BYU Law Review

Volume 1990 | Issue 4 Article 4

11-1-1990

Company Law in the European Single Market

Richard D. English

Follow this and additional works at: https://digitalcommons.law.byu.edu/lawreview

Part of the Business Organizations Law Commons, European Law Commons, International Law Commons, and the Securities Law Commons

Recommended Citation
Richard D. English, *Company Law in the European Single Market*, 1990 BYU L. Rev. 1413 (1990).
Available at: https://digitalcommons.law.byu.edu/lawreview/vol1990/iss4/4

This Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Company Law in the European Single Market

*Richard D. English**

Table of Contents

I. THE CONTEXT FOR COMPANY LAW IN THE EUROPEAN COMMUNITY 1415
A. *Introduction* 1415
B. *Company Law in the Nations of the European Community* 1418
1. *Formation* 1421
2. *Capital structure* 1424
3. *Shareholders and their rights* 1427
4. *Directors and boards* 1430
5. *Fundamental changes* 1431
C. *Corporations and Private International Law* 1432
D. *The Constitutional Foundations of Company Law Harmonization* 1436
II. THE COMPANY LAW OF THE EUROPEAN COMMUNITY BEFORE THE INTERNAL MARKET PROGRAM 1439
A. *Introduction* 1439
B. *The First Company Law Directive: Safeguards* 1440
1. *Disclosure, the registry, and publication* 1440
2. *Authority to bind a company* 1441
3. *Nullity* 1442
C. *The Second Company Law Directive: Capital Structures* 1443
D. *The Third Company Law Directive: Mergers* 1448
E. *The Sixth Company Law Directive: Division of Marketable Share Companies* 1454

---

* B.A., University of Texas (Austin); J.D., University of Texas School of Law. The author serves as Senior Advisor on Europe and 1992, U.S. Department of State, Washington, D.C. The opinions expressed in this article are those of the author and are not necessarily those of the U.S. Department of State.

F. *The Fourth Company Law Directive: Annual Accounts* ... 1458
G. *The Seventh Company Law Directive: Consolidated Accounts* ... 1460
H. *The Eighth Company Law Directive: Qualifications of Auditors* ... 1463
I. *The Twelfth Company Law Directive: Single Member Companies* ... 1464
J. *EC Company Law before the Single Market Program* ... 1465

III. COMPANY LAW IN THE 1992 PROGRAM ... 1466
A. *The White Paper and its Views on Company Law* ... 1466
B. *The European Economic Interest Grouping* 1469
C. *Disclosure Requirements in Respect of Branches* ... 1479
D. *Annual and Consolidated Accounts* ... 1481
E. *Takeover Bids* ... 1482
F. *Cross-Border Mergers* ... 1488
G. *The Relationship of Undertakings in a Group* ... 1494
H. *Structure of Public Limited Companies* ... 1497
1. *The two-tier system* ... 1498
2. *The one-tier system* ... 1503
3. *The general meeting* ... 1508
4. *Annual accounts* ... 1510
I. *The European Company Statute* ... 1512
1. *Formation* ... 1515
2. *Formation by merger* ... 1515
3. *Formation of a holding company* ... 1516
4. *Formation of a joint subsidiary* ... 1517
5. *Capital structure* ... 1517
6. *General meeting* ... 1521
7. *Governing bodies* ... 1523
8. *Groups of companies* ... 1523
9. *Winding up, insolvency, and suspension of payments* ... 1524
10. *Mergers* ... 1525
11. *Sanctions* ... 1525
J. *The Impact of The Single Market Program* 1525

IV. A COMPANY LAW FOR THE NEW EUROPE ... 1526
A. *The Achievement* ... 1526

B. *What Company Law for Europe?* 1528
1. *The kaleidescope of law* 1530
2. *Protective or facilitative?* 1530
3. *Uniformity or flexibility?* 1534
4. *Harmonization or mutual recognition?* . 1535
5. *Federal and state regulation?* 1535
6. *Private property or public institution?* 1536
C. *The Future* 1538

I. The Context for Company Law in the European Community

A. *Introduction*

The creation of a single market, long a daunting goal for the European Community (EC),[1] now seems attainable by the end of 1992. The EC has made impressive progress[2] in enacting the proposals made in the Commission's 1985 White Paper on Completing the Internal Market.[3] Successful completion of the pro-

---

1. The "European Community" is the name ordinarily used for the European Economic Community, as well as the related European Coal and Steel Community and the European Atomic Energy Community. T. Hartley, The Foundations of European Community Law 3 (1981). The Community originally consisted of six member states: Germany (the Federal Republic), Belgium, France, Italy, Luxembourg, and the Netherlands. *Id.* at 3. The Community was enlarged by the addition of Denmark, Ireland, and the United Kingdom on January 1, 1973; Greece on January 1, 1981; and Spain and Portugal on January 1, 1986. D. Wyatt & A. Dashwood, The Substantive Law of the EEC 11-12 (2d ed. 1987).

Two other generally useful books on the legal system of the European Community and its laws are: P. Kapteyn & P. Verloren Van Themaat, Introduction to the Law of the European Communities (2d. ed. 1989); D. Lasok & J. Bridge, Law and Institutions of the European Communities (4th ed. 1987). The Hartley volume and the Lasok and Bridge volume both tend to concentrate on the legal institutions of the Community, rather than the substantive law. More extensive treatment can be found in the form of an extensive annotation of the Treaty of Rome. H. Smit & P. Herzog, Law of the European Community (1986).

Three additional useful volumes, each providing a concise overview of institutional and substantive law, are Parry & Dinnage, Parry & Hardy's EEC Law (1981); W. Rawlinson & M. Cornwell-Kelly, European Community Law (1990); J. Steiner, Textbook on EEC Law (1988).

