COMMISSION OF THE EUROPEAN COMMUNITIES

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PART III

AMENDED PROPOSAL FOR A COUNCIL REGULATION

ON THE STATUTE FOR EUROPEAN COMPANIES

- Explanatory Notes to the Statute and its Annexes

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presented by the Commission to the Council pursuant to the second paragraph of Article 149 of the EEC Treaty

COM (75) 150 final
PART III

C O N T E N T S

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EXPLANATORY NOTES

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I. INTRODUCTION

The European Parliament and the Economic and Social Committee have issued Opinions on the proposal for a Council Regulation on the Statute for European Companies. In the light of these Opinions, the Commission has altered its original proposal under the Article 149 (2) of the Treaty establishing a European Economic Community.

At the same time, it has carried out the adjustments made necessary by the accession of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland.

At the express request of the European Parliament and the Economic and Social Committee, the provisions of the proposal have been further aligned on the proposals put forward in the meantime by the Commission concerning the coordination of the safeguards under national company law and on the alterations made by the Commission to its earlier proposals on this subject. The provisions of the proposal were also brought into line with the work on the creation of European law by means of conventions, and in particular with the draft Convention on the international merger of limited companies, which was drawn up by Government experts from the six original Member States in accordance with the third paragraph of Article 220 of the EEC Treaty.

This alignment is necessary in order to prevent comparable matters being regulated in the coordinated laws of Member States or in the Conventions concluded between Member States, otherwise than in the Statute for European Companies unless there is good reason.

Lastly, account was taken of the view of of numerous business associations and trade union organizations and of the theoretical considerations regarding the Commission's proposal of a European Company Statute.

The changes are explained below. Attention is drawn in the notes on individual Articles to any adjustment or rearrangement of provisions.

II. NOTES ON THE INDIVIDUAL PROVISIONS

TITLE I - GENERAL PROVISIONS

At the request of the European Parliament and the Economic and Social Committee, access to the legal form of a European Company has been extended.

The minimum capital required for three types of constitution has been appreciably lowered.

In addition, undertakings established in a legal form other than that of a company limited by shares may also form a joint subsidiary.

Article 2

1. The right to form a joint subsidiary is to be granted not only to public limited companies and to the private limited companies and cooperative societies specifically mentioned by the Parliament and by the Economic and Social Committee but also to other companies having legal personality and other corporations engaging in economic activity in the Community.

2. It does not at present appear possible to extend the right of access to the S.E. further.

The right to form an S.E. by merger or by forming a holding company must continue to be reserved for undertakings established in the legal form of a company limited by shares. The exchange of shares associated with these types of constitution (Articles 21 and 29) is practicable only where the founder companies have this legal form.

In the Republic of Ireland and in the United Kingdom any undertaking having the legal form of a "company limited by shares", i.e. including "private companies", may participate in the formation of an S.E. by merger or by setting up a holding company. The difference between "private companies" and other kinds of "limited company" is not such as to make special treatment appear justified.

3. The request was made that the right to be incorporated as a European company be extended not only to undertakings established in a different legal form from that of a company limited by shares but also to undertakings which had already merged at European level before the effective date of the Statute.

A change of this sort would necessitate a special procedure for examining whether the economic characteristics required for the formation of a European company were satisfied. This would make it necessary for the original proposal to be radically altered and would lead to great technical difficulties. For these reasons the criteria for forming an S.E. will continue to be legal characteristics only.

4. The Economic Committee of the European Parliament expressly requested that access to the form of a European company be even further extended. In its view, natural persons should also be able to form a European company.

However, the objective of the S.E. which formed the basis of the Commission proposal and which has been approved is to act as a means of integrating existing undertakings. It is designed to stop a loophole occasioned by the fact that the machinery for cooperation between undertakings is rooted in national legal systems. Because of the restricted scope of these national systems, which end at the intra-Community frontiers, there is no suitable instrument for cross-frontier coooperation. The European company is intended to facilitate such cooperation by means of established machinery appropriate to the scale of the common market and independent of national law.

There is an urgent economic need for this in the Community.

For the formation of new undertakings, on the other hand, the national instruments provide an adequate formal solution for the present.

5. Paragraph 3 deals with the extent to which the founder companies and corporations participating in the formation of an S.E. must be recognized pursuant to the Convention on the mutual recognition of companies and bodies corporate of 29 February 1968.

The consequences for an S.E. which flow from non-recognition of a founder company by a Member State must be kept within the tightest possible limits. The proposal therefore aims at ensuring that only those Member States to whose laws one of the companies or corporations participating in the formation is subject must have recognized the founder companies, and other corporations participating in the formation pursuant to the Convention on recognition of 29 February 1968.

Article 3

Paragraph 1 lays down rules concerning the participation of an existing S.E. in the establishment of an S.E. by merger or the formation of a holding company. Paragraph 2 concerns the formation of a joint subsidiary. This change follows from the new version of Article 2.

Paragraph 4 covers those cases where, in addition to an S.E., founder companies from various Member States participate in the formation of another S.E. In such cases, recognition of the founder companies incorporated under national law is accorded by analogy with Article 2(3).

Article 4

The European Parliament and the Economic and Social Committee were in favour of lowering the minimum capital. The Commission has complied with the Opinion of the European Parliament. In so doing and in order that the minimum capital required for the various types of constitution should not vary too greatly, it has also lowered the capital required in the case of a merger or the formation of a holding company.

Article 5

The Commission is holding by its proposal to allow the European company to have several registered offices. In the Commission's view, the legal considerations which led the European Parliament to oppose this proposal are not sufficient to outweigh the advantages connected with the possession of a number of registered offices.

The Commission provided an opportunity of opting for possession of a number of registered offices to combat the psychological difficulties which may arise as a result of companies participating in the formation of an S.E. being closely connected by name and tradition with the country in which their own registered office is situated. The european character of the new legal form would be severely circumscribed if this opportunity were not available.

Problems arise from the admissibility of possessing several registered offices only in legal disputes concerning the internal affairs of the companies (repeal of resolutions of the General Meeting, for example), where conflicting decisions by several competent courts must be avoided.

Under Article 16 of the Convention on Jurisdiction and the Enforcement of Civil and Commercial Judgements of 27 September 1968, the court where the company's registered office is situated has exclusive jurisdiction in such internal disputes. However, the jurisdictional conflicts arising here-from will be settled by reccurse to the provision contained in Article 23 of the Convention, under which the court last appealed to declines juris-diction in favour of the court first appealed to.

In order to avoid any difficulty or uncertainty in applying the above Convention, and its Articles 16 and 53 in particular, to the European Company, Articles 10-a-, 10-b- and 10-c- have been added and reference should be made to the explanatory notes thereon.

Article 6

1. In accordance with the wishes of the European Parliament but contrary to the opinion of the Economic and Social Committee, the irrebuttable character of the presumptions arising under paragraph 2, which enable the existence of a controlling influence within the meaning of paragraph 1 to be deduced from circumstances alone, has been retained.

2. The grounds for presumption contained in paragraph 2 will in future also include "indirect" power to exert influence. The grounds have consequently been extended to cover cases where undertakings can dispose of the power to exert influence referred to in paragraph 2 through other dependent undertakings or intermediaries.

3. At the request of the European Parliament, the irrebutable presumption of dependence arising under the original paragraph 2 (c) when a controlling influence is exerted under a contract has been dropped. However, contrary to the Parliament's wish, it has not been incorporated in paragraph 3 as a rebuttable presumption, since contrary to what is the case with the other presumptions, it only reiterates the criterion for "controlling influence" within the meaning of paragraph 1 and consequently can in no way facilitate determination as to whether it exists.

The wording of the presumption in paragraph 3 and of the provision in paragraph 4 on calculating the extent of the shareholding has been changed.

Paragraph 3 is extended, by analogy with the rule in paragraph 2, to include cases where influence is exercised indirectly through shares held by another dependent undertaking.

4. The extension of the rule in paragraph 3 to include indirect influence has made the sentence in paragraph 4 governing this situation redundant,

and therefore only the provision contained in the second sentence of this paragraph need be retained.

Article 7

This provision has been retained against the wishes of the Economic and Social Committee. It is important as regards drawing the line between the Statute and the national laws under which the S.E. must operate.

For clarification it was expressly emphasized that, for purposes of applying the Statute, the common rules and general principles of the laws of the Member States as referred to in Article 7(1)b are regarded as being incorporated therein. It is in no way unusual for common principles of national law to be incorporated in Community law in this way. An example is the ruling on the non-contractual liability of the Community in Article 215 of the EEC Treaty.

Article 8

Paragraph 1 has been supplemented by a reference to the documents to be filed in the European Commercial Register. This appeared desirable in view of the provisions of paragraphs 3 and 4 concerning the filed documents.

In accordance with the wishes of the European Parliament, a requirement to file duplicates of the documents filed in the European Commercial Register in the supplementary register in the Member State where the S.E. has its registered office has been added to paragraph 3.

Article 9

At the request of the European Parliament and to prevent incorrect details being published, the daily newspaper has been deleted from the

list in paragraph 1 of official journals whose published contents entail legal consequences (Article 9-a-(3)).

In addition, it has been laid down that only the text in the original language of a notice published in the Official Journal is to be authentic. A similar provision also applies, for example, to the offering of public construction contracts for tender. This is necessary in order to avoid legal uncertainty caused by ambiguous translations.

Article 9-a-

The provisions of Article 9-a- are based closely on Article 3 of the first Directive on the coordination of safeguards in company law. They originate in a proposal by the Economic and Social Committee's Section for Economic Questions. In its report the latter recommended drawing up, for the S.E., a coherent set of rules on publication.

Article 10

This Article has merely been reworded.

Articles 10-a-, 10-b- and 10-c-

1. The Convention on jurisdiction and the enforcement of civil and commercial judgments (27 September 1968) will normally apply to law-suits to which an S.E. is a party. This is particularly the case as to Article 16(2) of the Convention, which awards sole competence to the courts of the State in which the companies or other corporate bodies have their registered office in all matters regarding validity, nullity or dissolution and the decisions taken by their governing bodies. The

case is again the same under Article 53, which assimilates the registered office of companies and other corporate bodies to their permanent residence for the purposes of the Convention.

However, where there is more than one registered office and several courts in different States may therefore have sole jurisdiction, some doubt may arise as to the recognition, in the State of execution where another registered office lies, of a judgment given by a court that likewise has sole jurisdiction.

2. In order to avoid any difficulty or uncertainty, there is good reason for stating in express terms, even though this point is in fact covered by Article 7(1), that only the registered office specified in the statutes and not any other de facto office should be taken into account for the purposes of the above Convention (Article 10-a-).

3. Further, where there is more than one registered office, giving rise to exclusive jurisdiction on the part of courts of several Member States, it is desirable that the provisions as to interrelated actions should be strengthened as against those of Article 22 of the above Convention.

Two alterations are necessary: the one requiring the court seised in second place to stay proceedings, the other applying the interrelationship rule so as similarly to have proceedings halted even where interrelated actions

are not pending at the same level of jurisdiction. Contrary to abandonment of proceedings, suspension does not in fact have the effect of depriving the parties of any resort of jurisdiction, and it is moreover imperative for an S.E. that has registered offices in more than one country that conflicting decisions should be avoided (Article 10-b-).

For the rest, Article 22 of the Convention of 27 September 1968 applies in full, particularly as regards the definition of interrelationship. Article 23 of this Convention, which relates to litispendence in the case of an application falling within the sole jurisdiction of more than one court, will naturally apply without there being any need for special provision to be made in respect of the S.E.

4. It also seems right for express provision to be made to eliminate any likelihood of non-recognition in a State of execution due to the exclusive jurisdiction of its courts being repudiated by a court having similar sole jurisdiction in another Member State (Article 10-c-).

TITLE II - FORMATION

Title II, particularly the first two Sections, has been aligned to a considerable extent on the provisions of the amended proposal for a third Directive on the coordination of safeguards in connection with mergers between limited companies (COM/72/1668, 4 January 1973) and on the draft Convention on the International Merger of limited companies drawn up on the basis of Article 220 of the EEC Treaty (published as Supplement 13/73 to the Bulletin of the European Communities). This applies in particular to the first two Sections.

This met the wishes of the European Parliament and of the Economic and Social Committee. A legal act such as the merger of limited companies should, as far as possible, take place under the same conditions throughout the Community, irrespective of whether national or Community law applies.

In the new version, an attempt has been made under the provisions applicable to the formation of each type of company to give a coherent picture of all the formalities that must be completed.

In the section entitled "General" only those provisions have been retained which are applicable without additions or restrictions to all methods of formation. These are, in particular, the provisions concerning the Statutes, the supervision of formation by the European Court of Justice and the requirements which the auditors must satisfy.

The provisions of Section 2 on formation by merger have been complemented in particular by rules concerning the effects of mergers on employees (Articles 23a to 23d; see Article 6 of the proposal for a third Directive).

It proved possible to consolidate the provisions of Section 3 on formation by establishment of a holding company by making greater use of the possibility of referring to parallel provisions on mergers.

As to the rules in Section 4 on formation of a joint subsidiary and in Section 5 on formation of a subsidiary, it was necessary to ensure that the requisite protection guarantees were afforded also on the formation of this type of company in the event of all or a considerable part of the assets of the founder companies being transferred to a joint subsidiary.

Section one - General

Article 11

1. Paragraph 1 now makes clear that the founder companies are responsible for applying for registration of the S.E.

2. Paragraph 2 contains provisions concerning the documents relating to formation which must be appended to the application, and at the same time indicates the contents of Title II.

3. Paragraph 3 gives a definition of the expression "founder companies" for the purposes of Title II. This provision has become necessary because corporations other than limited companies have been authorized to participate in forming an S.E. It would be too unwieldy if reference had to be made to the provisions of Articles 2 and 3 each time the founders of the S.E. were mentioned.

Article 12

1. Article 12 now contains only the provisions of Article 12(3) of the old version concerning the authentication by notarial act of the document of constitution and refers in respect of the other requirements as to this instrument to the provisions relating to each mode of formation.

2. The Commission has maintained the notarial form for the document of constitution and the Statutes of the S.E. (Art. 13).

It is of great importance for the formation of the S.E. that the documents relating to formation should not contain any errors. In an international procedure such as the formation of an S.E., authentication by notarial deed appears to offer the best guarantee against the inaccuracy of the formation documents and the resulting dangers for the parties to the formation. The Commission considers that notaries in all Member States will be able to prepare themselves for the new tasks imposed on them by the Statute.

Article 13

1. The provisions of this Article consolidate the requirements as to the form and substance of the Statutes of the S.E.

2. Paragraph 2(a) on the name of the S.E. has been changed, in accordance with the proposal contained in the report of the Economic and Social Committee's Section for Economic Questions, so as to include the abbreviation "S.E." in the name of the company and thus to extend legal protection to it.

Moreover, provision is made in the Annex to the Statute for Member States to penalise unlawful use of the description "European company" and of the abbreviation "S.E."

Subparagraph c on the object of the undertaking has been aligned on Article 18(c) of the original proposal.

The changes to subparagraph d on the particulars concerning the shares issued are solely aimed at achieving greater clarity.

Subparagraph e of the original proposal concerning the accounting currency has been deleted because the relevant provisions of Article 40 make it redundant.

Subparagraphs f and g in the new version set out the particulars required concerning the Supervisory Board and the Board of Management of the S.E. which formerly appeared in Article 12(2)d.

Article 14

The rules contained in Article 14 have been incorporated in the provisions on the various modes of formation.

Article 15

1. The provision consolidates the rules on the appointment of auditors (paragraph 1), the qualifications required of them (paragraph 2) and their liability (paragraph 3).

The requirements as to the auditors' report have, on the other hand, been incorporated in the provisions on the various modes of formation.

2. Paragraph 1 on the appointment of auditors corresponds to Article 12(1) of the draft Convention on the International Merger of limited companies.

3. The provisions of paragraph 2 on the requirements as to auditors have been changed to meet the wishes of the European Parliament so as to take account of the admission and examination procedures in the new Member States.

In addition - in order to avert any encroachment upon the independence of auditors as far as may be possible - ineligibility on the grounds of dependence on a founder company has been made retroactive.

The last sentence of paragraph 2, which provides that the auditors may be the persons responsible for examining the annual accounts, corresponds to the second sentence of Article 5(2) of the amended proposal for a third Directive and to the second sentence of Article 12(3) of the draft Convention on the International Merger of limited companies.

4. Paragraph 3 regarding the liability of auditors replaces the earlier Article 20(3). The rules as to liability correspond to those applying to auditors examining the annual accounts (Article 209), to Members of the Board of Management (Articles 71 and 72a), and to the Supervisory Board of the S.E. (Articles 81 and 81a).

It stands to reason that all these persons, who in one way or another are responsible for safeguarding the assets of the S.E., should bear liability on a common basis.

5. Paragraph 4 has been added in order to regulate proceedings in connection with the liability of the S.E.

Article 16

Article 16 has been included among the provisions for the formation of subsidiary companies, to which it is of material importance (Articles 35-c- and 38(5)).

Article 17

1. On a proposal from the Economic and Social Committee, paragraph 2 of the original version has been deleted. Its subject - the calling in of accountants to assist the European Court of Justice - should be dealt with in the procedural regulation of the court, together with any other assistance required by the latter in reaching its decisions. In the Statute this provision can give rise to misunderstandings as to the purpose of the audit, which is purely a means of legal check.

2. In paragraph 2 the grounds on which registration may be refused have been reduced in number. The Court of Justice may refuse registration only where the provisions of the Statute relating to formation have not been complied with (paragraph 3(a) of the original version) or where the Statutes of the S.E. do not comply with the Statute (paragraph 3(c) of the original version).

Paragraph 3(b) of the original version (incompleteness of the formation documents) is redundant; it is replaced by paragraph 3 of the new version (supplementing of the documents relating to formation which have been filed).

Paragraph 3(d) of the original version has been deleted because it is ambiguous. This reason for refusal could have given the impression that the Court of Justice was required to carry out an assessment of the auditors' report from a financial point of view. This is not the case, especially since the new provision in Article 20(2) effectively ensures that capital is fully paid up.

3. Paragraph 3 corresponds to paragraph 4 of the original version but has been broadened in scope by the addition of the words "and the documents relating to formation which they have filed".

4. The substance of paragraph 4 corresponds to that of paragraph 5 of the old version.

Article 18

1. The provisions of Article 18 (1) have been aligned on Article 13. The new version of Article 8 and 9 has made subparagraph h of the original version redundant, since the company journals no longer include daily newspapers designated by the company.

2. In paragraph 2 the provision concerning publication in the company journals of the conclusions contained in the auditor's report has been deleted. Auditors' reports are now fully incorporated in the document of constitution (Articles 22, 30, 35 and 38). The document of constitution may be inspected at the European Commercial Register and its branches by all interested persons (Articles 17 (4) and 8 (4)). Consequently, there is no need for special publication of it.

In line with the underlying thinking behind Article 2 (1) d2 of the First Directive it must be immediately evident to any third party what arrangements have been made as regards the limits of the powers of individual members of the Board of Management to represent the company, even if the company's Board is limited to one member. (European Court of Justice case 32/74 "HAAGA").

Article 19

Paragraph 1 stipulates the date from which the S.E. has legal personality (see Article 26 (2)).

Paragraph 2 makes clear that the liability dealt with therein exists only in respect of obligations entered into vis-à-vis third parties.

At the request of the European Parliament, paragraph 3 provides for the newly-formed S.E. to assume liability for such obligations.

Article 20

1. At the request of the Economic and Social Committee, paragraph 1 no longer refers to the "persons responsible" for the founder companies but to the "governing bodies" of the latter.

2. Paragraph 2 now expressly extends the liability of the founder companies and the members of their governing bodies to ensuring that the capital is fully paid up. This is to make certain that the S.E. can have access to its capital from the moment it acquires legal personality.

3. Under paragraph 3 of the new version only the members of the governing bodies of the founder companies may be relieved of liability. The founder companies themselves are in all cases liable for any breach of duty.

Section two - Formation by merger

Article 21

1. As regards the definition of the merger procedure, the wording of paragraph 1 has been aligned on Article 2(3) of the amended proposal for a third Directive and on Article 4 of the draft Convention on international mergers.

2. Paragraph 2 corresponds to Article 2(5) of the proposal for a Directive and to Article 6 of the draft Convention.

Article 22

1. This Article concerning the requirements as to the draft document of constitution has been modelled on Articles 3 and 5(3) of the amended proposal for a third Directive and on Articles 8 and 9 of the draft Convention on mergers.

2. It further covers the case where a founder company has been in existence for less than three complete financial years (Article 22(2) c and e of the new version). Such companies should also be able to participate in the formation.

3. The provisions of Article 22 of the old version concerning the preparation of a balance sheet are contained in Article 22a, while the provisions on auditing have been consolidated in Article 23.

Care has been taken to ensure that all particulars and reports relevant to an assessment of the formation are incorporated in the draft document of constitution itself.

Article 22-a-

1. This Article contains the balance sheet regulations applicable in the event of formation by merger. Paragraph 1 corresponds to Article 14(1), (2) and (4) of the old version. Article 14(3) applies only to the formation of a subsidiary and consequently has been retained solely in that connection. Article 14(4) of the old version has been amended so as to cover, in particular, benefits and allowances granted to persons who, in order to make possible the formation of an S.E., resign from a founder company or from its governing bodies.

2. Paragraph 2 corresponds to Article 22(2)b of the original proposal. It has been aligned on Article 5(4) of the amended proposal for a third Directive and on Article 10 of the draft Convention on mergers.

Article 23

This Article now contains a comprehensive set of rules concerning the formation audit in the event of formation by merger.

It has been drawn up on the basis of Article 5(2) of the amended proposal for a third Directive and of Article 12(5) and (6) of the Convention on mergers. This amendment to the original proposal also takes account of a request of the Economic and Social Committee in connection with Article 22 of the old version.

Article 23-a-

Under this Article the governing bodies of the founder companies must explain the draft document of constitution and specify the consequences of the merger on the employees affected by it.

It appears proper that the remarks of the governing bodies should be consolidated into a single report rather than as laid down in Articles 5 and 6 of the third Directive and to incorporate this in the draft document of constitution (as was laid down in the first paragraph in the original Commission proposal).

The wording of this Article has been aligned on Articles 5(1) and 6(1) of the amended proposal for a third Directive.

Article 23b

This Article ensures that the draft document of constitution is made public in an appropriate manner. Previously this was dealt with in Article 24 in connection with approval of the merger by the General Meeting (Article 24(2) and (3)). Logically, it is preferable that these provisions should precede the Articles dealing with the - newly-introduced - discussion of the effects of the merger with the employees' representatives (Article 23c) and the approval of the merger by the shareholders (Article 24).

The new version recognizes that shareholders should not have to pay for copies of the documents relating to formation (see Article 5(5) of the amended proposal for a third Directive). Since this also applies to employees of the founder companies and to other persons whose interests are affected by the merger (debenture holders), provision has been made for the draft document of constitution to be supplied free of charge.

Article 23c

1. By analogy with the rule contained in Article 6 of the amended proposal for a third Directive, provision has been made for the effects of the merger to be discussed with the employees' representatives (paragraph 1).

2. In addition, paragraph 2 refers to those organizations or representatives who under the law applicable to the founder companies must be consulted in the event of a merger.

In the case of companies incorporated under national law, this means those persons or organizations which the Member States will designate for the purpose, under Article 6 of the third Directive, or which they have already designated.

If one of the founder companies is an S.E., the European Works Council must be consulted (where establishment of the latter is required under Article 100).

3. By analogy with Article 6 of the proposal for a third Directive, paragraph 3 lays down that the governing bodies and the employees' representatives must open negotiations with a view to reaching an agreement on measures to be taken in respect of the employees in the event of a merger (paragraph 3). The governing bodies of the founder companies must always open such negotiations where the employees' representatives consider that the interests of the employees might be affected. Any agreement reached on the measures to be taken in respect of the employees must be set down in writing.

4. If no agreement is reached as a result of the negotiations, paragraph 4 enables the employees' representatives to put forward in writing their views on the effects of the merger on the employees and on the results of the consultations and negotiations. Under paragraph 5 these views are notified to the General Meeting by the governing body of the company concerned. Thus, the General Meeting reaches its decision in full awareness of the views of the governing body and of the employees.

5. In any case, under paragraph 5 the General Meeting receives a report by the governing body on the results of the discussions and negotiations with the employees' representatives, if the latter have requested such negotiations under paragraph 3.

Reference must be made in the report either to agreement reached or to failure of the negotiations, or the reasons for the likely continuation of negotiations must otherwise be stated. The working of the General Meeting is not dependent, under these provisions, on the outcome of the negotiations.

The report must also contain any agreement reached (paragraph 3) or the written views of the employees (paragraph 4).

Article 23d

1. Where no agreement is reached on the measures to be taken in respect of the employees in the event of a merger, the question may be referred to an arbitration board. Arbitration proceedings are necessary in such a case to prevent the management deciding unilaterally in the last resort on the measures to be taken in respect of the employees, for failure to reach agreement does not prevent the merger. *)

2. In such a case therefore, the arbitration board, after hearing the parties, decides on the measures to be taken by the particular founder company or, later, by the S.E. where the latter acquires legal personality during the proceedings. The provisions concerning arbitration proceedings contained in Article 23d (2) and (3) are modelled on the corresponding provisions in Articles 128 and 129.

3. Paragraph 4 consists solely of a procedural provision intended to ensure the continuity of arbitration proceedings where the S.E. acquires legal personality during such proceedings (Article 19).

Article 24

1. As regards approval of the merger by the General Meeting, paragraph 1 no longer refers to the rules applicable to the winding up of the founder company but, as a general rule, to the provisions applicable in respect of mergers. Where an S.E. is a founder company, the provisions which apply are contained in Title XI.

2. Paragraphs 2 and 3 of Article 24 of the old version are incorporated in Article 23b.

3. Paragraph 2 of the new version takes account of the fact that another S.E. may participate in the formation of an S.E. The former reference to "national law" was imprecise.

*) See also Article 8 of the Proposal for a Directive on the retention of the rights and advantages of employees in the case of mergers, takeovers and amalgamations (COM/74/351 final of 29 May 1974 - O.J. No. C104/1 of 13th September 1974).

4. The last sentence of paragraph 4 of the new version takes account of the fact that non-shareholders are also interested in obtaining copies of the minutes of the General Meeting (see the notes to Article 23b).

Article 25

1. The changed wording of paragraph 1 defines more clearly the scope of the rules concerning the right of shareholders to challenge resolutions of General Meetings. The period within which application may be made to the Court has been extended.

2. Paragraph 2 sets out more succinctly than before the conditions under which the European Court of Justice may exercise the right to grant shareholders a special extension of time in which to challenge resolutions. Prima facie evidence must be produced to the Court of Justice that:

- the shareholder making the application was unable, through no fault of his own, to comply with the conditions of paragraph 1 and
- the resolution of approval is invalid.

Under the previous version of this paragraph, the production of prima facie evidence was required only in respect of the invalidity of the resolution. However, the Court of Justice should also be relieved of the necessity for a protracted examination of the matter with regard to the first condition and it would thus seem proper to allow the production of prima facie evidence to suffice here also.

3. Paragraph 3 ensures that the S.E. is not registered before the expiration of the periods for commencement of proceedings for cancellation or declaration of nullity. This addition would appear necessary to ensure that the shareholders' interest in protecting their legal rights does not become unenforceable due to the S.E. having acquired legal personality.

Article 26

1. Article 26 of the previous version has been supplemented by the requirement in paragraph 1 of the new version that the governing bodies of the founder companies inform the European Court of Justice

whether the resolution of the General Meeting has been challenged. This may enable the Court under Article 25 (3) to postpone registration where appropriate.

2. Paragraph 2 corresponds to Article 28(2) and (3) of the old version. To avoid legal uncertainty provision has been made for the founder companies to cease to exist on the day following the date of publication of the notice of formation of the S.E. (in this connection, see also Article 19 (1).)

Article 27

1. The system for protecting creditors contained in the original Article has been replaced by a system which no longer makes it possible for creditors to delay the merger until the founder companies have given security. However, creditors receive the right to require the S.E. to provide sureties in respect of their debts.

A similar system is contained in Article 19 of the draft Convention on the International Merger of limited companies. It is an improvement on the previous system since, on the one hand, it affords creditors sufficient protection but, on the other hand, does not delay the merger and thereby endanger other interests.

2. Paragraph 1 extends the scope of the system of protection - and in this it goes further than Article 19 (1) of the draft Convention on mergers - to cover all creditors whose claims stem from the period before the founder companies ceased to exist (Article 26 (2)).

