COMMISSION OF THE EUROPEAN COMMUNITIES

SECRETARIAT

Proposed statute for the EUROPEAN COMPANY

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Proposed statute for the European Company

CORRIGENDA SUPPLEMENT 8-1970

Page 3 — Line 1 : delete "Summary" and substitute "Contents".

In the penultimate line : delete "No." ; the word "statute" should appear with a capital "S" — thus "Statute".

Page 6 — Translator's note, line 2 : delete "in" and substitute "by".

line 3 : insert a comma after the word "plural".

Page 8 — Line 2 : delete "their" and substitute "its".

Page 10 — In Article 3, line 3, for "Sociétés" read "sociétés".

Notes on Articles 2 and 3, second paragraph of Note 1, line 1 : insert "of" after the word "forms". In line 3, there should be two asterisks after the word "limitata".

Translator's second note, line 1 : delete "terms" and substitute "types" ; delete "in" and substitute "by".

Page 14 — The last line should read : "Authentic English-language text of Article 17".

Page 16 — Last line : delete "newspapers" and substitute "periodicals".

Page 17 — Note 4 on Articles 8 to 10, line 2 : for "Article 54 (3g)" read "Article 54 (3) (g)".

Page 19 — Line 12 : delete "this" and substitute "the".

Page 22 — Notes on Articles 11 to 16, Note 2 : delete the third line (including the second figure 2) and substitute : "Article 13 prescribes the compulsory minimum content of the Statutes. Regard must . . ."

Page 29 — Article 25(3), line 2 : delete "applications" and substitute "application".

Page 34 — Article 32(6), last line : delete "and".

Page 39 — Line 15 : insert a hyphen between "paid" and "up".

Page 41 Article 42(4), line 3 : delete "shareholding" and substitute "shareholdings".

Page 46 Article 49(1). The second sentence should read : "Promises to pay, or payment of, fixed interest are prohibited".

Page 47 Note on Articles 48 and 49. Second paragraph, line 1 : insert "of" after "issue".

Page 52 Article 59(2), line 2 : delete "of".

Article 60(1), line 3 : delete comma and the words "and shall be by" and substitute "held in like manner as for passing a".

Page 53 Note on Article 60, line 4 : insert after "by the General Meeting must" the words "be taken only by a General Meeting which is competent to" ; in line 5 insert "must" before "create".

Page 77 Article 89(2), line 7 : delete "should" and substitute "shall".

Page 83 Note on Article 97, second paragraph, line 4 : insert "an" before "application" ; line 10 : delete "or" and substitute "of".

Page 89 Article 102, line 3 : delete "Part" and substitute "Title".

Page 127 Article 153 B. I. (3) : read "Derivativer Firmenwert", "goodwill", "fonds de commerce", "avviamento",

Page 130 Note on Article 153, paragraph 6, line 1 : insert "provisions" after "down".

Page 133 Note on Article 161, third paragraph, line 2 : delete "an" and substitute "and".

Page 134 Article 162 : delete "Equalization accounts" and substitute "Prepayments".

Page 135 Note on Article 167, second paragraph, line 3 : delete "State" and substitute "States".

Page 138 Article 169 A I (3) : read "Labour costs".

Page 150 Article 182 (4) (b), line 2 : delete "account" and substitute "amount".

Note on Article 182, paragraph 5, line 2 : insert : "it amongst the assets and the amount in question are indicated" after the word "showing".

Page 151 Note on Article 185, last line : delete "dispose of it" and substitute "utilize the profits".

Page 152 Article 186 (3), line 3 : insert "sheet" after "balance".

Page 154 Article 191, line 1 : insert "other" after "under".

Page 155 Note on Article 191, paragraph 7, line 1 : insert a comma after "products". In paragraph 8, line 2, delete "or" and substitute "of".

Page 159 Note on Article 199, paragraph 3, line 5 : delete "af" and substitute "of".

Page 161 Note on Article 201, line 1 : insert "down" after "laying".

Article 203 (2), line 4 : delete the semi-colon. In line 5 delete "limited companies" and substitute "sociétés anonymes".

Page 162 Note on Article 203, paragraph 2, line 5 : delete "limited companies" and substitute "sociétés anonymes".

Page 169 Note on Article 218, paragraph 3, line 3 : insert "Board" after "Supervisory".

Page 176 line 26 : insert a comma after "law".

Page 181 Article 230 (2), line 1 : delete the colon after "société anonyme".

Page 200 Article 256 (2), line 1 : delete "IV" and substitute "VI".

Note on Articles 254 to 256, last line : delete "IV" and substitute "VI".

Page 211 Note on Articles 270 and 271 : — lines 5 and 20 : delete "Section" and substitute "Sections".

— paragraph 4, line 2 : read "the acquiring European Company, respectively, are liable for the commitments of . . . .".

Page 212 Article 273, line 1 : delete "Section" and substitute "Sections".

Page 215 Note 1, first paragraph, line 4 : delete "its" and substitute "their".

COMMISSION OF THE EUROPEAN COMMUNITIES

SECRETARIAT

Proposal for a Council Regulation embodying a Statute for European Companies

(submitted to the Council on 30 June 1970)

Brussels

24 June 1970

Summary

The Council of the European Communities,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 235,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the Assembly,

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

Whereas the harmonious development of economic activities within the Community as a whole calls for transition from the stage of customs union to that of economic union; whereas achievement of the latter presupposes, in addition to the elimination of obstacles to trade, a reorganization of the factors of production and distribution on a Community scale in order to ensure that the enlarged market will operate similarly to a domestic market; whereas to this end it is essential that undertakings whose activity is not confined to meeting purely local requirements should be able to plan and carry out the reorganization of their activities at Community level and improve their means of action and their competitiveness directly at this level; and whereas, if such improvement were to occur in the main at national level, it might tend to fragment markets and so constitute an impediment to economic integration;

Whereas structural reorganization at Community level presupposes the possibility of combining the potential of existing undertakings in a number of Member States by rationalization and merger, but these processes can only be conducted subject to the rules on competition; whereas the establishment of European undertakings is the obvious and normal means of achieving that result under the most satisfactory conditions; whereas this is a necessary instrument for attainment of one of the objectives of the Community;

Whereas, however, the establishment of such undertakings meets with legal, fiscal and psychological difficulties; and whereas the measures provided for in the Treaty by way of harmonization of legislation and the conclusion of conventions to enable the movement of companies to be effected by transfer of the registered office and by merger are calculated to alleviate some of these difficulties, they do not dispense with the necessity of adopting a specific national legal system to invest an economically European undertaking with the legal status essential to a commercial company; still less do they eliminate the obstacle which a change of nationality constitutes for undertakings linked by name and tradition to a given country;

Whereas, therefore, the legal framework within which European undertakings must still operate, and which remains national in character, no longer corresponds to the economic framework within which they are to develop if

the Community is to achieve its purpose; and whereas this situation, especially because of the psychological effects it produces, may seriously impede the regrouping of companies incorporated in different countries;

Whereas the only solution capable of effecting both economic and legal unity of the European undertaking is, accordingly, to permit the formation, side by side with companies governed by one or other national law, of companies wholly subject only to a specific legal system that is directly applicable in all the Member States, thereby freeing this form of company from any legal tie to this or that particular country;

Whereas the introduction of this uniform legal status effective throughout the Community thus appears necessary for the unimpeded formation and management of undertakings of European dimensions produced by regrouping the forces of national companies;

Whereas the requisite powers to formulate this legal status have not been provided for in the Treaty;

Whereas the purpose underlying the legal form of a European commercial company demands in any event, without prejudice to economic requirements which may arise in the future, that a European company may be formed to effect mergers between companies incorporated in different Member States, as well as to allow such companies to form holding companies and joint subsidiary companies; and whereas it is sufficient, in order to attain the desired economic objectives at the same time as the process of founding a European company through merger and the establishment of holding companies is simplified, to accept as founders — apart from other European companies — only companies incorporated under national law in the form of a *société anonyme, Aktiengesellschaft, società per azioni or naamloze vennootschap*;*

Whereas the form of a European company should itself be that of a company limited by shares, which is best suited, from both the financial and management points of view, to the needs of companies operating at European level; and whereas, in order to ensure that such undertakings may operate on an acceptable scale, a minimum paid-up capital must be stipulated such that these companies have adequate resources at their disposal, but not such as thereby to restrict the formation of European companies by national undertakings of medium size; and whereas the amount of capital must none the less be smaller in the case of formation of subsidiaries;

Whereas to obtain maximum benefit from such uniformity of status, none of the regulations governing the founding, structure, operation and winding up of the European company must be subject to national laws; and

* Translator's note: these are companies limited by shares. For the sake of convenience only, they are together hereinafter referred to in the expression "société anonyme" or, where the context requires the plural by the expression "sociétés anonymes".

whereas it is necessary for this purpose to formulate a statute for the European company containing a full set of standard provisions and to refer back to the general principles common to the laws of the Member States for solution of problems relating to matters governed by this Statute but which have not expressly been dealt with herein;

Whereas in order to ensure uniformity of status it is imperative that the founding of the European company be subject to a system of registration at a central registry, under legal control, to eliminate any possibility of invalidity of the company after incorporation; and whereas one specific European legal body should be seised of this control in order to avoid discrepancies of judgment in the scrutiny of deeds and documents prepared by the founders; and whereas the requisite authority should naturally be vested in the judicial body of the Communities, the Court of Justice of the European Communities;

Whereas the Court of Justice must also have jurisdiction, to the exclusion of national courts, to decide whether a European company forms part of a group of companies within the meaning of this expression in Title VII of this Regulation; and whereas, indeed, the existence of a group, which has important legal implications for the management and shareholders of a company, being a member thereof, often cannot be established, in case of doubt, except by analysis of actual relationships between companies in different countries and hence of the *de facto* situations in these various countries, which require appraisal; and whereas an examination of this kind would be very difficult for a national tribunal whose powers of inquiry would not extend beyond the country concerned;

Whereas there are wide differences between the laws in force in the Member States as regards the representation of employees within undertakings and the extent to which their representatives participate in the decision-making machinery of *sociétés anonymes,* these questions should not be determined by national laws lest uniformity in the system of management of the European company be disrupted; and whereas if national legislation concerning representation of workers at management level can continue to apply, it is nevertheless necessary, in the case of European companies with branches in several Member States, to provide for the formation of a European Works Council with appropriate power to deal with matters affecting a number of branches; and whereas it is equally necessary to allow representation of workers on the Supervisory Board, to enable them to express their point of view when important economic decisions are made upon matters of company management and on the appointment of members of the Board of Management;

Whereas the European company must remain subject to national fiscal requirements, since formulation of a fiscal system solely for the European company might be the source of discrimination, favourable or otherwise, in relation to *sociétés anonymes* subject to national law; whereas, however,

allowance should be made in the calculation of the taxable profits of the European company for losses incurred by their permanent branches or subsidiaries in other countries, until taxation of the revenue of the companies can be brought under the exclusive control of their country of domicile for fiscal purposes; whereas it is necessary, moreover, to lay down a procedure for the settlement of possible disputes upon the determination of the domicile of the European company for fiscal purposes and to settle the terms and consequences of transfer of fiscal domicile from one country to another; and whereas, further, the European company is to benefit, on the same basis as companies incorporated under national law, from the provisions of the directive concerning the common fiscal system applicable to parent and subsidiary companies in different Member States and the directive on the common system applicable to mergers, scission and the contribution of assets effected between companies in different Member States, issued by the Council on...;

Whereas, in order to ensure that breaches of duty on the part of the members of the administrative organs of the European company shall not remain without penalty, it is essential that Member States introduce into their criminal law appropriate uniform provisions for dealing with punishable offences; and whereas it is necessary that all Member States should prescribe penalties for the same offences and only for those offences, in order to avoid disparities prejudicial to uniformity of status,

Has adopted this Regulation.

TITLE I

GENERAL PROVISIONS

Article 1

1. Commercial companies may be incorporated throughout the European Economic Community as European companies (Societas Europea "S.E.") on the conditions and terms set out in this Regulation.

2. The capital of the European company shall be divided into shares. The liability of the shareholders for the debts of the company shall be limited to the amount subscribed by them.

3. The S.E. is a commercial company whatever the object of its undertaking.

4. The S.E. has legal personality. In each Member State and subject to the express provisions of this Statute it shall be treated in all respects concerning its rights and powers as a société anonyme* incorporated under national law.

Notes on Article 1

1. The new legal form for the Common Market takes the form of a *société anonyme**. There were various reasons for this. On the one hand, it appeared substantially correct to develop this new form in the form of a company known to and familiar in all the Member States. On the other hand, the undertakings likely to be involved in international concentration are *sociétés anonymes**. The unification of such companies in various Member States, whether by merger, formation of a holding company or partial merger of divisions of enterprises into a joint subsidiary, will be best effected in a legal form which is the same as that of a *société anonyme**.

2. The European company has legal personality. It has exclusive title to the rights attached to its name; it is exclusively liable for commitments entered into in its name. The shareholders are liable, in principle, only to the extent of their subscription. As this subscription must be paid up in full at the time of formation of the company, the European company will be fully solvent *ab initio*.

3. In law, the European company will be a commercial company in all the Member States; this means that, whatever its object, it will be subject to the commercial law of the Member States where this applies by virtue of this Statute. This will be the case as regards the law applicable to businesses, general legal jurisdiction, insolvency and insolvency procedure.

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* See translator's note on page 6.

4. The Statute requires the Member States to treat the European company in the same way as national *sociétés anonymes*.* So far as concerns the right of the company to enter into various types of operation, this includes, without its being expressly stated in the Statute, the right to obtain credit, to issue securities and to arrange for their quotation on a stock exchange. Conversely, the Statute confers no privileges on the European company. Undertakings established in the form of a European company and those established in accordance with a particular national law will be subject to the same legal requirements as regards competition.

Article 2

Sociétés anonymes* incorporated under the law of a Member State and of which not less than two are subject to different national laws may establish an S.E. by merger or by formation of a holding company or joint subsidiary.

Article 3

1. An S.E already in existence may itself establish an S.E. by merger or by formation of a holding company or of a joint subsidiary with other S.E.s or with Sociétés anonymes* incorporated under the national law of a Member State.

2. An S.E. may establish a subsidiary in the form of an S.E.

Notes on Articles 2 and 3

1. Merger and formation of a holding company or of a joint subsidiary at international level presuppose that there are in any event at least two undertakings in different Member States. If the founders of European companies are to be undertakings already in existence, it is essential that they already have legal personality according to their national law. This is generally the case, in respect of companies having a share capital, in the Member States. In this category, only *sociétés anonymes*,* for practical reasons, are considered suitable.

There is no reason to fear discrimination against other forms undertaking, in particular the société à responsabilité limitée, the Gesellschaft mit beschränkter Haftung or the società a responsabilità limitata**. If such companies wish to combine on an international level they may be converted into *sociétés anonymes*,* in accordance with their own national law. To accept as founders, companies other than *sociétés anonymes* would add considerably to the difficulties of, on the one hand, the drafting of this Statute and, on the other, the supervision by the Court of Justice of the European Communities of the formation of an S.E. The Statute would necessitate lengthy regulations to take account of all the legal forms which exist under the laws of the various Member States. The Court of Justice could not confine itself, when examining into the formation of an S.E., to checking whether one of the founder companies is a duly constituted *société anonyme*.* In the face of such difficulties, it seemed proper to require conversion of such undertakings and to accept, in this context, only the legal form of a *société anonyme*.

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* See translator's note on page 6.

** These terms of company are hereinafter referred to only in the expression "société à responsabilité limitée" or in the plural thereof where the context so requires.

Lastly, for the sake of certainty in the law and for technical reasons, it was not possible to provide for the conversion into an S.E. of companies incorporated under a national law and already operating in a number of countries through branches having no legal personality. Indeed, such a possibility would rest on the assumption that one could define the exact criteria for deciding whether establishments outside the country where the head office is situated are to be regarded as true branches; there would arise further difficulties in connection with the legal scrutiny of formation and, in practice, it would be necessary to provide that if the required conditions were not satisfied, the purported formation would be invalid. It is, therefore, preferable to make the power to establish an S.E. dependent on the existence of subsidiaries formed as companies in accordance with a national law.

2. Merger by formation of a new company means, in the present context, amalgamation of two or more companies limited by shares, to form a new legal entity. The founder companies cease to exist. The purpose of the merger, which is to establish a European company, precludes recourse to the other recognized form of merger, namely, merger by takeover.

Within the meaning of this Article, a holding company is a company which does not itself engage in economic activity but which holds all the shares in the capital of *sociétés anonymes** incorporated under the law of one of the Member States and engaged in such activity. The Statute requires one hundred per cent ownership. To achieve this, the Statute requires the transfer to the holding company, constituted as a European company limited by shares, of all the shares held by the shareholders of the founder companies (Article 29). The shareholders of the founder companies become *ipso facto* (Article 33, paragraph 5) shareholders of the holding company.

3. An existing S.E. may also participate in the formation of another S.E. by merger or in the creation of a holding company or of a joint subsidiary (Article 3). In addition, an S.E. may, in contrast to *sociétés anonymes** incorporated under a national law, itself establish a subsidiary (Article 3, paragraph 2). There is no reason for prohibiting a European company from establishing a subsidiary having the same legal form as the parent company.

Article 4

The capital of an S.E. shall amount to not less than:

500 000 units of account in the case of merger or formation of a holding company,

250 000 units of account in the case of formation of a joint subsidiary,

100 000 units of account in the case of formation of a subsidiary by an S.E.

Note on Article 4

The fixing of a relatively high minimum capital is justified by the fact that the company to be formed will be multi-national in character. Companies so constituted will be in a stronger position to obtain credit.

* See translator's note on page 6.

The different types of constitution require different amounts of minimum capital. For mergers and for formation of holding companies by *sociétés anonymes** incorporated under national law or by existing S.E.s, resulting in the existence, in law or in fact, of new, larger undertakings, a minimum capital of 500 000 units of account seems appropriate. For formation of a joint subsidiary, on the other hand, it seemed proper to provide for a much lower minimum capital so as not to prevent activity whose object involves only limited cooperation. Thus, for a European company of this type, a minimum capital of 250 000 units of account is prescribed. In the case of a subsidiary of an S.E., having the legal form of an S.E., half this amount, namely 100 000 units of account, is adequate.

Article 5

1. The registered office of an S.E. shall be situate at the place specified in its Statutes. Such place shall be within the European Community.

2. The Statutes may designate a number of registered offices.

Note on Article 5

In accordance with this Article, the registered office of the S.E. will always be that specified in the Statutes. It must be situated within the territory of the European Economic Community. The location of the registered office has no connection with the location of the actual head office. The reasons for this choice are as follows:

The distinction between the registered office, as specified in the Statutes, and the actual head office is unimportant to the S.E., since it is no longer necessary to have any tie with the law of a Member State. National laws apply, in accordance with Article 7, only to matters which are not governed by this Statute.

Reference to the actual head office as the point of connection involves complications and is barely compatible with the basic concept of the S.E. The S.E. must be able to move its actual head office within the European Economic Community as freely as a company subject to national law can move its actual head office within a State, without having to alter in its Statutes the registered office therein specified.

For an S.E. the fact of having more than one registered office may create difficulties in the matter of legal jurisdiction in cases where this is determined by the location of the registered office. It did not seem possible to include in the regulation, upon this point, special rules as to competence and actions pending, bearing in mind the fact that such rules might entail modifications or additions to the Convention on Jurisdiction and the Enforcement of Civil and Commercial Judgments concluded by the Member States in Brussels on 27 September 1968. It may be necessary to consider the signing of a supplementary protocol giving exclusive jurisdiction, in certain types of action, to the court first seised thereof, to the exclusion of other courts which, by reference to the location of the registered office, would also have jurisdiction.

Article 6

1. For the purposes of this Statute, a dependent undertaking is one which is legally autonomous and on which another undertaking (hereinafter referred to

* See translator's note on page 6.

as the "controlling company") is able, directly or indirectly, to exercise a controlling influence, one of the two being an S.E.

2. An undertaking shall in any event be considered dependent on another when that other has the power, in relation to the first:

(a) to control more than half the votes attached to the whole of the issued share capital;

(b) to appoint more than half of its board of management or of its supervisory body;

(c) to exert, pursuant to contracts, a decisive influence on its management.

3. A controlling influence shall be presumed to exist where one undertaking has a majority shareholding in the capital of another.

4. In calculating the extent of the shareholding of a controlling company there shall be included the shares belonging to a dependent undertaking thereof. The same shall apply to the shareholding of an undertaking acting on behalf of the controlling company or of an undertaking dependent thereon.

Note on Article 6

Paragraph 1 gives a broad definition of the concept of dependence used in this Statute. Detailed interpretation is left to the courts. It is enough, for there to be dependence, that the controlling company has power to exert an influence. The source of this power and the means of exercising it are unimportant to the controlling company. The result is all that matters. It is not necessary that this influence be, in fact, exercised. On the other hand, when an undertaking exerts a decisive and continuous influence on the management of another, whether directly or indirectly, in whatever manner, dependence must be recognized.

Paragraphs 2 and 3 govern certain specific cases. Where paragraph 2 applies, the presumption of dependence is irrebuttable; the presumption arising under paragraph 3 is rebuttable. These provisions will assist the courts in deciding, on the basis of objective criteria, whether a state of dependence exists. The categories of criteria are not closed.

A controlling company has voting power (paragraph 2 (*a*)) in another undertaking, where that power arises by virtue of the holding of shares directly, or of the holding of shares by a dependent company or by an intermediary, and the controlling company, by exercising such voting power, may exert an influence. On the other hand, where a company has undertaken not to use the votes to which it is entitled by virtue of its holding of shares in another company, such votes are not regarded as being at its disposal. Such arrangements sometimes arise in the case of joint subidiaries. The partner who is in the strongest financial position holds the greater part of the capital but undertakes not to use the entire voting power arising therefrom, in order thereby to maintain equality of votes with the weaker partner.

Similarly, as regards the appointment of more than half of the members of the management and supervisory boards, the basis on which the controlling company is able to act is unimportant. Usually the power will stem from the fact of holding shares, but it may well arise under agreements to this effect.

The subject matter of the contracts mentioned in paragraph 2 *(c)* is not relevant. It is not necessary, in particular, that they provide expressly for control of the other undertaking. They must, nevertheless, make it possible for the controlling company to exercise a decisive influence over the dependent company for a certain period of time.

The presumption of dependence under paragraph 3 is rebuttable. A majority shareholding does not necessarily lead to dependence. For example, where an S.E. holds non-voting preference shares in a company incorporated under a national law, there will not be dependence. In such case the presumption may be rebutted. On the other hand, where a company holds the majority of the shares and has also the majority of votes, the irrebuttable presumption arising under paragraph 2 *(a)* applies.

Article 7

1. Save as otherwise provided, matters governed by this Statute, including those not expressly mentioned herein, shall not be subject to the national laws of the Member States. A matter not expressly dealt with herein shall be resolved:

(a) in accordance with the general principles upon which this Statute is based;

(b) if those general principles do not provide a solution to the problem, in accordance with the rules or general principles common to the laws of the Member States.

2. Matters which are not governed by this Statute shall be subject to the national law applicable in the circumstances.

Notes on Article 7

Article 7 defines the sphere of application of the Statute in relation to the laws of the Member States.

1. The Statute is based on the principle that it determines only the questions of law concerning those matters which it governs and settles. This provision is based on Article 17 of the Hague Convention of 1 July 1964 relating to a Uniform Law on the International Sale of Goods. The original French text of that Article reads as follows: "Les questions concernant des matières régies par la présente loi et qui ne sont pas expressément tranchées par elle, seront réglées selon les principes généraux dont elle s'inspire" ("Questions concerning matters governed by the present Law which are not expressly settled therein shall be settled in conformity with the general principles on which the present Law is based").*

2. Where a point of law relates to a matter governed by the Statute but could not be said to be resolved by it, the laws of the Member States are, by the Statute, made applicable thereto. The application of national law by the court seised of the matter would prejudice the uniformity of the law relating to European companies. It will be for the judge to fill this lacuna. To this end the Statute sets out certain binding principles. As the basis of the

* Authentic English language text of Article 17.

judge's decision, the Statute first lays down those general principles on which it is itself based. In this regard, consideration must first be given to the ultimate objectives and principles of the EEC Treaty and, in particular, to the rules prohibiting discrimination on grounds of nationality or establishing the free movement of persons, services and capital. Next will be considered the object and special characteristics of the S.E., as a company having distinct legal personality, the limitations imposed on the right to form such company, the system of normative rules applicable to and the judicial control over its formation, the absence of connection between the registered office and any particular legal system, the nature of this Statute as part of the law of the Community, the appropriate public notices, the principle of universal succession in the case of formation by merger, the principle of equality of treatment of the shareholders, the priority of the interests of creditors over those of the shareholders, the protection of minority shareholders in undertakings within a group, etc.

If the point in question cannot be resolved by application of these principles, the Statute refers the judge first to the general rules and then to the general principles common to the laws of the Member States. The judge must, therefore, settle the matter by a comparative approach, as he does when applying the law of a Member State in a case where neither law nor jurisprudence offer a solution. Reference must initially be made to the general rules applicable in all Member States. Only in the last resort may reference be made to the general principles of the national laws concerned.

3. There remain those matters which are not governed by the Statute. They are thereby excluded and are subject to the law of the Member States. The national law applicable in particular circumstances is not prescribed by the Statute, as this would be outside its province. Moreover, the diversity of cases requiring settlement makes it impossible to prescribe one uniform set of rules covering all eventualities. In principle, the private international law of the court hearing the case will settle the question of which law is to be applied.

4. The Statute thus endeavours to define the boundaries between its own sphere and that of the laws of the Member States by reference to the concept of "matter governed by this Statute". This concept, like all other rules of the Statute, is itself made subject to interpretation by the Court of the European Communities. The guideline for interpretation will be the intention of the Community to create for itself, through the medium of the Statute, a comprehensive and valid form of company having all the characteristics of a *société anonyme*.* Consequently, all questions of company law are governed by the Statute when, according to the principles of comparative law, they are required to be regarded as such. Connected branches of law must also be taken into account for purposes of a broad interpretation. In many cases, matters governed by the Statute will overlap with questions having no connection with company law. In certain cases, a solution will be possible only if a legal action can be severed so that its various parts can be isolated and made subject to the law properly applicable to them. It will be the function of the courts to do this.

Article 8

1. Every S.E. shall be registered in the European Commercial Register at the Court of Justice of the European Communities.

2. The formalities concerning the opening and maintaining of the European Commercial Register shall be laid down in rules prescribed by the Council on a proposal from the Commission.

* See translator's note on page 6.

3. Each Member State shall, in its own country, maintain a register supplementary to the European Commercial Register in which European companies, having their registered office in the territory of that State, shall also be registered. Entries appearing in the European Commercial Register and documents filed therein shall in case of conflict prevail over entries made in or copies issued out of the supplementary register.

4. The European Commercial Register, its supplementary registers and the documents filed therein shall be open to public inspection.

Article 9

1. All notices concerning the S.E. shall be published in the Official Gazette of the European Communities, in the official bulletins of company publications in the Member State in which the S.E. has its registered office, and in a daily newspaper circulating in that State.

2. The publications referred to in the preceding paragraph are hereinafter called "company journals".

3. Where this Statute prescribes a time-limit computed from the date of publication in the company journals, such time-limit shall be computed from the date of publication of whichever of the relevant journals shall last be published.

Article 10

The S.E. shall state on its letters and order forms its registration number in the European Commercial Register, the address of its registered office, the amount of its capital and, if it is the fact, that the company is in liquidation.

Notes on Articles 8 to 10

1. A European company is formed by registration under supervision of a judge and publication of the registered particulars. Every alteration in these particulars must also be registered. Appropriate public notice must be given. It represents an effective protection for the interests of creditors, shareholders and the public. It is particularly necessary for European companies since these will, in principle, come into existence through undertakings in different Member States or will be formed by such companies. New undertakings are required, under the new legal form, to give a standard form of public notice.

2. The media for effecting public notice are the European Commercial Register, with its branches in each Member State, and publication of the registered particulars in at least three newspapers prescribed by law. The register and the documents deposited with it must be

available for inspection by the public. If there arises any discrepancy between the entries, those in the European Register shall prevail.

All notices must also be published in the journals of the S.E.s (Article 9). These will necessarily include the Official Gazette of the European Communities, as well as the official company publications within the Member State in which the registered office of the S.E. is situated and a daily newspaper in that State. The S.E. may publish notice through other media.

3. In certain cases, publication in the company journals determines the date from which a time-limit begins to run. This will run from the date of publication of the last of the journals to appear. The interests of third parties will best be protected in this way.

4. In accordance with the provisions of Article 4 of the first directive dealing with the harmonization of protective clauses in company law, pursuant to Article 54(3 g) of the EEC Treaty, the Statute also requires the S.E. to state on its notepaper and order forms the main characteristics of its corporate status (Article 10).

TITLE II

FORMATION

Title II regulates the formation of European companies. Section One prescribes the general procedure applicable to various types of formation: merger, holding company, subsidiary established by a single European company, whilst the sections which follow take account of the peculiarities of formation of each type.

The Statute comes down on the side of formation under judicial control, with registration of the company in a commercial register (Section One). Then it sets out a system of standard provisions. Judicial control is to be exercised by the Court of Justice of the European Communities. This Court controls the validity of formation of the company. Control is exercised over a series of documents, the most important being the document of constitution, which contains, in addition to the documents necessary for every formation (e.g. the Statutes of the new company, the opening balance sheet and the auditors' report), a statement of the economic reasons for formation of this European company. In certain specified cases, the Court of Justice may refuse registration in the European Commercial Register. If the application meets with no objections, the Court orders registration of the company in the European Commercial Register. The new company acquires legal personality on the day on which notice of its registration is published in the Official Gazette of the European Communities.

The general provisions are completed by particular provisions applicable to formation of each type of company. In the case of formation of an S.E. by merger of *sociétés anonymes** incorporated under national law (Section Two), a draft of the terms of merger contains information relating to the founder companies and proposals for preservation of the rights of creditors and of third parties. The draft terms of merger must be approved by each founder company in General Meeting. The right of appeal in respect of cancellation of these resolutions of approval is governed by special provisions, as are the rights of protection of creditors and of third parties.

In the case of formation of an S.E. holding company (Section Three), the same provisions apply, with the exception of those dealing with protection of creditors and of third parties.

In the case of formation of a joint subsidiary (Section Four), or of a subsidiary of a single European company (Section Five) the only special provision relates to the body which approves the formation. In the first case, the competent body is that provided for by the national laws; where one of the founders is a European company, the Statute stipulates that approval be given by the Supervisory Board. The same applies in the second case.

Section one

General

Article 11

1. Application for registration of the S.E. shall be made to the Court of Justice of the European Communities for registration in the European Commercial Register.

* See translator's note on page 6.

2. There shall be attached to the application:

a) the document of constitution approved by the founder companies, together with its annexes;

b) the Statutes of each of the founder companies.

3. In addition, the application shall comply with the provisions of one of the following Sections of this Title, according to the form of constitution adopted.

Article 12

1. The document of constitution shall contain a general statement to the effect that the formation of the company complies with the conditions prescribed in Title I and shall also state the economic reasons for its formation.

2. There shall be attached to the document of constitution:

(a) the Statutes of the S.E.;

(b) the opening balance sheet of the S.E. with explanatory notes;

(c) the auditor's report;

(d) the composition of the first Board of Management and of the first Supervisory Board, where this does not appear in the Statutes.

3. The document of constitution and annexes mentioned in paragraph 2 *(a)* and *(d)* shall be authenticated by notarial act.

Article 13

The Statutes of the S.E. shall state at least:

(a) the name of the company, with the suffix "S.E.";

(b) the address of the registered office;

(c) the precise object of the undertaking;

(d) the amount of the capital, the nominal value and number of the shares, specifying whether they are bearer or registered shares, and, where there are different classes of shares, a description of each class;

(e) the accounting currency of the company;

(f) the period for which the company is formed, where this is fixed.

Article 14

1. The opening balance sheet of the S.E. and the accompanying explanatory notes shall comply with the requirements of this Statute relating to the balance sheet and to the explanatory notes contained in the annex to the annual accounts.

2. The explanatory notes shall show the approximate total expenses borne by the S.E. in respect of its formation and of matters incidental thereto.

3. The explanatory notes shall in addition contain particulars of the capital subscribed in kind, state its value and the names of the persons who subscribed the same and specify the nominal value and class of shares issued in respect thereof.

4. The benefits and special rights granted to each person taking part in the formation of the company shall be fully disclosed in the explanatory notes.

Article 15

1. The auditors' report shall be prepared by one or more auditors appointed by the founder companies.

2. Only persons who are suitably qualified and experienced may be appointed as auditors. They shall have obtained their professional qualifications by satisfying the requirements for admission and by passing a legally organized examination and shall be persons authorized in a Member State to act as auditors of the annual accounts of sociétés anonymes* whose shares are quoted on a stock exchange. Auditors shall be in no way dependent on the founder companies.

3. The auditors' report shall consist of a review of the entire operation of formation and, in particular, of:

(a) the opening balance sheet of the S.E. and the relevant explanatory notes;

(b) the valuation of the capital subscribed in kind;

(c) the payment up in full of the whole of the capital.

Article 16

1. If, within two years of formation, the S.E. shall acquire property owned by a founder company, or by a shareholder of the founder company or of the S.E., and the price shall exceed one tenth of the capital of the S.E., the

* See translator's note on page 6.

purchase shall in addition be the subject of an audit. The provisions of Article 15, paragraphs 1 and 2, shall apply. The purchase shall be subject to ratification by the members in General Meeting. The auditors' report shall be published in the company journals.

2. Paragraph 1 shall not apply if the purchase had already been agreed upon at the time of formation of the S.E. and the explanatory notes to the opening balance sheet dealt with it.

Notes on Articles 11 to 16

1. Articles 11 to 15 specify the documents to be attached to the application to the Court of Justice of the European Communities when an S.E. is to be formed. The principal document is the document of constitution of the new company to be formed. This document must establish that the formation satisfies the conditions set out in Articles 2 and 3 and state the economic reasons which justify the formation of the S.E. (Article 12). To this document of constitution are annexed the Statutes of the S.E., its opening balance sheet with explanatory notes and the auditors' report. These documents are the subject of the provisions which follow, namely Articles 13 to 15.

2. Whilst the first two articles specify what documents are required on formation, those which follow relate to matters of content and form.

2. Whilst the first two Articles specifiy what documents are required on formation, those also be had to the other provisions of the Statute which require the founders to determine certain fundamental matters which also have their place in the Statutes. The corporate name of the European company must include the suffix "S.E." (Societas europea) designed to indicate the special legal status of European companies. The corporate name is protected by law in force on this matter in the contracting States. The accounting currency of the company, as determined by the founders, is included in those matters which comprise the minimum content of the Statutes (letter *e*). The choice of accounting currency determines the currency in which the capital (Article 40) and the nominal value of the shares are expressed and the currency in which the accounts must be kept (Title VI).

3. The opening balance sheet of the new company must be drawn up in accordance with the provisions of the Statute (Article 14). That Article requires that the explanatory notes accompanying the opening balance sheet shall include information as to the anticipated total expenses of formation incurred by the S.E., subscriptions of capital in kind, the value and the names of the subscribers thereof, as well as to the benefits and preferences granted to persons who participated in the formation of the S.E. By publication of the expenses and commitments assumed by the company and of the subscriptions in kind, the Court of Justice should be able to make a realistic assessment of the position of the S.E. at the time of its formation.

4. The opening balance sheet and the accompanying explanatory notes, the valuation of capital subscribed in kind and the payment up in full of the capital are to be the subject of audit in the same way as the entire operation of formation (Article 15, paragraph 3). This is entrusted to auditors who must be totally independent of the founder companies. The Statute goes so far as to stipulate the minimum qualifications which the persons appointed for this purpose must hold; and the matters so stipulated are requisite throughout the entire

sphere of application of the Statute. The Statute requires that such persons give proof of adequate training and experience and were admitted to professional status after passing a special examination, in accordance with the procedure prescribed by the law of the Member States. The criterion adopted in the circumstances is that such examination qualifies the person who passed it to audit the accounts of *sociétés anonymes** whose shares are quoted on a stock exchange. The Statute does not require the founders to be nationals of the country whose legislation governs the founder companies or of the country in which the registered office of the S.E. is situated. The choice of auditors is left to the discretion of the companies. The only condition precedent is that the auditors fulfil the requirements of the Statute as to qualification. It is the function of the Court of Justice of the European Communities to exercise indirect control over these qualifications. If the Court of Justice is doubtful about the qualifications of the auditors, it may appoint auditors of its own choosing to carry out a second audit of the operation of formation, or of any documents, without stating its reasons, at the expense of the founder companies (Article 17, paragraph 2). The result of the auditors' report on the opening balance sheet and on the accompanying explanatory notes is published in the company journals (Article 18, paragraph 2).

5. In practice, capital may be subscribed in kind even after formation of the S.E. This practice involves the risk of overvaluation and may thereby operate to the disadvantage of the new company and its shareholders. Accordingly, Article 16 specifies, in accordance with the draft of a second directive, prepared pursuant to Article 54, (3)*(g)* of the Treaty establishing the EEC, that if within two years of formation the S.E. acquires property owned by one of the founder companies, by one of the shareholders thereof, or by a shareholder of the S.E., and if the price exceeds one tenth of the capital of the S.E., the acquisition must also be audited. The acquisition must, further, be approved by the General Meeting. There is no need for an audit or for approval in General Meeting if the acquisition had already been agreed at the time of formation of the S.E. and attention had been drawn to it in the explanatory notes accompanying the opening balance sheet.

Article 17

1. The Court of Justice of the European Communities shall examine whether the formalities required for formation of the S.E. have been complied with. A procedural regulation shall prescribe the conditions of this examination.

2. For purposes of this examination, the Court of Justice may, without stating its reasons, obtain the assistance of a qualified accountant, at the expense of the founder companies.

3. The Court of Justice shall refuse registration in the European Commercial Register in the following cases:

(a) the company has not been formed in accordance with this Statute;

(b) the document of constitution or its annexes are incomplete;

(c) the Statutes do not comply with the provisions of this Statute;

(d) the auditors' report does not establish that subscription of the whole of the capital is certain and, in particular, that the value of the capital subscribed

* See translator's note on page 6.

in kind is at least equal to the nominal value of the shares issued in consideration thereof.

4. The Court of Justice is authorized to obtain from the founder companies all the information it may require. It may give them an opportunity to supplement or correct their applications.

5. If the Court of Justice finds no reason to refuse or to defer registration it shall order registration of the S.E. in the European Commercial Register and shall forward to the Registry the application made by the S.E., accompanied by its document of constitution and the annexes thereto.

Article 18

1. There shall be registered in the European Commercial Register:

(a) the name of the company;

(b) the address of the registered office;

(c) the object of the undertaking;

(d) the amount of the capital;

(e) the names of the members of the Board of Management;

(f) a statement of the type of constitution as defined in Articles 2 and 3;

(g) particulars of the founder companies;

(h) the titles of the company journals.

2. The registration and the particulars prescribed in paragraph 1, together with the conclusions contained in the auditors' report, shall be published in the company journals.

Note on Articles 17 and 18

Examination by the Court of Justice of the European Communities of the validity of formation is the matter of underlying importance in the formation procedure. This Court was selected to carry out the legal supervision of formation because it is essential that a central court ensures, on a uniform basis wherever the Statute applies, that the prescribed conditions for formation of undertakings in a standard legal form are observed. Article 17 lays down the powers of the Court of Justice. It has wide powers of assessment. It is empowered to obtain from the founder companies all information which it considers necessary. Before making its decision, it may allow the founder companies the opportunity of supplementing or rectifying their application and, above all, upon examining into the formation, may enlist the services of an auditor of its own choosing, at the expense of the founder companies and without stating its reasons. In this way the validity of the examination of the company to be formed and the uniformity of the examination are ensured.

Paragraph 3 sets out the grounds upon which the Court of Justice may rely for refusing registration of the company in the European Commercial Register. Only when the Court of

Justice finds that the formation of the European company is proper in all respects so far as concerns the type and form proposed, and that there is no reason to refuse registration, does it order registration in the European Commercial Register.

Article 18 specifies the matters to be registered and to a large extent corresponds to the provision which determines the content of the Statutes; but it confines the matters to be registered to essentials. Some of these matters appear in the Statutes, but there should be added, for example, an indication of the type of company formed, the names of the founder companies and the names of the company journals. This information, together with the result of the auditors' report, is published in the company journals.

Article 19

1. The S.E. shall have legal personality from the date of publication of its registration in the Official Gazette of the European Communities. As from that date, it shall be treated as having been properly formed in all respects.

2. Any person acting in the name of the S.E., prior to the date of publication, shall be personally liable in respect of his acts; where several persons have acted together, they shall be jointly and severally liable.

Note on Article 19

The S.E. acquires legal personality on the date on which its registration is published in the Official Gazette of the European Communities. So far as the public is concerned, the company exists only from the date of publication of registration in the Official Gazette. Publication of the essential particulars of the new company (Article 18, paragraph 2) enables creditors and future shareholders to make an assessment of the European company. The date of publication in the Official Gazette of the European Communities is ascertainable beyond doubt. This criterion is conclusive. Moreover, this avoids the difficulty of the period between registration and publication that would arise if the company were to acquire legal personality on the date of entry in the commercial register. Any person acting in the name of the company prior to publication of registration is personally liable for his acts.

Article 20

1. For a period of three years from the date of registration of the S.E. in the European Commercial Register, the founder companies and the persons responsible therefor shall be jointly and severally liable to the S.E. and to third parties for any omission or inaccuracy in the particulars included in the application.

2. The founder companies and the persons responsible therefor shall not be liable under paragraph 1 if they had no knowledge of such omissions or inaccuracies and could not have acquired knowledge thereof by exercising the standard of care incumbent on a prudent businessman. In this context, matters

which are within the knowledge of persons responsible for a founder company shall be deemed to be within the knowledge of the company.

3. For a period of three years from the date of registration in the European Commercial Register, the auditors shall be jointly and severally liable to the S.E. and to third parties for any omission or inaccuracy in their report, unless they show that they have exercised the standard of care required in the practice of their profession.

Note on Article 20

The provisions of this Article complete the protection that wide publicity affords to future shareholders of the S.E., its creditors and third parties. The founder companies and the persons responsible for them, as well as the auditors, are jointly and severally liable to them for three years in respect of any omission or inaccuracy in the particulars contained in the application or in the auditors' report. The concept of "persons responsible" defines in general terms the persons acting on behalf of the founder companies, within the meaning of the legislation in their country. In making these persons liable, the basis of liability is broadened and personalized. The said persons are primarily liable; their liability is not secondary to that of the founder companies. They remain liable even where, as in the event of merger, the founder companies cease to exist. They are released from liability when they prove that they have observed the standard of care proper to the exercise of their profession.

Section two

Formation by merger

Article 21

Where an S.E. is formed by merger of sociétés anonymes*, the entire undertaking of the founder companies, including their assets and liabilities, shall be transferred, in exchange for the issue to the shareholders of the merging companies of shares in the S.E. and, if appropriate, an equalization payment in cash not exceeding 10% of the nominal value of the shares so issued.

Article 22

1. The founder companies shall prepare a draft of the terms of merger, containing:

(a) the draft document of constitution provided for in Article 12 and its annexes;

(b) the terms covering the exchange ratio of shares in the founder companies for shares in the S.E.;

* See translator's note on page 6.

(c) the basis of ascertainment of such share exchange ratio, duly approved by the auditors;

(d) particulars of issue of the S.E. shares;

(e) proposals as to the manner in which the rights of creditors are safeguarded;

(f) proposals as to the preservation of the rights of third parties (not being shareholders) to profits.

2. The following shall be annexed to the draft terms of merger:

(a) the Statutes of the founder companies brought up to date;

(b) the balance sheets and profit and loss accounts for the last three financial years of each of the founder companies; the last balance sheet shall have been drawn up as at a date not more than six months earlier than the date for which the first General Meeting provided for in Article 24 is convened; if drawn up as at an earlier date, it shall be redrawn as at the date of the first day of the second month preceding the date for which the General Meeting is convened. It shall not be necessary to draw up a fresh inventory. The values shown in the last balance sheet shall merely be altered to agree with the amendments in the books. However, depreciation and reserves for the intervening period shall be taken into account, together with any material change in the true value not shown in the books.

Article 23

The auditors are authorized to obtain from merging companies all information and documents which they consider useful, and to carry out all necessary investigations.

Article 24

1. The draft terms of merger shall be approved in General Meeting by each founder company. The resolution of approval shall satisfy the same conditions as are prescribed in the case of a resolution for winding up of the founder company. However, at a first General Meeting the quorum required shall not exceed one half of the shares carrying the right to vote; and at a second General Meeting the quorum shall not exceed one quarter of such shares. The majority required for the passing of a resolution of approval shall not exceed three quarters of the votes cast at the General Meeting. If the national law does not provide for a quorum, it shall not be permissible to require for the passing of the resolution of approval a majority exceeding three quarters of the votes cast and four fifths of the share capital represented.

2. From the date of convening of the General Meeting, the founder companies shall forthwith supply at the request of any interested person, upon payment of the cost price, a copy of the draft terms of merger and of its annexes. A note to this effect shall appear in the notice of General Meetings. The notice of meeting shall state, further, that only those shareholders who vote against the resolution in General Meeting and cause their dissent to be recorded in the Minutes may propose that it be withdrawn.

3. At least one month's notice of General Meetings shall be given.

4. Provided that the national law does not require more extensive information to be given to shareholders, each of them shall receive such information as he may request at the General Meeting upon essential points to enable him to make an assessment of the merger, including information relating to the other companies with which the merger is to be effected.

5. Minutes of General Meetings of the founder companies shall be drawn up by notarial act.

6. Minutes of General Meetings shall be filed without delay and at the latest within the two weeks following the General Meeting at which a decision has been taken, for inspection, free of charge, by any interested person. They shall be filed at the place designated by the national law of each of the founder companies for filing of their Statutes. Any shareholder or third party shall, as provided in Article 22, paragraph 1, be entitled to obtain, on request, a complete copy of the Minutes at cost price.