2. By February 28, 1990, the Council had adopted 158 of the 282 proposals, or almost 60% of the proposals then deemed necessary for the completion of the single market. Implementation of the adopted proposals by the Member States was also impressive: 70% of the necessary measures had been enacted, although only 21 proposals have been adopted by all twelve Member States. Fifth Progress Report of the Commission to the Council and the European Parliament (COM No. 90) 4 (1990) [hereinafter Fifth Progress Report].

3. Completing the Internal Market: White Paper From the Commission to the Council (1985) [hereinafter White Paper]. The White Paper contains a historic legisla-

gram will eliminate the most significant remaining physical, technical, and fiscal barriers[4] to the free movement of goods, persons, services, and capital[5] among the twelve Member States of the EC. This accomplishment will take the EC far beyond the limited benefits of the current free trade areas and customs unions[6] to the creation of a truly integrated economy of more than 320 million people,[7] one of the world's largest markets.

EC officials have been concerned for many years with the differing provisions in the company laws of the Member States. These differing provisions constitute significant barriers to doing business across their national boundaries. In particular, the impossibility of mergers, the difficulties of managing firms in a group, the tax problems, and the generally underdeveloped state of company law meant that European firms were not prepared to meet the competition from the United States and Japan, where large markets and more accommodating corporation laws permitted the creation of much larger enterprises. If the EC is truly to have a common market, changes are necessary. Not surprisingly, an EC official has called the company law proposals "crucial" to the completion of the single market.[8]

Of the 282 proposals now included in the 1992 program, only seven deal with company law.[9] However, those seven, together with enacted company law legislation, have been rewriting the rules under which business is organized in the EC. The wave of business combinations and acquisitions coinciding with the passage of the 1992 program[10] underscores the importance of company law.

---

tive program of approximately 300 proposals. M. CALINGAERT, THE 1992 CHALLENGE FROM EUROPE 1, 9, 135 (1988); P. KAPTEYN & P. VERLOREN VAN THEMAAT, *supra* note 1, at 469.

4. WHITE PAPER, *supra* note 3, at 5.

5. WHITE PAPER, *supra* note 3, at 4. For the elimination of obstacles to the free movement of goods, services, persons, and capital as a goal of the European Community, see Treaty Establishing the European Economic Community, *signed* March 25, 1957, 298 U.N.T.S. 11 (Jan. 1, 1958) [hereinafter Treaty of Rome]. An English translation is located at 1 COMM. MKT. REP. (CCH) ¶ 151 (1971).

6. By 1968, the EC had achieved the goal set forth in article 9 of creating a customs union. P. KAPTEYN & P. VERLOREN VAN THEMAAT, *supra* note 1, at 359-361.

7. WHITE PAPER, *supra* note 3, at 4-5, 7.

8. Interview with R. Hull, Directorate General XV, Commission of the European Communities, in Washington, D. C., (Feb. 1990).

9. FIFTH PROGRESS REPORT, *supra* note 2, Annex I at 37, Annex II at 14.

10. The pace of cross-border acquisitions and combinations was characterized as "accelerating rapidly" in 1989, with various counts citing 1275 and 1314 transnational deals, including not only those between European firms of different nationalities but also

In a sense, the company law segment is a microcosm of the 1992 program. The three basic policy approaches of the 1992 program are (1) direct Community rules,[11] (2) harmonization of Member State legislation,[12] and (3) mutual recognition by the Member States of other Member States' laws and institutions.[13] These approaches combined with the two most common legislative forms—the directive[14] and the regulation[15]— are represented in company law proposals. At the heart of the 1992 program, the company law segment draws upon diverse legal traditions and cultures,[16] raising important philosophical questions concerning the nature of the corporation: To what extent do facilitative[17] or protective company laws better serve the

---

including those external to the EC such as American firms. Holmes, *Europe's Shopping Spree*, 24 MERGERS & ACQUISITIONS 12, 14 (1990).

11. Direct Community rules, meaning enactments that provide uniform, generally applicable rules that apply directly to private parties throughout the territories of the Member States without intermediate action by the Member States, are usually the result of regulations, as the term is used in the European Community. Regulations, which are "directly applicable in all Member States", Treaty of Rome, *supra* note 5, at art. 189, provide a single standard or rule throughout the Community without the possibility that the Member States will implement the rules with variances. *See* T. HARTLEY, *supra* note 1, at 197-201. One of the distinguishing characteristics of a regulation is its general applicability. P. KAPTEYN & P. VERLOREN VAN THEMAAT, *supra* note 1, at 191. Both harmonization and mutual recognition may allow variations among the specific rules adopted in the Member States and can be implemented through directives. D. LASOK & J. BRIDGE, *supra* note 1, at 119.

12. WHITE PAPER, *supra* note 3, at 19.

13. WHITE PAPER, *supra* note 3, at 22-23. On the elimination of technical barriers, the Commission's stated that "[t]he Commission's general thrust in this area will be to move away from the concept of harmonization towards that of mutual recognition and equivalence." *Id.* at 6.

14. D. WYATT & A. DASHWOOD, *supra* note 1, at 41-47; T. HARTLEY, *supra* note 1, at 204-215; D. LASOK & J. BRIDGE, *supra* note 1, at 109-126; P. KAPTEYN & P. VERLOREN VAN THEMAAT, *supra* note 1, at 193-197.

15. The regulation is directly applicable, in the sense that it becomes part of the laws of the Member States and enforcable in their courts without further action by them, T. HARTLEY, *supra* note 1, at 197-201, and directly effective, in the sense that it confers rights on individuals which must be upheld by the national courts. *Id.* at 185; P. KAPTEYN & P. VERLOREN VAN THEMAAT, *supra* note 1, at 191-193, 338-339; D. WYATT & A. DASHWOOD, *supra* note 1, at 38-41; D. LASOK & J. BRIDGE, *supra* note 1, at 113-119.