3. Paragraph 2 is based on Article 19 (2) of the above-mentioned draft. However, the time limit for negotiations concerning the security has been extended to 14 days to give the parties concerned greater room for manoeuvre.

4. The content of paragraph 3 corresponds to that of Article 19 (3) of the above-mentioned draft.

5. Paragraph 4 incorporates the rules in respect of loan creditors contained in Article 20 of the draft Convention on mergers in the rules governing protection of creditors so as to achieve a coherent system.

Accordingly, loan creditors may apply for security if they have not, under the terms of paragraph 4, approved the merger, i.e. the rights and measures proposed in respect of themselves in the draft document of constitution (Article 22 (1)c).

This amended version of paragraph 4 takes account of the wishes of the European Parliament.

6. The rules in Article 27 appear sufficiently flexible to deal with individual cases involving the protection of creditors. In particular, it appears possible with their help to extend to the S.E. as a whole any special security existing in respect of one founder company or to create an equivalent substitute.

This applies, for example, to the floating charges existing in the United Kingdom and in Ireland for the benefit of debenture holders or other creditors. The board of directors of the British or Irish company concerned will in the draft document of constitution propose the rights or measures envisaged in respect of such persons. If the latter are not satisfied they may require the S.E. to provide securities of equivalent financial value to a floating charge.

Article 28

1. This Article regulates situations where one of the merging companies owns shares in another. The rules contained in Article 28 in the old version have been incorporated in Article 26 and Article 26 (1) has been dropped as being redundant.

2. Paragraph 1 corresponds in part to Article 42 (1) of the draft Convention on the International Merger of limited companies.

It lays down rules governing the consequences which flow from ownership by one of the founder companies of shares in anther founder company. Under the draft Convention on mergers, this situation was governed by the national law applicable to the company concerned (see the Goldman Report as regards Articles 5 and 42 of the draft - published as Supplement 13/73 to the Bulletin of the European Communities, pp. 47 and 91).

The Statute must lay down rules on this subject. Under the law of universal succession the shares become part of the assets of the S.E. Consequently, the shares and the assets to which they relate merge in the legal person of the S.E. As is usual in cases where such a merger of claims and obligations occurs, provision can be made for the shares received by the S.E. to cease to exist.

3. In the event of one company owning all the shares in another, paragraph 2 waives the requirement contained in Article 15 (1) to appoint an auditor for both companies. Although, in order to ascertain the share exchange ratio the audit must extend to both companies it is only necessary to appoint auditors for both companies where outside shareholders whose interests must be protected are affected. This is not the case here.

Section three - Formation of an S.E. as holding company

Article 29

1. Against the wishes of the Economic and Social Committee but with the approval of the European Parliament, the rule in paragraph 1 remains unchanged.

The Economic and Social Committee is opposed to the exchange of all the shares in all cases and would like shareholders of founder companies to be able to retain their shares.

However, the financial objective of forming a holding company is to enable shareholders of the founder companies to share not in the respective individual profits of the latter but in the profits of the holding company. In this case, the exchange of the shares helps to clarify the relationship.

2. Paragraph 2 has been supplemented by a rule similar to that contained in Article 223 (3) of the Commission's original proposal. On the formation of an S.E. as holding company, when the latter owns all shares in the founder companies, it appears desirable to specify expressly that any national provisions under which the founder companies must be wound up in such cases do not apply.

Articles 30 - 34

1. The rules on formation of an S.E. as holding company have been strengthened by alignment on the like provisions concerning formation by merger.

2. The interests of shareholders are similar in both cases, since they lose membership of their former companies and through the exchange of shares become shareholders in a new company.

3. The employees of the founder companies have a direct interest in being informed on the effects of the formation of the holding company and on any measures envisaged in respect of them - such as proposed rationalisation projects.

Where employees' representatives consider that formation of the holding company will adversely affect the interests of employees' provisions protecting the interests of employees applicable to mergers and contained in Articles 23c and 23d must

be applied by analogy. (*) In this case account must of course be taken of the fact that the founder companies continue to exist following formation of the holding company and are not replaced by the S.E.

4. The interests of creditors of the founder companies, however, are not the same as in the case of a merger.

Since the founder companies continue to exist following formation of the holding company, formation of the S.E. has no direct legal consequences requiring special regulation.

In the event of the formation of a purely financial holding company the founder companies in fact remain financially independent. However, where the founder companies are managed in a uniform manner by the holding company following the latter's formation, the safeguards of Article 239 applying to undertakings within a group take effect.

5. The new provisions take account of this situation and also regulate the formation of an S.E. as holding company as regards the position in law of shareholders and employees from the point of view of form, by making more frequent reference to the like provisions concerning formation by merger.

By such reference, account is taken of the comments of the European Parliament and of the Economic and Social Committee on Articles 30 - 34 and the corresponding Articles 22 - 26.

(*) See also Article 8 of the Proposal for a Directive on the retention of the rights and advantages of employees in the case of mergers, takeovers and amalgamations (COM/74/351 final of 29 May 1974 - O.J. No. C104/1 of 13th September 1974).

Section four - Formation of a joint subsidiary

Articles 35 - 37

1. It has been necessary to recast and to add to the provisions on the formation of a joint subsidiary because in this type of constitution not only may parts of the founder companies be combined but restructuring having a financial effect very similar to other forms of constitution can be carried out. This is especially important in the case of undertakings which, although unable to participate in other types of constitution, may take part in the formation of a joint subsidiary.

2. Article 35 accordingly refers to the same particulars as Article 22, with the exception of those relating to the exchange of shares or to the legal status of holders of securities other than shares.

3. Article 35a (1) and (2) a and b corresponds to Article 22a (1) (see the explanatory note to the latter).

Article 35a (2) (c) contains the provision in Article 14 (3) of the original Commission draft, which applies only to the formation of a subsidiary.

4. Article 35b corresponds to Article 23. However, the provisions concerning the contents of the auditors' report have been taken from Article 15 (3) of the old version. The verification provided for in subparagraph c of this article regarding payment in full of the whole of the capital has been deleted as redundant, since this is already effected by the security referred to in subparagraphs b. (valuation of contributions in kind) and a. (opening balance sheet).

5. Article 35c on auditing in the event of reformation corresponds to Article 16 of the original proposal. However, a simplified procedure was proposed for the appointment of auditors.

6. Article 36 specifies which laws apply to approval of the document of constitution and the Statutes.

As regards companies incorporated under national law, paragraph 2 refers to their respective national laws.

Provisions of national law which protect the shareholder, employees and creditors of a company in the event of its participation in the formation of another company are wholly applicable. This applies in particular to provisions such as those intended to be introduced pursuant to the Proposal for a Directive on the retention of the rights and advantages of employees in the case of mergers, takeovers and amalgamations (COM/74/351 final of 29 May 1974 - O.J. No. C 104/1 of 13th September 1974). Should the formation of the joint subsidiary result in the transfer of an establishment the provisions of national law adopted in implementation of that Directive or the provisions of national law which are already in existence apply.

Paragraph 3 contains special provisions which apply where an S.E. participates in the formation of a joint subsidiary. The requirement, already contained in Article 36 of the original version, that the Supervisory Board give its approval is insufficient to afford adequate protection of the interests of the parties. In particular, the employees of the S.E. must have the opportunity to state their views on the formation of the joint subsidiary and the consequences thereof (subparagraph c).

Where the total assets of the S.E. are transferred to the joint subsidiary or where its formation affects the competence of the General Meeting under Article 83 in any other way, the formation of the joint subsidiary must be approved by the shareholders of the S.E. (subparagraph d).

Where the interests of the employees are adversely affected by the formation of a joint subsidiary the Board of Management of the founder S.E. must prepare a social plan, which is subject to approval by the European Works Council (Article 36 (3) e).

7. Article 37 has been supplemented.

Section five - Formation of a subsidiary by an S.E.

Articles 38 and 39

As before, the rules make frequent reference to the provisions of Section four.

TITLE III CAPITAL - SHARES AND DEBENTURES

The changes in this Title relate to the rules on the increase of capital (Articles 41 to 43), acquisition by the S.E. of its own shares (Article 46), and reciprocal shareholding (Article 47). Further, the rules on disclosure of shareholdings, formerly contained in Article 47(5), have been extended and are now incorporated in a special provision (Article 46 a).

There have been no fundamental changes to the other provisions of this Title. The requirement that the capital of the S.E. must be fully paid continues, in particular, to apply (Article 40(2)).

The provisions regarding the increase of capital have been transposed. The distinction between an increase of capital and approval of a future increase of capital is now clear . The rules on shareholders' preferential subscription rights have been consolidated.

The rules on possession and acquisition of its own shares by the S.E. have been extended. As requested by the European Parliament, such acquisition is now possible if the shares are to be issued to employees.

In accordance with the general wishes of the European Parliament, the new text of the rules on reciprocal shareholding takes account of the work on the preliminary draft for a Directive on the harmonisation of law on groups of companies.

The more stringent rules on disclosure of shareholdings in Article 46 a, take account of recent trends towards greater clarity in the company law of Member States.

Certain adaptations have, further, been made, particularly to conform with the amended Proposal for a second Directive concerning the formation of public limited liability companies and the maintenance and alteration of their capital, of 30 October 1972 (COM (72) 1310).

Section 1 - Capital

Article 40

1. Although it was requested to do so by the Economic and Social Committee, the Commission is unable to delete from its proposal the requirement in paragraph 2 that the capital of the S.E. must be fully paid up. The Commission has also examined the request of the Legal Affairs Committee of the European Parliament and of the Economic and Social Committee as to whether at least certain companies such as insurance undertakings might not be exempted from the requirement that capital must be fully paid up.

This requirement is one of the fundamental features of the rules governing the S.E. and it has been introduced quite specifically to ensure that the S.E. enjoys maximum credit-worthiness and that its registered capital is fully at the disposal of its management.

Any exemption from the requirement that capital must be fully paid up prejudices these goals. Moreover, formation procedures which involve an exchange of shares, such as mergers or formation of a holding company, can in practice only be carried out by companies with a fully paid capital. On the other hand, where a joint subsidiary is formed, the minimum capital has now been reduced to such an extent that there would no longer appear to be any real need for an exempting provision, especially since only companies already in existence are allowed to form an S.E.

Moreover, if only partly paid shares were allowed, comprehensive rules would be needed to cover situations where full payment of shares was not effected subsequently. It must therefore be ensured that the declared risk capital is in fact available, e.g. by means of rules on the compulsory withdrawal and transfer of such shares.

2. In paragraph 3 the definition of capital subscribed in kind has been slightly altered. As before, it relates to intangible assets, but it is tied not to the concept of "value" but to the concept developed in private law of the "article".

The deciding factor is not whether the article is transferable but whether it is economically saleable (cf. e.g. Article 10 of the Proposal for a second Directive). Unsaleable contributions, such as an obligation to carry out work or provide services in particular, would be impermissible under paragraph 3.

3. The special rules on transfers of land requested by the Economic and Social Committee in view of national provisions which exclude such transfers (as they do the transfer of other rights in immoveable property) to companies not yet formed, appear unnecessary. The concept of "subscription" or the"contribution of capital subscribed in kind" may be interpreted as covering the legal position in which there is nothing further to prevent the company that has been formed from acquiring the article contributed.

4. In Article 48(1) account has been taken of the amendment requested by the Economic and Social Committee that the share capital should be divisible.

Article 41

1. This provision now contains a comprehensive set of rules for increasing capital by scrip issues or by the capitalization of reserves. In substance it corresponds to the original rules contained in paragraphs 1 and 2 of Article 41 and in paragraphs 3 and 4 of Article 42.

The creation of approved capital is now dealt with comprehensively in Article 42.

2. Article 41(1) in the new version consolidates the provisions previously contained in paragraphs 1 and 2; at the same time, the wording has been redrafted and two points have been clarified.

Increase of capital by capitalization, as an alternative to increase of capital by new issues, no longer relates to available reserves but to disposable reserves. This dovetails into the terminology used in the model balance sheet in Article 153 (item II on the liabilities side). At the same time, on a point made by the Section for Economic and Financial Questions of the Economic and Social Committee, it has been made clear that not all available reserves may be capitalized but only those specifically disposable for conversion.(1)

Further, the new wording makes it clearer than the original Commission proposal/did that an increase of capital requires an alteration of the Statutes.

3. Paragraph 2 contains the rules previously contained in Article 42(3) on the examination by experts of the value of assets subscribed in kind. At the request of the European Parliament, more flexible rules now govern the appointment of these experts.

The examination may, as previously laid down, be carried out either by experts appointed by the court or, alternatively by the S.E.'s annual auditor. Which alternative is adopted will depend on the merits of each particular case, the final choice being made jointly by the Board of Management and the Supervisory Board.

As regards the professional qualifications of experts appointed by the court, reference is no longer made to the rules in Article 203, which apply to the annual auditors, but only to Article 15(2). This makes no fundamental difference since, according to the new version of Article 15(2), the requirements of the former Article 203(3) as to the independence of annual auditors now also apply to experts.

The experts are now also subject to the same rules regarding liability (Article 15(3) as formation auditors. (Article 209 contains the rules in respect of annual auditors).

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(1) This paragraph concerns the English text.

4. Paragraph 3 corresponds with the second and third sentences of the former Article 42(3). These provisions ensure that the general public are made aware of the report on the assets subscribed in kind and that shareholders can acquaint themselves of its contents (re calling of a General Meeting, cf. Article 86).

Under Article 94(2), this report must further be deposited, qua annex to the minutes of the General Meeting deciding on the capital increase, with the European Commercial Register.

To this extent the provision equates in substance with Article 8(3) of the amended proposal for a Second Directive.

5. Paragraph 4 contains the rules formerly contained in Article 42(4) which govern the increase of capital by capitalization of reserves.

In accordance with the request of the European Parliament the rules have been added to in order that the S.E. may distribute shares to its employees in respect of the capital created by capitalizing reserves.

Article 42

1. This provision contains all the rules which apply to the legal concept of "approved capital". This aspect was previously governed by Articles 42(3) and 43(1) and (3).

2. Paragraphs 1 and 2 of the new version correspond to a considerable extent with the rules previously contained in Article 41(3).

However, it has been made clear in paragraph 1 that approval of a future increase of capital constitutes an alteration of the Statutes, to which all the provisions of Title VIII apply. Thus, directly after the General Meeting has adopted the resolution, the approval is examined by the European Court of Justice, and the amount of the approved capital and the period for which approval is given are then recorded in the European Commercial Register. This ensures that the approval is used and the new shares are issued on a firm legal basis.

This change, which serves to facilitate financing of the S.E. by improving this means of procuring capital, is based on financial considerations, in line with suggestions made in financial circles.

3. Paragraph 2 lays down the limits set to the approval of a future increase of capital. These were previously contained in Article 41(3) of the original proposal. It has not been necessary to include in the new text the exception then made where the creation of approved capital was linked to an issue of convertible debentures, since the latter is now dealt with comprehensively in Article 60, quite separately from Article 42.

4. Paragraphs 3 to 5 govern the utilization by the Board of Management of the S.E. of the approval obtained. In contrast to the provisions of Article 43(1) and (3), a decision on the manner of utilization by the Board of Management requires the agreement of the Supervisory Board. Further, the disclosure formalities incumbent upon the Board of Management have been made more specific.

Article 43

1. This provision now deals comprehensively with shareholders' subscription rights.

Paragraph 1 contains the rules formerly contained in Article 41(1) of the original proposal on shareholders' rights to scrip on a capital increase by a new issue. It has been made clear that this right exists in the case of cash subscriptions.

2. Paragraph 2 contains the rules on the withdrawal of subscription rights and corresponds in substance, with the first and second sentences of Article 42(2) of the original proposal. Paragraph 3 contains special rules for the withdrawal of such rights when a future increase of capital is approved. In accordance with a suggestion made in the report of the Section for Economic and Financial Questions of the Economic and Social Committee it is now possible to authorize the Board of Management to withhold the right to subscribe in order to provide the S.E. with greater flexibility in seeking potential sources of finance. The right to give such authorization is also provided for in Article 25(3) of the amended proposal for a Second Directive. However, a condition of granting the authorization is that the Board of Management justifies the need therefor in writing.

Article 43 a

This provision contains rules concerning the liability of the Board of Management of the S.E. They are modelled on those in Article 20 relating to founder companies and the members of their governing bodies.

Rules of this sort relating to liability are necessary not only in connection with the formation of the S.E. but also when its capital is increased, to ensure that its declared capital is at its disposal.

Article 44

1. It is now made clear in paragraph 1 that a reduction of capital requires an alteration of the Statutes, subject to all the relevant conditions in Title VIII.

2. By comparison with the original proposal, paragraph 3 extends the prohibition on using the amount of the difference between the assets and liabilities of the S.E., resulting from a reduction of capital, for the benefit of shareholders. The rules correspond to Article 30 of the proposal for a Second Directive.

Article 45

Paragraphs 1 to 3 contain the rules under which creditors are protected if the capital is reduced; they are similar to those in Article 27 relating to the formation of the S.E., to the explanatory notes on which Article reference may be made.

Paragraphs 4 and 5 correspond to Articles 29(2) and 30(1) respectively of the amended proposal for a Second Directive on company law.

Article 46

1. At the request of the European Parliament and the Economic and Social Committee, the prohibition in Article 46 on the acquisition and possession of its own shares by the S.E. has been relaxed so as to give the S.E. the additional right to distribute its own shares to its employees.

The Economic and Social Committee has asked for further relaxation of this prohibition in that it wishes the S.E. to be allowed to acquire its own shares to prevent the company suffering heavy losses. The limits to such an exception are difficult to define; they may render the prohibition meaningless and thus endanger the financial basis of the company. There would, moreover, appear to be no overriding need for such a rule on financial grounds. In the United Kingdom, companies do not have the right to acquire their own shares and this would not appear to have created any difficulties.

Neither is any exception justified in the case of an exchange of shares in connection with the giving of guarantees to the minority shareholders of a dependent company within a group. In such cases the shares may be acquired through the more straightforward solution of an increase of capital.

Lastly, by Article 44(2), a reduction of capital may be effected by reducing the nominal value of the shares so that here, too, an exception is unnecessary.

For these reasons and especially considering the fact that the European Parliament has expressed its opposition to any such exception, the Commission has not complied with the Economic and Social Committee's request.

2. At the wish of the European Parliament, paragraph 1 prohibits acquisition of shares in the S.E. not only by undertakings controlled by it, as previously laid down, but also by undertakings in which the S.E. holds a majority of shares. By Article 6 there is only a presumption of dependence in the latter situation. It must, however, be included within the prohibition, to prevent a major part of the shares in the S.E. held by the other undertaking from flowing back into the assets of the S.E. through the medium of its majority holding in the assets of that undertaking. This would indirectly reduce the capital of the S.E.

3. Paragraph 2 contains the substance of the exemption requested by the European Parliament enabling distribution of shares in the S.E. to its employees or to employees of undertakings belonging to the group.

At the request of the Parliament, paragraph 3 extends the prohibition, previously contained in the second sentence of Article 46(1), against pledging the shares of the S.E., to acquiring any right of usufruct or any other beneficial rights over them. Having regard to Article 92(1) whereby the usufructuary is entitled to exercise the voting rights attached to a share, such an extension is necessary to remove the danger of abuse through the exercise by the S.E. of voting rights attached to its own shares. This prohibition is aimed only at the S.E. since, other than where shares are acquired, there should, in practice, be little scope for nominee transactions using third parties or dependent undertakings acting on behalf of the S.E.

4. Paragraph 4 a corresponds to paragraph 2 of the original proposal. At the request of the European Parliament, the duty to dispose of shares within one year has been extended to eighteen months. In future, in accordance with the rules in paragraph 1, an undertaking in which the S.E. is a majority shareholder will also in future be obliged to dispose of its shares in the S.E.

Further, at the request of the Economic and Social Committee, it has been made clear that although the S.E. is not under the prohibition contained in paragraph 1 where it acquires its own shares by way of universal succession, such shares must be disposed of within the eighteen month period. In addition to mergers, already referred to in the previous Article 46(2), universal succession covers other forms of transfer of assets, such as inheritance.

5. Paragraph 4 b contains special rules for the transfer of shares acquired for distribution to employees. Care has been taken to ensure that such shares are also disposed of by the S.E. within eighteen months at the latest.

6. At the request of the European Parliament, paragraph 5 contains a rule to prevent the shares to which paragraphs 4(a) and 4(b) relate from being wrongfully dealt with before they are disposed of and, at the same time, to secure compliance with the duty to dispose of them under paragraph 4.

Article 46 a

1. Article 46 a imposes a duty to disclose all holdings of more than 10% of the capital of an S.E. and all holdings of an S.E. of more than 10% of the capital of another company. The essential aspects of this obligation were previously contained in Article 47(5).

The obligation has been incorporated in a separate provision since it is important not only as a basis for the rules in Article 47 governing reciprocal shareholdings. It is rather the expression of a desire which has developed increasingly in the legal policy of all the Member States that dominant relationships in an undertaking should be clearly revealed. In aiming towards this, the provision is also an important part of the system by which the Commission wishes to prosecute the stockmarket policy goal pursued in Italy through registration of shares. This goal is to identify every shareholder who is in a position to exert influence in a public limited company (cf. the explanatory notes to Article 50). Article 82 forms another part of this system, as regards shares quoted on a Stock Exchange.

2. Paragraph 1 extends the duty to provide the required information to every shareholder who directly or indirectly holds more than 10% of the capital of an S.E. The previous rules in Article 57(5) of the original proposal - in the context of reciprocal shareholdings - covered only companies. In addition, the period within which notice must be given of the shareholding has been fixed at eight days. This period commences when the person required to make notification is in a position to do so, i.e. as soon as he has acquired a holding or has received knowledge of an acquisition attributable to him.

3. Paragraph 2 retains unchanged the rule previously contained in the first sentence of Article 47(5) under which an S.E. holding more than 10% of the capital of another company must give that company notice of the shareholding. Such a rule is necessary to enable the system laid down in Article 47(2) for dismantling cross-holdings to function.

4. Paragraph 3 provides for a system, in line with the above-mentioned goals, for disclosure of shareholdings notified to the S.E. in accordance with paragraph 1. Previously, under Article 191(4), such shareholdings were published only in the notes on the annual accounts of the S.E. However, this does not adequately provide the general public with a sufficiently clear picture of the various interests held. The new rules seek to achieve this by requiring the S.E. to give notice to the European Commercial Register of all shareholdings of more than 10% of its capital and of any relevant change in such shareholdings. Any increase in a shareholding in the S.E. which causes it to pass steps of 15%, 20%, 25%, etc. of the S.E.'s capital is regarded as of relevance to the general public. The same applies where a reduction in the shareholdings causes it to fall below one of these 5% steps. Thus, for example, notice must be given to the European Commercial Register of an increase which causes a shareholding of 29% of the capital to rise to 31% or a reduction in a shareholding causing it to fall from 18% to 14%.

Steps taken to publish notice given by an S.E. of its shareholdings in another company (paragraph 2) must be governed by the law to which the latter company is subject.

5. Paragraph 4 contains the provisions previously contained in the third sentence of Article 47(5) guaranteeing implementation of the duty of notification, though with two alterations.

The suspension of rights provided for now affects only those shareholders of the S.E. who have failed to discharge their duty of notification under paragraph 1.

If on the other hand, the Board of Management neglects to make the notification that the S.E. is obliged to give under paragraph 2, suspension of the rights attaching to the shareholdings in other companies affected thereby is not a suitable sanction, as the S.E. is not immediately protected in this way.

Protection of the other company, for its part, is a matter for its local legislation.

The Board of Management of the S.E. will however, also be obliged to discharge their duty of notification under paragraph 2 by the threat of criminal proceedings that has been provided (see explanatory notes, paragraph 6), lest the S.E. suffer harm due to their failure to act.

Suspension of rights now applies in respect of the entire holding in the S.E. subject to notification under paragraph 1, insofar as it may not have been notified.

Under Article 47(5) 3. of the original version, however, the provision affected only that part of a holding which exceeded 10% of the S.E.'s capital. With a restriction of this kind, the effective scope of this provision would have remained too circumscribed.

6. To ensure compliance with the obligations laid down in Article 46 a, the Annex to the Statute provides (in addition to the sanctions under civil law of paragraph 4) that Member States must penalise a wilful breach of Article 46 a by criminal proceedings or in some other way.

Article 47

1. The prohibition on reciprocal shareholdings in excess of 10% between an S.E. and another company has been retained. Although approved by the European Parliament it has been rejected by the Economic and Social Committee as being too wide in its scope.

The Commission takes the view that the usefulness of cross-holdings as a means of cooperation between undertakings, which the Economic and Social Committee has cited, cannot outweigh the dangers inherent in such holdings in excess of 10%, of concealment of the proportions of capital held and distortion of the decisions of the General Meeting.

2. Paragraph 1 determines the yardsticks for cross-holdings for the purposes of the ensuing provisions.

3. Paragraph 2 governs the dismantling of cross-holding in excess of 10%. An effort has been made to make these simpler and fairer than the previous rules in paragraph 3 of the original proposal. In principle, the company which first fulfils its obligation under Article 46 a may retain its shareholding. This means that the company which first receives a notification under Article 46 a of the existence of a shareholding must reduce its holding.

Where both companies receive such notification simultaneously, each must reduce its holding to 10%.

However, as previously provided, the companies may still reach agreement on an alternative method of dismantling the cross-holding.

At the request of the Economic and Social Committee, the period within which the cross-holding must be dismantled has been extended to eighteen months, in line with the period laid down in Article 46(4), to reduce the danger of outside shareholders suffering losses due to a fall in share prices.

4. Paragraph 3 states that rights attaching to a holding that is to be dismantled will hold good as from the creation of the obligation to transfer and not merely as from its expiry, as was originally provided under paragraph 4.

In this way the risk inherent in a cross-holding of the decision-making process of the General Meeting being distorted is mitigated actually before the period during which this holding is to be dismantled expires.

5. In contrast to paragraph 2 of the original proposal, the rules on dismantling the reciprocal shareholding no longer take account of the extent of each holding.

However, an exception must be made in cases of reciprocal shareholding where one company holds the majority of the shares of another company or the other company is controlled by the first company. The rules contained in paragraphs 4 to 6 make this exception.

It appears unrealistic that the rules on dismantling a cross-holding permanently deprive a controlling company of the chance of possessing a majority shareholding and thus to exercise sole management as provided under the rules governing groups in Title VII even though the amount of the holding acquired would, in certain circumstances, enable economically justified sole management to be exercised.

6. With this in mind, the rules in paragraph 4, which are in line with those in Article 46(4) a. and (5), apply where an S.E. has such a majority holding. The rules in paragraph 4 have been expanded to avoid uncertainty of interpretation since a stipulation that the rules in Article 46(4) a. and (5) take precedence over those in Article 47(2) and (3) would result in a technically complicated solution and, in view of paragraphs 5 and 6, one difficult to understand.

7. In contrast to paragraph 4, paragraph 5 contains rules which apply where another company is able to control the S.E. In line with the rules in paragraph 4, it is provided that the S.E. must dispose of all its shares in that company. In this way the cross-holding is dismantled and the other company retains the right to form a group - in the same way that the S.E. does in the case governed by paragraph 4.

8. Paragraph 6 contains rules which apply where, exceptionally, each of the two companies with cross-holding controls the other or holds a majority of the other's shares.

Such a situation may perhaps arise where a company controlled by another company merges with a third company and thereby acquires a majority of the shares of the controlling company. Both companies must reduce their shareholdings to 10% within the period specified in paragraph 4 of eighteen months from the date on which the dependent relationship commences or the majority shareholding is acquired unless they reach agreement on a different procedure for reducing the cross-holding.

Section 2 - Shares

Article 48

In paragraph 1 the request of the Economic and Social Committee that the nominal value of the shares of an S.E. should be divisible by ten has been met.

Article 49

1. Paragraph 3 makes it clear that no shares carrying restricted or extended voting rights other than the non-voting shares provided for in paragraph 2 are permitted. This applies not only to shares carrying multiple voting rights which were expressly prohibited previously but, in particular, to shares carrying the right to nominate candidates for appointment to the Supervisory Board.

2. Paragraph 5 regarding changes in the relationships between several classes of shares had been adapted to Articles 22(3) and 28 of the amended proposal for a Second Directive. Holders of a particular class of shares must be protected not only against alteration of the relationship of one class to another, but also against any other adverse effects.

Article 50

1. The rule under which the European company may issue shares either in bearer or in registered form has been approved by the European Parliament and the Economic and Social Committee.

