Bulletin
of the European Communities

Supplement 13/73

Draft Convention on the international merger of sociétés anonymes

Report on the Draft Convention on the international merger of sociétés anonymes

(submitted to the Council by the Commission on 29 June 1973)

EUROPEAN COMMUNITIES
Commission

The Draft Convention on the international merger of 'sociétés anonymes', hereafter published, finds its legal basis in Article 220 of the Treaty establishing the European Economic Community. Article 220 states among other things the following: 'Member States shall, so far as is necessary, enter into negotiation with each other with a view to securing for the benefit of their nationals... the possibility of mergers between companies or firms governed by the laws of different countries'.

The Member States have acknowledged the necessity of such negotiations in 1965. A working group composed of representatives of the Governments of the Member States and experts of the Commission has been set up within the Commission. Mr Goldman, member of the French delegation and professor at the University of Paris for law, economics and social sciences, was chairman of the working group. Mr Goldman is the author of the report on the Draft Convention which is also published hereafter. The secretariat of the working group, whose work has been finished in the autumn of 1972, was performed by the Commission. At present the Draft Convention is being adapted to the situation within the new Member States. Only after this work has been completed the treaty can be signed.

contents

Draft Convention

Preamble

The High Contracting Parties to the Treaty establishing the European Economic Community,

Guided by the wish to implement the provisions of Article 220 of the said Treaty which concern the possibility of mergers between companies or firms governed by the laws of different countries,

Considering that the legal obstacles standing in the way of such operations should be removed without prejudice to the application to companies or firms of the other provisions of the Treaty,

Have decided to conclude the present Convention on the international merger of 'sociétés anonymes' and for this purpose have appointed as their plenipotentiaries:

His Majesty the King of the Belgians:
...

The President of the Federal Republic of Germany:
...

The President of the French Republic:
...

The President of the Italian Republic:
...

His Royal Highness the Grand Duke of Luxembourg:
...

Her Majesty the Queen of the Netherlands:
...

WHO, meeting in the Council, and after exchanging their respective full powers, found in good and due form,

HAVE REACHED AGREEMENT ON THE FOLLOWING PROVISIONS:

Chapter I

Field of application

Article 1[1]

1. Companies formed in accordance with the law of the different Contracting States may merge pursuant to the provisions of the present Convention provided they are accorded recognition in the Contracting States by virtue of the Convention of 29 February 1968 on the mutual recognition of companies and legal persons.

First variant[2]

2. Where one of the merging companies is not accorded recognition in a Contracting State by virtue of Article 3 or Article 9 of the Convention on the mutual recognition of companies and legal persons, the present Convention shall not apply if one of the merging companies or the new company has its seat in the territory of the said State.

3. If none of the merging companies nor the new company has its seat in the territory of the State which, by virtue of Article 3 or Article 9 of the Convention of 29 February 1968, does not accord recognition to one of such companies, the merger shall not be effective with respect to that State.

Second variant[3]

2. Where one of the merging companies is not accorded recognition in a Contracting State by virtue of Article 3 or Article 9 of the Convention on the mutual recognition of companies and legal persons, the present Convention shall not apply if one of the merging companies or the new company has its seat in the territory of the said State.

Article 2

Companies within the meaning of Article 1 are:

— la société anonyme — de naamloze vennootschap of Belgian law,
— die Aktiengesellschaft of German law,
— la société anonyme of French law,
— la société anonyme of Luxembourg law,
— de naamloze vennootschap of Netherlands law.

Article 3[4]

The merger may occur either by acquisition of one [or several] company [ies] by another in accordance with Chapter II, or by the formation of a new company in accordance with Chapter III of the present Convention.

Chapter II

Merger by acquisition

Section 1

Definition of merger by acquisition

Article 4

Merger by acquisition is the operation whereby one company transfers to another, by winding

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[1] The Belgian delegation has made a general reservation with respect to the whole of the problem raised by the definition of the field of application of the Convention.
The French delegation has proposed a text limiting the field of application of the Convention in cases where the decision-making centre of one of the companies is located outside the Community.
The delegations considered that the problem involved one of economic policy to be examined in the Council.

[2] The German, French and Italian delegations favour this variant.

[3] The Belgian, Luxembourg and Netherlands delegations favour this variant. The German delegation might possibly endorse it as well.

[4] The words between square brackets were proposed by the Italian delegation; this proposal did not meet with the approval of the other delegations.

up but without implementation of the liquidation procedure, the whole of its assets and liabilities by allotting to the shareholders of the company acquired shares in the acquiring company and, where applicable, by payment in cash of a balance not exceeding ten per cent of the nominal value of the shares allotted or, in the absence of a nominal value, of their book value.

Article 5

1. The provisions of the present chapter shall also be applicable where one of the companies holds all or part of the shares of the other.

2. However, where the acquiring company holds all the shares of the company acquired, the provisions of Article 8, para. 1, *b*) and *c*) shall not be applicable. In this case:

(a) the report provided for in Article 11 shall be prepared only for the acquiring company;

(b) each of the reports provided for in Article 12 shall be prepared in accordance with such text but shall be submitted solely to the shareholders of the acquiring company.

Article 6

Merger by acquisition may also take place in respect of a company acquired in liquidation where the law applicable to such company so permits and provided that the company acquired has not yet commenced distributing its assets among its shareholders.

Section 2

Preparation of the merger

Article 7

1. The organs of the merging companies which, according to the law applicable to each of the companies, are duly authorized in the case of mergers, shall prepare a merger plan in writing.

2. This plan shall take the form of a notarial deed where the law applicable to one of the merging companies so requires.

3. Where, by virtue of the law applicable to one of the companies, a contract has to be drawn up prior to the decisions of the general meetings, such contract shall constitute the merger plan within the meaning of the present Convention.

Article 8

1. The merger plan shall include as a minimum:

(a) the name, legal form and seat of the merging companies;

(b) the share exchange ratio and, where applicable, the amount of the cash payment;

(c) the procedure for the allotment of the shares in the acquiring company and the date from which such shares entitle participation in the profits;

(d) the date from which the operations of the company acquired are deemed to be effected on behalf of the acquiring company;

(e) the rights which are accorded by the acquiring company to shareholders having special rights and to holders of securities other than shares, or the measures proposed in respect of them.

2. The merger plan shall in addition state that the merger is subject to the approval of the merger plan by the competent organs defined in Article 16.

Article 9

To be annexed to the merger plan are:

(a) the up-to-date statutes of the merging companies;

(b) the balance sheets, profit and loss accounts and annual reports of the merging companies for the last three financial years;

(c) an interim statement of accounts as at the first day of the second month preceding the date of the merger plan where the last balance sheet relates to a financial year which ended more than six months prior to that date;

(d) the reports of the competent organs of the merging companies as provided for in Article 11;

(e) the 'experts' reports as provided for in Article 12.

Article 10

The interim statement of accounts provided for in Article 9, *c)* shall be drawn up in accordance with the same methods and shall be presented in the same way as the last annual balance sheet.

However,

(a) no new actual inventory shall be drawn up,

(b) the valuations appearing in the last balance sheet shall be amended only in the light of movements in book entries; but account shall be taken:

(i) of interim depreciations and reserves,

(ii) of substantial changes in actual values not reflected in book entries.

Article 11

The organs of each of the merging companies, authorized according to the law respectively applicable to them, shall prepare a detailed report explaining and justifying, from the legal and economic point of view, the merger plan and in particular the share exchange ratio.

Article 12[1]

1. At least one expert shall be appointed to each of the merging companies. The same person may be appointed only to one company.

2. Such experts shall be independent and, according to the law applicable to the company to which they are appointed, qualified to undertake the legally prescribed examination of the annual accounts of such company.

3. The method of appointment of the experts shall be determined by the law of the company to which they are appointed. They may be the persons responsible for examining the annual accounts where such persons fulfil the conditions of paragraph 2 of the present Article.

4. The experts shall examine the merger plan and prepare a report for the shareholders. The object and contents of such report shall be determined, for each company, by the law applicable to that company, but the experts shall in any event state whether, in their opinion, the exchange ratio is justified or not.

5. The declaration referred to in the preceding paragraph shall be supported at the least by the following matters:

(a) the relative assets of the companies on the basis of actual values;

(b) the relative earnings of the companies, taking account of future prospects;

(c) the valuation criteria in respect of net assets and earnings.

6. The report shall in addition indicate special evaluation difficulties, if any.

7. Each expert shall be entitled to obtain from the merging companies all useful information and documents and to undertake any necessary verification.

Article 13

1. In each of the Contracting States to whose laws the merging companies are subject, notice

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[1] The Belgian delegation expressed a reservation on this text. See appendix 3 of the report published hereafter.

of the merger plan shall be published, at least one month prior to the date for which the general meeting is convened, in the national gazette designated for the publication of amendments to the statutes. The publication of the notice shall take place according to the provisions of the law applicable to each of the companies.

2. Such notice shall contain the matters stipulated in Article 8. It shall in addition state the disclosure arrangements provided for in Articles 14 and 15, the right of consultation and the right to obtain copies granted by such provisions as well as the right of the creditors to request the giving of a security pursuant to Articles 18 to 21.

Article 14

1. The merger plan, as well as the annexes referred to in Article 9, *a)*, *b)* and *c)*, shall be deposited on the date of the convening of the general meeting which has to vote on the merger plan and in any event at least one month prior to the date of such meeting, in the file opened in the name of each of the merging companies in accordance with the law applicable to it.

2. A copy in full or in part of the documents referred to in paragraph 1 shall be obtainable simply upon request; the cost of such copy may not exceed the applicable administrative costs.

Article 15

1. From the time of the convening of the general meeting which is to vote on the merger plan, and in any event during the period of one month before the date of the meeting, each shareholder shall be entitled to examine, at the registered office, the merger plan and the annexes referred to in Article 9.

2. A copy in full or in part of the documents referred to in paragraph 1 shall be obtainable by all shareholders, without charge and simply upon request.

Section 3

Merger Decision

Article 16

1. The merger shall require the approval of the general meeting of each of the merging companies.

2. Where, according to the provisions of the law of the State to which one of the companies is subject, a merger contract is to be prepared subsequent to the decisions of the general meetings, such provisions shall be applied.

3. The provisions of the law to which each of the companies is subject, concerning intervention in the merger decision by shareholders having special rights or holders of securities other than shares, shall be applicable.

Article 17

1. The convening, composition and holding of general meetings as well as the quorum and majority conditions shall be governed, for each of the merging companies, by the provisions of the law applicable to it in the case of mergers or, failing this, to amendments to the statutes.

2. The law of the company acquired or its statutes may lay down special majority or quorum conditions for mergers governed by the present Convention. However, in no event may such requirement be:

(i) either a majority exceeding 3/4 of the votes cast at the general meeting and a quorum exceeding one half of the shares with voting rights upon a first convening and one quarter of such shares upon a second convening;

(ii) or, if the law makes no provision for a quorum, a majority exceeding 3/4 of the votes cast and 4/5 of the registered share capital represented at the meeting taking the decision.

Section 4

Protection of creditors

Article 18

1. Creditors other than debenture holders of the company acquired whose claim preceeds the publication of the notice of the merger plan concerning this company may, within thirty days of such publication, require the granting of a security.

2. Failing agreement within eight days of receipt of the creditor's request by the company, the court shall postpone the entry into effect of the merger until the granting of the security as ordered by it or until the rejection of the application. The court shall reject the request if the creditor already disposes of an adequate security or if one of the merging companies establishes that the acquiring company is manifestly solvent.

3. The company shall be exempt from granting a security if the debt, even if it has not matured, is repaid either prior to the decision of the court or not later than one month of such decision.

Article 19

1. The creditors other than debenture holders of the company acquired whose claim preceeds the fulfilment of the disclosure formalities referred to in Article 27 may, within three months of the completion of these formalities, require the granting of a security by the acquiring company. However, the creditors who were entitled to require a security from the company acquired in pursuance of Article 18 may not avail themselves of the provisions of the present Article.

2. Failing agreement within eight days of receipt by the company of the creditor's request, the court may order the granting of a security. Should the company fail to grant such security within one month of the court's decision the claim shall be immediately enforceable. The court may reject the application where the creditor already disposes of a sufficient security or where it is established that the acquiring company is manifestly solvent.

3. The company is exempt from giving a security where the debt, even if it has not matured, is repaid either prior to the court's decision or not later then one month of such decision.

4. The application of the present Article shall in no way prejudice the effects of the merger.

Article 20

Without prejudice to the rules relating to the collective exercise of their rights, Articles 18 and 19 shall be applied to the debenture holders of the company acquired, unless the merger has been approved by a general meeting of debenture holders or, if the law governing the company acquired contains no provision for such a meeting or does not grant it the power to approve the merger, by the debenture holders individually.

Article 21

Each Contracting State may declare:

(a) that it will apply only article 19 to the creditors, whether debenture holders or otherwise;

(b) that it will apply to the creditors, whether debenture holders or otherwise, of the acquiring company, where the latter is subject to its laws, the same provisions as to the creditors of the company acquired.

Article 22

The provisions of the law, concerning the protection of shareholders with special rights

or bearers of securities other than shares, to which each of the merging companies is subject, shall be applicable.

Section 5

Provisions on the question of participation[1]

See appendix 2 of the report published hereafter.

Section 6

Control and disclosure of the merger

Article 23

1. Where the law applicable to one of the merging companies makes provision, in the event of a merger, for a preventive control of legality, judicial or administrative, the provisions relating to such control shall apply to such company according to the law to which it is subject.

2. Where the law does not provide for a preventive control and where such control does not apply to all the legal acts necessary for the merger, then the minutes of the general meetings which decide on the merger and, where applicable, the merger contract subsequent to such general meetings, shall be drawn up and certified by notarial deed.

Article 24

1. If the control referred to in Article 23, paragraph 1 is prescribed for each of the merging companies, it shall relate solely:
(a) as regards each company, to the legal acts and formalities required of it and to the absence of a judicial decision of postponement taken by virtue of Article 18;
(b) furthermore, as regards the acquiring company, to the merger plan within the meaning of Article 7.

2. If the control is not prescribed for each of the merging companies it shall be concerned solely with the legal acts and formalities required of the company [companies] subjected[2] to such control and with the absence of a judicial decision of postponement taken by virtue of Article 18. As to the other company [the other companies][2], the notary shall verify and certify solely:

(i) the existence and legality of the legal acts and formalities required of the company for which he is acting and of the merger plan within the meaning of Article 7;

(ii) the absence of a judicial decision of postponement taken by virtue of Article 18.

3. Where the law of one of the merging companies prescribes the conclusion of a merger contract after the approval of the merger by the companies in question, the control or, where applicable, the verification by notary provided for in the previous paragraph shall relate solely:

(a) as to the company of which the law requires this contract, to the legal acts and formalities required of such company;

(b) as to the other company, to the legal acts and formalities required of it and in addition, if the law to which such company is subject provides for a control subsequent to the merger contract, to such contract;

(c) as to each company, to the absence of a judicial decision of postponement taken by virtue of Article 18.

In the case provided for in the present paragraph, the control or verification of the

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[1] The Italian delegation is opposed to the introduction into the Convention of provisions on this subject.
[2] The words between square brackets take account of the reservation expressed by the Italien delegation with respect to Article 3.

merger plan within the meaning of Article 7 shall be effected in the State where the control or verification formalities are completed in the first place.

Article 25

1. Where a control is necessary both as regards the acquiring company and the company acquired, this shall be carried out first of all on the acquiring company and the control necessary on the company acquired may proceed only if proof is provided that the necessary control formalities have been carried out on the acquiring company.

2. Where the control is only required either in respect of the company acquired or in respect of the acquiring company, it can take place only upon production of the notarial deed recording the decision by the general meeting of the other company approving the merger.

3. The provisions of paragraph 1 above are not applicable in cases where the law of the company acquired prescribes the conclusion of a merger contract after approval of the merger by the companies in question and where the law of the acquiring company requires a control of the merger subsequent to the conclusion of such contract.

Article 26

1. Where the conclusion of a merger contract is not prescribed by the law of one of the merging companies or where the merger contract prescribed by one of such laws was concluded before the general meetings decided upon it, the merger shall take effect on one of the following dates:

(a) on the date of the notarial deed recording the decision of the general meeting either of the company acquired or of the acquiring company which ever is the last to approve the merger where neither of these companies is subject to control;

(b) on the date of completion, which regard to the company acquired, of the control formalities where such control is necessary both for the acquiring company and for the company acquired;

(c) on the date of completion of the control formalities either with regard to the company acquired or with regard to the acquiring company, where such control is necessary only for one of such companies.

2. Where the merger contract prescribed by the law of one of the merging companies was concluded after the approval of the merger by the companies in question, the merger shall take effect on the date of conclusion of the merger contract; however, where the merger requires a control of one of the merging companies and where such control occurs only after the conclusion of the merger contract, the merger shall take effect only on the date of completion of the control formalities of the company acquired or, where no control is necessary of the latter, on the date of completion of the control formalities of the acquiring company.

Article 27

1. The procedures for disclosure shall be determined in respect of each of the merging companies by the law applicable to it.

2. Apart from the matters prescribed for each of the companies by the law applicable to it, the disclosure shall mention the place and date of performance of the disclosure formalities laid down in Articles 13 and 14.

3. The acquiring company may itself undertake the disclosure formalities relating to the company acquired.

Article 28

Subject to the application of Article 31, the merger may be invoked against third-parties under the conditions laid down in the provisions

of the law to which each of the companies is subject, on the invoking of mergers against third-parties or, in the absence of such provisions, on amendments to the statutes.

Section 7

Effects of the merger

Article 29

Subject to the provisions of Article 31, a merger shall automatically entail the universal transfer, both as between the company acquired and the acquiring company and as regards third parties, of the whole of the capital (assets and liabilities) of the company acquired to the acquiring company.

[*Article 30*[1]

1. The employment contracts concluded by the company acquired shall be automatically transferred to the acquiring company. In his relations with the acquiring company, the employee retains the seniority acquired in the service of the company acquired; the legal effects of such seniority shall be determined by the employment contract and by the law applicable to such contract.

2. Where the dismissal or resignation of the employee caused by his refusal to exercise his activity in a country other than that in which he exercised it prior to the merger, takes effect by virtue of the law applicable to the employment contract prior to the merger, the termination of such contract shall be deemed to have occurred by the action of the employer.

3. However, the previous paragraph shall not be applicable if the employee has given an undertaking, in his employment contract with the company acquired to work, if need be, in the country where he is requested to exercise his activity, unless such undertaking is invalidated by virtue of the law governing the employment contract.

4. Paragraph 2 shall also be applicable when the merger entails any other substantial change to the employment contract.]

Article 31

1. Where the law applicable to certain assets brought in by the company acquired requires special formalities, in the event of merger, to enable the transfer to be invoked against third parties, then such formalities shall be carried out in accordance with and their effect as well as the consequences of non-compliance shall be determined by such law.

2. The acquiring company may itself undertake such formalities.

Article 32

The issue of the shares of the acquiring company and of certificates representing such shares as well as, where applicable, of the cash adjustment, shall take place pursuant to the law

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[1] All the delegations have approved the contents of this Article but only four delegations are in favour of retaining it in the Convention.
The Belgian delegation considers that it should not appear because social questions should be settled as a whole and because the solutions given by this text could prejudge those which might be adopted in the framework of the activities undertaken by the Commission on the social problems of international concentrations.
The Luxembourg delegation shares the point of view of the Belgian delegation.
The Italian delegation considers that this Article should be supplemented by two provisions:
. one, for a special indemnity for employees affected by a decision to transfer the place of work,
. the other, for a period of reflection additional to the period of notice for employees to whom proposals are made in respect of a substantial change in their employment contract.
This proposal did not meet with the approval of the other delegations.

applicable to the company acquired in the event of merger, or in accordance with the provisions of the merger plan insofar as such provisions are compatible with such law.

Section 8

Liability and nullity

Article 33

Any liability which may be incurred by reason of the merger operations shall be governed, in respect of each of the merging companies, by the law applicable to it in the event of merger.

Article 34

Without prejudice to the provisions of Article 35, the conditions for and the effects of nullity of the acts leading to the merger shall be governed, in respect of each of the merging companies, by the law applicable to it in the event of merger.

Article 35

After the date fixed in Article 26, the nullity of the merger may no longer be established or pronounced, except for lack of judicial or administrative control or certification in due legal form. However, if in one of such cases the law applicable to the acquiring company excludes the nullity of the merger or subjects it to special conditions, such law shall be applicable.

Article 36

The civil sanctions other than nullity of the merger which may arise where nullity cannot be established or pronounced in application of the present Convention shall be determined by the law applicable to the acquiring company in case of merger. However, when the action for the granting of such sanctions is brought by the shareholders, the creditors or the contracting partners of the company acquired, such sanctions shall be determined by the law governing the company acquired applicable in case of merger.

Article 37

The nullity of the merger provided for in Article 35 may no longer be established or pronounced where it is still possible to eliminate the cause thereof and where regularization occurs in the time-limit fixed by the court.

Article 38

An action for nullity may no longer be brought after the expiry of a period of six months from the date on which the merger may be invoked against the party seeking the nullity.

Article 39

1. The decision establishing or pronouncing the nullity of the merger shall be published in the States where the seat of the companies having merged was located.

2. The procedure for and the effects of this publication shall be governed by the provisions of the law to which each of the companies is subject, on the invoking against third parties of amendments to the statutes.

3. Opposition by third parties, should the law of the State where the decision was pronounced so provide, is no longer admissible after the expiry of a period of six months from the performance of the disclosure formalities set out in the preceding paragraphs.

Article 40

1. The decision establishing or pronouncing the nullity of the merger shall not of itself

affect the validity of the commitments entered into by the acquiring company or of those assumed towards it prior to the disclosure referred to in Article 39.

2. The companies which have taken part in the merger shall bear joint and several liability for the commitments of the acquiring company referred to in the previous paragraph.

Chapter III

Merger by formation of a new company

Section 1

Definition of merger by formation of a new company

Article 41

Merger by formation of a new company is the operation whereby several companies transfer to a company which they form by winding up but without implementation of the liquidation procedure, the whole of their capital (assets and liabilities) by alloting to their shareholders shares in the new company and, where applicable, by payment in cash of a balance not exceeding ten per cent of the nominal value of the shares allotted or, in the absence of a nominal value, of their book value.

Article 42

1. The provisions of the present chapter shall also be applicable where one of the companies holds all or part of the shares of another.

2. However, where one of the merging companies holds all the shares of another, the report provided for in Article 11 shall be prepared only for the first company. In the same case, each of the reports provided for in Article 12 shall be prepared in accordance with such text but shall be submitted solely to the shareholders of the company which holds all the shares of the other company.

Article 43

Merger by formation of a new company may also take place where the companies which cease to exist are in liquidation if the laws respectively applicable to such companies so permit and provided that they have not yet commenced distributing their assets among their shareholders.

Section 2

Provisions of Chapter II applicable to merger by formation of a new company

Article 44

1. Articles 7 to 20, 21 *a)*, 22, 23, 24 (with the exception of paragraph 1, *b)*, 29, [30], 31 and 32[1], of Chapter II of the present Convention shall be applicable to merger by formation of a new company. For such application, the expressions 'merging companies' or 'company acquired', refer to the companies which cease to exist, and the expression 'acquiring company' refers to the new company.

2. Article 8, paragraph 1, *(a)* shall likewise be applicable to the new company.

3. For the application of Articles 9, *a)*, 14 and 15, the draft statutes of the new company shall be added to the statutes of the companies which cease to exist.

4. For the application of Article 19, the reference to Article 27 shall be replaced by a reference to Article 48.

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[1] This list will possibly have to be supplemented, taking account of the texts of Chapter II, Section 5.

Section 3

Special provisions

Article 45

1. The merger plan or the draft statutes of the new company shall state the names of the members of the organs of the new company whose appointment, according to the law of the country of the registered office of such company, is to be decided either by the general meeting or the companies which themselves cease to exist.

2. The merger plan and the draft statutes of the new company shall be approved by the general meetings of each of the companies which cease to exist.

Article 46

The new company shall be formed and the disclosure of its formation shall be ensured in accordance with the provisions of the law of the country of its registered office which apply to the formation of companies as the result of a merger or, failing such provisions pursuant to the general law on the formation of companies.

Article 47

The merger shall take effect on the date on which the new company acquires legal personality.

Article 48

1. The procedure for the disclosure of the merger shall be determined in respect of each of the companies which cease to exist by the law applicable to it.

2. Apart from the matter presented for each of the companies which cease to exist and for the new company by the law applicable to them, the disclosure shall mention the place and date of performance of the disclosure formalities laid down in Articles 13 and 14.

3. The new company may itself undertake the disclosure formalities relating to the companies which cease to exist.

Article 49

Subject to the application of Article 31, the merger may be invoked against third parties under the conditions laid down in the provisions of the law to which each of the companies which cease to exist and the new company are subject on the invoking of mergers against third parties or, in the absence of such provisions, on amendments to the statutes.

Article 50

Any liability which may be incurred by reason of the merger operations shall be governed, in respect of each of the companies which cease to exist, by the law applicable to it in the event of merger and for the new company by the law applicable in the event of formation of a company in the country of its registered office.

Article 51

The conditions for and the effects of nullity of the acts leading to the merger shall be governed, in respect of each of the companies which cease to exist, by the law applicable to it in the event of merger.

Article 52

1. The nullity of the new company shall be governed by the law of the country of its registered office applicable on the formation of a company.

2. The nullity of the merger may take place only if the new company is annulled.

Chapter IV

General provisions

Article 53

The decisions taken by the judicial or administrative authorities of a Contracting State in the exercise of the preventive control of legality provided for in Articles 23 and 24 shall be recognized in the other Contracting States in accordance with the provisions of the Convention of 27 September 1968 on jurisdiction and the enforcement of civil and commercial judgements.

Article 54

1. The persons who shall have the power to draw up the notarial deeds referred to in the present Convention shall be those authorized to draw up such deeds in the territory of the State to whose laws the company to which they relate is subject.

2. The deeds relating to several companies jointly may be drawn up by the persons authorized in one of the States to whose laws such companies are respectively subject.

3. The national provisions relating to the territorial authority of persons to draw up notarial deeds shall remain unaffected.

Article 55

The notarial and the deeds of a judicial or administrative authority drawn up in connection with a merger shall be exempt from authentication and any other similar formality.

Article 56

The present Convention shall not affect national and Community merger control provisions other than the preventive control of legality laid down in Articles 23 and 24. However, the nullity of a merger, even if it is provided for by the law under which such control has taken place, can be established or pronounced only in accordance with Articles 35 and 52, paragraph 2.

Chapter V

Interpretation of the Convention by the Court of Justice of the European Communities

Article 57

The Court of Justice of the European Communities shall have jurisdiction to give preliminary rulings on the interpretation of the present Convention.

Article 58

1. Where a question relating to the interpretation of the present Convention is raised before a court or tribunal of one of the Contracting States, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgement, request the Court of Justice to give a ruling there on.

2. Where any such question is raised in a case pending before a national court or tribunal against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

Article 59

1. Insofar as the present Convention does not provide otherwise, the provisions of the Treaty establishing the European Economic

Community and those of the annexed Protocol on the Statute of the Court of Justice, which are applicable where the Court is called upon to give preliminary rulings, shall likewise apply to the interpretation procedure under the present Convention.

2. The rules of procedure of the Court of Justice shall be adapted and supplemented if necessary in accordance with Article 188 of the Treaty establishing the European Economic Community.

Article 60[1]

1. The relevant authority of a Contracting State may request the Court of Justice to give a ruling on a question of interpretation of the present Convention if the decisions given by courts or tribunals of such State are at variance with the interpretation given either by the Court of Justice, or by a decision of a court or tribunal of another Contracting State [referred to in Article 58, paragraph 2, or which has decided on appeal]. The provisions of the present paragraph shall apply only to decisions having the force of law.

2. The interpretation given by the Court of Justice following such request shall not affect the decisions in respect of which the interpretation was requested.

3. The *Procureur Général* with the Courts of Cassation of the Contracting States or any other body designated by a Contracting State shall be able to refer to the Court of Justice a request for interpretation in pursuance of paragraph 1.

4. The Registrar of the Court of Justice shall notify the Contracting States, the Commission and the Council of the European Communities of such request; within a period of two months from this notification, they shall be entitled to submit to the Court statements of case or written observations.

5. The procedure provided for in the present Article shall give rise neither to the giving nor to the refund of costs or expenses.

Chapter VI

Final provisions

Article 61

1. In the relations between the Contracting States the present Convention shall be applicable notwithstanding any provisions to the contrary on the international merger of sociétés anonymes by shares arising under different national laws contained in other conventions to which Contracting States are or may become party.

2. However, the present Convention shall not affect:

— either the rules of domestic law,

— or the provisions of international convention which are or which may come into force and which provide, in other cases, for the possibility of international mergers, provided that such rules or provisions are compatible with the Treaty establishing the European Economic Community.

Article 62

The present Convention shall apply to the European territory of the Contracting States,

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[1] The German, Belgian and Italian delegations are in favour of the text between square brackets. The French, Luxembourg and Dutch delegations prefer to delete it, but the Dutch delegation is prepared to fall in with the decisions of the majority.
The German delegation has formulated two reservations:
(a) it reserves the right to revert to this text at the time of the Council discussions,
(b) it has pointed out that the adoption of this Article should not prejudge the solution to be adopted in future conventions.

to the French overseas departements and to the French overseas territories. The Kingdom of the Netherlands may, at the time of signing or of ratifying the present Convention or at any time thereafter, by notice to the Secretary-General of the Council of the European Communities, declare that the present Convention shall apply to Surinam and the Netherlands Antilles.

Article 63

The present Convention shall be ratified by the signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Communities.

Article 64

The present Convention shall enter into force on the first day of the third month following the deposit of the instrument of ratification by the last signatory State to undertake this formality.

Article 65

1. The declarations provided for in Article 21 may be made on the date of signature of the Convention or at any date thereafter.

The declarations made not later than the time of deposit of the instrument of ratification shall take effect on the date of entry into force of the Convention.

The declarations made subsequently shall take effect on the first day of the third month following their receipt by the Secretary-General of the Council of the European Communities.

2. Any Contracting State may at any time withdraw its declarations or any one of them.

This withdrawal shall take effect on the first day of the third month following their receipt by the Secretary-General of the Council of the European Communities. It shall be final.

3. The declarations and their withdrawal shall be without effect on mergers the plans for which were published previously according to Article 13.

Article 66

The Secretary-General of the Council of the European Communities shall notify the signatory States of:

(a) the deposit of every instrument of ratification,

(b) the date of entry into force of the present Convention,

(c) the declarations and notifications received in pursuance of Articles 21, 62 and 65,

(d) the dates where such declarations and notifications take effect.

Article 67

The present Convention is concluded for an unlimited period.

Article 68

Any contracting State may request the revision of the present Convention. In this event, a revision conference shall be convened by the President of the Council of the European Communities.

Article 69

The present Convention, drafted in a single copy, in the German, French, Italian and Dutch languages, all four texts being equally authentic, shall be deposited in the archives of the Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy to each of the Governments of the Signatory States.

IN WITNESS WHEREOF the undersigned plenipotentiaries have set their hands to the present Convention.

Done at Brussels on ...

For His Majesty the King of the Belgians,
...

For the President of the Federal Republic of Germany,
...

For the President of the French Republic,
...

For the President of the Italian Republic,
...

For His Royal Highness the Grand Duke of Luxembourg,
...

For Her Majesty the Queen of the Netherlands,
...

Joint declarations

The High Contracting Parties to the Treaty establishing the European Economic Community, on the occasion of the signature of the Convention on the international merger of sociétés anonymes, have approved the text of the following declarations:

Joint declaration No 1[1]

The Governments of the Kingdom of Belgium, the Federal Republic of Germany, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands,

Wishing to ensure the protection of employees' rights in the event of international mergers of companies,

Aware of the fact that the need for this protection is felt not only on the occasion of international mergers of companies, but also in all cases of international concentration operations, whatever form they assume,

Desirous of guaranteeing employees effective protection without prejudicing any more favourable provisions from which they benefit under the law applicable to them,

Note with satisfaction that the Commission of the European Communities has decided to set up for this purpose a working group to study the questions raised in this area by international concentration operations with a view to the drawing up of a legal instrument regulating these matters.

Joint declaration No 2

The Governments of the Kingdom of Belgium, the Federal Republic of Germany, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands,

Desirous of ensuring as effective and uniform an application as possible of the provisions of the present Convention,

Declare their willingness to organize, in conjunction with the Court of Justice, an exchange of information on the decisions taken in application of the present Convention by the courts and tribunals referred to in Article 58, paragraph 2.

Joint declaration No 3

The Governments of the Kingdom of Belgium, the Federal Republic of Germany, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands,

Aware that the problem of international mergers of companies raises not only strictly legal questions but also questions concerning the tax treatment of such mergers,

Convinced that the absence of a solution in this field may prove an obstacle to the implementation of international mergers of companies and consequently may prevent the Convention from attaining its objectives,

Declare that the solution to the problems of a tax nature referred to in the second paragraph is an indispensable condition for the effective application of the present Convention, and

Therefore undertake to contribute to the very rapid adoption, in the framework of the European Communities, of the necessary measures in this respect.

[1] Four delegations are in favour of this text. The German and Dutch delegations, on the other hand, are opposed to it.

IN WITNESS WHEREOF the undersigned plenipotentiaries have set their hands to the present joint declarations.

Done at Brussels on ...

For His Majesty the King of the Belgians,
...

For the President of the Federal Republic of Germany,
...

For the President of the French Republic,
...

For the President of the Italian Republic,
...

For His Royal Highness the Grand Duke of Luxembourg,
...

For Her Majesty the Queen of the Netherlands,
...

Report on the draft

Introduction

1. On 31 March 1965, even before the drafting of the Convention on the Mutual Recognition of Companies and Legal Persons[1] was fully completed, the government experts responsible for the drafting held a preliminary exchange of views on the Convention on International Mergers, likewise to be negotiated pursuant to Article 220, third indent of the Treaty of Rome. As in their work on the earlier Convention, they were assisted here too by the representatives of the Commission of the European Economic Community (later the Single Commission of the Communities) and in particular by the Directorate (later the Directorate-General). For the internal market and the approximation of laws, and throughout their meetings they were assisted by the comments of the Secretary-General of The Hague Convention on Private International Law.

