Department of Trade

Implementation of the Second EEC Directive on Company Law

An explanatory and consultative note

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IMPLEMENTATION OF THE SECOND EEC DIRECTIVE ON COMPANY LAW

AN EXPLANATORY AND CONSULTATIVE NOTE BY THE DEPARTMENT OF TRADE

Introduction

The EEC Council of Ministers adopted the Second Directive on Company Law on 13 December 1976; its aims are to regulate the formation of public companies and the maintenance and alteration of their capital. A copy of the Directive is at Annex A. Member States are required to bring into force legislation to implement the Directive by December 1978.

2 The purpose of this note is to set out those changes which the Department considers necessary to bring UK law into line with the Directive and to seek views in a number of cases on what form those changes should take. It also discusses whether certain of these changes should be applied to private as well as public companies. The note does not follow the sequence of the Directive Article by Article but examines in turn:

I The classification of companies.

II The subscription of capital.

III Maintenance of subscribed capital.

IV Increases in subscribed capital.

V Reduction of subscribed capital.

VI Other matters.

3 Comments on this note should be addressed to the Department of Trade, Companies Policy Division, Room 601, Sanctuary Buildings, 16-20 Great Smith Street, London SW1P 3DB. Comments should be with the Department by Friday 23 September.

I Classification of Companies

(i) The Distinction between Public and Private Companies

4 At present, if a company's articles contain the restrictions set out in Section 28 of the Companies Act 1948, on the transfer of its shares, the number of its members and the offering of its shares and debentures to the public, that company is a private company. If its articles do not contain all these restrictions it is a company other than a private company - the phrase "public company" is used in a few places in the legislation as a matter of convenience. A public company is therefore the residual category and a public company's articles could contain any two of the three restrictions referred to in Section 28.

5 The Second Directive lays down requirements which public companies must meet including a minimum level of subscribed capital. There have always been certain minimum requirements for public companies, for example as to the number of members or directors, but the Directive sets out a range of standards which public companies must meet, and it will no longer be appropriate for public companies to form a residual class. It is therefore proposed that the legislation will lay down separate requirements for private and for public companies: the essential characteristic which will distinguish public from private companies will be that public companies may offer their shares or debentures to the public while private companies will not be permitted to do so.

6 Public companies will, therefore, be required to have a minimum capital (see paragraph 11), to adopt a suitable designation in their title (paragraph 18), and to comply with the other provisions of the Directive. Existing provisions, for example those relating to the number of members and to the filing of accounts of public companies, will remain in force. Such companies will be permitted to offer their shares to the public.

7 It will be necessary in order to prevent companies from evading the requirements of the Directive to provide that those companies which are now, or become, public companies and which have at any time offered their shares or debentures to the public must remain public companies and comply with these new requirements unless:

(a) they have a capital which is below the minimum required for a public company and do not raise their capital to the required level; or

(b) they reduce their capital to a level which is below the minimum required; or

(c) the shares or debentures have been repurchased from the public.

The legislation will need to define what is meant in (c) by repurchase from the public. One way might be to provide that not less than, say, 90 per cent of each class of shares or debentures formerly held by the public must now be owned by not more than, say, 3 separate holders. The Department would welcome views on this proposal.

8 Private companies will in practice become the residual class of limited liability company, and it is appropriate to consider whether it is necessary to maintain the requirements for private companies set out in Section 28 of the 1948 Act. There are threee issues for consideration:

- First, certain companies, although not substantial trading concerns or companies whose shares would normally be

offered for sale to the public, cannot at present be treated as private companies because of the number of members which they have; for example, large tenants' associations. It is proposed above that the essence of the private company will not be the restriction on the number of members but rather the restriction on offering shares to the public. In order not to cause further problems for companies which are in other respects private but whose membership is greater than 50, it is proposed to remove the upper limit on the number of members of a private company so that they do not have to change their name or comply with the requirements for minimum subscription or other matters.

- Second, under existing law, if a private company breaches its articles and offers shares to the public, the consequences are clear: it loses/the benefits of private status but no criminal liability is incurred. Now that there are to be more rigorous provisions for public companies, it will be necessary to go further and provide that a company which does not meet the requirements for a public company set out in paragraph 6 above must be a private company and that notwithstanding anything in its articles a private company may not offer its shares or debentures to the public, and this restriction will be supported by criminal sanctions.

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- Third, it is necessary to consider whether restrictions on the transfer of shares should remain an essential element of the distinction to be drawn in future between public and private companies. Since private companies will form a broader class than hitherto, and will include a number of companies at present classified as public, the retention of Section 28(1)(a) could cause difficulty and it is therefore proposed to repeal it. There would also be difficulty in requiring public companies to allow free transfer of all their shares: clearly a complete lack of freedom to transfer shares is not compatible with the general concept of a public company, but limitations on certain types of transfer, particularly for certain classes of shares, are a common feature of public companies.

9 To summarise the position in relation to private companies, it is proposed to repeal Section 28 and replace it by providing:

(a) That a private company will be any limited company with a share capital which is not a public company.

(b) That a private company, notwithstanding anything in its articles, may not offer its shares or debentures to the public, and this restriction will be supported by criminal sanctions.

Other requirements in the law relating, for example, to minimum number of members and directors will remain unchanged.

10 The changes outlined above will have a number of consequences, particularly for companies which at present are public and which cannot meet the requirements in paragraph 6, and for the conversion of a private company into a public company and vice versa. These questions are dealt with under separate headings in later sections of this paper.

(ii) Minimum Subscribed Capital for Public Companies

11 Article 6 of the Directive requires that public companies should have a subscribed capital of 25,000 European Units of Account (roughly £16,000). This is a relatively low figure and the Department believes that it would be appropriate to adopt a more rigorous standard to ensure some greater measure of substance in public companies. It therefore proposes to set the minimum level of subscribed capital at £50,000.

12 It should be noted that the subscribed capital does not for this purpose include general reserves, share premium accounts or capital redemption reserve funds but if these were to be used to issue new shares, then those shares would count towards subscribed capital.

13 The Directive contains provision for a periodic review by the Council of Ministers of the minimum level of subscribed capital for public companies, as well as provisions dealing with the consequences of a fluctuation in the rate of exchange between national currencies and European Units of Account. Although it is proposed to set the minimum capital requirements well above the figure required by the Directive, it nonetheless seems sensible to provide that the minimum capital requirement can be subsequently increased by statutory instrument; it would be necessary to provide for Parliamentary scrutiny and approval as well as for some protection for existing public companies.

14 It will be necessary for public companies formed after implementation of the Directive to reach the minimum level of subscribed capital on incorporation or before commencement of business. At present, by virtue of Section 109 of the Companies Act 1948, public companies formed as such cannot commence business until the Registrar of Companies has issued a certificate ("the trading certificate"). This is only issued when certain conditions have been complied with, and until it has been issued any contract entered into by the company is only provisional. Together with the requirements for a statutory report to members under Section 130 and for the consent of directors under Section 181, the provisions of Section 109 are largely bypassed by companies being formed as private companies and then being subsequently converted into public companies with the minimum of formality (restrictions on this procedure are proposed in paragraph 20 below).

15 However, on the question of forming public companies ab initio, the Department considers that the statutory requirements set out above serve no useful purpose in practice and invites comments on whether they might not be repealed or simplified. In place of them, one might provide that the initial subscribers must agree to take up at least the minimum level of subscribed capital required by law, but that upon incorporation, the company would be free to commence business without further restrictions or formalities. Safeguards might be needed to ensure that subscriptions were in

fact paid before incorporation : to ensure that this took place evidence would be required to be submitted to the Registrar that the subscriptions were held in a special account on trust for the company as soon as it came into existence.

Such a revision would have the consequence that there would be no need under Article 4 of the Directive to lay down rules about responsibility for liabilities incurred before a trading certificate is issued.

16 The Directive also contains provisions about the minimum subscribed capital of public companies which are already incorporated. Article 43.2 allows Member States to provide a three year period for such companies to reach the minimum level, failing which they would have to become private companies, no longer able to offer their shares to the public. The Department would be grateful for views on whether it is considered necessary to provide a three year period for compliance with the minimum levels of subscribed capital. In favour of taking advantage of this full period, one might argue that it would allow companies at the margin a better opportunity of remaining public. However, as explained in paragraph 18 below, public companies are to be required under Article 1.1 to apply to change their name to include an indication of their public status. Article 43.2 allows for 18 months' derogation for this provision as it applies to existing public companies and, in order to allow the Registrar time to check the applications and issue all the necessary change of name certificates, the Department proposes to allow companies 15 months in which to apply for a change of name. Thus, there would be a 21 month period between the last date on which existing public companies could apply for a change of name and the last date by which they would have to reach the minimum level of subscribed capital. If they changed their name but subsequently failed to reach the minimum level, they would then have to change their name (and status) back again. This would be confusing and burdensome, and one way to avoid such vacillations would be to provide that when a company applied to change its name to indicate public status, it would have to satisfy the Registrar that it had reached the minimum level of subscribed capital. This would mean, in effect, that existing public companies had 15 months rather than three years to reach the level of subscribed capital. If they did not and so had to become private companies, they could apply later to convert into a public company if they reached the required level of capital (see paragraph 20 below on the conversion of private into public companies).

17 If however importance is attached to giving existing public companies the full three years in which to comply with the minimum level of subscribed capital, it becomes necessary to devise checks so that at the end of that period one can ensure that they have either reached the minimum level of subscribed capital or have ceased to be public companies. It would seem necessary to provide that it would be an offence for such a company after that time to trade under its public title if it had not reached the required level of subscribed capital; also it would be an offence for it to offer its shares to the public. The Registrar would be given the power to apply for the winding-up of the companies which wilfully

refuse to change their status to that of a private company. As however the definition of private company is to be changed to a residual one (see paragraph 8 above), all that would be necessary for the directors to do would be to apply to the Registrar to change their name (omitting the indication of public status). The change would be effective from the issue of a new certificate and there would of course be protection for third parties.