The Commission is aware that this rule causes difficulties in Italy because only registered shares are allowed there. However, it believes that it is possible to achieve the stockmarket policy goal of clear revelation of the controlling interests in a company, pursued in Italy by the share registration requirement, by other means in the case of the S.E. The rules in Article 46 a and 82 of the new version lay down even more strictly than was the case in the original proposal that every shareholder able to exert influence in an S.E. must be identified. These rules are supplemented by the requirement in Article 89(2) that a list must be kept of persons present at General Meetings and by the prohibition in Articles 88 and 88 a of the exercise of voting rights by secret proxy.

The other goal pursued in Italy through registration of shares, that of proper taxation of shareholders, can likewise be achieved in other ways (deduction at source, bordereau accounting).

It is therefore unnecessary to require the shares of the S.E. to be registered, thus making it more difficult for them to be dealt with on the securities markets of most Member States.

2. Paragraph 2 requires an alphabetical register to be kept of the legal holders

of registered shares, accessible to all persons. This appears to be a more practical way of listing such shareholders than the keeping of a share register, as previously provided.

Article 51

1. The rules in paragraphs2 and 6 of the original proposal concerning the issue of provisional certificates prior to the preparation of share certificates have been deleted since they cause uncertainty and because there appears to be no compelling need for them in practice.

2. Paragraph 4, which corresponds to paragraph 5 of the previous version, now contains all the rules which apply to cancellation of share certificates by the court and to their effect as against the S.E., so that the former reference to national law is redundant.

Article 52

The scope of the previous rule has been cut down so that it now governs only the effectiveness of a transfer of bearer shares as against the S.E. The law applicable to the relationship between the transferor and the transferee of the share is not thereby anticipated. Such law may, as in Germany, lay down that certain further requirements, such as consensus on the transfer, must be met in addition to simple delivery of the share, for acquisition to take effect as against the transferor.

Article 53

1. The amendments to paragraph 1 are the result of amendments to Article 50(2) and 52. The reader is referred to the explanatory notes to these Articles.

2. Paragraph 4 has been redrafted so as to establish more clearly the significance of the prohibition on registering transfers shortly before General Meetings. c.f. the new version of Article 86(1) on the covering of the General Meeting.

Section 3 - Debentures

Article 54

This Article has been reworded so as to take account of the new Article 60 a, regarding the issue of profit-sharing debentures.

Article 55

At the request of the European Parliament, the details to be included in the notice of a public issue of debentures have been expanded.

Article 56

The text of paragraph 2 has been revised.

Article 57

1. Paragraph 1 now makes it clear that upon a public issue of debentures the Board of Management of the S.E. will as a general rule appoint the representative of the body of debenture holders.

2. In paragraph 2 it is made clear that surety in respect of the issue in question may be transferred by the company to the representative of the body of debenture holders in his capacity as their "trustee". In addition, the rights which may be exercised by the representative of the body of debenture holders at General Meetings have been more precisely defined.

Lastly, at the request of the European Parliament, debenture holders may have access to the documents to which shareholders have access.

Article 58

1. In paragraph 1 the percentage of debenture holders who may have a meeting of the body convened has been increased from 5 to 10. This is to avoid the risk of abuse of this right by debenture holders who, in general, are adequately protected by the representative of the body.

2. At the request of the European Parliament, the quorum laid down for a meeting to be validly held has been reduced to fifty percent of the holders of debentures issued and outstanding. Further, the original text of paragraph 2 has been retained in order to avoid misunderstandings regarding validity of the meeting.

3. The text of paragraph 4 has been revised.

Article 59

The text of paragraph 2 has been revised in its wording.

Article 60

1. The rules concerning questions connected with the issue of convertible debentures have now been consolidated.

2. Paragraph 1 makes it clear that the issue of convertible debentures requires an alteration of the Statutes. This, in particular, ensures, to the benefit of subsequent holders of such convertible debentures, that the European Court of Justice will duly and in accordance with the relevant provisions of Title IX examine whether the formal conditions for issue have been satisfied and, especially, whether sufficient approved capital is available to cover the subsequent exchange of debentures. The convertible debentures may then be acquired on a legally secure basis.

The amendment is based on economic considerations similar to those underlying the corresponding situation governed by Article 42, where shares are issued consequent upon the creation of approved capital.

3. Paragraph 2 of the new version limits the amount of approved capital which may be made available for the issue of convertible debentures and makes it independent of the amount of approved capital created in pursuance of Article 42.

In both cases, the Commission still considers it necessary that the creation of approved capital should be restricted in order to protect shareholders. However, the issue of convertible debentures is governed by different rules and serves different purposes from an increase of capital effected in accordance with the new version of Article 42, so that a common limit for both methods of financing does not appear justified.

4. Paragraph 3 of the new version corresponds to paragraph 2 of the previous version. At the request of the European Parliament, the rules governing shareholders' subscription rights have been extended and restriction of such rights has been made subject to the guarantees contained in Article 43.

Paragraph 4 corresponds to paragraph 3 of the previous version, the wording of which has been revised.

Paragraph 5 lays down the publication formalities to be carried out by the Board of Management; these correspond with those in Article 42(5).

Article 60 a

The Commission has complied with the request of the Economic and Social Committee that the S.E. should be able to issue profit-sharing debentures.

In order to protect shareholders, it appears appropriate that the issue should be based on a resolution which meets the requirements for altering the Statutes and that shareholders should be accorded subscription rights, as is the case where convertible debentures are issued.

Article 61

The issue of profit-sharing debentures is now permitted under Article 60 a, so that it is clear that these do not fall within the prohibition in Article 61.

There appears to be no compelling need for any further exemption from the prohibition in Article 61.

Title IV Governing bodies

The provisions regarding the governing bodies of the S.E. and the distribution of their powers among the S.E.'s General Meeting, Supervisory Board and Board of Management have been approved in principle both by the European Parliament and by the Economic and Social Committee. It was recognised, in particular, that a division was desirable between the functions of the Supervisory Board and those of the Board of Management in order to afford the S.E. every opportunity of conducting its affairs effectively and at the same time ensure that these were efficiently supervised. The basic principles of title IV have therefore been left unaltered.

Substantial changes have, however, been made in the provisions in the second section of this title regarding the composition of the Supervisory Board.

The question as to whether and how employees should participate in the composition of the Supervisory Board lay at the centre of discussions on the European Company right from the start.

Since the Commission submitted its proposal in 1970 there has been a certain convergence of attitudes as regards the general viewpoint on employee participation on the governing bodies of their company (1). Evidence of this may be found not only in the deliberations of the European Parliament but also in those of the Economic and Social Committee. Approval has in the mean time been unanimously given to the principle of representation on the Supervisory Boards of the S.E. ; unanimous, too, was the demand for a uniform European solution that would not be forced to rely upon different domestic legislations nor permit of divergent models.

As regards its composition in detail, there was agreement in the European Parliament that the Supervisory Board should comprise an equal number of shareholders' and employees' representatives who will in turn jointly co-opt independant persons representing general interests.

(1) The Commission enters into detail in its document on Employee Participation and Company Structure in the European Communities.

Views differed on this point in the Economic and Social Committee, so that no recommendation was produced.

The Commission's revised proposal is based on the Opinion of the European Parliament. The Commission feels that equal weighting of shareholder and employee representation on the Supervisory Board cannot but contribute towards the creation within the S.E. of a new relationship between the S.E. and its employees. Employees are given the opportunity of active participation in an undertaking of a type new in Europe not only in that they may safeguard their rights and status but also in that they contribute towards shaping a corporate policy duly evaluated to take the interests of all parties concerned into account.

The provisions requested by the European Parliament ensure that deadlock in the decision-making process within the S.E. is avoided. The Commission further regards the fact that interests wider than those of the shareholders and employees directly affected are represented on the Supervisory Board of a European undertaking under these provisions as a positive element.

The comprehensive provisions sought by the European Parliament regarding the composition of the Supervisory Board in fact, in logical sequence, fit better among those of Title IV and not in Article 137, which forms part of Title V regarding employee representation within the S.E. They have therefore been included among the provisions of section two of Title IV without this signifying any material change. The new provisions of Articles 74 a, 75 a and 75 b serve this purpose.

In line with the tenor of the European Parliament's Opinion, the same conditions have also been granted to members of the Supervisory Board in the regulations concerning the term of office and premature expiry thereof. In this connection reference should be made to Articles 74 c and d, and the corresponding explanatory notes. With further regard to this Opinion, a provision for removal from office by court order has been introduced, to apply to all members (Articles 74e).

The other changes to the provisions of Title IV are more technical in nature. By re-grouping a number of provisions, the first section, on the Board of Management, was made more succinct; the information to be passed on by this Board to the Supervisory Board is now governed comprehensively by the new Article 73 a.

At the request of the European Parliament, the instances in which the court may intervene under Article 99 have been expanded in section five, which deals with special controls.

The provisions of Title IV in general have been adapted in accordance with the European Parliament's wishes to the Commission's proposal for a fifth Directive of 9.10.1972[1] regarding the structure of limited companies. This particularly concerns the liability of members of the Board of Management and Supervisory Board and the exercise of voting rights in the General Meeting.

(1) Official Journal C 131/49 of 13.12.1972 issued with explanatory notes as supplement 10/72 to the Bulletin of the European Communities.

Section one Board of Management

Article 63

1. Paragraph 1 regarding the appointment of members of the Board of Management has been extended to include a clarificatory comment (cf.Art.13).

2. The new paragraph 2 specifies that members of the Board of Management must be appointed for a restricted period. This seems necessary to the Commission in order to give the Supervisory Board a means of renewing the Board of Management in all circumstances in the company's interests, without resort to the process of dismissal under paragraph 7, which could be personally distasteful to the parties and possibly costly for the company.

   The period of appointment can be fixed in a flexible manner within the prescribed maximum period of six years.

3. The requirements as to the nationality of members of the Board of Management previously contained in paragraph 3 have been deleted.

   While the European Parliament had not in fact questioned this provision, its Legal Affairs Committee having expressly rejected a proposed amendment, the Economic and Social Committee nevertheless raised objections which the Commission feels are justified.

   The provision runs counter to the possibility existing under the Statute for shares in an S.E. to be held by non-Community shareholders. The work force of the S.E. may originate as well from non-Member countries. The provision is therefore a dead letter without real effect on the structure of the European Company, and merely gives the unjustified impression of a restrictive or discriminatory posture.

4. Paragraph 4 regarding the circumstances in which the office of member of the Board of Management may not be exercised has been redrafted. Particular account was taken of discussions within the Economic and Social Committee.

The first ground for disqualification covers every kind of incapacity of legal origin affecting the Board member concerned. The lack of legal capacity referred to previously is included in this category.

The second category covers disqualification by the court. What is required is a decision of the court, irrespective whether the proceedings were civil, criminal or procedural in nature and brought within or beyond the Community, as a result of which, under the law of a Member State, the person affected thereby is temporarily or permanently prevented from holding office as member of the Board of Management or in some similar capacity. The instances of bankruptcy and criminal conviction referred to previously are included in this category.

5. In paragraph 6 the provision regarding responsibility for personal matters has been deleted and has been transferred in amended form to Article 64 (2), to the explanatory note to which reference may be made.

6. Paragraph 7 has been reworded and has had an elucidatory sentence added. The intention set out in paragraph 3 of the explanatory notes to the first draft of giving definitive effect to dismissal in all circumstances received inadequate expression in the earlier text.

Article 64

1. For the sake of greater clarity paragraph 2 now deals comprehensively with the distribution of responsibilities within the Board of Management. Responsibilities were previously dealt with in Articles 63 (6)2 and 64 (2).

The functioning of the Board, earlier also covered by Article 64 (2), is now dealt with separately in paragraph 3.

According to Article 63 (6) 2. of the original proposal a member of the Board of Management was to be entrusted with personnel matters. This provision has been amended to cater for the fact that, in holding companies in particular, Board duties are frequently delegated not on departmental but on divisional lines.

Each member of the Board of Management accordingly becomes responsible for all matters relating to a specific group undertaking or for all matters within a division of an undertaking. An arrangement of this kind should not be ruled out through any statutory provision for competence in personnel matters.

Determination of responsibilities in personnel matters remains as before, a matter for the Supervisory Board. This will ensure that the solutions found will be those doing justice to all interests.

The only statutory requirement is that competence in personnel matters should be clearly defined within the Board of Management.

3. Paragraph 3 contains a redrafting of the previous provision for the internal functioning of the Board of Management, as it stood in paragraph 2 (2) of the original proposals, as desired by the European Parliament.

Article 65

1. Representation of the company in dealings with third parties, formerly governed by Articles 65 and 67, is now dealt with comprehensively in Article 65, with due regard to the new provisions on publicity of Article 9 a.

2. The principle of individual representation laid down in paragraph 1 was approved by the Economic and Social Committee and was not questioned in debate in the European Parliament. Industrial representation makes for clear-cut relationships in formal transactions and is therefore retained unchanged.

3. Paragraph 2 has been criticised, both by the European Parliament's Legal Affairs Committee and by the Economic and Social Committee, particularly for its use of the concept of "agents with power of procuration", which has no standard meaning within the Community.

The new wording takes account of discussions held by both bodies.

4. It is intended that the Board of Management retains the capacity, previously provided, to delegate specific duties and powers to persons having its confidence, who will act on its responsibility. There is no need to make special provision for the delegation of powers within the company.

Under Article 62, there is no restriction on the range of functions of the Board of Management. For this reason, too, there is no call within the scope of the Statute for the introduction of the Company Secretary, whose appointment is governed by law in Great Britain and Ireland. There is, however, certainly no bar to the Board of Management delegating specific duties to persons acting on its responsibility. This also applies to the duties performed by company secretaries in companies in Britain and Ireland.

Where persons entrusted by the Board of Management with the performance of specific tasks shall be empowered to represent the company generally and unrestrictedly in dealings with third parties, however, there is a case for their powers of representation to be regulated under the Statute. Such powers conferred under the ordinary law are insufficient for this purpose, as their content would have in general to be verified from one case to the next. General representatives of this kind cannot therefore enjoy the confidence in their powers in the normal course of business that is due under Article 65 (2) to persons having general powers of representation without limitation vis-à-vis outsiders.

The appointment of persons with general representative powers is dependant upon the consent of the Supervisory Board, as was the case in the original proposal. The Board of Management may revoke the appointment at any time without regard to the contract of service that such persons may have with the S.E.

The effects of the appointment and revocation vis-à-vis third parties are dealt with in paragraph 5.

5. Paragraph 3 contains the provision previously made in Article 67 regarding acts of the Board of Management falling outside the company's objects. The last sentence of Article 67 has, however, been deleted as superfluous (cf. Article 65 (1) supra). The rule now applies to representatives with general powers. In accordance with the aims of the provisions of paragraph 2, the effects of the representative powers of such persons vis-à-vis third parties will be similar in every respect to those of members of the Board of Management.

6. Paragraph 4 is substantially equivalent to the former paragraph 3.

7. The first sentence of paragraph 5 of the new version replaces paragraph 4 of the old with a reference to the general rules of Article 9 a regarding publicity. The second sentence corresponds substantially to the earlier paragraph 5.

Article 66

1. The acts enumerated in Article 66 (1) continue to be subject to approval by the Supervisory Board, with the agreement of the European Parliament and, in essence, that of the Economic and Social Committee.

In sub-paragraph a. the concept of the "establishment" as a technical institution has, at the request of the European Parliament, been used instead of the less concrete term "undertaking".

Sub-paragraph b. will in future unmistakably include modifications in the functions of the undertaking.

Provisions for an S.E. that controls a group have been added to the former paragraph 1. Decisions of the S.E.'s Board of Management in their capacity as management of the group will accordingly require Supervisory Board consent in the cases set out in Article 66 where they affect a dependent group undertaking. This is an implicit consequence of managing the group as an economic unit. Stipulation of a duty of consent limited to the sphere of the S.E. would hardly be expedient if the S.E. is formed as a holding company. The addition makes for clearer interpretation in this case.

2. Paragraph 2 has been added at the request of the European Parliament in order to set up criteria for determining the cases referred to in the first paragraph and, in particular, for interpreting the unqualified terms "appreciable" and "substantial" used in the text.

3. Paragraph 3 corresponds with the first sentence of the previous paragraph 2. In order to avoid any misunderstanding it has been made clear that paragraph 1 does not list exhaustively the statutorily prescribed instances where consent is required. Supervisory Board approval is also mandatorily prescribed in other parts of the Statute (e.g. upon the formation of a joint subsidiary - Art.36 (3)b.); utilisation of approved capital (Art.43); issue of convertible debentures (Art.60); confirmation of the Annual Accounts (Art. 213); and transformation and merger (Arts. 264 (1) and 270 (2)).

4. Paragraph 4 corresponds with the second sentence of the previous paragraph 2. The provisions relate to paragraph 1 and 3 and have therefore been given separate status. The paragraph has been adapted to Articles 12(3) and 10(4) of the proposal for a fifth Directive.

5. Paragraph 5 includes an explanatory comment, at the request of the European Parliament. There is no need in this instance for an exact description of the powers concerned.

Article 67

The provisions of Article 67 have been assumed into Article 65 (3).

Article 68

1. The content of paragraph 1 corresponds to that of Article 211 and the former can therefore be deleted.

2. The Board of Management's duty of informing the Supervisory Board has been dealt with comprehensively in the new Article 73 a. The earlier provisions of Articles 68 (2) and (3) and 73 (1) led to overlapping.

Article 69

1. The Economic and Social Committee recommended that the embargoes on taking up credit contained in paragraph 3 be split up. The European Parliament's Legal Affairs Committee, however, expressly supported retention of the Commission's version and this was accepted by the plenum. The Commission consequently made no alterations in this respect.

2. Paragraph 4, regarding agreements affecting the interests of members of the Board of Management, has been adapted to the proposal for a fifth Directive.

Article 70

The Economic and Social Committee considered that it was up to the Board of Management to promote the company's well-being, including that of its employees, in the general interest. After careful discussion in the Legal Affairs Committee, the European Parliament, however, approved the Commission version. Therefore this point was not changed.

The principle that the company's activities may be pursued only within the limits of the constitutional law of the Member States and of the Community Treaties does not, in the Commission's view, require particular mention.

Article 71

1. The liability provisions for members of the Board of Management have been approved in outline by both the European Parliament and the Economic and Social Committee. They have therefore been retained but have been duly adapted, at the request of the European Parliament, to the proposal for a fifth Directive (Articles 14 - 20 of the Proposal).

Article 71 now deals only with the preconditions for liability and Article 72, in conjunction, with the bringing of liability proceedings.

2. Paragraph 1, regarding the criteria on which liability is based, is no longer aligned on "wrongful acts" of Board of Management members "in the course of their administration". The intention is, rather, to encompass the whole range of obligations that Board members must discharge in the course of their duties.

The concept of breach of duty seems to serve adequately as a general criterion on which liability may be based within the scope of the Statute for the S.E. It is given further shape by the provisions of the S.E., and of Article 70 in particular, the statutes of the S.E. and the contract of service for members of the Board of Management.

Failure to observe the provisions of the Statute or the statutes of the S.E., already alluded to previously, appear, in this light, as particularly prominent cases of breach of obligations.

3. The first sentence of paragraph 2 governs the ways in which members of the Board of Management may be held liable. The second sentence contains the provisions formerly found in paragraph 2 as to proof of innocence in the absence of fault or negligence. At the request of the European Parliament it was made clear that any member of the Board of Management may relieve himself of his individual liability (cf. also, Article 14(2) of the proposal for a fifth Directive).

4. Paragraph 3 has been adapted to Article 14(4) of the proposal for a fifth Directive.

5. The new paragraph 4 substantially incorporates Article 14(5) of the proposed Directive.

6. The former paragraph 4 becomes paragraph 5 without change.

7. The former paragraph 5 has been taken in as Article 72(5) as it concerns actions in respect of liability and therefore has its logical place there.

Article 72

1. Paragraph 1 now deals only with the decision whether proceedings should be brought in respect of liability. It contains the first sentence of the previous paragraph 1 and a provision on the majority required in the General Meeting for such a resolution, which substantially corresponds with Article 15 (2) of the proposal for a fifth Directive and contains a limitation of Article 91(2) of the Statute.
2. Paragraph 2 deals in redrafted form with the prosecution of an action resolved by the Supervisory Board or General Meeting, formerly governed by the second and third sentences of paragraph 1.
3. Paragraph 3 retains unchanged the provisions of the previous paragraph 2 regarding the institution of liability proceedings by shareholders. These provisions have been approved by the European Parliament. They correspond to Article 16 of the proposal for a fifth Directive.
4. Paragraph 4 regarding liability proceedings brought by creditors is substantially equivalent to Article 19 of the proposal for a fifth Directive.
5. Paragraph 5 corresponds with Article 71 (5).
6. Paragraph 6 is a revised version of the former paragraph 3.
7. The earlier paragraph 7 is deleted; it encroaches upon the procedural law of Member States, which can lead to unnecessary complications.

Article 72-a-

While Articles 71 and 72 deal with compensation claims brought on behalf of the company, the new Article 72 a governs the injury that can be done to shareholders and third parties as a direct result of a breach of obligations by the Board of Management in the course of administering the company. This provision corresponds with Article 20 of the proposal for a fifth Directive.

Section two - Supervisory Board

Article 73

1. There has, with the agreement of the European Parliament and the Economic and Social Committee, been little substantial change in the powers of the Supervisory Board.

   The Board of Management's duty to provide information and the corresponding rights of the Supervisory Board have been taken out of the original version of Article 73 (1). As a simplification measure, they have been incorporated into the new Article 73 a together with the provisions of Articles 68 and 78.

2. Paragraph 3 has been corrected. The Statute provides no instance where the Supervisory Board can intervene directly in the administration of the company. Refusal of the consent required under the Statute for a proposed "act of Management" (Art.66) constitutes only indirect intervention.

3. Paragraph 4 has been deleted as there are many other ways temporarily filling vacancies on the Board of Management. It is still perfectly possible for members of the Supervisory Board to resign from membership and become members of the Board of Management. Representation pro rata temporis of a Supervisory Board member does not, however, seem the ideal solution for this new concept in European law, having regard to the associated suspension of the separation of powers as between the Supervisory Board and the management.

4. The suggestion of the Economic and Social Committee that the Supervisory Board be required to draw up detailed rules of procedure regarding its supervisory activities in order to avoid conflict with other governing bodies of the company has not been adopted.

   The powers of the governing bodies have been statutorily determined and can - except in the case of the freedom in drawing up the statutes allowed under Article 66 - be neither extended nor reduced by internal rules. The Supervisory Board may, however, regulate its internal functioning by such a set of rules without the need for specific provision in this respect.

Article 73 a

1. Paragraph 1 combines the provisions of Article 73 (1) 2. and those of Article 68 (2) concerning the quarterly report by the Board of Management to the Supervisory Board. It is oriented towards the conduct and progress of the affairs of the company and undertakings controlled by it (Article 73 (1); Article 68 (2)). The terms "subsidiaries" and "divisions" used in Article 73 (1) were superfluous and could be deleted. The present wording substantially corresponds with Article 11 (1) of the proposal for a fifth Directive.

2. Paragraph 2 contains the provisions of Article 68(3) of the original proposal. As a result, it was possible to eliminate sub-paragraph 3 of the previous Article 73 (1) which had a similar content. It is for the chairman of the Supervisory Board to decide whether the information given to him should be passed on to Supervisory members before the actual quarterly report is made and whether there is any need for a meeting of the Board to be called.

3. Paragraph 3 in essence corresponds to the former Article 73 (1)2.1. The duty of providing a report has been extended to controlled untertakings in parallel with the general provisions of paragraph 1 (Article 68 (2) of the original draft).

4. Paragraph 4 contains the substance of the former Article 73 (1) 2.2. The duty of providing information has been extended beyond the terms of the latter to apply to all dependent undertakings in accordance with the general intentions of Article 73 a, irrespective whether they are uniformly subject to the group management or not.

The limitation, previously imposed on the right to obtain information, to events that might have a "substantial influence upon the position of the company" ran counter, in its intrinsic intent, to the unlimited rights of inspection and suspension accorded to the Supervisory Board under the earlier Article 78 (1), these rights having been expressly approved by the European Parliament. The limitation has therefore been deleted.

5. At the general wish of the European Parliament, paragraph 4 has been aligned on Article 11(4) of the proposal for a fifth Directive, so that not only the supervisory Board but also one third of its members may make the request for information referred to. These members may avail of the right to information of the Supervisory Board as a whole and it is therefore meet that the information and particulars requested should in any event be passed to all members of the Board for information simultaneously.

6. Paragraph 5 deals with the Supervisory Board's right of access to the documents of the business. It contains the substance of Article 78 (2) of the original proposal. By way of adjustment to Article 11(4) of the proposed fifth Directive, provision is now made for both this right and that to information under paragraph 4 to be exercised by one third of the members of the Supervisory Board on the latter's behalf. On practical considerations, delegation of the right of access to a small number of members has to be permitted.

   Provision is further made for the Supervisory Board or one third of its members to retain the services of a confidential expert to examine technically complex matters. Similar provision is made in Article 11 (4) of the proposal for a fifth Directive.

7. Having regard to the joint responsibility of the Supervisory Board, paragraph 6 prevents any unequal treatment of its members in the provision of information to the Board. It corresponds with Article 11(5) of the proposal for a fifth Directive.

Article 74

1. Paragraphs 1 and 2 of Article 74 now govern the conditions of Supervisory Board membership. Paragraphs 3 and 4 regulate the number of members.

2. Paragraph 1 contains the previous provisions of paragraph 2, according to which only natural persons could be members of the Supervisory Board. This has been approved by the European Parliament and the Economic and Social Committee. The Second sub-paragraph of paragraph 1 limits the number of Supervisory Board appointments that may be held simultaneously, in line with Article 9 (3) of the proposal for a fifth Directive, by members of the Supervisory Board of an S.E.

An exception has, however, been made in the case of Supervisory Board appointments within a group. The special conditions obtaining within groups justify the number of such appointments counting as only two within the total.

Article 69 (1) provides that a member of the Board of Managment may not serve on the S.E.'s Supervisory Board. This prohibition must be extended to membership of the Supervisory Board by members of the management body of an undertaking on which the S.E.'s Board of Management can exercise a controlling influence, as the latter could otherwise influence the S.E.'s Supervisory Board through the managing body of the dependant undertaking. This is not now possible.

3. Paragraph 2 repeats the provisions of Article 74 (2) 2. without specific reference, for the sake of clarity.

4. Paragraph 3 (1) contains the principle previously enshrined in paragraph 2 (2) that the number of Supervisory Board members shall be specified in the statutes. As previously provided in paragraph 1 (1) of Article 74, however, their number must be divisible by 3. At the request of the European Parliament, the number must, additionally, be an odd one, so that majority decisions can be reached not only within the Supervisory Board as a whole but also within the individual groups of members. This is important, having regard both to the appointment of Supervisory Board members representing neither the shareholders nor the employees (Articles 74 a, 75 a and 75 b) and to employees' rights on transformation and merger (Articles 268 (4), 272 a and 273 a).

The minimum figure, previously stated in Article 74(1) 2. has consequently been fixed at 9 at the request of the European Parliament.

This provision has been extended, having regard to the participation of employees of group undertakings dependent on the S.E. in electing employee representatives to the S.E.'s Supervisory Board, by a stipulation including establishments of group undertakings for the purpose of assessing the minimum figure.

5. Paragraph 4 contains a transitional arrangement whereby the convening of the General Meeting merely to elect members to the Supervisory Board is avoided.

The Economic and Social Committee rightly criticised the necessity of calling a General Meeting in the comparable instance of the former Article 75 (4).

Article 74 a

1. This provision concerns the composition of the Supervisory Board. Paragraph 1 corresponds to the wording proposed by the European Parliament for Article 137(1). The Commission supports the Parliament's view on the composition of the Supervisory Board for the reasons set out in the introduction to this Title. The European Parliament's text proposed by the governs the composition of the Supervisory Board in Article 137 as a whole. A logically better place for this is among the provisions of this section and not in Article 137, which forms part of the Title on "Representation of Employees". Article 137 will accordingly in future contain only the rules applying specifically to the representation of employees within the scope of the general provisions of Article 74 a (Article 74 a (3)). These rules are in context with the electoral provisions applying to the European Works Council, and the general provisions of Title V, and should therefore remain in Title V.

3. Provision for electing or appointing shareholders' representatives can still be made in Article 75 within the tenets of Article 74 a(1). As regards the cooptive third, the provisions of Articles 75 a and 75 b have been introduced and these materially correspond with Article 137(3) as proposed by the European Parliament.

