulation was adopted.

2. Individual Countries

2.1 Poland

Poland signed an Association Agreement with the European Union on 16 December 1991.[17] It applied for membership of the European Union on 5 April 1994. In its most recent Regular Report on Poland's progress towards accession, the European Commission notes that Polish company law still displays some inconsistencies with the *acquis communautaire*, in particular in the field of auditing and company registration. Generally speaking, however, Poland has made steady progress in this regard and should focus on ensuring full alignment with the *acquis*.[18]

In 2000, in the context of Poland's future membership of the European Union and the related measures of conformity, the Polish Commercial Code (PCC) and the rules governing Polish stock companies were comprehensively amended.[19]

Polish stock companies are regulated by Article 301 PCC et seq.[20] Each company is characterised by the limited liability of every shareholder and may be founded by one or more people.

The Polish legal system is influenced in particular by German law.[21] As a result, stock companies are administered according to a two-tier board system, which requires the existence of three mandatory organs. The first two are the management board and the general shareholders' meeting. With regard to the third, until the amendment of the PCC in 2000, companies could choose between a special auditor and a supervisory board. Since then, every stock company is obliged to establish a supervisory board.[22]

The *management board* is appointed by the supervisory board. According to Article 368(2) and (3) PCC, the management board may consist of one or several members. All members must be natural persons[23] and are allowed to be shareholders in the company, although this is not legally required. Members are

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[17] *OJ* 1993 L 348.

[18] SEC (2002) 1408, 9 October 2002. Regular Report on Poland's progress towards accession, COM (2002) 700 final, p. 61 et seq.

[19] Oplustil, *Gläubigerschutz durch reale Kapitalaufbringung im deutschen und polnischen Recht der Kapitalgesellschaften: eine rechtsvergleichende Untersuchung* (Frankfurt am Main, Berlin, Bern, Brussels, New York, Oxford, Vienna, Lang 2001) p. 2 et seq.

[20] Polish Commercial Code of 15 September 2000 (Dz. U. No. 94, Pos 1037).

[21] Kalss, loc. cit. n. 7, at p. 825; Graf von Bernstorff, 'Zivilrechtsentwicklung in Mittel- und Osteuropa', *RIW* (1998) p. 830.

[22] Art. 381 PCC; Schnell and Brockhuis, 'Polen: Gesetzbuch der Handelsgesellschaften – AG', *WiRO* (2002) p. 18.

[23] Art. 18 PCC.

appointed for a period of no more than five years, but may be re-elected.

Members of the management board may be removed without reason by the supervisory board or the general shareholders' meeting. However, it is possible to demand that there be important reasons for such dismissal.[24]

The management board holds executive power (management) and the power of representation. Every member of the board has the power to effect transactions with a third party on behalf of the company.[25] Although company statutes may limit the internal powers of the members of the management board, such restrictions do not apply in relation to third parties.[26] In the case of a management board that consists of several members, the company's statutes determine the form of representation (single power of representation, collective power of representation or representation only together with a procurator). The executive powers of the management board are exercised by the entire board, unless the company's statutes determines otherwise.

The *supervisory board* has at least three members, who are elected and dismissed by the general shareholders' general meeting if the company's statutes do not determine otherwise. The members of the supervisory board may be re-elected.

With regard to the protection of minority shareholders, the PCC determines that a minority of shareholders representing just five per cent of the share capital can enforce the appointment of the supervisory board by a resolution of the general shareholders' meeting, even if this is not provided for in the company's statutes.

Article 387(1) PCC contains regulations concerning conflicts of interest of the members of the supervisory board, in order to guarantee the board's independence. As in German law, a person is excluded from membership if he or she is a procurator of the company, a member of the management board of the company or one of its subsidiaries, or a lawyer for the company.

The supervisory board has powers of control. It is entitled to appoint and dismiss the members of the management board and to approve the financial reports.[27] The supervisory board does not have executive powers, however, nor does it have the authority to issue directives binding the management board. In other words, the powers of the two organs are strictly separated. Nevertheless, a company's statutes may list several types of contracts to which the supervisory board must agree. At the same time, those statutes may strengthen or reduce the powers of the supervisory board.

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[24] Arts. 368(4) and 370(1) and (2) PCC.

[25] Art. 368(1) PCC.

[26] Arts. 372(2) and 375 PCC.

[27] Art. 382(3) PCC.

In Polish company law, the general shareholders' meeting is regarded as the highest organ in a stock company, because of its power to make important decisions.[28]

The ordinary general meeting takes place once a year for the discussion and approval of the management report on business activity and the financial report.[29] The ordinary meeting also determines the distribution of profits and approves the management board's members.

All other general shareholders' meetings are extraordinary general meetings, regardless of their subject. According to Article 398 PCC, extraordinary general meetings must take place at the times determined by law or by the company's statutes, or whenever the supervisory board or the management board considers it necessary or useful to convene such a meeting. An extraordinary general meeting must also be called if shareholders representing at least ten per cent of the share capital call for such a meeting.[30]

As Polish company law only uses the two-tier board system, Poland will need to adopt the one-tier board system by making use of Article 43(4) of the European Company Regulation.

2.2 **Czech Republic**

The Czech Republic formally applied for EU membership on 17 January 1996.[31] In 1997, the European Commission observed that it should not be a major problem to bring Czech company law fully into line with the relevant EC legislation in the medium term.[32] In its latest Regular Report on the Czech Republic's progress towards accession the European Commission notes that a high degree of compatibility has been achieved and that the country's administrative capacity is generally satisfactory.[33]

Czech stock companies are regulated by Articles 154-220zb of the Czech Commercial Code (CCC),[34] which recently underwent comprehensive reforms. Shortly after the far-reaching reforms introduced by Amendment 370/2000, the CCC was again modified by Amendment 501/2001, which was initially meant

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[28] Schnell and Brockhuis, loc. cit. n. 24, at p. 20.

[29] Art. 395 PCC.

[30] Art. 400 PCC.

[31] *OJ* 1994 L 360. Following the dissolution of Czechoslovakia, the European Association Agreement with the Czech Republic was signed in October 1993 and entered into force on 1 January 1995.

[32] Agenda 2000 – European Commission's Opinion on the Czech Republic's Application for Membership of the European Union, Doc/97/17, p. 41.

[33] SEC (2002) 1406, 9 October 2002. Regular Report on the Czech Republic's progress towards accession, COM (2002) 700 final, p. 65.

[34] 513/1991 Sb. in the version of 15/2002 Sb.

to be a mere ‘technical reform’ that did not alter the context of the legal norms.[35] Together, these reforms have lead to important changes in Czech company law.