(iii) Designation of Public Companies

18 Quite apart from the question dealt with above of re-defining a public company, the Directive requires that the title of public companies should be distinct from those of other companies (Article 1.1). It has already been announced that the Government has decided that it is public companies who should change their name to ensure such a distinction. It is proposed that the title of all public companies, whether limited by shares or limited by guarantee but with a share capital, should end with a distinctive designation such as "public limited company" (p.l.c.) or "limited corporation" (ltdc) or "Incorporated" (Inc) instead of "limited". A Welsh equivalent would be provided for public companies which were Welsh companies within the meaning of Section 30 of the Companies Act 1976. Comments on the choice of designation would be welcome.

19 When the legislation introducing these changes has been brought into effect, companies formed after that time will have to ensure that their proposed title includes the appropriate designation as a condition of incorporation. However, for existing public companies, there will be a period of up to eighteen months during which the necessary changes can be made. The Department recognises that this will mean additional burdens on companies and is anxious to minimise the cost of and simplify the procedure for complying with the new requirements. Therefore, the Department proposes to legislate on the following basis:-

(a) Once the legislation has come into effect, an existing public company meeting the requirements will be authorised to change its name provided that the change is solely to comply with the new requirements, by means of filing with the Registrar of Companies an application in the prescribed form following a decision by its board of directors; the name will be changed on the issue of a new certificate from the Registrar. As the change will be limited to that necessary to comply with the new regulations, it is not proposed that companies should seek either the permission of the Department before making the change or the authority of a general meeting of the company to carry out the change. Once the certificate has been issued by the Registrar, it would be unlawful for the company to use its old name, but there would be the standard protection for those dealing with the company, along the lines of Section 18(4) of the Companies Act 1948.

(b) An existing public company meeting the requirements set out in paragraph 6 will be under an obligation to make an application to change its name within 15 months of the implementation of the legislation. If the change consists only of the designation of status, no fee will be charged by the Registrar. It will however be an offence for such a company not to make an application within that time limit and, as well as the company, the directors and officers will also be liable to prosecution. In addition, offers of shares or debentures by that company might be prohibited. The Registrar of Companies would be empowered to petition for the winding-up of any company which wilfully refused to apply for a change of name.

(c) The Department invites views on whether it would be desirable to provide that at any time within the 15 month period but before the Registrar had issued a revised certificate following an application by the company it should be lawful for the company to use its existing name and the new name interchangeably; the argument for such a provision is that it would allow a gradual change to be made in items such as stationery during that period to avoid waste. There will of course need to be provisions to protect third parties who have dealt with the company under either name.

(d) Alternatively, it would be possible to provide for a six month transitional period after the company had adopted the new form of its name, during which it could continue to use up old stationery stocks etc showing the old form of its name. Again, safeguards would be necessary to protect third parties.

It will be unlawful, except in the transitional period proposed in (c) above, for a company to use the designation of a public company unless it has a current certificate from the Registrar. Criminal penalties will apply to companies using the designation of a public company without proper authority.

(iv) <u>Conversion of Private Companies into Public Companies</u>

20 A private company can at present convert into a public company simply by amending its articles. Within fourteen days of passing a resolution doing that, the company must either file a statement in lieu of prospectus or issue a prospectus (Section 30 of the Companies Act 1948). There is no requirement for the issue of any certificate by the Registrar. When the new arrangements come into operation, this will no longer be appropriate since it will be necessary to check that the company complies with the regulations about an appropriate name and about the minimum level of subscribed capital. In future therefore, a company will not become public until the Registrar has issued an amended certificate

which in turn will depend on that company meeting the requirements as to name and subscribed capital. The requirement concerning the subscribed capital of companies converting to public status are discussed in paragraph 43 below.

(v) Conversion of Public Companies into Private Companies

21 At present, a public company may, if it has less than 50 members, convert into a private company by adopting the three restrictions set out in Section 28 in its articles (and making whatever other consequential amendments may be necessary). Under the new arrangements, it will not be necessary for the company to alter its articles, but it will be required to satisfy the Registrar that it has satisfied the conditions outlined in paragraph 7 above before being allowed to convert from public to private status.

(vi) Other Matters Concerning Classification of Companies

22 The discussion above of the definitions of public and private companies has been restricted to limited companies with a share capital. This is deliberate for it is the intention that the classification should have no application to unlimited companies nor to companies limited by guarantee without a share capital. No change is proposed in the designation of the latter which will remain "limited". It is intended however to clarify the position of those unlimited companies and companies limited by guarantee without a share capital which have in the past been treated as public companies, and provide that they can enjoy the privileges of private status (such as the minimum membership requirement).

23 At present although under Section 44 of the Companies Act 1967 an unlimited company can re-register as a limited company, such a change is only effective when the Registrar has issued a Certificate of Incorporation as a limited company; it is proposed to make provisions which ensure that before the Registrar issues such a Certificate the company has, if it wishes to become a limited company with a share capital, complied with the requirements of either a public or a private limited company as to name, and capital.

24 Existing companies which are limited by guarantee but have a share capital will come within the classification of public and private companies, with the same designation as companies limited by shares. However, the Department would also be grateful for views on the recommendation made in the Jenkins Committee Report on Company Law that no further companies limited by guarantee and having a share capital should be registered, on the grounds that it is inappropriate for a company formed with the intention of making pro-rata distributions of profits to its members to be able to register as a company limited by guarantee.

25 Finally, the Department has power under Section 19 of the Companies Act 1948 to permit charitable or other companies to dispense with "Limited" from their titles. The great majority

of these companies are limited by guarantee without a share capital and no change is envisaged for them. For companies with a share capital, the legislation will provide in the case of licences already granted that if the company is private, no change will be necessary; if however it is a public one, as defined for Second Directive purposes, its licence must be cancelled, to meet the requirements of the Directive that the title of a public company should indicate its status. The Department will publicise the new arrangements so that existing licence holders will have time to rearrange their affairs if they so wish.

II The Subscription of Capital

(i) Issue of Shares at a Discount

26 There is a general rule under UK law that shares may not be issued at a price lower than their nominal value: Article 8 of the Directive lays down a similar rule, but whereas there are two exceptions under UK law, the Directive only provides for one of these. This is the exemption, at present contained in Section 53 of the Companies Act 1948, whereby allottees of shares are entitled to deduct or to be paid underwriting commission for agreeing to subscribe for those shares; no change is called for here. The second existing exemption under UK Law is contained in Section 57 of the Companies Act 1948, but the provision is rarely used. It is intended to repeal it, for both public and private companies.

(ii) Acceptable Consideration for Shares

27 Article 7 of the Directive lays down that the subscribed capital for a company may be formed only of assets capable of economic assessment, but that an undertaking to perform work or supply services may not form part of these assets. The first provision is already part of our law, but amendments will be required to give effect to the second point, for shares issued after the coming into operation of the legislation. "An undertaking to perform work or supply services" is not to be taken to cover "knowhow" and "good will" which will remain lawful consideration for the issue of shares, subject to assessment by an expert (Article 10). It is not intended to apply these amendments to private companies.

(iii) Payment for Shares

28 The Directive contains provisions for the payment of consideration for shares in Article 9, relating to shares subscribed upon incorporation or before commencement of business, and in Articles 26 and 27.1 relating to subsequent subscriptions of capital. The provisions are almost identical.

29 So far as shares issued upon incorporation or commencement of business are concerned, the precise arrangements to be made will depend upon whether two-stage incorporation is maintained (see paragraph 15 above). Subject to this it will be necessary to provide that where shares are to be issued, they must be paid up upon incorporation or before commencement of business to at least 25% of their nominal value. Although the Directive does not require it, it would seem sensible to provide further that any premium should be paid in full. These rules would apply whether or not shares were offered to the public and whether the consideration comprised cash or other assets or a mixture of cash and other assets. The valuation of non-cash considerations is discussed in paragraphs 33 to 37 below, but in cases where some part of the consideration is other than cash, then the balance of that part of the consideration, after payment of at least 25% of the nominal value plus the whole of any premium, must be transferred within 5 years of incorporation or commencement of business to the company. There will be a requirement to make an appropriate return to the Registrar of Companies to ensure compliance with this rule, and if it is not complied with, the shares would be forfeited (see paragraph 51 below). The Department invites views as to whether the transfer of the balance of the consideration should be required to be made within a shorter time limit than 5 years.

30 Similar rules will be necessary for subsequent increases in subscribed capital. It is not proposed to apply them to either initial subscriptions or subsequent increases by private companies.

(iv) Derogation for Employee Shareholdings

31 Under Article 41.1 Member States may derogate from the rules as to the payment of 25% of the nominal value plus the whole of any premium both upon incorporation or commencement of business and subsequently to the extent necessary to promote shareholding by employees in the companies concerned. It is proposed to take advantage of this provision to exempt any arrangements under which shares in a company are issued to employees of that company and, if it forms part of a group of companies, to employees of any other company within that group of companies. The exemption will cover directors who hold salaried employment in such companies. Companies will therefore be free to take advantage of the exemption if they wish to, though of course they will not be obliged to do so. It should be noted that there is no provision to exempt companies from the requirement that consideration other than cash must be transferred within 5 years or from the requirement that an undertaking to provide services or to perform work is not to be an acceptable consideration for the issue of shares.

(v) Postponement for Existing Companies

32 Where the initial subscription or subsequent increase in capital by public companies has taken place prior to the implementation of the Directive, provision must be made to ensure that the

requirements of Articles 9, 26 and 27.1 discussed in paragraphs 28 to 30 above, are not avoided. Under Article 43, however, Member States have power to postpone the application of these requirements until 18 months (in the case of Article 26 and Article 27.1) or 3 years (in the case of Article 9) after the coming into force of the rest of the provisions of the Directive. The Department intends to provide that, at the end of the requisite period of grace allowed in the Directive, the requirements of these Articles relating to the payment of consideration for shares must have been fulfilled.

(vi) Expert's Report on Consideration Other than Cash

33 Article 10 of the Directive lays down provisions relating to the need for an independent expert's report on the value of any consideration for shares other than cash, whether the shares are issued upon incorporation or before commencement of business or subsequently. The report is required whether the shares in question are offered to the public or not.

34 Provision will be made where shares are issued by public companies for a consideration other than cash after the coming into operation of the UK legislation for the report to contain a description of the assets forming part or all of the consideration, a statement of the methods of valuation used, a statement of the nominal value of the shares to be issued for the consideration, together with any premium on such shares, and a statement of the value of the assets which form the consideration in question.