4. Paragraph 5 contains a procedural provision previously in Article 75(5).

Article 74 b

This provision ensures that the S.E.'s Supervisory Board can fulfil its tasks even if not all its members have been elected.
Paragraph 1 corresponds to the wording proposed by the European Parliament for Article 143 (1) which relates back to Article 142 of the original proposal. Paragraph 2 contains analogous provisions for the time leading up to the election of the third third of the membership.

Article 74 c

1. Stipulations as to the Supervisory Board's term of office were originally left to the statutes (Article 74 (3)). In order to facilitate simultaneous holding of elections for the European Works Council and for employee representatives on the Supervisory Board, the European Parliament has, however, asked for the maximum period under Article 74 (3) to be reduced from five years to four and fixed the employees' representatives' term of office at four years (Article 144 of the text proposed by the European Parliament).

Supervisory Board elections shall take as simple a form as possible in respect of all categories of members of Board, with due regard to this proposed text; at the same time, however, all members of the Supervisory Board shall rank equally on the Board. Differential terms of office would be incompatible with this and it therefore seems opportune to specify a standard period of four years.

Re-election was already permitted previously, under Article 75(1).

2. Paragraph 2 matches up with a proposal made by the European Parliament in order to prevent a vacancy arising when an employee representative's term of office expires (Article 143(2) of the Parliament's text).

   In view of the pursuit of equality amongst members of the Supervisory Board, there is justification for extending this provision to apply generally to all its members.

   In order to avoid any abuse , it will be possible to bridge over a vacancy arising from delayed elections only for a limited period of time.

3. Paragraph 3 is a simplification. The terms of office of all members of the Supervisory Board should end at the same time.

Article 74 d

1. This provision contains a standard provision for the premature termination of a member's term of office. Formerly, such a provision applied only to employees' representatives, to which the provisions of Articles 108 and 110 were to apply, in accordance with Article 144(2). It seems desirable, however, that the provision should also apply to the other categories of Supervisory Board members.

2. Paragraph 1 has been drafted on Article 108 (1).

3. Paragraph 2 corresponds with Article 108(3) which in turn replaces Article 110, though in distinction to the latter, it has been decided not to have alternates step in in the event of only temporary incapacity; the provision regarding representation of absent members by those present (Article 77(3)) seems more appropriate here.

   Dismissal by the court, which the European Parliament has provided for in respect of employees' representatives (Article 144 a of the Parliament text), is intended under Article 74 e to apply to all members of the Supervisory Board and to be available in the same legal grounds.

4. Paragraph 3 contains provisions for the event of no alternate being able to step in. This may arise because no alternate has been elected or because the alternates elected have become unavailable in the meantime.

The Economic and Social Committee rightly pointed out in connection with the provisions of Article 75(4) of the original proposal that it would be inordinately expensive to carry out the normal voting procedure for the remainder of the term of office. On the other hand, the Supervisory Board's viability depends decisively on its having a balanced composition.

Article 74 e

1. This Article introduces a legal expulsion procedure for all members of the Supervisory Board in respect of gross dereliction of duty. The European Parliament had sought a procedure of this kind for employees' representatives in Article 144a of its Opinion. The concept underlying the Statute, according to which all members of the Supervisory Board have equal rights and obligations (Article 80), is in fact answered by the fact that all members can be relieved of their office by the court in the same circumstances upon gross dereliction of their duties.

2. The substantive ground for dismissal - serious breach of obligations - corresponds with the European Parliament's Opinion on Article 144 a. The court may, however, intervene only on application. Ex officio intervention as requested by the European Parliament is foreign to the procedures of many Member States.

   In accordance with the intentions underlying Article 74 e, the right to make application has been granted both to the General Meeting and to the representative body of employees in the S.E.

   In defining the employees' representative body it proved possible to turn to the provisions of Article 75 a (2) regarding the nomination rights in respect of the co-optive third. These provisions for their part relate back to Article 131 of the European Parliament's Opinion.

   The employees' representatives on the Supervisory Board who in certain circumstances have subsidiary nomination rights under Article 75 a(2)b,cc have however been excepted in this case. Where neither a European Works Council nor an employee representative body within the meaning of Article 75(2)b.aa and bb exists within the S.E., employee interests will be sufficiently protected in this case by one quarter of elector employees being granted, under the subsequent provisions, a right to apply to the court for an expulsion order. This right to apply on the part of the employees and that of the Supervisory Board itself relates back to the European Parliament's Opinion on Article 144 a.

   Pari passu to the employees' right of application, this has also been granted to shareholders. In view of the complex nature of such a procedure,

more particularly stringent conditions have been laid down, worded analogously to those for special supervision, than e.g. in connection with bringing a liability action.

Article 75

1. The appointment of shareholders' representatives to the Supervisory Board is, under paragraph 1 (1), a matter for the General Meeting, as before.

   The second sentence includes an elucidatory reference to an exception in the case of the Supervisory Board of a newly formed S.E. (cf. Article 13). The reference to alternates was added at the suggestion of the Economic and Social Committee so as to give the General Meeting a simple means for dealing with vacancies on the Supervisory Board. Where the General Meeting has not elected alternates, Article 74 d (3) will apply in the event of a vancancy.

2. Paragraph 2 has been introduced to enable a minority of shareholders to be represented on the Supervisory Board.

   It can be important for a founder company with a minority holding in the S.E. to have representation on the Supercisory Board guaranteed, particularly where an S.E. is formed as a joint subsidiary. There would be no such guarantee under the general application of the rule in Article 91(2) to the election of Supervisory Board members. According to this, resolutions will be adopted by the General Meeting by a majority vote. If, on the other hand, the opportunity under Article 91 (2) is availed of and a larger majority is prescribed under the statutes, the majority would then encounter too great a difficulty in electing their own representatives.

   Under Article 75 (2), therefore, the possibility exists for the statutes to specify an electoral procedure that would do justice to all interests in such a case. Introduction of the practice of "cumulative voting" current in the US for example might be contemplated.

3. Article 75 (3) regarding dismissal of shareholders' representatives corresponds substantially with paragraph 2 of the original proposal. This right of dismissal guarantees that the majority shareholders at any particular time can be represented on the Supervisory Board on a sudden change in share ownership.

4. Paragraph 3 of the original proposal has been retained in altered form in Article 75 (4).

An age limit may in future be specified only for the shareholders' representatives. Such a provision does not seem particularly necessary for other members of the Supervisory Board owing to the proposed election procedure. It would moreover be improper for an age limit in respect of the latter to be imposed by the shareholders alone.

The provisions of the former paragraph 4 have been deleted as superfluous in view of the new Article 74 d.

The earlier paragraph 5 has now become Article 74 (5).

Article 75 a

1. Articles 75 a and 75 b contain without substantial change the conditions put forward by the European Parliament for the appointment of the third third of the Supervisory Board to be co-opted jointly by the representatives of shareholders and employees. Article 75 a covers the nomination procedure. The elections themselves are covered by Article 75 b.

2. Article 75 a corresponds substantially with Article 137(3)1. of the text proposed by the European Parliament. The right of nomination could not, however, be restricted to the European Works Council (in addition to the General Meeting and the Board of Management), as proposed under the European Parliament's Opinion, since a European Works Council need be formed only when the terms of Article 100 apply. It is in line with the basic thinking behind the European Parliament's text that nominations could be made on the part of employees even where no European Works Council has to be formed.

   Article 75 a(1) takes account of this fact and extends the right of nomination to "the employees' representative body". This body is defined in the subsequent provisions of paragraph 2 analogously to the wording of Article 131 as proposed by the European Parliament.

   As regards the cases that could quite conceivably arise in an S.E. with a small establishment where neither a European Works Council nor an employee representative body exists pursuant to sub-sub-paragraphs aa and bb, reference is made in sub-sub-paragraph cc back to the employees' representatives on the Supervisory Board in order not to over-complicate the issue.

   If the S.E. is the controlling company of a group and is required to form a Group Works Council under Article 130, the latter too will be an employee representative body entitled to make nominations for the purposes of Article 75 a. The employees of the group as a whole have an immediate interest in the composition of the Supervisory Board; under Article 137 they also participate in electing employees' representatives to the Supervisory Board.

   When an S.E. is being formed, it would be too burdensome to convene a General Meeting for the purpose only of preparing a list of candidates. Therefore paragraph 4 in such a case gives the right to put forward candidates to the bodies of the founder companies which decide upon the formation of the S.E. (Art. 24, 32, 36 and 39).

3. Paragraph 3 states the qualifications for nominated candidates. It corresponds with Article 137(3) 2. of the European Parliament's proposal.

The approach has been kept very general. The requirements are intended to facilitate the election of suitable, independent members. Too strict a formalisation of the rules would, on the other hand, militate against the desired consensus amongst the parties.

On the positive side it is provided that wider interests than those of the shareholders and employees most closely concerned in the decision-making process in the S.E. should be given a hearing.

The co-optive members are expected, because of their personal and professional qualifications, to be able to contribute towards solutions satisfying all interests in situations of conflict in the enterprise.

Furthermore the requirements set out to establish a quasi-trustee role on the part of the co-optive members towards the undertaking as a whole by making them independent of the interests represented by the other two thirds of the membership. Additional guarantees on this score are given by the voting procedure of Article 75 b.

Article 75 b

1. This provision governs the appointment of co-optive members of the Supervisory Board.

Paragraph 1 contains the essential provision made by the European Parliament in Article 137(3)3.1. Under it, a candidate is elected only if he receives two-thirds of the votes cast.

2. Paragraph 2 substantially contains Article 137(3)2. 2 of the European Parliament's proposal.

3. Paragraph 3 contains provisions for the new nominations required under paragraph 2 in the event of inconclusive voting. They are intended to avoid the necessity of convening a General Meeting and the employees' representative body referred to in Article 75 a for the sole purpose of submitting new nominations. In order to simplify the procedure it appears fitting that both bodies be given the opportunity of entrusting to a smaller circle of persons the work of seeking fresh nominations that will have some likelihood of success.

   The General Meeting and the employees' representative body may reject this course, in which case the elected representatives of the shareholders and employees on the Supervisory Board shall be considered as authorised to submit new nominations of their own accord.

4. Paragraph 4 makes provision for the European Parliament's wishes regarding a decision by an arbitration board when the election fails to take place.

5. Paragraph 5 governs the composition of the arbitration board on essentially the same lines as Article 137(3) 3. as proposed by the European Parliament.

Article 76

1. Paragraph 1 has been extended at the request of the Economic and Social Committee.

2. The wording of paragraph 2 has been changed to avoid the impression that the Supervisory Board chairman is required to verify whether the application to convene the Board is justified. It has, further, been made clear that the application can be made only by the Board of Management and not by its individual members.

Article 77

1. The wording of paragraph 1 has been revised and a provision concerning additions to the agenda was attached.

2. The sequence of paragraphs 3 and 4 has been reversed, as the provisions of the earlier aragraph 3 logically develop from these of the earlier paragraph 4.

3. The authority given under paragraph 3 of the new version has been provided in accordance with a proposed amendment of the European Parliament to paragraph 4 of the original draft.

4. At the request of the European Parliament, paragraph 4 now takes account of the possibility of proxy voting in accordance with the preceding paragraph.

5. Paragraph 6 has been simplified at the request of the European Parliament.

Article 78

This provision has been assumed into Article 73 a (5).

Article 79

Paragraph 3, regarding agreements affecting the interests of a member of the Supervisory Board, has - like Article 69(4) - been adapted to Article 10 of the proposal for a fifth Directive.

Articles 81 and 81 a

The liability of members of the Supervisory Board continues to take a form parallel to that of members of the Board of Management. The changes to Article 81 take account of these to Articles 71 and 72.

Article 81 a corresponds with Article 72 a, to the explanatory notes on which reference should be made.

Section three

(Special obligations applicable to members of the Board of Management, the Supervisory Board, the auditors and principal shareholders)

Article 82

1. The incorporation of provisions regarding priviledged access to information on the S.E. into the Statute for European Companies has been approved by the European Parliament and by the Economic and Social Committee.

   The Economic and Social Committee wishes, however, to delete principal shareholders from the group of persons concerned. The European Parliament, has, however, approved paragraph 1. The desired amendment would run counter to present-day trends in company law, particularly in Great-Britain and the Netherlands. No material changes have therefore been made.

2. The formal provisions of paragraphs 2 to 4 have been considered as over-subtle, particularly by the Economic and Social Committee. If the provisions are to bring insider dealing out into the open, however, no deletions may be made from them. Practical difficulties should not be over-emphasised, given modern methods of information retrieval.

3. The provisions regarding transfer profits under paragraph 5 have been generally criticised as too inflexible. The Economic and Social Committee would like to see the legal effect of paragraph 5 restricted to speculative profits. The European Parliament's Legal Affairs Committee, on the other hand, considers the provisions do not go far enough and has asked the Commission to investigate the setting up of a vetting committee. This approach is, however, on the institutional grounds already put forward by the Legal Affairs Committee, hardly a viable one, at least for the limited purposes of the European Limited Company.

   The problems surrounding the utilization of insider knowledge are at present under keen discussion in the Member States. For this reason, and in view of the wide ranging opinions expressed, the Commission has, for the time being, decided against altering its original proposals.

Section four

The General Meeting

Article 83

1. The list of attributes falling to the General Meeting in paragraph 1 has been improved upon at the request of the European Parliament and of the Economic and Social Committee.

   The discharge of members of the Board of Management proposed by the European Parliament has not been included in the list as it has no legal effect under the system adopted by the Statute (cf. Article 71(4) of the new version) and will not therefore in future be covered under Article 218 (2) and (3).

2. The contracts referred to in item k on the list in paragraph 1 have been expressly made subject to approval by the General Meeting at the request of the European Parliament. It has been emphasized that such approval is essentially effective vis-à-vis third parties, as is the case under Article 66(4).

   This provision regarding third parties cannot apply to merger or transformation of the S.E. leading to alteration in its structure. Such cases must therefore be retained in the list under paragraph 1, contrary to Parliament's wish.

3. Paragraph 3 has been added by way of clarification, at the request of the European Parliament. A detailed description of the powers is unneccessary in this context.

Article 85

Paragraph 3 has been deleted. Extension of the agenda has been incorporated into Article 86(3) which previously dealt only with the publication of amendments. In the case of extensions to the agenda, there in fact seems no justification, contrary to the position as regards convening of the General Meeting under paragraphs 1 and 2, for subjecting exercise of minority shareholders' rights to supervision by the court. For this reason, no limitation of this kind was provided either under Article 25(2) of the proposal for a fifth Directive.

Article 86

1. Paragraph 1 regarding the calling of a General Meeting has been extended, at the request of the European Parliament, by a provision concerning holders of registered shares.

2. Paragraph 2 has been reworded.

3. Paragraph 3 now covers extensions to the agenda in the same way as it does the introduction of amendments (cf. the explanatory notes to Article 85(3) supra). The limitation on the publication of amendments has, further, been deleted at the request of the European Parliament, The provisions correspond substantially with those of Article 25(2) and (3) of the proposal for a fifth Directive.

4. Paragraph 4 has been changed at the request of the European Parliament.

Article 87

1. In accordance with the European Parliament's Opinion, paragraph 1 now states clearly that shareholders do not lose their voting rights when, e.g., they become members of the Board of Management or the Supervisory Board. The provisions of paragraph 1 apply only to members who are not shareholders.

   Where members of these bodies are shareholders, they will ipso facto fall within the restrictions on voting rights of Article 91(3) (formerly Article 92(3)). This is why the provision additionally proposed by the European Parliament on this point is unnecessary.

2. Holders of convertible debentures will not in future, at the request of the European Parliament, be admitted to the General Meeting. This group will be kept adequately informed by their representative, who has participation rights under Article 57(2). Nor are holders of deposited shares now entitled to participate. They may deal through the person exercising the rights attaching to their shares.

Article 88

1. The provisions regarding the exercise of voting rights by proxies have been adapted to Articles 27 and 28 of the proposal for a fifth Directive on the structure of limited liability companies, in accordance with the general wishes of the European Parliament.

2. The persons referred to in paragraph 1 continue to be ineligible as proxies. The Economic and Social Committee asked that an exception be made in the case of salaried employees of the company. In the cases that it mentions, however, there are sufficient alternative modes of representation not likely to lead to the kind of conflict referred to in the explanatory notes to Article 88 of the original proposal, The addition to paragraph 1 relates back to Articles 27 and 24 (e) of the proposal for a fifth Directive.

3. Paragraph 2 has been revised and extended in accordance with Article 27(3) of the above mentioned proposal for a directive.

4. Paragraph 3(1) has been amended by analogy with Article 28(1)a of the proposed Directive. Delegated proxies have been permitted at the request of the Economic and Social Committee.

5. Paragraph 4 has, in view of its general purport, been incorporated as an independant provision in Article 88 b.

Article 88a

1. By analogy with Article 28 of the proposal for a fifth Directive, this Article contains provisions, additional to those of Article 88, regarding cases where shareholders are publicly invited to grant a proxy.

2. Paragraph 1 contains the particulars required in the circumstances referred to in Article 28(1)c-g of the above-mentioned proposal. The provisions contained in sub-paragraphs a and b have already been generally covered in Article 88.

Paragraph 2 makes it clear that financial institutions are also included under the provisions of paragraph 1 if they seek proxies only from customers having deposited share certificates. In this way any doubts will be avoided as to whether an invitation directed towards a specific and distinct group of persons is public within the meaning of paragraph 1. The general provisions of paragraph 1 must however conform with those of paragraph 2 to the extent that an invitation to act as proxy may be addressed only to the depositor customers of the financial institution.

Article 88 b

In view of its general application, the prohibition under Article 88(4) has been incorporated into an independent provision following after those regarding exercise of voting rights.

Article 89

Having regard to the European Parliament's Opinion, the attendance list required under paragraph 2 need no longer be prepared by a notary. The numerous practical objections against the attendance list have consequently been largely removed. In the case of large companies with many shareholders, preparation of such a list can indeed lead to some difficulty, but this does not justify abandoning this requirement, which makes for open dealing and legal caution. Large companies of this kind can as a rule avail themselves of data processing equipment to overcome this problem.

Article 90

1. Paragraphs 1 and 3 a have been redrafted. In doing so, paragraph 3a has been aligned on paragraph 1 at the request of the Economic and Social Committee.

2. In the company's interests, proceedings regarding a refusal of information shall be heard in private. This is now expressly stated in paragraph 1, in the same way as in Article 220(4) where similar considerations apply.

Article 91

1. Paragraphs 2 and 3 regarding the passing of resolution by the company have been combined for drafting reasons.

2. The former paragraph 3 of Article 92, relating to suspension of voting rights, has become paragraph 3 of Article 91 as it is closely linked with the provisions of the latter. The wording of this provision has been adapted to article 34 of the proposal for a fifth Directive, thereby also taking account of the Economic and Social Committee's objections. Discharge of shareholders is no longer dealt with in the new version as the General Meeting no longer grants this under Article 218, as redrafted.

Article 93

1. Under the new version of paragraph 1, no agreements regarding the exercise of voting rights as directed by the governing bodies of an undertaking controlled by the S.E. shall be permitted. If such agreements were to be allowed, the prohibition as to the exercise of voting rights on the directions of the S.E.'s governing bodies could be easily circumvented.

2. The procedural provisions of paragraphs 2 and 3 applying to voting agreements have been criticised by the Economic and Social Committee but approved, in substance, by the European Parliament. Having regard to the European Parliament's Opinion, only drafting alterations were therefore undertaken.

Article 94

Paragraph 1 continues to require that the minutes of the General Meeting shall be kept by a notary. This has been supported by the Legal Affairs Committee of the European Parliament in view of the value of the documentary evidence.

Reference on this point may further be made to the explanatory notes on the redrafted Article 12.

Article 95

1. The right to seek cancellation under paragraph 2 has been made subject, on the basis of the Opinion of the European Parliament, to proof of an interest in the due performance of the provision infringed. This is the mandatory basis for any action brought by shareholders or any other interested party. This factor is not, however, sufficiently clearly expressed in the Parliament's proposal.

It was stated in the explanatory notes to article 95(2) that breach of the provision must have influenced the General Meeting resolution in question. This idea has now been assumed into the text of paragraph 2 in the form given it by the European Parliament in the similar case where elections to the European Works Council (Article 20(1) of Annex II)

or to the Supervisory Board (Article 22(1) of Annexe III) are challenged. What is in question here is therefore not an actual effect that may be hard to prove, but only a potential one.

Paragraph 2 in its present form also embraces with general effect all cases where a resolution of the General Meeting may be impugned under the rules in Art. of the proposal for a fifth Directive, without, however, its scope being thereby .

If defects have occured in the motion for a resolution of the General Meeting of the S.E. of the kind referred to in Article 42(a) to (d) of the above proposal it must in all events be assumed, in accordance with Article 95 (2), that a shareholder was in a position to influence the discussions and the resolution by properly exercising his rights.

Defects under Article 42 (e) and (f) of the proposal for a fifth Directive are further covered ipso facto by Article 95 (2).

Article 96

This Article has been deleted on the basis of the European Parliament's Opinion.

The industrial and commercial activities of an S.E. are subject, under Articles 1 (4) and 7 (2), to the public policy of the Member States whose national law applies to them in each particular case. There is no justification for providing for exceptions, with ambiguous preconditions and disputable effects, in respect of resolutions of the General Meeting.

Section five

Special supervision of Governing Bodies

Article 97

The provisions laying down the conditions for a special investigation and for jurisdiction have been reworded in view of the Opinions of the European Parliament and the Economic and Social Committee, who approved them in principle.

The Economic and Social Committee's suggestion that the General Meeting also be given a right of application has not, however, been adopted. It suffices if this right is accorded to the shareholders themselves.

Article 98

At the request of the European Parliament, paragraph 2 has been clarified to state that it is enough for the court to consider the application as *prima facie* justified.

If the court rejects the application as unfounded, costs will be awarded in accordance with ordinary procedural law. This need not, therefore, be regulated under the Statute. If the petition is successful, provision must then necessarily be made regarding the cost of the special investigation. The first and second sentences of paragraph 1 of the former Article 99 have been assumed into paragraph 5 in order to ensure that, as before, interested parties will be informed of the results of the special investigation.

Article 99

1. Article 99 governs further procedures after submission of the special commissioners' report. It has been reworded on the basis of the European Parliament's Opinion.

2. Paragraph 1 now makes special provision for the closure of the proceedings if neither of the parties calls upon the court and applies for measures in accordance with paragraph 3. A decision by the court as to closure of proceedings and publication thereof in accordance with paragraph 5 is in the company's interests.

3. The new paragraph 2 contains procedural rules for the application of measures under paragraph 3, at the European Parliament's request.

4. The new paragraph 3 incorporates the earlier paragraph 2. At the request of the European Parliament, the court's powers have been widened considerably beyond the original proposal. The court is given a wide measure of freedom to lay down measures to suit the circumstances.

5. The former paragraph 3 becomes paragraph 4 unchanged.

6. Paragraph 5 has been revised in accordance with the European Parliament's Opinion.

TITLE V

REPRESENTATION OF EMPLOYEES IN THE S.E.

The Statute for the European Company proposed in 1970 provides, in Title V, for three types of legal machinery for establishing the representation of employees and for facilitating the regulation of terms of employment and remuneration within the S.E.:

1. The European Works Council, representing the employees;
2. The representation of employees in the Supervisory Board of the S.E.;
3. The possibility of concluding collective agreements between the S.E. and the trades unions represented within its establishments.

This machinery was discussed in great detail by the European Parliament and the Economic and Social Committee. European industry and the European trade unions have also fully expressed their opinions on the subject.

Both the European Parliament and the Economic and Social Committee agree with the principles underlying this process of regulation. Views within the Economic and Social Com ittee differed, however, as to the details of the machinery and therefore it limited itself to presenting the various attitudes of its members, so as to avoid self-contradictory opinions on the indiviual points arising from shifts in the pattern of voting.

The creation of the European Works Council as a body representing all the employees of an S.E. with establishments in different Member States was widely approved. Its composition and competence, however, are the subject of debate.

The European Parliament has proposed the direct election of members of the European Works Council according to a uniform set of electoral rules. The previous solution, that of holding direct elections governed by existing national provisions on employees' representation in the establishments of the S.E., was no longer tenable, since no general statutory or formally agreed system of employee representation to which reference could be made exists in the United Kingdom or Ireland.

The Commission has adopted this new concept and the electoral rules based on it. They are contained in Annex II to the Statute, which is incorporated therein by virtue of Article 104 of the new version. The Commission, like the European Parliament, believes that the direct election of employees' representatives in accordance with democratic principles will increase the European Works Council's ability to operate at a supra-national level.

The provisions on the term of office and the operation of the European Works Council have been rearranged to render them more coherent.

Where there is doubt as to the extent of the obligation of secrecy imposed on members of the European Works Council under Article 114, this will in future be decided by the court and not, as hitherto, by the Board of Management.

At the request of the European Parliament and the European trades unions, the competence of the European Works Council has been more narrowly delineated in Article 119. It is now laid down in paragraph two of this Article that the competence of the European Works Council extends only to matters that cannot be settled at plant level. So as not to encroach on the province of the parties involved in the collective settlement of conditions of employment, the European Works Council is expressly prohibited from concluding agreements concerning such conditions.

The rights of the European Works Coucil to be kept informed on the position of the S.E. have been extended at the request of the European Parliament. Likewise at the request of the European Parliament the European Works Council's co-determination rights have, in particular, been extended to cover the detrimental effects on employees of the closure or transfer of an establishment. This is the object of the social plan introduced in Article 126a. If the Board of Management of the S.E. and the European Works Council cannot reach agreement concerning the plan, the Arbitration Board provided for in Article 128, on which the Board of Management and the European Works Council have equal representation, decides the question in issue.

The economic decision itself on the actual closure of an establishment is not affected by these provisions. The decision is taken, as before, by the Board of Management with the agreement of the Supervisory Board, after consultation with the European Works Council pursuant to Article 125.

Section two of Title V deals with the representation of employees in undertakings in a group controlled by an S.E. The provisions in this section have where necessary been adapted to the amendments to the first section on the European Works Council; otherwise they remain essentially unchanged.

The composition of the Supervisory Board has already been dealt with in section two of Title IV, (Articles 74 to 75b). The introductory notesto the new version of Title IV state that the Commission, in formulating Articles 74a, 75a, and 75b, has closely followed the Opinion of the European Parliament, and its version of Article 137. As regards the principles underlying the composition of the Supervisory Board, reference should be made to the introductory notes to Title IV, and in particular to Articles 74a, 75a and75b.

In accordance with the position of Article 137 in the scheme of Title V, the new version of this Article deals only with the appointment of employee representatives to the Supervisory Board.

As a result of the Opinion of the European Parliament, persons employed in a group undertaking controlled by the S.E., whose registered office is situated within the Community, now also participate in the election of employee representatives to the Supervisory Board of the S.E. The reason is that, in accordance with the provisions relating to groups of companies, these undertakings are under the sole management of the S.E., with the result that all the employees of a dependent undertaking belonging to the group are affected in the same way by decisions taken by the S.E.

The previous provisions on elections contained in Articles 139 to 142 are no longer practicable, since no employee representative boards of the kind they presuppose exist in the United Kingdom or Ireland. The Commission has therefore adopted the electoral provisions contained in Annex III of the Statute as proposed by the European Parliament, and incorporated into it by Article 137(1) in the new version. According to them, employees of the S.E. and its dependent group undertakings elect a number of electoral delegates for the establishment in which they are employed, along the principles applying in the case of the European Works Council. The electoral college in turn elects representatives to the Supervisory Board of the S.E. by proportional representation. Since it is important that employees should also be represented by persons who are capable of viewing the undertaking of the S.E. both from the point of view of the particular industry and in the overall economic context, a minority of the employee representatives may, in accordance with Article 137(2), be persons who are not employed in the undertaking.

The European Parliament particularly welcomed the possibility offered in Section four of collective agreements being concluded between the S.E. and the trades unions represented in its establishments. The relevant provision was therefore retained without material alteration.

TITLE V

REPRESENTATION OF EMPLOYEES IN THE EUROPEAN COMPANY

Section one

The European Works Council

SUB-SECTION ONE

GENERAL

Article 100

1. The principle has been maintained that a European Works Council shall be set up if an S.E. has establishments in more than one of the Member States.

