

COMMISSION
OF THE EUROPEAN COMMUNITIES

Proposal for a fifth directive on
THE STRUCTURE
OF SOCIÉTÉS ANONYMES

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COMMISSION
of the European Communities

Proposal for a fifth directive

to coordinate the 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, as regards the structure of sociétés anonymes and the powers and obligations of their organs

(presented by the Commission to the Council)

Brussels

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Proposal for a directive

The Council of the European Communities,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 54(3) (g) thereof;

Having regard to the proposal from the Commission;

Having regard to the Opinion of the European Parliament;

Having regard to the Opinion of the Economic and Social Committee;

Whereas the coordination provided for in Article 54(3) (g) was begun by Directive No. 68/151/EEC of 9 March 1968 governing the disclosure, validity of obligations entered into by the representative organs and the nullity of sociétés anonymes, sociétés en commandite par actions and sociétés à responsabilité limitée*;

Whereas the coordination of national laws relating to such limited liability companies was continued by Directive No. ... of ...¹ on the annual accounts;

Whereas further the coordination of laws relating to sociétés anonymes* must be given priority because these companies much more than others carry on cross-frontier activities;

Whereas the laws of the Member States relating to the formation and capital of sociétés anonymes* were coordinated by Directive No. ... of ...² and those relating to mergers of such companies were coordinated by Directive No. ... of ...³;

Whereas so that the protection afforded to the interests of members and others is made equivalent, the laws of the Member States relating to the structure of sociétés anonymes* and to the powers and obligations of their organs must be coordinated;

Whereas in the fields aforesaid equivalent legal conditions must be created in the Community for sociétés anonymes*;

Whereas so far as concerns the organization of the administration of this type of company two different sets of arrangements at present obtain in the Community; whereas one of these provides for one administrative organ only while the other provides for two, namely a management organ responsible for managing the business of the company and an organ responsible for controlling the management body; whereas in practice, even under the arrangement which provides for only one administrative organ, a *de facto* distinction is made between active members who manage the business of the company and passive

* Where the French terms are used in the recitals of this Proposal they are to be taken to include a reference to the corresponding types of company existing in each of the six Member States.

¹ OJ C 7 of 28.1.1972.

² OJ C 48 of 24.4.1970.

³ OJ C 89 of 14.7.1970.

members who confine themselves to supervision; whereas in order to delimit clearly the responsibilities of the persons who are charged respectively with one or other of these duties it is preferable that there be separate organs whose responsibility it is to carry them out; whereas further the two-tier system will facilitate the formation of sociétés anonymes* by members or groups of members from different Member States and, thereby, interpenetration of undertakings within the Community; whereas to this end the introduction of the two-tier system on an optional basis would not be sufficient and whereas that structure must be made compulsory for all sociétés anonymes*;

Whereas the laws of certain Member States provide for worker participation within the supervisory body but no such provision exists in other Member States; whereas differences in the laws relating to this field must be eliminated not least because they constitute a barrier to the application of the Community rules which are necessary to facilitate transnational operations involving reconstruction and interpenetration of undertakings, in particular in so far as concerns the giving of effect to Article 220 of the Treaty which provides *inter alia* for international merger and transfer of the seat; whereas in order to make provision for worker participation in appointing and dismissing members of the supervisory organ the Directive does not make rules uniform for all the Member States but leaves them to choose between a number of equivalent arrangements;

Whereas the members of the management and supervisory organs must be made subject to special rules relating to civil liability which provide for joint and several liability, reverse the burden of proof in respect of liability for wrongful acts and ensure that the bringing of proceedings on behalf of the company for the purpose of making those persons liable is not improperly prevented;

Whereas as regards the preparation and holding of general meetings, the shareholders must be protected by equivalent provisions relating to the form, content and period of notice, the right to attend and to be represented at meetings, written or oral information, exercise of the right to vote, the majorities required for the passing of resolutions and, finally, the right to bring proceedings in respect of void or voidable resolutions;

Whereas certain rights of shareholders should be capable of being exercised by a minority of them;

Whereas in the interests of members and others the audit of the annual accounts should be carried out by experts whose independence is guaranteed by special provisions;

* Where the French terms are used in the recitals of this Proposal they are to be taken to include a reference to the corresponding types of company existing in each of the six Member States.

Has adopted this Directive:

Scope of application

Article 1

1. The coordination measures prescribed by this Directive apply to the laws, regulations and administrative provisions of the Member States relating to the following types of company:
 - in Germany: die Aktiengesellschaft,
 - in Belgium: de naamloze vennootschap—la société anonyme,
 - in France: la société anonyme,
 - in Italy: la società per azioni,
 - in Luxembourg: la société anonyme,
 - in the Netherlands: de naamloze vennootschap.
2. It shall be permissible for the Member States not to apply the provisions of this Directive to cooperatives whose legal form is that of one of the types of company indicated in the foregoing paragraph.

CHAPTER I

Structure of the Company

Article 2

1. The Member States shall make provision so that the structure of the company takes the form provided for in Chapters II and III of this Directive, the company thereby having not less than three separate organs:
 - (a) the management organ responsible for managing and representing the company;
 - (b) the supervisory organ responsible for controlling the management organ;
 - (c) the general meeting of shareholders.
2. They shall, further, make provision for the annual accounts to be drawn up and audited in manner provided in Chapter IV of this Directive.

CHAPTER II

The Management Organ and the Supervisory Organ

Article 3

1. The members of the management organ shall be appointed by the supervisory organ.
2. Where the management organ has more than one member, the supervisory organ shall specify which member of the management organ is responsible for questions of personnel and worker relations.
3. The provisions of this Article shall be without prejudice to national laws under which the appointment or dismissal of any member of the management organ cannot be effected against the wishes of the majority of the members of the supervisory organ who were appointed by the workers or by their representatives.

Article 4

1. The laws of the Member States shall make provision that, at any rate for companies which employ five hundred staff or more, the appointment of members of the supervisory organ shall be made in manner provided in paragraphs 2 or 3.
2. Without prejudice to the provisions contained in the following subparagraphs, the members of the supervisory organ shall be appointed by the general meeting.

Not less than one third of the members of the supervisory organ shall be appointed by the workers or their representatives or upon proposal by the workers or their representatives.

The laws of the Member States may provide in relation to the appointment of members of the supervisory board that some of those who are not appointed in manner provided in the preceding subparagraphs may be appointed otherwise than by the general meeting.

3. The members of the supervisory organ shall be appointed by that organ. However, the general meeting or the representatives of the workers may object to the appointment of a proposed candidate on the ground either that he lacks the ability to carry out his duties or that if he were appointed there would, having regard to the interests of the company, the share-

holders or the workers, be imbalance in the composition of the supervisory organ. In such cases the appointment shall not be made unless the objection is declared unfounded by an independent body existing under public law.

4. As regards companies which employ a lesser number of workers than that fixed in pursuance of paragraph 1 the members of the supervisory organ shall be appointed by the general meeting.
5. The members of the first management organ and of the first supervisory organ may be appointed in the statutes or in the instrument of constitution.

Article 5

1. Only natural persons may be appointed as members of the management organ.
2. Where the laws of the Member States provide that legal persons may be members of the supervisory organ, those legal persons shall designate a permanent representative who shall be subject to the same conditions and obligations as if he were personally a member of the supervisory organ, but without prejudice to the liability of the legal person which he represents.

Article 6

No person may be at the same time a member of the management organ and of the supervisory organ.

Article 7

The members of the management organ and of the supervisory organ shall be appointed for a specified period not exceeding six years. They shall be eligible for reappointment.

Article 8

The management organ and the supervisory organ shall not fix the remuneration of their own members.

Article 9

1. The members of the management organ shall not, without the authorization of the supervisory organ, carry on within another undertaking any activity, whether remunerated or not, for their own account or for account of any other person.
2. The general meeting shall be informed each year of the authorizations given.
3. A natural person shall not be a member of the supervisory organ of more than 10 companies.

Article 10

1. Every agreement to which the company is party and in which a member of the management organ or of the supervisory organ has an interest, even if only indirect, must be authorized by the supervisory organ at least.
2. Where a member of the management organ or supervisory organ becomes aware that such circumstances as are described in paragraph 1 obtain, he shall inform those two organs thereof. The interested member shall not take part either in the discussion or decision relating to the relevant agreement within the management organ or the discussion or decision relating to the giving of the authorization required under paragraph 1 within the supervisory organ.
3. The general meeting shall be informed each year of the authorizations given under paragraph 1.
4. Want of authorization by the supervisory organ or irregularity in the decision giving authorization shall not be adduced as against third parties save where the company proves that the third party was aware of the want of authorization or of the irregularity in the decision, or that in view of the circumstances he could not have been unaware thereof.

Article 11

1. The management organ shall not less than every three months send to the supervisory organ a report on the progress of the company's affairs.

2. The management organ shall within three months following the end of each financial year present to the supervisory organ the draft annual accounts and draft annual report within the meaning of Articles 2 and 43 of Directive No. ... of ...¹.
3. The supervisory organ may at any time request from the management organ a special report on the affairs of the company or on certain aspects thereof.
4. The supervisory organ or one third of the members thereof shall be entitled to obtain from the management organ all information and relevant documents and to undertake all such investigations as may be necessary. The supervisory organ may authorize one or more of its members or one or more experts to exercise these powers.
5. Each member of the supervisory organ shall be entitled to examine all reports, documents and information supplied by the management organ to the supervisory organ.

Article 12

1. The authorization of the supervisory organ shall be obtained for decisions of the management organ relating to:
 - (a) the closure or transfer of the undertaking or of substantial parts thereof;
 - (b) substantial curtailment or extension of the activities of the undertaking;
 - (c) substantial organizational changes within the undertaking;
 - (d) establishment of long-term cooperation with other undertakings or the termination thereof.
2. The law or the statutes may provide that the authorization of the supervisory organ must be obtained also for the effecting of other operations.
3. The provisions of Article 10(4) shall apply as regards third parties.

Article 13

1. The members of the management organ may be dismissed by the supervisory organ.

¹ OJ C7 of 28.1.1972.

2. The members of the supervisory organ may be dismissed at any time by the organs or persons who appointed them and under the same procedures. However, the members of the supervisory organ who were appointed by it under Article 4(3) may be dismissed only where proper grounds for dismissal are found to exist by judgment of the court in proceedings brought in that behalf by the supervisory organ, the general meeting or the workers' representatives.

Article 14

1. The laws of the Member States shall make such provision relating to the civil liability of the members of the management organ and of the supervisory organ as to ensure that, at minimum, compensation is made for all damage sustained by the company as a result of breaches of law or of the statutes or of other wrongful acts committed by the members of those organs in carrying out their duties.
2. Each member of the organ in question shall be jointly and severally liable without limit. He may however exonerate himself from liability if he proves that no fault is attributable to him personally.
3. The provisions of the preceding paragraphs shall apply even where the powers vested in the organ have been allocated among its members.
4. The authorization given by the supervisory organ shall not have the effect of exempting the members of the management organ from civil liability.
5. Furthermore, any discharge, instruction or authorization given by the general meeting shall not have the effect of exempting the members of the management organ or of the supervisory organ from civil liability.

Article 15

1. Proceedings on behalf of the company to enforce the liability referred to in Article 14 shall be commenced if the general meeting so resolves.
2. Neither the law nor the statutes may require for the passing of a resolution in that behalf a majority greater than an absolute majority of votes of the shareholders present or represented.

Article 16

It shall be provided that proceedings on behalf of the company to enforce the liability referred to in Article 14 shall also be commenced if so requested by one or more shareholders:

- (a) who hold shares of a certain nominal value or proportional value which the Member States shall not require to be greater than 5 % of the capital subscribed; or

- (b) who hold shares of a certain nominal value or proportional value which the Member States shall not require to be greater than 100 000 units of account. This figure may vary up to not more than 10 % for purposes of conversion into national currency.

Article 17

The bringing of proceedings on behalf of the company to enforce the liability referred to in Article 14 shall not be made subject, whether by law, the statutes or any agreement:

- (a) to prior resolution of the general meeting or other organ of the company; or
- (b) to prior decision of the Court in respect of wrongful acts of the members of the management organ or of the supervisory organ, or in respect of the dismissal or replacement of members thereof.