35 The Department proposes to take powers to designate as an expert for this purpose any person who is qualified to act as an auditor to a company which has offered shares to the public. It does not propose to take powers to issue further authorities in individual cases. Whilst a person may be "an expert" there will be the further requirement that he is independent of the company; it is proposed to follow the precedent in paragraph 6 of Schedule 6 of the Companies Act 1948. In particular, it should be noted that a company's own auditor will qualify as a person independent for this purpose.

36 There will also be an obligation on the company to send a copy of any such report to the Registrar before incorporation or commencement of business or in the case of subsequent increases, before the shares are issued. An amendment to Section 9(3) of the European Communities Act 1972 will be made, requiring the Registrar to publish in the Gazette notice of the receipt of such reports by him.

37 It is not proposed to apply these provisions to private companies.

(vii) Exemption from Obligation to Provide Experts' Reports

38 The Department proposes to take advantage of Article 27.3 which allows Member States not to require an independent expert's report under Article 27.1 and .2 in cases where the increase is

part of a take-over or merger when new shares are offered to the shareholders of a company to be merged or taken over, in return for their shares in that company. This exemption applies only in the case of an increase in subscribed capital of a company and not in the case of an initial subscription, or a subscription before commencement of business.

39 It is not however proposed to take advantage of the derogation in Article 27.4, which allows Members States to exempt companies from the requirement to provide an expert's report providing certain conditions are met.

(viii) Acquisitions from Initial Subscribers

40 To comply with Article 11, it is proposed to lay down that where, within two years of incorporation as a public company, that company wishes to acquire from any person who signed its memorandum as an initial subscriber any assets for a consideration equal to 10% or more of its subscribed capital at the time of the proposed acquisition, then such an acquisition will be void unless the asset has been the subject of a report by an independent expert as required in paragraphs 33 to 36 above, and unless the acquisition and the terms thereof have been approved by the company in general meeting. The Department does not propose to extend these requirements to acquisitions from other persons.

41 It is proposed to exempt acquisitions made in the normal course of the company's business, or at the direction or under the supervision of any judicial body or any administrative body which is given power to direct or supervise the acquisition of assets. So far as the reference to "stock exchange transactions" are concerned, since by definition such acquisitions can only be made from jobbers, the Department invites views on whether it is necessary to provide any specific exemption since it seems unlikely that circumstances will arise in which there would be any problem.

42 It is not proposed to apply these provisions to private companies.

(ix) Subscription of Capital by Companies Converting from Private to Public Status

43 Reference has already been made in paragraph 29 above to the conversion of private companies into public companies. Provision will be required in these cases to give effect to Article 13 of the Directive. It has already been discussed how it is proposed to ensure that they comply with the minimum level of subscribed capital. It is proposed to lay down further requirements that

(a) the minimum level of capital should have been subscribed for valuable consideration other than an undertaking to perform work or supply services;

(b) the capital is at least 25% paid up upon conversion, and that non cash consideration is transferred within five years of conversion;

(c) independent experts should report on the acquisition of assets from the promoters of a company, as provided in paragraph 40 above, within two years of incorporation, when within that two year period, the company has converted into a public company and the acquisition takes place after that time; and

(d) where there has been an increase in capital for a non-cash consideration since the last audited accounts prior to conversion, it will be necessary for an expert's report to be prepared on the value of that consideration.

III Maintenance of Subscribed Capital

(i) Payment of Dividends

44 Article 15 lays down a number of important rules about the circumstances in which dividends may or may not be paid. Some of these are of direct relevance to the question of introducing a new system of inflation accounting, and it seems to the Department sensible to frame legislation in a way which will incorporate the rules in Article 15 while at the same time preserving sufficient flexibility to allow the provisions to be adapted to cover such changes as may be necessary when inflation accounting is introduced.

45 Dividends and Net Assets. Article 15.1(a) and (b) lay down rules aimed at ensuring that dividends on shares are not paid when the accounts of a company show that its net assets are or would be after such a dividend be lessthan the subscribed capital plus any reserves which are not, by the law or by the articles, available for distribution by way of dividends. This represents an important change in UK law; at present there is no restriction, based on the balance sheet of a company, on the payment of dividends. Whilst it seems at present relatively straightforward to define the minimum capital to be maintained, problems may arise upon the introduction of a system of inflation accounting so far as distributable reserves are concerned. Difficult questions arise even now about the definition and valuation of net assets, so that for example one needs to consider how far assets may be revalued to take account of inflation or unrealised gains or losses caused by other factors. Because these issues are complex and technical, and will certainly need to be reconsidered in the light of the system of inflation accounting and the finally agreed form of the draft EEC Fourth Directive on company accounts, it would seem sensible for legislation to provide the Secretary of State power by statutory instrument, to define and lay down rules for the valuation of net assets and also reserves which are not available

by law for distribution by way of dividend (such as the capital redemption fund or the share premium account). It is proposed that the Secretary of State's powers should allow for different definitions or methods of valuation for different categories of companies, based on size or other factors and there should be power to modify the definitions or methods of valuation in the light of changing circumstances. There would need to be appropriate parliamentary safeguards on the use of such a power.

46 Dividends and Profits. Article 15.1(c) lays down that the amount of the distribution to shareholders may not exceed the amount of the profits at the end of the last financial year plus any profits brought forward and sums drawn from reserves available for this purpose, less any losses brought and sums placed to reserves in accordance with the law or statutes. Once again this represents a substantial change from the present position where for example previous losses do not have to be made good before dividends can be paid. The position is further complicated by variations between Scottish and English law. The issues are once again closely related to those involved in inflation accounting, and it is therefore proposed to adopt a similar approach to that taken in the case of net assets, by laying down the basic requirement in legislation with power for the Secretary of State to make regulations regarding the detailed application of the requirement.

47 The powers relating to dividends, proposed in paragraphs 45 and 46 above, will apply to private as well as public companies.

48 Interim Dividends. At present interim dividends can be paid provided that the directors are satisfied that the financial position of the company warrants the payment of such dividends out of distributable profits. Under Article 15.2 interim dividends will continue to be permitted but will be subject to certain restrictions. The directors will be required to be satisfied that the amount to be distributed does not exceed the total profits made since the end of the last financial year for which accounts have been drawn up, plus any profits brought forward and sums from reserves available for this purpose, less losses brought forward and sums to be placed to the reserve pursuant to the requirements of the law or the articles. The directors will also be required to draw up and file with the Registrar an interim statement which would be on the lines of the statement which the London Stock Exchange requires from listed companies for the purpose of half yearly reports and would give sufficient information to show that the distribution complied with the requirements of Article 15.2. It is not the intention to require the interim statement to be audited but it would be made an offence for the directors to make a distribution without having issued a statement, or to issue a statement which did not comply with the statutory requirements or which they knew was false in a material particular. There is of course a substantial overlap with the previous provisions, as far as the definition of terms of the requirements are concerned, therefore it is proposed to proceed in the same fashion, by laying down the basic rule in the legislation, with power for the Secretary of State to make detailed regulations.

(ii) Exemption for Investment Trusts

49 It is intended to take advantage of the provision in Article 15.4 to permit the Secretary of State to exempt certain investment trusts from the rule contained in Article 15.1(a) that dividends may not be paid when this would reduce net assets below the level of subscribed capital plus undistributable reserves. The procedure proposed is that companies which came within the definition of investment trust companies would be free to apply to the Secretary of State for a certificate, receipt of which would exempt them from the obligations referred to. However, companies would then become subject to the requirement contained in paragraph 15.4(a) (b) and (c). Once again the Secretary of State's powers to define net assets would extend to Article 15.4 (b) and would also cover total assets and total liabilities to creditors.

(iii) Consequence of a Company Subscribing for its Own Shares via a Nominee

50 Under UK case law and under Article 18 of the Second Directive, a company cannot subscribe for its own shares. It may be desirable to enact this by statute for both public and private companies. In addition, Article 18.2 lays down that if a person acting in his own name but on behalf of the company subscribes for its shares he shall be deemed to have subscribed for them on his own account; and further that if he does not pay for them, the initial subscribers, or in the case of a subsequent increase in capital, the directors shall be liable to pay for them, subject to an exemption if they can show that they are not personally at fault. UK case law is not clear about the consequences for a nominee of a company subscribing for its shares, and legislation is proposed to make it a criminal offence for a person to subscribe for a company's shares acting knowingly on behalf of that company. However, beyond that, if a person whether knowingly or not subscribes on behalf of an issuing company for its shares, he will be deemed to have subscribed on his own behalf so far as his liability to pay for them is concerned. The shares will belong to him, but if he was knowingly a party to the transaction there may be a case for requiring forfeiture without removing his liability to pay for them. If in any case he is not able to pay for them, the initial subscribers or the directors would be liable to pay, subject to the possibility of relief under Section 448 of the Companies Act 1948.

(iv) Acquisition by a Company of Its Own Shares

51 The Department does not propose to make any changes in the circumstances in which a company can acquire its own shares, but certain consequential amendments to UK law are required to comply with Articles 20 and 22 of the Directive. The three circumstances in which a company can, exceptionally, acquire its own shares are:

(a) in the case of redeemable preference shares, provided that the company complies with Section 58 of the 1948 Act;

(b) under an order of the Court by Section 210, in which case the shares must be cancelled immediately; and

(c) in the case of forfeiture.

In the case of (a) and (b), acquisition is followed by cancellation; there is no intention of changing this, and therefore consequently no intention of applying the looser provisions of Article 20.2 and .3. However the present law on forfeiture provides that the company may retain shares indefinitely. It will therefore be necessary to limit this right to those cases where the percentage of shares held by the company is 10% or less; in other cases the shares must be disposed of within 3 years of acquisition. If they are not disposed of within that period, they will be cancelled by operation of law, and a return in the prescribed form will be required to the Registrar of Companies. If cancellation has the effect of reducing the subscribed capital below the minimum level required by law, it would be an offence to trade under the company's public title and the Registrar would have power to apply for the winding up of the company. Furthermore, whilst holding its own shares under this provision but before cancellation, the compnay will not be allowed to exercise any voting rights.

