

11-1-1990

An Entity for Community Cooperation: The European Economic Interest Grouping

P. Sterling Kerr

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [European Law Commons](#), and the [International Law Commons](#)

Recommended Citation

P. Sterling Kerr, *An Entity for Community Cooperation: The European Economic Interest Grouping*, 1990 BYU L. Rev. 1743 (1990).
Available at: <https://digitalcommons.law.byu.edu/lawreview/vol1990/iss4/14>

This Comment is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

An Entity for Community Cooperation: The European Economic Interest Grouping

I. INTRODUCTION

The creation of the European single market in 1992 poses an incredible challenge for businesses operating within the European Community. The combination of increased competition, new laws and regulations, and changes in the economic environment make doing business in the Community substantially more difficult.¹ While these problems will be difficult for large enterprises, the problems may well be insurmountable for the small business. The European Commission (the Commission), the body charged with proposing and implementing measures which will advance Community objectives,² is concerned with this problem. Ninety-five percent of the companies doing business in the various Community nations are characterized as small or medium sized enterprises (SMEs).³ This figure becomes even

1. In a recent study by the European Commission, business leaders throughout the Community have expressed their views as to the greatest challenges facing Community enterprise. Ranked in order of significance, the barriers are:

- 1) technical standards and regulations;
- 2) administrative barriers;
- 3) frontier formalities;
- 4) freight transport regulations;
- 5) value-added tax differences;
- 6) capital markets control;
- 7) government procurement restrictions; and
- 8) implementation of Community law.

Numbers 1 and 2 were ranked as approximately equal, as were numbers 5 through 8. M. EMERSON, M. AUJEAN, M. CATINAT, P. GOYBET, & A. JACQUEMIN, *THE ECONOMICS OF 1992: THE E.C. COMMISSION'S ASSESSMENT OF THE ECONOMIC EFFECTS OF COMPLETING THE INTERNAL MARKET* 32 (1988).

2. The European Commission acts as the "initiator and executive" within the Community's system of government. The tasks of the European Commission are as follows: To ensure that Community rules and the principles of the common market are respected To propose to the Community Council of Ministers measures likely to advance the development of Community policies. . . . To implement Community policies, whether based on Council decisions or directly on Treaty provisions.

COMMISSION OF THE EUROPEAN COMMUNITIES, EUROPEAN FILE No. 11/86, *THE INSTITUTIONS OF THE EUROPEAN COMMUNITY* 3-4 (June-July 1986).

3. Small and medium sized enterprises have been defined to range in size from a company with 50 employees or fewer to one with up to 500 employees. If the definition is in fact a company employing up to 500 people, then 95% of the businesses in the Com-

more disturbing when one realizes that the SMEs account for over two-thirds of the employment for the entire Community.⁴

The Commission is aware of the problems facing SMEs and has implemented a number of programs directed toward easing the burdens of these businesses. Among these programs are Euro-Info Centres, BC-Net, and the Sprint and Comett programs.⁵ In conjunction with programs and information centers, the Commission promulgated a number of regulations to help create an environment conducive to business in a single market.⁶ One of the Commission's regulations authorized a new legal entity, the European Economic Interest Grouping (EEIG), for conducting business within the Community. As its name suggests, an EEIG consists of a group of companies, one from each country in the Community, with a common interest in cooperating to

munity fall within this range. COMMISSION OF THE EUROPEAN COMMUNITIES, EUROPEAN FILE NO. 6/83, THE COMMUNITY AND SMALL AND MEDIUM-SIZED ENTERPRISES 1 (Mar. 1983).

4. COMMISSION OF THE EUROPEAN COMMUNITIES, EUROPEAN FILE NO. 11/88, THE EUROPEAN COMMUNITY AND COOPERATION AMONG SMALL AND MEDIUM-SIZED ENTERPRISES: TOWARDS A COMMUNITY POLICY 3 (Nov. 1988) [hereinafter COOPERATION AMONG SMEs].

5. The "Euro-Info Centres" were inaugurated in 1987 and were all operational as of February 1988. Each Euro-Info Centre, located in various cities throughout the Community, is to provide information to businesses much like the Small Business Administration offices in the United States. They provide for updated information on legislation, direction in searching for venture capital, and general business consulting.

The Business Cooperation Network (BC-Net) system is a computer data-base/matching service. Its role is to provide a computerized list of companies seeking to cooperate with similar types of companies in various Community countries. When companies match, they are then able to form cooperative ventures thus taking advantage of the forthcoming integrated market.