Article 18

1. Renunciation by the company of the right to bring proceedings on behalf of the company to enforce the liability referred to in Article 14 shall not be implied:
 - (a) from the sole fact that the general meeting has approved the accounts relating to the financial year during which the acts giving rise to damage occurred;
 - (b) from the sole fact that the general meeting has given discharge to the members of the management organ or of the supervisory organ in respect of that financial year.
2. For renunciation to take place the following minimum conditions must be satisfied:
 - (a) an act giving rise to damage must actually have occurred;
 - (b) the general meeting must expressly resolve to renounce; the resolution shall in no way affect the right conferred by Article 16 on one or more shareholders who satisfy the requirements of that Article, provided they voted against the resolution or made objection thereto which was recorded in the minutes.
3. This Article shall apply to all compromises relating to the bringing of proceedings to enforce the liability aforesaid which have been agreed between the company and the member whose liability is in question.

Article 19

1. Proceedings on behalf of the company to enforce the liability referred to in Article 14 may also be brought by a creditor of the company who is unable to obtain payment from it.
2. Action by the creditor under the preceding paragraph shall in no way be affected by such renunciation or transactions as are referred to in Article 18.

Article 20

1. The Member States shall make such provision relating to the civil liability of the members of the management organ and of the supervisory organ as to ensure that compensation is made for all damage sustained personally by shareholders and third parties as a result of breaches of law or of the statutes or of other wrongful acts committed by the members of those organs in carrying out their duties.
2. The provisions of Article 14(2) to (5) shall apply.

Article 21

The period in which action to enforce the liability referred to in Article 14, 19 or 20 may be brought shall not be less than three years from the date of the act giving rise to damage or, if the act has been dissembled, from the time when it has become known.

CHAPTER III

General meeting

Article 22

1. The general meeting shall be convened at least once each year.
2. It may be convened at any time by the management organ.

Article 23

1. It shall be provided that one or more shareholders who satisfy the requirements of Article 16 may request the company to convene the general meeting and settle the agenda therefor.

2. If, following a request made under paragraph 1 no action has been taken by the company within one month, the competent court must have power to convene the general meeting or to authorize it to be convened either by the shareholders who requested that it be convened or by their agents.

Article 24

1. The laws of the Member States may provide that the general meeting of a company all of whose shares are registered may be convened by notice sent by registered letter. In every other case the meeting shall be convened by notice published at least in the company's national gazette designated in that behalf pursuant to Article 3(4) of Directive No. 68/151/EEC of 9 March 1968.
2. The notice shall contain the following particulars at least:
 - (a) the name of the company and the address of its registered office;
 - (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;
 - (g) the wording of proposed resolutions concerning each of the items on the agenda.
3. The length of the period between the date of dispatch by registered letter of the first notice of meeting and the date of the first meeting of the general meeting shall be not less than two weeks, and the length of the period between the date of first publication of the notice of meeting and the date of the first meeting of the general meeting shall be not less than one month.

Article 25

1. It shall be provided that one or more shareholders who satisfy the requirements of Article 16 may request that one or more new items be included in the agenda of a general meeting of which notice has already been given.

2. Requests for inclusion of new items in the agenda shall be sent to the company within five days following the date of dispatch by registered letter of the first notice of general meeting or within 10 days following the first publication of the notice of general meeting.
3. The items whose inclusion in the agenda has been requested under the last foregoing paragraph shall be communicated or published in the same way as the notice of meeting, not less than five days or 10 days, respectively, before the meeting.

Article 26

Every shareholder who has completed the formalities prescribed by law or by the statutes shall be entitled to attend the general meeting.

Article 27

1. Every shareholder shall be entitled to appoint a person to represent him at the general meeting.
2. The statutes may restrict the choice of representative to one or more specified categories of persons. Every shareholder must, however, have the right to appoint another shareholder to represent him.
3. The appointment shall be made in writing which shall be sent to the company and be retained by it for not less than three years.

Article 28

1. If any person publicly invites shareholders to send their forms of proxy to him and offers to appoint agents for them, Article 27 and the following provisions shall apply:
 - (a) the appointment shall relate only to one meeting; it shall, however, be valid for a second meeting having the same agenda;
 - (b) the appointment shall be revocable;
 - (c) the invitation shall be sent in writing to every shareholder whose name and permanent address are known;
 - (d) the invitation shall contain the following particulars at least:
 - (aa) the agenda of the meeting;
 - (bb) the wording of proposed resolutions concerning each of the items on the agenda;

- (cc) a statement to the effect that the documents referred to in Article 30 are available to any shareholder who requests them;
 - (dd) a request for instructions concerning the exercise of the right to vote in respect of each item on the agenda;
 - (ee) a statement of the way in which the agent will exercise the right to vote if the shareholder gives no instructions;
- (e) the right to vote shall be exercised in accordance with the instructions of the shareholder or, if none are given by him, in accordance with the statement made to the shareholder;
 - (f) the agent may, however, depart from the instructions given by the shareholder or from the statement made to him if circumstances arise which were not known at the time the instructions or invitation were sent and the interests of the shareholder might be detrimentally affected;
 - (g) where the right to vote has been exercised in a manner contrary to the shareholder's instructions or to the statement made to him, the agent shall forthwith inform the shareholder and explain the reasons therefor.
2. The provisions of the foregoing paragraph shall apply where the company invites the shareholder to send his form of proxy to it and it appoints an agent for him.

Article 29

A list of persons present shall be drawn up in respect of each general meeting before any business is transacted. The list shall contain the following particulars at least:

- (a) the name and permanent address of each shareholder present;
- (b) the name and permanent address of each shareholder represented and of the person representing him;
- (c) the number, class, nominal or proportional value and number of votes attaching to the shares of each shareholder present or represented.

Article 30

1. The documents relating to the annual accounts within the meaning of Article 2(1) of Directive No. ... of ...¹ together with the report of the persons responsible for auditing the accounts (Article 60 of this Directive)

¹ OJ C 7 of 28.1.1972.

shall be available to every shareholder at latest from the date of dispatch or of publication of the notice of general meeting convened to examine or adopt the annual accounts and the appropriation of the results of the financial year.

2. Paragraph 1 shall apply also to contracts in respect of which the approval of the general meeting is required.

Article 31

1. Every shareholder who so requests at a general meeting shall be entitled to obtain correct information concerning the affairs of the company if such information is necessary to enable an objective assessment to be made of the items on the agenda.
2. The management organ shall supply the information.
3. The communication of information may be refused only where:
 - (a) communication might cause material detriment to the company, or
 - (b) the company is under legal obligation not to divulge the information in question.
4. Disputes as to whether a refusal to supply information was justified shall be determined by the court.

Article 32

1. The general meeting shall not pass any resolution concerning items which do not appear on the agenda.
2. Paragraph 1 shall not apply provided all the shareholders are present or are represented at the general meeting and no shareholder requires his objection that the business in question should not be discussed to be recorded in the minutes.
3. It shall, however, be permissible for the Member States not to apply paragraph 1 to resolutions relating to the following matters:
 - (a) dismissal of members of the management organ or supervisory organ or of the persons responsible for auditing the accounts, provided that at the same meeting of the general meeting other persons are appointed to replace them;

- (b) the bringing of proceedings on behalf of the company to enforce the liability of the members of the management organ or of the supervisory organ, provided that the annual accounts have been discussed or been the subject of a resolution at the same meeting;
- (c) the calling of a new meeting.

Article 33

1. The shareholder's right to vote shall be proportionate to the fraction of capital subscribed which the share represents.
2. Notwithstanding paragraph 1, the laws of the Member States may authorize the statutes to allow:
 - (a) restriction or exclusion of the right to vote 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. In no case may the right to vote be exercised where payment up of calls made by the company has not been effected.

Article 34

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) discharge of that shareholder;
- (b) rights which the company may exercise against that shareholder;
- (c) the release of that shareholder from his obligations to the company;
- (d) approval of contracts made between the company and that shareholder.

Article 35

Agreements whereby a shareholder undertakes to vote in any of the following ways shall be void:

- (a) that he will always follow the instructions of the company or of one of its organs;

- (b) that he will always approve proposals made by the company or by one of its organs;
- (c) that he will vote in a specified manner, or abstain, in consideration of special advantages.

Article 36

1. Resolutions of the general meeting shall be passed by absolute majority of votes cast by all the shareholders present or represented, unless a greater majority or other requirements be prescribed by law or by the statutes.
2. The foregoing paragraph shall not apply to the appointment of members of the management organ or of the supervisory organ or of the persons responsible for auditing the accounts of the company.

Article 37

1. A resolution of the general meeting shall be required for any alteration of the statutes.
2. The laws of the Member States may, however, provide that the general meeting may authorize another organ of the company to alter the statutes, provided:
 - (a) the alteration is effected only for the purpose of giving effect to a resolution already passed by the general meeting; or
 - (b) the alteration is imposed by an administrative authority whose approval is necessary in order for alterations of the statutes to be valid;
 - (c) the alteration is effected solely in order that the statutes comply with compulsory provisions of law.

Article 38

The complete text of the alteration to the statutes which is to be put before the general meeting shall be set out in the notice of meeting.

Article 39

1. A majority of not less than two thirds either of votes carried by shares represented at the meeting or of the capital subscribed which is represented thereat shall be required for the passing by the general meeting of resolutions altering the statutes.

2. Where, however, the laws of the Member States provide that the general meeting may validly transact business only if at least one half of the capital subscribed is represented, resolutions for alteration of the statutes shall require a majority not less than that required under Article 36.
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 shareholders involved.

Article 40

1. A resolution of the general meeting shall, where the share capital is divided into different classes and the resolution is detrimental to the holder of shares of those classes, be valid only if consented to by separate vote at least of each class.
2. Article 39 shall apply.

Article 41

1. Minutes shall be prepared of 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;
 - (d) objections made by shareholders to discussion of particular items of business.
3. There shall be annexed to the minutes:
 - (a) the list of persons present;
 - (b) the documents relating to the calling of the general meeting.
4. The minutes and the documents annexed thereto shall be held at the disposal at least of the shareholders and shall be kept for not less than three years.

Article 42.

The Member States shall ensure that, without prejudice to rights acquired in good faith by third parties, all resolutions of the general meeting are void or voidable where:

- (a) the general meeting was not called in conformity with Article 24(1), (2)(b) and (d) and (3);

- (b) the subject matter of the resolution was not communicated and published in conformity with Article 24(2)(f) or Article 25(3), but without prejudice to the provisions of Article 32(2) or (3);
- (c) contrary to Article 26, a shareholder was not allowed to attend the general meeting;
- (d) contrary to Article 30, a shareholder was unable to examine a document or, contrary to Article 31, information was refused to him;
- (e) in the course of transacting business the provisions of Articles 33 and 34 relating to the exercise of the right of vote were not observed and as a result thereof the outcome of the vote was decisively affected;
- (f) the majority required under Article 36 or 39 was not obtained.

Article 43

Proceedings under Article 42 for nullity or voidability may be brought at least:

- (a) in the case of Article 42(a), by any shareholder who was not present or represented at the general meeting;
- (b) in the case of Article 42(b), by any shareholder unless he was present or represented at the general meeting but did not cause to be recorded in the minutes his objection that the business in question should not be discussed;
- (c) in the case of Article 42(c), by any shareholder who was not allowed to attend the general meeting;
- (d) in the case of Article 42(d), by any shareholder who was unable to examine any document or to whom information was refused;
- (e) in the case of Article 42(e), by any shareholder who was excluded from voting or who disputes the right to vote of some other shareholder who voted;
- (f) in the case of Article 42(f), by any shareholder.

Article 44

Proceedings for nullity or voidability shall be brought within a period which the Member States shall fix at not less than three months nor more than one year from the time when the resolution of the general meeting could be adduced as against the person who claims that the resolution is void or voidable.

Article 45

A Resolution of the general meeting shall not be declared void where it has been replaced by another resolution passed in conformity with the law or the statutes. The competent court must have power to allow the company time to do this.