16. *See infra* text acccompanying note 23.

17. "Facilitative" is used here in much the same sense as some writers on corporation law have used "enabling," "permissive," or "liberal," in constrast to laws that will be described herein as "protective." The meaning was expressed well (and the contrast implied) in the following:

> The [Model Business Corporation] Act has been prepared as an enabling statute under which a corporation may be organized and continue to exist, controlling its internal affairs and determining its relation with the state of its creation while its existence continues. It is not, and is not intended to be, a statute

needs of highly industrialized economies and their constituent institutions—the modern enterprise, the consumer, and the investor? Do facilitative or protective laws better serve the economic and political health of the twelve united Western European nations of the EC? This examination of the company law proposals of the 1992 program can only begin to explore these questions.

B. Company Law in the Nations of the European Community

With origins in Western Europe, the Industrial Revolution resulted in larger and more complex methods of production, the necessity for larger aggregations of capital, and the need for the corporate form of enterprise. These industrial needs provided a driving force for the evolution of existing legal concepts as well as the development of new concepts. This economic evolution coincided with the consolidation of the nation-state system and the modernization of Western European legal systems—most notably the enactment of the Civil Codes of France in 1804[18] and the German empire in 1896.[19] In the twelve nations that now constitute the EC, it was not merely possible, but truly inevitable, that the lawyers, judges, scholars, and legislators from each country would develop different approaches to the problems presented by the development of the corporation as an economically important legal institution. These differences are now seen as barriers to be overcome in the creation of the single market.

The corporation is a legal entity,[20] an artificial person cre-

---

> regulating its business or external affairs. Regulation as such is regarded as the province of other statutes.

PREFACE TO 1953 REVISION OF THE MODEL BUSINESS CORPORATION ACT, *quoted in* H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES 29 (1983). *See also id.* at 178 n.6. The same distinction is found in the following quote:

> The primary purpose of corporation laws is not regulatory. They are enabling acts, to authorize business men to organize and to operate their business, large or small, with the advantages of the corporate mechanism. They are drawn with a view to facilitate efficient management of business and adjustment to the needs of change.

H. BALLANTINE, BALLANTINE ON CORPORATIONS, 41-42 (Rev. ed. 1946). *See also* Latty, *Why are Business Corporation Laws Largely Enabling?* 50 CORNELL L. REV. 599 (1965).

18. J. MERRYMAN, THE CIVIL LAW TRADITION 28-29 (2d. ed. 1985).

19. *Id.* at 30-32.

20. H. HENN & J. ALEXANDER, *supra* note 17, at 125; S. MAYSON, D. FRENCH, & C. RYAN, COMPANY LAW 1 (1989) [hereinafter S. MAYSON].

ated by the law,[21] and its characteristics are dependent upon the law.[22] In Western Europe, the presence of three legal traditions—the Civil Law, the Common Law, and the Scandinavian Law[23]—and fourteen legal systems resulted in different solutions to common problems and contributed to the emergence of divergent and sometimes conflicting institutions and rules.[24] To some extent, different perspectives on the nature of the corporation, the relationship of the corporation to the state, and the economic role of government may have also contributed to the development of differences. For these reasons, company law is an area where the laws of the Member States have been likely to differ.

Nevertheless, the law governing the corporate form of business association, whatever its nationality, must address a common core of important problems.[25] The law must determine the legal relations among the various parties who participate within the corporation and the external parties who deal with it.[26] Corporate law must govern the basic constitutive foundations of the company.[27] Its primary function must be to define the manner of the company's formation, the resulting rights and duties of those participating in the corporation, and the powers and obligations of this institution in relation to other persons and institutions.[28]

In Western Europe, including the twelve nations of the EC, it has been found convenient to develop two general types of companies.[29] The corporate form used for larger companies, or

---

21. H. Henn & J. Alexander, *supra* note 17, at 14, 16, 17-19.

22. *Id.* at 125.

23. For a discussion of the civil law tradition as distinguished from the common law tradition and the Scandinavian tradition, see J. Merryman, *supra* note 18, at 1-5. Denmark is part of the Scandivavian legal tradition. Tamm, *A Survey of Danish Legal History*, Danish Law 21 (H. Gammeltoft-Hansen, B. Gomard, & A. Philip, ed., 1982). The three legal systems of England and Wales, Northern Ireland, and the Republic of Ireland (Eire) are part of the common law tradition. J. Merryman, *supra* note 18, at 4. Scotland and the remaining nine Member States of the EC (Belgium, France, the Federal Republic of Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal, and Spain) are of the civil law tradition. The United Kingdom therefore has three legal systems. A. Conard, Corporations in Perspective 5 (1976). *See also* Company Law in Europe 5 (S. Frommel & J. Thompson eds. 1975) [hereinafter S. Frommel & J. Thompson].

24. A. Conard, *supra* note 23, at 6-8.

25. *Id.* at 3-4.

26. *Id.*; S. Mayson, *supra* note 20, at 1.

27. M. Eisenberg, The Structure of the Corporation 1 (1976).

28. *See id.* at 1.

29. S. Frommel & J. Thompson, *supra* note 23, at 14-16; A. Conard, *supra* note 23, at 76-77.

Although in the United States the corporation has been of one type, it should be

"marketable share companies,"[30] is called the public limited

---

noted that American law includes a tendency toward special rules for smaller corporations, including (1) the development of special rules and statutes for closely held corporations, *see* H. HENN & J. ALEXANDER, *supra* note 19, at 698; (2) special tax treatment under Subschapter S of the Internal Revenue Code, *see id.* at 134-35; and (3) exemptions from registration and prospectus requirements under the Securities Act of 1933, *see id.* at 796-804.

