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Statute for a European company

SYN 218

Proposal for a Regulation on the Statute for a European company

SYN 219

Proposal for a Directive complementing the Statute for a European company with regard to the involvement of employees in the European company

(presented by the Commission to the Council on 25 August 1989)

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NOTE TO THE READER

Numerous provisions of the proposal for a Regulation and the proposal for a Directive refer, on points of company law, either to directives already adopted or to existing proposals for directives.

To assist in reading this Supplement, the reader will find below the complete references to these directives and proposals, which are mentioned only in abbreviated form in the body of the text:

(i) Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (first Directive): JO L 65, 14.3.1968 and Bull. CE 4-1968, point 7; English Special Edition 1968(I), p. 41;

(ii) Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited-liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (second Directive): OJ L 26, 31.1.1977 and Bull. EC 1976, point 2119;

(iii) Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (fourth Directive): OJ L 222, 14.8.1978 and Bull. EC 6-1978, point 2.1.12;

(iv) Council Directive 78/885/EEC of 9 October 1978 based on Article 54(3)(g) of the Treaty concerning mergers of public limited-liability companies (third Directive): OJ L 295, 20.10.1978 and Bull. EC 10-1978, point 1.2.3;

(v) Council Directive 83/349/EEC of 13 June 1983 based on Article 54(3)(g) of the Treaty on consolidated accounts (seventh Directive): OJ L 193, 18.7.1983 and Bull. EC 5-1983, points 2.1.26 to 2.1.30;

(vi) Council Directive 84/253/EEC of 10 April 1984 based on Article 54(3)(g) of the Treaty on the approval of persons responsible for carrying out the statutory audits of accounting documents (eighth Directive): OJ L 126, 12.5.1984 and Bull. EC 3-1984, points 2.1.17 and 2.1.18;

(vii) Amended proposal for a fifth Council Directive based on Article 54(3)(g) of the Treaty concerning the structure of public limited companies and the powers and obligations of their organs: OJ C 240, 9.9.1983, Bull. EC 7/8-1983, points 1.2.1 to 1.2.4 and Supplement 6/83 — Bull. EC;

(viii) Proposal for a 10th Council Directive based on Article 54(3)(g) of the Treaty concerning cross-border mergers of public limited companies: OJ C 23, 25.1.1985, Bull. EC 12-1984, point 2.1.21 and Supplement 3/85 — Bull. EC;

(ix) Amended proposal for an 11th Council Directive on company law concerning disclosure requirements in respect of branches opened in a Member State by certain types of companies governed by the law of another State: OJ C 203, 12.8.1986, and Bull. EC 7/8-1986, points 2.1.16 and 3.5.1; OJ C 105 21.4.1988 and Bull. 4-1988, point 2.1.80; Supplement 5/88 — Bull. EC.

Preface

Background

Nearly 20 years ago the Commission proposed a statute for a company to be created under European law, since it considered that the existence of such a statute was necessary for the establishment of the common market.

Since then the importance of such a company has become quite obvious in the context of completing the single market of 1992. At its meeting in Brussels in June 1987 the European Council requested the institutions concerned 'to make swift progress with regard to the company law adjustments required for the creation of a European company'. For this reason, at the suggestion of its President Mr Delors, the Commission decided to relaunch this initiative by means of a memorandum addressed to the Council, the European Parliament and the two sides of industry.

The conclusions reached by the Internal Market Council of 18 November 1988 made it clear that the majority of the Member States were in favour of the guidelines proposed by the Commission, both as regards the optional character of a European company and its independence of national laws and as regards the principle of rules dealing with the involvement of employees in the future European company.

In November 1988 the Economic and Social Committee, by a large majority adopted an opinion which was also favourable to the suggestions made in the Commission's memorandum, including those on the involvement of employees.

Finally, on 16 March 1989 the European Parliament also approved the Commission's proposal, emphasizing particularly the fact that the European company would be a useful instrument for restructuring European businesses and especially for making them more competitive on the world market.

On the basis of these preliminary discussions the Commission on 12 July 1989, on the proposal of its Vice-President Mr Bangemann, adopted a proposal for a statute for a European company. The objective was to free the companies of Member States from the legal and practical constraints arising from the existence of 12 distinct legal systems by creating a single European instrument.

Why a Statute for a European company?

The European company:

(i) is the first instrument that will enable businesses to carry out cross-frontier restructuring by means of an international assets merger rather than merely by means of a takeover bid. This is because in the present state of our law assets mergers are not legally possible until the proposal for a 10th Directive, which is at present held up, can be adopted by the Council:

(ii) will also be a very useful instrument for creating joint subsidiaries or holding companies of international groups. This Statute based on European law will be a means of overcoming major psychological obstacles, since it will avoid placing the firms concerned in the position of having to choose the structure of a particular Member State in order to develop their activities in several Member States;

(iii) will make it easier to manage transnational groups, since it will be possible for all the companies in a group to be managed in accordance with a common strategy;

(iv) will be useful not only to large businesses but also to small ones.[1] At present the latter find it very difficult to cooperate on a cross-frontier basis since

1 For this purpose the minimum capital has been reduced from ECU 250 000 to ECU 100 000.

they have to submit themselves to as many different legal systems as there are Member States involved.

The Commission has received requests from a number of firms for such a statute for all the reasons just mentioned, but those interested will find on examining the text that there are a number of additional advantages:

(i) as regards the tax aspect, the Statute takes into account the specific nature of the European company, which will carry on its taxable activities through the medium of permanent establishments situated abroad. In this context the losses incurred by those establishments may be set against the company's profits;

(ii) as regards the disclosure of information and the audit of annual and consolidated accounts European companies will enjoy all the options open to the Member States under the fourth Directive (78/660/EEC) and the seventh Directive (83/349/EEC);

(iii) in order not to delay its adoption, the Statute does not contain any rules on groups of companies, which are not legally recognized in the majority of the Member States. However, in the States where a law on groups exists (the Federal Republic of Germany and Portugal) the European company will ensure for minority shareholders and third parties the protection they enjoy under that law when their company is controlled by another.

The essential characteristics of the Statute

The European company will be based on an independent law distinct from national laws, where reference will be made to the law harmonized at European level. The Statute will coexist with other forms of companies created under national law and will provide businesses with an additional option. The proposed Statute is thus an instrument that is:

(i) optional for public limited companies from at least two Member States which desire to merge or to create a holding company. For creating a joint subsidiary the Statute is much more widely available, to all companies or firms or other legal bodies from at least two Member States;

(ii) transnational, since it will make it possible to overcome the legal difficulties involved in associations or mergers between companies established in two different Member States;

(iii) attractive from a tax point of view since the basis of assessment for the European company will be calculated after setting off the losses incurred by permanent establishments abroad.

The involvement of employees in the European company

The Statute proposed by the Commission also deals with the involvement of employees in the company. The substance of this may be summarized in a brief formula: no European company without a certain form of involvement, namely regular information for the employees, and consultation of them before implementation of decisions in certain defined cases.

In practice the employees will be consulted on the company's main strategic decisions:

(i) the closure or transfer of establishments or a substantial part thereof;

(ii) substantial reduction, extension or alteration of the activities of the company;

(iii) the setting-up of a subsidiary or of a holding company;

(iv) the establishment of long-term cooperation with other businesses, or its termination;

(v) substantial organizational changes within the company.

On the other hand, the day-to-day management of the European company will be solely the responsibility of the management.

The Commission is submitting to the Twelve an optional system based on three models defining the involvement of employees in the company:

(i) representation of the employees on the supervisory board or the administrative board;

(ii) creation of a separate body representing the employees;

(iii) other models drawn up by agreement between employers and employees.

A Member State will be permitted to limit the choice of models for European companies having their registered office on its territory. Where several models are available the management of each of the founder companies must choose one on the basis of an agreement with the representatives of the employees. Since equivalence between the different models is ensured by the Statute it is for the management of the company to choose the model of representation of the employees which it regards as the most appropriate.

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The Commission considers that the European company will facilitate cross-frontier cooperation between limited companies from different countries and hence will avoid the partitioning of the internal market into national markets. It will thus contribute to attainment of the 1992 objective.

Introduction

The European company (Latin *Societas Europaea,* SE) is designed to enable companies governed by the laws of different Member States to choose a structure for cooperation and restructuring suited to the dimensions of the large market to be achieved in 1992. It aims to free companies from the legal and practical constraints arising from the existence of 12 separate legal systems by offering them an optional structure based on Community law and independent of national laws in so far as these have not been harmonized. As long ago as 1970, the Commission put forward a proposal based on Article 235 of the EEC Treaty.[1] This proposal was amended in 1975.[2] The Council suspended work on it in 1982. It was suggested that this project should be revived as part of the drive towards completing the internal market. In June 1987 the European Council in Brussels requested the institutions concerned to make swift progress with regard to the company law adjustments required for the creation of a European company.'[3] On 8 June 1988 the Commission submitted a memorandum describing the main difficulties and sketching solutions.[4]

The text now proposed is in two parts. It brings together in a Regulation based on Article 100a all the rules necessary for the creation and operation of the SE, except those dealing with the involvement of employees in the SE. The latter rules form the subject of a complementary Directive, in view of the diversity of national rules and practices on that subject. The Regulation and the Directive form a composite whole, and must be applied together.

In order to make the Statute attractive to small businesses, the minimum capital requirement has been lowered from ECU 250 000 to ECU 100 000 (Title I).

Title II, on methods of formation, is based on the 1975 proposal. An SE may be set up by merger, by the formation of a holding company, or by the formation of a joint subsidiary. The procedure for formation by merger is based largely on Directive 78/855/EEC, supplemented to take account of the cross-border aspect of the proposal for a 10th Directive.

Title III, on capital, shares and debentures, has been revised in the light of Directive 77/91/EEC.

The structure of the SE is dealt with in Title IV; here the proposal takes account of progress in the Council's discussion of the proposal for a fifth Directive, and retains the option of either a one-tier board system or a two-tier system with a management board and a supervisory board.

For the preparation, publication and auditing of annual accounts and consolidated accounts (Title V), the Statute refers to the accounting directives, namely Directives 78/660/EEC, 83/349/EEC and 84/253/EEC.

The options left to the Member States in Directives 78/660/EEC and 83/349/EEC have been given to the SE. This has been done in order to avoid having to renegotiate those directives.

The Statute no longer contains any provisions concerning groups (Title VI), because there is currently no need for specific rules for SEs in this area. The SE will be treated in the same way as other companies governed by the legislation of the Member State in which they have their registered office. The Commission is studying the need for coordination of the laws of the Member States in this respect.

Winding up and liquidation (Title VII) are matters which have not yet been harmonized. The proposed regulation restricts the grounds on which an SE may be wound up, and settles only the questions which

1 OJ C 124, 10.10.1970; Supplement 8/70 — Bull. EC.
2 Supplement 4/75 — Bull. EC.
3 Bull. EC 6-1987, point 1.1.4.
4 Bull. EC 6-1988, point 2.1.127 and Supplement 3/88 — Bull. EC.

are essential for the protection of the shareholders at this delicate stage of the life of the company.

Given the complexity of the question of the insolvency of an SE, the proposal contents itself with a reference to the law of the Member State in which the SE has its registered office.

Title VIII refers to Title II for cross-border mergers and to the laws of the Member States, as harmonized by the third Directive, for domestic mergers.

As far as tax arrangements are concerned (Title IX), the SE will be subject to the tax law of the country in which it has its registered office. Losses suffered by an SE's permanent establishments abroad can be offset against its profits. This provision is indispensable in order to overcome the obstacles which an SE would otherwise encounter in its business, which by its nature is cross-border business.

To avoid any discrimination against other firms carrying on business across borders, the same rules will be proposed as a directive for other legal forms of undertaking.

The involvement of employees in the SE is dealt with by means of a Directive, which is an indispensable complement to the Regulation. The term 'employees' corresponds to the 'workers' referred to in Title III of Part Two of the Treaty. It comprises persons with a contract of service, of whatever kind, to an employer. It covers the various categories of staff employed by businesses in the Community. Employees are to play a part in supervision and in the definition of strategy. Three models of participation are provided for: participation in determining the membership of the supervisory board (model one), participation through a staff representative body distinct from the governing bodies of the company (model two), and a form of participation to be established by collective agreement (model three). A Member State may restrict the choice of models open to SEs having their registered office in its territory. The management or administrative boards as the case of the founder companies may be and the representatives of the employees of those companies are to agree on the choice of a model. If they fail to reach agreement the management board is to choose a model, since there can be no SE without participation, and the models all confer equivalent rights on the employees. If model three is chosen but no agreement is reached on the form, a standard model is to be applied, to be drawn up by the State and satisfying the information and consultation requirements laid down in the Statute.

Commentary on the Articles

TITLE I

General provisions

Article 2

The Statute provides three ways of forming an SE.

1. Only public limited companies can set up an SE by merger (assets merger) or by formation of a holding company. This is because the necessary exchange of shares will only be possible if both the founders are public limited companies.

If private limited companies wish to form an SE they will first have to become public limited companies in accordance with their domestic law.

2. The scope for setting up an SE by forming a joint subsidiary is wider. Participation is open to all legal bodies governed by public or private law, whether or not they are in company form and indeed whether or not they have legal personality, and regardless of whether they carry on a commercial activity or just an activity with an ultimate economic purpose. This very broad concept is based on that adopted for the European Economic Interest Grouping (EEIG) established by Council Regulation (EEC) No 2137/85 of 25 July 1985.[1]
On grounds of legal certainty and for technical reasons it has not been possible to make provision for the conversion into an SE of a company incorporated under national law and having branches in several Member States. Such a company could set up an SE by merging at least two subsidiaries in different Member States.

Article 3

1 and 2. An existing SE may be party to the formation of another SE by merger or formation of a holding company or joint subsidiary.

3. An SE may also set up one or more subsidiaries, but in order to avoid the creation of 'cascades' of SEs, an SE which is itself a subsidiary of an SE cannot create further subsidiary SEs.

Article 4

1. The amended proposal of 1975[2] would have required a minimum capital of ECU 250 000 where an SE was set up by merger or formation of a holding company and ECU 100 000 where the new SE was a joint subsidiary or a subsidiary of another SE.

This distinction has been dropped. The minimum capital for an SE is now ECU 100 000 in all cases. The intention is to make it easier for small businesses to take advantage of the Statute. There is also the fact that once a subsidiary SE has been set up it will have its own independent existence; it may be bought or may itself set up subsidiaries. There will then be nothing to distinguish it from other SEs set up by merger or by the formation of a holding company.

The figure of ECU 100 000 is close to that laid down for domestic public limited companies in the laws of most of the Member States under Directive 77/91/EEC. The capital need only be 25% paid up (see Article 38(2)).

2 and 3. Where an SE is set up to carry on a regulated activity, it will of course be subject to the specific requirements governing that activity. An SE may be a credit institution. In that case the minimum capital is that required by Article 3 of the proposal for a second Council Directive on the taking-up and pursuit of the business of credit institutions.[3]

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1 OJ L 199, 31.7.1989, Bull. EC 7/8-1985, point 2.1.10.
2 Supplement 4/75 — Bull. EC.
3 OJ C 84, 31.3.1988; Bull. EC 1-1988, points 1.2.1 to 1.2.3

The figure given there is ECU 5 million, which may be reduced to ECU 1 million in certain circumstances.

In the case of insurance undertakings, the text makes reference only to the laws of the Member State in which the SE has its registered office, even though there has already been Community-level harmonization in this field. The capital required does not correspond in all Member States to the 'solvency margin' referred to in Directives 73/239/EEC[1] of 24 July 1973 and 79/267/EEC[2] of 13 March 1979 on the taking-up of the business of indirect insurance.

Article 5

The registered office of the SE designated in the statute must be the place where it has its central administration, that is to say its *siège réel* or real seat. This use of the *siège réel* concept is important in several respects. Firstly, it reflects the dominant thinking in the Member States. Secondly, it allows the law of one specific Member State to be applied to the SE, either as the normal rule (where an express reference is made by the statute itself, for example) or in the absence of any other rule (e.g. Article 7(1)(b)).

The transfer of an SE's registered office may be decided in the same way as an amendment of its statutes (Article 81(h)).

Article 6

This Article defines what 'controlled undertaking' and 'controlling undertaking' mean in the Statute.

These definitions are needed despite the fact that the Statute does not lay down any rules dealing specifically with the management of a group headed by the SE, mainly in order to prevent an SE from subscribing for or acquiring its own shares through the agency of a controlled undertaking (Article 48(1) and Article 49(1) and (9)). They are necessary also in order to determine the law applicable under Article 114(1) and (2).

The definition is based on Article 8 of Directive 88/627/EEC[3] of 12 December 1988 on the information to be published when a major holding in a listed company is acquired or disposed of. The tests chosen are simple and easy to apply.

Article 7

This Article defines the scope of the Statute in relation to the laws of the Member States. A distinction has to be drawn between the matters which are regulated by the Statute and those which are not.

1. Where a matter is regulated by the Statute, the Statute should be as independent as possible of national law so as to ensure that from the firm's point of view it does represent a simplification and an improvement over the existing position. The amended proposal of 1975[4] excluded the law of the Member States entirely. The Statute which resulted was too extensive, detailed and inflexible. The new draft simplifies matters by referring to the domestic law of the Member State in which the SE has its registered office whenever the company law directives have harmonized or are in the process of harmonizing the national rules (disclosure, accounts, mergers, etc.). Reference has also had to be made to national law in fields where Community rules cannot be expected in the near future (groups of companies, winding up and liquidation, etc).

If a question of law arises on a matter covered by the Statute but not expressly determined by it, the national courts will have to fill the gap by looking in the first place at the general principles upon which the Statute is based. If the question cannot be settled in that way the Statute refers to the law applying to public limited companies in the Member State in which the SE has its registered office.

Thus the demarcation line between the provisions of the Statute and the ordinary provisions of national law is clearly marked out. The adoption of the EEIG Regulation, which takes the same approach, shows that coexistence of this kind is possible.

2. Paragraph 2 makes provision for the special situation in the United Kingdom, where Scottish law is different from that in force elsewhere.

3. Provision is then made for matters which are not governed by the Statute. They are excluded from its scope, and subject to the law of the Member States. The law applicable in a particular case is to be determined in accordance with the private international law of the forum.

1 OJ L 228, 16. 8. 1973; Bull. EC 7/8-1973, point 2.1.22.
2 OJ L 63, 13.3. 1979; Bull. EC 3-1979, point 2.1.34.
3 OJ L 348, 17.12.1988, Bull. EC 12-1988, point 2.1.146.
4 Supplement 4/75 — Bull. EC.

4. The Statute requires Member States to treat SEs in the same way as public limited companies incorporated under their domestic law. This will apply for example with regard to the taking-up of various kinds of business, capacity to borrow, the issuing of securities, and the listing of such securities on a stock exchange. The only privilege that the Statute confers on the SE is the Community character of its structure. Companies in the form of SEs and companies incorporated under domestic law are thus on an equal footing in terms of competition.