52 In all cases where a company acquires its own shares there will be an obligation to provide by way of a note in the accounts the information required under Article 22.2, namely

(a) the reasons for the acquisition made during the financial year;

(b) the number and nominal value of the shares acquired, cancelled and otherwise disposed of during the financial year (together with the proportion of the subscribed capital which each of these represents) together with a note of the maximum number and nominal value of shares held at any point during the year, again together with the percentage of the subscribed capital which that represents; and

(c) where shares have been acquired or disposed of for a consideration, the consideration.

53 It is not proposed to apply these new provisions to private companies.

(v) Serious Loss of Subscribed Capital

54 Article 17 of the Directive lays down that in the event of a serious loss of subscribed capital, a general meeting of shareholders must be called to consider whether the company should be wound up or other measures taken. If half or more of the subscribed capital is lost, that must be taken to be a serious loss for this purpose, although there is a discretionary power for Member States to apply a more rigorous standard. The provision is not intended to override any other obligation of the company or its directors, for example whether it is proper to continue to trade, nor to take away from creditors the right for example to petition for the winding up of the company; rather it is a supplementary requirement which in certain circumstances will give a right to shareholders to be consulted.

55 It is proposed to lay a duty on the directors of a public company to call an extraordinary general meeting in the event of a serious loss of capital to consider what action if any should be taken. A serious loss of capital will be defined as a loss of 50% or more of the subscribed capital. Directors will be obliged to call the meeting within 30 days of the time when they become aware of the event, and any resolution to be considered at the meeting will require special notice, notwithstanding anything to the contrary in the articles or elsewhere. As to the nature of the resolution, the normal rules will apply. Therefore if for example the directors propose to recommend a winding up, a special resolution will be necessary. Similarly, whether or not class meetings should be called will not be laid down by law, but will depend on the articles. It would be an offence for the directors not to call a meeting when they knew of a serious loss of capital.

(vi) Acceptance by a Company of its own Shares as Security

56 Article 24 lays down that the acceptance by a company of its own shares is to be treated as an acquisition for the purposes of certain other Articles. However, since the Directive imposes minimum standards, it is for consideration whether more rigorous provisions should not be introduced.

57 Under existing UK law, a company cannot take a legal mortgage of its own shares, as this would amount to being its own shareholder. However there is nothing at present to prevent an equitable mortgage being created, and furthermore the articles frequently provide that the company shall have a lien over the shares of each member for his debts and liabilities to the company.

58 It is proposed that where the lien over shares is in respect of any unpaid calls on those shares such a lien will continue to be lawful. It falls within Article 20.1(e) and is therefore exempt from the requirements of Article 19. However, other equitable liens and mortgages would fall under Article 19; it does not seem on balance valuable to continue such liens and

mortgages on this basis and therefore it is proposed to provide that, without prejudice to existing arrangements, new liens and mortgages created after the coming into operation of these provisions will not be valid. The Department would be grateful for comments on this proposal, and would also welcome views on whether there should be exceptions from this provision for banks and other companies whose ordinary business includes the lending of money, so that equitable mortgages and such equitable liens (in favour of them) should continue to be valid, and on whether it should be applied to private companies.

IV Increases in Subscribed Capital

59 Reference has already been made to a number of provisions of the Directive (Article 25 onwards) which apply to the increase of subscribed capital, just as they apply to the initial subscription upon formation of the company or before commencement of business. There are however a number of provisions which apply merely when capital is increased, and these are dealt with below.

(i) Time Limit for Issue by Directors of Authorised Capital

60 Article 25 lays down certain rules about how long an authorisation to issue authorised capital remains valid. To give effect to this, it is proposed to enact Clause 55 of the Companies Bill 1973. It is for consideration whether in place of sub-clause (3), there should be substituted some longer period of up to 5 years. The Department would welcome views on this. The text of Clause 55 is reproduced at Annex B.

61 It will also be necessary to amend section 9(3) of the European Communities Act 1972, to require the Registrar to give notice in the Gazette of any resolutions received by him approving an increase in the subscribed capital or authorising the directors to issue shares.

62 It is envisaged that Clause 55 would also be applied to private companies, but not the amendment to the European Communities Act 1972.

(ii) Rights of Different Classes of Shareholders

63 Article 25.3 requires that where a company has several classes of shares, any decision by the general meeting called for by Article 25 must also be approved by a separate vote of each class of shareholders whose rights are affected by the increase in capital.

64 However, the Jenkins Committee on Company Law made recommendations about the whole question of class rights, and it is proposed to enact them on the lines of Clause 24 of the Companies Bill 1973, the text of which is reproduced at Annex C. However,

as drafted, this does not go quite far enough since it would allow a company to have in its articles a provision that class rights could be altered without the agreement of shareholders of that class, which would not be in line with the Directive. It is proposed therefore to add a further provision that in the case of decisions about increases in capital, and authorisations that the directors may issue shares, the consent of each class of shareholders whose legal rights will be affected will be necessary, and for this purpose, a simple majority in favour of an ordinary resolution of which special notice has been given will suffice.

65 It is proposed to apply these provisions to private as well as public companies.

(iii) Rights of Pre-Emption

66 Whilst there are no rules under UK law on the rights of pre-emption for existing shareholders, it is frequently the practice of companies to provide them with such an opportunity to purchase subsequently-issued shares and indeed it is a Stock Exchange requirement for listed companies to do so. It is now however necessary to lay down certain minimum rules by statute and the Department's proposals are set out below.

67 Article 29.1 lays down the basic rule that existing shareholders must be given the opportunity to purchase any shares issued in proportion to their existing shareholdings, in cases where the capital is increased by consideration in cash. Legislation will be necessary to implement this rule, and in doing so it will be made clear that general rights of pre-emption will apply only to holders of equity share capital as defined in Section 154(5) of the Companies Act 1948. Holders of shares with limited rights to participate in dividends will not be covered by the general rule, although rights of pre-emption could be attached to such non-qualitying shares by the company's articles or by the terms of issue of those shares. Where the capital is being increased by the issue of non-qualifying shares with limited rights, existing equity shareholders will not have pre-emptive rights to acquire such shares.

68 The general rights of pre-emption for existing shareholders will apply also where the company issues securities convertible into equity shares.

69 It is not intended to take advantage of Article 29.2(b) which allows Member States to provide that, in cases in which the subscribed capital of a company with several classes of shares carrying differing voting rights is increased by issuing new shares in only one of the classes, the right of pre-emption of shareholders in the other classes can be exercised only after it had been exercised by the shareholders of the class in which the new shares are being issued.

70 The right of pre-emption will in all cases be subject to such restrictions as are imposed by under provisions such as in the Exchange Control Act 1947 and monopolies and mergers legislation.

71 Article 29 lays down requirements about informing shareholders of their rights of pre-emption and giving them a minimum period to make up their mind whether to accept or not. In the vast majority of cases, where shares are registered, this will require that the company should inform those on the register of the relevant date for details of th offer. Since those people will be already informed about the company generally, it is not proposed that the requirement for a full prospectus under Schedule 4 of the Companies Act 1948 should be imposed; rather the requirement will be for an abridged prospectus, with which companies are already familiar. The legislation will also lay down the minimum period that shareholders must be given to accept the offer from the time that it was posted to them; the Directive says that this must be at least 14 days, but the Department will welcome views on whether a longer period is desirable.

72 Some companies will have shares in circulation which are in bearer form. To comply with Article 29.3 which requires publication of offers of subscription on a pre-emptive basis attaching to unregistered securities, it will be necessary to amend Section 9(3) of the European Communities Act 1972 to require that in such cases the Registrar publishes in the Gazette notice of the receipt by him of a prospectus which offers shares on a pre-emptive basis to holders of a bearer's securities. Where bearer shares are not involved, such publication will not be required. These arrangements will be in addition to any provisions in the articles or elsewhere which require the company to draw such matters to the attention of their bearer shareholders.

73 There will be two ways in which the right of pre-emption may be withdrawn by the company, though it should be noted that any restriction or withdrawal of such rights in a company's memorandum or articles will be ineffective when the legislation comes into operation.

74 The first way in which the right of pre-emption may be restricted or withdrawn is by a resolution of the company in general meeting. Provided that there is no express prohibition in the memorandum or articles, it would be lawful for a company in general meeting to agree by way of special resolution to restrict or withdraw rights of pre-emption, subject to its following the procedures set out below and also subject to the right of access to the court for an aggrieved shareholder under Section 210 of the Companies Act 1948. The resolution will require special notice, and when sent to shareholders, it must be accompanied by a report by the directors, setting out the reasons for the restriction or withdrawal, and giving an explanation of the price at which the securities in question are to be issued. If the

resolution is put forward by someone other than the directors, that person will be required to give the directors a statement of his reasons, and an explanation of the price proposed; the directors will be required to circulate this, with their comments on it. If the resolution is approved by the general meeting, a copy must be sent to the Registrar, and he will be required under a further amendment to Section 9(3) of the European Communities Act to publish in the Gazette notice of the receipt of such a resolution.

75 The second way in which the right of pre-emption may be restricted or withdrawn is when a company in general meeting approves the exercise by the directors of any power to issue shares (Article 29.5). In such a case, the company may at the same time authorise the directors to restrict or withdraw the rights of pre-emption, provided of course that there is nothing in the memorandum or articles of the company to prevent this. In these latter cases however the authority to restrict or withdraw pre-emption rights will remain valid for only as long as the approval to issue shares remains valid. Under this procedure, there would be no requirement for directors' reports but the resolution to withdraw or restrict the rights would have to be a special resolution requiring special notice; the Registrar would similarly be required to publish in the Gazette notice of receipt of it.

76 It is proposed that these provisions would be applied to private as well as public companies. Despite the rule in Clemens v Clemens Bros Ltd and another ([1976] 2 All ER 268) that the majority shareholder was not entitled as of right to exercise her votes as an ordinary shareholder in any way she pleased and that her right was subject to equitable considerations, there is evidence that in other cases minority shareholders in private companies have had inadequate protection against discrimatory increases in share capital.

(iv) Increases in Capital Not Fully Subscribed

77 It is proposed to lay down a requirement that where an increase in capital is not fully subscribed, the capital will be increased by the amount of the subscriptions received only if the conditions of the issue so provides. This would give effect to Article 28 of the Directive: it would apply only to public companies.