The Strategic Programme for Innovation and Technology Transfer (Sprint) is a three pronged program for: 1) increasing technology transfer between Community countries, 2) developing a structure for fostering innovation through expert advice on capital, marketing and design, and for 3) circulating the latest technologies throughout the Community by using conferences, training and data bank services. See COOPERATION AMONG SMEs, *supra* note 4, at 8-11.

The Comett Programme aims to develop cross-border training in order to assist firms whose industrial and technological development requires skills adapted to the European context. COMMISSION OF THE EUROPEAN COMMUNITIES, EUROPEAN FILE NO. 3/88, THE COMMUNITY AND BUSINESS: THE ACTION PROGRAMME FOR SMALL AND MEDIUM-SIZED ENTERPRISES 9 (Mar. 1988).

6. The Commission has promulgated a number of regulations with the aim of elucidating Articles 85 and 86 of the Treaty of Rome. These laws include:

- 1) the communication on cooperation agreements;
- 2) the statement on *de minimis* agreements;
- 3) various exemptions have been granted to encourage certain kinds of collaboration between companies;
- 4) The European Economic Interest Grouping.

COOPERATION AMONG SMEs, *supra* note 4, at 6-7.

develop a particular market or product. An EEIG resembles a joint venture, with the exception that once formed, the joint venture has its own legal personality which is similar to a corporation.

The EEIG is only one of the many programs and regulations that the Commission has adopted to promote a smooth transition for small businesses into the single market in 1992.⁷ As it stands, the EEIG is not an attempt to substitute a European Company Statute. A European Company Statute is still under investigation and consideration by the Commission.⁸

The EEIG's origins are discussed in section II of this paper. Section III distinguishes the features of an EEIG from other types of business entities. A brief discussion of how foreign business might take advantage of the EEIG follows in section IV. Part V concludes that businesses have begun adopting the EEIG as a vehicle by which to operate in the consolidated 1992 market.

II. ORIGINS OF THE EUROPEAN ECONOMIC INTEREST GROUPING

The idea for the EEIG originated with the French. French company law embodies six separate entities or forms of carrying

7. Since the creation of the European Economic Community, there have been efforts to create an environment of transnational cooperation for businesses operating within the Community. These initiatives were promulgated in the form of company law directives. The first directive of 1968 called for providing a system of publicity for all companies focusing on the information regarding a company's existence and those persons entitled to act for the company. It also provided for detail as to the validity of obligations entered into by a company. The second directive of 1976 and third directive of 1978 set forth common standards for raising capital in publicly held companies and merger rules for Community companies respectively. The fourth, seventh, and eighth directives provided a code of generally accepted accounting laws. While there are other directives, these particular directives have been the seeds for work on a European Company Statute, which has not yet been completed, but if adopted would offer European incorporation for limited liability companies as an alternative to national incorporation. *COMMISSION OF THE EUROPEAN COMMUNITIES, EUROPEAN FILE NO. 4/85, COMPANY LAW IN THE EUROPEAN COMMUNITY 4-7 (Apr. 1985).*

8. For some years now, work has been proceeding on the harmonization of national company laws through Commission directives, etc. This effort has been undertaken in order to reduce substantial differences between members of the community in regard to company law and to create a homogeneous legal environment for business and investment in the Community.

The Commission also wanted to create a vehicle for incorporation on a Community level, and is currently "revising earlier proposals for a European company statute, available on a voluntary basis to those who wish to use it to expand their present operations and make the fullest use of the opportunities offered by the completion of the internal market planned for 1992." *The EEIG Arrives*, Common Mkt. Rep. (CCH) ¶ 633 (1989).

on business operations.⁹ One of these entities is the *groupement d'interet economique* (commercial interest grouping) on which the EEIG was modeled. The French commercial interest group is a relatively new form of business organization and has only been available to French businesses since 1967.¹⁰ Its purpose is to allow French companies to pool expertise and resources in pilot projects and experiments while at the same time providing for alternative means of trading and expanding the business of its member entities.¹¹ The difference between the French commercial interest grouping and the EEIG is a matter of geography. The commercial interest grouping is only a valid business entity for operation within France, while the EEIG will be a legal entity for every nation within the European Community.