Article 46

The question whether a decision of nullity pronounced by a court of law in respect of a resolution of the general meeting may be relied on as against third parties shall be governed by Article 12(1) of Directive No. 68/151/EEC of 9 March 1968. . .

Article 47

Where the laws of the Member States provide for special meetings of holders of certain classes of shares, the provisions of Chapter 3 shall apply to such meetings and to the resolutions thereof.

CHAPTER IV

The adoption and audit of the annual accounts

Article 48

1. The annual accounts within the meaning of Article 2 of Directive No. . . . of . . .¹ shall be adopted by the general meeting.
2. The laws of the Member States may, however, provide that the annual accounts shall be adopted not by the general meeting but by the management organ and the supervisory organ, unless those two organs decide otherwise or fail to agree.

Article 49

1. Five per cent of the result for each year, reduced where appropriate by losses brought forward from previous years, shall be appropriated to legal reserve until that reserve amounts to not less than 10 % of the capital subscribed.

¹ OJ C 7 of 28.1.1972.

2. So long as the legal reserve does not exceed the amount specified in the foregoing paragraph it shall not be used except to set off losses and then only if other reserves are inadequate for that purpose.

Article 50

1. The general meeting shall decide how the result for each year, reduced where appropriate by the amount of the losses brought forward from previous years, are to be appropriated.
2. The statutes may, however, provide for the appropriation of a maximum of 50 % of the result referred to in paragraph 1.

Article 51

1. One or more persons shall be made responsible for auditing the accounts of the company.
2. The audit shall in any event cover the annual accounts within the meaning of Article 2 of Council Directive No. . . . of . . .¹ and the annual report within the meaning of Article 43 of that Directive.

Article 52

Only persons who are independent of the company and who are nominated or approved by a judicial or administrative authority may be charged with the responsibility of auditing the accounts of the company.

Article 53

1. The audit of the accounts shall in no case be undertaken by persons who are members, or who during the last three years have been members, of the management organ, supervisory organ or staff of the company whose accounts are to be audited.
2. Further, the audit of the accounts shall in no case be undertaken by companies or firms whose members or partners, members of the management organ or supervisory organ, or of which the persons who have power of representation are members, or during the last three years have been members, of the management organ, supervisory organ or staff of the company whose accounts are to be audited.

¹ OJ C7 of 28.1.1972.

Article 54

1. The persons who have audited the accounts shall in no case be or, for a period of three years following cessation of their duties, become members of the management organ, supervisory organ or staff of the company whose accounts have been audited.
2. Further, the members or partners, members of the management organ or supervisory organ or the persons who have power of representation of the companies or firms who have audited the accounts shall in no case become members of the management organ, supervisory organ or staff of the company whose accounts have been audited, less than three years after cessation of their duties.

Article 55

1. The persons who are to audit the accounts shall be appointed by the general meeting. This Directive shall, however, be without prejudice to the provisions of law of the Member States relating to the appointment of such persons at the time of formation of the company.
2. Where appointment by the general meeting has not been made in due time or where any of the persons appointed is unable to carry out his duties, the management organ, the supervisory organ or any shareholder must have the right to apply to the court for appointment of one or more persons to audit the accounts.
3. Further, the court must have power to dismiss, where there are proper grounds, any person appointed by the general meeting to audit the accounts, and must also have power to appoint some other person for that purpose if application is made by the management organ, supervisory organ or by one or more shareholders who satisfy the requirements of Article 16.

Such application shall be made within two weeks following the date of the appointment by the general meeting.

Article 56

The persons who audit the accounts shall be appointed for a period certain of not less than three years nor more than six years. They shall be eligible for reappointment.

Article 57

1. The remuneration of the persons appointed by the general meeting to audit the accounts shall be fixed for the whole of their period of office before it commences.
2. Apart from the remuneration fixed pursuant to paragraph 1, no remuneration or benefit shall be accorded to the persons in question in respect of their auditing of the accounts.
3. The provisions of paragraph 2 shall apply to the persons appointed by the Court to audit the accounts.

Article 58

1. The persons appointed to audit the accounts shall in all cases examine whether the annual accounts within the meaning of Article 2 of Directive No. ... of ...¹ and the annual report within the meaning of Article 43 of that Directive are in conformity with the law and the statutes.
2. If they have no reservation to make, the persons responsible for the audit shall so certify on the annual accounts; otherwise they shall issue their certificate subject to reservations or shall refuse their certificate.

Article 59

The persons responsible for auditing the accounts shall be entitled to obtain from the company all information and relevant documents and to undertake all such investigations as may be necessary.

Article 60

The persons responsible for auditing the accounts shall prepare a detailed report relating to the results of their work. The report shall contain the following at least:

- (a) an indication of whether the provisions of Article 51(1) have been observed;
- (b) observations concerning any infringements of law or of the statutes which have been found in the company's accounts, in its annual accounts or in the management report;

¹ OJ C7 of 28.1.1972.

- (c) observations concerning any facts noted which constitute a serious danger to the financial situation of the company;
- (d) the complete text of the certificate given pursuant to Article 58(2). Where reservations have been made or where the certificate has been withheld, the reasons therefor shall be specified.

Article 61

Save where proper grounds exist, the persons responsible for auditing the accounts shall not be dismissed by the general meeting before the end of their period of office.

Article 62

Articles 14 to 21 of this Directive shall apply in respect of the civil liability of the persons responsible for auditing the accounts, so as to ensure that compensation is made for any damage sustained by the company, any shareholder or third party as a result of wrongful acts committed by those persons aforesaid in carrying out their duties.

Article 63

1. The Member States shall ensure that without prejudice to rights acquired in good faith by third parties, all resolutions of the organ whose responsibility it is to adopt the annual accounts are void or voidable where:
 - (a) the annual accounts have not been audited in conformity with Article 58(1);
 - (b) the certificate relating to the annual accounts has been refused in accordance with Article 58(2);
 - (c) the annual accounts have not been audited by a person nominated or approved in manner required by Article 52;
 - (d) the annual accounts have been audited by a person who, under Article 53, should not have been made responsible for the audit, or who has been dismissed by the court in conformity with Article 55(3) or by the general meeting in conformity with Article 61;
 - (e) the annual accounts have been audited by a person who, contrary to Article 55(1), was not appointed by the general meeting or who, contrary to Article 55(2) or (3), was not appointed by the court.

2. Proceedings for nullity or voidability may be brought at least by any shareholder.
3. Articles 44 to 46 shall apply.

CHAPTER V

General provisions

Article 64

1. The Member States shall bring into force within 18 months following the notification of this Directive all such amendments to their laws, regulations or administrative provisions as may be necessary to comply with the provisions of this Directive and shall inform the Commission thereof.
2. The Member States may provide that the amendments to their laws as referred to in paragraph 1 shall not apply to companies already in existence at the time of entry into force of those amendments until eighteen months after that time.
3. The Member shall communicate to the Commission, for information, the texts of the draft laws and regulations, together with the grounds therefor, relating to the field governed by this Directive. The texts shall be communicated not later than six months before the proposed date of entry into force of the drafts.

Article 65

This Directive is addressed to the Member States.

Explanatory memorandum

Introduction

I. Article 54(3) (g) of the Treaty provides for coordination of the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms with a view to making such safeguards equivalent. Coordination began with Directive No 68/151¹ of 9 March 1968. That Directive applies to sociétés anonymes, sociétés en commandite par actions and sociétés à responsabilité limitée. As regards these types of company, approximation has been effected of the safeguards required in the following fields:

1. disclosure of important information relating to the company;
2. validity of obligations entered into by the representative organs of the company;
3. nullity of companies.

On 16 November 1971 the Commission submitted to the Council a proposal for a Fourth Directive² having the same scope of application as the First Directive, on the presentation and content of the annual accounts and report, methods of valuation, and publication of those documents.

Continuing its work of coordination of the law relating to companies and firms, the Commission has turned its attention to sociétés anonymes*. This is the most important type of company from the economic point of view and the most developed from the legal point of view. The coordination effected in respect of it will make it easier to coordinate at a later stage the safeguards required for other types. The Commission has submitted to the Council the following proposals for coordination of the safeguards required of sociétés anonymes*:

- 9 March 1970, Proposal for a Second Directive concerning formation of sociétés anonymes* and the maintenance and alteration of their capital³;
- 16 June 1970, Proposal for a Third Directive concerning merger of sociétés anonymes⁴.

This Proposal for a Fifth Directive will effect coordination of the safeguards required as regards the structure of sociétés anonymes* and the powers and obligations of their organs.

* Where the French terms are used in this Explanatory Memorandum they are to be taken to include a reference to the corresponding types of company existing in each of the six Member States.

¹ OJ L 65 of 14.3.1968.

² OJ C 7 of 28.1.1972.

³ OJ C 48 of 24.4.1970.

⁴ OJ C 89 of 14.7.1970.

II. Classically the société anonyme* has one administrative organ and the general meeting of shareholders, whereas the two-tier system has two: the management organ, which is responsible for managing the business of the company and for representing it, and the supervisory organ responsible for controlling the management organ.

At present, certain Member States employ the classical form and others the two-tier system. Some Member States allow companies to choose one or the other, but one of those Member States has made the two-tier system compulsory for undertakings over a certain size.

In practice, however, the difference between the two arrangements is not so great as it would seem at first sight. The division of responsibilities as between the persons who carry out management duties and those who supervise them, effectively obtains under the classical arrangement as well, for some of the members of the administrative organ manage and represent the company while the others are responsible for supervising them.

This is already reflected to some extent in legislation; in particular in the provisions which make management and representation the responsibility of one or more members of the administrative organ or, sometimes, of one or more General Managers, or managers, appointed by that organ. This does not, however, alter the fact that these persons are members, with others, of the same organ of the company.

To group together, within a single administrative organ, persons who are responsible for carrying out different functions no longer answers the needs of modern management of undertakings. To protect shareholders and third parties it is essential that the fields of responsibility be clearly demarcated. This can be achieved only by vesting the responsibility for management and supervision in separate organs. It will, moreover, facilitate formation of sociétés anonymes* by members or groups of members from different Member States. Generally it will be sufficient for them to be represented within the supervisory organ so as not to obstruct the formation of a homogeneous management organ.

For the foregoing reasons the two-tier system is gaining support. To introduce it on an optional basis would not, however, be enough because the classical system does not afford equivalent safeguards to shareholders and third parties. The Directive provides that for all sociétés anonymes within the common market there be a uniform type of structure comprising, alongside the general meeting of shareholders, a management organ responsible for managing and representing the company and a supervisory organ to control the management organ.

* Where the French terms are used in this Explanatory Memorandum they are to be taken to include a reference to the corresponding types of company existing in each of the six Member States.

The two-tier system should apply to all undertakings, irrespective of size, which are incorporated in the form of sociétés anonymes. That form is intended principally for medium or large undertakings; smaller undertakings can adopt the form of the société à responsabilité limitée*.

This is why the relatively high figure of 25 000 units of account is proposed as the minimum capital of the société anonyme* (see Article 6 of the Proposal for a Second Directive).

Furthermore, disclosure of the annual accounts is provided for, in full, only as regards sociétés anonymes* (see Article 2(2) (f) of the First Directive) whereas for sociétés à responsabilité limitée* the degree of disclosure required may vary according to the size of the undertaking (see Article 50 of the Proposal for a Fourth Directive).

The members of a société anonyme*, unlike those of a société à responsabilité limitée*, are as a rule less closely connected with the company. This may be seen from the fact that shares can be freely transferred, and be quoted on a stock exchange, with the result that the shares of a company are often widely held by the public. The tendency will be even greater under the influence of provisions promoting the issue of shares to employees. One of the principal characteristics of the société anonyme* is the fact that the members are as a rule neither able nor willing to exercise any permanent control over the persons who are responsible for managing its business. This cannot be remedied by giving greater power to the general meeting or to minorities of shareholders. It is for this reason that a separate supervisory organ must be introduced.

Companies which have hitherto employed the classical arrangement will be able to change over to the two-tier system without any great difficulty. The "passive" members of the administrative organ can be appointed to the supervisory organ and the "active" members can be appointed to carry out duties within the management organ.