For a comprehensive review of the state of company law in two leading EC members on the eve of company law harmonization, see Kohler, *The New Corporation Laws in Germany (1966) and France (1967) and the Trend Towards a Uniform Corporation Law for the Common Market*, 43 TULANE L. REV. 58 (1968). *See also*, Branson, *Countertrends in Corporation Law: Model Business Corporation Act Revision, British Company Law Reform, and Principles of Corporate Governance and Structure*, 68 MINN. L. REV. 53 (1983); Tunc, *A French Lawyer Looks at American Corporation Law and Securities Regulation*, 130 U. PA. L. REV. 757 (1982); Vagts, *Reforming the Modern Corporation: Perspectives from the German*, 80 HARV. L. REV. 23 (1966).

30. The term "marketable share company" is used here, following the lead of Professor Buxbaum, *see* Buxbaum, *The Formation of Marketable Share Companies*, 13 INT'L ENCYCLOPEDIA COMP. L. 3-2 (1974), in preference to such terms as "stock company" because it seems clearest and most descriptive of the type. *See* A. CONARD, 2 AMERICAN ENTERPRISE IN THE COMMON MARKET (1960). The most equivalent term in American law would be "publicly held corporation."

The legislation of the European Community has effectively developed a classification of companies in the Member States through their listing in several directives. The first category is the public limited company and includes the legal entities of the Member States as follows: in Belgium, *societe anonyme* or *naamloze vennootschap*; in Denmark, *aktieselskaber*; in Germany, *Aktiengesellschaft*; in Greece, *anonymi etairia*; in France, *societe anonyme*; in Ireland, the public company limited by shares or by guarantee, or public limited company; in Italy, *societa per azioni*; in Luxembourg, *societe anonyme*; in the Netherlands, *naamloze vennootschap*; in the United Kingdom: public companies limited by shares or by guarantee, or public limited company. The list appears in less than complete form due to the failure to include future Member States in the Second Company Law Directive, *infra* note 238, at art. 1; the Third Company Law Directive, *infra* note 284, at art. 1; the proposed Fifth Company Law Directive, *infra* note 670, at art. 1; and the proposed Tenth Company Law Directive, *infra* note 604, at art. 1(1).

The second category is the private limited company and it includes the following kinds of companies: In Belgium, *societe privee a responsibilite limitee* or *de besloten vennootschap met beperke aansprakelijkheid*; in Denmark, *anpartsselskaber*; in Germany, *Gesellschaft mit beschraenkter Haftung*; in Greece, *etaria periorismenis euthynis*; in Spain, *sociedad de responsabilidad limitada*; in France, *societe a responsabilite limitee*; in Ireland, private company limited by shares or by guarantee, or private limited company; in Italy, *societa a responsabilita limitata*; in Luxembourg, *societe a responsibilite limitee*; in the Netherlands, *besloten vennootschap met beperkte aansprakelijkheid*; in Portugal, *sociedade por quotas*; in the United Kingdom, private company limited by shares or by guarantee, or private limited company. *See* Twelfth Company Law Directive, *infra* note 414, at art. 1.

The other categories include the general partnership, the limited partnership, the unlimited company, and the limited partnership with marketable shares. Some of these forms of business associations are included in the lists of companies in the proposed Thirteenth Company Law Directive on Takeover Bids applies, *infra* note 539, at art. 1; *Original Proposal*, in the First Company Law Directive, *infra* note 209, at art 1, and in the Seventh Company Law Directive, *infra* note 382, at art. 4(1).

company in England and Wales,[31] the *Aktiengesellschaft* in Germany,[32] the *societe anonyme* in France,[33] and *la societe per azioni* in Italy.[34] The form used for the more numerous smaller companies, or "limited liability companies,"[35] is called the private limited company in England and Wales,[36] the *Gesellschaft mit Beschrankt Haftung* in West Germany,[37] the *societe a responsibilite limitee* in France,[38] and the *societa a responsibilite limita* in Italy.[39] Originally, these general types among the different countries could be regarded only as very general equivalents. Their attributes were developed separately in fourteen distinct legal systems. There was, however, an interchange of ideas across the borders in the region.[40] Nevertheless, it should be recognized that the legislation of the EC on national law has tended to make the typology more valid and will continue to do so in the future, since harmonization will not only reduce the divergence of Member State company law but also reinforce the distinctiveness of the two company types.

In addition, a large array of other types of firms includes the equivalents of partnerships, limited partnerships, and related business associations. The forces which have historically resulted in the proliferation of divergent forms and rules in national company laws have now been met by the countervailing force of the EC's expanding authority and the growing economic unity of Western Europe.

1. Formation

A system of company law must provide a means for the formation of companies.[41] Generally, law in Western Europe has generally required at least two persons and often several persons to form a company,[42] although in some cases a company can be

---

31. S. MAYSON, *supra* note 20, at 12.

32. N. HORN, H. KOETZ, & H. LESER, GERMAN PRIVATE AND COMMERCIAL LAW: AN INTRODUCTION 257 (T. Weir trans. 1982) [hereinafter N. HORN].

33. Buxbaum, *supra* note 30, at 8; A. CONARD, *supra* note 23, at 76-77.

34. G. CERTOMA, THE ITALIAN LEGAL SYSTEM 402 (1985).

35. S. FROMMEL & J. THOMPSON, *supra* note 23, at 15, 18-20; A. CONARD, *supra* note 23, at 77.

36. S. MAYSON, *supra* note 20, at 12.

37. A. CONARD, *supra* note 23, at 77; N. HORN, *supra* note 32 at 251.

38. A. CONARD, *supra* note 23, at 77.

39. G. CERTOMA, *supra* note 34, at 402.

40. *See* S. FROMMEL & J. THOMPSON, *supra* note 23, at 4-5, 15-16.

