

# CIVIL LAW STATUS OF THE SUPERVISORY ORGAN IN EUROPEAN BUSINESS COMPANIES

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**Abstract:** *The Supervisory organ is a compulsory element in the governance structure of the European Structures for Business Association, namely the European Company (Societas Europaea) and the European Cooperative Society (Societas Cooperativa Europaea) that have chosen a two-tier system for their organizations. The organ under consideration presents a hybrid regulatory framework. On the one hand, these are the provisions in the regulations of the European Union, and, on the other, the national law regulations.*

*The organ in question has specific characteristics. Its members are elected by the General meeting. The staff of the first supervisory board may be appointed in the statutes. This should apply without prejudice to any employee participation arrangements determined pursuant to Directive 2003/72 / EC.*

*The members of the Supervisory organ are elected for the term specified in the Statute of the association. Their maximum term of office after the expiry mandate date may not exceed six months. The package of powers includes constitutional, authoritative and controlling rights and obligations. The supervisory organ shall elect and dismiss members or an individual member of the management organ. In cases explicitly provided for in the statute of the association, a certain category of legal transactions cannot be concluded by the management organ without the permission of the supervisory organ. Its controlling functions are particularly important. The supervisory organ shall supervise the duties performed by the management organ. It may not itself exercise the power to manage the associations. The supervisory organ may not represent the associations in dealings with third parties. It shall represent the associations in dealings with the management body, or its members, in respect of litigation or the conclusion of contracts. The management organ shall report to the supervisory body at least once every three months on the progress and foreseeable developments of the association's business, taking into account any information relating to undertakings controlled by the association that may significantly affect the progress of the association business. The members of the Supervisory organ are holders of Civil liability. Its legal basis is the relevant rules in the national law relating to joint stock companies or cooperative organizations in the Member States in which they have registered their office. This liability is based on the possible damage caused by illegal or incorrect acts or actions.*

**Keywords:** *Supervisory organ, European Company, European Cooperative Society, Management organ, General Meeting.*

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## 1. INTRODUCTION

The rapid and intensive evolution of the integration processes between the Member States of the European Union, the effective functioning of the common market and the achievement of sustainable competitiveness determine the emergence of new legal and organizational forms of business association. Among the determinants of their emergence the establishment of a unique social market economy combining social justice and economic growth should be mentioned. These are the European Economic Interest Grouping (EEIG) [1], the European company (*Societas Europaea*) (SA) [2] and the (*Societas Cooperativa Europaea*) (SCE) [3]. These new cross-border European legal entities are totally unknown in the existing typology of company entities on the Old continent [4].

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The Community Acts governing them such as Council Regulation (EEC) No 2137/85, Council Regulation (EC) № 2157/2001 and Council Regulation (EC) No 1435/2003 determine their legal status. They also establish the architecture of their management. In addition to the General Meeting two additional alternative management systems are possible. One is a two-tier system, which includes a supervisory organ and a management organ. The other is a one-tier system, which provides only for an administrative organ.

The European lawmaker has granted the right of a company to choose its own management structure in the process of its establishing. The choice is limited within the available conventional set. This approach is a manifestation of company's democracy [5].

This hypothesis does not apply to the European Economic Interest Grouping. The organs of a grouping shall be the acting collectively members and the manager (or managers). No special supervisory organ is foreseen. A contract for the formation of a grouping may provide for other organs. If it does, it shall determine their powers [6].

## **2. CIVIL LAW FEATURES OF THE SUPERVISORY ORGAN**

The supervisory organ is a mandatory component of the governance structure of European companies that have chosen a two-tier system. In the event that only a one-tier system is statutory in a Member State, the state is obliged to adopt specific rules for a two-tier system of the supranational European forms established in its territory [7].

In the different countries the supervisory organ is named differently but the names possess similar denotations [8].

Council Regulation (EC) № 2157/2001 and Council Regulation (EC) No 1435/2003 clearly distinguish between the legal status of the supervisory organ and the management organ. There are specific Community provisions for both organs, as well as common rules for their operation. Some of the normative texts establishing the legal status of the supervisory organ are identical to those for the management organ.