The case has indeed been put on many occasions that a European Works Council should be formed even if the S.E. has an establishment in only one Member State. But it is considered that the desired uniform representation of the S.E. employees' interests can in such cases be achieved through the instruments of national law. With this in mind, both the European Parliament and the Economic and Social Committee have lent their support to the present solution.

2. The wording of the Article has been clarified to meet the views of the European Parliament. Provision has been made in particular to ensure that the two establishments in various Member States concerned in the formation of a European Works Council shall have sufficient employees to enable representatives to be elected on to the European Works Council in accordance with the new Article 103.

Article 101

The feeling has been voiced in various quarters that the competence of the national bodies representing employees should be left quite untouched and that the European Works Council should be given only subsidiary powers. This view has, however, been expressly repudiated by the European Parliament as it conflicts with the idea of the European Works Council as a body whereby the interests of the S.E.'s employees can be represented on a uniform basis (Article 119(1)). Article 101 has therefore been left unchanged.

Article 102

1. The European Parliament has proposed that the national organizations representing employees referred to in the following provisions of this Section (and of the subsequent Section) should no longer be specified in the body of the Statute but in a special appendix (Annex I), to be kept up-to-date by the Commission with the assistance of the Member State concerned in each case. In this way greater account can be taken on a more flexible basis of the changes occuring in the Member States.

The new wording corresponds substantially with the European Parliament's Opinion.

Article 102 a

This provision refers to the arrangements of the Member State in which the establishment is situated concerning the conditions under which a trade or industrial union may be represented in an establishment of the S.E.

A similar arrangement originally applied under Article 116 (2), but as it also in fact applies to a number of other Articles, and especially in the case of the election of members to the European Works Council, a self-contained Article has been incorporated at the request of the European Parliament.

The wording of this Article based on the European Parliament's Opinion is the result of exhaustive consideration within the Legal Affairs Committee.

Whether or not a trade union is represented in an establishment will accordingly in no way be either directly or indirectly determined by the Statute. The sole criterion will be the arrangements applying in the Member State in which the establishment is situated.

SUB-SECTION TWO
COMPOSITION AND ELECTION

Article 103

1. The wording of paragraph 1 has been revised at the request of the European Parliament. Furthermore it was made clear that corresponding with the provisions of article 104 (in connection with article 102) of the original proposal only establishments within the Community may delegate representatives to the European Works Council. As to the question of electoral procedure (direct or indirect suffrage) with which this provision is partly concerned, cf. the notes on the new Article 104.

2. Article 103 (2) has been redrafted to meet the views of the European Parliament. It now states in what establishments representatives may be appointed and what the number of the latter will be. This was formerly governed by Article 105, but is of fundamental importance in view of the subsequent electoral arrangements under Article 104.

The former provisions of Article 105 have been changed in that establishments of 50 employees and over are now represented on the European Works Council. The number of representatives for establishments of 500 employees and over has been increased. In this way a better

balance can be achieved - as the Legal Affairs Committee of the European Parliament has already pointed out - as between the number of employees and the number of representatives on the European Works Council, and, in the larger establishments at least, adequate representation of the various employee groups is made possible.

3. Paragraphs 2 and 3 of the former Article 103 have in part been amended and incorporated into the new Article 103a in line with the Opinion of the European Parliament.

Article 103a

1. This provision now contains the special measures originally contained in Article 103(2) and (3), in accordance with the European Parliament's Opinion.

2. Paragraph 1 corresponds to the former Article 103(2)

3. Under paragraph 2 the additional elections for which provision was originally made only in the case of a merger are extended to apply in all similar circumstances, where the S.E. acquires or opens establishments with at least 50 employees after the European Works Council elections have been held. The European Parliament has, however, introduced a general restriction in this connection so as to avoid too swift a sequence of elections in such establishments.

Article 104

The proposed direct election of members of the European Works Council has met with criticism from industrial circles. Indirect elections through national employee representative bodies are preferred. This view has also been put by the European Trade Union Federation. In 1970, however, the European Federation of Free Trades Unions in memoranda dated 4 November, 15 April and opted for direct voting on uniform electoral principles.

The European Parliament agreed with direct elections in its proposals and recommended the introduction of uniform electoral rules.

The Commission shares the European Parliament's view that the European Works Council will find its task - to represent the interests of employees in different Member States - made easier if its members are all confirmed in the same manner by the democratic votes of the employees.

The fear that this might lead to conflict between the European Works Council and the national representative bodies appears unjustified - particularly in view of the new wording in Article 119, recommended by the European Parliament, of the rule regarding the competence of the European Works Council. It should also be noted in this connection that dual membership of the European Works Council and national representative bodies is permissible under Article 107(2).

Under a direct voting system, however, the previously proposed reference to the electoral rules applying to the national employee representative bodies at the S.E.'s establishments is no longer possible. In the United Kingdom and in Ireland there are no general representative bodies for employees existing on either a statutory or a contractual basis to which reference could be made.

The European Parliament has therefore proposed that uniform electoral rules be introduced as Annex II to the Statute, and wishes to make this Annex an integral part of the Statute. The new wording of Article 104 is based on this concept. As regards the electoral rules themselves, reference can be made to the notes on Annex II.

Article 105

This provision regarding the number of an establishment's representatives on the European Works Council has been incorporated in amended form in Article 103(2).

Article 106

The date of the elections is now determined in the electoral rules in Annex II (cf. Article 14(1) in particular), so that the former provision can be deleted.

The provisions suggested by the European Parliament to take its place, regarding the convocation of the European Works Council, have been included in Article 109, which now deals with this matter comprehensively.

SUB-SECTION THREE

TERM OF OFFICE

Article 107

1. The term of office of the European Works Council has been extended to four years at the request of the European Parliament. In consequence, the elections for the European Works Council (Article 104) and for employees' representatives to serve on the Supervisory Board (Article 137(1) of the new version and Article 1 of Annex III) can be held simultaneously in the establishments of the S.E., as the Supervisory Board's term of office is now also a standard four years (Article 74c).

The date of commencing office, originally governed by Article 111(3), is now determined in Article 107 so as to achieve greater cohesion and clarity in these provisions. In order to avoid any misunderstanding,

re-election has been expressly authorised. This was formerly provided only in the case of shareholders' representatives on the Supervisory Board (Article 75(1)). The same rule now applies to all members of the Supervisory Board under Article 74c(1).

2. The wording of paragraph 2 has been revised having regard to the Opinion of the European Parliament.

Article 108

1. This Article now contains a cohesive provision on requirements for all effects of termination of European Works Council membership.

2. The number of grounds under paragraph 1 on which membership may terminate has been revised in accordance with the European Parliament's Opinion.

3. The new paragraph 2 governs the appointment of alternates in consequence of the foregoing. This was formerly governed by Article 11C. The wording of this provision has been revised, particular attention being given to removal of members from the European Works Council, which is dealt with under Article 108a.

4. Paragraph 3 contains a special provision applying on expiry of the period of office intended to ensure continuity in the representation of an establishment on the European Works Council in the event of a delay in new elections. The European Parliament inserted this provision into its version of Article 109 as paragraph 3.

Article 108a

1. The European Parliament has asked that it be made possible for a member to be expelled from the European Works Council for dereliction of duty by court order and for a court to dissolve the European Works

Council. The new Article provides for this procedure which substantially corresponds with Article 108 (2) and (3) as proposed by the Parliament.

2. The European Parliament has, further, considered it desirable to introduce a provision whereby the European Works Council can compel the S.E.'s Board of Management to observe the statute and wished to include a new paragraph 4 under Article 108 to this end.

The Commission feels that such a provision is unnecessary as the European Works Council already has the procedures under Articles 97-99 at its disposal for this purpose. The provision that Parliament seeks is, moreover, open to objection on legal grounds as the proposed imposition of a cash penalty, without a compelling reason, encroaches upon the arrangements applying in each Member State for enforcing judgments. On this consideration the Commission diverged from the European Parliament in this matter.

Article 109

1. For the sake of convenience this Article now comprises all provisions regarding the constituent meeting of the European Works Council.

2. Paragraph 1 sets out in altered form the provisions formerly contained in Article 106(1), regarding the constituent meeting of a European Works Council elected for the first time. The provision corresponds to the provision suggested by the European Parliament as Article 106(1).

The maximum time-limit for convening the European Works Council had to be fixed at 100 days from the formation of the S.E. having regard to the necessary period in which to prepare for elections. Hitherto a time-limit of a total of three months applied in this respect under Articles 106 and 111(1).

It is intended under Article 14 of Annex II that members should be elected to the European Works Council within 75 days of the incorporation of the S.E. The provisions of Article 109(1) therefore leave relatively

little room for delay in holding elections at the individual establishments. Should elections at individual establishments be delayed for more than 25 days such establishments will not then be represented when the constituent meeting of the European Works Council is held. This fact must be accepted, bearing in mind that too long a postponement of the constituent meeting will adversely affect the viability of the Council.

3. The former paragraph 1 of Article 109 is deleted; provision regarding new elections is now made in the electoral rules in Annex II (cf. Article 14(1) in particular).

4. Paragraph 2 governs the constituent meeting of the newly elected European Works Council on the same lines as before. The wording has been adapted to the European Parliament's views (Article 109(1), Parliament's version). Delay in holding elections at individual establishments will not affect the constituent meeting of the newly elected European Works Council as the term of office of existing members of the Council will be extended in accordance with Article 108(3).

5. Paragraph 4 lays down the period of notice to be given for the constituent meeting of the European Works Council. The European Parliament proposed this period under Article 106(2).

Article 110

This provision regarding replacement by an alternate has been incorporated in amended form as Article 108(2).

SUB-SECTION FOUR

OPERATION

Article 111

1. Paragraph 1 of the new version now contains the provision previously contained in paragraph 2 concerning the first official action of the newly

constituted European Works Council. The wording has been adapted to meet the views of the European Parliament.

2. The original paragraph 2 regarding the constituent meeting has now become Article 109(1) in altered form. The former paragraph 3 regarding the term of office has become superfluous through the redrafting of Article 107(1).

3. The new paragraph 2 regarding competence to take decisions was added, on the suggestion of the European Parliament, in order to secure proper conduct of the constituent meeting.

4. Paragraphs 3 and 4 regarding decisions taken by the European Works Council contain provisions parallel to those applicable to the Supervisory Board under Article 77. These rules of procedure are also important for the European Works Council as a means of facilitating the discharge of its duties.

5. Paragraph 5 now expressly provides an opportunity for the European Works Council to set up committees. This can be useful where there is a large number of members. A committee can also be useful to prepare the proposals for electing the third Third of members of the Supervisory Board under Article 75a.

Article 112

1. Paragraph 1 regarding security against dismissal for members of the European Works Council has been adapted to the Opinion of the European Parliament.

2. Paragraph 2 deals with a request made by the European Parliament and the Social and Economic Committee with regard to protecting candidates for election to the European Works Council against dismissal. A time-limit had to be set for such protection. Protection running the full four years of the Council's term of office would appear unreasonable, particularly in view of the fact that the nomination of candidates is a simple matter (cf. Article 3(3) of Annex II). The risk of abuse must therefore be avoided.

It suffices if candidates are protected during the run-up period and during a cooling-off period after the elections. Three months seems reasonable for the latter purpose.

3. The sanction under paragraph 3 was put forward by the European Parliament (Article 145) as an extension to the protection against dismissal of employees' representatives on the Supervisory Board. A parallel provision in the instances under Article 108 seems requisite.

Article 113

1. As the European Parliament and the Economic and Social Committee wish the members of the European Works Council are no longer exempted from their professional duties by their own decision but only if the Council as a whole considers it necessary.

2. Paragraph 2 was revised at the suggestion of trades unions.

Article 114

1. Paragraph 1 has been reworded so as to place greater emphasis on the object of professional secrecy. The obligation of secrecy has, at the request of the European Parliament, been extended to trade union delegates (Article 116) and experts consulted by the Council (Article 117). To ensure that this obligation of secrecy under Article 114 is observed, the range of offences set out in Annex IV that Member States may penalise under Article 282 has been extended to include a provision relating inter alia to infringements under Article 114.

2. The new paragraph 2 lifts the obligation of secrecy in dealings with members of the S.E.'s Supervisory Board and of the Group Works Council to enable members of the European Works Council to work freely with such persons. It was possible to allow this without harming any of the S.E.'s interests worthy of protection as such persons are already subject to a particular obligation of secrecy under the Statute (Article 80(2) as regards Supervisory Board members, while Article 133 refers to Article 114 as regards members of the Group Works Council).

The obligation of secrecy could not be lifted further to extend to national employee representative bodies, however. The range of persons in possession of a secret would then no longer remain sufficiently manageable to guarantee effective secrecy. This would mean in practice that the information flow from Board of Management to European Works Council would not be facilitated and the latter would encounter greater difficulty in fulfilling its functions.

3. Paragraph 3 offers the European Works Council an opportunity to obtain a decision from the court as to whether the Board of Management has correctly designated information as secret. The former rule, which left it to the Board to determine the scope of the obligation of secrecy, was unsatisfactory in the trades unions' view as the Board could then in certain circumstances unjustifiably have prevented members of the European Works Council from keeping employees informed (Article 118(1)). Nor did it, on the other hand, appear right to make secrecy regarding any particular fact a matter for agreement between the Board and the Council, as had been requested by the European trades unions. Members of the European Works Council would not normally have the necessary technical expertise to appraise questions regarding the protection of business secrets. Nor, for the same reasons, do members of the arbitration board seem competent to judge on such matters. It therefore appears

preferable to seek a decision from a court, which will also be approached with such matters in other contexts. A judicial procedure is also provided under the Statute to decide whether the Board of Management may withhold information from shareholders at a general meeting (Article 90(5)). The provision in Article 114(3) is derived therefrom.

Article 115

The addition precludes any misunderstanding regarding the cost of European Works Council elections.

Article 116

1. The participation of trade union representatives in European Works Council meetings has been simplified at the request of the European Parliament. An appropriate resolution by a majority of the Council remains necessary for this purpose, though irrespective of the number of Council members moving such a resolution.

Cooperation between the European Works Council and the trades unions represented at S.E. establishments on matters of acknowledged mutual interest may in certain circumstances be promoted by eliminating the procedural obstacles previously existing.

2. The former paragraph 2 regarding trades unions represented at S.E. establishments has been reformulated and incorporated as Article 102a.

Article 117

The circumstances in which an expert may be consulted by the European Works Council have been stated more concretely at the suggestion of the European Parliament. The Social and Economic Committee's desire

that the obligation of secrecy be extended to cover experts has already been accommodated by extension to Article 114.

Article 118

1. The obligation to pass information on to the European Works Council is now specifically extended to include members of national employee representative bodies. In this way special emphasis is placed on necessary co-operation between the Council and such bodies.

2. In paragraph 2 the concept of "process secret" has been replaced by that of "business secret" and contrasted with that of the "operations secret" as also arises in Article 128(3). Having regard to the views of the Economic and Social Committee, no "special protection" is now required for such secrets. All operational and business secrets must be handled in confidence by the European Works Council. In cases of doubt as to the scope of the protection of secrecy the provisions of Article 114 will apply.

SUB-SECTION FIVE

FUNCTIONS AND POWERS

Article 119

The competence of the European Works Council has been more sharply delineated/having regard to the opinion of the European Parliament. In the latter's view, the European Works Council should be responsible for matters in which uniform representation of the S.E.'s employees is desirable, but not for matters that can in fact be settled at establishment level.

Nor is the collective formulation of working conditions a matter for the European Works Council. The function of the trades unions to safeguard their members'interests will be left untouched by the European Works Council.

The new version of paragraph 2 specifies, having regard to the opinion of the European Parliament, that where collectively agreed arrangements exist, their provisions will be left unaffected by the activities of the European Works Council. The latter has, further, been expressly prohibited from settling working conditions by agreement with the S.E.'s Board of Management. It is hereby intended to forestall any possible conflict with the functions of the trades unions.

Article 120

1. The importance of passing comprehensive information on serious matters regarding the S.E. to the European Works Council at an early stage in order to facilitate its functions has been extensively acknowledged.

2. Paragraph 1 has been revised on the basis of the European Parliament's views. The suggestions of the Economic and Social Committee have also thereby been taken into account.

3. Paragraph 2 regarding the quarterly report to be made by the Board of Management has been amended and extended to meet Parliament's wishes.

The first two sentences have been drafted more succinctly.

The particulars to be included in the report have been substantially extended. As provided earlier, the report must deal in particular with general developments in the sector of the economy in which the S.E. is active. A comprehensive appraisal of the S.E.'s position must also include the activities of undertakings controlled by it as defined in Article 6; this is also required in the case of the Board of Management's report to the Supervisory Board (Article 73a(1)).

The additional information now requested regarding the S.E.'s economic and financial circumstances was suggested by the European Parliament. A true picture is obtained therefrom, however, only if account is taken of the S.E.'s relations with its associated undertakings in a group. Shareholders' rights to information have therefore been extended under Article 90(1) to take this into account.

The information already required earlier regarding trends in the S.E.'s affairs have at the request of Parliament been extended to include the production and sales position. The particulars to be included in the report regarding the level of employment have been reformulated. In certain cases conditions in a group undertaking under sole management by the Board of Management of the S.E. may have a bearing on the proper assessment of the Board's personnel policy.

The particulars now required regarding the production and investment programme and the other newly added information to be included in the report are based on the European Parliament's views.

Article 121

The new version of paragraph 2 provides that shareholders of the S.E. shall, where applicable, be furnished with the consolidated and semi-consolidated annual accounts and the corresponding status reports (Articles 196-202 and Article 216(4)).

Article 122

Paragraph 1 has been revised to express more clearly that the Board of Management is obliged to provide the information sought.

Article 123

1. The European Works Council's right of co-determination in the cases set out in paragraph 1 has been underwritten by the European Parliament and, moreover, been extended to the preparation of a social plan in the event of the closure of an establishment. The Economic and Social Committee voiced no united opinion on the question whether the European Works Council should be granted the latter right, but recommended the deletion of items (c), (f) and (g) in the list in paragraph 1, which it considered went too far.

2. The social plan provided for under item (h) of the European Parliament's proposal has not, however, been included in the list under Article 123(1). It is not sufficient in this case to accord a co-determination right; the Board of Management must be obliged to prepare a social plan and to discuss it with the European Works Council. A new Article 126a relating to the social plan has therefore been included to complement Article 125, which lists the cases when a social plan may be required, and Article 126, which imposes a duty on the Board of Management to provide information in such cases. In this way the European Parliament's request is substantially met.

3. The European Parliament's desire that the European Works Council be consulted when an establishment is closed as expressed in item (i) of its version of Article 123(1) is met under Article 125(1)a., so that no provision need be made in Article 123.

Article 124

1. The Economic and Social Committee objected to this Article as it feared that it might anticipate terms of wage agreements. The European Parliament, on the other hand, supported its retention and suggested that it be extended by a provision regarding controls on workers' performance (Article 1(c)). In view of the considerations made by the Social and Economic Committee, however, Parliament did not adopt its Social Affairs Committee's opinion that the list under Article 124 should be made subject to approval by the European Works Council, by analogy with the position regarding works councils in Western Germany.

This could in fact lead to an overlap with wage agreement arrangements. If, however, the European Works Council is consulted only in the cases set out in Article 124 such arrangements cannot then be anticipated. The Commission has therefore retained Article 124.

2. The wording of paragraph 1 has been completed, in accordance with the European Parliament's views, with a provision regarding controls on employee performance.

3. Article 2 now avoids the previous reference.

Article 125

1. The list of cases under paragraph 1 in which the European Works Council must be consulted has been adapted to the new wording of the list in Article 66(1) in accordance with the underlying concept of Article 125. The European Parliament's Opinion on Article 125(1)a.-d. is substantially met thereby.

2. The European Parliament has, moreover, proposed that the list be extended to ensure that the European Works Council is also consulted

when the S.E. is dissolved or merged with other companies. This request by Parliament has been taken care of elsewhere. It is in fact difficult to fit consultation of this kind into the list under Article 125 as it is not for the Board of Management or the Supervisory Board but for the General Meeting to decide in this case. Consultation with the European Works Council is therefore provided for in the new article 248 (2) in the case of dissolution and by Article 23c in the case of forming an S.E. by merger, to which reference is also made in the new provisions of Title XI regarding mergers.

Consultation is also provided for when the S.E. is transformed (Article 265(2)) and where the S.E. takes part in forming a joint subsidiary (Article 36(3)c.). In all such cases the duty of consultation fits better into the provisions of the Article concerned rather than into the list under Article 125.

3. Article 125, unlike Article 66, need not extend to decisions taken by the Board of Management in the exercice of sole management in respect of a group undertaking controlled by the S.E. The European Works Council in fact represents only the interests of employees of the S.E. The Board of Management may, however, be obliged to consult the Group Works Council in the case of such decisions, under Article 135(2).

4. The addition providing for better determination of the duty of consultation in the cases listed in Article 125 corresponds with the parallel arrangement under Article 66(2). For the reasons set out above, the European Works Council should be consulted on matters regarding the S.E. but not those concerning dependent undertakings within a group.

Article 126

The requirements as to the written information to be supplied by the Board of Management to the European Works Council when the latter is consulted in accordance with Article 125 have been worded to follow Articles 23-a- and 271-b- more closely. These provisions are in turn based on Article 6 (1) of the amended Proposal for a third Directive on mergers of sociétés anonymes (COM(72) 1668, 4 January 1973).

The report provided by the Board of Management in accordance with Article 126 is also intended to serve as the basis for the negotiations provided for in Article 126-a- on the social plan, if, already prima facie opinion of the Board of Management, the interests of employees are likely to be adversely affected by the proposed decision.

Article 126-a-

1. This Article contains the provisions requested by the European Parliament on the social plan to be adopted if establishments are closed or transferred. As indicated in the explanatory notes to Article 123 of the new version, it is not sufficient in this case to extend the right of the European Works Council to participate in making decisions, as proposed by the European Parliament; the Board of Management must also be obliged to prepare a social plan and to discuss it with the European Works Council.

2. The scope of the provisions regarding the social plan dovetails with the list in Article 125. All cases are thus included where the structure of the undertaking may be altered by a decision of the Board of Management, and the interests of employees thereby adversely affected.

Alterations resulting from winding-up or merger of the SE with other companies, decided upon by the General Meeting in accordance with Article 247-a-, are excluded. Provision regarding the social plan has in such cases been made in conjunction with preparation of the appropriate

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resolution by the General Meeting (Articles 23-c- and 23-d-, which, by corresponding references, also apply to mergers, pursuant to the provisions of Title XI; Article 248-a- /applies in the case of dissolution by resolution of the General Meeting).

3. The provision itself closely follows those referred to above contained in Articles 23-c- and 23-d- in respect of mergers, which in turn follow Article 6 of the amended Proposal for a third Directive on mergers of sociétés anonymes. Reference should therefore be made to the explanatory notes to Articles 23-c- and 23-d- of the new version.

4. According to paragraph 1, the Board of Management must enter into negotiations on the social plan if the European Works Council considers that the decision which the Board of Management intends to make would adversely affect the interests of employees.

5. According to paragraph 2, the agreement between the Board of Management and the European Works Council regarding the social plan has the effect of an agreement under Article 127. Article 127 (2) and (3) therefore apply.

6. If no agreement is reached on the social plan, and if the Supervisory Board agrees to the decision which the Board of Management intends to make, the appropriate course of action will be decided by an Arbitration Board, as in the cases referred to in Articles 123, 23-c- and 23 -d-.

7. There is no justification for granting the European Works Council a right of veto in respect of the closure of an establishment if the rights and interests of employees are protected in this way. Such a veto was requested by the Legal Affairs Committees of the European Parliament, but the request was rejected by Parliament in plenary session.

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Nor, under the proposals applying to national companies, are employee representatives granted the right to object to fundamental decisions; such proposals include e.g. the proposal for a third Directive on mergers and the Proposal for a Directive on the retention of the rights and advantages of employees in the case of mergers, takeovers and amalgamations (Proposal of 31 May 1974, OJ No C104, 13 September 1974, p.1.).

In the context of the powers held within the European Company, the Supervisory Board of the SE is the most suitable body to bring about a settlement which will take account of all interests involved, including those of employees, where conflict arises as a result of the possible closure of an establishment. Article 126 a therefore lays down that neither the negotiations regarding the social plan, nor the referral of the matter to the arbitration board should these negotiations break down, should hinder emplementation of the measures intended. That this is true in the former case is clear from Article 126 a in general, and from Article 126 a (4) in particular, while Article 126 a (5), which is modelled on Article 8 (3) of the abovementioned Proposal for a Directive of 31 May 1974, expressly indicated that this also applies in the latter case.

Article 127

1. The European Trade Union Confederation considered that no useful purpose was served by granting the European Works Council the right to conclude agreements. However, the Legal Affairs Committee and the Committee on Social Affairs and Employment of the European Parliament were in favour of retaining this Article.

It seems desirable that the European Works Council should be equipped in a way that ensures that all employees of the SE, irrespective of their place of employment and of any change therein within the SE across intra-Community frontiers, should have a statutory right to be included in the SE's welfare facilities. The provisions regarding agreement

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on a social plan (Article 126 a) stress the importance for employees of the results of agreements concluded by the European Works Council. There is no longer any likelihood, following the redrafting of Article 119, of a conflict between agreements concluded by the European Works Council and collective agreements regulating conditions of employment. Where the latter type of agreement exists, agreements cannot be concluded by the European Works Council. The Commission retained Article 127 in view of these considerations.

The scope of agreements to be concluded by the European Works Council has, moreover, been limited by paragraph 1 to the cases set out in Article 123, in order to anticipate the possibility of conflict (within the area covered by Article 124) with collective agreements.

2. Paragraph 2 has been supplemented as a result of the Opinion of the European Parliament, to make it clear that whichever provisions are more favourable to employees must be applied.

3. At the request of the European Parliament, paragraph 3 clarified the effect of agreements concluded by the European Works Council.

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SUB-SECTION SIX

ARBITRATION PROCEEDINGS

Article 128

1. Reference of disputes between the Board of Management and the European Works Council to an Arbitration Board for settlement was considered desirable by the European Parliament, especially in view of the European Works Council's co-determination rights in the matters dealt with by Article 123. This is necessary to prevent decision-making within the undertaking coming to a halt.

The rights of trades unions remain as little affected by this provision as by the other provisions concerning the European Works Council.

2. As a result of the Opinion of the European Parliament, the powers of the Arbitration Board have been limited in paragraph 1. Paragraph 2, covering the composition of the Board, has been reworded to make it clearer.

3. The wording of paragraph 3, which imposes a duty of professional secrecy on Members of the Arbitration Board has been adapted to Article 114.

Article 129

The principle that disputes between the bodies representing employees at establishment level and the European Works Council should be settled within the undertaking, has been approved by the European Parliament.

The only alteration to this Article has been the adaptation of its wording to Article 102.

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Section two

The Group Works Council

Article 130

1. The Group Works Council is not a representative body for establishments, but for undertakings belonging to the group as a whole.*

2. At the request of the European Parliament, it is no longer a requirement for the formation of a Group Works Council that the SE and its dependent undertakings should have establishments in several Member States.

As the Legal Affairs Committee of the European Parliament emphasized, contrary to the position existing in the case of the European Works Council, there is no need to take account, when making provision for the Group Works Council, of the opportunities under national law for employee representation in dependent group undertakings. The Group Works Council must be seen in the context of the legal provisions regarding company groups relating to the SE and the latter's capacity to exercise sole management (Article 240) over the group. A Group Works Council must therefore be formed wherever a group exists, as defined in Article 223, and if at least two undertakings within the group have sufficient employees to appoint representatives to the Group Works Council in accordance with Article 132.

3. The original text provided that a Group Works Council had also to be formed if the SE was in turn dependent on another undertaking. This case does not in fact require any special treatment, since such dependance per se does not essentially affect the capacity of the SE to exercise management over other undertakings and thereby to establish a group within the meaning of Article 223.

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* On the Opinion of the European Parliament, the wording of the German text of this Article has been amended to give full effect to this point.

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A Group Works Council would therefore have to be established even in the absence of specific provisions.

Special treatment is required only in the more specific case where the "controlling" SE is itself subject to unified group management, i.e. as a "dependent group undertaking". In accordance with the provision approved by the European Parliament, a Group Works Council must be established in this case in order that the interests of employees in the sub-group controlled through the SE can be protected by the provisions of the Statute as far as possible.

An exception to the general rule is, however, justified in cases where employees of the SE and of group undertakings controlled by it are represented on a body of the undertaking which has overall control of the group, on an equivalent basis as / Group Works Council of the SE. / their representation on the

If employees are represented on a body of a similar composition and having the same powers as the Group Works Council in the SE vis-à-vis the group's overall management, representation at sub-group level would only lead to an unneccessary duplication of competence in bodies representing employees at intermediate levels.