Article 25

1. Resolutions of General Meetings may be challenged only by shareholders who voted against the resolution at the General Meeting and caused their dissent to be recorded in the Minutes. Legal proceedings, whatever the cause of action, shall be commenced in the competent national court within one month of the passing of the resolution.

2. The Court of Justice of the European Communities may, on the application (which shall specify the reasons therefor) of a shareholder who was unable to take the action referred to in paragraph 1, after hearing the founder companies and before registration of the S.E. in the European Commercial Register, grant him an extension of time in which to commence proceedings in the competent national court for cancellation or declaration of nullity of the resolution provided that *prima facie* evidence be produced to the Court of Justice that a breach of the fundamental provisions of the Statutes or of the relevant national law has occurred.

3. The Court of Justice of the European Communities shall not forward the applications of the S.E. to the European Commercial Register for registration until final judgment has been given in proceedings for cancellation or for a declaration of nullity.

4. Resolutions of General Meetings shall not be challenged after the date on which registration of the S.E. in the European Commercial Register was published in the Official Gazette of the European Communities.

Article 26

Minutes of General Meetings together with certificates of filing thereof shall be annexed to the application of the S.E. to the Court of Justice of the European Communities.

Article 27

1. The creditors and third parties mentioned in Article 22, paragraph 1, subparagraphs *(e)* and *(f)* may, if they consider that their rights are curtailed by the merger, oppose the same in the Court of Justice of the European Communities within the two months following the filing of the Minutes, as provided for in Article 24, paragraph 6, stating the reasons on which they base their opposition. Until this period has expired, the Court of Justice shall not direct registration of the S.E. in the European Commercial Register.

2. If the Court of Justice of the European Communities, after hearing the founder companies, considers the opposition justified, it may require the founder company concerned to provide suitable sureties.

Article 28

1. Registration of the S.E. in the European Commercial Register shall be published in the company journals. The merger shall in addition be registered and published in manner required by the provisions of the national law governing the dissolution of the founder companies.

2. The founder companies shall cease to exist, without liquidation, on the date on which publication as aforesaid shall have been made in the Official Gazette of the European Communities. As from that date, the liability of the S.E. shall be substituted for that of the founder companies.

3. By virtue of publication, the shareholders of the founder companies shall become shareholders of the S.E.

4. After publication of the dissolution of the founder companies as provided for in paragraph 1, the commercial registers or the courts within whose jurisdiction the registered offices of the founder companies are situated shall automatically forward the documents of constitution and other documents in their possession to the supplementary registers of the European Commercial Register in the country in which the founder company concerned had its registered office.

Notes on Articles 21 to 28

1. Section Two regulates the formation of a European company by merger of *sociétés anonymes** incorporated under national law. The Statute is based on the principle of universal succession (Article 21). In consequence of the merger of the founder companies, all the assets of the founder companies are transferred to the new company being formed. The S.E. succeeds to all the rights and obligations of the founder companies. It is not necessary to draw up acts of transfer for each asset to be transferred.

2. For shareholders, the merger takes the form of an exchange of shares in the founder companies for shares in the S.E. to the same value as those formerly held. To facilitate this exchange a balancing payment in cash may be made but in order to protect creditors, only within certain limits (Article 21).

3. To give interested parties a true picture of the founder companies by merger whereof the S.E. will come into existence, such companies must draw up draft terms of merger to which must be annexed, in addition to the document of constitution and the other prescribed annexes, the balance sheets and profit and loss accounts relating to the three preceding financial years of each founder company (Article 22, paragraph 2(b)). The managements must ensure in this respect that the annual accounts reflect the up-to-date position of the books of account in manner provided for by the Statute. Moreover, the basis of ascertainment of the exchange ratio of the shares concerned, duly approved by the auditors, must also be annexed. The basis of ascertainment of the share exchange ratio (Article 22, paragraph 1(c)) is to include the equalization payment in cash, which must be fixed within reasonable limits.

4. Articles 24 and 25 regulate the procedure for approval by the General Meeting of the founder companies and the extent of the right to take legal proceedings for cancellation of the resolutions of approval. In principle, it is the national law governing the founder companies which regulates the procedure for approval. The Statute refers back to the provisions of the national law which govern the dissolution of the companies. But the Statute itself determines the upper limit of the quorum and of the majority required. If it were otherwise, the provisions of national laws could easily make the establishment of companies in the new legal form very much more difficult.

Shareholders must be given a wide range of information concerning the proposal of merger. This accounts for the limitation, to a certain degree, of the right of appeal for cancellation of the resolutions of approval. The management's proposals must not take the shareholders unawares. The shareholders must have the opportunity of studying the proposals in full detail, in preparation for the General Meeting at which the formation is to be approved. Shareholders and all interested parties are entitled, against payment of the actual cost, to be supplied with a copy of the proposed terms of merger and its annexes. The expression "interested party" means any person able to prove that his financial interests

* See translator's note on page 6.

are such as to justify his having access to the documents in the matter. At the General Meeting, the shareholders must be given full information on all material points to enable them to form a judgment on the merger, including matters concerning the company with which the merger is to be effected. Finally, the shareholders and all interested parties are entitled, after the General Meeting, to inspect free of charge the Minutes thereof, drawn up by notarial act.

5. The right to extensive information lies at the root of the provisions dealing with the right to take proceedings for cancellation of the resolutions of approval (Article 25). Only a shareholder who voted against the resolution at the General Meeting has the right to apply for cancellation thereof. To reduce as much as possible, in the interests of the proposals, the period of uncertainty during which proceedings for cancellation of the resolution of approval may be brought, the Statute specifies that such proceedings must be commenced within the relatively short period of one month. In view of the information supplied, this period should suffice for shareholders to form an opinion and act accordingly.

Article 25, paragraph 2, preserves the rights of a shareholder who, through no fault of his own, has not been able to record a dissentient vote at the General Meeting or to apply for cancellation within one month of the resolution. This, of course, is a matter which is in the discretion of the Court of Justice of the European Communities. It is for the Court of Justice to decide whether the rights of the shareholder have been violated or whether it is a question of an attempt wrongfully to prevent the merger. As to the merits, it must appear that there has been breach of the material provisions of the Statutes of the founder company concerned or of the national law applicable. It will be sufficient if *prima facie* evidence is produced to the Court of Justice. If the conditions prescribed by this provision are satisfied, the Court of Justice may grant to the shareholder a period of time in which to institute proceedings for cancellation or for nullity in the appropriate national court. The instigation of proceedings of this kind will suspend registration of the S.E. in the European Commercial Register. Where registration of the S.E. in the European Commercial Register has been published in the Official Gazette of the European Communities, in consequence of judgment following upon the exercise of the legal rights aforesaid, the resolutions of approval passed by the General Meeting may no longer be the subject of proceedings for cancellation. Any national law to the contrary does not apply. It is necessary to have such a rule so that the existence of the S.E. cannot subsequently be put in doubt.

6. The founder companies cease to exist upon merger. Care must be taken to ensure that the rights of the companies' creditors or of third parties having claims on the profits are not impaired by legal act effected in the interests of the founder companies. For this reason the founder companies are required by Article 22, paragraph 1(e) and (f), to make proposals in the draft terms of merger for the preservation of such rights.

If the persons concerned do not agree these proposals and consider that the proposed merger will adversely affect their rights, they can neither impede the progress of the operation nor have it postponed because of their opposition (Article 27). The Statute provides that the rights of creditors and of third parties who have claims on the profits will be adequately protected by virtue of their right of recourse to the Court of Justice of the European Communities, which, if it thinks fit, may make registration of the S.E. in the European Commercial Register conditional upon the execution of satisfactory guarantees. These provisions afford a practical means of arrangement of the interests involved. The rights of interested parties and the interests of the founder companies and their shareholders in the speedy completion of the merger must not be endangered.

7. Article 28 reiterates the general rule of Article 18, paragraph 2, by which registration in the European Commercial Register is published in the company journals. Moreover, the merger must be registered and notice thereof given in accordance with the provisions of the

national law governing the dissolution of companies. The Statute also deals with the dissolution of the founder companies. The effective date is that on which the S.E. acquires legal personality, that is, pursuant to Article 19, the date on which notice of registration appears in the Official Gazette of the European Communities, since the founder companies cease to exist at that same instant. All other notices in the company journals, as well as registration of the dissolution of the founder companies and the giving of notice thereof in accordance with the provisions of the national law, are therefore merely declaratory in character. Paragraph 3 specifies, in accordance with the provision relating to dissolution of the founder companies, the date on which the shareholders thereof become shareholders of the S.E.

Finally, paragraph 4 of this Article provides for the transfer of all acts and other documents filed with national commercial registers or courts to the branch of the European Commercial Register in the Member State in which the respective founder companies had their head offices. This ensures their safe keeping and the centralization of all documents relating to former founder companies.

Section three

Formation of an S.E. as holding company

Article 29

1. Where an S.E. is formed as a holding company, all the shares in the capital of the founder companies shall pass to the S.E. holding company in exchange for shares in the S.E. holding company.

2. The founder companies shall continue to exist.

Article 30

1. The founder companies shall draw up a draft document of constitution which shall comply with the requirements of Article 12, paragraph 1. This draft shall contain:

(a) a proposal as to the ratio of exchange of shares in the founder companies for shares in the S.E.;

(b) proposals as to the terms upon which the shares of the S.E. shall be issued;

(c) the basis of ascertainment, duly approved by the auditors, of the ratio of exchange of shares in the founder companies for shares in the S.E.

This draft shall be authenticated.

2. In addition to the annexes provided for in Article 12, paragraph 2, there shall be attached to the draft document of constitution the balance sheets and profit and loss accounts for the last three financial years of each of the founder companies; the last balance sheet shall have been drawn up as at a date not more than six months earlier than the date for which the first General Meeting provided for in Article 32 of the relevant company is convened; if drawn up as at an earlier date, it shall be redrawn as at the date of the first day of the second month preceding the date for which the General Meeting is convened. It shall not be necessary to draw up a fresh inventory. The values shown in the last balance sheet shall merely be altered to agree with the amendments in the books. However, depreciation and reserves for the intervening period shall be taken into account, together with any material change in the true value not shown in the books.

Article 31

The auditors are authorized to obtain from the S.E. holding company all information and documents which they consider useful, and to carry out all necessary investigations.

Article 32

1. The draft document of constitution and its annexes shall be approved in General Meeting of each of the founder companies. The resolution of approval shall satisfy the same conditions as are prescribed in the case of a resolution for winding up of the founder company. However, at a first General Meeting the quorum required shall not exceed one half of the shares carrying the right to vote; and at a second General Meeting the quorum shall not exceed one quarter of such shares. If the national law does not provide for a quorum, it shall not be permissible to require for the passing of the resolution of approval a majority exceeding three quarters of the votes cast and four fifths of the share capital represented.

2. From the date of convening of the General Meeting, the founder companies shall forthwith supply at the request of any interested person, upon payment of the cost price, a copy of the draft document of constitution together with all its annexes. A note to this effect shall appear in the notice of General Meeting. The notice shall state, moreover, that only those shareholders who vote against the resolution in General Meeting and who cause their dissent to be recorded in the Minutes may propose that it be withdrawn.

3. At least one month's notice of General Meetings shall be given.

4. Provided that the national law does not require more extensive information to be given to shareholders, each of them shall receive such information as he may request at the General Meeting upon essential points to enable him to make an assessment of the formation of the S.E. holding company.

5. Minutes of General Meetings of the founder companies shall be drawn up by notarial act.

6. Minutes of General Meetings shall be filed without delay and at the latest within the two weeks following the General Meeting at which the decision was taken, for inspection, free of charge, by any shareholder. They shall be filed at the place designated by the national law of each of the founder companies for filing of their Statutes. Any shareholder shall be entitled to obtain, on request, a complete copy of the Minutes and at cost price.

Article 33

1. Resolutions of General Meetings may be challenged only by shareholders who voted against the draft document of constitution and caused their dissent to be recorded in the Minutes. Legal proceedings, whatever the cause of action, shall be commenced in the competent national court within one month of the passing of the resolution.

2. The Court of Justice of the European Communities may, on the application (which shall specify the reasons therefor) of a shareholder who was unable to take the action referred to in paragraph 1, after hearing the founder companies and before registration of the S.E. in the European Commercial Register, grant him an extension of time in which to commence proceedings for cancellation or declaration of nullity in the competent national court, provided that *prima facie* evidence be produced to the Court of Justice that a breach of the fundamental provisions of the Statutes or of the relevant national law has occurred.

3. The Court of Justice shall not forward the application of the S.E. to the European Commercial Register for registration until final judgment has been given in proceedings for cancellation or for a declaration of nullity.

4. Resolutions of General Meetings shall not be challenged by way of proceedings for cancellation or declaration of nullity after the date on which registration of the S.E. in the European Commercial Register was published in the Official Gazette of the European Communities.

5. By virtue of publication, the shareholders of the founder companies shall become shareholders of the S.E.

Article 34

Minutes of the General Meetings together with certificates of filing thereof shall be annexed to the application of the S.E. to the Court of Justice of the European Communities by the founder companies.

Note on Articles 29 to 34

Section Three regulates the formation of a European company as a holding company. The Statute provides that all the shares of the founder companies pass to the new S.E. (Article 29). As is necessary for the formation of a holding company, the founder companies continue to exist in the legal form prescribed by the relevant national legislation.

In general, the same legal problems arise in the case of formation of a holding company by *sociétés anonymes** as in the case of their merger. The rules contained in the Statute thus run parallel in both cases. Articles 30 to 34 correspond to Articles 22 to 26 save for minor differences concerning the subject matter. Reference should be made to the reasons underlying the provisions of those Articles.

Section four

Formation of a joint subsidiary

Article 35

The document of constitution and the Statutes of the S.E. shall state the names of the founder companies and the amount of the participation of each of them in the joint subsidiary.

Article 36

If one of the founder companies is an S.E., the decision of the Board of Management to participate in the formation of a joint subsidiary shall be approved by the Supervisory Board.

Article 37

The terms of the resolutions of approval shall be communicated with the application of the joint subsidiary to the Court of Justice of the European Communities.

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* See translator's note on page 6.

Note on Articles 35 to 37

The question arose, in connection with the formation of a joint subsidiary, as to whether a document of constitution were necessary for such formation. It was decided in the affirmative. Certainly it makes some difference that an S.E. is formed with the participation of a large number of shareholders, as in the case of merger or formation of a holding company, but that, in contrast, formation of a joint subsidiary is rather a case where the management of undertakings is of opinion that certain parts thereof should be hived off and have separate independent legal status, by formation of such subsidiary. For this purpose, it might perhaps appear that an extensive document of constitution would be too inconvenient and too costly. This argument is not, however, conclusive. The requirement of a document of constitution has been retained for this type of formation since it provides the only means of verification by the Court of Justice that the procedure of formation was properly carried out and of ensuring that the requisite notices are published. Such verification is especially necessary in the circumstances.

The special requirements are that the names of the founder companies and the amount of their shareholdings in the new S.E. must be stated. The Statute provides that approval of the formation of a joint subsidiary must be obtained only where one of the parent companies is an S.E. In such case, it is the approval of the Supervisory Board of that parent company which is requisite. In other cases, reference is made to the national law appropriate in the particular circumstances for the purpose of ascertaining which body has power of approval. This may be the Supervisory Board or the General Meetings or both.

The terms of the resolution of approval must be annexed to the application (Article 37) made to the Court of Justice.

Section five

Formation of a subsidiary by an S.E.

Article 38

1. The document of constitution and the Statutes of the S.E. shall state the name of the founder company.

2. Article 11, paragraph 2 (b), shall not apply.

Article 39

The document of constitution and its annexes shall be approved by the Supervisory Board of the founder company.

Note on Articles 38 and 39

Where a subsidiary is formed by a single S.E., it did not appear necessary to require that the Statutes of the S.E. to be formed be submitted to the Court of Justice of the European Communities. In accordance with Article 38, paragraph 2, the provisions of Article 11, paragraph 2(b), do not apply. The Statute itself specifies which body is competent to approve the document of constitution, i.e. the Supervisory Board of the founder S.E.

The terms of the resolution of approval must be annexed to the application made to the Court of Justice (Article 39).

TITLE III

CAPITAL — SHARES AND THE RIGHTS OF SHAREHOLDERS — DEBENTURES

Title III deals with questions concerning the capital of the European company (Section One), shares and the rights of shareholders (Section Two), debentures issued by the company (Section Three) and other securities (Section Four).

The European company, considered as a type of company, is based on the concept of share capital (Section One). The capital is the total of the amounts subscribed by the members. Thus it represents, on the one hand, security for all the liabilities contracted by the company vis-à-vis third parties. The subscription and maintenance of the capital are, therefore, of the utmost importance in the interests of the creditors. On the other hand, in so far as it is the sum of the shares allotted to the shareholders, it determines the extent of their liabilities and rights. The relationship between these rights is determined by the nominal value of each share. So that the connection between the holding of shares and the rights attached to membership would remain undivided, it was decided that shares having no par value should not be permitted.

The capital must be wholly paid up either in cash or in kind. Payment up of capital by instalments and the maintaining of reserve capital by means of partly paid up shares are prohibited. Subscription of capital in the form of intangible assets is permissible; valuation of these is subject to particularly rigorous examination. Section One governs the increase of capital, the preferential right of subscription enjoyed by shareholders, the creation of approved capital and the reduction of capital. The S.E. is prohibited from acquiring its own shares and from reciprocal shareholding, which is defined as the holding of more than 10 % of the capital of another company. The regulations contained in Section One conform to the draft of a second directive relating to coordination of safeguards required under company law, issued pursuant to Article 54 (3)(g) of the EEC Treaty.

The rights of shareholders (Section Two) are represented by shares of nominal value. The issue of different classes of shares and of shares carrying no voting rights is permissible, but shares carrying multiple voting rights are prohibited. The S.E. may issue bearer shares or registered shares, the transfer of which is dealt with herein.

The important point in Section Three, debentures, is that all the debenture holders constitute a body whose decisions, which must be taken by three-quarters majority, are binding on all of them. This body appoints a representative but has no legal capacity. The issue of securities granting to non-members a right to participate in the profits is not allowed (Section Four).

Section one

Capital

Article 40

1. The capital of the S.E. shall be expressed in European Community units of account or in the currency of one of the Member States.

2. The capital of the S.E. shall be divided into shares. It shall be fully paid up, either in cash or in kind. Return of capital is prohibited, save in the event of a reduction of capital.

3. Capital subscribed otherwise than in cash shall be treated as subscribed in kind. Intangible assets shall be treated as capital subscribed in kind provided that they are transferable.

Note on Article 40

It is consistent with the general definition of a company limited by shares that its capital should be divided into shares. The Statute follows this principle. Only the question of the currency in which the capital and the shares were to be expressed remained to be settled (Article 40, paragraph 1). The Statute does not require that all European companies shall use a common currency.

The founders may choose between the unit of account of the Communities and the currency of one of the Member States. The Statute requires only that the currency selected shall consistently be used in all legal transactions in which money is involved, e.g. for the nominal value of shares, in accounts, and so on.

The Statute requires the capital to be fully paid up, to ensure the financial stability of the new company and its independence of the founder companies. The possibility of taking credit against capital not yet actually subscribed was rejected. As a result, the amount of the capital of the European company assumes greater significance, since it represents, at the time of incorporation of the new S.E., the true value of the assets at its disposal.

Subscriptions in kind are allowed. The form which subscriptions in kind may take, under the Statute, is very wide. Intangibles such as know-how or goodwill are equally acceptable, but not the value of labour. Intangibles are subjected to particularly close scrutiny and must be shown separately in the balance sheet. The separation of these items in the balance sheet affords protection to the creditors and shareholders.

Article 41

1. Any increase of capital shall require a resolution of the General Meeting passed in like manner to a resolution for alteration of the Statutes.

2. The capital shall be increased either by capitalization of available reserves or by subscription of new capital which shall be paid up in full.

3. An increase of capital by subscription of new capital may also be effected by creation of approved capital. This shall not exceed one half the amount of capital specified in the Statutes. Approval may be given for a maximum period of five years, unless the creation of approved capital is contemporaneous with an issue of convertible debentures.

Article 42

1. Where the capital is increased by subscription of new capital, the shareholders shall be entitled to subscribe for new shares in proportion to their existing shareholdings. The Board of Management shall give notice in the company journals of the amount of the issue and of the period within which the right to subscribe shall be exercised. This period shall be not less than one month from the date of publication.

2. In the resolution for increase of capital by subscription of new capital, the General Meeting may exclude, in whole or in part, the right of members to subscribe. This may be agreed upon only where the Meeting has first received a report from the Board of Management giving reasons for exclusion, in whole or in part, of the right to subscribe and for the proposed price of issue. As from the date of notice of the General Meeting, the shareholders shall be entitled forthwith to obtain free copies of this report. A note to this effect shall appear in the notice of Meeting.

3. Where new capital is subscribed wholly or partly in kind, a report as to the value thereof, signed by at least two independent and qualified accountants appointed by the court within whose jurisdiction the registered office of the S.E. is situate, shall be submitted to the General Meeting. As from the date of notice of the General Meeting, the shareholders shall be entitled forthwith to obtain free copies of this report. A note to this effect shall appear in the notice of General Meeting. The provisions of Article 15, paragraph 2, and of Article 203 shall apply to such accountants.

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

Article 43

1. Where approved capital is created, the Board of Management shall each year, in the annex to the annual accounts, give particulars of the manner in which it has been employed.

2. Paragraphs 1 to 3 of the preceding Article shall apply. Shareholders shall be entitled to obtain, with the annex to the annual accounts, free copies of the report mentioned in paragraph 3 of the preceding Article.

3. Where the approved capital has been fully applied or has been used only in part but the period aforesaid has expired, the Board of Management shall, pursuant to the resolution of the General Meeting for creation of approved capital, amend the Statutes, as necessary, to show the increase of capital which has been effected.

Note on Articles 41 to 43

Every increase in capital affects the rights of shareholders. It must, therefore, be the subject of a resolution in General Meeting. As an alteration of the Statutes is involved (Article 41, paragraph 1), the increase is subject to the most stringent conditions required for their alteration: not less than three quarters of the votes validly cast must be in favour of an increase in capital, and the quorum required for a first General Meeting, namely one half of the capital, must be present (Article 243, paragraph 2).

When the capital is increased, the principle of payment up in full applies. If the increase is effected by subscriptions in cash, these must be fully paid up. The same applies to subscriptions in kind. The S.E. may increase its capital by introduction of new capital from external sources and may capitalize its reserves (Article 41, paragraph 2).

The right of shareholders to maintain the proportion of their share in the capital of the company is assured, in the case of an increase through capitalization of reserves, by allotment of new shares; and, where the increase takes the form of subscription of fresh capital, by a rights issue, pro rata, in either case, to their existing holding. When the increase is made by subscription of fresh capital, the General Meeting may suspend, in whole or in part, the preferential right of subscription. To protect the interests of the shareholders, the Statute requires that they be given detailed information, in good time, of the reasons which prompted the Board of Management to propose that such right should be withdrawn. It appeared that the delimitation of interests in this way would provide a suitable safeguard for the interests of shareholders on the one hand, and for the company's freedom of action on the other.

Further, the Statute adopts the legal concept of approved capital (Article 41, paragraph 3, and Article 43). The Board of Management is thereby enabled to react quickly to certain market conditions. The amount of approved capital and the period for which it may be raised are, however, limited. The Board of Management is specifically required to make an annual report concerning this capital. Article 43, paragraph 2, deals with certain matters of detail and makes Article 42, paragraphs 1 to 3, applicable.

Article 44

1. Any reduction of capital shall require a resolution of the General Meeting passed in like manner to a resolution for alteration of the Statutes. The reasons for the reduction in capital shall be specified in the notice of General Meeting.

2. The reduction of capital shall be effected by decreasing the nominal value of the shares. The amount of nominal capital shall not, however, be reduced below the amount of minimum capital. Only when losses have been incurred may the General Meeting resolve to reduce the capital to an amount below that of the minimum capital; the General Meeting shall, at the same time, resolve to increase the capital so that it be raised to an amount equal to or exceeding the minimum capital. This provision shall not be treated as inconsistent with Article 249.

3. When the capital is reduced for the purpose of reconciling the same with the capital of the company as diminished by losses and, in consequence of the

reduction, the assets are in excess of the liabilities, the balance shall be entered in a reserve account. For a period of three years, this reserve shall not be used for the purpose of distribution of dividends.

Note on Article 44

Both reduction and increase of capital affect the very basis of the company. They entail alteration of the Statutes and consequently necessitate the passing of a resolution to that effect by the General Meeting, the prescribed conditions applicable to which must be complied with (Article 243). The notice convening the General Meeting must set out for the benefit of the shareholders the reasons for the proposed course of action.

Technically, the reduction of capital is effected by decreasing the nominal amount of the shares. As a result of the functional link between the amount of the shares and the capital of the company, a reduction of the former results in a reduction of the latter. The limit below which a reduction in capital must not go is the amount of the minimum capital specified in the company's Statutes. Only when a reduction of capital is immediately followed by an increase up to the level of, or beyond, the minimum capital may this lower limit be exceeded. This method of reconstruction is also permissible and currently employed under national company laws. However, the right of the General Meeting to wind up the company remains intact.

If any financial loss obliges the company to alter its capital to reflect the true value of the assets, the reduction must not be effected in such a way that an accounting surplus results which could be used for the purpose of making a distribution. Accordingly, the difference between the totals of the assets and liabilities, resulting from the reduction of capital, may not be used for payment of dividends but must be carried to reserve and remain frozen for a period of three years.

Article 45

1. Creditors who consider that their rights are prejudiced by the reduction of capital may, within two months of filing of the Minutes of the General Meeting, apply to the court within whose jurisdiction the registered office of the company is situate.

2. The court within whose jurisdiction the registered office of the company is situate may, if satisfied as to the merits of the application, order that some or all of the creditors be paid off, or that appropriate security be given in their favour. The alteration of the Statutes shall not be forwarded for entry in the European Commercial Register before the expiration of two months from filing of the Minutes of the General Meeting.

Note on Article 45

A reduction of capital may affect the security of creditors. Their security may be reduced. Special regulations for their protection are, therefore, needed. These follow the provisions of the Statute relating to formation of an S.E. by merger of national *sociétés*

*anonymes** (Article 27). The relationship of interests is approximately the same. There is no place, however, for the Court of Justice of the European Communities to intervene, as no question of formation arises. Creditors may not oppose a reduction of capital; but they may apply to the court within whose jurisdiction the company's registered office is situate for the purpose of obtaining payment or the provision of appropriate security in respect of the sums due to them. The manner in which the creditors are protected is left to the discretion of the court.

Article 46

1. The acquisition of shares in the S.E. by the S.E. itself, by third parties on behalf of the S.E. or by undertakings controlled by the S.E. is prohibited. This prohibition extends to the taking of any pledge of shares of the S.E.

2. When an undertaking passes into the control of an S.E. in which it holds shares, it shall dispose of them within one year from the date upon which it passes into such control. In the meantime, the shares shall confer no rights on the controlled undertaking. The same rule shall apply in the case of merger.

Note on Article 46

The Statute prohibits the S.E. from acquiring its own shares, whether directly or indirectly.

The acquisition of its own shares is tantamount to concealed repayment of capital subscribed, which is not permitted. It also operates as a reduction of capital without the safeguards prescribed by law for creditors in such circumstances. It would also be possible for certain shareholders to be treated preferentially. For these reasons, the Statute has come down in favour of prohibiting the S.E. from acquiring its own shares, and has discarded compromise solutions. Genuine financial requirements which could be met in a particular case by the acquisition of its own shares by the company may also be met by creating approved capital. This applies in particular to membership of the company on the part of the workers by means of employees' shares.

All forms of indirect acquisition of its own shares are also prohibited. The prohibition also covers acquisition by creation of a state of dependence between an undertaking and an S.E., or by merger of several companies. Article 6 defines "dependence". Where dependence exists, in which case the position is the same as that which results from the direct acquisition of its own shares, the S.E. is required to dispose of the said shares within one year.

Article 47

1. Reciprocal shareholding is prohibited when one of the undertakings is an S.E.

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* See translator's note on page 6.

2. Reciprocal shareholding shall be deemed to exist where each company holds, either solely or jointly with others, whether directly or through a company controlled by it or through third parties acting on its behalf, more than 10% of the capital of the other.

3. Where there is reciprocal shareholding, the company whose holding of shares is the smaller shall reduce its holding to 10% within one year from the date on which such companies become aware of the reciprocal shareholding, unless, within the like period, they agree some other method of terminating the reciprocal shareholding. If the shareholdings are equal, both companies shall satisfy this obligation. However, where a company acquires a shareholding of 10% or more, or increases its holding to that percentage after having been informed by the other company that it has a 10% holding, the duty of disposal shall fall on the former.

4. After expiration of the period specified in the preceding paragraph, no rights accruing to the holder of the shares shall be exercised if the holdings are in excess of 10%.

5. An S.E. which holds, either solely or jointly with others, whether directly or through a company controlled by it or through third parties acting on its behalf, more than 10% of the capital of a company shall forthwith give notice in writing to such company of this shareholding and of any change therein, stating the exact amount. Every company whose shareholding in an S.E. reaches this level shall be under the like obligation. Until such notice be given, no rights accruing to the holder of such shares shall be exercised, if the holding exceeds 10%.

Note on Article 47

The Statute not only prohibits the S.E. from holding its own shares; it prohibits any reciprocal shareholding, whether direct or indirect. The risk to creditors and to those shareholders who take no part in the matter is similar in both cases.

The Statute prescribes the minimum percentage at which reciprocal shareholding is deemed to exist. The possibility of oversight concerning the property of the company is recognized so long as the holding of shares does not exceed 10 %. The Statute prohibits any interrelation, over and above that percentage, whether direct or indirect, between the capital of undertakings, when one of the companies concerned is an S.E. Where reciprocal shareholding exists it must be terminated in accordance with the provisions of the Statute. These are based on the principle that the company holding the smaller percentage must reduce it to the approved proportion. An S.E. with a holding in excess of 10 % in the capital of another company, and any other company whose holding in the capital of an S.E. reaches this limit, must notify the other company accordingly. This system of notice should ensure the effectiveness of the prohibition of reciprocal holdings and also help keep each company informed of any sizable participation by other companies in its capital.

Section two

Shares and the rights of shareholders

Article 48

1. The nominal value of the shares shall be expressed in the same currency as the capital.

2. Shares of different nominal value may be issued.

3. Shares are indivisible. Where more than one person holds a share, the rights deriving therefrom may be exercised only by one common representative.

Article 49

1. Shares may carry different rights in respect of distribution of profits and assets of the company. Promises to pay or payment of fixed interest are prohibited.

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

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

(b) they shall confer all the rights of a shareholder, save only the right to vote; they shall carry the right to subscribe only for non-voting shares;

(c) they shall not be included in computing a quorum or a majority required by this Statute or by the Statutes.

The foregoing provisions of this Article are without prejudice to paragraph 5 of this Article or to paragraph 2 of Article 235.

3. Shares carrying multiple voting rights are prohibited.

4. Shares carrying the same rights shall constitute one class of shares.

5. A resolution of the General Meeting varying the relationship between different classes of shares to the detriment of one class shall be valid only if approved by the holders of the shares of that class. In such a case, holders of non-voting shares shall be entitled to vote. The provisions of Title VIII shall apply in regard to convening, quorum and majority.

Note on Articles 48 and 49

The Statute provides for the issue of shares of nominal value. In so doing, it adheres to the fundamental concept that the capital of the company constitutes the core of the company's structure, and it declines to permit shares of no par value. The nominal value creates an indissoluble relationship between the share, as the embodiment of the rights of the shareholder as a member of the company, in particular the right to vote, and the capital of the company as specified in its Statutes. Shares of no par value would eliminate this functional relationship and, by departing from the premise that the capital lies at the heart of the company, would require an entirely different concept of the company. The Statute satisfies those requirements of the company which might be met by the issue of shares of no par value by not stipulating a minimum nominal value. Thus the share capital may be divided into a very large number of shares. The nominal value may be the smallest monetary unit in any of the relevant national currencies or the unit of account of the European Communities, excluding decimal subdivisions. The notion that the share itself is indivisible and that several joint holders must exercise their rights therein through a single representative is inherent in the nature of the share as the embodiment of the right of participation.

In these matters, apart from the prohibition of the issue shares carrying multiple votes, which may adversely affect the relationship between the employment of risk capital and the right of vote (Article 49, paragraph 3), the Statute allows great freedom of action. The founders may issue shares of different nominal value (Article 48, paragraph 2), carrying different rights of participation in profits and assets (Article 49, paragraph 1), carrying no voting rights (Article 49, paragraph 2), or a combination of various possibilities, e.g. preference shares with no voting rights.

The Statute imposes no limitation on the granting of preferential rights, except that they must relate to the assets of the company. Thus the creation of preference shares whose holders enjoy the exclusive right of nomination for appointment of members of the administrative organs of the company, as is the case in the Netherlands, is not permitted. The issue of shares carrying no voting rights is also subject to certain limitations since, as is the case with shares carrying multiple voting rights, they involve the danger that the functional relationship between capital subscribed and the right to vote may be undermined. The issue of such shares is, accordingly, permissible only up to an overall nominal value equal to one half of the capital of the company.

Shares conferring the same rights constitute one class of shares; to safeguard their interests, holders of shares of the same class are granted the right, by separate vote, to approve a resolution of the General Meeting varying the relationship existing between the classes of shares to the detriment of that class. In such a case, the holders of non-voting shares are entitled to vote. In default of their approval, the resolution of the General Meeting is void. It must be borne in mind that the resolution of the General Meeting constitutes an alteration of the Statutes, in view of the fact that the relationship between the several classes of shares must be set out as part of the minimum content of the Statutes (Article 13). Thus a resolution of the General Meeting as such must comply with the conditions prescribed for any alteration of the Statutes (Title VIII).

Article 50

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

2. Registered shares shall be recorded in the company's share register together with the name and address of the holder. Access to the information contained in the share register shall be given to any shareholder at his request.

Article 51

1. Every shareholder shall be entitled to receive a certificate for each of his shares, free of cost.

2. Pending the preparation of the certificates, the company shall, if so requested by the shareholder, issue provisional certificates. Such certificates shall be in registered form.

3. Where, in consequence of any change in the legal position, certificates issued have become inaccurate, the Board of Management may, following a request to the holders to this effect, declare void any such certificates that are not submitted for rectification or exchange. Certificates declared void shall be replaced by new certificates.

4. If a certificate has so deteriorated that it is no longer suitable for circulation, the shareholder shall be entitled, provided that the material content of the certificate remains legible, to request the issue to him by the company of a new certificate in exchange for the old. The shareholder shall pay the costs in advance.

5. When a certificate is lost or destroyed, the shareholder may apply to the court within whose jurisdiction the registered office of the company is situate for cancellation of the certificate and for delivery of a new certificate in its place. The applicant shall cause to be published, in the company journals, a public notice requesting any interested person to notify within three months his actual or potential rights in respect of the certificate. As to any other matter arising in connection therewith, the provisions of the national law of the country in which the registered office is situate shall apply.

6. The provisions of this Article shall apply to provisional certificates.

Article 52

Bearer shares shall be transferred by simple delivery.

Article 53

1. Transfer of registered shares shall be effected by registration in the share register of the company.

2. Registration shall be effected upon production of a declaration of transfer dated and signed by the transferor and by the transferee.

3. The Statutes may restrict the right of transfer. The restrictions shall be clearly stated in the Statutes. They shall not be such as to amount to a complete discretion, on the part of the company, in the matter of approval of a transfer, or such as to render the shares non-transferable in practice.

4. Declarations of transfer made during the four weeks preceding a General Meeting shall not be entered in the share register until after such meeting has been held.

Note on Articles 50 to 53

The Statute authorizes the S.E. to issue bearer and registered shares. The founders may choose either of these two forms. The Statute permits the issue of both forms concurrently, each shareholder being given the choice and having also the right to convert his shares from one form to the other.

The Statute could not stipulate for registered shares only. Both types of shares are permitted in all the Member States. In five of the Member States, particularly in the case of large undertakings, the bearer share is by far the more widely used. This is the only form of share which permits of quick transactions, including dealings on a stock exchange. This characteristic is the prerequisite for the raising of capital by public issue, which this type of company must be enabled to do. If only registered shares were allowed, the concept of the European company would be greatly affected. Generally speaking, no useful purpose is served by publishing the name of every shareholder, down to the last, together with details of the extent of the shareholdings. It will be sufficient to comply with Article 47, paragraph 5, which provides for the giving of notice in respect of direct or indirect holdings in excess of 10 %. The only argument in favour of registered shares is the greater ease with which tax payable by persons receiving a dividend can be collected. This need is met by the system operated in five Member States by the method of deduction at source, the person receiving the dividend being responsible for claiming repayment of any tax overpaid. Within the field of company law, the issue of registered shares is obligatory only in cases where European companies are to be formed with a limited number of members. To achieve the closer link necessary in this case between the individual shareholder and the company, the Statute offers the registered form of share.

The Statute contains regulations concerning the transfer of both types of shares. In the case of bearer shares, the Statute provides only that delivery of the share certificate must form part of the act of transfer (Article 52). All other details, in particular any question concerning the relationship between rights of real property and rights of personal property, are governed by the national law applicable in the circumstances in accordance with the private international law of the country concerned.

The issue of registered shares involves the keeping of a share register. The details are regulated by Article 50, paragraph 2. The transfer of registered shares must be recorded in the register (Article 53, paragraph 1). The change of legal ownership is effected by means of a declaration of transfer in writing, dated and signed by the person disposing of the share and by the buyer. The Statute deals in greater detail with the regulations for transfer of registered shares than for transfer of bearer shares.

The Statute enables the company to lay down more rigorous conditions for the transfer of registered shares, but certain limitations are imposed in order to preserve the transferability of the share (Article 53, paragraph 3). Lastly, the Statute exempts the company from giving immediate effect to declarations of transfer by entry in the share register, during the four weeks preceding a General Meeting. In this way, the company has ample time to examine any declarations received. The shareholders have the opportunity of making a correct appraisal of the shareholdings in the capital of the company prior to the General Meeting.

Section three

Debentures

Article 54

The Board of Management may issue debentures, subject to the approval of the Supervisory Board. The provisions of Article 60 shall apply to the issue of convertible debentures.

Article 55

Not less than fourteen days' notice of any public issue of debentures shall be given in the company journals. The notice shall specify the number, nominal amount, issue price and rate of interest of the debentures to be issued, and the date and conditions of redemption.

Article 56

1. Holders of debentures of the same public issue shall automatically constitute a body whose resolutions, subject to their being passed in accordance with the provisions of this Section, shall be binding on each of them.

2. A meeting of such body shall be competent to decide on any proposal of the company relating to the issue and, in particular, on any proposal which might vary the conditions of issue or vary or cancel any securities.

Article 57

1. Upon a public issue of debentures, the company shall appoint a person who is independent of the company to be the representative of the body of debenture holders. A meeting of the said body may at any time dismiss the

representative and appoint another person in his place. In an emergency, any debenture holder may apply to the court in whose jurisdiction the registered office of the S.E. is situate for appointment of a representative.

2. The representative of the body of debenture holders shall represent the latter vis-à-vis the S.E. in any judicial or other proceedings. He is entitled to attend General Meetings of the company and to exercise at such meetings all the rights, excepting the right to vote, of a shareholder, and in particular the right to request and receive information. The company shall make available to the representative all documents which shareholders are entitled to see, or of which they are entitled to obtain a copy.

Article 58

1. A meeting of the body of debenture holders shall be convened by the representative or by the Board of Management of the S.E. One or more debenture holders holding 5% of the debentures in circulation or a nominal value of 250 000 units of account may, in writing, request the representative or the Board of Management to convene such a meeting.

2. A meeting shall be validly held if three quarters of the debenture holders are present or are represented. Failing this quorum the meeting shall be reconvened. The second meeting shall be validly held whatever the number of debenture holders present or represented.

3. A majority of three quarters of the votes validly cast shall be required for the passing of resolutions.

4. Voting rights shall be proportional to the nominal amount of debentures held. The minimum nominal amount shall carry the right to one vote.

5. The representative or, in his absence, a member of the Board of Management of the company shall take the chair.

6. The provisions governing the convening and holding of meetings shall apply.

Article 59

1. The expenses incurred in convening and holding meetings of debenture holders, in remunerating the representative and in implementing the steps to be taken in the interests of the body of debenture holders and in the preservation of their rights shall be borne by the company.

2. Any disputes between the company and the body of debenture holders shall be decided of by the court within whose jurisdiction the S.E. has its registered office.

Note on Articles 54 to 59

Section Three of Title III regulates the issue of debentures. Holders of debentures of one and the same issue constitute a body. This means that they meet to discuss matters of interest concerning that issue of debentures and to pass resolutions binding on them all upon any proposals of the company (Article 56). For such resolutions to be valid, the Statute calls for a high quorum in respect of the first meeting (Article 58, paragraph 2). A majority of three quarters of the votes validly cast must always be in favour of the resolutions (Article 58, paragraph 3). For the rest, the provisions regulating the convening and holding of General Meetings apply *mutatis mutandis* (Article 58, paragraph 6). The debenture holders thus have at their disposal an official body which enables them to protect their rights much better than if they were acting individually.

The body of debenture holders has no legal personality. It is represented in its relations with the company, however, by a representative (Article 57, paragraph 2). The first representative is appointed by the company. The meeting is entitled to dismiss him and to replace him by a representative in whom it has confidence. The representative is entitled to attend General Meetings and to exercise thereat all the rights of a shareholder, with the exception of the right to vote. This is particularly important so far as concerns the right to information.

Moreover, the company must send to such representative all documents of which the shareholders are entitled to know the content (Article 57, paragraph 2).

The issue of debentures lies within the competence of the Board of Management (Article 54). Approval must be given by the Supervisory Board. When an issue of new debentures is envisaged, Article 55 requires the company to publish the details in good time.

Article 60

1. A decision to issue convertible debentures to persons who shall thereby have a vested right to exchange or subscribe for shares may be taken only by a General Meeting, and shall be by resolution altering the Statutes. The meeting shall simultaneously create approved capital, in respect of which the shareholders shall waive their right of subcription. The amount of approved capital shall be equal to the amount which would be attained if the right to exchange or subscribe for shares were exercised in full.

2. Shareholders shall be entitled to apply for convertible debentures issued unless otherwise resolved in General Meeting.

3. So long as convertible debentures are in circulation, the company shall not alter its Statutes so as to reduce the rights of the holders of convertible debentures unless, not less than three months before the alteration, they be

given the opportunity, by notice published in the company journals, of exercising their right of subscription or exchange, or unless approval be given by the body of debenture holders for alteration of the Statutes.

Note on Article 60

The Statute affords to the S.E. the power of issuing debentures convertible into shares. Articles 54 to 59 deal with the principles applicable to this form of issue. Article 60 deals with the details. This Article specifies that the decision for the issue of convertible debentures by the General Meeting must alter the Statutes and, subject to renunciation by the shareholders of their preferential right of subscription, create approved capital of an amount large enough to permit the issue of shares in respect of the entire loan in case the debenture holders exercise their right of conversion or subscription. The renunciation of the shareholders' preferential right of subscription for shares, as required by the Statute, is compensated for by their being granted a preferential right to apply for the convertible debentures. To secure the rights attaching to the convertible debentures, the Statute prohibits the company from passing any resolution altering its Statutes so long as the debentures are in circulation. During this period, therefore, no increase of capital and no issue of convertible debentures may be made. The sole exception is where the debenture holders are given the opportunity of becoming full shareholders by exercising their right of conversion or subscription, or where, as a body, they have approved the alteration of the Statutes (Article 60, paragraph 3).

Article 60 corresponds to Article 22, paragraph 4, of the draft of a second directive concerning the coordination of the safeguards required under company law, based on Article 54 (3)(g) of the Treaty establishing the EEC, in that it provides for an increase of capital upon the issue of debentures convertible into shares.

Section four

Other securities

Article 61

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

Note on Article 61

For the sake of simplicity and lucidity of the regulations, the Statute prohibits the issue of all other types of securities, existing under national laws, which entitle non-shareholders to participate in the profits or assets of the company e.g., debentures carrying the right to a share of profits, or founders' shares. Securities of this type may easily lead to abuse. The S.E. has no financial requirements which cannot be satisfied by the other methods at its disposal.

TITLE IV

ADMINISTRATIVE ORGANS

The internal structure of the S.E., and the distribution of authority between the various official bodies within it, raises the fundamental problem of separation of the powers of administration or management from those of supervision or control. In principle, this division is recognized in the company law of all Members of the Community, but is arranged in various ways. The choice between the rigid system of separation existing under German law and, if so desired, under French and Dutch law, on the one hand, and the flexible system operating at present only in Belgium, Italy and Luxembourg, on the other, was made in favour of the former. That system makes for more continuous and more effective supervision and control. Within the S.E. the functions are thus divided between three separate bodies.

The *Board of Management* is responsible for managing the affairs of the company. In most large undertakings it will be collective in character and will thereby encourage the build-up of the team spirit required in the administration of contemporary business. The Board of Management will be the motivating force of the company and its means of contact with third parties. Dealings with third parties are governed by regulations based on Council Directive 68/151/EEC of 9 March 1968 (Official Gazette of the European Communities No. L 65/8, 14 March 1968).

The *Supervisory Board* will be permanently responsible for control and supervision of the company's affairs. For this purpose it is invested with all relevant powers concerning preparation of the accounts and the commencing of legal actions based on the liability of the Board of Management. The provisions of Title V, Section Three, will, in due course, enable workers' representatives to be appointed to the Supervisory Board.

In order to avoid conflict with the Supervisory Board, the powers of the *General Meeting* are specifically defined. The list of its powers reveals, however, that the taking of decisions essential to the existence of the company lies within the province of the General Meeting, which remains the supreme body inside the company. In this connection, care has been taken to ensure that shareholders enjoy the right, which has been most meticulously provided for, to receive full information upon matters with which they will have to deal in General Meeting.