The Directive does not prescribe that the management organ must have more than one member. This is not necessary in view of the fact that the supervisory function is transferred to a separate organ. However, in companies which have 500 employees or more, for which the Directive requires that the employees be represented on the supervisory organ, that organ must have at least three members.

III. Introduction of the two-tier system on a compulsory basis for all sociétés anonymes* will enable, and require, the laws of the Member States relating to worker-participation in the administration of such companies to be coordinated.

* Where the French terms are used in this Explanatory Memorandum they are to be taken to include a reference to the corresponding types of company existing in each of the six Member States.

Of course, the problem of worker-participation is not confined solely to undertakings incorporated in the form of the société anonyme*. Thus, for example, participation occurs everywhere, in undertakings of every legal form, through representatives appointed by the workers to represent them vis-à-vis the management. The scope and content of these representatives' powers vary from Member State to Member State. Only by provisions for approximation of law which relate to undertakings of all types can the differences be eliminated.

This Directive, however, deals only with coordination of laws relating to sociétés anonymes*. Accordingly the rules relating to worker-participation must be confined to those which are of the essence in the context of the société anonyme*. In a number of Member States participation in the administration of companies of this type occurs on the part of the workers in addition to their being represented vis-à-vis the management.

In one Member State the workers in certain sectors of the economy are represented on the management organ as well. Coordination is not absolutely necessary as regards this aspect of the matter but is essential in relation to the composition of the supervisory organ.

The laws of some Member States make it compulsory for workers of all companies, or at any rate of those which exceed a certain size, to be represented on the supervisory organ. Other Member States have no such provisions. The Directive could not both impose the two-tier system upon all companies and at the same time allow the differences in the laws of the Member States relating to worker-participation in the supervisory organ to continue.

The lack of coordination in this field is obstructing the adoption of Community rules concerning transnational reconstruction and interpenetration of undertakings.

Worker-participation in the composition of the supervisory organ is made mandatory for companies above a certain size. The Directive fixes the limit at 500 workers. Over and above this figure the workers' interests cannot be protected satisfactorily by means of worker-representation vis-à-vis the management. The workers must be able to take part in appointing and dismissing the members of the supervisory organ which controls the management organ.

There is the advantage, in restricting worker-participation to the supervisory organ, that the workers cannot be held responsible for acts of the management. Furthermore, none of the members is subject to the instructions of the workers. Every member carries out his duties under his own responsibility and completely independently. Each has the same powers and obligations as the others. It would be inconsistent to allow the workers' representatives on the supervisory organ to have no more than an advisory role.

* Where the French terms are used in this Explanatory Memorandum they are to be taken to include a reference to the corresponding types of company existing in each of the six Member States.

Finally, the fact that the workers are represented on the supervisory organ does not prevent them from being subject to the instructions of the management in carrying out their working duties.

The Commission does not consider it reasonable to create an entirely new scheme of worker-representation on the supervisory organ. In this field, in which ideas proliferate, it seems much more advisable to the Commission not to anticipate future developments but to build on provisions of law which now exist. Accordingly the Directive does not lay down uniform rules but leaves the Member States to make their choice from the arrangements set out in Article 4(2) and (3) which notwithstanding the differences between them ensure equivalent safeguards for the workers.

Article 1

As indicated in the Introduction, the Directive applies only to sociétés anonymes* (paragraph 1). Member States may, however, exempt from the Directive cooperatives whose legal form is that of a société anonyme* (paragraph 2). A like provision appears in Article 1(2) of the Third Directive.

CHAPTER I

Structure of the Company

Article 2

The general meeting is the shareholders' organ for discussion and decision-making. More detailed rules on this subject are to be found in Chapter III of this Directive. However, a resolution of the general meeting is only required for a small number of matters of great importance for the company. In no case is the general meeting responsible for the management or representation of the company, or for the permanent supervision of its activities, this task being entrusted to other organs.

As has already been indicated in the Introduction, every société anonyme must have a management organ to manage and represent it and a supervisory organ to control the management organ. The provisions relating to membership of these organs are to be found in Chapter II of this Directive.

* Where the French terms are used in this Explanatory Memorandum they are to be taken to include a reference to the corresponding types of company existing in each of the six Member States.

The next chapter, on provisions relating to the general meeting, is followed by Chapter IV which contains provisions relating to the adoption and audit of annual accounts. The latter contains, in particular, rules concerning the persons responsible for auditing the accounts. Member States are not obliged to give such persons the status of an organ of the company; this is only obligatory as regards the general meeting, and the management and supervisory organs.

Article 3

It is a feature of the two-tier system that the member or members of the management organ should always be appointed by the supervisory organ (paragraph 1). The supervisory body with its generally speaking smaller membership, is better suited than the general meeting of all the shareholders to choose the persons to whom the management and representation of the undertaking are to be entrusted.

Where the management organ has more than one member, the workers in the company will want particularly to know which member of the management organ is responsible for questions of personnel and worker relations. For this reason such member should be expressly designated; this should not however prevent his being entrusted with other tasks as well (paragraph 2).

In one Member State, in certain sectors of the economy, there are special provisions whereby no member can be appointed to the management organ against the wishes of the majority of the members of the supervisory organ appointed by the workers. The Directive is without prejudice to such provisions.

Article 4

The Directive starts with the basic principle that the appointment of the supervisory organ must be sanctioned by the general meeting. Indeed, in companies where the workers take no part in appointing the members of the supervisory organ, the general meeting has exclusive competence to make such appointments (paragraph 4). It is only compulsory for the workers to take part in such appointments in the case of companies employing five hundred workers or more (paragraph 1). No other criterion, such as the amount of capital subscribed, or relationships between shareholders (family companies) is to be used. The number of workers indicated represents a minimum provision only. Member States may therefore, when organizing worker participation in the appointment of the supervisory organ pursuant to this Directive, fix a lower limit.

The forms taken by such participation need not necessarily be identical throughout the Community. The Member States may be left to choose from among several examples which are considered as equivalent.

In the first example (paragraph 2) some members of the supervisory organ are appointed by the general meeting (first subparagraph) and some are appointed by the workers. Not less than one-third of the members of the supervisory organ must be workers' representatives. The Member States have more or less a free hand to organize the various details of procedure. The power of appointment may be vested either in the workers directly or in their representatives, for example, their representatives within the undertaking or the trade unions represented in the undertaking. It is possible also to provide that the appointments should be made by another organ of the company, such as the general meeting, but only on proposal by the workers or their representatives (second subparagraph).

Finally, the laws of the Member States may provide for certain members of the supervisory organ to be appointed neither by the general meeting nor by the workers. Representatives of the general interest come to mind here particularly. It will be for the Member States to regulate the making of such appointments. Members so appointed need not necessarily be equal in number to those appointed by the shareholders or the workers (third subparagraph).

In the second example (paragraph 3) the supervisory organ co-opts its own members. However, the shareholders and the workers are involved by virtue of the fact that either the general meeting or the workers' representatives may object to the appointment of any proposed candidate. This right to object must not be used to block all and any nominations. For this reason the only valid reasons for an objection are lack of ability on the part of the candidate to carry out his duties or the fact that the appointment of the candidate would bring about an imbalance in the composition of the supervisory organ, having regard to the interests of the company, the shareholders and the workers. Furthermore, the final decision on the validity of the objection must be entrusted to an independent body existing under public law. The Commission is working on the assumption that due regard will be had for balanced representation of the two sides of industry in the composition of supervisory organs.

In accordance with a principle common to all legal systems, the members of the first management and supervisory organs may be appointed in the statutes or instruments of constitution.

Article 5

It follows from the nature of the management organ's responsibilities that only natural persons can be appointed members thereof.

A different solution is adopted in respect of the members of the supervisory organ. The nature of their responsibilities is such that it is not necessary for them to be limited to natural persons. However, the appointment of legal persons as members of the supervisory organ should only be allowed by the Member States if certain measures are taken to avoid abuses:

- The legal person may only be represented in the supervisory organ by a permanent representative designated by it.

- This representative must satisfy all the conditions prescribed by law and by the statutes for membership of the supervisory organ. Thus, for example, the disclosure requirements as to the identity of the members of the supervisory organ cover also the identity of the representative (Article 2 of Directive No. 68/151 of 9 March 1968). Thus, also, Articles 6 and 54 of this Directive, which exclude certain persons from appointment as members of the supervisory organ, apply where appropriate to the representatives of legal persons.

The representative must be subject to the same obligations as if he were personally a member of the supervisory organ. This does not affect the application of any provisions in Member States whereby the legal person is also liable for the acts of its representative. On the other hand, the legal person is entitled to remove its representative at any time on condition that the representative is replaced immediately in such a way as not to impede the functioning of the supervisory organ. The removal and replacement must be disclosed in accordance with the provisions of the Directive of 9 March 1968.

Article 6

The object of entrusting responsibilities of management and supervision to separate organs would be defeated if it were permitted for a person to be a member of both organs at the same time.

Article 7

To increase the answerabilities of the management and supervisory organs it seems appropriate to confirm the principle whereby the members of these organs can only be appointed for specified periods. In this connection, the Directive provides that no appointment may be for a period exceeding six years. Within this limit, the Member States may legislate as they wish. For example, they may lay down shorter periods or periods of differing length for first and subsequent appointments during the company's existence. It will also be possible to provide for different periods of appointment for the management organ and the supervisory organ. However, in no case may the limit of six years be exceeded. For example a rule could not be adopted which provided for appointments of unlimited duration whilst allowing the statutes to provide for appointments of limited duration.

The recognition of the principle that each appointment must be for a specified period is not intended to exclude the possibility of renewals.

Article 8

In most Member States the law contains special provisions in respect of the remuneration of members of the management and supervisory organs. Abuses must be avoided and for this purpose it must be forbidden for such remuneration to be fixed by the recipients themselves.

Article 9

The fact that a member of the management organ carries on an activity within another enterprise may impede the proper discharge of his duties within the company.

The company cannot remain indifferent to such problems, particularly as the two undertakings concerned may be in competition with each other.

Steps must therefore be taken to prevent the interests of the company from being prejudiced. Of course, it is not a question of forbidding such activities entirely, but of making them subject to the company's authorization, whether they are remunerated or not, and whether for the account of the person concerned or of any other person.

Which organ should be responsible for granting such authorization? The other members of the management organ must be excluded as being likely to give their consent too readily. Nor is the general meeting particularly competent to judge the effect of an outside activity on the company's affairs. It is the supervisory organ which is best suited to fulfilling this task.

The authorization must not be of a general character, or of permanent duration. It must be specially given for each proposed activity. Moreover, the general meeting must be informed each year of the authorizations given.

A member of a supervisory organ cannot be prohibited from serving other companies also. A limit should, however, be placed on the number of companies in which he can be involved, lest the control exercised over the management organ should become illusory.

Article 10

Members of management and supervisory organs must be prevented from abusing their powers for the furtherance of their own interests and to the detriment of those of the company.

This danger arises not only when contracts are concluded between the company and one of its members but also in the case of contracts in which a member has an interest without in fact being a party thereto. For example, if a member holds shares in, or is a member of the supervisory organ of, an

enterprise which makes a contract with the company, there are grounds for apprehension that the member's decision will be taken not entirely in the interests of the company.

Naturally it is not a question of prohibiting such contracts entirely but of effectively supervising them by making them subject to authorization.

Such supervision is to be carried out by the supervisory organ. This is obviously so where members of the management board are concerned with the contract in question. In the event that members of the supervisory organ are interested, the rule remains the same since the management organ is not sufficiently independent of the supervisory organ. The general meeting cannot fulfil this function as it is insufficiently well informed. Of course, where authorization is requested in favour of a member of the supervisory organ, he must be excluded from the discussion of the matter. Likewise, where a member of the management organ has an interest, he must be excluded from discussion within that organ on the contract in question. This principle cannot apply if he is the sole manager, and in this case the only requirement is that he seek the authorization of the supervisory organ.