As in Slovakia, Czech stock companies are organised according to a two-tier board system that includes a management board and a supervisory board. The *management board* leads, directs and represents the company. All powers that are not explicitly attributed to another organ rest with the managing directors. No company organ can issue binding directives to the managing directors with regard to the (day-to-day) management of the company. However, the general shareholders’ meeting can issue principles that the managing directors are obliged to follow (Art. 194(4) CCC). The management board is appointed and dismissed – in contrast to the German or Austrian two-tier system – by the general shareholders’ meeting. However, the company’s statutes may provide for the right of appointment and removal by the supervisory board (Art. 194(1) CCC). In any case, such removal does not require a special justification.

The *supervisory board* controls the activity of the management board and the company’s transactions in general. For this purpose it is entitled to examine all the company’s documents. Members of the supervisory board may not be members of the managing board. They are appointed and removed by the general shareholders’ meeting. The supervisory board must comprise at least three members, and the number of board members must always be divisible by three. This is especially important with regard to the provisions on worker involvement. Article 200 CCC establishes a system of worker involvement for large companies. If a company employs more than 50 workers, then one-third of the members must be appointed by the workers. The company’s statutes may provide that more than one-third of the members shall be elected by the workers, but the workers’ representatives may not exceed the number of members appointed by the general shareholders’ meeting. The workers’ representatives are elected directly. The candidate or candidates that receive the most votes will be appointed as director(s).[36] The company’s statutes may provide that certain transactions are subject to the approval of the supervisory board. In such cases, the members of the supervisory board are jointly and individually liable together with the management board.[37] However, if the supervisory board withholds its approval, the management board is not responsible for damages incurred by the company.

The *general shareholders’ meeting* is authorised to make decisions on such matters as the amendment of the company’s statutes, the issue of bonds, the

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[35] Bohata, ‘Tschechisches HGB und kein Ende’, 2 *WiRO* (2002) p. 43.

[36] Indirect voting through electoral delegates is only permitted if the company’s statutes provide for such a procedure and the company employs more than 1,000 workers. See Bohata, loc. cit. n. 37, at p. 45.

[37] Bohata, loc. cit. n. 37, at p. 45.

approval of the annual accounts, the payment of the managing and supervisory directors, the sale or transfer of the whole enterprise or parts of it, control or dependency agreements and agreements on the distribution of profits.[38] The general shareholders' meeting adopts resolutions by a simple majority of the shareholders present. Certain matters, like the modification of the statutes, require a majority of two-thirds of the shareholders present. The general shareholders' meeting must be called by the management board at least 30 days before the meeting is held. Thirty per cent of the shareholders must be present to allow the meeting to pass resolutions. A single-member company has no general shareholders' meeting (Art. 190 CCC). The single shareholder exercises the competences of the general shareholders' meeting and adopts the resolutions in written form.

With regard to the European Company Regulation, Czech company law will have to adopt additional provisions concerning the one-tier system.

2.3 **Slovakia**

Slovakia presented its application for EU membership on 27 June 1995.[39] The company law chapter was closed by the end of September 2002. In its latest Regular Report on Slovakia's progress towards accession, the European Commission notes that, as a result of Slovakia's new Commercial Code, Slovakian company law is now broadly in line with the *acquis communautaire*.[40] With regard to accounting rules, in particular, the Slovakian parliament has passed a law to achieve full compliance with the Fourth and Seventh EU Directives. A new Auditors Act was adopted in July 2002 and is scheduled to enter into force at the beginning of 2003.[41] In the field of company law, Amendment 500/2001 Z.z. of the Slovakian Commercial Code (SCC) introduced substantial reforms to fully harmonise national company law with European company law. It is therefore also referred to as the EU amendment.[42] The main part of the amendment, which entered into force on 1 January 2002, deals with the protection of shareholders and creditors and regulates the status of the management board by partially incorporating the OECD's Principles of Corporate Governance into national law. Slovakian company law now

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[38] See also Art. 187 CCC for a full list of competences.

[39] *OJ* 1994 L 359. The Association Agreement was signed on 6 October 1993.

[40] SEC (2002) 1410, 9 October 2002. Regular Report on Slovakia's progress towards accession, COM (2002) 700 final, p. 60.

[41] Ibid.

[42] Stessl, 'Jüngste Neuerungen im slowakischen Gesellschaftsrecht', 8 *WiRO* (2002) p. 237.

distinguishes between public and private stock companies. Public stock companies are companies that have publicly offered their shares.[43]

The Slovakian stock company is regulated by Articles 154 to 220 SCC.[44] It is organised according to a two-tier management system, which means that three company organs are mandatory: the general shareholders' meeting, the management board and the supervisory board. Other organs may be established and endowed with consultative functions.

If the company's statutes so provide, the supervisory board appoints the managing directors. Otherwise, the general shareholders' meeting is responsible for appointing the *management board*. No just cause is required for the removal of the managing directors. The president of the management board must be appointed by the same organ that elects the rest of the board (the general shareholders' meeting or the supervisory board) and not – as used to be the case – by the board itself. The Slovakian Supreme Court has declared that company statutes must regulate the procedures for appointing and removing directors.[45] The management board may be composed of a single person.[46]

The *supervisory board* is nominated by the general shareholders' meeting. If the company employs more than 50 full-time employees, the workers are entitled to appoint one-third of the members of the supervisory board. However, the SCC does not provide a special voting procedure for the election of the workers' representatives. Company statutes can raise or lower the required number of workers, as long as the workers' rights in this regard are not erased entirely.[47]

The responsibilities of the managing directors have been intensified by the so-called EU amendment. For example, the right of the general shareholders' meeting to issue directives that are binding on managing directors has been abolished. At the same time, the responsibilities of managing directors have been increased in conformity with European standards. Managing directors are responsible for increased standards of professional diligence.

Changes in Slovakian company law have also strengthened *minority shareholder rights*. Above all, the principle of equal treatment has been incorporated in the SCC and the duty of loyalty has been regulated. Minority shareholder rights are linked to a five per cent threshold. A minority of five per cent can (a)

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[43] Article 154 SCC. See Stessl, loc. cit. n. 44, at pp. 238-239. A public stock company can convert itself into a private stock company if there are no more than 30 shareholders and all shareholders agree to the conversion. See Kováč, *Harmonisierung des slowakischen Gesellschaftsrechts mit dem Gemeinschaftsrecht* (2001) p. 54.

[44] Obchodný zákonník, Zákon č. 513/1991 Zb. in the version of Zákon č. 238/2000 Z.z.

[45] V 23/97. See Kováč, op. cit. n. 45, at p. 66.

[46] According to Stessl, it is not clear whether the management board may be composed of only one person. See Stessl, loc. cit. n. 44, at p. 240.