Perhaps the most well-known and successful of the French commercial interest groupings is Airbus Industrie. Airbus Industrie is a collaboration by France, Germany, the United Kingdom and Spain to develop aircraft which compete very well against the once dominant United States aircraft industry. Airbus Industrie limits its manufacturing and development to aircraft with seating capacities exceeding 150 passengers. It has been very successful in this particular niche with advance orders for over 1800 planes. The unique aspect of Airbus Industrie is that member companies of the commercial interest grouping compete against each other in building aircraft that seat fewer than 150 passengers. The member companies chose this French business form to do something that could not be done individually—to collaborate and pool resources that would be competitive with the American industry.¹²

Aware of the success of the Airbus commercial interest grouping, the Commission decided in 1973 to utilize the same type of entity to foster similar cooperation within the Commu-

9. French business forms include the general partnership (*societe en nom collectif*), the limited partnership (*societe en commandite simple*), the private consortium (*societe anonyme*), the public company where the directors are personally liable for the company's debts (*societe en commandite par actions*), the private company (*societe a responsabilite limitee*), and finally the commercial interest group (*groupement d'interet economique*). R. PENNINGTON & F. WOOLDRIDGE, *COMPANY LAW IN THE EUROPEAN COMMUNITIES* 36 (3d ed. 1982).

10. *Id.*

11. *Id.*

12. COMMISSION OF EUROPEAN COMMUNITIES, No. ISEC/B16/89, BACKGROUND REPORT: THE EUROPEAN ECONOMIC INTEREST GROUPING 8 (May 1989) [hereinafter BACKGROUND REPORT].

nity. The regulation was drafted by the Commission, and this new Community entity was entitled the EEIG. The council regulation finally passed in July 1985 and went into effect as to each member nation in July 1989.¹³

III. CHARACTERISTICS OF AN EEIG

A. Formation

An EEIG is like a partnership with many aspects of a corporation.¹⁴ However, there is no need for articles of incorporation and bylaws, which are necessities in describing the scope of an incorporated entity in the United States.¹⁵ Rather, the EEIG comes into being through an elaborate contract. The contract provides for guidance on membership, capital investment by each member,¹⁶ profit sharing, and duties of each particular member. Article 5 of the Council Regulation set forth the minimum requirements for an EEIG contract.¹⁷ These minimum re-

13. The lag time between the passage of the EEIG regulation and its implementation was to "allow Member States first to set up the necessary machinery for the registration of groupings in their territories and the disclosure of certain matters relating to groupings." Council Regulation (EEC) No. 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG), 28 O.J. EUR. COMM. (No. L 199) 2 (1985) [hereinafter Council Regulation].

14. BACKGROUND REPORT, *supra* note 12, at 2.

15. The equivalent of articles of incorporation and bylaws in most European companies is the articles and memorandum. The purpose is the same: to give notice, define the scope of the entity, and determine how it is to be operated in regard to shareholders, directors and officers.

16. Under the regulation establishing the EEIG, a minimum capital investment by each member is not required. In the United States, a corporation must have a minimal capital investment upon formation. For example, in Utah the amount is \$1000.00. UTAH CODE ANN. § 16-10-52 (1988). Lack of capital upon formation of a corporation—undercapitalization—is one factor to determine whether or not a third party in a lawsuit is able to pierce the corporate veil and sue the shareholders of the corporation. The same idea probably holds true in Europe; however, the minimum capital requirements upon formation of a corporation are normally very high, often discouraging incorporation by very small businesses. For instance, in France, the required minimum share capital is 250,000 Francs (\$35-40,000.00) R. PENNINGTON & F. WOOLDRIDGE, *supra* note 9, at 37. The Commission probably did not impose a capital requirement upon the formation of an EEIG in order to help small companies take advantage of the entity. Also, since members of an EEIG are jointly and severally liable for the debts of the EEIG, the shareholders (or members) clearly do not receive limited liability status.

17. Article 5 of the Council Regulation provides:

A contract for the formation of a grouping shall include at least:

(a) the name of the grouping preceded or followed either by the words 'European Economic Interest Grouping' or by the initials 'EEIG', unless those words or initials already form part of the name;

quirements give members significant freedom in structuring their particular EEIG.¹⁸ Freedom of contract was one of the goals of the Council Regulation's drafters and is expressed quite clearly in the preamble: "[A] grouping's ability to adapt to economic conditions must be guaranteed by the considerable freedom for its members in their contractual relations and the internal organization of the grouping. . . ."¹⁹