The supervisory organ can only exercise effective control if it is kept informed of transactions giving rise to a conflict of interest. The management organ must also receive such information to enable it to discuss the matter with full knowledge of the facts and without the interested member taking part in the vote.

As provided in Article 9, the general meeting must be informed each year of the authorizations given by the supervisory organ.

One final problem must be dealt with; the protection of third parties dealing with the company without knowing whether the contract in question affects the interests of one of the members of the company's representative organs or whether authorization has been duly given by the supervisory organ.

Third parties cannot in fact rely on the provisions of Article 9(3) of Directive 151/68/EEC of 9 March 1968 whereby limits under the statutes on the powers of the organs of the company can never be relied on against third parties: the provisions under consideration are not part of the statutes but of the law. It would hardly be fair for third parties in good faith to be prejudiced, therefore this Directive provides that want of the necessary authorization or an irregularity in the authorization shall only be relied on against a third party where the company can prove that the third party was aware thereof or, in the circumstances, could not have been unaware thereof.

Article 11

In order to fulfil its responsibilities, the supervisory organ must be informed at regular intervals of the progress of the company's affairs. For this purpose, the management organ must submit a written report, at least every three months (paragraph 1).

The management organ is also obliged to submit to the supervisory organ, within three months of the end of each financial year, the drafts of the annual accounts and the annual report in accordance with the provisions of the Proposal for a Fourth Directive (paragraph 2). This obligation is irrespective of whether the accounts are to be adopted by both the organs or by the general meeting (see Article 48).

Apart from the above-mentioned obligations to supply information, the supervisory organ must be able at any time to request from the management organ a special report on the company's affairs or any part thereof (paragraph 3). The Directive does not deal with the question whether a special report should contain information as to the affairs of an undertaking associated with the company: this question can only be solved in the context of a general coordination of company law. Certainly the supervisory organ must have all the necessary powers of obtaining information and making investigations necessary for carrying out its task, but these powers must not be confined to that organ in its entirety. Indeed it should be possible for such powers to be exercised by a minority of the members of the supervisory organ so as to avoid the possibility of collusion between the management organ and the majority on the supervisory organ. Furthermore the supervisory organ should be authorized to delegate its powers to one or more of its members or to experts qualified to examine difficult technical or economic questions (paragraph 4). Such delegations will not affect the collective responsibility of the supervisory organ. To be in a position to discharge such responsibility, each member must be able to examine all reports, documents and information supplied by the management organ (paragraph 5).

Article 12

The responsibilities of the supervisory organ are limited to the control of the management of the company. This is not however inconsistent with the principle that matters of policy and development plans, as well as other matters of major importance to the company, may only be decided on by the management organ with the consent of the supervisory organ (paragraph 1). In the same way the law or the statutes may make the conclusion of certain contracts subject to authorization by the supervisory organ (paragraph 2). These provisions may refer to specific categories of transactions, for example, the acquisition or disposal of immovable property, or may only apply to transactions involving more than a certain amount of money. It would be undesirable however to define transactions requiring authorization so widely that the management organ was no longer in charge of the management of the company. Moreover, even when authorization is requested for a particular transaction it is still the management organ which decides to go ahead with the transaction and ensures that it is brought to its conclusion.

The problem of the protection of third parties in good faith arises here as it does in Article 10: where authorization is required under the statutes, third parties enjoy the safeguards provided for in Article 9 of Directive No. 68/151/EEC of 9 March 1968. Where, on the other hand, it is required by law, the rule laid down in Article 10(4) of this Directive must apply.

Article 13

The supervisory organ has exclusive competence to appoint and dismiss the members of the management organ (paragraph 1). This principle runs counter to national provisions which, whilst vesting the power to appoint members of the management organ in the supervisory organ, permit the dismissal of such members by the general meeting. In practice it is more difficult to have a resolution passed by the general meeting than by the supervisory organ. When a member of the management organ is no longer capable of carrying out his duties a decision as to his dismissal must be taken as speedily as possible.

Where the general meeting alone appoints the members of the supervisory organ (Article 4(4)), only the general meeting is competent to dismiss them (Article 13(2)). Where the workers take part in the appointment of members to the supervisory organ (Article 4(1) to (3)) the rules governing competence to dismiss such members are in general the same as those governing competence to appoint them.

There is an exception, however, in the second example of worker participation in which all the members of the supervisory organ are coopted. In this case a decision to dismiss can only be taken by a court and on proper grounds. The supervisory organ, the general meeting and the workers' representatives are here treated on an equal footing in that all three are entitled to commence the proceedings in that behalf.

Article 14

As the general rules of private law relating to civil liability are judged insufficient, all modern systems of company law contain stricter rules to govern the responsibility of the organs of companies. This is also the position adopted by the Directive, which seeks to ensure that neither the statutes nor any agreement may contain any exclusion of provisions governing the responsibilities of members of the management and supervisory organs. The Directive itself only lays down minimum rules and leaves the Member States free to introduce or retain stricter provisions.

Members of the company's representative organs are only liable where the company has suffered damage. There must therefore be a causal connection between the act complained of and the damage suffered. The laws of the

Member States all require that the act complained of must be a wrongful act. Apart from contraventions of the law or of the statutes, such a wrongful act may arise from negligent management of the company's affairs.

When the company's representative organs have more than one member, it is difficult for a third party to know which member of the organ is responsible for the damage. The Directive therefore provides that in such cases the members of the organ in question shall be jointly and severally liable, whatever the nature of the wrongful act.

According to the principles of civil law it is for the person who has suffered damage to prove that a wrongful act was committed by the person who has caused it. If this rule were applied in this context it would result in the failure of many actions in civil liability. It would be very difficult for a third party to investigate occurrences within the company. This is why third parties should be relieved of the onus of proof, and the members accused should be obliged to prove that no wrongful act is attributable to them.

It is common practice for the members of each organ of the company to allocate various responsibilities amongst themselves, but other members should not be allowed to escape their joint liability on the grounds that the act giving rise to damage was within the area of responsibility of one of their colleagues. This is why they should only be allowed to escape such joint liability if they can prove that they exercised proper supervision over the activities of such colleague and did everything possible for the protection of the company's interests (paragraph 3).

The law or the statutes require the authorization of the supervisory organ to be obtained before certain contracts can be concluded with the company. It would be wrong to assume that the grant of such authorization relieves the management organ of any civil liability (paragraph 4).

What are the effects on the civil liability of the management and supervisory organs of a resolution of the general meeting giving a discharge, instructions or authorization with regard to an act which has given rise to damage for the company ?

In view of modern trends in company law such discharge can no longer be considered as a waiver of the right to bring an action in civil liability. In most cases the shareholders have insufficient information to appreciate all the circumstances which might lead to damage. For the same reasons authorizations and even instructions given by the general meeting cannot relieve the representative organs of the company of civil liability (paragraph 5).

Article 15

The preceding Article lays down the substantive rules relating to actions on behalf of the company against members of the management and supervisory organs. The purpose of this Article is to clarify a rule of procedure. The laws of all the Member States provide that such an action must be commenced when the general meeting demands it. (paragraph 1).

This safeguard would, however, be of no effect if the taking of the decision by the shareholders were subject to excessively strict conditions. This is why the Directive provides that in no case may a majority be required greater than an absolute majority of the votes of shareholders present or represented. (paragraph 2).

Article 16

In practice it is quite difficult to secure the commencement of proceedings on behalf of the company through a demand by the general meeting, owing to the confidence which the majority of shareholders have in the management and supervisory organs. Therefore, following the example of several national laws, the Directive gives minority shareholders the right to secure the commencement of proceedings.

The detailed rules of procedure to be followed by the minority shareholders will have to be laid down by the Member States. In general it is necessary that the group of shareholders should hold 5 or 10 per cent of the capital subscribed to exercise the minority right of action. The Directive sets a maximum of 5 per cent, for the possible protection of the right of minority shareholders. This maximum, which is a percentage of the issued capital, is still insufficient as regards companies above a certain size and accordingly, apart from the reference to capital subscribed, it is also possible for shareholders holding shares with a nominal value or proportional value of at least 100 000 units of account to secure the commencement of proceedings on behalf of the company.

However, the Directive only lays down minimum rules of protection and the Member States are free to grant this right to one shareholder alone without making it subject to the holding of a specified proportion of the capital.

Article 17

The purpose of the last two preceding Articles is to lay down the conditions under which proceedings may be commenced on behalf of the company. Further safeguards are required, however, to render these principles effective. The Directive therefore prohibits any provision under the law, in the statutes or in any agreement subjecting the commencement of such proceedings to a

prior resolution of the general meeting. This is especially important with regard to the rights of minority shareholders, referred to in Article 16. These minorities must be able to secure the commencement of proceedings on behalf of the company without having to submit the whole matter to the general meeting in advance. This would in most cases only be a waste of time and money. (subparagraph (a)).

Finally, the commencement of proceedings on behalf of the company must not be made subject to a prior decision of the Court in respect of wrongful acts of the members of the representative organs of the company, or in respect of the replacement of such members (subparagraph (b)).

Article 18.

The Directive does not exclude the possibility of a renunciation of the right to bring proceedings on behalf of the company but such renunciation must obviously be subject to certain safeguards to preserve the effect of the safeguards attached to the exercise of the right. Certain decisions by the general meeting, therefore, such as the approval of the accounts, or the granting of a discharge, in respect of the financial year during which the acts giving rise to damage occur, must not be taken as implying that the shareholders no longer wish to proceed against the members responsible for the damage (paragraph 1).

Furthermore, the Directive lays down minimum conditions for effecting a valid renunciation (paragraph 2). In the first place, this can only take place as the result of an express resolution on a subject appearing in the agenda of the general meeting and dealing with the facts in question, and where the members have been fully informed of such facts and of the damage which could result therefrom for the company. Also the minority shareholders referred to in Article 16 should be entitled to object to such renunciation in spite of the resolution of the general meeting; for this it is necessary that such minority should have voted against the renunciation or have made an objection thereto recorded in the minutes of the meeting.

The provisions of this Article apply also to any compromise between the company and a member of one of its organs, where the liability of such member is in question (paragraph 3).

Article 19

It would not be just for creditors to be denied payment because the company does not commence proceedings against members of the management or supervisory organs (paragraph 1). This problem is dealt with under the procedures for arrangements with creditors and bankruptcy under which the administrator is, in general, empowered to call the debtors of the person concerned before the court. However, other safeguards, apart from these procedures, must be

ensured for creditors. For this reason, following the example of most of the laws of the Member States, the Directive gives creditors the right to commence proceedings on behalf of the company but without, as is the case under certain national laws, confining it to cases where a member of the representative organs has committed grave offences. The company must furthermore be prevented from depriving the creditor of this right by means of a compromise or renunciation of the right to commence proceedings: such acts could not be relied on against creditors (paragraph 2).

Article 20

The provisions of Article 14 to 19 of this Directive are concerned only with the commencement of proceedings on behalf of the company, but the acts of members of the management and supervisory organs may also directly harm the personal interests of shareholders or third parties, in a way quite different from cases in which the interests of the shareholders as a whole are affected, by reason of the diminution caused by the damage to the value of their stake in the company. The Directive ensures equivalent and effective protection by applying to actions brought by individuals the principles of joint and several liability and of the reversal of the burden of proof. Likewise such actions cannot be barred by any resolution of the general meeting or supervisory organ.

These rules are without prejudice to national provisions under which companies must in all circumstances be responsible for the acts of their representative organs.

Article 21

The severity of the rules relating to the civil liability of members of the management and supervisory organs is tempered in most legal systems by the application of periods of limitation which are much shorter than those under general civil law. However, the fixing by Member States of periods that are too short must be avoided. The Directive therefore lays down a minimum of three years.

These provisions apply to proceedings on behalf of the company and to proceedings by individual shareholders or third parties.

CHAPTER III

General meeting

For a whole range of matters of major importance to the company a resolution of the general meeting is required. For example one need only turn to Articles 9, 16, 22, 24, 25, 27, 31, 32 and 33 of the Proposal for a Second Directive, and Articles 4, 19, 20 and 21 of the Proposal for a Third Directive.