V Reduction of Subscribed Capital

78 Under UK law, the only way in which a company's subscribed capital can be reduced is by order of the court, either following an application under Section 66 or as a remedy in circumstances falling under Section 210 of the Companies Act 1948. Consideration has to be given to those cases where the reduction by a court of a company's subscribed capital will mean that the company no longer

has the minimum level of subscribed capital which is required for public companies. As envisaged by Article 34, it is proposed to lay down that in those cases provided that the reduction is to be accompanied by an increase in subscribed capital at least sufficient to enable the company to reach the minimum level of subscribed capital, then no further action by the court will be required. Where however there is to be no offsetting increase in subscribed capital, it is proposed to require that the court should not give its consent to a reduction in capital, unless the company changes its name so as to remove the public status designation.

VI Other Matters

Miscellaneous Publicity Requirements

79 Legislation will be required in order to give effect to Articles 3(e) and (g) and 39(h). Respectively, these require publicity to be given to certain information about different classes of shares, about the amount of subscribed capital paid up on incorporation or before commencement of business, and about share redemptions. It is proposed to cover Article 3(e) by a provision along the lines of Clause 23 of the Companies Bill 1973, the text of which is reproduced at Annex D.

ISSUES FOR CONSULTATION

80 The Department would be grateful for any comments about the proposals put forward in this paper. However, there are a number of specific points on which the Department would welcome views; these are identified in the main text, but are also listed below for convenience.

(i) Whether the proposal made in the penultimate sentence of paragraph 7 for ensuring that the shares and debentures of existing public companies wishing to convert into private companies have been repurchased from the public is a sufficient safeguard.

(ii) Whether the existing two-tier system of incorporation for public companies including the requirements set out in Sections 109, 130 and 181 of the Companies Act 1948, should be simplified or repealed (paragraph 15).

(iii) Whether it is necessary to give existing public companies the full three years allowed under Article 43.2 of the Directive in which to reach the minimum level of subscribed capital (paragraph 16).

(iv) What the distinctive designation for public companies, discussed in paragraph 18, should be.

(v) Whether the proposals made in paragraph 19 for the transitional arrangements for existing public companies changing their name to include the distinctive designation are desirable including in particular the option of allowing existing public companies to use their old and new names interchangeably for a limited period (paragraph 19(c) and (d)), subject to safeguards for those dealing with them.

(vi) Whether no further companies limited by guarantee but having a share capital should be registered (paragraph 24).

(vii) Whether the transfer of the balance of any consideration other than cash promised in payment for shares should have to be made within a shorter time limit than five years (paragraph 29).

(viii) Whether it is necessary to provide any specific exemption for stock exchange acquisitions under Article 11.3 from the requirements concerning acquisition of assets by the company from initial subscribers (paragraph 41).

(ix) Whether it is desirable to lay down in statute the rule that a company may not subscribe for its own shares (paragraph 50). The rule, which is required by Article 18 of the Directive, is already embodied in UK case law.

(x) Whether it is desirable to lay down that where a person subscribes for shares knowingly on behalf of that company, these shares should be forfeited (paragraph 50).

(xi) Whether the proposal to prohibit new equitable liens and mortgages over a company's own shares (paragraph 58) is desirable, and also whether if introduced such a provision should apply either to banks and other companies whose ordinary business includes the lending of money or to private companies.

(xii) Whether, if Clause 55 of the Companies Bill 1973 were to be enacted in order to comply with Article 25 of the Directive (paragraph 60), authorisations to issue authorised capital should not remain valid for some longer period (not more than five years) than is specified in sub-clause (3).

(xiii) Whether the minimum period allowed to shareholders to exercise their pre-emptive rights should be more than fourteen days from the time that the offer is posted to them (paragraph 71).

DEPARTMENT OF TRADE

July 1977

ANNEX A

Company capital: ministers adopt the second directive

The EEC council of ministers adopted the second directive on the harmonisation of company law on 13 December. The aims of the directive are to regulate the formation of public companies and the maintenance and alteration of their capital.

The text of the directive is published below. It will apply to all UK public companies and will have to be incorporated in UK law within the next two years. Its provisions are minimum requirements. In some articles it is permissive, and where this is so there is clearly no requirement to incorporate that particular article in UK law.

Article 1

1 The co-ordination measures prescribed by this Directive shall apply to the provisions laid down by law, regulation or administrative action in Member States relating to the following types of company:

in Belgium: la société anonyme/de naamloze vennootschap

in Denmark: aktieselskabet

in France: la société anonyme

in Germany: die Aktiengesellschaft

in Ireland: the public company limited by shares, the public company limited by guarantee and having a share capital

in Italy: la società per azioni

in Luxembourg: la société anonyme

in the Netherlands: de naamloze vennootschap

in the United Kingdom: the public company limited by shares, the public company limited by guarantee and having a share capital.

The name for any company of the above types shall comprise or be accompanied by a description which is distinct from the description required of other types of companies.

2 The Member States may decide not to apply this Directive to investment companies with variable capital and to co-operatives incorporated as one of the types of company listed in paragraph 1. Insofar as the laws of the Member States make use of this option, they shall require such companies to include the words 'investment company with variable capital' or 'co-operative' in all documents indicated in Article 4 of Directive 68/151/EEC.

The expression 'investment company with variable capital,' within the meaning of this Directive, means only those companies:

the exclusive object of which is to invest their funds in various stocks and shares, land or other assets with the sole aim of spreading investment risks and giving their shareholders the benefit of the results of the management of their assets,

which offer their own shares for subscription by the public, and

the statutes of which provide that, within the limits of a minimum and maximum capital, they may at any time issue, redeem or resell their shares.

Article 2

The statutes or the instrument of incorporation of the company shall always give at least the following information:

a the type and name of the company;

b the objects of the company;

c when the company has no authorised capital, the amount of the subscribed capital;

when the company has an authorised capital, the amount thereof and also the amount of the capital subscribed at the time the company is incorporated or is authorised to commence business, and at the time of any change in the authorised capital, without prejudice to Article 2(1)(e) of Directive 68/151/EEC;

d insofar as they are not legally determined, the rules governing the number of and the procedure for appointing members of the bodies responsible for representing the company with regard to third parties, administration, management, supervision or control of the company and the allocation of powers among those bodies;

e the duration of the company, except where this is indefinite.

Article 3

The following information at least must appear in either the statutes or the instrument of incorporation or a separate document published in accordance with the procedure laid down in the laws of each Member State in accordance with Article 3 of Directive 68/151/EEC:

a the registered office;

b the nominal value of the shares subscribed and, at least once a year, the number thereof;

c the number of shares subscribed without stating the nominal value, where such shares may be issued under national law;

d the special conditions if any limiting the transfer of shares;

e where there are several classes of shares, the information under b, c and d for each class and the rights attaching to the shares of each class;

f whether the shares are registered or bearer, where national law provides for both types, and any provisions relating to the conversion of such shares unless the procedure is laid down by law;

g the amount of the subscribed capital paid up at the time the company is incorporated or is authorised to commence business;

h the nominal value of the shares or, where there is no nominal value, the number of shares issued for a consideration other than in cash, together with the nature of the consideration and the name of the person providing this consideration;

i the identity of the natural or legal persons or companies or firms by whom or in whose name the statutes or the instrument of incorporation, or where the company was not formed at the same time, the drafts of these documents, have been signed;

j the total amount, or at least an estimate, of all the costs payable by the company or chargeable to it by reason of its formation and, where appropriate, before the company is authorised to commence business;

k any special advantage granted, at the time the company is formed or up to the time it receives authorisation to commence business, to anyone who has taken part in the formation of the company or in transactions leading to the grant of such authorisation.

Article 4

1 Where the laws of a Member State prescribe that a company may not commence business without authorisation, they shall also make provision for responsibility for liabilities incurred by or on behalf of the company during the period before such authorisation is granted or refused.

2 Paragraph 1 shall not apply to liabilities under contracts concluded by the company conditionally upon its being granted authorisation to commence business.

Article 5

1 Where the laws of a Member State require a company to be formed by more than one member, the fact that all the shares are held by one person or that the number of members has fallen below the legal minimum after incorporation of the company shall not lead to the automatic dissolution of the company.

2 If the cases referred to in paragraph 1, the laws of a Member State permit the company to be wound up by order of the court, the judge having jurisdiction must be able to give the company sufficient time to regularise its position.

3 Where such a winding up order is made the company shall enter into liquidation.

Article 6

1 The laws of the Member States shall require that, in order that a company may be incorporated or obtain authorisation to commence business, a minimum capital shall be subscribed the amount of which shall be not less than 25,000 European units of account.

The European unit of account shall be that defined by Commission Decision No 3289/75/ECSC. The equivalent in national currency shall be calculated initially at the rate applicable on the date of adoption of this Directive.

2 If the equivalent of the European unit of account in national currency is altered so that the value of the minimum capital in national currency remains less than 22,500 European units of account for a period of one year, the Commission shall inform the Member State concerned that is must amend its legislation to comply with paragraph 1 within twelve months following the expiry of that period. However, the Member State may provide that the amended legislation shall not apply to companies already in existance until eighteen months after its entry into force.

3 Every five years the Council, acting on a proposal from the Commission, shall examine and, if need be, revise the amounts expressed in this Article in European units of account in the light of economic and monetary trends in the Community and of the tendency towards allowing only large and medium-sized undertakings to opt for the types of company listed in Article 1(1).

Article 7

The subscribed capital may be ~~found~~ formed only of assets capable of economic assessment. However, an undertaking to perform work or supply services may not form part of these assets.

Article 8

1 Shares may not be issued at a price lower than their nominal value or, where there is no nominal value, their accountable par.

2 However, Member States may allow those who undertake to place shares in the exercise of their profession to pay less than the total price of the shares for which they subscribe in the course of this transaction.

Article 9

1 Shares issued for a consideration must be paid up at the time the company is incorporated or is authorised to commence business at not less than 25% of their nominal value or, in the absence of a nominal value, their accountable par.

2 However, where shares are issued for a consideration other than in cash at the time the company is incorporated or is authorised to commence business, the consideration must be transferred in full within five years of that time.

Article 10

1 A report on any consideration other than in cash shall be drawn up before the company is incorporated or is authorised to commence business, by one or more independent experts appointed or approved by an administrative or judicial authority. Such experts may be natural persons as well as legal persons and companies or firms under the laws of each Member State.