The normal functioning of these three bodies may be seriously impeded and the result could be irreparable damage to the company. It is for this reason that for exceptional circumstances the procedure of *special supervision* has been devised, for the purpose of making the organs of the company operational again and to secure the smooth running of the business.

Section one

Board of Management

Article 62

The company shall be administered by a Board of Management exercising its functions under the control of a Supervisory Board.

Note on Article 62

Under the system adopted here, the Board of Management derives its powers directly from the Statute. Its independence of the Supervisory Board is also stressed by Article 69, paragraph 1, which provides that members of the Board of Management must not also be members of the Supervisory Board.

As may be seen from other Articles of the Statute (in particular, Articles 66, 68, 73 and 203), there is no absolutely rigid separation.

Article 63

1. Members of the Board of Management shall be appointed by the Supervisory Board. The Supervisory Board, on behalf of the company, shall conclude a contract with each member of the Board of Management containing the terms relating to, and the amount of, his remuneration.

2. Only natural persons shall be appointed members of the Board of Management.

3. Where the Board of Management comprises one or two members it shall be composed only of nationals of Member States. In all other cases, this requirement shall apply to the majority of members of the Board of Management.

4. The Board of Management shall not include persons not having legal capacity or persons who, by virtue of the laws of a Member State, are prohibited from assuming such office by reason of criminal conviction or bankruptcy.

5. The maximum number of members of the Board of Management shall be specified in the Statutes.

6. Where the Board of Management comprises more than one member, the Supervisory Board may appoint one such member as chairman. In the like case, the Supervisory Board shall also appoint one such member to be responsible for personnel and industrial relations.

7. The Supervisory Board may dismiss members of the Board of Management, including the chairman, where serious grounds justify such action. Dismissal shall entail immediate and final termination of office. The other effects of dismissal shall be determined in accordance with the contract and the law applicable thereto.

Note on Article 63

In the context of this Article, stress must be laid on the importance of the contract to be made between the Supervisory Board and each member of the Board of Management. In the interests of both parties, this contract should contain all the requisite provisions concerning the effective position of the members of the Board of Management during their term of office and at its conclusion. The terms concerning remuneration, indemnities and pension must be stated in full. In addition, it would be desirable to state expressly which national law of the Member States, selected by agreement of the parties, will apply to questions not dealt with in the contract.

It will be noted that paragraph 4 lays downs a general regulation that persons who are under legal disability or have been adjudged bankrupt, by decision of the courts of Member States, and are thereby debarred from holding the office of director of a company incorporated under a national law are ineligible for membership of the Board of Management of an S.E. This disability applies in every State of the Community. Yet there are no regulations concerning the incompatibility of membership of the Board of Management of an S.E. with the holding of, for example, an elected or administrative post. It will be for each national law to provide that the holding of certain offices is incompatible with the holding of office in an S.E.

As to the removal of a member of the Board of Management, it will be noted that although, for purposes of ascertaining the effects thereof, reference is made to the terms of the contract and to the national law to which it is subject, paragraph 7 contains an important provision. The removal always entails immediate and final cessation of duties on the part of the member concerned. A subsequent decision by the competent court that such dismissal was unjustified could in no circumstances result in a return to office. Where removal has taken place without serious grounds or in violation of the Statute or the contract, it may at most give rise to a claim for damages.

Article 64

1. The Board of Management shall have full power to act in the interests of the company, save as expressly reserved to other bodies by this Statute.

2. Where the Board of Management comprises more than one member, the members act collectively. Subject to the provisions of Article 63, paragraph 6, members of the Board of Management may divide their powers among themselves; division so made shall be for internal purposes only. The Supervisory Board may at any time make regulations for the internal operation of the Board of Management.

Note on Article 64

By the provisions of the first paragraph of this Article, the Board of Management is made the central organ of the S.E. It is competent in law to take any action not expressly assigned to any other organ of the company. A principle is involved here which applies to the relationship between the organs of the company. The effect vis-à-vis third parties is dealt with in Article 67.

The Statute leaves the Board of Management a fair degree of freedom as to its internal organization. Such organization may result from simple agreement between its members to share out the various duties which the Board has to discharge. But the internal organization of the Board of Management may derive from rules of procedure determined by the Supervisory Board. Such rules of procedure, which should be designed only to promote good relations and efficiency amongst members of the Board of Management, may not be relied on to defeat claims by third parties.

Article 65

1. Where the Board of Management comprises more than one member, each of them shall have authority to represent the company in its dealings with third parties, unless otherwise provided by the Statutes. Provisions of the Statutes to this latter effect may not be relied on to defeat claims by third parties.

2. The Board of Management may appoint agents with power of procuration and authorize them to exercise specified powers of representation, subject to approval of their appointment and of the extent of their powers by the Supervisory Board.

3. Notice of change in membership of the Board of Management, appointment or dismissal of an agent having power of procuration, the extent of the powers which they are authorized to exercise and any change therein shall be given to the European Commercial Register by the Board of Management.

4. Until publication in the company journals of the fact of registration of the contents of such notice, the same may not be relied on to defeat claims by third parties unless the company proves that they had knowledge thereof. Third parties shall, however, be entitled to plead the same.

5. After registration of the names of the members of the Board of Management and of authorized agents, any irregularity in their appointment may not be relied on to defeat claims by third parties unless the company proves that they had knowledge thereof.

Note on Article 65

Clear, exact regulation of the relationships between third parties and the Board of Management and, in particular, of the validity of commitments undertaken by the Board is undoubtedly essential to the permanent standing of the new legal form both within the Community and elsewhere. The regulation of these matters is in line with the provisions of Section II of Council Directive 68/151/EEC of 9 March 1968. It goes further, however, and gives full effect to those provisions by selecting the most progressive solutions.

This is the object of the present and of the two following Articles. Article 65, paragraph 1, lays down the principle that the Board of Management may validly be represented by any member thereof. Any provision to the contrary contained in the Statutes of the company may not be relied on to defeat the claims of third parties.

The appointment of agents having power to bind the company and the extent of their powers are regulated by paragraphs 2 to 5. The importance of such agents is underlined by the fact that the Supervisory Board must approve any decision which concerns them. Moreover, as with any change in the composition of the Board of Management, the appointment or dismissal of such agents and the extent of their powers are to be registered with the European Commercial Register.

In pursuance of Article 3 (paragraphs 5 and 7) and Article 8 of the said Directive, paragraphs 4 and 5 deal with the effect of registration of notices concerning the company's representatives. The result of these provisions is that limited power of representation of the company by one or more agents having power of procuration may, as from the date of publication, be relied on in cases of claims by third parties, whereas this is not the case where limitations are imposed upon the powers of a member of the Board of Management.

The difference is readily explained. In the words of the Directive, members of the Board of Management "as a legally constituted body, are empowered to bind the company in dealing with third parties and to represent it at law"; whereas agents with power of procuration are merely employees of the company appointed at the discretion of the Board of Management and whom third parties are not expected to treat with a general presumption of confidence.

Article 66

1. The following acts of the Board of Management shall be subject to prior authorization by the Supervisory Board:

(a) 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. Apart from the cases mentioned in paragraph 1, the Statutes may specify that certain acts of the Board of Management shall be subject to prior authorization by the Supervisory Board. In the case of paragraph 1 and of this present paragraph, absence of prior authorization may not be relied on to defeat claims by third parties.

Note on Article 66

This provision introduces a form of collaboration between the Board of Management and the Supervisory Board without affecting the rights of third parties, who may not be aware of the limitation on the powers of the Board of Management. Notwithstanding the lack of prior authorization by the Supervisory Board, any action remains binding vis-à-vis

third parties. On the other hand, by failing to apply for authorization, the Board of Management exposes itself to an action by the Supervisory Board for damages or dismissal of one or more of its members. The granting of authorization does not, however, relieve members of the Board of Management from ultimate liability in the event of improper action (Article 71, paragraph 3).

Article 67

In its dealings with third parties, the company shall be bound by the acts of members of the Board of Management, notwithstanding that such acts are outside the object of the company, unless the same are *ultra vires* the Board of Management as provided by this Statute. Limitations placed on the Board's powers by the Statutes may not be relied on to defeat claims by third parties.

Note on Article 67

This regulation is directly inspired by Article 9, paragraph 1, subparagraph 1, of the said Directive. The only limitation on the power of the Board of Management to bind the company is the limitation imposed on that body by the Statute itself. In no case may the object for which the company was formed constitute a limitation on the power of the Board of Management to represent the company. By closing the loophole in Article 9, paragraph 1, subparagraph 2, of the Directive, the present Article overcomes the difficulty of proof by the company that the third party was aware that the objects of the company had been exceeded.

Provisions of the Statutes which limit the powers of company organs may not be relied on to defeat claims by third parties.

Article 68

1. Within three months of the closing of each financial year the Board of Management shall submit to the Supervisory Board draft accounts and a draft management report relating thereto.

2. At least once each quarter, the Board of Management shall submit to the Supervisory Board a report on the progress of the company and of the companies controlled by it. Quarterly accounts shall be attached to the report.

3. Further, the Board of Management shall immediately inform the chairman of the Supervisory Board of any matter of importance. Any matter arising within a dependent company which may appreciably affect the S.E. shall be considered a matter of importance. Matters so referred to the chairman of the Supervisory Board shall be incorporated in the subsequent quarterly report.

Note on Article 68

The requirements of this Article are designed to provide a legal framework for the desired cooperation between Board of Management and Supervisory Board. In this respect, it will be noted that the Board of Management is required to report, at least once a quarter, to the Supervisory Board. This report does not exempt the Board of Management from complying with requests for further information at all times. Moreover, the Board of Management must of its own accord forthwith inform the Supervisory Board of any matter "which may appreciably affect the S.E."

Article 69

1. A member of the Board of Management may not also be a member of the Supervisory Board.

2. Members of the Board of Management may not engage in other professional activities, nor accept appointment to the Supervisory Board of another company, unless specifically authorized so to do by the Supervisory Board.

3. Members of the Board of Management may not borrow, in any form whatever, from the company or from its dependent companies, nor obtain from them any overdraft, whether on current or other account, nor procure them to guarantee or endorse their commitments to third parties. This prohibition shall extend to the spouse, ascendants and descendants of each member of the Board of Management, and to any intermediary.

4. Prior authorization of the Supervisory Board shall be required for the making of any agreement to which the company is a party and in which a member of the Board of Management has an interest, direct or indirect. To this end, the member concerned shall advise the Supervisory Board, in writing, of the proposed agreement. Failure to obtain such authorization may not be relied on to defeat claims by third parties, unless the company proves that the third party knew that such authorization had not been obtained.

Note on Article 69

To enable the Board of Management to exert the driving force intended by this Statute, members thereof must be in a position to devote themselves full-time to their task. They must not, therefore, undertake any other professional activity unless specially authorized to do so by the Supervisory Board.

Moreover, if they are to be entirely at the service of the company, there must be no clash of interest between members of the Board of Management and the company. For this reason they are prohibited, without exception, from making with the company any of the financial arrangements listed in paragraph 3. This prohibition extends to their families. In addition, where a director has a personal interest, even indirectly, in agreements binding on

the company, he is required to apply for prior authorization of the Supervisory Board. His request must be in writing. In conformity with the principles incorporated in preceding paragraphs, the act remains valid in respect of third parties even if authorization was not obtained. The absence of such authorization may, however, if the third party was aware that it had not been granted, be relied on as against him. This provision is unusual; it is not, however, inconsistent with Article 67, since any infringement of the provisions of paragraph 4 of the present Article would mean that the powers specifically defined by the Statute itself have been exceeded.

Article 70

1. In carrying out their duties of management, members of the Board of Management shall exercise the standard of care befitting a conscientious manager and promote the interests of the company and of its personnel.

2. They shall exercise proper discretion in respect of information of a confidential nature concerning the company or its dependent undertakings They shall exercise the like discretion even after they have ceased to hold office.

Note on Article 70

Promotion of the interests of the personnel is one of the general responsibilities of the members of the Board of Management. This provision, somewhat novel in company law, should be read together with the provisions of Title V.

So far as the duty of discretion is concerned, difficulties may arise in the case of a group of companies. Where the provisions of Article 240 apply, it must be acknowledged that there is a limit to the discretion required on the part of members of the Board of Management of a dependent company vis-à-vis the Board of Management of the controlling company.

Article 71

1. The members of the Board of Management are jointly and severally liable to the company for any failure to observe the provisions both of this Statute and of the Statutes of the company and for wrongful acts committed in the course of their administration.

2. They shall not be held liable if they prove that no fault is attributable to them and if they brought the relevant acts or omissions to the attention of the Supervisory Board, in writing and without delay, after the same had come to their knowledge.

3. Authorization granted by the Supervisory Board shall not exonerate the members of the Board of Management from their responsibility.

4. The right of action in respect of liability of the members of the Board of Management shall be barred at the end of three years from the date of the act complained of or, if such act was concealed, from the date of its discovery.

5. Where the company becomes insolvent, an action in respect of liability against the members of the Board of Management shall lie also at the instance of the syndic.

Note on Article 71

This regulation is concerned only with the liability of the members of the Board of Management to the company, not to third parties. The three classes of wrongful act here referred to are clearly defined in the first paragraph. Although the liability of the Board of Management, being collectively responsible, is in principle joint and several, the liability can be avoided but the member seeking to avoid it must prove two things: not only that no fault is attributable to him, but also that he had in writing previously exposed the relevant act or omission. He must, so to speak, have dissociated himself from the matter from the outset.

Article 72

1. The Supervisory Board and the General Meeting may resolve that proceedings be instituted on behalf of the company in respect of liability of the members of the Board of Management or of any member thereof. The action shall be brought by the Supervisory Board. The Meeting may, however, appoint a special representative to bring the action.

2. An action may also be brought, on behalf and for account of the company, by one or more shareholders holding 5% of the capital or shares of a nominal value of 100 000 units of account. For this purpose, the shareholders, if there are more than one, shall appoint a special representative who shall be responsible for bringing the action.

3. The plaintiffs may sue for damages in full compensation for the loss sustained by the company, to which the damages and interest shall be paid. If the claim succeeds, the costs of the proceedings shall be borne entirely by the company.

4. If the claim envisaged under paragraph 2 of this Article shall fail, the plaintiffs may be ordered personally to pay the costs both of the company and of the defendants, and, if the action was malicious, to pay damages and interest to the defendants or to the company.

Note on Article 72

Application of the provisions concerning liability contained in the preceding Article is a matter for the Supervisory Board or the General Meeting. It is primarily a case for action by the Supervisory Board since it has a permanent function and the appropriate structure. The General Meeting, in order to bring the action, must appoint a special representative beforehand.

The official organs of the company have no exclusive powers in this respect. Paragraph 2 enables a minority to commence proceedings, provided that it represents at least 5 % of the capital of the company or 100 000 units of account. If this minority comprises more than one shareholder it must, like the General Meeting, appoint a special representative.

Section two

The Supervisory Board

Article 73

1. The Supervisory Board shall exercise permanent control over the management of the company by the Board of Management.

At least every quarter, the Board of Management shall submit to the Supervisory Board a report on the administration of the company and of its subsidiaries or divisions. This report shall be concerned particularly with the company's dealings with undertakings within the group.

The Supervisory Board may at any time require the Board of Management to submit a special report on the administration of the company and on specific points concerning its business affairs. It may likewise request information on events occurring within affiliated undertakings in the group, where such events may have a substantial influence upon the position of the company.

It shall be part of the duty of the Board of Management to inform the Supervisory Board, on its own initiative and without delay, if it has knowledge of such events.

2. The Supervisory Board shall advise the Board of Management, either upon request thereof or on its own initiative, on any matter of importance to the company.

3. Save in the cases specifically provided for in this Statute, the Supervisory Board shall not intervene directly in the management of the company nor represent it in dealings with third parties. Vis-à-vis the Board of Management

or any member thereof the Supervisory Board shall represent the company at law or in agreements made between the company and a member of the Board of Management.

4. In the event of a vacancy on the Board of Management or if one or more members thereof be unable to attend, the Supervisory Board may, for a period to be specified in advance but not exceeding one year, appoint one or more of its members as alternates. Whilst performing the duties of an alternate, such members shall not carry out those of a member of the Supervisory Board. The provisions of Section One of this Title shall apply to alternates.

Note on Article 73

The function of the Supervisory Board, as the controlling organ of the management of the company, is fundamentally different from that of the General Meeting in two respects. The Supervisory Board is permanent and it is an advisory body. Its permanence has already been emphasised by Article 68.

As to its advisory role, this may come into play, apart from the cases mentioned in Section One, at the request of the Board of Management or on the initiative of the Supervisory Board itself.

Paragraphs 3 and 4 of the present Article, however, make it clear that the control and advisory functions of the Supervisory Board are not to lead to any interference on its part in the management of the company. It is only exceptionally, and solely in the cases mentioned in these paragraphs — representation of the company at law, in agreements between the company and a member of the Board of Management, vacancy or inability to attend on the part of one or more members thereof — that the Supervisory Board may carry out duties that are within the scope of the Board of Management.

Article 74

1. The number of members of the Supervisory Board shall be divisible by three. Where an S.E. has permanent establishments in several Member States, the Supervisory Board shall comprise not less than twelve members.

2. Only natural persons may be members of the Supervisory Board. Their maximum number shall be laid down by the Statutes. Article 63, paragraph 4, shall apply to them.

3. Subject to the provisions of Article 137, the members of the Supervisory Board shall be appointed by the General Meeting for a period, prescribed by the Statutes, of not more than five years.

Note on Article 74

The Statute provides that the minimum number of members of the Supervisory Board shall be not less than three. Where the S.E. has permanent establishments in several Member States, the minimum number shall be twelve. This regulation has been made to take into account workers' representation, to ensure a balance between the two types of member.

The Statute does not provide for the appointment of legal persons as members of the Supervisory Board. This is to ensure that members not only of the Board of Management, but also of the Supervisory Board, of every S.E., are persons who have been appointed, above all, for their personal qualities and dynamic character.

Article 75

1. Members of the Supervisory Board shall be eligible for re-election.

2. Members appointed by the General Meeting may be dismissed by that body at any time.

3. Where an age limit is specified in the Statutes, members of the Supervisory Board who attain that age shall remain in office until the close of the following General Meeting.

4. If the number of members of the Supervisory Board shall fall below the legal minimum, the Board of Management shall forthwith convene a General Meeting for the purpose of bringing the Supervisory Board up to full strength.

5. Notice of any change in composition of the Supervisory Board shall forthwith be given by the Board of Management to the European Commercial Register.

Note on Article 75

The provisions of this Article are designed to give the Supervisory Board a certain degree of stability.

The power of removal lies with the General Meeting for the very reason that it is the General Meeting which has the power of appointment.

The provision contained in paragraph 3 is noteworthy in that it constitutes a recommendation to the persons responsible for drawing up the Statutes, rather than a regulation fixing an age limit.

Article 76

1. The Supervisory Board shall elect from its members a chairman and a vice-chairman.

2. The chairman of the Supervisory Board shall convene the same either on his own initiative or at the request of a member thereof or of a member of the Board of Management. Such request shall set out the reasons therefor. If, within fourteen days, the request be not complied with, the member who made it may convene the Supervisory Board.

3. Members of the Board of Management shall attend meetings of the Supervisory Board unless the latter shall otherwise decide. They shall attend in an advisory capacity.

Note on Article 76

The provision contained in paragraph 2 is related to the permanent nature of the Supervisory Board and ensures regular meetings thereof. Similarly, paragraph 3 stresses the need for cooperation between the Board of Management and its permanent Supervisory Board.

Article 77

1. The Board of Management shall supply information in writing on each item on the agenda, which shall be settled by the chairman of the Supervisory Board. The agenda and the information in writing aforesaid shall be sent by the Board of Management to each member of the Supervisory Board.

2. Meetings of the Supervisory Board shall not be validly held unless at least one half of its members is present.

3. Unless a greater majority is specified in the Statutes, decisions shall be made by majority vote of members present.

4. Members not present may take part in decisions either by authorizing a member present to represent them, or by sending a written vote through him.

5. In the conditions mentioned in the Statutes, decisions on any specific matter may be made in writing, in particular by exchange of telegrams or telex messages, provided that no objection is raised to such procedure by any member.

6. Minutes of Supervisory Board decisions shall be prepared under supervision of the Board of Management; they shall be examined and signed by the chairman of the Supervisory Board. If no member of the Board of Management is present at a meeting of the Supervisory Board, or if the latter makes a decision in writing, the chairman shall appoint a member of the Supervisory Board to prepare the Minutes.

Note on Article 77

The importance of the functions assigned to the Supervisory Board is such that detailed regulations are made concerning the conditions in which they are to be performed.

Article 78

The Supervisory Board shall have unlimited rights of inspection of and control over all company activities; it shall have direct access to ledgers, correspondence, minutes and, in general, all company documents.

Note on Article 78

This provision was considered necessary to enable the Supervisory Board, as an organ of the company, to perform its functions whenever and wherever appropriate and in order to obviate the necessity of obtaining authorization of the courts.

Article 79

1. The remuneration of members of the Supervisory Board may be determined by the Statutes or, in default, by the General Meeting.

2. Members of the Supervisory Board may not borrow, in any form whatever, from the company or from its dependent companies, nor obtain from them any overdraft, whether on current or other account, nor procure them to guarantee or endorse their commitments to third parties. This prohibition shall extend to the spouse, ascendants and descendants of each member of the Supervisory Board, and to any intermediary.

3. Prior authorization of the Supervisory Board shall be required for the making of any agreement to which the company is a party and in which a member of the Supervisory Board has an interest, direct or indirect. Failure to obtain such authorization may not be relied on to defeat claims by third parties, unless the company proves that the third party was acting in bad faith. The member concerned shall make his request for authorization in writing and shall not take part in the vote on the application for approval.

Note on Article 79

The first paragraph of this Article allows a degree of freedom in determining the remuneration of members of the Supervisory Board.

Paragraphs 2 and 3 reiterate the prohibitions and the requirement of prior authorization applicable to members of the Board of Management pursuant to Article 69, and apply them to members of the Supervisory Board.

From paragraph 3 arises the distinction that for members of the Supervisory Board, the necessary authorization is granted by the organ of which they are members.

Article 80

1. In carrying out their duties, the members of the Supervisory Board shall have regard to the interests of the company and of its personnel.

2. They shall exercise proper discretion in respect of information of a confidential nature concerning the company or its dependent companies. They shall exercise the like discretion even after they have ceased to hold office.

Note on Article 80

See the note on Article 70.

Article 81

1. The members of the Supervisory Board are jointly and severally liable to the company for any failure to observe the provisions both of this Statute and of the Statutes of the company and for wrongful acts committed in the course of their administration.

2. They shall not be held liable in respect of acts in which they took no part, if they prove that no fault is attributable to them and that they brought such acts to the attention of the chairman of the Supervisory Board in writing and without delay, after the same had come to their knowledge.

3. The right of action in respect of liability of the members of the Supervisory Board shall be barred at the end of three years from the date of the act complained of or, if such act was concealed, from the date of its discovery.

4. Where the company becomes insolvent, an action in respect of liability against the members of the Supervisory Board shall lie at the instance of the syndic.

5. The General Meeting and the shareholders may also bring an action in respect of liability against the members of the Supervisory Board under the conditions prescribed by Article 72.

Note on Article 81

This provision is similar to that contained in Article 71 with the sole difference that members of the Supervisory Board cannot be held responsible for errors of management.

As to the procedure for bringing of actions in respect of the liability of members of the Supervisory Board, the provisons of Article 72 relating to members of the Board of Management are to be applied, *mutatis mutandis*.

Section three

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

Article 82

1. Where the company's shares are quoted on a Stock Exchange, members of the Management and Supervisory Boards and the persons responsible for auditing the accounts of the company shall, within twenty days of acquisition, either cause to be converted into registered shares or lodge with a bank, shares in the capital of the S.E. which are owned directly, or through an intermediary, by them, their spouse or their infant children.

Subject to Article 47, paragraph 5, the same obligation shall apply to any person who holds, directly or through an intermediary, solely or jointly with his spouse or infant children, more than 10% of the capital of the company.

2. Persons who acquire any of the capacities mentioned in paragraph 1 shall forthwith give notice to the European Commercial Register for the purpose of entry therein, of the number, nominal value and, where appropriate, the class, of the shares to which the said paragraph applies, together with the name and status of the owner thereof. An extract from the register of registered shares or a certificate issued by the bank with which they are lodged shall be attached in support of the notice.

3. The like persons shall, further, give notice to the European Commercial Register within fifteen days of the end of each quarter of the financial year, for the purpose of registration, of any sale or purchase of shares, to which paragraph 1 applies, effected during that quarter, specifying the price paid or received.

4. In respect of each person mentioned in paragraph 1, the European Commercial Register shall keep an up-to-date record of the number, nominal value and, where appropriate, the class, of shares held by him, together with a record of transactions of which notice has been given pursuant to paragraph 3. Any person having an interest may inspect the entries in the register and, on payment of the expenses, obtain a copy thereof.

5. Any profit made by a person mentioned in paragraph 1 on purchase and resale of shares, or vice versa, within six months, for his own account or that of his spouse or infant children shall automatically be the property of the S.E. The amount thereof shall be paid to the company within eight days from completion of the transaction from which the profit arose.

Note on Article 82

This provision safeguards the legitimate interests of shareholders, particularly in large companies where the shares are widely distributed amongst the public. In such companies, management and large shareholders may have information concerning the company's affairs which is not available to the main body of shareholders. Any personal profit deriving from such information through transactions involving the shares of the company must be to the detriment of the principle of equality amongst the shareholders.

To avoid this, it is appropriate, on the one hand, that the shareholdings of persons holding a large number of the company's shares and any changes therein should be made known and, on the other, that any profit arising from short-term, and, therefore, speculative, transactions should accrue to the company. Provisions based on similar considerations exist in English law (Companies Act 1948, Section 195) and in the regulations governing transferable securities in the United States (Securities Exchange Act 1934, Section 16). As regards the Member States, these provisions were recently introduced into French law (Law No. 66-537 of 24 July 1966, Article 162-1 and Decree No. 67-236 of 23 March 1967, Articles 153-1 to 153-7).

Section four

The General Meeting

Article 83

Subject to the limitations prescribed by this Statute, the General Meeting may pass resolutions concerning the following matters:

(a) increase or reduction of capital;

(b) issue of debentures convertible into shares;

(c) appointment or removal of members of the Supervisory Board;

(d) legal proceedings on behalf of the company;

(e) appointment of auditors;

(f) appropriation of annual profits;

(g) alteration of the Statutes;

(h) winding-up of the company and appointment of liquidators;

(i) conversion of the company;

(j) merger or transfer of all or of a substantial part of the company's assets;

(k) approval of contracts committing the S.E. in the following respects:

to pool the whole or a part of its profits or of the profits of one or more of its establishments with the profits of other undertakings or of one or more of the establishments thereof, or to share the profit pooled;

to lease its undertaking to another undertaking or otherwise grant possession thereof to another undertaking.

to carry on its business on behalf of another undertaking.

Note on Article 83

The list of matters with which the General Meeting is competent to deal is exhaustive. The significance of this is that the General Meeting has only those powers which the Statute confers upon it in this Article.

All matters for decision touching the continuation in existence or the development of the S.E. are included therein. Most of the items relate to standard legal transactions recognized under all legal systems. Where item (j) mentions the "transfer of all or of a substantial part of the company's assets", the reference is to cases where the S.E. contributes part of its assets to another company. The word "substantial" raises a question of interpretation as to the extent of the powers of the General Meeting. It is implicit that some part of the activity or production of the S.E. is removed and that the company benefiting from the contribution is thereby enabled to enter some new field of operation or appreciably expand operations already under way.

Finally, it should be noted that the Statute makes no distinction between ordinary and extraordinary General Meetings. It provides only that in certain cases a qualified majority (three quarters of the votes cast) is required as against the simple majority prescribed by Article 91.

Article 84

1. The General Meeting shall be convened by the Board of Management. It shall be held at least once each year, not later than six months after the end of the financial year, principally to review the annual accounts and the management report. Upon the application of the Board of Management this period may, in exceptional circumstances, be extended by order of the court within whose jurisdiction the registered office of the company is situate, from which there shall be no right of appeal.

2. The Board of Management may convene a General Meeting at any time and shall do so if the Supervisory Board so requires.

3. If the Board of Management shall fail to convene a General Meeting prescribed by this Statute or by the Statutes or as required by the Supervisory Board, the latter may convene the same.

Note on Article 84

The Board of Management takes a major part in convening the General Meeting. It decides the date of the meeting and may call several meetings at its discretion. However, the Board of Management is required to call at least one General Meeting each year, within six months of the end of the financial year. It may only exceed this time limit if so authorized by the court within whose jurisdiction the company's registered office is situated.

The Statute provides for the case where the Board of Management fails to carry out this duty, by making the Supervisory Board responsible for performing it (paragraph 3) and the latter is empowered to require the Board of Management to convene the meeting (paragraph 2).

Article 85

1. One or more shareholders holding between them not less than 5% of the capital or a nominal value of at least 100 000 units of account may by requisition in writing setting out their reasons and the items on the agenda, require that a General Meeting be convened. The Statutes may specify a lesser percentage and number of units.

2. If within one month the requisition mentioned in paragraph 1 has not been complied with, the requisitionist or requisitionists may apply to the court for an order that the meeting be convened. The application shall be heard by the court within whose jurisdiction the registered office of the S.E. is situate and there shall be no right of appeal against its decision. If, after hearing the company, the court shall consider the application justified, it shall authorise the requisitionist or requisitionists to convene the General Meeting at the expense of the company, shall settle the agenda and appoint the chairman.

3. Before the dispatch of notice of the next General Meeting, the shareholder or shareholders referred to in paragraph 1 of this Article shall be entitled to require that certain items be placed on the agenda. If the Board of Management shall refuse to include such items within one month, the requisitionist or requisitionists may apply to the court for an order that they be included. The application shall be heard by the court within whose jurisdiction the registered office of the S.E. is situate and there shall be no right of appeal against its decision. If, after hearing the company, the court shall

consider the application justified, it shall order the Board of Management to place on the agenda one or more of the items forming the subject of the application.

Note on Article 85

The rights of the shareholders, whether majority shareholders or otherwise, must be safeguarded within the framework of the General Meeting. For this reason, a minority representing at least 100 000 units of account or 5 % of the capital (even less if the Statutes so provide) has the right to request that a General Meeting be convened. If this minority does not obtain satisfaction from the Board of Management, it may apply to the court within whose jurisdiction the registered office of the S.E. is situate, not only for an order that a meeting be convened but also for specific items to be entered on the agenda. An application for insertion of items on the agenda may not, however, be made once it has been decided to convene a meeting, since last minute alterations of the agenda are undesirable.

Article 86

1. A General Meeting shall be convened by notice published in the company journals not less than four weeks before the date of the meeting.

2. The notice shall set out the agenda and the proposals concerning each item thereon.

3. The shareholder or shareholders referred to in paragraph 1 of Article 85 shall be entitled, within one week of publication of the notice provided for in the preceding paragraph, to require counter-proposals confined strictly to items on the agenda, to be published in like manner to the agenda not later than ten days prior to the meeting, unless such counter-proposals would involve a resolution inconsistent with this Statute or the Statutes of the company, or an identical counter-proposal has been rejected by a General Meeting during the previous five years.

4. The General Meeting may pass resolutions upon items not included in the duly published agenda only by unanimous vote of all the shareholders of the company. The meeting may, however, remove one or more members of the Supervisory Board appointed by the General Meeting, and may replace them without the matter appearing on the agenda, provided that one half of the capital is present or represented.

Note on Article 86

Provisions regulating the General Meeting and the kind of matters to be discussed by it are important for a number of reasons, particularly from the point of view of increasing the shareholders' participation in the making of fundamental decisions affecting the company.

It is, therefore, provided that the minority, as defined in Article 85, paragraph 1, may make counter-proposals on items appearing on the agenda.

By way of exception to the generally accepted principle whereby the General Meeting may make decisions only on items on the agenda, the removal of one or more members of the Supervisory Board may be resolved upon in the course of a General Meeting. The considerations relevant to the appointment of a Supervisory Board (see the note on Article 73), made it necessary to prescribe special conditions as to the quorum (half of the capital).

Article 87

1. The members of the Board of Management and of the Supervisory Board shall attend General Meetings in a consultative capacity.

2. Every shareholder and every holder of a share certificate or of debentures convertible into shares is entitled to attend the General Meeting.

3. The Statutes may make attendance at a General Meeting conditional upon the lodging of the scrip certificates with a bank at least fifteen days prior to the meeting and until the conclusion thereof. In such case, the banks shall forthwith give notice of such deposit to the company, indicating the nature and nominal value of the certificates and the names and addresses of the persons lodging the same.

4. In lieu of the lodging of certificates provided for by paragraph 3, the Statutes may require that notice of intention to attend the meeting be given in writing or by telegram at least eight days prior to the holding thereof. If so, the information required under paragraph 3 shall be communicated to the company.

5. Where the Statutes contain such provisions as are mentioned in paragraphs 3 and 4, a note to this effect shall appear in the notice convening the meeting.

Note on Article 87

The right to attend the General Meeting is not strictly confined to shareholders. Not only is the meeting open to members of the Board of Management and of the Supervisory Board, who might not hold shares, but also to holders of share certificates or convertible debentures.

The Statutes may require that the certificates representing the right of the holder to attend the meeting be lodged with a bank prior to the meeting.

Article 88

1. Shareholders who are entitled to vote may be represented by a proxy at General Meetings. Members of the Board of Management, members of the Supervisory Board and employees of the company, or of its dependent companies, may not act as proxies.

2. The appointment of a proxy shall be made in writing and the person appointed shall act without payment. It shall specify the shares in respect of which the right to vote will be exercised. The form of proxy shall be lodged with the company prior to the meeting.

3. The appointment of a proxy shall be valid for not more than six months. It may be revoked at any time. The appointee shall not delegate his powers.

4. No person may vote in his own name in respect of shares belonging to another, unless a form of proxy has been duly lodged. This prohibition shall not apply to companies which manage investment funds.

Note on Article 88

Paragraph 1 establishes the principle that any shareholder who is entitled to vote may appoint a proxy to vote for him. This right, which is particularly appropriate in the case of an S.E., whose shareholders may be scattered throughout a number of different countries, cannot be revoked by the Statutes.

The exclusion of members of the Board of Management, members of the Supervisory Board and employees of the company or of its dependent companies, from acting as proxy, which is already expressly recognized in the law of two of the Member States, is justified because of the conflict of interests which might arise in a number of circumstances (discharge of the members of the Board of Management, legal actions against members of the Board of Management or of the Supervisory Board, dismissal of a member of the Supervisory Board, etc.).

Paragraphs 2 and 3 contain the material provisions which apply to the appointment of a proxy. These may be supplemented by further requirements prescribed by the Statutes, especially as regards the content of the proxy form.

The prohibition contained in paragraph 4 relates particularly to banks, which may not vote without special mandate from their customers. Without specifying the nature of the rights of investment funds in respect of shares which they hold, it is right that the prohibition should not apply to companies which manage such funds, in view of the character of their activities.

Article 89

1. Unless otherwise provided by the Statutes, the chairman of the Supervisory Board shall preside at General Meetings, or, in his absence, the vice-chair-

man of that Board, and in the absence of the vice-chairman, the oldest member thereof. In the absence of any member of the Supervisory Board, the meeting shall elect its own chairman.

2. A list of persons present shall be prepared by a notary. Before opening the meeting, the said list shall be made available in the assembly hall for perusal by those attending the meeting. It shall record the name and place of residence of all certificate holders present and represented, and also the number, description and nominal value of their shares and, if there is more than one class of shares, the class to which the certificates relate. Where a proxy is also attending in his own right as a shareholder, separate entries should be made.

3. Any person attending a General Meeting is entitled to speak upon matters appearing on the agenda and which the chairman has opened to debate. Any shareholder may make counter-proposals on any item on the agenda. The chairman shall regulate the discussion and may take any steps which he considers appropriate for the orderly conduct of business.

4. The chairman shall determine the order of voting if there is more than one proposition on the same item. The Statutes may provide for a secret vote in respect of the appointment or removal of members of the Supervisory Board; a General Meeting may at any time, by majority vote, decide to the contrary. Voting in respect of appointments may be by acclamation provided that no objection be raised by any shareholder entitled to vote.

Note on Article 89

As in the case of the Supervisory Board, detailed regulations for the holding of General Meetings were considered necessary.

Article 90

1. During the course of a General Meeting, any shareholder shall be entitled to be given information, at his request, by the Board of Management concerning the affairs of the company, where such information is necessary for realistic discussion of items on the agenda. The obligation to impart information shall extend to legal and business matters between the S.E. and its dependent or controlling companies or affiliated undertakings within a group.

2. The information supplied shall be true and fair in all respects.

3. The Board of Management may refuse to give information where :

(a) in the opinion of a reasonable businessman, it would be such as to cause considerable prejudice to the S.E. or to any of its dependent or controlling companies; or

(b) by divulging the same it would commit a criminal offence.

4. Where information is refused to a shareholder, he shall be entitled to require that his question and the grounds relied on for refusing to answer it be entered in the Minutes of the General Meeting.

5. A shareholder to whom information is refused may challenge the validity of the refusal in the court within whose jurisdiction the registered office of the S.E. is situate whose decision shall be final and without right of appeal. Application to the court shall be made within two weeks from the date of closure of the General Meeting.

6. If the plaintiff's right to be given the information is upheld, the Board of Management shall publish the question and the relevant information in the company journals within the ensuing four weeks.

Note on Article 90

The question of release of information to shareholders at General Meetings is a delicate one and it was considered that a special Article should be devoted to it.

The extent of the shareholder's right to information is dealt with in paragraph 1 which relates it to items on the agenda. But the question may not be related solely to the company holding the meeting; it may embrace other companies forming part of the same group.

As to the reply, paragraph 2 provides, somewhat generally, that it shall be "true and fair in all respects". Paragraph 3 accords the right to refuse the information in two cases: where there is risk of considerable prejudice to the S.E. or to the companies in the group and where the supplying of information would constitute a criminal offence.

Paragraphs 4, 5 and 6 provide for the legal consequences of failure to supply information or of the supply of inadequate information, by granting a right of application to the court within whose jurisdiction the registered office is situate. This should enable full effect to be given to the right of information, which is equally important from the point of view of obtaining greater participation by shareholders in the life of the company.

Article 91

1. Subject to Article 49, paragraph 2, each share shall carry a right of vote proportionate to the share of capital which it represents; each share shall carry at least one vote.

2. A simple majority of the votes validly cast shall be required for the passing of resolutions by the General Meeting, save where this Statute prescribes a larger majority.

3. The Statutes may prescribe a larger majority in cases where this Statute does not do so, provided that the majority required shall not exceed four fifths of the votes validly cast.

Note on Article 91

The principle set out in paragraph 1 makes void any provision contained in the Statutes which confers on a shareholder a right of vote disproportionate to his share of the capital.

The majority rule prescribed by paragraph 2, i.e. a simple majority of votes validly cast, is subject to certain exceptions set out in the Statute (Articles 85 and 243) . Apart from these exceptions, the Statutes, in circumstances specified therein, may provide for a qualified majority which may not, however, be more than four fifths of the votes validly cast. So that it may be ascertained whether there is a majority, abstentions are not to be taken into consideration.

Article 92

1. The voting rights attached to a share shall be exercised by the person entitled in possession to a life interest therein. Upon a resolution altering the Statutes, however, the right to vote shall be exercised by the legal owner of the share.

2. Voting rights in respect of shares which are in pledge shall be exercised by the legal owner. For this purpose, for a period of fifteen days prior to the General Meeting and until the conclusion thereof, the pledgee shall at the request of the debtor lodge the shares which he holds in pledge with a bank appointed by the company at the debtor's request.

3. A shareholder shall not exercise his right of vote, nor procure it to be exercised by any other person, upon a resolution concerning his own discharge or upon any other resolution in respect of which his own interest is in conflict with that of the company.

Note on Article 92

These paragraphs contain the necessary provisions regulating the conditions of exercise of the right to vote. For the relevant provisions in the case of joint ownership, see Article 48, paragraph 3.

Article 93

1. Shareholders may, gratuitously, agree to entrust to one of their number, or to a third party, the decision as to the manner in which their right of vote is to be exercised. All agreements pursuant to which shareholders bind themselves to vote in accordance with the directions of the Board of Management or of the Supervisory Board, or in support of proposals of those organs, shall be void.

2. Notice of the agreement shall be given to the company. The agreement shall not take effect, vis-à-vis the company, until such notice has been given. Votes cast in pursuance of such agreement, prior to the notice, shall be void.

3. The names of the parties to the agreement and the total nominal value of their shares shall be set out in the management report. The date of expiry of the agreement shall also be specified in the said report.

Note on Article 93

Rather than impose a prohibition which could be circumvented, the Statute expressly authorizes agreements as to the way in which votes are to be exercised, provided that no consideration is given therefor. But they must be true agreements, freely entered into, and not blind undertakings made in advance to submit to the directions of the Board of Management or of the Supervisory Board. The latter type of agreement—scarcely worthy of the name—is void.

Further, a certain publicity must be given to such agreements. The entire content thereof must be communicated to the company. Votes cast prior thereto are void. Finally, the management report must set out the names of the parties and the total amount of the shares involved.

Article 94

1. The Minutes of the General Meeting shall be drawn up by a notary. They shall include the items discussed, the comments which speakers have asked to be placed on record and the resolutions passed by the General Meeting.

2. The list of persons present and the documents relating to the convening of the meeting shall be annexed to the Minutes together with the reports to shareholders on items placed on the agenda.

3. Immediately after the General Meeting the Board of Management shall file two authenticated copies of the Minutes and of the annexes thereto in the European Commercial Register.

Note on Article 94

This Article is complementary to Article 89 and prescribes the formalities to be followed after the General Meeting has been held.

Article 95

1. Subject to the special procedures and provisions set out in this Statute, resolutions of the General Meeting may, in accordance with the conditions hereinafter contained, be cancelled on the grounds of violation of the provisions hereof, or of the Statutes of the company.

2. Proceedings for cancellation may be brought by any shareholder or by any other interested person who shows that the observance of the provisions is a matter in which he has a proper interest.

3. The proceedings for cancellation shall be brought before the court within whose jurisdiction the registered office of the S.E. is situate, within three months of filing of the Minutes of the Meeting in the European Commercial Register, and shall be against the company. If the proceedings are based on grounds which have been concealed, they may be pleaded within the three months following discovery thereof.

4. On the application of the plaintiff and after hearing the company, the judge may suspend implementation of the resolution in question. He may, likewise, on the application of the company, and after hearing the plaintiff, order that the plaintiff provide security to cover any damage caused by the proceedings or by suspension of implementation of the resolution in the event of dismissal of the proceedings as being unfounded.

5. A judgment ordering cancellation or suspension of a resolution shall have effect in respect of all parties, subject to the rights acquired vis-à-vis the company by third parties acting in good faith. The Board of Management shall forthwith file two authenticated copies of the judgment or order in the European Commercial Register.

6. The judge may not order cancellation of a resolution where the resolution has been replaced by another passed in accordance with this Statute and the Statutes of the company. The judge may, if he thinks fit, allow such time as may be necessary for the meeting to pass such resolution.

Note on Article 95

The right to take proceedings for cancellation of resolutions passed by the General Meeting is of particular importance for shareholders and third parties alike. Speed is of the

essence from the point of view of both and for this reason paragraph 3 imposes a time-limit of three months from filing of the Minutes in the European Commercial Register for action to be commenced.

Conversely, the grounds for cancellation are numerous, comprising, as they do, any infringement of the provisions of the Statute or the Statutes of the company. The grounds include, *inter alia*, violation of the shareholders' right to information (Article 90) to the extent that this has influenced a resolution passed by the General Meeting. They may possibly extend to common law grounds for cancellation in accordance with general principles of law, e.g. abuse of power on the part of the majority.

Cancellation or suspension of the resolution has effect *erga omnes* and the findings of the court are published by the European Commercial Registry.

Cancellation may be avoided if, pursuant to an order of the judge or before he has delivered judgment, the Meeting has amended the resolution in question. In any event, the judge has full discretion as regards resolutions covered by this Article.

Article 96

1. Any resolution of the General Meeting which is contrary to public policy or morality shall be void.

2. Any person having an interest may plead the provisions of the preceding paragraph within three years of the passing of the resolution. Where the grounds of invalidity have been concealed, they may, for a period of three years following the discovery thereof, be relied on as grounds for legal proceedings.

Note on Article 96

As distinct from proceedings for cancellation covered by Article 95, the action for nullity here provided for has a strictly limited field of application since it lies only in cases of flagrant breach of public policy or morality. The nullity must be unquestionable and require no special legal procedure for the purpose of establishing invalidity. Nevertheless, a three year time-limit has been set for bringing the action. If the facts constituting the grounds of action have been concealed—failure to file the Minutes or to make record in the Minutes, etc.—the time-limit runs from the time when the grounds are discovered.

Section five

Special supervision of the Administrative Organs

Article 97

Where there are firm grounds for believing that the Board of Management or the Supervisory Board has committed a serious breach of its obliga-

tions or a member of either of them has committed such breach of his obligations or that those Boards (or either of them) are no longer in a position to perform their functions and that there is a consequent risk that the company may thereby suffer substantial prejudice:

(i) shareholders owning between them either 10 % of the capital of the company or shares to the value of 200 000 units of account; or

(ii) the representative of a body of debenture holders; or

(iii) the European Works Council

may apply, setting out the grounds of the application, for one or more special commissioners to be appointed by the court within whose jurisdiction the registered office of the company is situate or by the court specially designated by the Member States for hearing such application.

Note on Article 97

The Statute here prescribes the procedure for dealing with any serious disturbance in the normal operation of the company. It can be applied only in the case of very grave lapses on the part of the Board of Management and of the Supervisory Board arising either from seriously wrongful acts or from differences of opinion such as impede the normal running of affairs. In either case the damage suffered by or threatening the company must be substantial.