This Directive contains further provisions relating to the powers of the general meeting. The object of the provisions of Chapter III of this Directive is not to make certain transactions by the company dependent on a resolution of all the shareholders, but to protect the latter in the exercise of their rights during general meetings and against certain resolutions taken in general meetings.

Article 22

In accordance with a principle common to all legal systems, the general meeting must be convened at least once a year (paragraph 1). This is necessary for the rendering of the annual accounts. But in view of the many matters for which a resolution of the general meeting is required, it should also be possible for it to be convened as and when necessary for the management of the company. The management organ must therefore have an unlimited power to convene general meetings, which must in no way be restricted by the law or the statutes (paragraph 2).

Once this minimum safeguard is ensured, Member States can be left free to grant, by law or under statutes, the right to convene general meetings to any other persons, for example the auditors, the liquidators of the company or the supervisory organ.

Article 23

Minority shareholders, as defined in Article 16, who are entitled to commence proceedings on behalf of the company against members of the management and supervisory organs, or to prevent the renunciation of the right to commence such proceedings, must also be able to demand that a general meeting be convened (paragraph 1).

Abuse of this power by shareholders must however be avoided. As the organs of the company cannot be the final arbiters in the matter, shareholders should be authorized to bring the matter before the court on the expiry of one month after their demand to the company. Member States must organize the legal procedure involved, particularly the details of convening the meeting under the order of the court (paragraph 2).

Article 24

General meetings must be convened in such a way that all shareholders may have knowledge thereof. Where only registered shares are issued by a company, and the names and addresses of all the shareholders are entered in the Company's registers, the Directive provides that the notice of meeting may be sent to each of the shareholders by registered letter. In other cases the notice

should be published in the national gazette designated pursuant to Article 3(4) of Directive No 68/151/EEC of 9 March 1968, in which all the information relating to the company is published (paragraph 1).

Such publication must take place at least once, but national provisions may require publication on more than one occasion, or publication elsewhere, for example in daily newspapers, in addition to publication in the national gazette mentioned above.

The Directive lays down minimum contents for the notice of meeting (paragraph 2). The information required under (a) and (b) call for no comment, but it is important for the shareholder to know whether he is being called to an ordinary, extraordinary or special meeting, since according to the type of meeting convened, different rules as to quorum and majority may apply. The formalities under the Statutes relating to attendance at the meeting and voting thereat must also be communicated (see (d)). Any limitation under the statutes on the choice of persons as agents for shareholders must also be mentioned in the notice (see (e)). In all cases details must be given of the agenda (see (f)) and the proposed resolutions on each of the subjects therein (see (9)) set out in such a way that their wording and content can be readily appreciated without the need to refer to other documents.

All the legal systems have provisions relating to the periods between the date of the notice and the date of the meeting but such periods vary among the Member States between 5 days and one month.

A common solution cannot be found by compromising between these various periods. Shareholders should have a reasonable time in which to make arrangements to attend or be represented at the general meeting, since an increasing number of shareholders may be resident outside the country where the company's registered office is situated, and too short a period of notice would prevent them from replying to the notice. Besides, the rules introduced by the Directive for the representation of shareholders (Article 28) and for amendments to the agenda by minority shareholders (Article 25) cannot operate unless periods of notice are sufficiently long. This is why the Directive lays down a uniform period of one month. An exception is envisaged, however, for companies which have issued only registered shares: a notice of meeting addressed to each shareholder personally by registered letter may be sent only two weeks before the date fixed for the meeting.

These periods need only run from the date of the first publication of the notice of meeting, or of the first registered letter enclosing the notice, and the date of the first meeting of the general meeting. Member States may prescribe other periods either for the renewal of the notice or for the reconvening of meetings with the same agenda (paragraph 3).

Article 25

The minority shareholders, who have the right to demand the convening of a general meeting must also be able to request the inclusion of one or more new items in the agenda for a meeting of which notice has already been given. It is possible that different minorities may propose different changes to the agenda for the same meeting. Given the period of notice of one month, requests for the inclusion of new items may only be made during the period of ten days following publication of the notice, so that the company may inform all the shareholders of the agenda as so modified, by the same methods as the notice of meeting, at least ten days before the meeting.

Where notice is sent by registered letter at least two weeks before the meeting the two periods of ten days mentioned above are reduced to five days.

Article 26

The Member States are to lay down the formalities to be complied with by shareholders in order to attend the meeting. Three sorts of formality are in general use:

1. the deposit of the share certificates with a notary, with a bank or with the company itself;
2. notice of attendance given by the shareholder to the company;
3. with regard to registered shares, the entry of the holder in respect thereof in the company's registers.

The Directive impliedly prohibits the imposing of further conditions, other than these procedural formalities, on admission to general meetings. Thus, for example, the laws of the Member States cannot require a minimum number of shares to be held in the company, or deny admission to the meeting to a shareholder whose shares are not fully paid up.

The Directive only deals with the admission of shareholders and leaves it to the Member States to specify what other categories of persons may also attend general meetings. Finally, this Article does not deal with conditions for exercising voting rights, which are governed by Article 33.

Article 27

It often happens that a shareholder is unwilling or unable to attend a general meeting, particularly if he resides in a country other than that where the company's registered office is situated. The law in all the Member States therefore makes provision for shareholders to be represented at meetings. This Directive confirms this right to be represented and prohibits any provision of law to the contrary (paragraph 1).

In certain companies it may be desirable to limit the categories of persons who may be appointed as representatives. These restrictions should be laid down in the statutes and it should always be possible for a shareholder to be represented by another shareholder (paragraph 2).

To facilitate proof of appointment as representative, the form of proxy must always be completed in writing and must be delivered to the company which must keep it at least three years, that is to say, during the same period of time for which it must keep the other documents relating to the meeting, such as the list of members present and the minutes (paragraph 3).

Article 28

The provisions of Article 27 are insufficient to meet cases where the company, or other bodies such as associations of shareholders or credit institutions, request shareholders to send them their forms of proxy and offer to appoint representatives for them.

It is of course for the Member States to set up such systems of representation but the safeguards for shareholders in the various countries should be equivalent and the Directive therefore lays down a series of additional conditions for these forms of representation.

First, the shareholder must not be unduly bound to the representative selected: the appointment must therefore be limited to one meeting, whilst remaining valid, however, for any further meeting on the same agenda (paragraph 1 (a)). In any case the appointment may be revoked at any time (see (b)). The purpose of these arrangements as regards representation is to enable as many shareholders as possible to take part in the meeting through their representatives. It would therefore be contrary to this principle to permit organizations to seek appointments from amongst one class only of shareholders (see (c)).

It is not, however, sufficient to mobilize in this way shareholders who do not wish to attend, and are willing to have their voting rights exercised by representatives; it must be ensured that representatives vote in conformity with the wishes and in the interests of their principals. Therefore every request for appointment as representative must be accompanied by a request for instructions as to voting and all necessary information relating to the items on the agenda and the proposed resolutions in each such item.

In spite of these provisions it is common practice for shareholders to be blindly confident in the establishments which arrange their representation and to omit to give any instructions. It should be compulsory therefore for the representative to indicate on the request for appointment how he will vote in the absence of instructions (see (d)).

The representative would thus be bound, if not by the instructions given by his principal, then by his own statement as to his voting intentions (see (e)). This rule applies equally in cases where the company itself makes requests for

appointment: the representative appointed by it might refuse to represent a shareholder giving instructions contrary to the proposals of the organs of the company. In fact he represents not the company but the shareholder, and the latter is in most cases unable to find anyone else to represent him.

As an exceptional measure, a representative should be authorized to depart from the instructions received or statement made where, as a result of circumstances hitherto unknown, the exercise of voting rights as indicated by reference to a superseded situation might result in damage being suffered by the principal (see (f)). In such a case the representative must inform the principal immediately and provide all relevant information (see (g)).

Article 29

A list of persons present is to be drawn up in respect of each general meeting in order to verify the identity of those attending and to ascertain whether requirements as to quorum and majorities are fulfilled. This list should contain the names and addresses of shareholders present or represented and, where appropriate, of their representatives. The number, class, nominal or proportional value of, and the number of votes attaching to the shares of each shareholder present or represented should also appear in the list. As a result, national provisions permitting a member to have his votes cast by a representative without revealing his identity cannot remain in force. It is essential that such right of anonymous voting be abolished as facts may come to light during the same meeting which result in a shareholder being disqualified from voting (Article 34).

The Directive does not require the Member States to follow any specified form for drawing up the list of those present. Unless it calls upon the services of a notary, the company is fully responsible for ensuring that the list is established and properly prepared.

This document is primarily for the information of persons attending the meeting and they must be able to inspect it from the beginning of the meeting. After the meeting, furthermore, it must be kept available for inspection by every shareholder, whether or not he was present or represented at the meeting. For this purpose the list of members present must be attached to the minutes, which must be kept for three years. (Article 41(4)).

Article 30

As regards certain resolutions to be proposed at the general meeting the particulars given in the notice of meeting do not give sufficient information to shareholders. To remedy this deficiency, the Directive provides that certain documents must be available to every shareholder at the latest from the date of despatch or publication of the notice of meeting. These are primarily the

documents relating to the annual accounts and the report of the auditors in accordance with the Proposal for a Fourth Directive but shareholders should also have access to copies of contracts for which the authorization of the general meeting is requested.

Article 31

It is not enough that shareholders should have the right to put questions at general meetings to the company's managers; it is also essential that the latter be obliged to supply the information requested.

This obligation is, however, subject to certain restrictions. Thus, in the first place, information concerning the affairs of the company is only given if it is necessary to enable an objective assessment to be made of the items on the agenda (paragraph 1). The Directive does not deal with the question whether the right to information extends to cover the affairs of undertakings connected with the company: this question will be solved as part of the harmonization of laws relating to groups of companies.

Secondly, information requested may be refused where to give it might be detrimental to the company or would run counter to a legal obligation of secrecy (paragraph 3).

Apart from these restrictions on the duty to give information, the Member States may not introduce any further grounds for refusal: for example, the amounts of certain taxes or the difference between the book value and the real value of certain items in the balance sheet are not to be treated as matters on which information may be refused.

The management organ is responsible for supplying information (paragraph 2), but Member States may also vest this responsibility in other persons, for example the supervisory organ or the auditors.

In practice the management organ and the shareholder are not often in agreement as to whether information requested should be given or not. Power to decide such questions should not be given to the general meeting, as it could not be relied upon to decide objectively.

Power should therefore be given to the court to decide whether a refusal to give information is justified.

The court's judgment can deal at the same time with the question whether resolutions passed by the meeting in contravention of a member's right to receive information are void or voidable (Article 42(d)).

Article 32

In accordance with a principle common to all the legal systems, the general meeting may not pass any resolution concerning items which do not appear in the agenda communicated or published in accordance with Article 24(2) or Article 25(3).

However, this provision need not be observed where all the shareholders are present or represented at the meeting and no objection is recorded in the minutes (paragraph 2).

At the choice of the national legislator, three types of resolution may be passed without having been included in the agenda (paragraph 3).

An action may be brought at any time for a declaration that a resolution passed in contravention of paragraph 1 is void or voidable.

Article 33

The shareholder's right to vote must be proportionate to the fraction of the capital subscribed which his shareholding represents (paragraph 1). However, it is not the purpose of the Directive to prevent Member States from authorizing certain exceptions to this principle.

The first exception recognized by the Directive is the authorization of so-called "Preferred" shares by which a company can meet special needs for finance. The disadvantage of the restriction or even the exclusion of voting rights must be compensated by granting the holders of such shares special advantages by comparison with other shareholders, for example in respect of dividends or as regards distribution of assets upon liquidation (paragraph 2(a)).

Secondly, national provisions limiting the number of votes in respect of shares allotted to one shareholder may remain in force. These measures must, however, apply to all the shareholders or at least to all holders of shares of the same class (paragraph 2 (b)).

These exceptions to the principle of the proportionality of votes to shareholdings may only be introduced in the statutes. No further exceptions are provided for. For example it would be forbidden to grant a double vote to holders of fully paid-up shares upon their having held such shares for a certain length of time.