Article 1 of the Council Regulation also requires proper registration to form an EEIG.²⁰ Article 6 states: "A grouping shall be registered in the State in which it has its official address, at the registry designated pursuant to Article 39(1)."²¹ Article 39(1) requires that each of the European Community States designate a registry for EEIGs and make known the rules for registration.²² The Member States are also responsible for informing the public of new EEIGs through publication in the official gazette of the Member State in which the EEIG has its official address.²³ Although the Commission decided to adopt the EEIG in 1985, the regulation did not go into effect until 1989 while the Member States setup registration facilities and formalities.²⁴

B. *Distribution of Profit and Legal Capacity*

To assist American legal practitioners in understanding what an EEIG is and when its use is most beneficial, a distinction should be made between the EEIG and American business entities. One of the most important distinctions between an EEIG and an American corporation, for instance, is that an

-
- (b) the official address of the grouping;
 - (c) the objects for which the grouping is formed;
 - (d) the name, business name, legal form, permanent address or registered office, and the number and place of registration, if any, of each member of the grouping;
 - (e) the duration of the grouping, except where this is indefinite.

Council Regulation, *supra* note 13, art. 5.

18. "The essential aim of those who drafted the regulation was to give members the possibility to adapt the contract of the grouping to their own particular economic requirements." COMMISSION OF THE EUROPEAN COMMUNITIES, EUROPEAN FILE NO. 6/89, THE EUROPEAN ECONOMIC INTEREST GROUPING (EEIG): A NEW INSTRUMENT FOR ECONOMIC CO-OPERATION IN THE COMMUNITY 3 (June 1989) [hereinafter *NEW INSTRUMENT*].

19. Council Regulation, *supra* note 13, preamble.

20. *Id.* art. 1.

21. *Id.* art. 6.

22. *Id.* art. 39(1).

23. *Id.*

24. *Id.* preamble.

EEIG does not issue shares. As Article 3 states, an EEIG is not to be established with the purpose of making profits.²⁵ This, however, does not mean it is prohibited from making profits; instead, all income and profits derived from the EEIG are to be passed on to the individual members of the grouping.²⁶ In this respect the EEIG is similar to a partnership in the United States. Gross receipts are offset by expenses resulting in a net profit. Like a partnership, the profit is then distributed to the partners according to the partnership agreement. In an EEIG, profit sharing is determined in the contract establishing the particular grouping; otherwise, each member receives equal shares.²⁷

Furthermore, because an EEIG has certain aspects of a partnership, the question of its legal capacity becomes rather interesting. In the United States, courts and legislators have struggled with the "entity" and "aggregate" theories of partnership—that is, should a partnership be considered an entity separate and distinct from its individual partners, or should it be nothing more than a means for carrying on business without a separate legal existence?²⁸ The European Commission created the EEIG with a corporate form but avoided "aggregate" and "entity" questions. As a result, the EEIG is a separate entity from its members (partners). Except for national tax treatment,

25. Article 3(1) of the Council Regulation provides:

The purpose of the grouping shall be to facilitate or develop the economic activities of its members and to improve or increase the results of those activities; its purpose is not to make profits for itself. Its activity shall be related to the economic activities of its members and must not be more than ancillary to those activities.

Id. art 3(1).

26. Article 21 provides:

The profits resulting from a grouping's activities shall be deemed to be the profits of the members and shall be apportioned among them in the proportions laid down in the contract for the formation of the grouping or, in the absence of such provision, in equal shares.

Id. art 21(1).

27. *Id.*

28. For an in depth discussion of the aggregate and entity theories of partnership, see Jensen, *Is a Partnership Under the Uniform Partnership Act an Aggregate or an Entity?* 16 VAND. L. REV. 377 (1963). Many courts in the United States express the view that: "[a] partnership is not a legal entity. The law recognizes no personality in a partnership other than that of the partners who compose it." *Aboussie v. Aboussie*, 270 S.W. 2d 636, 639 (Tex. Civ. App. 1954) (writ refused). This view, however, seems to be opposed to that expressed in the Uniform Partnership Act (UPA). Many of the UPA's provisions appear to give the partnership status as a legal personality or entity. For example section 9(1) provides that the "partner is an agent of the partnership." Uniform Partnership Act § 9(1), 6 U.C.A. 132 (1969).