The exceptional nature of the procedure is also underlined by the conditions which have to be satisfied before shareholders may take action. In the case of rectification of the annual accounts (Article 220), actions in respect of liability of the Board of Management (Article 72) or applications for the convening of a General Meeting (Article 84), application by the shareholders may properly be heard provided that they hold 5 % of the capital of the company or shares of a total nominal value of 100 000 units of account. In the case of control of the two Boards the Statute prescribes 10 % of the capital or 200 000 units of account. Further, by way of emphasizing the interest which the company has in this control, the Statute provides for application to be made also by the representative(s) of the body or bodies or debenture holders and by the special Works Council constituted under Section One of Title V. The inclusion of that Council is a remarkable innovation but readily explained by the role which it is called upon to fulfil.

The special control procedure is carried out in two stages: first, the appointment of special commissioners as provided for in Article 98 and, secondly, the making of orders concerning administrative action, as dealt with in Article 99.

Article 98

1. The court shall deal with the application in chambers and shall hear both parties.

2. If, in the opinion of the court, the application is valid, it shall, at the expense of the company, appoint one or more special commissioners and

specify the matters which they are to investigate. Their duties may, on their own application, be enlarged by the court, subject to hearing the company.

3. There shall be no appeal against a decision to appoint special commissioners or, where applicable, to enlarge their duties. Such decisions shall be published in the company journals.

4. The court may require the company to deposit a sum of money or procure a banker's guarantee to be given in respect of payment of fees of the special commissioners. The amount of their remuneration shall be determined by the court on completion of their investigations and after they have been heard by the court. The court may, during the course of the investigation, increase the amount required to be deposited.

5. Special commissioners shall have the same powers as the auditors of the annual accounts.

6. On completion of their investigations the special commissioners shall submit their report to the court which appointed them.

Note on Article 98

The application is made to the court within whose jurisdiction the registered office of the company is situate. The court shall carry out a preliminary examination of the situation out of which the application arises. It must decide whether it is appropriate that special commissioners be appointed, which is a serious step from the company's point of view. Where the court decides that special commissioners should be appointed, it must specify clearly the duties to be performed by them. It may enlarge their duties during the course of the investigation. Action taken at this stage of the procedure is concerned essentially with obtaining information. Its implementation must not be retarded. For this reason there is no appeal against the decision to appoint special commissioners.

The Article provides for publication of these decisions and regulates the financial aspects of the appointment of commissioners so as to expedite their investigations. The decisive phase of the procedure will begin when the special commissioners have submitted their report.

Article 99

1. The registrar shall notify the parties immediately after the special commissioners' report has been filed. The parties shall be entitled to obtain a copy thereof. The court shall act upon the application of the first party to apply.

2. Having full regard to the contents of the report and after hearing the parties, the court may:

(i) suspend from office one or more members of the Board of Management or of the Supervisory Board;

(ii) dismiss them;

(iii) appoint new members to these bodies on a temporary basis.

3. The court shall have power of control over action initiated by it. On application by the company it may curtail or extend the period of suspension. It shall determine the fees to be paid by the company to persons appointed on a temporary basis.

4. The court may make orders for giving interim effect to decisions which it has made under paragraphs 2 and 3. These shall apply in relation to third parties from the date of their publication in the company journals. They shall, further, be registered in the European Commercial Register.

Note on Article 99

The second phase of the procedure begins with notice to the parties of filing of the special commissioners' report. The report must be made available to the parties since subsequent discussions will hinge upon it. Depending upon whether their fears are confirmed or removed by the contents of the report, the plaintiffs will maintain their action or abandon it. In the latter case, the organ that was the subject of the application will probably take up the procedure at least to obtain a decision as to costs and expenses.

If the action is continued by those who made the original application, the court will have to consider what measures are called for by the special commissioners' findings. In this the court has full discretion.

Paragraph 2 of the Article prescribes the kind of action that may be ordered, namely, the appointment, dismissal or suspension of members of the organs concerned. Thus, under this procedure, the court takes the place of the organs normally responsible under the Statute for taking such measures. Because of their exceptional nature, the judge must specify the means of implementation, the duration and extent of functions, the fees of new appointees, their relationship with members remaining in office, etc. It may be desirable for him to deal especially with the question of the continuing validity of the contracts of employment of members suspended: in principle these contracts should not, at any rate at this stage, be terminated.

As these matters, even if the subject of temporary orders only, may raise grounds for complaint, it is fitting that appeal may be made. Yet the possibility of an appeal must not impede the "interim" execution of decisions made by judges of first instance. Interim execution will no doubt generally be ordered without requiring security to be given. As soon as it has been pronounced, the decision of the court must be published in the company journals. This is a condition precedent to its taking effect. It must also be entered in the European Commercial Register. Should the decision at first instance, ordering interim execution, be amended on appeal, the like publicity must be given.

TITLE V

REPRESENTATION OF EMPLOYEES IN THE EUROPEAN COMPANY

The European company is a new type of organization available to undertakings in Europe. Organization of an undertaking involves not only the regulation of the company's legal relationships with its shareholders and third parties, which is the purpose of company law in the narrow sense; the legal position of the employees within the undertaking is just as essential to its proper internal functioning and its business relations with others.

It is generally accepted nowadays in the Member States that an employee has both a *de facto* and a *de jure* relationship to the undertaking. He is a member of the unit constituted by the undertaking and brought into being by orderly cooperation in the process of production, a unit expressed in a single management and organizational authority.

The laws of the Member States show the practical consequences of the legal and factual relationships between the employees and the undertaking. True, the resulting laws differ in content, but they all involve the principle that the employees of a company must be enabled to unite in defence of their interests within the undertaking and to share in the making of certain decisions.

The European company should not only take account of this development, it should encourage it, especially because the efficiency of an undertaking with branches in a number of Member States will depend largely upon the existence of legal means of assisting and encouraging cooperation both between employees and management and between employees in different countries, and which, accordingly, contribute to the solution of particular problems which may arise when a company's personnel is recruited from more than one Member State.

In Title V, the Statute provides three types of legal machinery for regulating the representation of employees within the undertaking and for facilitating the regulation of conditions of employment and remuneration within the European company:

1. The European Works Council, representing the employees in each establishment of the undertaking,

2. Representation of employees on the Supervisory Board of the European company,

3. The possibility of concluding collective agreements between the European company and the unions represented within the undertaking.

The need for representation of employees in each establishment of the undertaking is not disputed in any Member State. The purpose of such representation is to ensure that the interests of the employees are considered when the conditions of work in the establishment are being settled. The Statute attaches great importance to close collaboration between the management of the undertaking and the European Works Council, and to the provision by the undertaking of formal machinery to ensure that full information is given to the employees' representatives in each establishment on all matters of importance affecting the undertaking and its establishments. When particular problems have to be solved between the management of the undertaking and the European Works Council, the Statute provides for the making of agreements between them which shall apply to all employees concerned within the undertaking.

The laws of the Member States differ on whether employees should be represented on the Supervisory Board of the company. The Commission of the European Communities is of the opinion that such representation is necessary in the case of the European company. The Statute makes provision for employees to be represented on the Supervisory Board of the European company by members whom they have elected. These members will be in the same legal position as the members of the Supervisory Board who have been elected by the General Meeting.

The Commission of the European Communities is aware of the fact that certain trade unions in the Member States consider that the presence of employees' representatives on the governing bodies of the company, and on the Supervisory Board in particular, is not desirable. The result may be that the employees of a European company refrain from appointing representatives to the Supervisory Board. To ensure that the administrative organs of the company are able to function in spite of this, the Statute provides that the Supervisory Board has power to take decisions notwithstanding the absence of employees' representatives.

Conditions of employment and remuneration, particularly wage rates, are generally determined in the Member States by collective agreements concluded between the undertakings or employers' federations on the one hand, and the national trade unions in the Member States on the other.

It may be thought, so far as concerns the regulation of conditions of employment and remuneration, that the European company could well adapt itself to existing agreements, at national level, dealing with these matters. This solution would not, however, take sufficient account of the special requirements which arise in this respect from the international nature of the European company. For this reason, the Statute confers certain powers in this matter on the European company, paving the way for uniform regulation of conditions of employment and remuneration in the European company in the event that it be considered necessary.

Section one

The European Works Council

SUB-SECTION ONE

GENERAL

Article 100

A European Works Council shall be formed in every European company having establishments in more than one of the Member States.

Note on Article 100

The present Article provides for the setting up of a European Works Council in every European company which has establishments in more than one of the Member States.

In order to respect, so far as possible, the autonomy of the national laws of Member States, there is no provision in the Statute for any special form of representation of employees in the case of European companies which have only one establishment, or which have several establishments in the same Member State. The object of forming the European Works Council is primarily to ensure uniformity of representation for all employees in a European company. This is already the case for the European company all of whose establishments are in the same Member State; in these circumstances, the national law of that State will uniformly apply.

Article 101

Unless otherwise expressly provided for in this Statute, organs of employee representation formed in the establishments of a European company pursuant to national laws shall continue in existence with the same functions and powers as are conferred upon them under that law.

Note on Article 101

This Article ensures that representative bodies set up under national laws in company establishments shall continue to exist and may continue to carry out their functions where the European Works Council does not settle a matter by exercising its own powers.

Where, in pursuance of national laws, a number of establishments is collectively represented by a central body, this shall also continue in existence, together with its functions and powers. The competence and powers of representative bodies on a national level are not restricted by the Statute except where this is necessary in order to ensure effective representation of the employees of the whole of the European company or of several of its establishments.

Article 102

For establishments situate in the countries hereinafter specified in this Article, the following shall constitute employees' representative bodies within the meaning of Section One of this Part :

(i) The Federal Republic of Germany: the "Betriebsräte" established under the decree of 11 October 1952;

(ii) Belgium: the "ondernemingsraden" or "conseils d'entreprise" established under the law of 20 September 1948;

(iii) France: the "comités d'entreprise" established by the decree of 22 February 1945;

(iv) Italy: the "commissioni interne d'azienda" established in pursuance of the collective agreement of 18 April 1966;

(v) Luxembourg: the "délégations ouvrières principales" established under the law of 20 November 1962 and the "délégations d'employés" established under the law of 20 April 1962;

(vi) The Netherlands: the "ondernemingsraden" established under the law of 4 May 1950.

Note on Article 102

Additional functions and powers are conferred by the Statute on the representative bodies established under national law in the company's establishments (cf. the electoral procedure). As there are several forms of representation of employees in the Member States, it was necessary to specify the bodies to which the various Articles of this Section relate.

SUB-SECTION TWO

COMPOSITION AND ELECTION

Article 103

1. The members of the European Works Council shall be elected by the employees in each establishment of the European company.

2. Where all the assets and liabilities of a European company having establishments in more than one of the Member States are transferred to another European company, the members of the European Works Council of the European company by which the transfer is made shall become members of the European Works Council of the European company to which the transfer is made.

3. Where all the assets and liabilities of a company incorporated under a national law, or of a European company having establishments only in one of the Member States, are transferred to a European company, the European Works Council of the European company to which the transfer is made shall be enlarged in order to accommodate those members who are elected by the representative bodies of the company by which the transfer is made.

Note on Article 103

This Article provides for direct election of members of the European Works Council by the employees in the individual establishments of the European company. This procedure is based on democratic principles and avoids the disadvantages of two-stage election.

Moreover, direct election of members of the European Works Council by all the employees of a European company is not desirable. This system would carry the risk of employees of small establishments being outnumbered by those of larger establishments. In current circumstances, it would involve a number of practical difficulties arising out of the fact that the establishments of a company for which a European Works Council is to be formed are situated in different Member States. Difficulties of language may, for example, impede the presentation of candidates.

When the assets and liabilities of a company are transferred to an existing European company (merger by takeover), there is no necessity to elect a new European Works Council. The European company to which the transfer is made continues in existence and so, accordingly, does its European Works Council. The European Works Council of that European company does not, therefore, have to be enlarged except to the extent necessary to ensure adequate representation of the employees of the company taken over.

If the company taken over is a European company with establishments in more than one of the Member States, it already has a European Works Council. If that Council becomes in its entirety part of the European Works Council of the European company to which the transfer is made, representation within the acquiring company of the employees of the company acquired, as required by the Statute, is thereby ensured.

The members of the European Works Council of the company taken over become members of the European Works Council of the company to which the transfer is made and their term of office will expire at the same time as that of the members of the European Works Council of the latter company. The period during which they hold office may thus be different from that prescribed by the Statute in respect of membership of the European Works Council.

If there is no European Works Council in the company taken over (whether it be a company incorporated under national law or a European company, whose establishments are situated in the same Member State), the additional members of the European Works Council of the European company to which the transfer is made will be elected by the employees in the several establishments of the company taken over. The number of additional members to be elected will depend upon the number of people employed in those several establishments.

Article 104

The election of members to the European Works Council shall be subject to the rules which apply to the election of employee members of the representative bodies referred to in Article 102.

Note on Article 104

The election of members to the European Works Council takes place in accordance with the same rules as govern the election of members to the representative bodies of individual establishments of the European company. The law applicable is, accordingly, the national law of the Member State in which the establishment whose employees are electing representatives to the European Works Council is situated. The rules of procedure referred to in this Article include all provisions relating to preparation for elections and actual voting (e.g. time-limits, method of voting, counting of votes, announcement of results). These rules

contain provisions concerning the right of nomination, eligibility to vote, eligibility of candidates, system of election (majority or proportional representation) and the right to enter an objection.

This Article takes account of the fact that the members of the European Works Council are not elected by a single body of employees of a European company but by the employees of each establishment. This has the advantage that the election of members to the European Works Council is regulated by a procedure which has regard to the special features that characterize the different works councils and with which employees have already become familiar through election of representatives to the works council of their establishment.

Article 105

Each establishment of the S.E. shall elect to the European Works Council:

from 200 to 999 employees: 2 representatives

from 1 000 to 2 999 employees: 3 representatives

from 3 000 to 4 999 employees: 4 representatives

where there are more than 5 000 employees, 1 representative for each additional 5 000 employees.

The same number of alternates shall be elected.

Note on Article 105

The number of members of the European Works Council is determined by the number of establishments in the European company and the number of their employees. The number of members on the European Works Council is of great importance for its proper functioning. If there are too many members, effective cooperation may not be ensured. There must, on the other hand, be a sufficiently large number of members so that the different categories of employees are represented on the European Works Council. Finally, the European Works Council must comprise a sufficient number of members who are qualified to carry out its extensive duties.

The composition of the European Works Council here provided for has regard to the conditions which will exist in the large European companies. As, under Article 100, a European Works Council must be formed only in the case of companies having establishments in different Member States, the composition of the European Works Council, as provided for in the Statute, will generally ensure that it functions properly.

Article 106

Voting shall take place within the two months following the formation of the S.E.

Note on Article 106

A period of two months would appear to be necessary for preparation of the election. This period was intentionally made rather short so as to ensure that, as soon as possible after formation, the European company will have a representative body of employees capable of performing its functions.

Strictly speaking, this Article relates only to the first election of a European Works Council after a European company has been formed. It should, however, be applied *mutatis mutandis* in cases of merger by takeover where the European Works Council of the European company taking over is retained and enlarged in order to accommodate members elected by employees of establishments of the company acquired.

SUB-SECTION THREE

TERM OF OFFICE

Article 107

1. The European Works Council shall be elected for a period of three years.

2. The election of an employee to the European Works Council shall in no way affect his position as a member of the representative bodies referred to in Article 102.

Note on Article 107

In principle, the European Works Council is elected for a period of three years. This period is reduced when the European company for which the European Works Council is established is party to a merger. Where the merger is effected by formation of a new company (Article 269, paragraph 1(a)), the European companies concerned cease to exist and the mandate of the European Works Council is terminated when the European company in respect of which it was formed ceases to exist, i.e. on the day upon which notice of the merger is published in the Official Gazette of the European Communities (cf. Article 271, paragraph 5).

Similarly, in the case of merger by takeover (Article 269, paragraph 1(b)), the mandate of the European Works Council expires when the European company in respect of which it was formed, and which is taken over, ceases to exist. The members of the European Works Council of the company taken over become members of the European Works Council of the acquiring company.

The members of the European Works Council may at the same time be members of the representative bodies set up in the various establishments of the company in accordance with national law. Such dual membership is often desirable as it makes for cooperation between the European Works Council and the representative bodies in each country. An employee who is a member of both bodies will be particularly well placed to defend the interests of

the employees in the establishment to which he belongs. He will also be in a position to explain to the works council of that establishment, decisions of the European Works Council which in any way affect the establishment, and possibly also to assist in their implementation.

Article 108

The term of office of the members of the European Works Council shall cease upon expiration of the mandate of the European Works Council, or by their resignation, or by termination of their contract of employment or by their ceasing to be eligible for membership.

Note on Article 108

This Article sets out the circumstances in which the members of the European Works Council cease to hold office. These include the expiration of the mandate of the European Works Council, resignation by a member thereof, termination of the contract of employment between the member of the European Works Council and the European company, and loss of eligibility for office.

Article 109

1. Two months before the date of expiration of the mandate of the European Works Council, elections shall be held to choose the members of the European Works Council for the following term.

2. The first meeting of the new European Works Council shall be convened by the chairman of the old Council not later than one month before expiration of the mandate thereof.

3. The old Council shall continue to deal with current business until the first meeting of the new European Works Council is held.

Note on Article 109

The aim of this Article is to enable the new European Works Council to be elected in good time before the mandate of the old European Works Council expires. This guarantees maximum continuity in the work of the Council. Newly elected members will have sufficient time, before actually assuming office, to familiarize themselves with the responsibilities entrusted to them.

It is also for the purpose of ensuring continuity in the work of the European Works Council that paragraph 2 of this Article requires the chairman of the old Council to summon the new Council to its first meeting not less than one month before the mandate of the old Council expires. The old chairman must do so even if he has not been re-elected to membership of the new European Works Council.

Article 110

Any member of the European Works Council whose mandate expires before its normal term or who is temporarily unable to carry out his mandate shall be replaced by an alternate member.

Note on Article 110

Whenever a member of the European Works Council is prevented from carrying out his duties, whether temporarily or permanently, he must be replaced by an alternate. This involves the appointment of alternate members in accordance with the provisions of national law, as provided for under Article 104, when the European Works Council is elected.

Members holding office on the European Works Council shall in principle be replaced regardless of the reason for their ceasing to carry out their duties.

SUB-SECTION FOUR

MANAGEMENT

Article 111

1. After the European company has been formed, the first meeting of the European Works Council shall be convened by the Board of Management within one month from the date of the election.

2. The members present at that meeting shall elect a chairman and draw up its internal rules of procedure.

3. The mandate of the European Works Council within the meaning of Article 107 shall have effect as from the day of the first meeting.

Note on Article 111

The responsibility for convening the first meeting of the European Works Council devolves upon the Board of Management, as that is the body best equipped to supply information to the employees who have been elected and to make preparations for the meeting.

The first meeting of the European Works Council of the newly established European company must take place within one month from the date of election. As the election has to be organized within two months of the setting up of the European company (Article 106), the European Works Council can be ready for work within three months of the setting up of the European company. It is in the interests both of the employees and of the management of the European company that this period be shortened even further, if possible.

The first official action of the European Works Council is to elect a chairman and formulate its internal rules of procedure. Only then will the European Works Council, generally speaking, be able to carry out its basic duties. The European Works Council appoints its chairman and adopts its own internal rules of procedure by simple majority vote.

Article 112

No employee who is an actual or alternate member of the European Works Council shall be dismissed from his employment during his term of office on the European Works Council nor during the three years following the period thereof, save upon grounds which, in accordance with the national law applicable, entitle the European company to terminate the contract of employment without notice.

Note on Article 112

This Article affords special protection to members of the European Works Council against dismissal from their employment. A decision to dismiss any such member, contrary to this provision, would be ineffective. This protection is essential in order to ensure the independence and effectiveness of employees' representation. Protection against dismissal must also be maintained for a reasonable period after the mandate has come to an end, for otherwise the worry of finding employment might compromise the independence of the members of the European Works Council. The sole purpose of protection against dismissal is to ensure that the members of the European Works Council suffer no disadvantage as a result of their activities on the Council. Accordingly, a member of the European Works Council may be dismissed if he is guilty of serious misconduct as against the company such as would entitle the company to dismiss him without notice. The conditions applicable to this subject are contained in the various national laws relating to dismissal. Reference is made to national laws in order not to encumber this Statute with detailed rules concerning the law relating to dismissal. This does not affect the equality with which members of the European Works Council are treated, for the provisions of the national laws of the Member States relating to dismissal of an employee without notice are fundamentally the same.

Article 113

1. During their term of office the members of the European Works Council shall be exempt from the obligation to carry out the duties of their employment to the extent to which they consider it necessary for the performance of their duties on the Council.

2. The members of the European Works Council shall continue to receive the wages and salaries and all allowances and bonuses which were payable to them before their election to the European Works Council. They shall be entitled to all benefits and increases in wages, salaries, allowances and bonuses.

Note on Article 113

The members of the European Works Council are entitled to carry out the tasks demanded of them during working hours. Meetings of the European Works Council may take place during working hours and it is for members of the European Works Council to decide whether they need to be excused wholly or partly from the duties connected with their employment. Permission of the management of the European company is not required. However, members of the European Works Council must inform the management of the European company in good time where they are prevented from carrying out the work of their employment with the undertaking.

If, because of his involvement in the affairs of the European Works Council, a member thereof is obliged to work outside working hours, he does not receive any indemnity or compensation for the time he devotes to such activity.

The principle whereby members of the European Works Council should not enjoy any advantage or suffer any disadvantage as compared with other employees of the European company is specifically applied in paragraph 2 of this Article, as in the preceding Article. Paragraph 2 begins by stating expressly that members of the European Works Council shall continue to receive the same remuneration as has been paid to them hitherto. This means that they continue to receive their wages or salary even when excused from fulfilling the duties of their employment. Further, the amount of their remuneration is not to be altered by reason of their election to membership of the European Works Council.

It follows, from the principle aforesaid, that members of the European Works Council shall throughout their term of office be entitled to all general benefits and changes in wages and salaries.

Article 114

Present and former members of the European Works Council shall be bound particularly to keep the secrets of the undertaking and its affairs which come to their knowledge by virtue of their membership of the European Works Council and which have been declared secret by the Board of Management. This provision shall apply also to alternate members.

Note on Article 114

The extensive obligation on the Board of Management to keep the European Works Council fully informed puts the members of the European Works Council under strict obligation to observe professional secrecy. This includes facts relating to the technical operation or the business activities of the company, which are known only to a limited number of persons and which it is in the business interests of the company to keep secret. The Board of Management must expressly stipulate which information is to be regarded as secret.

The members of the European Works Council are also forbidden to pass on these secrets to persons who are themselves bound by some particular obligation to observe professional secrecy. The only exception to this rule is where a secret has been imparted to

an employee in his capacity as a member of the European Works Council or to the European Works Council as a whole. In this case, members who were not previously in possession of the information may be made privy to it.

The Statute does not provide any specific penalty in the event of failure on the part of members of the European Works Council to observe professional secrecy. The consequences of such failure are, accordingly, governed by the criminal law in force in the Member States. Further, in the event of culpable failure to observe this obligation, the guilty member of the Council is liable to make good the damage resulting from the unauthorized release of information. Breach of the obligation of professional secrecy may make it impossible to continue the contract of employment of the member of the Council concerned and may be grounds for dismissal without notice.

Article 115

The operating expenses of the European Works Council shall be borne by the S.E.

Note on Article 115

The European company's obligation to meet the costs of the European Works Council applies only to those arising out of the carrying out of its duties, i.e. all costs of equipment and personnel required. The S.E. may make suitable offices and equipment available to the European Works Council free of charge.

In deciding which costs have been incurred by the European Works Council in the normal course of fulfilment of its duties, it is not a matter of deciding whether these costs were objectively necessary but rather of establishing whether, upon proper consideration, the members of the European Works Council deemed the expenditure necessary.

If there is a difference of opinion between the S.E. and the European Works Council as to whether certain costs should be reimbursed, the matter may be referred to the court of arbitration mentioned in Article 128.

Article 116

1. At the request of one sixth of its members, the European Works Council may decide, by majority vote, that the delegate of a trade union represented in an establishment of the European company shall be entitled to attend certain meetings of the Council in an advisory capacity.

2. The question whether a trade union is represented in an establishment of the S.E. shall be determined in accordance with the law of the country in which the establishment is situate.

Note on Article 116

This Article provides that delegates of trade unions represented in the establishments of the S.E. may attend certain meetings of the European Works Council. Whether a trade union is represented in an establishment is a matter to be determined in accordance with the national law of the Member State in which that establishment is situated. Renvoi to the national law applies in general to all the provisions in this Section where mention is made of a trade union represented in the establishments of the company (Articles 140 and 146).

Article 117

The European Works Council may, for clarification of certain questions, consult one or more experts if it considers this to be necessary for the proper discharge of its duties.

The Board of Management shall make available to the experts, free of charge, all documentation necessary for their work, save where this would be seriously inimical to the interests of the company. The costs incurred in consulting experts shall be borne by the S.E.

Note on Article 117

The European Works Council has to fulfil a number of tasks which require a knowledge of complicated business mechanisms. It must, therefore, be able when necessary to call upon experts for advice on various matters and to assist in preparing its decisions. This Article expressly stipulates that the S.E. shall bear the cost of consulting these experts. It ensures, further, that an expert shall have access to all the documents he needs in order to do his work. The only restriction is where it would be seriously to the detriment of the interests of the S.E. to make these documents freely available for consultation. In the event of a difference of opinion on this point between the Board of Management and the European Works Council, the matter may be referred to the court of arbitration mentioned in Article 128.

It is clear from the text of this Article that the European Works Council may only call in experts for the consideration of certain questions. The European Works Council is consequently not entitled to employ experts as permanent advisers.

Article 118

1. The European Works Council shall keep the employees regularly informed of its work by such means as it shall deem most suitable for this purpose.

2. The information supplied shall have regard to the interests of the S.E. and shall not disclose secrets appertaining to operations or processes which are specially protected in one of the Member States.

Note on Article 118

The European Works Council should regularly inform the employees of the S.E. of the work it is doing. Only extensive and regular information will ensure the necessary cooperation between the European Works Council and the employees whom it represents. It enables the employees to keep a check on the way in which the European Works Council carries out its duties.

The European Works Council will itself determine the form in which these reports are prepared and issued. This will depend particularly upon the number of employees it represents and the organization of the company.

SUB-SECTION FIVE

FUNCTION AND POWERS

Article 119

1. The European Works Council shall be responsible for representing the interests of the employees of the S.E.

2. The European Works Council shall confine itself to dealing with those matters which concern the S.E. as a whole or several of its establishments. It shall not be competent in matters which are the subject of a collective agreement within the meaning of Section Four of this Title.

3. The European Works Council shall ensure that effect be given to provisions of law existing for the benefit of the employees of the S.E., collective agreements made in accordance with Section Four, and agreements concluded within the company as a result of its efforts.

Note on Article 119

This Article describes generally the responsibilities and powers of the European Works Council. Paragraph 1 provides that the European Works Council is to represent the interests of employees of the S.E. as a whole. It should not favour certain categories of employee, such as those in certain establishments or of certain nationalities, in relation to employees of other categories. This does not, however, preclude special intervention on its part for the purpose of defending the interests of certain categories of employee, or even of certain employees, where particular circumstances justify such action.

The European Works Council is restricted, in the fulfilment of its tasks, to the spheres of competence allotted to it by this Statute. Paragraph 2 limits the competence of the European Works Council in two ways. The first sentence has regard to the fact that the European Works Council represents the employees of the S.E. as a whole, and that the works councils set up in the individual establishments of the company, in accordance with the national law, continue to exist (Article 101). Matters which concern only one particular

establishment are to be dealt with by the representative body formed under national law. The European Works Council can, at best, influence the decision of that body by its advice and recommendations. Where, on the other hand, a matter concerns a number of establishments, the European Works Council will be the body competent to act, being the body representing the employees of those establishments. In the interests of efficiency it is important that the European Works Council should, in every sphere, work in cooperation with the representative bodies existing under national law and solicit their opinions before taking important decisions.

The competence of the European Works Council is further limited by collective agreements concluded between the S.E. and the trade unions represented within it (cf. Section Four of this Title). The important point here is not that a matter may be settled by means of collective agreement but that the agreement does, in fact, exist.

The competence of the European Works Council is yet further limited where the S.E. is a member of a group and a works council has been formed for the group. The approval required under Article 123 to be given by the European Works Council for certain decisions of the Board of Management is then to be given by the Group Works Council (Article 135, paragraph 1).

If there is a difference of opinion on the question of competence as between the various councils or as between the councils and the Board of Management, the matter may be referred to the court of arbitration mentioned in Article 128.

Article 120

1. The Board of Management and the European Works Council shall meet at regular intervals for joint discussion.

2. The Board of Management of the S.E. shall keep the European Works Council regularly informed of the general economic position of the S.E. and of its future development. To this end it shall send to it every quarter a report on the preceding quarter. This report shall contain at least:

(a) a general survey of developments in the sectors of the economy in which the S.E. operates;

(b) a survey of the development of the business of the S.E.;

(c) an exposé of likely developments and of their repercussions on the employment situation;

(d) a survey of investment resolved to be made.

3. The Board of Management shall inform the European Works Council of every event of importance.

Note on Article 120

It is in the interests both of the Board of Management of the S.E. and of the European Works Council and the employees whom it represents that the Board and the Council should work together closely and in mutual trust. This cooperation, for which both sides are

responsible, does not exclude effective representation of the interests of each; it should, on the contrary, make it easier. From this point of view, it is particularly important that the Board of Management of the S.E. and the European Works Council should keep each other fully informed and work in agreement. The provisions of this Statute attach particular value to this cooperation by requiring the Board of Management to provide the European Works Council with detailed information upon various matters.

The Board of Management is to send to the European Works Council every quarter a written report on the business situation of the S.E. The information provided for in paragraph 1 is essential for the effective working of the European Works Council. The Council must be aware of trends in the sectors of the economy in which the S.E. operates, as also of the present situation of the S.E. and foreseeable economic developments. Finally, it is also to be informed of important decisions in advance, such as those concerning investment or rationalization measures which may have considerable repercussions on the development of the S.E. and on the position of its employees. If it is informed promptly, the European Works Council will be able to prepare for or minimize any unfavourable consequences to the employees of changes in the economic situation and of any specific measures to be taken and, in collaboration with the Board of Management, to seek in good time a solution to the difficulties anticipated. It is in the Board's interest to prepare the report provided for in paragraph 2 of this Article in such a way as to ensure that the European Works Council is fully informed. Where necessary it should also elaborate on the contents of the report and state the long-term aims and prospects of the company.

Article 121

1. The European Works Council shall receive the same communications and documents as the shareholders.

2. The annual accounts shall after adoption be sent to the European Works Council together with the management report.

Note on Article 121

This Article contains another direct application of the obligation on the Board of Management to supply the European Works Council with information. All information supplied to shareholders of the S.E. must also be supplied to the European Works Council.

Because of the particular importance of the information contained in the annual accounts, it is expressly stipulated in paragraph 2 that these be forwarded to the European Works Council together with the management report.

Article 122

1. The European Works Council may request written information from the Board of Management on any matter which it considers of importance and may give its opinion thereon.

2. The European Works Council may invite any member of the Board of Management to its meetings and request him to provide information on or explanations of certain business operations.

Note on Article 122

Whereas the two preceding Articles impose upon the Board of Management the obligation to keep the European Works Council regularly informed, this Article confers upon the European Works Council the right to ask the Board for additional information on certain matters. Paragraph 1 provides for information to be supplied in writing. The right of the European Works Council to receive information is not subject to any condition that these should be matters which may be regarded objectively as having particular importance for the employees of the S.E. and for the work of the European Works Council. Frequently, this question cannot be settled in accordance with any objective standards and, even where it can be done, it is only after the information requested has been supplied.

Paragraph 2 provides for information to be supplied verbally. The European Works Council may invite members of the Board of Management to its meetings and request them to provide it with information on and explanations of certain business operations. This has the advantage over the procedure provided for in paragraph 1 that it enables the European Works Council immediately to give its opinion on the statements of the Board, thereby expediting and facilitating the reconciliation of opposing points of view. The right to verbal information is also not limited to specific fields or to questions of particular importance.

Obviously the Board of Management must meet the requests of the European Works Council unless the overriding interests of the S.E. would make this inadvisable. In the event of disagreement between the Board of Management and the European Works Council on the question whether a request may be declined or information refused, the matter may be referred to the court of arbitration (Article 128).

Article 123

1. Decisions concerning the following matters may be made by the Board of Management only with the agreement of the European Works Council:

(a) rules relating to recruitment, promotion and dismissal of employees;

(b) implementation of vocational training;

(c) fixing of terms of remuneration and introduction of new methods of computing remuneration;

(d) measures relating to industrial safety, health and hygiene;

(e) introduction and management of social facilities;

(f) daily time of commencement and termination of work;

(g) preparation of the holiday schedule.

2. Any decision taken by the Board of Management in respect of the matters specified in paragraph 1 without the agreement of the European Works Council shall be void.

3. If the European Works Council withholds its agreement or does not express its opinion within a reasonable period, agreement may be given by the court of arbitration mentioned in Article 128.

4. In respect of the decisions referred to in paragraph 1 above, employees' representative bodies set up in the various establishments shall exercise the right to participate, accorded by national law, only when the European Works Council is not competent to do so under Article 119, paragraph 2, first sentence.

Note on Article 123

This Article gives the European Works Council an absolute right to take part in making decisions on certain matters. This right only arises where the European Works Council has general competence within the meaning of Article 119, paragraph 1. Accordingly, it does not apply in respect of matters which have been settled by collective agreement within the meaning of Section Four of this Title; nor where the Group Works Council is competent (Article 134, paragraph 2), in which case the agreement of the Group Works Council replaces that of the European Works Council (Article 135, paragraph 1). If decisions of the Board of Management of the controlling S.E. were to be made subject to the agreement of the works councils of the various dependent companies, vital decisions and measures would be considerably delayed and, in many cases, even made impossible. On the other hand, when agreement has been refused by the competent Group Works Council, the agreement of the aggregate of the European Works Councils cannot be substituted therefor. This is because of the position of the Group Works Council as the common representative body, within the limits of its competence, of the employees in all the companies in the group.

Everything which applies to the relationship between the Group Works Council and the European Works Council applies also, by analogy, to the relationship between the European Works Council and the representative bodies set up under national law in the individual establishments. The right of these representative bodies to take part in making decisions is replaced by the rights conferred by this Article upon the European Works Council. If a decision falls within the competence of the Group Works Council, the rights of participation of the representative bodies set up under national law are restricted in favour of the Group Works Council (Article 135, paragraph 1).

The European Works Council may make agreements in respect of the undertaking on matters specified in this Article (Article 127, paragraph 1). Such agreements may be substituted for the agreement required to be given under this Article.

Any decision taken by the Board of Management on a matter lying within the competence of the European Works Council without the latter's agreement is void (paragraph 2). Paragraph 3 provides that the agreement thereof may be dispensed with and that the agreement of the court of arbitration mentioned in Article 128 may be obtained, where agreement is refused by the European Works Council. The same applies when the European Works Council delays a decision or measure by failing to express its opinion within a reasonable period. In the event of dispute, the question whether the European Works

Council has had a reasonable period in which to give its opinion will be determined by the court of arbitration before making any decision in the matter. It is important in this connection to know whether the opinion of the European Works Council required considerable preparation and whether the Board of Management made it known that the decision was one of particular urgency.

The right of the European Works Council to take part in making decisions is provided for in matters which directly concern the employees of the S.E. The list contained in paragraph 1 of this Article is exhaustive.

(a) The rules relating to recruitment, promotion and dismissal of employees should be understood as meaning the directions issued by the Board of Management. In large companies, in particular, they have a decisive influence on the career prospects of employees and on the structure of company personnel. Thus they include conditions of recruitment and of appointment to certain posts (previous theoretical training required, professional experience, age, etc.), the criteria on which promotion is based (specialized courses, language courses, etc.) and the grounds, in general, which will lead to dismissal of employees.

The right to share in the taking of decisions does not apply to individual measures. The validity of these is determined solely by the law of the Member State in which the employee concerned works. This in no way affects the existing right of works councils set up under national law in the various establishments to participate in the making of decisions of an individual nature. Because it is so closely associated with the undertaking, the European Works Council, as the common representative body of all employees in the S.E., is much less well equipped than the representative bodies set up under national law and closely associated with the establishment, to take part in decisions of an individual nature.

(b) The European Works Council participates in determining the ways and means in which vocational training is to be organized. The concept of vocational training includes the basic training of apprentices, general further training and advanced training given to employees to equip them to carry out specialized work, as well as the practical training provided for persons from outside the establishment. Vocational training also includes the retraining of employees for work in other fields, which may become necessary, for example, following a change in economic conditions.

(c) The fixing of terms of remuneration relates to the manner in which wages and salaries are paid (hourly or piece-work rates, instalments, dates of payment, etc.). Methods of computing remuneration should be understood to mean the procedure whereby rates of pay are applied: job assessment, means of relating wages to output (team or individual rates, piece-work or time rates, etc.).

(d) A right to participate in decision-making is provided for in matters connected with safety, health and hygiene, i.e. in a sphere which directly concerns the life and health of the employees. The right to take part in decision-making extends to matters relating to industrial safety, accident prevention, training of workers in accident prevention, and the provision and maintenance of first aid stations. The European Works Council cannot, of course, impose additional measures but it can press for such measures to be taken, and it can represent the interests of employees when new plant is being installed.

(e) The European Works Council has the right to participate in making decisions connected with the introduction and management of social facilities. It has no more right here than in the case of matters mentioned in paragraph (d) to compel the introduction of other social facilities but again it can use its influence to this end, and as it exercises its right to share in decision-making from the moment when the social facilities are introduced, it can have considerable say as to the form they take. The European Works Council can take part in

decisions concerning any administrative action which is not exclusively a matter of the day-to-day internal running of the company. Accordingly, the Board of Management will recognize its right to manage social facilities itself.

(f) The agreement required for determining the time of commencement and termination of work. This provision relates to the dividing up of the whole of the working time: beginning and ending of the working day, breaks therein, and which days shall be working days. It does not relate, however, to the fixing of total daily or weekly working hours. Agreement is necessary when rules of a general nature are involved, but not when the distribution of working hours is changed only for certain employees pursuant to individual contract or by virtue of powers vested in the management.

(g) The holiday schedule provides for distribution of holidays over the year for each category of employee. The number of days of holiday is fixed not by the holiday schedule but by law, collective agreement or individual contract.

Article 124

1. The Board of Management shall consult the European Works Council before making any decision concerning:

(a) job evaluation;

(b) rates of wages per job or for piece-work.

2. Article 123, paragraph 2 shall apply.

3. The Board of Management may make a decision without the opinion of the European Works Council where the latter does not inform the Board of its opinion within a reasonable time.

Note on Article 124

This Article requires the Board of Management to consult the European Works Council before making any decision on the matters aforesaid. If it fails to fulfil this obligation, its decision is void. The European Works Council should inform the Board of its opinion as soon as possible in order to exert a timely influence on the Board and not pointlessly delay its decision. If it does not make its opinion known within a reasonable period it loses the right to take part in this decision. The court of arbitration will, where necessary, decide whether the European Works Council has had sufficient time in which to give its opinion (Article 128).

The requirement that the European Works Council be consulted is not a substitute for the requirement of national law that the representative bodies set up in individual establishments be consulted. Similarly, where necessary, the Board of Management is obliged to consult the Group Works Council and all the European Works Councils of the various dependent companies. In making its decisions, the Board of Management has, in this way, a broad spectrum of the opinions and arguments put forward by the employees.

(a) Job evaluation means the determination, by analysis, of the degree of difficulty of the work involved in a given job. This often constitutes the basis upon which employees are divided into salaried and wage-earning categories.

(b) The European Works Council is entitled to take part in fixing wage rates for the job or for piece-work, i.e. the objective fixing of these rates for certain operations and certain jobs. This Article does not, however, relate to the use of these job rates or piece-work rates in calculating the wages of each employee.

Article 125

1. The Board of Management shall also consult the European Works Council before making any decision 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. In the cases specified in paragraph 1, the Supervisory Board shall not give the approval required under Article 66, paragraph 1 until the European Works Council has expressed its opinion, save where the European Works Council has not done so within a reasonable time.

Note on Article 125

This Article contains a further list of matters upon which the Board of Management cannot make decisions without prior consultation with the European Works Council. In contrast to the previous Article, these are not decisions which directly affect the employees but decisions which, by reason of their importance for the future business and organization of the company, may have very important consequences for employees. Through prior consultation, the European Works Council is able to exercise an influence at a very early stage on the attitude of the Board of Management, and by acting in good time can prevent or minimize consequences which are not to the benefit of the employees.

The European Works Council loses its right to participate in the making of certain decisions if it does not exercise that right within a reasonable period. In each case, the length of this period is determined according to whether the work required long preparation (e.g. the obtaining of expert opinions) and whether the matter was obviously urgent. Disputes may be referred to the court of arbitration (Article 128).

Paragraph 2 ensures that the rule of compulsory consultation will be observed. It also enables the European Works Council to influence the attitude of the Supervisory Board. Under Article 66, paragraph 1, the agreement of the Supervisory Board is required for all decisions of the Board of Management mentioned in the foregoing Article. This is to be given only after the opinion of the European Works Council has been obtained. The Supervisory Board must be satisfied that this condition has been fulfilled.

Consultation is obligatory. The Board of Management cannot evade it on the ground that the decisions involved are of particular urgency. All decisions on matters mentioned in the present Article require, even when they are urgent, thorough preparation by the Board of Management and the Supervisory Board. When the European Works Council is informed in good time by the Board of Management of a proposed decision, it can express its opinion without thereby delaying the decision.

The interest of the S.E. in the preservation of its secrets in no way justifies restriction of compulsory consultation. The members of the European Works Councils are bound by a special obligation not to disclose these secrets (Article 114). Experience in the Member States shows that members of employees' representative bodies do in fact respect this obligation.

(a) The closure of the undertaking should be understood to refer here to definitive cessation of activities. It leads to winding-up of the undertaking and dismissal of the employees. The same applies to the closing down of parts of the undertaking. The question whether the part concerned is a very substantial part of the undertaking is determined by the importance which that part bears in relation to the undertaking as a whole and by the number of employees affected by the closure. Even individual establishments and departments within an establishment may be substantial parts of an undertaking. If a part of an undertaking has carried on its activities only for specified purposes or for a specified period of time, consultation is not obligatory when this part is shut down after completion of the work decided upon in advance or on expiration of the period provided for.

Transfer of the undertaking primarily involves the actual transfer of the administration of the company and of its establishments.

(b) Consultation is compulsory even where the undertaking's activities are changed temporarily, provided that this is not purely a seasonal change or one of very short duration.

(c) Organizational changes within the undertaking should be understood to refer to a redistribution of responsibilities and powers within the undertaking and a change in composition of the persons exercising them. It arises, for example, on a re-allocation of the work to be performed in the process of production amongst individual establishments and the departments of one establishment.

(d) Decisions which relate to cooperation with other undertakings often have no direct bearing on the financial and social situation of employees. On the other hand, the indirect effects on employees, often felt only in the long term, are generally very important. There is, therefore, a danger here that the making of binding agreements with other undertakings may produce a state of affairs whose repercussions on individual employees could not have been foreseen by the Board of Management when the agreements were made, and which cannot subsequently be avoided. This is why prior consultation of the European Works Council would appear to be equally necessary before such decisions are taken.

The form assumed by cooperation with other undertakings is irrelevant for the purposes of this Article. The only deciding factor is that cooperation be established on a permanent basis, i.e. that it should not simply be cooperation in individual projects in the ordinary course of operations of the undertaking or establishment.

Article 126

1. Consultation by the Board of Management with the European Works Council shall be in writing, setting out the reasons underlying a decision and

the likely consequences of the decision from the point of view of the business and of the employees.

2. If the Board of Management disregards the recommendations contained in the European Works Council's opinion, it shall state its reasons for so doing.

Note on Article 126

This Article formulates the procedure for consultation. The Board of Management must set out in writing its proposed decision and the factors which it considers to be in support of that decision. It must also state the consequences that such decision will have for the S.E. and its employees.

The Board of Management may, when making its decision, ignore the recommendations of the European Works Council. It must then deal with the arguments put forward by the European Works Council and show why it considered it necessary to decide otherwise.

Article 127

1. The European Works Council may, to the extent that it is competent, make collective agreements with the Board of Management of the S.E. in respect of the matters specified in Articles 123 and 124.

2. Collective agreements made by the European Works Council shall have priority over agreements made by the representative bodies referred to in Article 102.

Note on Article 127

Where an agreement has been made between the S.E. and the European Works Council, acting within its powers, the contents thereof directly influence the working conditions of employees to which it relates. The provisions of collective agreements cannot be altered to the benefit of employees by individual agreements. On the other hand, the spirit of these collective agreements does not, in principle, exclude the possibility of altering a collective agreement, to the benefit of employees, by an individual agreement.

In order to avoid the making of different collective agreements by the European Works Council and by national representative bodies, paragraph 2 gives priority to agreements concluded by the European Works Council. Article 135, paragraph 2 contains a similar provision relating to group collective agreements. Under that provision, collective agreements made by the Group Works Council, acting within its powers, take priority over collective agreements made by the European Works Council and by national representative bodies.

Collective agreements, by whichever employees' representative body they were negotiated, give way to collective agreements concluded between the S.E. and the trade unions represented in its establishments. The unions in this way exercise a direct influence on the conditions of employment in the S.E.

SUB-SECTION SIX

ARBITRATION PROCEDURE

Article 128

1. A court of arbitration shall be established for the settlement of disputes between the European Works Council and the Board of Management of the S.E.

2. The court of arbitration shall be composed of assessors, half of whom shall be appointed by the European Works Council and half by the Board of Management of the S.E., and an impartial chairman appointed by mutual agreement between the parties. In default of agreement as to appointment of the chairman or as to the assessors in general, they shall be appointed by the court within whose jurisdiction the registered office of the company is situate.

3. The members of the court of arbitration shall be subject to special obligations in the matter of professional secrecy.