Upon the formation of the company, the capital subscribed should not be entirely paid up. Article 6 of the Proposal for a Second Directive provides that shares should be paid up as to 25 % in cash and that further calls should be made as and when required by the company. No shareholder should be able to exercise his right to vote until he has paid up all calls made by the company (paragraph 3).

From this must be distinguished the question of the effect on voting rights where shares are only partly paid up because the company has not made further calls. Following the laws of five of the Member States, the Directive prohibits in all cases any exception to the principle of proportionality. The company should not be able to wield any influence over the number of shareholders' votes.

Article 34

In the event of a conflict of interests between the company and a shareholder, the latter must not be allowed to exercise his right to vote. The Directive lays down four cases in which this prohibition must apply.

A shareholder who is also a member of the management or supervisory organs must not take part in the vote on their discharge (see (a)). Of course, the granting or refusal of a discharge does not have direct effects such as the immediate dismissal of the members concerned or the commencement of proceedings against them on behalf of the company. But the vote on the discharge should not be considered as a mere formality: it is the most important means available to the general meeting for the expression of its confidence or otherwise in the management of the company.

Furthermore, no shareholder may vote when the general meeting is called upon to decide whether to exercise rights against him on behalf of the company or to release him from obligations to the company (see (b) and (c)).

Certain agreements to which the company is to be a party require the consent of the general meeting. Where such a contract is to be entered into with a shareholder, the latter must also be excluded from the vote (see (d)).

In no case may the statutes provide for any exceptions to or derogations from the prohibitions on voting referred to above. These principles must be observed even where the result is to exclude from the vote a majority of shareholders who have an interest which is not that of the company and to limit the vote to a minority of disinterested shareholders.

The prohibitions in question apply not only to shareholders but also to their representatives. Also they apply to shareholders whether they are voting in respect of their own shares or the shares of another.

Article 35

There are wide differences between the rules in the Member States governing voting agreements. As the Directive only lays down minimum provisions, it is limited to combating the most flagrant abuses. For this purpose it lays down conditions in which such agreements are in all cases void.

In the first place all agreements whereby a shareholder undertakes always to follow the instructions of the company are void (see (a)). Furthermore, shareholders must not agree always to approve the proposals of the organs of the company, as this would deprive the general meeting of its controlling function (see (b)).

On the other hand, voting agreements concluded between shareholders or between shareholders and third parties cannot be prohibited entirely; they may be justified, for example, as an essential part of a consortium agreement. However, the pure purchase of votes by the granting of special advantages is in all cases unlawful (see (c)).

It must be recalled that although the Directive provides that certain voting agreements shall be void, it makes no comment as to their effect on votes which are cast in pursuance of such void agreements.

Article 36

This provision lays down the necessary majority for resolutions of the general meeting, namely an absolute majority of members present or represented (paragraph 1). Resolutions can accordingly only be passed if they receive the votes of one half of the persons mentioned plus one. One exception only is provided for in the case of appointments (paragraph 2) which may be effected by relative majorities. This permits inter alia the making of appointments by methods which ensure the representation of minorities.

The Directive does not prevent Member States from requiring larger majorities for certain resolutions. Large majorities are in any case already required for increases or reductions of capital (Articles 22 and 27 of the Proposal for a Second Directive) for mergers (Article 4 of the Proposal for a Third Directive) and for alterations to the statutes (Article 37 of this Directive).

Larger majorities may also be required by the statutes for all or certain resolutions.

Article 37

The object of this provision is to ensure that any alteration to the statutes is submitted to the general meeting (paragraph 1). Exceptions to this principle are permitted only in three closely-defined cases (paragraph 2).

When the general meeting delegates to the management organ certain transactions which entail for their completion an alteration to the statutes, it must be possible for the management organ to be empowered to alter the statutes (see (a)). For example, an authorization to issue further capital within a fixed maximum (see Article 22(2) of the Proposal for a Second Directive) may also include authorization to alter the amount shown in the statutes as being the amount of the capital subscribed, and this may also be the case where convertible debentures are converted.

The management organ may also be empowered to alter the statutes where such alteration is required by an administrative authority and, under the law applicable, the prior consent of such authority is required for such alteration to be valid (see (b)).

In view of the wide area of coordination yet to be achieved in this field, company laws will be modified further on several occasions. Where such future modifications necessarily entail alterations to the statutes, it would be pointless to require that every such operation should be sanctioned by a resolution of the general meeting (letter (c)).

Article 38

The particulars to be included in notices of general meeting pursuant to Article 24(2) would not in most cases give shareholders sufficient information for a decision on an alteration of the statutes. In such case the notice should also include the full text of the proposed alterations.

Article 39

Following the example of the laws of five Member States the Directive provides that resolutions of the general meeting to alter the statutes should be passed by a qualified majority. This majority cannot be less than two-thirds of the votes carried by shares represented at the meeting or of the capital subscribed represented thereat (paragraph 1).

National provisions which permit smaller majorities either for all or for certain resolutions (e.g. increases of capital) are incompatible with such Community rule as aforesaid. On the other hand it will be possible to lay down, by law or in the statutes, stricter conditions which, where appropriate, could vary according to the type of alteration proposed to the statutes. The Directive is also without prejudice to national rules requiring the consent of all shareholders for certain resolutions of great importance.

Where the required majority is not obtained at the first meeting, certain legal systems provide that a second meeting may be convened at which the resolution may be passed by a smaller majority. The Directive does not affect systems permitting two consecutive meetings with the same agenda. However, the minimum two-thirds majority must always be observed, no matter at what meeting the resolution is passed. One exception should be made to this principle.

Some legal systems, besides the majorities required for resolutions, lay down also a smaller quorum for the second meeting than for the first. But where the law applicable provides that the resolution can only be passed if half of all the shareholders are present, it would be excessive to insist that, in addition, two-thirds at least of those present be in favour of the alteration proposed to the statutes. In this case the absolute majority required by Article 36 will suffice (paragraph 2).

The Directive does not follow the example of certain national laws which require the minutes recording the resolutions in question to be authenticated by notarial act. In this context, however, the provisions of Directive No. 68/151/EEC of 9 March 1968 should be borne in mind, which provide that every alteration to the statutes must be published. Finally, the Directive does not prevent any Member State from submitting the registration of an alteration to prior inspection by a court or administrative authority.

In a *société anonyme** the shareholder's obligation is limited to paying up his shares. It follows from this principle that an increase in the obligations of shareholders cannot be voted on by the majorities laid down for alterations to the statutes. The approval of all shareholders involved must be obtained (paragraph 3).

Article 40

Further rules must be laid down for cases where the company issues several classes of shares. Where measures are proposed which would entail an alteration in the relationship between the classes of shares, not only a resolution in general meeting is necessary, but also a separate vote at least on the part of the holders of shares of a class to which the resolution in question could be detrimental (see Article 22(3) of the Proposal for a Second Directive). Such a vote is of course subject to the majority requirements laid down in Article 39.

Article 41

Minutes must be drawn up of each general meeting (paragraph 1). It is for Member States to decide whether the minutes should be authenticated by notarial act. The Directive however lays down the minimum particulars which must appear therein.

These are, firstly, the place and date of the meeting, the subject-matter of the resolutions and the results of the voting. Where a shareholder has objected to the discussion of a particular item of business, this must also be recorded. The latter point is particularly important for the purposes of actions under Article 43(b) attacking resolutions of the general meeting as void or voidable.

There must be attached to the minutes the list of members present (Article 29) and the documents relating to the convening of the general meeting, i.e. copies of the published or letter-form notice of meeting provided for in Article 24.

* Where the French terms are used in this Explanatory Memorandum they are to be taken to include a reference to the corresponding types of company existing in each of the six Member States.

The minutes are primarily for the information of shareholders. For this reason, it does not seem necessary that the minutes should be filed in the register of the company in accordance with Article 3(2) of Directive No. 68/151/EEC of 9 March 1968. It must be remembered, however, that Article 2 of that Directive requires the disclosure of certain resolutions of the general meeting which are also of interest to third parties. Other requirements as to disclosure are contained in the provisions of the 2nd and 3rd Directives, for example in respect of resolutions increasing or reducing the capital or on mergers.

Article 42

Shareholders must be protected against infringements of national provisions in conformity with this Directive relating to the preparation and conduct of general meetings, particularly in the case of infringements which might have some influence over the resolutions passed.

The laws of the Member States contain two kinds of sanction: a resolution is either void or voidable. In the first case the resolution is automatically of no legal effect, in the second case it is treated as valid until it is declared void by the court. The Directive does not seek to answer the question as to which infringements should be visited with one sanction or the other. To achieve equivalence of shareholder protection it is sufficient to specify which infringements always render a resolution void or voidable. However, the list of these contained in the Directive only concerns breaches of the provisions of these Community rules. In other words, the Member States are free to introduce similar sanctions against other infringements, for example infringements of the principle of equal treatment of shareholders, good faith or morality, or cases of abuse of power.

The Directive is mainly concerned with infringements relating to the formalities and time limits laid down for the convening of meetings (Articles 42(a) and 24(1) and (3)). However, as regards the minimum contents of the notice of meeting (Article 24(2)), only the omission of the place or date of the meeting, or of details of the formalities to be fulfilled in order to attend and vote, will render void or voidable any resolution passed at such meeting.

Refusal to allow a shareholder to attend a meeting must have the same result, where he has completed the formalities required (Article 41(c)). Furthermore, a resolution of the general meeting will be void or voidable if its subject-matter was not communicated or published in the notice (Article 24(2) (f) or when new items were added to the agenda at the request of minority shareholders (Article 25(3)). An exception must be made for the cases referred to in Article 32 (2) and (3) where, as an exceptional measure, matters may be discussed which do not appear on the agenda (Article 42(b)).

Shareholders called upon to vote the adoption of the annual accounts or to consent to certain contracts must be supplied with additional written information (Article 31). Also, at each general meeting, every shareholder has the

right to obtain information (Article 31). Any infringement of these provisions will also render resolutions void or voidable where there is a connection between the subject matter of the resolutions and the documents or information refused (Article 42(d)).

Infringements of the provisions on the exercise of voting rights are also regulated herein. One can quote as an example the case where a shareholder casts more votes than he is entitled to by virtue of his shareholding (Article 33) or where a shareholder votes despite being excluded by reason of a conflict of interests (Article 34). It is necessary in these cases, however, that such infringements should have affected the results of the voting.

Finally, a resolution of the general meeting can always be challenged where the majority required under Article 36 or 39 was not obtained (Article 42 (f)).

Article 43

The rules which lay down the grounds on which resolutions of the general meeting may be void or voidable must be supplemented by provisions specifying what persons are empowered to commence the proceedings in that behalf. Uniform rules are not necessary for this purpose: equivalence of shareholder protection can be achieved by minimum provisions.

In respect of defects in the notice of meeting which entail nullity or voidability, it must always be possible for proceedings to be commenced by shareholders who were not present or represented at the meeting (see (a)).

In cases of infringement of the principle that the subject matter of every resolution must have featured in the agenda, not only absent shareholders, but also shareholders among those present or represented who protested against such matters being discussed, may commence proceedings (see (b)). Where on the other hand the right to attend a meeting has been refused, only the shareholder concerned may commence proceedings (see (c)). The same rule applies in the case of a refusal to produce documents or supply information (see (d)).

A distinction must be drawn in cases of infringements against provisions concerning the right to vote which influence the result of the vote in question: where the shareholder was prevented from voting, then he at least must be able to have recourse to the court. Where the shareholder, on the other hand, took part in the voting irregularly, every other shareholder must be able to bring proceedings (see (e)). Finally, where the necessary majority for a resolution was not obtained, all the shareholders must be able to have recourse to the court.

Article 44

The question whether a resolution of a general meeting is void or voidable cannot remain too long in suspense. Shareholders must, however, be protected against excessively short time limits being fixed. To reconcile these opposing interests, the Directive provides for a range of between three and twelve months within which the Member States may choose a period of limitation according to their requirements.