After more than seven years of discussions—conducted, like those which had led to the preparation of the draft Convention on the Recognition of Companies, under the chairmanship of Mr Berthold Goldman, Professor at the Faculty of Law and Economic Sciences, and subsequently at the University of Law, Economics and Social Sciences of Paris—the group of experts authorized Professor Goldman to transmit the draft Convention with which this report is concerned to the President of the Council of the European Communities, the Permanent Representatives of the Member States accredited to the Communities, and the President of the Commission of the Communities.

2. It was never questioned, at the outset or as the deliberations proceeded, that in the present state of the economy and the law of the Member States of the EEC, the negotiation and conclusion of such a Convention was indeed 'necessary', as required by Article 220 of the treaty.

3. From the economic point of view, first of all, it very soon became clear, following the entry into force of the EEC Treaty, that with one or two rare exceptions the size of undertakings in the Member States was not in keeping either with the requirements of the vast market which would be created by the progressive unification of national markets or with the competitive needs of those undertakings in relation to undertakings in third countries. In fact the Commission stressed in its Memorandum of 1 December 1965 on industrial concentration in the Common Market[2] that the latter 'requires undertakings on a European scale to ensure that the advantages of mass production and scientific and technical research will accrue without restriction to 180 million consumers'. 'Thus many European undertakings', the Memorandum went on, 'should adapt themselves through internal growth or by means of mergers with other undertakings to this expanded market. Strengthening their competitiveness is also advantageous to them in international competition with large undertakings in third countries.'

Five years later, the Commission of the Communities confirmed that view in its Memorandum to the Council on the Community's industrial policy,[3] which states as follows (page 138):

'The effect of the creation of a single market for all products and the free movement of people and the means of production within the Community is not solely to widen the outlets for European firms and intensify competition on the markets of the Six. The economic union thus created greatly alters the

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[1] Supplement 2/69 — Bull. EC.
Convention signed at Brussels on 29 February 1968.

[2] See text in *Revue trimestrielle de droit européen*, 1966, 651, cf.
E.E.C. Commission, *Ninth General Report on the Activities of the Community*, June 1966, para. 70 et seq.

[3] *Industrial Policy of the Community*, Memorandum of the Commission to the Council, Brussels 1970; ECSC — EEC — EAEC *Fourth General Report on the Activities of the Communities*, February 1971, para. 205 et seq.

strategy situation for Community firms and forces them to change their structure, their methods and often their size in order to adapt themselves to the new conditions of the Common Market.

These changes in the attitude, structure and size of firms are indeed the economic ends to be sough after if the Community is expected to provide increased productivity, a better capacity for financing and research, greater ability to compete in the international field, in a word, quicker and more assured industrial growth.'

This did not of course mean that the concentration of firms was regarded as a panacea to be adopted wholesale and to be encouraged unreservedly. In fact, even in the 1965 Memorandum the Commission pointed out that 'while a positive attitude to concentrations is essential in the present era of European integration, the interplay of the rules of competition in the Treaty must at the same time make it possible for small and medium-sized firms to maintain their specific role and to prevent the abuse of dominant positions by firms inside and outside the Community'.[1] This same concern, strengthened by the trend observed in the meantime towards economic concentration in certain sectors, is expressed in the Memorandum on industrial policy[2] and in other documents issued by the Commission.[3] It is shared by the Governments of the Member States, and both there and at the level of the organs of the Community there is a growing anxiety to ensure that the concentration of firms does not impair the rights and interests of employees.

But for all these limitations and proper precautions, the intra-Community concentration of firms is nevertheless economically necessary, and always will be. Such concentrations have of course taken place ever since the establishment of the Common Market, between undertakings in different Member States, e.g. by the acquisition of interests; on the other hand, the general and contractual law of those States raises legal and fiscal obstacles to *mergers of companies* that more often than not appear to be insurmountable and in any event have not been surmounted up to the present. Yet the merger is not only the ideal form from a legal part of view, since it replaces two or more existing legal persons by a single one, thus making the legal unity and the economic unity of the undertaking coincide. Mergers can also have advantages in regard to the operation and management of the undertaking since, in a better way than the acquisition of interests, in certain circumstances at any rate, they permit unity of management, the transmission of directives and information, rationalization of production and its distribution among the different industrial units.[4]

4. The strictly legal obstacles to mergers derive from the company law of the Member States.

(a) Netherlands law to date does not include any provisions relating to domestic mergers of companies, so that naturally there is no legal instrument to use in the case of a merger of a Netherlands company with a company of another State.

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1 *Revue trimestrielle de droit européen*, 1966, 651.

2 E.E.C. Commission, *Industrial Policy of the Community*, Memorandum of the Commission to the Council, Brussels 1970, 157-158.

3 See for example: *Première orientation pour une politique énergétique communautaire.* Supplément 12/68 Bull. CE.

4 See for example the work of the Symposia of *Paris*, 26-28 October 1967 *(Mergers, cooperation, concentration of entreprises): Revue du Marché Commun* 1968, n° 1, and of *Rome* (10-13 October 1968), Federation of European Jurists, and: *La fusion des sociétés de capitaux relevant de législations nationales différentes* (opening statement by L. Dabin, Reports by B. Goldman and P. Sanders, Discussion) in: *Le rapprochement du droit de l'économie en Europe (Angleichung des Rechts der Wirtschaft in Europa), Kölner Schriften zum Europarecht*, Cologne-Berlin-Bonn-Munich 1971, p. 285 et seq.

(b) The interpretation of texts relating to the change of nationality of companies[1] leads to the conclusion that in *Belgium*, *France* and *Luxembourg* the acquisition of a company of one of these countries by a company of another State requires the unanimous approval of the members. But as we know, this is virtually never attainable in companies of certain size where the shares are distributed among a large number of shareholders. In those same countries, acquisition of a foreign company by a local company could be decided by the extraordinary general meeting under the usual quorum and majority conditions, but this possibility has no practical value unless it is to be found in the same way in the company acquired.[2]

(c) The German doctrine goes further; it regards mergers between a German company and a foreign company as ruled out by law at all times, whether the German company is acquired or being acquired (or is the new company or one of those ceasing to exist.[3]

(d) Italian law[4] is in fact alone in recognizing international mergers, provided they are approved, at the level of the Italian company (and if it is a société anonyme by the extraordinary general meeting whose decision is taken on the basis of the quorum and the majority prescribed for changes to the statutes. Even then, it should also be pointed out that at least a Part of the Italian doctrine[5] considers that shareholders who have voted against the decision to merge are entitled to exercise the right of withdrawal *(recesso)* expressly laid down in Article 2437 of the *Codice civile* in the case of transfer of the registered office of an Italian company abroad. But quite apart from this difficulty—which it will be seen was finally overcome in the Convention[6]—it will be noted here again that this liberal feature of Italian law would only have the effect of facilitating mergers between an Italian company and a foreign company where an Italian company was taken over by a Belgian, French or Luxembourg company (or in the event of the disappearance of an Italian company by its merging into a new company set up in accordance with the law of one of these three countries). In practice, in any case, no case is cited in Italy of mergers which have come about in this way.

5. No international convention binding on the Member States, or only some of them exists

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[1] See in regard to *France:* Law of 24 July 1966, Art. 60, 154. In *Belgium*, the same inference can be drawn from Article 70 of the consolidated laws of commercial companies *(C. Comm.*, Book I, Title IX, Laws of 6 January 1958 and 23 February 1967), which states that the general meeting 'shall have the right, unless otherwise provided, to amend the statutes *but shall not change any of the essential features of the company*'. Nationality is undoubtedly one of these essential features, which may have led to the authoritative contention that agreement, even if unanimous, by the shareholders would be insufficient to effect any change, since in fact it would necessitate the formation of a new company (see J. Van Ryn, *Principes de droit commercial*, I. 799); for the case where the acquired company differs in nationality from the company acquired see in particular *op. cit.* No 853, and J.G. Renauld: *La fusion des sociétés en droit belge*, *Rev. de dr. intern. et de dr. comparé*, 1962, 217. For *Luxembourg*, see *L. soc. comm.*, Article 67, 2.

[2] These solutions apply even more so to partnerships where the contractual character is far more marked, but admittedly it is generally less difficult in such partnerships to obtain the unanimous agreement of the partners.

[3] See Gessler, *Report to the International Symposium on European Law*, Brussels, 1961, pp. 41-42; Beitzke, *Unternehmungsverflechtung in Europa und das deutsche Gesellschaftsrecht* (Groupings of undertakings in Europe and German company law) *Report to the Rome Symposium of the Federation of European Jurists*, October 1968, para. III, No 20.

[4] *Codice civile*, Article 2365, 2369. These texts do not rule out, either explicity or implicitly, the power of the extraordinary general meeting to change the nationality of the company. Furthermore, Article 1369 authorizes transfer of the registered office abroad without requiring unanimity.

[5] See Brunetti, *Trattato del diritto delle società*, 1947-1950, 561, note 20; also the authors quoted by B. Goldman, *Report to the Paris Symposium*, October 1967, *Revue du Marché commun*, 1968, pp. 300-301. For the opposite view see Franceschelli, *ibid*, p. 336.

[6] The provisions in the Convention concerning approval of the merger by the general meetings of each of the companies merging do not grant the right of withdrawal in the case of shareholders who have voted against approval (see para. 45 et seq. below), whereas such a provision was envisaged and discussed by the group during their work.

to mitigate the solutions of their national legal systems in regard to international mergers.

The possibility of such mitigation could be inferred from Article 154 of the French Law of 24 July 1966 on sociétés commerciales[1] which adopts provision introduced previously into Article 31 of the Law of 24 July 1867 and stipulates that 'the extraordinary general meeting (of a société anonyme) may change the nationality of the company, provided the host country has concluded a special agreement with France under which acquisition of its nationality and transfer of the registered office to its territory are permitted, while the company retains its legal personality'. Indeed, insofar as the requirement of unanimous approval of the shareholders for the acquisition of a French company by a foreign company is to be deduced by applying the doctrine of the impossibility of changing the nationality of the company without such approval (a deduction which is debatable, since it is difficult to hold that a company which is acquired and therefore ceases to exist, changes nationality), it could be argued that the extraordinary general meeting can validly decide such an acquisition where the acquiring company is of a country with which there is an agreement such as that envisaged in Article 154. But to date France has not concluded any such agreement.

In fact Article 4, para. 2, of *The Hague Convention of 1956* on the recognition of foreign companies, associations and foundations, furnishes the only semblance of an attempt to regulate the problem of international mergers in the relations between several States (including those which shortly afterwards were to form the European Economic Community). But the restraint of this text indicates the difficulty of such regulation. It stipulates that 'mergers between a company, association or foundation which has acquired legal personality in one of the Contracting States and a company, association or foundation which has acquired legal personality in another Contracting State shall be recognized in all the Contracting States, provided it is recognized in the States concerned'. In other words, a State party to the Convention (which incidentally has not yet entered into force) could not refuse to recognize the validity and the effects of a merger between companies belonging to two other Contracting States which allow mergers. But since in fact such mergers would only be recognized by two States parties to the Convention and at the same time Members of the Community in very special circumstances (in practice this means, as will be recalled—leaving aside the case of a Belgian, French or Luxembourg company whose shareholders had unanimously approved an acquisition by a foreign company—the acquisition of an Italian company by a company other than a German or Netherlands company) the text in question would in any event add little to the present state of the law on this subject.

6. This lack of rules to cover international mergers made the convention envisaged in Article 220 of the Treaty indispensable once the economic need for such mergers was recognized.

But vis-à-vis company law, the drafting of such a convention was bound to create difficulties stemming from the often profound differences between the national law of the Member States in regard to internal mergers, to say nothing of the fact, already mentioned, that there is no legislation with this object in the Netherlands.

Indeed, leaving aside the purely technical differences, which in the last resort could be regarded as negligeable and citing only examples here, it will be recalled that these legislations differ particulary in that some do not require the conclusion of a merger agreement between the management organs of the companies in question prior to action by their general meetings (Belgium and Luxembourg); French law provides for a draft contract; in German law a contract must be made, but it can be concluded before or after the general meetings; finally Italian legislation stipulates a contract

[1] *Journal Officiel de la République française*, 26 July 1966.

subsequent to the concordant resolutions of the general meetings. Similarly, German law, Italian law to a more limited extent French law exercise a justicial preventive control over the legality of mergers, whereas the law of Belgium and Luxembourg regards the obligatory employment of a notary as the means of ensuring their regularity. Again, the protection of creditors, particularly those of the acquired company is regulated according to very different principles in the different legislations.

These various questions will recur again below when we come to examine the provisions of the Convention concerning them. But the examples given are sufficient to make it clear that it was not always possible to regulate international mergers by designating one national law as appropriate to determine the conditions, machinery and effects applicable in each particular case. The answer was often not easily divisible, so that it could not be found, in respect of any particular company, by applying its governing law. In fact, because of the divergencies between the laws of the Member States, the unrestricted application of such a method would have had the effect of making the juridical regime of international mergers in some instances more liberal, in others more restrictive, according to whether they were subject, as a result of the links connecting the companies concerned, with the laws of this or that Member State.

Consequently, it was essential to combine this method of settling disputes with a number of uniform substantive rules, applicable to international mergers. But here again, the achievement of uniformity, even partial, was hampered by the differences between national legislations in regard to internal mergers, since Member States might hesitate to accept in the case of international mergers an approach too far removed from that they normally apply in relation to domestic mergers.

7. These difficulties could of course be reduced, if not removed, by the coordination of national legislations relating to domestic mergers on the basis of Article 54, para. 3, *(g)* of the Treaty of Rome. The government expert appointed to draw up the Convention on International Mergers raised the question when they began their deliberations whether it would not be wise for the group itself to work on the drafting of the directive on the coordination of domestic law, their activities in the former case being exercised on behalf of Governments, and in the latter within the framework of the Commission. But they very quickly agreed not to adopt that method, since its implementation would have raised objections of a theoretical nature, and in any event would have come up against very serious practical difficulties.

The experts did, however, decide at the same time to keep themselves constantly informed about the work of preparing the directive on domestic mergers which, as we know, culminated in the draft directive transmitted by the Commission to the Council on 16 June 1970[1]. The government group, like the Commission's experts, tried as far as possible to achieve a similar if not an identical approach and indeed wording.

But the coordination of the provisions of national law relating to domestic mergers by no means produced complete uniformity. For that reason, and also because the solutions, even when uniform, to the problem of domestic mergers do not necessarily always apply to international mergers, it was found necessary to maintain in the Convention a combination of conflicts of laws, rules and substantive rules appropriate to international mergers.

8. As the law governing the Member States stood when the work was begun, and as it still stands today, international mergers were likewise faced, and are still faced, with tax obstacles which although merely *de facto*, have nevertheless in many instances a nullifying effect. Such are in particular the imposition of charge in respect of unreal value on the company acquired or the risk of double taxation (where the acquiring company retains a place

[1] OJ C 89, 14.7.1970.

of business in the country of the company acquired).

Hence the government experts observed at the very outset that it would be useless to make international mergers legally possible vis-à-vis company law unless tax obstacles were removed. But in the end they came to the conclusion that it would be better to leave it to the tax experts meeting under the auspices of the Commission, with this in mind, to make a proposal for a directive on the coordination of tax in that field; and such a directive on the coordination of tax law in that field; and such a directive was in fact transmitted by the Commission to the Council on 18 March 1969;[1] but it has not been adopted to date, a fact which led the experts to append to the Convention the text of a joint declaration designed to stress the importance of the fiscal problem inherent in international mergers, and the solution of those problems (para. 180 et seq.).

9. This is the way in which the method used in the Convention to solve the legal questions raised by international mergers, and the selection of such questions, were determined. As we have seen, the method combines rules of conflict and substantive rules. With regard to the selection, the Convention is confined to matters arising out of company law, although in the opinion of the large majority of delegations, individual protection of employees and their representation in the management, organs while also being an aspect of social legislation, could not be left out of the Convention. Employees are, after all, connected with the undertaking in hardly less strict a sense than members and more than creditors, so that it would have been difficult not to make a start at least on measures designed to protect them in the event of international mergers, at a time when measures governing the protection of members and creditors were being worked out. With regard to the representation of employees in the company's management and supervisory organs, this has a direct bearing, in the legal systems embodying such provisions, on the very structure of these bodies, so that the matter is just as much of concern to company law as to social legislation.[2]

10. According to the method and within the limitations thus laid down, the Convention establishes first of all the *field of application* (Chapter I, Articles 1 to 3), subsequently deals with *mergers by acquisition* (Chapter II, Articles 4 to 40), and then with *mergers by formation of a new company* (Chapter III, Articles 41 to 52), proceeding here wherever possible, by using the provisions relating to mergers by acquisition, Chapter IV (Articles 53 to 56) contains *general provisions* relating to both types of mergers; Chapter V (Articles 57 to 60) deals with the interpretation of the Convention by the Court of Justice of the European Communities and Chapter VI (Articles 61 to 69) contains the *final provisions.* Finally *joint declarations* attached.

This report will follow the same arrangement.

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[1] OJ C 39, 22.3.1969.

[2] For the individual protection of workers see draft Convention, Article 30, para. 95 et seq. below, and first Declaration No 1, para. 175 et seq. below; and for the problem of participation see Special Report, annex 2 below.

Chapter I

Field of application

11. In determining the scope of the Convention, it seemed desirable to define companies to which it would apply, and the operations involved.

The first question is in two parts, since the companies to which the Convention applies are characterized, first of all, by their links with the Contracting States (see below, Section I) and secondly by their legal form (Section II). The second question is answered by Article 3 of the Convention, which mentions, and hence brings within the field of application of the Convention, both mergers by acquisition and mergers by formation of a new company, thus exclusing other operations, even if they are akin to mergers (Section III). But these provisions are pinpointed by the definitions of the two types of mergers, in Articles 4 and 41 of the Convention respectively, and these will be referred to again when the texts are discussed.

Finally, it should be noted that the territorial scope of the Convention is determined, in the usual way, in the final provisions (Article 62: see para. 166 below).

Section 1

Links between the companies to which the Convention applies and the contracting States

12. The definition of the link which must connect a company with a state of the Community (or a State which is a party to a Convention concluded within the framework of the Community) so that it can benefit from the Community's rules and institutions or the Community convention presents very serious difficulties for the Member States and the institutions of the Community. The difficulties arise not only from the need to make a selection from several possible criteria for the legal links connecting a company with a State, but also from the fact that in this field legal, economic and political factors are closely intertwined.

This had already become apparent when in the general programmes of December 1961 it was found necessary to determine the conditions governing subsidiary places of business and business operations carried out by a company belonging to one Member State on the territory of another (i.e. the only types of action at present feasible to promote the international expansion of companies). It was nevertheless found possible to combine the criterion of linkage, whether abstract or legal, under Article 58 of the Treaty of Rome, and consisting merely of 'incorporation' in a Member State, with the more concrete requirement of an affective and continous link with the economy of a State, thus reflecting the condition of a prior establishment in the Community prescribed by Article 52 of the Treaty.

The question was to arise again among the Six in connexion with the drafting of the Convention on the Mutual Recognition of Companies and Legal Persons, and it was settled by a different method though based on the same principle—namely that as a general rule, formation in accordance with the law of a Contracting State and establishment of the registered office in the territories where the Convention applies were regarded as sufficient to warrant recognition under it. But the option was allowed to any Contracting State of refusing to recognize companies having their real seat outside those territories, if they had 'no genuine link with the economy' of one of them (Convention on Recognition, Article 3). These same points relating to the economy and economic policy were to arise also, and even more cogently, in connexion with intra-Community mergers. These are, as has been said, one of the vital instruments for economic concentration across frontiers, and hence for better adaptation of undertakings to the

Common Market and the strenthening of their international competitiveness. Consequently, a particular Government might consider that mergers should be reserved for undertakings—and hence companies—genuinely linked to the Community through one of the Contracting States. Thus here again the requirement of an economic and even political link side by side with the legal link could arise. It must be added, too, that the difficulties of defining the legal link were themselves increased by the risk of different treatment, by different States, of one and the same company in respect of its recognition, precisely by virtue of Article 3 of the Convention on Recognition (and also Article 9, which provides that recognition may be refused for reasons of public policy to be assessed separately by each Contracting State). Furthermore, the separation between the legal and economic criteria might seem artificial inasmuch as the severity of the latter can help to make the former more liberal.

13. At all events, the experts were obliged in the main to accept the separate treatment. They abandoned the idea of including in the draft wording which would reflect the basically economic concern of one at least of the delegations because it had been impossible to reach even a partial and limited agreement to its proposals; and they decided merely that a special report on that aspect of the problem should be put before the representatives of the Member States of the Community meeting in the Council; only at that political level could a reply to that concern be found, if it could be found at all.

On the other hand, the experts attempted to define the criterion of linkage of companies to whom the Convention was to apply, mainly if not exclusively from the legal point of view. Here again, however, they did not reach complete agreement, so that some of the provisions of Article 1 present two variants—an indication of the difficulty of the problem even as thus circumscribed.

14. Unanimity was found possible, however, in regard to the basic definition of the legal criteria of linkage. This definition is established, in paragraph 1 of *Article 1*, by reference to the Convention of 29 February 1968 on the Mutual Recognition of Companies and Legal Persons. Thus in virtue of the provisions of the present Convention, companies established in accordance with the law of the different contracting states may merge, provided they are recognized in those States in virtue of the Convention on Recognition.

Each of these three elements in the text calls for some comments:

(a) The object of Article 1 is to determine the field of application of the Convention vis-à-vis benefiting companies. Hence it neither prejudges nor rules out the possibility and validity of international mergers carried out in accordance with other rules of law, contractual or general, which might make them possible under different conditions. Article 61 of the Convention confirms the point; Article 1, para. 1, merely defines the companies which may merge 'pursuant to the provisions of the present Convention', but not those which in general may take part in international mergers.

(b) These companies must have been established in accordance with the law of the different Contracting States. Establishment in accordance with the law of one of the Contracting States is already, as we know, the basic condition for recognition under the Convention on Recognition; and it is noteworthy that in the present state of the law among the Six, the further requirement of establishment of the registered office 'in the territories to which the present Convention applies' added nothing, since none of the legislations in question allows a company to be set up under its provisions by fixing its registered office abroad.

But it was also pointed out that the Convention referred only to mergers between companies set up in accordance with the law of different Contracting States, so that its field of application covered only international mergers. Moreover, Article 220 of the Treaty provides for the negotiation of a Convention only to cover

'the possibility of mergers between companies or firms governed by the laws of different countries'. The experts agreed to specify in that connexion that a merger of two companies of a single State which ceased to exist to be replaced by a new company set up in another State did not come within the scope of the Convention.

(c) Finally, companies cannot merge under the new Convention unless 'they are accorded recognition in the Contracting States by virtue of the Convention of 29 February 1968'. This condition does not duplicate the requirement of establishment in accordance with the law of a Contracting State, since, as has been mentioned, the Brussels Convention allows for refusal of recognition to companies thus established, which means that only companies not so refused recognition benefit in all instances, and without restriction, from the Convention on Mergers.

15. If one of the companies merging is not recognized (even though established in accordance with the law of a Contracting State) in virtue of Article 3 or Article 9 of the Convention on Recognition, serious difficulties arise, and as we have already stated, the experts were unable to solve them by submitting a unanimous text, so that the rest of Article 1 consists of two variants.

Before discussing each of them in turn, however, it should be emphasized that all the experts felt that refusal by a Contracting State to recognize one of the merging companies on the basis of Article 3 (real seat outside the territories to which the Convention on Recognition applies) or Article 9 (public policy) of the Convention on Recognition was bound to have some effect on the applicability of the new Convention. A merger after all implies the performance by each of the companies of a large number of important legal acts, and it is difficult to conceive how the validity of such acts could fail to be impugned in one way or another where the company involved was not recognized by one of the Contracting States.

16. That being so, the most drastic solution would have been to rule out the application of the Convention in all instances where one of the merging companies is not recognized, even where no special link existed between the companies, or the new company if any, and the Contracting State refusing recognition.

In practice, for example, if France made the declaration provided for in Article 3 of the Convention on Recognition, a company having its registered office in the Netherlands and its real seat at Stockholm would not have been able to merge with a company having its registered office in Luxembourg, even though neither the Netherlands nor Luxembourg had made or would make that same declaration.

Logically, there were sound arguments both for and against this solution. It could be said in its favour that to permit the type of merger under consideration would render a refusal of recognition meaningless, even though it was in conformity with the 1968 Convention. Against it, it could be said that to rule out such mergers would be to inflict the effects of refusal of recognition on States recognizing the companies in question.

In practice, such a system would have forced the control authorities or the notary, in States recognizing companies wishing to merge, to query a refusal of recognition, often a virtual refusal, by another State. It was certainly unreasonable to impose such a task on them, and the responsabilities which could arise therefrom.

17. Hence the delegations which had advocated that drastic course agreed to drop it, but subject to a condition so to speak. That is the significance of the first variant of the wording of the text following paragraph 1. Other delegations did not accept the 'condition', and one of them stated that it was prepared to waive it hence the drafting of the second variant.

The first variant, favoured by the German, French and Italian delegations, consists of two paragraphs.

i) The first paragraph (which would form paragraph 2 of Article 1) limits the effects of a refusal of recognition so that it would only stand in the way of the application of the Convention on Mergers if any of the companies merging (thus including the one not refused recognition, and irrespective of whether it was the acquiring company, the company acquired or the new company if any, had its registered office in the territory, from which state the refusal emanates. In such circumstances, that State would have a direct interest in witnessing the full effect of its non-recognition of one of the merging companies; and it should be stressed that this effect would be general, inasmuch as the merger would be ruled out even in respect of States recognizing the company in question. Thus a Netherlands company having its real seat in the United States, and hence not recognized by France, could not merge with a company having its seat in France, could not merge with a company having its seat in France, and the ban would apply in respect of all the Contracting States, including the Netherlands.

ii) The Convention would, on the other hand, continue to apply where none of the companies in question had its seat in the territory of the State refusing to recognize one of them; in other words, in the example cited above involving a Netherlands company not recognized by France and a Luxembourg company, a merger would be possible.

But as we have said, this limitation of the effects of refusal of recognition had a condition attached to it by the delegations which at the outset had not accepted it, namely the insertion in the Convention of the second paragraph of the first variant (which would form paragraph 3 of Article 1). In virtue of this clause, the type of merger in question, even though feasible under the Convention where none of the merging companies nor the new company has its seat in the territory of the State not recognizing one of the companies, would be ineffective vis-à-vis that State.

18. Other delegations, however, felt that the drawbacks to that type of partial veto on mergers were too great, quite apart from the difficulties which would arise in its application. It seemed to them that international mergers would thus be hedged around by a measure of uncertainty at variance with the interests of members and outsiders, and they feared that the companies involved might thus be constrained to give up the idea, so that an extreme situation would be reached where the Convention was rendered totally inapplicable by the mere refusal by one of the Contracting States to recognize any one of the companies.

This is the situation catered for in the second variant of Article 1, which after paragraph 1 (adopted unanimously, it will be remembered) consists only of a paragraph 2 identical with the corresponding wording of the first variant. But in this instance, that would be the only concession made to the State refusing recognition: the refusal would only be an obstacle to a merger if any of the merging companies, or the new company, had its seat within the territory of that State. Except in those circumstances, the merger would be effective in respect of all the Contracting States, including the one which had refused to recognize one of the companies involved (without prejudice, of course, to the possibility open to any State to refuse to recognize the acquiring company or the new company, subject to the conditions of such a refusal, as defined in Article 3 or Article 9 of the 1968 Convention, being fulfilled).

19. The choice between these two variants will be a matter for the Governments of the Member States, and it may be hoped that the choice will be simplified by the decision, likewise to be made by them, concerning the strictly economic aspect of the link between the merging companies and the Contracting States.

It may be added that in the case of both the first and the second variants, there are technical points common to both that must still be clarified:

(a) The question was asked how the refusal of recognition conditioning the non-applicability

of the Convention would be made known, or indeed ascertained, and also under the first variant (Article 1, para. 3), the inapplicability of a merger to the State from which the refusal came. The answer to this is relatively simple.

(i) In the case of Article 1, para. 2 (first and second variants), one of the companies merging or the new company has its seat in the territory of the State refusing recognition. The control authorities or notaries in that State will therefore be in a position to check that a refusal of recognition has effectively or virtually been applied in respect of any one of the companies in question, even if it has its seat in another State, since the refusal will be based either on the declaration envisaged in Article 3 of the 1968 Convention, or on public policy as assessed in the home State. The control authorities or the notary in the other interested State will not need to make this check, since in any event an impediment to the merger will be raised through the control (administrative, juridical or notarial) exercised in the first State.

(ii) In the case of paragraph 3 (first variant), refusal to give effect to the merger will be decided by an administrative or judicial authority in the State not recognizing one of the merging companies. This authority will naturally be in a position to check that recognition has been refused.

It must at the same time be admitted that in this instance the notaries or control authorities in the States directly interested in the merger may find it extremely difficult to check or to predict a refusal of recognition by a third State, and hence the fact that the merger is ineffective within the territory of that State. In the view of some delegations, this difficulty of foreseeing what is happening constitutes a serious drawback to the first variant.

(b) It will have been noted, at the same time, that in regulating the case where one of the companies in question has its seat in the territory of a State refusing recognition to one of the merging companies (paragraph 2, first and second variants) or the case where none of the companies has its seat within the territory of that State (first variant, paragraph 3), the Convention does not specify whether it is the registered office or the real seat that is meant. The inference is that both are intended. This means that the Convention will not be applicable where either one of the merging companies or the new company has its seat whether registered office or real in the territory of a State refusing recognition to one of the companies merging, this means (if the first variant is adopted) that the inapplicability of the merger to the State refusing recognition will only arise where none of the companies in question has its seat (registered office or real), within the territory of that State, since otherwise we would be back to paragraph 2, and the Convention would be inapplicable.

(c) A final difficulty relating to application was raised in the course of the discussions, namely where an exequatur in respect of a judgment recognizing the validity of a merger taking place in a Contracting State is applied for in another State where the merger is ineffective (through the application of Article 1, first variant, paragraph 3), as a result of a refusal to recognize one of the companies based on Article 9 of the Convention of 1968 (public policy).

This difficulty is bound up with the more general problem of the relationship between the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Civil and Commercial Judgments[1] and the Convention on Mergers. The group of experts considered that it was not called upon to take a stand on that question.

20. Finally, attention should be drawn to footnote 1 to Article 1 of the Convention. This expresses the general reservations of two delegations, different in scope no doubt but both reflecting the economic and political problems underlying the task of determining the companies which benefit under the

[1] Supplement 2/69 — Bull. EC.

Convention. These could not be solved, and probably it was too much to expect them to be solved, at the expert level.

The problems in question, and the debates to which they gave rise in the group of experts, are the subject of a special report annexed to this report.

Section 2

Legal form of companies to which the Convention applies

21. *Article 2* makes is clear that the Convention is applicable only to the société anonyme, the Aktiengesellschaft, the società per azioni and the naamloze vennootschap of the Contracting States. Thus the sociétés de personnes, the sociétés en commandite par actions as well as the sociétés à responsabilité limitée are excluded.

With regard to the last-named, the question of extending the Convention to cover them arose in the course of the deliberations; but in the end the experts felt that in any event the first thing to be done was to conclude or at any rate to produce the final drafting of a Convention confined to sociétés anonymes which it need hardly be said are the most important type in trade between the Member States of the Community and therefore between Contracting States—and to envisage the possibility of drawing up later on, in the light of the experience thus gained, a new convention extending the coverage in that way.

Section 3

Operations envisaged under the Convention

22. *Article 3* refers to the two types of mergers to be dealt with in chapters II and III of the Convention respectively; merger acquisition and merger by formation of a new company. It has already been pointed out that both these operations are carefully defined at the beginning of the relevant chapters; thus studying the definitions is the only way to determine the operations in question.

23. But the very absence of reference in the text to any operations other than merger by acquisition and merger by formation of a new company leads us to the conclusion that the Convention is not applicable to them, even though their economic results, and in fact the rules of law governing them in the legislation of this or that Member State, make them akin to mergers.

The question was raised, for example, in relation to 'scission' found, for example, in French law[1] and in Belgian tax law[2], and mentioned by the Belgian delegation as a matter of great economic importance for Belgium. But the fact that the questions raised by the two types of merger referred to are complex enough as it is, and the difficulty the experts had in resolving them, led the experts to abandon any idea of regulating such 'kindred operations'. It may be noted here and now, however, that these could perfectly well arise between companies in different Contracting States in virtue of rules of general or contract law other than those in the Convention which are already in force or may in due course come into force. This point will be raised again in connexion with Article 61 (see para. 165 below).

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[1] Law of 24 July 1966, Article 371, para. 3, Article 382 et seq.

[2] See J.G. Renauld, *op. cit.*, p. 77.

Chapter II

Merger by acquisition

24. This chapter contains the bulk of the substantive provisions of the Convention, since as has already been pointed out, the regulation of mergers by formation of a new company has in large measure been dealt with simply by referring to that of mergers by acquisition.

First of all there is a definition of this operation (Section 1) consisting, as will be seen, of provisions which help to delimit the field of application of the Convention. Next, following a plan that reflects as far as possible the chronological order in which the various phases are carried out or the problems which can arise, the following are dealt with: preparation of the merger (Section 2); decision to merge (Section 3); protection of creditors (Section 4), the protection of shareholders being covered essentially by provisions contained in the two preceding sections; control and disclosure of the merger (Section 5—Section 6 being left blank for texts not yet proposed concerning the problem of 'participation': see para. 67 below); the effects of the merger (Section 7); and finally, liability which may be incurred and nullity which may be declared (Section 8).

Section 1

Definition of merger by acquisition

25. The actual definition of a merger by acquisition is given in *Article 4*, the wording of which is virtually identical to that of Article 2, paragraph 2, of the draft directive on domestic mergers of sociétés anonymes.

The characteristic features of this definition, similar to the conventional elements embodied in the notion of merger by acquisition already to be found in the legislations of the Contracting States, are as follows:

(a) In a merger by acquisition the company acquired is wound up without implementation of the liquidation procedure. Thus there is no realization or dispersal of its assets, so that its industrial, commercial or financial potential transferred to the company acquiring it remains intact.

(b) By this operation the company acquired transfers the whole of its capital to the company acquiring it. This transfer takes place 'uno actu', and in the ordinary way automatically (as specified in Article 29 in respect of the effects of mergers: see para. 91 below). Furthermore, and even though this may seem in theory to be superfluous, it is expressly stated that the capital transferred comprises 'assets and liabilities', thus avoiding any confusion between the notion of capital and that of the company's assets.