41. S. MAYSON, *supra* note 20, at 1.

42. G. CERTOMA, *supra* note 34, at 403 (Italy: absence of plurality results in nullity);

formed by one person.[43] Companies must file a memorandum of association,[44] charter,[45] constitutive act,[46] or deed of incorporation[47] showing such information as the name,[48] address, seat[49] or registered office,[50] nature of proposed business,[51] statement that liability is limited,[52] the amount of nominal capital,[53] and the number and value of shares.[54] The objects of the company must also be specified in the memorandum.[55]

Companies may also be able[56] or required to file a second document, variously called Articles of Association[57] or *statuts* (statutes).[58] In this document, a company is required to disclose its rules governing internal regulation of the company,[59] the di-

---

S. MAYSON, *supra* note 20, at 1-2 (United Kingdom: Often in the U.K. a company can be organized with two shareholders, one of whom holds one share as the nominee for the other, who can instruct the nominee in all matters). *See Id.*; N. HORN, *supra* note 32, at 251 (Germany); C. COM. art. 74 (Fr.).

43. Buxbaum, *supra* note 30, at 13-14. One person corporations in the U.K. should not be included in this discussion, since they are not created for business purposes. *See* S. MAYSON, *supra* note 20, at 3, 28. *See also infra* text discussing the Twelfth Company Law Directive.

44. Buxbaum, *supra* note 30, at 11; S. FROMMEL & J. THOMPSON, *supra* note 23, at 29; G. CERTOMA, *supra* note 34, at 403 (Italy); S. MAYSON, *supra* note 20, at 30.

45. C. COM. art. 74 (Fr.).

46. N. HORN, *supra* note 32, at 257 (F.R.G.: *Satzung*).

47. S. FROMMEL & J. THOMPSON, *supra* note 23, at 29 (Spain, Italy).

48. N. HORN, *supra* note 32, at 257 (FRG); S. MAYSON, *supra* note 20, at 31 (UK); G. CERTOMA, *supra* note 34, at 403 (Italy).

49. G. CERTOMA, *supra* note 34, at 403 (Italy).

50. S. FROMMEL & J. THOMPSON, *supra* note 23, at 31-33; S. MAYSON, *supra* note 20, at 31,38 (UK); N. HORN, *supra* note 32, at 257 (FRG).

51. S. MAYSON, *supra* note 20, at 31 (UK); G. CERTOMA, *supra* note 34, at 403 (Italy).

52. S. MAYSON, *supra* note 20, at 31 (UK).

53. *Id.*; N. HORN, *supra* note 32, at 257; AKTIENGESETZ, 1965: THE GERMAN STOCK CORPORATION LAW § 23, at 44 (R. Mueller & E. Galbraith eds. 1966) (citation is to English translation) (F.R.G.) [hereinafter AKTIENGESETZ].

54. S. MAYSON, *supra* note 20, at 31 (U.K.); N. HORN, *supra* note 32, at 257, AKTIENGESETZ, *supra* note 53, § 23, at 44 (F.R.G.).

55. S. FROMMEL & J. THOMPSON, *supra* note 23, at 33; S. MAYSON, *supra* note 20, at 31, 38-45 (U.K.); N. HORN, *supra* note 32, at 257; AKTIENGESETZ, *supra* note 53, at 44 (F.R.G.); G. CERTOMA, *supra* note 34, at 403 (Italy).

56. S. MAYSON, *supra* note 20, at 63 (U.K.: If a company does not file articles of association, then a model set known as Table A applies).

57. S. FROMMEL & J. THOMPSON, *supra* note 23, at 29; S. MAYSON, *supra* note 20, at 63 (U.K.); G. CERTOMA, *supra* note 34, at 403; N. HORN, *supra* note 32, at 257 (not authorized in the F.R.G.).

58. S. FROMMEL & J. THOMPSON, *supra* note 23, at 30; C. COM. art. 74 (Fr.).

59. S. MAYSON, *supra* note 20, at 30 (U.K.).

rectors' duties, voting rights, and other important rules.[60] These documents must be filed with a public office.[61]

The founding documents reflect the company's plan, scope, and objectives, as well as its members' commitments.[62] Whether acts that are not within those objectives are *ultra vires* has traditionally been a matter of national law.[63] In some countries, the corporate existence begins once these documents are filed; in others, it begins with the issuance of a certificate of incorporation.[64]

Traditionally, the civil law systems provided two means for the formation of marketable share companies:[65] incorporation by stages and simultaneous formation. Incorporation by stages allowed the promoters to invite the public to subscribe for shares pursuant to a prospectus, after which the subscribers were called to a meeting to approve the founding documents, the issuance of in-kind shares, and other decisions.[66] Simultaneous formation allowed subscribers to purchase the initial capital, followed by issuance of a prospectus and a public appeal at a later time.[67]

National law differs in the degree to which promoters are liable for pre-incorporation contracts.[68] The incorporators' liability may be terminated upon completion of incorporation.[69] Na-

---

60. *Id.*

61. *Id.* at 63 (U.K.: if not filed, Table A applies); N. HORN, *supra* note 32, at 258 (F.R.G.); G. CERTOMA, *supra* note 34, at 403 (Italy).