4. Paragraph two, which was intended to enable other bodies to represent employees in dealings with the Board of Management having overall control of the group, has been deleted as proposed in the European Parliament's Opinion. The Committee on Social Affairs and Employment of the European Parliament had feared lest this provision be used to circumvent those by which the Group Works Council was set up.

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Article 131

1. This Article on the appointment of members of the Group Works Council was amended to accord with the Opinion of the European Parliament.

The proposal for the indirect election of members has been retained in view of the deliberations of the Legal Affairs Committee of the European Parliament. Considering the large number of employees in different establishments who are represented by a single member of the Group Works Council, it would be impossible for such a member to make himself properly known to employees and gain their confidence in a direct election.

If, on the other hand, the number of members of the Group Works Council were increased to remedy the situation, the Group Works Council could become incapable of functioning properly and a dialogue with the group's overall management become considerably more difficult to establish.

2. As a result of the Opinion, of the European Parliament, the circle of representative bodies entitled to participate in the election has been expanded in two respects in contrast with the original text. In all group undertakings, the bodies representing employees that have to be set up at group undertaking level in accordance with the appropriate provision are not the principal factor. If there is no central representative body at group undertaking level, the representative bodies at establishment level within the meaning of Annex I jointly elect representatives for the undertaking concerned. The new version of Article 132 (2) lays down that in this case the management body in the particular undertaking must ensure that the necessary steps are taken for the election to be carried out.

In countries where there are no employees' representative bodies within the meaning of Annex I, the election will be conducted by the persons or organizations recognized there as representing employees.

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The text as given in the Opinion of the European Parliament has been further extended by the addition of a sub-paragraph (c) governing the situation where neither form of employees' representative body exists in a group undertaking. In this case, recourse must be had to the body of the employees as a whole. This would appear unobjectionable, /as it is small undertakings with clearly defined structures /which will usually be concerned in such a case.

Article 132

1. Paragraph 1 regarding the number of representatives to be appointed from the group undertaking has been adapted to the Opinion of the European Parliament.

2. Paragraph 2 has been added to ensure that the election is properly carried out. The responsibilities at each stage of the procedure have therefore been stressed.

3. Paragraph 3 makes provision for the intervening period before a decision by the European Court of Justice on whether an undertaking is a group undertaking, if this is in dispute. A similar provision was proposed by the European Parliament in respect of the participation of employees of such undertakings in the election of members to the Supervisory Board of the SE (Article 4 (5) of Annex III).

Article 133

There is justification for the provisions regarding the term of office of the European Works Council (Articles 107 to 109) being applied to the Group Works Council as well.

Article 134

1. The wording of paragraph 1 on responsibilities of the Group Works Council has been amended to emphasize that it applies to groups (or sub-groups) controlled by the SE.

2. The first sub-paragraph of paragraph 2 emphasizes that the competence of the Group Works Council extends over the group controlled by the SE as a whole, but at the same time it makes no material change as regards competence in matters concerning a number of undertakings within the group. As previously, this provision follows Article 119 (2) in defining the area of competence. The amendments made to that article have consequently been applied to Article 134 (2).

3. The individual powers of the Group Works Council are now set out in Article 135. Article 135 (1) and (2) of the new version replaces the provisions contained in the previous Article 134 (3).

Article 135

1. The right of the Group Works Council to be kept informed, to be consulted and to share in decision-taking is now governed by this one article. The principles of this provision were originally contained in Article 134 (3) and Article 135 (1) and (2).

2. The new version of paragraph 1 governs the duty of the Board of Management to provide information. This duty now extends expressly to matters concerning the group.

3. The new version of paragraph 2 now lays down expressly that in matters affecting the group, the Group Works Council has the same right to be consulted and to share in decision-taking as the European Works Council.

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4. The new version of paragraph 3 corresponds to the earlier paragraph 1 which has been changed only in its wording.

5. The new version of paragraph 4 contains the previous paragraph 2 regarding the precedence of agreements concluded by the Group Works Council. At the request of the European Parliament, the text has been amended to follow the new text of Article 127 (2).

6. Paragraph 5 corresponds to Article 127 (3).

Article 136

1. The provisions governing settlement of disputes between the Board of Management of the SE and the Group Works Council, and between the latter and the bodies representing employees in dependent group undertakings, had to be amended to follow the amendments to Article 128 in particular. For this reason, both cases are now dealt with separately in Article 136 (1) and (2).

2. Paragraph 3 retains the references to the provisions regarding the establishment and procedure of Arbitration Boards, previously contained in paragraph 2, materially unchanged.

Section three

Representation of employees on the Supervisory Board

Article 137

1. Paragraph 1 regarding the representation of employees on the Supervisory Board of the SE was one of the central topics in the discussion of the Commission Proposal for a Statute for the European company.

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As already indicated in the introductory notes to Title IV, the Commission has adopted the Opinion of the European Parliament, and now proposes that one third of the members of the Supervisory Board should consist of representatives of shareholders, one third of employees' representatives, and one third of members representing general interests and coopted by both groups.

In conformity with the general scheme of the Statute, the provisions regarding the composition of the Supervisory Board were not, as originally proposed by the European Parliament, included in Article 137 under Title V on the "Representation of Employees in the SE", but under Title IV in the newly incorporated Article 74a in the section headed "The Supervisory Board". There has not, however, been any material deviation from the text of Article 137 (1) contained in the Opinion of the European Parliament.

2. In accordance with its position in Title V on the representation of employees, Article 137 (1) now deals only with the election of employees' representatives to the Supervisory Board of the SE. It provides that employees' representatives must be elected by the employees of the SE and of group undertakings controlled by it.

The participation of employees of dependent group undertakings in the election of employees' representatives to the Supervisory Board of the SE was requested by the European Parliament and taken into account in its proposed electoral rules (Annex III, Article 1). Such participation is necessary, since these undertakings may, according to the provisions of the Statute applicable to groups (Article 240), fall under sole management. It follows from this that decisions taken by the management of the SE affect employees in dependent group undertakings in the same way as employees in the SE. The former must therefore be given the same opportunity to shape and assume responsibility for the policy decisions of the SE as the latter.

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3. According to the provision proposed originally, employees' representatives on the Supervisory Board were to be elected by the national bodies representing employees at establishment level. This provision is no longer practicable since a general system of employee representation on a statutory or formally agreed basis, to which reference could be made for present purposes, does not exist in the United Kingdom or in Ireland. The provision contained defects even apart from this, since small establishments in which there is no requirement to set up bodies representing employees were excluded from participating in elections.

The European Parliament therefore proposed the introduction of a uniform set of electoral rules for employee representatives on the Supervisory Board, and set these out in Annex III. The Parliament wished to incorporate this Annex into the Statute by means of Article 137a, of its proposed text. The Commission views this as a practicable solution, and has therefore incorporated Article 137a of the text proposed by the European Parliament in the new text of Article 137 (1).

The electoral rules contained in Annex III are, like the original Commission Proposal, based on the indirect election of employee representatives to the Supervisory Board. The Legal Affairs Committee of the European Parliament came out against direct elections, on the grounds that candidates would have great difficulty in making themselves known to all the employees in the various establishments and in gaining their confidence. It therefore proposed the election of employee representatives by means of electoral delegates, who in their turn would be appointed in all the establishments of the S.E. and of its dependent group undertakings in accordance with the principles applicable to the election of representatives to the European Works Council.

The election of employee representatives by the electoral college is also intended to take place on the basis of proportional representation.

If elections are held in only one establishment, they are to be conducted on a direct basis, again, by proportional representation.

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As regards the electoral rules in detail, reference should be made to Annex III and to the explanatory notes thereon.

4. Paragraph 2 now takes the opinion of the European Parliament by requiring a majority of the employee representatives to be employed by the S.E. or by group undertakings controlled by it.

A proportion of the employee representatives may, however, fall outside the scope of such an employment relationship. Where the number of employee representatives is three, this applies in the case of one of them; where there are five, seven or nine employee representatives, as is arithmetically possible under Article 74 (3), this applies in the case of two of them.

The Legal Affairs Committee of the European Parliament stressed the need to include, amongst employee representatives, people who are better able than those employed in the undertaking to consider the undertaking both within the overall economic context and from the point of view of the particular industry.

However, according to the opinion of the European Parliament, it should be left to the employees of the S.E. to decide whether they also want to nominate and to elect as their representatives to the Supervisory Board persons not employed in the establishments of the S.E.

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5. Paragraph 3 provides that, in general, employees of dependent group undertakings will take part in the election of the Supervisory Board of the S.E., even if the S.E. is itself a group undertaking controlled by another undertaking. This provision is based on the same principle as the original second sentence of Article 130(1) regarding the Group Works Council in a sub-group. This provides that where an undertaking in a sub-group is controlled through an S.E., its employees must be suitably represented in the decision-making process of the S.E. at sub-group level.

However, employees in a group undertaking controlled by an S.E. do not have to be represented on the Supervisory Board of the S.E., if the S.E. is a group undertaking controlled by a company on whose governing bodies employees of the S.E. and its dependent undertakings are represented in a manner equivalent to that required under the provisions in respect of the S.E. regarding the composition and powers of the Supervisory Board. In this case, the employees' representatives on the Supervisory Board of the S.E. are only elected by its own employees. However, the employees in undertakings controlled by the S.E. also appoint representatives to the corresponding bodies of the controlling group company along with the employees of the S.E.

Different additional provisions would multiply the number of electoral procedures and unnecessarily complicate the decision-making structure within the group.

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6. Paragraph 4 provides that only dependent group undertakings whose registered offices are situated within the Community may participate in elections to the Supervisory Board of the S.E. The Statute cannot impose requirements as to elections outside its field of application; nor could the courts guarantee that they would be properly implemented. Moreover, undertakings whose registered offices are situated outside the Community and which are dependent on an S.E. do not come within the provisions of the Statute regarding groups.

Paragraph 4 lays down a general provision for the election of employees' representatives to the Supervisory Board, to prevent the series of individual provisions which apply to dependent group undertakings from becoming too unwieldy.

Article 138

1. The European Parliament was in favour of employees not being represented on the Supervisory Board of the S.E. if a majority of the employees so decide. The Commission has decided to adhere to this principle in place of the original requirement of a two-thirds majority in favour of renouncing representation.

However, in view of the electoral rules in Article 137, this decision can no longer be taken solely by the employees in the S.E. The employees in dependent group undertakings who participate in the election of employees' representatives to the Supervisory Board must also be taken into account. Article 138 (1) incorporates for this purpose the provisions relating to entitlement to vote contained in Annex III, Article 2, and provides that employees will not be represented on the Supervisory Board if a majority of the employees who are entitled to vote in accordance with Annex III Article 2 vote against representation.

2. At the request of the European Parliament, paragraph 2 clarifies the effect of a decision against representation taken in accordance with Article 138 (1).

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Articles 139 to 143

1. Since the electoral rules are now contained in Article 137 (1) and Annex III, the previous provisions relating to the election of employees' representatives to the Supervisory Board of the S.E. have been deleted.

2. The provision contained in the previous Article 142 was for schematic reasons incorporated in Article 74b (1) in Section 2 of Title IV in the form in which it appears as Article 143 (1) of the Opinion of the European Parliament. The application of Article 143 (2) in the version of the Opinion of the European Parliament was extended to all members of the Supervisory Board, and incorporated in this form in Article 74c (2).

Article 144

1. The term of office and its premature termination are now governed in respect of all members of the Supervisory Board by Articles 74c and 74d. Article 144 has therefore been deleted.

2. Article 144a in the version of the Opinion of the European Parliament has been incorporated in an amended form in Article 74e. This Article provides for a system of appeal to the courts in the case of gross dereliction of duty, in accordance with the proposal of the European Parliament, though applying equally to the Supervisory Board.

Article 145

1. The first sentence of paragraph 1 retains unchanged, for the sake of clarity, the first sentence of the old provision, although the principle of equality of rights and obligations is already provided for in Title IV, in particular in Articles 80 and 81 and now additionally, in Article 74e.

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2. In order to prevent misunderstandings, it was expressly laid down that membership of the Supervisory Board should be compatible with membership of the various bodies representing employees. A similar provision was laid down in Article 107 (2) with regard to the relationship between membership of the European Works Council and membership of national bodies representing employees. Membership of both the Works Council and the Supervisory Board is common practice in the Federal Republic of Germany.
for example

3. The first sentence of paragraph 2 regarding protection from dismissal corresponds essentially to the second sentence of the previous version of Article 145. Paragraph 2, moreover, contains a parallel provision to that contained in Article 113 (1) and (2).

Section four

Regulation of Terms of Employment

Article 146

Article 146 regarding the special capacity of the S.E. to conclude collective agreements was extended at the request of the European Parliament to include a provision ensuring that favourable terms obtained in the individual establishments of the S.E. take precedence. At any one time, the most favourable terms of employment should apply in respect of employees.

Article 147

The European Trade Union Confederation was not in favour of the idea that terms of employment agreed in a European collective agreement might, under paragraph 2, be extended by the contract of employment to employees who do not belong to a trade union.

Encroachment in this way upon the right to conclude contracts freely by prohibiting an extension of the contract seems, however, to be beyond the limited objectives of the Statute for the European company. It cannot be inferred from this provision, which is concerned with the individual contract of employment, that the collectively agreed conditions of employment are generally binding.

Title VI - Preparation of the Annual Accounts

The provisions of this Title have been adapted to follow the amended proposal of a Fourth Directive on the annual accounts of limited liability companies (Bulletin of the E.C. - Supplement 6/74) and the proposal of a Fifth Directive on the structure of societes anonymes (OJ No C 131, 13 December 1972), as expressly requested by the European Parliament and the Economic and Social Committee. Most of the amendments which follow are the result of this adaptation and do not therefore require a special commentary.

A draft Directive on the preparation of group accounts is at present still under preparation by the Commission. On its completion, the provisions in Section 6 of this Title (Preparation of Group Accounts) will have to be adapted to follow it.

Article 148

The inclusion of a statement of source and application of funds in the annual accounts of the S.E. is the result of a suggestion by the European Parliament. The reader of the balance sheet should be informed about the funds at the company's disposal during the accounting year, the sources of these funds (e.g. the year's profit, increase in capital, issuing of debentures), and how they have been used (e.g. purchase of plant, increase of stocks, dividends). A much clearer view of the company's financial position will be obtained with the provision of a funds statement. The importance of the funds statement is becoming increasingly recognized in accounting practice, and it is, moreover, already required in some Member States for companies quoted on the stock exchange. The proposed Directive on the prospectus to be published when securities are admitted to official stock exchange quotation (OJ No C 131 of 13 December 1972) contains a corresponding provision.

The general provisions which apply to the drawing up of the annual accounts apply to the funds statement. There are no further requirements as to the content and lay-out of the funds statement, which are to be determined by developments in practice. This process is not yet far enough advanced to enable detailed rules to be formulated at present on this part of the annual accounts.

Article 157

Discounts must always be shown as a separate item, whether they appear in the balance sheet or in the notes of the accounts (cf. Article 188). They may be shown under costs of formation.

Article 161

Particular importance is also ascribed in other parts of the Statute to the relationship of the S.E. with majority-held subsidiaries or with undertakings which hold a majority interest in the S.E. Such relationships are also relevant for the purposes of disclosure. The concept of the associated undertaking is therefore extended to include these relationships.

Article 181

This provision is modelled on Article 30 of the amended proposal of a Fourth Directive on annual accounts. Article 31 of the draft Directive also authorizes the revaluation of tangible fixed assets and of participating interest and other financial assets. Those revaluations, which are intended to fix the value of assets at

present values, do not have to be carried out according to a fixed system. This provision may seem acceptable having regard to the accounting practices in some Member States. For the S.E. however, such a provision appears less desirable. Only a systematic revaluation on the basis of one of the methods set out in Article 181(1) is therefore permitted.

Article 191

1. To ensure that the record is complete, the information required under item 10 must also include the total emoluments received by the people concerned on account of their positions of a comparable nature in undertakings dependent on or controlling the S.E.

2. If the classical purchase price or production cost method of valuation is used in preparing the annual accounts, the S.E. must, in accordance with item 13, supply additional information as to the amount of its assets and the results for the year, calculated on the basis of one of the more recent valuation methods specified in Article 181(1)). It is important that this information is shown on the accounts, so that the possible effects of inflation on the assets and the company results can be gauged. There is no similar duty of disclosure in the amended draft Fourth Directive. The methods of valuation mentioned are not yet part of accounting practice in most of the Member States, and their introduction could make effective auditing difficult. Even though the introduction of such a duty of disclosure for all companies under national law as part of a process of approximation still appears premature, it may nevertheless be instituted in respect of the S.E., which can draw on the necessary experts.

Article 196

1. The group accounts must, like the accounts referred to in Article 148, contain a funds statement, in this case for the whole group.

2. Article 227 is incorporated in Article 196.

Article 203

In accordance with a proposal from the European Parliament, paragraph 2 has been clarified to show that the admission procedure and the examination do not necessarily have to be governed by legal provisions. The conditions contained in this paragraph will also be fulfilled if the admission procedure and the examination are recognized under national law.

Articles 203 a -- 220

1. These Articles have been adapted to follow the provisions of the proposal of a ... Fifth Directive and, insofar as they are concerned with the publication of annual accounts, the corresponding provisions in the draft Fourth Directive.

2. The rules governing the independence of auditors contained in Article 203 a and 203 b also take account of the relationships between the S.E. and undertakings dependent on it or controlling it.

3. Article 209 governs the auditor's liability, as before pari passu with that of the special auditor under the new Article 15(3). This provision corresponds with that regarding members of the Board of Management (Articles 71 and 72 a) and of the Supervisory Board of the S.E. (Articles 81 and 81 a).

4. The provisions concerning the discharge of the members of the Board of Management and of the Supervisory Board in Article 216(3) and Article 218 have been deleted and not replaced. In conformity with Article 14(5) of the draft Fifth Directive, the general meeting can still bring a civil action irrespective of whether it has granted a discharge from liability.

Explanatory notes

Title VII - Groups of Companies

The essential feature of the rules applicable to groups of companies, contained in the previous proposal, have been retained. The European Parliament has accepted in principle the provisions of the Statute applying to groups of companies and has approved the creation of the legal framework on which the operation of a group of companies is based and the protection to be afforded to outside shareholders and creditors of dependent group companies. The Economic and Social Committee has proposed no fundamental changes to these provisions either.

Certain new rules have been added. The application of the protective provisions to sub-groups controlled by an S.E. is more precisely defined (Article 224). The controlling group undertaking is now entitled to acquire the shares of outside shareholders of a depending group company once it holds ninety per cent of its shares. Similarly, outside shareholders are also entitled to require that their shares be acquired (Section 4). Further, provisions have been included concerning the liability of members of the board of directors of the controlling group undertaking for damage resulting from their failure to exercise the necessary care in conducting the group management (Section 6). Lastly, transitional rules have been laid down for applying the provisions to group relationships already in existence prior to the formation of the S.E. (Section 7).

Section 1 -- Definition and Scope

Article 223

1. According to the criteria for defining the existence of a group in paragraph 1, the legal form of the controlling undertaking is not a decisive factor. The grouping of legally autonomous undertakings under uniform management can be organized other than in the legal form of a company limited by shares. A rule that made provision only for controlling group undertakings in the form of a limited company would be easy to circumvent.

This does not apply to dependent group undertakings. The definition in paragraph 1 takes account only of dependent group undertakings carried on in the legal form of a limited company (paragraph 1). With other legal forms involving a greater degree of personal liability it is difficult to conceive of a conflict between the interests of the company and those of the group which might put outside shareholders and creditors at risk. The original proposal also intended that the safeguards of the 3rd Section should apply only to limited companies, as shown by Article 238 of the previous version. With the introduction of Article 223(3) of the new version this Article has become redundant.

2. In paragraph 1 the phrase "whether existing within the Member States or not" has been deleted as being redundant. Article 224 defines the scope of application of Title VII.

3. Title VII applies only to dependent group companies formed under the law of a Member State. Paragraph 4 is worded accordingly, as are Articles 224(1), 225(1) and 228(1).

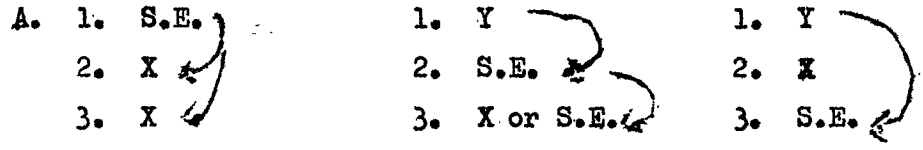
Article 224

1. Certain drafting changes have been made, especially with regard to the new Section 6.

2. The criteria laid down in Article 223(1) for defining the existence of a group are based on the economic unity of the group. The group consists of one controlling undertaking and one or more dependent companies under the uniform management of the controlling undertaking. The concept "controlling undertaking of a group" in Article 224 must be interpreted in accordance with the definition in Article 223(1). This means that where an indirect relationship of dependence exists, the safeguarding provisions to the benefit of the outside shareholders and creditors must be applied by the undertaking in overall control of the group. In fact, only this undertaking has the right to issue instructions under Article 240.

A special situation arises, however, where further group companies are controlled through a dependent S.E. within a group, i.e. where a sub-group is controlled by an S.E. If application of the provisions safeguarding outside shareholders and creditors were not extended to group companies controlled through an S.E. it would be simple to circumvent the provisions of this Title. Companies forming an S.E. would only need to ensure that the S.E., instead of being at the top of the group structure, occupied an intermediate position in the chain of group companies. The provisions of Title VII would then apply merely to the relationship between the controlling group undertaking and the dependent S.E. within the group, but not to group companies controlled through the S.E. For this reason the scope of application of Title VII now extends to cover the situation where a sub-group is controlled by an S.E. A further consideration is that employees of companies in a sub-group are protected at the level of the S.E. which controls it. They participate in the elections to the Supervisory Board of the S.E. and are represented on the Group Works Council of the S.E.

The following diagram illustrates the situations that could arise :



X : dependent group company formed under the law of a Member State

Y : controlling group undertaking (not an S.E.), irrespective of the location of its regestered office

The arrows indicate which undertaking must give the guarantees referred to in Sections 3 and 5 to which other undertaking.

Situation A

The S.E. exercises uniform management and is therefore also able to cause loss or damage to company 3 through company 2. For this reason it must give both companies the guarantees laid down. Other provisions of the Statute are based on the same concept so that, for example, the Supervisory Board and the shareholders of the S.E. enjoy a right of access to information in respect of the dependent group company 3 (Articles 73 and 90(1)). A Group Works Council, in which the interests of the employees of company 3 are also represented, must be formed within the S.E.

Situation B

The dependent S.E. within the group must, for its part, protect shareholders and creditors of company 3 (paragraph 3). It counts as a controlling undertaking of a group under the terms of Articles 225 to 240 d and must give the guarantees laid down in Sections 3 and 5. It also has the right under Article 240 to issue instructions and is subject to the rules on liability contained in Articles 240 a to 240 c . In the event of an exchange of shares, the shareholders in company 3 become normally outside shareholders in the S.E. and are thus again covered by the safeguards of Section 3 (Article 224(1)). If the conditions laid down in Article 228(1) a or b were satisfied the S.E. could also make a direct offer of an exchange of shares in company 1. On the other hand, the S.E. must not be allowed to calculate the equalisation payment provided for in Article 228(2) on the basis of its own profit for the year. The S.E. is itself a dependent company within a group and could suffer through the exercise by company 1 of its right to issue instructions. Article 231(2) b accordingly contains special rules applicable to a sub-group. There is no need for similar provisions in respect of creditors. Creditors of company 3 become creditors of the S.E. when the provisions of Article 239 apply and thus they become creditors of company 1 where necessary

Situation C

Outside shareholders and creditors of the S.E. must be protected not by company 2 but by company 1. Undertakings 1, 2 and 3 form a group. Since undertaking 1 exercises uniform management, it is ultimately liable for any harm done to the S.E. by company 2.

In the case of an exchange of shares, an equalization payment under Article 228(2) or liability for non-payment under Article 239, any guarantees given by company 2 to the S.E., could also be to little effect. Company 2 is itself a dependent company within a group and could be injured by undertaking 1.

Article 225

1. In certain circumstances it can also be important to an undertaking formed under national law to know with certainty whether or not it must be regarded as a controlling undertaking of a group within the meaning of the Statute and whether it must therefore give the guarantees laid down in Sections 3 and 5. For this reason the right to apply to the Court of Justice for a decision under paragraph 1 is extended to such companies also, as it is, of course, to dependent group companies in a sub-group controlled by an S.E.

2. In calculating the shares which must be held by outside shareholders under paragraph 2(a), those owned directly or indirectly by the controlling group undertaking or which are attributable to it must be left out of account. The criterion for calculating the shareholding in an S.E. has been deleted and has not been replaced.

3. The interests of employees of a group company controlled by an S.E. are catered for in the manner laid down in this Statute when the election of members of the Supervisory Board of the S.E. is organised and through the formation of a Group Works Council. For this reason employees and their representative bodies have an interest equal to that of outside shareholders and creditors of a dependent group company in being able to apply to the court for a decision as provided under this Article (paragraph 3).

Section 2 - Publicity

Article 226

When giving notice that it belongs to a group, the S.E. must make clear the position which it occupies in the group structure, and, where it is a dependent group company, it must publish the name of the controlling group undertaking.

Article 227

This Article has been incorporated in Article 196.

Section 3 - Protection of outside shareholders

Article 228

1. Under the original proposal a controlling group undertaking which was an S.E. or a company limited by shares formed under national law with a registered office within a Member State had to offer outside shareholders the option of a cash payment or an exchange of shares. In certain circumstances such a rule could place a heavy financial burden on the controlling group undertaking, especially if, where the shareholding was a relatively small one, a large number of outside shareholders was to opt for a cash settlement. For this reason the controlling group undertaking has now been given the right to choose between a cash payment and an exchange of shares but only, of course, in the cases specified in sub-paragraphs 1 (a) and 1 (b). Where the controlling undertaking is an S.E. or a company

limited by shares formed under the law of a Member State, it may offer a cash payment or an exchange of shares or both, in which case the choice is left to the outside shareholders (paragraph 1(a)). A company limited by shares not formed under the law of a Member State may offer outside shareholders only a cash payment or the choice between a cash payment and an exchange of shares. Where a company limited by shares formed outside the Community is involved, there could be problems in examining the share exchange ratio, so that in this case the offer of an exchange of shares alone is not permitted. Where an exchange of shares is offered, the shareholders must always be in a position to opt for a cash settlement (paragraph 1(b)).

Where shares are exchanged, the controlling group undertaking may offer (convertible) debentures instead of its own shares. Where a sub-group is controlled by an S.E., the latter may, as an alternative, offer shares in the group company which controls it, provided that the conditions laid down in paragraphs 1(a) and 1(b) are satisfied.

2. Under Article 231 of the original version the controlling group undertaking had discretion to offer outside shareholders an annual equalization payment as well. This rule can lead to outside shareholders being forced to relinquish their shares since no real alternative is open to them if they are offered an excessively low payment or no payment at all.

The second paragraph of Article 228 of the new version requires the controlling group undertaking to offer an annual equalization payment in every case and, in addition, Article 231 of the new version lays down certain criteria for calculating its amount. This ensures that outside shareholders have complete freedom to decide whether or not to relinquish their shares.

3. The initiative for the procedure laid down in Section 3 must be taken by the controlling group undertaking (paragraph 1) which must itself decide on the options open to it under Articles 228(1) and 231. The procedure has thus been modified in that under the original proposal the controlling group undertaking was required to submit a proposal only after it had received the experts' report on the adequacy of the offers of the dependent group undertaking (Article 233 of the former version).

Articles 229 and 230

These provisions have been incorporated in the first paragraph of Article 228 except for Article 230(3) which it has been possible to drop in the light of the last sentence of Article 224(3).

Article 231

The annual equalization payment to be offered by the controlling group undertaking must provide outside shareholders with a real alternative; the criteria for calculating its amount have accordingly been more precisely defined. These criteria are designed to secure a minimum amount but the annual equalization amount can be higher. They also provide a yardstick to the experts who are required to examine the adequacy of the offer under Article 232. The annual equalization payment must be at least as much as the dependent group company's potential future dividend. It may be calculated on the basis of future dividends payable by the controlling group undertaking only if the latter is an S.E. or a company limited by shares incorporated under national law (paragraph 2(a)). In this case the ratio between both companies' shares must be calculated and examined by the experts as provided for in Article 232.