[47] Kalss, loc. cit. n. 7, at p. 848.

request a general shareholders' meeting; (b) add issues to the agenda of such a meeting; (c) prosecute company claims against the management board and prevent the company from agreeing to settle the legal action with the directors; and (d) prosecute claims against other shareholders. Minority shareholders can bring an action on behalf of the company, if the supervisory board or the management board do not immediately pursue the above-mentioned claims themselves.[48]

As the two-tier system is mandatory under current law, Slovakia will have to adopt additional provisions concerning the one-tier system to implement the European Company Regulation.

2.4 **Hungary**

Hungary presented its application for EU membership on 31 March 1994.[49] In its latest Regular Report on Hungary's progress towards accession the European Commission notes that a significant degree of alignment has been achieved in the field of company law and that outstanding issues are of a technical nature.[50]

Hungarian stock companies are regulated mainly by Articles 175-271 of the Law on Commercial Companies (LCC).[51] A new Company Act was adopted in 1997, replacing the former Company Act of 1988. The new act led to some important changes. It strengthened minority shareholder rights and creditor protection and brought Hungarian company law up to European standards.

Hungarian company law establishes a two-tier system.[52] The mandatory organs are the general shareholders' meeting, the management board and the supervisory board. The *management board* leads the company and is composed of three to eleven members (Art. 240 LLC). Its members are appointed and removed by the general shareholders' meeting. However, a company's statutes may provide for the appointment of the management board by the supervisory board. The management board elects a president from among its members. The right to appoint the president cannot be delegated to the supervisory board or the founders.[53]

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[48] Stessl, loc. cit. n. 44, at p. 240.

[49] *OJ* 1993 L 347. The Association Agreement was signed on 16 December 1991.

[50] SEC (2002) 1404, 9 October 2002. Regular Report on Slovakia's progress towards accession, COM (2002) 700 final, p. 61.

[51] Law CXLIV/97 of 9 December 1997, which entered into force on 16 June 1998.

[52] With regard to CEOs, see further *infra*.

[53] The statutes must state that the president is elected by the supervisory board or appointed by one of the founders. See Gálffy, *Die Ungarische Aktiengesellschaft und ihre Satzung* (1999) p. 151.

In its rules of internal procedure, the management board can distribute competences and tasks among its members. It cannot provide for anything other than collective responsibility, however, which sets certain limits on the distribution of competences.

The *supervisory board* controls the company's management board. It cannot be rendered subject to binding directives by the general shareholders' meeting. The supervisory board consists of three to fifteen members, who are appointed by the general shareholders' meeting. A third of the members can be nominated by the workers, if the number of full-time employees exceeds 200. The workers' representatives are nominated by the workers' council and appointed by the general shareholders' meeting, unless the designated members have a conflict of interests. The workers' representatives have the same rights and duties as the members elected by the general shareholders' meeting. They can overrule the majority of the board and compel the general shareholders' meeting to take up a particular issue.[54]

A company's statutes may state that certain transactions are subject to the approval of the supervisory board. All measures adopted in this context have to be reported to the *general shareholders' meeting*. Whenever the supervisory board withholds its approval, the management board is entitled to submit the issue to the general shareholders' meeting, which can approve the transaction with a majority of three-quarters of the votes cast.

In addition to managing directors and a supervisory board, Hungarian companies often have a *chief executive officer*, who usually has power of representation – in addition to the managing directors – and runs the company's day-to-day business, whereas the other directors are only involved in decisions regarding transactions of special importance.[55] This form of internal organisation has a long tradition that started in the former state-owned companies. It has lead to a three-tier management system in which the management board has only limited powers.[56] The post of general director is not mentioned in the LCC. A general director may thus be part of the management board or act as chief executive officer.

Hungary needs to adopt additional regulations concerning the one-tier system and adapt typical two-tier provisions to the one-tier system. This means that Hungarian company law will eventually include different regulations on workers' representation for the one- and two-tier systems.

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[54] Art. 37(3) LCC. See Vatheuer, 'Arbeitnehmermitbestimmung in Ungarn', 6 *WiRO* (2002) p. 169.

[55] Gálffy, op. cit. n. 55, at pp. 170-171.

[56] Ibid., p. 171.

2.5 Slovenia

Slovenia was the last candidate country to apply for EU membership, on 10 June 1996. The Accession Agreement between Slovenia and the European Union was signed on the same day.[57] In its latest Regular Report on Slovenia's progress towards accession, the European Commission noted that substantial legislative progress has been made in the field of company law and that the legislative framework is nearly complete.[58] The Slovenian government and parliament have been forced to shoulder a substantial workload in order to bring Slovenian company law up to European standards. The so-called Law on Economic Companies,[59] which dates from 1993, has therefore been amended several times during the past decade. The most important reform was achieved in 2000 through an amendment by which the main EU directives on company law (the Second (capital), Third (merger) and Sixth (demerger) Directives) where incorporated into Slovenian law.[60] It is interesting to note that the reform act on the implementation of the EU directives also promoted the diversity of corporate models within the framework of the law.[61] Slovenian companies have quite a broad spectrum of choices as regards the internal organisation and structure of the stock company.[62]

However, this broad spectrum of different models is available only to small private companies. A company must establish a supervisory board, in addition to its management board and general shareholders' meeting, if its capital exceeds SLT 410 million (= approx. €1.8 million) or the number of employees exceeds 500, if the company is quoted on the stock exchange, or if the company has more than 100 shareholders or a public offering took place during its establishment. In other words, large companies and companies with publicly offered or quoted shares are characterised by the two-tier system.

Stock companies whose shares are quoted on the stock exchange must in any case establish a supervisory board and are therefore characterised by the two-tier system.

According to the Law on Worker Involvement, employees are entitled to be members of the supervisory board. The permitted proportion of members who

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[57] *OJ* 1999 L 51.

[58] SEC (2002) 1411, 9 October 2002. Regular Report on Poland's progress towards accession, COM (2002) 700 final, p. 44.

[59] Law Gazette of Slovenia No. 30/1993 of 10 July 1993.

[60] Doralt, Bruckmüller and Knaus, 'Europäisierung des Slowenischen Gesellschaftsrechts', 4 *Juridicum* (2000) p. 232 et seq.; Knauss, *Slowenisches Gesellschaftsrecht* (2002) p. 3 et seq.

[61] See, for example, Doralt, Kocbek and Pivka, *Die Aktiengesellschaft und ihre Satzung nach slowenischem Recht* (1997); Knauss, op. cit. n. 62, at p. 343 et seq.