Article 8

1. An SE is set up by being entered in a register designated by the law of the Member State in which it has its registered office in accordance with Article 3 of Directive 68/151/EEC. The use made here of a system which exists in all Member States makes it unnecessary to establish a European commercial register and to confer jurisdiction on the Court of Justice to hear actions in respect of the formation of any SE.

2. Any branch opened by an SE in a Member State other than that in which it has its registered office is to be registered in that other Member State, in order to ensure that shareholders and outsiders are fully informed. The procedure to be followed is the one laid down for branches by Articles 1 to 3 of the amended proposal for an 11th Company Law Directive, which is itself based on the system established for companies by Directive 68/151/EEC.

Article 9

Documents concerning the SE are to be disclosed by the means laid down in the laws of each Member State in accordance with Article 3 of Directive 68/151/EEC. That system consists of entry in a register and publication in a national gazette. Only then may those documents be relied upon against third parties.

Article 10

Notice is to be given in the Official Journal whenever an SE is formed or the liquidation of an SE is terminated. This type of publicity seems important given the nature of an SE's business, which is by definition transnational. But publication of this notice will have no legal implications. The relevant events can be relied upon against third parties from the date of the notice referred to in Article 9.

Article 11

This Article lists the details which must be supplied on an SE's business documents and those of any branch in another Member State. The list is fuller than that in Article 4 of Directive 68/151/EEC.

TITLE II

Formation

SECTION 1

General

Article 12

This Article defines the concept of founder companies for the purposes of Title II. This is necessary since public limited companies are no longer the only legal bodies which may participate in forming an SE.

Articles 13 and 14

These two Articles relating to the instrument of incorporation of the SE and to the experts' report on non-cash consideration refer back, as far as the conditions to be fulfilled by the latter are concerned, to provisions of national law.

Article 15

The task of ensuring that the rules governing the formation of the SE are complied with is entrusted to the national authorities which carry out that task for all other public limited companies. However, the Statute stipulates that Member States must ensure that such supervision is effective and that it covers the conditions laid down both by the Statute and by national law.

Article 16

This Article defines the date on which the SE begins to exist.

SECTION 2

Formation by merger

Article 17

The wording of this Article, which describes the merger process, is based on Directive 78/855/EEC and on the proposal for a 10th Directive on cross-frontier mergers. The formation of an SE by merger is based on an identical legal mechanism to that laid down by the proposal for a 10th Directive, since it involves the merging of two companies from different Member States. The rights of the employees of the merging companies are protected in each Member State in accordance with Council Directive 77/187/EEC[1] of 14 February 1977 on the safeguarding of employees'rights in the event of transfers of undertakings, businesses or parts of businesses.

Articles 18 and 19

The draft terms of merger, which are common to all the founder companies, set out certain details, an exhaustive list of which is given in the interests of greater clarity.

The arrangements for publishing the draft terms of merger are the same as those laid down for domestic mergers.

In view of the cross-frontier nature of the merger, however, more extensive publication of certain information is required.

Articles 20 and 21

The board of each of the merging companies is required to draw up a detailied report to shareholders justifying the merger. This report is examined by experts who are responsible in particular for checking, on behalf of shareholders, whether the share exchange ratio is fair and reasonable.

Article 22

A merger has always to be approved by a general meeting of each of the founder companies. The resolution approving the merger is subject to the same conditions as apply in the case of domestic mergers.

Article 23

Claims which originated prior to publication of the draft terms of merger and which have not yet reached maturity at the time of publication are governed by those provisions of the national law governing the founder companies which relate to the arrangements for protecting the interests of creditors.

Articles 24 and 25

The provisions relating to the supervision and control of compliance with merger requirements lay down certain rules for synchronizing supervisory procedures so as to prevent irreversible situations. The date on which the merger takes effect thus follows the completion of all the checks carried out on the founder companies and is determined by the law of the Member State in which the SE is to have its registered office.

Articles 26 and 27

The merger must be made public before it can become effective against third parties.

The merger entails the transfer of all the assets and liabilities of the founder companies to the SE.

Article 28

The liability of members of the administrative board or management board and of the experts of the founder companies is governed by the law of the Member State in which the founder company concerned has its registered office, subject to the minimum requirements laid down in the third Directive being observed.

Article 29

This Article limits the grounds on which a merger may be declared null and void to cases where one or other of the supervisory procedures has not been carried out.

It also seemed desirable, in order to limit the danger of mergers being declared null and void, to protect the cross-frontier merger from such a declaration

1 OJ L 61, 5.3.1977; Bull. EC 2-1977, point 2.1.23.

where it is not provided for in the law of the State in which the SE has its registered office, since that company only comes into existence when the merger has been completed.

Article 30

This Article lays down the rules applicable to the formation of an SE by merger where one of the founder merging companies holds all or part of the capital of the other.

SECTION 3

Formation of an SE holding company

Article 31

The economic aim underlying the formation of a holding company is to enable the shareholders of the founder companies to participate in the profits of the holding company; for that reason, an exchange of shares has to take place. As a result of that exchange, the holding company becomes the sole holder of all the shares in the founder companies; it is therefore appropriate that the application of national provisions providing for the founder companies to be wound up in such cases should be expressly excluded.

Article 32

The provisions of this Article relating to the formation of an SE holding company refer to the provisions relating to formation by merger.

Article 33

This Article introduces a system for informing the employees of founder companies about the implications of the formation of the holding company.

SECTION 4

Formation of a joint subsidiary

Articles 34 and 35

The provisions relating to the formation of a joint subsidiary are worded so that the decision to set up an SE is not a matter for the boards of the founder companies but for their general meetings; the Statute governs the approval of the formation of a joint subsidiary only where one of the parent companies is an SE.

SECTION 5

Formation of a subsidiary by an SE

Articles 36 and 37

This is the only case where the formation of an SE does not presuppose the existence of two companies from different Member States; this requirement of a foreign element is nevertheless observed in the formation of the parent SE.

Unlike national public limited companies, therefore, an SE, acting alone, may set up a subsidiary having the same legal form as the parent company.

TITLE III

Capital — Shares — Debentures

Article 38

Paragraph 2

The rule that shares must be 25% paid up represents an average of the rates in the Member States, and has been taken over from Directive 77/91/EEC.

The obligation to transfer in full any consideration other than cash is a protection against fictitious consideration, and one of the simplest ways of ensuring that a subscriber offering consideration other than cash does in fact transfer it.

Paragraph 3

Contributions must be realizable. In order to provide security for creditors, promises to perform work or to supply services which cannot be converted into money are not permitted.

Article 39

This Article provides some security for creditors. It accepts, however, that professional intermediaries placing shares may buy them below par, the difference representing payment for their services.

Article 41

This Article states a general principle deriving from the dual nature of share capital, which is at the same time the sum of the contributions which allow the company to be set up and the company's fund for safeguarding creditors. Shareholders cannot be dispensed from the obligation to furnish their consideration, except in the event of a reduction in the subscribed capital.

Article 42

Paragraph 1

Article 38 has already laid down a minimum proportion in which the shares must be paid up on the formation of the company; the same proportion applies to an increase in capital.

Paragraph 2

The requirement of a report on the valuation of any consideration other than cash represents a safeguard for those subscribing cash and for creditors. The valuation must be objective, and therefore carried out outside the company by independent valuers.

Paragraph 4

An increase in the subscribed capital can be regarded as an amendment of the statutes. The requirement of a resolution of the general meeting is therefore an indispensable safeguard.

Paragraph 5

The restriction to available reserves is intended to ensure that reserves legally required cannot be capitalized, while anything in excess may be. Proportionate distribution of new shares protects the existing shareholders. An exemption has been provided for to allow for distribution of the new shares to the employees.

Article 43

Paragraph 1

Provision is made for authorizing an increase in capital, with a maximum set by the statutes or the general meeting in the interests of the shareholders. But any increase in the subscribed capital is not to exceed one half of the capital already subscribed.

Paragraphs 2 to 4

These paragraphs make it clear that the powers of the management board or the administrative board are merely delegated powers in relation to the powers of the general meeting.

Article 44

The principle of a preferential right of subscription is laid down in order to provide protection for the existing shareholders when the capital is to be increased by the issue of new shares for cash. The shareholder is entitled not to see his own participation in the SE reduced by the issue of new shares. But exceptions have to be made in order to prevent this individual safeguard for the shareholder from damaging the interests of the company and making it more difficult to obtain outside finance. Where any such exception is to be made the shareholders must have been properly informed.

Article 45

Paragraph 1

The procedure laid down for reductions of capital is intended to ensure equal treatment of shareholders.

Paragraph 2

This paragraph also represents an application of the principle of equal treatment of shareholders.

Paragraph 3

A reduction of capital may not bring the capital below the prescribed minimum, except in response to losses. But in that case the capital must then be brought back to the prescribed minimum or above it.

Paragraph 4

A reduction in capital in response to losses must not make it possible to circumvent safeguards for

creditors. The economic purpose of a reduction is to allow the capital to be increased at the same time or later, so as to obtain fresh resources for an SE in difficulties. An increase will be impossible while the balance sheet shows a loss and the accounting value of the old shares is therefore below par.

Article 46

Creditors who dealt with the SE before its capital was reduced must be protected. They are generally to be entitled to security; the manner in which this right is exercised is to be governed by the law of the Member State where the company has its registered office.

Article 48

Paragraph 1

An SE may not subscribe for its own shares. This ban extends to undertakings it controls, as otherwise the major part of a stake held by the SE in a controlled undertaking could find its way back into its own capital via a stake held by the controlled undertaking in the parent SE. This would indirectly reduce the SE's capital.

Paragraph 2

This paragraph extends the protection of the capital provided by paragraph 1 where the company subscribes for its own shares through a person acting on its behalf.

Paragraph 3

This sanction provides greater flexibility than would nullity of the subscription, without introducing joint and several liability.

Article 49

Acquisition by an SE of its own shares infringes the principle that the capital must be kept intact, and is therefore generally prohibited. Paragraph 2 sets out certain exceptions, which involve no appreciable danger to third parties or shareholders. It is enough that they should be regulated, and this is done in paragraphs 3 and 4.

Paragraph 5

This ban is an extension of the rule in paragraph 1. The holder of a right of usufruct may have voting rights (Article 92 (4)), and this extension is necessary to avoid the danger of abuse which would arise if the company could exercise voting rights attached to its own shares.

Paragraph 9

In line with paragraph 1, any undertaking coming under the SE's control is also required to dispose of any shares it holds in the SE.

An SE which acquires its own shares as a result of a universal transfer of assets does not thereby infringe the ban in paragraph 1. But the shares must be disposed of within 18 months.

Paragraph 10

This provision covers distribution to the employees.

Paragraph 11

This provision prevents any abuse of the SE's own shares, and ensures that the obligation to dispose of or distribute shares will be complied with. The acquisition by a company of its own shares can be regarded as repayment of capital. Such a share therefore has no intrinsic value in the SE's capital. It no longer forms part of the net assets; the holding of a stake in the net assets is not based on the share, except in a purely formal sense, but in reality on the contribution made. Consequently, no rights should attach to a share in the company which is held as part of the company's own assets.

Article 50

This provision reflects a fundamental concern for clarity in relations within companies. The purpose is to identify any shareholder able to exercise influence in the SE.

Article 52

Paragraph 1

The ban on fixed interest represents an application of the principle that there should be no distribution without profit.

Paragraphs 2 and 3

Non-voting shares are permitted under specified conditions.

There can be no other restriction or extension of voting rights. This would in particular prohibit shares carrying a right to nominate members of the supervisory board.

Paragraph 5

This represents an application of the principle of equal treatment of shareholders.

Article 58

Paragraph 1

It is right and proper that the issue of debentures convertible into shares in conjunction with an increase in capital should be governed by the same rules with regard to the powers of the decision-making bodies involved and the same procedure followed as a straightforward increase in capital.

Paragraph 3

This provision protects the holders of convertible debentures. The proportion of holders whose rights may be affected is restricted by the second sentence.

Article 59

In the interests of the shareholders it is appropriate to require that any issue of debentures carrying the right to a share in profits be decided in the same way as an amendment to the statutes, and that the shareholders be given a right of subscription similar to their right in the event of an issue of convertible debentures.

TITLE IV

Governing bodies

Article 61

On the question of governing bodies, the Statute is based on national company law and on the amended proposal for a fifth Directive on the structure of public limited companies; it makes provision for a separation of powers between the general meeting of shareholders, which is to decide certain major items of business, and the bodies which are to manage and represent the SE.

The management and representation of the SE is to be the function either of a management board, with a supervisory board monitoring its activities (the two-tier board system), or of an administrative board (the single-tier system) The SE's founder companies are authorized to choose between the two systems; detailed rules for each system are spelt out in Section 1 and Section 2. Section 3 sets out rules common to both systems, while Section 4 contains detailed rules governing the general meeting.

SECTION 1

Two-tier board system

Sub-section 1

MANAGEMENT BOARD

Article 62

The most important characteristic of the two-tier system is that the members of the management board are always to be appointed by the supervisory board; the two bodies are kept separate by a rule preventing the same person from serving on both at the same time.

Sub-section 2

SUPERVISORY BOARD

Article 63

The members of the supervisory board are to be appointed by the general meeting and, where the SE uses a model of employee participation which so requires, by the employees too.

Article 64

To be able to perform its function the supervisory board is to receive a quarterly report on the company's affairs. The supervisory board must be able to require the management board to provide information or a special report on any matter concerning

the company at any time, and must be able to carry out any enquiries necessary for the performance of its duties. Any member may also require that information be given to the supervisory board as a whole; but in order to avoid duplication such requests must be made through the chairman of the board.

Article 65

To ensure that the supervisory board functions properly it is to be convened not only at the chairman's initiative or at the request of the management board but likewise at the request of any of its members. Like the preceding article, this provision is necessary in order to avoid any possibility of collusion between the management board and a majority on the supervisory board.

SECTION 2

Single-tier system

Article 66

This Article defines the fundamental characteristics of the single-tier structure. The administrative board must have at least three members, appointed by the general meeting and, where the model of participation in use requires it, by the employees. All the members are to designate one or more executive members from among its own members, and to delegate the management and representation of the company to them; the main function of the other members is to supervise the executive members; in order to strengthen the position of the non-executive members, they are to be more numerous than the executive members.

Article 67

The board is to meet at least once every quarter to allow the executive members to report to the whole board, and so to enable the non-executive members to supervise the management and progress of the company's affairs. All members of the administrative board have the same rights and obligations, apart from the actual management of the company; it does not appear necessary to make provision for an individual right of access to information or of enquiry as in Article 64(3) and (4).

SECTION 3

Rules common to the single-tier and two-tier board systems

Article 68

The better to ensure that the members of the governing bodies can be held responsible for their acts it was felt useful to state the principle that they can be appointed only for a specific period of time, which is not to exceed six years.

Article 69

The functions of the members of the governing bodies are such that they can properly be carried out only by natural persons. The admission of legal persons to any of these bodies has therefore to be subject to special rules, first and foremost the requirement that such a legal person must appoint a natural person to represent it in the performance of its duties on the relevant board.

Paragraph 4 has been included to allow representation of a minority of shareholders on the administrative or supervisory board. Particularly where an SE has been set up as a joint subsidiary, it may be important to a founder company with a minority holding in the capital to have the assurance that its interests will be represented on the board. There would be no such assurance if the members of the administrative or supervisory board were elected under the general rules in Article 94(2), according to which resolutions of the general meeting are to require a majority.

Article 70

The main purpose of this Article is to allow a list of alternative members to be elected, so that there will be no need to set the expensive election procedure in motion every time there is a vacancy on the board.

Article 71

This provision deals with the representation of the company in dealings with third parties, and is closely based on the rules in Directive 68/151/EEC, both as regards the question of whether those acting for the company are to do so together or may do so alone and as regards the appointment of persons with general authority to represent the company.

Article 72

The supervisory board or non-executive members are confined to supervising the management of the company. But it does not contradict this principle to require that development programmes and strategies and other measures of major importance to the company be decided by the management board or the executive directors only with the agreement of the supervisory board or of the administrative board as a whole. Even though authorization for a particular operation has to be obtained, it is the management board or the executive directors who will take the decision and implement it.

Article 73

This provision is intended to prevent members of the governing bodies from abusing their powers in their personal interest and to the detriment of the company. It does not prohibit transactions of the kind at issue, but seeks to provide an effective means of control by making them subject to authorization.

Article 74

Every member of a board is to have the same rights and obligations even though certain responsibilities of the board may be entrusted to particular members. One of the main obligations of board members is the obligation to protect confidential information. This Article also makes it clear that the fundamental duty of the members of the governing bodies of the company is to act in the interests of the company.

Article 75

The general rule is that the power to appoint the members of the supervisory board or the administrative board is accompanied by the power to remove them at will.

This Article also lays down a procedure for the removal of members by the courts, acting on the application of bodies or persons who do not have power to appoint the members concerned. This exception is also necessary where, in accordance with the model of employee involvement, members of the board are co-opted.

Article 76

This provision lays down the basic rules for the quorum and majority required for board decisions.

Article 77

This Article and those following it deal with the liability of the governing bodies of the SE for loss wrongly caused to the company. There is to be liability only if the company has suffered damage. Thus there has to be a causal link between the act done and the damage itself.

Where the governing body has more than one member, it is difficult for an outsider to know which member may have caused the damage; the provision therefore makes all the members of the relevant body jointly and severally liable, whatever the nature of the act.

Under the ordinary principles of civil law a person who has suffered damage is required to prove that the person who caused it was at fault. This rule here would defeat many actions for liability, as it would be very difficult for an outsider to verify what was done inside the company. The burden of proof has therefore been reversed, and the members of the board required to prove that no fault is attributable to them personally.

Article 78

This provision sets out to clarify the procedural rules governing actions brought on the company's behalf against members of the governing bodies. An action may be brought by the administrative board or by the supervisory board; an action must be brought if the general meeting so decides.

The provision also gives minority shareholders and creditors the right to bring actions on behalf of the SE.

Article 79

This provision allows the SE to waive its right to bring an action for damages, but imposes certain conditions to ensure that the rights to bring such actions conferred by the earlier articles do not become illusory.

Article 80

The severity of the rules on liability is balanced by the imposition of a period of limitation, which in view of the cross-border character of the SE is set at five years.

SECTION 4

General meeting

Article 81

A number of major steps require a resolution of the general meeting: the list given here is not an exhaustive one.

The Statute draws no distinction between ordinary and extraordinary general meetings. It does however require a qualified majority rather than a simple majority in certain cases.

The provisions set out in this section are intended to protect the rights of shareholders at general meetings and to provide safeguards against certain decisions which may be taken by such meetings.

Article 82

In accordance with a principle common to all Member States, a general meeting must be held at least once a year. This is made necessary by the need to approve the annual accounts.