(c) In exchange for the capital transferred, the shareholders of the company acquired are allotted shares in the acquiring company. This again is a basic feature of the operation, distinguishing it from the acquisition of assets through debentures or cash payment and culminating in the elimination of the shareholders of the company acquired. Furthermore, in the legal system of all the Contracting States, this is the only type of merger by which liabilities can be transferred without the agreement of the creditors (subject of course to the arrangements made for their protection: see paragraph 52 et seq. below).

(d) But provision had to be made for the fact that because of the share exchange terms it would not be possible to avoid all cash adjustments. These are therefore permissible without preventing the operation from constituting a merger, provided they do not exceed 10 per cent 'of the nominal value of the shares allotted, or in the absence of a nominal value, their book value'.

The latter part of this provision was inserted to take account of the fact that some of the Contracting States (e.g. in Belgium and Luxem-

bourg)[1] have a type of share without nominal value, and it was specified that the term 'book par value' meant the value obtained by dividing the capital by the number of shares issued. The Netherlands delegation proposed at one point that the authorized percentage of cash adjustment should be calculated in relation to the 'actual value' of the shares handed over, but it finally abandoned the suggestion in view of the difficulty, emphasized by other delegations, of determining this.

26. *Article 5*, paragraph 1, specifies that the provisions relating to mergers by acquisition are applicable where one of the companies is the holder of all or part of the shares of the other company.

This point could hardly give rise to objection where the share held by one of the companies in the other company's capital does not give it control of the latter. In particular, the experts did not consider that if the company acquired holds shares in the company acquiring it and hands them over by virtue of the merger, the operation could be subject to the regulations governing acquisition by a company of its own shares, simply because it is part of the overall transfer of the whole of the capital. Conversely, where the acquiring company holds shares in the company acquired the former will receive part of its own shares, intended for handing over to the shareholders in the acquired company. What finally happens to them—whether they are extinguished by absorption or maintained as part of the assets of the acquiring company for possible disposal at a later date—will depend on the law applicable to the latter. The same applies of course in the preceding hypothesis where shares in the acquiring company are transferred to it because prior to the merger they belonged to the company acquired.

The same questions arise, and the replies to them are the same, when the holdings of one of the companies in the other place the latter under the former's control. It is in fact fairly common for a parent company to absorb its subsidiary. The reciprocal operation is more rarely found, but it can nevertheless, especially in international relations, be economically interesting or bring legitimate tax benefits, so that it should be brought within the Convention.[2]

This will apply both when the holdings involve a majority of the shares and when one of the companies holds all the shares in the other. But in considering this possibility, Article 5 does not attempt to prejudge the treatment of one-man companies by the law of the various Contracting States.[3] Moreover, it was pointed out that if it was the acquiring company that held all the shares in the company acquired, some of the provisions of the Convention concerning the points mentioned in the merger plan (Article 8) and the reports relating to that plan (Article 11 and 12), should not be applied or would need to be adapted to that particular case. This is the object of Article 5 para. 2, which can be more usefully discussed at the same time as the various provisions to which it refers (see paras. 31 and 35 et seq. below).

27. *Article 6* states that mergers by acquisition are possible with a company in liquidation, subject to two conditions:

(a) The company acquired must not have begun to distribute its assets among its shareholders. Thus the course adopted—and already recognized in the case of domestic mergers in French law (Law of 24 July 1966, Article 371), German law (Law of 6 September 1965, Article 339, para. 2) and Belgian law[4]—is not at variance with the principle that in the event

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[1] For *Belgium* see *Lois coordonnées*, Article 41; for *Luxembourg* see: Law of 10 August 1915, Article 37.

[2] See the draft directive, Article 20, for the case where the acquiring company holds all the shares in the company acquired. While not ruling out regulation, the draft directive does not impose it in the reverse case, which definitely does not have the practical interest within a single country that it can have internationally.

[3] See Council Directive (68/151/EEC) of 9 March 1968 (OJ, No L 65, 14.3.1968), Article 11, para. 2, f).

[4] See *Van Ryn, op. cit.*, I, 852-3. *Van Ommeslaghe, Rapport introductif* du 20 février 1967.

of a merger, the company acquired is wound up without being liquidated. The transfer of the whole of the assets remains possible so long as distribution has not yet begun; and if a part of the liabilities has been discharged, this will have an effect on the share exchange terms but will not jeopardize the economic object of the operation.

(b) The operation is only possible where the law applicable to the company acquired permits it.

As in all the other provisions of this type embodied in the Convention, the term 'law applicable to the company' must be understood to mean the rules of that law as they relate to mergers. In the present state of the legislations of the Contracting States, such rules exist only for domestic mergers, and originally it had been proposed to refer specifically to these. But in the end it was felt that it would be preferable to allow for cases where at some future time the law of a Contracting State might include provisions applicable to international mergers. These would then apply, by virtue of all the provisions of the Convention specifying the law of a Contracting State in relation to mergers.

In practice, and subject to the unlikely event of measures applicable to international mergers being taken at some future date in a Contracting State forbidding such mergers with a company acquired in liquidation, the rule of conflict in Article 6 would no longer work differently according to the links of the company acquired if the draft directive on internal mergers was adopted without modification of its Article 2, paragraph 4, that instrument furnishes the same solution, and it would thus be incorporated into the laws of all the Contracting States.

Section 2

Preparation of the merger

28. Under this heading, Articles 7 to 15 of the Convention deal with the whole series of questions relating to the merger plan, a document which together with its annexes will serve as a basis for the discussions in the general meetings of shareholders by which the merger has to be approved: first of all the actual requirements of the plan the conditions under which it is drawn up, its form and content (see para. 1 below), then its annexes, and in particular the ‚interim balance sheet' and the reports on the merger plan (para. 2), and finally the disclosure or notice required in respect of the merger plan and the annexes (para. 3).

Paragraph 1

The proposal to merge

29. In practice, general meetings of shareholders cannot be called to discuss a merger unless its conditions and the arrangements for it have been drawn up in advance by means of an agreement between the managing organs of the companies in question; conversely, such agreement does not bind the companies unless it has the approval of their general meetings.

But in the present state of company law in the Contracting States these procedures, which, when all is said and done, are basically very simple, are implemented by means of different legal techniques. German law[1] stipulates a merger contract; French law a 'draft merger contract'[2] or a 'merger plan';[3] the laws of Belgium and Luxembourg make no mention of such a document; while Italian law prescribes an 'atto di fusione' subsequent to the deliberations of the general meetings.[4]

The adoption of the draft directive on domestic mergers should cope with these divergencies, since in Article 3 paragraph 1, it provides that

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[1] *Aktiengesetz*, 6 September 1966 (Bundesgesetzblatt I, p. 1089): paras. 340 and 341.
[2] Law of 24 July 1966, Article 374.
[3] D. 67.236, 23 March 1967 (*Journal officiel de la République française*, 24.3.1967, Article 254).
[4] *Codice civile*, Article 2504.

'the administrative organs of each of the merging companies shall draw up a merger plan in writing'. But the Convention had to take account of the national laws as they now stand; thus in respect of the merger plan it embodies the substantive rules or rules of conflict which seemed to meet the needs of international mergers and could be put into application independently of the coordination of the various legislations in respect of internal mergers. Care was taken, however, to draft the substantive rules governing the minimum content of the merger plan (see para. 31 below) in a manner as close as possible to the wording of the corresponding text of the draft directive.

30. *Article 7* of the Convention contains the provisions relating to authorities to draw up the merger plan and form of presentation of the instrument. But it should be pointed out first of all that it stipulates, implicitly no doubt but quite clearly, that the latter must be drawn up, subject to the proviso (para. 3) that 'where by virtue of the law applicable to one of the companies, a contract has to be drawn up prior to the decisions of the general meetings, such contract shall constitute the merger within the meaning of the present Convention'. The reference here is to the approach found in German law, as mentioned above (see p. 45, footnote 1). Thus in the event of a merger between a German company and a company belonging to another Contracting State, the preliminary document—which, it is understood, will in any circumstances be a single document—will take the form of a merger contract, though still subject to all the provisions of the Convention relating to the merger plan.

The merger plan is drawn up by the organs of the merging companies which have jurisdiction in this matter for the purpose of mergers under the law applicable to each one of them. Thus the Convention merely introduces a conflict of laws provision, particularly so as to avoid having to determine the respective roles of the 'board of directors' and the 'supervisory board' in German or where applicable French companies. It should be noted, however, that the draft directive specifies that this jurisdiction is to be uniformly conferred on the 'administrative organs' of the merging companies.

Like the draft directive (Article 3, para. 1) the Convention makes it mandatory for the merger plan in all circumstances to be drawn up in writing; furthermore, the prescribed procedure must be followed, where this is required by the law of one of the companies merging. This is at present the case in German law, and nothing in the draft directive provides for or implies any modification on this point. 'Prescribed procedure' in this context was taken to mean, in conformity with the meaning usual in international conventions, notarial procedure, and the competence to draw up the prescribed notarial deed is determined by Article 54 of the Convention (see para. 145 et seq. below).

31. *Article 8* defines the minimum content of the merger project. It specifies the same items as Article 3, paragraph 2, of the draft directive on domestic mergers, plus the stipulation 'that the merger is subject to the approval of the merger plan by the competent organs defined in Article 16'. It was deemed advisable to mention that point in the case of international mergers so as to prevent third parties who were ignorant of a foreign law and perusing the plan from thinking that it represents all that is required for a merger.

The first three stipulations do not really call for any special comment, exept that the second (share exchange terms) and the third (arrangements for the allotment of the shares of the acquiring company and the date from which they give the right to participate in profits) do not have to appear in the plan when the acquiring company is the holder of all the shares of the company acquired, since in these circumstances there are no shareholders outside the acquiring company to be protected by this information. The purpose of the fourth stipulation (Article 8, d) is to make known the 'internal date' of the merger, the date from which the acquiring company takes responsi-

bility for the operations of the company acquired. This date, which must be fixed in advance, is both in law and in fact different from the date on which the merger takes effect (Article 26: see para. 81 et seq. below) and the date when it may be invoked against third parties (Article 28: see para. 90 below).

Lastly, the purpose of the fifth stipulation (Article 8, e) is to specify and make known 'the rights which are awarded by the acquiring company shareholders having special rights and to holders of securities other than shares, or the measures proposed in respect of them'. The text was deliberately worded in very general terms in view of the various types of such shares and securities in different legal systems and the different rights which can be attached to them. This was stressed in particular by the German delegation. More often than not, the securities referred to will be shares giving entitlement to statutory interest, a preferential dividend or a bonus, shares carrying double or multiple votes, founders' shares, shares in profits or convertible debentures. But this list is given only by way of example, since the text embraces in a general way all shares other than 'ordinary' shares, or all securities conferring rights which in the event of a merger, can give entitlement to special treatment, i.e. measures additional to those prescribed under the Convention for the benefit of all the shareholders and forming the general law applicable to mergers governed by it. It is this 'special treatment' that must be specified, and consequently brought to the notice of the interested parties, by the disclosure of the merger notice (Article 13, para. 2: see para. 41 below).

Paragraph 2

The annexes to the merger plan
The reports of company organs and independent experts

32. *Article 9* of the draft Convention lists the documents which must be attached to the merger plan. These largely supplement the particulars, reduced to the indispensable minimum, furnished by the merger plan. The first three documents (statutes, balance sheets and 'interim' statements of accounts: see paragraph 33 et seq. below in regard to the lastnamed item) must be made available not only to the shareholders of the merging companies but also to any other interested person, and particularly to the creditors of the companies. The last two (reports of company organs and reports of experts) are on the other hand for shareholders only, since their publication could be harmful to the companies in question. This distinction, which clarifies the list given in Article 9, is implemented by Articles 14 and 15 of the preliminary draft (see para. 42 et seq. below).

33. Particularly noteworthy among the annexes specified in Article 9 is the 'statement of accounts' (letter *c)*. This is annexed to the balance sheets, profit-and-loss accounts and annual reports of the merging companies for the previous three financial years (required in all circumstances), when a relatively long period of time has elapsed since the end of the previous financial year and the particulars given in the bookkeeping documents relating to this last financial year might be dangerously out of date. The 'statement of accounts' (which could thus be described as an 'interim balance sheet') must in fact be drawn up on the first day of the second month preceding the date of the merger plan where the last balance sheet relates to a financial year that ended more than six months prior to that date. In practice, therefore, any interested person can obtain information on the situation of the company (insofar as this can be done from a book-keeping document) at a date not more than six months before the merger plan (where the plan is dated on the last day of the half year following the closure of the last financial year), and possibly not more than two months and one day before the date of the plan.

34. *Article 10* lays down the procedure for establishing the interim balance where this is

required. The difficulty here was to ensure that the content of this balance would allow comparison with the balance sheets for previous years without at the same time forcing the companies in the middle of the financial year to produce a document that would conform strictly to the requirements of a balance sheet proper.

To make such a comparison possible, Article 10, paragraph 1, specifies that the interim balance shall be drawn up 'in accordance with the same methods and shall be presented in the same way as the last annual balance sheet'. But the rest of the Article relaxes the usual requirements in regard to balance sheets by relieving the companies of the obligation to carry out another actual stocktaking operation and to take account of evaluation changes other than those resulting from book entries, except for interim depreciation and reserves, and major changes in the actual value of items in the previous balance sheet. The term 'depreciation and reserves' was intended to mean significant adjustments made either by deduction from assets or entry under liabilities (e.g. for installation costs, frozen assets, stocks, circulating capital credits, and property securities forming part of the circulating capital) and funds set aside to cover risks and outgoings (e.g. pension funds and similar items and provision for taxes). In this way the statement of accounts should reflect fairly faithfully the standing of a concern at a date as close as possible to that of the merger plan, without its preparation involving too heavy a burden.

35. *Article 11* provides that a report on the merger plan shall be drawn up by the organs of each of the companies merging. It will be recalled that this report must be annexed to the merger plan but it will also be seen that while it must be communicated to the shareholders (Article 15: see para. 43 below), it does not, on the other hand, have to be published so as to be accessible to outsiders.

As in the case of the merger plan (Article 7: see para. 30 above), the Convention does not specify by means of a substantive rule the organs competent to do this, the matter being left to the law applicable to each of the companies. Here again, the reference is to the provisions of that law as they relate to mergers, or at the present time the rules governing domestic mergers. This means that in practice, if the draft directive were adopted without any change in Article 5, para. 1 of its text, in all the Contracting States this task would fall on the company's administrative organs. If provisions relating to international mergers were subsequently adopted in a Contracting State, they would have to be applied; but it is unlikely that they would not entrust the drafting of the report on the merger to the company's administrative organs.

The report must be detailed, and it must explain and justify the merger project from both the legal and the economic points of view. These stipulations (likewise identical with those in the draft directive) are the fruit of lengthy discussions, and their aim is to provide the shareholders with complete and effective information while at the same time avoiding placing the organs of the company in a straitjacket. Let us bear in mind—even though these comments cannot be regarded as reflecting categorical instructions concerning the structure of the report and the items to be included—that the document must not be either vague or summary, and that it must furnish explanations and justification, both of a legal nature (e.g. concerning the organs and the functioning of the acquiring company once the acquisition has taken place, and economic (e.g. enlightening shareholders as to the company's potential and outlets, once the merger has taken place).

But the only 'explanation and justification' mandatorily prescribed refer to the share exchange terms (Article 11, in fine). It will be seen below that this basic component of the plan must also be the subject of a declaration in the experts' reports, as distinct from the reports of the organs of the companies (Article 12: see para. 37 below) and must give certain minimum reasons, which are statutorily determined. The managements organs are not obliged to incorporate these reasons in

their own report. If they are asked to furnish justification on this subject, it is rather to make them assume responsibility for the merger plan and in particular the share exchange terms.

The provisions discussed concerning the content of the report of the company organs are identical with the corresponding provisions of Article 5, paragraph 1 of the draft directive on domestic mergers.

36. The experts felt that as it stood, this report was exclusively of interest to the shareholders of the merging companies, for the simple reason that the justification of the share exchange terms is after all its essential object. Hence Article 5, para. 2, 2) provides that when the acquiring company is the holder of all the shares in the company acquired, the report called for under Article 11 is only drawn up for the former. In these circumstances, there are in fact no shareholders of the company acquired with interests distinct from those of the acquiring company. The latter's shareholders will be informed and protected by explanations and justifications furnished in the report drawn up by its own administrative organs (and also, as will be seen, by the reports of experts).

37. Quite apart from the reports of the company organs, the merger must also, under *Article 12*, be the subject of expert reports which must likewise be annexed to the project (Article 9, *e)* and must be communicated like them exclusively to the shareholders of each of the companies (Article 15: see para. 43 below).

(a) In its first two paragraphs, Article 12 deals with the status, qualifications and appointment of the experts. They must be independent, which in accordance with a substantive rule of the Convention excludes the directors or employees of the company concerned.

They must be qualified; but on that point the Convention confines itself to a rule of conflict: this requirement is met if the experts are fitted to carry out, in accordance with the law applicable to the company to which they are appointed, the auditing prescribed by law of the annual accounts of that company (e.g. 'Wirtschaftsprüfer' in Germany, 'commissaires aux comptes' in France, 'réviseurs d'entreprise' in Belgium). This establishes the mutual confidence which the Contracting States must show in regard to the professional competence and the moral character of persons recognized under the laws of each of them as possessing these qualifications.

In the same way, the law of each company is cited in respect of the method of appointment of the experts attached to it (Article 12, para. 3), it being understood that persons already in charge of the auditing of the annual accounts may be designated, provided they fulfil the conditions laid down in paragraph 1. This means, in particular, that the commissaire aux comptes (or 'Wirtschaftsprüfer', réviseur etc.) of a company can be designated as expert to scrutinize the merger plan concerning that company, even though he is also linked with it by a contract of gainful employment, so long as under the law governing the company such contract does not deprive him of his independence. In a more general way, the appointment of experts can be made, under the provisions of this law, either by those organs of the company to which it grants jurisdiction for that purpose, or by a judicial or administrative body.

(b) Article 12, paragraph 4, defines the duties of the experts and determines, by a rule which is partly a rule of conflict and partly a substantive rule, the object and content of their reports, drawn up separately for each company.

The experts examine the merger project, and draw up a report specified as being 'for the shareholders' (Article 12, para. 4). Thus the Convention abandons the idea of two distinct reports for each company, one to be brought to the notice of the administrative organs only, while the other alone would be communicated to the shareholders. But this does of course not prevent the administrative organs from

obtaining clarification by means of expert studies, which could be more detailed than the reports themselves.

With regard to the object and content of these reports, while in general it is left to the law (on mergers) applicable to each company to determine these, the Convention nevertheless defines the minimum content by means of substantive rules.

Thus each of the experts must declare in respect of the company to which he is designated, whether in his opinion the transfer exchange terms are or are not warranted. They must justify this declaration by at least three categories of data, covering respectively the relative net assets of the companies based on actual values, the relative value of the earnings of the companies with due regard to future prospects, and the criteria used for the evaluation of the net assets and yields. The wording here, likewise the outcome of lengthy discussions, takes account of the essential factors, practically always found, on which the share exchange terms are based and the need to give shareholders a chance to assess those evaluations by explaining to them the criteria used in making them. But as we also know, in different types of cases, variable factors which it would be useless to try to enumerate exhaustively may enter into the evaluation of the assets and foreseeable yield, which in turn determine the share exchange terms and hence paragraph 6 provides, also in a substantive rule, that 'the report shall, in addition, indicate special difficulties of evaluation, if any'.

It will be noted that these various stipulations also appear in Article 5, paras. 2, 3 and 4 of the draft directive on domestic mergers, so that the insertion of substantive rules in the Convention on this point should not cause any special complications for international mergers.

Following an examination of this clause by the Belgian Banking Commission, the Belgian delegation proposed in a note sent to the Chairman of the group and the Commission services for the November 1970 session that adjustments should be made to it. The proposal could not be discussed by the group, since the text had already been adopted on third reading, and in virtue of an earlier procedural decision this prevented any re-examination. In view of this decision, the Belgian delegation agreed not to press for a further examination, but it was agreed that the Belgian note would be attached to the present report (see Annex 3).

(*c*) Article 12, para. 7 stipulates that 'each expert shall be entiled to obtain all useful information and documents from the merging companies and to undertake any necessary verification'. This rule too is to be found in the draft directive on internal mergers (Article 5, para. 2, 2) and in both instances it gives each expert the rights defined in it in respect not only of the company to which he is appointed but of the other company as well.

38. Article 5, para. 2, *b)* specifies that where the acquiring company holds all the shares in the company acquired, each expert report shall be prepared in accordance with Article 12, but shall be submitted only to the shareholders of the acquiring company.

This provision is not identical with the one referred to earlier (see para. 36 above), which in the same circumstances waives the report of the company organs as laid down in Article 11 in the case of the company acquired.

The two expert reports to be drawn up under Article 12 by the acquiring company and the company acquired are necessary here, since the shareholders of the former must be able to satisfy themselves that the share exchange terms are in order by means of documents drawn up separately in respect of both companies. The purpose of the report provided for in Article 11 is different, as we have seen—in this case the company organs themselves assume responsibility for the merger plan whereas this is pointless for the company acquired, since the company acquiring it, is its only shareholder.

But even though two expert reports must be drawn up, they need only be communicated to the shareholders of the acquiring company, since the latter, being the only shareholder in the company acquired, must necessarily be acquainted with them.

Paragraph 3

Disclosure and communication of the merger plan and its annexes

39. By prescribing in the Convention the presentation of a merger plan containing a minimum of mandatory items and a series of annexes, all designed to explain and justify the proposal, and in particular the share exchange, the intention was to devise an initial means of protecting the shareholders and third parties in particular the companies' creditors). After all, the shareholders cannot rationally vote on the merger unless they are acquainted with its basic details and the justification for it; similarly, it is on the basis of a comparative study of the assets of the companies merging that the creditors of the one or the other will decide whether or not to make use of the safeguards available to them under Articles 18 to 21 of the Convention (see para. 52 et seq. below). In the same way, shareholders having special rights and holders of securities other than shares must be informed, for example, of the rights guaranteed them by the acquiring company or the measures it is proposed to take in their interests.

But the details of the particulars to be furnished and the ways and means of making them known will depend on the nature of the rights of the various categories of interested parties and their relationship with the company. Furthermore, any arrangements for disclosure must take account of the cost involved, so as to ensure that this is not unduly heavy.

40. With all this in mind, the Convention specifies information at three levels: actual publication of the merger plan (Article 13); public deposit, accessible without restriction, of the plan and such of its annexes as must be brought to the notice of all interested persons and can be so brought without difficulty (Article 14); and non-public deposit, accessible only to the shareholders, of the merger plan and all its annexes (Article 15), both types of deposit including the right to obtain copies.

41. Article 13, para. 1 stipulates that in each of the Contracting States to which the merging companies belong, a notice of the merger plan must be published at least a month prior to the date of convocation of the general meeting (which will be called upon to deliberate on the project) in the national gazette designated for the publication of amendments to the statutes.

In the course of the discussions it was stated that this publication requirement was designed to 'draw attention' to the merger plan. But it is not meant merely as a 'flicker light' to indicate that such a plan exists. The notice must not only contain all the items which Article 8 stipulates as the minimum content of the plan (see para. 31 above); it must also (para. 2) mention the deposits made and the right to consult the document and to obtain copies as stipulated in Articles 14 and 15, thus enabling any interested person or any shareholder, as the case may be, to exercise those rights effectively. Going even further than mere disclosure, the notice must also mention the right of creditors to ask for security in accordance with Articles 18 to 21 (see para. 52 et seq. below). Thus the experts did not rely on the knowledge which in theory creditors should have of the provisions of the Convention concerning them. Their attention is expressly drawn to these provisions, so that where appropriate they can exercise the rights thus granted to them.

It may be further observed in relation to Article 13 that:

(a) The Contracting States in which the notice of the merger plan must be published are deliberately designated as 'the states to whose laws the merging companies are subject', an expression sufficiently vague to avoid pre-

judging the criterion of linkage of companies to which the Convention applies, as defined in Article 1;

(b) Since the substantive provisions of Article 13 defining the content of the disclosure notice are quite specific, the object of the reference in the second sentence of paragraph 1 of the Article to the provisions of the law governing each of the companies relative to the disclosure is necessarily limited—it is concerned in particular with actually specifying the national gazette and determining what persons are to carry out the disclosure formalities (see the Directive of 9 March 1968, Article 5).

42. Public deposit accessible to all is stipulated in *Article 14*. This applies to the merger plan and its first three annexes: statutes balance sheets, profit-and-loss accounts and reports covering the last three financial years, and where applicable, an interim statement of accounts (Article 9, *(a)*, *(b)* and *(c)*. These furnish data on the financial situation of the companies, which all persons who have entered into relations with them should be enabled to ascertain so that they can weigh the likely effect of the proposed merger on what is to happen to their rights.

Deposit must take place on the day of convocation of the general meeting, if this precedes the actual data of the meeting by more than one month, or otherwise at least one month before this data, irrespective of the legal provisions applicable to the company in this respect. The deposit is made in the file opened, or to be opened, in the name of the company in each Contracting State by virtue of the Directive of 9 March 1968 (Article 3, para. 1). Consideration was given to the various possible ways of organizing this file in the different States, and it was specified that the deposit should be made in respect of each company according to the law applicable to it.

Finally, Article 14, paragraph 2 provides that a copy of the whole or any part of the documents deposited shall be obtainable on mere request (and hence by anyone making such request) at a price not exceeding the administrative cost thereof.

43. The recipients of the largest amount of information are the shareholders, the idea being, as has been said, to enable them to understand what they are voting about: and *Article 15* provides that from the date of convocation of the general meeting, and in any case during a period of one month prior to the date of the meeting (i.e. for the same length of time as the public deposit under Article 14), any shareholder shall have the right to inspect at the company's registered office the merger plan and all its annexes (i.e. including the reports of the company organs and of experts, which it would have been improper, if not invariably pointless, to communicate to third parties) and to obtain copies of the whole or any part of these documents free of charge.

All this places the provisions relating to the preparation and the content of the reports preliminary to a merger, and in particular the reports of experts (Articles 11 and 12: see para. 35 et seq. above) in their proper perspective. They are, as has already been pointed out, measures designed for the protection of the shareholders.

Section 3

Merger Decision

44. This section deals first and foremost with the jurisdiction of general meetings (Article 16, para. 1) and the conditions under which they meet and deliberate (Article 17). But Article 16, paragraph 2 and 16, paragraph 3 also add details found necessary to cater for legal provisions or particular circumstances calling for measures other than action by the general meetings.

We shall deal first with this action and ancillary measures (para. 1), and we shall then discuss

the provisions relating to the convocation and conduct of the meetings (para. 2).

Paragraph 1

Action by the general meetings
Ancillary measures

45. Under *Article 16*, paragraph 1, 'a merger shall require the approval of the general meeting of each of the merging companies'.

Here we have a substantive rule, which confers this power on the general meetings irrespective of the provisions of the law applicable to each of the companies involved. But as we know, action by the general meetings is already required, in the case of domestic mergers, in all the Contracting States embodying this point in their legislation. The uniformity found here should be extended and consolidated in the future by the draft directive, which on this point used exactly the same wording as the convention (Article 4, para. 1). At the same time, it is in practice not foreseeable that in the case of international mergers not coming within the scope of the Convention the law of a Contracting State is likely in the future to waive the requirement of approval by the general meeting. Hence we are and no doubt always will be faced with a uniform rule applying to all mergers of companies, whether domestic or international, and in the latter case, whether they come under the Convention or not. Indeed, a merger is too important an operation for anyone to think of undertaking it without consulting the whole body of shareholders and obtaining their agreement.

46. Although action by the general meetings is indispensable, it may not be sufficient to make final or legally perfect the decision to merge.

(a) First of all, the company may include shareholders having special rights or may have ties with holders of securities other than shares. We know that by virtue of a substantive rule, Article 8, paragraph 1, *e)* of the Convention includes among the items constituting the minimum content of the merger plan that of the rights guaranteed to such persons or measures proposed for their benefit (see para. 32 above). But quite apart from these measures or commitments, which will take effect once the merger has taken place, the protection of such share or security holders is generally catered for under national legislations by their participation in the actual decision to merge.[1] The way in which this operates varies, and will no doubt continue to do so, since the draft directive on domestic mergers makes no provision for coordination in this matter. Nor was it deemed necessary to lay down in the Convention a uniform substantive rule making such participation mandatory and defining its nature and the conditions governing it. Hence Article 16, paragraph 3 merely refers in this connexion, by means of a rule of conflict, to the provisions of the law applicable to each of the companies (and here we must understand once again the provisions governing domestic mergers, unless any of the legal systems to which reference is made embodies provisions on this point relating to international mergers). If the law in question should require action by debenture-holders (e.g. in France and Luxembourg), it would likewise be applicable.

(b) Account had also to be taken of the fact that under Italian law an 'atto di fusione' is required subsequent to the general meetings (see paras. 6 and 29 above) in order to put the legal seal on a merger by means of this contractual instrument.[2] This is in practice the object

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[1] See for example, for Belgium: *Lois coordonnées*, Article 71; for France: Law of 24 July 1966, Article 156; for Italy: *Codice civile*, Article 2376; for Luxembourg: Law of 10 August 1915, Article 68.

[2] The conclusion of an '*atto di fusione*' subsequent to the decisions of the general meetings is justified by the fact that in Italian law, divisions of meetings (that is acts of a legal person) are only binding on the organs of the companies and the members, and do not create any legal relationship with third parties. The preparation of a legal instrument to which the two companies are parties, pursuant to the decisions of the general meetings, is necessary before a company can transfer its capital to another. Furthermore, the preparation of the 'atto di fusione' makes it possible to check the concordance of the decisions taken by the general meetings of the two companies (see para. 75 below).

of the rule of conflict in Article 16, paragraph 2 declaring such provisions applicable.

On the other hand, there is no mention in the text of the case of German law, which, as has likewise been recalled, stipulates a 'Verschmelzungsvertrag' (merger contract) prior to the general meetings which have to approve it. But this in no way implies that the provision in question will not be applicable where one of the companies merging comes under German law. Indeed, as we have seen, in virtue of Article 7, paragraph 3, in the case in point it is this prior contract to merge that constitutes the merger plan prescribed by the Convention (see para. 30 above).

Paragraph 2

Convening and proceedings of the general meetings

47. While it is true that the approval of a merger by the general meetings is in practice prescribed, at the present time, by the laws of all the Contracting States, on the other hand the rules relating to the 'procedure' governing these meetings (convening, composition holding) and the special conditions as to any quorum or majority required before the approval of the merger can be considered as adopted, vary from one legislation to another. In Germany, for example, the law does not require a quorum, since the representation of the shareholders is amply provided for by the banks where the securities are deposited. In Italy, a quorum is only indirectly made necessary by the establishment of a majority based on registered capital;[1] and, in the countries where a quorum and a minimum majority are both required, their relative importance varies.[2]

48. In this situation, the Convention first of all lays down (*Article 17*, para. 1) a rule of conflict citing for the settlement of all these issues the provisions of the law applicable to each of the companies concerning mergers, or in default of such provisions, amendments to the statutes. Incidentally, this secondary procedure was inserted in the text to make allowance for the fact that in the Netherlands there is no legislation on mergers; but it was agreed that it could be deleted if such legislation was adopted there prior to the signing of the Convention.

49. Subject to that reservation, which it may be hoped will be temporary, the rule of conflict would amount in practice, as the national legislations now stand, to the application of the provisions of the proposed law relating to domestic mergers. But in the first place, we should look ahead here again to the possibility that in the future a Contracting State might adopt provisions catering for international mergers, and in that event these would normally be applicable to mergers coming under the Convention, which does not lay down uniform rules in this sphere. At the same time, and for that very reason, it was necessary to see to it that such provisions relating to the company acquired did not make international mergers unduly difficult, indeed virtually impossible. (This is the case at the present time, as we have seen, where a Belgian, French or Luxembourg company is acquired by a foreign company, the merger being subject, at any rate in accordance with the prevailing theory, to the unanimous approval of the shareholders). Finally, it was considered that even in the absence of provisions with this object in the law governing a particular company, its statutes should be able to define the conditions as to quorum or majority for international mergers, even though in practice such statutory clauses are apparently not known at all. But it was also necessary to ensure that companies did not hamstring the effective application of the Convention by applying such provisions.

50. These are the arguments underlying and explaining the wording of Article 17,

[1] See for Germany: *AktG*, paragraph 340 (2); for Italy: *Codice civile*, Articles 2368, 2 and 2369, 3 and 4.

[2] See for Belgium: *Lois coordonnées*, Article 70; for France: Law of 24 July 1966, Article 153; for Luxembourg: Law of 10 August 1915, Article 67.

paragraph 2 relating to the quorum and majority required in the general meeting of the company acquired. The text first of all expressly lays down the right of the legislator or those drafting the statutes to lay down special majority or quorum conditions for mergers governed by the present Convention. But supplementing the rule of conflict with a substantive rule, the text goes on to put a limit to this freedom, determined differently according as the law governing the company does or does not require, in addition to a specified majority, a minimum quorum for the approval of the merger:

(i) In the first case, the majority required may not exceed three-quarters of the votes cast, and the quorum may not be more than half the shares carrying voting rights the first time and a quarter of these shares the second time;

(ii) In the second case, the majority required may not be higher than three-quarters of the votes cast and four-fifths of the capital represented at the meeting taking the decision, which must not be confused with the whole of the registered capital. If it were prescribed by law or in the statutes this second majority would mean that the three-quarters majority, reckoned in numbers of votes (and it must be remembered that certain types of shares may carry a double or multiple vote) would likewise correspond to four-fifths of the capital represented by the shares having participated in the vote no account being taken in this second calculation of multiple votes for a single share. To go beyond this second majority as thus calculated, it would not be possible to exceed the four-fifths requirement.

51. Finally, it should be pointed out that this alternative limitation applies only to the statutory or legal provisions relating to mergers governed by the Convention. In other words, it is obvious that the statutes or the law could lay down stricter conditions for mergers not coming within the scope of the Convention (in practice between companies in one Contracting State and those of a third State). But it must be pointed out above all that if different requirements (as for example under Italian law, where a quorum is required indirectly by way of majority calculated on the basis of the whole of the registered capital), or even stricter requirements (a larger majority or quorum) were adopted by the law or the statutes in the case of all mergers, including internal mergers, they would have to be met.