[62] Knaus, op. cit. n. 62, at p. 429.

are also employees ranges between one-third and a half of the total number of members, depending on the company.[63]

If a company possesses none of the above-mentioned characteristics, only two organs are mandatory, namely, the general shareholders' meeting and the management board. In such cases, it is up to the company to decide whether to establish a supervisory board or a similar institution with equivalent tasks. In total, the law offers five alternatives in this regard:

(1) a volunteer supervisory board;
(2) charging the general assembly with the tasks and responsibility of the supervisory board;
(3) charging another organ or institution of the company with the tasks of the supervisory board;
(4) appointing a single person to fulfil the tasks of the supervisory board; or
(5) increasing the responsibilities of the auditor of the company.

This list indicates a broad range of possibilities. However, this flexibility also raises a lot of questions. For example, what is meant with other organs or institutions of the company? It is also not clear whether third parties that are charged with the responsibilities and tasks of the supervisory board have the same legal status as the members of the supervisory board. The relationship between the supervisory board (or one of its alternatives) and the status and responsibilities of the auditor is not clear at all.[64] If another organ or institution is charged with the responsibilities of the supervisory board, the company's statutes are not permitted to make the management board responsible for these duties, as this would upset the system of checks and balances of the Slovenian stock company.

Generally speaking, only a small minority of Slovenian companies are characterised by the two-tier system. If the conditions for the establishment of a supervisory board are not met, the relevant powers are divided between the management board and the general shareholders' meeting. It is up to the individual company to create a powerful general shareholders' meeting or to focus power within the management board.

If no supervisory board is established, the management board must consist of at least three members. The lack of an independent organ is then compensated

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[63] Bratina, 'Stevilo in sestava clanov nadzornega svata', 25 *Pravna praska* (1997) p. 10 et seq.; Sarman, 'Polosaj in volga predstavnikov declavcev v nadzornem svetu', 6-7 *Podjetje in delo* (1997) p. 114 et seq.

[64] See Knaus, 'Ausgewählte Fragen des slowenischen Gesellschaftsrechts', in Kalss, *Aktuelle Fragen des Gläubigerschutzes im italienischen, slowenischen und österreichischen Kapitalgesellschaftsrecht* (2002) pp. 91 and 108 et seq.

for through a system of mutual checks and balances between the individual members of the board.

The members of the management board are appointed by the supervisory board. If the latter does not exist, the general shareholders' meeting is responsible. According to Article 250(2) of the Law on Economic Corporations, there are many reasons for removing a member of the board.[65] These reasons include a severe breach of duty, an inability to duly perform the relevant administrative functions or a vote of no confidence in the general shareholders' meeting, as well as other economic reasons (a significant change in the composition of the shareholders, the introduction of new products or a change of direction within the company).[66]

Faced with the task of incorporating the European Company Regulation into Slovenian law, the Slovenian parliament can rely on a broad range of options. The implementation and integration of the Regulation will therefore probably be achieved within the range of existing alternatives. The one-tier system and the two-tier system are both already recognised within Slovenian law, at least in the case of small private companies. It is therefore up to the Slovenian parliament to decide how to create the Slovenian model of the *Societas Europaea*. As the European Company Statute must allow for both models, the key issue lies in the question whether to create the European Company as a prototype for large public companies or to base the European Company on existing company types and then expand its scope to include large public companies as well. At the moment, opinions concerning the acceptance and possible application of the European Company Regulation by the economy are cautious if not reluctant.

2.6 **Estonia**

Estonia submitted its application for EU membership on 24 November 1995.[67] It is currently in the process of adapting its legislation to the *acquis communautaire*. By the end of 2001, the chapter on company law was provisionally closed. In its latest Regular Report on Estonia's progress towards accession, the European Commission noted that it was satisfied with the situation in Estonia in the area of company law, although some regulations are still lacking, particularly with regard to the Third EU Directive on mergers.[68]

Prior to 1 September 1995, Estonian commercial law provisions were contained predominantly in governmental decrees. The new Estonian

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[65] *Contra* Knaus, loc. cit. n. 66, at p. 111; Knauss, op. cit. n. 62, at p. 415 et seq.

[66] Knaus, op. cit. n. 62, at p. 447.

[67] OJ 1998 L 68. The Association Agreement was signed five months earlier on 6 June 1995.

[68] SEC (2002) 1402, 9 October 2002. Regular Report on Estonia's progress towards accession, COM (2002) 700 final, p. 56.

Commercial Code (ECC), which was adopted by the Estonian parliament on 15 February 1995,[69] entered into force on 1 September 1995 and substantially amended these provisions. In addition to the ECC, specific areas of business activity are governed by special norms that have been laid down in the Associations Act, the Accounting Act, the Act on Credit Banks, the Insurance Act and the Securities Market Act.

In Estonia stock companies are regulated in Articles 221-383 ECC. An Estonian stock company has a minimum share capital of EEK 400,000[70] (= approx. €26,000). Its organisational structure is characterised by a two-tier system.

The *general shareholders' meeting* is the highest executive organ in a stock company. This is explicitly stated in Article 290(2) ECC. The shareholders exercise their rights at the general shareholders' meeting, which is held once a year at the invitation the management board. The agenda is determined by the supervisory board, unless the general shareholders' meeting was called by the shareholders themselves or by the auditor. The competences of the general shareholders' meeting are laid down in Article 298 ECC and cover, *inter alia*, the amendment of the articles of association, increases and reductions in share capital and the election and removal of the members of the supervisory board.

The *supervisory board* is composed of at least three members that do not need to be shareholders (Art. 318 ECC). Only natural legal persons may be members of the board. In general, the members of the board are elected and removed by the general shareholders' meeting (Art. 319 ECC), although a company's statutes may prescribe that no more than half the members are elected otherwise. The members are elected for a period of five years, or shorter if so provided by the company's statutes. The supervisory board is responsible for planning the activities of the company and for organising and supervising the management board (Art. 316 ECC). It must give its consent to the conclusion of transactions by the management board that go beyond the scope of everyday activities. According to the ECC, such transactions include the acquisition or termination of holdings in other companies, the granting of extraordinary loans or guarantees of debt obligations, etc. (Art. 317 ECC)

The *management board* is the executive organ that represents and controls the stock company (Art. 306 ECC). The management board is elected and removed by the supervisory board for a period of three years, or shorter if so provided by the company's statutes. It is obliged to comply with the directions and orders of the supervisory board. The supervisory board must give its

[69] *Riigi Teataja* (State Gazette) I 1995, 26/28, 355. For the consolidated text, see *Riigi Teataja* I 1998, 91/93, 1500 (in the edition of the Act of 16 June 2002). An English translation is available at <http://www.legaltext.ee/text/en/X0001K11.htm>.