4. Decisions of the court of arbitration shall be binding on both parties.

Note on Article 128

To ensure that cooperation between the Board of Management and the European Works Council is as close as possible and characterized so far as possible by mutual confidence, all disputes must be settled within the undertaking itself. As it will not always be possible to reach a negotiated agreement, it is necessary to have a court of arbitration whose decisions shall be binding on both parties. In principle, the parties themselves determine the composition of the court of arbitration. It is only where no agreement can be reached on the composition of the court, and to the extent that such agreement proves impossible, that a body outside the undertaking need resolve this aspect of the procedure.

Article 129

1. A court of arbitration shall be established for the settlement of disputes between the European Works Council and the representative bodies referred to in Article 102.

2. Article 128, paragraphs 2, 3 and 4 shall apply.

Note on Article 129

The principle expressed in the preceding Article, whereby differences of opinion must be settled within the undertaking, applies particularly to relations between the various bodies representing the employees. Accordingly, it is necessary to set up courts to arbitrate between the European Works Council and the employees' representative bodies formed in the establishments under national law.

Courts of arbitration are provided for under Article 136 for settlement of disputes between the various bodies representing the employees.

Section two

The Group Works Council

Article 130

1. A Group Works Council shall be formed in every S.E. which is the controlling company in a group having establishments in a number of Member States or whose dependent undertakings have establishments in a number of Member States, notwithstanding that such controlling S.E. is itself dependent on another company.

2. Other bodies which represent the common interests of employees vis-à-vis the Board of Management of the controlling S.E. may be formed in place of the Group Works Council. Such bodies shall have, in relation to the Board of Management of the controlling S.E., the same rights and obligations as the Group Works Council.

Note on Article 130

The European Works Council can effectively defend the interests of employees only if it is involved in the entire decision-making process by information, consultation or participation in decisions. If a number of undertakings are united under a single group management, many decisions concerning the undertaking are entrusted to the controlling S.E. and the employees' representative bodies in the various undertakings are unable to take part in them. Thus it is necessary for the employees in all the group's undertakings to be represented on a common body which works with the Board of Management of the controlling S.E. This need is generally stressed in proposals for reform in the Member States.

As the legal and actual position of the various groups differs too widely, it was not thought desirable to prescribe detailed rules which would be binding upon the Group Works Council. It should be left to the employees of each group to appoint a body to represent the interests of all of them in relation to the group management, thereby having regard to

the particular situation of each group (paragraph 2). In this way it becomes possible to avoid too great a restriction of the responsibilities and powers of the various representative bodies by the Group Works Council.

Article 131

The members of the Group Works Council shall be appointed by:

(a) the European Works Councils in the companies within the group, where these are European companies in which a European Works Council must be formed pursuant to Article 100;

(b) the employees' representative bodies referred to in Article 102 in undertakings within the group, where these are companies incorporated under national law or are European companies in which it is not necessary to form a European Works Council.

Note on Article 131

The interests of all the employees in the group must be represented on the Group Works Council. Frequently, however, direct election of members to this council by the employees in the group will scarcely be possible if only for technical reasons. It was, accordingly, necessary to make the representative bodies existing in the group's undertakings responsible for appointing to the Group Works Council members in whom they have confidence.

Article 132

The representative bodies referred to in Article 131 shall appoint delegates to the Group Works Council from amongst their own members, in accordance with the following scale:

1 representative for each undertaking with less than 1 000 employees,

2 representatives for each undertaking with from 1 000 to 4 999 employees,

3 representatives for each undertaking with from 5 000 to 9 999 employees,

4 representatives for each undertaking with from 10 000 to 19 999 employees,

and an additional representative for every further 10 000 employees.

Note on Article 132

The representative bodies referred to in Article 131 are responsible for appointing, from amongst their members, delegates to the Group Works Council. They shall organize the election as they think fit. It seemed appropriate that the Statute should stipulate only the number of representatives in accordance with a reasonably graduated scale.

Article 133

Articles 111 to 118 shall apply to the operation of the Group Works Council.

Note on Article 133

The Group Works Council, being the only body which represents the interests of the employees of the group vis-à-vis the group management, has responsibilities similar to those of the European Works Council acting as representative of the employees of the S.E. The provisions regulating the work of the European Works Council were, therefore, able to be applied to the Group Works Council.

As other forms of representation may be established for employees within a group, in place of the Group Works Council (cf. Article 130, paragraph 2), the provisions relating to the working of the Group Works Council are not compulsory and may be modified by the parties concerned.

Article 134

1. The Group Works Council shall be responsible for representing the interests of the employees of the undertakings within the group.

2. The Group Works Council shall be competent only in matters concerning a number of dependent undertakings or not less than one such undertaking and the controlling S.E. Its competence shall not extend to matters which form the subject of a collective agreement within the meaning of Section Four of this Title.

3. Articles 120 to 127 shall apply to the relationship between the Group Works Council and the Board of Management of the controlling S.E.

Note on Article 134

Paragraphs 1 and 2 of this Article fix the responsibilities and competence of the Group Works Council. They follow the same pattern as the regulations contained in Article 119 governing the European Works Council and reference may be made to the note on that

Article. As it represents all the employees in the group, the Group Works Council is in principle competent to act in all matters which concern several companies in a group, even when only the controlling S.E. and one dependent company are involved.

In order to ensure effective representation of employees in a group vis-à-vis the group management, the Group Works Council has, in paragraph 3, been given the same rights and duties in relation to the Board of Management of the controlling S.E. as are provided for in the case of the European Works Council in Articles 120 to 127.

Article 135

1. The agreement of the European Works Council required under Article 123 shall be replaced by that of the Group Works Council where it is competent. Article 123, paragraph 4 shall apply to national representative bodies.

2. Collective agreements made by the Group Works Council shall have priority over those made by the European Works Councils or by the representative bodies referred to in Article 102.

Note on Article 135

The responsibilities and powers of the European Works Councils and works councils formed under national law in dependent companies are not fundamentally affected by the Group Works Council. This principle is subject to restriction only in so far as this is absolutely necessary in order that there be a single body representing all the employees in the group and that the group be able to make decisions.

Thus the agreement of the various representative bodies as required by this Statute or by the national law of the Member States to decisions of the Board of Management may validly be given by the Group Works Council on behalf of these bodies. Conversely, the other rights of participation, such as the right to prior consultation, remain unchanged.

The Group Works Council may, moreover, make collective agreements which have effect for some or all of the companies within the group, and may thereby act in place of the various representative bodies.

Article 136

1. Courts of arbitration shall be established for the settlement of disputes between the Group Works Council and the Board of Management of the controlling S.E., or between the European Works Councils in the group and the works council or representative bodies referred to in Article 102 in the undertakings within the group.

2. Article 128, paragraphs 2, 3 and 4 shall apply. The court which shall be competent to exercise the power conferred by Article 128, paragraph 2,

second sentence, shall be determined by the law of the place in which the registered office of the controlling S.E. is situate.

Note on Article 136

See the notes on Articles 128 and 129.

Section three

Representation of Employees on the Supervisory Board

Article 137

1. The employees of the S.E. shall be represented on the Supervisory Board of the company. They shall appoint one member for every two appointed by the General Meeting. The Statutes may provide for a higher number of employees' representatives.

2. Where the number of employees' representatives on the Supervisory Board does not exceed three, at least one of them shall be a person who is not employed in an establishment of the S.E. Where the number of employees' representatives is four or more, at least two of them shall be persons who are not employed in an establishment of the S.E.

Note on Article 137

This Article provides for the appointment of representatives of the employees of the S.E. to the Supervisory Board. The employees are thus given powers of control and joint management additional to, but different in kind from, the powers conferred on the employees' various representative bodies within the establishments. This joint participation, stemming from the very constitution of the company, between the representatives of shareholders and the representatives of employees in one of its organs will encourage both cooperation and exchange of information between the management of the S.E. and the employees' representatives.

The Supervisory Board is the appropriate organ for such representation. As the Board of Management is appointed by the Supervisory Board, the employees, through their representatives on this Board, have some control over the composition of the Board of Management; and as the Board of Management is controlled by the Supervisory Board and may be dismissed by it, the employees may also exercise some influence on the policy of the undertaking.

One third of the members of the Supervisory Board are appointed by the employees as their representatives. This ensures effective expression within the Board of the point of view

of the employees' representatives. It also has regard to the existence, within the S.E., of other bodies exclusively composed of employees' representatives, such as the European Works Council, with wide powers in their relations with the management of the undertaking.

The Article permits the number of employees' representatives on the Supervisory Board to be increased, allowing company law its role in this respect. Recognizing the variety of situations which arise in practice, no attempt has been made to regulate the procedure or to specify who will negotiate this matter. The Statutes must expressly authorize an increase in the number of employees' representatives on the Supervisory Board. This may be done when a European company is formed. After formation of the company, an increase in the number of employees' representatives would require alteration of the Statutes and necessitate the agreement of the General Meeting.

Paragraph 2 provides that the Supervisory Board must also include among its members representatives who are not employees of the S.E. The purpose of this provision is to prevent employees' representatives from having regard only to matters which are internal to the undertaking.

Article 138

1. Employees shall not be represented on the Supervisory Board if not less than two thirds of the employees of the S.E. so decide.

2. A decision to this effect may be taken only once during the term of office of the Supervisory Board.

Note on Article 138

Representation of employees on the Supervisory Board is the general rule under the Statute. This concept is, however, meaningless and incapable of being applied if it is not subscribed to by a sufficient number of employees of the S.E. Accordingly, this Article provides that there shall be no representation of employees on the Supervisory Board if two thirds of the employees of the S.E. so decide.

As provided by paragraph 2, voting on this question may take place only once during the term of office of the Supervisory Board.

Article 139

1. The members of the representative bodies referred to in Article 102 shall elect representatives of the employees to the Supervisory Board. They shall not be bound by the decisions and instructions of the bodies of which they are members.

2. Each member shall have a number of votes equal to the number of employees in his establishment divided by the number of members of the representative body in that establishment. A fraction of a vote greater than one half shall be counted as a whole vote.

3. Election shall be by list.

4. The list of nominations must contain the names of as many candidates as there are posts to be filled on the Supervisory Board. An alternate shall be elected for each candidate.

5. The list of nominations shall take account of the matters specified in Article 137, paragraph 2. It shall include candidates of different nationalities in proportion to the number of employees in each of the Member States.

6. The list adopted shall be that which receives the most votes and at least one half of the votes polled.

7. If the majority required is not obtained on the first poll, a second poll shall be held. In this poll, voting shall take place only on the two lists which gained most votes during the first poll. The list adopted shall be that which receives the most votes.

Note on Article 139

In contrast to the members of the European Works Council, the employees' representatives on the Supervisory Board are not elected directly by the employees of the company.

The electors in this case are the members of the representative bodies set up under national law in the various establishments. Together they make up an electoral college. When exercising their right of vote, these members are not bound by decisions or instructions of the bodies of which they form part. The procedure provided for allows members of the representative bodies which by a majority refuse to appoint representatives to the Supervisory Board, to take part in the election.

The ratio of the number of people employed in an establishment to the number of members on the representative body set up under national law within the establishment may vary very considerably. It would be inequitable, therefore, if, on joint election of members of the Supervisory Board, the votes of members of the different representative bodies set up under national law were to carry the same weight. Voting must, therefore, be geared to take this into account. For this purpose, the total number of persons employed in each establishment must be divided by the number of members on the representative body formed within the establishment. If, for example, an establishment has 564 employees who are represented by a works council of 10 members, this method of calculation works out at 56.4 votes. The fraction of four tenths of a vote is ignored because it is less than half (paragraph 2, second sentence). Each member of this works council would thus have 56 votes.

The system of voting by list, as provided for by this Article, makes it impossible for employees in smaller establishments to be put in a minority by employees of larger establishments. This is particularly important when the establishments of the S.E. are situated in different Member States. For this reason it is stipulated that each list of nominations must include candidates of different nationalities at least to the extent that employees of the company are employed in a number of Member States.

The employees' representatives on the Supervisory Board should have the support of as great a majority of the employees of the S.E. as possible. This majority will, in particular,

lend greater weight to the arguments put forward by employees' representatives during the Supervisory Board's discussions. That is why, to gain election, a list must receive at least half the votes polled.

As the right to nominate candidates for this election is quite widely distributed, as provided by Article 140, the required majority will often not be obtained on the first vote. For this reason, the only lists which apply on the second poll are the two which received most votes in the first.

Article 140

1. Lists of candidates may be submitted by the representative bodies referred to in Article 102, by the European Works Council, by the trade unions represented in the establishments of the S.E. and by the employees of the S.E. The Group Works Council may also submit lists of candidates for election to the Supervisory Board of an S.E. which is the controlling company of a group within the meaning of Article 223.

2. The lists of candidates submitted by employees shall be signed by not less than one tenth of the total number of employees in the S.E. or by not less than 100 employees of the S.E.

Note on Article 140

This Article specifies the bodies which are entitled to submit lists of candidates for election. The fact that the right to nominate candidates is spread fairly widely ensures that a sufficient number of candidates representing the various nationalities and classes of interests will seek election. The special case of groups of undertakings has been dealt with by giving the Group Works Council, in its capacity of representative of the employees throughout the group, the right to propose lists of candidates for election to the Supervisory Board of the controlling S.E.

Article 141

1. The election shall be held during the two months following formation of the S.E.

2. Two months before expiration of the term of office of the Supervisory Board, elections shall be held to choose the employees' representatives for the following term.

Note on Article 141

Paragraph 1 relates to the election of the first Supervisory Board after formation of the S.E. As in the case of the election of the European Works Council, a period of two months

is prescribed. Paragraph 2 relates to periodic election of the Supervisory Board at the end of each term of office. Here, too, the provisions run parallel with those for the election of the European Works Council.

Article 142

The Supervisory Board shall, notwithstanding that election of the employees' representatives shall not have taken place within the two months following formation of the S.E. or prior to commencement of a new term of office of the Supervisory Board, be entitled to exercise its powers through the members elected by the General Meeting, until such time as the employees' representatives shall be elected.

Note on Article 142

It is essential that the Supervisory Board be enabled to function even though the employees have not appointed their representatives. Accordingly, this Article expressly authorizes the Supervisory Board to act in such a situation. In calculating the majorities required in the case of the Supervisory Board, the number of seats allotted to the employees' representatives will be disregarded.

Article 143

1. Before the election, an electoral commission shall be appointed.

2. The electoral commission shall be responsible for preparing and holding the election and also for voting in pursuance of Article 138.

3. The electoral commission shall be composed of members of the representative bodies referred to in Article 102 in proportion to the number of employees whom they represent. The number of such members shall not exceed twenty-five.

4. The members of the electoral commission shall not be bound by the decisions or instructions of the representative bodies of which they are members.

Note on Article 143

The provisions relating to appointment of an electoral commission are compulsory. This commission must make the preparations for and supervise the election of the employees' representatives to the Supervisory Board. It has the like responsibility for the vote provided for in Article 138 when employees have to decide whether they are to be represented on the Supervisory Board.

The composition of the electoral commission is not regulated in detail. This is to allow for adaptation to the requirements of the individual S.E. The number of members must be such as to ensure that it operates effectively. It must be sufficiently large for the various groups of employees to be appropriately represented.

The members of the electoral commission are not bound by the instructions and decisions of the representative bodies, formed under national law, to which they belong. The electoral commission may also include members of the representative bodies formed under national law which have decided by a majority not to appoint employees' representatives to the Supervisory Board.

Article 144

The members of the Supervisory Board elected by the employees shall hold office for the same period as those appointed by the General Meeting. Articles 108 and 110 shall apply.

Note on Article 144

In order to ensure the effectiveness and continuity of the work of the Supervisory Board, the members elected by the employees and those elected by the General Meeting hold office for the same period of time, thus effectively promoting equality of treatment of both types of member.

A member leaving the Board is replaced by the person named as his alternate on the appropriate list.

Article 145

Employees' representatives on the Supervisory Board shall have the same rights and duties as the other members of the Supervisory Board. They shall enjoy the same protection in the matter of dismissal as members of the European Works Council.

Note on Article 145

This Article guarantees employees' representatives equivalent legal status with those members of the Supervisory Board who are elected by the General Meeting, as is absolutely necessary for the performance of their duties. This applies to all rights and obligations of members of the Supervisory Board provided for by the Statute or by the Statutes of the S.E. Any agreement to the contrary contained in an individual contract made with a representative of the employees is void. The employees' representatives are thus also entitled to receive remuneration at the rate paid to the members elected by the General Meeting. They have the same responsibilities as those members and are answerable, like them, for any failure to carry out their obligations.

In order to ensure their independence, which might be compromised by their position as employees of the S.E., they are granted the same protection in respect of dismissal as is

given to members of the European Works Council. They cannot be dismissed during their term of office nor during the three years following, unless there exist grounds for dismissal without notice (cf. Article 112).

Section four

Establishment of Conditions of Employment

Article 146

The conditions of employment which shall apply to the employees of the S.E. may be regulated by collective agreement made between the S.E. and the trade unions represented in its establishments.

Note on Article 146

This provision authorizes the S.E. to make collective agreements. Thus the S.E. is not restricted to the regime of collective agreements on a national basis, the provisions of which apply only to establishments situated in the same Member State. The concluding of collective agreements at European level makes it possible to avoid undesirable disparities in conditions of employment within the one undertaking.

Collective agreements may be made with the trade unions represented in the establishments of the S.E. The question of which unions are concerned is decided by the national law of the Member States (cf. Article 116, paragraph 2).

Article 147

1. The conditions of employment governed by a collective agreement shall apply directly to and be binding on all employees of the S.E. who are members of a trade union which is party to that collective agreement.

2. It may be made a term of the contract of employment concluded between an S.E. and an employee to whom a collective agreement does not directly apply under the foregoing paragraph, that the conditions of employment contained in the collective agreement shall be incorporated in the contract.

Note on Article 147

Paragraph 1 provides that the conditions of employment regulated by collective agreement apply directly to all employees who are trade union members, with the result that

specific agreement making the clauses of the collective agreement applicable to the individual contract is not required.

In the case of employees who are not members of a trade union represented in the S.E., the provisions of collective agreements may, under paragraph 2, be made applicable to the individual contract. The purpose of this Article is expressly to authorize the application of the provisions of collective agreements to individual contracts.

TITLE VI

PREPARATION OF THE ANNUAL ACCOUNTS

The first seven Sections in this Title contain the basic regulations concerning the preparation of annual accounts. These regulations are substantially in line with the draft directive on harmonization of national systems of law concerning the presentation of company accounts which the Commission of the European Communities is now preparing pursuant to Article 54 (3) (g) of the EEC Treaty. They relate only to the preparation of the balance sheet for commercial purposes and not to the balance sheet for tax purposes.

In some respects, however, such as the valuation of investments and the information to be appended to the annual accounts, the regulations contained in this Title go rather further than that draft. In general, the aim has been to require European companies to make disclosure of a wide range of information, whilst at the same time denying them any opportunity for evasion so far as the preparation of accounts is concerned.

On the other hand, the disclosure requirements should not become excessive by going far beyond those national laws on the subject which are the more progressive in Member States. In formulating accounting principles for S.E.s, it would be possible, of course, to follow the most up-to-date methods in the field of business management. But this would mean that many undertakings would no longer be able to apply the rules to which they are accustomed. It might also involve them in technical problems, such as would arise, for example, if the replacement cost method of valuing fixed assets and stocks, unknown in most Member States, were made compulsory. It follows that the rules governing preparation of the accounts should, in general, be based on existing practices and principles in Member States. The attempt has been made to take account, so far as possible, of future possible advances in this field. Thus, when drawing up their profit and loss account, undertakings may elect to adopt the modern method of breaking down costs according to types of operation. On the other hand, the replacement cost method of valuation is made available to them if they wish to use it. In this way it is intended to strike a balance between stringent disclosure requirements and the need to have regard to existing practice in Member States.

Sections Eight and Nine of this Title contain provisions concerning the powers of the organs responsible for the preparation of the annual accounts and management report; allocation of profits; discharge of the organs of management; publication of the annual accounts and report; and, finally, legal procedure for challenging the annual accounts and report. The principal matters proposed in the Statute on the subject of preparation of the accounts are as follows:

The annual accounts and report are drafted by the Board of Management, which then presents them, together with its proposed appropriation of profits for the year and the auditors' report, to the Supervisory Board. These documents are reviewed, and the annual accounts and management report agreed, by the Board of Management and the Supervisory Board jointly. They may transfer up to one half of the year's profits to reserve, leaving to the Annual General Meeting only the question of how the balance is to be appropriated. If the Board of Management and the Supervisory Board fail to settle the annual accounts or to agree on the appropriation of the profits for the year, it is for the Annual General Meeting to resolve the matter.

Section one

General provisions

Article 148

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

2. The annual accounts shall be drawn up in accordance with regular and proper accounting principles.

3. They shall be presented clearly and accurately. Subject to the provisions on valuation and classification, they shall reflect as true and fair a view as possible of the company's assets, liabilities, financial position and results.

4. The methods of valuation and classification used in consecutive annual accounts, and particularly their manner of presentation, shall be consistent. Legitimate departures from these may be made in exceptional cases and must be duly explained and justified in the notes on the accounts.

Note on Article 148

Paragraph 3 of Article 148 states the underlying purpose of the provisions relating to the annual accounts, namely to give as true and fair a view as possible of the company's assets, liabilities, financial position and results. This principle is to be respected at all times when rules of classification and valuation are being applied. As the information given in annual accounts on results is bound to be limited, the words "subject to the provisions on valuation and classification" have been added.

Together, the balance sheet, the profit and loss account, and the notes on the accounts must give the true and fair view required so far as possible. They form a composite whole. Comments on individual items in the balance sheet and in the profit and loss account shall be set out in the notes on the accounts.

Paragraph 4 of Article 148 expresses the principle of consistency in presentation of the annual accounts. It is very important that any alteration in the method of valuation be indicated in the notes on the accounts. This is to facilitate comparison of consecutive annual accounts.

Article 149

The provisions of Sections One to Six of this Title shall not apply to S.E.s the object of whose business is the making of loans (banks) or of contracts of insurance (insurance companies). The law of the Member State

from which such companies are actually managed shall apply in place of those provisions.

Note on Article 149

Banks and insurance companies are excluded from the provisions of Sections One to Six of this Title. The special nature of the business of these undertakings calls for special provisions relating to the preparation of their annual accounts - as, indeed, already exist in the Member States. Moreover, in most of the Member States the banks and insurance companies are subject to regulations of public law which should continue to apply to them even when reconstituted as S.E.s.

Section two

Classification of the annual accounts

SUBSECTION ONE

GENERAL PROVISIONS

Article 150

1. In both the balance sheet and the profit and loss account, the items specified in Subsections Two and Four of this Section shall always be shown separately. Items preceded by an Arabic numeral may be classified differently where the special nature of the undertaking so requires. A true and fair view must be reflected notwithstanding any different classification, which must in any event be explained in the notes on the accounts.

2. Balance sheet and the profit and loss account items preceded by an Arabic numeral which in relation to the size of the company are of minor importance may be lumped together.

3. Comparative figures for the previous financial year shall be shown in respect of each item in the balance sheet and the profit and loss account.

Note on Article 150

For both the balance sheet and the profit and loss account, minimum requirements are imposed in respect of compulsory classification. Possible criticism to the effect that the classification, being binding, is insufficiently flexible, and so could impair the view reflected by the annual accounts, has been anticipated in a number of ways. Thus, the classification

may always be elaborated if this will increase the amount of information conveyed. Again, it may be varied, where, for the sake of clarity, the special nature of the undertaking so requires, or where the relevant data for purposes of the classification are not available. As a rule, however, these variations are small in relation to the general systems of classification adapted to the needs of industrial and trading companies, and they only apply to the particular needs of special undertakings engaged in specialized fields, e.g. mining and shipping.

In order to make the annual accounts more intelligible, it may be necessary (see Article 150, paragraph 2) to combine some balance sheet and profit and loss account items that are of relatively minor importance in relation to the size of the undertaking. Whether or not an item is of minor importance for the purpose of assessing the position of a company should be left to the discretion of the company and its auditor. It accordingly appeared unnecessary to prescribe any fixed limits (e.g. x per cent of the total of the balance sheet).

The requirement, under paragraph 3, of comparative figures for the previous year is introduced to facilitate comparison of the company's progress over a period of time.

Article 151

Assets shall not be shown net of liabilities, nor income net of charges, or vice versa.

SUBSECTION TWO

BALANCE SHEET

Article 152

The balance sheet shall be drawn up either in the horizontal (Art. 153) or in the narrative (Art. 154) form of presentation.

Note on Article 152

For layout of the balance sheet a choice is offered between the horizontal and the narrative form of presentation. In the former, assets and liabilities are arranged on opposite sides, with assets entered on the debit and liabilities on the credit side. In the narrative form, assets and liabilities are arranged one below the other. The choice of the one method of presentation in preference to the other will not materially affect comparison between companies.

The horizontal method of presentation is usually adopted in Member States at the present time. The narrative form is offered as an alternative, however, in the light of possible future trends.

Article 153

Horizontal form of presentation

The following items shall be shown on the assets side:

A. Costs of formation

B. Fixed assets

I. Intangible assets:

1. Research and development costs,

2. Concessions, patents, licences, trade-marks and similar rights which:

(a) were acquired for consideration and are not to be included under 3, or

(b) were created by the company itself,

3. "Derivativer Firmenwert", goodwill, "fonds de commerce", "avviamento",

4. Work in progress and prepayments on account of intangible assets.

II. Tangible assets:

1. Land and buildings,

2. Industrial plant and machinery,

3. Other plant and industrial and commercial equipment,

4. Plant under construction and prepayments on account of tangible assets.

III. Investments and other financial assets:

1. Investments other than those included under B-III-2,

2. Holdings in associated companies,

3. Securities representing financial assets other than those included under B-III-1 and 2,

4. Claims on companies in which the S.E. holds an investment,

5. Claims on associated companies,

6. Other claims.

C. Current assets:

I. Stocks:

1. Raw materials and auxiliary materials including fuel,
2. Products in course of manufacture, including rejects,
3. Finished products and goods for resale,
4. Prepayments on account of stocks.

II. Debtors:

(Amounts becoming due and payable within one year shall be shown separately in each case.)

1. Debtors (trade),
2. Debtors (undertakings in which the S.E. holds an investment),
3. Debtors (associated companies),
4. Miscellaneous.

III. Securities forming part of current assets and other liquid assets:

1. Bills of exchange,
2. Other securities forming part of current assets except cheques included under 3,
3. Balances with banks and on post office current accounts, cheques and cash.

D. Pre-payments

E. Loss per balance sheet

The following items shall be shown on the liabilities side:

I. Share capital:

Different classes of shares, if any, shall be shown separately, stating the nominal amount of each share.

II. Reserves:

1. Balance on share premium account,
2. Reserves arising on revaluation,

3. Reserves for intangible assets,
4. Statutory reserves,
5. Free reserves.

III. Depreciation not shown on the assets side:

1. Depreciation of costs of formation,
2. Depreciation of intangible assets,
3. Depreciation of tangible assets,
4. Depreciation of investments and other financial assets.

(Items included under 2 to 4 should be broken down in the same way as the corresponding assets.)

IV. Provisions for depreciation, where the provision is not shown on the assets side:

1. Of intangible assets
2. Of tangible assets
3. Of investments and other financial assets

(Items included under 1 to 3 should be broken down in the same way as the corresponding assets.)

V. Provisions for contingencies and charges:

1. Pensions and similar commitments,
2. Taxation (provision for future taxation being shown separately),
3. Miscellaneous.

VI. Creditors:

(In respect of each of the following headings, debts becoming due and payable within one year and fully secured debts shall be shown separately.)

1. Loans (convertible loans being shown separately),
2. Bank borrowings,
3. Prepayments on orders received,
4. Suppliers of goods and services,
5. Bills of exchange,

6. Creditors (companies in which the S.E. holds an investment),
7. Creditors (associated companies),
8. Miscellaneous.

VII. Accruals

VIII. Profit per balance sheet.

Note on Article 153

The assets side of the balance sheet is broken down into costs of formation, fixed assets, current assets and pre-payments accounts. The object of this breakdown and of its subheadings is to classify assets in order of liquidity, those which are generally the most difficult to convert into cash and also the most difficult to value being shown first.

The balance sheet will reflect the company's financial position better by virtue of the fact that in respect of debtors — and the same principle applies to creditors — the maturity date is to be indicated. Although there may be practical difficulties in calculating the maturity date, particularly where ostensibly short-term credits are in fact extended into medium- or long-term ones (revolving credits), this information should be given, for it serves a useful purpose.

In classifying the reserves, it seems desirable for the share premium reserve to be kept separate as it arises by way of subscription of capital.

Statutory reserves are reserves created in pursuance of the requirements of the company's statutes.

If, under Article 181, depreciation in the value of money or variation, for other reasons, in replacement costs are taken into account in valuing certain assets, a corresponding appropriation equal to the difference in value should be made to revaluation reserve. This may be reduced to a residual balance if, under Article 181, paragraph 2(c), a part or the whole of the revaluation reserve is capitalized.

It seems advisable to break down for contingencies and charges into provision for pensions, tax and miscellaneous because they are of a different financial nature in each case.

Under creditors, items which are covered by legally enforceable security must be shown separately. This is so that creditors and third parties are made aware of the extent to which the assets of the company are encumbered and other creditors have priority.

Article 154

Balance sheet in narrative form.

Note on Article 154

Consultations concerning this form of presentation were still in progress when the proposed Statute was being drafted. The terms of this Article have not, therefore, been settled.

Article 155

1. Where an asset or a liability relates to more than one item in the balance sheet, this fact shall be stated, where it is necessary to a proper understanding of the balance sheet, against the item under which it is shown.

2. Investments in associated companies shall be shown only under the item which relates thereto.

Article 156

The following, unless required to be shown on the liabilities side, shall be set out separately at the end of the balance sheet or in the notes on the accounts:

1. Contingent liabilities on bills of exchange issued and negotiated, indemnities, guarantees and similar commitments,

2. Any financial obligations incurred for an amount exceeding 100 000 units of account and for a term exceeding one year.

Liabilities incurred towards associated companies are to be shown separately.

Note on Article 156

In order to show clearly the company's financial position, it seems desirable to state separately any obligations incurred for a term exceeding one year. The obligations intended to be covered are those having the character neither of provisions nor of debts. Examples would be obligations arising under leasing agreements.

SUBSECTION THREE

PARTICULARS CONCERNING CERTAIN ITEMS IN THE BALANCE SHEET

Article 157

Costs of formation shall include, in particular, costs of incorporation and of issue of capital, expenses incurred on inauguration, expansion or reconstitution of the undertaking, and discounts.

Article 158

1. Whether a particular asset is to be classified as fixed or current shall depend upon its purpose.

2. Fixed assets shall comprise only those which are permanently used to enable the company to operate.

3. Where the classification of a fixed asset is in doubt, an indication of the item under which it has been included shall be given either in the balance sheet or in the notes on the accounts.

4. The balance sheet or the notes on the accounts shall indicate the changes in fixed assets that have taken place; using as starting point the purchase price or initial production cost or the replacement cost severally for each item of fixed assets, there shall be shown by way of total as at the date of the balance sheet, first, the assets acquired, assets disposed of, transfers and appreciations in value during the accounting period and, secondly, depreciation and provisions for depreciation. If depreciation and provisions therefor are shown in the balance sheet they may be entered either:

(a) on the assets side, or

(b) on the liabilities side.

5. Paragraph 4 shall equally apply to the treatment of costs of formation.

Note on Article 158

Article 158, paragraph 4, requires companies to indicate in their annual accounts whatever changes in fixed assets have occurred. Anyone examining the balance sheet may see in this way how those assets have been affected by additions, disposals, transfers, appreciation, depreciation and provisions for depreciation since the date of the last balance sheet. For this purpose, all items should be shown gross, starting with their purchase price or initial production cost and adding the cumulative total of depreciation and provisions for depreciation as at the date of the balance sheet.

Depreciation and provisions therefor may be shown as items deducted on the assets side or as separate items on the liabilities side. In order that the indications of changes in fixed assets shall not make the balance sheet more difficult to follow, the changes may be shown in the notes on the accounts.

Article 159

Under research and development costs there shall be included only the research and development costs relating to particular products and processes.

Note on Article 159

Only research and development costs incurred in respect of particular products and processes may be included under the item "research and development costs". The costs of what is known as basic research are not to be included.

Article 160

Under "Land and buildings" shall be included land, whether built on or not, and any buildings erected thereon including their fixtures.

Article 161

1. Investments for the purposes of this Title shall mean rights of participation, whether or not represented by scrip certificates, in other undertakings, which rights are intended, by establishing a permanent link with those undertakings, to promote the company's own business. Ownership of 10 per cent of the shares in the capital of a company limited by shares shall be deemed to constitute an investment.

2. Associated companies shall mean legally autonomous companies existing inside or outside the Member States which, in relation to the S.E., are dependent or controlling undertakings (Art. 6), undertakings forming part of the same group (Art. 223) or undertakings under the same management as the S.E. but in such manner that none of them is a dependent or controlling company.

Note on Article 161

In determining whether there is an investment, the deciding factor is the undertaking's own intention in respect of its holding. The criterion adopted in defining an investment is therefore a subjective one. The holding of a given percentage of another company's share capital is a less suitable criterion in view of the fact that where the capital is widely distributed, the holding of a small percentage may be sufficient to enable an influence to be brought to bear on the other undertaking.

Even where there is a majority holding, however, the intention to establish a permanent link with another undertaking may be lacking, e.g. where the S.E. acquires an undertaking owning unprofitable shares which the S.E. wishes to sell at the earliest opportunity. In such case the S.E. should not be obliged to include those shares in its investments and disclose them as such.

The term "associated companies", defined in paragraph 2, includes dependent and controlling undertakings, undertakings forming part of a group, an undertakings which with the S.E. form a group without any of them being either a dependent or a controlling undertaking. It is used merely to simplify matters.

Article 162

Under "Equalization accounts" there shall be shown, on the assets side, expenditure incurred during the accounting period but relating to a subsequent period.

Article 163

Provision in respect of intangible assets shall be the adjusting item for "Research and development costs" on the assets side and for the intangible assets referred to in Article 153 at B-I-2(b).

Article 164

1. Under depreciation there shall be included all losses in value definitively sustained as at the date of the balance sheet.

2. Provisions for depreciation shall be the adjusting items for losses in value of assets which have not yet definitively been sustained but which are to be expected in the light of prudent valuation.

Note on Article 164

Article 164 defines depreciation as amounts which have definitively been sustained. Under the item "Provision for depreciation" may be entered only amounts equivalent to the reduction in value of assets which prudence dictates should be brought into account as at the date of the balance sheet but which have not yet been definitively quantified. This distinction between depreciation and provision for depreciation depends heavily on the judgement of those who prepare the balance sheet; but they are, of course, controlled by the auditors. Provisions for depreciation differ from provisions for contingencies and charges (see Article 165) in that the former represent adjustments made in respect of assets appearing in the balance sheet, whereas the latter relate not to assets but to anticipated future losses.

Further, provisions for contingencies and charges form part of a company's obligations and, therefore, of outside capital used in the business, whereas provisions for depreciation form part of the capital of the undertaking itself.

Article 165

Under "Provisions for contingencies and charges" there shall be included:

1. Debts whose origin, existence or amount is doubtful;

2. Losses which may arise from current operations;

3. Charges arising during the financial year but involving expenditure only in a subsequent year.

Note on Article 165

Article 165 seeks to define provisions for contingencies and charges with the utmost clarity in order to prevent them from being inflated and from thereby giving rise to the formation of undisclosed reserves. The risk that the Board of Management and the Supervisory Board might, when drawing up the balance sheet, use these provisions to manipulate the profit for the year and, hence, the way in which it is appropriated is not very great in the case of an S.E., because those organs are already authorized to determine the way in which a substantial part (one half) of this profit will be appropriated.

Article 166

Under "Accruals" there shall be shown, on the liabilities side, income received before the date of the balance sheet but attributable to a subsequent financial year.

SUBSECTION FOUR

CLASSIFICATION OF THE PROFIT AND LOSS ACCOUNT

Article 167

The profit and loss account shall be prepared in accordance with one of the following methods.

Note on Article 167

There are four different methods available to the S.E. in preparing its profit and loss account. They differ not only in presentation (horizontal or narrative) but also in both method and classification in dealing with charges and income. One alternative is to give the year's total expenditure broken down according to kind, against which are shown goods and services sold (turnover), plus goods and services produced during the year but not yet sold, less goods and services sold during the year but produced during a previous year. The other is to break down expenditure according to the operations in respect of which it was incurred and to relate the cost of goods and services sold to resultant turnover.

The need to provide several methods arises, in the first place, from differences in rules and practice in the Member States. The method under Article 168 is the most widely used in Member State at present. However, that set out in Article 170 is more advanced from a business management point of view and should, therefore, be admitted with an eye to the future.

Moreover, it appears to be desirable in practice that there be freedom to choose between the various systems because, from the business management point of view, the principles relating to the presentation of profit and loss accounts carry advantages and disadvantages alike.

The methods may be regarded as equivalent to each other because the essential principles of profit and loss account presentation are applied in all of them. One of the essential functions of the profit and loss account from the management point of view is to show the sources from which the year's results emanate. This requires, first, that items should, largely, be shown gross, i.e. that expenditure and income should not be shown net, the one of the other; in particular, turnover should be shown separately. Again, judgement of a company's results demands knowledge of the exent to which its published results arise out of the year's trading, or financial developments during the year, or exceptional factors altogether unconnected with the company's normal trading during the year. That is why expenditure and income are broken down into three groups of corresponding items throughout.

It can be said in favour of the method under Article 168 that, first, breaking down of expenditure according to kind creates no problem of analysing trading costs by operations and, secondly, makes it possible to arrive at the value of the total production of the undertaking, which is one yardstick of its profitability. The value of goods and services produced by a company whose output can be held in stock consists of the proceeds both of output sold and of output produced during the year but remaining unsold. It should be borne in mind, however, that this value comprises items of cost which are dissimilar in kind. Moreover, turnover includes the year's profit, whilst changes in value of stocks of finished and semi-finished products are based on the application to them of the method of valuation which involves taking their lowest value. There is, therefore, the possibility that changes in value of stocks of unsold products may produce an appearance of fluctuation in profitability.

In favour of the method under Article 170 it can be said that the separation of expenditure according to the kind of operation fits in better, in many cases, with the cost accounting system used by undertakings than a breakdown of costs according to kind and so affords an insight into their cost structure. What is more, similar items are grouped together. Against this, it is impossible to ascertain actual output achieved during the relevant period, unless sold in full during that period; in some cases, e.g. where the process of production lasts a long time (shipbuilding), this leads to undesirable fluctuations in published results where, in such cases, interim accounts are not produced.

Article 168

I. Trading results (excluding income and expenditure, if any, included under II):

1. Net turnover,
2. Changes in stocks of finished and semi-finished products,
3. Other goods and services supplied by the undertaking to itself,
4. Other trading income arising out of the operations of the underaknig,
5. Raw materials and auxiliary materials including fuel,
6. Labour costs,

7. Depreciation of costs of formation,

8. Depreciation and provisions for depreciation of intangible and tangible assets,

9. Other trading costs,

10. Trading profit or loss,

II. Financial results:

11. Income arising under agreements requiring transfer of profits, whether relating to the whole or a part of the profits, income from associated undertakings being shown separately,

12. Income from trade investments, other than income shown under II-11, income from associated undertakings being shown separately,

13. Income from other securities held and from claims forming part of the financial assets, income from associated undertakings being shown separately,

14. Other interest and similar income, that from associated undertakings being shown separately,

15. Expenditure arising from absorption of losses,

16. Depreciation and provisions for depreciation of investments and other fixed financial assets,

17. Interest and similar charges, those arising in respect of associated undertakings being shown separately,

18. Financial profit or loss.

III. Non-recurring income and expenditure:

19. Non-recurring income

20. Non-recurring expenditure

21. Balance of non-recurring items

22. Subtotal

IV. Taxation:

23. Taxation of profits

(a) current

(b) future

24. Other taxes not included under I, II or III above

25. Subtotal

V. Set-off or transfer of profit or loss:

26. Income arising as a result of set-off of losses

27. Profits transferred under agreement requiring transfer of profits, whether relating to the whole or a part of the profits

VI. Profit for the year/Loss for the year

VII. Profit or loss brought forward from the previous year

28. Subtotal

VIII. Changes in reserves:

29. Withdrawals from reserves

30. Appropriation of profit for the year to reserves

IX. Profit/Loss to balance sheet

Article 169

A. *Expenditure*

I. Trading costs (excluding those, if any, included under II):

1. Reduction in stocks of finished and semi-finished products

2. Raw materials and auxiliary materials including fuel

3. Labour

4. Depreciation of costs of formation

5. Depreciation and provisions for depreciation of intangible and tangible assets

6. Other trading costs

II. Financial expenditure:

1. Expenditure arising from absorption of losses

2. Depreciation and provisions for depreciation of investments and other fixed financial assets

3. Interest and similar charges, those arising in respect of associated undertakings being shown separately

III. Non-recurring expenditure

IV. Taxation:

1. Taxation of profits

(a) current

(b) future

2. Other taxes not included under I, II or III above

V. Profits transferred under agreement requiring transfer of profits, whether relating to the whole or a part of the profits

VI. Profit:

1. Loss brought forward from the previous year

2. Appropriation of profit for the year to reserves

3. Profit to balance sheet

B. *Income*

I. Trading income (excluding income, if any, included under II):

1. Net turnover

2. Increase in stocks of finished and semi-finished products

3. Other goods and services supplied by the undertaking to itself

4. Other trading income

II. Financial income:

1. Income arising under agreements requiring transfer of profits, whether relating to the whole or a part of the profits, income from associated undertakings being shown separately

2. Income from trade investments other than as shown under II-1, income from associated undertakings being shown separately,

3. Income from other securities held and from claims forming part of the financial assets, income from associated undertakings being shown separately,

4. Other interest and similar income, that from associated undertakings being shown separately

III. Non-recurring income

IV. Income arising as a result of set-off of losses

V. Losses:

1. Profit brought forward from the previous year

2. Withdrawals from reserves

3. Loss to balance sheet

Note on Articles 168 and 169

The items "Other trading income" and "Other trading costs" included in these layouts relate to goods and services supplied by or to the undertaking respectively otherwise than in the conduct of its normal business, but which nevertheless are supplied with a certain degree of regularity. They differ in this respect from "Non-recurring income" and "Non-recurring expenditure", appearing in III, which may be equally unusual but cannot be described as regular.

Article 170

I. Trading results (excluding any income and expenditure, if any, shown under II):

1. Net turnover,

2. Production costs of goods and services supplied (including depreciation and provisions for depreciation),

3. Gross trading profit,

4. Distribution costs (including depreciation and provisions for depreciation),

5. General administration expenses (including depreciation and provisions for depreciation),

6. Other trading income,

7. Trading profit or loss.

II. Financial results:

8. Income arising under agreements requiring transfer of profits, whether relating to the whole or a part of the profits, income from associated undertakings being shown separately,

9. Income from trade investments, other than income shown under II-8, income from associated undertakings being shown separately,

10. Income from other securities held and from claims forming part of the financial assets, income from associated undertakings being shown separately,

11. Other interest and similar income, that from associated undertakings being shown separately,

12. Expenditure arising from absorption of losses,

13. Depreciation and provisions for depreciation of investments and other fixed financial assets,

14. Interest and similar charges, those arising in respect of associated undertakings being shown separately,

15. Financial profit or loss.

III. Non-recurring income and expenditure:

16. Non-recurring income,

17. Non-recurring expenditure,

18. Balance of non-recurring items,

19. Subtotal.

IV. Taxation:

20 taxation of profits,

(a) current,

(b) future,

21. Other taxes not included under I, II or III above,

22. Subtotal.

V. Set-off or transfer of profit or loss:

23. Income arising as a result of set-off of losses,

24. Profits transferred under agreement requiring transfer of profits, whether relating to the whole or a part of the profits.

VI. Profit for the year/Loss for the year.

VII. Profit or loss brought forward from the previous year:

25. Subtotal.

VIII. Changes in reserves:

26. Withdrawals from reserves,

27. Appropriation of profit for the year to reserves.

IX. Profit/Loss to balance sheet.

Article 171

A. *Expenditure*

I. Trading costs (excluding those, if any, included under II):

1. Production costs of goods and services supplied (including depreciation and provisions for depreciation),

2. Distribution costs (including depreciation and provisions for depreciation),

3. General administration expenses (including depreciation and provisions for depreciation).

II. Financial expenditure:

1. Expenditure arising from absorption of losses,

2. Depreciation and provisions for depreciation of investments and other fixed financial assets,

3. Interest and similar charges, those arising in respect of associated undertakings being shown separately.

III. Non-recurring expenditure.

IV. Taxation:

1. Taxation of profits,

(a) current,

(b) future,

2. Other taxes not included under I, II or III above.

V. Profits transferred under agreement requiring transfer of profits, whether relating to the whole or a part of the profits.

VI. Profits:

1. Loss brought forward from the previous year,
2. Appropriation of profit for the year to reserves,
3. Profit to balance sheet.

B. *Income*

I. Trading income (excluding income, if any, included under II):

1. Net turnover,
2. Other trading income.

II. Financial income:

1. Income arising under agreements requiring transfer of profits, whether relating to the whole or a part of the profits, income from associated undertakings being shown separately,

2. Income from trade investments other than as shown under II-1, income from associated undertakings being shown separately,

3. Income from other securities held and from claims forming part of the financial assets, income from associated undertakings being shown separately,

4. Other interest and similar income, that from associated undertakings being shown separately.

III. Non-recurring income.

IV. Income arising as a result of set-off of losses.

V. Losses:

1. Profit brought forward from the previous year,
2. Withdrawals from reserves,
3. Loss to balance sheet.

SUBSECTION FIVE

PARTICULARS CONCERNING CERTAIN ITEMS IN THE PROFIT AND LOSS ACCOUNT

Article 172

"Net turnover" shall comprise the receipts from sale of the products, goods and services which it is the company's normal business to supply, less any reductions in selling prices, value added tax and other taxes calculated on turnover.