This possibility cannot in theory be ruled out, since the draft directive on domestic mergers did not coordinate the provisions relating to quorum and majority, except to prescribe that the latter 'may not in any circumstances be less than two-thirds, either of the votes corresponding to the securities represented in the general meeting, or of the registered capital represented in the meeting' (Article 4, para. 1). But this is a minimum figure, not a maximum. For practical purposes, however, it is hardly likely that any domestic law, or statutes will in the future stipulate a majority or quorum for internal mergers higher than the maxima laid down in Article 17, paragraph 2. If that were the case, such provisions would have to be applied, for although the Convention can lawfully limit legal or statutory discrimination unfavourable to the international mergers to which it applies, on the other hand it was not the intention of the Contracting States to grant more favourable treatment for such mergers than that granted for domestic mergers.

Section 4

Protection of creditors

52. In combination with the rules governing disclosure and publicity designed to help the shareholders in casting their votes (Chapter II, Section 2, Articles 7 to 15: see para. 28 above), the provisions of Section 3 just discussed (para. 44 et seq. above) safeguard the shareholders of companies merging against an operation which could be prejudicial to them either because of a wrong assessment of the situation and prospects of the companies involved, or more particularly, in the case of

the shareholders of the company acquired, because their rights in a company in one country (frequently that of their nationality or residence) are exchanged for rights in a company in another country.

Mergers likewise entail risks, for similar reasons, to the creditors of the companies in question. Insofar as the measures for disclosure and publicity are aimed at them, these also provide protection. But they would be insufficient in themselves, particularly as far as the creditors of the company acquired are concerned, since they find themselves saddled with a new debtor who they fear may be less solvent. In addition to this risk, which is common to domestic mergers and international mergers alike, there is a further risk in the latter case because of the legal and territorial ties of the new debtor with a country other than that of the company acquired and often foreign in relation to the nationality or residence of the creditors of that company.

Hence the Convention was obliged, in the same way as domestic law and even more urgently, to insert provisions for the protection of the creditors of the company acquired—first and foremost the non-debenture-holding creditors (Articles 18 and 19). Provisions had likewise to be adopted in regard to the debenture-holding creditors of the company acquired to take account of the collective exercise and protection of their rights and interests embodied in certain legislations (Article 20).

But whether in respect of the protection of debenture-holding creditors or not, or of the creditors of the company acquired or the company acquiring it, it was not found possible to achieve unanimity among all the delegations on the application by all the Contracting States of all the solutions thus devised. They persisted in opposing the very concept of creditor and hence the practice. In the outcome, one of the delegations stood by a system of a priori protection, i.e. exercised prior to the merger's taking effect and holding up, at least potentially, its entry into force; on the other hand, the rest of the delegations showed a preference for a posteriori protection exercised after the merger has taken effect can be invoked against third parties by virtue of the disclosure formalities, so that it can neither delay the effects of the merger nor challenge its validity.[1] Articles 18 and 19 of the Convention respectively reflect these two concepts, as we shall see; but in order to make allowance for the views of delegations which did subscribe to the idea of a priori protection, the Contracting States had to be granted the option of ruling out its application by making a declaration. At the same time, they were given the option of extending the measures for the protection of the creditors of the company acquired to those of the acquiring company. This is the two fold object of Article 21 of the Convention.

Finally, Article 22 deals with the protection of shareholders having special rights and the holders of securities other than shares.

In the four subsections below, we shall examine these four groups of provisions in turn.

Paragraph 1

Protection of non-debenture-holding creditors of the company acquired

53. It has been pointed out that Articles 18 and 19 of the Convention reflect the a priori and a posteriori protection respectively of the creditors of the company acquired. Let us verify this by looking in turn at the machinery instituted under these articles.

[1] For a priori protection, see for Italy the *Codice civile*, Article 2503; for a posteriori protection see for France the Law of 24 July 1966, Article 2381; for Germany (*AktG.*, para. 347). At the present time there is no express provision on this point in Belgian law, which protects creditors by means of the ordinary actio pauliana rules, third party liability, and in some cases Article 1188 of the Civil Code (see Van Ryn, *op. cit.* I, 860; Renauld, *op. cit.*, p. 62). A text organizing a priori protection for creditors will be found in the Belgian draft law on *sociétés anonymes*.

A. — A priori protection

54. *Article 18* of the Convention defines the exclusive rights of 'the creditors other than debenture holdings of the company acquired whose claims preceed the publication of the notice of the merger plan concerning their company' (for the notice to be given of the merger plan and its disclosure, see Article 13 of the Convention and paragraphs 39, 40, 41 and seq. above). These creditors have dealt with the company acquired at a time when there was no published document making it possible for them to foresee that the company might cease to exist as a result of a merger. Hence the Convention includes for their benefit a type of a priori protection, the application of which, it will be recalled, the Contracting States may rule out (Article 21, *a)*: see para. 63 et seq. below).

55. These creditors have the right, within thirty days of publication of the notice of the merger plan: concerning the company acquired (or more precisely, as of that date, to be acquired and in their debt, to 'require the granting of a security'. This 'requirement' must be submitted in the form of a 'request', the form of which is not specified in the Convention. It will therefore be regulated by each individual legislation, but the later phases of the machinery imply first of all that it must from the outset be brought to the knowledge of the debtor company, and that it may at the same time be subject to challenge (cf. 'assignation' in French procedure) but this second characteristic is not mandatory.

Article 18, 2 grants the parties a grace period of eight days reckoned from the date of the receipt of the request by the company, to try to reach agreement, i.e. in practice, by withdrawal of this request by the creditor or consent by the company to grant security. As will be seen, payment of the debt, even if not yet due, may take place without the agreement of the creditor (see para. 56 below). Failing agreement within this period, the court postpones the entry into force of the merger (the date of which is determined by Article 26: see para. 81 et seq. below) 'until the granting of the security as ordered by it or until the rejection of the application'. The Convention does not specify whether the 'request' is that made initially to the company, and thus presumably, as has been said, subject to challenge, or a separate such request made by the creditor in the absence of agreement with the debtor company. The decision here is left to the individual legislations, but the first alternative would no doubt be preferable inasmuch as it would make for a more speedy solution.

Speed is of essence, since it is here that the suspensory effect of the request by the creditor arises, giving an a priori character to the protection given him by this clause, which stipulates that the court shall withhold the entry into force of the merger until the request is rejected or, if it is granted, until the decision is implemented by the granting of the security prescribed. The merger operations can of course go ahead, but even if they are carried out prior to rejection by the Court or the granting of a security, the entry into force of the merger, making its effectiveness inter partes, remains in abeyance. Thus quite clearly, it is desirable that a solution be found as speedily as possible, and this could come about first of all, as we have emphasized, through the challenge in regard to the initial request, and secondly, through the institution of summary procedure by the Contracting States not waiving the application of Article 18. But the Convention does not, of course, prescribe such procedure, which is left to the individual law of each State.

It will also have been noted that, because of the grace period granted to creditors under Article 18 to submit their request, no merger can take effect less than thirty days following the publication of the notice of the merger plan relating to the company acquired. But that would in any event be ruled out by virtue of Article 13, which prescribes that the publication must take place 'at least one month prior

to the date for which the general meeting is convened' (see para. 41 above).

56. Substantively speaking, Article 18 embodies two rules mandatory on all States which have not waived the application of this Article.

(a) The second sentence of paragraph 2 provides that 'the Court shall reject the application if the creditor already disposes of an adequate security or if one of the merging companies establishes that the acquiring company is manifestly solvent'.

The assessment of the 'adequacy' of the security already in the possession of the creditor or of the 'manifest' solvency of the acquiring company (which, in virtue of the merger will become the debtor in place of the company acquired) is naturally a matter for the Court dealing with the case; but if the Court accepts the request, it must look into the question of the inadequacy of the security or lack of 'manifest' solvency of the acquiring company; and if it rejects the request, it must look into the solvency situation (or at any rate expressly establish it).

The Article likewise specifies that proof of the solvency of the acquiring company can be supplied by 'one of the merging companies', i.e. not only by the company acquired, but also by the acquiring company. This means that the latter can intervene in the action instituted by the creditor against the company acquired with a view to establishing its solvency and, if necessary, query the security to be supplied. Whether this is done by the company acquired before it ceases to exist, or directly by the acquiring company, the latter will in the long run bear the financial burden, by virtue of the transfer of the assets of the company acquired as a result of the merger (Convention, Article 29; see para. 91 et seq. below). In fact, all the companies involved in the merger have an interest in removing the possible obstacle to it arising out of the application of Article 18.

(b) The second substantive rule is contained in Article 18, 3, which provides that 'the company shall be exempt from granting a security if the debt even if it has not matured, is repaid either prior to the decision of the Court, or not later than one month of such decision'.

Thus in practice the text grants the company (whether acquired or acquiring) a grace period of one month to grant the security ordered. During that period, it can escape the obligation to grant a security by repaying the debt, even if it is not yet due. This is a departure from the general rule which prohibits the debtor from paying in advance, at any rate where the maintenance of the term is or may be in the interests of the creditor or in the joint interests of the creditor and the debtor (e.g. for all debts on which interest is payable). This departure is necessary, since a creditor cannot be allowed to manifest distrust of the acquiring company by calling for a security while at the same time refusing payment of the sums due, even if these are paid in advance.

This payment could be made by the company acquired (or the acquiring company for its account) on receipt of the request for granting a security, without waiting for the court to announce its decision; but it could also be usefully made within one month following the court's decision, it being understood that in this instance it takes the place of the security ordered, so that the merger can only take effect when the payment has been made.

B. — A posteriori protection

57. *Article 19* deals with the protection of creditors other than 'debenture holders of the company acquired whose claim preceeds the fulfilment of the disclosure forma lities referred to in Article 27' (on this Article see para. 88 et seq. below). This wording covers both the creditors whose claim preceeds the publication of the notice of the merger plan and those whose claim arose after the disclosure but prior to the fulfilment of the formalities laid down in Article 27. However, (Article 19, para. 1, second sentence) the former cannot

take advantage of Article 19 if they are entitled to invoke Article 18, i.e. if they have not forfeited this right through a statement made by a Contracting State under Article 21 (see para. 63 et seq. below) to the effect that it will only apply Article 19. In fact, it is of little importance whether creditors to whom the benefit of Article 18 applies have or have not taken advantage of it; the moment they could have done so, they are excluded from the benefits of Article 19.

58. Like the creditors referred to in Article 18, those referred to in Article 19 can require the granting of a security. For this purpose they have a grace period of three months reckoned from the date of the disclosure formalities referred to in Article 27. This grace period is longer than under Article 18, but this is easily justified, since the exercise of the right thus granted to creditors cannot hold up the entry into effect of the merger (this would moreover be impossible if the request were made following the entry into effect). More generally, Article 19, para. 4 provides that the application of this article 'shall in no way prejudice the effects of the merger'. This is the fundamental feature of a posteriori protection, and it should be pointed out that it will be found even where a creditor has invoked Article 19 prior to the date of the disclosure formalities under Article 27, as he would be perfectly entitled to do if his claim had already arisen.

59. Subject to this basic difference—which will also produce certain effects inherent in the procedure under Article 19—the machinery set up under this Article operates in the same way as that in Article 18.

In the three month period mentioned previously, the creditor is entitled to require the granting of security. Failing an agreement within eight days of receipt of such request by the company, the Court may either order the granting of security (but with no question, as we know, of holding up the effective date of the merger) or it may reject the request 'if the creditor already disposes of a sufficient security, if it is established that the acquiring company is manifestly solvent' (Article 19, para. 2). The observations made concerning the conditions governing rejection of the request where this is based on Article 18 (see para. 55 above) apply here, but it may be simply observed that if, unlike the preceding article, Article 19 does not expressly provide that the proof of manifest solvency can be adduced by 'one of the merging companies', this is because more often than not the event referred to in Article 19 will take place at a time when the company acquired has already ceased to exist. But the neutral wording of the text ('if it is established ...') has been deliberately chosen so as not to deprive the company acquired of the option of producing this proof to the Court, if the question should arise before it ceases to exist.

60. If the company should fail to grant security within one month of the decision ordering it to do so, 'the claim shall be immediately enforceable' (Article 19, para. 2: second sentence).

This provision concerns only fixed-term credits, and involves bringing such terms to an end. If, on the other hand, it involved contingent credits, the creditor would not of course be deprived of the right to invoke Article 19, any more than he would be deprived of the right to benefit under Article 18 if he fulfilled the conditions required for this and his application was not ruled out by virtue of a declaration made pursuant to Article 21; but the failure of the company to grant the security ordered would naturally not have the effect of making it a claim pure and simple, and consequently payable. It would be open to creditors to have the decision implemented or enforced in accordance with court procedure (e.g. under French law, by obtaining a judgment in lieu of the granting of the security).

It should be noted finally that as in the case of Article 18, the company is exempt from the requirement of granting a security if the debt, even if not due, is repaid either prior to the decision of the Court or within a month following that decision at the latest. Thus

here again the term is ended to the detriment of the creditor, although it should be observed that in the case of Article 19, failure to pay within the prescribed time-limit does not of course hold up the entry into force of the merger. Its only consequence is that the company is still under an obligation to grant the security ordered by the Court. In practice, this means here, as under Article 18, that the company has one month to implement the decision.

Paragraph 2

Protection of debenture holders of the company acquired

61. The protection of debenture-holding creditors could raise specific problems related in substance with the particular nature of their links with the debtor company, and in technique with the existence in the legislations of several of the Contracting States[1] of collective organizations and representation of their interests, differing from one State to another. But care had also be taken that debenture borrowing, which constitutes an important element in a company's liabilities, should not have the effect of paralyzing international mergers by conferring unduly extensive rights on debenture holders.

62. Bearing these points in mind, *Article 20* in principle brackets the debenture holders of the company acquired with non-debenture-holding creditors of the company by extending the benefits of Articles 18 and 19 of the Convention to them (provided, of course, in the case of Article 18, that its application has not been waived by a Contracting State in virtue of Article 21: see para. 63 et seq. below).

However, if under the applicable law the rights of debenture holders can or must be exercised collectively (in practice through representatives of the whole group), the rules thus laid down on the subject will be applied. In addition, to take account of the legislations of countries which provide that mergers (domestic or where applicable international) shall be subject to a general meeting of the debenture holders. Article 20 provides that if the merger has been approved by such a meeting, the debenture holders (and they must be understood to include those voting against approval) can no longer invoke Articles 18 and 19.

Lastly, if the law governing the company acquired does not mandatorily require a collective body of debenture holders (as is the case, for example, in German law) or does not give the meeting of the debenture holders jurisdiction to approve mergers, Articles 18 and 19 can likewise not be invoked 'unless the merger has been approved ... by the debenture holders individually' (Article 20, in fine). Naturally, if there is no collective body, approval by individual debenture holders (even if they constitute the majority) is not binding on the others, but it deprives those giving the approval of the right to require the granting of a security under Articles 18 and 19, whereas those debenture holders who have not approved the merger retain this right.

Paragraph 3

Declarations restricting or extending the application of the rules relating to the protection of creditors

63. It has already been pointed out (see para. 52 above) that the formulation of a uniform system of creditor protection proved particularly difficult, owing to the differences in concept between the various legislations, whether in regard to the siting and the effects of this protection in the framework of merger operations (a priori or a posteriori protection), or in regard to its application to the creditors of the acquiring company.

The compromise finally arrived at consisted in the organization, as we saw in the case of the

[1] See for France: Law of 24 July 1966, Article 380; for Belgium: *Lois coordonnées*, Articles 91 and 93, Van Ryn, op. cit., I, No 860.

creditors of the company acquired, of two protective mechanisms, one a priori (Article 18), and the other a posteriori (Article 19), and their extension to cover the debenture holders of that company (Article 20), subject to the right of the Contracting States to declare:

(i) that they will apply only Article 19, i.e. a posteriori protection (Article 21, *a)* and consequentially Article 20 insofar as it refers to Article 19;

(ii) that they will extend to the creditors of the acquiring company the same dispositions as to the creditors of the company acquired (i.e. either Articles 18, 19 and 20, if the State in question has not made the former declaration, or if it has done so, Article 19 and the relevant part of Article 20).

64. These provisions call for several observations:

(a) Any declarations which may be made in virtue of *Article 21, a)* or *b)*, must have reference to all creditors, whether debenture holders or not, without distinction. The intention was to ensure that States did not unduly complicate mechanism already complex enough by declaring, for example, that they will apply Article 19 alone to non-debenture-holding creditors, and Articles 18 and 19 to debenture holders.

(b) Similarly, if a State made the declaration under Article 21, *b)*, the creditors of the acquiring company could not be treated any differently by that State from those of the company acquired. In other words, if that same State had made the declaration under Article 21, *a)*, the creditors of the acquiring company could only invoke Article 19, and if it had not done so, it could claim the benefits of Articles 18 and 19.

(c) Finally—and this is the essential point—declarations under Article 21 will affect the creditors of a company governed by the laws of the State making them. This point is made expressly in Article 21, *b)* in respect of the declaration extending protection to the creditors of the declaration extending protection to the creditors of the acquiring company. The text provides that the State may declare 'that it will apply to the creditors of the acquiring company ... where the latter is subject to its laws, the same provisions as are applied to the creditors of the company acquired'.

Article 21, *a)* is more laconic. It does not state in so many words that it refers to the creditors of the company acquired, but this goes without saying in view of the reference to Article 19, which concerns these creditors alone. Nor does it specify that the declaration can only refer to the creditors of the company acquired when the latter comes under the legislation of the State making the declaration; but the same applies here, since no Contracting State would wish to become involved in the relations between creditors and a company where the latter does not come under its laws.

65. The arrangements for making or withdrawing the declarations envisaged in Article 21, the date on which declarations or withdrawals of declarations take effect, and the exclusion of any retroactivity in respect of them, are governed by Article 65 (see para. 169 et seq. below).

Paragraph 4

Protection of shareholders having special rights or bearers of securities other than shares

66. Mergers, whether internal or international, inevitably raise the question of the special rights of certain shareholders (e.g. plural voting rights, the right to a preferential dividend or a 'superdividend'), and holders of securities other than shares (e.g. profit-sharing rights, bonus issues; debentures convertible into shares; debentures exchangeable for shares; debentures carrying preferential rights of subscription to the registered capital and profit-sharing debentures.

The protection of these rights (as indeed their very nature) is dealt with in a variety of ways

according to the different legal systems, which may well be coordinated in this respect, in part at any rate, by the adoption of the draft directive on domestic mergers (see Articles 13 and 14).

In this situation, the Convention merely lays down, in *Article 22*, a rule of conflict under which 'the provisions of the laws concerning the protection of shareholders with special rights or bearers of securities other than shares, to which each of the merging companies is subject, shall be applicable'.

The provisions in question are as usual those which in the particular State relate to internal mergers, except where that State has rules governing international mergers, in which case they apply.

It should be further pointed out that by the general nature of its wording, Article 22 covers debenture holders. But this does not thereby contradict Article 20, which grants debenture holders the right to call for a security, under the conditions laid down in Articles 18 and 19, and subject to the reservations made therein. Thus the reference in Article 22 in regard to debenture holders is to measures of protection other than this right, laid down in the law governing the company, whether acquired or acquiring.

Section 5

The Question of 'participation'

67. The experts were not able to propose, even by a majority, provisions relating to the prospects for and the institution of 'participation' in the event of international mergers. The problem was therefore left to be discussed by the Member States meeting in the Council, under the terms and in the circumstances described in the special report annexed to the present report. It will be recalled, incidentally, that the Italian delegation continued to oppose the insertion in the Convention of clauses designed to regulate this: (see para. 9, note 17 above).

While taking note of this stand, the other delegations set aside Section 5 of Chapter II of the Convention for clauses on this subject.

Section 6

Control and disclosure of the merger

68. Under this heading the Convention deals with four questions which are linked: the institution and object of judicial or administrative preventive control of mergers or the formalities regarded as the equivalent of such control (para. 1); the chronological order in which judicial or administrative control, and where applicable the equivalent formalities (second para.), must be carried out in the companies merging, the date on which the merger takes effect (para. 3); and finally, disclosure of the merger and invoking it against third parties (fourth para.).

Paragraph 1

The institution and object of preventive control or equivalent formalities

69. As we know, the legislations of the six Member States of the European Communities and parties to the Convention are divided into two groups as regards the machinery provided to ensure that the constitutions of companies and modifications of their statutes are in keeping with the law— on the one side, Germany, France, Italy and the Netherlands, where the law embodies a preventive control of legality—carried out by the judicial authorities in the first three countries and by the administration in the Netherlands; and on the other, Belgium and Luxembourg, where there is no such control. Here mandatory action is taken by a notary (also required, in fact, in the countries of the first group with the exception of France), who takes service of the statutes of a société anonyme or prepares minutes of the meetings at which amendments to the statutes are adopted. This, combined with the profes-

sional responsibility of a notary, in the event of infringements of the law in connexion with his official duties, is regarded as in almost all cases amply sufficient to prevent irregularities. This same division is found in relation to mergers, which are subject to preventive control of legality in the first three countries, while in the last two they involve the mandatory notarial recording of the proceedings of the general meeting deciding on the merger.[1] In the Netherlands no choice has yet been made between preventive control and the notarial deed. For the time being, administrative control is carried out by reason of the amendments to the statutes bound up with mergers.

70. Because of the links connecting each of the Member States of the Communities with its own system, the First Directive on coordination of safeguards applicable to companies dated 9 March 1968 (Article 10) maintained this duality in regard to the formation of companies and modification of their statutes. Article 10 of this Directive provides that 'in all Member States whose laws do not provide for preventive control, administrative or judicial; at the time of formation of a company, the instrument of constitution the company statutes and any amendments to those documents shall be drawn up and certified in due legal form'; and it is envisaged that the same option shall be left to the Member States in regard to domestic mergers as far as 'decisions of general meetings establishing that a merger has taken place and all other documents establishing that a merger has taken place' (draft directive on domestic mergers, Article 8) are concerned.

71. The difference between legislations that provide for preventive control and those that require certification of a merger by notarial deed will thus remain. This being so, the Convention on International Mergers had in turn to take it into account. Hence Article 23, para. 1 provides that 'if the law governing one of the merging companies makes provision in the event of a merger, for a preventive control of legality, judicial or administrative, the provisions relating to such control shall apply to such company according to the law to which it is subject'; but it specifies in para. 2 that 'where the law does not provide for a preventive control and where such control does not apply to all the legal acts necessary for the merger, then the minutes of the general meetings which decide on the merger and, where applicable, the merger contract subsequent to such general meetings, shall be drawn up and certified by notarial deed'.

Technically, para. 1 is a rule of conflict, which leaves it to the provisions on mergers (international, or failing these, domestic, as already mentioned) contained in the law governing the company, to decide on the existence of the control, the authority entrusted to carry it out, and the procedure itself (for the object of the control, see para. 72 et seq. below). Para. 2, on the other hand, is a substantive rule, since, in the absence of control, it prescribes certification by notarial deed. But in the present state of law, in the only two Contracting States (Belgium and Luxembourg) where there is no judicial or administrative control, this requirement is as we know already met similarly. In Italian law, which, at the moment, is the only one to prescribe this, the merger contract subsequent to the general meetings must be drawn up and certified by notarial deed.

72. As in the internal law of the States which practise these two systems respectively, preventive control and certifications by a notary relate only to the legality of the documents and formalities connected with the merger (for controls other than legality control, see Article 56, para. 149 et seq. below). But the

[1] See for the application of the control system in Germany *AktG*, paragraphs 345-346; in France, the Law of 24 July 1966, Article 6, 3 applicable to all amendments to statutes; in Italy, the *Codice Civile*, Articles 2502 and 2411; and for the certification of resolutions by certified act, see for Belgium, *Lois coordonnées*, Article 12, 1, which refers to Article 4, 2; in Luxembourg: *E. Arendt*, in A.N.S.A., *Aperçu du régime des sociétés par actions*, Belgium-Luxembourg, p. 42. It should be noted that quite apart from control, the merger contract must be attested in Germany by a notorial act (*AktG*, para. 341-1).

combination in a single merger of controls exercised by the authorities of two or more countries, or controls in some and interventions by a notary in others, necessitated clarification on the object of each type of control, or of control on the one side and notarial certification on the other.

This clarification is given in *Article 24*, which distinguishes three cases:

(a) Where judicial or administrative control is prescribed for each of the companies merging (e.g. merger between a German company and a French company);

(b) Where it is not prescribed for each of the companies merging, thus necessarily implying action by a notary vis-à-vis the company where there is no control (e.g. merger between a Belgian company and a German company);

(c) Where the law governing one of the companies merging prescribes the conclusion of a merger contract subsequent to the approval of the merger by the companies in question (in practice, this applies to any merger involving an Italian company, whether the other company is governed by a law prescribing judicial or administrative control, or certification by notarial deed.

On the other hand, there is no special provision covering cases where judicial or administrative control is not prescribed for any of the companies merging (e.g. mergers between a Belgian company and a Luxembourg company). The delegations of Belgium and Luxembourg, the only countries directly concerned here, stated that such a provision was not necessary, since the application to each company of the rules of its own law in respect of mergers would not raise any difficulty and would be sufficient to provide any verification that might be required. Nor does the Convention make any special provision for mergers with a Netherlands company, even though current Netherlands law does not embody any rule relating to mergers. In view of the likelihood that such rules will come into force in its country in the near future, the Netherlands delegation felt that this lacuna did not constitute a drawback

73. In the first case (Article 24, para. 1) the control applies distributively in respect of each company first to the legal acts and formalities 'required of it' (in other words, the report of the company organs—Article 11; the experts' report—Article 12; publication of the notice of the merger plan, and the plan itself—Articles 13, 14 and 15; the general meetings—Articles 16 and 17): and secondly, to the 'absence of a judical decision of postponement taken by virtue of Article 18' (see para. 54 above), it being understood that it will be the responsibility of the control body to ensure that no such decision has been taken in respect of either the company in which it operates or the other. On the other hand, the merger plan, or the merger contract as its equivalent, when drawn up prior to the general meetings (Articles 7 to 10), is a single and indivisible document common to the companies merging, and hence it involves a single control operation in the acquiring company (Article 24, para. 1, *b)*. This option is bound up with the chronological order of the control operations, which in this case are carried out first of all in the acquiring company (Article 25, para. 1: see para. 77 below).

74. In the second case (Article 24, para. 2), the respective objects of control and notarial certification are determined in the same manner in respect of the legal acts and formalities separately required of each of the companies merging: control and certification in each company of the legal acts and formalities required of it and of the absence of a judicial decision to postpone the merger taken in virtue of Article 18 (here again it is specified that the notary too will to satisfy himself that no decision has been taken by either of the companies in question). But it is stipulated that the notary shall 'check and certify ... the existence and legality of the legal acts and formalities required of the company for which he is acting.' This is a substantive rule which

is in fact in keeping with the current provisions of Belgian and Luxembourg law relating to the functions of the notary,[1] guaranteeing the effective equivalence of notarial action and judicial or administrative control.

In the same circumstances, the single control of the merger plan (or the equivalent merger contract) is left to the notary, since chronologically the control is only carried out in the company whose law requires it following certification by notarial deed of the resolution of the general meeting of the other company approving the merger, and on production of the notarial deed (Article 25, para 2: see para.78 below).

75. The third and last case is that where a contract subsequent to the approval of the merger is prescribed by the law governing one of the companies in question, Here again, control or, where applicable, certification by the notary, is exercised distributively in respect of the legal acts and formalities required of each of the companies and of non-existence of a judicial decision to postpone the merger taken in virtue of Article 18. Similarly, the control of certification of the merger project is carried out in the State where the control and certification formalities are performed first, the chronological order being determined here by Article 25, and varying according to the circumstances (see para. 79 below).

But in this instance, apart from the merger plan, there is a second indivisible instrument, namely the merger contract, subsequent to approval of the merger. But the text does not stipulate control of this contract in the company whose law requires it (this is implicit in para. 3, *a)* whereas it does so stipulate in respect of the other company if the law applicable to the latter provides for control subsequent to the merger contract. In practice, for example, in the event of a merger between an Italian company and a German company, the 'subsequent' merger contract will not be controlled in Italy but will be controlled in Germany.

At first sight, this seems surprising. But the decision was taken because the Italian delegation, as a directly interested party, explained that it is compulsory under Italian law for service of an a posteriori contract to be taken by a notary, who himself checks the regularity of the general meetings and the concordance of their resolutions. However, German law requires the control to be carried out after the contract has been concluded; the German delegation asked that this requirement be respected in the case of an a posteriori contract, and the Italian delegation did not oppose this.

Paragraph 2

Chronological order of the formalities for control or certification by a notary

76. *Article 25* determines the chronological order in which the operations of judicial or administrative control and certification by a notary are to be carried out. This was deemed necessary in order to enable the date on which the merger would take effect to be fixed (Article 26: see para. 81 et seq. below), and to ensure that this is not done until the prescribed control and certification have been completed in each of the companies. However, as in determining the object of these measures, the delegations of Belgium and Luxembourg argued that the establishment of a chronological order was unnecessary when notarial certification alone was required of the companies merging, i.e. in practice, where these companies come under Belgian and Luxembourg law respectively.

Hence only three cases were specifed, the first two being the same as those in Article 24, and the third similar to the last case mentioned in that article.

77. In the first case (where judicial or administrative control is required in both the

[1] See, for example, for Belgium: Raucq and Cambier, *Traité du Notariat*, 1943, II, No 3615 et seq.

companies: Article 25, para. 1) control must be carried out first of all on the acquiring company, and cannot be instituted in the company acquired unless proof is adduced that it has been carried out in the acquiring company. In view of the identical nature of the control formalities, those affecting the company acquired were placed last here, since it will cease to exist as a result of the merger; and it is preferable not to hasten its disappearance, which is not easily reversed, until such time as the merger operations have been completed and checked in the acquiring company.

78. In the second case (where judicial or administrative control is required in one of the companies only, and hence there is certification by a notary in the other: Article 25, para. 2), the essential difference between the measures of control and certification respectively made it seems advisable not to apply the same criterion. Whether it is to be carried out in the acquiring company or the company acquired, judicial or administrative control can only take place following certification by notarial deed of the general meeting of the other company approving the merger, and hence following attestation by the notary. It was felt, in fact, that there was no reason for a check to be made by a notary belonging to one country on judicial or administrative formalities carried out in another when it seemed acceptable for an act certified by a notarial deed and filed in one country to be produced to the judicial or administrative authorities in another (in the same way as the proof of the control formalities in the preceding case).

79. The third case is that in which the law governing the company acquired prescribes the conclusion of a merger contract by the companies involved and the law governing the acquiring company requires control of the merger subsequent to the conclusion of this contract (Article 25, para. 1; in practice, this is the case at present where an Italian company is acquired by a German company). Here para. 1 of Article 25 is not applied, since under it the control carried out in the acquiring company takes place before that in the company acquired (see para. 77 above. This would not meet the requirements of the law of the acquiring company, which extends the control to the a posteriori contract prescribed by the law of the company acquired but is concluded after the control formalities instituted by this law have been completed.

On the other hand, the application of Article 25, para. 1 did not have to be ruled out in the opposite case—where a German company is taken over by an Italian company. Here,since the control to be carried out in the company acquired comes last, in accordance with the general rule laid down in para 1, it can be exercised, as is required by German law, over the merger contract concluded following the approval of the merger by the general meetings.

80. Finally, it will be noted that Article 25 does not define any specific means of proof of the control or certification formalities. Para. 1 merely provides that proof shall be adduced that the control formalities have been carried out in the acquiring company, and para. 2 makes the control in the company whose law requires this subject to production of the notarial deed drawn up in the other company. Thus it is the rules of proof under private international law in the country where the proof has to be adduced that will determine the procedure.

Paragraph 3

Date on which the merger takes effect

81. *Article 26* specifies the date on which the particular merger takes effect, without prejudice to any agreement fixing the date on which the shares of the acquiring company allocated to the shareholders of the company acquired give entitlement to participate in profits and the date from which the operations of the company acquired are to be regarded as performed for account of the acquiring company (Article 8,

para. 1, c and d : see para. 31 above). The date of invoking of the merger against third parties is dealt with in Article 28 (see para. 90 below). The date determined in accordance with Article 26 will thus essentially be that on which the complete transfer of the capital of the company acquired to the company acquiring it takes place (Article 29 : see para. 94 et seq. below).

82. For a given merger, this date must manifestly be one and one only. It is inconceivable that the merger should take effect for one of the companies on one day and for the other on a different day. Hence the fixing of the date could not be left to the jurisdiction of the laws applicable in the event of a merger to each of the companies, since the laws of the Contracting States work differently here. Thus a rule based on the conflict of laws would have made the merger take effect on different dates according to the particular company considered, through the application of its proper law.

83. The principle of determining the uniform date is in itself very simple. The merger can only take effect when all the legal acts and formalities required for its accomplishment have been completed in respect of both the companies. But this is dependent on documents or formalities differing widely according to the laws applicable to each of the companies : preventive control of a judicial or administrative character, certification by notarial deed of the resolutions of the general meetings approving the merger, or a merger contract concluded subsequent to the general meetings. But as we have seen, the Convention makes allowance for all these systems, combining them according to the various hypotheses that can arise (Article 23 to 25 : see para. 69 et seq. above). Thus there was no option but to take account also of this diversity in fixing the date on which the merger would take effect; and as a result, this date, a single date for any given merger, is determined in several different ways according to the legal acts or formalities required in individual cases by the laws of the companies merging. Thus while the principle is simple, its application is inevitably complex.

84. To this end, Article 26 arranges the various hypotheses, using a method we have already seen, into two groups, which are dealt with in paras. 1 and 2 respectively of the Article.

85. Article 26, para. 1 covers all types of mergers excepts those in which a merger contract if prescribed by the law governing one of the companies merging, has been concluded subsequent to the deliberations of the general meetings. In practice, therefore, this excludes mergers involving an Italian company in all instances (since as we know, Italian law requires the conclusion of a contract a posteriori), and mergers involving a German company when the merger contract prescribed by German law has been concluded (as is feasible but not obligatory in German law) after the general meetings.

Within these various hypotheses, the text distinguishes three situations:[1]

(a) The first is that in which 'neither of these companies is subject to control' (Article 26, para. 1, *a)*. In practice, this means a merger between a Belgian company and a Luxembourg company. Here the merger takes effect on the date of the notarial deed recording the resolution of the general meeting of the company approving the merger last, since there is then nothing more to be done to accomplish the merger. Furthermore, it matters little, and the text makes this clear, whether the meeting is that of the acquiring company or the other, since as will be remembered, in this case the Convention does not stipulate the chronological order of the operations (see para. 76 above).