[70] Estonian Kroon.

consent to transactions that go beyond the scope of everyday economic activities. The management board may consist of just one director or several members. These members need not be shareholders. Members of the supervisory board may not sit on the management board. At least half the members of the management board must reside in Estonia.

2.7 **Latvia**

Latvia submitted its application for EU membership on 13 October 1995.[71] In its latest Regular Report on the progress of Latvia towards accession, the European Commission notes that Latvia has made progress in the harmonisation of its company law and that its legislation is already largely in line with the *acquis communautaire*, especially in the field of accounting law, even if some discrepancies still remain.[72]

With regard to company law, the Commercial Law (CL) of 13 April 2000 entered into force on 1 January 2001.[73] It was recently amended for the fourth time by the Law of 14 February 2002, which not only specified more explicit formulations for certain provisions in company statutes, but also led to major changes in mandatory capital reserves and the protection of minority shareholders. In one piece of legislation, the Commercial Law covers the various forms of commercial activity that may be performed in Latvia. Chapter XI of the Commercial Law defines a stock company as a 'public company, the shares (stock) of which may be publicly tradable objects' (section 134(4) CL). There are two kinds of stock companies: those that are public and those that are private. Only a public stock company is allowed to apply for a stock exchange listing. At least three founders are needed to form a joint stock company with only Latvian participation. However, a foreign legal entity, the state or a local government may be the sole founder of a stock company.

Stock companies are regulated by sections 225-314 CL and by the Law on Joint-Stock companies of 1993 as amended by the Law of 1 June 2000. The minimum equity capital of a stock company must amount to LVL 25,000[74] (= approx. €40,000).

The new Commercial Law imposes a two-tier board system on all joint stock companies. It refers to three administrative organs: a general shareholders' meeting, a council and a board of directors (section 266 CL).

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[71] *OJ* 1998 L 26. The Association Agreement was signed on 16 June 1995.

[72] SEC (2002) 1405, 9 October 2002. Regular Report on Latvia's progress towards accession, COM (2002) 700 final, p. 61.

[73] As amended by the Laws of 21 December 2000, 29 March 2001, 26 June 2001 and 14 February 2002. An English translation by the *Tulkošanas un terminoloģijas centrs* is available at <http://www.ttc.lv>.

[74] Latvian Lats.

The *general shareholders' meeting* is responsible for electing and removing the members of the council. In general, the meeting is called by the board of directors and takes place at least once a year. If the board fails to convene the meeting, the council, the Commercial Register Office or the liquidators may do so. In particular, the general shareholders' meeting is authorised to approve the annual accounts, the use of profits, amendments to the company's statutes and increases or reductions in equity capital (section 268 CL). The agenda is set by the person or body that convenes the meeting.

The *council* is the company's supervisory body (section 290 CL). The council also represents the interests of the shareholders between the meetings of the shareholders and supervises the activities of the board. It elects and removes the members of the board of directors. Its main tasks are to monitor the board (to ensure that the company's business is conducted in accordance with law, the company's statutes and the resolutions of the shareholders); to examine the annual accounts and the proposals of the board of directors; and to approve transactions between the company and the members of the board of directors or the auditor (section 292 CL). The company's statutes may further provide that the board of directors requires the consent of the council to decide issues of major importance (section 294 CL).

The minimum number of council members is three, unless the company's shares are in public circulation, in which case the minimum number is five. Only natural persons may sit on the council, and members of the board of directors are excluded (section 295 CL). The council is elected by the general shareholders' meeting for a maximum period of three years. The nomination and election of candidates is regulated in detail: shareholders or a group of shareholders are entitled to nominate a candidate if, after dividing the equity capital by the voting rights of the (group of) shareholder(s), the candidate represents at least five per cent of the share capital with voting rights represented at the meeting of shareholders. Based on the number of members provided for in the company's statutes, the candidates receiving the most votes are elected. The members of the council may be removed through a decision by the general shareholders' meeting.

The *board of directors* is the company's executive organ. It manages and represents the company (section 301 CL). In theory, the executive organ of a Latvian stock company is a collegial organ only (section 302 CL). All the members have power of representation that may not be restricted in relation to third parties. The board of directors must have at least three members, and only natural persons may sit on the board. Members of the company's council or of a dominant company or group of companies are excluded. At least half the members of the board must reside in Latvia (section 304 CL). The board is elected by the council (section 305 CL) for a period of three years, unless the company's statutes provide otherwise. Board members may only be recalled for

important reasons, such as gross violations of authority or a failure to perform their functions in a proper manner (section 306 CL).

2.8 **Lithuania**

Lithuania submitted its application for EU membership on 8 December 1995.[75] In its latest Regular Report on Lithuania's progress towards accession, the European Commission noted that Lithuania has increased its level of alignment, although some discrepancies remain.[76]

Important legislation in the field of company law includes the Civil Code of the Republic of Lithuania of 18 July 2000, Law No. I-196 on Enterprises of 8 May 1990 and, in particular, Law No. I-528 on Companies of 5 July 1994 (LoC), which entered into force on 1 July 2000.[77] The latter was amended by Law No. VIII-1835 of 13 July 2000, which entered into force on 1 January 2001. The minimum authorised capital required by public joint stock companies is LTL 150,000[78] (= approx. €43,500).

Public stock companies are managed according to a one or two-tier system. According to Article 22 of the LoC, the mandatory management bodies of a public stock company are the general shareholders' meeting, the head of administration and at least one collegial management body – a supervisory board or a management board.

The *general shareholders' meeting* is the company's supreme management body, as stated explicitly in Article 24 LoC. It is exclusively competent to elect the members of the supervisory board or – if there is no supervisory board – the members of the management board or – if there is no management board – the head of administration. It can also dismiss the members of the supervisory board, the management board and the head of administration if they were elected by the general shareholders' meeting. The tasks of the general shareholders' meeting are quite extensive. It adopts all resolutions that are not adopted by other management organs. The general shareholders' meeting may be called by the supervisory board, the management board, a group of shareholders representing at least one-tenth of all voting rights, unless the company's statutes provide for a smaller amount, or an institution that holds special shares (Art. 26 LoC). The management or supervisory board must adopt a resolution convening the general shareholders' meeting at least once a year.

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[75] *OJ* 1998 L 51. The Association Agreement was signed on 12 June 1995.

[76] SEC (2002) 1402, 9 October 2002. Regular Report on Latvia's progress towards accession, COM (2002) 700 final, p. 65.

[77] An official translation is available at <http://www.lsc.lt/uploads/Company%20Law.doc>.

[78] Lithuanian Litas. This amount was raised from 100,000 to 150,000 LTL in the Amendment Law of 13 July 2000.