But given the long list of matters necessitating a resolution of the general meeting, it must be possible to call a general meeting as the conduct of the company's affairs requires. The management board or the administrative board must therefore be entitled to call a general meeting at any time, and this power must not be restricted by the statutes.

Article 83

A minority of shareholders as defined in Article 75 must also be able to require a general meeting.

While shareholders must be prevented from abusing this power, the governing bodies of the company cannot be allowed to have the last word, so the shareholders should be authorized to refer the matter to the courts if their request is not complied with within one month.

Article 84

The method of calling the general meeting must be such that news of it can reach all shareholders.

The minimum information which must be provided by the notice of the meeting is laid down in the Statute. There is no need to comment on the details listed, although it is important that the shareholder should know whether he is being called to an ordinary, extraordinary or special meeting, since the rules for the quorum and majority will be different depending on the nature of the meeting.

The laws of all Member States lay down a minimum period between notice and meeting, but the periods set vary between five days and one month depending on the Member State.

Shareholders have to be allowed sufficient time to prepare to attend the general meeting or to arrange to be represented there; it must be borne in mind that a steadily growing number of shareholders may be resident outside the country where the company has its registered office, and that short deadlines would prevent them from attending. Nor would the arrangements for proxies and for the amendment of the agenda by a minority be able to function without sufficiently long deadlines. The Statute therefore lays down a period of one month.

Article 85

A minority of shareholders equal to that entitled to call a general meeting should also be in a position to have one or more additional items included on the agenda of a general meeting already called. It may be that for one and the same meeting various minorities will cause various amendments to be made to the agenda. As the notice of the meeting is to be published one month before the meeting takes place, requests for the inclusion of additional items are to be put forward within seven days of the first notice; this will enable the company to notify all shareholders of the amended agenda, through the same channels as those laid down for the calling of the meeting, not less than seven days before the meeting takes place.

Article 86

The Statute prevents attendance at the general meeting being made subject to conditions other than procedural formalities such as the deposit of share

certificates with a notary, a bank or the company itself, notification by the shareholder of his intention to attend the meeting, or proper recording of registered shares in the company register. The statutes may not, for example, require possession of a stated number of shares as a qualification for attendance.

Article 87

It often happens that the shareholder is unable or unwilling to attend the general meeting, particularly if he is not resident in the country in which the company has its registered office. Representation by proxy is provided for in all Member States. The Statute recognizes this right and prohibits any provision to the contrary in the statutes.

In certain companies it may be useful to restrict the categories of persons who may be appointed as proxies. These restrictions are to be laid down by the law of the place where the company has its registered office or in the statutes; a shareholder may always appoint another shareholder as his proxy.

To make it easier to verify the proxy's credentials, he must be nominated to the company in writing; the company is to preserve the document for at least three years, the same period as that laid down for the other documents relating to the meeting such as the attendance list and the minutes.

Article 88

Article 87 will not be sufficient where bodies such as associations of shareholders or credit institutions ask the shareholders to give them proxies and themselves designate later the persons who are to exercise them. Additional guarantees are needed here to ensure that the proxy votes in accordance with the instructions given.

By way of exception the proxy may depart from the shareholder's instructions or the statement made to the shareholder; he must then inform the shareholder accordingly as soon as possible and provide all necessary explanations.

Article 89

The notice convening the general meeting does not provide the shareholders with sufficient information regarding certain particular decisions to be taken by it. The statute therefore provides that certain documents are to be available to every shareholder, at the latest by the date of dispatch or publication of the notice. The main such documents are the annual accounts and the auditors' report; the texts of agreements requiring approval by the general meeting must also be available.

Article 90

It is not enough to give the shareholders the right to put questions to the management at the general meeting; the management must also be required to supply the information requested.

The information requested may be refused if it would be likely to cause harm to the company or if its disclosure would be incompatible with a legal obligation of confidentiality.

Apart from these restrictions on the duty to supply information, the statutes may not make provision for any other grounds of refusal.

The board is responsible for supplying information. If the board and the shareholder disagree as to whether information asked for should be supplied, the power to settle the matter cannot be left with the general meeting, where an objective decision cannot be guaranteed. The Regulation provides for an appeal to the court to check the validity of the refusal.

Article 91

The Statute here follows a principle common to the laws of all Member States by prohibiting the general meeting from taking decisions on any matters not on the agenda communicated or published in accordance with Articles 84 and 85.

But this principle need not apply where all shareholders are present or represented at the meeting and no shareholder objects.

Article 92

The shareholder's voting rights must be proportionate to his stake in the capital as represented by his shares. Only two exceptions are permitted, and only if they are provided for in the statutes.

Thus double or multiple voting rights are prohibited.

The Statute itself lays down two cases in which the right to vote may not be exercised, and refers to the law of the State in which the SE has its registered office for certain other cases.

Article 93

In the case of certain conflicts of interest between the company and the shareholder, the shareholder must be prevented from exercising his voting rights. The Regulation sets out the circumstances in which this is so.

These prohibitions apply not only to shareholders but to their proxies as well. They apply to shareholders whether or not they own the shares carrying the voting rights in question.

Article 94

This Article defines the majority needed for resolutions of the general meeting: as an absolute majority of the votes attached to the capital represented.

The statutes may require larger majorities for all or for certain resolutions. An exception is made in order to facilitate the appointment or dismissal of board members.

The Regulation itself also requires higher majorities for certain resolutions.

Article 95

This provision gives the general meeting power to make any amendment to the statutes, with carefully defined exceptions.

Where the general meeting empowers the board to do certain things which require amendment of the statutes, it must be possible to empower the board to amend the statutes accordingly. For example, an authorization to increase the subscribed capital up to a fixed maximum may include an authorization to amend the issued capital in the statutes; this may also be the case where convertible debentures are to be converted.

Article 96

The information which under Article 84(2) must be included in the notice convening the general meeting is not sufficient where shareholders are required to decide on an amendment to the statutes. In that case the full text of the amendments proposed must also be included.

Article 97

Following the example of the laws of most Member States, the Statute requires a qualified majority for a resolution of the general meeting to amend the statutes.

In a limited liability company a shareholder's only obligation is to pay up the amount he has agreed to contribute. It follows that an increase in the obligations of the shareholders cannot be decided simply by the majorities required for amendment of the statutes. All the shareholders concerned must approve. An amending resolution must be made public.

Article 98

Additional rules are needed where the company has issued different kinds of shares. If the measures envisaged would also change the relationship between the classes of share, there must in addition to a resolution of the general meeting also be a separate vote of each class of shareholder whose rights are affected by the resolution.

Article 99

Minutes are to be drawn up for each session of the general meeting. The Regulation lays down the minimum information which must be included.

The minutes are addressed primarily to the shareholders. It does not appear necessary to require that they be registered and published.

Article 100

Actions for the annulment of resolutions of the general meeting are of great importance to the shareholders and to outsiders. Both would wish to see any such actions brought quickly. Paragraph 3 therefore restricts the period in which such an action may be brought to three months from the closure of the general meeting.

The grounds for annulment are fairly broad: any infringement of the Regulation or of the company's statutes is sufficient. This would include an infringe-

ment of the shareholders' entitlement to information, to the extent that it influenced the general meeting. The ordinary grounds of annulment under general principles of law, such as abuse of a majority position, might also be invoked.

Annulment or suspension of a resolution is valid against third parties, and the court's decision is to be disclosed by registration and publication in the ordinary way.

A declaration that a resolution is void can be prevented if, on the order of the court or before the court has delivered judgement, the general meeting amends the resolution challenged. The court retains a wide discretion with regard to the resolutions concerned in this Article.

TITLE V

Annual accounts and consolidated accounts

Articles 110 to 113

The Council has adopted three Directives relating to the preparation, auditing and publication of annual accounts and consolidated accounts. These are Directive 78/660/EEC (annual accounts). Directive 83/349/EEC (consolidated accounts) and Directive 84/253/EEC (approval of persons responsible for carrying out the statutory audits of accounting documents). In addition, the Council adopted on 8 December 1986 Directive 86/635/EEC, which specifically relates to the annual accounts and consolidated accounts of banks and other financial institutions.[1] The annual accounts and consolidated accounts of insurance companies are the subject of a further proposal for a Directive which is currently before the Council.[2] The provisions of Title V refer extensively to this Community legislation.

The SE must comply with the provisions of Directives 78/660/EEC and 83/349/EEC. It will be able to make use of the options which these Directives grant Member States.

Those European companies which are credit institutions or insurance companies have to apply the national provisions adopted pursuant to the Directives on those subjects.

TITLE VI

Groups of companies

Article 114

1. The question of rules dealing specifically with groups arises in connection with the European Company Statute because two of the ways of setting up an SE (creation of a holding company or of a joint subsidiary) automatically entail the formation of a group of companies. What, then, are the rules which will govern relations between the SE and its subsidiaries?

The aim of the original draft of the European Company Statute was to enable those setting up an SE to opt for a special group status, which would facilitate management of the company as a single economic unit, while at the same time ensuring appropriate protection for the interests of third parties (e.g. minority shareholders and creditors).

The memorandum on the European Company Statute[3] asked, however, whether the Statute was the proper place to create a body of rules governing groups.

2. At present the laws of the Federal Republic of Germany and of Portugal are the only ones which recognize the right of a parent company of a group to manage its subsidiaries in the interests of the group, and which consequently lay down specific safeguards for minority shareholders and creditors.

In the 1985 White Paper on the Internal market[4] the Commission stated that it was considering a proposal to coordinate the national law on the subject in the light of comparative law studies in progress.

3. If specific rules are included in the Statute at this stage they will prejudge the outcome of those studies, and will jeopardize the rapid adoption of the regulation establishing the Statute.

1 OJ L 372, 31.12.1986; Bull. EC 12-1986, point 2.1.127.
2 OJ C 131, 18.5.1987; Bull. EC 12-1986, point 2.1.125.
3 Bull. EC 6-1988, point 2.1.127; Supplement 3/88 — Bull. EC.
4 Bull. EC 6-1988, points 1.3.1 to 1.3.9.

Debate on the Commission's earlier proposal[1] came to a halt in 1982 because, before stating a view on the arrangements for groups where one member of the group is an SE, delegations wanted to know what the Commission would be proposing for the harmonization of the Member States' legislation on groups in general.

Specific rules would certainly be useful to facilitate the management of a group headed by an SE. But they are not indispensable. An SE can be treated as a public limited company governed by the legislation of the Member State in which it has its registered office, and its rights and obligations can be determined by reference to the rules governing such a company, whether it is the parent company or the subsidiary in a group.

On the basis of the rules and principles of private international law generally accepted in the Member States it can be presumed that the law applicable to a subsidiary will determine the rights and obligations of a parent company which is itself governed by a different set of national laws from that applying to the subsidiary.

4. If we follow this approach it should be stated in the regulation establishing the European Company Statute that where an SE is a subsidiary company or, in the language of the Statute, a 'controlled undertaking', it is to be treated like any other public limited company governed by the laws of the Member State in which it has its registered office.

On the other hand, if it is the SE which is exercising control, the regulation establishing the Statute does not need to lay down specific rules, which will be supplied by the law governing the company controlled by the SE.

The rights conferred and the obligations imposed on a firm as a result of the control it exercises over another which is governed by separate legislation do not however affect any obligations which may be incumbent on the controlling undertaking under its own proper law, for example as regards the preparation of consolidated accounts.

TITLE VII

Winding-up, liquidation, insolvency and suspension of payments

SECTION I

Winding-up

Article 115

This Article sets limits to the procedures for the winding up of an SE. In the interests of legal certainty and the protection of shareholders the grounds for automatic winding up must be restricted. The Statute prescribes only the case where the duration of the company laid down in the statutes expires; this possibility exists in the laws of all Member States. As the documents are a matter of public record, the duration of the company is an incontestable fact which can be verified by anybody.

In allowing the general meeting of shareholders to decide to wind up the company the Statute is likewise accepting a rule which is generaly recognized; the mechanisms are governed by Article 116.

Failing a decision of the general meeting, winding-up requires a court decision; such a decision may be granted on a ground contemplated in the law of the place where the SE has its registered office or in the statutes, or where no disclosure of annual accounts has taken place, or where the issued capital has been reduced below the legal minimum.

Article 116

On the one hand the Statute limits the grounds for automatic winding-up; but on the other it seeks to facilitate the taking of a decision to wind up the company by the shareholders, in order as far as possible to avoid the need for court proceedings. A distinction is made as regards the majority needed at the general meeting. Where the ground of winding-up is one contemplated by law or by the statutes, a simple majority is sufficient.

In all other cases a decision to wind up the company represents an amendment to the statutes, for which the laws of all Member States require a qualified majority. It should be emphasized that this rule

[1] OJ C 124, 10.10.1970; Supplement 8/70 — Bull. EC; Supplement 4/75 — Bull. EC.

represents a minimum requirement, and the statutes may impose stricter conditions.

Article 117

It has already been observed that the power conferred on the courts to decide that an SE is to be wound up can only be a residual one; the power to decide is to lie in the first place with the shareholders.

As a matter of principle it will be for the Member States to regulate the procedure to be followed before the court. But it does appear necessary to make rules on who is entitled to initiate such proceedings. First and foremost there would be the governing bodies of the company. The general meeting, however, would be entitled to decide by itself to wind up the company. However, to avoid any abuse of the majority requirements in Article 116, any shareholder or person showing a legitimate interest must also be in a position to refer the matter to the court.

In a case where the irregularity which forms the ground for winding up can be remedied, the court must be able to grant the company sufficient time to do so.

Article 118

To ensure that shareholders and third parties are properly protected, there must be proper disclosure of the decision to wind up the company.

Article 119

This provision is intended to clear up the uncertainty as to whether a decision to allow a company to continue in business is possible after the decision to wind it up has been taken by the general meeting of shareholders. Clearly the fresh decision must require at least the same majority as that required for the initial decision to wind up the company. But a decision to continue must be ruled out once any distribution has been made in the course of the liquidation. The general meeting may also review an automatic winding-up which takes place because the duration of the company has expired. The decision to continue will require a change in the objects of the company and must be disclosed.

The Statute does not deal with the grounds on which a winding-up decision made by a court may be reviewed.

SECTION 2

Liquidation

Article 120

Any winding-up leads automatically to the liquidation of the assets. Once the decision to wind up has been taken, the company continues to exist only for purposes of the liquidation.

Liquidation is everywhere administered either by one or more liquidators. Clearly the appointment of liquidators is of particular importance to the shareholders. To safeguard their role in the choice of liquidators, the Statute lays down a set of rules on the shareholders' powers.

Under this scheme liquidators may be appointed in the first place by the statutes or by methods set out therein. Such clauses can of course be amended, even after a decision to wind up the company, but only in the manner required for the amendment of those documents. Secondly, the general meeting of shareholders may appoint liquidators, which is a generally accepted rule. To facilitate a decision the Statute requires a simple majority of the votes cast. Individual shareholders are protected against any abuse on the part of the majority by Article 131, which makes it possible to have a liquidator removed by a court on showing cause. In the third place, in case the general meeting fails to appoint liquidators, a power of appointment must be conferred on a court. To speed up the appointment and to give maximum protection to those concerned, the matter may be brought before the court not only by the governing bodies of the company but also by any shareholder, whatever his stake in the capital. But this power in any event remains a subsidiary one, to be exercised failing appointment under the statutes or instrument of incorporation or by the general meeting.

The set of rules on the appointment of liquidators would be incomplete without provision for the case where the statutes are silent and neither the general meeting nor the court has made an appointment. In that case the members of the administrative or management body are to be deemed to be liquidators until the powers already referred to have been exercised.

Finally, the general meeting, or failing that the court, is to set the remuneration of the liquidators.

Article 121

The rules on the appointment of liquidators in Article 120 must be supplemented by rules on their removal. The fact that a liquidator has been appointed under the statutes should not prevent his removal by the general meeting of shareholders, acting by a majority of the votes cast. This is all the more true of the withdrawal of an appointment originally made by the general meeting. However, it appears appropriate to give the court a general power of removal, alongside that of the general meeting, not only in the interest of those managing the company, but above all in order to protect individual shareholders against any negligence on the part of the majority of shareholders which might allow a liquidator who fails properly to perform his duties to continue in office. Any removal of a liquidator is to be disclosed.

Article 122

The Regulation adopts the quite general rule that the liquidators may do anything, even undertaking new transactions, to the extent necessary for the purposes of the liquidation, which has become the new object of the company.

The liquidators are to have power to bind the company in dealings with third parties and in legal proceedings. To ensure protection for third parties provision is made here for disclosure of the appointment and termination of office of liquidators and the extent of their power to represent the company.

Article 123

The Regulation requires certain safeguards as regards the civil liability of liquidators. Firstly, the civil liability of liquidators may in no case be less strict than that of the members of the single board or management board. Any reduction in the liability of liquidators as compared with the liability of the members of the relevant board is therefore prohibited, and thus may not be provided for by clauses in the statutes.

Article 124

It is normal practice to draw up a statement of assets and liabilities at the date on which liquidation begins. The Regulation requires that such a statement be drawn up, but does not seek to regulate its contents or to require disclosure. The document must be supplied on request to any shareholder, member or creditor.

To avoid any misunderstanding in this matter, the Regulation leaves no doubt that the winding-up and liquidation of a company in no way affects its obligations under the rules on company accounts, which are to apply subject to the specific requirements of the liquidation.

Article 125

The winding-up of any company must be disclosed in accordance with Article 9.

But disclosure of this kind is not sufficient to ensure equivalent protection of the company's creditors throughout the Community. The Statute therefore goes on to make the same disclosure requirements apply to the invitation to creditors to lodge their claims and to the indication of the date after which distributions may be made. Any known creditor of the company is to receive a similar invitation individually. To avoid any misunderstanding the Regulation makes no provision for a cut-off date for creditors who do not come forward by the date indicated. The date to be indicated merely represents information supplied to creditors, and in no way affects their claims on the company in liquidation.

Article 126

According to a general principle governing liquidation all creditors of the company must be paid in full before there can be any distribution of the net assets remaining. The statutes may determine the beneficiaries of any such distribution. In the absence of such a clause the net assets are to be distributed among the shareholders. That distribution is to be in proportion to their holdings in the capital of the company, unless the statutes provide otherwise. There is a particular problem where the capital has not been paid up in equal proportions. In that case, in order to ensure that the shareholders are treated equally, all considerations paid up are to be repaid, and the net assets remaining are to be distributed by the proportional rule.

Lastly, no distribution may be made until adequate security has been set aside for claims which have not yet fallen due, or which are in dispute, or where the creditor cannot be identified.

Article 127

For the better protection of the shareholders against any failure to comply with the principles of distribution in Article 126, the liquidators must draw up a distribution plan after the date indicated in the invitation to creditors issued under Article 125. This document must be brought to the attention of the general meeting and of any beneficiary designated in the statutes. The Regulation requires that the general meeting be informed, but does not require its approval.

The protection provided takes the form of a right to challenge the plan before a court, a right held by any shareholder and any beneficiary, but not by a creditor, who at this stage should already have been paid in full. In the event of any such challenge it will be for the court in question to decide whether, and if so to what extent, any partial distribution may be made pending the final decision.