(b) The second situation is that in which, conversely, control within the meaning of Article 23, para. 1 (i.e. preventive control of legality, judicial or administrative) is required in

[1] Owing to the particular system prevailing in the Netherlands (see para. 69 above), no example is given of a merger involving a Netherlands company.

respect both of the acquiring company and that acquired. The mergers involved (bearing in mind that mergers with an Italian company come under the second group), are those of German companies (except where the merger contract has been concluded subsequent to the general meetings) or French companies. Here the merger takes effect on the date on which the control is carried out in the company acquired, since again this is also the control that must come last (Article 25, para. 77 above).[1]

(c) The third and last situation is where control (within the meaning of Article 23, para. 1: see b above) is only required in one of the two companies. This applies to mergers between a German company (unless the merger contract has been concluded subsequent to the general meetings) or French company, and a Belgian or Luxembourg company. Here the merger takes effect on the date when this control is carried out, and we know it must always take place following certification in due legal form of the resolution of the general meeting of the other company, approving the merger (Article 25, para.2: see para. 78 above).

86. Article 26, para. 2 covers the other set of possibilities, the essential feature of which is the conclusion a posteriori of the merger contract, prescribed (under Italian law) or permitted (under German law) by the law governing one of the companies merging. In this instance, the principle is first of all simple in its application: the merger takes effect on the date on which the merger contract is concluded, since prior to that date not all the formalities have been completed.

But account had still to be taken of the case where the law of one of the companies merging prescribes a control which takes place only after the merger contract has been concluded (this happens under German law). The merger will then take effect on the date when the control formalities are carried out in the company-acquired or acquiring—whose law requires this. Indeed this control alone, subsequent to the contract brings the chain of operations to an end.

Paragraph 4

Disclosure of the merger — invoking against third parties

87. The procedure for the disclosure of the formation and winding up of sociétés anonymes and amendments to their statutes, as well as the conditions governing the invoking of documents and information whose disclosure is mandatory, against third parties, were coordinated by the Directive of 9 March 1968. In fact, mergers by acquisition almost invariably involve some amendment of the statutes of the acquiring company, and in all instances, winding up of the company acquired. In a more general way, if Article 10 of the draft directive on domestic mergers as at present worded were adopted, these mergers would be directly subject to disclosure in each of the Contracting States, in accordance with the Directive of 9 March 1968. Finally, there is nothing to suggest that if provisions relevant to international mergers were introduced into the laws of a Contracting State the requirements with regard to disclosure would be different. That would certainly be out of the question as far as increasing the capital of the acquiring company and winding up the company acquired is concerned.

88. Consequently, it seems reasonable to assume that the procedure for disclosure of mergers in general, or where applicable, of international mergers, is or will be identical or very similar in all the Contracting States. Hence it was perfectly feasible here to adopt the simple solution of rule of conflict. This is the object of *Article 27*, para. 1 of the Convention, which provides that the procedure for disclosure shall be determined in respect of each of the companies merging by the law applicable to it.

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[1] If in accordance with the Italian proposal (see Article 3 of the draft Convention) it was agreed that a merger could take place by the acquisition of two or more companies, this provision would have to be adapted to allow for the fact that the control would no longer be carried out in just one company acquired. This is one of the examples of the kind of adaptation the Convention would have to make if it catered for this type of merger.

It will be noted however, that implicitly yet indisputably, this wording prescribes disclosure of an international merger: the law governing each company determines the procedure for disclosure, but it could not waive it (this would in any case be unthinkable for any legislator). It should also be remembered that it is the date of disclosure by each of the companies that constitutes the start of the three-month period within which creditors of the company acquired (Article 19, and in certain circumstances creditors of the acquiring company (Article 21, *b)*) may exercise their rights (see para. 57 et seq. and 63 et seq. above).

89. Article 27 likewise contains two substantive rules expressly stated.

(a) By virtue of para. 2, disclosure of the merger must refer, in respect of each of the companies, to 'the place and date of performance of the disclosure formalities laid down in Articles 13 and 14' (i.e. notice of the merger plan and deposit of the plan and certain of its annexes in the files of each of the companies merging: see para. 40 et seq. above). This reference will enable any interested person to take note, in particular, of the accountancy documents deposited along with the merger plan (Article 9, *b)* and *c)*) and where necessary, if he is a creditor of one of the companies, to judge whether he would be well advised to exercise the rights granted to him, according to the circumstances, under Articles 19 and 21.

(b) Article 27, para. 3 provides that the 'acquiring company may itself undertake the disclosure formalities relating to the company acquired.' This precaution is vital, since the effect of a merger is to make the company acquired disappear without implementation of the liquidation procedure so that it might have been feared that its former managing organs would neglect to undertake the disclosure formalities relating to it of their own accord.

90. The system thus adopted inevitably leads to duplication of the disclosure (by the acquiring company and the company acquired). But invoking the merger against third parties depends on the disclosure; for that reason lengthy discussions were held in the course of the group's work concerning the necessity and the possibility of nevertheless stipulating, by means of a uniform rule, a single date of such invoking, which would have been (except for a 'period of grace' in certain circumstances) the date of the latest disclosure. But after further examination on the initiative of Professor Gessler, the head of the German delegation at the time, who contributed a very thorough study of the problem, the experts reached the conclusion that such a course would have serious drawbacks owing to the difficulty for third parties taking cognizance of one of the disclosures to ascertain whether that disclosure was the latest or not. On the other hand, the study in question revealed that duality of dates for invoking against third parties (respectively the dates for each of the companies of the disclosure made in accordance with its proper law) involved virtually no practical difficulties.

In these circumstances the rule of conflict in *Article 28* was adopted. This provides that 'subject to the application of Article 31' (on this point see para. 100 below) 'the merger may be invoked against third parties on the conditions laid down in the provisions of the law to which each of the companies is subject, on the invoking of mergers against third parties or, in the absence of such provisions, on amendments to the statutes'. The 'conditions' envisaged here naturally include also the right of the company to prove that the third parties had knowledge of the merger even though it had not been made public; the period of grace granted following publication to third parties to prove that they could not possibly have had knowledge of it; and the right of third parties to avail themselves of the merger even though not made public; and all this subject to the provisions of the law applicable to the company, with due regard to the Directive of 9 March 1968 (Article 3, paras. 4 to 7) and, where appropriate, to the draft directive on domestic mergers.

Section 7

Effects of the merger

91. The very definition in Article 4 of mergers by acquisition as governed by the Convention determined the two characteristic effects, namely transfer of the capital of the company acquired to the acquiring company, and conversely the allotment to the shareholders of the company acquired of shares in the acquiring company, if necessary supplemented by a cash adjustment proportionately limited (see para. 25 above).

In Chapter II, Section 7, relating to the effects of the merger, Article 29 again lays down at the outset the principle of transfer of the capital, and specifies the legal regime applicable. Since this transfer covers both the assets, including personal rights, and the liabilities, i.e. the obligations contracted by the company acquired, it necessarily implies the replacement of the company acquired by the company acquiring as party to contracts concluded by the former. But this replacement raises complex issues, first of all in regard to contracts made very difficult or extremely costly to execute by the merger or contracts which the company taken over had concluded intuitu personae; and secondly, contracts or in more general terms working arrangements on which a merger frequently has consequences not merely juridical but social and human, such as no Government would wish to ignore.

Lastly, from a more technical point of view, the transfer of certain property or rights included in the capital of the company acquired can be made subject by the law applicable to them to special formalities designed for example to protect, for the benefit and in respect of third parties, public credit and the safeguards governing transactions. Consequently some means of coordination had to be found between the principle of universal transfer and these requirements.

92. All these problems were looked into in the course of the deliberations, but after lengthy discussions the experts decided against including in the Convention provisions to cover contracts made extremely difficult or very costly to execute by the merger (e.g. an exclusive supply contract concluded by the company acquired with a supplier other than the one with which the acquiring company has arrangements to supply the same products) and contracts intuitu persone (for example, a mandate given or received by the company acquired). Among the legislations of the Contracting States, only German law at the present time embodies such provisions (AktG. para. 346, 3). In the other contracting States, the answer to these difficulties would be sought in general provisions of law, and it may also be noted that the draft directive on domestic mergers lays down no regulations in this matter. This being so, in the end it was not deemed advisable to cater for this in the Convention, and the experts were unanimous in holding that in each State, its solution should continue to be sought as hitherto in the private international law rules of the forum.

93. On the other hand, the Convention includes a clause relating to employment contracts concluded by the company acquired (Article 30), and it may be well not only to explain its substance but to specify also in what circumstances it is presented to the Government of the Contracting States. The question of invoking the transfer of certain assets against third persons is dealt with in Article 31.

Under para. 1 below we shall examine Articles 29, 30 and 31, which are centred round the principle of transfer of the capital. After that, para. 2 will be devoted to Article 32, which deals with the allotment of the shares of the acquiring company and where appropriate the cash adjustment, as the second characteristic effect of the merger.

Paragraph 1

Transfer of the capital

94. By the terms of *Article 29*, 'subject to the provisions of Article 31, a merger shall auto-

matically entail the universal transfer, both as between the company acquired and the whole of the capital (assets and liabilities) of the company acquired to the acquiring company'.

Apart from the 'reservation' in Article 31, which will be discussed further (see para. 100 below), the main characteristics of the juridical regime governing the transfer of the capital as formulated in the text here are as follows:

(a) The transfer is universal in the sense that it relates to the whole of the capital of the company acquired regarded as a 'juridical whole'. Thus it does not arise out of the juxtaposition of separate and distinct acts relative to the various components of the capital but is carried out in a single lapse of time and by a single legal act (uno actu), namely the merger itself. This being so, it would not have been necessary in stricit logic to specify that a merger involves the tranfer of the capital (assets and liabilities); but as in the case of the definition as such of a merger by acquisition (Article 4: see para. 25 above), it was felt to be preferable in practice to do so, first of all owing to the danger of confusing the notion of a company's capital with that of its assets, and more especially, because of the oddity, vis-à-vis the laws of most of the States Members, of the notion of transfer of liabilities without the consent of the creditors.

(b) In fact, this is one of the consequences of the mechanism of the transfer of the capital: it operates automatically, i.e. by the direct and exclusive effect of the merger itself, without the necessity for any separate legal act by the companies in question, with or without the intervention of third parties, or for any formality additional to those required by the merger.

(c) Thirdly, tranfer of the capital takes place in accordance with the machinery thus defined, both between the companies merging and in respect of third parties. By the mere effect of the merger, the capital of the company acquired actually merges, erga omnes, into that of the acquiring company. It must merely be recalled here that the merger may only be invoked against third parties by virtue of disclosure, the legal regime of which is determined in respect of each of the companies in question by the law applicable to it (Article 27 and 28: see para. 87 et seq. above). This means that theacquiring company can only avail itself of the transfer of the capital vis-à-vis third parties through this disclosure, and in such kindred conditions as are determined by the applicable law, but this does not touch the substance of the law, and it must be pointed out also that subject to Article 31, invoking the transfer of the capital against third parties depends precisely on the mere disclosure of the merger itself, i.e. on the single legal act of which it is the effect.

95. It has already been said that the universal transfer of the capital embraces that of the contracts by which the company acquired was bound at the time of the merger. *Article 30*, para. 1 (first sentence) expressly states this consequence in respect of employment contracts. Since all that is involved is the application of a general principle, this provision might be thought superfluous; but it constitutes the starting point of special protective measures which are the essential object of Article 30, so that if only for the sake of clarity its insertion in the Convention would be justified. But there is also a substantive reason: perhaps it is better to emphasize expressly that a merger does not in itself constitute a reason for breaking employment contracts in spite of the changes it produces in the legal status of business which depended on the company acquired and their staff, and can produce in their activities.

96. It is nevertheless true that the mere transfer of the employment contract, i.e. the individual agreement between the employee and tha company acquired is not sufficient to solve completely, even from a strictly legal point of view, the problems which a merger can raise in the relations between the acquiring company and the employees of the company acquired.

In the first place, employment contracts are governed by a law which determines their interpretation, conditions their validity, and pinpoints, indeed rounds off their effects. No doubt this is true of any contract; but under a rule of private international law which is

fairly generally followed, the individual contract of employment is subject to the law of the country where the employee works. But as a result of a merger, an employee may be called upon to work in a country other than that in which he was employed before the merger took place, and irrespective of direct safeguards provided in Article 30 where the move is not accepted by the employee (see para. 98; *(b)* and *(c)* below); the question could reasonably be asked whether this change of country of employment should or should not produce a change in the law governing current contracts. After much argument, the experts abandoned the idea of settling this question as being too closely bound up with the whole subject of international social legislation for an 'incidental' solution to be found for it in a convention relating to mergers. This means that employment contracts passed on to the acquiring company will be governed by the law applicable to them under the rules of private international law of the forum and incidentally, the Commission's representatives reminded the experts that the Commission had embarked on the task of preparing the coordination of these rules in the Member-States of the Communities. The contract of employment is also frequently concluded as part of a collective employment agreement to which it merely contributes certain adjustments in the individual relations between employer and employee. Moreover, when there is a collective agreement, people talk rather of employment relations than of an employment contract, and the individual's choice in many instances is limited to acceptance by the employee of work offered by the employer. In fact, it is very difficult to say whether and how far a collective agreement can be implemented beyond national frontiers. This question has been inadequately explored, and the answer would in any case vary from country to country. Consequently, it would make still less sense to try to cope with it in the Convention.

97. In spite of this change in the 'juridical climate' of the individual contract of employment—indeed the danger of its partial disappearance—the transfer of the contract nevertheless has significant consequences. Not only is it an obstacle, as has already been said, preventing the merger from being systematically used as a pretext for an employee's dismissal or resignation, but it means that insofar as the mutual obligations of the parties depend on the contract, they will be determined by it. This will be true, for example, of the level of pay and any additional perquisites in kind, the nature of the work done by the employee, the undertakings he has given in regard to loyalty, trade secrets or competition. It may also be true of the length of annual leave (except for observance of the minimum prescribed by the law governing the contract); and with the same reservation, it may be true of the length of notice required to terminate the contract and the amount of termination pay, if these questions are regulated in the individual contract of employment, or even in the collective employment agreement if under the law of the forum the judge should find that the individual contract of employment incorporates the relevant clauses of the collective agreement.

In any event, these are obviously only isolated examples, since as must once again be stressed, the question whether employment relations are a matter for the individual contract, the collective agreement or the relevant law will in each instance be a matter for the judge and the law of the forum. But they would appear to be sufficient to illustrate the practical significance of the transfer to the acquiring company of employment contracts binding upon the company acquired.

98. Quite apart from this implementation of the principle laid down in Article 29, Article 30 contains a number of special safeguard provisions.

(a) In his relations with the acquiring company, the employee keeps the seniority he has reached in the service of the company acquired (Article 30, para. 1, second sentence). It was useful to state this expressly, since in spite of the transfer of the contract it was not self-evident, in view of the change of employer. Seniority after all often has important side-

effects, e.g. in relation to the amount of salary and allowances due in the event of termination of the contract or the length of notice to be given for termination of employment. If these effects are specified by the contract, its terms will be applied; if not, the effects will be determined by the law applicable to the contract (Article 30, para. 1, in fine), this being left, in accordance with the general method outlined above, to the rule of private international law of the judge of the forum.

(b) A merger may cause the acquiring company, as has already been said, to transfer to the country of its registered office or to a third country, places of business which came under the company acquired and were located in the country of its registered office or in a country other than that to which they are transferred. In this event, the acquiring company will frequently offer all or a portion of the staff of these establishments the opportunity to continue to work in them in the country where they are newly installed.

This is from the human point of view one of the most serious consequences that can arise out of a merger, and is particulary marked in international mergers. It is not enough to ague, in order to minimize its effects, that the Community is bound to become a territorial economic unit; this does not dispose of the psychological and moral factors underlying the lack of manpower mobility which after all apply even within one and the same country, as we know. It must therefore be assumed that in many cases an employee will refuse to leave his home country, and that his refusal will result either in dismissal by the employer or resignation of his own accord. Para. 2 of Article 30 therefore provides that if dismissal or resignation takes place in virtue of the law applicable to the contract of employment prior to the merger, the contract is regarded as having been terminated on the initiative of the employer, and the employee will therefore be entitled to whatever compensation payable where termination is so caused, as laid down in the contract and in the law governing it under private international law of the forum. This compensation will of course only be payable if the dismissal or resignation actually takes place, otherwise there is no termination of the contract; but the Convention, departing from its usual procedure here so as to provide more complete protection for the employee, specifies that it is the law applicable to the contract prior to the merger that must determine whether the contract is terminated or not. This is not a contingent rule of law, but rather a territorial rule of conflict. Consideration will be given to the whole of the legal system proper to the contract with the company acquired and the choice among its provisions, chronologically successive and possibly different, will depend on the rules of the forum relative to conflicts in relation to time in private international law.

(c) Para. 3 of Article 30, however supersedes para. 2 in cases where the employee has undertaken under his contract of employment with the company acquired in the country where he is being asked to work, unless this undertaking is rendered ineffective in virtue of the law governing employment contracts—this again, in acordance with the general method, being the law applicable in virtue of the rule of private international law of the forum.

(d) Finally, para. 4 of Article 30 declares that para. 2 is likewise applicable where the merger entails substantial changes in the contract of employment other than transfer of the place of work from one country to another. The experts decided against listing these substantial changes on the grounds that the list would have been either incomplete or unduly long, or both. Possible examples worth citing are changes in the nature of the employee's work or salary cuts.

Para. 4 does not refer to para. 3, since it is virtually inconceivable that an employee would accept in advance any substantial change in his contract. In any event, if such a clause did arise, it would not rule out the application of para. 2.

99. The text of Article 30 analysed above was the outcome of long and arduous discussions, and it represented the common denomi-

nator where the delegations were able to find common ground, at least technically. The delegations of Belgium and Luxembourg nevertheless finally opposed maintaining it in the Convention, not of course for lack of interest in the protection of employees in the event of an international merger, but on the contrary because they felt, as the Belgian delegation in particular strongly emphasized on more than one occasion, that such protection should be far broader, both in scope and in content. It is after all necessary in all international concentrations of undertakings, including those brought about otherwise than by merger, and it must safeguard employees against the whole gamut of adverse effects, physical or human, which such operations can have on them. For this reason, the Commission of the European Communities has initiated studies in this sphere, as described in Joint Decleration No 1 attached to the Convention (see para. 175 et seq. below); but the delegations of Belgium and Luxembourg felt precisely that by inserting into the Convention a text limited in scope there was a danger of prejudging the over-all solutions which these studies might produce.

On the other hand, the rest of the delegations felt that it would be better, by subscribing to Article 30, to rescue at one the little that had been achieved at the cost of patient efforts. In fact, the Italian delegation not only did not oppose the insertion of the text in the Convention, but considered that it should be supplemented by other concrete measures of protection (see the footnote to Article 30); but this proposal did not find favour with the other delegations, although the need for comprehensive protection was recognized by all and affirmed in Joint Declaration No 1 (see para. 175 et seq. below).

100. Likewise important, but strictly technical in character, is the final adjustment made in the Convention (*Article 31*) to the principle of universal transfer. Here the text provides (para. 1) that 'if the law applicable to certain assets brought in the company acquired requires special formalities in the event of a merger to enable the transfer to be invoked against third parties, then such formalities shall be carried out in accordance with and their effects as well as the consequences of non-compliance shall be determined by the said law'. What the experts had in mind here, for example, were immovable property, long-term leases, stock-in-trade, and industrial property rights. But the very variety of the laws of the Contracting States led the experts to avoid any enumeration, the rule being one of pure conflict of laws in regard to the assets concerned, the formalities required, the sanctions applied and the effect produced.

On the other hand, it should be stressed that the requirements of such formalities, left to the laws of the Contracting States, can only affect invoking against third parties the transfer of the assets to which they relate, whereas in respect both of these assets and of all the other components of the capital of the company required, transfer as such takes place automatically, i.e. by the very fact of the merger (Article 29: see para. 91 et seq. above). It is also laid down (Article 31, para. 2) that the acquiring company may itself carry out the formalities envisaged in para. 1. This precaution is vital to prevent the disappearance of the company, and any negligence on the part of its former organs of management, from making the transfer of the assets in question against third persons impossibles on this same point (see Article 27, para. 3, para. 94, *(b)* above).

It was also pointed out in the course of the discussion of the text that the national law still had the option of applying, in the event of transfer of certain assets as a result of a merger, formalities other than those designed to make it possible to invoke such transfer as against third parties (e.g. entry in a land register); but in no instance can formalities condition the automatic transfer of the capital of the company acquired by virtue of the merger itself.

Paragraph 2

Issue of shares and cash adjustments

101. In virtue of *Article 32*, the issue of shares, as well as that of share certificates, must be

made in accordance with the provisions on mergers of the law applicable to the company acquired. If the merger plan itself contains provisions to this effect, these will be followed, insofar as they are compatible with the law thus specified.

Section 8

Liability and nullity

102. A merger is the culmination of a series of acts which may involve irregularities in respect either of the Convention itself, if it regulates them directly, or of the national laws, when the Convention refers to them. In strict logic all such irregularities, or at any rate the more serious ones, could render the act affected, and consequently, the merger itself, void. But we know that generally speaking nullity has very serious drawbacks in company matters which have led most of the national legislatures to keep its causes and effects down to a minimum. The limitations adopted are coordinated in the legislations of the Contracting States by the Directive of 9 March 1968. What is likely to have still more serious consequences is nullity of a merger, since this threatens an industrial and financial regrouping which it is impossible to unscramble without causing serious harm; and this would apply with even greater force to an international merger, which will almost invariably involve very substantial interests.

103. For this reason the Convention, by combining, in accordance with its usual practice, rules of conflict and substantive rules, has devised a legal régime to govern nullity which takes these factors into account. In establishing this régime, the delegations had in mind both the Directive of 9 March 1968 and the draft directive on domestic mergers, and they also took heed of the lesson to be learned from the limits which the authors of the latter found in the matter of coordination.

104. But whether or not they culminate in nullity, irregularities affecting a merger can cause harm to the companies involved, to their shareholders, and to third parties. Thus liabilities may be incurred, and these too are not disregarded in the Convention.

Furthermore—as was realized, for example, when the draft directive on domestic mergers was being prepared[1]—sanctions other than nullity and third party liability can be incurred for irregularities arising out of mergers; and these too are taken into account in the Convention.

105. In the section below we shall look first (para. 1) at liability, which is dealt with in Article 33, at the head of Section 8 of the Convention; we shall then go on (para. 2) to discuss all the questions concerned with nullity (Articles 34, 35 and 37 to 39, para. 2) and finally (in para. 3) we shall consider Article 36, relating to civil sanctions other than nullity.

Paragraph 1

Liability

106. *Article 33* provides that any 'liability which may be incurred by reason of the merger operations shall be governed, in respect of each of the merging companies by the law applicable to it in the event of a merger.' This is a rule of conflict, since it was clear from the outset that the Convention could not embark on a type of the systems of third party liability in the Contracting States that was limited to one particular area.

107. It may be noted, moreover, that if Articles 16 and 17 of the draft directive on domestic mergers were adopted as at present worded, the legislations of the Contracting States would have to institute third party liability in respect of the members of the management and supervisory organs of the company acquired and of the experts appointed

1 The draft directive requires the Member States to arrange for this type of sanctions (Article 18, para. 2).

to prepare the report on the merger plan on its behalf in accordance with the principles or for the purpose of these two articles respectively. But article 33 of the Convention is deliberately couched in much more general terms, not only because in the case of internal mergers these provisions are for the moment only proposals, but also because the national legislations can or could impose other types of liability (on the organs or experts of the acquiring company for example), or liability peculiar to international mergers. It was therefore deemed advisable merely to give a blanket reference, for each of the companies merging, to the law applicable to it in the event of a merger. This means, here as everywhere else, the prospective law on international mergers, or failing this, the rules governing liability incurred in the event of a domestic merger, it being further specified that as in the case of all rules of conflict, 'law' signifies law of any kind, including jurisprudence as such.

Whether disputes relating to liability are regarded as coming under the law of the acquiring company or that of the company acquired will no doubt raise difficulties such as arise constantly in private international law. These will have to be disposed of in each individual instance by the judge of the forum, in accordance with the particular system used for settling conflicts of laws.

Paragraph 2

Nullity

108. As has been said, the charge of irregularity for which the sanction may involve nullity may be made in respect of the various acts concurring to bring about a merger. But nullity of the whole merger itself can result. The Convention deals separately with these two aspects of the problem of nullity.

A. — Nullity in respect of the acts leading to a merger

109. *Article 34* specifies that 'the conditions for and the effects of nullity of the acts leading to the merger shall be governed in respect of each of the merging companies by the law applicable to it in the event of merger'. Here again we have a rule of conflict; the Convention had no call to become involved, except to stipulate that beyond a certain date it cannot challenge the validity of the merger itself on grounds other than those accepted by the Convention itself (Article 35: see para. 111 et seq. below). This explains the expression: 'Without prejudice to the provisions of Article 35...' used at the beginning of Article 34.

110. Apart from that, this provision calls for little special comment. It will be noted merely that the expression 'acts leading to the merger' is a all-embracing as possible. It covers both preparatory acts, such as the merger plan, disclosure and deposit of the plan, reports of company organs or of experts, and communication of these documents, and the acts crystallizing the merger (e.g. the deliberations of general meetings and the subsequent merger contract). But obviously each individual national legislation must decide which of these 'acts' can be annulled. Where they have to do exclusively with one of the companies (e.g. the reports of company organs or experts, and general meetings), nullity of these instruments is governed by the law applicable to that company in the event of a merger (international, or failing this, domestic). Where the acts are indivisible, as in the case of a merger plan, or a merger contract, nullity could be pronounced by the presiding judge, by joint or several application of the laws of the two companies, in accordance with the principles of his own system of coping with conflicts of laws.

B. — Nullity of the merger

111. *Article 35* circumscribes very closely the cases where nullity of a merger once completed can be established or pronounced. After the date laid down in Article 26 (the date, as will be remembered, on which the merger takes effect: see para. 81 et seq. above), this can only occur 'for lack of judicial or administrative control or certification in due legal form'; in other words, where neither of the steps has been taken that

are calculated almost invariably to prevent the merger if one or more of the acts required are found to be irregular. Further still 'If in one of such cases the law governing the acquiring company excludes the nullity of the merger or subjects it to special conditions, such law shall be applicable' (Article 35, second sentence). The rule of conflict only arises, as we see, to make the possible danger of nullity even more remote; but it refers here exclusively to the law of the acquiring company, since it is the latter that bears the main brunt of the action to annul the merger, and it runs the risk of being wound up and dissolved if the nullity is established or pronounced. It therefore seemed proper to safeguard mergers against nullity not recognized by the law of the acquiring company, but not to admit this exclusion of one of the causes of nullity if it were embodied in the law governing the company acquired. It is self-evident, on the other hand, that the absence of control or of certification in due legal form (or the one of these two causes recognized by the law of the acquiring company) would involve nullity, whether caused by the acquiring company or by the company acquired.

112. Article 35 also calls for the following observations:

(a) It specifies that nullity may not be 'established or pronounced' except in the cases indicated, thus covering even the circumstances in which, under the law applicable, the judge does not decide that a merger is null but merely establishes nullity as arising directly out of the law.

(b) Article 35—which it will be recalled is referred to in Article 34 (see para. 109 above)—rules out establishment or pronouncement of nullity in respect of one of the acts leading to a merger after the date on which the merger takes effect. To be more exact, it would be better to say that nullity could take place after that date, but it could not invalidate the merger. However, in practice this is inconceivable, since it would make the nullity of the isolated act meaningless.

(c) Finally, it was pointed out in the course of the deliberations that the judicial or administrative control in default of which nullity is incurred is the preventive control of legality envisaged in Article 23, para. 1 (see para. 69 et seq. above; and for controls other than legality control, see Article 56, para. 149 et seq. below).

113. Even in the two sole cases admitted, the Convention offers yet another device for avoiding nullity, a device known to certain national legislations in the case of nullity incurred by companies[1] and likewise taken over for domestic mergers by the draft directive (Article 18, *(d)*). Thus *Article 37* provides that 'nullity of the merger provided for in Article 35 may no longer be established or pronounced' (for this twofold stipulation, see para. 112, *(a)* above) 'where it is still possible to eliminate the cause thereof and where regularization occurs within the time-limit fixed by the court'. This implies that the court handling an action for nullity of a merger to which the Convention applies must set a time-limit for regularizing the position; but it is up to it to specify the duration.

114. It will be noted on the other hand that where it can occur, and failing such regularization within the time-limit set, nullity of a merger is not subject to the possibility of a 'return to the status quo'. This condition is, however, embodied in the draft directive on domestic mergers (Article 18, *(b)*); but even if national legislations have already adopted it or should do so in the future for internal mergers, it could not be extended to international mergers under the Convention, since the latter determines the cases and conditions in which nullity of a merger can be established or pronounced on the basis of substantive rules, without the additional intervention of a rule of conflict.

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[1] See, for example, for France: Law of 24 July, 1966, Article 363. For Germany: formation of companies, cf. *AktG.*, paragraph 275, 2 and 276.

115. By the terms of *Article 38*, 'an action for annulment may no longer be brought after the expiry of a period of six months from the date on which the merger may be invoked against the party seeking the annulment'. Thus a rule of procedure here limits the risks of nullity of the merger (on this same point, in respect of internal mergers, see the draft directive, Article 18, *(c)*).

The date from which the period of six months is reckoned will vary according as the action for annulment is based on the failure of control or of certification in due legal form in respect of one or other of the companies in question, since for each of them the merger may be invoked against third parties in accordance with the conditions laid down by the law governing it (Article 28: see para. 90 et seq. above).

116. *Article 39* stipulates disclosure of the decision establishing or pronouncing nullity in the States where the companies which have merged had their seat (para. 1), and in regard to the arrangements to be made for this disclosure and its effects, it cites the provisions of the law of each of the companies relating to the invoking of statutory amendments against third parties (para. 2). In para. 3, it specifies that opposition by third parties, when allowed by the law of the State where the decision was taken, shall no longer be receivable after the expiry of a period of six months reckoned from the completion of the disclosure formalities envisaged in the previous paragraphs (in this connexion, see Article 12, para. 1 of the Directive of 9 March 1968 for nullity applied to companies, and Article 18, para 1, *(e)* of the draft directive for domestic mergers).

The interpretation of these provisions does not seem likely to raise any difficulty. It is hardly necessary to point out, in particular, that by envisaging an action for annulment (Article 38) and by prescribing disclosure of the decision, the Convention implies that nullity of the merger can in fact only be established or pronounced by means of a decision. This is an implicit substantive rule, in keeping moreover with the state of the law of the six contracting countries which would be reinforced, if that were necessary, in respect of domestic mergers (Article 18, para. 1, *(a)*). Conversely, it is obvious that the Convention merely specifies the time-limit for third party opposition, and does not prescribe regular resort to this practice, which in any case depends for its existance and its legal regime on the law of the State where the decision is taken.[1]

117. The decision establishing or pronouncing nullity of the merger will clearly produce effects. It is hardly conceivable, in particular, that it will not in one way or another influence what happens to the acquiring company and possibly the company acquired (e.g. either the former will be wound up or dissolved or if it is still feasible, the company acquired will be reconstituted and recover its capital, the acquiring company then reverting to its previous status). But it was not the purpose of the Convention to regulate these effects, which will be determined by the law applicable in accordance with the private international law of the judge handling the case.

On the other hand, for the protection of third parties, it was essential to safeguard any obligations which might arise for the acquiring company during the period after the merger has become effective. This is catered for in *Article 40*.

118. Article 40 states in paragraph 1 that 'the decision establishing or pronouncing the nullity of the merger shall not of itself affect the validity of the commitments entered into by the acquiring company or those assumed towards it prior to the disclosure referred in Article 39'.

The term 'commitments' here must be taken to mean all obligations arising for the acquiring company, whatever the source (contract, quasi-contract, tort, or any other). At the same time, it is obvious that the text refers only to obligations arising subsequent to the date on which the merger takes effect, as laid down in

[1] It may be recalled here that German law makes no provision for this type of action.

Article 26 (see para. 81 et seq. above) and including those arising between that date and the date when the merger can be invoked against the creditors (Article 28: see para. 90 et seq. above), at any rate if under the law applicable, third parties are entitled to avail themselves of the merger even before it may be invoked against them (see para. 90 above). Furthermore, the obligations in question are the ones arising before the decision establishing or pronouncing nullity of the merger may be invoked against the creditors, in accordance with the national law envisaged in Article 39, para. 2 —see para. 116 above—and implicitly referred to in Article 40, para. 1.

119. To strengthen creditor protection, paragraph 2 of Article 40 provides that 'the companies which have taken part in the merger shall bear joint and several liability for the commitments of the acquiring company referred to in the previous paragraph'. The text here would be effectively implemented where nullity of the merger did not involve the winding up and the dissolution of the acquiring company (since in this case it is the capital of the latter, incorporating that of the company acquired, that would incur liability for the commitments in question) but reconstitution of the companies which had merged.

Paragraph 3

Civil sanctions other than nullity

120. The provisions on nullity just discussed will undoubtedly have the effect of making cases where it is effectively established or pronounced quite exceptional. While this aim is desirable in view of the drawbacks of invalidating an international merger once it has taken place, the conclusion must not be drawn that short of nullity, irregularities affecting merger operations will escape with impunity; if that were so they would be likely to proliferate to the detriment of the legitimate interests of the members and of third parties.

The liability incurred by those causing such irregularities is of course already a sanction additional to nullity, and it can arise even when nullity can no longer be established or pronounced. But as may be well imagined, in addition to liability, national laws provide other measures involving sanctions or compensation Some of these measures may be civil. Examples would be—as was pointed out by Professor van Ommerslaghe in his report on the draft directive on domestic mergers—an adjustment of the share exchange terms, or compulsory repurchase of the shares of the minority by the majority.

121. *Article 36* provides for such sanctions, which could arise if nullity of the merger could no longer be established or pronounced but for the determination of such sanctions it stipulates in principle the law applicable to the acquiring company in the event of a merger. This is justified by the fact that in practice, and precisely because nullity of the merger is out of the question, it is in the acquiring company that such sanctions could be applied. But the Article adds that where the action designed to impose such sanctions is brought by the shareholders, the creditors, or the co-contractors of the company acquired, these sanctions shall be determined by the law of the company acquired relating to mergers. In fact, it may be felt that the persons envisaged will have quite rightly counted on being protected by that law.