Article 173

Under "Other goods and services supplied by the undertaking to itself" shall be shown all goods and services supplied by the undertaking and applied for its own internal use, where these are included in the assets, but excluding increases in stocks of finished and semi-finished products.

Article 174

Under "Expenditure arising as a result of absorption of losses" shall be shown losses incurred by other companies which the S.E. is committed to absorb.

Article 175

1. Under "Non-recurring income" and "Non-recurring expenditure" shall be shown income and expenditure which is attributable to another financial year and income and expenditure arising otherwise than as a result of the company's normal activities.

2. If these items of income and expenditure are not unimportant for the purpose of assessing the results, they shall be shown as a separate item in the profit and loss account or in the notes on the accounts.

Note on Article 175

Where non-recurring income or expenditure is of more than secondary importance for the purpose of assessing the results, it is to be shown separately in the profit and loss account or in the notes on the accounts. The object of this is to prevent undertakings from falsifying their trading results by, for example, selling a property in order to use the proceeds for concealing any loss they may have made.

Article 176

Under "Taxation of profits" shall be shown the actual amount of tax payable in respect of the financial year and also, separately, the amount of any future tax liabilities.

Note on Article 176

Undertakings are required, where appropriate, to show future tax liabilities, i.e. tax charges which have been incurred during the year but will not become due and payable until subsequent years. Where the tax law allows accelerated depreciation, the taxable profit is correspondingly reduced, but will increase in subsequent years because the depreciation has already been charged.

Article 177

Under "Income arising from absorption of losses" shall be shown expenditure repayable by third parties pursuant to agreements for pooling of losses.

Article 178

Under "Appropriation of profit for the year to reserves" shall be shown the amount of profit for the year which the Board of Management and the Supervisory Board decide to appropriate to reserves in accordance with Article 217, paragraph 1.

Note on Article 178

In the narrative form of profit and loss account are shown the profit for the year, on the one hand, and the profit figure appearing in the balance sheet, on the other. The profit for the year is a sub-total which is omitted in the horizontal form of presentation. The Board of Management and the Supervisory Board may appropriate up to half the profit for the year to reserves (see Section Eight). This transfer to reserves is shown under "Appropriation of profit for the year to reserves". The profit appearing in the balance sheet is the remaining part of the profit for the year, which is at the disposal of the General Meeting.

Section three

Evaluation of items in the annual accounts

SUBSECTION ONE

GENERAL PRINCIPLES

Article 179

1. The following general principles shall be applied in evaluating items for purposes of the annual accounts:

(a) Only profits earned as at the date of the balance sheet shall be included; proper allowance shall, however, be made for all risks foreseeable at that date.

(b) Proper allowance shall be made for any items involving losses which come to light after the date of the balance sheet but before it has been finalized, where the same have arisen during the financial year to which the annual accounts relate.

(c) Proper allowance shall be made for any depreciation in value, irrespective of whether the financial year closes with a loss or a profit.

(d) All assets and liabilities shall be valued separately.

(e) The closing balance sheet relating to one financial year shall match up with the opening balance sheet relating to the following year.

2. Exceptions may be made in applying these general principles where special circumstances so require. The exceptions, and the reasons therefor, shall be duly explained in the notes on the accounts.

Note on Article 179

This Article sets out the most important of the general principles of valuation.

The principle defined in paragraph 1(a) is based on common prudence, a principle of good business management which is already applied throughout the EEC. It is dictated not merely by the need to protect creditors: it is very much in the interest of the management of the undertaking itself. The same prudence is reflected in the principles set out in points (b) to (e) of this Article. For technical or economic reasons, however, these cannot always be applied in practice. Thus the principle of common prudence may quite properly be abandoned in the case of long-term operations. In shipbuilding, for example, profits may be brought into account even whilst a vessel is under construction. Another example arises in connection with the principle of separate valuation. Thus, it may be impossible or unduly time-consuming to determine exact amounts or the real purchase price or production costs. It is for this reason that simpler methods for determining amounts or costs, such as valuation according to categories or valuation at constant prices (cf. Article 184), have been evolved in practice. Use of these methods is unobjectionable so long as the results do not differ basically from those shown by the separate valuation method. Departures from these general principles are permitted by Article 179 provided that they are explained and justified in the notes on the accounts.

Article 180

Articles 182 to 189 shall apply to the valuation of items comprised in the annual accounts.

Article 181

1. In place of the valuation rules referred to in Article 180, the replacement cost method of valuation may be used. The notes on the accounts shall specify the items which have been valued on this basis.

2. Where the replacement cost method of valuation is used the following rules shall apply:

(a) Differences arising as a result of the application of the replacement cost method of valuation in place of the valuation rules referred to in Article 180 shall be included under "Reserves arising on revaluation".

(b) Revaluation reserves may be written back only if the amounts transferred thereto are no longer required for the purpose of replacement of assets. If no longer required for that purpose, they shall be written back. These amounts shall be added to the profit for the year or shall be deducted from the loss for the year. They shall be shown in the profit and loss account as a separate item.

(c) Subject to Article 41, revaluation reserves may be capitalized.

(d) The differences referred to in 2(a) shall, in the notes on the accounts, be shown separately at least in respect of the following items:

I. Balance sheet:

(1) Fixed assets:

(a) Intangible assets,

(b) Tangible assets,

(c) Trade investments and other fixed financial assets.

(2) Current assets.

II. Profit and loss account:

(1) Depreciation of fixed assets:

(a) Intangible assets,

(b) Tangible assets,

(c) Trade investments and other fixed financial assets.

(2) Provisions for depreciation of fixed assets:

(a) Intangible assets,

(b) Tangible assets,

(c) Trade investments and other fixed financial assets.

(e) Depreciation and provisions for depreciation shall be calculated annually on the basis of the replacement cost arrived at for the year in question.

(f) In addition, Articles 182 to 189 shall apply.

Note on Articles 180 and 181

Basically, there are two methods of valuation currently in use in preparing annual accounts : the historical cost method and the replacement cost method.

In favour of applying the historical cost method it can be argued chiefly that acquisition prices paid can be ascertained precisely, whereas valuations which take account of changes in the value of money or of other factors affecting replacement costs cannot always be made with certainty. Even where annual profits based on replacement costs contain, to some extent, fictitious profits, such profits do not necessarily have to be distributed. On the contrary, it is open to the organs of a company, when deciding how its profit should be allocated, to apply the principle of strict conservation of capital or substance by an appropriate allocation to a special reserve for this purpose, thus preventing any fictitious profit from being distributed to shareholders. Even so, this method detracts from the principles of clarity and prudence which apply to the preparation of the balance sheet, for the extent to which profits are inflated is left unascertained.

It can, on the other hand, be argued in favour of valuation which takes account of changes in the value of money or of other factors affecting replacement costs, that here, in contrast to the traditional method of valuation, annual profits have already been pruned of any fictitious profits. This means that the principle of strict conservation of capital or substance can be applied in calculating the profit, thus making it easier to determine the charges that are involved therein. Against this, in calculating replacement costs and the extent to which profits contain any fictitious element much is left to the discretion of the company's management, as the yardsticks for use in these matters are less reliable than those for determining purchase prices or production costs. Having regard to current regulations and practice in the majority of Member States, the rules set out in detail in Articles 182 to 189 are based on the purchase price or production cost principle. At the same time, bearing in mind the current practice in some Member States and the desirability of catering for future developments, including adjustment of the rules of valuation so that they take account of changes in the value of money or of other factors affecting replacement costs, Article 181 authorizes undertakings to employ the replacement cost method of valuation.

The replacement cost method of valuation is not dealt with in detail by this Statute. Consultations on the subject being still far from complete, it seemed neither possible nor desirable to work out detailed regulations, in view of the fact that they would prevent future developments in this field from being taken into consideration. In any event, companies must at all times, even when applying the replacement cost principle of valuation, be guided by the mandatory requirement of Article 148 that they should give as true and fair a view of the company's position as possible. Moreover, the control exercised in this matter by the auditors is not to be overlooked.

Undertakings which use the replacement cost method of valuation must transfer to revaluation reserve the amount of any differences thrown up as a result of the use of that method rather than the historical cost method of valuation. This reserve may be written back only to the extent that it is no longer required for the purpose of replacement of assets, as would be the case if replacement costs declined or the undertaking reduced its production activities by, say, selling one of its production units. In this event, the corresponding amounts comprised in the revaluation reserve are no longer required for the purpose of maintaining the productive capacity of the undertaking and must then be added to the profit for the year or deducted from the loss for the year; otherwise the Board of Management, in contravention of the compulsory requirements concerning allocation of profits, would be able to keep these sums in reserve. It is for this reason that the revaluation reserve must, in this case, be written back.

Undertakings which adopt the replacement cost method of valuation must show separately in the notes on the accounts the amount of the differences referred to in paragraph 2(d). This is necessary in order to ensure comparability of annual accounts.

In the event of an increase in replacement costs, undertakings are prohibited by paragraph 2(e) from making any change in the amount of depreciation charged in previous years, or in the amount of provision made during those years for depreciation, where the rate applied was too low.

SUBSECTION TWO

VALUATION RULES

Article 182

1.(a) Items of fixed assets shall be shown in the balance sheet at purchase price or production cost after charging depreciation and making provision for depreciation.

(b) The purchase price or production cost of fixed assets having a working life limited in time shall be depreciated at rates which are in keeping with regular and proper accounting principles.

(c) (aa) Provision for unusual depreciation of items of fixed assets may be made whether or not their working life is limited in time, so that their value be shown at the lower figure attributable to them as at the date of the balance sheet or as accepted for tax purposes.

(bb) Special depreciation shall be charged if it is anticipated that the reduction in value will be permanent.

(cc) Such lower figure shall cease to apply when the circumstances on the basis of which the depreciation was charged or the provison for depreciation was made have ceased to obtain.

2. The purchase price shall be calculated by adding to the price paid the expenses incidental thereto.

3.(a) The production cost shall be calculated by adding to the purchase price of raw and auxiliary materials including fuel the manufacturing costs directly attributable to the product in question.

(b) A reasonable proportion of the manufacturing costs which are only indirectly attributable to the product in question may also be added to the production cost to the extent that they relate to the period of manufacture.

(c) Costs of distribution shall not be included in production cost.

4.(a) Interest on loans raised to finance the acquisition of fixed capital assets may be included in production cost to the extent that it relates to the period during which the acquisition was made; the inclusion of this interest element in the assets shall be mentioned in the notes on the accounts.

(b) Interest on own capital may be included in production cost; the reasons for including this element in the assets, and the account of the interest, shall be indicated in the notes on the accounts.

Note on Article 182

This Article sets out the rules for valuing fixed assets. Those whose working life is limited in time must be written down at a regular rate. Depreciation which results in prudent non-arbitrary apportionment of the purchase price and production cost of an asset, spread over its life, is deemed to be charged at a regular rate. Moreover, whether their period of working life is limited or not, fixed assets may be written down at a special rate so as to reduce them to whatever lower value they should have as at the date of the balance sheet. As such assets are, by definition, intended for permanent employment in the business, the lower value must be applied where the reduction in value is foreseen as being permanent.

The object of requiring incidental expenses to be included in the purchase price is to limit the formation of undisclosed reserves (paragraph 2).

It is left to undertakings themselves to decide whether to include in production cost a proportion of indirect manufacturing costs. They are thus free, at least in the interest of cautious valuation, to exclude such costs when, as is already frequently the case, they operate a system of allocating a proportion of overheads (paragraph 3).

Interest on loans may only be included in production cost to the extent that it forms part of the operating expenses (paragraph 4(a)).

Interest on own capital may only be included in production cost where the reasons for showing in the notes on the accounts (paragraph (4b)). This rule seems necessary, in the interests of sound business management, so that in special cases (e.g. where undertakings engaged in house-building finance their operations by means of their own capital) the picture given of the company's position is not distorted.

Article 183

1. Where intangibles are brought in as assets, they shall be depreciated over the period of their useful economic life assessed with proper commercial caution.

2. A reserve shall be constituted of an amount equal to the research and development costs included under assets and to the value of the intangible assets referred to in Article 153, B I-2(b). Amounts withdrawn from such reserve shall form part of the profit for the year or be deducted from the loss for the year. They shall be shown in the profit and loss account as a separate item.

Note on Article 183

It seems right to allow for all intangible assets, whether produced by the company itself or purchased, to be shown on the assets side, particularly having regard to the fact that otherwise, if they were treated as a charge on profits for the year, the view reflected of the company's position and trading results, especially in the case of small and medium-sized companies, would be distorted. This is not to underestimate the difficulties of proper valuation of these assets in each case.

Paragraph 2 requires a reserve to be set aside to the value of any intangible assets created by the undertaking which are shown on the assets side. This is to prevent the amounts in question from being included in the profit for the year. Withdrawals from this reserve, as in the case of revaluation reserve, must be added to the profit for the year or deducted from the loss for the year. In the former case, the way in which they are appropriated is governed by the rules relating to appropriation of profits.

Article 184

Fixed assets as well as raw materials and auxiliary materials including fuel which are constantly being replaced may, notwithstanding Article 179, paragraph 1(d), be shown on the assets side at a fixed quantity and value, if variations in the quantity, value and composition thereof are negligible.

Note on Article 184

The provisions of this Article constitute an exception to the principle of separate valuation. They are designed to simplify accounting and valuation in respect of certain stocks.

Article 185

Where an S.E. holds an investment, within the meaning of Article 161, in excess of 50 per cent, that holding shall be shown at its true value.

Note on Article 185

For the purpose of valuing investments, a distinction must be made between minority and majority holdings. The valuation of minority holdings is subject to the same rules as that of other fixed assets. Majority holdings, however, must be shown in the balance sheet at their true value, i.e. regard is to be had not only to the cost of acquiring the majority holding but also to the post-acquisition profits and losses of the undertaking in which the investment is held. For this purpose it is immaterial from the economic point of view whether the profits of the subsidiary have been distributed to the parent company or have been retained by the subsidiary. The parent company, by virtue of its majority holding, may dispose of it as and when it likes.

Article 186

1. Current assets shall be valued at purchase price or production cost.

2. If the market price at the date of the balance sheet is lower than the purchase price or production cost, the lower value shall be used.

3. If the market price cannot be ascertained and the purchase price or production cost is higher than the value which ought to be imputed to the relevant assets at the date of the balance, it is the latter value which shall be adopted.

4. Current assets may be shown at a lower value than that calculated in accordance with paragraphs 2 or 3 above:

(a) if this is required, upon a reasonable commercial assessment, so that the valuation of these items does not have to be changed in the short term on account of fluctuations in value, or

(b) if this is permitted for tax purposes.

5. Such lower value shall cease to apply when the circumstances on the basis of which it was adopted no longer obtain.

6. The definitions of purchase price and of production cost contained in Article 182, paragraphs 2 to 4, shall apply.

Note on Article 186

Current assets are to be valued at the lowest value applicable to them. If the market price at the date of the balance sheet or, if this is not available, the value at that date, is lower than the purchase price or production cost, the lower value must be adopted. It is equally proper to adopt a lower value in anticipation of likely price fluctuations in the short term — such as occur in raw material prices in international markets, e.g. copper — or in the light of possible tax advantages.

In order to limit the formation of undisclosed reserves, the use of a lower value must be discontinued, when no longer justified, and replaced by a higher one.

Article 187

Identical items of stocks which have been purchased at different prices may be valued at the balance sheet date either on the basis of weighted average prices or by the "First in first out" (Fifo) method or "Last in first out" (Lifo) method.

Article 188

1. Costs of formation shall be shown as a separate item in the balance sheet at purchase price or production cost.

2. They shall be duly depreciated over a five-year period. A different procedure may be adopted in exceptional cases if warranted by the circumstances.

3. Items included under this heading shall be explained in the notes on the accounts.

4.(a) Where debts or loans to be repaid exceed the principal, the difference may be capitalized under costs of formation as a separate item.

(b) The amount of the difference shall be written off not later than the time when repayment of the loan or debt is made.

Article 189

Provisions shall not exceed in amount the sums which a reasonable businessman would consider necessary.

Section four

Contents of the notes on the accounts

Article 190

The notes on the accounts shall contain commentary on the balance sheet and profit and loss account in such manner as to give as true and fair a view as possible of the company's assets, liabilities, financial position and results.

Note on Article 190

The notes on the accounts are designed to explain the various items in the balance sheet and profit and loss account. These documents form a composite whole which must give the reader as true and fair a view as possible of the company's assets, liabilities, financial situation and results.

Article 191

In addition to the information required under Articles in this Statute, the notes on the accounts shall set out information in respect of the following matters in any event:

1. The principles of valuation applied to the various items in the annual accounts;

2. Any exceptions to the general principles set out in Articles 148, paragraph 4, and 179, which may affect comparison with the accounts as at the end of the previous year; any major differences which result must be quantified;

3. The names and registered offices of undertakings in which the S.E. holds not less than 10 per cent of the shares, together with the percentage holding in each case;

4. Any investments in the capital of the S.E. of which it has been notified in accordance with Article 47, paragraph 5, together with the names of the owners thereof;

5. Any group of companies to which the S.E. belongs either as a controlling company or as a dependent undertaking, or to which it has ceased to belong, together with an explanation of the circumstances; the S.E. must also state whether it is under common management with other companies without any of them being controlling companies or dependent undertakings;

6. The names of associated companies (Art. 161, par. 2), the legal and business relationship with each of them, and any events that have taken place in any of them which might materially affect the position of the S.E.;

7. Turnover, broken down according to products, operations and markets;

8. The composition of the labour force split up as between wage earners and salary earners, showing their age-groups and places of employment, average wages and salaries, and the amount of social security contributions during the financial year;

9. Total emoluments during the financial year paid to the Board of Management and the Supervisory Board, and to former members of the Board of Management or, in the event of death, to their dependants, with a breakdown of sums paid in respect of each category;

10. Value added tax and other taxes comprised in the trading results, financial results and non-recurring income and expenditure.

Note on Article 191

This Article specifies the matters to be included in the notes on the accounts. Other items to be mentioned in the notes on the accounts are specified elsewhere in the Statute.

It is of great importance, first, that undertakings state in the notes on the accounts any change in the method of valuation. Any major differences which result must be quantified. This ensures that annual accounts for consecutive years are comparable.

The notes on the accounts must state the names and registered offices of undertakings in which the S.E. holds 10 per cent or more of the shares, together with the amount of each holding. This requirement, therefore, does not relate only to undertakings in which the S.E. has an investment within the meaning of Article 161, but goes much further.

In the notes on the accounts the S.E. must also state the names of any associated undertakings, its legal and business relationship with each of them and any events that have taken place in any of them which might materially affect its position.

A possible exception to these disclosure requirements is envisaged by Article 192. The specified information may be omitted where in the opinion of a reasonable businessman it might, if given, seriously prejudice the interests of the undertakings in question (see also Article 90, paragraph 3(a)). Such omissions must be mentioned in the notes on the accounts of the S.E.

Where the specified information would make the notes on the accounts unduly long, it may be set out in a document which is to be filed with the European Commercial Register (see Article 193).

Equally important is the breakdown of the turnover according to products operations and markets (e.g. the Common Market or others) as prescribed by Article 191, paragraph 7. S.E.'s are not to be reticent in these matters.

Annual accounts have so far failed to bring out, at any rate in Europe, the importance or the company's labour force from the point of view of its business. For this reason paragraph 8 requires the notes on the accounts to include information on the composition of the labour force, the number of wage and salary earners, their age structure and their place of employment. Average wages and salaries and the amount of social security contributions are important data in assessing the company's position.

Article 192

In respect of the items specified in Article 191, paragraphs 3 and 6, the information required may be omitted where in the opinion of a reasonable businessman it could seriously prejudice the interests of the undertakings in question. Such omissions shall be mentioned in the notes on the accounts or in a document pursuant to Article 193.

Article 193

The information required to be given under Article 191, paragraphs 3 and 6, may be contained in a document which shall be filed with the European Commercial Register. Where the information is supplied in this manner, that fact shall be mentioned in the notes on the accounts.

Article 194

The notes on the accounts shall contain a proposal for appropriation of profit for the year.

Section five

Contents of the annual report

Article 195

1. The annual report shall review the development of the company's business and position during the past financial year, having regard to the principles of regular and proper accounting.

2. In addition to the information required under other Articles in this Statute, the annual report shall set out information in respect of the following matters in any event:

(a) Important events that have taken place since the end of the financial year;

(b) The company's likely future development;

(c) Proposed capital expenditure, the scale thereof and the amount of the expenses likely to be incurred in connection therewith.

Note on Article 195

The annual report which is to be presented by the Board of Management must mention all matters which, though not directly related to the various items in the balance sheet, affect the assessment of the company's business position as a whole. It represents the personal judgement of the Board of Management on the development and future prospects of the company. Capital expenditure proposed by the Supervisory Board and Board of Management must, because the matter is important, be expressly mentioned.

Section six

Preparation of group accounts

Article 196

1. If the S.E. is the controlling company in a group of companies, it shall, in respect of the group, draw up a consolidated balance sheet and a consolidated profit and loss account together with notes on the consolidated accounts

and a consolidated annual report. The consolidated accounts, prepared as at the same date as the annual accounts of the S.E., shall relate to every undertaking which, in accordance with Article 223, is a member of the group.

2. If the S.E. is a dependent company within a group of companies, it shall, in respect of its own part of the group and where Article 227, paragraph 2, applies, draw up a part-consolidated balance sheet and a part-consolidated profit and loss account together with notes on the part-consolidated accounts and a part-consolidated annual report. Such accounts, which shall be prepared as at the same date as the annual accounts of the S.E., shall relate to the undertakings controlled through the S.E. Articles 197 to 202 shall apply to part-consolidated accounts and reports.

Note on Article 196

The whole question of preparation of group accounts is still under active discussion, and there is still a long way to go before the relevant management techniques are fully developed. At present, there are no regulations in most of the Member States regarding the preparation of group accounts. This Statute accordingly lays down no detailed regulations for preparation of consolidated accounts by S.E.'s. This Section contains merely a few general principles for preparation thereof and leaves the way open for developments in theory and practice to be considered.

The S.E. is required to draw up consolidated annual accounts and a consolidated annual report if it is the controlling company within a group of companies. The consolidated accounts are to include every undertaking which is a member of the group. A group is defined by Article 223.

The S.E. must draw up part-consolidated accounts and a part-consolidated report if it is a dependent company within a group and other undertakings in the group are controlled through it (see Article 227, paragraph 2). Such undertakings are to be included in the part-consolidated accounts of the S.E.

Article 197

1.(a) Consolidated accounts shall not relate to undertakings within the group where the effect would be to make the information contained in the consolidated accounts less meaningful.

(b) Consolidated accounts need not relate to undertakings within the group which are so small that the view reflected of the assets, liabilities, financial position and results of the group is not affected by omitting them.

2.(a) The reason for non-consolidation of the accounts of any undertaking within the group shall be stated in the notes on the accounts.

(b) The annual accounts of undertakings such as are referred to in paragraph 1(a) shall be drawn up as at the date of the consolidated accounts and shall be annexed to the notes thereon.

Note on Article 197

This Article deals with the case of undertakings that are not included in consolidated accounts. An undertaking within a group is not to be included in those accounts if the picture which they give of the assets, liabilities, financial position and results of the group would be disorted by its inclusion. Likewise, it is appropriate, and also accords with existing practice in Member States, not to consolidate the accounts of an undertaking, within the group, which is too small to affect the view given of the assets, liabilities, financial position and results of the group. The question of when an undertaking is too small, for this purpose, cannot be answered precisely, and can only be resolved in the light of the general business activities of the group.

Consolidated accounts must show plainly which undertakings have not been consolidated, and why . For the purpose of presenting a picture of the assets, liabilities, financial position and results of the non-consolidated undertakings, however, it seems right to require that their accounts be annexed to the notes on the accounts either separately or, as in the Netherlands, in the form of "combined" accounts. On the other hand, it seems legitimate to waive this requirement where non-consolidation of an undertaking was on the grounds specified in paragraph 1(b).

Article 198

1. The consolidated accounts shall comprise the group balance sheet, the group profit and loss account and the notes on the accounts. These shall constitute a composite whole. They shall comply with regular and proper accounting principles.

2. Consolidated accounts shall be presented clearly and accurately. Subject to the provisions on presentation and valuation, they shall reflect as true and fair a view as possible of the group's assets, liabilities, financial position and results.

Note on Article 198

This Article corresponds to Article 148, paragraphs 1, 2 and 3. As the consolidated accounts do not consolidate exclusively the accounts of undertakings, within the group, established pursuant to this Statute, it is appropriate to extend the general principle of that earlier Article specifically to consolidated accounts.

Article 199

The provisions of Section Two of this Title shall apply to the presentation of consolidated accounts subject to the following exceptions:

1. In the group balance sheet:

(a) The amount of any differences as between the book value at the date of first consolidation of investment holdings in the capital of undertakings in the

group, and the value thereof including reserves and profits, on subsequent valuation, shall be shown separately under one item entitled "Consolidation equalization account";

(b) Interests held by companies outside the group in the capital, reserves and profits of undertakings within the group shall be shown as a separate item;

(c) Stocks may be grouped together under one global item.

2. In the group profit and loss account the following items may be lumped together:

(a) Article 168, items I-2 to 9;

(b) Article 169, items A-I-1 to 6 and B-I-2 to 4;

(c) Article 170, items I-2 to 6;

(d) Article 171, items A-I-1 tot 3 and B-I-2.

Note on Article 199

This Article governs the consolidation of capital, i.e. the manner in which the holdings of undertakings within the group in the capital of other undertakings in the same group are to be set off against the proportion of capital of the latter undertakings which they represent. No such procedure is to be adopted where undertakings in the group hold shares in the controlling company, whose capital must in every case be shown without any deduction in the consolidated accounts.

As the book value of the investment and the proportion of capital which it represents in the other company are generally not the same, the consolidation of capital will give rise to a positive or a negative difference the amount of which, in a particular case, depends on the structure of the capital of the other undertaking which is to be consolidated. The consolidation of capital covers the whole of the capital of the undertaking within the group, i.e. its share capital, reserves and profits, including profits carried forward.

In point of time, a consolidation of capital may be based either on the capital at the time when a holding is acquired or on the capital existing at the date of the balance sheet. In the first case, consolidation relates only to that part of the capital of the undertaking, being consolidated, which existed at the time when the holding was acquired. Profits earned by that undertaking after acquisition af the holding by the group and allocated to its reserves will be shown as reserves in the consolidated accounts in the same way as profits retained by the controlling company. Barring a change in the book value of the holding or in the level of capital reserves, the consolidation equalization item remains unchanged under this method.

Under the second method, the value of the holding is set off against the capital of the undertaking at any date that may be chosen. Profits earned by the undertaking after the date of acquisition of the holding by the group will be shown in the consolidated balance sheet not under reserves but under the consolidation equalization item, which thus changes with every change in the capital of the undertaking within the group which is being consolidated (e.g. by appropriation to or withdrawal from reserves).

In this Article the first of these two methods is preferred on the ground that the distinction that it draws between capital reserves and reserves built up out of profit helps to make the consolidated accounts more informative.

Paragraph 1(b) requires the consolidated amounts to be shown gross after allowing for minority interests; thus the consolidated balance sheet will include all assets and debts in their entirety even where a group's holding in an undertaking within the group is less than 100 per cent. Outside interests will be shown as a balancing item. This is the method most widely used in the Member States and also, so far as is known, in other countries.

To lump stocks together in one global item, as permitted under paragraph 1(c), seems legitimate on the ground that, particularly in vertical groups, they are difficult to break down by individual categories.

To combine a series of expenditure and income items in the profit and loss account, as permitted under paragraph 2, seems sensible in view of the fact that individual expenditure and income items are far less meaningful in the consolidated profit and loss account, where different types of expenditure and income are set off against each other, than in the annual accounts of the various undertakings; indeed, to do so makes consolidated accounts more intelligible.

Article 200

1. As the undertakings in a group constitute one economic unit, all assets and liabilities shall be incorporated in the group consolidated balance sheet at the values shown in the balance sheets of the undertakings within the group.

2. The annual accounts of undertakings to which consolidated accounts relate shall be prepared so far as possible in accordance with the same rules of valuation.

Note on Article 200

The principle of valuation to be applied to consolidated accounts is that all assets and liabilities shall be consolidated at the balance sheet values shown in the accounts of the undertakings within the group. This principle cannot be applied, however, without qualification. It follows from the concept of the group as one economic unit that profits on transactions between undertakings within the group are realized only when the goods and services in question have finally been supplied to third parties. As the rule against including unrealized profits applies equally to consolidated accounts, it follows that profits that have not yet been made must be strictly excluded.

To ensure that the relationship between the values used in the consolidated balance sheet and in the balance sheets of the undertakings within the group does not conflict with the provisions of Article 198, paragraph 2, it seemed appropriate to stipulate, as appears in paragraph 2 of Article 200, that the annual accounts of undertakings to which the consolidated accounts relate, i.e. including those of undertakings to which this Statute has no application, shall be prepared so far as possible in accordance with the same rules of valuation, i.e. those prescribed by this Statute.

Article 201

1. In so far as the information contained in the notes on the consolidated accounts is important for the purpose of assessment thereof, Articles 191 to 193 shall apply.

2. The methods of consolidation and, in particular, the sources and composition of the consolidation equalization account and the non-elimination, if any, of profits on transactions between undertakings within the group shall be explained.

Note on Article 201

As the Statute deliberately refrains from laying specific methods of consolidation, it seems desirable, in the interests of clarity in the consolidated accounts, that an explanation of the actual methods employed be provided in the notes on the accounts.

Article 202

Article 195 shall apply to the consolidated annual report.

Section seven

Audit

Article 203

1. The annual accounts and, in so far as it reviews developments in the company's business and position during the past financial year, the annual report shall be audited by an independent auditor acting on his own responsibility.

2. Only persons who are suitably qualified and experienced may be appointed auditors. They shall have obtained their professional qualifications by satisfying the requirements for admission and by passing a legally organized examination; and shall be persons authorized in a Member State to act as auditors of the annual accounts of limited companies whose shares are quoted on a stock exchange.

3. Auditors shall be completely independent of the S.E.

Note on Article 203

Accounting regulations are meaningful only if their application is subject to the strictest possible scrutiny by independent experts. The audit provides the surest guarantee of regular and proper accounting. For S.E.'s however, there is the difficulty that accountants'

qualifications in the Member States are not the same, nor do all of them have a professional institute of accountants established by public law by way of safeguard. These discrepancies can be removed only by harmonizing the existing rules and pratice in Member States. Until then, the regulations concerning audit of S.E.'s must take the present differences into account.

Concerning the choice of auditors for S.E.'s, the solution proposed is as follows. First, the only persons who may be appointed as auditors are those who are "suitably qualified and experienced" to hold this office "by satisfying the requirements for admission and by passing a legally organized examination". Secondly, they must be authorized in one of the Member States to audit the annual accounts of limited companies whose shares are quoted on a stock exchange. The first condition is very important in that it makes it possible to debar from auditing the annual accounts of an S.E. those persons who, although practising as auditors in a Member State, have not satisfied the requirements for admission and for examination.

Article 204

1. The auditor shall be appointed by the General Meeting. In respect of the first financial year, the auditor may be appointed by the General Meetings of the founder companies.

2. He may not be removed by the General Meeting save where there are serious grounds for so doing. He shall be entitled to be present during discussions concerning his removal.

3. The auditor shall be entitled to withdraw from his contract where there are serious grounds for so doing.

Note on Article 204

Auditors are appointed by the General Meeting. Although a proposal as to the appointment will normally be made by the management, the General Meeting is quite unfettered in its choice. For the first financial year the appointment may be made by the General Meetings of the founder companies, which obviates the need to convene a General Meeting of the S.E. solely for this purpose.

Article 205

The auditor shall ascertain whether the accounting system and the annual accounts comply with this Statute and with the Statutes of the company and with the principles of regular and proper accounting.

Article 206

1. In carrying out his duties, the auditor shall be completely free to examine and check any documents and assets of the S.E.

2. He shall be entitled to require any explanation or information that he may consider necessary for the proper execution of his duties.

3. If the carrying out of his duties shall so require, he shall have the like rights in respect of associated undertakings.

4. The auditor may be assisted in his work by colleagues or specialists. They shall have the same rights as the auditor himself and shall act under his responsibility. The auditor and those who assist him shall keep secret all matters of professional confidence.

Note on Article 206

This Article defines the powers of the auditors. These powers apply equally where associated undertakings are involved. The auditors may in respect of these undertakings exercise their right to receive information and to examine and have access to any assets relevant to their work. This extension is fairly far-reaching. It was necessary, however, to simplify the duties of auditors. In addition, the auditors, like their assistants, must keep professional confidences.

Article 207

1. If, on completion of his audit, the auditor has no objection to make in respect of the annual accounts, he shall certify them without qualification.

2. If he has any objection to make in respect of the annual accounts, he shall qualify his certificate as appropriate or withhold it altogether.

3. Any qualification or withholding of a certificate shall be expressly explained.

Note on Article 207

This Article governs the issue of the auditor's certificate, following his audit, and his right to qualify or withhold it.

Article 208

1. The auditor shall, furthermore, present to the Supervisory Board a written report on the results of his audit.

2. The auditor shall also report any matters which he discovers in carrying out his duties and which might jeopardize the existence of the company or significantly affect its development, or which indicate serious infringements by

the Board of Management otherwise than in respect of preparation of the accounts, of any of the provisions of this Statute or of the Statutes of the company.

Note on Article 208

The auditor is required to report to the Supervisory Board in writing upon the result of his audit. He must also report any facts discovered by him which threaten the existence of the S.E. or significantly affect its development, as well as any serious infringements by the Board of Management of provisions of this Statute, or of the Statutes of the company, not directly concerned with the preparation of the accounts.

Article 209

The provisions of Article 20 relating to the liability of auditors shall apply also to the liability of auditors of the annual accounts.

Note on Article 209

The liability of the auditors of the final accounts is defined by reference to the liability of the auditors referred to in Article 20. Their liability is thus limited to a period of three years, reckoned in this case from the date of filing the annual documents with the European Commercial Register (Article 219).

Article 210

The provisions of this Section shall apply to the audit of the consolidated accounts and report of a group of companies or of part of a group of companies.

Section eight

Approval of the accounts and report Appropriation of profits, discharge of directors, and publication

Article 211

The Board of Management shall, before the end of the first three months of each financial year, draw up the annual accounts and report for the previous financial year.

Article 212

The annual accounts and report shall be submitted by the Board of Management to the Supervisory Board. The auditor's report shall be annexed thereto.

Note on Articles 211 and 212

During the first three months of the financial year, the Board of Management must collaborate closely with the auditors. By the end of that period the draft annual accounts and report, together with the auditor's report, must be submitted to the Supervisory Board (Article 68 in conjunction with Articles 211 and 212).

The question arises whether this period is too short. Here it must be remembered that the General Meeting, which has to consider these documents, must be held during the first six months of the financial year (Article 84) and be convened on not less than four weeks' notice (Article 86). This leaves a maximum of two months for the annual accounts and report to be examined and approved by the Board of Management and the Supervisory Board.

The Board of Management has also, in the light of the draft annual accounts, to submit to the Supervisory Board its proposals for appropriation of profit for the year. These proposals are to be annexed to the notes on the accounts (Article 194). The annual accounts and the profit for the year are interconnected. The total of depreciation, for example, affects the amount of profit. The Board of Management and the Supervisory Board have together to consider the entire situation.

Article 213

1. The annual accounts and report shall be settled by the Board of Management and the Supervisory Board in joint session but voting separately.

2. At the request of the chairman of the Supervisory Board, the auditors shall, in an advisory capacity, attend meetings of the Supervisory Board at which the annual accounts and report are settled.

Note on Article 213

The Board of Management and the Supervisory Board together settle the annual accounts and report. This procedure has been chosen in preference to the procedure of having the annual accounts and report settled by the Supervisory Board. The Supervisory Board and the Board of Management are equally responsible for the contents of these documents. They consider them jointly. Each of them, nevertheless, takes its decision separately.

Often, too much is expected from the General Meeting in this respect. How can it judge whether the amounts set aside for depreciation and provisions are correct? Random attendance scarcely qualifies the General Meeting to resolve such questions, and many others,

involved in the matter of approval of annual accounts. It is, moreover, scarcely possible to debate such questions with hundreds of shareholders (let alone thousands, as in the case of large companies with widely dispersed shareholdings). Nevertheless, provision has been made for the General Meeting to intervene in the event of disagreement between the Board of Management and the Supervisory Board on the question of approval of the annual accounts. In that event, which is rare in practice, in view of the fact that the two Boards usually reach agreement after joint consultation, the intervention of a third party is inevitably called for. As a matter of company law, the General Meeting comes first to mind. It will, however, be concerned in these cases with specific points on which the two Boards differed and will not need to embark upon general discussion of the annual accounts.

No such provision for settlement of disputes has been made in respect of the report. The report contains, in fact, no more than a review of the S.E.'s current position and likely development. The General Meeting is incapable of passing what is necessarily a subjective judgement on that development. In any event, it lacks the requisite knowledge of the facts. The Board of Management and the Supervisory Board should, therefore, always agree on the question of approval of the report.

If the chairman so desires, the auditors may attend meetings of the Supervisory Board at which the annual accounts are approved (paragraph 2). This will be the normal procedure, although cases may arise where the Supervisory Board prefers to consult alone with the Board of Management. In any event, no objection may be taken on the ground of absence of the auditors.

Article 214

1. Failing agreement by the Supervisory Board and the Board of Management in the matter of approval of the annual accounts, the accounts shall be approved by the General Meeting, save where the disagreement between the Board of Management and the Supervisory Board relates only to appropriation of the profit.

2. The annual accounts and report prepared by the Board of Management, together with the Supervisory Board's comments which shall be contained in a document to be appended to the notes on the accounts, shall be laid before the General Meeting for its decision.

Note on Article 214

This Article deals with the case where there is disagreement between the Supervisory Board and the Board of Management. The annual accounts are then approved by the General Meeting. The only exception provided for is where the disagreement between the Board of Management and the Supervisory Board relates solely to the proposals in the notes on the accounts for allocating the profit for the year. At that stage the amount of profit has already been determined, and the only point at issue between the two Boards is how this profit is to be applied. Such differences are to be reconciled in accordance with Article 217.

In all other cases of disagreement between the Board of Management and the Supervisory Board, the annual accounts are to be approved by the General Meeting which reaches its decision on the basis of the draft annual accounts prepared by the Board of Management and of the Supervisory Board's comments which are to be appended to the

notes on the accounts. For the purpose of approving the annual accounts, the General Meeting is not bound to follow the opinion of either Board; it is free to decide as it thinks fit.

Article 215

Articles 211 to 214 shall apply to the approval of the consolidated accounts and report of a group of companies and of a part of a group of companies.

Article 216

1. At the General Meeting, duly convened in accordance with Article 84, there shall be presented in one document:

(a) The annual accounts;

(b) The auditors' certificate. If the certificate is qualified or a certificate has been withheld, this shall be mentioned and explained;

(c) The annual report.

2. As from the date of the notice convening the General Meeting, the documents referred to in the preceding paragraph (annual documents) may forthwith be obtained from the company by any person free of charge. A statement to this effect shall appear in the notice.

3. The annual documents shall form the basis upon which the General Meeting will make its decision with respect to the appropriation of profit and the discharge of the members of the Board of Management and of the Supervisory Board.

4. Paragraphs 1 and 2 of this Article shall apply to the consolidated accounts and report of a group of companies and of a part of a group of companies.

Note on Article 216

The items listed in paragraph 1 are presented to the General Meeting in one document.

As from the date of the notice convening the Annual General Meeting, not only the shareholders, but anybody may obtain this document from the company free of charge.

Extension of this privilege to any person is in conformity with current practice. Persons who may be considering purchase of shares in the company, creditors, and the financial Press may all be interested in studying the documents which should on no account be kept secret. Restricting them to shareholders seems an unnecessary complication. After the General Meeting the annual documents are filed in the European Commercial Register and its appropriate national branch office (see Article 219) where anybody is free to study them.

1. If the Board of Management and the Supervisory Board approve the annual accounts, they may appropriate part of the profit for the year, but not exceeding one half thereof, to reserves.

2. Failing agreement by the Supervisory Board and the Board of Management as to the amount or manner of appropriation of the profit for the year, the matter shall be resolved by the General Meeting.

3. In the event of such disagreement, the comments of the Supervisory Board shall set out its views in a document to be appended to the notes on the accounts.

4. The General Meeting shall determine the appropriation of the balance of profit shown in the balance sheet (paragraph 1) on the basis of the joint proposals of the Board of Management and of the Supervisory Board and, where requisite, the appropriation of profit for the year (paragraph 2) on the basis of the proposals of the Board of Management and of the views of the Supervisory Board referred to in the preceding paragraph.

Note on Article 217

When, as is normally the case, the Board of Management and the Supervisory Board agree to approve the annual accounts, they may appropriate half the profit for the year to reserves. This ceiling is a corollary of the principle, adopted in the draft, that the General Meeting must be enabled to form a clear picture of the company's assets, liabilities, financial position and results. This should avoid the situation whereby, because of insufficient knowledge of the company's real position, shareholders accept takeover bids with undue alacrity. It ought not, however, to induce shareholders, for their part, to demand distributions of profit which might threaten the company's future development, if not its very existence. To meet the situation, the 50 per cent limit, which imposes no obligation on the management, but merely authorizes it to retain profits up to this limit at its own discretion, has been introduced as a safety-valve; nor should it be overlooked that in companies whose shares are widely dispersed amongst the public, the rate of distribution tends not to exceed but to fall well short of this level.

If part of the profit for the year is appropriated by the Board of Management and the Supervisory Board to reserves, the General Meeting determines solely the allocation of the remainder, i.e. the balance of profit per the balance sheet. A proposal for appropriation of this balance must be set out in the notes on the accounts (Article 194). Where, as should normally be the case, the General Meeting has merely to determine the appropriation of the balance, it has complete freedom in so doing, and is in no way bound by any proposals put to it in this respect by the Board of Management and the Supervisory Board. The balance sheet profit figure must, however, amount to not less than half the profit for the year, and it may be greater. The General Meeting may resolve to distribute the whole of it, or may appropriate a part or even the whole of it to reserves.

Paragraph 2 envisages two contingencies. The first is that the Board of Management and the Supervisory Board fail to agree on the amount of profit for the year. In this case, the annual accounts must, pursuant to Article 214, be approved by the General Meeting, which

has then also to determine how the profit for the year is to be appropriated. The second is that the Supervisory Board and the Board of Management, whilst agreeing the amount of profit for the year and, hence, approving the annual accounts, disagree on how that profit is to be allocated. In this situation, the General Meeting determines how the profit for the year is to be appropriated, i.e. as in the first case, the entire profit for the year.

In the above-mentioned cases of disagreement, where the General Meeting has to deal with the profit for the year, the Supervisory Board must let it know what profit for the year should in the opinion of that Board be approved and how it should be appropriated (first case) or how the approved profit should be appropriated (second case). The Supervisory Board must state its position concerning this in a document appended to the notes on the accounts (paragraph 3).

Article 218

1. The General Meeting to which the annual documents are presented shall determine whether a discharge be given to the members of the Board of Management and of the Supervisory Board. A separate vote shall be held in respect of the discharge of any particular member if one quarter of the shareholders represented shall so require.

2. A discharge is a vote of confidence by the General Meeting. It relates to all matters and acts apparent from the annual documents.

3. The General Meeting may not, after giving a discharge, resolve to bring an action for liability against the Board of Management or any of its members. The giving of a discharge shall not, however, preclude the bringing of other actions against the Board of Management, the Supervisory Board or any of their members, or against the company.

Note on Article 218

This Article is concerned with the giving of a discharge to the members of the Board of Management and of the Supervisory Board. The discharge is given by the General Meeting at the time that it considers the annual documents, and basically extends to all members of those organs. As in the West German Aktiengesetz (Section 120), there is provision for a minority of shareholders to demand a separate vote concerning the discharge of any particular member (paragraph 1).

The discharge should be seen as a vote of confidence by the General Meeting. Needless to say, it does not go beyond matters and acts brought to the knowledge of the General Meeting through the annual documents.

Having once given a discharge, the General Meeting may no longer resolve to bring an action for liability against the Board of Management. Otherwise, however, its right to bring actions against the Board of Management, the Supervisory or any of their members is unaffected.

Article 219

1. Immediately after the General Meeting two copies of the document laid before it in accordance with Article 216, and of the Minutes of the meeting, shall be filed in the European Commercial Register.

2. Notice of filing and, if appropriate, an announcement of any declaration of dividend, shall forthwith be published by the Board of Management in the company journals.

3. Paragraphs 1 and 2 of this Article shall apply to publication of the annual documents of a group of companies or of a part of a group of companies.

Note on Article 219

After the Annual General Meeting the Board of Management must file the annual documents and the minutes in duplicate with the European Commercial Register, which will forward the second copy to the appropriate national branch office (Article 8).

The payment of a dividend is to be announced immediately by the Board of Management in the company journals (Article 9).

Section nine

Legal proceedings in respect of the annual accounts and report

Article 220

1. One or more shareholders whose shares represent in total five per cent of the share capital or a nominal value of 100 000 units of account, or the representative of a body of debenture holders, may apply, setting out their reasons, to the court within whose jurisdiction the registered office is situate, if they consider that the presentation of the annual accounts or of the report, in so far as it reviews developments in the company's business and position during the previous financial year, does not comply with the requirements of this Statute, provided that their objections have been recorded in the Minutes of the General Meeting.

2. The application shall be made within three months, computed from the date of filing required under Article 219, paragraph 1.

3. The court may call on one or more experts to assist it in reaching its decision. Articles 203 and 206 shall apply to these experts.

4. Evidence shall be heard in chambers in the presence of both parties. The judgment of the court shall be published.

Note on Article 220

In addition to the safeguards provided by the audit, there are judicial safeguards. Article 220, paragraph 1, authorizes shareholders whose shares represent in total 5 per cent of the capital or a nominal value of 100 000 units of account, to apply, stating their reasons, to the court in whose jurisdiction the registered office is situate, if they consider that the annual accounts or the report, in so far as it summarizes developments in the company's business or position during the previous financial year (Article 195, paragraph 1), do not comply with the provisions of this Statute. The auditors of the final accounts must also have regard to these matters. If there is any breach of the provisions of this Statute, they will mention it when issuing a qualified certificate or when withholding their certificate. Even if not mentioned by the auditors, the shareholders may consider that there has been a breach of the provisions of this Statute and make an application to the court on their own initiative.