Article 128

The liquidation is terminated once the distribution has been made.

Where after the liquidation has been terminated previously unknown assets or liabilities of the company come to light, the liquidation may be reopened, but only by a decision of the court, which must appoint the liquidators.

The fact that a liquidation has been terminated is subject to a disclosure requirement.

SECTION 3

Insolvency and suspension of payments

Articles 129 and 130

In all Member States there are special rules governing companies which are the subject of proceedings for insolvency or suspension of payments, and the Regulation does not affect those rules.

A draft convention aligning these insolvency procedures has been drawn up on the basis of Article 220 of the EEC Treaty. The draft is before the Council.

Decisions taken in the course of proceedings for insolvency or suspension of payments are subject to a disclosure requirement.

TITLE VIII

Mergers

Articles 131 and 132

Title VIII allows an SE to merge with other SEs and with public limited companies incorporated under national law, either by taking them over or by forming a new SE jointly with them. The reverse procedure is also authorized: an SE may be taken over by a national public limited company, and may set up a new national public limited company together with another such company or with another SE or other SEs.

TITLE IX

Permanent establishments

Article 133

It is in the nature of an SE that it should operate across borders. It is primarily a new tool of cross-border cooperation, facilitating links between companies in different Member States.

It is essential, therefore, that the SE should be able to overcome the handicap which this would otherwise impose on it in terms of taxation.

Where an SE conducts taxable business through permanent establishments abroad, losses suffered by those establishments would, generally speaking, not be taken into account for tax purposes in its country of residence if profits from foreign business are exempt from tax in that country under national tax law or bilateral conventions. This rule could result in an SE being more heavily taxed. To avoid this, paragraph 1 provides that such losses may be deducted against an SE's profits.

To safeguard the interests of the Member State of the SE, paragraph 2 provides that subsequent profits made by such permanent establishments are to be added to the SE's profits, up to the amount of the losses previously deducted.

Paragraph 4 takes account of the fact that in Member States applying the imputation system a tax treatment identical to that under paragraphs 1 to 3 is already applied.

Final provisions

To deal with the involvement of employees in the SE, appropriate provisions should be adopted by means of a Directive so as to enable Member States to take account of their national rules and practices when implementing the Directive in their national law.

Article 135 does not lay down a rule of law. It merely refers to the provisions of the Directive dealing with the involvement of employees in the SE, which is complementary to this Regulation.

Article 136 provides that an SE may be formed in any Member State which has implemented in its national law the provisions of Directive... dealing with the involvement of employees in the SE. By so doing it prohibits the creation of an SE in a State which has not incorporated those provisions.

Article 137 postpones the applicability of the Regulation so as to make its entry into force coincide with the date by which Member States must implement the Directive.

Commentary on the Articles

The purpose of the Directive is to recognize the involvement of employees in the company, to make them feel that the business of the firm is their business. The three models proposed each provide a structure through which this involvement can operate.

Article 2 clarifies the concept of employee participation as being not in the day-to-day running of the firm, which is the function of management, but in supervision and strategic development.

Article 3 determines the mechanisms for choosing between the various models of participation; it allows a Member State to restrict the choice to two models or even a single model.

There are different possibilities. If only one model is permitted the SE will have to adopt that one. Where the choice is between two or three, the managements of each of the founder companies are to choose a model, if possible with the agreement of the representatives of their own employees provided for by the law or practice of the relevant Member State. If the management and employee representatives cannot reach agreement on the model proposed by management, management may decide to propose another model acceptable to the employees; but it must not be forgotten that the SE cannot be set up without the approval of the general meeting of shareholders. It would be unrealistic to give the employees a right of veto which might prevent formation of the SE, or induce management to locate its registered office in another Member State. If no agreement is reached, therefore, the model is to be chosen by management.

If the representatives of the employees of company A and company B disagree between themselves on the choice of model proposed by management, the majority will prevail. An SE may never be set up until a model of participation has been chosen.

After the SE has been formed it may prove necessary to change the model chosen at the time of formation. Such a change will be possible if there is agreement between the management of the SE and the representatives of its employees. The agreement is to be approved by the general meeting.

In view of the great flexibility of the Statute, which will allow models of participation to be adopted which will operate in different ways according to national traditions, paragraph 4 requires each Member State to determine the details of the practical application of the participation models which may be used by SEs having their registered offices in its territory.

Article 4 makes provision for a model of employee participation either on the supervisory board (the two-tier system) or on the administrative board with a definition of management and supervisory functions (the single-tier system).

If this model is chosen all the employees of the SE and its various establishments, in whatever Member State they are employed are to elect representatives to the supervisory board (or administrative board) of the SE itself; these board members (at least one-third and not more than one-half) will sit alongside the shareholders' representatives (at least one-half and not more than two-thirds).

Pursuant to Article 74 of Council Regulation ... all board members, whether they represent employees or shareholders, are to have the same rights and obligations. However the power to authorize certain operations (listed in Article 72 of the Regulation) will rest with a majority of the members. A minority will be informed and consulted; it will in any event be able to express its view, even if it is not in a position to decide on the operation itself. In one Member State the general meeting and the employees do not designate their representatives directly. Article 4(ii) takes account of this original system of appointing the supervisory board. If this system were adopted by an SE, the shareholders and the employees or

their representatives would have the same rights to recommend, or to object to, the appointment by the supervisory board of a new member of that board.

Article 5 makes provision for a model of employee participation through a body which represents the employees at company level but is separate from the company supervisory or management structure. If this model is chosen all employees of the company and its various establishments, in whatever Member State they may be employed, are to elect representatives to sit on this body, where they will enjoy the same rights of information (see Article 64 of the Regulation) and of consultation in the implementation of the same decisions (listed in Article 72 of the Regulation) as those in the model defined in Article 4.

Article 10 makes it clear that the rights of information and consultation conferred on the separate body referred to in Article 5 in no way diminish the rights enjoyed under the laws of the various Member States by the representatives of the employees of the SE's establishments there: Betriebsräte, shop stewards, conseils d'entreprise and so on are to retain the rights they exercise on behalf of the employees they represent in the various establishments of the SE.

Article 6 allows other models of participation to be established in the SE by means of a collective agreement, to be negotiated between the managements of the founder companies and the representatives of those companies' employees.

The Commission takes the view, for example, that the three-way model proposed by Parliament in 1974, and incorporated in the Commission's amended proposal of 1975, could be established within the SE by agreement. Other models would also be possible, as long as the agreement ensured that the employees or their representatives had the same rights of information and consultation as those provided by the other two models provided for in Articles 4 and 5. Paragraph 3 therefore empowers a 'works committee' type of representation to ask the management for the information it needs to perform its functions, in the same way as the 'separate body' representing the workers may do under Article 5(2)(b). Paragraph 4 covers confidentiality of information along the lines laid down in the laws of a majority of Member States. Paragraph 5 nevertheless allows the management to withhold certain sensitive information if the law of the Member State permits. One might imagine, for example, that the agreement concluded would provide for information and consultation of a general meeting of the company's employees, as is done in certain companies. In that case, steps would have to be taken to prevent information from being disclosed which might seriously jeopardize the interests of the SE or disrupt its projects.

Paragraph 8 authorizes a Member State which so desires to make provision for another model, known as a 'standard model', in conformity with the most advanced practice in the country. The standard model would apply in the SE where the two parties so decided or where no agreement was reached. This possibility comes close to merely relying on national practice; the Commission has accepted it only on condition that the SE's employees or their representatives are guaranteed the rights of information and consultation referred to in Article 6: that is to say the quarterly information referred to in paragraph 2(a), the information and consultation referred to in paragraph 2(b) and, where the employees are represented by a collegiate body, the right of that body to require the information necessary for the performance of its duties under paragraph 3.

Article 7: All employees of the SE are automatically entitled to vote to elect their representatives under any of the three models of participation.

Provision must be made to ensure that representatives represent roughly equal numbers of employees, so that particular groups of employees are not over-represented and, in models two and three, that the number of representatives is not too great.

In model one the proportion between employees' representatives and shareholders' representatives will determine the number of seats available: either it will be one-third to one-half of the whole, or the whole board will be co-opted.

In all other respects the rules governing elections will have to be laid down in the Member States, if this has not already been done.

Article 8: The proportional rule is to apply before the SE is formed, too, in order to prevent all the representatives of the employees of the founder companies, who may in some companies be very numerous and yet represent only a small proportion of employees, from all having an equal say, together with management in the choice of the model of participation or the setting-up of the supervisory board where the number of places is limited to between one-third and one-half *vis-à-vis* the shareholders'

representatives. The separate body must not comprise a very large number of members either, even if Article 4 does not stipulate the number, which is therefore to be laid down in the statutes in consultation with the representatives of the employees. The representatives designated in accordance with Article 8 will continue to perform their duties until the new members elected by the employees of the SE take up their duties.

Article 9 provides that the employees' representatives are to be provided with premises and other financial and material resources enabling them to meet, to consult their voters (telephone, telex etc.), to travel and to obtain expert assistance, in order to be able to perform their duties properly. Close consultation between the management and employees' representatives is the best way of making a reasonable assessment of the real needs of the employees' representatives.

Article 10 has been commented on in connection with Article 5.

Article 11 is not a further model of participation, as it would be difficult to ensure that it was equivalent to the other three. It is not easy to be certain that the same information and consultation is available here as with the other three models. It is nevertheless useful to make provision for agreements providing for employee participation in the SE's profits or losses.

Proposal for a Council regulation on the Statute for a European company

The Council of the European Communities

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100a thereof,

Having regard to the proposal from the Commission,

in cooperation with the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas the completion of the internal market within the period set by Article 8a of the Treaty, and the improvement it must bring about in the economic and social situation throughout the Community, mean not only that barriers to trade must be removed, but also that the structures of production must be adapted to the Community dimension; for this purpose it is essential that companies whose business is not limited to satisfying purely local needs should be able to plan and carry out the reorganization of their business on a Community scale;

Whereas such reorganization presupposes that existing companies from different Member States have the option of combining their potential by means of mergers; whereas such operations can be carried out only with due regard to the competition rules of the Treaty;

Whereas restructuring and cooperation operations involving companies from different Member States give rise to legal and psychological difficulties and tax problems; whereas the approximation of Member States' company law by means of directives based on Article 54 of the Treaty can overcome some of these difficulties; whereas such approximation does not, however, remove the need for companies governed by different legal systems to choose a form of company governed by a particular national law;

Whereas the legal framework in which business still has to be carried on in Europe, being still based entirely on national laws, thus no longer corresponds to the economic framework in which it must develop if the objectives set out in Article 8a of the Treaty are to be achieved; whereas this situation forms a considerable obstacle to the creation of groups consisting of companies from different Member States;

Whereas it is essential to ensure as far as possible that the economic unit and the legal unit of business in Europe coincide; whereas for this purpose provision should be made for creating, side by side with companies governed by a particular national law, companies formed and carrying on business under the law created by a Community regulation directly applicable in all Member States;

Whereas the provisions of such a regulation will permit the creation and management of companies with a European dimension, free from the obstacles arising from the disparity and the limited territorial application of national company laws;

Whereas such a regulation forms part of the national legal systems and contributes to their approximation, thus constituting a measure relating to the approximation of the laws of the Member States with a view to the establishment and functioning of the internal market;

Whereas the Statute for a European company (SE) is among the measures to be adopted by the Council before 1992 listed in the Commission's White Paper on completing the internal market, approved by the European Council of June 1985 in Milan; whereas the European Council of 1987 in Brussels expressed the wish to see such a Statute created swiftly;

Whereas since the presentation by the Commission in 1970 of a proposal for a Regulation on the Statute for a European company,[1] amended in 1975,[2] work

1 OJ C 124, 10.10.1970; Supplement 8/70 — Bull. EC.
2 Supplement 4/75 — Bull. EC.

on the approximation of national company law has made substantial progress, so that on those points where the functioning of a European company does not need uniform Community rules, reference may be made to the law governing public companies in the Member State where it has its registered office;

Whereas, without prejudice to any economic needs that may arise in the future, if the essential objective of the legal rules governing a European company is to be attained, it must be possible at least to create such a company as a means of enabling companies from different Member States to merge or to create a holding company, and of enabling companies and other legal bodies carrying on an economic activity, and governed by the laws of different Member States, to form a joint subsidiary;

Whereas the European company itself must take the form of a public company limited by shares, this being the form most suited, in terms of both financing and management, to the needs of a company carrying on business on a European scale; whereas in order to ensure that such companies are of reasonable size, a minimum capital should be set which will provide them with sufficient assets without making it difficult for small and medium-sized businesses to form a European company;

Whereas a European company must be efficiently managed and properly supervised; whereas it must be borne in mind that there are at present in the Community two different systems of administration of public companies; whereas, although a European company should be allowed to choose between the two systems, the respective responsibilities of those reponsible for management and those responsible for supervision should be clearly defined;

Whereas, having regard to the approximation effected by Directive 78/660/EEC and Directive 83/349/EEC, as last amended in both cases by the Act of Accession of Spain and Portugal, on annual accounts and consolidated accounts, the provisions of those directives can be made applicable to European companies and such companies may chosse between the options offered by those provisions;

Whereas, under the rules and general principles of private international law, where one undertaking controls another governed by a different legal system, its ensuing rights and obligations as regards the protection of minority shareholders and third parties are governed by the law governing the controlled undertaking, without prejudice to the obligations imposed on the controlling undertaking by its own law, for example the requirement to draw up consolidated accounts;

Whereas, without prejudice to the consequences of any later coordination of the law of the Member States, specific rules for the European company are not at present required in this field; whereas the rules and general principles of private international law should therefore be applied both in cases where the European company exercises control and in cases where it is the controlled company;

Whereas the rule thus applicable in the case where the European company is controlled by another undertaking should be specified, and for this purpose reference should be made to the law governing public companies in the State where the European company has its registered office;

Whereas for purposes of taxation the SE must be made subject to the legislation of the State in which it is resident; whereas provision should be made for deduction of losses incurred by the SE's permanent establishments abroad; whereas in order to avoid any discrimination against other firms carrying on cross-border business, similar provisions will be proposed by means of a directive for all other legal forms of business;

Whereas each Member State must be required to apply in respect of infringements of the provisions of this Regulation the sanctions applicable to public limited companies governed by its law;

Whereas the rules on the involvement of employees in the European company are contained in Directive... based on Article 54 of the Treaty, and its provisions thus form an indissociable complement to this Regulation and must be applied concomitantly;

Whereas, on matters not covered by this Regulation, the provisions of the law of the Member States and of Community law are applicable, for example on:

(i) social security and employment law,

(ii) taxation and competition law,

(iii) intellectual property law,

(iv) insolvency law;

Whereas the application of this Regulation must be deferred so as to enable each Member State to incorporate into its national law the provisions of the

abovementioned Directive and to set up in advance the necessary machinery for the formation and operation of European companies having their registered office in its territory, so that the Regulation and the Directive may be applied concomitantly,

Has adopted this Regulation:

TITLE I

General provisions

Article 1

(Form of the European company (SE))

1. Companies may be formed throughout the Community in the form of a European public limited company *(Societas Europaea,* 'SE') on the conditions and in the manner set out in this Regulation.

2. The capital of the SE shall be divided into shares. The liablility of the shareholders for the debts and obligations of the company shall be limited to the amount subscribed by them.

3. The SE shall be a commercial company whatever the object of its undertaking.

4. The SE shall have legal personality.

Article 2

(Formation)

1. Public limited companies formed under the law of a Member State and having their registered office and central administration within the Community may form an SE by merging or by forming a holding company, provided at least two of them have their central administration in different Member States.

2. Companies or firms within the meaning of the second paragraph of Article 58 of the Treaty and other legal bodies governed by public or private law which have been formed in accordance with the law of a Member State and have their registered office and central administration in the Community may set up an SE by forming a joint subsidiary, provided that at least two of them have their central administration in different Member States.

Article 3

(Formation with participation of an SE)

1. An SE together with one or more other SEs or together with one or more limited companies incorporated under the laws of a Member State and having their registered office and central administration within the Community may form an SE by merging or by forming a holding company.

2. An SE together with one or more other SEs, or together with one or more companies or legal bodies within the meaning of Article 2(2), may set up an SE by forming a joint subsidiary.

3. An SE may itself form one or more subsidiaries in the form of an SE. Such a subsidiary may not, however, itself establish a subsidiary in the form of an SE.

Article 4

(Minimum capital)

1. Subject to paragraphs 2 and 3, the capital of an SE shall amount to not less than ECU 100 000.

2. Where an SE carries on the business of a credit institution it shall be subject to the minimum capital requirements laid down by the laws of the Member State in which it has its registered office in accordance with the proposal for a second Council Directive on the taking-up and pursuit of the business of credit institutions.[1]

3. Where an SE carries on the business of an insurance undertaking it shall be subject to the minimum capital requirements laid down by the laws of the Member State in which it has its registered office.

Article 5

(Registered office of SE)

The registered office of an SE shall be situated at the place specified in its statutes. Such place shall be

[1] OJ C 84, 31.3.1988; Bull. EC 1-1988, points 1.2.1 to 1.2.3.;
OJ C 167, 3.7.1989; Bull. EC 5-1989, point 2.1.9.

within the Community. It shall be the same as the place where the SE has its central administration.

Article 6

(Controlled and controlling undertakings)

1. A 'controlled undertaking' means any undertaking in which a natural or legal person:

(a) has a majority of the shareholders' or members' voting rights;

or

(b) has the right to appoint or remove a majority of the members of the administrative, management or supervisory board, and is at the same time a shareholder in, or member of, that undertaking;

or

(c) is a shareholder or member and alone controls, pursuant to an agreement entered into with other shareholders or members of the undertaking, a majority of the shareholders' or members' voting rights.

2. For the purposes of paragraph 1, the controlling undertaking's rights as regards voting, appointment and removal shall include the rights of any other controlled undertaking and those of any person or body acting in his or its own name but on behalf of the controlling undertaking or of any other controlled undertaking.

Article 7

(Scope of the regulation)

1. Matters covered by this Regulation, but not expressly mentioned herein, shall be governed:

(a) by the general principles upon which this Regulation is based;

(b) if those general principles do not provide a solution to the problem, by the law applying to public limited companies in the State in which the SE has its registered office.

2. Where a State comprises several territorial units, each of which has its own rules of law applicable to the matters referred to in paragraph 1, each territorial unit shall be considered a State for the purposes of identifying the law applicable under paragraph 1(b).

3. In matters which are not covered by this Regulation, Community law and the law of the Member States shall apply to the SE.

4. In each Member State and subject to the express provisions of this Regulation, an SE shall have the same rights, powers and obligations as a public limited company incorporated under national law.

Article 8

(Registration)

1. Every SE shall be registered in the State in which it has its registered office in a register designated by the law of that State in accordance with Article 3 of Directive 68/151/EEC.