122. *Article 36* calls for two further observations:

(a) Although it refers in very general terms to civil sanctions, it is not concerned with liability, which is dealt with in Article 33 (see para. 106 et seq. above). In fact, the latter is a special case taking precedence within this orbit over the general rule of Article 36 (specialia generalibus derogant). In practice, this means that liability would be regulated by the law governing the company against which the action is brought, or the company with which the acts laid against the individual defending such action are linked. For example, the liability

of the directors of one of the companies will be governed by the latter's law, that of the expert by the law of the company to which he was appointed. In all these cases, obviously, the law in question is that applicable in the event of a merger.

(b) Article 36 relates only to civil sanctions, but this does not prevent the Contracting States from applying penal or administrative sanctions in the event of irregularity in merger operations. Such sanctions naturally come under the law of each State, and will be applied by the authorities just as they will not apply those of the law of another State; and they can perfectly well be applied, if the law from which they derive so decides, even where the nullity of the merger can be established or pronounced in virtue of the Convention. But the Convention had no call to become involved here, even by crystallizing the principles just recalled in a text.

Chapter III

Merger by formation of a new company

123. Like Chapter II relating to mergers by acquisition, Chapter III of the Convention, dealing with mergers by formation of a new company, begins with a definition of this operation (Section 1), borrowing with virtually no substantive change the wording of the corresponding section at the head of Chapter II.

Once this had been done, it was not necessary to repeat, for mergers by formation of a new company, all the provisions relating to mergers by acquisition, since it was found that most of these provisions would apply to this second type of merger as they stood, subject to adaptation of the terminology and one or two very slight substantive adjustments, Section 2 of Chapter III sets out the provisions thus adapted and adjusted.

However, on a number of points, provisions peculair to mergers by formation of a new company had to be devised. These are grouped together in Section 3 of Chapter III.

Section 1

Definition of merger by formation of a new company

124. *Article 41* contains the actual definition of merger by formation of a new company. The characteristics of this operation, as set forth in the Article, correspond feature for feature to those already seen in the definition of merger by take-over in Article 4, except of course that here two companies at least transfer their capital to the new company set up by them, whereas in the case of a merger by acquisition of the enquiring company to which the transfer is made, existed prior to the operation.

Hence we shall confine our analysis of Article 41 to the observations made in regard to Article 4 (see para. 25 above), with the additional point that the definition of merger by formation of a new company is couched in virtually identical terms in the Convention and in the draft directive on draft mergers (Article 2, para. 3).

125. Article 42 is parallel to Article 5 (see para. 26 above). It provides in para. 1 that the provisions relating to mergers by formation of a new company shall likewise apply where one of the companies holds all or part of the shares of the other. Para. 2 takes over and simply adapts to cover this operation—which does not involve one acquiring company, and one company acquired, but two or more companies which disappear to form a new company—the provisions of Article 5, paras. 2, *(a)* and *(b)* on the application of Articles 11 and 12 in the event of one of the companies merging being the holder of all the shares in another.

It was felt that in international relations, mergers by formation of a new company could be of interest and could therefore find themselves in this situation. Such would be the case, for example, if the organs of management of the parent company considered it worth while (e.g. for tax reasons) to establish the registered office of the company, after merging with its subsidiary in a country other than that in which the registered office of either was located. For this it would be necessary, if the merger was by acquisition, subsequently to transfer the registered office of the acquiring company to the country selected. In the present state of the general and contract law of the Contracting States, international transfer of the registered office of a company in this way would meet with obstacles in many cases insurmountable; and even if the obstacles were to disappear one day by virtue of a convention on the transfer of the registered office of a company from country to country—for which negotiations are envisaged likewise in Article 220 of the Treaty of Rome—a merger by acquisition followed by transfer of the company's registered office would be more complicated than the direct formation of a new company in the country where companies merging with that end in view would like to establish their registered office. These difficulties do not arise within one and the same country, since there is no particular obstacle to the transfer of registered offices. This is the reason why the case was not considered in the draft directive on domestic mergers.

126. In the same way (in contrast with what is laid down in Article 5, para. 2, first sentence, in respect of mergers by acquisition of a subsidiary by the parent company holding all its shares), Article 42 does not rule out the application of Article 8, para. 1, *(b)* and *(c)*. These, it will be remembered, are texts prescribing that the merger plan shall mention the share exchange terms, the amount of any cash adjustment, the arrangements for allotment of the shares of the acquiring company, and the date on which the shares give entitlement to participate in profits. As was explained above (para. 31), in the event of a merger by acquisition, these points did not need to be mentioned in the merger plan where the acquiring company was the holder of all the shares in the company acquired, since in that case there would be no shareholders outside the acquiring company to be protected by means of this information. The acquiring company being the only shareholder in the company acquired would allocate to itself its own shares, created in lieu of the capital contributed by the company acquired.

The situation is different in the case of a merger by formation of a new company, since in this case it is the latter's shares which will be distributed to the shareholders of the companies which cease to exist, including the shareholders of the company holding all the shares in the other, or another. Consequently, these shareholders are entitled to receive the particulars which are to be mentioned pursuant to Article 8, para. 1, *(b)* and *(c)*.

127. Article 43 corresponds to Article 6 (see para. 27 above), but the reference to the law of the company acquired to allow the merger to take place when the latter is in liquidation is in this case necessarily replaced by a reference to the respective laws applicable.

It should be emphasized that the pertinent law is in each instance that of the company in liquidation. If this allows for mergers, it makes little difference whether the law of another company which is not in liquidation forbids mergers in the case of companies in liquidation.

Section 2

Provisions relating to mergers by acquisition applicable to mergers by formation of a new company

128. Article 44 para. 1 lists the provisions of Chapter II which apply to mergers by formation of a new company. It does not refer to Articles 1 and 2 dealing with the field of application of the Convention as a whole (see para. 11 et seq. above) and at present common to the two types of merger mentioned in Article 3 (see para. 22 above).

For the application of the provisions relative to mergers by acquisition to mergers by formation of a new company, the terms 'companies merging' or 'company acquired' designate the companies which cease to exist, and the term 'acquiring company' refers to the new company, the point being that it is only the companies ceasing to exist which 'merge', since the new company will only come into existence by the effect of the merger. Similarly, the companies which cease to exist are wound up and transfer their capital, whereas the new company receives it, so that both the former and the latter are respectively in parallel legal situations to that of the company acquired and the acquiring company.

129. The essential omissions in the enumeration in Article 44 are first of all the provisions in Chapter II, Section 1 (Articles 4 to 6: definition of merger by acquisition and Section 8 liability and nullity). The former, as we have seen, are taken over and adapted in Chapter III by Articles 41 to 43 (see para. 124 et seq. above); the latter could not be adapted as they stand to cover the type of merger envisaged in Chapter III, for the very good reason that this type involves the formation of a new company, and in the main, liability and nullity are handled at the level of this new company.

Nor do the following appear in the enumeration:

— Article 21, *(b)* (see para. 63 above) and Article 14, para. 1, *(b)* (see para. 73 above), since both these Articles presuppose the existence of an acquiring company, but the control of the merger plan prescribed in Article 24, para. 1, *(b)* in the acquiring company must take place here in each of the companies disappearing whose law provides for preventive control of legality;

— Article 25, which specifies in the event of a merger by acquisition the chronological order of control, or control and notarial certification, since in the mergers governed by Chapter III control or certification by notarial act of the formation of the new company must necessarily come last, so that the chronological order of the formalities in the companies which cease to exist does not matter;

— Article 26 (date on which the merger takes effect: see para. 81 et seq. above), Articles 27 and 28 (disclosure and invoking the merger against third parties—see para. 87 et seq. above), since the formation of a new company necessitates special provisions in respect of these matters (Articles 47 to 49; see para. 135 et seq. below).

It is further stipulated, in a footnote to Article 44, para. 1, that the enumeration will have to be completed in the light of the texts inserted in Chapter II, Section 5 (question of participation: see para. 67 above).

Various adjustments are also made to some of the provisions relating to mergers by acquisition

applicable to mergers by formation of a new company.

(a) Article 8, para. 1, *(a)* is equally applicable to the new company (Article 44, para. 2). It is the Article that prescribes that the merger plan shall mention the name, legal form and registered office of companies merging, and it obviously had to be specified that in the case of Chapter III these particulars would be given not only for the companies ceasing to exist but for the new company as well.

(b) Similarly, for the application of Article 9, (which mentions among the annexes which must mandatorily accompany the merger plan the Statutes of the companies merging: see para. 32 et seq. above) and Articles 14 and 15 (which require the deposit of the statutes together with the merger plan and communication of these to all shareholders: see para. 42 et seq. above), the draft statutes of the new company are attached to the statutes of the companies merging (Article 44, para. 3). This document is necessary to provide complete information for shareholders and third parties.

(c) Finally, Article 44, para. 4 provides that for the application of Article 19 (relating to the 'a posteriori' protection of creditors: see para. 57 above) the reference to Article 27 (relating to disclosure of mergers by acquisition: see para. 87 et seq. above) is replaced by a reference to Article 48, the Article dealing with disclosure in the case of mergers by formation of a new company (see para. 136 below).

Section 3

Special provisions

130. These provisions relate to the merger plan and the draft statutes of the new company (para. 1); the formation of the new company (para. 2); the date on which the merger takes effect and disclosure of the merger (para. 3); and liability and nullity (para. 4). Mention will also be made of certain provisions discussed in the course of the deliberations but finally discarded (para. 5).

Paragraph 1

The merger plan and draft statutes of the new company

131. As we know, Articles 7 to 10, relating to the merger plan and its annexes, and Articles 14 and 15, concerning deposit and communication of these instruments, are applicable in virtue of Article 44 to mergers by formation of a new company. The same applies to Article 16, concerning approval of the merger by the general meetings of the companies merging, the post-merger contract, and action by shareholders having special rights and holders of securities other than shares (see para. 45 et seq. above).

But in the case of Chapter III, these provisions had to be supplemented to take account of the establishment of a new company. This is the object of *Article 45*.

132. Paragraph 1 of the Article provides that 'the merger plan or the draft statutes of the new company shall state the names of the members of the organs of the new company whose appointment according to the law of the country of the registered office of such company is to be divided either by the general meeting or the companies which themselves cease to exist'.

This means that the appointment of the members of the organs of the new company will be subject to the approval of the general meetings of each of the companies ceasing to exist (Article 45, para. 2, see para. 133 below). It is specified that the particulars must appear either in the merger or in the draft statutes since one or other of these alternatives is adopted for domestic mergers by the laws of the Member States. On the other hand the members whose names must thus be mentioned (and hence whose appointment is subject to the approval specified) are those who under the law of the country where the new company establishes its registered office must be appointed either by the general meeting of that company or by the companies which cease to exist.

Deliberate use was made, in expressing this second alternative, of the very general formula 'appointment... is to be divided by the companies which themselves cease to exist...', so as not to prejudge the provisions of the applicable law which determine which of the organs of a company ceasing to exist must make the appointments.

133. Article 45, para. 2 stipulates that 'the merger plan and the draft statutes of the new company shall be approved by the general meetings of each of the companies which cease to exist'.

Inasmuch as it stipulates approval of the merger plan this Article is parallel to Article 16, para. 1 (see para. 45 et seq. above), which is already referred to in Article 44 (see para. 128 above), and which stipulates that a merger (by acquisition) requires the approval of the general meetings of each of the companies merging. But in this case it was desirable to stipulate in addition the approval of the draft statutes of the new company, since this is formed by the companies which cease to exist (Article 41: see para. 124 above, and on the same point in the case of domestic mergers, the draft directive, Article 19, para. 2).

Paragraph 2

Formation of the new company

134. Apart from the substantive rule in Article 45, para. 2, which prescribes the approval of the statutes by the general meetings of the companies which cease to exist, *Article 46* specifies in all matters concerning the formation of the new company and the disclosure thereof the provisions of the law of the country of its registered office relating to the formation of companies arising out of a merger, or failing such provisions, the general law governing company formation. The final part of the Article takes account of those legislations which have no rules governing the formation of companies as a result of mergers.

Paragraph 3

Date on which the merger takes effect and disclosure of the merger

135. The principle determining the date on which the merger takes effect is the same here as in the case of a merger by acquisition. The date is that on which all the documents and formalities required for the crystallization of the merger have been completed (see para. 83 above). But whereas for a merger by acquisition the application of this principle results in different dates according as the merger is subject to legality control in both companies or only in one of them, and bearing in mind also the post-merger contract (Article 26: see para. 81 et seq. above) it was found possible to avoid these distinctions in the case of mergers by formation of a new company. Here the merger is not entirely effective until the new company comes into existence in law, since the formation of the company is the final step in the merger as such, as defined in Article 41 (see para. 124 above). In practice, on the other hand the discussions revealed that in all the Contracting States, whether they belong to the judicial or administrative control system or to that of notarial certification, the new company only acquires legal personality after all the documents and all the formalities required for the merger to take effect have been completed.

In this situation, *Article 47* states a very simple uniform rule: the merger takes effect on the date on which the new company acquires legal personality.

136. Articles 48 and 49 embody provisions in respect of disclosure of the merger and invoking it against third parties very similar to those for mergers by acquisition we saw in Articles 27 and 28 (see para. 87 et seq. above).

(a) Under *Article 48*, para. 1, the arrangements for disclosure of the merger are determined in respect of each of the companies which cease to exist by the law applicable to it (see

disclosure of the formation of the new company, which as we have seen is dealt with in Article 46 (see para. 134 above).

But as in the case of mergers by acquisition it is specified (Article 48, para. 2) by means of a substantive rule supplementing the rule of conflict that disclosure shall include mention of the place and date where the disclosure formalities laid down in Articles 13 and 14 were carried out (publication of the merger plan and deposit of the plan and certain of its annexes —see Article 27, para. 2). This stipulation extends to disclosure of the new company, since those taking cognizance of the merger in the country of the new company must know where they can obtain the information on the subject.

Finally, like the acquiring company under Article 27, para. 3 (see para. 89 above) and for the same reasons, the new company can itself carry out the disclosure formalities relating to the companies which cease to exist (Article 48, para. 3).

(b) Article 49 regulates the invoking of mergers against third parties in the same way as Article 28 does in respect of mergers by acquisition (see para. 90 above). The legal provisions for determining the conditions subject to which this can take place are those governing each of the companies which cease to exist, as well of course as those of the law governing the new company. Hence there will be several dates on which the merger may be relied on or against third parties. The reasons why this arrangement was finally preferred to that of a single date were explained above in connexion with mergers by acquisition.

It should also be noted that like Article 28, Article 49 is subject to the application of Article 31, concerning the special formalities required by the law governing certain assets, as regards invoking their transfer against third parties (see para. 100 above).

Paragraph 4

Liability and nullity

137. Article 50, concerning liability, is strictly parallel to Article 33 relating to the same subject in the case of mergers by acquisition (see para. 106 et seq. above). It indicates in respect of each of the companies ceasing to exist the law applicable to it in the event of a merger, and for the new company the law applicable in the event of the formation of a company in the country of its registered office.

138. Similarly, *Article 51*, on nullity of acts leading to a merger, is parallel to Article 34 (see para. 109 et seq. above). For the conditions and effects of such nullity it indicates the law applicable in the event of a merger to each of the companies which cease to exist.

However, Article 51 does not adopt the reservation in regard to Article 34, which as will be remembered limits the grounds on which nullity of a merger by acquisition may be established or pronounced after the date on which the merger takes effect (see para. 111 et seq. above). But the question of nullity of the merger does not strictly arise here; nullity in this case is closely connected with that of the new company, so that Article 52 makes the former subordinate to the latter (see para. 140 below). But it was not necessary in Article 51 to make a reservation in respect of the application of Article 35, for the simple reason that its effect is to make nullity of acts leading up to the merger insufficient to cause the nullity of the merger; this could only be at best a secondary consequence brought about by nullity incurred by the new company.

139. Nullity of the new company is governed, in accordance with *Article 52*, para. 1, by the law applicable in the event of formation of a company in the country of its registered office. The term 'nullity' here is comprehensive: it refers to the causes of nullity (a complete list

of these is given in Article 11, para. 2 of the Directive of 9 March 1968; but it should be pointed out that the Member States of the EEC had the option of not accepting, and that some of them in fact did not accept, all the causes of nullity thus 'authorized'), to the requirement of a judicial decision to pronounce nullity, and to the invoking of this decision against third parties and the effects of nullity. All of these are matters on which the legislations of the Contracting States have been or will be coordinated in implementation of the Directive of 9 March 1968.

140. Furthermore, Article 52, para. 2 stipulates that nullity of a merger may not take place unless there is nullity of the new company. We have indicated above the impact of this provision on the regulation of nullity of acts leading to a merger (see para. 138 above).

Paragraph 5

Provisions discarded

141. It was envisaged in the course of the discussions that two provisions might be inserted into the Convention to cater for certain effects of nullity pronounced in respect of a new company set up by way of merger: one by which all the companies which had taken part in the merger would be responsible jointly and severally with their capital for commitments underwritten by the company born of the merger; and the other by which these companies would again take over, retroactively and automatically, the rights and obligations transferred to the company wound up, except that the court pronouncing nullity would determine how this should be done.

But is was found that in this way the Convention would regulate the effects of nullity in respect of a company, whereas under the law of the Contracting States, these effects should be determined in accordance with the Directive of 9 March 1968. Indeed, Article 12, para. 3 of the Directive lays down that nullity shall not affect the validity of any commitments entered into by or with the company, which means that national legislations could not provide that the company born of a merger could evade honouring its commitments on the grounds that nullity had been pronounced in respect of it. Such commitments must in fact be honoured in respect of the whole of the capital of the company, comprising all the assets contributed by the companies which have ceased to exist.

With regard to the reconstitution of these companies, apart from the fact that it might seem at variance with the principle of non-retroactivity of nullity pronounced in respect of a company, the essential consequences of which are mentioned in Article 12, paras. 2 and 3 of the Directive of 9 March 1968, it was estimated that this would more often than not meet with considerable practical difficulties.

142. The outcome of all this is that by application of Article 52, para. 1 (see para. 139 above), the effects of nullity pronounced against a company born of a merger are regulated exclusively by the law applicable to the formation of a company in the country of its registered office. In practice, these effects should conform to the provisions of the Directive of 9 March 1968.

Chapter IV

General provisions

143. The general provisions deal first of all with judicial or administrative decisions and notarial deeds relating to mergers (section I), and secondly with the rules relating to control of mergers other than preventive control of legality (section II). After that details will be given of provisions envisaged in the course of the deliberations but finally abandoned (section III).

Section 1

Judicial and administrative decisions — Notarial Deeds

Paragraph 1

Recognition of decisions

144. Under *Article 53*, decisions taken by the judicial or administrative authorities of a Contracting State in the exercise of the preventive control of legality laid down in Articles 23 and 24 (see para. 68 et seq. above) are recognized in the other Contracting States in accordance with the provisions of the Convention on Jurisdiction.

It was felt that in the absence of such a provision, doubts might have arisen in respect of the application of the Convention to such judgments, or some of them. It might have been true, for example, of judgments by administrative authorities; furthermore, the designation of certain authorities (e.g. the registrar of the tribunal de commerce in France) as judicial or administrative agencies might have been queried. Similarly, even where it is exercised by a judge, as in Germany and Italy, preventive control of legality involves acts (e.g. authorization of entry in the register) whose status as 'judgments' within the meaning of Article 25 of the Convention on Jurisdiction is open to question.

Article 53 forestalls such doubts, whether justified or not. The experts naturally assumed when they inserted the Article in the Convention on Mergers that the Convention would not enter into force earlier than the Convention on Jurisdiction.

Paragraph 2

Power to draw up notarial deeds

145. It will be recalled that in the absence of preventive control of legality bearing on all the acts required for a merger, the Convention prescribes certification in due legal form of the minutes of the general meetings at which the merger is decided, and where applicable, the contract subsequent to such general meetings (Article 23, para. 2: see para. 68 et seq. above). It will also be recalled that by virtue of Article 7, para. 2 (see para. 30 above) the merger plan must also be drawn up in due legal form if the law of one of the companies merging so requires. Mergers coming under the Convention necessarily involve companies belonging to different Contracting States; hence it was essential to provide for international competence to draw up such notarial deeds.

146. Such is the purpose of *Article 54*, which first of all embodies (para. 1) a point recognized in private international law in all the Contracting States by granting competence for this purpose to 'persons authorized to draw up such acts in the territory of the State to whose laws the company to which they relate is subject. Thus in the event of a merger between a Belgian company and a Luxembourg company, the number of the general meetings of each of the companies approving the merger will be drawn up by Belgian notaries in the former case and by Luxembourg notaries in the latter.

But there are notarial deeds relating to mergers which are not linked to one of the companies individually. This is true of the merger plan if it takes this form, and of the merger contract subsequent to the general meetings. The case

is dealt with in Article 54, para. 2, which states that 'acts relating to several companies jointly may be drawn up by the persons authorized in one of the States to whose laws such are respectively subject'. For example, in the case of a merger between a Belgian company and an Italian company, the notarial deeds attesting the 'a posteriori' merger contract (which must be established in accordance with Article 16, para. 2: see para. 45 above) may be handled by either an Italian notary or a Belgian notary.

147. As has been said, these provisions relate only to the international competence of the persons called upon to prepare the deeds envisaged by the Convention. They are not designed to regulate, within any Contracting State, the way in which the competence is granted to this or that person in that State qualified to prepare such acts, this being solely a matter for the domestic law.

Paragraph 3 of Article 54 expressly confirms this when it states that 'the national provisions relating to the territorial authority of persons instructed to prepare notarial deeds shall be respected'. For example, Belgian law alone will decide whether the documents relating to a merger involving a Belgian company having its seat in Brussels and a company in another Contracting State must be drawn up by a notary residing in Brussels or may be drawn up equally well by any notary residing anywhere in Belgium, or only by certain such notaries. Similarly, each country has the right to decide whether or not to allow its notaries to draw up instruments abroad and to allow foreign notaries to do the same within its territory.

Paragraph 3

Waiver of authentication

148. Following the example of The Hague Convention of 5 October 1961 waiving the requirement of authentication of foreign public documents, and the Convention of Brussels of 27 September 1968 (Articles 49 and 50, third paragraph), *Article 55* waives authentication and all other similar formalities in respect of 'notarial deeds' and documents of a judicial or administrative authority drawn up in connexion with a merger.

The expression 'notarial deeds' here relates to documents attested by a notary. Furthermore, any enumeration of the documents for which authentication was waived was studiously avoided. The very comprehensive wording of the Article covers all instruments connected with mergers, including those which the Convention does not expressly regulate (e.g. attestation by a notary to serve as proof that he has certified the legality of the merger operations, if the law of the company with which he is concerned requires such a document).

Similarly, the Article waives not merely authentication but any other formality of the kind in respect of such acts, which must be taken to include the apostil to The Hague Convention of 5 October 1961 and any other formality whose object is to attest the regularity or authenticity of the instrument or merely to certify physically the signature of its author.

Section 2

Controls other than preventive control of legality

149. In the Contracting States, mergers are subject, or could in the future become subject, to controls laid down by law and even arising out of professional practice, other than preventive control of legality of the merger vis-à-vis company law as it exists in some of these States. This type of control is of course also additional to certification of the legality of the merger by a notary in those States where there is no judicial or administrative control for this purpose. Such as for example (the list does not pretend to be exhaustive) the control exercised in Belgium by the Banking Commission over the information given to the public when securities created by the merger are quoted on the stock exchange. This control

is exercised frequently, but only de facto, over the reports made to general meetings which have to decide on a merger, and it is of great practical efficacy, even though it cannot have the effect either of arresting or of nullifying the merger. Mention may also be made of the control exercised in Germany over mergers, regarded from the economic point of view of the concentration of undertakings, by the cartels authorities (GWB of 27 July 1957), a device which may well develop in the near future; the same type of control which can be exercised in France in respect of certain mergers (for example if they appear as the result of an abuse of dominant positions), in virtue of Article 59*bis* of the amended Order of 30 June 1945, and control by the French Stock Exchange Operations Commission where a merger involves a company whose securities are quoted on the stock exchange; the requirement in Italy of a ministerial authorization to increase the capital of the acquiring company the granting of which furnishes an opportunity for assessing the economic desirability of the merger; the control exercised in Luxembourg by the Banking Control Commissioner if there is offer or public sale of securities; and in the Netherlands, refusal of dealings in securities by the Association for Trade in Transferable Securities, which involves intervention by the Amsterdam Stock Exchange in the event of failure to observe the 'merger code' set up by a regulation of the Economic and Social Council (the Code contains measures for the protection of shareholders and employees).

In ECSC, mergers only occur in practice for the time being between undertakings within a single Member State, but where they involve coal or steel firms, they are subject to control by the Commission (ECSC Treaty, Article 66). This same control would of course also be exercised in regard to mergers between companies of different Member States. Again, as we know, the EEC Commission exercises control over concentrations affecting trade between Member States where the operations involved seem to it to constitute an abuse of dominant positions (see the Continental Can Company decision of 9 December 1971: OJ No L 7 of 8 January 1972). If the Commission should exercise such control over an international merger, the Convention would not stand in the way.

150. Obviously in deciding in Article 23 that if the law governing one of the companies merging provides for preventive control of legality of the merger the provisions governing such control apply to that company (see para. 71 above), the Convention was not ruling out the various national controls other than legality control (and more specifically, here again, other than legality vis-à-vis company law) existing in the Contracting States—of which we have just given several examples. Nor did it rule out any controls of that nature which may be instituted in those States in the future. Nor again, of course, can exclusion result from Article 23, para. 2, which prescribes, in the absence of such control, certification in due legal form of the general meetings where the merger is decided and the merger contract, if any, subsequent to those meetings (see para. 71 above).

151. But in the end it seemed preferable to embody this in a text, and it was done in *Article 56*, which provides (first sentence) that 'the present Convention shall not affect national and Community merger control provisions other than the preventive control of legality laid down in Articles 23 and 24'. These provisions will therefore be applied to a merger governed by the Convention as to any other; but the second sentence of Article 56 specifies—and this is no doubt the main point of the Article—that 'nullity of a merger, even if provided for by the law under which such control has taken place, can be certified or pronounced only in accordance with Articles 35 and 52, para. 2'. Nullity in such circumstances, if provided for by, say, the law of competition can therefore not take place in the case of a merger by acquisition after the date when this has taken effect (Article 35: see para. 111 et seq. above;) and in the case of a merger by formation of a new company, unless nullity is pronounced in respect of this company itself (Article 52,

para. 2: see para. 139 et seq. above); and this can not happen in the Contracting States, as we know, outside the cases exhaustively listed in the Directive of 9 March 1968 (Article 11, para. 2).

152. But ruling out nullity of the merger would not prevent the controls envisaged in Article 56 from generating other sanctions to be determined and regulated by the law instituting such controls. To mention one or two examples only: third party liability incurred by those attempting to evade control or not obeying the orders of the authority exercising it; fines (e.g. those laid down in Article 66 of the ECSC Treaty and Article 15 of Regulation No 17/62/EEC); transfers of shares or division of assets (ECSC Treaty, Article 66: cf. the Continental Can Company decision cited above para. 149), provided such measures do not imply nullity of the merger in circumstances at variance with Articles 35 and 52, para. 2 of the Convention; penal sanctions, etc.

Section 3

General provisions discarded

153. These provisions related either to the conclusive force of certified acts drawn up in connexion with a merger (para. 1), or to public policy (para. 2).

Paragraph 1

Conclusive force of certified acts

154. Under the law of the various Contracting States, excepting that of Germany, the conclusive force of a certified act cannot be challenged in respect of the particulars entered by the notary in the instrument ex propriis sensibus, except through the forgery plea procedure.

But a certified act relating to a merger may have to be produced to the authorities in a country other than that where it was drawn up. This would be true, for example, of the post-merger contract required by the law of one of the companies but subject to control in the country of the other company (Article 24, para. 3, *(a)*) see para. 75 above). How would the conclusive force of the act be treated in the host country? And by what procedure and before what court could it be challenged, for example if the challenge referred to particulars protected in the country of origin by the plea of forgery requirement?

155. The experts agreed that conclusive force would be determined, in accordance with a rule of private international law followed very generally, by the law of the country where the act was drawn up; but it seemed unnecessary to corroborate this in a text, for the very good reason that it arises under general law, which is virtually uniform on this point in the Contracting States.

With regard to the plea of forgery (which is necessary the moment the judge in the country where the act is produced gives it the conclusive force it had in the country of origin, and that the act is valid in that country subject to this procedure), the feeling of most of the experts was that the plea should be made before the competent court in the country where the act was drawn up. But recourse to a plea of forgery seemed too exceptional to warrant an explicit provision in the Convention.

156. It will be noted finally that in the case of acts of judicial or administrative authorities relating to mergers, the problem of conclusive force does not appear necessarily to arise, since it derives from the recognition which as we know must be granted to them under the provisions of the Convention of 27 September 1968 (Article 53: see para. 144 above).

Paragraph 2

Public policy

157. The idea had been mooted in the course of the deliberations of inserting in the

Convention a provision relating to public policy, closely based on Article 9, para. 1, and Article 10 of the Convention on Recognition.

But here again it was found—as in the course of the work on the formulation of the latter Convention and the Convention on Jurisdiction Article 27, para. 1 of which also makes a reservation on grounds of public policy—that such a provision would be extremely unusual in the relations between the Contracting States, whose moral concepts and fundamental principles of laws are similar, and whose laws in relation to companies and mergers are likely to be progressively coordinated. Furthermore, it was pointed out that Article 1, para. 2 of the Convention already referred in both its variants to the case where one of the companies merging was not recognized in a Contracting State, for example, pursuant to Article 9 of the Convention of 29 February 1968 (i.e. for reasons of public policy within the framework of that Article) and the consequences were drawn in relation to mergers. It therefore seemed unnecessary to make an express reservation, by means of a general provision, in respect of public policy, since it is difficult to imagine what other practical effects there might be.

Chapter V

Interpretation of the Convention by the Court of Justice of the European Communities

158. The heed to ensure as far as possible the uniform interpretation in all the Contracting States of conventions concluded pursuant to Article 220 of the Treaty of Rome had already been realized when work began on the Convention on Recognition and the Convention on Jurisdiction. This uniformity of interpretation is indeed a condition for the real uniformity of decisions taken in virtue of the Conventions in all the Contracting States, and hence for their effective implementation.

This explains why joint declarations were annexed to the first two Conventions signed, by which the Governments of the Contracting States in essence declared themselves ready to examine the possibility of avoiding differences of interpretation by granting jurisdiction to the Court of Justice of the European Communities, and to negotiate an agreement to this effect if necessary.

159. Hence two protocols were signed in Brussels on 3 June 1971 concerning the interpretation by the Court of Justice of the Conventions of 29 February and 27 September 1968 respectively.[1]

There are two main differences between these two agreements:

(a) Article 1 of the Protocol concerning the Convention on Recognition, like Article 177 of the Treaty of Rome, provides that courts in the Contracting States have the option or the obligation to bring any request for a preliminary ruling on interpretation before the Court of Justice, according to whether or not there is a possibility of appeal from their decisions under internal law; whereas Article 3

[1] Supplement 4/71—Bull. EC.

of the Protocol concerning the Convention on Jurisdiction, which is much more complex in its drafting, implies essentially that the right to request a ruling from the Court is not granted, unless the circumstances are exceptional, to courts of first instance.

(b) Again, Article 4 of the Protocol concerning the Convention on Jurisdiction provides for a request for a ruling on interpretation which the competent authority in a Contracting State may make of the Court of Justice along the lines of the 'pourvoi dans l'intérêt de la loi' ('appeal in the interests of the law') found in several of the Contracting States.[1]

160. The Articles relating to interpretation by the Court of Justice, which in this instance it was found possible to incorporate in the Convention on Mergers too, are based on these two sources.

(a) After laying down in *Article 57* the principle of the jurisdiction of the Court of Justice of the Communities to decide matters relating to its interpretation, the Convention in *Article 58* separates the jurisdiction between the courts which must request this interpretation and those which have the option of doing so, in the same way as Article 1 of the Protocol concerning the Convention on Recognition and Article 177 of the EEC Treaty. The obligation to request a ruling of the Court applies only to courts or tribunals in Contracting States whose decisions cannot be appealed under internal law, but all other courts have the option of so doing.

There are two reasons explaining and justifying this differentiation. First of all, the Convention on mergers relates to companies, as does the Convention on Recognition; it was therefore natural that the former should take over the latter's procedure in regard to the division between courts entitled to request a ruling of the Court of Justice and courts required to do so. Furthermore, the reason why the Protocol concerning the Convention on Jurisdiction grants the option of requesting a preliminary ruling on interpretation to courts of appeal only is that it was felt that disputes over the recognition and implementation of decisions would be very frequent, so that the Court might well have been swamped by an unduly large number of requests for interpretation if the latter could have been made by any court; on the other hand there is little to be feared in regard to the Convention on International Mergers, since it is unlikely that these will be very numerous.

(b) However, *Article 60* takes over in almost identical terms the provisions of Article 4 of the Protocol concerning the interpretation of the Convention on Jurisdiction which has no counterpart in the other Protocol. Thus we find in the sphere of the Convention on Mergers a sort of 'appeal in the interests of the law', or more precisely, a type of appeal which can be made by the Procureur Général with the Courts of Cassation of the Contracting States, or any other authorities designated by a Contracting State (Article 60, para. 3), to require the Court of Justice to give a ruling on a question of interpretation of the Convention, if the judgment handed down by courts in the State whose competent authorities make the appeal are at variance with the interpretation given either by the Court of Justice or by a court in another Contracting State (subject to difficulties, to which we shall refer below, in determining the courts of another Contracting State whose judgments are subject to appeal: see para. 162, *(c)* below).

This procedure is not designed to alter the judgment to which it applies; hence paragraph 2 of Article 60 specifies that the interpretation given by the Court of Justice following such a request shall have no effect on those judgments. It is a 'supreme appeal' to prevent divergent interpretations from becoming crystallized, and

[1] See for example, in French law, the Law of 3 July 1967, *Journal Officiel de la République française* of 4 July 1967, Article 17; D. 67-1210, 22 December 1967, *Journal Officiel de la République française* of 30 December 1967, Article 20.

it can only be made if duly argued decisions by national courts have the force of law (Article 60, para. 1 in fine); otherwise, the court dealing with an appeal under internal law against such a judgment may or should, according to the circumstances, call for a preliminary ruling on interpretation.