According to paragraph 2(a) read together with Article 224(3) of the new version, where a sub-group is controlled by an S.E., the latter could calculate the payment on the basis of its future dividends. This would, however, be less appropriate since the S.E. is itself a dependent company within a group. Paragraph 2(a) therefore provides that in this case the calculation may be made by reference only to future dividends paid by the company with overall control.

Article 232

1. The dependent group company need appoint experts only after the controlling group undertaking has made the offers under Article 228 (see explanatory notes to Article 228(3)). The experts' report is intended for the outside shareholders, who may have sight of its entire contents (Article 234(3)).

2. The experts are under the same liability for errors and omissions in their report as the auditors under Article 15(3) (paragraph 1).

3. Protection of outside shareholders is strengthened through their right to challenge the appointment of the experts before the court within whose jurisdiction the registered office is situated on the grounds that they are insufficiently unbiassed, and to ask for other experts to be appointed (paragraph 2).

4. Paragraphs 3 to 5 are modelled on Article 23.

Article 233

1. Because of the changed procedure under Article 228, paragraphs 1 to 3 of the original version have become redundant.

2. Paragraph 4 of the original version has been aligned on Articles 228 and 232(1) of the amended version.

Article 234

1. At least one month must elapse between the date of convening the General Meeting required to decide on the offers and the date on which it is held. This ensures that outside shareholders have sufficient time to consider the matter (paragraph 1).

2. Paragraph 2 is aligned on the amended version of Article 228.

3. With regard to the last sentence of paragraph 3, see Article 23(b)(3) of the amended proposal.

Article 235

1. Paragraph 1 has been aligned on the amended version of Articles 6 and 228.

2. Under paragraph 3 the proceedings of the General Meeting are to be recorded in a notarial deed. The minutes are to be filed and made available to any interested party.

Article 236

1. The General Meeting might possibly reject part only of the proposals of the controlling group undertaking. Where such rejection relates to an offer which is not mandatory under Article 228, e.g. to an exchange of convertible debentures with a simultaneous offer of a cash payment, a decision of the court under Article 236 is unnecessary. It would be necessary only if the entire settlement procedure were blocked through rejection of the offer by the General Meeting.

   The controlling group undertaking would appear to be the most obvious potential applicant, although the possibility of its ceasing to operate, thus preventing the procedure from taking its course, must not be excluded. In this case the individual shareholders of the dependent group company have the right to apply to the court.

2. The experts appointed by the court (paragraph 3) are under the same liability as the auditors under Article 15(3).

Article 237

1. Paragraphs 1, 2 and 4 have been aligned on Article 228 as amended. In addition, paragraph 1 gives a more precise definition of the term "company journals" as applied to dependent group companies not in the legal form of an S.E.

2. Paragraph 5 makes the group undertaking concerned jointly and severally liable for making the annual equalization payments.

Section 4 - Relinquishment of minority shareholders

This Section is new. Under the law of some Member States, where a company holds more than a certain percentage of the shares of another company, it has the right, in certain circumstances, to acquire the shares of the remaining minority shareholders in that company. The introduction of such a rule for the S.E. would appear entirely justified, and it would appear appropriate to tie this directly to the criteria for determining the existence of a group as defined in the Statute.

It is precisely in a group, especially where there are dependent group companies with only a few minority shareholders, that the interest of majority and of minority shareholders may conflict. In such circumstances it could be in the interests of the controlling group undertaking to make the dependent group company entirely subordinate to the interests of the group and to integrate it into the group policy. This would be made much simpler if it could acquire the shares of minority shareholders in the dependent company. Further, in such cases the few minority shareholders are not in a particularly enviable position; their ability to influence the workings of the company is in practice negligible. There is therefore every reason for giving them the opportunity of relinquishing their shares in it.

Under the following rules, the proportion of shares which must be held is fixed at ninety per cent. Once its holding reaches or exceeds this percentage the controlling group undertaking may acquire the shares of outside shareholders of a dependent group company and the outside shareholders may, for their part, require that their shares be acquired.

Article 238 a

The controlling group undertaking may acquire ninety per cent or more of the shares of the dependent group company at various times. Basically three cases are possible. It may hold this percentage when the group comes into existence, the percentage may be reached in the course of the procedure laid down in Section 3, or as a result of the acquisition of further shares after completion of the procedure. Article 238 a lays down rules governing the first and the third cases while the second case is covered by Article 238 b .

Where the above-mentioned percentage has already been reached or exceeded by the time the group comes into existence, the controlling group-undertaking may elect to carry out either the procedure laid down in Section 3 or a procedure under Article 238 a . The difference between the two is that in the first case, outside shareholders must be offered an annual equalization payment. If the controlling group undertaking does not wish to acquire the shares of all outside shareholders at the time when the group comes into existence it can still decide to do so later.

Where the controlling group undertaking acquires ninety per cent or more of the shares only after completion of the procedure laid down in Section 3, it does not need to decide immediately whether or not to acquire the shares of the remaining outside shareholders. No period is laid down within which this decision must be taken.

The controlling group undertaking must in all cases immediately notify its acquisition of ninety per cent or more of the shares to the dependent group company concerned so that this may be published in the company journals (paragraph 2). It is on the basis of this information that outside shareholders may themselves enforce their right to relinquish their shares.

If the controlling group undertaking wishes to acquire the shares of the outside shareholders it must offer them a cash payment or an exchange of shares. The provisions of Section 3 relating to the rules of procedure, examination and the process for reaching a decision must be applied. Upon publication of the final offer, the shares of the outside shareholders ipso jure become the property of the controlling group undertaking and outside shareholders can then no longer act in that capacity. If they have a share certificate this is evidence only of a claim to a cash payment or an exchange of shares(paragraph 1) and it ceases to confer any rights on them.

If an outside shareholder wishes to relinquish his shares the controlling group undertaking must, at his request, make him an offer. It may offer a cash payment or, in the cases specified in Article 228(1), the alternative of shares or debentures in exchange. The outside shareholders may so request at any time after publication pursuant to paragraph 2. No time-limit is laid down. Where, pursuant to this provision, the controlling group undertaking has previously acquired the shares of other outside shareholders it behoves a new applicant to know what offer was made to them and its amount. This reduces the risk of unequal treatment.

The procedural rules and the rules on examination of the offer in Section 3 do not apply since in this case requests will, for the most part, come from individual outside shareholders and any procedure under those rules would be too cumbersome. The adequacy of the offer in response to a request from an outside shareholder does not therefore need to be examined and verified by an expert. However, if the outside shareholder finds the amount of the offer unacceptable he may have recourse to the court. Since the court's decision is of importance to any remaining outside shareholders of the company, it must be published.

Article 238 b

This provision governs the situation where, on completion of the procedure laid down in Section 3, the controlling group company has acquired ninety per cent or more of the capital of the dependent group company by obtaining outside shareholders' shares for cash or by share exchange. The controlling group undertaking may then subsequently acquire the shares of the remaining outside shareholders of the dependent group company who have decided to accept the offer of an annual equalization payment, on the same terms as those offered to them on completion of the procedure laid down in Section 3 (Article 237(1)). The outside shareholders, for their part, may require that their shares be purchased or exchanged on those terms. It is perfectly conceivable that they might wish to alter their original decision to remain members of the company once the predominance of the controlling group undertaking has further increased.

The procedure laid down is simple as the conditions for acquiring the shares of outside shareholders have already been tested and confirmed. The procedure must of course be carried out promptly since the adequacy of the cash payment or share exchange ratio might otherwise become uncertain owing to changes in the economic circumstances.

The procedure is as follows. Where, on expiry of the period referred to in Article 237(2), the controlling group undertaking has acquired ninety per cent or more of the capital of the dependent group company it must, within one week after this period has lapsed, notify the dependent group company whether or not it wishes to buy out the remaining outside shareholders (paragraph 1). This notification must be immediately published in the company journals by the dependent group company, with details of the amount of the cash payment or of the share exchange ratio (paragraph 2).

If the controlling undertaking does not wish to acquire the outside shareholders' shares, these become the property of the controlling undertaking ipso jure as soon as notification is published.

If the controlling undertaking does not wish to acquire the shares of outside shareholders the latter may, within one month of publication of the notification, require that their shares be acquired for cash or by way of an exchange of shares (paragraph 4).

If acquisition of the outside shareholders' shares is desired neither by the controlling group undertaking nor by the outside shareholders themselves, both may still request this at a later date under the general rules in Article 238 a .

Section 5 - Protection of creditors

Article 239

1. The definition of the scope of application in paragraph 1 has been deleted as this is now dealt with definitively in Article 224.

2. The words "jointly and severally" in paragraph 1 have been deleted. The liability referred to in paragraph 1 is not joint and several since creditors must first claim payment from the dependent group company itself (paragraph 2). They must have made a written demand for payment and have failed to obtain satisfaction.

Section 6 - Instructions and liability

Article 240

The original version only resolved the conflict that may confront the board of directors of the dependent group company when the controlling group undertaking exercises its de facto powers. This board is required to safeguard the interests of the dependent group company alone. In order to establish clear relationships between the group undertakings concerned, the controlling group undertaking now enjoys an express right to issue instructions. The right to issue instructions is the counterpart of the guarantees to be offered by the controlling group undertaking. A controlling group undertaking not formed under the law of a Member State also has the right to issue instructions since such undertakings must also provide the guarantees (paragraph 1).

The right to issue instructions may be exercised from the time of publication under Article 237. The guarantees are definitively in force from that time onwards.

Problems may arise where, under the law governing the dependent group company, certain decisions of its board of directors may be taken only with the consent of a supervisory body.

In this connection, the possibility must also be considered that employees have seats on the supervisory body whose consent is required. The ability to enforce an instruction even against the wishes of a supervisory body which includes such members would appear to be justified only if the interests of the employees of the dependent group company are protected in the same or in an equivalent manner in the decision-making procedure at the level of the controlling group undertaking.

This requirement would be satisfied in a group or a sub-group controlled by an S.E. Employees in companies within a group controlled by an S.E. participate in electing members to its Supervisory Board. Thus, under Article 240(2), the S.E. is able to enforce a decision even if the consent necessary at the level of a group company controlled by it is refused, but only after it has obtained the consent of the Supervisory Board of the S.E.

Where the controlling group undertaking is an undertaking formed under national law, it may enforce an instruction against the wishes of the Supervisory Board of an S.E. within a group controlled by it only, if the interests of the employees of the S.E. and, in the case of a sub-group, of other group companies controlled through it, are protected in the same or in an equivalent manner at the level of the controlling group undertaking. It is impossible, within the present scope of the Statute, to lay down rules as to the structure of a controlling group undertaking formed under national law. However, this should not result in any reduction in the protection of employees interests afforded by the S.E.

The reference in paragraph 3 to the powers of a dependent group undertaking which is an S.E. under Article 240(2) applies where a sub-group is controlled by an S.E. Under Article 240 the S.E. also has the right to issue instructions within sub-groups and is thus able, where the conditions set out in Article 240(2) are satisfied, to enforce an instruction against the wishes of the supervisory body of a group company controlled by the S.E. In exercising its right to issue instructions the controlling group undertaking could disregard such a decision of the Supervisory Board only if the employees of the S.E. and of companies associated with it in the sub-group are represented in an equivalent manner on the governing bodies of the controlling group undertaking.

The powers of the employees' representative bodies existing within the group undertakings (European Works Council or representative bodies within the meaning of Annex I to the Statute) remain unaffected. If the controlling undertaking of a group is however an S.E. and the measures envisaged affect several group undertakings, Article 135(2) and (3) shall apply.

Articles 240 a, 240 b and 240 c

Where the controlling group undertaking acquires the right to issue instructions under Article 240, the board of directors of the dependent group company, insofar as it is required to carry out the instructions, becomes merely the instrument for putting into effect the group policy laid down by the company with overall control. In certain circumstances this could adversely affect the interests of an individual dependent group company. However, once the right to issue instructions has been recognized the grounds are removed for holding the members of the board of directors of the latter company liable to it for any harm they may cause it (Article 240 c). Liability must in fact attach at group level. In exercising uniform management, the members of the board of directors of the controlling undertaking, and, where there is a supervisory body and a management body, the members of both bodies, must exercise the necessary standard of care (Article 240 a). If they fail to do so, the management at group level is liable to the dependent group company for any resulting harm caused to it (Article 240 b(1)).

This liability attaches only from the time at which its powers of management are legalized. If the dependent group company sustains loss as a result of instructions carried out before this time, the members of the board of directors of the company will be subject to the traditional rules governing liability.

Proceedings may be brought by one or more outside shareholders in accordance with the conditions laid down in Article 240 b(2)(a) or, where appropriate, by the liquidator or trustee in bankruptcy (Article 240 b(2)(b)). Since both the board of directors and the General Meeting of the dependent group company are entirely under the control of the group management, they are not likely to do so.

Section 7 - Special rules regarding group relationships in existence prior to the formation of the S.E.

Article 240 d

Not frequently the companies that form the S.E. will themselves belong to a group and control one or more dependent group companies. After the S.E. has been formed these latter companies could become dependent group companies in a group controlled by the S.E., especially where an S.E. is formed by merger or through the establishment of a holding company. If the S.E. were required to immediately apply the procedure laid down in Section 3 to all such companies, a considerable financial burden could be laid on it. This might, on occasion, be seen as a reason for not forming an S.E. Further, the question arises as to whether the S.E. must be held liable for all the commitments of these companies. The introduction of transitional rules therefore seems appropriate.

The rules apply only where the S.E. notifies the Commercial Register and publishes in the company journals immediately once the group comes into existence firstly the fact that certain of its dependent group companies were, prior to the formation, group companies of one of its founder companies, and secondly, the names of the dependent group companies concerned (paragraph 1). If the notification is not made, the provisions of Sections 3 to 6 must be applied in full.

Within 18 months after it is formed the S.E. need offer outside shareholders of the companies notified no more than an annual equalization payment (paragraph 2). The right to issue instructions may be exercised and the rules on liability contained in Articles 240 a to 240 c apply as soon as the annual equalization payment has been determined (paragraph 6).

The S.E. must offer a cash payment or an exchange of shares under Article 228(1) within six years of its formation (paragraph 3). Where the transitional rules apply, the S.E. may acquire the shares of outside shareholders under the Section 4 rules only after this procedure has

been completed. From that time onwards outside shareholders may also require that their shares be acquired under these rules (paragraph 4). This provision is necessary since outside shareholders could otherwise require that their shares be acquired immediately after formation, provided the requirement of Section 4 were met, and could thus invalidate the transitional rules.

Creditors of the companies notified may bring claims against the S.E. only in respect of commitments arising after the formation of the S.E. (paragraph 5).

TITLE VIII
ALTERATION OF THE STATUTES

There have been no fundamental changes in the rules for altering the Statutes.

Article 241

The earlier provisions have been supplemented by a new paragraph 2 which provides that the Board of Management may propose an alteration of the Statutes to the General Meeting only with the consent of the Supervisory Board. It seems desirable to lay down a formal procedure of co-operation with the Supervisory Board similar to that under which the prior authorisation referred to in Article 66(1) is obtained, with regard to the preparation of Board of Management proposals for alteration of the statutes. The duty formerly imposed upon the Board of Management by Article 242(3) of justifying its proposals before the General Meeting is dealt with in the second paragraph of Article 241, thereby consolidating the rules relating to the duties of the Board of Management when an alteration of the Statutes is proposed.

The rights of the General Meeting of the shareholders remain unaffected by the new additions. The shareholders themselves retain the right, as before, to request alteration of the Statutes where Articles 85 or 86 apply.

Article 242

Paragraph 1 has had its wording changed.

Paragraph 2 also includes the report to be drawn up by the Board of Management pursuant to Article 241(2) of the new text amongst documents that shareholders may obtain before the General Meeting.

Paragraph 3, which relates to this report, has been deleted as superfluous since its first sentence has become Article 241(2) and its second sentence Article 242(2).

Article 243

The quorum required under paragraph 1 to enable the General Meeting to resolve resolutions effectively and the need to convene a second General Meeting where this quorum is not reached have been regarded with some misgivings by those concerned in Member States whose company law contains no provisions for such a quorum.

However, the European Parliament has insisted on the need for a quorum, as required in Belgium, France, Italy and Luxembourg, both here and in the case of a meeting of debenture holders (Article 58(2)). The Commission has not altered the first paragraph of Article 243 since Parliament has not objected to its present form.

Paragraphs 2 and 3 have been merged so that the Statutes may now only prescribe a majority higher than the three-quarters majority laid down. They may no longer impose additional requirements as was previously possible. There appears to be no overriding need for such requirements which might give rise to uncertainty in the case of a company operating in a European context.

Article 245

The procedure whereby the European Court of Justice scrutinises alterations to the Statutes has been more closely aligned with the rules in Article 17 governing scrutiny of the formation of the company, to the new text of the explanatory note to which Article reference may be made. At the same time, account has been taken of the Economic and Social Committee's desire that paragraph 1 be amended. Sub-paragraph (b) of the former paragraph 2 has been dropped as a ground for refusing registration since it might have given the impression that it required the court to assess the auditors' report from an economic standpoint. This the court is, however, not asked to do, especially as the new rule concerning liability in Article 43(a) effectively ensures that capital is fully paid up in all cases.

The new text accordingly retains only sub-paragraph (b) of the previous text as a ground for refusal. However, it mentions only the resolution of the General Meeting, since defective proceedings automatically result in the resolution itself being defective and therefore do not need separate mention, as was previously the case.

Paragraph 4 of the new text corresponds to Article 246(1). This provision regarding registration of the alteration has been included in Article 245 with the other provisions concerning the procedure for examination by the court, so as to match up with Article 17.

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Paragraph 5 corresponds to Article 246(2). This provision, too, has been incorporated into the existing Article 245 to make for a clearer arrangement of the rules.

Article 246

The provisions of paragraphs 1 and 2 have been assumed into Article 245 because their substance is closely related to it and in view of the provision made under Article 17.

Paragraph 3 has been deleted since the effects of an alteration of the Statutes as against third parties are now generally dealt with under Article 9-a.

Title IX - Dissolution, Liquidation, Bankruptcy and related Proceedings

At the request of the European Parliament, provision has been made for the European Works Council to be consulted before the General Meeting resolves to dissolve the company. In addition, the preparation of a social plan has been prescribed to deal with social consequences arising from such a decision of the General Meeting.

Furthermore, provisions of this Title have further been changed with regard to certain technical points, with particular reference to the Opinion of the Economic and Social Committee. It will consequently be possible in future to continue an S.E. to operate which has either been dissolved by General Meeting resolution or by the passage of time provided that distribution of its assets among the shareholders has not yet begun.

Section 1 - Dissolution

Article 247

1. The wording of sub-paragraph c) regarding winding-up under Article 249(4) has been amended so as to state with greater clarity that ipso jure dissolution is concerned. No other statutory grounds for winding-up are at present included in the Statute. The Commission does not therefore feel that the time is ripe for adjustment to the future introduction of further grounds for dissolution, as requested by the Legal Affairs Committee of the European Parliament.

2. Sub-paragraph d) regarding dissolution upon insolvency now expressly includes the case of dissolution by a decision of the court refusing institution of bankruptcy proceedings due to lack of assets.

3. Sub-paragraph d) has been added in order to take account of the expansion of powers under Article 99 inserted at the request of the European Parliament.

Article 248

1. Paragraph 1 regarding the conditions for a resolution by the General Meeting to dissolve the company has merely been reworded.

2. The new paragraphs 2 and 3 take account of the European Parliament's wish to alter Article 125 and ensure that the European Works Council can form an opinion before the General Meeting decides to dissolve the S.E.

2. The Board of Management must, under paragraph 2, both advise and hear the views of the European Works Council if it itself intends to propose dissolution, and also if shareholders have applied for dissolution under Article 85.

4. Paragraph 3 corresponds with Article 125(2).

Article 248 a

This Article contains a parallel provision to Article 126 a, adapted to the special features of dissolution, regarding the social plan to deal with the consequences upon the employees of dissolution decided upon by the General Meeting.

The provision takes account of the request made by the European Parliament for the introduction of a social plan amongst the list of decisions requiring approval under Article 123 (Article 123(1) h, of the parliamentary draft).

Article 249

1. Paragraph 1(2) of this provision regarding the resolution to be passed by the General Meeting upon the company encountering substantial losses has been altered at the request of the European Parliament in order to avoid conflict between the Board of Management and the Supervisory Board. The provision, has, further, been worded more clearly.

2. The report by the Board of Management and the Supervisory Board's opinion on dissolution will in future be made available not just to persons attending the General Meeting, as was previously the case. The interests of employees and their representatives and those of creditors will also be affected by the dissolution. Provision has therefore been made in the second sub-paragraph of the new version of

paragraph 1 for these reports to be made available to any interested person. The original proposal made similar provision in respect of the document of constitution and its appendices (Article 24(2) of the original proposal, now Article 23 b(1) of the new version).

3. The requirements for statutory dissolution under paragraph 4 have been streamlined at the European Parliament's request. From the statutory point of view, the question is merely one of the absence of a valid resolution by the General Meeting.

Article 250

1. This provision has been redrafted in order to clarify the procedure to be followed for registering the dissolution and publishing it both in the case of dissolution by General Meeting resolution (Article 247 a) and in the case of dissolution by passage of time (Article 247 b) or de jure (Article 247 c). The procedure in the case of dissolution through insolvency (Article 247 d) or by court order (Article 247 e) is dealt with separately under the provisions applying in such cases (Articles 263 and 99).

2. Paragraph 1 of the new version governs supervision of the dissolution resolution of the General Meeting (Article 247 a) by the European Court of Justice and registration of the dissolution and publication thereof, by reference to the provisions relating to changes to the statutes.

3. Under the new version of paragraph 2, in the cases of dissolution by passage of time (Article 247 b) and de jure (Article 247 c) originally covered by Article 250, the liquidators are now required to have the dissolution registered. Under paragraph 1 of the original version this only lay upon the Board of Management. In such cases, however, dissolution will, contraty to what is the case with dissolution by resolution of the General Meeting, already have occured before registration. The powers of the Board of Management have in fact been extinguished upon dissolution and passed on to the liquidators (Article 252(1)).

4. Paragraph 2(2) contains the substance of the provision in the previous paragraph 2 regarding registration to be ordered by the court in the case of dissolution by passage of time or de jure.

The second sub-paragraph of paragraph 2 contains a provision for publication applying both to registration of the dissolution by the liquidators and to registration under court order. The costs provision thereby became dispensable and was deleted.

Sub-section 2 - Liquidation

Article 252

1. Paragraph 2 of the new version has been altered so as to get out the occasions on which the court may intervene in the appointment and dismissal of liquidators more clearly.

   If the court orders dissolution of the company under Article 99 or registration of de jure dissolution under Article 250(2), it is then proper for the court itself to appoint the liquidators at the outset, so as to give a guarantee that abuses or irregularities that have occurred cannot be repeated.

2. Paragraph 3 has been made to state clearly that the liquidators appointed by the court under paragraph 2, cannot be dismissed e.g. by the General Meeting.

Article 253

This provision now states further that it is for the liquidators appointed in each case to notify the Commercial Register.

Article 254

At the suggestion of representatives of commerce and industry, the liquidators have now been enabled to distribute assets of the company amongst the shareholders at their market value rather than convert such assets into cash, wherever disposal in this way is possible - e.g. in the case of shares held by the S.E.

Article 255

1. The procedure under paragraph 2 whereby creditors are required to notify their claims, has been simplified by the general introduction of notice by registered letter instead of the reference, previously adopted, to the provisions of domestic law governing the service of documents.

2. At the request of the European Parliament, and the Economic and Social Committee, paragraph 3 no longer provides for the extinguishing of unnotified claims. According to the new version, creditors who fail to notify their claims within the prescribed period lose only the right to enforce their claims on the company. Such claims otherwise continue unaffected - e.g. against third parties with joint liability.

   The exception requested by the Economic and Social Committee in respect of future claims seems inopportune to the Commission. Such claims can be provisionally notified and where necessary discharged under Article 257(2).

Article 256

Paragraph 2 takes account of the release from liability under Article 218 and no longer states this provision within the reference thereto.

Article 257

The substance of paragraph 1 has been adjusted with regard to Article 49(1).

Article 258

Only shareholders and creditors are now given the opportunity under paragraph 2 to proceed against the scheme of distribution as only they have their statutorily protected rights affected thereby.

Article 260

The Commission agrees with the Economic and Social Committee that modern methods of information storage must be available to the European Commercial Register, but feels that the proper way in which deposited documents should be safekept should not be governed by Article 260 but by the rules to be prescribed by the Council under Article 8(2).

Article 260 a

This provision has been introduced at the request of the Economic and Social Committee in order to facilitate continuation of an S.E. dissolved by a resolution of the General Meeting, provided that distribution of the assets to shareholders has not yet begun. The provision has been worded analogously with Articles 248(1) and 250(1).

Article 260 b

Having regard to the provisions of Article 260 a, it seems fitting that an S.E. should also be capable of continuation where the period laid down for its duration in the statutes has expired, provided that distribution of its assets amongst the shareholders has not yet begun.

Article 260 b permits an appropriate alteration of the statutes to suffice for this purpose.

Section 3 - Bankruptcy, winding-up, arrangements, compositions and similar proceedings

Article 261

The terminology of the provision and the heading to this Section have been adapted to the "preliminary draft of a Convention on bankruptcy, winding-up, arrangements, compositions and similar proceedings" of 16.2.1970.

Article 262

Under Article 3 of the above preliminary draft of a Convention on bankruptcy, sole competence for the hearing of bankruptcy proceedings rests with the courts of the Member State in which the debtor's centre of administration is situated. In the case of companies it is presumed (subject to rebuttal) that the company's centre of administration is situated where the registered office is established under the statutes.

This provision is to be preferred in respect of the S.E. to that originally made in Article 262, whereby it was irrefutably presumed that the S.E.'s registered office under the statutes was its centre of administration. In this way it was intended to ensure that the court having jurisdiction over the place of the registered office would be competent for the institution of bankruptcy proceedings (1). This provision might, however, have led to difficulties where the S.E. had several registered offices.

If competence to hear bankruptcy proceedings against the S.E. is defined by the general provisions of the Convention, such difficulties do not arise. The provisions contained in the preliminary draft already comprehensively cover the possibility of courts of several Member States being seized of the bankruptcy of the same S.E.

On these considerations the special provisions of Article 262 were deleted.

Article 263

1. Paragraph 1 now ensures that not only the institution of bankruptcy proceedings but also that of composition and other proceedings in respect of which the provisions of the above preliminary draft of a Convention on bankruptcy apply (Article 1 of the preliminary draft) will be notified

(1) cf. the explanatory notes to Article 262 of the original proposal

to the European Commercial Register for registration.

This provision corresponds with Article 25(2) of the preliminary draft of a Convention on bankruptcy. The particulars to be entered on the European Commercial Register have been stated in greater detail as the draft Convention makes no stipulation to this effect. The opportunity has, however, been taken to incorporate the information to be published in the Official Journal of the EEC pursuant to Article III of the protocol to the Convention.

2. Paragraph 2 ensures that the judgements and acts to be published in the Official Journal of the EEC pursuant to Article IV of the above protocol will also be notified to the European Commercial Register.

3. The new paragraph 3 provides for registration of dismissal of bankruptcy proceedings owing to want of assets, by direction of the court.

Instructions may be given by the court - as is usual in such cases in the Federal Republic of Germany, for example - either on its own moving or on application by an interested party.

4. Paragraph 4 contains a provision regarding publication of the registration applying to paragraphs 1 and 3.

Titre X - Transformation

The European Parliament and the Economic and Social Committee have approved the principle that an S.E. may be transformed into a /limited company constituted under national law.

The rules relating to transformation set out in the earlier version of Articles 264 and 265 have, however, been supplemented by provisions intended to ensure that employees continue to be represented in the governing bodies of the company.

The Legal Affairs Committee of the European Parliament and the Economic and Social Committee have also discussed ways of ensuring that employees continue to participate in decision-making when an S.E. is transformed. These discussions did not, however, result in any proposals for supplementing the previous text.

The Commission's view is that a more effective guarantee of continued participation in decision-making is now required, in particular because a different concept based on the Opinion of the European Parliament underlies the employee participation rules.