third parties deal directly with the EEIG as an entity and not its individual members.²⁹ An EEIG shall "have the capacity, in its own name, to have rights and obligations of all kinds, to make contracts or accomplish other legal acts, and to sue and be sued."³⁰ Like an American corporation, the EEIG becomes a fictional "person." However, because of joint and several liability imposed upon the members of an EEIG, the corporate status granted to the EEIG is not as beneficial as its American counterpart.³¹

However, an EEIG is not analogous to a holding company or similar entity in American practice.³² An EEIG is an ancillary body to aid in a specific economic goal of its members.³³

C. *Liability and Legal Obligations of Members*

Because the EEIG is treated as a "legal person" within the Community, it may undertake transactions and complete contracts in its own name.³⁴ For example, a French company could contract with an EEIG to provide a service. If the EEIG is unable to perform the contract, the EEIG itself would be responsible for whatever damages the French company incurred. Al-

29. Whether an EEIG will have "legal personality" in regard to national tax treatment is to be left up to each individual country within the Community. The idea is that profit derived by the EEIG will be passed through to the members. However, individual countries within the Community could tax an EEIG as if it were a national corporation as a cost of doing business within that particular nation, similar to state corporate franchise taxes in the United States. Council Regulation, *supra* note 13, art. 40.

30. *Id.* art. 1(2).

31. Most state laws grant similar "personality" to corporations. In Utah, the statute is very specific as to what a corporation may do, and to what rights it has. Each corporation can have perpetual life, can be sued and sue, can purchase, loan, own, make contracts and conduct its activities. Even more important, however, is the limited liability enjoyed by those owning the corporation. There are numerous other rights. See UTAH CODE ANN. § 16-10-4 (1988).

32. In a background report by the Commission of the European Communities, the Commission stated that an EEIG was not to be a holding company. "The grouping is not a form of holding company and can never completely take over the activities of its members." BACKGROUND REPORT, *supra* note 12, at 3.

33. The preamble of the Council Regulation states:

Whereas a grouping differs from a firm or company principally in its purpose, which is only to facilitate or develop the economic activities of its members to enable them to improve their own results; whereas, by reason of that ancillary nature, a grouping's activities must be related to the economic activities of its members but not replace them so that, to that extent, for example, a grouping may not itself, with regard to third parties, practice a profession, the concept of economic activities being interpreted in the widest sense.

Council Regulation, *supra* note 13, at 1.

34. Council Regulation, *supra* note 13, art. 2(1).

though the regulation establishing the EEIG stated that the purpose of the EEIG is not to make profits for itself,³⁵ the EEIG is liable for debts which it incurs and should make payment out of its own accounts, not the accounts of its members. However, if the EEIG cannot pay its debts, whether contracted for or through legal consequences, the individual members are jointly and severally liable for the full amounts.³⁶ This unlimited joint and several liability is the risk assumed when entering into an EEIG contract without capital. Without unlimited joint and several liability, third parties would be completely unprotected if the EEIG defaulted; therefore, they would be very hesitant to enter into any type of agreement with an EEIG.³⁷ Since this would defeat the purpose for which the Commission created the EEIG, liability for debt must rest secondarily on the heads of each of the members. Before a creditor can pursue an individual member, however, it must first request payment from the EEIG in an appropriate period of time, or proceed against the EEIG to satisfy a judgment or debt.³⁸

The principle of unlimited joint and several liability extends not only to the original members of an EEIG, but also to new members. According to Article 26(2), every new member will be responsible for the debts of the EEIG, even those debts arising before the new member joined the EEIG.³⁹ This is different from

35. *Id.* art. 3(1).

36. Article 24(1) states: "The members of a grouping shall have unlimited joint and several liability for its debts and other liabilities of whatsoever nature. National law shall determine the consequences of such liability." *Id.* at 24(1).

37. NEW INSTRUMENT, *supra* note 18, at 9.

38. Article 24(2) states:

Creditors may not proceed against a member for payment in respect of debts and other liabilities, in accordance with the conditions laid down in paragraph 1, before the liquidation of a grouping is concluded, unless they have first requested the grouping to pay and payment has not been made within an appropriate period.

Council Regulation, *supra* note 13, art 24(2).

No mention is made as to how long this appropriate period is, and it can be expected that this will be a term demanded by third parties entering into contracts with EEIGs.

39. Article 26(2) states:

Every new member shall be liable, in accordance with the conditions laid down in Article 24, for the grouping's debts and other liabilities, including those arising out of the grouping's activities before his admission.