2. Where an SE has a branch in a Member State other than that in which it has its registered office, the branch shall be registered in that other Member State under the procedures laid down in the laws of that Member State in accordance with the amended proposal for an 11th Directive.

Article 9

(Publication of documents)

Publication of the documents and particulars concerning the SE which must be published under this Regulation shall be effected in the manner laid down in the laws of each Member State in accordance with Article 3 of Directive 68/151/EEC.

Article 10

(Notice in the Official Journal)

1. Notice that an SE has been formed, stating the number, date and place of registration and the date and place of publication and the title of the publication shall be published for information purposes in the *Official Journal of the European Communities* after the publication referred to in Article 9. The same shall be done where a liquidation is terminated.

2. The Member States shall ensure that the particulars referred to in paragraph 1 are forwarded to the Office for Official Publications of the European

Communities within one month of the disclosure referred to in Article 9.

Article 11

(Documents of the SE)

Letters, order forms and similar documents shall state legibly:

(a) the name of the SE, preceded or followed by the initials 'SE' unless those initals already form part of the name;

(b) the place of the register in which the SE is registered in accordance with Article 8(1), and the number of the SE's entry in that register;

(c) the address of the SE's registered office;

(d) the amount of capital issued and paid up;

(e) the SE's VAT number;

(f) the fact that the SE is in liquidation if that is so.

Any branch of the SE, when registered in accordance with Article 8(2), must give the above particulars, together with those relating to its own registration, on the documents referred to in the first paragraph emanating from that branch.

TITLE II

Formation

SECTION 1

General

Article 12

(Founder companies)

The founder companies of an SE for the purposes of this Title are the companies, firms and other legal bodies which may form an SE by the means of formation provided for in Articles 2 and 3.

Article 13

(Instrument of incorporation and statutes of the SE)

The founder companies shall draw up the instrument of incorporation and the statutes, if the statutes are a separate instrument, in the forms required for the formation of public limited companies by the law of the State in which the SE is to have its registered office.

Article 14

(Experts; verification)

The provisions of national law concerning the examination of consideration other than cash, adopted in the State in which the SE is to have its registered office, pursuant to Article 10 of Directive 77/91/EEC, shall apply.

Article 15

(Supervision of formation)

The procedures for ensuring that the requirements of this Regulation and, where appropriate, of applicable national law, are complied with in regard to the formation of an SE and its statutes shall be those provided in respect of public limited companies under the law of the State in which the SE is to have its registered office. Member States shall take the measures necessary to ensure that such procedures are effective.

Article 16

(Legal personality)

The SE shall have legal personality as from the date set by the law of the State in which it is to have its registered office.

SECTION 2

Formation by merger

Article 17

(Definition)

1. In the formation of an SE by merger, the merging companies shall be wound up without going into liquidation and transfer to the SE all their assets and liabilities in exchange for the issue to their shareholders of shares in the SE and a cash payment, if any, not exceeding 10% of the nominal value of the shares so issued or, where there is no nominal value, of their accounting par value.

2. A company may participate in the formation of an SE by merger even if it is in liquidation, provided it has not yet begun to distribute its assets to the shareholders.

3. The rights of the employees of each of the merging companies shall be protected in accordance with the provisions of national law giving effect to Council Directive 77/187/EEC[1] of 14 February 1977 on the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses.

Article 18

(Draft terms of merger)

1. The administrative or management board of the founder companies shall draw up draft terms of merger. The draft terms of merger shall include the following particulars:

(a) the type, name and registered office of each of the founder companies and of the SE;

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

(c) the terms relating to the allotment of shares of the SE;

(d) the date from which the holding of shares of the SE entitles their holders to participate in profits and any special conditions affecting that entitlement;

(e) the date from which transactions by the founder companies will be treated for accounting purposes as being those of the SE;

(f) the rights conferred by the SE on the holders of shares to which special rights are attached and on the holders of securities other than shares, or the measures proposed concerning them;

(g) any special advantage granted to the experts appointed under Article 21(1) or to members of the administrative, management, supervisory or controlling bodies of the founder companies.

2. The draft terms of merger shall be drawn up and certified in due legal form if the law of the Member State in which any of the founder companies has its registered office so requires.

3. The law of the Member State requiring that the draft terms of merger be drawn up and certified in due legal form shall determine the person or authority competent to do so. Where the laws of several Member States in which the founder companies have their registered offices require the draft terms of merger to be drawn up and certified in due legal form, this may be done by any person or authority competent under the law of one of those Member States.

Article 19

(Publication of the draft terms of merger)

1. For each of the founder companies, the draft terms of merger shall be made public in the manner prescribed by the laws of each Member State in accordance with Article 3 of Directive 68/151/EEC at least one month before the date of the general meeting called to decide thereon.

2. For each of the founder companies, the publication of the draft terms of merger referred to in paragraph 1, effected in accordance with Article 3(4) of Directive 68/151/EEC shall contain at least the following particulars:

(a) the type, name and registered office of the founder companies;

(b) the register in which the documents and particulars referred to in Article 3(2) of Directive 68/151/EEC are filed in respect of each founder company, and the number of the entry in that register.

(c) the conditions which determine, in accordance with Article 25, the date on which the merger and formation shall take effect.

3. The publication shall also specify the arrangements made in accordance with the provisions of national law giving effect to Articles 13, 14, and 15 of Directive 78/855/EEC and with Article 23 of this Regulation for the exercise of the rights of the creditors of the founder companies.

[1] OJ L 61, 5.3.1977; Bull. EC 2-1977, point 2.1.23.

Article 20

(Board's report)

The administrative or management board of each of the merging companies shall draw up a detailed written report explaining and justifying the draft terms of merger from the legal and economic point of view and, in particular, the share exchange ratio.

The report shall also indicate any special valuation difficulties which have arisen.

Article 21

(Supervision of the conduct of the merger)

1. One or more experts, acting on behalf of each founder company but independent of them, appointed or approved by a judicial or administrative authority in the Member State in which the company concerned has its registered office, shall examine the draft terms of merger and draw up a written report for the shareholders.

2. In the report referred to in paragraph 1 the experts must state whether, in their opinion, the share exchange ratio is fair and reasonable. The statement must at least:

(a) indicate the method(s) used in arriving at the proposed share exchange ratio;

(b) state whether the method(s) used are adequate in the circumstances, the values arrived at using each method and an opinion on the relative importance attributed to such methods in arriving at the value decided on.

The report shall also indicate any special valuation difficulties which have arisen.

3. Each expert shall be entitled to obtain from the merging companies all relevant information and documents and to carry out all necessary investigations.

4. Where the laws of all the Member States in which the founder companies have their registered office make provision for one or more independent experts to be appointed for all the founder companies such appointment may be made, at the joint request of those companies, by a judicial or administrative authority in any of the Member States. In such cases the law of the Member State of the appointing authority shall determine the content of the expert's report.

Article 22

(Approval of the merger by general meetings)

1. The draft terms of merger and the instrument of incorporation of the SE and, if the statutes are a separate instrument, its statutes shall be approved by the general meeting of each of the founder companies. The resolution of the general meeting approving the merger shall be subject to the provisions giving effect to Article 7 of Directive 78/855/EEC in the case of domestic mergers.

2. For each of the founder companies, the provisions of national law adopted in accordance with Article 11 of Directive 78/855/EEC shall apply to the information to be provided to shareholders before the date of the general meeting called to approve the merger.

Article 23

(Protection of creditors)

The following provisions of the national law to which the founder companies are subject shall apply:

(a) the provisions relating to the protection of the interests of creditors and debenture holders of the companies in the case of a domestic merger;

(b) the provisions relating to the protection of the interests of holders of securities, other than shares, which carry special rights, provided that where the SE is being formed by the merger of public limited companies

(i) the law of the State in which each of the companies has its registered office shall determine whether a meeting of the holders of such securities may approve a change in their rights;

(ii) the law of the State in which the SE is to have its registered office shall determine whether the holders of such securities are entitled to require the SE to redeem their securities.

Article 24

(Supervision of the legality of mergers)

1. Where the laws of a Member State governing one or more founder companies provide for judicial or administrative preventative supervision of the legality of mergers those laws shall apply to those companies.

2. Where the laws of a Member State governing one or more founder companies do not provide for judicial or administrative preventative supervision of the legality of mergers, or where such supervision does not extend to all the legal acts required for a merger, the national provisions giving effect to Article 16 of Directive 78/855/EEC shall apply to the company or companies concerned. Where those laws provide for a merger contract to be concluded following the decisions of the general meeting held concerning the merger, that contract shall be concluded by all the companies involved in the operation. Article 18(3) shall apply.

3. Where the laws of the State in which the SE is to have its registered office and the laws governing one or more of the founder companies provide for judicial or administrative preventative supervision of the legality of mergers, such supervision shall be carried out first in respect of the SE. The supervision may be carried out in respect of the founder companies only when it can be shown that such supervision has been carried out in respect of the SE in accordance with Article 15.

4. Where the laws governing one or more of the founder companies taking part in the merger provide for judicial or administrative preventative supervision of the legality of mergers whereas the laws governing one or more of the other founder companies taking part in the merger do not, such supervision shall be carried out on the basis of the documents drawn up and certified in due legal form referred to in Article 16 of Directive 78/855/EEC.

Article 25

(Effective date)

The date on which the merger and the simultaneous formation of the SE takes effect shall be determined by the law of the State in which the SE has its registered office. That date must be after all necessary supervision has been carried out and, where appropriate, the certified documents referred to in Article 24 have been drawn up for each of the founder companies.

Article 26

(Publicity)

For each of the founder companies, the merger must be publicized in the manner prescribed by national law, in accordance with Article 3 of Directive 68/151/EEC.

Article 27

(Effects of the merger)

A merger shall have the following consequences *ipso jure* and simultaneously:

(a) the transfer, both as between the founder companies and the SE and as regards third parties, of all the assets and liabilities of the founder companies to the SE;

(b) the shareholders of the founder companies become shareholders of the SE;

(c) the founder companies cease to exist.

Article 28

(Liability of board members)

The liability of members of the administrative or the management board of founder companies and of such companies' experts shall be governed by the provisions of national law giving effect to Articles 20 and 21 of Directive 78/855/EEC in the State in which the founder company concerned has its registered office or, where appropriate, by this Regulation.

However, in the case of an appointment under Article 21 (4), the liability of the expert or experts shall be governed by the law of the Member State of the judicial or administrative authority which appointed them.

Article 29

(Nullity)

The question of the nullity of a merger that has taken effect pursuant to Article 25 shall be governed by the national law of the company concerned but a merger may be declared null and void only where there has been no judicial or administrative preventative supervision of its legality or where there is no certified documentation where such supervision or the drawing-up of such documentation is laid down by the laws of the Member State governing the relevant company. However, where the laws of the State in which the SE has its registered office do not provide for a merger to be declared null and void on such grounds, no such nullity may be declared.

Article 30

(Merger: shareholdings between fellow founder companies)

Articles 17 to 29 shall also apply where one of the founder companies holds all or part of the shares of another founder company. In such a case, shares in founder companies which come into the possession of the SE as part of the assets of a founder company shall be cancelled.

SECTION 3

Formation of an SE holding company

Article 31

(Definition)

1. If an SE is formed as a holding company, all the shares of the founder companies shall be transferred to the SE in exchange for shares of the SE.

2. The founder companies shall continue to exist. Any provisions of the laws of the States in which the founder companies have their registered office, requiring that a company be wound up if all its shares come to be held by one person shall not apply.

Article 32

(Draft terms of formation)

1. The administrative or management board of the founder companies shall draw up draft terms for the formation of an SE holding company containing the particulars referred to in Article 18(1)(a), (b) and (c) and Article 21 and shall prepare the report provided for in Article 20.

2. The provisions of Article 21 shall apply to the supervision of the formation of the holding company in respect of each founder company.

3. The provisions of Article 22 shall apply to the approval of the formation of the holding company by the general meeting of each of the founder companies.

4. The provisions of Article 28 on the liability of board members shall apply.

5. The formation of an SE holding company may be declared null and void only for failure to supervise the formation of the holding company in accordance with Article 29.

6. For the purposes of applying the provisions of Section 2 on formation by merger, merger shall be read as formation of an SE holding company.

Article 33

(Matters affecting employees)

The administrative or management board of each of the founder companies shall discuss with the representatives of its employees the legal, economic and employment implications of the formation of an SE holding company for the employees and any measures proposed to deal with them.

SECTION 4

Formation of a joint subsidiary

Article 34

(Draft terms of formation)

If a joint subsidiary is formed in the form of an SE, the administrative or the management board of each of the founder companies shall draw up draft terms for the formation of the subsidiary including the following particulars:

(a) the type, name and registered office of the founder companies and of the proposed SE;

(b) the size of the shareholdings of the founder companies in the SE;

(c) the economic reasons for the formation.

Article 35

(Approval of the formation)

1. The draft terms of formation and the instrument of incorporation of the SE and its statutes, if the statutes are a separate instrument, its statutes shall be approved by each of the founder companies in accordance with the law which governs it.

2. Founder companies incorporated under national law shall be subject to all the provisions governing their participation in the formation of a subsidiary in the form of a public limited company under national law.

3. Where a founder company itself has the form of an SE, the following provisions shall apply:

(a) the instrument of incorporation and the statutes shall be authorized in accordance with Article 72 of this Regulation;

(b) if the decision on the participation of the SE in the formation of the subsidiary falls within the matters to be decided by the general meeting, the instrument of incorporation and the statutes must also be approved by the general meeting.

SECTION 5

Formation of a subsidiary by an SE

Article 36

(Draft terms of formation)

If an SE forms a subsidiary in the form of an SE, the administrative or management board shall draw up draft terms for the formation of the subsidiary. Those draft terms shall include the following particulars:

(a) the name and registered office of the founder company and the instrument of incorporation of the subsidiary or its statutes, if the statutes are a separate instrument;

(b) the economic reasons for the formation.

Article 37

(Approval of the formation)

The instrument of incorporation of the subsidiary or its statutes, if the statutes are a separate instrument, shall be approved in accordance with Article 35(3).

TITLE III

Capital — shares — debentures

Article 38

(Capital of the SE)

1. The capital of the SE shall be denominated in ecus.

2. The capital of the SE shall be divided into shares denominated in ecus. Shares issued for a consideration must be paid up at the time the company is registered in the register referred to in Article 8(1) to the extent of not less than 25% of their nominal value. However, where shares are issued for a consideration other than cash at the time the company is registered, that consideration must be transferred to the company in full within five years of the date on which the company was incorporated or acquired legal personality.

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

Article 39

1. Shares may not be issued at a price lower than their nominal value.

2. Professional intermediaries who undertake to place shares may be charged less than the total price of the shares for which they subscribe in the course of such a transaction.

Article 40

All shareholders in like circumstances shall be treated in a like manner.

Article 41

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

Article 42

(Increase in capital)

1. The capital of the SE may be increased by the subscription of new capital. An increase in capital shall require amendment of the statutes. Shares issued for a consideration in the course of an increase in subscribed capital must be paid up to not less than 25% of their nominal value. Where provision is made for an issue premium, it must be paid in full.

2. Where all or part of the consideration for the increase in capital is in a form other than cash, a report on the valuation of the consideration shall be submitted to the general meeting. The report shall be prepared and signed by one or more experts independent of the SE and appointed or approved by the court within whose jurisdiction the registered office of the SE is situated.

3. The expert's report shall be published in accordance with Article 9.

4. Any increase in subscribed capital must be decided upon by the general meeting. Both this decision and the increase in the subscribed capital shall be published in accordance with Article 9.

5. Where the capital is increased by the capitalization of available reserves, the new shares shall be distributed amongst the shareholders in proportion to their existing shareholdings.

However, in its decision on the increase in capital, the general meeting may decide that some or all of the new shares shall be distributed amongst the employees of the SE.

Article 43

(Authorization of future increase in capital)

1. The statutes or instrument of incorporation or the general meeting, the decision of which must be published in accordance with Article 9, may authorize an increase in the subscribed capital, provided that such increase shall not exceed one-half of the capital already subscribed.

2. Where appropriate, the increase in the subscribed capital up to the maximum authorized under paragraph 1 shall be decided by the administrative or the management board. The power of such body in this respect shall be for a maximum period of five years, and may be renewed one or more times by the general meeting, each time for a period not exceeding five years.

3. The administrative or the management board must register decisions authorizing a future increase in capital.

The administrative or the management board must register, and publicize in accordance with Article 9, all issues of shares up to the maximum authorized capital limits and the consideration furnished for those shares. In addition, the board shall report each year in the notes on the accounts on the use it has made of the authorization.

4. Where the authorized capital has been fully subscribed or where the period referred to in paragraph 2 has elapsed with only part of the authorized capital having been subscribed, the administrative or the management board shall amend the statutes to indicate the new total capital.

Where the authorization to increase capital has not been used, the administrative or the management board shall decide to delete the authorization clause referred to in paragraph 1. The board shall register such decisions.

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

Article 44

(Subscription rights of shareholders)

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

2. Any offer of subscription on a pre-emptive basis and the period within which this right must be exercised shall be published in accordance with Article

9. However, it may be provided that such publication is not required where all the shares of the SE are registered. In such case, all the shareholders must be informed in writing. The right of pre-emption must be exercised within a period which shall not be less than 14 days from the date of publication of the offer or from the date of dispatch of the letters to the shareholders.

3. The right of pre-emption may not be restricted or withdrawn by the statutes or the instrument of incorporation. This may, however, be done by decision of the general meeting. The administrative or the management board shall be required to present to such a meeting a written report indicating the reasons for restriction or withdrawal of the right of pre-emption and justifying the proposed issue price. The decision shall require at least a two-thirds majority of the votes attaching to the securities represented or to the subscribed capital represented. The decision shall be published in accordance with Article 9.

4. The statutes, the instrument of incorporation, or the general meeting, acting in accordance with the rules for a quorum, a majority and publication set out in paragraph 3, may give the power to restrict or withdraw the right of pre-emption to the administrative or the management board which is empowered to decide on an increase in subscribed capital within the limits of the authorized capital. This power may not be granted for a longer period than the power for which provision is made in Article 43(2).

5. Shareholders may obtain copies of the reports referred to in paragraph 3 free of charge from the day on which notice of the general meeting is given. A statement to that effect shall be made in the notice convening the general meeting.

Article 45

(Reduction of capital)

1. Any reduction in the subscribed capital, except under a court order, must be subject at least to a decision of the general meeting acting in accordance with the rules for a quorum and a majority laid down in Article 44(3). Such decision shall be published in accordance with Article 9.

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

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

3. A reduction of capital shall be effected by reducing the nominal value of the shares. However, the nominal subscribed capital may not be reduced to an amount less than the minimum capital. Only where losses have been incurred may the general meeting decide to reduce the capital below the minimum capital, and in that case it shall at the same time decide to increase the capital to an amount equal to or higher than the minimum capital.