This right may be exercised not only by the above-mentioned minority of shareholders, but also by the representative of a body of debenture holders. It may be wondered whether this right should not be widened further. In the Netherlands, there are draft proposals for reform whereby this right is extended to any interested person and to the Public Prosecutions Office at the Court of Amsterdam, which is the court competent to deal with such applications. The use of the general expression "any interested person" leaves it to the Court to interpret those words, which could include, and, where profit-sharing schemes are in operation, invariably do include, the workers. In the Statutes of the S.E., however, so broad a formula seemed less appropriate. The rules that have been made relate to two specific cases only.

Apart from this, the Article prescribes the procedure for making the application. It must be made within three months of filing with the European Commercial Register of the documents to which it relates (paragraph 2). At the hearings the court may call one or more auditors as expert witnesses (paragraph 3). The proceedings take place in camera, but in the presence of the applicants and the company. The judgment is published (paragaph 4. It will be important to other S.E.s as a precedent for the drawing up of their annual accounts. It appeared necessary, in the interests of the company, that the proceedings be held in private.

Article 221

1. Where the court upholds the application, it shall order precisely how the company is to rectify its annual accounts or its annual report. Such order may be of future application only.

2. Where the order of the court relates to the balance sheet or the profit and loss account for the year in respect of which the application is made, these shall be deemed to be invalid. The company shall then draw up a new balance sheet or profit and loss account, with due regard to the terms of the

order, and shall submit the same to the General Meeting within the time-limit prescribed. The court may limit the consequences of the invalidity.

3. Where the order is of future application only, the court may subsequently, on application by the company, rescind the order if the circumstances have changed.

Note on Article 221

The court has not merely to determine whether there has been a breach of the provisions of this Statute in presentation of the annual accounts or the report (and, in respect of the latter, only as regards the terms of Article 195, paragraph 1). It must also issue precise instructions as to how those documents are to be presented. In practice, rectification of the notes on the annual accounts, or of the report, will cause little difficulty. The company must issue a supplementary report.

Rectification of the balance sheet or of the profit and loss account, however, is liable to cause considerable difficulties. It could, in the end, produce a different balance in respect of the year's operations and hence a different appropriation of profit. Where distributions, particularly of dividends, have already been made, a rectification for the year to which the application relates may give rise to unpleasantness and could entail repayment, for example, of the whole or part of the dividend. It is for this reason that the court is empowered to issue instructions of future application only.

If the order of the court relates to the balance sheet or the profit and loss account for the year in respect of which the application has been made, the adoption of those documents must be treated as invalid. In this case, the company is required to draw up a new balance sheet or a new profit and loss account, with due regard to the terms of the order, and to submit it to the General Meeting within the time-limit ordered by the court (paragraph 2). The court is again empowered to obviate unpleasantness of the kind previously mentioned, by limiting the consequences of the invalidity. It may, for instance, order that a dividend which has already been paid shall not be repaid.

Paragraph 3 provides for the case where there has been a change in circumstances, by empowering the court, on application by the company, to rescind instructions referring to the future.

Article 222

The provisions of this Section shall apply to the consolidated accounts and report of a group of companies and of a part of a group of companies.

TITLE VII

GROUPS OF COMPANIES

The grouping of undertakings under one (group) management has of recent years featured in the law of all highly industrialized countries and outstripped in economic importance any other form of cooperation between undertakings. This has arisen out of the trend towards undertakings of ever increasing size. What distinguishes groups of undertakings, however, is that their constituent parts, although dependent economically, still retain their legal identity. This results in conflict between the requirements of the business as seen by the group's sole management and the law applicable to companies as legal entities, which law provides for a balance of forces stemming from economic independence and identity of personality as between the legal persons and undertakings concerned.

This is particularly true of sociétés anonymes:* all company law is based on the common interest that shareholders have in the profitability of the company carrying on the business and provides for a balanced system of control of its various organs. This mechanism can no longer operate satisfactorily, however, where the company is controlled by another undertaking and is subordinated to the interests of a unit larger than itself.

This poses a threat not only for minority shareholders but also for creditors who rely on the protection provided for by law. Similar dangers exist for other types of company, although they diminish in proportion as the personal element and, hence, collective liability, assume greater importance.

It is for company law to determine the legal consequences of this development. There is at present in this sphere a wide and ever increasing gap between legal reality and the law.

In fact, the only Member State whose law seeks to have regard to this development is Germany. Other countries are faced with the need to introduce similar provisions, however much opposition there may be on the part of certain business interests. This Statute might well serve as a model for that purpose.

The Statute takes as starting point the fact that groups exist. For purposes of application of the Statute, the group is defined in terms of the forms in which it actually exists in the law of each Member State. There is no question, therefore, of prohibiting the existence of groups or, by means of regulations, of making their formation more difficult. On the contrary, the special regulations proposed here are designed to make the life of a group easier by establishing a clear and precise set of conditions which have regard to the requirements of business as seen by the group management and to the needs of minority shareholders and creditors.

The grouping of legally autonomous undertakings under one management raises questions of economics and competition which fall outside the scope of this Statute and have been deliberately left aside. Company law is merely the means of regulating how companies should be organized, and of providing any safeguards that may be required. Its implications for business and competition are assessed according to other criteria and must, therefore, be

* See translator's note on page 6.

the subject of special regulations. The fact that the groups' legal existence is recognized in company law, and that its consequences for minority shareholders and creditors are the subject of regulations, in no way affects assessment of the group so far as concerns its business and competitive results. The Statute defines this new situation. It specifies immediate legal consequences for controlling and controlled companies as well as for minority shareholders and creditors. It seeks to do so in simple and clear terms. Its aim is simply to provide a framework within which the undertakings concerned will enjoy ample freedom of organization. So far as the safeguards are concerned, the provisions of the Statute are based on the present-day practice of groups of undertakings.

Following the majority opinion of business interests, the Statute assumes that the group represents a single undertaking managed according to standard principles, the interests of its various parts, i.e. of its constituent undertakings, being subordinate to those of the whole. The extent to which the dependent undertakings are effectively under one management varies from one group to another. Some group managements merely lay down general guidelines beyond which the member undertakings are given a free hand to manage themselves, whilst others apply rigidly centralized control in management of the dependent undertakings. Such differences cannot be covered by legislation. These are matters which must be determined by the group's management, and they may be modified in the light of business requirements. The internal organization of the group is difficult, if not impossible, to control from outside. Accordingly, an undertaking which is a member of a group must be regarded as bound by instructions within the group, irrespective of whether such instructions are issued to it.

A system of safeguards for outside shareholders is the necessary corollary of the right, that has to be recognized, of the one management to issue instructions. By recognizing that, as the group is a single undertaking, the controlling company must exercise a large measure of authority over the dependent undertakings, it becomes essential to provide for protection of the interests of the shareholders and creditors concerned. Outside shareholders (minority interests) must be given the opportunity, as soon as the undertaking becomes a member of a group, to relinquish their holdings in the dependent undertaking (which will no longer be managed independently in accordance with its own business interests and can no longer act freely in the light of them) in exchange either for a payment in cash or for an allotment of shares in the controlling company. The Statute provides also for payment by the controlling company of annuities by way of compensation, and thus offers a wide choice of relationship to the controlling company in its dealings with the shareholders.

Those who use the dependent undertaking for the purpose of their own interests must also accept liability towards its creditors. The Statute provides, therefore, that the controlling company is jointly and severally liable for all the obligations of the dependent undertaking.

Finally, the provisions for the giving of certain notices will enable the public to ascertain whether an S.E. forms part of a group or not.

The Statute thus seeks to establish a legal framework and to reconcile the interests of the group with those of outside shareholders and creditors. By requiring either payment in cash or an exchange of shares, the proposed system will in many cases reinforce the legal ties. It could be objected that this will promote concentration. The objection does not, however, stand up to close examination. All that has been done is to draw certain conclusions, in law, from the fact that concentration already exists, with a view to protecting the interests of those concerned. Those conclusions have scarcely any effect on economic concentration. In any case, undertakings are not compelled under this system to effect any consolidation from the legal point of view if they prefer to make use of the different forms of payment of compensation which are available to them.

Section one

Definition and scope

Article 223

1. A controlling company and one or more undertakings controlled by it, whether existing within the Member States or not, shall constitute a group within the meaning of this Statute if all of them are under the sole management of the controlling company and if one of them is an S.E.

Each of them is an undertaking within the group.

2. Where an undertaking is controlled by another within the meaning of Article 6, there is a presumption that the controlling company and the controlled undertaking constitute a group.

3. Where all the shares of an undertaking formed under national law, being an undertaking within a group and having its registered office in a Member State, are held by an S.E., any provisions of national law which in these circumstances require the undertaking to be wound up shall not apply.

Note on Article 223

For purposes of this Statute it is necessary to have a definition of a group because direct legal consequences flow from the definition: disclosure, protection of outside shareholders and creditors, and the means whereby control is to be exercised. These require clear definition. It is necessary also because there is still no generally accepted view, in Member States, of what a group is, or of the criteria to be applied in determining whether a group exists. Only in one of the Member States are there special provisions of law in this respect and reasonably long practical experience in operating them. For this reason the definition of a group is largely based on the one used in the German Companies Act (Section 18(1)). It is also in line with the majority opinion of business interests.

In the definition given, the existence of a group is determined by two criteria:

— first, there must be two companies in a controlling/controlled relationship, the criteria of the existence of such relationship being set out in Article 6;

— secondly, the controlling company and the controlled undertaking must be under the sole management of the controlling company.

Sole management is not defined. The exigencies of business are such that it seems desirable to leave the concept undefined in order to leave wide power of interpretation to the courts. Regard may be had, in this way, to the many different forms existing in actual practice in business. This will necessarily involve some uncertainty in the law, at first, but that disadvantage will be more than offset by the benefits deriving from flexible interpretation and application. In practice, there should be little difficulty. The presumption which arises under paragraph 2 will help, in any event. Often, too, the question of control will be

more simply determined by reference to the presumption that arises under Article 6. In any case, it will be easier to clear up these questions when particular cases arise than to define, in abstract terms, what constitutes sole management. The presumption, under paragraph 2, that a group is in existence shifts the onus of proof and requires the undertakings concerned, knowing as they do their own internal relationships, to prove that they are not under one management notwithstanding that some degree of control exists.

A group, within the meaning of the Statute, exists only where one of the member undertakings is an S.E., irrespective of the legal form or of the location of the registered office of the members. The other undertakings may even be located outside the Community. Groups do not cease to exist at national frontiers and are not confined, by the terms of any definition, within any one territory. Where the registered offices of undertakings within a group are situated not in Member States, but in third countries, certain legal and practical problems arise which are regulated severally in the following Sections of this Title.

The concept of a group underlying this proposed Statute relates solely to groups in which there are dependent undertakings. It excludes horizontal or similar groups—i.e. relationships where undertakings are under one management but where none of them is dependent upon any other. As a matter of fact, in the majority of Member States a group is not regarded as existing in those circumstances. The regulations relating to protection of outside shareholders and creditors do not apply to that type of group. The relevant provisions on this subject are, therefore, not contained in this Title, but in the Articles on disclosure and on the presentation of accounts, where such relationships become important (Article 161, paragraph 2 and Article 191, point 5).

In many cases, application of the regulations of the Statute dealing with groups will mean that the controlling S.E. will acquire all the shares in dependent companies formed under national law. As these companies will continue to be subject to national law save where the provisions of the Statute apply, they may, under the national laws of certain countries, be subject to compulsory winding up. This is obviated by paragraph 3.

Article 224

1. Where the controlling company of a group is an S.E., Sections Three to Five of this Title shall apply to dependent undertakings whose registered offices are situate in the Member States and to their relationship with the controlling S.E.

2. Where an S.E. is a dependent undertaking, Sections Three to Five of this Title shall apply to the S.E. and to its relationship with the controlling company, whether the registered office of the controlling company is situate in the Member States or elsewhere.

Note on Article 224

This Article governs the sphere of application of the provisions concerning the protection of outside shareholders and of creditors, and the validity of the means whereby dependent companies are controlled.

These provisions, which are inseparably connected, unlike those dealing with disclosure, are not confined to S.E.'s, appertaining as they do to the relationship between an S.E. and other undertakings, whether the S.E. is the controlling company of a group and upon which the others are dependent or is itself an undertaking controlled by another undertaking within the group. In either case, the rights of outside shareholders and of creditors of the dependent undertakings must be a matter of corresponding obligation on the part of the controlling company.

Paragraph 1 covers the case where the S.E. is the controlling company. It extends the application of Sections Three to Five to dependent undertakings formed under national law and having their registered office in the Member States. National law is applicable only where the legal relationship between the S.E. and the controlling company is not governed by this Statute.

The question arises whether Section 311 and the Sections following it in the Companies Act of Germany apply in this case. As this present Statute imposes mandatory protection of outside shareholders and of creditors of dependent companies on all groups, whereas German law makes such protection conditional upon the existence of an agreement for control, Sections 311 ff of the Companies Act of Germany do not apply to a *société anonyme** incorporated under German law even in the absence of an agreement for control between the controlling S.E. and that other company.

Where an S.E. controls an undertaking formed outside the European Communities, protection of the participators in and creditors of that undertaking is a matter to which the proper law governing that undertaking applies.

Paragraph 2 deals with the case where the S.E. is a dependent undertaking. Here, the right of protection of the S.E.'s outside shareholders and creditors constitutes one of the obligations of the controlling company irrespective of where its registered office is situated. It is the law applicable to the dependent undertaking, i.e. this Statute, which determines this matter.

Article 225

1. An S.E. may apply to the Court of Justice of the European Communities for a declaration as to whether it is an undertaking within a group within the meaning of this Statute.

An undertaking formed under national law may likewise apply to the Court of Justice for a declaration as to whether it is a dependent undertaking within a group controlled by an S.E.

2. Where the S.E. or the undertaking formed under national law makes no application for a declaration pursuant to paragraph 1, the following persons shall be entitled to apply:

(a) Shareholders who, if the undertaking were held to be dependent, would be outside shareholders and who hold between them either 5 per cent of the capital, after deducting the shares belonging to the undertaking held to be the controlling undertaking, if that be the case, or shares in the S.E. of a nominal value of not less than 50 000 units of account; or

* See translator's note on page 6.

(b) Creditors, where the undertaking which might be held to be a controlling company does not comply with the requirements of Article 239.

3. The Court of Justice shall give judgment after hearing evidence from the undertakings within the group. It shall, where appropriate, determine the date with effect from which the undertaking becomes an undertaking within the group.

4. Costs shall be a matter for decision by the Court of Justice.

Note on Article 225

Whether an undertaking in the form of an S.E. or of a company incorporated under national law belongs to a group, within the meaning of this Statute, is of fundamental importance in view of the legal consequences which this entails for the undertaking in question. Where this matter is in dispute, a rapid and final decision is needed to put an end to the uncertainty. As a special case, the Court of Justice of the European Communities is competent in the matter; it has not been left to the national courts. A central court best ensures that this Article will be interpreted and applied uniformly without submissions giving rise to delays. Another factor in favour of this solution is that the issue will always involve two companies and their mutual relationship. As their respective registered offices will often be in different Member States, a national court may have difficulty in resolving the problem and there could also be the risk of conflicting judgments.

This does not preclude the possibility that, although matters of international scale may be involved, the question whether a relationship of controlling company/dependent undertaking exists according to Article 6, may nevertheless have to be decided by national courts. The question could arise incidentally during an action falling within the competence of the national courts, making it expedient that their competence be preserved in such circumstances. Further, the considerations which weigh in favour of assigning competence to the Court of Justice of the European Communities do not operate in those circumstances.

Application may be made not only by undertakings within the group but also by persons entitled to protection of their rights. This is the necessary counterpart, in terms of procedure, to the specific rights granted by Sections 3 and 4. Interested parties may apply to the Court for a ruling on whether the conditions entitling them to exercise their rights are satisfied. Outside shareholders may apply, however, only if they together hold a specified minimum amount of capital; this condition is imposed in order to avoid frivolous actions. No similar condition seemed to be called for in respect of creditors as it would be in their interest to apply for such ruling only if the debtor failed to discharge his obligations.

Section two

Publicity

Article 226

1. Where an S.E. becomes an undertaking within a group, it shall forthwith cause that fact to be registered in the European Commercial Register and to be announced in the company journals.

2. The same shall apply where an S.E. ceases to form part of a group.

Note on Article 226

This provision requires the S.E. to give notice of whether it belongs to a group or whether it is economically independent. The giving of notice is not only important to outside shareholders and to creditors on account of the rights which thereby arise in their favour, but also conforms with the basic principle of the Statute that facts relating to the position of the company should be published in an appropriate manner.

Article 227

1. An S.E. which is a controlling company shall draw up consolidated annual accounts and a report in accordance with the provisions of Title VI.

2. An S.E. which is a dependent undertaking through which other undertakings are controlled shall, in accordance with the provisions of Title VI, draw up part-consolidated annual accounts and a report, save where the controlling company of the group itself draws up accounts in accordance with the provisions of Title VI relating to preparation of the accounts of groups of undertakings.

Note on Article 227

Article 6 of the Title dealing with preparation of the accounts contains regulations concerning the preparation of group annual accounts and reports. This Article requires those regulations to be observed in the cases specified in the Article.

Section three

Protection of outside shareholders

Article 228

1. Outside shareholders of a dependent undertaking having its registered office in the Member States may elect for:

(a) Payment in cash pursuant to Article 229, or

(b) Exchange of shares pursuant to Article 230.

2. Where the controlling company of a group has also undertaken, in accordance with Article 231, to make annual payments calculated in relation to the nominal value of each share, outside shareholders may elect instead to receive such payments.

Note on Article 228

Section 3 contains the necessary provisions for protection of the outside shareholders in a dependent undertaking within a group.

When the controlling company is an S.E. or a *société anonyme** incorporated under national law, those shareholders are entitled, subject to the two following Articles, to exchange their shares for shares in the controlling company or to receive payment in cash. They are free to choose either.

If the controlling company is not an S.E. or a *société anonyme** incorporated under national law, the outside shareholders can opt only for payment in cash. The same applies where the registered office of the controlling company is situated outside the Member States.

The procedure for determining the amount of the cash payment or the share exchange ratio is expressly laid down. The controlling company can make proposals to the shareholders but they are free to decide whether or not to accept them and to assist them in their decision they will be presented with the result of an audit made by qualified experts appointed by the management organs of the controlled companies, who will have investigated the relationships between the companies concerned. If the shareholders reject the proposals of the controlling company or if a resolution by the General Meeting to accept them is challenged, the final decision on whether the proposals are equitable will be made by the court which has jurisdiction over the dependent company. Adequate material and procedural safeguards for outside shareholders are thus prescribed in order to prevent their interests from being in any way prejudiced.

Any controlling company is free to offer to outside shareholders a sum in compensation in the form of an annuity calculated in relation to the nominal value of the shares and to fix the terms of the offer. In view of the well-defined procedure and attendant safeguards provided in respect of payment in cash or exchange of shares, it appeared to be possible to allow a controlling company a completely free hand in determining the form of compensation that it may wish to offer. In turn, shareholders are completely free to decide whether or not to accept any such offer; it is for them to decide whether they prefer immediate cash payment or, in due course, exchange of shares.

Article 229

1. Where the controlling company of a group is an S.E. it shall make an offer to the outside shareholders to purchase for cash the shares held by them in a dependent undertaking whose registered office is situate within the Member States.

2. A controlling company incorporated under national law, whether its registered office is situate within the Member States or not, shall be subject to

* See translator's note on page 6.

the like obligation in respect of the outside shareholders of an S.E. over which it has control.

Note on Article 229

This provision requires a controlling company, whatever form it may have, to make a fair offer in cash. What is fair will have to be determined upon the merits in each case, including the value of the dependent undertaking and its profitability.

Article 230

1. Where the controlling company of a group is an S.E. it shall, in addition to making an offer to purchase for cash the shares of outside shareholders in a dependent undertaking whose registered office is situate in the Member States, offer to exchange those shares for shares in the capital of the S.E.

2. The controlling company of a group, being a société anonyme:* incorporated under national law whose registered office is situate in the Member States, shall be subject to the like obligation in respect of the outside shareholders of a dependent S.E.

3. If, in the cases referred to in paragraphs 1 and 2, the controlling company of a group is in turn a dependent of an S.E. or of a société anonyme* incorporated under national law whose registered office is situate in the Member States, it may offer to exchange the shares of outside shareholders of an undertaking over which it has control not for shares in its own capital but for shares in the capital of the company by which it is itself controlled.

Note on Article 230

This Article requires a controlling company, being an S.E. or a *société anonyme** incorporated under national law, to offer the outside shareholders of a dependent undertaking exchange of their shares for its own, as an alternative to a payment in cash.

Here, again, the basic question is whether the offer is fair. Contrary to what happens in the case of a cash offer, however, the position of the controlling company must be taken into account in fixing the terms of the share exchange. Hence the need to restrict this option to the case of a controlling company whose registered office is in one of the Member States. It would not be possible to make an assessment of its economic position, which is essential for the purpose of determining the basis of exchange of shares under the procedure laid down in this Section, if the company were established outside the area in which this Statute applies.

* See translator's note on page 6.

Article 231

The controlling company of a group, whether its registered office is situate in the Member States or not, may also undertake to compensate outside shareholders of a dependent undertaking whose registered office is situate in the Member States by paying them an annuity in compensation calculated in relation to the nominal value of their shares.

Note on Article 231

This Article gives a controlling company very substantial latitude in settling its relationship with outside shareholders, empowering it to propose any arrangement that it considers appropriate. It may, in its own interests, offer to outside shareholders such terms as may induce them not to elect for an exchange of shares or a cash offer. There are no restrictions as to the terms of the offer. Whether an annuity is preferable to the other options is left to each shareholder to decide for himself. Special safeguards in the form of minimum terms or independent audits are not called for. Shareholders are adequately safeguarded by being entitled at any time to opt for immediate payment in cash or exchange of shares if they consider the company's offer of an annuity to be inadequate.

If the controlling company wishes the outside shareholders to stay with the dependent undertaking, it must not only assure them of an adequate and sufficiently secure return, but also protect them against the possibility of the state of dependence coming to an end. The controlling company is best placed to judge to what extent it may be in its interest to arrange such terms. Freedom of action is, accordingly, preferable to detailed legal regulation of this matter.

Article 232

1. A dependent undertaking whose registered office is situate in the Member States shall, immediately upon becoming a member of a group or being held by the Court of Justice to be a member of a group, appoint independent experts and instruct them to prepare a report concerning the amount of the payment in cash and, where necessary, the share exchange ratio that are appropriate.

Article 15, paragraph 2, shall apply to such experts.

2. The experts shall be entitled to obtain any information from the dependent undertaking and from the controlling company and to undertake any investigations that may be necessary.

Note on Article 232

It is essential that the appraisals and evaluations on which proposals to the outside shareholders will be based be undertaken by impartial experts, who must be appointed by the dependent undertakings whose shareholders will use them. The experts must be entitled to demand from the companies concerned any information and documents required.

The controlling company is not debarred, for its part, from commissioning experts to cooperate with those appointed by the dependent undertaking or to prepare a separate report. Special provisions on this subject did not seem to be called for.

Article 233

1. Upon completion of their investigations, the experts shall deliver their report to the dependent undertaking.

2. The dependent undertaking shall forthwith forward the report to the controlling company.

3. Within a reasonable period after receiving the report, the controlling company shall inform the dependent undertaking of its proposals concerning the amount of the payment in cash and, where necessary, the share exchange ratio, indicating at the same time whether it intends to make payment of annuities in compensation.

4. The management organs of the dependent undertaking shall prepare for the benefit of its shareholders a summary of the experts' report, setting out the results of the investigations undertaken and the main facts and circumstances on which the results are based. The said organs shall comment on the report and its conclusions. They may make proposals, stating their reasons, concerning the amount of the payment in cash and the share exchange ratio that they consider appropriate.

Note on Article 233

Even after the report has been prepared, the initiative rests with the dependent undertaking. As it is the outside shareholders thereof who are affected when the undertaking becomes part of a group, the experts are required to send their report to that undertaking (paragraph 1), whose management organs must then summarize it for the benefit of shareholders so as to form an adequate basis of assessment for them (paragraph 3). As the experts may conceivably have had to deal with secrets of the business or of the undertaking itself in their report, it seems inappropriate for the report itself to be published or placed at the disposal of shareholders.

In view of the procedure selected, it is not necessary that the experts present a unanimous report. They may differ both in their assessment of the facts and in their conclusions. They play only an auxiliary role and are required merely to assist the interested parties—the outside shareholders, the organs of the dependent company, and the controlling company—in making their decision which, in the final analysis, they must make under their own responsibility.

As it is the controlling company which will have to raise and pay out the requisite funds, any proposals concerning the ratio of exchange of shares or the amount of the cash payment must come, in the first place, from that company. Its proposals may differ from those of the experts, but any offer that is less generous will have to be explained. The

proposals must be sent to the dependent undertaking's Board of Management within a reasonable period, which can only be ascertained in the light of each case. Prescribing of a fixed period did not seem appropriate for this would not have regard to the special features and problems arising in each particular case.

Article 234

1. The competent organ of management in the dependent undertaking shall within a reasonable period convene a General Meeting to decide on the amount of the payment in cash and, where necessary, the share exchange ratio.

2. The notice convening the meeting shall be accompanied by the controlling company's proposals concerning the amount of the payment in cash and, where appropriate, the share exchange ratio and, further, where appropriate, the amount of the annuity in compensation. Any proposals made by the organs of management shall also be sent to the shareholders.

3. There shall appear in the notice convening the meeting a note to the effect that shareholders are entitled to obtain free of charge on request a summary of the experts' report, the management organs' comments thereon and, if appropriate, a memorandum on the proposals made under paragraph 2.

Note on Article 234

The outside shareholders decide in General Meeting whether they wish to accept the proposed terms of exchange of their shares for shares in the controlling company or the amount of the cash payment offered. These terms must be set out in the notice of meeting itself. The same applies in respect of annuities in compensation. The outside shareholders are also entitled to obtain on request any documents they need in order to reach a decision, notably the summary of the experts' report and the comments of their own company's Board of Management and Supervisory Board. Where the controlling company has specifically set out the grounds on which its proposals are based, those grounds must also be made known to the shareholders.

The General Meeting must be convened within a reasonable period after the controlling company's proposed terms have been notified pursuant to Article 233, paragraph 2. Here, again, it has to be borne in mind that whilst the interested parties must be given adequate time and opportunity to form their opinion, the procedure must be implemented as quickly as possible.

Article 235

1. When the proposed cash offer and share exchange ratio are put to the vote, shares held by the controlling company or attributable to it in accordance with Article 6, paragraph 4, shall be disregarded.

2. A majority of three-quarters of the capital entitled to vote pursuant to paragraph 1 and represented at the General Meeting shall be required in order for the vote to be decisive. Non-voting shares shall be counted in calculating the majority. They shall carry the right to vote.

Note on Article 235

At the General Meeting, only shares other than those held by the controlling company, as defined in Article 6, paragraph 4, have voting rights. The right to consent to the ratio of exchange of shares or the amount of the payment in cash is reserved exclusively to the outside shareholders, who are independent of the controlling company.

On the other hand, holders of non-voting shares must be entitled to join in the discussion. For the purpose of calculating the majority, the basis prescribed is not the number of votes but the capital represented. This is right and proper because the net asset value of the shares, which is the very matter at issue, concerns the owners of non-voting shares just as much as others.

No quorum is prescribed. Only the share capital represented at the General Meeting is taken into account. If three-quarters of the capital represented is in favour, the resolution is taken to have been passed.

The vote relates only to the compulsory safeguards provided for by this Statute, not to compensation payments. The controlling company is free to offer such payments in its own unfettered discretion and the shareholders are at liberty to accept or reject. It is a matter of unilateral obligation on the part of the controlling company.

Article 236

1. If the General Meeting rejects the proposals of the controlling company, the amount of the payment in cash and, where appropriate, the share exchange ratio shall, on application by the controlling company, be determined, without right of appeal, by the court within whose jurisdiction the registered office is situate. Such application shall be made within one month of the decision of the General Meeting.

2. The same shall apply if the resolution of the General Meeting to accept the controlling company's proposals is challenged. The action brought for this purpose shall be in respect only of the question whether the proposed cash payment or share exchange ratio is equitable and shall lie only on the part of outside shareholders who voted against the resolution at the Meeting and caused their opposition to be recorded in the Minutes, and who hold between them not less than 20 per cent of the capital entitled to vote pursuant to Article 235.

3. The court may, at the expense of the dependent undertaking, appoint independent experts who satisfy the conditions prescribed by Article 15, paragraph 2. Article 232, paragraph 2, shall apply.

Note on Article 236

In the event of the controlling company's proposals being rejected, the terms of the share exchange and the amount of the payment in cash are settled by the court. This necessarily follows from adopting a system under which the establishment of a group attracts immediate legal consequences. The controlling company should not be entitled (and might often find it difficult on economic grounds) to evade its obligations by severing its links with the dependent undertaking, any more than it should be compelled to act in accordance with a resolution of the General Meeting as to the amount of a payment in cash or the ratio of exchange of shares which does not accord with its own ideas and financial resources. A court, by way of independent body, must, therefore, be brought in. The court must seek to arrive at a solution which is fair to both sides; in this it will not only be guided by the investigations which form the basis of the experts' report, but may also itself appoint further experts to assist it in reaching its decision. The judgment of the court is final. The amount of the cash payment and the share exchange ratio determined by the court will be definitive and binding on all parties. This system accords with the principle that the compensation procedure should be as expeditious as possible. What is required here is an effective decision and assessment of the business aspects involved. Appeal to another court would produce greater delay rather than shed new light.

Similar considerations apply so far as the bringing of action is considered. To avoid unnecessary litigation, a resolution of the General Meeting may be challenged only by a substantial proportion of shareholders who must also have been represented at the General Meeting and have recorded their objection in the Minutes.

Article 237

1. The competent organ of management in the dependent undertaking shall give notice in the company journals of the amount of the payment in cash and of the ratio of exchange of shares within two months of the passing of the resolution by the General Meeting or, where Article 236 applies, within one month of the giving of judgment by the court. At the same time, it shall give notice in the company journals of any undertaking by the controlling company to pay annuities in compensation to outside shareholders pursuant to Article 231, and of the terms of such undertaking.

2. Every outside shareholder of the dependent undertaking shall be entitled to require payment in cash or, if appropriate, exchange of his shares within three months of publication of the final notice in the company journals.

3. The undertakings within the group shall be jointly and severally liable in respect of payment in cash. The controlling company shall be liable in respect of exchange of shares.

4. Where the controlling company has undertaken to pay annuities in compensation pursuant to Article 231, payment thereof shall be made to outside shareholders who have not exercised their right under paragraph 2.

Note on Article 237

This Article governs the implementation and execution of the resolution of the General Meeting or judgment of the court. Precise time limits are prescribed. In these circumstances the controlling company must, after a given period, be relieved of the necessity of keeping funds available for making the payments in cash or for exchange of shares. This is justified by business requirements. The three-month time limit is thus a closing date. Outside shareholders who have not exercised their rights during this period can no longer do so thereafter. They remain shareholders of the dependent company with all the rights that this implies. Where the company has undertaken to pay them an annuity in accordance with Article 231, they will receive payment each year.

Article 238

The provisions of this Section shall apply to dependent undertakings existing as sociétés à responsabilité limitée.[1] References to outside shareholders and to the General Meeting shall be read as if there were substituted therefor references to outside members and the meeting respectively.

Note on Article 238

This Article extends the application of the protection provisions to dependent undertakings existing as *sociétés à responsabilité limitée.*[1]

For the most part, dependent undertakings will have the form of *sociétés anonymes*[2] or *sociétés à responsabilité limitée.*[1] This Statute provides comprehensive protection for the outside members of such undertakings.

Section four

Protection of creditors

Article 239

1. A controlling company, whether its registered office is situate in the Member States or not, shall be jointly and severally liable for the obligations

[1] See translator's note on page 10.
[2] See translator's note on page 6.

of a dependent undertaking whose registered office is situate in the Member States.

2. Proceedings may, however, be brought against the controlling company only where the creditor proves that he has endeavoured, and failed, to obtain payment of his debt from the dependent undertaking.

Note on Article 239

Two forms of protection of creditors were open:

(a) Either the controlling company might be required to make up the dependent undertaking's losses annually, thus ensuring for the benefit of creditors that the net assets at the time of establishing the control are maintained. This would not, however, guarantee immediate settlement of the creditor's claim, nor would it be directly related to the liquidity of the dependent undertaking. As against this, the creditor could distrain on the controlling company by virtue of its obligation to make up the controlled company's losses, and obtain payment accordingly. This would be quite logical, since establishment of control should not, of necessity, entail any additional safeguard for creditors. So far as the creditor is concerned, the debtor remains the same even when its affairs are subject to decisive intervention by another undertaking.

(b) Or creditors might be protected by making the controlling company jointly and severally liable for the debts of the dependent undertaking. Such an arrangement, although harder to justify from a general point of view, has the advantage of enabling a creditor to bring action against the undertaking financially responsible for the affairs of the debtor, which, in the case of a group, is the controlling company. At all events, the controlling company's intervention in the affairs of the dependent undertaking can be so powerful as to create direct financial responsibility. Indeed, the stage has already been reached in practice where controlling companies readily assume responsibility for the debts of the companies they control without being expressly liable to do so. What is at stake here is the reputation of the group as a whole.

This Statute accordingly provides for joint and several liability. Although creditors are consequently over-protected to a degree, this is justified in view of the controlling company's power to intervene in the management of undertakings under its control.

The liability extends to all claims, regardless of their basis in law or of the date when they arose. Control of a debtor undertaking should not jeopardize its creditors and, accordingly, creditors outstanding at the time of establishing the control must be protected. But creditors whose claims have arisen subsequent to the establishment of control are equally entitled to protection and there is no convincing reason why their claims should be subordinated. It is not to be expected of them that they should either place their trust in the controlling company's integrity or demand special guarantees. To limit the liability of the controlling company to the claims of the longest outstanding creditors of the dependent undertaking would also raise difficulties because the date on which a claim arises and its amount on a given date are often difficult to determine.

On the other hand, creditors should not have an unfettered right to press their claims against one or other of the two companies. They must first deal with and seek payment from their debtor. It is only when they can show these efforts to have been unsuccessful, which will normally be after legal action, that they will then be able to apply to the controlling company. In the end, the difference where creditors are protected by the obligation to make up the losses of the dependent undertaking is thus purely procedural.

Section five

Instructions

Article 240

Where the protection provided for in Section Three has been accorded in conformity with the procedure prescribed therein, the organ appointed to represent a dependent undertaking shall not refuse to carry out the instructions of its controlling company whose registered office is situate in the Member States on the grounds that they would be contrary to the interests of the dependent undertaking.

Note on Article 240

The controlling company's power to issue instructions to the dependent undertaking is based on fact or on law. The Statute takes this power for granted, making no distinction as to how it arises, nor acknowledging it to be the controlling company's right when, in the circumstances, no express acknowledgement is called for. The real need is to resolve the dilemma in which members of the organs of the dependent undertaking are placed when the controlling company requires them to carry out instructions conflicting with their obligations towards their own company. This dilemma is resolved in favour of the controlling company by relieving the members of the organs of the dependent company of all responsibility towards their own company when carrying out such instructions. The essential prerequisites of this, however, are that shareholders be afforded the protection prescribed by Section Three and that the controlling company's registered office be situated in one of the Member States.

TITLE VIII

ALTERATION OF THE STATUTES

Alteration of the Statutes is made the subject of a separate Title comprising all the provisions required. The Statutes may be altered only by the General Meeting.

This Statute requires that shareholders be given full prior information concerning the nature of the proposed alteration and of the reasons therefor. Apart from the conditions covering a quorum, every alteration of the Statutes requires a majority of three quarters of the votes cast. Judicial scrutiny of alterations of the Statutes, registration in the European Commercial Register and publication in the company journals are effected in accordance with the procedure prescribed for formation of the company.

Article 241

Any alteration of the Statutes shall be effected by resolution of the General Meeting.

Article 242

1. The substance of a proposed alteration of the Statutes shall be specified in the agenda of the meeting issued under Article 84.

2. As soon as notice of the General Meeting has been given, the shareholders may apply to the company for the complete text of the proposed alteration to be supplied to them immediately and free of charge. A note to this effect shall appear in the notice of meeting.

3. The Board of Management shall set out in a report the reasons for its proposed alteration of the Statutes. Paragraph 2 shall also apply to the report.

Note on Articles 241 and 242

For the purpose of informing shareholders of a proposed alteration of the Statutes, the Board of Management may, in the notice of the General Meeting, indicate merely the substance thereof. The complete text of the proposed alteration does not have to be given. Shareholders desiring further information can obtain the text of the proposed alteration on application.

To enable shareholders to assess the significance of the proposals, on which their opinion will be based, the Statute expressly requires the Board of Management to state its reasons for the alteration. The report setting out those reasons is also obtainable by shareholders on request. This two-tier system of notification ensures that the shareholders are adequately informed and keeps the costs to the company to a minimum.

Article 243

1. The General Meeting may be duly held only if not less than one half of the capital is represented. If the first notice of meeting fails to produce such quorum, a second notice shall be issued. The General Meeting may then be duly held irrespective of the amount of capital represented. A note to this effect shall appear in the notice of meeting.

2. Resolutions shall be duly passed if three quarters of the votes validly cast are in favour thereof.

3. The Statutes may impose more stringent requirements.

Note on Article 243

This Article prescribes the conditions relating to the quorum and to the minimum amount of capital. In determining either of these, non-voting shares are excluded (cf. Article 49, paragraph 2(c)].

The text clearly shows that where a second General Meeting has to be held, it cannot be convened at the same time as the first. A second General Meeting may be convened only where a quorum was not attained at the first meeting. Separate notice of the second General Meeting is needed in order to give shareholders a further opportunity to consider whether or not they wish to attend. No quorum is required for the second General Meeting, the notice whereof will carry a note to this effect.

Article 244

1. The alteration of the Statutes shall be notified by the Board of Management to the Court of Justice of the European Communities for registration in the European Commercial Register.

2. The notification shall be accompanied by two authenticated copies of:

(a) the Minutes of the General Meeting and of the annexes prescribed by Article 94, relating to the alteration of the Statutes;

(b) the complete text of the Statutes as altered.

Article 245

1. The Court of Justice of the European Communities shall satisfy itself that the meeting was properly held, that the resolutions were validly passed and that where the capital has been increased it has been paid up in full, save where the increase is by way of creation of new capital within the meaning of Article 41, paragraph 3.

2. The Court of Justice of the European Communities shall refuse registration in the European Commercial Register where:

(a) the resolution or the proceedings were not in accordance with the provisions of this Statute or of the Statutes of the company;

(b) in the case of an increase of capital it does not appear from the auditors' report that payment up in full is certain or, in particular, that the value of subscriptions in kind is at least equal to the nominal value of the shares to be allotted in exchange.

Article 246

1. Where the Court of Justice finds no grounds for refusing or postponing registration, it shall order that the alteration of the Statutes be registered in the European Commercial Register and shall forward to the Registrar the notification and the annexed documents.

2. Notice of registration of the alteration shall be published in the company journals.

3. Until notice of registration of the alteration of the Statutes has been published in the company journals, the alteration shall not be relied on to defeat the claims of third parties unless the company proves that they had knowledge thereof.

Note on Articles 244 and 246

So far as concerns the procedure for judicial control and giving of notice of alteration of the Statutes, the Statute follows the provisions of Title II regarding the formation of companies. The position is the same in both cases.

Article 244, however, differs from Article 94, paragraph 3, in as much as the latter requires the Board of Management to send two copies of the Minutes of each General Meeting to the European Commercial Register direct, whereas any alteration of the Statutes must first be submitted for scrutiny to the Court of Justice of the European Communities, which then, if duly satisfied, orders registration of the alteration in the European Commercial Register.

The documents required, including the full text of the Statutes as altered, must be submitted in duplicate, one for the European Commercial Register and the other for the branch office thereof in the Member State in which the S.E. has its registered office.

Examination by the Court of Justice of the European Communities is confined to ascertaining whether, in the light of the documents submitted, the meeting was properly held and the resolution was validly passed. If the documents are incomplete, the Court of Justice may at any time allow the S.E. to regularize or rectify the notification. If the alteration of the Statutes is for the purpose of increasing the capital by further subscriptions in cash, the court will also ascertain whether the increased capital is fully paid up. The only exception to this (Article 245, paragraph 1) is where the alteration merely creates approved capital

pursuant to Article 41, paragraph 3. If the increase of capital is effected by further subscriptions in kind, control by the Court is not required. Under Article 42, paragraph 3, such subscriptions have to be valued by two independent accountants appointed by the Court within whose jurisdiction the registered office is situated. This ensures the requisite control.

If the resolution or the holding of the meeting is invalid because the provisions of this Statute or of the Statutes of the company are not complied with or if, in the case of an increase of capital, it is doubtful whether the capital will be paid up in full, the Court of Justice must refuse registration. In such cases the S.E. is required to carry out the proper procedure.

Where the Court of Justice has no grounds of objection, it orders registration. Article 246 corresponds to Article 17, paragraph 5. Notice of registration must be given. Paragraph 3 of this Article provides the necessary safeguards for third parties acting in good faith. They are entitled to rely on the old text registered in the European Commercial Register until such time as notice of the alteration has been published. If the company denies the good faith of third parties, it must prove that the alteration was known to them.

TITLE IX

WINDING UP, LIQUIDATION, INSOLVENCY AND SIMILAR PROCEDURES

Title IX governs the winding up of a European company, the subsequent procedures and the law applicable to insolvency. Apart from winding up pursuant to a resolution of the shareholders in General Meeting or expiration of the period for which the company was formed, as specified in the Statutes, insolvency is the main reason in law for winding up a company. The company being wound up is put into liquidation. As a rule, the Board of Management is responsible for carrying out the liquidation. Extensive powers of control over the liquidators are, however, conferred on the General Meeting.

The principal object of liquidation is to satisfy the company's creditors. The surplus assets are distributed amongst the shareholders in accordance with an arrangement for distribution. The insolvency procedures follow the preliminary draft of a "Convention on insolvency, composition and similar procedures", by which the law to be applied is to be prescribed.

Section one

Winding up

Article 247

An S.E. shall be wound up:

(a) by resolution of the General Meeting;

(b) on expiration of the period for which the company was formed as specified in its Statutes;

(c) in the circumstances referred to in Article 249, paragraph 4; or

(d) on declaration of insolvency of the S.E.

Article 248

A resolution under paragraph (a) of Article 247 shall comply with the requirements relating to resolutions for alteration of the Statutes.

Article 249

1. If losses shown in the books reduce a company's net assets below half its share capital, the General Meeting convened for the purpose of considering the annual accounts pursuant to Article 84 shall decide whether the company

should be wound up. Where this item is included in the agenda, the Board of Management shall expressly make known its opinion on the question of winding up in a special report approved by the Supervisory Board and referred to in the agenda. Any person entitled to attend the General Meeting may apply for a copy of this report to be sent to him free of charge fifteen days before the date of the meeting.

2. If it is decided not to wind up the company, its share capital shall be reduced within not more than two years from the date of the General Meeting referred to in paragraph 1 by an amount at least equal to the loss incurred, unless its net assets have in the meantime increased to an amount equal to not less than half of the capital. A reduction of the capital below the minimum level prescribed by Article 4 may be effected, however, only where an increase in the capital to the level prescribed by that Article is effected simultaneously. The Board of Management shall forthwith notify the European Commercial Register of the date on which the said two-year period will expire.

3. In each case the General Meeting shall pass its resolutions in accordance with the provisions which apply to alteration of the Statutes.

4. If a General Meeting has not been held, or if it has been unable within the period prescribed by paragraph 2 to pass valid resolutions either for winding up the company or for reducing its capital under the conditions hereinbefore contained, the company shall at the end of the two-year period prescribed by paragraph 2 automatically be dissolved.

Note on Articles 247 to 249

The Statute deals first with voluntary winding up of a company by resolution of the General Meeting. Apart from the necessary quorum, such resolution requires a majority of three quarters of the votes validly cast (Art. 248 in conjuction with Art. 243). The General Meeting must be convened in accordance with the regulations contained in Title IV, Section Four.

The fact that one of the grounds for winding up a company is the expiration of the period specified in its Statutes recognizes the right of the promoters to form the company for a fixed period of time. They will not, as a general rule, have done this. Thus the Statute requires the period for which the company is formed to be specified only where that period is of fixed duration (Article 13(f)).

Article 249, paragraph 4, referred to in Article 247(c), provides a special ground for winding up which is designed to protect the shareholders. The General Meeting, in the course of the annual discussion of its accounts, is empowered and obliged by the Statute, subject to the same requirements as to majority as are prescribed for alteration of the Statutes, to decide whether the company is to be wound up where losses have reduced its net assets below half the share capital specified in its Statutes (Article 249, paragraph 1).

Where such losses have been incurred, the Board of Management must make known its views as to whether the company should be wound up. It must do this in a special report, approved by the Supervisory Board, to be laid before the General Meeting.

In order to enable the company, if it wishes, to continue in existence despite this loss, the Statute allows the company, if it has not decided to wind up, a respite of two years, during which the share capital must be reduced by an amount equal to the loss incurred. As in the case of an ordinary reduction within the meaning of Article 44, paragraph 2, the capital may not be reduced below the required minimum unless the company resolves at the same time to increase its capital to restore it to the minimum amount (Article 249, paragraph 2). No reduction is needed if, within the stated period, the company's net assets increase to an amount equal to half the capital. The Statute clearly states that this must be by real increase in the net assets.