He may, however, be exempted by a clause in the contract for the formation of the grouping or in the instrument of admission from the payments of debts and other liabilities which originated before his admission. Such a clause may be relied on as against third parties, under the conditions referred to in

an American partnership where the new partner is not liable for previous debt. A new member may disclaim this liability in a contract, but it will be valid against third persons only if adequate notice is given in accordance with Article 8. Article 8 provides for filing and publication, with the particulars of the notice required to be published by each Member State.⁴⁰

D. Organization and Management

The Commission has granted member companies substantial discretion in the organization and management of an EEIG. Within the limits of the regulations establishing the EEIG as a business entity, the members of an EEIG are allowed to make their own internal organizational arrangement.⁴¹ The regulation establishing the EEIG, however, requires two management bodies, the College of Members and the Manager.

The College of Members is the group of members acting together to pursue the stated objectives of the grouping. The College of Members is analogous, in some respects, to an American corporation's Board of Directors. Each member has the right to one vote; however, the contract may allow for some members to have more than one vote, so long as no one member holds a majority of votes.⁴² The contract should also specify what constitutes a quorum or a majority for voting purposes, while recognizing that the regulation does require unanimity for a number of management decisions.⁴³

Article 9(1), only if it is published in accordance with Article 8.
Id. art 26(2).

40. Individual countries within the Community will have their own laws for the registration and notice to the public of EEIGs: Protection of third parties is ensured by the obligation to publish the main documentation of the EEIG. This publication follows the rules laid down for companies by the Members States. It involves the filing of certain documents and particulars at the registry where the EEIG is registered and their publication in a journal which carries legal notices.

NEW INSTRUMENT, *supra* note 18, at 10.

41. The freedom for EEIG members to create their own internal management structure and organization is a welcome relief from some of the more constricting requirements of national company and corporate law. For instance, in proposals for a European Company Statute, the Commission proposed requirements for a European company to have some degree of employee input in upper level management decisions. U.S. CHAMBER OF COMMERCE, EUROPE 1992: A PRACTICAL GUIDE FOR AMERICAN BUSINESS 35-36 (1989) [hereinafter CHAMBER OF COMMERCE REPORT].

42. Council Regulation, *supra* note 13, art. 17.

43. Article 17(2) states:

A unanimous decision by the members shall be required to:
(a) alter the objects of a grouping;

The second management body is the manager or managers.⁴⁴ The manager or managers are responsible for the EEIG's dealings with third persons. The acts of a manager bind the EEIG in an unlimited way, similar to the way in which the president of an American corporation can bind the corporation.⁴⁵ A manager's ability to bind the EEIG extends even beyond those activities which do not fall within the stated objectives of the grouping. The only instance in which a manager's ability to bind the EEIG could be limited is when the EEIG can prove that the third party knew or could not have been unaware that the act of the manager fell outside of the objects of the grouping.⁴⁶

Because of the harsh consequences of such binding managerial power, the regulation sets forth one limitation on the manager's power, the "double signature" requirement.⁴⁷ In effect, the

(b) alter the number of votes allotted to each member;

(c) alter the conditions for the taking of decisions;

(d) extend the duration of a grouping beyond any period fixed in the contract for the formation of a grouping;

(e) alter the contribution by every member or by some members to the grouping's financing;

(f) alter any other obligation of a member, unless otherwise provided by the contract for the formation of the grouping;

(g) make any alteration of the contract for the formation of the grouping not covered by this paragraph, unless otherwise provided by the contract.

Id. art. 17(2).

44. Article 16(1) states: "The organs of a grouping shall be the members acting collectively and the manager or managers. A contract for the formation of a grouping may provide for other organs; if it does it shall determine their powers." *Id.* art. 16(1).

45. Article 20(1) states:

1. Only the manager or, where there are two or more, each of the managers shall represent a grouping in respect of dealing with third parties.

Each of the managers shall bind the grouping as regards third parties when he acts on behalf of the grouping, even where his acts do not fall within the objects of the grouping, unless the grouping proves that the third party knew or could not, under the circumstances, have been unaware that the act fell outside the objects of the grouping; publication of the particulars referred to in Article 5(c) shall not of itself be proof thereof.

No limitation on the powers of the manager or managers, whether deriving from the contract for the formation of the grouping or from a decision by the members, may be relied on as against third parties even if it is published.

Id. art. 20(1).

46. *Id.* art. 20.

47. Article 20(2) states:

2. The contract for the formation of the grouping may provide that the grouping shall be validly bound only by two or more managers acting jointly. Such a clause may be relied on as against third parties in accordance with the conditions referred to in Article 9(1) only if it is published in accordance with Article 8.