2 The experts' report shall contain at least a description of each of the assets comprising the consideration as well as of the methods of valuation used and shall state whether the values arrived at by the application of these methods correspond at least to the number and nominal value or, where there is no nominal value, to the accountable par and, where appropriate, to the premium on the shares to be issued for them.

3 The experts' report shall be published in the manner laid down by the laws of each Member State, in accordance with Article 3 of Directive 68/151/EEC.

4 Member States may decide not to apply this Article where 90% of the nominal value, or where there is no nominal value, of the accountable par, of all the shares is issued to one or more companies for a consideration other than in cash, and where the following requirements are met:

a with regard to the company in receipt of such consideration, the persons referred to in Article 3i have agreed to dispense with the expert's report;

b such agreement has been published as provided for in paragraph 3;

c the companies furnishing such consideration have reserves which may not be distributed under the law or the statutes and which are at least equal to the nominal value or, where there is no nominal value, the accountable par of the shares issued for consideration other than in cash;

d the companies furnishing such consideration guarantee up to an amount equal to that indicated in paragraph c, the debts of the recipient company arising between the time the shares are issued for a consideration other than in cash and one year after the publication of that company's annual accounts for the financial year during which such consideration was furnished. Any transfer of these shares is prohibited within this period

e the guarantee referred to in d has been published as provided for in paragraph 3;

f the companies furnishing such consideration shall place a sum equal to that indicated in c into a reserve which may not be distributed until three years after publication of the annual accounts of the recipient company for the financial year during which such consideration was furnished or, if necessary, until such later date as all claims relating to the guarantee referred to in d which are submitted during this period have been settled

Article 11

1 If, before the expiry of a time limit laid down by national law of at least two years from the time the company is incorporated or is authorised to commence business, the company acquires any asset belonging to a person or company or firm referred to in Article 3i for a consideration of not less than 1/10th of the subscribed capital, the acquisition shall be examined and details of it published in the manner provided for in Article 10 and it shall be submitted for the approval of the general meeting.

Member States may also require these provisions to be applied when the assets belong to a shareholder or to any other person.

2 Paragraph 1 shall not apply to acquisitions effected in the normal course of the company's business, to acquisitions effected at the instance or under the supervision of an administrative or judicial authority, or to stock exchange acquisitions.

Article 12

Subject to the provisions relating to the reduction of subscribed capital, the shareholders may not be released from the obligation to pay up their contributions

Article 13

Pending co-ordination of national laws at a subsequent date, Member States shall adopt the measures necessary to require provision of at least the same safeguards as are laid down in Articles 2 to 12 in the event of the conversion of another type of company into a public limited liability company.

Article 14

Articles 2 to 13 shall not prejudice the provisions of Member States on competence and procedure relating to the modification of the statutes or of the instrument of incorporation.

Article 15

1 a Except for cases of reductions of subscribed capital, no distribution to shareholders may be made when on the closing date of the last financial year the net assets as set out in the company's annual accounts are, or following such a distribution would become, lower than the amount of the subscribed capital plus those reserves which may not be distributed under the law or the statutes.

b Where the uncalled part of the subscribed capital is not included in the assets shown in the balance sheet, this amount shall be deducted from the amount of subscribed capital referred to in paragraph a.

c The amount of a distribution to shareholders may not exceed the amount of the profits at the end of the last financial year plus any profits brought forward and sums drawn from reserves available for this purpose, less any losses brought forward and sums placed to reserve in accordance with the law or the statutes.

d The expression 'distribution' used in subparagraphs a and c includes in particular the payment of dividends and of interest relating to shares.

2 When the laws of a Member State allow the payment of interim dividends, the following conditions at least shall apply:

a interim accounts shall be drawn up showing that the funds available for distribution are sufficient;

b the amount to be distributed may not exceed the total profits made since the end of the last financial year for which the annual accounts have been drawn up, plus any profits brought forward and sums drawn from reserves available for this purpose, less losses brought forward and sums to be placed to reserve pursuant to the requirements of the law or the statutes.

3 Paragraphs 1 and 2 shall not affect the provisions of the Member States as regards increases in subscribed capital by capitalisation of reserves.

4 The laws of a Member State may provide for derogations from paragraph 1a in the case of investment companies with fixed capital.

The expression 'investment company with fixed capital,' within the meaning of this paragraph means only those companies:

the exclusive object of which is to invest their funds in various stocks and shares, land or other assets with the sole aim of spreading investment risks and giving their shareholders the benefit of the results of the management of their assets and

which offer their own shares for subscription by the public.

Insofar as the laws of Member States make use of this option they shall:

a require such companies to include the expression 'investment company' in all documents indicated in Article 4 of Directive 68/151/EEC;

b not permit any such company whose net assets fall below the amount specified in paragraph 1a to make a distribution to shareholders when on the closing date of the last financial year the company's total assets as set out in the annual accounts are, or following such distribution would become, less than one and a half times the amount of the company's total liabilities to creditors as set out in the annual accounts;

c require any such company which makes a distribution when its net assets fall below the amount specified in paragraph 1a to include in its annual accounts a note to that effect.

Article 16

Any distribution made contrary to Article 15 must be returned by shareholders who have received it if the company proves that these shareholders knew of the irregularity of the distributions made to them, or could not in view of the circumstances have been unaware of it.

Article 17

1 In the case of a serious loss of the subscribed capital, a general meeting of shareholders must be called within the period laid down by the laws of the Member States, to consider whether the company should be wound up or any other measures taken.

2 The amount of a loss deemed to be serious within the meaning of paragraph 1 may not be set by the laws of Member States at a figure higher than half the subscribed capital.

Article 18

1 The shares of a company may not be subscribed for by the company itself.

2 If the shares of a company have been subscribed for by a person acting in his own name, but on behalf of the company, the subscriber shall be deemed to have subscribed for them for his own account.

3 The persons or companies or firms referred to in Article 3i or, in cases of an increase in subscribed capital, the members of the administrative or management body shall be liable to pay for shares subscribed in contravention of this Article.

However, the laws of a Member State may provide that any such person may be released from his obligation if he proves that no fault is attributable to him personally.

Article 19

1 Where the laws of a Member State permit a company to acquire its own shares, either itself or through a person acting in his own name but on the company's behalf, they shall make such acquisitions subject to at least the following conditions:

a authorisation shall be given by the general meeting, which shall determine the terms and conditions of such acquisitions, and in particular the maximum number of shares to be acquired, the duration of the period for which the authorisation is given and which may not exceed eighteen months, and, in the case of acquisition for value, the maximum and minimum consideration. Members of the administrative or management body shall be required to satisfy themselves that at the time when each authorised acquisition is effected the conditions referred to in subparagraphs b, c and d are respected;

b the nominal value or, in the absence thereof, the accountable par of the acquired shares, including shares previously acquired by the company and held by it, and shares acquired by a person acting in his own name but on the company's behalf, may not exceed 10% of the subscribed capital;

c the acquisitions may not have the effect of reducing the net assets below the amount mentioned in Article 15 1a;

d only fully paid up shares may be included in the transaction.

2 The laws of a Member State may provide for derogations from the first sentence of paragraph 1a where the acquisition of a company's own shares is necessary to prevent serious and imminent harm to the company. In such a case, the next general meeting must be informed by the administrative or management body of the reasons for and nature of the acquisitions effected, of the number and nominal value or, in the absence of a nominal value, the accountable par, of the shares acquired, of the proportion of the subscribed capital which they represent, and of the consideration for these shares.

3 Member States may decide not to apply the first sentence of paragraph 1a to shares acquired by either the company itself or by a person acting in his own name but on the company's behalf, for distribution to that company's employees or to the employees of an associate company. Such shares must be distributed within twelve months of their acquisition.

Article 20

1 Member States may decide not to apply Article 19 to:

a shares acquired in carrying out a decision to reduce capital, or in the circumstances referred to in Article 39;

b shares acquired as a result of a universal transfer of assets;

c fully paid-up shares acquired free of charge or by banks and other financial institutions as purchasing commission;

d shares acquired by virtue of a legal obligation or resulting from a court ruling for the protection of minority shareholders in the event, particularly, of a merger, a change in the company's object or form, transfer abroad of the registered office, or the introduction of restrictions on the transfer of shares;

e shares acquired from a shareholder in the event of failure to pay them up;

f shares acquired in order to indemnify minority shareholders in associated companies;

g fully paid-up shares acquired under a sale enforced by a court order for the payment of a debt owed to the company by the owner of the shares;

h fully paid-up shares issued by an investment company with fixed capital, as defined in the second subparagraph of Article 15(4), and acquired at the investor's request by that company or by an associate company. Article 15(4a) shall apply. These acquisitions may not have the effect of reducing the net assets below the amount of the subscribed capital plus any reserves the distribution of which is forbidden by law.

2 Shares acquired in the cases listed in paragraph 1b to g above must, however, be disposed of within not more than three years of their acquisition unless the nominal value or, in the absence of a nominal value, the accountable par of the shares acquired, including shares which the company may have acquired through a person acting in his own name but on the company's behalf, does not exceed 10% of the subscribed capital.

3 If the shares are not disposed of within the period laid down in paragraph 2, they must be cancelled. The laws of a Member State may make this cancellation subject to a corresponding reduction in the subscribed capital. Such a reduction must be prescribed where the acquisition of shares to be cancelled results in the net assets having fallen below the amount specified in Article 15 1a.

Article 21

Shares acquired in contravention of Articles 19 and 20 shall be disposed of within one year of their acquisition. Should they not be disposed of within that period, Article 20(3) shall apply.

Article 22

1 Where the laws of a Member State permit a company to acquire its own shares, either itself or through a person acting in his own name but on the company's behalf, they shall make the holding of these shares at all times subject to at least the following conditions:

a among the rights attaching to the shares, the right to vote attaching to the company's own shares shall in any event be suspended;

b if the shares are included among the assets shown in the balance-sheet, a reserve of the same amount, unavailable for distribution, shall be included among the liabilities.