62. Buxbaum, *supra* note 30, at 11-20.

63. S. FROMMEL & J. THOMPSON, *supra* note 23, at 33. The First Company Law Directive of the European Community effectively required the abolition of the doctrine of ultra vires in those member states where it prevailed. S. MAYSON, *supra* note 20, at 44-55 (U.K.: The doctrine of ultra vires was abolished by section 108 of the Companies Act of 1989). THE COMPANIES ACT 1989: TEXT AND COMMENTARY 40-137 to 40-140 (G. Morse, M. Bridge, D. Milman, K. Morse, & C. Ryan eds. 1990); N. HORN, *supra* note 32, at 259 (F.R.G.: no ultra vires doctrine); G. CERTOMA, *supra* note 34, at 403 (Italy).

64. S. FROMMEL & J. THOMPSON, *supra* note 23, at 33; S. MAYSON, *supra* note 20, at 1, 96 (U.K.: date in certificate of incorporation); N. HORN, *supra* note 32, at 258 (F.R.G.); G. CERTOMA, *supra* note 34, at 403 (Italy: publication is also required).

65. S. FROMMEL & J. THOMPSON, *supra* note 23, at 20.

66. *Id.* at 20-21, 29.

67. *Id.* at 21, 29.

68. S. MAYSON, *supra* note 20, at 92-93 (U.K.: promoters liable for pre-incorporation contracts); E. ERCKLENTZ, MODERN GERMAN CORPORATION LAW 65-66 (1979); AKTIENGESETZ, *supra* note 53, § 41(1), at 60 (F.R.G.: promoters liable for preformation agreements but *Aktiengesellschaft* may assume obligations with certain exceptions); G. CERTOMA, *supra* note 34, at 403 (Italy: persons acting in name of company prior to formation are jointly and severally liable).

69. S. MAYSON, *supra* note 20, at 94 (U.K.: preincorporation contracts not subject to ratification but only to novation); AKTIENGESETZ, *supra* note 53, § 41(3), at 60 (F.R.G.: preincorporation contracts may be transferred to the *Aktiengesellschaft* without consent

tional law may require the listing of all or some categories of contracts and expenses in the founding documents in order to transfer liability from the promoters to the new company.[70]

Western European legal systems generally provide limited means of annulling the existence of a corporation.[71] For example, in Germany, a suit to annul a corporation must be brought within three years of incorporation.[72] In France, provisions are more complex but the tendency has been to establish time limits and allow for the cure of defects.[73]

2. *Capital structure*

The equity in a marketable share company is generally called stock or some equivalent—shares in the UK, *actions* in France, *Aktien* in Germany, *acciones* in Spain, and *azioni* in Italy.[74] In a limited liability company, the equity may be called a quota, part, or participation.[75]

Although incorporation generally requires more than one shareholder,[76] after incorporation the shares can, in many countries, be transferred to a single shareholder.[77] Otherwise, one-person companies have not been permitted, and the single shareholder may be threatened with personal liability[78] or disso-

---

of creditors but with notice).

70. E. ERCKLENTZ, *supra* note 68, at 66, AKTIENGESETZ, *supra* note 53, § 41(3), at 60 (F.R.G.).

71. S. MAYSON, *supra* note 20, at 18, 96 (U.K.: certificate of incorporation is conclusive evidence of existence); C. COM. art. 360, 363, 364 (Fr.); E. ERCKLENTZ, *supra* note 68, at 38-39; AKTIENGESETZ, *supra* note 53, § 275(1), at 316 (F.R.G.).

72. E. ERCKLENTZ, *supra* note 68, at 38; AKTIENGESETZ, *supra* note 53, at §§ 275(2)-(3) (F.R.G.: if cureable by amendment, within three months after demand on corporation).

73. *See* C. COM. arts. 360, 363-64 (Fr.).

74. S. FROMMEL & J. THOMPSON, *supra* note 23, at 24; C. COM. art. 73 (Fr.); N. HORN, *supra* note 32, at 257.

75. S. FROMMEL & J. THOMPSON, *supra* note 23, at 24 (*parts sociales* in France, *Geschaftsanteille* in Germany, *participaciones* in Italy); G. CERTOMA, *supra* note 34, at 409 (Italy: parts).

76. S. FROMMEL & J. THOMPSON, *supra* note 23, at 22; S. MAYSON, *supra* note 20, at 1-2 (U.K.); C. COM. arts. 34, 73 (Fr.: *societe anonyme* requires seven shareholders, but *societe a responsibilite limitee* requires only one); N. HORN, *supra* note 32, at 251, 257; AKTIENGESETZ, *supra* note 53, § 2, at 33 (F.R.G.: *Aktiengesellschaft* requires five; since 1980, one person may form *Gesellschaft mit Beschrankt Haftung*); G. CERTOMA, *supra* note 34, at 403 (Italy). *See* changes imposed by Twelfth Company Law Directive, *infra* notes 416-26.

77. S. FROMMEL & J. THOMPSON, *supra* note 23, at 22; S. MAYSON, *supra* note 20, at 28-29 (U.K.); G. CERTOMA, *supra* note 34, at 403 (Italy).

78. G. CERTOMA, *supra* note 34, at 403 (Italy).

lution of his corporation.[79] Preferred shares are generally permitted, though used infrequently,[80] while shares without voting rights are generally not.[81]

Marketable share companies must have a minimum amount of capital,[82] as must most limited liability companies.[83] The legal capital of a corporation is generally the aggregate amount of the par value of its shares.[84] In some countries no par shares are not permitted.[85] The objectives of minimum capital requirements are to protect creditors from undercapitalized corporations and to prevent entrepreneurs from selecting a corporate form that is too cumbersome and expensive for their enterprises.[86]

In common law systems, a corporation need not issue all authorized shares.[87] In civil law countries, all authorized shares must be issued;[88] the concept of authorized but unissued shares is not recognized.[89] Some company laws require that the entire amount of capital be subscribed before corporate existence com-

---

79. S. FROMMEL & J. THOMPSON, *supra* note 23, at 22.

80. S. MAYSON, *supra* note 20, at 137 (U.K.); E. ERCKLENTZ, *supra* note 68, at 262; N. HORN, *supra* note 32, at 265; AKTIENGESETZ, *supra* note 53, § 60, at 80, §§ 139-140, at 169-70 (F.R.G.); G. CERTOMA, *supra* note 34, at 404 (Italy).