It is worth noting that the period can only run from the time when the resolution of the general meeting became adduceable as against the person claiming that the resolution is void or voidable. With regard to all resolutions required to be published under Directive No. 68/151/EEC, the commencement of the period will be governed by Article 3(5) of that Directive. Furthermore, Article 18(1) (c) of the Proposal for a Third Directive contains similar provisions in respect of the nullity of mergers.

Member States may lay down different periods in respect of grounds for nullity or voidability other than those laid down by Articles 42 and 43.

Article 45

It is in the interests of shareholders that a resolution which is attacked should be replaced by another resolution passed in accordance with the law and the statutes, rather than declared void by judgment of the court. The Directive provides, therefore, that the competent court must be able to allow the company a period of time for this purpose. Similar provision is made for cases of winding up by reason of the number of members having been reduced below the legal minimum (Article 5—Proposal a Second Directive) and of nullity of merger (Article 18(1) (d) Proposal for a Third Directive).

Article 46

The question under what circumstances a judgment declaring void a resolution of the general meeting can be relied on as against third parties can only be settled by applying the same principles as apply to judgments on the nullity of companies, which are contained in Article 12 of Directive No 68/151/EEC of 9 March 1968. Furthermore, similar rules are laid down with regard to the nullity of mergers by Article 18(1) (e) of the Proposal for a Third Directive.

Article 47

Member States may make their own arrangements with regard to voting by holders of certain classes of shares, either by giving them separate votes within the general meeting or by providing for special meetings. The latter must in all cases be governed by the same rules as apply to general meetings in accordance with the provisions of Chapter III of this Directive.

CHAPTER IV

The Adoption and Audit of the Annual Accounts

Article 48

With regard to the adoption of the annual accounts, the Directive gives the laws of the Member States the choice between giving either exclusive or subsidiary competence to the general meeting. Under the latter system, the management organ and the supervisory organ adopt the accounts whilst the general meeting does no more than act as an arbitrator between them. The general meeting only takes the final decision if so requested by the two organs or if the latter fail to agree.

Article 49

Following the example of the laws of five of the Member States, the Directive provides that a legal reserve shall be set up. Amounts appropriated to this reserve must appear on the liabilities side of the balance sheet (Article 8 of the Proposal for a Fourth Directive). This is in accord with the prohibition against the distribution of profits to shareholders where the net assets of the company fall below the amount of the capital subscribed plus non-distributable reserves (Article 12 of the Proposal for a Second Directive).

The object of the legal reserve is to set aside part of the profits of the financial year exclusively for offsetting any future losses. The legal reserve gives a surer safeguard than the capital subscribed, which the company may dispose of by recourse to the procedure for reduction (see Articles 27 to 34 of the Proposal for a Second Directive).

To achieve equivalent protection for members and for third parties it is sufficient to fix the minimum amounts that are to be appropriated to the legal reserve. These are to be at least 5% of the profits of the financial year up to a limit of 10% of the capital subscribed (paragraph 1).

As has already been pointed out, these are only minimum provisions. A Member State could, for example, set the limit referred to at 20% of the capital subscribed.

The setting up of a legal reserve for offsetting losses would not suffice on its own. It is a further requirement that there be no other available reserves. With regard to these available reserves there is no need to distinguish between those created pursuant to a resolution of the general meeting and those created pursuant to a provision in the statutes. In fact it matters little that such reserves may previously have been intended for other purposes, for priority must always be given to the offsetting of losses.

However, the provisions referred to can only apply to the minimum amounts which must be appropriated to the legal reserve pursuant to this Directive. Where the law or the statutes require larger amounts to be appropriated thereto they may be used for purposes other than the offsetting of losses. This corresponds, furthermore, with Article 26 of the Proposal for a Second Directive which provides that where the capital subscribed is increased by means of capitalization of reserves, the legal reserve may be used to the extent that it exceeds 10% of the capital subscribed.

Article 50

With regard to the adoption of the annual accounts, Article 48 gives Member States the choice between giving exclusive or subsidiary competence to the general meeting.

The situation is different, however, as regards the appropriation of the result for the financial year. Five Member States give competence to take this decision to the general meeting, whilst the sixth gives by law to the management organ and the supervisory organ the power to appropriate one half of the profits to free reserves without the consent of the shareholders. These two systems cannot be considered as equivalent and it is, therefore, essential to observe throughout the Community the principle that control over the entire results of the financial year should be in the hands of the shareholders.

This does not mean, however, that profits should always be distributed. On the contrary, in many cases the necessity of setting up a reserve is indisputable. It is only a question of ensuring that the shareholders should have an influence over the decision.

It is, of course, useful that the management should know to what extent it is empowered to set up reserves. For this purpose, paragraph 2 expressly provides that such a power may be delegated by the statutes to the management organ. However, it should not be possible by this means to reduce the powers of the general meeting to nothing. The Directive only authorizes appropriation to be required by the statutes within the limit of one half of the results of the financial year. The general meeting is still competent to decide as to the application of the remainder.

Article 51

Under the laws of all the Member States, the annual accounts of the company must be audited by persons other than those responsible for management of the company. Some Member States confine the powers of such persons to auditing the annual accounts, whilst others empower them also to supervise the management of the company on a permanent basis. It is not necessary for the Directive to impose the latter system on Member States. In any event the two-tier

system provided for by the Directive entails that in every company a supervisory organ will be appointed to control the management organ. There is no need, therefore, to entrust the same responsibilities to other persons as well.

However, the principle must be observed throughout the Community that the annual accounts must always be audited by persons other than the members of the supervisory organ. It is not necessary to provide a uniform solution to the question of whether such persons constitute organs of the company. This applies also as to the number of persons who may or must be entrusted with the audit of the accounts.

Article 52

Only independent persons may be entrusted with the audit of the accounts of the company. Such persons must also have the necessary qualifications. Detailed provisions on this matter cannot be included in this Directive, as specific rules are in course of preparation.

Article 53

The requirement of independence entails that members of the management and supervisory organs must in all cases be excluded from taking part in the audit of the accounts. The same must apply with regard to the staff of the company, as they are under the orders of the management organ (paragraph 1).

The laws of some Member States consider it to be incompatible with the requirement of independence that persons who are not on the staff of the company but render services to the company on a permanent and remunerated basis should be entrusted with the audit of the accounts. In other Member States, on the other hand, it is permissible, and common practice, for the position of auditor of the company's accounts to be combined with that of an adviser to the company. This legal disparity is left untouched by the Directive.

As this Article is only a minimum provision, the Member States are free to disqualify as auditors the spouses, relations in the direct line or the collateral relations of persons prohibited by the Directive from auditing the accounts. Furthermore, the Member States may also exclude persons who are not employed in the company to be audited but are employed in an associated company. In this respect, Community rules can only be introduced as part of the coordination of the laws relating to groups of companies.

The prohibition contained in the Directive against entrusting the audit of the accounts to members of the management or supervisory organs or of the staff of the company would be quite insufficient if it were only applicable in respect of the position occupied as at the time of being appointed auditor. The

independence of the person concerned would be equally questionable if he had occupied such a position a short time previously. In such a case he might, as a member of one of the two organs or as an employee, have taken part in transactions having a direct bearing on the annual accounts to be audited. In the interests of certainty in the law, a certain period should be laid down. This should be three years, as provided in various Member States (paragraph 1).

It is for the Member States to settle the conditions under which accounts may be audited by firms or companies instead of natural persons. It must be appreciated that when a firm or company is entrusted with these functions its independence may in certain particular circumstances be open to question. This would be the case where the relationship between members, the management or the authorized representatives of the auditing firm or company and the company to be audited are such that these persons could not be appointed auditors as individuals. This prohibition must apply also to the auditing firm or company (paragraph 2).

Article 54

The object of this article is to safeguard the independence of auditors by prohibiting them from being engaged or employed by the audited company during a period of three years following the end of the audit. This provision is based to a large extent on Article 53.

Article 55

In principle the persons who are to audit the accounts are appointed by the general meeting. However, the laws of the Member States may make exceptions in cases where the company is in the course of formation, for example by providing for appointment by the statutes, or by the instrument of constitution or any other document (paragraph 1).

What happens if the general meeting does not make such appointment in due time? The matter cannot wait until another general meeting is convened, nor can the appointment be entrusted to the management or supervisory organs. In this case it is for the court to make the appointment. Application can be made to the court either by a shareholder or by the management or supervisory organs. The same rule applies where persons appointed by the general meeting are unable to carry out their functions (paragraph 2).

Cases might arise where the general meeting makes an appointment without taking into account at the time all the circumstances which might call in question the independence of the persons appointed. Every appointment must, therefore, be subject to revocation by the court where there are proper grounds. It would not be justifiable, however, for one shareholder alone to be empowered

to commence proceedings in this behalf. For this reason, this can only be done by a minority of shareholders (paragraph 3). This minority is the same as that which can require that proceedings be commenced on behalf of the company against members of the management or supervisory organs (Article 16) or that a general meeting be convened (Article 23) or that one or more new items be added to the agenda (Article 25). Save for a time limit of two weeks for the making of the application, the rules governing such proceedings are to be laid down by the Member States.

Article 56

Certain Member States limit the duration of the appointment of auditors to one year, whilst in others appointments are always made for several years. Appointments may be renewed under all the legal systems. There is a difference from the point of view of the auditor, however, between holding an office which expires after one audit of the annual accounts, and remaining in office for several years unless removed on proper grounds. The latter solution gives him greater independence and the Directive therefore lays down that appointments shall be for a minimum duration of three years.

It is not without danger, however, to leave the auditing of a company's accounts in the same hands for an unlimited period. Therefore a maximum duration of six years is laid down for each appointment. The general meeting must, therefore, at the expiry of each period of office make a new appointment. It is not possible to prolong a period of office from year to year by tacit renewal unless the general meeting decides otherwise.

Article 57

The remuneration of the persons appointed to audit the accounts must be fixed, for the whole of their period of office, before such period commences (paragraph 1). This does not mean that the total amount must be exactly fixed in advance; reference may be made to a scale. Neither the company nor the auditor, however, must be in a position to influence the amount of the remuneration. To avoid circumvention of this principle, no other remuneration or benefit may be granted to the auditors. It is permissible, on the other hand, to grant them special remuneration for services other than their auditing services (paragraph 2).

Article 58

The audit of the accounts must cover also the books of the company, as well as the annual accounts and the annual report within the meaning of the Proposal for a Fourth Directive.

The documents in question must first be examined as to their conformity with the law. In so far as the law allows, the provisions of the statutes must also be observed (paragraph 1).

The results of the audit must be recorded on the annual accounts (paragraph 2).

Article 59

To carry out their functions, the auditors must have a wide right to obtain information and make investigations. However, the question whether such right should apply also in respect of undertakings associated with the company to be audited can only be dealt with as part of the coordination of the laws relating to groups of companies.

Article 60

The results of the audit of the accounts are to be recorded on the annual accounts. Such record is confined to a statement either that the company's books, the annual accounts and the annual report are in conformity with the law and the statutes, or in what respects they are not. This will not suffice, however, for the information of the shareholders, and they must therefore receive an auditors' report in accordance with this Article, to be published as provided for in Article 44 of the Proposal for a Fourth Directive.

Article 61

In some Member States the law provides that auditors may be removed at any time before the end of their period of office, whilst in others this may only be done where proper grounds exist. In fact the importance of this divergence is diminished by the fact that dismissal without proper grounds generally gives rise to a right to compensation. But auditors must be protected against arbitrary removal, not so much in their own interests as in those of the shareholders and creditors of the company. The Directive therefore only permits dismissal on proper grounds.

Article 62

The responsibility of persons responsible for auditing the accounts must be as strict as that of members of the management or supervisory organs of the company. National provisions which limit their liability, in the event of negligence, to a certain figure are incompatible with this principle.

Article 63

Serious infringements of the provisions relating to the auditing of accounts must result in the nullity or voidability of the resolutions adopting the annual accounts. Special provision must be made for this case, in addition to the general rules of Article 42 on nullity and voidability of resolutions of the general meeting. The list of conditions is limitative in the sense that resolutions cannot be rendered void or voidable by infringements of any other of the provisions of this Directive relating to auditing. Where Member States have prescribed this sanction for infringements not included in the list, such rules may remain in force.

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