According to the Opinion of the European Parliament, which the Commission has followed in its amended Proposal, employees are to be represented on the Supervisory Board of the European company on an equal footing with shareholders, so that the interests of both groups are properly taken into account in supervising the running of the company and in taking major decisions concerning it. This new concept of the S.E., which is concerned equally with the interests of shareholders and employees, is incompatible with a situation where the right of employees to be represented on the Supervisory Board of the S.E. could be withdrawn through transformation of the S.E. into a company incorporated under national law, without equivalent provision for employee participation, solely by a resolution of the General Meeting.

The Commission therefore proposes that the conversion of an S.E. involving a reduced measure of employee participation in the governing bodies of the company may only be effected if a majority of the employees' representatives on the Supervisory Board of the S.E. is convinced that transformation is an economic necessity, and votes accordingly.

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The rules governing the technicalities of transformation have, moreover, been arranged more logically in accordance with the observations of the Economic and Social Committee.

Article 264

1. In order to give effect to the rules for the protection of employees interests set out in the introduction to the new version of this Title, the first paragraph now provides that an S.E. may be transformed by the General Meeting only upon a proposal by the Board of Management, and that the proposal requires the agreement of the Supervisory Board.

2. The newly added fourth paragraph lays down that the consent of the Supervisory Board to transformation of the S.E. into a company on whose governing bodies employee representation is not equivalent to that required under the rules governing the S.E. will be effective only if supported by a majority of the employees' representatives on the Supervisory Board. Under the newly added second paragraph of Article 265, the Supervisory Board cannot decide whether to give its consent until the Board of Management has consulted the European Works Council.

3. In accordance with the wishes of the European Parliament and the Economic and Social Committee, this provision enables the S.E. to be transformed on the grounds of unavoidable economic necessity in certain circumstances. At the same time however, the Commission feels that it takes full account of the new concept of the European company and of the interests of its employees.

4. The second and third paragraphs are retained unchanged. The observance of a waiting period before conversion can be effected is still a sound principle. It prevents the S.E. being used merely as a means of changing the form of a company. Such use and the dangers of abuse arising from it would be detrimental to the success of the new legal framework for a European company. However, in view of the protective provisions ensuring the continuation of a participation in decision-making on the part of employees, it no longer appears necessary to extend this period to five years as requested by the Economic and Social Committee.

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Article 265

Only the wording of the first paragraph has been altered.

The second paragraph ensures that the European Works Council is consulted before the S.E. is transformed. The European Parliament proposed in respect of Article 125 that the European Works Council should also be consulted on matters of importance to the undertaking other than those set out in the Article. Such matters would in fact include transformation, along with dissolution and mergers as specified by Parliament.

Transformation differs from the dissolution of the S.E. or mergers, however, in that no social plan has been provided for , since transformation as such cannot have consequences for employees which would need to be dealt with by a social plan.

Article 266

The third and fourth paragraphs have been amended so that the terminology conforms with that used in the amended provisions of Article 245 concerning scrutiny of the alteration of the Statutes by the European Court of Justice. The reader is referred to the explanatory notes to that Article.

Article 267

This provision gave rise to misunderstanding concerning the timing and effect of the transformation. It has therefore been deleted and incorporated in a different form as the second paragraph of Article 268 of the new draft.

Article 268

The transformation procedure following examination of the transformation by the European Court of Justice (Article 266) has been made clearer. This is to avoid misunderstandings as to the formalities to be carried out and the sequence of the procedural steps. The new rules follow more closely the preliminary draft made by Professor Sanders[1], and take account of the observations of the Economic and Social Committee.

The first paragraph makes it clear that the subsequent transformation procedures take place at national level.

The second paragraph governs the effect of transformation; unlike the deleted Article 267, it makes it clear that the identity of the company is retained.

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[1] Preliminary draft Statute for the European company, December 1966- Competition series 1967-6.

The third and fourth paragraphs of the new draft contain essentially the provisions relating to the procedure to be followed on completion of transformation, which were contained in the first and second paragraphs of the original draft.

The third paragraph of the original text is deleted, since the effect of registering the transformation as against third parties is governed by the newly introduced general provision regarding publication in Article 9-a.

Title XI - Merger

The provisions of Title XI concerning the merger of European companies have been completely redrafted, although they are still based on the fundamental concept embodied in the original proposal that a European company should be able to merge with other European companies and with limited companies incorporated under national law by taking them over or by forming a new European company with them. Moreover, the reverse process should be permissible so that it should be possible for a European company to be absorbed by a limited company incorporated under national law or to form a new limited company under national law with such companies or with European companies (1).

This concept has been formally approved by the European Parliament and by the Economic and Social Committee. However, the Economic and Social Committee, in particular, has rightly pointed out that the former rules do not do justice to this concept and it has stressed that the Statute must include specific rules on the acquisition of an S.E. by a limited company incorporated under national law.

The former rules were also clearly in need of improvement in other respects. The previously mentioned references to the provisions governing formation in Section 2 of Title II which relates to merger by formation of a new company are not, in fact, always appropriate in the case of mergers by take-over.

Where it has not been possible to refer to Section 2 of Title II regarding the provisions governing formation, the new provisions of Title XI have been assimilated, as were the provisions governing formation, to the provisions of the amended Proposal for a Third Directive and to those of the Draft Convention on the international merger of limited companies (2).

(1) Initial explanatory note to Title XI - Supplement to Bulletin 8 - 1970 of the European Communities

(2) In this connection cf. the initial explanatory note to the amended provisions of Title II.

The first Section of the new rules, "General Provisions", contains a list of all cases in which an S.E. may participate in a merger and refers to the provisions of this Statute that apply in specific cases. Further, this Section contains general provisions which apply in every case in which an S.E. participates in a merger.

The second Section lays down the rules that apply where an S.E. takes over another S.E. or a company governed by national law. In the original proposal, the rules that applied in these two cases were contained in Sections 1 and 2 (Articles 271 and 274). They can, however, be dealt with together.

Cases of merger by formation of a new S.E., also dealt with in Sections 1 and 2 of the original rules, are already automatically covered by the provisions governing formation in Title II and no longer need separate mention other than in the general provisions in the first Section of Title XI. The third Section of the new text of Title XI deals with the acquisition of an S.E. by a limited company incorporated under national law.

The concluding fourth Section of this Title lays down the rules that apply to a merger by formation of a new limited company under national law.

Section 1 -- General Provisions

Article 269

Section 1 now provides a complete list of the various cases in which an S.E. may participate in a merger. At the wish of the European Parliament and of the Economic and Social Committee, it expressly admits the possibility of a merger between an S.E. and several other companies. It was possible, under the former proposal, for more than two companies to participate in the formation of an S.E. by merger (cf. Articles 2 and 3).

Section 2 defines the merger operations, regulated by Title XI, in which an S.E. may participate.

Various people have expressed the wish that an S.E. should also be able to participate in operations similar to mergers, such as scission. However, the corresponding legal forms in the various Member States differ considerably and in some they are unknown. The establishment of satisfactory rules for the S.E. therefore presents considerable difficulty, especially in the case of cross-frontier operations. At the present time the Commission considers that such rules are not absolutely necessary.

Section 3 of the new rules contains the provision in the former paragraph 2 concerning the participation in a merger of an S.E. in liquidation. Furthermore, where national companies in liquidation are acquired by an S.E. they may participate in a merger. Corresponding rules relating to the founder companies of the S.E. have already been adopted in Article 21(2) of the new text. It is logical that national limited companies should receive the same treatment in both these types of merger since their assets are to be transferred to an S.E. in each of the two cases.

Article 270

The new text of this Article contains provisions which apply to an S.E. in all cases in which it participates in a merger (paragraph 1). Formerly such provisions did not exist. They are, however, necessary so that the references to the law governing the merging companies contained in the provisions governing formation in Title II or in the subsequent Sections of Title XI may be complemented if an S.E. is affected.

Paragraph 2 lays down rules for drawing up the draft document of constitution or the merger plan.

Paragraph 3 requires the Board of Management to appoint the auditors chosen by the General Meeting who possess the necessary qualifications for carrying out the formation audit (Article 203), (cf. the former Articles 270(2), 271(2)).

Paragraph 4 lays down that the resolution of the General Meeting approving the merger must be passed in like manner to a resolution for alteration of the Statute. This corresponds to the concept embodied in the former rules (Article 271(1)).

Article 270 a

There are many references in subsequent Sections of this Title to the provisions governing formation in Title II. However, concepts used in the latter, such as "founder company", need to be replaced in the case regulated in Sections 2 and 3, since these are concerned not with merger by formation of a new S.E. but with merger by take-over. Article 270 makes this adjustment.

Section 2

Acquisition by an S.E.

Article 271

1. The material requirements in paragraph 1(a) to (e) which the merger plan must satisfy in the event of the take-over of a limited company by an S.E. correspond to the rules governing merger by take-over in Article 3(2) of the amended proposal for a Third Directive and Article 8(2) of the Draft Convention on international mergers.

2. The other rules governing the content of the merger plan and its annexes are aligned on Article 22 or consist of references to that provision.

Article 271 a to 271 e

The rules which govern examination of the merger plan, explanation of it to all interested persons, covening of the General Meeting, discussion with employees of repercussions of the merger, determination of any measures to be adopted in respect of them and, lastly, approval of the merger by the General Meeting, in the case both of the company acquired and of the acquiring company, consist largely of references on the same lines as the provisions governing formation in Title II.

As was in fact the case hitherto, limited companies incorporated under national law are therefore subject to the same Community rules in all cases where their assets are transferred to an S.E. by way of merger.

Article 271 f

The rules which govern notification of the merger to the Court of Justice of the European Communities for registration in the European Commercial Register are modelled on Article 26(1).

Article 271 g

This provision lays down rules concerning examination of the merger by the court, publication of it and the date on which it takes effect on the same lines as the provisions governing formation of an S.E. (with regard to paragraph 3, cf. Article 26(2)).

Article 271 h

A reference to Article 27 ensures the protection of creditors of the company acquired.

Article 271 i

1. This provision regulates the special circumstances which may arise where the acquiring S.E. owns shares in one of the companies acquired. The rules in Section 1 correspond in substance to Article 26(1) and those in Section 2 to Article 5(2) of the Draft Convention on international mergers. The provision is in response to a wish expressed by the Economic and Social Committee.

2. The reverse case, where the company acquired owns shares in the S.E., is covered by the rules in Article 46(4) a, which require the S.E. to dispose of its own shares where these are acquired by way of universal succession.

Section 3

Acquisition of an S.E. with a limited company incorporated under national law

Article 272

This provision regulates the material requirements to be satisfied by the merger plan, and by the procedures for examination and explanation of it, through references to the rules in the second Section of this Title.

Article 272 a

As in the case of the transformation of an S.E. into a limited company incorporated under national law where an S.E. is taken over by such a company, the question of representation of employees on the latter's governing bodies also arises if the limited company incorporated under national law is not subject to employee participation rules equivalent to those which govern the S.E.

As in the case of transformation, the Commission considers it as unjustified, in the event of a merger, that through the merger, employees of the S.E. should lose their representation on the Supervisory Board of their company or see it considerably reduced against the wishes of their elected representatives.

In this connection, reference should be made as regards points of detail to the explanatory notes to Article 264, concerning transformation.

Article 272 b to 272 d

With regard to an S.E. which has been acquired, the rules which govern the convening of the General Meeting, discussion with employees on repercussions of the merger, determination of any measures to be adopted in respect of them and approval of the merger by the General Meeting, consist of references to the provisions governing formation.

On the other hand, with regard to the acquiring limited company these matters may be settled by the national law applicable to them and therefore need not be dealt with by the Statute.

Article 272 e

This Article lays down rules governing supervision of the merger by the Court of Justice of the European Communities and is modelled on the corresponding Article concerning transformation (Article 266).

Article 272 f

This provision regulates registration of the merger in the European Commercial Register and notice of such registration at Community level.

Article 272 g

The effect of the merger - that the S.E. ceases to exist - is governed by standard rules at Community level.

Article 272 h

This provision protects creditors of the S.E. by referring to Article 27. However, creditors may well avail themselves of any more favourable guarantees to which they may be entitled under the law governing the acquiring company.

Article 272 i

This Article lays down the rules which apply where the acquiring company owns all or part of the shares of the S.E.

Article 271 i notwithstanding, no rules are laid down for the final treatment of such shares; this is governed by the law to which the acquiring company is subject (in this connection, see the explanatory notes to Article 28 and the Goldman Report on Article 5 of the Draft Convention on international mergers).

Section 4

Merger by formation of a new limited liability company incorporated under national law

Article 273

This Article lays down rules governing the material requirements which the merger plan must satisfy. References to the provisions governing formation were possible since the cases are arranged in much the same way.

The opening balance sheet to be prepared under Article 22(1)b in respect of an S.E. has not been prescribed for the new company to be incorporated under national law. Under Article 273 e, domestic law will apply in this case. /which is

Paragraph 3 corresponds to Article 45(1) of the Draft Convention on international merger.

Paragraph 4 concerns the qualifications of the auditors not covered in paragraph 2 by the reference to Article 23.

Article 273 a to 273 d

The content of these Articles corresponds to that of Article 272 a to d. Equal treatment of the S.E. is justified by the fact that in both cases the S.E. ceases to exist and transfers its assets and liabilities to a company incorporated under national law.

Article 273 e

The rules governing formation of the new company correspond to Article 46 of the Draft Convention on international merger.

Article 273 f

It was possible to lay down rules governing examination of the merger by the European Court of Justice and registration of the merger by reference to the provisions which apply to mergers by take-over of an S.E.

The time specified in paragraph 2 is governed by the provisions referred to in Article 273 e. It is important because of the effects referred to in Article 273 g.

Article 273 g

The expiry of the S.E. must coincide with the formation of the new company. Thus, in contrast with other forms of merger, the effects of the merger cannot be regulated exhaustively at Community level.

Article 273 h

This provision corresponds to Article 272 h.

Article 273 i

Paragraph 1 of this provision corresponds to Article 272 i (1); reference may be made to the explanatory notes to the latter.

Paragraph 2, on the other hand, corresponds to Article 28(2); reference may, again, be made to the explanatory notes to the latter.

Article 274

Acquisition by an S.E. is now dealt with in Section 2 of this Title. Article 274 has therefore been deleted.

Title XII - Taxation

No changes have been made to the substance of the provisions of this Title. The rules laid down in the Statute have been approved in principle both by the European Parliament and by the Economic and Social Committee.

Section 1 - Formation

Article 275

The European Parliament wished to supplement this provision concerning the formation of a European holding company with a clause stipulating that shareholders' benefits under double taxation agreements should not be prejudiced.

Holding companies within the Community are generally covered by such agreements. As a rule, an S.E. or its shareholders benefit from them without special mention being necessary. However, double taxation agreements do not apply to holding companies subject to a special tax system, as may, in particular, be the case in Luxembourg.

The addition to Article 275 could, however, lead to such companies unjustifiably deriving benefit from double taxation agreements. This must be prevented in the interests of combating tax evasion.

In view of these considerations, the Commission has not adopted the amendment desired.

Section 3 - Permanent establishments and subsidiaries

Article 278

To avoid double taxation of an S.E. with a permanent establishment in another Member State, the European Parliament would like rules on the lines of those in Article 281(2) added to Article 278 to ensure that permanent establishments and subsidiary companies are given equal treatment when carrying losses forward to the S.E.

This request for parity is, however, misconceived since the situations of the permanent establishment and subsidiary company are not identical. The Statute applies only to permanent establishments within the Community (Article 278), whereas there is no such limitation in the case of subsidiary companies (Article 281). It is known that all Member States including the three new ones permit resident companies to carry forward their losses. It therefore follows that under Article 279 permanent establishments will also be able to do so. The proposed paragraph 5 is hence superfluous.

Subsidiary companies on the other hand may find that under the fiscal system of a third country they are unable to carry forward their losses. Provision is therefore made for this contingency in Article 281, paragraph 2, first sentence.

Articles 280 and 281

The amendments are no more than technical corrections.

Title XIII - Offences

Article 282

1. The concept underlying the previous rules has been retained. However, the European Parliament is unwilling to leave it to Member States to lay down the penalties attaching to the offences set out in the Annex to the Statute (Annex 4 of the new text). It has called for a Community Directive establishing the nature of the offences and the appropriate penalties. The Economic and Social Committee has also stated that it is in favour of establishing penalties as part of Community law.

   In the Commission's view, to meet the Parliament's request would give rise to difficult legal questions regarding the equivalence of the penalties provided under the existing wide variety of systems of criminal law and forms of criminal procedures, and would unnecessarily increase the complexity of the Statute.

   The aim is to penalize certain offences set out in the Annex to the Statute (Annex 4). It can be left to the national legislatures to provide for the means most suited to achieving this aim in the particular national context.

2. The wording of Article 282 has been amended to take account of the special circumstances which result from the distinction drawn in Germany between administrative offences punishable by fines and criminal offences . In fact, certain acts equivalent to those set out in the Annex are dealt with in Germany not as criminal but as administrative offences.

Title XIV - Final Provisions

Article 283

The European Parliament and the Economic and Social Committee have expressed misgivings about the shortness of the period within which national laws must be adapted. At the wish of the European Parliament this period has been extended to 12 months.

Article 284

At the wish of the European Parliament, the period referred to in Article 284 has also been extended to 12 months to keep it in line with the period referred to in Article 283.

ANNEX I

Article 102 of the Statute has been altered in conformity with the opinion of the European Parliament. As a result, the national employee representative bodies to whom reference is made in the provisions of Title V and elsewhere in the Statute are now listed in this Annex.

Reference is made in these provisions, at times, to representation at plant level and, at times, to central representation (cf. e.g. Article 131, where the election of members of the Group Works Council is primarily a matter for the centrally formed employee representative body).

Annex I has accordingly been divided into two sections, in which the representative bodies and their legal or negotiated bases are listed at each of the two levels. Only such representative bodies have been listed for which there is a statutory or generally recognized negotiated basis open to all employees. At the present time no such representation exists either in the United Kingdom or in Ireland. In Belgium and Denmark they so far exist only at works level.

The Annex will have to be kept up-dated in the light of developments and, where necessary, restated in greater detail. The latter point applies particularly in the case of Italy, where "Commissioni interne" have in many undertakings been replaced or complemented by "Consigli di fabbrica" as the representative body for all the employees, wholly or partly assuming the tasks of the former.

ANNEX II

1. Annex II contains the electoral rules recommended by the European Parliament for the European Works Council. These rules have been incorporated into the Statute by the new Article 104.
As regards the reasons for introducing the electoral rules, reference should be made to the explanatory notes on the new version of Article 104 of the Statute.

The rules were prepared by the Legal Affairs Committee of the European Parliament in consultation with the rapporteur of the Committee for Social Affairs and with the technical support of officials of the Commission.

2. Section I (Articles 1 to 8) contains the general rules applying to elections.

Members of the European Works Council are elected at the individual establishments of the S.E. by the workers employed therein, irrespective of their nationality and by direct, secret ballot (Articles 1 and 3 (1)). Lists of candidates may be submitted by the trades unions and by groups of employees (Article 3 (2)).

There seems no justification in granting the right to appoint candidates only to the unions, as is the case e.g. in Belgium. The relationship between organised and unorganised labour varies too greatly in this respect from one Member State to another and to some extent, within the same Member State, even from one undertaking to the next. It appears however to be justified to increase the minimum number proposed by the Parliament for groups of employees from 25 to 100, in order to prevent too wide a fragmentation of votes.

Employees have not been divided up into individual groups, such as "workers", "staff", or "supervisory staff" for the purpose of European Works Council elections. Such categorisation differs too greatly from Member State to Member State. On this point, the Legal Affairs Committee's Supplementary Report reads : "The division of

employees into different electoral groups is based on the particular characteristics of the respective national systems of employees' representation. These characteristics certainly do not apply to employee representation at the international level; . neither its functions nor its composition are the same". (1).

By adopting the d'Hondt system of proportional representation by the maximum quotient method with a preference vote for one candidate on the elected list (Articles 5 and 6) fair representation on the European Works Council of all groups of employees in the establishment concerned can in fact be ensured as far as possible.

3. Preparations for (Articles 14 to 16) and implementation of (Articles 17 to 19) the elections governed by Section II are in the hands of an electoral commission, independent of the S.E.'s Board of Management (Articles 9 to 13), which is to be set up in the establishment concerned (Article 11).

The time-limits included in the individual electoral rules relate to a timetable, according to which the elections are due to take place not more than 75 days after the formation of the S.E., or 30 days before the expiry of the period of office of the European Works Council that is to be re-elected (cf. Article 14(1)). To ensure trouble-free adhesion to this timetable, the period fixed under Article 9(2)) for objections against the listing of all establishments participating in the election was reduced, contrary to the text of the European Parliament's Opinion, from 20 days to 15.

4. Section III (Article 20) covers contestation of the elections and the consequences thereof.

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(1) P.E. 35.861. Document 67/74 of 26.6.1974 paragraph 113.

5. As regards details of the voting procedures, reference should be made to Mr. Brugger's explanatory comments in the Legal Affairs Committee's Supplementary Report (op.cit. paragraph 118). This applies particularly as regards the description of the d'Hondt maximum quotient method (Document 67/74 P.E. 35.861/fin. of 26.6.1974, paragraphs 112 to 130).

ANNEX III

1. The provisions regarding the election of employees' representatives to the Supervisory Board were, like the provisions of Annex II regarding elections for the European Works Council, prepared by the European Parliament's Legal Affairs Committee in consultation with the rapporteur of the Committee for Social Affairs and with the technical assistance of the officials of the Commission and approved by the Plenum of the European Parliament. These were incorporated into the Statute by the new Article 137(1), which corresponds to Article 137 a of the text of the European Parliament's Opinion.

The reasons why the provisions were introduced have already been stated in the explanatory notes on the new version of Article 137. Here the chief points have also been set out that the new wording shares with the original proposal and also those on which they differ.

2. General matters are dealt with in Article 137 of the Statute and in Section II of Annex III.

As was done previously, provision is made for the indirect election of employees' representatives to the Supervisory Board, in cases where several establishments participate (Article 1(1)). Under the new provisions, the votes in this case are cast by special electors elected on a uniform basis in the individual establishments (Article 1(2)). Not only the S.E.'s employees but also the employees of group undertakings controlled by the S.E. having their registered offices within the Member States participate in these elections (Article 137(1) (3) and (4) of the Statute; Article 1(1) of Annex III). If a vote is to be taken in only one establishment, however, the employees' representatives will be elected directly (Article 1(3)).

For the grounds underlying these regulations, reference should be made to the explanatory notes on Article 137 of the new proposal and to paragraphs 131 and 132 of the Supplementary Report of the European Parliament's Legal Affairs Committee (1).

3. Section II (Articles 3 to 22) governs the indirect election of employees' representatives.

4. Sub-section A of this Section (Articles 3 to 6) governs the election of electoral delegates on the principles applying in the case of the election of members of the European Works Council (cf. in particular, Article 3(1)).

5. Sub-section B of this Section (Articles 7 to 21) governs the election of employees' representatives by the electoral delegates.

Nominations may be submitted by the European Works Council, the trades unions, and groups of employees or electoral delegates (Article 7). For the same reasons as were stated in the explanatory notes to Appendix II in respect of elections for the European Works Council, it would not be proper to accord nomination rights only to the trades unions.

The electoral college for its part elects the employees' representatives on the Supervisory Board of the S.E. If a number of representatives are to be elected the d'Hondt system of proportional representation by the maximum quotient method will be used (Articles 10 and 11). Here, too, as in the case of elections for the European Works Council, every attempt is made to use voting procedures to ensure that all groups of employees will be represented on the Supervisory Board.

The technical implementation of elections of electoral delegates and of employee representatives on the Supervisory Board is closely coordinated with that applying to membership of the European Works Council.

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(1) P E. 35.861 - Document 67/74 of 26.6.1974.

Preparations for and implementation of the elections is left to a central electoral commission (Article 14). This commission is composed of three members appointed from the electoral commissions at plant level. The central electoral commission presides over the discussions within the electoral college (Article 19). Provision has been made to ensure that nominations not made by the electoral delegates themselves can still be amended, withdrawn or consolidated with other nominations in the electoral college by their representatives (Article 18(4)).

6. Sub-section C (Article 22) covers contestation of the elections.

7. Section III governs the direct election of employees' representatives on the Supervisory Board which occurs in accordance with Article 1(3) if voting is confined to one establishment.

The elections are prepared as provided in respect of those for the European Works Council; seats will be distributed in accordance with the rules applying under Section II with regard to the electoral college.

8. As regards details of the electoral rules, reference should be made to the Supplementary Report of the Legal Affairs Committee, by Mr. Brugger (1). This applies particularly to an explanation of the d'Hondt maximum quotient method (2).

9. Certain technical departures have, however, been made from the electoral rules as stated in the European Parliament's Opinion.

These relate to the alteration of Article 137(2) of the Statute consequent upon the European Parliament's Opinion. Contrary to the original wording of the Commission's proposal and the recommendations

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(1) P E 35.661 - Document 67/74 of 26.6.1974, paragraphs 131-141.

(2) Paragraph 138.

of the European Parliament's Legal Affairs Committee, the election to the Supervisory Board of a number of employee representatives from outside the undertaking is no longer mandatorily requisite.

Consequently, when distributing seats on the Supervisory Board, it was no longer necessary to ensure that the required number of persons from outside the undertaking under Article 137 (2) should obtain seats on the Board. According to the new version of Article 137(2), it is necessary now only to prevent more seats falling to candidates from outside the undertaking than is permitted under Article 137 (2).

Having regard to the above, Articles 8 regarding the lists of candidates and 10 (3) and (4) and 11 regarding the distribution of seats in the event of there being several lists, and 12 (1) and (2) regarding the distribution of seats where there is only one list have been altered accordingly.

If, as a result, the number of seats allotted to candidates not employed in an establishment of the S.E. exceeds, as to the persons not employed in the establishments of the S.E., the maximum number permitted under Article 137(2), the supernumerary candidates must give way to the candidates employed in an establishment of the S.E., who are next in line on their electoral list. Example :

Five employees' representatives are to be elected to the Supervisory Board. Under the maximum quotient system of d'Hondt (Article 11 (1) seats 1 and 3 are to be allotted to list A, seats 2 and 4 to list B, and seat 5 to list C.

Seat 1 falls to a candidate not employed in an establishment of the S.E. entered on list A, either through precedence on the list itself or as a result of preferential votes in his favour ; seat 4 is allocated to a similar candidate on list B.

If seat 5, allotted to list C, subsequently falls to a candidate on this list not employed in an establishment of the S.E., in order to prevent that more persons not employed in an establishment of the S.E. will be elected than is permitted under Article 137 (2), this candidate must give way, on the distribution of seats, to the candidate nearest to him on list C either in sequence of listing or in the number of preference votes obtained, but employed in an establishment of the S.E. (Article 11 (3).

10. In article 23 (3), the minimum number required in cases of direct elections for groups of employees wishing to submit lists of candidates was increased, as compared with the proposal of the European Parliament, from 25 to 100, as in the similar case under article 3(2) of Annex II.

ANNEX IV

1. In the introductory clause, it is left to the Member States -- as a consequence of the alteration of Article 282 -- to penalise the incidents subsequently listed either by criminal proceedings or in some other way.

2. As incident under iten VIII has been extended to include the threat of sanctions not only in the case of a breach of Article 82 but also of failure to fulfil the declaration obligations under Article 46 a of the new version.

3. The incidents under IX to XI have been newly added. Under IX, Member States are obliged to introduce sanctions against the breach of the obligations of secrecy under the Statute for European Companies.

No effective protection against the revelation of secrets has hitherto been afforded, but is nonetheless indispensable. The provision embraces all persons who have a duty of secrecy imposed upon them by the Statute, i.e., in particular, members of the Board of Management, of the Supervisory Board, of the European Works Council, and of the Group Works Council, auditors, trade union representatives attending meetings of the European Works Council, and European Works Council experts.

X. was necessary in order to ensure that the votes of European Works Council members and of employees' representatives on the Supervisory Board of the S.E. remain free from unfair influence. Comparable provisions may be found in the legislation of certain Member States, protecting the implementation of elections for employee representative bodies set up under municipal law.

XI. serves to protect the trade names of the S.E. by creating sanctions against the unlawful use of confusing descriptions.

XII. is intended to facilitate transactions with the S.E. and to ensure that third parties having dealings with it will have continuing and untrammeled access to information that is important to them.

Obligations on the part of Member States such as those mentioned under XI. and XII. have also been incorporated by the Commission into Article 19(2) of its proposal for a regulation of the Council on the European Co-operation grouping (ECG) (1).

(1) Official Journal of the EEC C 14 of 15.2.1974, with explanatory notes printed as Supplement 1/74 to the Bulletin of the European Communities.