This same device of an 'appeal in the interests of the law' also explains paragraphs 4 and 5 of Article 60. The former lays down a procedure by which any Contracting State, or the Commission or the Council of the European Communities, may submit statements of case or written observations to the Court of Justice; under the second, the procedure may not involve either the levying or refund of costs or expenses.

161. To round off the list of provisions under Chapter V, we need only mention *Article 59*, under which 'insofar as the present Convention does not provide otherwise, the provisions of the Treaty establishing the European Economic Community and those of the annexed Protocol on the Statute of the Court of Justice which are applicable where the Court is called upon to give preliminary rulings, shall likewise apply to the interpretation procedure under the present Convention'. The wording at the beginning of the text is explained by the fact that the machinery for preliminary ruling concerning interpretation here does not derive from Article 177 of the Treaty of Rome but from provisions in the Convention itself, which in fact are not identical, in particular in respect of all matters relating to request under Article 60, these being unknown in EEC law. Taking these differences into account, Article 59, para. 2, provides moreover that 'the rules of procedure of the Court of Justice shall be adapted and supplemented if necessary in accordance with Article 188 of the Treaty establishing the European Economic Community'.

162. It remains to recall reservations or misgivings which arose in connexion with the adoption of the wording of Chapter V.

(a) None of the delegations raised any objection to Articles 57, 58 and 59, i.e. to texts other than that instituting appeals similar to the 'appeal in the interests of law'. But the delegation of the Grand Duchy recalled that it had always been and continued to be anxious that the widest possible powers to rule on interpretation should be conferred on the Court of Justice by means of a comprehensive convention covering the interpretation of all the conventions concluded or to be concluded pursuant to Article 220 of the Treaty of Rome.

(b) The German delegation, while not opposing the insertion of Article 60 in the Convention, reserved the right to revert to it when the matter came up for discussion in the Council, and emphasized that in any event its adoption should not prejudge any solution that might be found in future conventions.

(c) Lastly, the scope of request under Article 60 gave rise to differences of opinion.

The delegations agreed unanimously that a request would in any event be in order if a judgment handed down in the Contracting State whose competent authorities lodged the request was at variance with an interpretation given by the Court of Justice.

But beyond this, under one system (preferred by the French, Luxembourg and Netherlands delegations) a request would be in order in the event of a disputed judgment of any court whatever in another Contracting State. A second more restrictive system would make this possible only if the challenge referred to the interpretation given by a court whose judgment were not subject to appeal under municipal law, or an appeal court. This second system (identical with that of the Protocol on the interpretation of the Convention on Jurisdiction) is favoured by the German, Belgian and Italian delegations; while the Netherlands delegation, although indicating its preference for the first system, stated its readiness to fall in with the decision of the majority.

It was this divergence which prompted the wording 'referred to Article 58, para. 2, or

which has decided on appeal' given in square brackets in Article 60, para. 1.

163. The concern of the Contracting States to ensure that the application of the Convention is as effective as possible likewise prompted the adoption of Joint Declaration No 2 (see para. 178 et seq. below).

Chapter VI

Final provisions

164. The final provisions relate to the following questions:

— Relationship between the Convention on the one hand and other conventions and the rules of domestic law on the other (Section I);

— Territorial field of application of the Convention (Section II);

— Ratifications and entry into force (Section III);

— Declarations provided for in Article 21 of the Convention (Section IV);

— Deposit and notifications (Section V);

— Duration and revision (Section VI);

— Authentic texts (Section VII);

On all these points the Convention follows very closely, with minor adaptations, the corresponding provisions of the two Conventions concluded pursuant to Article 220 of the EEC Treaty and already signed and in the course of ratification (Convention on Recognition, Convention on Jurisdiction), account being taken in some instances of clarifications furnished by the Protocols of 3 June 1971 concerning the interpretation of these conventions.

Section 1

Relationship between the Convention, other conventions and the rules of domestic law

165. Under *Article* 61, para. 1, preference is given to the Convention in the event of discrepancy within its field of application (i.e. in respect of mergers of sociétés anonymes coming under different national legislations), between its provisions and those of other conventions to which the Contracting States are or may become parties.

However (Article 61, para. 2) the Convention does not affect such provisions, nor rules of domestic law, present or future, which provide in other instances for the possibility of international mergers. In other words, the Contracting States are at liberty, through other international commitments or in virtue of their domestic law, to go further than the Convention, but may not restrict its scope.

Such treaty provisions or rules of domestic law should also be compatible with the Treaty establishing the European Economic Community. This means that neither bilateral conventions nor rules of domestic law may allow companies belonging to certain Member States alone the possibility of merging in cases not laid down in the Convention binding them all, since this would be at variance with the principle of non-discrimination between individuals and legal persons nationals of those States (EEC Treaty, Article 7).

Section 2

Territorial field of application

166. According to *Article* 62, the Convention 'shall apply to the European territory of the Contracting States, to the French Overseas Departments and to the French Overseas Territories'. Furthermore the Kingdom of the Netherlands may, at the time of signing or of ratifying the present Convention or at any time thereafter, by notice to the Secretary-General of the Council of the European Communities, declare that the ... Convention shall apply to Surinam and the Netherlands Antilles'.

It will be noted first of all that this wording, which is more concrete in respect of the Netherlands than that in the Convention on Recognition (Article 12) is taken verbatim from the Protocols of 3 June 1971 (Protocol concerning the interpretation of the Convention on Recognition, Article 4, and Protocol concerning the interpretation of the Convention on Jurisdiction, Article 6). No objection could be raised, moreover, to its introduction into the Convention, since both for the French Overseas Territories and for Surinam and the Netherlands Antilles the French and Netherlands delegations had declared respectively during the deliberations leading to the conclusion of the Convention on Recognition that the company law applied there is, and is to remain, identical with or substantially similar to that of the European territories of France and the Netherlands. This means that as applied to the law in force in the overseas territories and countries in question, the many references in the Convention to the provisions of the national legislations concerning mergers or amendments to statutes will produce virtually identical results with those arising out of their application to the legislations of the European territories of those two States.

Section 3

Ratifications and entry into force

167. *Article 63* provides that the Convention shall be ratified by the signatory States. The duty of depositary of the instruments of ratification is entrusted to the Secretary-General of the Council of the European Communities, since the Convention is after all concluded within the framework of the Communities.

168. According to *Article 64*, the Convention 'shall enter into force on the first day of the third month following the deposit of the instrument of ratification by the last signatory State to undertake this formality'. This means that before it can enter into force, the Convention must have been ratified by all the signatory States.

Section 4

Declarations provided for in Article 21

169. It will be recalled that under Article 21 (see para. 63 et seq. above), any Contracting State may declare that:

(a) It will apply to creditors, whether debenture holders or otherwise, only Article 19 (i.e. a posteriori protection, as opposed to the a priori protection provided for in Article 18: see para. 53 et seq. above);

(b) It will apply to creditors, whether debenture holders or not, of the acquiring company where the latter is subject to its law, the same provisions as to creditors of the company acquired.

Article 65, para. 1, states that these declarations may be made on the date of signature of the Convention or at any subsequent date. The possibility of making one or other declaration following signature of the Convention, and even after its entry into force, certainly presents drawbacks. But they are minor, since as we shall see, Article 66 provides (see para. 171 below) that the Secretary-General of the European Communities shall notify the signatory States, among others, of the declarations in question, so that any State can be adequately informed in accordance with the provisions it lays down. This information should give interested persons timely warning, for while declarations made not later than at the time of deposit of the instrument of ratification take effect on the day of entry into force of the Convention, those made later will only take effect on the first day of the third month following receipt of that notification. Lastly, in virtue of Article 65, para. 3, declarations have no effect on mergers where the merger plan has been disclosed previously in accordance with Article 13 (see para. 41 above). In practice this provision only affects declarations made after the entry into force of the Convention, and prevents these from modifying the legal status of mergers, whether already completed or still in progress at the time when the declarations are made.

In view of these precautions, a 'last-minute' declaration presents little danger, and the experts considered it useful to authorize this so as to enable a Contracting State which had in the first instance observed the general law of the Convention, i.e. protection both a priori and a posteriori but confined to the creditors of the company taken over, to revert in the light of experience to merely a posteriori protection (in conformity with the domestic law of most of the Contracting States), or to extend protection to the creditors of the acquiring company (or both).

170. Conversely, and likewise for the sake of flexibility, Article 65, para. 2, allows any Contracting State to withdraw its declarations, or one of them, whether made prior to the deposit of the instrument of ratification, at the time of deposit, or subsequently. Like declarations made subsequent to the deposit of the instrument of ratification, and for the same reasons of publicity and security, the withdrawal must be communicated to the Secretary-General of the Council of the European Communities, who must in turn bring it to the notice of the signatory States (Article 66, *(c)*): see para. 171 below). It takes effect only on the first day of the third month following receipt of the notification (Article 65, para. 2, second sub-paragraph), and it has no effect on mergers where the merger plan has been published previously (Article 65, para. 3).

Lastly, withdrawal of a declaration is final (Article 65, para. 2, second sub-paragraph in fine). It was decided that allow a declaration to be remade once it had been withdrawn, or even to allow it to be withdrawn at a later date... would have made the application of the Convention not so much flexible as unwarrantably unstable.

Section 5

Deposit and modifications

171. Under the terms of Article 69, the Convention shall be deposited in the archives of the Secretariat of the Council of the European Communities, and the Secretary-General shall transmit a certified true copy to the Government of each signatory State. Furthermore, *Article 66* instructs the Secretary-General to notify the signatory States of the following legal instruments and facts of which they have to be

informed if they are to be apprised of the applicability of the Convention and of any changes made in its application.

(a) The deposit of every instrument of ratification;

(b) The date of entry into force of the Convention (Article 64: see para. 168 above);

(c) The declarations and notifications received in pursuance of Articles 21 (see para. 63 et seq. above), 62 (see para. 166 above) and 65 (see para. 169 et seq. above);

(d) The dates when these declarations and notifications take effect (established, as we know, in Article 65: see para. 169 et seq. above).

Section 6

Duration and revision

172. *Article 67* states that the Convention 'is concluded for an unlimited period', a stipulation logically borrowed, in this Convention as in the previous ones (see Convention on Recognition, Article 17; Convention on Jurisdiction, Article 26; and the Protocols of 3 June 1971, Articles 8 and 12) from Article 240 of the Treaty establishing the European Economic Community.

Consequentially, *Article 68* specifies that any Contracting State may request the revision of the Convention. In this event, a revision conference shall be convened by the President of the Council of the European Communities (similar wording appears in the Convention on Recognition, Article 18; the Convention on Jurisdiction, Article 67; and the Protocols of 3 June 1971, Articles 9 and 13).

Section 7

Authentic texts

173. In virtue of *Article 69*, the Convention is drawn up in a single original, in the Dutch, French, German and Italian languages, all four texts being equally authentic (similar wording appears in the EEC Treaty, Article 248; the Convention on Recognition, Article 19; the Convention on Jurisdiction, Article 68; and the Protocol of 3 June 1971, Articles 10 and 14).

Chapter VII

Joint declarations

174. Three joint declarations are annexed to the Convention, the first for special reasons which will be explained (see para. 177 below). They are concerned respectively with:

— The protection of the rights of workers (Section I);

— The exchange of information concerning certain decisions taken in application of the Convention (Section II);

— The tax treatment of international company mergers (Section III).

Section 1

Joint Declaration No 1

(Protection of the rights of workers)

175. Comments were made (para. 95 et seq.) on Article 30 of the Convention, which makes the general principle of transfer of a company's capital applicable to contracts of employment binding on the company acquired and supplements this by measures for the protection of employees, for example where they are offered work in a country other than that in which they were employed prior to the merger, or where the merger involves other substantial changes in the contract of employment. But it was pointed out at the same time that although agreement, at any rate at the technical level, had only been reached in regard to this limited text, all the delegations were perfectly aware of the far greater social problems which mergers, and in a more general way, international concentrations would bring about, and of the need to find and promote over-all solutions to these problems. This in fact led two delegations, as will be remembered, to oppose the insertion of Article 30 in the Convention (see para. 99 above).

176. With this in mind, the experts endeavoured throughout the discussions to find ways and means of expressing this concern and more precisely the serious concern of their Governments for the social aspects of international mergers. This is the object of Joint Declaration No 1, which affirms the concern of the Governments for the protection of the rights of employees, not only in the event of international mergers of companies but in all international concentration operations of whatever kind. It should also be observed at once that as far as concentration operations other than mergers are concerned, protection under this heading is outside the scope of the Convention.

The declaration also expresses the desire of the Governments to provide employees with effective protection without prejudice to any more favourable provisions they enjoy in virtue of the law applicable to them. The idea here was to reflect the concern felt by several delegations that since international agreement was only feasible in respect of certain protective measures, their adoption might seem in cases of international mergers to prevail over more favourable provisions made by national legislations. In view of that, the experts deliberately gave very full treatment to any more favourable provisions which workers would enjoy 'under the law applicable to them', without prejudice either to the title of that law (which may be that of the individual contract of employment, the employment legislation mandatorily applicable, a collective agreement, or any other legal system under the body of rules which the judge of the forum might feel constrained to apply), or its source (law, regulation, care law, or other).

Lastly, by this declaration the Governments of the signatory States 'note with satisfaction that the Commission of the European Communities has decided to set up' (for the protection of employees) 'a working group to study the questions raised in this area by international

concentration operations with a view to drawing up a legal unstrument to regulate these matters.' In fact, in the course of the deliberations the representative of the Directorate-General of the internal market and the approximation of laws of the Commission informed the experts that this working group had been set up. In the final paragraph of the declaration, the Governments would be expressing their satisfaction at this decision, at the same time implicitly renewing their hopes that the study in question would effectively extend, as was intended, to all forms of international concentration, while avoiding prejudging also the nature of whatever legal instrument (inter-State convention, Council regulation or directive) which might be drawn up.

177. The delegations of Belgium, France, Italy and Luxembourg approved this text (whereas it will be remembered that the delegations of Belgium and Luxembourg were opposed to the insertion of Article 30 in the Convention on the grounds that it was unduly narrow in scope). The delegations of Germany and Netherlands opposed it, not of course because they did not share the unanimous concern for the protection of the rights of workers, but because they considered that the initiative taken by the Cimmossion made the proposed declaration superfluous, and that the Memeber States should steer clear of any involvement in the future outcome of that initiative by means of a simple wish expressed in a document with no immediate and direct legal force.

Section 2

Joint Declaration No 2

(Exchange of information)

178. The Governments of the signatory States, adopting the essential wording of the joint declarations attached the Protocol concerning the interpretation of the Convention on Recognition and the Protocol concerning the interpretation of the Convention on Jurisdiction respectively, expressed in Joint Declaration No 2 their desire to ensure that the provisions of the Convention are applied as effectively and uniformly as possible and declared their readiness to organize to this end, in cooperation with the Court of Justice, an exchange of information on the decisions made in application of the Convention by the courts and tribunals mentioned in Article 58, para. 2. These are of course the national courts whose judgments do not admit of appeal under domestic law and which are therefore required to ask the Court of Justice for a preliminary ruling on questions of interpretation of the Convention (see para. 160 above).

179. There is not need to dwell on the importance of this exchange of information. In the first place, there is no guarantee that a national supreme court will at all times request an interpretation of the Court of Justice, either because it feels that the particular provision is perfectly clear, or because in its view the point has already been the subject of an interpretation, and all that is needed is to apply it. On the other hand, since the interpretation of the Court of Justice is by its nature abstract, the inferences which will be drawn from it by national courts may involve more than subtleties, even in very similar types of cases. This like Article 177 of the Treaty of Rome, Article 58, para. 2, of the Convention does not entirely dispose of this danger of different interpretations, even at the level of the highest national courts. The exchange of information laid down in Joint Declaration No 2 will draw attention to these discrepancies, and will thus make a very useful contribution to a uniform interpretation of the Convention.

Section 3

Joint Declaration No 3

(Tax treatment of international mergers)

180. When they began their work, as will be remembered (see para. 8 above) the experts

considered it pointless to make international mergers legally possible unless the tax obstacles existing at the present stage of the law of the Contracting States and very frequently making mergers virtually impossible were removed at the same time. But it was to be remembered that in view of their limited terms of reference, they had felt it preferable from the outset to leave it to the tax experts meeting within the framework of the Commission to produce the draft directive which was subsequently to be submitted to the Council on 18 March 1969.

181. On the initiative of the Italian delegation, the link between tax problems and the legal regulation of international mergers was again brought up in the final phase of the work. The relative slowness of the Council of the Communities to adopt the draft directive on taxation was not the only reason for this initiative. The Italian delegation made a very thorough study of all the tax questions which could arise out of international mergers, and expressed the opinion that unless the Community replied to these questions such mergers, although legally feasible by virtue of the Convention, might not always come about for exclusively economic reasons of an objective kind, but in order to enable companies belonging to one country to place themselves under the tax regime of another which seemed likely to be more advantageous; or conversely, there might be a 'flight' from mergers with the companies of a particular country because their consequences seemed likely to be fiscally disadvantageous.

With this in mind, the Italian delegation raised, in addition to the question of the tax treatment of international mergers as such, those of the taxation of company profits and the movement of transferable securities, indicating also from this latter point of view, possible consequences of an obligatory nominal value of company shares.

182. Without contesting the importance of these various questions, the other delegations felt that their solution was not be sought, in general, within the framework of the Convention on International Mergers.

However, they appreciated the concern expressed by the Italian delegation, and they reached unanimous agreement on the text of Joint Declaration No 3.

Although apparently limited in scope, this declaration is nevertheless of great practical significance. The Governments of the signatory States recall in it first of all that 'the problem of international mergers of companies raises not only strictly legal questions but also questions concerning the tax treatment of mergers'. By thus refraining from mentioning the other tax issues referred to above, the Governments on the other hand express their conviction that the lack of a solution in regard to the tax treatment of international mergers may prevent them from taking place 'and consequently may prevent the Convention from attaining its objectives', so that this is an indispensable prerequisite for the effective application of the Convention. They therefore undertake to help to expedite the adoption within the framework of the European Communities of the measures required. This undertaking makes the declaration a very concrete one, since the representatives of these same Governments make up the membership of the Council of the Communities, which at present has before it the draft directive concerning the common régime of mergers between companies of different Member States (and hence Contracting States).

Brussels, 27 September 1972.

Annex 1

Special report on the situation of certain companies vis-à-vis the Convention on the international merger of sociétés anonymes

1. The report concerning the draft Convention on the international merger of sociétés anonymes states (paras. 12, 13, 20) that while the link between companies to which the Convention applies, and the Contracting States is necessarily first and foremost juridical, it can also be regarded from an economic and indeed a political point of view. It further points out that while the experts designated by the Member States succeeded—though obliged to leave the choice between two variants open in some respects—in presenting to their Governments in Article 1 of the draft a text defining the link in law between the companies to which the Convention would be applicable, they felt that a decision on the need for, and in some cases the definition of, an economic link between such companies and the Contracting States was dependent on political options which could only be exercised by the representatives of the Member States of the European Communities meeting in the Council.

But in the course of their deliberations the experts found that the adoption, if any, of a specifically economic criterion for the links binding companies (which most of the delegations did not favour), and particularly that suggested, as we shall see, by the French delegation, would raise technical issues which would have to be solved before that criterion could be applied; and even though it did not seem to them advisable, precisely because of the political implications of the problem as a whole, to try to settle those issues, they nevertheless agreed that the attention of their Governments should be drawn to them by way of a special report to be annexed to the report on the draft Convention. Hence to present document.

2. From the outset, the French delegation emphasized the importance it attached to the links between the companies involved and the Contracting States, especially because of the legal and fiscal benefits which the Convention would bring such companies by easing the way for international mergers and making them practically feasible by liberal tax reliefs. The French delegation considered that such benefits should only be granted to 'genuinely Community' companies, thus stressing what the Contracting States had already recognized, namely that the exclusively juridical and quite abstract criterion in Article 58 of the Treaty of Rome was not 'automatically' applicable in conventions to be concluded pursuant to Article 220. Nor would this criterion of linkage, which differed from that in Article 58, necessarily be uniform in all those conventions.

3. From the very outset the other delegations expressed serious reservations, not to say decided opposition, to seeking in the Convention on International Mergers a criterion on linkage more restrictive than the one adopted in the Convention on Recognition; but they asked the French delegation to crystallize its views in a draft text which could be discussed on a subsequent occasion.

4. This draft was submitted by the French delegation at the meetings of 2 to 6 June 1969. The draft text, which with drafting changes would have formed Article 1 of the Convention, reads as follows:

'*Article 1.* The Contracting States shall recognize mergers taking place in accordance with the provisions set out below between companies formed under the law of one of the States and having their registered office in the territories to which the present Convention applies.

However, the previous paragraph shall not apply if one of the companies merging belongs to an international group of companies

and decisions relating to its industrial, commercial, financial or social policy are taken on the instructions or recommendations of a company having its effective seat outside the territories to which the present Convention applies.'

In the 'explanatory note' accompanying its proposal, the French delegation again recalled that 'without prejudice to any benefits conferred by other instruments, the Convention on International Mergers shall permit such operations—at present impossible in practice because of the current rules of law in the six Member States', and it drew conclusion that 'the legal possibilities thus offered to enterprises for concentration and restructuring within the framework of the Common Market seem to ... warrant confining them to companies having substantial links with the Member States of the Communities'.

This, it was explained, was why after the first paragraph has given a definition of the nationality of companies closely based on that in the Convention of 29 February 1968, the second paragraph of the proposed text, envisaging the cases where one of the companies merging belongs to an international group of companies, withholds the benefits of the Convention unless the 'decision-making centre' of the group is inside the Community. This 'decision-making centre' would be the place where 'decisions are taken concerning investments, financing, manufacturing programmes, patent and licence policy, employment policy, and competition and markets' (but the French delegation pointed out orally in the course of the debate that this was not an exhaustive list of examples). Where the decision-making centre as thus defined is in a country outside the Communities, the French delegation's argument is that the enterprises dependent on it, even if legally attached to a Member State, cannot be considered 'genuine Community' companies.

5. The first paragraph of the French proposal has to do with the strictly juridical linkage of companies. This is at present dealt with in Article 1 of the draft Convention, with its two variants, and there is a commentary on it in the report (para. 12 et seq.).

The second paragraph, concerning economic linkage, gave rise to lengthy exchanges of views. Quite apart from the objections of principle already mentioned (although the experts refrained from discussing them at length on the grounds that such a discussion could only usefully be held at the political level), several legal and practical questions were raised.

(a) One of the delegations expressed the view that the text could be regarded as incompatible with Articles 7, 58 and 220 of the EEC Treaty.

The French delegation again observed, in connexion with the possible incompatibility of its proposal with Article 58 of the Treaty, that it appeared to have been agreed during the preceding discussions, relating both to the Convention on Mergers and to the Convention on Recognition, and in the latter case during the discussions in the Council, that the criteria of linkage of companies could differ according as the basis of discussion was Article 58 or 220, and also according to which of the various conventions was referred to in the latter.

(b) The question was also raised whether, if the requirement of economic linkage was accepted, it would be in its proper place in the Convention, or whether it would not be more appropriate among Community provisions on taxation in relation to International Mergers. In the latter case, the companies meeting not only the legal criterion but the economic criterion of linkage as well would be given the tax advantages granted to international mergers between companies belonging to different Member States, but the applicability of the Convention, and hence the legal possibilities it offers, would be subject only to their links in law.

During the experts' deliberations, the French delegation did not entirely rule out the possibility of its proposal being inserted in the tax provisions alone.

(c) It was pointed out by several delegations that if the principle of economic link were adopted in the Convention, the text embodying it would have to be very carefully drafted.

In that connexion, most of the delegations felt on first sight that the notion of 'decision-making centres' was too vague and might well give rise to differences of interpretation on the part of national authorities. But the French delegation pointed out first of all that in fact, in business practice, dependency status within a group of companies was more often than not easily ascertained or revealed; and secondly, that preliminary rulings on interpretation by the Court of Justice should make it possible to avoid any difference of opinion as to the general meaning of the notion of 'decision-making centres'.

All the same, the French delegation did not present the criterion proposed as one not open to discussion. It pointed out in particular that a different approach had been suggested in July 1967 in a report of the Committee of Permanent Representatives on Community policy in regard to petroleum and natural gas, accepted by the Council as a starting-point for subsequent work. The report indicated that the expression 'Community undertakings' as used in the particular context, 'designates undertakings whose base interest coincide by their nature permanently with those of the Community and which do not qualify for the benefits reserved by their countries of origin for the subsidiaries of undertakings from third countries established within the Community'. 'It might be said', the report went on, 'that this coinciding of interests exists when the undertaking is controlled by nationals or Governments of Member States and its decision-making centre is located in one of the countries of the Community'. Without proposing the adoption of such text, the French delegation felt that it gave food for thought about the problem of economic links.

(d) In any event, the other delegations strongly emphasized,—and the French delegation did not demur—that if the requirement of an economic link was laid down in the Convention, in particular the link involving the whereabouts of the 'decision-making centre', it would be essential to look into the method of verifying, in connexion with any particular merger, whether the requirement was effectively met.

In that connexion it was pointed out that in companies which were subject, in regard to mergers in particular, to preventive control of legality, judicial or administrative, it would no doubt be the authority exercising control that would have to ascertain whether the company involved did or did not belong to an international group, and if so, whether the 'decision-making centre' of the group was situated inside or outside the Community. But it was also pointed out that when in the absence of judicial or administrative control, the attestation of legality was placed in the hands of a notary, it might seem more difficult to expect the latter to undertake such a search. In that case, would it not be better to entrust that aspect of control, even in a company whose law merely provided for the services of a notary, to an authority other than a notary? This question was of course simply raised, but it was not examined, let alone answered.

(e) One vital question remained to be considered, namely that of sanctions attached to the requirements of economic linkage. In other words, what would happen if a company belonging to an international group whose 'decision-making centre' was outside the Community nevertheless merged, and indeed in the manner consistent with the Convention, with a company belonging to another Contracting State?

Under the French proposal (which it must again be pointed out was not submitted as the last word on the subject), in such circumstances the Convention would be inapplicable in such a case, and hence the merger would be a nullity, or more precisely, would not produce the effects laid down in the Convention. Article 35 (which, as we know, stipulates that after the date on which a merger takes effect,

nullity can no longer be established or pronounced unless in default of judicial or administrative control or in the absence of a certified act presupposes that the merger which is being challenged comes within the field of application of the Convention, otherwise it is alien to the Convention and to all its other provisions.

In the course of the discussion, the French experts, while not in any way committing their Government, nevertheless did not rule out the possibility of the whereabouts of the 'decision-making centre' in the Community being considered not as a condition of applicability of the Convention, but merely as a condition of the validity of the merger.

If this were so, it would of course, always mean ascertaining, by means either of judicial or administrative control or of notarial certification (or some control replacing this on the particular point) that the condition was met. But once the control or certification had been carried out, the merger would be safe from the possibility of nullity under Article 35, even if it should be subsequently proved that one or more companies which had taken part in it belonged to an international group whose decision-making centre was situated outside the Community.

Without further committing their Governments, most of the other delegations expressed the view that such a notion (which would naturally be reflected in wording different from that of the French proposal) might make it easier to incorporate in the Convention an economic criterion for the linkage between the companies merging and the Contracting States.

Brussels, 27 September 1972.

Annex 2

Special Report on the question of 'Participation'

1. Mergers between sociétés anonymes coming under the legislation of different nations necessarily raise the question of representation of the employees in the organs of those companies, or of some of them. This representation —which will be referred to below as 'participation' according to current usage, even though its organization and functioning by no means always involve employee participation in the actual management of the particular company— is in fact catered for in some of the legislations of the Member States, but in ways that differ from one to another, while other legislations have no such arrangements, but have provision for collective action by the employees at the company's places of business. But in effect international mergers cause one or more companies to cease to exist, and their businesses are from then onwards run by the acquiring company or by the new company, governed by a different law. Thus normally the consequence, in the present state of company law in the Contracting States, tends to be a drastic change in the representation of the employees in the company's organs, if not its disappearance.

2. Hence participation was singled out from the outset as one of the problems to be discussed by the experts. After a preliminary exchange of views of a general nature, three approaches emerged within the group which may be outlined as follows: The delegation from Italy was quick to argue that this problem could only be solved by coordination of the national legislations, which the Council of the Communities alone was competent to carry out; so that in its opinion, participation was not a subject for negotiations between the Member States or for provisions in a convention concluded pursuant to Article 220 of the Treaty of Rome;

— the delegation of the Federal Republic of Germany, on the other hand, urged vigorously and unceasingly the capital importance of the problem as Germany saw it and the overriding necessity for coping with it in the Convention, not only to ensure that international mergers did not become a means by which certain companies could 'evade' participation (which we know looms large in German legislation) but also to enable the type of international concentration operations which the Convention would promote to provide an opportunity for the development of participation as a factor making for peace and social progress;

— the other delegations, while sharing the German delegation's view that the question of participation in the context of international mergers could be settled in a convention concluded pursuant to Article 220, expressed the view—some of them vehemently, others in a less downright way—that precisely because of its social and hence its political importance, the problem could only be solved at the level of the representatives of the Member States meeting in the Council; but they nevertheless hoped, like the German delegation, that the group of experts would give it serious consideration so as to be able to provide the Council with as broad a view as possible of its legal aspects.

3. Hence the Chairman placed before the group of experts a draft text which forms Annex 2 A of this special report.

The suggestions put forward in this proposal (which of course would involve editorial and drafting changes if it were to be accepted as a basis for discussion) are based on the following factors:

(a) In principle, the laws on participation are territorial in their application. This means that in the event of an international merger, the representation of the employees company organs should be governed by the law of the acquiring company.

This is the point made in para. 1 of the proposal, and it would naturally apply also to the new company created as the result of a merger as

envisaged in the provisions of Chapter III of the Convention.

(b) Likewise territorial in their application are the laws relating to staff representation in the places of business of the acquiring company (or the new company), including of course those which before the merger belonged to the company acquired (or ceasing to exist). Para. 2 of the proposal deals with this point.

(c) But to take account, as far as is compatible with this principle of territoriality, of the rights granted to the employees of the country of the company acquired (or ceasing to exist) by the law which governed the latter, these rights would be transferred (subject to such adjustments as were necessary) to the places of business maintained by the acquiring company (or the new company) in the countries where the registered office of the company acquired was located. This is the object of para. 3 of the proposal.

4. The experts held a preliminary exchange of views on this proposal at their November 1970 meeting, and later on the German delegation did what it had wished to do at that meeting and on 1 June 1971 submitted a proposal (Annex 2 B) which was discussed thoroughly during the meeting of July 1971.

Ar that July meeting, in the face of the opposition of all the delegations at any rate to the institution of participation in cases where none of the companies concerned had had such a system prior to the merger the German delegation submitted on a purely provisional basis a 'contingent' proposal waiving participation in such cases (see Annex 2 C).

In accordance with the decision taken at the end of that meeting, on 7 August 1971 the Chairman of the group prepared a note setting out the pros and cons of the problem as they emerged from the discussions up to that time (see Annex 2 D). This note summarizes in particular the arguments put forward by the German delegation in support of its initial proposal, and reference should be made to it.

5. In this context the experts again examined the problem at their meetings of December 1971 and April 1972.

The stand taken by the delegations in the course of this examination may be defined as follows:

(a) The Italian delegation, while agreeing to submit strictly technical comments on the proposals made by the German delegation and the Chairman of the group, maintained the 'plea of non-admissibility' it had previously lodged in respect of any settlement of the problem of participation in the Convention on International Mergers.

The arguments in support of this stand were stated in a note dated 20 December 1971, (Annex E) which at the same time replied to the opposing submitted by the Chairman in his note of 7 August 1971 already mentioned (Annex 2 D) in favour of the insertion of provisions on participation in the Convention.

There is no point in pursuing the debate on this point in the present report, whose sole aim is to inform the representatives of the Member States of the Communities meeting in the Council as to the State of the work on participation now that they have before them the draft Convention on International Mergers. The writer would like to point out however—to reply very briefly to the arguments urged with particular force by the Italian delegation in the above-mentioned note—that in his view the jurisdiction given by the Treaty of Rome to the organs of the EEC in regard to the coordination of laws does not prevent the Member States from introducing into a convention uniform provisions of substantive law to regulate questions coming within the sphere of the Convention; and he persists in the belief that this is precisely the case of participation which under the legislations of three of the Contracting States affects the very structure of organs of one or more of the companies merging.

But the fact remains, of course, that the Member States of the Communities meeting in the Council at the moment are only dealing with the problem of participation subject to the express

reservation of the plea of non-admissibility raised by the Italian delegation.

(b) While not asking for its 'contingent' proposal (Annex 2 C) to be withdrawn from the file transmitted to the States' representatives, the German delegations maintains its original proposal (Annex 2 B), which it will be remembered provides for the institution of participation in the acquiring company (or the new company), even if none of the companies had such a system prior to the merger. The other delegations unanimously maintain their opposition to this broadening of the scope of participation.

The Netherlands delegation would be prepared to accept the German 'contingent' proposal provided the equivalence of the German and Netherlands systems of participation which it accepts, were also accepted by the other delegations (and in particular by the German delegation in the case of an acquisition of a German company by a Netherlands company). This attitude on the part of the Netherlands would have the following consequences:

(i) When the acquiring company is a Netherlands company, the Netherlands law relating to participation would apply (even if the company acquired were German);

(ii) When the company acquired is a Netherlands company, the special rules on participation contained in the German 'contingent' proposal would apply to the acquiring company, unless that company were German in which case the German law on participation would apply to it.

(c) The Belgian delegation, while signifying its agreement in principle with the Chairman's proposal (Annex 2 A) submitted two amendments to this text:

(i) Under the first amendment, para. 2 of the Chairman's proposal would read as follows: 'Staff representation and the jurisdiction of the organs of that representation in the places of business of the acquiring company shall be governed, in respect of each such place of business, by the law and the collective employment agreements of the Contracting State in which it is situated.'

The Belgian delegation explained this amendment by saying that in Belgium, staff representation was governed by the law concerning company boards and safety and health committees, and trade union representation by collective employment agreements.

(ii) The second amendment, which was not put in writing, would set up at company level a consultative organ designed to examine the decisions of the management affecting the activities of places of business situated in two or more Contracting States, and to give advice and make recommendations on the subject of those decisions.