2 Where the laws of a Member State permit a company to acquire its own shares, either itself or through a person acting in his own name but on the company's behalf, they shall require the annual report to state at least:

a the reasons for acquisitions made during the financial year;

b the number and nominal value or, in the absence of a nominal value, the accountable par of the shares acquired and disposed of during the financial year and the proportion of the subscribed capital which they represent;

c in the case of acquisition or disposal for a value, the consideration for the shares;

d the number and nominal value or, in the absence of a nominal value, the accountable par of all the shares acquired and held by the company and the proportion of the subscribed capital which they represent.

Article 23

1 A company may not advance funds, nor make loans, nor provide security, with a view to the acquisition of its shares by a third party.

2 Paragraph 1 shall not apply to transactions concluded by banks and other financial institutions in the normal course of business, nor to transactions effected with a view to the acquisition of shares by or for the company's employees or the employees of an associate company. However, these transactions may not have the effect of reducing the net assets below the amount specified in Article 15 (1a).

3 Paragraph 1 shall not apply to transactions effected with a view to the acquisition of shares as described in Article 20 1h.

Article 24

1 The acceptance of the company's own shares as security, either by the company itself or through a person acting in his own name but on the company's behalf, shall be treated as an acquisition for the purposes of Articles 19, 20 (1), 22 and 23.

2 The Member States may decide not to apply paragraph 1 to transactions concluded by banks and other financial institutions in the normal course of business.

Article 25

1 Any increase in capital must be decided upon by the general meeting. Both this decision and the increase in the subscribed capital shall be published in the manner laid down by the laws of each Member State, in accordance with Article 3 of Directive 68/151/EEC.

2 Nevertheless, the statutes or instrument of incorporation or the general meeting, the decision of which must be published in accordance with the rules referred to in paragraph 1, may authorise an increase in the subscribed capital up to a maximum amount which they shall fix with due regard for any maximum amount provided for by law. Where appropriate, the increase in the subscribed capital shall be decided on within the limits of the amount fixed, by the company body empowered to do so. The power of such body in this respect shall be for a maximum period of five years and may be renewed one or more times by the general meeting each time for a period not exceeding five years.

3 Where there are several classes of shares, the decision by the general meeting concerning the increase in capital referred to in paragraph 1 or the authorisation to increase the capital referred to in paragraph 2, shall be subject to a separate vote at least for each class of shareholder whose rights are affected by the transaction.

4 This Article shall apply to the issue of all securities which are convertible into shares or which carry the right to subscribe for shares, but not to the conversion of such securities, nor to the exercise of the right to subscribe.

Article 26

Shares issued for a consideration, in the course of an increase in subscribed capital, must be paid up to at least 25% of their nominal value or, in the absence of a nominal value, of their accountable par. Where provision is made for an issue premium, it must be paid in full.

Article 27

1 Where shares are issued for a consideration other than in cash in the course of an increase in the subscribed capital the consideration must be transferred in full within a period of five years from the decision to increase the subscribed capital.

2 The consideration referred to in paragraph 1 shall be the subject of a report drawn up before the increase in capital is made by one or more experts who are independent of the company and appointed or approved by an administrative or judicial authority. Such experts may be natural persons as well as legal persons and companies and firms under the laws of each Member State.

Article 10 (2) and (3) shall apply.

3 Member States may decide not to apply paragraph 2 in the event of an increase in subscribed capital made in order to give effect to a merger or a public offer for the purchase or exchange of shares and to pay the shareholders of the company which is being absorbed or which is the object of the public offer for the purchase or exchange of shares.

4 Member States may decide not to apply paragraph 2 if all the shares issued in the course of an increase in subscribed capital are issued for a consideration other than in cash to one or more companies, on condition that all the shareholders in the company which receive the consideration have agreed not to have an experts' report drawn up and that the requirements of Article 10 4b to f are met.

Article 28

Where an increase in capital is not fully subscribed, the capital will be increased by the amount of the subscriptions received only if the conditions of the issue so provide.

Article 29

1 Whenever the capital is increased by consideration in cash, the shares must be offered on a pre-emptive basis to shareholders in proportion to the capital represented by their shares.

2 The laws of a Member State:

a need not apply paragraph 1 above to shares which carry a limited right to participate in distributions within the meaning of Article 15 and/or in the company's assets in the event of liquidation; or

b may permit, where the subscribed capital of a company having several classes of shares carrying different rights with regard to voting, or participation in in distributions within the meaning of Article 15 or in assets in the event of liquidation, is increased by issuing new shares in only one of these classes, the right of pre-emption of shareholders of the other classes, to be exercised only after the exercise of this right by the shareholders of the class in which the new shares are being issued.

3 Any offer of subscription on a pre-emptive basis and the period within which this right must be exercised shall be published in the national gazette appointed in accordance with Directive 68/151/EEC. However, the laws of a Member State need not provide for such publication where all a company's shares are registered. In such case, all the company's shareholders must be informed in writing. The right of pre-emption must be exercised within a period which shall not be less than fourteen days from the date of publication of the offer or from the date of dispatch of the letters to the shareholders.

4 The right of pre-emption may not be restricted or withdrawn by the statutes or instrument of incorporation. This may, however, be done by decision of the general meeting. The administrative or management body shall be required to present to such a meeting a written report indicating the reasons for restriction or withdrawal of the right of pre-emption, and justifying the proposed issue price. The general meeting shall act in accordance with the rules for a quorum and a majority laid down in Article 40. Its decision shall be published in the manner laid down by the laws of each Member State, in accordance with Article 3 of Directive 68/151/EEC.

5 The laws of a Member State may provide that the statutes, the instrument of incorporation or the general meeting, acting in accordance with the rules for a quorum, a majority and publication set out in paragraph 4, may give the power to restrict or withdraw the right of pre-emption to the company body which is empowered to decide on an increase in subscribed capital within the limits of the authorised capital. This power may not be granted for a longer period than the power for which provision is made in Article 25(2).

6 Paragraphs 1 to 5 shall apply to the issue of all securities which are convertible into shares or which carry the right to subscribe for shares, but not to the conversion of such securities, nor to the exercise of the right to subscribe.

7 The right of pre-emption is not excluded for the purposes of paragraphs 4 and 5 where, in accordance with the decision to increase the subscribed capital, shares are issued to banks or other financial institutions with a view to their being offered to shareholders of the company in accordance with paragraphs 1 and 3.

Article 30

Any reduction in the subscribed capital, except under a court order, must be subject at least to a decision of the general meeting acting in accordance with the rules for a quorum and a majority laid down in Article 40 without prejudice to Articles 36 and 37. Such decision shall be published in the manner laid down by the laws of each Member State in accordance with Article 3 of Directive 68/151/EEC.

The notice convening the meeting must specify at least the purpose of the reduction and the way in which it is to be carried out.

Article 31

Where there are several classes of shares, the decision by the general meeting concerning a reduction in the subscribed capital shall be subject to a separate vote, at least for each class of shareholders whose rights are affected by the transaction.

Article 32

1 In the event of a reduction in the subscribed capital, at least the creditors whose claims antedate the publication of the decision to make the reduction shall be entitled at least to have the right to obtain security for claims which have not fallen due by the date of that publication. The laws of a Member State shall lay down the conditions for the exercise of this right. They may not set aside such right unless the creditor has adequate safeguards, or unless the latter are not necessary in view of the assets of the company.

2 The laws of the Member States shall also stipulate at least that the reduction shall be void or that no payment may be made for the benefit of the shareholders, until the creditors have obtained satisfaction or a court has decided that their application should not be acceded to.

3 This Article shall apply where the reduction in the subscribed capital is brought about by the total or partial waiving of the payment of the balance of the shareholders' contributions.

Article 33

1 Member States need not apply Article 32 to a reduction in the subscribed capital whose purpose is to offset losses incurred or to include sums of money in a reserve provided that, following this operation, the amount of such reserve is not more than 10% of the reduced subscribed capital. Except in the event of a reduction in the subscribed capital, this reserve may not be distributed to shareholders; it may be used only for offsetting losses incurred or for increasing the subscribed capital by the capitalisation of such reserve, insofar as the Member States permit such an operation.

2 In the cases referred to in paragraph 1 the laws of the Member States must at least provide for the measures necessary to ensure that the amounts deriving from the reduction of subscribed capital may not be used for making payments or distributions to shareholders or discharging shareholders from the obligation to make their contributions.

Article 34

The subscribed capital may not be reduced to an amount less than the minimum capital laid down in accordance with Article 6. However, Member States may permit such a reduction if they also provide that the decision to reduce the subscribed capital may take effect only when the subscribed capital is increased to an amount at least equal to the prescribed minimum.

Article 35

Where the laws of a Member State authorise total or partial redemption of the subscribed capital without reduction of the latter, they shall at least require that the following conditions are observed:

a where the statutes or instrument of incorporation provide for redemption, the latter shall be decided on by the general meeting voting at least under the usual conditions of quorum and majority. Where the statutes or instrument of incorporation do not provide for redemption, the latter shall be decided upon by the general meeting acting at least under the conditions of quorum and majority laid down in Article 40. The decision must be published in the manner prescribed by the laws of each Member State, in accordance with Article 3 of Directive 68/151/EEC;

b only sums which are available for distribution within the meaning of Article 15(1) may be used for redemption purposes;

c shareholders whose shares are redeemed shall retain their rights in the company, with the exception of their rights to the repayment of their investment and participation in the distribution of an initial dividend on unredeemed shares.

Article 36

1 Where the laws of a Member State may allow companies to reduce their subscribed capital by compulsory withdrawal of shares, they shall require that at least the following conditions are observed:

a compulsory withdrawal must be prescribed or authorised by the statutes or instrument of incorporation before subscription of the shares which are to be withdrawn are subscribed for;

b where the compulsory withdrawal is merely authorised by the statutes or instrument of incorporation, it shall be decided upon by the general meeting unless it has been unanimously approved by the shareholders concerned;

c the company body deciding on the compulsory withdrawal shall fix the terms and manner thereof, where they have not already been fixed by the statutes or instrument of incorporation;

d Article 32 shall apply except in the case of fully paid-up shares which are made available to the company free of charge or are withdrawn using sums available for distribution in accordance with Article 15(1); in these cases, an amount equal to the nominal value or, in the absence thereof, to the accountable par of all the withdrawn shares must be included in a reserve. Except in the event of a reduction in the subscribed capital this reserve may not be distributed to shareholders. It can be used only for offsetting losses incurred or for increasing the subscribed capital by the capitalisation of such reserve, insofar as Member States permit such an operation;

e the decision on compulsory withdrawal shall be published in the manner laid down by the laws of each Member State in accordance with Article 3 of Directive 68/151/EEC.