The *supervisory board* is a collegial body that supervises the activities of the company and is directed by a chairman (Art. 32 LoC). It is composed of three to fifteen members. The supervisory board is elected by the general shareholders' meeting for a period not exceeding four years. Only natural persons may be members of the supervisory board. Members of the management board and the head of administration are excluded from membership. The general shareholders' meeting may remove the entire supervisory board *in corpore* or individual members thereof before the expiry of their term, apparently without the need to provide a significant reason (cf. Art. 32 LoC). The supervisory board elects the members of the management board or – if there is no management board – the head of administration and may also remove them (Art. 33 LoC). It monitors the work of the executive organ(s) and makes proposals to the general shareholders' meeting concerning the company's finances. In legal disputes between the company and the management board, the supervisory board represents the company.

The *management board* is a collegial body whose activities are directed by the chairman of the board (Art. 34 LoC). There must be at least three board members. The board and its chairman are elected by the supervisory board for a term not exceeding four years. Only natural persons may sit on the board, and members of the supervisory board are excluded from membership. The supervisory board or – if there is no supervisory board – the general shareholders' meeting may remove the entire management board *in corpore* or individual members thereof before the expiry of their term. The competences of the management board are laid down in Article 35 LoC and cover: the consideration and approval of the structure of the company's management and its positions, the salaries of the head of administration and his deputies and the rules governing the head of administration, his deputies and the branches of the company. The management board can also elect and remove the head of administration and has to examine and evaluate all material submitted by the head of administration.

The *head of administration* manages the administrative body that organises and carries out the company's business activities. He represents the company in relations with third parties both in court and in arbitration. He is elected and may be removed by the company's management board or – if there is no management board – by the supervisory board or – if there is no supervisory board – by the general shareholders' meeting. If the head of administration is not a member of the management board, he shall participate in the meeting of the boards of the company and in the general shareholders' meeting in an advisory capacity.

2.9 Bulgaria

Bulgaria applied for EU membership on 14 December 1995,[79] but will not enter the European Union together with the first group of candidate countries. In the November 2002 roadmap for Bulgaria, the European Commission noted that Bulgaria should focus further effort on full alignment with the *acquis communautaire*, especially in the fields of acquisitions, mergers and the division of companies.[80]

Bulgarian stock companies are regulated by Article 158 et seq. of the Bulgarian Commercial Act (BCA), which underwent basic legislative reform in 2000,[81] with a view to Bulgaria's future membership of the European Union.[82]

Bulgarian company law is characterised by the possibility to choose between a one-tier board system and a two-tier board system. The two-tier board system is influenced by the German company law. The one-tier board system emulates French company law[83] and was introduced to meet the demands of public companies and lower costs for smaller stock companies.[84] It allows a sole share-holder to exercise direct control over a company.

In the case of the two-tier board system, a management board, a supervisory board and a general shareholders' meeting must be established. The management board is appointed and removed by the supervisory board and has both executive power and power of representation.[85] The supervisory board monitors the executive activities of the management board. It is also charged with approving various commercial measures, such as the appointment by the management board of persons that are authorised to represent the company,[86] and is responsible for the annual accounts and the management's report.

In the case of a one-tier board system the mandatory organs for a stock company are the council of directors and the general shareholders' meeting. As the main management body, the council of directors has both executive power and power of representation. One or several members may be endowed with executive power by the council of directors. In contrast to the two-tier system,

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[79] *OJ* 1994 L 358. The Association Agreement was signed on 31 December 1994.

[80] Communication from the Commission to the Council and the European Parliament – Roadmaps for Bulgaria and Romania of 13 November 2002, COM (2002) 624 final, p. 10.

[81] Commercial Act of 16 May 1991 (DV 48/1991) most recently amended by the Act of 28 September 2000 (DV 84/2000).

[82] With regard to other legislative developments, see Graf von Bernstorff, loc. cit. n. 23, at p. 829.

[83] See Arlt et al., loc. cit. n. 17.

[84] Aladschov, 'Verwaltungsstruktur der Aktiengesellschaft im bulgarischen Handelsrecht', *WiRO* (2001) p. 336.

[85] Art. 241 BCA.

[86] Art. 236(1) BCA.

there is no organ explicitly charged with supervision. This power therefore lies with the general shareholders' meeting.

A general shareholders' meeting must be established under both board systems. The general shareholders' meeting takes the most basic and important business decisions, such as decisions concerning changes in the company's corporate form or the amendment of its statutes.[87] As the shareholders are the capital providers/investors, they also have the power to decide matters involving financial activities or transactions, such as increases or decreases in capital.[88]

The fact that Bulgaria offers a choice between the two board systems reduces the scope of the legislative requirements for the introduction of the *Societas Europaea* in the Bulgarian capital market to technical matters.

2.10 **Croatia**

Croatia is not among the ten candidate countries that are currently preparing to join the European Union, but will participate in the subsequent enlargement of the European Union. Efforts to implement European standards in the field of company law have therefore not yet been realised, although a broad amendment of Croatian company law is in preparation and will be realised in the summer of 2003. The main source of Croatian company law is the Law on Commercial Corporations of 1993 (LCC).[89] The Croatian model of a stock company closely resembles the German-Austrian model.[90] In other words, the two-tier system is mandatory regardless of the size of the company or the volume of its shares. Every company is obliged to establish not only a management board (Art. 239 LCC) and a general shareholders' meeting, but also a supervisory board (Art. 254 LCC).[91] The management board is solely responsible for managing the company (Art. 240 LCC). Neither the general shareholders' meeting nor the supervisory board are entitled to pass resolutions that are binding on the management board.[92] The general shareholders' meeting is only entitled to decide on a measure if the matter in question is submitted to it by management board, but cannot be required to pass resolutions on matters of management. The incorporation of the European Company Regulation forms an important

[87] Art. 221(1) BCA.

[88] Art. 192(2), 199(1) and 221(2) BCA.

[89] Law Gazette of Croatia No. 111/93.

[90] Kalss, loc. cit. n. 7, at p. 845. See also Ledic, 'Die Gründung von Tochtergesellschaften in Kroatien', in Lutter, *Die Gründung einer Tochtergesellschaft im Ausland* (1995) pp. 443-447.

[91] Bogdani and Pürner, 'Das neue kroatische Gesellschaftsrecht unter besonderer Berücksichtigung ausländischer Investitionen in Breidenbach', *WiRO* p. 10.

[92] Pintaric, *Jahrbuch für Ostrecht* (1994) p. 78; Ledic, loc. cit. n. 92, at p. 444; Kalss, loc. cit. n. 7, at p. 846.

challenge for the Croatian parliament, as it requires a political decision to expand the possibilities for domestic stock companies as well as European Companies. Croatia thus faces the same issues as Austria and Germany.