4. Where the subscribed capital is reduced in order to adjust it to the diminished value of the company following losses, and, as a result of the reduction, assets exceed liabilities, the difference shall be entered in a reserve. This reserve may not be used for the distribution of dividends or for the granting of other benefits to shareholders.

Article 46

(Protection of creditors in the event of reduction of capital)

1. In the event of a reduction in the subscribed capital, the creditors whose claims antedate the publication of the decision to make the reduction shall be entitled at least to have the right to obtain security for claims which have not fallen due by the date of that publication.

The conditions for the exercise of this right shall be governed by the law of the State where the company has its registered office.

2. The reduction shall be void or no payment may be made for the benefit of the shareholders until the creditors have obtained satisfaction or the court within whose jurisdiction the registered office of the SE is situated, has decided that their application should not be acceded to.

3. Paragraphs 1 and 2 shall apply where the reduction in the subscribed capital is brought about by the total or partial waiving of the payment of the balance of the shareholders' contributions.

They shall not apply to reductions in the subscribed capital for the purpose of adjusting it to the real value of the company following losses.

Article 47

The subscribed capital may not be reduced to an amount less than the minimum capital laid down in accordance with Article 4. However, such a reduction may be made if it is also provided that the decision to reduce the subscribed capital may take effect only when the subscribed capital is increased to an amount at least equal to the prescribed minimum.

Article 48

(Own shares)

1. The subscription for shares of the SE by the SE itself, third parties acting on its behalf or undertakings controlled by it within the meaning of Article 6 or in which it holds a majority of the shares is prohibited.

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

3. The founder companies of the SE by which or in name of which the statutes or the instrument of incorporation of the SE were signed or in the case of an increase in the subscribed capital, the members of the administrative or the management board, shall be liable to pay for shares subscribed in contravention of this Article.

Article 49

1. The acquisition of shares of the SE by the SE itself, third parties acting on its behalf or undertakings controlled by it within the meaning of Article 6 or in which it holds a majority of the shares is prohibited.

2. Paragraph 1 shall not apply to:

(a) the acquisition by the SE or third parties acting on its behalf of shares of the SE for the purpose of distributing them to the employees of the SE;

(b) shares acquired in carrying out a decision to reduce capital;

(c) shares acquired as a result of a universal transfer of assets;

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

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

(f) shares acquired from a shareholder in the event of failure to pay them up;

(g) shares acquired in order to indemnify minority shareholders in controlled companies;

(h) fully paid-up shares acquired under a sale enforced by a court order for the payment of a debt owed to the company by the owner of the shares.

3. Shares acquired in the cases listed in paragraph 2(c) to (h) above must, however, be disposed of within not more than three years of their acquisition unless the nominal value of the shares acquired, including shares the SE may have acquired directly or indirectly, does not exceed 10% of the subscribed capital.

4. If the shares are not disposed of within the period laid down in paragraph 3 they must be cancelled.

5. The SE may not accept its own shares as security or acquire any rights of usufruct or other beneficial rights over them.

6. An SE may not advance funds, nor make loans, nor provide security, with a view to the acquisition of its shares by a third party.

7. Paragraph 6 shall not apply to transactions concluded by banks and other financial institutions in the normal course of business, nor to transactions effected with a view to the acquisition of shares by or for the employees of the SE or a controlled company. However, these transactions may not have the effect of reducing the net assets of the SE below the amount of its subscribed capital plus the reserves which by law or under the statutes may not be distributed.

8. Shares acquired in contravention of paragraph 1 shall be disposed of within six months of their acquisition.

9. If an undertaking comes under the control of the SE or if a majority of its shares are acquired by such

an SE, and it holds shares in the SE, the undertaking shall dispose of the shares in the SE within 18 months from the date of its coming under the control of the SE or from the date when the SE acquired a majority of its shares.

If an SE acquires its own shares by way of universal transfer of assets or if an undertaking which is controlled by the SE or the majority of those shares are held by the SE acquires shares of the SE in this manner, such shares shall be disposed of within the same period.

10. Shares acquired by the SE pursuant to paragraph 2(a) shall, if they have not been distributed to the employees within 12 months of being acquired, be disposed of within the following six months.

11. No rights may be exercised in respect of the shares referred to in paragraphs 8, 9 and 10 until they have been disposed of or distributed to the employees.

Article 50

(Disclosure of holdings)

Holdings of the SE in other companies shall be disclosed in accordance with the provisions of national law giving effect to Directive 88/627/EEC[1] of 12 December 1988 on the information to be published when a major holding in a listed company is acquired or disposed of.

Article 51

(Indivisibility of shares)

The rights attached to a share shall be indivisible. Where a share is owned jointly by more than one person, the rights attached to it may be exercised only through a common representative.

Article 52

(Rights conferred by shares)

1. Shares may carry different rights in respect of the distribution of the profits and assets of the company. Payment of fixed interest may be neither made nor promised to shareholders.

2. Non-voting shares may be issued subject to the following conditions:

(a) their total nominal value shall not exceed one-half of the capital;

(b) they must carry all the rights of a shareholder other than the right to vote, except that the right to subscribe for new shares may be limited by the statutes or by resolution of the general meeting to non-voting shares. In addition they must confer special advantages;

(c) they shall not be included in computing a quorum or majority required by this Regulation or the statutes of the company.

The above shall be without prejudice to paragraph 5.

3. Any other restriction or extension of voting rights, such as shares carrying multiple voting rights, is prohibited.

4. Shares carrying the same rights shall form a class.

5. Where there are several classes of shares, any decision of the general meeting which adversely affects the rights of a particular class of shareholders shall be subject to a separate vote at least for each class of shareholder whose rights are affected by the transaction. The provisions governing an amendment of the statutes shall apply as regards the convening of meetings and the required quorum and majority to the holders of the shares of the class concerned.

Article 53

(Issue of bearer and registered shares)

1. Shares shall be in either bearer or registered form. The statutes may entitle shareholders to request conversion of their bearer shares into registered shares or vice versa.

2. An SE which issues registered shares shall keep an alphabetical register of all shareholders, together with their addresses and the number and class of shares they hold. The register shall be open for public inspection on request at the registered office of the SE.

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1 OJ L 348, 17.12.1988; Bull. EC 12-1988; point 2.1.146.

Article 54

(Issue and transfer of shares)

The laws of the State in which the SE has its registered office shall govern the issue, replacement and cancellation of share certificates, and the transfer of shares.

Article 55

(Publication requirements for obtaining stock-exchange listing and for offering securities to the public)

1. The provisions of national law giving effect to Directive 80/390/EEC[1] of 17 March 1980 shall apply to the listing particulars to be published for the admission of securities of the SE to official stock-exchange listing.

2. The provisions of national law giving effect to Directive 89/298/EEC[2] of 17 April 1989 shall apply to the prospectus to be published where securities are offered to the public.

Article 56

(Issue of debentures)

The SE may issue debentures.

Article 57

(Body of debenture holders)

The laws of the State in which the SE has its registered office shall apply to the body of debenture holders.

Article 58

(Debentures convertible into shares)

1. Articles 43, and 44 shall apply to the issue of debentures convertible into shares.

2. The laws of the State in which the SE has its registered office shall apply to the conditions and procedure for the exercise of conversion or subscription rights.

3. As long as convertible debentures are outstanding, the SE may not decide on any amendment of the statutes affecting the rights of the holders of such debentures except where less than 5% of the convertible debentures is still outstanding and their holders have the opportunity to exercise their conversion or subscription rights in good time before the amendment takes effect or if the body of convertible debenture holders has approved the proposed amendment. In the latter case, a higher percentage may be stipulated in the loan conditions.

4. Where conversion or subscription rights attached to convertible debentures have been fully exercised or have been exercised only in part but the period in which they may be exercised has expired the management or the administration board shall alter the statutes to show the new amount of capital. Where subscription or conversion rights are not exercised within the prescribed period, the management or the administration board, shall delete from the statutes the clause concerning the issue of convertible debentures.

Such amendments to the statutes shall be published in accordance with Article 9.

Article 59

(Participating debentures)

1. The general meeting may, by a resolution which meets the requirements for altering the statutes, decide to issue debentures carrying the right to share in profits. Such debentures shall be issued for cash and shall carry rights determined wholly or partly by reference to the profits of the SE.

2. Article 58(3) shall apply, *mutatis mutandis,* to participating debentures.

Article 60

(Other securities)

The SE shall not issue to persons, who are shareholders of the SE other securities carrying a right to participate in the profits or assets of the SE.

1 OJ L 100, 17.4.1980; Bull. EC 12-1979, point 2.1.54.
2 OJ L 124, 5.5.1989; Bull. EC 4-1989, point 2.1.15.

TITLE IV

Governing bodies

Article 61

The statutes of the SE shall provide for the company to have as its governing bodies the general meeting of shareholders and either a management board and a supervisory board (two-tier system) or an administrative board (one-tier system).

SECTION I

Two-tier system

Sub-section 1

MANAGEMENT BOARD

Article 62

(Functions of the management board: appointment of members)

1. The SE shall be managed and represented by a management board under the supervision of a supervisory board.

2. The members of the management board shall be appointed by the supervisory board, which may remove them at any time.

3. No person may at the same time be a member of the management board and the supervisory board of the same SE.

4. The number of members of the management board shall be laid down in the statutes of the SE.

5. The rules of procedure of the management board shall be adopted by the supervisory board, after obtaining the views of the management board.

Sub-section 2

SUPERVISORY BOARD

Article 63

(Functions of the supervisory board; appointment of members)

1. The supervisory board may not participate in the management of the company nor represent it in dealings with third parties. However, it shall represent the company in its relations with members of the management board.

2. Subject to the measure adopted to give effect to Article 4 of Council Directive ... [completing the Statute in respect of the involvement of employees in SEs] members of the supervisory board shall be appointed by the general meeting.

Article 64

(Right to information)

1. At least once every three months, the management board shall report to the supervisory board on the management and progress of the company's affairs, including undertakings controlled by it, and on the company's situation and prospects.

2. The management board shall inform the chairman of the supervisory board without delay of all matters of importance, including any event occurring in the company or in undertakings controlled by it which may have an appreciable effect on the SE.

3. The supervisory board may at any time require the management board to provide information or a special report on any matter concerning the company or undertaking controlled by it.

4. The supervisory board shall be entitled to undertake all investigations necessary for the performance of its duties. It may appoint one or more of its members to pursue such investigations on its behalf and may call in the help of experts.

5. Any member of the supervisory board may, through the chairman of that board, require the management board to provide the supervisory board with any information necessary for the performance of its duties.

6. Each member of the supervisory board shall be entitled to examine all reports, documents and information and the results of enquiries and inspections obtained under the preceding paragraphs.

Article 65

(Rules of procedure, calling of meetings)

1. The supervisory board shall adopt its rules of procedure and shall elect a chairman and one or more vice-chairmen from among its members.

2. The chairman may call a meeting of the supervisory board on his own initiative and shall do so at the request of a member of the supervisory board or of a member of the management board.

SECTION 2

The single-tier system

Article 66

(The administrative board; appointment of members)

1. The SE shall be managed and represented by an administrative board. The board shall be composed of at least three members. It shall adopt its rules of procedure and shall elect a chairman and one or more vice-chairmen from among its members.

2. The management of the SE shall be delegated by the administrative board to one or more of its members. The executive members shall be fewer in number than the other members of the board. The delegation of management responsibilities to an executive member of the administrative board may be revoked by the board at any time.

3. Subject to the measures adopted to give effect to Article 4 of Council Directive ... [completing the Statute in respect of the involvement of employees in SEs] members of the administrative board shall be appointed by the general meeting.

Article 67

(Right to information)

1. The administrative board shall meet at least once every three months to discuss the management and progress of the company's affairs, including undertakings controlled by it and the company's situation and prospects.

2. Each member shall inform the chairman of the administrative board without delay of all matters of importance, including any event occurring in the company or in undertakings controlled by it which may have an appreciable effect on the SE.

3. Any member of the administrative board may request the chairman to call a meeting of that board to discuss particular aspects of the company. If the request has not been complied with within 15 days, a meeting of the administrative board may be called by one-third of its members.

4. Each member of the administrative board shall be entitled to examine all reports, documents and information supplied to the board concerning the matters referred to in paragraphs 1 and 3.

SECTION 3

Rules common to the single-tier and two-tier board systems

Article 68

(Term of office)

1. Members of the governing bodies shall be appointed for a period laid down in the statutes not exceeding six years.

However, the first members of the supervisory board or of the administrative board, who are to be appointed by the shareholders shall be appointed by the instrument of incorporation of the SE for a period not exceeding three years.

2. Board members may be reappointed.

Article 69

(Conditions of membership)

1. Where the statutes of the SE allow a legal person or company to be a member of a board, that legal person or company shall designate a natural person to represent it in the performance of its duties on the board. The representative shall be subject to the same conditions and obligations as if he were personally a member. Publication under Article 9 shall refer both to the representative and to the legal person or company represented. The legal person or company shall be jointly and severally liable without limitation for obligations arising from the acts of its representative.

2. No person may be a board member who

(i) under the law applicable to him, or

(ii) as a result of a judicial or administrative decision delivered or recognized in a Member State,

is disqualified from serving on an administrative, supervisory or management board.

3. The statutes may lay down special conditions of eligibility for members representing the shareholders.

4. Notwithstanding the rule laid down in Article 94(2), the statutes of the SE may provide voting procedures for the appointment of members of the administrative or the supervisory board by the general meeting such that one or more members and their alternatives may be appointed by a minority of the shareholders.

Article 70

(Vacancies)

The statutes of the SE may provide for the appointment of alternative members to vacancies. Such appointments may be terminated at any time by the appointment of a full member.

Article 71

(Power of representation)

1. Where the management board is composed of more than one member, or where the management of the company is delegated to more than one member of the administrative board those members have authority to represent the company collectively only in dealings with third parties. However, the statutes of the SE may provide that a member of the relevant board shall have authority to represent the SE alone or together with one or more other members of the board or together with a person who has been given general authority to represent the company under paragraph 2.

2. The administrative board or, as the case may be, the management board with the approval of the supervisory board, may confer a general authority to represent the company on one or more persons. Such authority may be revoked at any time, in the same way, by the board which granted it.

3. Acts performed by those having authority to represent the company under paragraphs 1 and 2 shall bind the company *vis-à-vis* third parties, even where the acts in question are not in accordance with the objects of the company, providing they do not exceed the powers conferred by this Regulation.

Article 72

(Operations requiring prior authorization

1. The implementation of decisions on:

(a) the closure or transfer of establishments or of substantial parts thereof.

(b) substantial reduction, extension or alteration of the activities of the SE,

(c) substantial organizational changes within the SE,

(d) the establishment of cooperation with other undertakings which is both long term and of importance to the activities of the SE, or the termination thereof,

(e) the setting-up of a subsidiary or of a holding company,

may be effected by the management board only following prior authorization of the supervisory board or by the administrative board as a whole.

Implementation may not be delegated to the executive members of the administrative board.

Acts done in breach of the above provisions may not be relied upon against third parties, unless the SE can prove that the third party was aware of the breach.

2. The statutes of the SE may provide that paragraph 1 shall also apply to other types of decisions.

Article 73

(Conflicts of interest)

1. Any transaction in which a board member has an interest conflicting with the interests of the SE shall require the prior authorization of the supervisory board or the administrative board.

2. The statutes of the SE may provide that paragraph 1 shall not apply to routine transactions concluded on normal terms and conditions.

3. A member to whom paragraph 1 applies shall be entitled to be heard before a decision on the authorization is made but may not take part in the

deliberations of the relevant board when it makes its decision.

4. Authorizations given under paragraph 1 during any financial year shall be communicated to the shareholders not later than at the first general meeting following the end of the financial year in question.

5. Failure to obtain authorization may not be relied upon against third parties, unless the SE can prove that the third party was aware of the need for, and lack of, such authorization.

Article 74

(Rights and obligations)

1. Each member of a board of the SE shall have the same rights and obligations, without prejudice to:

(a) any internal allocation of responsibilities between the members of the board, and the provisions of the board's rules of procedure governing the taking of decisions in the event of a tied vote;

(b) the provisions concerning the delegation of management responsibilities to executive members.

2. All board members shall carry out their functions in the interests of the SE, having regard in particular to the interests of the shareholders and the employees.

3. All board members shall exercise a proper discretion in respect of information of a confidential nature concerning the SE. This duty shall continue to apply even after they have ceased to hold office.

Article 75

(Removal of members)

1. Members of the supervisory board or the administrative board may be dismissed at any time by the same body, persons or groups of persons who under this Regulation or the statutes of the SE have the power to appoint them.

2. In addition, members of the supervisory board or the administrative board may be dismissed on proper grounds by the court within whose jurisdiction the registered office of the SE is situated in proceedings brought by the general meeting of the shareholders, the representatives of the employees, the supervisory board or the administrative board. Such proceedings may also be brought by one or more shareholders who together hold 10% of the capital of the SE.

Article 76

(Quorum, majority)

1. Unless the statutes of the SE require a higher quorum, a board shall not conduct business validly unless at least half of its members take part in the deliberations.

2. Members who are absent may take part in decisions by authorizing a member who is present to represent them. No member may represent more than one absent member.

3. Unless the statutes of the SE provide for a larger majority, decisions shall be taken by a majority of the members present or represented.

4. Under terms laid down in the statutes of the SE a board may also take decisions by procedures under which the members vote in writing, by telex, telegram or telephone or by any other means of telecommunication, provided that all members are informed of the proposed voting procedure and no member objects to the use of that procedure.

Article 77

(Civil liability)

1. Members of the administrative board, the management board or the supervisory board, shall be liable to the SE for any damage sustained by the company as a result of wrongful acts committed in carrying out their duties.

2. Where the board concerned is composed of more than one member, all the members shall be jointly and severally liable without limit. However, a member may be relieved of liability if he can prove that no fault is attributable to him personally. Such relief may not be claimed by a member on the sole ground that the act giving rise to liability did not come within the sphere of responsibilities delegated to him.

Article 78

(Proceedings on behalf of the company)

1. The administrative board or the supervisory board, may institute proceedings on the company's behalf to establish liability.

2. Such proceedings must be brought if the general meeting so decides. The general meeting may appoint a special representative for this purpose. For such a decision the statutes may not prescribe a majority greater than an absolute majority of the votes attached to the capital represented.

3. Such proceedings on behalf of the company may also be brought by one or more shareholders who together hold 10% of the capital of the SE.

4. Such proceedings may be brought by any creditor of the SE who can show that he cannot obtain satisfaction of his claim on the company.

Article 79

(Waiver of proceedings on behalf of the company)

1. The SE may waive its right to institute proceedings on the company's behalf to establish liability. Such a waiver shall require an express resolution of the general meeting taken in the knowledge of the wrongful act giving rise to damage for the company. However, such a resolution may not be passed if it is opposed by shareholders whose holdings amount to the figure referred to in Article 75.

2. Paragraph 1 shall also apply to any compromise relating to such proceedings agreed between the company and a board member.