As can be seen from its name, the supervisory organ supervises the work of the management organ [9]. This control function does not belong to each of its individual members but to the whole body as a collective establishment. In practice, it performs only one integral part of the complex of the company's management actions. Hence, a supervisory organ cannot exercise the entire management complex (Art.40, para. 1). Therefore, it is inadmissible for the supervisory organ to give obligatory instructions and orders on all issues of the operational management of the management organ, which is responsible for the management of the company. This distinction of functions is an essential legal feature of a two-tier system. This distinction is also clear when relocating the company's registered office [10].

The nature of the powers of the supervisory organ does not allow it to represent the company before third parties. It does not have the representative power to carry out any civil transactions. All external legal actions performed on behalf of the company and at its expense are illegitimate [11].

The Commerce Act of Bulgaria explicitly stipulates that the supervisory organ may not take part in the management of the company. The supervisory organ shall represent the company

only in its relations with the managing organ (Art. 242, para.1). The provision in German law is identical (Genossenschaftsgesetz (GenG) - § 39). This legal situation is also stipulated in the French law [12].

The members of the supervisory organ of the company are elected by the General Meeting of the shareholders or cooperators. The personnel of the first supervisory organ may be formed by the Statute of the company. The principle established in the Regulations will apply in compliance with the national law, which allows minority shareholders or other persons or organs to designate some of the members of the company's body and the employee participation in compliance with all the conditions defined in Council Directive 2001 / 86 / EC and Council Directive 2003/72/EC. This provision mirrors Art. 43, para. 3 postulating the election of the members of the administrative organ under the one-tier system (Viz. Art. 40 and Art. 43, para.3). This power of the General Meeting is its exclusive competence and therefore it cannot be delegated to another body.

The number of members of the supervisory organ and the rules for their election shall be laid down in the Statutes. The regulations make it possible for a Member State to fix the number of members of a supervisory body of companies registered in its territory, as well as the minimum and / or maximum number of members. The German law provides for a different number of supervisory organs for cooperatives and joint stock companies [13] as follows: a joint stock company with more than 2,000 employees must have a supervisory organ of at least 12 members; for staff between 10,000 and 20,000 it must have 16 members, and for more than 20,000 employees, their number must be 20 [14]. In contrast to this regulation, the European company is given the right to determine the maximum number of members of the supervisory board in its Statutes, provided that it is a multiple of three. The company can independently determine the number of members of the supervisory organ between three and nine members (with a capital of less than EUR 1, 500 000), between 3 and 15 members (with a capital of up to EUR 15. 000 000) and between 3 and 21 members with a capital of more than EUR 10, 000 000) [15]. Thus, the provisions for joint stock companies will not apply [16].

Twenty of the Member States have set the minimum staff of which 16 have defined three-member bodies. Six countries have specified the lower and the upper limits of the staff of the organ in question. With regard to the maximum number, it ranges from 7 to 21 members.

The constitution of the supervisory organ reflects the desire of a number of Member States to involve employees in the management of the company [17]. In Germany the participation of employees' representatives in this body is differentiated according to their number. For employees over 500 people, the representatives should be one third of its members, and for more than 2,000 people – two thirds. This approach is also observed in the Netherlands, where three management systems have been established. The Employees' Council (Werknemersraad) will nominate members of the supervisory organ under the structural model of the SE, and under a relaxed regime will express an opinion on the selection and dismissal of the members of the organ in view.

The exercised control [18] can be preliminary (*a priori*), current and subsequent (*a posteriori*) depending on the moment of its implementation. The most common practice is the exercise of control after the performance of the respective legal actions by the management body. The analysis of the supervisory activity, however, reveals that the *ex-ante* (before the event, au préalable) control functions are especially effective [19].

Those regulations establish only the essential legal characteristics of the supervisory body. A more detailed regulation is available concerning the tools for obtaining the information necessary for its functioning.