81. S. FROMMEL & J. THOMPSON, *supra* note 23, at 34; S. MAYSON, *supra* note 20, at 138 (U.K.); N. HORN, *supra* note 32, at 257; AKTIENGESETZ, *supra* note 53, §12(1), at 37 (F.R.G.: preferred without voting rights permitted); E. ERCKLENTZ, *supra* note 68, at 62.

82. S. FROMMEL & J. THOMPSON, *supra* note 23, at 23; S. MAYSON, *supra* note 20, at 21-22 (U.K.: 50,000 Pounds); N. HORN, *supra* note 32, at 264; AKTIENGESETZ, *supra* note 53, § 7, at 35 (F.R.G.: 100,000 DM); G. CERTOMA, *supra* note 34, at 402 (Italy: 200 million Lira).

83. S. FROMMEL & J. THOMPSON, *supra* note 23, at 23; S. MAYSON, *supra* note 20, at 21 (U.K.: only a trivial amount); N. HORN, *supra* note 32, at 251 (F.R.G.: DM 50,000); G. CERTOMA, *supra* note 34, at 409 (Italy: 20 million Lira).

84. S. MAYSON, *supra* note 20, at 133-34 (U.K.); N. HORN, *supra* note 32, at 264 (F.R.G.).

85. *See* S. MAYSON, *supra* note 20, at 134 (U.K.); N. HORN, *supra* note 32, at 264; E. ERCKLENTZ, *supra* note 68, at 21 (F.R.G.).

86. E. ERCKLENTZ, *supra* note 68, at 367-371. Although the minimum capital requirements for the formation of U.S. corporations have traditionally been very low, *see* H. HENN & J. ALEXANDER, *supra* note 17, at 295, European jurisidictions have continued to require substantially larger amounts of capital, A. CONARD, *supra* note 23, at 310; Buxbaum, *supra* note 30, at 3-21. It should be remembered that American corporations are comparable to marketable share companies and limited liability companies. *See supra* text accompanying notes 29-39. The determination of the Europeans to maintain high capital requirements for marketable share companies is shown by the inclusion of the 25,000 European Community Units [ECU] minimum capital requirement in the Second Company Law Directive. *See infra* text accompany note 245.

87. S. MAYSON, *supra* note 20, at 139-40 (U.K.).

88. S. FROMMEL & J. THOMPSON, *supra* note 23, at 23; C. COM. art. 75 (Fr.: "The capital must be subscribed in full."); E. ERCKLENTZ, *supra* note 68, at 369 (F.R.G.).

89. E. ERCKLENTZ, *supra* note 68, at 369 (F.R.G.).

mences;[90] sometimes, it must not only be subscribed but also paid.[91] In some cases, for the marketable share company, only a portion of the capital must be paid immediately;[92] the balance remains the obligation of the subscribers.[93]

When the consideration for shares is something other than cash, special rules are often applied.[94] In some countries, where the consideration is in kind rather than cash, it must be paid immediately in full.[95] Often it must be reviewed by specially appointed auditors who report on the value of the contributions.[96] In some cases, a contract of particulars must be registered.[97]

A company's capital must not be distributed to its shareholders but must remain, subject to losses, in reserve for its creditors.[98] In some countries, if the company's capital falls below a certain threshold, the process of liquidating the company must commence unless the capital is restored, even if the company is able to pay its debts.[99]

The tendency in Western European law is to prohibit companies from acquiring their own shares.[100] However, such acqui-

---

90. S. FROMMEL & J. THOMPSON, *supra* note 23, at 23-24; N. HORN, *supra* note 32, at 264 (F.R.G. requires that one-fourth be paid before the *Aktiengesetz* is registered); G. CERTOMA, *supra* note 34, at 403.

91. S. FROMMEL & J. THOMPSON, *supra* note 23, at 29; *see also supra* note 90.

92. S. MAYSON, *supra* note 20, at 149-52 (U.K.); C. COM. art. 75 (Fr.: requires that one-fourth of the value of par-value shares be paid at time of subscription); N. HORN, *supra* note 32, at 264 (F.R.G.: one-fourth); G. CERTOMA, *supra* note 34, at 403 (Italy: three-tenths).

93. S. FROMMEL & J. THOMPSON, *supra* note 23, at 23-24.

94. *Id.* at 31; S. MAYSON, *supra* note 20, at 153-155 (U.K.); N. HORN, *supra* note 32, at 264; AKTIENGESETZ, *supra* note 53, § 27, at 49 (F.R.G.).

95. France. Law no. 66-537 (July 24, 1966), art. 75(3), in FRENCH LAW 5-31 (G. Berman, H. de Vries & N. Galston eds. 1989); S. MAYSON, *supra* note 20, at 155 (U.K.: contributor of inkind capital may transfer property later with contract considered present contribution of capital); C. COM. art. 75 (Fr.: "Shares representing contributions in kind are fully paid up when issued."); E. ERCKLENTZ, *supra* note 68, at 377-379, 386-88 (F.R.G.); G. CERTOMA, *supra* note 34, at 403 (Italy: value of payment in kind must be disclosed in memorandum of association).