Article 80

(Limitation of actions)

No proceedings on the company's behalf to establish liability may be instituted more than five years after the act giving rise to damage.

SECTION 4

General meeting

Article 81

(Competence)

The following matters shall be resolved by the general meeting:

(a) increases or reductions in subscribed or authorized capital;

(b) issues of debentures convertible into shares or carrying subscription rights and of debentures carrying the right to share in the profits;

(c) the appointment or removal of members of the administrative board or of the supervisory board, who represent the shareholders;

(d) the institution of proceedings on the company's behalf for negligence or misconduct by board members;

(e) the appointment or dismissal of auditors;

(f) approval of the annual accounts;

(g) appropriation of the profit or loss for the year;

(h) amendment of the statutes;

(i) winding up and appointment of liquidators;

(j) transformation;

(k) merger of the SE with another company;

(l) transfers of assets.

Article 82

(Holding of general meeting)

1. A general meeting shall be held at least once a year. However, the first general meeting may be held at any time in the 18 months following the incorporation of the SE.

2. A general meeting may be called at any time by the management board or the administrative board.

Article 83

(Meeting called by minority shareholders)

1. It shall be provided that one or more shareholders who satisfy the conditions set out in Article 75 may request the SE to call the general meeting and to settle the agenda therefor.

2. If, following a request made under paragraph 1, no action has been taken within a month, the court within whose jurisdiction the registered office of the SE is situated may order the calling of a general meeting or authorize either the shareholders who have requested it or their representative to call the meeting.

Article 84

(Methods of calling meetings)

1. (a) The general meeting shall be called by a notice published either in the national gazette specified in the legislation of the State of the registered office in accordance with Article 3(4) of Directive 68/151/EEC or in one or more large-circulation newspapers.

(b) However, where all the shares in an SE are registered or where all its shareholders are known, the general meeting may be called by any means of communication addressed to all the shareholders.

2. The notice calling the general meeting shall contain the following particulars, at least:

(a) the name and the registered office of the SE;

(b) the place and date of the meeting;

(c) the type of general meeting (ordinary, extraordinary or special);

(d) a statement of the formalities, if any, prescribed by the statutes for attendance at the general meeting and for the exercise of the right to vote;

(e) any provisions of the statutes which require the shareholder, where he appoints an agent, to appoint a person who falls within certain specified categories of persons.

(f) the agenda showing the subjects to be discussed and the proposals for resolutions.

3. The period between the date of first publication of the notice in accordance with paragraph 1(a), or the date of dispatch of the first communication as mentioned in paragraph 1(b), and the date of the opening of the general meeting shall be not less than 30 days.

Article 85

1. One or more shareholders who satisfy the requirements laid down in Article 75 may request that one or more additional items be included on the agenda of a general meeting of which notice has already been given.

2. Requests for inclusion of additional agenda items shall be sent to the SE within seven days of the first publication of the notice calling the general meeting in accordance with Article 84(1)(a) or the dispatch of the first communication calling the general meeting by the means mentioned in Article 84(1)(b).

3. Items whose inclusion in the agenda has been requested under paragraph 2, shall be communicated or published in the same way as the notice of meeting, not less than seven days before the meeting.

Article 86

(Attendance at general meeting)

Every shareholder who has complied with the formalities prescribed by the statutes shall be entitled to attend the general meeting. However, the statutes may prohibit shareholders having no voting rights from attending the meeting.

Article 87

(Proxies)

1. Every shareholder shall be entitled to appoint a person to represent him at the general meeting.

2. The law of the Member State where the registered office of the SE is situated or the statutes may restrict the choice of representative to one or more specified categories of persons, but a shareholder may not be prevented from appointing another shareholder to represent him.

3. The appointment shall be made in writing and shall be retained for the period mentioned in Article 99(4).

Article 88

1. Where the proxies appointed are persons acting in a professional capacity, the provisions of Article 87 and the following provisions shall apply:

(a) the appointment shall relate to only one meeting, but it shall be valid for successive meetings with the same agenda, without prejudice to paragraph 2;

(b) the appointment shall be revocable;

(c) all the shareholders whose names and addresses are known shall be invited, either in writing or by publication in one or more large-circulation newspapers, to appoint the person in question as their proxy;

(d) the invitation to appoint the person in question as a proxy shall contain at least the following information:

(i) the agenda showing the subjects for discussion and the proposals for resolutions;

(ii) an indication that the documents mentioned in Article 89 are available to shareholders who ask for them;

(iii) a request for instructions concerning the exercise of the right to vote in respect of each item on the agenda;

(iv) a statement of the way in which the proxy will exercise the right to vote in the absence of any instructions from the shareholder;

(e) the right to vote shall be exercised in accordance with the shareholders' instructions, or in the absence of such instructions in accordance with the statement made to the shareholder. However, the proxy may depart from the shareholders' instructions or the statement made to the shareholder by reason of circumstances unknown when the instructions were given or the invitation to appoint a proxy issued, where voting in accordance with instructions or the statement would be liable to prejudice the shareholder's interests. The proxy shall forthwith inform the shareholder and explain the reasons for his action.

2. Notwithstanding paragraph 1(a), a proxy may be appointed for a specified period not exceeding 15 months. In this case the information indicated in paragraph 1(d) shall be given to all the shareholders referred to in paragraph 1(c) before any general meeting.

Article 89

(Availability of accounts)

The annual accounts and, where appropriate, the consolidated accounts, the proposed appropriation of profits or treatment of loss where it does not appear in the annual accounts, the annual report and the opinion of the persons responsible for auditing the accounts shall be available to every shareholder at the latest from the date of dispatch or publication of the notice of general meeting called to adopt the annual accounts and to decide on the appropriation of profits or treatment of loss. Every shareholder shall be able to obtain a copy of these documents free of charge upon request. From the same date, the report of the persons responsible for auditing the accounts shall be available to any shareholder wishing to consult it at the registered office of the SE.

Article 90

(Right to information)

1. Every shareholder who so requests at a general meeting shall be entitled to obtain information on the affairs of the company arising from items on the agenda or concerning matters on which the general meeting may take a decision in accordance with Article 91(2).

2. The management board or the executive members of the administrative board shall supply this information.

3. The communication of information may be refused only where:

(a) it would be likely to be seriously prejudicial to the company or a controlled company, or

(b) its disclosure would be incompatible with a legal obligation of confidentiality.

4. A shareholder to whom information is refused may require that his question and the grounds for refusal shall be entered in the minutes of the general meeting.

5. A shareholder to whom information is refused may challenge the validity of the refusal in the court

within whose jurisdiction the registered office of the SE is situated. Application to the court shall be made within two weeks of the closure of the general meeting.

Article 91

(Decisions; Agenda)

1. The general meeting shall not pass any resolution concerning items which have not been communicated or published in accordance with Article 84(2)(f) or Article 85(3).

2. Paragraph 1 shall not apply when all the shareholders are present in person or by proxy at the general meeting and no shareholder objects to the matter in question being discussed.

Article 92

(Voting rights)

1. A shareholder's voting rights shall be proportionate to the fraction of the subscribed capital which his shares represent.

2. The statutes may authorize:

(a) restriction or exclusion of voting rights in respect of shares which carry special advantages;

(b) restriction of votes in respect of shares allotted to the same shareholder, provided the restriction applies at least to all shareholders of the same class.

3. The right to vote may not be exercised:

(a) where a call made by the company has not been paid;

(b) on shares held by the SE itself or by one of its subsidiaries.

4. The law of the State where the registered office of the SE is situated shall govern the exercise of voting rights in cases of succession, usufruct, pledge of shares, or failure to notify substantial holdings.

Article 93

(Conflict of interest)

Neither a shareholder nor his representative shall exercise the right to vote attached to his shares or to shares belonging to third persons where the subject matter of the resolution relates to:

(a) the assertion of claims by the SE against that shareholder;

(b) the commencement of legal proceedings to establish the liability of that shareholder to the company in accordance with Article 78;

(c) waiver of the right to bring proceedings to establish the liability of that shareholder to the company in accordance with Article 79.

Article 94

(Required majority)

1. Resolutions of the general meeting shall require at least an absolute majority of the votes attached to the subscribed capital present or represented unless a greater majority is prescribed by this Regulation.

2. However, as regards the appointment or dismissal of members of the administrative board, the management board or the supervisory board the statutes may not require a majority greater than that mentioned in paragraph 1.

Article 95

(Amendment of statutes)

1. A resolution of the general meeting shall be required for any amendment of the statutes of the instrument of incorporation.

2. However, the statutes may provide that the administrative board or the management board may amend the statutes or the instrument of incorporation where the amendment merely implements a resolution already passed by the general meeting, or by the board itself by virtue of an authorization given by the general meeting, by the statutes, or by the instrument of incorporation.

Article 96

1. The complete text of the amendment of the statutes or of the instrument of incorporation which is to be put before the general meeting shall be set out in the notice of meeting.

2. However, the statutes may provide that the complete text of the amendment mentioned in paragraph 1 may be obtained by any shareholder free of charge upon request.

Article 97

1. A majority of not less than two-thirds of votes attached to subscribed capital represented at the meeting shall be required for the passing by the general meeting of resolutions amending the statutes or the instrument of incorporation.

2. However, the statutes may provide that where at least one-half of the subscribed capital is represented, a simple majority of the votes in paragraph 1 shall suffice.

3. Resolutions of the general meeting which would have the effect of increasing the liabilities of the shareholders shall require in any event the approval of all the shareholders involved.

4. A resolution amending the statutes or the instrument of incorporation shall be made public in accordance with Article 9.

Article 98

(Separate vote of each class of shareholder)

1. Where there are several classes of shares, any resolution of the general meeting shall require a separate vote at least for each class of shareholders whose rights are affected by the resolution.

2. Where a resolution of the general meeting requires the majority of votes specified in Article 97(1) and (2), that majority shall also be required for the separate vote of each class of shareholders whose rights are affected by the resolution.

Article 99

(Minutes)

1. Minutes shall be drawn up for every meeting of the general meeting.

2. The minutes shall contain the following particulars, at least:

(a) the place and date of the meeting;

(b) the resolutions passed;

(c) the result of the voting.

3. There shall be annexed to the minutes:

(a) the attendance list;

(b) the documents relating to the calling of the general meeting.

4. The minutes and the documents annexed thereto shall be retained for at least three years. A copy of the minutes and the documents annexed thereto may be obtained by any shareholder, free of charge, upon request.

Article 100

(Appeal against resolutions of general meeting)

1. Resolutions of the general meeting may be declared invalid as infringing the provisions of this Regulation or of the company's statutes, in the following manner.

2. An action for such a declaration may be brought by any shareholder or any person having a legitimate interest, provided he can show that he has an interest in having the infringed provision observed and that the resolution of the general meeting may have been altered or influenced by the infringement.

3. The action for such a declaration shall be brought within three months of the closure of the general meeting, before the court within whose jurisdiction the registered office of the SE is situated. It shall be taken against the SE.

4. The procedure in the action for such a declaration shall be governed by the law of the place where the SE has its registered office.

5. The decision declaring the resolution void shall be published in accordance with Article 9.

6. The declaration that a resolution is void may no longer be made by the court if that resolution has been replaced by another taken in conformity with this Regulation and the statutes of the SE. The court may, on its own initiative, grant the time necessary to enable the general meeting to pass such a new resolution.

TITLE V

Annual accounts and consolidated accounts

SECTION 1

Annual accounts

Sub-section 1

PREPARATION OF ANNUAL ACCOUNTS

Article 101

1. The SE shall draw up annual accounts comprising the balance sheet, the profit and loss account and the notes on the accounts. These documents shall constitute a composite whole.

2. The annual accounts of the SE shall be drawn up in accordance with the provisions of Directive 78/660/EEC subject to paragraph 3 of this Article.

3. (a) Articles 1, 2(5), final sentence, 2(6), 4(1), final sentence, 4(2), final sentence, 4(3)(b), final sentence, 4(4), final sentence, 5, 43(2), 45(1)(b), final sentence, 54, 55 and 62 of Directive 78/660/EEC shall not apply.

(b) For the purpose of drawing up the annual accounts, the provisions of Articles 2, 3, 4, 6 and 7 of Directive 78/660/EEC shall apply. The SE may avail itself of the option provided for in Article 6 of that Directive.

(c) For the presentation of the balance sheet, the SE may choose between the layouts prescribed by Articles 9 and 10 of Directive 78/660/EEC. It may avail itself of the options provided for in Articles 9, 10, 11, 18, final sentence, 20(2) and 21, final sentence, of that Directive.

(d) For the presentation of the profit and loss account, the SE may choose between the layouts prescribed by Articles 23 to 26 of Directive 78/660/EEC. It may avail itself of the options provided for in Articles 27 and 30 of that Directive.

(e) The items shown in the annual accounts shall be valued in accordance with the principles laid down in Article 31 of Directive 78/660/EEC. They shall be valued on the basis of the principle of purchase price or production cost according to the provisions of Articles 34 to 42 of that Directive.

However, the SE may choose to apply one of the three alternative valuation methods provided for in Article 33 of that Directive. If the SE avails itself of that possibility, it shall ensure that the method applied is consistent with the principles laid down in that Article. Details of the method applied shall be given in the annex thereto.

The SE may avail itself of the options provided for in Articles 34(1), 36, 37(1) and (2), 39(1)(c) and (2) and 40(1) of that Directive.

(f) In addition to the information required under other provisions of Directive 78/660/EEC, the notes on the accounts must include the information provided for in Article 43 of that Directive at least. The SE may avail itself of the options provided for in Articles 44 and 45(1) and (2) of that Directive.

Sub-section 2

PREPARATION OF THE ANNUAL REPORT

Article 102

1. The SE shall draw up an annual report which must include at least a fair review of the development of the company's business and of its position.

2. The annual report shall also include the information provided for in Article 46 of Directive 78/660/EEC.

Sub-section 3

AUDITING

Article 103

1. The annual accounts of the SE shall be audited by one or more persons authorized to do so in a Member State in accordance with the provisions of Directive 84/253/EEC[1]. Those persons shall also verify that the annual report is consistent with the annual accounts for the same financial year.

2. If the SE meets the criteria laid down in Article 11 of Directive 78/660/EEC, it shall not be required to have its accounts audited. In such cases, members of administrative board or the management board shall be subject to the sanctions applicable to public limited liability companies in the State in which the

[1] OJ L 126, 12. 5. 1984, p. 20.

SE has its registered office where the annual accounts or annual reports are not drawn up in accordance with the provisions of this section.

Sub-section 4

PUBLICATION

Article 104

1. The annual accounts, duly approved, and the annual report and audit report shall be published as laid down in accordance with Article 3 of Directive 68/151/EEC by the laws of the Member State in which the SE has its registered office.

2. The SE may avail itself of the options provided for in Article 47 of Directive 78/660/EEC.

3. Articles 48, 49 and 50 of Directive 78/660/EEC shall apply to the SE.

Sub-section 5

FINAL PROVISIONS

Article 105

Articles 56 to 61 of Directive 78/660/EEC shall apply to the SE. The SE may avail itself of the options provided for in those Articles.

SECTION 2

Consolidated accounts

Sub-section 1

CONDITIONS FOR THE PREPARATION OF CONSOLIDATED ACCOUNTS

Article 106

1. Where the SE is a parent undertaking within the meaning of Article 1(1) and (2) of Directive 83/349/EEC, it shall be required to draw up consolidated accounts and a consolidated annual report in accordance with the provisions of that Directive.

2. Articles 1(1)(c) last sentence, 1(d)(bb), last sentence, 1(d), second and third subparagraphs, 4 and 5 of Directive 83/349/EEC shall not apply.

3. The SE may avail itself of the options provided for in Articles 1, 6, 12 and 15 of Directive 83/349/EEC.

Article 107

1. Where the SE is a parent undertaking within the meaning of Article 1(1) and (2) of Directive 83/349/EEC and is at the same time a subsidiary undertaking of a parent undertaking governed by the law of a Member State, it shall be exempt from the obligation to draw up consolidated accounts subject to the conditions laid down in Articles 7 and 8 of that Directive. Article 10 of that Directive shall apply.

2. Articles 7(1)(b), second subparagraph, 8(1), last sentence, 8(2) and (3), and 9 of that Directive shall not apply.

3. The exemption provided for in paragraph 1 shall not apply where the securities of the SE have been admitted to official listing on a stock exchange established in a Member State.

Article 108

1. Where the SE is a parent undertaking within the meaning of Article 1(1) and (2) of Directive 83/349/EEC and is at the same time a subsidiary undertaking of a parent undertaking which is not governed by the law of a Member state, it shall be exempt from the obligation to draw up consolidated accounts subject to the conditions laid down in Article 11 of that Directive.

2. Articles 8(1), second sentence, 8(2) and (3), and 10 of that Directive shall not apply.

3. The exemption provided for in paragraph 1 shall not apply where the securities of the SE have been admitted to official listing on a stock exchange established in a Member State.

Sub-section 2

THE PREPARATION OF CONSOLIDATED ACCOUNTS

Article 109

1. The consolidated accounts shall comprise the consolidated balance sheet, the consolidated profit and loss account and the notes on the accounts. These documents shall constitute a composite whole.

2. The consolidated accounts shall be drawn up in accordance with the provisions of Directive 83/349/EEC subject to paragraph 3 of this Article.

3. (a) Articles 16(5), final sentence, 16(6), 33(2)(c), first sentence, 33(3), final sentence, 34, point 12, final sentence, and point 13, final sentence, 35(1)(b), second sentence, 40, 41(5) and 48 of Directive 83/349/EEC shall not apply.

(b) The SE may avail itself of the options provided for in Articles 17(2), 19(1)(b), 20, 26(1)(c), final sentence, 26(2), 27(2), 28, second sentence, 29(2)(a), second sentence, 29(5), final sentence, 30(2), 32, 33(2)(d) and 35(1) of Directive 83/349/EEC.

Sub-section 3

PREPARATION OF THE CONSOLIDATED ANNUAL REPORT

Article 110

1. The consolidated annual report shall include at least a fair review of the development of the company's business and the position of the undertakings included in the consolidation taken as a whole.

2. The consolidated annual report shall also include the information provided for in Article 36 of Directive 83/349/EEC. The SE may avail itself of the option provided for in the final sentence of paragraph 2(d) of that Article.

Sub-section 4

AUDITING OF THE CONSOLIDATED ACCOUNTS

Article 111

The consolidated accounts shall be audited by one or more persons authorized to do so in a Member State in accordance with the provisions of Directive 84/253/EEC. Those persons shall also verify that the consolidated annual report is consistent with the consolidated accounts for the financial year in question.

Sub-section 5

PUBLICATION

Article 112

1. The consolidated accounts, duly approved, and the consolidated annual report, together with the audit report, shall be published as laid down in accordance with Article 3 of Directive 68/151/EEC by the laws of the Member State in which the SE has its registered office.