2.11 **Russian Federation**

The Russian Federation is not a candidate for EU membership. As the European Union is an important business partner, however, the Russian legislature pays significant attention to EU legislation.

The main source of company law in the Russian Federation is Part 1 of the Civil Code (CC) of 1994,[93] which deals with the law relating to legal persons in Articles 48-213. Joint stock companies are further governed by Federal Law No. 208 on Joint Stock Companies of 24 November 1995 (JSC Law),[94] which was substantially amended in 2001 by Federal Law No. 120 of 7 August 2001. The amendments entered into force on 1 January 2002, except those governing the competences of the general shareholders' meeting and the procedure for adopting resolutions, which came into force on the date of the new law's publication, namely, 9 August 2001. The purpose of the new law is to strengthen the rights of the shareholders.[95] A further amendment was adopted very recently concerning the payment of dividends.[96] Other significant pieces of law relating

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[93] Civil Code of the Russian Federation No. 51 of 21 October 1994, Part I (in the edition of Federal Laws No. 18 of 20 February 1996, No. 111 of 12 August 1996, No. 138 of 8 July 1999, No. 45 of 16 April 2001, No. 54 of 15 May 2001 and No. 31 of 21 March 2002).

[94] In the edition of Federal Laws No. 65 of 13 June 1996, No. 101 of 24 May 1999, No. 120 of 7 August 2001 and No. 31 of 21 March 2002.

[95] For an overview of the main changes, see Schmitt and Vogt, 'Stärkung der Rechte von Aktionäre – Reform des russischen Aktiengesetzes', *RIW* (2002) p. 762 et seq.

[96] Federal Law No. 134-FZ of 31 October 2002 on Amendments to the Federal Law on Joint Stock Companies. Joint stock companies regain the right to pay out intermediary (half-yearly or quarterly) dividends by decision of the general shareholders' meeting. Earlier, Federal Law No. 120-FZ of 7 August 2001, which entered into force on 1 January 2002, specified that the company could decide (i.e. announce its intention) to pay out dividends on deployed stocks once a year. Before 1 January 2002, joint stock companies not only paid out annual dividends announced by the general shareholders' meeting, but also intermediary dividends by decision of the board of directors. The new wording of Article 42 ('Procedure for the payment of dividends by the company') specifies that the decision (announcement) to pay out dividends for the first quarter, six months or nine months of the fiscal year must be made within three months of the conclusion of the appropriate period. The decision (announcement) falls within the competences of the general shareholders' meeting. The current law applies to the payment of dividends on deployed stocks after 30 September 2002.

to joint stock companies are the laws governing the securities market,[97] the bankruptcy law[98] and the competition law.[99]

There is controversy about which set of rules prevails in the case of contradictions between the Civil Code and company law, particularly the JSC Law. Although the Civil Code itself provides for the creation of such laws, recent laws derogate it. For example, according to the Civil Code, a company may not repurchase its own shares, whereas the JSC Law does permit this. Some authors argue that in light of the civil law tradition the Civil Code is higher in the hierarchy of norms and should thus prevail.[100] Others, citing the *lex specialis derogat lex generalis* rule, prefer to give priority to the JSC Law.[101]

Besides limited liability companies, the legal system of the Russian Federation recognises two types of joint stock companies.[102] The SAO (*sakrytoye aktsionernoye obshchestvo*) is a closed joint stock company in which the shares are distributed only among its founders or an other previously specified group of persons (Art. 97(2) CC).[103] This type of company is not entitled to conduct an open subscription for the shares it issues (Art. 97 CC), and the number of participants is limited to 50 (Art. 4(4) JSC Law). On the other hand, the OAO

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97 Federal Law No. 39 on the Securities Market of 20 March 1996 (in the edition of Federal Laws No. 182 of 21 March 2002, No. 139 of 8 July 1999 and No. 121 of 7 August 2001); Federal Law No. 46 on the Protection of the Rights and Legitimate Interests of Investors in the Securities Market of 12 February 1999 (in the edition of Federal Law No. 196 of 30 December 2001, with changes and amendments made by Federal Laws No. 150 of 27 December 2000 and No. 194 of 30 December 2001).

98 Federal Law No. 6 on Insolvency of 10 December 1997 (in the edition of Federal Law No. 31 of 21 March 2002, with changes and amendments made by the Resolutions of the Constitutional Court of the Russian Federation No. 8-P of 16 May 2000, No. 9-P of 6 June 2000 and No. 4-P of 12 March 2001).

99 Federal Law No. 948-1 on Competition and Restriction of Monopolistic Activity on Commodities Markets (in the edition of Federal Laws No. 3119-1 of 24 June 1992, No. 3310-1 of 15 July 1992; No. 83 of 25 May 1995, No. 70 of 6 May 1998, No. 3 of 2 January 2000, No. 196 of 30 December 2001 and No. 31 of 21 March 2002).

100 See, for example, Bushev, 'The Theory and Practice of Corporate Governance in Russia', 27(1) *Review of Central and East European Law* (2001) p. 73.

101 For further references, see Nysten-Haarala, *Russian Enterprises and Company Law in Transition* (International Institute for Applied System Analysis 2001) p. 13 et seq., available at <http://www.iiasa.ac.at>.

102 It has been stressed that the Russian legal system does not use the terms 'company' or 'company law', preferring 'societies' and 'law of juristic persons'. See, for example, Butler and Gashi Butler, *Russian Company Law*, third ed. (2000) p. vii). However, for the sake of consistency within this comparative survey, the terms 'company' and 'company law' will be employed here.

103 The main differences between the two are (1) that the charter capital of an SAO is divided into stocks, rather than participatory shares, and (2) that the members of a limited liability company may withdraw from the company at any time, without requiring the consent of the other members.

(*okrytoye aktsionernoye obshchestvo*) is an open joint stock company whose members are entitled to sell their stock without the consent of the other shareholders (Art. 97(1) CC).[104] It may conduct an open subscription and a free sale of its stock, as long as it respects the relevant legal conditions. The nature of a joint stock company (open or closed) must be apparent from its company name.[105]

An OAO must have minimum charter capital of no less than a thousand times the minimum wage established by federal law on the date of the company's registration (= approx. €12,000),[106] whereas the minimum charter capital for an SAO must amount to at least one hundred times the same sum (Art. 99 CC in conjunction with Art. 26 JSC Law).

A Russian joint stock company is characterised by the following elements of internal organisation: a general shareholders' meeting, a board of directors (or supervisory board – the Russian legislature uses these terms synonymously) and various executive organs, including a general director (single-member executive body) or a management board (collective executive organ). It is difficult to say whether Russian joint stock companies are organised according to a classical two-tier board system. Even if a board of directors exists, which is mandatory for companies with more than 50 shareholders, there is still no two-tier board system as in Germany or Austria, as there is no other board that draws directors of other companies into the management of the company.