Id. art. 20(2).

double signature requirement means that an EEIG can be bound to a third party only if two managers sign the contract. A double signature clause in the contract forming an EEIG is valid only as to the EEIG's dealing with third persons if sufficient notice of multiple managers is given through publication.⁴⁸

E. Life of the EEIG and Winding Up

Theoretically, the life of an EEIG—like a corporation in the United States—can be indefinite.⁴⁹ Upon the death, withdrawal or insolvency of a member (in the case of an EEIG) or a shareholder (in the case of an American corporation), the entity will continue to exist. This is somewhat peculiar in the case of an EEIG. The EEIG is created by contract to perform or complete a particular purpose, and usually such a specific purpose is not intended to be indefinite. Indeed, the contract forming an EEIG can specify the length of its existence.⁵⁰ The idea of specifying the term of an entity's existence differs somewhat from American corporate law, although some American jurisdictions do "permit the formation of corporations with less than perpetual duration."⁵¹

Since the EEIG is intended in most instances to have a finite existence, the Council regulation establishing the EEIG acknowledges certain occurrences which will trigger the winding up of an EEIG's affairs. The provisions in the EEIG regulation providing for EEIG termination are quite similar to American partnership law, with the only significant difference being nomenclature. American partnership law goes into great detail on procedures for terminating a partnership. First, an occurrence (death, bankruptcy, withdrawal or expulsion by any general partner or by court order) must trigger a technical dissolution. Dissolution is followed by winding up (liquidation of assets and

48. NEW INSTRUMENT, *supra* note 18, at 7.

49. The regulation establishing the EEIG does not expressly state that the EEIG has infinite life; however, it does leave the duration up to the grouping's members "except where this is indefinite." Council Regulation, *supra* note 13, art. 13, art 5(e). This language impliedly gives the EEIG infinite life. In the United States, a corporation "is the only form of business enterprise which theoretically may have perpetual existence in most jurisdictions." H. HENN & J. ALEXANDER, *Laws of Corporations and Other Business Enterprises* 132 (3d ed. 1983). In fact, perpetual succession is normally a key factor in company decisions to incorporate.

50. Council Regulation, *supra* note 13, art. 5(e). Article 31(2) also evidences that a grouping's life is determined by the members in the contract of formation. *Id.* art. 31(2).

51. H. HENN & J. ALEXANDER, *supra* note 49, at 132.

distribution to creditors and partners) and termination of the partnership. The EEIG regulation speaks of winding up, liquidation, and conclusion, which are equivalent to dissolution, winding up, and termination under American law.⁵² Article 31 provides that a decision to wind up requires unanimous approval by the members.⁵³ Article 32 cross-references to certain violations which could cause an EEIG to be involuntarily wound up by judicial action.⁵⁴ Among the violations which constitute grounds for judicial winding up are the following: having an EEIG exceed 500 employees, having an EEIG be a member in another EEIG, or having the EEIG control one of its member companies or organizations.⁵⁵ Liquidation and conclusion of an EEIG should be left to the national law of the country in which the EEIG is registered.⁵⁶ Since all European Community States have something approximating a corporation, the liquidation of an EEIG should be treated the same as any other legal entity.⁵⁷

IV. USE OF AN EEIG BY NON-EUROPEAN COMMUNITY BUSINESSES

The intent of the European Commission in promulgating the EEIG was to help European companies take full advantage of the single market. The Commission never intended foreign corporations to become members of EEIGs.⁵⁸ An American corporation, based in the United States, could not become a member in an EEIG. Membership "is not open to members based in

52. The preamble states: "Whereas the grounds for winding up which are peculiar to the grouping should be specific while referring to national law for its liquidation and conclusion thereof." Council Regulation, *supra* note 13, at 2.

53. *Id.* art. 31.

54. *Id.* art. 32.

55. *Id.*

56. "The liquidation of a grouping and the conclusion of its liquidation shall be governed by national law." *Id.* art. 35(2).

57. BACKGROUND REPORT, *supra* note 12, at 5.

58. Article 4(1)(a) states:

1. Only the following may be members of the grouping: (a) companies or firms within the meaning of the second paragraph of Article 58 of the Treaty and other legal bodies governed by public or private law, which have been formed in accordance with the law of a Member State and which have their registered or statutory office and central administration in the Community; where, under the law of a Member State, a company, firm or other legal body is not obliged to have a registered or statutory office, it shall be sufficient for such a company, firm or other legal body to have its central administration in the Community.