2. Article 38(3), (4) and (6) of Directive 83/349/EEC shall not apply.

3. The management board and the executive members of the administrative board shall be liable to the sanctions provided for [...] if the consolidated accounts and consolidated annual report are not published.

SECTION 3

Banks and insurance companies

Article 113

1. SEs which are credit or financial institutions shall comply, as regards the drawing-up, auditing and publication of annual accounts and consolidated accounts with the rules laid down pursuant to Directive 86/635/EEC[1] of 8 December 1986, by the national law of the State in which the SE has its registered office.

2. SEs which are insurance companies shall comply, as regards the drawing-up, auditing and publication of annual accounts and consolidated accounts, with the rules laid down, pursuant to Directive [... which, supplementing Directive 78/660/EEC, harmonizes the provisions governing the annual accounts and the consolidated accounts of insurance companies, by the national law of the State in which the company has its registered office].

TITLE VI

Groups of companies

Article 114

1. Where an undertaking controls an SE, that undertaking's consequent rights and obligations relating to the protection of minority shareholders and third parties shall be those defined by the law governing public limited companies in the State where the SE has its registered office.

[1] OJ L 372, 31. 12. 1986; Bull. EC 12-1986, point 2.1.127.

2. Paragraph 1 shall not affect the obligations imposed on the controlling undertaking by the legal system which governs it.

TITLE VII

Winding up, liquidation, insolvency and suspension of payments

SECTION 1

Winding up

Article 115

An SE may be wound up:

1. upon the expiry of the duration laid down for it in the statutes or the instrument of incorporation,

2. by resolution of the general meeting of shareholders, or

3. by decision of the court of the place where the SE has its registered office:

(a) where the subscribed capital of the company has been reduced below the minimum capital provided for in Article 4;

(b) where the disclosure of annual accounts has not taken place in the SE's last three financial years;

(c) on any ground laid down in the law of the place where the SE has its registered office or provided for in the statutes or the instrument of incorporation.

Article 116

(Winding up by resolution of the general meeting)

1. A resolution of the general meeting of shareholders to wind up the SE on any ground laid down by the statutes or instrument of incorporation shall require at least a simple majority of the votes attached to the subscribed capital represented.

2. In all other cases a resolution of the general meeting of shareholders to wind up the SE shall require at least a two-thirds majority of the votes attached to the subscribed capital represented. The statutes may, however, lay down that, when at least half the subscribed capital is represented, the simple majority referred to in paragraph 1 is sufficient.

Article 117

(Winding up by the court)

1. Winding-up proceedings may be brought in the court of the place where the SE has its registered office by the administrative board, the management board or the supervisory board of the SE, by any shareholder, or by any person with a legitimate interest.

2. Where the SE is able to remove the ground for winding up, the court may grant it a period of time sufficient to allow it to do so.

Article 118

(Publication of winding up)

The winding-up shall be published in the manner referred to in Article 9.

Article 119

(Wound-up SE to continue in existence)

1. Where an SE is to be wound up as a result of a resolution to that effect of the general meeting of shareholders or upon the expiry of its prescribed duration, the general meeting of shareholders may resolve that it is to continue in existence as long as there has been no distribution on the basis of liquidation in accordance with Article 126.

2. The resolution that the company is to continue in existence shall be passed in accordance with Article 116(2), and published in the manner referred to in Article 9.

SECTION 2

Liquidation

Article 120

(Appointment of liquidators)

1. The winding-up of an SE shall entail the liquidation of its assets. The liquidation shall be carried out by one or more liquidators.

2. Liquidators shall be appointed:

(a) by the statutes or instrument of incorporation, or in the manner laid down therein; or

(b) by a resolution of the general meeting of shareholders acting by the simple majority of the votes specified in Article 116(1); or

(c) failing an appointment pursuant to (a) or (b), by the court in whose jurisdiction the registered office of the SE is situated on the application of any shareholder or of the administrative board, the management board or the supervisory board.

3. In the absence of an appointment pursuant to paragraph 2, the duties of liquidator shall be performed by the administrative board or the management board.

4. The general meeting shall determine the remuneration of the liquidators. Where the liquidators are appointed by a court in whose jurisdiction the registered office of the SE is situated, the court shall determine their remuneration.

Article 121

(Removal of liquidators)

The liquidators may be removed before the termination of the liquidation:

(a) where they were appointed in accordance with Article 120(2)(a) and (b) or where Article 120(3) applies, by a decision of the general meeting acting by the simple majority of the votes specified in Article 116(1).

(b) irrespective of the manner of appointment, by a court in whose jurisdiction the registered office of the SE is situated, on petition of any person having a legitimate interest in the matter and showing a proper ground.

Article 122

(Powers of liquidators)

1. The liquidators may take all appropriate steps to liquidate the SE and, in particular, shall terminate transactions pending, collect debts, convert remaining assets into cash where this is necessary for their realization and to pay the sums owing to creditors. The liquidators may undertake new transactions to the extent necessary for the purposes of the liquidation.

2. The liquidators shall have the power to bind the SE in dealings with third parties and to take legal proceedings on its behalf.

The appointment, termination of office and identity of liquidators shall be published in the manner referred to in Article 9. It must appear from the disclosure whether the liquidators may represent the company alone or must act jointly.

Article 123

(Liability of liquidators)

The rules on the civil liability of members of the administrative board or of the management board of an SE shall also apply to the civil liability of liquidators for wrongful acts committed in carrying out their duties.

Article 124

(Accounting documents)

1. The liquidators shall draw up a statement of the assets and liabilities of the SE on the date the winding-up commenced. Any shareholder or creditor of the SE shall be entitled to obtain a copy of this statement free of charge, upon request.

2. The liquidators shall report on their activities to the general meeting each year.

3. The rules concerning the drawing-up, auditing and publication of annual accounts or consolidated accounts and the approval of persons responsible for carrying out the statutory audits of those accounts shall apply *mutatis mutandis*.

Article 125

(Information supplied to creditors)

The notice of the winding-up of the company provided for in Article 118 shall invite creditors to lodge their claims, and shall indicate the date after which distributions on the basis of liquidation will be made.

An invitation to lodge claims shall also be sent in writing to any creditor known to the company.

Article 126

(Distribution)

1. No distribution on the basis of liquidation may be made to the beneficiaries designated in the statutes or the instrument of incorporation, or failing any such designation to the shareholders, until all creditors of the company have been paid in full and the time-limits indicated in Articles 125 and 127(2) have expired.

2. After the creditors have been paid in full, and anything due to the beneficiaries referred to in paragraph 1 has been distributed, the net assets of the SE shall, except where otherwise stated in the statutes or the instrument of incorporation, be distributed among the shareholders in proportion to the nominal value of their shares.

3. Where the shares issued by the SE have not all been paid up in the same proportion, the amounts paid up shall be repaid. In that case only the remaining net assets shall be distributed in accordance with paragraph 2. If the net assets are not sufficient to repay the amounts paid up, the shareholders shall bear the loss in proportion to the nominal value of their shares.

4. Where a claim on an SE has not yet fallen due or is in dispute or where the creditor is not known, the net assets may be distributed only if adequate security is set aside for the creditor or if the assets remaining, after a partial distribution represent sufficient security.

Article 127

(Distribution plan)

1. The liquidator or liquidators shall draw up a plan for the distribution of the net assets of the company pursuant to Article 126 after the date indicated in Article 125.

2. This plan shall be brought to the attention of the general meeting and of any beneficiary designated in the statutes or instrument of incorporation. Any shareholder and any beneficiary may challenge the plan in the court of the place where the SE has its registered office within three months of the date on which it was brought to the attention of the general meeting or of that beneficiary. No distribution may be made until that period has expired.

3. Where there is a challenge it shall be for the court to decide whether and to what extent any partial distributions may be made in the course of the proceedings before the court takes its decision.

Article 128

(Termination of liquidation)

1. The liquidation shall be terminated when the distribution is complete.

2. Where, after the liquidation is terminated, further assets or liabilities of the SE come to light which were previously unknown, or further liquidation measures prove necessary, a court in whose jurisdiction the registered office of the SE is situated shall, on the application of any shareholder or creditor, renew the mandate of the former liquidators or appoint other liquidators.

3. Termination of liquidation and removal of the SE from the register referred to in Article 8(1) shall be published in the manner referred to in Article 9.

4. Following the liquidation, the books and records relating to the liquidation shall be lodged at the register referred to in paragraph 3. Any interested party may examine such books and records.

SECTION 3

Insolvency and suspension of payments

Article 129

In respect of insolvency and suspension of payments the SE shall be subject to the law of the place where it has its registered office.

Article 130

1. The opening of insolvency or suspension of payments proceedings shall be notified for entry in the register by the person appointed to conduct the proceedings. The entry in the register shall show the following:

(a) the nature of the proceedings, the date of the order, and the court making it;

(b) the date on which payments were suspended, if the court order provides for this;

(c) the name and address of the administrator, trustee, receiver, liquidator or any other person having power to conduct the proceedings, or of each of them where there are more than one;

(d) any other information considered necessary.

2. Where a court finally dismisses an application for the opening of the proceedings referred to in paragraph 1 owing to want of sufficient assets, it shall, either of its own motion or on application by any interested party, order its decision to be noted in the register.

3. Particulars registered pursuant to paragraphs 1 and 2 shall be published in the manner referred to in Article 9.

TITLE VIII

Mergers

Article 131

(Types of merger)

An SE may merge with other SEs or with other public limited companies incorporated under the law of one of the Member States in the following ways:

(a) by forming a new SE;

(b) by the SE taking over one or more public limited companies;

(c) by a public limited company taking over the SE;

(d) by forming a new public limited company.

Article 132

(Applicable law)

1. Where the companies participating in the merger have their registered offices in the same Member State, the provisions of national law giving effect to Directive 78/855/EEC shall apply.

2. Where the companies participating in the merger have their registered offices in different Member States, the provisions of Title II shall apply *mutatis mutandis.*

TITLE IX

Permanent establishments

Article 133

1. Where an SE has one or more permanent establishments in a Member State or a non-member State, and the aggregation of the profits and losses for tax purposes of all such permanent establishments results in a net loss, that loss may be set against the profits of the SE in the State where it is resident for tax purposes.

2. Subsequent profits of the permanent establishments of the SE in another State shall constitute taxable income of the SE in the State in which it is resident for tax purposes, up to the amount of the losses imputed in accordance with paragraph 1.

3. Where a permanent establishment is situated in a Member State, the imputable losses under paragraph 1 and the taxable profits under paragraph 2 shall be determined by the laws of that Member State.

4. Member States shall be free not to apply the provisions of this Article if they avoid double taxation by allowing the SE to set the tax already paid by its permanent establishments against the tax due from it in respect of the profits realized by those permanent establishments.

TITLE X

Sanctions

Article 134

The provisions of national law applicable to the infringement of the rules relating to public limited companies shall apply to the infringement of any of the provisions of this Regulation.

TITLE XI

Final provisions

Article 135

The involvement of employees in the SE shall be defined in accordance with the provisions adopted to give effect to Directive... by the Member State where the SE has its registered office.

Article 136

An SE may be formed in any Member State which has implemented in national law the provisions of Directive... [on the involvement of employees in the SE].

Article 137

This Regulation shall enter into force on 1 January 1992.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Council

Proposal for a Council Directive

complementing the Statute for a European company with regard to the involvement of employees in the European company

The Council of the European Communities,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 54 thereof,

Having regard to the proposal from the Commission,

In cooperation with the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas, in order to attain the objectives set out in Article 8a of the Treaty, Council Regulation No... establishes a Statute for a European company (SE);

Whereas, in order to promote the economic and social objectives of the Community, arrangements should be made for employees to participate in the supervision and strategic development of the SE;

Whereas the great diversity of rules and practices existing in the Member States as regards the manner in which employees' representatives participate in supervision of the decisions of the governing bodies of public limited companies makes it impossible to lay down uniform rules on the involvement of employees in the SE;

Whereas the laws of the Member States should therefore be coordinated with a view to making equivalent the safeguards required for the protection of the interests of members and third persons, of public limited companies in each Member State, with due regard to the specific characteristics of the operation of such companies having their registered office in its territory; whereas such coordination must take account of the fact that an SE is created by a restructuring or cooperation operation involving companies governed by the law of at least two Member States;

Whereas account should be taken of the specific characteristics of the laws of the Member States by establishing for the SE a framework comprising several models of participation, and authorizing, first, Member States to choose the model or models best corresponding to their national traditions, and, secondly, the management board or the administrative board, as the case may be, and the representatives of the employees of the SE or of its founder companies to choose the model most suited to their social environment;

Whereas the provisions of this Directive form an indissociable complement to the provisions of Regulation... and it is therefore necessary to ensure that the two sets of provisions are applied concomitantly,

Has adopted this Directive:

Article 1

The coordination measures prescribed by this Directive shall apply to the laws, regulations and administrative provisions in the Member States concerning the involvement of employees in the SE.

These measures are an essential supplement to Regulation... on the Statute for a European company.

TITLE 1

Models of participation

Article 2

Member States shall take the necessary measures to enable employees of the SE to participate in the supervision and strategic development of the SE in accordance with the provisions of this Directive.

Article 3

1. Subject to the application of paragraph 5, the participation of SE employees prescribed by Article 2

shall be determined in accordance with one of the models set out in Articles 4, 5 and 6 by means of an agreement concluded between the management boards and the administrative boards of the founder companies and the representatives of the employees of those companies provided for by the laws and practices of the Member States. Where no agreement can be reached the management and administrative boards shall choose the model applicable to the SE.

2. An SE may not be formed unless one of the models referred to in Articles 4, 5 and 6 has been chosen.

3. Subject to the application of paragraph 5, the chosen model may be replaced by another model in Articles 4, 5 and 6 by an agreement concluded between the management or the administrative board and the representatives of the employees of the SE. This agreement must be submitted for the approval of the general meeting.

4. Each Member State shall determine the manner in which the participation models shall be applied for SEs having their registered office in its territory.

5. A Member State may restrict the choice of the models referred to in Articles 4, 5, and 6 or make only one of these models compulsory for SEs having their registered office in its territory.

SECTION 1

Supervisory board or administrative board

Article 4

The appointment of members of the supervisory board or the administrative board, as the case may be, shall be governed by the following rules:

(i) at least one-third and not more than one-half of them shall be appointed by the employees of the SE or their representatives in that company; or

(ii) they shall be co-opted by the board. However, the general meeting of shareholders or the representatives of the employees may, on specific grounds, object to the appointment of a particular candidate. In such cases the appointment may not be made until an independent body established under public law has declared the objection inadmissible.

SECTION 2

Separate body

Article 5

1. A separate body shall represent the employees of the SE. The number of members of that body and the detailed rules governing their election or appointment shall be laid down in the statutes in consultation with the representatives of the employees of the founder companies in accordance with the laws or practices of the Member States.

2. The body representing the employees shall have the right:

(a) at least once every three months, to be informed by the management board or the administrative board of the progress of the company's business, including that of undertakings controlled by it, and of its prospects;

(b) where it is necessary for the performance of its duties, to require from the management board or the administrative board a report concerning certain of the company's business or any information or documents;

(c) to be informed and consulted by the management board or the administrative board before any decision referred to in Article 72 of Regulation... is implemented.

3. Article 74(3) of that Regulation shall apply to members of the separate body.

SECTION 3

Other models

Article 6

1. Models other than those referred to in Articles 4 and 5 may be established by means of an agreement concluded between the management boards and the administrative boards of the founder companies and the employees or their representatives in those companies.

2. The agreement reached shall provide at least for the employees of the SE or their representatives:

(a) once every three months, to be informed of the progress of the company's business, including that of undertakings controlled by it, and of its prospects;

(b) to be informed and consulted before any decision referred to in Article 72 of Regulation... is implemented.

3. Where the agreement provides for a collegiate body representing the employees, that body may require the management board or the administrative board to provide the information necessary for the performance of its duties.

4. The agreement shall provide that the employee's representatives must observe the necessary discretion in relation to any confidential information they hold on the SE. They shall be bound by this obligation even after their duties have ceased.

5. If the law of the State where the SE has its registered office so permits, the agreement may permit the management board or the administrative board of the SE to withhold from the employees or their representatives any information the disclosure of which might seriously jeopardize the interests of the SE or disrupt its projects.

6. The parties to the negotiations may be assisted by experts of their choice at the expense of the founder companies.

7. The agreement may be concluded for a fixed period and re-negotiated upon expiry of that period. However, the agreement concluded shall remain in force until the entry into force of the new agreement.

8. Where the two parties to the negotiations so decide, or where no agreement such as is mentioned in paragraph 1 can be reached, a standard model, provided by the law of the State where the SE has its registered office, shall apply to the SE. This model shall be in conformity with the most advanced national practices and shall ensure for the employees at least the rights of information and consultation provided for by this article.

SECTION 4

Election of the representatives of the employees of the SE

Article 7

The representatives of the employees of the SE shall be elected in accordance with systems which take into account, in an appropriate manner, the number of staff they represent.

All employees must be able to participate in the vote.

The election shall be conducted in accordance with the laws or practices of the Member States.

Article 8

The first members of the supervisory board or the administrative board to be appointed by the employees and the first members of the separate body representing the employees shall be appointed by the representatives of the employees of the founder companies in proportion to the number of employees they represent and in accordance with the laws or practices of the Member States. Those first members shall remain in office until such time as the requirements for electing the representatives of the employees of the SE are satisfied.

SECTION 5

Article 9

1. The management board or the administrative board of the SE shall provide the representatives of the employees with such financial and material resources as enable them to meet and perform their duties in an appropriate manner.

2. The practical arrangements for making available such financial and material resources shall be settled in consultation with the representatives of the employees of the SE.

SECTION 6

Representation of employees in the establishments of the SE

Article 10

Save as otherwise provided in this Directive, the status and duties of the representatives of the employees or of the body which represents them, for which provision is made in the establishments of the SE, shall be determined by the laws or practices of the Member States.

TITLE 2

Employee participation in the capital or in the profit or loss of the SE

SECTION 1

Article 11

Employee participation in the capital or in the profits or losses of the SE may be organized by means of a collective agreement negotiated and concluded by the management boards and the administrative boards of the founder companies, or of the SE when constituted, and the employees or their representatives who are duly authorized to negotiate in those companies.

SECTION 2

Final provisions

Article 12

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 January 1992. They shall immediately communicate the measures taken to the Commission.

The provisions adopted pursuant to the first subparagraph shall make express reference to this Directive.

2. Member States shall communicate to the Commission the main provisions of domestic law which they adopt in the field covered by this Directive.

Article 13

This Directive is addressed to the Member States.

Done at Brussels,

For the Council

European Communities — Commission

Statute for a European company

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Based respectively on Articles 100a and 54 of the Treaty, the proposal for a Regulation on the Statute for a European company, and the proposal for a Directive complementing the Statute with regard to the involvement of employees in the European company, aim to permit firms in the Community to choose a structure for cooperation adapted to the dimensions of the forthcoming single market, while ensuring that employees are consulted, or at least informed, on the company's strategic decisions.