Articles 103 CC and 47 JSC Law explicitly state that the *general shareholders' meeting* is the highest organ of the company. It must be held at least once a year (Art. 47 JSC Law) and has numerous competences.[107] Among other things, the general shareholders' meeting is entitled to elect and remove the board of directors.

The *board of directors* (or supervisory board) acts as the general executive and manages the company's day-to-day activities, except for measures falling within the sphere of competence of the general shareholders' meeting (Art. 64 JSC Law). This is a mixture of the British and German systems. The creation of a board of directors is mandatory in a company with more than 50 shareholders (Art. 103(2) CC). If there is no board, the functions of the company's board of directors must be executed by the general shareholders' meeting. In such cases, the company's statutes should specify either a particular person or body within

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[104] For a brief overview, see Mikhailova, 'Doing Business in Russia', *International Business Lawyer* (2001) p. 211 et seq.

[105] Article 4 JSC Law.

[106] Information from the site of the Russian Federation's Ministry for Economic Development and Trade: <http://www.inves.ru>.

[107] With regard to the division of competences of the general shareholders' meeting of a JSC in light of Russian case law, see Kurzynsky-Singer, 'Das Aktienrecht in der Rechtsprechung des rußländischen Obersten Arbitragegerichts', *Wichtigste Gesetzgebung in Mittel- und Osteuropa – Monatshefte für Osteuropäisches Recht (WGO-MfOR)* (1999) p. 423 et seq.

the company whose jurisdiction includes the decision to convene the general shareholders' meeting and approve its agenda. Among other things, the board of directors also has exclusive competence to elect and remove the company's executive organ (Art. 65 JSC Law). The powers of the board are quite extensive. For example, a decision of the general shareholders' meeting regarding the reorganisation of the company or the issue of annual dividends, requires a proposal from the board of directors (Arts. 42 and 49 JSC Law).

There are no restrictions on the number board members that may be chosen, but if the company has more than 1,000 shareholders with voting powers there have to be at least seven board members and if there are more than 10,000 shareholders with voting powers there have to be at least nine board members (Art. 66 JSC Law). In the event that a company has both a board of directors and a management board, the executive members on the board of directors may account for no more than a quarter of the membership of the management board (Art. 66(2), first sentence, JSC). Before the 2001 amendment of the JSC Law, the board of directors was not allowed to consist of more than half the members of an executive organ. The new law also states explicitly that only natural persons may become members of the board of directors. The board members may not own any stock in the company (Art. 66(2), second sentence, JSC Law). The chairman of the board is elected by a majority of its members, unless the company's statutes stipulate otherwise. The chairman organises the work of the board, as well as presiding over the general shareholders' meeting (Art. 67 JSC Law). The law prohibits the combination of the position of the chairman of the board of directors with that of general director.

In the Russian Federation, a board of directors fulfils the functions of both the executive board and the supervisory board, as in the German system. It also resembles the British board of directors in this regard. The functions of the board are somewhat unclear, due to the inconsistencies between the Civil Code, which follows the German model, and the JSC Law, which after successful lobbying by Russian industrialists tends more towards the Anglo-Saxon model.[108]

The *executive organ* of a joint stock company is either a one-man body (director or director-general) or a collective body (board or directorate). In either case, it is authorised to manage the day-to-day activities of the company (Art. 103 CC and Art. 69 JSC Law). The executive organ usually consists of a general-director,[109] but the executive competences may also be transferred under a contract to a management organisation or an external manager by

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[108] Nysten-Haarala, op. cit. n. 103, at p. 20.

[109] Karimullin, *Schutz der Minderheitsanleger in Russland*, Working Paper No. 84 (Research Institute for Central and Eastern European Business Law of the Vienna University of Economics and Business Administration (FOWI) 2001) p. 11.

decision of the general shareholders' meeting (Art. 69(1), third sentence, JCS Law). According to the new JSC Law, the executive organ is explicitly accountable not only towards the board of directors, but also towards the general shareholders' meeting (Art. 69(1), second sentence, JCS Law). It has also become easier to dismiss a company's executive body. A general shareholders' meeting may at any time decide to remove the company's individual executive body – the director-general – or any member of its collective executive body – the management board or the directorate – unless the power to appoint and remove such bodies is granted by the company's statutes to the board of directors. In addition, the general shareholders' meeting may at any time resolve to dismiss the company's management organisation or external manager.

The Russian Federation follows the European models of company law. However, the discrepancy between law and practice appears to be considerable. For instance, the protection of minority shareholders does not function in practice, as managers can easily circumvent the rules.[110] With regard to organisational structure, it may be concluded that the executive bodies of companies are essentially modern. On the basis of the law, the board of directors is already powerful (more powerful than the general shareholders' meeting), but it proves to be even more so in practice.[111] Since company law is a new branch of Russian law, if in fact it exists at all, practitioners are not used to working with it. International pressure and the need to make Russia appealing to foreign investors has led to calls for greater legal certainty. The new JSC Law in an important step in this direction. In addition, efforts from the realms of academia and business led to the presentation of a Russian Code of Corporate Conduct on 5 April 2002.[112]

3. Final Remarks

The short overview of eleven legal systems demonstrates the richness of company law and, in particular, the variety of organisational models employed in these countries. Although the implementation of the EU directives has already been accomplished in most of the countries concerned, interesting differences between the legal orders still remain. Apart from the 'elements of corporate governance' presented by the high-level group of experts to the European Commission in November 2002, Europe still provides a broad space for national particularities. To summarise, there are no countries with a pure

[110] Nysten-Haarala, op. cit. n. 103, at p. iii.
[111] Nysten-Haarala, op. cit. n. 103, at p. 22.
[112] Available at <http://www.rid.ru/db.php?db_id=516&l=en>. For an overview of Russian corporate governance issues, see <http://www.corp-gov.ru>.

one-tier system, nine countries with a two-tier system and two countries which offer both. In two countries (Russia and Latvia), however, the two-tier system is quite similar to an elaborate version of the one-tier system, while in Slovenia it is mandatory for big companies. Thus, one can find different examples of both types.

Although the Western and Central European legal orders served as models to shape company law and corporate governance structures in the countries of Central and Eastern Europe, most of the national legal orders have tried to create their own framework for their post-Communist economies. The legislatures have come to understand that only a clear, transparent and reasonable legal framework, particularly in the field of company law, can stimulate the confidence of investors and thereby promote the economy as a whole. The need to implement the European Company Regulation provides the candidate countries with another opportunity to reshape their company laws.

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