2 Articles 30(1), 31, 33 and 40 shall not apply to the cases to which paragraph 1 refers.

Article 37

1 In the case of a reduction in the subscribed capital by the withdrawal of shares acquired by the company itself or by a person acting in his own name but on behalf of the company, the withdrawal must always be decided on by the general meeting.

2 Article 32 shall apply unless the shares are fully paid-up and are acquired free of charge or using sums available for distribution in accordance with Article 15(1); in these cases an amount equal to the nominal value or, in the absence thereof, to the accountable par of all the shares withdrawn must be included in a reserve. Except in the event of a reduction in the subscribed capital, this reserve may not be distributed to shareholders. It may be used only for offsetting losses incurred or for increasing the subscribed capital by the capitalisation of such reserve, insofar as the Member States permit such an operation.

3 Articles 31, 33 and 40 shall not apply to the cases to which paragraph 1 refers.

Article 38

In the cases covered by Articles 35, 36(1b) and 37(1) when there are several classes of shares, the decision by the general meeting concerning redemption of the subscribed capital or its reduction by withdrawal of shares shall be subject to a separate vote, at least for each class of shareholders whose rights are affected by the transaction.

Article 39

Where the laws of a Member State authorise companies to issue redeemable shares, they shall require that the following conditions, at least, are complied with for the redemption of such shares:

a redemption must be authorised by the company's statutes or instrument of incorporation before the redeemable shares are subscribed for;

b the shares must be fully paid up;

c the terms and the manner of redemption must be laid down in the company's statutes or instrument of incorporation;

d redemption can be only effected by using sums available for distribution in accordance with Article 15(1) or the proceeds of a new issue made with a view to effecting such redemption;

e an amount equal to the nominal value or, in the absence thereof, to the accountable par of all the redeemed shares must be included in a reserve which cannot be distributed to the shareholders, except in the event of a reduction in the subscribed capital; it may be used only for the purpose of increasing the subscribed capital by the capitalisation of reserves.

f subparagraph e shall not apply to redemption using the proceeds of a new issue made with a view to effecting such redemption;

g where provision is made for the payment of a premium to shareholders in consequence of a redemption, the premium may be paid only from sums available for distribution in accordance with Article 15(1), or from a reserve other than that referred to in e which may not be distributed to shareholders except in the event of a reduction in the subscribed capital; this reserve may be used only for the purposes of increasing the subscribed capital by the capitalization of reserves or for covering the costs referred to in Article 3j or the cost of issuing shares or debentures or for the payment of a premium to holders of redeemable shares or debentures.

h notification of redemption shall be published in the manner laid down by the laws of each Member State in accordance with Article 3 of Directive 68/151/EEC.

Article 40

1 The laws of the Member States shall provide that the decisions referred to in Articles 29(4) and (5), 30, 31, 35 and 38 must be taken at least by a majority of not less than two thirds of the votes attaching to the securities or the subscribed capital represented.

2 The laws of the Member States may, however, lay down that a simple majority of the votes specified in paragraph 1 is sufficient when at least half the subscribed capital is represented.

Article 41

1 Member States may derogate from Article 9(1), Article 19(1a), first sentence, and b and from Articles 25, 26 and 29 to the extent that such derogations are necessary for the adoption or application of provisions designed to encourage the participation of employees, or other groups of persons defined by national law, in the capital of undertakings.

2 Member States may decide not to apply Article 19(1a), first sentence, and Articles 30, 31, 36, 37, 38 and 39 to companies incorporated under a special law which issue both capital shares and workers' shares, the latter being issued to the company's employees as a body, who are represented at general meetings of shareholders by delegates having the right to vote.

Article 42

For the purposes of the implementation of this Directive, the laws of the Member States shall ensure equal treatment to all shareholders who are in the same position.

Article 43

1 Member States shall bring into force the laws, regulations and administrative provisions needed in order to comply with this Directive within two years of its notification. They shall forthwith inform the Commission thereof.

2 Member States may decide not to apply Article 3g, i, j and k to companies already in existence at the date of entry into force of the provisions referred to in paragraph 1.

They may provide that the other provisions of this Directive shall not apply to such companies until eighteen months after that date.

However, this time limit may be three years in the case of Articles 6 and 9 and five years in the case of unregistered companies in the United Kingdom and Ireland.

3 Member States shall ensure that they communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

ANNEX B

Extract from the Companies Bill 1973

30 55.—(1) Notwithstanding anything in a company's memorandum or articles, the directors shall not without the prior approval of the company in general meeting exercise any power of the company to issue shares.

Approval of company required for issue of shares by directors.

(2) Approval for the purposes of this section may be confined 35 to a particular exercise of that power or may apply to the exercise of that power generally; and any such approval may be unconditional or subject to conditions.

(3) Any approval for the purposes of this section shall continue in force until—

40 (a) the conclusion of the annual general meeting commencing next after the date on which the approval was given; or

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(b) the expiration of the period within which the next annual general meeting after that date is required by law to be held,

whichever is the earlier; but any approval may be previously revoked or varied by the company in general meeting. 5

(4) The directors may issue shares notwithstanding that an approval for the purposes of this section has ceased to be in force if the shares are issued in pursuance of an offer, agreement or option made or granted by them while the approval was in force and they were authorised by the approval to make or 10 grant an offer, agreement or option which would or might require shares to be issued after the expiration of the approval.

(5) Section 143 of the Act of 1948 shall apply to any resolution whereby an approval is given for the purposes of this section. 15

(6) Any issue of shares made by a company in contravention of this section shall be void and consideration given for the shares shall be recoverable accordingly.

(7) Any director who knowingly contravenes, or permits or authorises the contravention of, this section with respect to 20 any issue of shares shall be liable to compensate the company and the person to whom the shares were issued for any loss, damages or costs which the company or that person may have sustained or incurred thereby; but no proceedings to recover any such loss, damages or costs shall be commenced after the 25 expiration of two years from the date of the issue.

(8) This section shall not apply to any issue of shares of a company before—

(a) the beginning of the annual general meeting commencing next after the coming into operation of this section; 30 or

(b) the expiration of the period within which the next annual general meeting after the coming into operation of this section is required by law to be held,

whichever is the earlier. 35

Extract from the Companies Bill 1973

20 24.—(1) This section shall have effect with respect to the variation of the rights attached to any class of shares of a company whose share capital is divided into shares of different classes.

Variation of rights attached to special classes of shares.

(2) Except where the rights are attached to the class of shares 25 by the memorandum, the articles of the company shall, if they do not contain any provision with respect to the variation of the rights, be deemed to contain a provision corresponding to regulation 4 in Part I of Table A.

(3) Where the rights are attached to the class of shares by 30 a memorandum delivered for registration under section 12 of the Act of 1948 and—

(*a*) provision for the variation of those rights is contained in articles delivered for registration with the memorandum; or

35 (*b*) the said regulation 4 applies to the company by virtue of section 8(2) of that Act (Table A to apply where no articles are registered etc.),

those rights shall be capable of variation in accordance with the articles as for the time being in force whether or not 40 reference is made in the memorandum to their variation in that manner.

(4) The provisions of section 73 below and of section 133 (length of notice for calling meetings), section 134 (general provisions as to meetings and votes) and section 140 (circulation of

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members' resolutions) of the Act of 1948 shall, so far as applicable, apply in relation to any meeting of shareholders required by a provision for the variation of the rights attached to a class of shares which is, or by virtue of this section is deemed to be, contained in a company's articles and shall so apply with the 5 necessary modifications and subject to the following provisions—

(*a*) the necessary quorum at any such meeting other than an adjourned meeting shall be two persons at least holding or representing by proxy one-third of the issued shares of the class in question and at any adjourned 10 meeting one person holding shares of the class in question;

(*b*) any holder of shares of the class in question present in person or by proxy may demand a poll.

(5) Where the articles of a company contain, or by virtue 15 of this section are deemed to contain, a provision for the variation of the rights attached to any class of shares those rights shall not be capable of variation otherwise than in accordance with that provision.

(6) Any provision deemed by virtue of this section to be 20 contained in a company's articles shall be subject to alteration in like manner as a provision in fact contained therein; but any alteration of a provision for the variation of the rights attached to a class of shares which is, or by virtue of this section is deemed to be, contained in a company's articles shall 25 itself be treated as a variation of those rights.

(7) In this section and, except where the context otherwise requires, in any provision for the variation of the rights attached to a class of shares contained in a company's articles references to the variation of those rights shall include references to their 30 abrogation.

(8) Nothing in subsection (5) above shall be construed as derogating from the powers of the court under section 70 below or under section 206 or 208 of the Act of 1948.

Extract from the Companies Bill 1973

Shares with special rights

Registration of particulars of special rights.

23.—(1) Where a company issues shares with rights which are not stated in its memorandum or articles or in any resolution 35 or document to which section 143 of the Act of 1948 applies the company shall, unless the shares are in all respects uniform with shares previously issued, deliver to the registrar of companies within fourteen days of issuing the shares a statement in the prescribed form containing particulars of those rights. 40

(2) Where the rights attached to any shares of a company are varied otherwise than by an amendment of the company's memorandum or articles or by a resolution or document to which the said section 143 applies, the company shall within fourteen

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days of the date on which the variation is made deliver to the registrar of companies a statement in the prescribed form containing particulars of the variation.

(3) Where a company (otherwise than by any such amendment, 5 resolution or document as is mentioned in subsection (2) above) assigns a name or other designation, or a new name or other designation, to any class of its shares it shall within fourteen days of doing so deliver to the registrar of companies a notice in the prescribed form giving particulars thereof.

10 (4) Where a company has before the date of the coming into operation of this section issued shares with such rights as are mentioned in subsection (1) above, the company shall within three months of that date deliver to the registrar of companies a statement in the prescribed form containing particu-15 lars of those rights.

(5) If a company fails to comply with this section, the company and every officer of the company who is in default shall be guilty of an offence and liable on summary conviction to a default fine.