If these conditions are not satisfied within the period allowed, either because no General Meeting has been held or because resolutions for winding up the company or for reducing its capital in manner required by the Statute could not be passed in time, the company is automatically dissolved at the end of the two-year period, i.e. without further legal procedure.

In order to establish this date precisely, the Statute stipulates that the two-year period begins to run from the date of the last ordinary General Meeting convened to consider the accounts after the loss referred to in Article 249, paragraph 1, has been incurred, and requires the date of expiry to be recorded in the European Commercial Register, which must be notified thereof by the Board of Management for the purpose of registration (Article 249, paragraph 2, third sentence).

The remaining ground for winding up is stated in the Statute to be a declaration of insolvency.

Article 250

1. In the cases referred to in Article 247, (b) and (c), the Board of Management shall, for the purpose of registration, immediately notify the European Commercial Register of the winding up of the company and give notice in the company journals.

2. If the requirements of the preceding paragraph are not complied with before the expiration of two weeks following the winding up, any person concerned may apply to the court in whose jurisdiction the registered office is situate for an order that the winding up be registered in the European Commercial Register, and that notice be given at the company's expense.

Note on Article 250

Notice of winding up, as of formation, of a European company must be given. A winding up following the expiration of the period for which the company was formed, as specified in its Statutes, or a winding up in the circumstances referred to in Article 249, paragraph 4, is required by the Statute to be notified to and registered in the European Commercial Register, and announced in the company journals. Where a company is wound up by resolution of the General Meeting (Article 247(a)), Article 248 stipulates that the procedure prescribed by Articles 244 to 246 must be carried out: notification to the Court of Justice of the European Communities, verification by the Court that the meeting was validly held and registration by order of the Court. This is why Article 250, paragraph 1, makes no reference to Article 247(a).

To protect the interests of shareholders and third parties, the Statute entitles certain outsiders to apply for registration of the winding up of the company. The Statute gives very wide meaning to the expression "person concerned". The applicant must prove to the court in whose jurisdiction the registered office is situate that the requirements of Article 250, paragraph 1, are, for him, of some business interest.

Section two

Liquidation

Article 251

1. Save in the event of a declaration of insolvency, winding up of the company shall be followed by liquidation which shall be carried out in accordance with the provisions of this Section.

2. Unless otherwise required by the provisions of this Section and in so far as the provisions thereof are not inconsistent with the purpose of the liquidation, S.E.s that are being wound up shall, until the liquidation is completed, continue to be subject to the same provisions as S.E.s which are not being wound up.

3. The provisions relating to the powers and duties of the members of the Board of Management shall, for purposes of the liquidation, apply to the liquidators. The liquidators shall be subject to control by the Supervisory Board.

Article 252

1. On winding up the powers of the Board of Management shall cease. The members of the current Board of Management shall carry out the liquidation unless other persons are appointed as liquidators by the General Meeting.

2. On the application of one or more shareholders holding between them either 5 per cent of the share capital or shares of a nominal value of 100 000 units of account, the court in whose jurisdiction the registered office is situate may, where serious grounds exist, remove the liquidators and appoint others in their place.

3. The General Meeting may at any time remove the liquidators and appoint others in their place.

4. The General Meeting shall determine the amount of the liquidators' fees. If the liquidators are appointed by the court under paragraph 2, the amount of their fees shall be determined by the court.

Article 253

Notice of the appointment or removal of liquidators shall be given to the European Commercial Register for the purpose of registration and be published in the company journals. Article 65 shall apply.

Note on Articles 251 to 253

For liquidations consequent on winding up, other than those following a declaration of insolvency, the Statute lays down the principle that precisely the same provisions are applicable to an S.E. in liquidation as to one which is not in liquidation. The provisions of Section Two are, therefore, merely by way of exception. This is also true of the powers and obligations of the liquidators who, in accordance with the Statute, will normally be the members of the former Board of Management. The General Meeting may, however, remove them immediately or during the course of liquidation and replace them by others.

The Statute extends the protection of shareholders by means of special safeguards for minority interests, empowering one or more shareholders holding the specified proportion of the company's capital to make an application, which the court may grant if there are serious grounds (Article 252, paragraph 2), for removal of the liquidators. It will be for the courts to determine what is meant by serious grounds. There would be serious grounds if, in particular, the liquidators discriminate in favour of one or more major shareholders at the expense of minority interests.

Liquidation does not bring the duties of the Supervisory Board to an end. It is responsible for controlling the liquidators (Article 251, paragraph 3, second sentence). There is no provision for control from outside the company itself, e.g. by the court within whose jurisdiction the registered office is situate.

Article 253 requires the usual notice of appointment and removal of liquidators to be given. Application of Article 65 means that the liquidators themselves are responsible for giving notice of their appointment, removal or replacement; that they may appoint or dismiss agents having power of procuration and define the powers thereof; that each liquidator is authorized to represent the company unless the Statutes otherwise provide (Article 65, paragraph 1, first sentence). Finally, the provisions protecting third parties acting in good faith also apply here.

Article 254

The liquidators shall terminate work in progress, collect in the debts, convert the remaining assets into cash and pay off the creditors. If necessary for the purposes of the liquidation, they may enter into new commitments.

Article 255

1. Making specific reference to the winding up of the company, the liquidators shall invite the creditors to submit their claims. Notice for this purpose shall be published in the company journals on three occasions, with an interval of not less than two weeks between each.

2. Every creditor known to the company who has failed to present his claim within three months of the date of the final notice shall, in manner required by his national law, be invited in writing to do so.

3. Claims which are not presented within one year of the date of the final notice shall be extinguished. Express notice to this effect shall be given in the notices published pursuant to paragraph 1 and in the written invitation pursuant to paragraph 2.

Article 256

1. The liquidators shall lay before the General Meeting annual accounts in respect of their activities.

2. The provisions of the first seven Sections of Title IV concerning the preparation of accounts, of Article 218 concerning discharge of the members of the Board of Management and of the Supervisory Board, and of Article 219 concerning notices shall apply.

Note on Articles 254 to 256

Article 254 defines the duties of the liquidators. It should be noted that the liquidators' powers, even in relation to third parties, are confined to the purposes of the liquidation (Article 251, paragraph 2). In contrast to the powers of the Board of Management of a company not in liquidation, the restriction also applies to the powers of representation in relation to outsiders. Subject thereto, however, the liquidators may undertake new transactions. The rule is that such transactions must be necessary for purposes of the liquidation.

The primary object of liquidation is to satisfy the creditors. The procedure prescribed by the Statute is designed to expedite the liquidation. It is for this reason that it provides for extinguishment of all claims after the procedure has been completed. During the first stage of the procedure, a notice inviting all creditors to submit their claims to the company must be published in the company journals. Next, the company may in writing invite the known creditors to do so. Both invitations must expressly state that unsubmitted claims may be extinguished. When the procedure has been duly carried out and the time limits specified by law have expired, the liquidators will know that further claims against the company cannot be made. It is not a question of expropriation. Silence on the part of a creditor gives rise to a clear presumption of tacit renunciation by him, and so there is no dispossession against the will of the persons concerned.

Finally, it is a normal part of the duties of liquidators to prepare annual accounts in accordance with the provisions of Title IV.

Article 257

1. Assets remaining after discharge of the liabilities shall be distributed amongst the shareholders in proportion to the nominal value of their shares.

2. Where a liability cannot be discharged for the time being, or is disputed, a distribution of assets may be made only if security is given in favour of the creditor or if the assets remaining after a partial distribution constitute adequate security.

Article 258

1. A complete or partial distribution of assets shall not be made until accounts prepared in accordance with Article 256, together with a scheme of distribution drawn up after the end of the one-year period prescribed by Article 255, paragraph 3, have been presented to the General Meeting, and a further three months have elapsed after filing of the annual documents and scheme of distribution in the European Commercial Register during which no proceedings have been commenced in the court within whose jurisdiction the registered office is situate. The same shall apply where any such proceedings have been dismissed by the court.

2. Notwithstanding the provisions of Article 220, any person interested may bring such proceedings provided that they relate to the scheme of distribution.

Note on Articles 257 and 258

When the creditors are satisfied, or their claims are extinguished under Article 255, paragraph 3, the remaining assets can be distributed amongst the shareholders, subject to three conditions. First, at the end of the one-year closing period prescribed by Article 255, at least one set of accounts must have been presented to the shareholders together with a scheme of distribution; secondly, three months must have elapsed since the annual documents and scheme of distribution were filed with the European Commercial Register; thirdly, no proceedings must have been commenced during that period.

This procedure is necessary in order both to ensure essential publicity and protection of the rights of those concerned. It also expressly applies in the event of partial division of surplus assets where it seems feasible to make a distribution to shareholders of amounts that are available beyond any shadow of doubt. Needless to say, the said procedure does not affect claims which are disputed or cannot be settled at the time of any such distribution, unless security is given in manner prescribed by the Statute in favour of the creditors concerned.

Article 259

1. Upon completion of the liquidation the liquidators shall forthwith give notice thereof to the European Commercial Register for the purpose of registration and in the company journals.

2. If further action in respect of the liquidation shall thereafter become necessary, the court within whose jurisdiction the registered office is situate shall, on the application of the shareholders or of a creditor, renew the mandate of the former liquidators or appoint other liquidators.

Article 260

1. Following the liquidation, the books and records of the S.E. shall be lodged with the European Commercial Register for retention there for ten years.

2. The Court of Justice of the European Communities may authorize shareholders and creditors to examine such books and records.

Note on Articles 259 and 260

The two final Articles of this Section set out the procedure to be followed after liquidation. The Statute indicates what publicity is required. It also provides for the liquidation to be re-opened if further action becomes necessary. An application for this purpose may be made by any shareholder or creditor.

The publicity provisions include the lodging of all the S.E.'s books and records with the European Commercial Register for ten years. The Court of Justice of the European Communities determines who may examine the documents lodged, after weighing the interests of shareholders and creditors against those of third parties who, at the time, had business dealings with the S.E.

Section three

Insolvency and similar procedures

Article 261

An S.E. shall be subject to any Convention that may be concluded between the Member States in respect of insolvency, arrangements with creditors and similar procedures.

Note on Article 261

Questions of procedure and jurisdiction in the matter of insolvency are to be dealt with in a special Convention of which a preliminary draft is currently being presented to the Member States. The S.E. will be subject to the provisions of the Convention, the main points of which are summarized below.

First, it should be pointed out that the Convention applies only if any of the procedures to which it relates involve an international element. For an S.E. this, obviously, will most frequently be the case. Subject to this reservation, the Convention has a wide field of application, including insolvency, arrangements with creditors and similar procedures. A full list of the matters covered is contained in Article 1 of the Protocol annexed to the Convention.

In respect of the procedures to which it relates, the Convention puts into effect the principle of uniformity and universality of insolvency.

As regards jurisdiction, with which it is its primary purpose to deal, the fundamental rule (Article 2) is that any proceedings to which the Convention applies that have been commenced in one of the Member States are automatically effective in all others. There are various regulations for ascertaining which court has exclusive jurisdiction and for preventing, where necessary, any conflict in the matter of jurisdiction (Articles 3 to 16).

Beyond this, the Convention deals also with questions other than jurisdiction and specifies which law is to be applied, either by setting out rules relating to conflict of law (Articles 18 and 19) or by introducing standard provisions, notably with regard to the effects of insolvency.

To facilitate the application of the principle of universality of insolvency, whereby the effects of an insolvency extend to the debtor's total assets within the Community, an annex to the Convention contains the draft of a uniform law which the contracting States undertake to introduce into their own law. This governs such questions as extending the effects of insolvency to include liability on the part of the company's management, evidence as to the property of the spouse, the period between the date on which the debtor is deemed to have ceased payment and the date of the order, compensation and contracts of sale containing a revesting clause.

National law, i.e. the law of the competent court as determined by the Convention, which in the case of a European company is the law of the court within whose jurisdiction the registered office is situate, governs the conditions in which insolvency proceedings may be commenced. Accordingly, it is that law which will regulate the Board of Management's obligations in respect of the steps it must take and of the responsibilities it must discharge (lodging of the balance sheet, declaration of insolvency, etc.).

Article 262

For the purpose of application of the regulations relating to jurisdiction which are contained in any convention concluded between the Member States in respect of insolvency, arrangements with creditors and similar procedures, the business of an S.E. shall always be deemed to be carried on from the registered office specified in its Statutes.

Note on Article 262

This Article makes the presumption which may arise under paragraph 2 of the preliminary draft of the convention into an absolute rule. The presumption thereunder is that the registered office specified in the Statutes is the central place from which the business is carried on. The question of which court is competent is determined according to that criterion. The court within whose jurisdiction the registered office is situated will always be the competent court in the matter of insolvency.

For the purpose of insolvency, as for the question of general jurisdiction, the possibility that an S.E. may have more than one registered office will probably make it necessary, in respect of insolvency, as of general jurisdiction, to adopt a protocol supplementing one or other of the Conventions relating to jurisdiction.

Article 263

1. The syndic appointed upon the insolvency of an S.E. shall ensure that the order made at the commencement of insolvency proceedings is registered in the European Commercial Register before it is published in the Official Gazette of the European Communities and in the company journals. The entry in the Register shall include the particulars required by any convention concluded between the Member States in respect of insolvency, arrangements with creditors and similar procedures.

2. The syndic shall also notify the European Commercial Register of decisions made pursuant to any such convention.

Note on Article 263

The purpose of this Article is simply to relate, in advance, certain requirements as to the giving of notices, as provided for in the draft convention or in the protocols thereto, to the special institutions concerning the S.E.

TITLE X

CONVERSION

The Statute does not prohibit a European company from converting itself into a *société anonyme** constituted under the laws of one of the Member States if, because of the location of its effective management, it has business ties with that Member State.

Conversion is decided upon by resolution of the General Meeting. The Court of Justice of the European Communities, to which any such resolution must be notified, merely satisfies itself that the resolution was validly passed. If it has no objections, the Court of Justice certifies accordingly. Thereafter, the European company ceases to be subject to the provisions of this Statute. The regulations which then apply are those of the national law. The Statute merely prescribes that after the procedures required under the national law have been duly completed, one copy of the documents required by that law must be lodged with the European Commercial Register by way of final act. The conversion is registered therein and published in the Official Gazette of the European Communities. The company subsists as a European company until the day on which it becomes a legal entity by virtue of the provisions of the national law in question.

Article 264

1. By resolution of the General Meeting passed in like manner to a resolution for alteration of the Statutes, an S.E. may be converted into a société anonyme* constituted under the laws of one of the Member States.

2. Conversion shall not be effected until three years after formation of the S.E.

3. The S.E. shall be converted into a company under the laws of the Member State in which its effective management is located.

Article 265

The reasons for the proposal to convert an S.E. into a société anonyme* constituted under the laws of a Member State shall be set out in a report by the Board of Management. Article 242, paragraph 2 shall apply to such report.

Note on Articles 264 and 265

To prevent abuse, the right to convert a European company into a company existing under national law is not unrestricted. The Statute requires that there be business ties between the company and the Member State to whose law it wishes to become subject.

* See translator's note on page 6.

Such tie is presumed to exist if the place where the effective management is located is in that Member State. The company must, further, have been in existence as a European company for at least three years.

By imposing these requirements, it becomes possible for the Statute to authorize the conversion of an S.E., irrespective of the origin of its founder companies, into a *société anonyme** under the laws of any Member State whatever. The fact that an S.E. may be converted only into a *société anonyme** corresponds to the restriction imposed in respect of formation of an S.E. The structural uniformity of this type of company makes the position easier so far as the regulations are concerned. At a later stage the company is free to carry out any other conversion authorized by the national law.

The resolution of the General Meeting altering the Statutes must comply with the requirements of Title VIII. The provisions of Article 243 specifying the quorum and a majority of three quarters of votes validly cast must be observed. Non-voting shares are excluded. Notice of the meeting must be given in accordance with Title IV, Section Four. Article 265 requires that a report be prepared by the Board of Management setting out the reasons for the proposed conversion. This report is obtainable by shareholders on demand. A note to this effect must appear in the notice of General Meeting (Article 265 in conjuction with Article 242, paragraph 2).

Article 266

1. The resolution for conversion shall be notified by the Board of Management to the Court of Justice of the European Communities.

2. This notification shall be accompanied by:

(a) two authenticated copies of the Minutes of the General Meeting and, where they relate to the resolution for conversion, the annexes specified in Articles 94 and 265;

(b) the authenticated text of the Statutes as altered by the General Meeting.

3. The Court of Justice of the European Communities shall ascertain whether the resolution was validly passed.

4. If the resolution was passed in accordance with the provisions of this Statute and of the Statutes of the S.E., the Court of Justice of the European Communities shall return the documents mentioned in paragraph 2 to the S.E. together with a certificate that the resolution was validly passed.

Article 267

The company shall subsist as an S.E. until the day on which it acquires legal personality as a société anonyme* constituted under national law.

* See translator's note on page 6.

Article 268

1. Immediately after acquiring legal personality as a société anonyme* constituted under national law, the company shall send to the European Commercial Register one of the copies referred to in Article 266, paragraph 2(a) together with one copy of the documents and supporting papers required under its national law for formation of sociétés anonymes,* including the certificate that the requisite notices have appeared in the national publications.

2. The European Commercial Register shall register the conversion and give notice of the conversion in the Official Gazette of the European Communities, making due reference to the registration effected, filing of documents and giving of notices pursuant to the national law where the documents and supporting papers sent to the European Commercial Register are evidence thereof.

3. The conversion of the company shall not be relied on to defeat the claims of third parties until such time as notice of the conversion has been published in the Official Gazette of the European Communities.

Note on Articles 266 to 268

Following the resolution of the General Meeting, the Statute provides for a two-stage procedure. The Court of Justice of the European Communities, which must be notified of the conversion, checks whether, in the light of the documents sent to it, the resolutions were validly passed (Article 266, paragraph 2). This requires that all formalities prescribed by the Statute have been duly observed. The documents to be supplied include the full text of the Statutes as altered. Having examined these, the Court of Justice returns them together with a certificate that they are in order. It is then the responsibility of the Board of Management to carry out whatever formalities are required by national law, which will vary according to the national law in question. Any lacunae in the regulations will have to be filled by the national legislatures. The Statute assumes that the regulations for incorporation of the company will be broadly similar to the regulations governing the formation of *sociétés anonymes*.* Accordingly, in connection with the second stage of the conversion procedure, the Statute refers to the "documents and supporting papers" required under the national law for formation of *sociétés anonymes*.* This means all the documents which the national law in question requires to be produced upon formation of *sociétés anonymes*.* A certificate that notice has been given in the national publications must also be included.

When the procedure under national law has been completed, i.e. as soon as the company has acquired legal personality under the national law in question, the company's organ of management forwards the documents referred to in Article 268, paragraph 1 to the European Commercial Register, which registers the conversion and publishes it in the Official Gazette of the European Communities. This terminates the procedure of conversion and the requisite publication thereof.

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* See translator's note on page 6.

The Statute provides for the company to retain the legal personality of a European company until the day on which it acquires legal personality under its future national law (Article 267). This ensures its continuity as a legal person. The Statute had also to protect third parties acting in good faith who had done business with the company before notice of conversion was given in the Official Gazette of the European Communities. It is for this reason that a provision for protection of those acting in good faith has been added here. Good faith in this context means ignorance of the legal change that has taken place (Article 268, paragraph 3).

TITLE XI

MERGER

European companies may merge either with each other or with a company formed under the law of a Member State. Whereas Title II deals with merger of *sociétés anonymes** incorporated under national law which results in formation of a European company, this Title covers merger involving a European company already in existence.

The merger may be effected by forming a new European company or by take-over. An existing European company may either form a new European company together with another European company or *société anonyme** formed under national law, or take over another European company or *société anonyme** formed under national law. The result will invariably be a European company.

The reverse process, i.e. the take-over of a European company by a *société anonyme** incorporated under national law or the formation of a new *société anonyme** incorporated under national law by merger of a European company and a *société anonyme** incorporated under national law, is, of course, also possible. The procedure is, however, governed by national law and is, therefore, not dealt with in this Statute.

As the merger of *sociétés anonymes** incorporated under national law is one way in which European companies may be formed, it has been possible, in settling the regulations applicable to merger, to make frequent reference to the provisions of Title II. So far as national companies are concerned, their own national law relating to mergers applies.

As in the case of all important matters of procedure, notice of merger must be given. Under the Statute, publication of registration in the European Commercial Register has the legal consequence that the companies taken over cease to exist.

Section one

Merger of European companies

Article 269

1. An S.E. may, without being put into liquidation, merge with another S.E.:

(a) by formation of a new S.E. to which the whole of the assets and liabilities of the merging companies shall be transferred in exchange for shares in the new S.E.;

(b) by transfer to the acquiring S.E. in exchange for shares therein of the whole of the assets and liabilities of the S.E. acquired.

2. An S.E. in liquidation may be party to a merger by formation of a new S.E. or by acquisition of an S.E., provided that distribution of the assets amongst the shareholders of the S.E. in liquidation has not begun.

* See translator's note on page 6.

Note on Article 269

Section One deals with merger of European companies with each other. The Statute provides for the two traditional forms of merger: formation of a new S.E. and takeover. It also expressly allows merger of European companies in liquidation so long as the liquidation has not yet reached the stage where the surplus assets are being distributed.

Such merger, like the formation of a European company by merger of two national *sociétés anonymes*,* is based on the principle of universal succession. The individual assets do not, therefore, have to be transferred separately. Liquidation is not required. In the case of merger by formation of a new S.E., the two merging companies cease to exist; in the case of merger by takeover, only the company acquired ceases to exist.

Article 270

1. Merger by formation of a new S.E. shall require a resolution of the General Meeting of each S.E. passed in like manner to a resolution for alteration of the Statutes.

2. Sections One and Two of Title II of this Statute shall apply. For purposes of application of those Sections, references to the "auditors" shall be deleted and there shall be substituted therefor in each case a reference to the "auditors of the annual accounts".

Article 271

1. Merger by take-over shall require a resolution of the General Meeting of each S.E. passed in like manner to a resolution for alteration of the Statutes.

2. Sections One and Two of Title II of this Statute shall apply by analogy save where this Article and the following Articles otherwise provide. For purposes of application of those Sections, references to the "auditors" shall be deleted and there shall be substituted therefor in each case a reference to the "auditors of the annual accounts".

3. A merger by take-over shall be notified by the acquiring S.E. to the Court of Justice of the European Communities for registration in the European Commercial Register.

4. Notice of registration shall be published in the company journals of the merging companies.

5. The S.E. acquired shall cease to exist on the date of publication in the Official Gazette of the European Communities. With effect from that date the liability of the acquiring S.E. shall be substituted for that of the S.E. acquired.

* See translator's note on page 6.

Note on Articles 270 and 271

Both forms of merger require a resolution of the General Meeting of each S.E. concerned passed in conformity with the provisions prescribed for alteration of the Statutes. Article 243 must be complied with. The General Meeting is convened in accordance with the procedure laid down in Title IV, Section Four. The merger procedure itself is subject to the provisions of Title II, Section One and Two (Article 270, paragraph 2 and Article 271, paragraph 2).

Where a new European company is formed, the shareholders of the merging companies are obliged to exchange their shares for shares in the new S.E. This follows from Article 28, paragraph 3. The same applies to the shareholders of the company taken over in the case of a merger by takeover.

Articles 270 and 271 make Article 21 applicable and it follows that in the case of merger of European companies an equalization payment not exceeding 10 per cent of the nominal value of the newly formed European company's share capital may be made in cash.

From the principle of universal succession it follows that the new European company or the acquiring European company respectively are liable for the commitments, respectively, of the old company or of the company acquired.

Article 271, paragraph 5 expressly reiterates this in respect of merger by takeover, stipulating that the liability runs from the date on which the company acquired ceases to exist.

As to other matters, reference should be made to the commentary on Section One and Two of Title II.

Mergers by takeover are required by Article 271 of the Statute to be notified by the acquiring European company to the Court of Justice of the European Communities for registration in the European Commercial Register. Notice of registration is to be given in the journals of all the merging companies. The company taken over ceases to exist on the date of publication in the Official Gazette of the European Communities. This provision corresponds to Article 28.

Section two

Merger of S.E.s with sociétés anonymes* incorporated under the law of one of the Member States

Article 272

1. An S.E. may, without being put into liquidation, merge with a société anonyme* incorporated under the law of one of the Member States:

(a) by formation of a new S.E., to which the whole of the assets and liabilities of the merging companies shall be transferred in exchange for shares in the new S.E.;

* See translator's note on page 6.

(b) by transfer to the acquiring S.E. in exchange for shares therein of the whole of the assets and liabilities of the S.E. acquired.

2. An S.E. in liquidation or a société anonyme* incorporated under the law of one of the Member States and in liquidation may be party to a merger by formation of a new S.E. or to a merger by takeover of a société anonyme* incorporated under the law of one of the Member States provided that distribution of the assets of the company in liquidation amongst its shareholders has not yet begun.

Article 273

Section One and Two of Title II of this Statute shall apply to merger by formation of a new S.E. For purposes of application of those Sections, references to the "auditors" shall be deleted and there shall be substituted therefor in each case a reference to the "auditors of the annual accounts".

Article 274

1. Article 271 shall apply to merger by takeover of a société anonyme* incorporated under the law of one of the Member States.

2. The merger shall be notified by the acquiring S.E. to the Court of Justice of the European Communities for registration in the European Commercial Register.

3. Notice of registration shall be published by the S.E. in its company journals. The société anonyme* acquired shall procure notice of merger to be given in like manner to notice of dissolution of a company as prescribed by the law under which the société anonyme* was incorporated.

4. The S.E. taken over shall cease to exist on the date of publication in the Official Gazette of the European Communities. With effect from that date the liability of the acquiring S.E. shall be substituted for that of the société anonyme* acquired.

Note on Articles 272 to 274

The Statute also allows merger of European companies with *sociétés anonymes** incorporated under the law of one of the Member States, provided that the newly created company or the acquiring company is a European company. The reverse case falls outside the scope of the Statute. Companies in liquidation may also be party to these operations.

* See translator's note on page 6.

The Statute lays down the conditions in which they may be parties. Here again the Statute refers to the provisions of Sections One and Two of Title II. For mergers involving the take-over of a national *société anonyme*,* Title II applies by virtue of Article 271 (Article 274, paragraph 1). The merger must be notified by the acquiring European company to the Court of Justice for registration in the European Commercial Register. As in the case of merger by takeover of European companies, the Statute provides that upon publication in the Official Gazette of the European Communities the company acquired ceases to exist. It further provides that the *société anonyme** acquired must give notice of the merger in the manner prescribed by the law under which it was formed for publication of notice of dissolution of companies.

* See translator's note on page 6.

TITLE XII

TAXATION

The fiscal problems raised by the European company can be grouped under three heads, namely those which arise:

(i) at the time of formation of the company;

(ii) during the company's lifetime, relating to its status for tax purposes and, in particular, to the method of taxing its profits;

(iii) as to its domicile for tax purposes and any change therein.

1. *General system of taxation of a European company*

It appears that special provisions for taxation of European companies must be ruled out. They could, in theory, only be more favourable than the regulations now prevailing. This would not only run counter to the principles of modern tax law, which tend to attach more importance to the function and business structure of undertakings than to its legal form; it would also deliberately create new sources of distortion and discrimination detrimental to free and effective competition and inconsistent with fiscal neutrality. Accordingly, the tax regulations now prevailing must apply to European companies just as to other companies.

At the same time, it has to be admitted that the present system of taxation of companies that operate in a number of States through permanent establishments or subsidiaries—a system of the utmost importance for European companies—is unsatisfactory. It is certainly a problem of major consequence when one bears in mind that economic integration should, in the normal course of events, encourage companies, whether or not they are European companies, to extend their business into different countries. This is why the Commission has already proposed that the matter be regulated in the wider context of cross-frontier company amalgamations.

(a) So far as permanent establishments are concerned, the solutions put forward by the Commission in its proposed "directive on the common system of taxation applicable to mergers, scission and contribution of assets effected between companies in different Member States" are, in essence, as follows:

(i) to adhere to the principle that the profits of a permanent establishment are taxable solely by the State in which that establishment is located, but to allow companies to opt for taxation of their profits computed on a world-wide basis. This system makes it possible, in particular, for losses incurred by establishments abroad to be deducted in the country of domicile for tax purposes. The means whereby this system may be applied will have to be dealt with in a later draft directive as it raises a series of problems requiring further study.

(ii) to make it unlawful for the permanent establishments of foreign companies to be discriminated against, as they sometimes are, in relation to national companies.

It is not yet possible, pending further study, to foresee when a common system of taxation of profits computed on a world-wide basis will be introduced at EEC level. It is known, however, that in some Member States (the Federal Republic of Germany, the Netherlands) a system under which losses incurred abroad can be set off in the country in which the head office is located is already being applied by way of correction to the principle of bringing into account for tax purposes the results of trading, inside the country

itself, shown by undertakings. Obviously, this problem is particularly important to S.E.'s for they will generally have establishments throughout the Community outside the country in which they are domiciled for tax purposes. It is, accordingly, this system which the Statute makes applicable in general to the S.E. Two Articles providing for taxation of a permanent establishment solely by the State in which it is situated and for prohibition of discrimination against that establishment have been added provisionally in view of the importance of these matters to the S.E. They will, however, have to be deleted if, as seems likely, the draft directive on mergers, which contains identical provisions, is approved before the Statute of the S.E.

(b) The Commission has, in addition, submitted to the Council a proposed "directive concerning the common fiscal system applicable to parent and subsidiary companies in different Member States", which is primarily designed to prevent double taxation of profits transferred by a subsidiary company to its parent company.

This present text prescribes for parent companies the system of consolidated profits, which is similar to the system of calculating profits on a world-wide basis. Here, again, provision will have to be made in a later directive for the uniform application and date of coming into force of that system. In the meantime, a system similar to the deduction of losses incurred by permanent establishments, viz. offsetting by the parent company of losses incurred by subsidiaries, has been adopted as a temporary solution.

However, if the Statute of the S.E. is approved before the directive governing the relations between parent and subsidiary companies, the articles of the directive will have to be incorporated in the Statute.

2. *Formation of European companies* –

The formation of a European company, like that of any other company, raises the problem of indirect taxation on the raising of capital. In view of the principle previously mentioned of non-discrimination in favour of S.E.'s, special provision for them in this respect cannot be made. Hence the provisions of the Council directive of 17 July 1969 (Official Gazette of the European Communities L 249 of 3 October 1969) governing this matter will apply to S.E.'s in the same way as to other companies. This directive stipulates *inter alia* that the rate of capital duty shall not normally be more than 2 per cent nor less than 1 per cent, but that it is reduced by 50 per cent or more in the case of merger or of subscription of capital in the form of part of an undertaking. Proposals for harmonizing these rates are to be submitted by the Commission to the Council before 1 January 1971.

Accordingly, the Statute passes over the problem arising on formation of S.E.'s except for the one special case of a European holding company, where it is essential to ensure that the exchange of shares required for its formation does not involve fiscal consequences.

The formation of a European company poses many other problems where the formation is a result of merger of companies from different contracting States. A solution should usually, however, be found under the terms of the Commission's draft directive on the taxation of international mergers. In the event of approval of the text thereof being unduly delayed, it may be desirable to introduce most of its articles into the Statute of the S.E.

3. *Domicile of European companies for tax purposes. Change of domicile*

The fact that a European company may have more than one registered office is not to lead to its having more than one domicile for tax purposes. For various reasons, it is essential that a European company should have only one domicile for tax purposes. This is

especially important in ascertaining which tax law is applicable to distribution of profits, to income received from investments in companies in third countries and to profits earned in those countries.

This obviously raises the question of how the domicile for tax purposes is to be determined. In domestic tax law this is primarily a matter of fact, such as the location of the effective management or the main centre of operations. In the large majority of cases, of course, the tax domicile coincides with the location of the registered office specified in the Statutes. To prevent evasion, however, the location of the registered office is not used as the criterion for tax purposes. It would be all too easy for a company established in one country to set up a fictitious registered office, which is nothing more than a letter box, in one of the so-called "tax haven" countries, in order to take advantage of an especially favourable tax system.

In international law, if the tax domicile of a company is in dispute as between two countries, i.e. if, according to each country's internal legislation, the company has a dual tax domicile, by far the most common solution under bilateral agreements is to adopt as criterion of the tax domicile the place where the company's head office or centre of effective management is located. This concept has also been applied by the Council in its directive on indirect taxation on the raising of capital. It seems logical, therefore, to extend it to this Statute, which lays down also a procedure for determination of questions that may arise between States, including a procedure for application to the Court of Justice in cases of conflict as to domicile for tax purposes.

The principle of a single tax domicile should not, however, mean that this domicile is fixed for all time. There may be sound business reasons for a European company to wish to transfer its centre of effective management, and hence its tax domicile, from one country to another, e.g. because of a shift in its main centre of operations. It would be highly regrettable if such a transfer were to be prevented by tax obstacles. Accordingly, this Statute provides for such transfer to be made, involving freedom from liability to tax, after a minimum period of five years residence for tax purposes in one country. The minimum period is prescribed in order to prevent abuse. This is a matter which raises problems similar to those raised by mergers and has been regulated in the same spirit, i.e. by avoiding any charge to tax at the time of the company's transfer whilst at the same time safeguarding the financial interests of the State in which it was formerly domiciled for tax purposes.

Section one

Formation

Article 275

1. Where a European holding company within the meaning of Articles 2 and 3 is formed by sociétés anonymes* incorporated under the law of one of the Member States or by European companies, allotment to the shareholders of those companies of shares in the European holding company in exchange for shares in those companies shall not give rise to any charge to tax.

* See translator's note on page 6.

2. Where such shares form part of the assets of an undertaking, the Member States may waive this rule if the shares in the European holding company are not shown in the balance sheet for tax purposes of that undertaking at the same value at which the shares in the sociétés anonymes* or in the European companies were shown.

Note on Article 275

The exchange of shares involved in the formation of a European holding company within the meaning of Articles 2 and 3 is a purely technical operation which involves no capital gain for the shareholders of the European company's founder companies. It should, therefore, be devoid of any tax consequences which so far as the shareholders are concerned may, on the one hand, cause prejudice to them and, on the other, cause them to oppose the formation. By the same token, if the shares form part of the assets of an undertaking, it is reasonable to require that the new shares be shown in the balance sheet at the same value as the old.

Section two

Tax domicile

Article 276

1. For purposes of taxation, the S.E. shall be treated as resident in the Member State in which the centre of its effective management is located.

2. Action to remove any difficulties or doubts which arise in connection with the application of paragraph 1 shall be taken by Member States if a competent authority in a Member State shall consider it necessary or if the S.E. shall request it to do so.

3. The competent authorities in Member States may communicate with each other direct with a view to making an agreement for purposes of the preceding paragraph. The S.E. interested in or affected by such action, or its representative, shall at its request be allowed to give evidence.

4. In default of agreement in pursuance of paragraphs 2 and 3, each State concerned may refer the matter to the Court of Justice, whose decision shall be final. The S.E. shall be entitled to be heard.

5. For so long as the centre of effective management shall not definitively have been determined by such action as aforesaid, the liability of the S.E. for payment of tax shall at its request be deferred.

* See translator's note on page 6.

Note on Article 276

The first paragraph determines the residence of the S.E., i.e. its domicile for tax purposes.

A procedure is provided for settling disputes arising out of the application of paragraph 1. This is initiated when an administrative authority in a State considers it necessary or is requested by the S.E. to do so. The S.E. thus has an indirect right to inaugurate the procedure.

The first sentence of paragraph 3 was introduced to relieve the tax authorities of the need to resort to lengthy diplomatic processes. It should also be noted that the entire procedure laid down in this Article is subject to no time limit, for any time limit would be difficult to fix. But paragraph 5, granting the company a deferment of liability, should be an incentive to States to settle the dispute as rapidly as possible.

In the absence of agreement, any State concerned may refer the matter to the Court of Justice, whose decision is final. Having allowed the S.E. the right to give evidence to the competent national authorities, it seemed logical to allow it also to be heard by the Court of Justice.

Article 277

Where an S.E., which for purposes of taxation has been resident in a Member State for not less than five years, transfers its effective management to another Member State, the State in which the centre of effective management was located prior to the transfer:

(a) shall not impose any charge to tax on any increase in value of the assets of the S.E., that is to say on the amount of the difference between the real value of those assets and the value thereof as shown in the balance sheet of the S.E. for tax purposes, where those assets are from an accounting point of view attributed at the same value to a permanent establishment of the S.E. in that State, and contribute towards the taxable income of that establishment;

(b) shall authorize any such permanent establishment as is referred to in (a) above to carry forward and retain free from liability to tax under general law any provisions and reserves created by the S.E. in that State and which are exempt in whole or in part from liability to tax;

(c) shall permit such permanent establishment to carry forward and write off, in accordance with general law, losses incurred by the S.E. which have not yet been written off for tax purposes in that State;

(d) shall from the date of transfer waive all right to impose any charge to tax in respect of the activities of the S.E. carried on outside its territory, if, for tax purposes, the S.E. includes such activities with those that it carries on in the State to which it transfers its centre of effective management. Where they are so included, paragraphs (b) and (c) above shall not apply if the provisions, reserves or losses therein referred to relate to activities carried on outside the territory of the State in which the centre of effective management was located prior to the transfer.

Note on Article 277

Paragraph (a) governs the important question of appreciation in value by establishing, as in the case of mergers, a system of tax exemption, which has the advantage of avoiding any charge to tax whilst at the same time protecting the rights of the State in which the tax domicile was previously located.

Paragraphs (b) and (c) govern, on the same lines as for mergers, the question of tax-free provisions or reserves and losses not yet written off.

Paragraph (d) enables the S.E. to include the activities it carries on outside the territory of the State of its former tax domicile with those that it carries on in the State of its new one. In this case, the first-mentioned State must waive its right to tax those activities.

Furthermore, in order to prevent evasion as a result of transfers being made purely for tax reasons, it seemed appropriate to restrict the benefit arising out of the application of this Article to European companies whose domicile for tax purposes has been in the same State for at least five years.

Section three

Permanent establishments and subsidiaries

Article 278

1. Where an S.E. whose domicile for tax purposes is in a Member State has a permanent establishment in another Member State, only the latter Member State shall have the right to charge to tax the profits of that establishment.

2. If during any tax period the overall result of the operations of an S.E.'s permanent establishments in that State shows a loss, that loss shall be deductible from the taxable profits of the S.E. in the State in which it is resident for tax purposes.

3. Subsequent profits made by those permanent establishments shall constitute taxable income of the S.E. in the State in which it is resident for tax purposes up to an amount not exceeding the amount of the loss allowed by way of deduction under paragraph 2 above.

4. The amount of the loss deductible under paragraph 2 above and the amount of profit chargeable to tax under paragraph 3 above shall be determined in accordance with the law of the State in which the permanent establishment or establishments are located.

Note on Article 278

Paragraph 1 is designed to prevent double taxation by providing that in the Member States an establishment may be taxed only by the State in which it is located.

Paragraph 2 establishes the principle that losses incurred by permanent establishments located in other Member States may be deducted from the taxable profits of an S.E. in the State of its tax domicile.

Paragraph 3 specifies how the deduction is later to be dealt with, requiring it to be "written off" against the permanent establishment's subsequent profits, for in all Member States its losses must be carried forward to other tax periods pursuant to Article 279.

Paragraph 4, for the sake of simplicity, permits deduction of a loss the amount of which is calculated in accordance with the law of the country in which the permanent establishment is situated. The same applies to the taxation of its subsequent profits, if any, which must be set off against that loss. Simplification of the matter in this way is justified because the rules for calculating the overall results of undertakings do not differ basically between one Member State and another.

Article 279

The tax treatment of a permanent establishment maintained in a Member State by an S.E. which is resident for tax purposes in another Member State shall not result in a greater charge to tax for that permenent establishment than would arise in the case of a company carrying on a business of the same nature and being resident for tax purposes in that other State.

Article 280

1. The expression "permanent establishment" means a fixed place of business at which an S.E. carries on its activities in whole or in part.

2. The term "permanent establishment" includes in particular:

(a) a seat of management;

(b) a branch;

(c) an office;

(d) a factory;

(e) a workshop;

(f) a mine, quarry or any other site for extraction of natural resources;

(g) work of construction or assembly carried on for more than twelve months.

3. Installations and warehouses falling within sub-paragraphs (a) to (e) below shall not be considered permanent establishments irrespective of whether one or all of the criteria specified therein are satisfied:

(a) installations used solely for storage, display or delivery of goods owned by a company;

(b) warehouses for goods owned by a company and maintained solely for the purpose of storage, display or delivery;

(c) warehouses for goods owned by a company and maintained solely for the purpose of processing by another undertaking;

(d) a fixed place of business used solely for the purpose of purchasing goods or collecting information for a company;

(e) a fixed place of business used by a company solely for the purpose of promotion, supplying information, scientific research or similar preparatory or auxiliary activities.

4. A person acting in one Member State on behalf of a company in another Member State, other than an independent agent within the meaning of paragraph 5, shall be deemed to be a "permanent establishment" in the former State if in that State he enjoys and regularly exercises the right to make agreements in the name of the company, save where his activities are limited to the purchase of goods for the company.

5. A company in one Member State shall not be treated as having a permanent establishment in another Member State simply because it carries on its activities therein through a broker, a general agent or any other independent agent acting in the normal course of their activities.

6. The fact that a company in one Member State controls or is controlled by a company that is subject to the law of another Member State or that carries on its activities therein (whether through a permanent establishment or not) shall not be sufficient in itself to make either of those companies a permanent establishment of the other.

Note on Article 280

The definition of a permanent establishment set out in this Article is taken from the preliminary draft of a multilateral double taxation agreement intended to replace existing bilateral agreements.

Article 281

1. Where an S.E. holds not less than 50 per cent of the capital of another company whose profits are chargeable to tax and whose operations in any tax period result in a loss, that loss shall be deductible, in proportion to the holding, from the profits chargeable to tax of the S.E. in the State in which the S.E. is resident for tax purposes.

2. A deduction made pursuant to paragraph 1 above shall be final if, under the law applicable to the company whose capital is held as aforesaid, the loss referred to in the said paragraph cannot be carried forward to other tax

periods. Conversely, the subsequent profits of that company shall constitute taxable income of the S.E. in the State in which it is resident for tax purposes up to an amount not exceeding the amount of the loss allowed by way of deduction and *pro rata* to the capital held at the time those profits were earned.

3. Where the holding falls below 50 per cent, any loss deducted from the profits of the S.E. under paragraph 1 above during the preceding five tax periods shall, notwithstanding the provisions of paragraph 2, be added back to the taxable profits of that S.E.

4. Where such holding as is referred to in paragraph 1 above is in the capital of a company resident in a Member State, the amount of the loss deductible under paragraph 1 above and the amount of the subsequent profits taxable under paragraph 2 above shall be determined in accordance with the law of that contracting State.

Note on Article 281

The provisions of this Article are analagous to those contained in Article 278 relating to losses incurred by permanent establishments. The present Article makes it possible to set off the losses and profits of undertakings which are legally independent. It thus seeks to substitute for the narrow legal concept of the taxpayer the wider economic concept of the "group of companies" which, although legally independent, nevertheless form an economic unit treated for tax purposes as one undertaking. This is a true concept only where the integration of individual group companies has reached an advanced stage; it is for this reason that paragraph 1 prescribes a minimum holding of 50 per cent. For the same reason, and in order also to forestall certain manipulations on the part of companies, paragraph 3 provides for any losses deducted during the previous five-year period to be added back when the holding falls below 50 per cent.

Furthermore, there did not seem to be any case for restricting the application of this system to subsidiaries set up within the Community only, as S.E.'s operating on a world-wide scale ought not to be handicapped. In fact, expansion beyond the frontiers of the Community will normally be through subsidiaries rather than establishments.

TITLE XIII

OFFENCES

Article 282

1. The Member States shall introduce into their law appropriate provisions for creating the offences set out in the annex hereto.

2. Provisions of national law applicable to breach of regulations relating to companies shall not apply to breach of any of the provisions of this Statute.

Note on Article 282

The Statute contains no penal provisions relating to S.E.'s. It is left to the Member States to impose penalties but the Statute requires them to create in their own law the offences set out in the annex.

TITLE XIV

FINAL PROVISIONS

Article 283

The Member States shall implement the requirements of Article 282 within six months of the making of this regulation.

Article 284

This regulation shall be binding in its entirety and directly applicable in each Member State.

It shall enter into force six months after publication in the Official Gazette of the European Communities.

ANNEX TO COUNCIL REGULATION No. EMBODYING A STATUTE FOR EUROPEAN COMPANIES

The following persons shall be guilty of an offence and liable to punishment accordingly:

I. Any member, as such, of the Board of Management, of the Supervisory Board or of any other organ of management of a founder company who wilfully makes any false statement in or omits material facts from the report on formation, or the annexes thereto, in respect of:

(a) the amount of the share capital or the nominal value and number of the shares,

(b) the valuation of capital subscribed in kind or the source of such capital,

(c) the expenses incurred in connection with formation,

(d) the privileges and benefits granted to persons who took part in the formation of the company.

II. Any member, as such, of the Board of Management or of the Supervisory Board of an S.E. who wilfully makes any false statement or omits material facts with a view to registration of an increase or reduction in the share capital of an S.E.

III. Any person who wilfully issues any share before the nominal amount thereof has been fully paid up.

IV. Any person who, in order to exercise a right of vote at a General Meeting, wilfully makes use of shares of another person which he has obtained for that purpose by granting or promising special benefits or who, for that same purpose, transfers shares to another person in return for or in consideration of the promise of special benefits.

V. Any member of the Board of Management or of the Supervisory Board who wilfully makes any false statement in or omits material facts from the annual accounts, consolidated annual accounts, part-consolidated annual accounts or in the report, consolidated report or part-consolidated report.

VI. A member, as such, of the Board of Management or of the Supervisory Board who, by deliberate act or omission, causes false or incomplete information to be used in the preparation of the auditor's report.

VII. Any auditor who, as such auditor, wilfully prepares a false or incomplete auditor's report.

VIII. Any person to whom Article 82 applies and who in respect of the matters therein specified wilfully fails to carry out the formalities, apply for alteration or give notice as thereby required.