Such a consultative organ would be set up in all cases where the acquiring company (or the new company) maintained a place of business in a Contracting State other than that in which it had its registered office, even though none of the companies merging had a participation system (e.g. in the case of a merger between a Belgian company and an Italian company more places of business were kept in Belgium and Italy: It was specified also that this amendment would be added to the present text of the Chairman's proposal without involving, in particular, the suppression of para. 3 of that text.

(d) The delegations of France and the Grand Duchy supported the Chairman's proposal and the amendments submitted by the Belgian delegation. The Italian delegation agreed, before the amendments were submitted but with the express reservation of its plea of non-admissibility, that from a strictly technical point of view the Chairman's proposal could be taken as a basis for discussion. It took no explicit decision on the Belgian amendments.

Brussels, 27 September 1972

P.S.: This report was drawn up and approved prior to the publictaion of the draft fifth directive on the structure of sociétés anonymes transmitted by the Commission to the Council of the European Communities on 9 October 1972.[1]

The author of this report feels that a proposal is a document which the Contracting States might well have to take into consideration.

Paris, 29 November 1972

[1] Supplement 10/72—Bull. EC.

Annex 2 A

Article 20[1]

Preliminary Draft Text prepared by the Chairman

1. Staff representation and powers in the management and supervisory organs of the acquiring company shall be governed by the law applicable to that company.

2. Staff representation and the jurisdiction of the organs entrusted therewith at the places of the acquiring company shall be governed, in respect of each such place of business, by the law of the Contracting State in which it is situated.

3. In addition, if the supervisory organ of the company acquired included staff representation, and if the acquiring company maintains one or more places of business in the territory of the Contracting State where the registered office of the company acquired was situated, the following provisions shall be applied:

(a) The reports which the management organ of the company acquired was required to submit to the supervisory organ shall be submitted to the boards of each of the places of business situated in the territory of the State where the company acquired had its seat but such reports shall comprise only particulars concerning the operation and prospects of the place of business in question, decisions relating to it, and the situation in regard to such portion of the company's assets as is allotted to it;

(b) The powers of control of the company's accounts, previously exercised by the supervisory body, shall be exercised by the board of each place of business over its operational accounts;

(c) If certain company operations were subject to approval by the supervisory organ of the company acquired the board or boards of the places of business situated within the territory of the State where that company had its seat shall be consulted in regard to these operations before they are finally approved by the competent organs of the company under the law applicable to the acquiring company.

4. Subject to the limitations specified in regard to their object, the reports and the control laid down in paragraph 3 *(a)* and 3 *(b)* shall be established in accordance with the provisions of the law of the State whose territory the seat of the company acquired was situated governing the jurisdiction of the supervisory organ of companies to which the present Convention applies.

[1] To be inserted, if approved, in Chapter II, section 5 of the Convention, the articles being renumbered accordingly.

Annex 2 B

Proposal by the German delegation on the Regulation of Employee Participation

With a view to regulating the matter of employee participation, the German delegation proposes that the draft Convention on International Mergers of companies be amended and supplemented as follows:

1. The following provisions shall be inserted in the Convention as Article 20 to Article 20 quater.

Article 20[1]

1. Participation by representatives of the employees in the organs of the acquiring company shall be governed by the application of the provisions of the international convention concluded between the Member States of the European Communities on the formation of a European société anonyme or by the Community regulation on that same subject based on the Treaty of Rome. The same shall apply to the structure of the acquiring company insofar as this is necessary for the implementation of the preceding sentence.

2. However, where the law applicable to the acquiring company provides for participation in its organs by a number of representatives of the employees exceeding that provided in the international convention or the Community regulations referred to in the previous paragraph, participation by the representatives of the employees in the organs of the acquiring company shall be determined by the law applicable to that company.

Article 20 bis

Until such time as the international convention or the Community regulation referred to in Article 20 enters into force, Articles 20 ter and 20 quater shall be applied.

Article 20 ter

Participation by the representatives of the employees in the management and supervisory organs of the acquiring company and the rights and duties of those representatives, shall be determined by the law applicable to the company, unless Article 20 quater provides otherwise.

Article 20 quater

Where the company acquired has a supervisory board which under the law applicable to that company must include representatives of the employees having the right to attend meetings and to vote, the following provisions shall be applied to the acquiring company as of the date on which the merger takes effect (Article 23).

1. Where the law applicable to the acquiring company does not mandatorily prescribe the formation of a supervisory board, the provisions applied to that company shall be those relative to the structure of sociétés anonymes which have chosen the system of supervision of the management and representation of the company by a supervisory board.[2] The supervisory board shall consist of three members, unless the statutes stipulate a larger number divisible by three.

2. One third of the members of the supervisory board shall be representatives of the employees. The statutes may specify propor-

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[1] To be inserted, if approved, in Chapter II, section 5 of the Convention. The numbering of all the articles mentioned in the text would have to be changed to coincide with the final numbering of the articles.

[2] This provision presupposes that the Member States shall be required, in virtue of the directive on harmonization of the provisions relating to the structure of sociétés anonymes to give companies at least the option of selecting the so-called 'dualist' system.

tional participation [fraction] or a larger number of representatives of the employees.

3. The representatives of the employees shall be elected for the term of office laid down by law or in the statutes for the members of the supervisory board to be elected by the general meeting.

The mandate of the representatives of the employees on the supervisory board shall come to an end on the expiry of the mandate of the other members of the supervisory board in accordance with the law and the statutes as well as through loss of eligibility or removal. Voting rights, eligibility, the statutory majorities and procedure for electing and removing representatives of the employees, and for the withdrawal of their mandate and annulment of elections and removals, shall be determined in accordance with Annex X to the present Convention.[1] Annex X shall constitute an integral part of the Convention.

4. The representatives of the employees on the supervisory board shall have the same rights and duties (obligations) as the other members of the supervisory board.

5. The representatives of the employees on the supervisory board shall be first elected not later than two months after the merger has come into effect (Article 23). If the supervisory board does not include representatives of the employees, or includes fewer than the number prescribed by the present Convention, the law applicable, and the statutes or the number needed for a quorum, the legal consequences shall be determined by Annex X to the present Convention.

6. The provisions of the law applicable, even mandatorily, shall not be applied to the acquiring company where they are at variance with the provisions of paragraphs 1-5 above.

2. Article 42, para. 1 shall be amended as follows:

(a) In paragraph 1, first sentence, replace the reference (at present in square brackets) to Article 20, by a reference to Articles 20 to 20 quater.

(b) In paragraph 1, add a third sentence reading as follows:

'Article 20 quater shall apply even if one only of the companies ceasing to exist fulfils the conditions laid down in this provision'.

3. To cater for the questions raised in Article 20 quater (para. 3, third sentence, and para. 5, second sentence), an Annex X shall be added to the Convention. The German delegation may wish to make proposals at a later date regarding the content of this Annex; since these proposals are more or less technical in character, and it would be useful to hold discussions beforehand and to reach agreement on the principles underlying the German proposal.

[1] See also Articles 139, 140 and 143 of the Commission's draft regulation governing European sociétés anonymes.

Annex 2 C

Contingent proposal[1] by the German delegation on the Regulation of Employee Participation

1. The following provisions shall be inserted in the Convention under Articles 20 to 20 ter.[2]

Article 20

Text the same as that of Article 20 ter of the main proposal (with amendment of the reference).

Article 20 bis

Where the company acquired has a supervisory board which under the law applicable to that company must include representatives of the employees having the right to attend meetings and to vote, participation by representatives of the employees in the organs of the acquiring company shall be governed by the application of the provisions of the international convention concluded between the Member States of the European Communities ... (the rest as in Article 20, para. 1, of the main proposal).

Article 20 ter

Until such time as the international convention or the Community regulation referred to in Article 20 bis enters into force, the following provisions shall be applied provided the company acquired fulfils the conditions of Article 20 bis:

.....

(Paragraphs 1 to 6: text the same as that of Article 20 quater of the main proposal).

2. Same as paragraph 2 of the main proposal (with amendment of the reference to Article 20 et seq.).

3. Same as paragraph 3 of the main proposal (with amendment of the reference to Article 20 et seq.).

[1] See Annex 2 B.
[2] See Annex 2 B, footnote [1], p. 110.

Annex 2 D

Note by the Chairman on the representation of employees in the organs of the acquiring company or the new company

1. Following the discussion of the problem of representation of the employees in the organs of the acquired company or the new company (referred to below for short as the problem of participation at the last session of the group of experts held in Brussels on 7 July 1971, the Chairman proposed that a note might be drafted briefly outlining the background to the problem as emerging from that discussion and from the exchanges of views which had taken place at previous sessions.

This is the purpose of the present document, which the delegations agreed should be placed before them so that they could consult their Governments and receive instructions from them in time for the next session of the group.

A. Gist of the earlier discussions — Draft text submitted by the Chairman

2. Prior to the session of July 1971, the problem of participation had figured several times on the agenda of the meetings of the group.

The delegation of the Italian Republic had, however, from the outset expressed the view that this problem was outside the group's jurisdiction, since in its view the solution could not be found in a convention on mergers; but while maintaining this stand, which was placed on record at the session of July 1971, the Italian delegation did not oppose the discussion of the problem, and agreed to contribute to it on a purely subsidiary basis, by making a thorough commentary on the substance.

At the same time, the delegation of the Federal Republic of Germany, even though from the outset it had expressed a keen desire that the problem should be examined and a solution put forward by the group to the representatives of the Governments of the Member States meeting in the Council, for some time stated that it could not see its way to formulating a proposal or taking an active part in a discussion on the substance of the matter. Later on, it declared its willingness to look into any proposals submitted by other delegations, but none of them saw fit to meet this wish. In particular, the delegation of the French Republic expressed the view that because of its political, social and economic implications, the problem of participation in the event of an international merger (which in its view, unlike that of the Italian delegation, should be effectively settled by the Convention) could only be usefully discussed in the Council. But the French delegation and others which shared its view with various slight differences, declared their readiness to examine any proposals that might be put forward.

3. In these circumstances, with a view to providing a basis for discussion, the Chairman of the group prepared a preliminary draft text which now appears as Article 20 in Annex 2 A.

Basically, this text lays down the principle of the territoriality of the law relating to staff representation, either in the management and supervisory organs of the acquiring company (para. 1), or in the places of business set up by it (para. 2). This would mean in practice that participation at the company organ level would only exist if the law of the acquiring company so prescribed, and that it would be organized, if the occasion arose, in accordance with that law. On the other hand, at the level of the places of business set up, staff representation would be organized in each instance in accordance with the law of the country where it was located.

But these proposals (which would conform to the principles generally accepted for the settlement of conflicts of law in the field of company law and employment law are supplemented by the Chairman's proposal (para. 3): the principle involved is that where the supervisory body of

the company acquired includes staff representation in accordance with the law of that company, the powers of the staff representatives will be transferred to the places of business maintained by the acquiring company in the country of the company acquired but will be confined to those places of business. This would be an attempt as far as possible to reconcile respect for the acquired rights of the employees of the country of the company acquired with the principle of territoriality of the rules relating to participation.

4. This text gave rise to a single general exchange of views, in the course of a session before that of July 1971. Subject to the stand taken by the Italian and German delegations, as referred to above, the experts were unable to do more on that occasion, in the absence of instruction from their Governments, than express their immediate reactions, personal and provisional. It should be noted however, that in the opinion of the French delegation, which was similar, the principles reflected in the Chairman's proposal seemed to warrant being taken into consideration.

5. During the session of July 1971 the Chairman's proposal was not discussed again, but it was agreed that the delegations would ask their Governments before the next session for instructions to enable them to take a stand on the subject.

B. The German proposal of 1 June 1971

6. In accordance with the hope it had expressed at the penultimate session of the group, the German delegation was able to submit on 1 June 1971 a 'proposal on employee participation' which is again reproduced in the original German text and in a provisional French translation (p. 26[1]) in Annex B.

The background, the rationale and the content of this proposal were thoroughly and lucidly expounded by the German delegation in the course of the session of July 1971; and the other delegations were asked to consult in that connexion the draft minutes of the session produced by the services of the Commission and approved by the Chairman.

7. However, for the sole purpose of simplifying the use of the present note, the principles and the general outlines of the German proposal will be recalled below, on the responsibility of the Chairman alone. Obviously this presentation does not commit the German delegation.

(i) The German proposal is based on a twofold premise:

— The EEC is due to establish by way of a convention between the Member States,or a Council regulation, a European société anonyme which will embody a uniform system of participation.

— The introduction into the legislations of all the Member States, at least on an optional basis, of the so-called 'dualist' system of organization of société anonyme (comprising an organ of management and a supervisory organ) will be prescribed by a Council directive.

(ii) In this context, participation will be regulated, in the acquiring company,[2] by application of the pertinent provisions of the statutes of the European société anonyme once they have been adopted.

However, under this definitive system, if the law of the acquiring company provided for representation of the workers numerically exeeding that prescribed by the satutes of the

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[1] The translation was made by the Chairman, who was anxious to remain as close as possible to the original German text, though this means that it was not always possible to meet the standards of a polished French version.

[2] The German proposal starts out from the premise that the merger is by acquisition and the same principle will be adopted in the remainder of the present note. But obviously it also covers mergers by formation of a new company. Here, what has been said of the acquisition and the company acquired will apply mutatis mutandis to the new company and to the companies wich cease to esist.

European company, this law would apply. The German delegation explained that this reservation was made in particular in the light of a possible development of German law having the effect of extending the field of application of participation on a parity basis or of instituting a general rule of law requiring representation of the employees to be more than one third.

(iii) Until such time as the statutes of the European société anonyme enter into force, participation will be governed, in principle, by the law of the acquiring company.

However, where the company acquired had a supervisory board including employees' representatives, the acquiring company will adopt the 'dualist' system, and one-third of its supervisory board will have to be made up of such representatives.

(iv) To cover the same transitional period, the German proposal includes provisions relating to the length of the term of office and the rights and duties of the employees' representatives on the supervisory board; and it specifies the preparation of an annex to the Convention regulating 'voting rights, eligibility, the statutory majorities and procedure for electing representatives of the employees and for the withdrawal of their mandate, and annulment of elections and removals'. The German delegation considers in fact that to achieve uniformity of participation forthwith (this will of course be the result of applying the rules governing the European société anonyme) these various questions should be settled by common substantive provisions applicable during the transitional phase.

C. Discussion of the German proposal — The German delegations 'contingent' proposal of 8 July 1971

8. Following the preliminary statements by the German delegation mentioned above, its proposal was fully discussed on 7 July 1971, and the summary records of that discussion will be found in the draft minutes already mentioned. Delegations are asked to consult these.

In the course of the discussion, the experts were only able to express personal views, since in spite of the efforts made by the German delegation to formulate its proposal before the session began, Governments did not have the time to study the matter sufficiently to be able to issue instructions. However, the exchange of views which took place suggested that those instructions would be likely to cover in particular the following points:

— Powers of the group and inclusion of a regulation governing participation in the Convention;

— Field of application of participation;

— Immediate adoption of a permanent system of participation, or a transitional system distinct from a permanent system, as in the German proposal;

— Institution, on a permanent basis or for an initial phase, of a uniform system of participation, or recourse to a rule of conflict, or a combination of both methods (and how it would operate);

— Even under a uniform system of participation, adoption or otherwise of more or less detailed substantive rules governing the appointment of employees' representatives and the duration, performance and termination of their duties. The substance of these various questions will be outlined below.

(a) *Powers of the group*

9. Mention has been made above of the stand taken by the Italian delegation on this subject. This did not find favour with the other delegations; nor can the Chairman accept the view for the following reasons:

(i) Even if it were felt that the terms of Article 220 of the Treaty of Rome limit the sphere of negotiations, it seems clear that it does extend to participation. The very feasibility of international mergers, which are the object of the Convention envisaged by the text, does after all depend on the settlement of this

issue. Nor would participation appear to be alien to company law, since on the contrary it provides for representation of the employees in company organs.

(ii) In any event, Article 220 is indicative but not exhaustive. It provides that Governments shall as far as necessary enter into negotiations as specified, but there is of course nothing to prevent them from extending the scope of those negotiations (as they did, moreover, in the case of the Convention on Jurisdiction and the Enforcement of Judgements.

(iii) Lastly, while it is true that the solution of the problem of participation may involve coordination of the legal systems of the Member States by means of uniform substantive rules, this is in no way precluded in an international convention, and indeed it is used both in the Convention on Jurisdiction referred to above and in many of the provisions, already approved by the experts, of the preliminary draft convention on international mergers. It is advisable, no doubt, to maintain this coordination in the sphere of the Convention, in the case in point, the sphere of international mergers; but subject to that reservation, it is perfectly appropriate there.

In any case, the group of experts will be called upon to express a definitive opinion on this question at the next session.

(b) *Field of application of participation*

10. Under the German proposal, participation would apply in acquiring company even if it was not laid down either by the law of that company or by the law of the company acquired.

This suggestion elicited very serious objections from several of the experts, and their opinion is shared by the Chairman. It is not easy to see why a Belgian company, for example, taking over an Italian company, should institute participation when neither company had it prior to the merger. In such a case there could be no question either of 'evading' participation or of ignoring the acquired rights of employees. To impose participation in such a case would be tantamount to trying to make the institution universally applicable by using the expedient of an international convention whose primary purpose is different. This would seem to be going beyond the natural sphere of the rules proper to this Convention.

11. The German delegation, appreciating these objections, intimated its willingness to consider restricting the field of application of participation so as to exclude it where it was not incorporated in any of the laws governing the companies merging.

At the meeting of 8 July 1971, it formulated a contingent proposal to this end. A provisional French translation of this is given in annex 2 C.[1]

The German delegation nevertheless made it clear at that same meeting that it still preferred its initial proposal. The German delegation is asked, as are the other delegations as well, to seek government instructions on this point before the next session.

(c) *A permanent system of participation forthwith or a transitional system followed by a permanent system (namely that of the European société anonyme).*

12. Several experts pointed out in this connexion that it was difficult both technically and substantively, to refer in the Convention to the system of participation of the European société anonyme since theoretically its statutes were not yet adopted.

According to them—and that constituted the technical objection—it would mean a blind reference, since there was nothing to indicate at the present time what these statutes would look like or how participation would be organized in them. With regard to the substance, it was equally uncertain that the system of participation of the European société anonyme would be suitable for a company which, even

[1] See page 114, footnote [2].

after being acquired by another, would still be a company of a particular State coming under the law of that State.

It is to be hoped that the Governments can instruct the experts which of these two methods to choose: a permanent system immediately, or a transitional system followed by the system of participation of the European société anonyme on a permanent basis.

(d) *Uniform system or rule of conflict—combination of both methods.*

13. In the initial German proposal, the combination of a rule of conflict (application of the law governing the acquiring company) and substantive rules (mandatory representation of the employees comprising one-third of the members of the supervisory board where the acquiring company has such a system of participation) only appears under the transitional alternative. Under the permanent arrangement the system of participation of the European company, namely uniform, will be applied an all instances.

This uniform system would apply likewise under the 'contingent' proposal where the company acquired had staff representation on its supervisory board; but in the other cases it would again be the law of the acquiring company that would be applied.

On the other hand, any permanent system that did not refer to the statutes of the European company would seem necessarily to combine a rule of conflict with substantive rules.

(i) A priori, none of the experts was opposed personally to the principle of regulating participation by applying the law governing the acquiring company.

This principle should not in fact meet with serious objections where the acquiring company has a system of participation at the company organ level whereas the company acquired had none (e.g. where a Belgian company is taken over by a German company); but this initial point calls for confirmation in instructions from Governments.

(ii) The difficulty emerges at once when the two companies both have participation, but the systems are different (e.g. where a Netherlands company is acquired by a German company or vice versa).

The application here of the law governing the acquiring company presupposes that the Contracting States accept the basic equivalence of the different national systems of participation which is of course by no means necessarily true.

Meanwhile, in the course of the discussion of July 1971 the Netherlands expert, expressing a strictly personal opinion, argued that it would not be impossible in the case of an acquisition of a Netherlands company by a German company for the German system of participation to be applied in the acquiring company.

But the German delegation did not feel able to take a favourable view of the reverse situation (i.e. application of the Netherlands system in the event of an acquisition of a German company by a Netherlands company).

It is therefore to be hoped that the delegations will receive instructions from their Governments on the question whether the law of the acquiring company shall or shall not apply even when the company acquired had a different system of participation under its own law.

(iii) If the reply to the above question was negative, it would still have to be determined how participation should be regulated at the level of the acquiring company.

It does not seem possible here to be satisfied with a rule of conflict pure and simple, declaring the law of the company acquired to be applicable. In the first place, theoretically nothing would justify the preference given to the latter when jurisdiction given to the law of the acquiring company is on the contrary in keeping with the general principles of private international company law and of labour relations. In practice, moreover, the application

of the law of the company acquired in the country of the acquiring company could encounter insurmountable difficulties (especially when this presupposes, as is the case in Netherlands law, action by the authorities of the State which has laid it down).

It is therefore desirable, if we wish to ensure that the law of the acquiring company does not apply in all instances, to devise a conventional system of participation based on substantive rules, to deal with this situation. This is the approach adopted technically in the German proposal; but several experts pointed out that in actual fact what was advocated would be precisely the answer found in German law; this would amount to 'exporting' German law, without recourse to a rule of conflict.

It would be most helpful if the experts could be given instrucions, at any rate in regard to the general lines of a conventional system of participation which would apply where the two companies have different systems of participation (failing application of the law governing the acquiring company).

(iv) The institution of such a conventional system will probably in any event be necessary where the law of the acquiring company has no system of participation whatever and where there is one under the law of the company acquired (e.g. where a German company is acquired by a Belgian company). This is indeed the typical situtation where some Governments might fear 'evasion' of participation and the end-result would be disregard of the acquired rights of the employees of the company acquired.

Hence the Governments should make up their minds whether the conventional system (other than the rule of conflict) should be instituted for this case alone—unless of course they consider that it should be discarded entirely. But at the present stage of the discussion, it seems unlikely that this last approach could muster a unanimous vote.

(e) *More or less detailed uniform regulation of the designation of the employees' representatives, the conditions governing the performance and termination of their duties.*

14. Several experts argued that this substantive regulation should not and could not enter into details. At the most, they felt, general principles (e.g. on fair representation of minorities) could be laid down in the Convention. The German delegation did not rule out the possibility of a solution in this direction.

The Chairman would like to point out that if in the outcome a system of employees' representation in the supervisory organ were adopted, the functioning of that organ would presumably have been the subject of legislative coordination by directive. A simple principle of placing the employees' representatives on the same footing as the other members of the supervisory board would thus seem calculated to avoid unduly great divergencies from one country to another.

It is to be hoped that the experts can obtain instructions from their Governments on this point also.

In conclusion, it may be recalled that the series of questions raised in the present note cannot in any way be regarded as exhaustive. The Chairman will put forward for discussion any other questions or proposals which delegations may formulate on instruction from their Governments.

Annex 2 E

Note by the Italian delegation on the representation of employees in the organs of the acquiring company or the new company

1. During the last session of the group of national experts held at Brussels on 8 and 9 December 1971, the Italian delegation was authorized to submit a note giving an account of the terms of the plea of non-admissibility it lodged in connexion with the proposal to institute a conventional system of representation of employees in the organs of the acquiring company or the new company arising out of a merger.

From the start of the negotiations the Italian delegation expressed the view that the problem raised by the fact that there were national systems of participation differing from one country in the Community to another was outside the field of application of Article 220 third indent of the Treaty of Rome and that, consequently, employee participation in the administration of the acquiring company or the new company should be governed by lex societatis, in application of the principles in force in regard to conflicts of laws; to the exclusion of any rule of substantive law to be inserted in the Convention.

The arguments put forward by the Italian delegation may be summarized as follows:

(a) The institution of participation (as established in German and Netherlands law) is entirely alien to the process of international mergers. Consequently regulation of the participation of employees in the organs of the company has no connexion with the specific object of the Convention under Article 220 of the Treaty of Rome, namely the elimination of obstacles which in the present state of the national legislations stand in the way of the concentration of undertakings of different nationalities in a single legal unit.

(b) Under the terms of Article 220 of the Treaty, the Convention is intended for 'companies or firms governed by the laws of different countries'. This means that for all the problems relating to the organization of the company, the structure and the composition of its organs, there can be no solution within the framework of the Convention other than that resulting from the application of the national law.

(c) A merger involves, by definition, the extinction of the company acquired (and hence its organs). The adoption of a conventional system under which the system of participation applicable to the company acquired would 'survive' the extinction of the company (and its organs) even where the acquiring company comes under a legal system which knows nothing of participation seems to be incompatible with the very notion of international mergers.

(d) The problem of participation was raised in the course of the sessions of the group because of the diversity of national legislations in this company law area and the possibility of the machinery for intra-Community mergers being used by the companies of certain countries to avoid a national system of participation they find distasteful. There is similar danger of 'evasion', as has been pointed out, in respect of the régime in force in Italy under which shares are required to be registered.

Thus participation constitutes a problem of coordination of national legislations. But this coordination of laws is not the object of Article 220 but comes within the field of application of other Articles of the Treaty of Rome (Articles 54, para. 3, *(g)* 100, 101 and 235).

(e) It was recognized that in ratifying the Treaty of Rome, the Member States did not assume the obligation at an international level, to negotiate participation within the framework of the Convention on Mergers. Hence it is impossible to deny the right of national delegations to reject prima facie any proposal relating to participation.

2. To round off the above account, it may be well to add a few observations concerning the objections raised to the Italian delegation's attitude.

(a) The statement that 'the very feasibility' of an international merger depends on settling the issue of participation is untenable. On the contrary, it would seem evident that failing the introduction in the prospective Convention of provisions relating to participation by the employees in the administration of the acquiring company, or the new company, would be governed by the lex societatis, and this would have no impact on the feasibility of international mergers. It was also held that the question of participation should be regarded as coming within the scope of Article 220 of the Treaty of Rome, since it is probable that the countries of the Community most directly interested in this problem will not ratify the Convention unless it has suitable provisions on participation.

Quite clearly, it is impossible to draw any inference of a legal nature concerning the interpretation of Article 220 of the Treaty from the above statement. The argument moreover has a negative counterpart: the introduction of provisions relating to participation could cause other Member States, even though they intend to honour the international commitments undertaken in virtue of Article 220 of the Treaty, not to conclude the Convention.

(b) Even if it were agreed that Article 220 of the Treaty is an indicative text and does not restrict the jurisdiction of the Member States, it could not be inferred that the countries of the Community have the sovereign right to enlarge the scope of the Convention unrestrictedly.

The problem of participation as was observed above, is linked with the coordination of national legislations in regard to the structure of companies limited by shares.

But the legal instrument laid down in the EEC Treaty for the coordination of legislation (see Articles 54, para. 3, *(g)* 100, 101, and 235) is not an inter-State Convention, but a regulation or directive of the Community institutions.

In other words, by ratifying the Treaty of Rome, the Member States have limited their sovereignty in certain fields and consequently have renounced the option of negotiating among themselves agreements on matters for which the Treaty has transferred jurisdiction to the Community's institutions.

Nor would it appear possible, conversely, to use the argument of the precedent constituted by the Convention on Jurisdiction and the Enforcement of Judgements.

There is no question but this Convention does effectively embody provisions which go beyond the scope of Article 220. But this broadening of scope has not involved any encroachment on the rights of the Commission and the Council, and it has been made possible by the agreement of all the States. On the other hand, as far as the question raised here is concerned, not all the delegations have agreed to extend the scope of the Convention to cover participation. This fact cannot be regarded as negligible, since quite apart from the fact that the Member States are not at liberty in any circumstances to usurp the jurisdiction of the Community institutions, the possibility of extending the negotiations to matters which do not come within the scope of Article 220—and which consequently the Member States are under no obligation to deal with in this context—presupposes agreement by all the national delegations.

With regard to the objection raised in the course of the session of 8 December 1971, namely that before the Convention can be concluded, all the provisions of the draft must be approved unanimously (so that the problem of participation would in this respect not differ from the other aspects of the Convention already examined by the national experts) it should be pointed out that that statement does not dispose of the distinction between questions of admissibility and questions of substance.

Thus, whereas in regard to the matters directly related to the operation of international mergers (and consequently covered by the terms of reference of the national experts), the problem which arises is only that of reaching agreement on the content of the texts proposed, where they are not so related it is essential first of all to solve a problem of procedure—that of verifying the admissibility of the question.

(c) While it is true that the technique of coordination of national legislations by recourse to provisions of substantive law has already been used in many of the provisions of the draft Convention already approved by the national experts, this does not invalidate the present argument.

Recourse to this technique is after all fully justified in regard to the uniform provisions of substantive law at present embodied in the draft Convention (e.g. the provisions determining the content of the merger plan, that relating to the expert reports on the share exchange terms of the merging companies, that regulating the sharing of jurisdiction among national authorities concerned with control of the merger, etc.) These provisions are concerned with the iter by which an international merger proceeds, and consequently they are directly related to the terms of reference of the national experts.

On the other hand, for the reasons pointed out above (see sub-para. *(b)*) the possibility must be ruled out of introduction into the draft Convention provisions of substantive law relating to juridical institutions such as participation which are not only totally alien to the purpose of the Convention but in fact relate to problems of coordination of the structures of companies subject to the jurisdiction of Community institutions. This conclusion is corroborated if we remember that the acquiring company and the new company, as companies subject to national law, are bound to observe the directives of the Council of the European Communities in the matter of coordination of the structures of the company organs, so that the uniform system of participation which it is suggested should be incorporated into the Convention might prove to be incompatible with the provisions of the Community's directives.

It need only be observed in this connexion that under the proposal put forward by the delegation of the Federal Republic of Germany (see Annex 2 B) the participation scheme which seems likely to be adopted for the 'European company' would be applied to the acquiring company. But on the contrary, it cannot be dogmatically stated that some future directive on coordination or some regulation of the Council of the Communities will not impose on companies under national law a system of participation which will be mandatorily different from that of the European company.

In that event there would be an unbridgeable disparity between the Convention concluded pursuant to Article 220 of the Treaty and a law-making act of the institutions of the Communities.

Moreover, the fact that the expert group has no jurisdiction to regulate by provisions of substantive law matters relating to company organization and structure has already been recognized by the national experts in connexion with the discussions on the regime of nullity of the new company arising out of an international merger. This régime is at present defined in Article 52 of the draft Convention, which contains a conflict of laws provision —referring to the national law—and not a provision of substantive law, as had been proposed initially.

For the foregoing reasons, the delegation of Italy cannot see its way to changing its position.

Annex 3

Note by the Belgian delegation on Article 9, paragraph 3[1] of the preliminary draft Convention on international mergers

The attention of the Belgian delegation has been drawn by the Banking Commission to the serious difficulties of interpretation and implementation of paragraph 3 of Article 9[1] of the preliminary draft Convention on international mergers.

The Banking Commission has the following observations to make:

An initial difficulty is the lack of precision of certain concepts, e.g. those of 'net assets on the basis of actual values' and 'earnings taking account of future prospects'.

With regard to the first of these concepts, the question arises whether it is used as opposed to that of net assets as shown in the accounts or the balance sheet envisaged in article 7, para. 7, *(c)*.[2] Otherwise, the reference would be virtually meaningless. If it is so intended, the text would imply the necessity, for the purpose of a merger, of adjusting the evaluations shown in the accounts and balance sheet, apart from and indeed in contradiction to the provisions often compulsorily laid down in respect of accounts in some Member States and likely to be so in due course in the Community.

In determining share exchange terms such adjustments are of course often made, especially where the evaluation criteria and depreciation policies of the merging companies are very different. It also happens where the assets of the merging companies are of very different kinds.

But these necessary adjustments are solely designed to ensure that the evaluations are comparable for the purposes of the merger. They can hardly be regarded as likely to show 'actual' value. They do not necessarily cover the whole of the assets and liabilities. The company reform carried out in Belgium and the work of the Elmendorff group have revealed that the juridical notion of 'actual' value is ambiguous and indeed misleading.

The term 'earnings of companies, taking account of future prospects' is equally lacking in precision.

The second difficulty is that according to the draft Convention of the experts that the share exchange terms are or are not in order that must state the grounds at least as indicated in sub-paragraphs *(a)*, *(b)* and *(c)*. It frequently happens in practice that one or other of these criteria, or even both, are regarded as insufficient to determine the relationship. It also frequently occurs that there is a considerable gap between the two sets of findings. In such instances it will be difficult for an expert to give the grounds for the declaration by reference to tha data in question.

On the other hand, it would be useful if the expert report could provide, in the absence of the report of the competant organ of management, precise statements on the criteria used, on the justification in concreto of these criteria, the way in which they are used, and where necessary the relative weighting given them.

It is foolish to imagine that these reports can be drawn up more or less automatically and mechanically. After all, the determination of the share exchange terms is invariably the outcome of a choice among many alternatives, of basic option as to methods, and of weighing the results arrived at by these calculations.

Reference may be made in this connexion to the recent treatise by Mr G. Pourbaix on the 'Valeur de l'entreprise' in which he studies a large number of mergers which have taken place in Belgium over the last few years.

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[1] This has become Article 12, paragraph 5 in the draft Convention.

[2] Now Article 9, *(b)* and *(c)*.

The Belgian delegation feels that the above statements give food for thought, emanating as they do from a body whose experience in regard to company mergers is based on concern for the protection of shareholders and third parties.

For the same reason it could not support a text which required auditors to implement notions lacking precision.

In view of the discussions arising out of these texts in June 1969 the Belgian delegation proposes that Article 9, para. 3[1] be drafted as follows:

'The experts shall examine the merger plan and shall draw up a report for the shareholders.

The object and content of this report shall be determined, in respect of each company, by the law applicable to that company.

In this document, the experts shall in all instances declare whether in their opinion the exchange terms for securities and the methods followed in establishing them are or are not justified.

This declaration shall state the grounds, mentioning in particular the following points:

(a) The precise details and justification in the case in point of the criterion or criteria used in determining the proposed exchange terms;

(b) If there are several criteria, the exchange terms resulting from the application of each, and justification of the weighting given to each;

(c) The exchange terms resulting from a comparison respectively of the net assets and the profitability of the merging companies, corrected by the application of identical accounting methods and rules of evaluation and adjustment. If these methods are not adopted, the grounds shall be stated.

The report shall further mention any special difficulties encountered in determining the share exchange terms'.

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[1] See page 122, note [1].