The management organ shall report to the supervisory organ at least once every three months on the progress and the foreseeable development of the SE's business (Art. 41, para. 1). The nature of the substantive content of this Community norm is interesting. On the one hand, it contains an imperative element, namely that the governing body is obliged to unconditionally provide information at least once every three months. On the other hand, it gives the reporting body the operational autonomy to choose the set of issues that it considers to be structurally determining for the development of the company at that moment. This dispositive principle is confirmed by the requirement that together with the specified periodic information, the management body is obliged to provide timely information to the supervisory body on all circumstances that may have a significant impact on the company. These regulations are logically justified as the governing body performs management functions and can assess which problems are a priority for the development of SE in the specific economic and social environment, as well as such issues that may have a strong negative impact on it.

It is by ensuring that the supervisory body is fully and systematically informed that it is empowered to request the information it needs to carry out its supervisory activities. The Regulation does not specify what the legal consequences would be in the event of non-performance or poor performance of this obligation in case the information provided is incomplete, inaccurate, incorrect, late, etc. Therefore, in the absence of relevant rules in the national law, these issues should be regulated in the company's Statutes.

Assuming that the supervisory body is not satisfied with the information provided, it is authorized to carry out inspections and/or to organize their implementation. These actions should be in line with the rule of law [20].

The right to information in question is a collective right, i.e. it belongs to the supervisory body as a collegial body. This is evidenced by the legal and technical formulations that are carried out in the singular grammatical number.

The analysis of the Community regulations in this area reveals only two cases of granting an individual right to information to a member of a supervisor organ. There is a special provision stating that each member of the supervisor organ has the right of access to all the information provided to them (Art. 43, para.5). In the second case, the individual right to information is conditional. Any member of the organ concerned may request from the management organ any information necessary for the performance of its control activities only if the Member State where the SE is located has provided for this possibility (Art. 41, para. 3, second sentence).

The individual right of information of the member of the management organ in the one-tier system is regulated in a different way. They have the personal right to investigate all the information delivered to the authority (44, para. 2).

The members of the supervisory organ of the European company and of the European Cooperative Society shall be elected for a term laid down in the Statutes, but not longer than six years [21]. Therefore, the period for the performance of their duties in this organ in the corporate enti-

ty may be fixed for a shorter period, but not for a longer period. This provision provides greater flexibility for both types of companies, as a number of national legislations provide for shorter terms for members of the organs of joint stock companies and cooperatives. For example, a member of the management organ of a joint stock company based in Estonia may be elected for five years if the Statutes do not provide for a shorter term [22].

The Shareholder Legislation of Bulgaria has adopted a general legal decision for all elected bodies of formations stipulating that the members of the administrative organ (one-tier system), supervisory organ and management organ are elected for a period of five years, unless the Statute indicates a shorter period [23]. The legal situation in Germany is identical, where the law stipulates that an executive member, i.e. a CEO in a joint stock company cannot be elected for a term exceeding five years [24], and the term of office of a member of the supervisory organ shall be interrupted no later than the closing of the General Meeting after the four-year term of office [25]. The maximum term of six years laid down by Council Regulation (EC) № 2157/2001 for members of the bodies of a European company is an advantage for the company and makes it more competitive in choosing the form of business association in the Member State concerned. The legal situation of the European Cooperative Society is identical. Council Regulation (EC) № 1435/2003 stipulates that the members of SCE organs shall be appointed for a period laid down in the Statutes not exceeding six years. The Cooperatives Act of Bulgaria states that the members of the control shall be elected among the members of the cooperative for a term of four years.

### 3. CONCLUSION

The supervisory organ is a pronounced form of social democracy. The selection of the staff of this essential body is also a manifestation of the exercise of the rights of citizens as a whole, and of shareholders and cooperators, in particular [26]. The direct election of its members by the General Meetings of the shareholders in the European company and of the cooperators in the European cooperative society determines its important place in the management architecture of the corporate entities considered. Reporting its activities to the highest body of companies helps to increase its economic and organizational activities, to increase their competitiveness and their sustainable smart development.

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