Council Regulation, *supra* note 13, art. 4(1)(a).

third countries," except in a few limited circumstances discussed below.⁵⁹

One of those limited circumstances occurs when the foreign corporation has a subsidiary incorporated in a European Community Member State.⁶⁰ However, there is an obstacle to this route for foreign participation. To preclude a foreign corporation from setting up a subsidiary with the sole intent of becoming a member of an EEIG, the Commission requires that "members of an EEIG must have been engaged in some previous 'economic activity' within the community."⁶¹ Natural persons from foreign countries will also be precluded from participation in an EEIG, since foreign membership in an EEIG is limited to those who can obtain corporate personality within the Community.⁶²

Nevertheless, foreign companies that want access to the Community's markets which cannot directly participate in an EEIG can still form "joint ventures" with EEIGs. EEIGs can subcontract, or enter into "joint venture" contracts with companies established outside the Community, or can even acquire interests in other companies to form "joint subsidiaries."⁶³

V. CONCLUSION

Although it is too early to determine whether the Commission's goals for the EEIG of increased transnational cooperation and greater global competitiveness will be fulfilled,⁶⁴ it is clear that the 1992 deadline is affecting business strategy today. Indeed, some businesses are already taking advantage of the EEIG to improve their position for the single market in 1992.⁶⁵ It is

59. BACKGROUND REPORT, *supra* note 12, at 2.

60. *Id.*

61.

United States based companies located in the U.S. cannot participate directly in an EEIG. EEIG participating companies must be EC based. A non-EC company could, however, participate through a subsidiary incorporated in a member state. Also, members of an EEIG must have been engaged in some previous "economic activity"—that is, new business entities cannot be formed solely for EEIG purposes.

CHAMBER OF COMMERCE REPORT, *supra* note 41, at 41.

62. BACKGROUND REPORT, *supra* note 12, at 2.

63. See NEW INSTRUMENT, *supra* note 18, at 4.

64. EEIGs are intended to facilitate transnational cooperation. The aim and *raison d'entre* of such groupings is to allow the partners to overlap some of their economic activities while developing new and complementary functions for which they find it advantageous to group together. *Id.* at 3.

65. Many businesses are taking advantage of this new vehicle for cooperation:

true that the economic interest grouping as conceived by the French has been successful to some extent. However, it will be interesting to see whether the EEIG in the larger Community context will be able to match the successes of French groupings such as Airbus Industrie. The EEIG does have some fundamental problems. Limitations on the number of employees, possible conflicts with the EEC competition laws and lack of unlimited liability for members may prove the EEIG to be an ineffective business entity. However, to date, the EEIG is the only truly European Community-wide business entity.⁶⁶ "Greater competitiveness will depend on securing an environment that encourages adjustment and change."⁶⁷ Since the European company statute has yet to be implemented, the EEIG has become the necessary vehicle for European companies to use in their adjustment and preparation for the proposed single market in 1992.

P. Sterling Kerr

Concrete plans to establish an EEIG as soon as permissible exist for an association of lawyers, an organization of specialists in the training of business managers to promote European market training programmes, an association of transport businesses aimed at developing a European transport network, a grouping of partners for cooperation in the field of management consultancy, a grouping from three member states designed to promote the European export of handicraft products, and a grouping for developing and promoting standard computer software packages.

BACKGROUND REPORT, *supra* note 12, at 6.

Of particular interest is the EEIG formed between law firms in five countries (France, Spain, Italy, Belgium and Britain). This particular EEIG spearheaded by a firm in Manchester, England (Pannone Blackburn) will provide cross-border legal services to clients who need expertise in the laws and customs of European Community nations. This new EEIG will begin doing business under the name Pannone De Becker. *European Lawyers Form Economic Interest Grouping*, 85 L. SOC'Y GAZETTE 5 (1988).

66. Carreau & Lee, *Towards a European Company Law*, 9 NW. J. INT'L. L. & BUS. 501, 505 (1989).

67. COMMISSION OF THE EUROPEAN COMMUNITIES, PROGRAMME OF THE COMMISSION FOR 1988: STATEMENT BY JACQUES DELORS, PRESIDENT OF COMMISSION, TO THE EUROPEAN PARLIAMENT 37 (Bulletin of the European Communities Supp. 1/88).