96. S. FROMMEL & J. THOMPSON, *supra* note 23, at 31, 44; S. MAYSON, *supra* note 20, at 154-155 (U.K.).

97. S. MAYSON, *supra* note 20, at 155 (U.K.).

98. *Id.* at 235-237 (U.K.); N. HORN, *supra* note 32, at 268; AKTIENGESETZ, *supra* note 53, § 57(1), at 79 (F.R.G.); G. CERTOMA, *supra* note 34, at 405 (Italy).

99. S. FROMMEL & J. THOMPSON, *supra* note 23, at 54; S. MAYSON, *supra* note 20, at 241 (U.K.: where capital falls below half its called-up share capital, directors must convene extraordinary general meeting); G. CERTOMA, *supra* note 34, at 405 (Italy: where capital falls below one-third as a result of losses, stated capital must be reduced).

100. S. MAYSON, *supra* note 20, at 140, 251-254 (U.K.: company may acquire but must cancel); N. HORN, *supra* note 32, at 265; AKTIENGESETZ, *supra* note 53, § 71, at 89 (F.R.G.: permitted only under limited circumstances); G. CERTOMA, *supra* note 34, at 404

sitions are sometimes permitted if the shares are to be purchased from net profits and the general meeting authorizes the purchase.[101] In Western Europe, particularly in Germany, shares are commonly issued in bearer form,[102] making them negotiable instruments,[103] the title to which is transferred by mere delivery of the stock certificate to the transferee.[104] Shares may also be held in registered or nominative form,[105] but national laws differ as to whether such shares are to be treated as negotiable instruments.[106] National laws also differ as to whether restrictions on the transfer of shares will be upheld,[107] but in general, restrictions are more likely to be permitted in a larger range of circumstances in a limited liability company than in a marketable share company.[108]

3. *Shareholders and their rights*

The stockholders meeting, usually called the general meeting, is very important.[109] Limited liability companies may make some decisions without formal meetings,[110] but marketable share companies generally cannot.[111] Voting by proxy, with some re-

---

(Italy).

101. S. MAYSON, *supra* note 20, at 252-253 (U.K.).

102. S. FROMMEL & J. THOMPSON, *supra* note 23, at 24-25, 36. *Contra* S. MAYSON, *supra* note 20, at 310-312 (U.K.: shares must be registered, and each company is required to keep a register of its members or shareholders); E. ERCKLENTZ, *supra* note 68, at 283-284; N. HORN, *supra* note 32, at 264; AKTIENGESETZ, *supra* note 53, § 10(2), at 37, § 24, at 47 (F.R.G.: bearer shares are the usual form, and *Aktiengesetz* contains a mild presumption that bearer shares will be used); G. CERTOMA, *supra* note 34, at 404 (Italy: bearer shares are prohibited); COMPARATIVE LAW 807-828 (R. Schlesinger, H. Baade, M. Damaska, & P. Herzog, ed. 1988).

103. S. FROMMEL & J. THOMPSON, *supra* note 23, at 25.

104. *Id.*

105. AKTIENGESETZ, *supra* note 53, § 10, at37 (F.R.G.).

106. S. FROMMEL & J. THOMPSON, *supra* note 23, at 36; C. COM. art. 43 (Fr.: "Company shares may not be represented by negotiable instruments."); N. HORN, *supra* note 32, at 264 (F.R.G.).

107. S. FROMMEL & J. THOMPSON, *supra* note 23, at 26; S. MAYSON, *supra* note 20, at 500 (U.K.: permitted); C. COM. art. 45 (Fr.: shares in limited liability companies may be transferred only with the consent of a majority of the shareholders and shareholders holding at least three quarters of the company shares).

108. S. FROMMEL & J. THOMPSON, *supra* note 23, at 26.

109. S. MAYSON, *supra* note 20, at 312-13 (U.K.); C. COM. art. 153, 155 (Fr.); N. HORN, *supra* note 32, at 262-64 (F.R.G.).

110. S. MAYSON, *supra* note 20, at 314 (U.K.: bill for Company Act 1989 proposed that private companies could dispense with the annual general meetings); N. HORN, *supra* note 32, at 254 (F.R.G.: GmbH may dispense with general meetings).

111. S. MAYSON, *supra* note 20, at 313-14 (U.K.).

strictions, is generally permitted.[112] National laws include provisions on quorums,[113] and sometimes national laws require affirmative votes greater than a majority.[114] If more than one class of shares exist, national laws sometimes provide for voting by class on certain kinds of decisions,[115] such as the election of directors.

In Western Europe, the authority to declare dividends is usually vested in the shareholders acting in the general meeting,[116] rather than in the board of directors as in the United States.[117] Generally, the law does not permit dividend distributions when their payment would impair the company's stated capital.[118] Dividends must usually be paid out of current earnings as stated in the accounts considered by the shareholders at the general meeting.[119] Under some national laws, a portion of the earnings must be set aside annually in a statutory reserve until the reserve equals a fixed percentage of the company's capital.[120] However, company laws provide that dividends may be promptly declared out of profits less previous losses.[121] The in-

---

112. *Id.* at 336-37 (U.K.).

113. S. FROMMEL & J. THOMPSON, *supra* note 23, at 45-46; S. MAYSON, *supra* note 20, at 325-26 (U.K.: Articles of Association generally define quorum); C. COM. art. 153 (Fr.: quorum is shareholders or representatives possessing one-half of voting rights at first convening); N. HORN, *supra* note 32, at 263; E. ERCKLENTZ, *supra* note 68, at 290 (F.R.G.: no quorum required).

114. S. FROMMEL & J. THOMPSON, *supra* note 23, at 45-46; S. MAYSON, *supra* note 20, at 313, 328-31 (U.K.); C. COM. art. 153 (Fr.: decisions of general meeting require two-thirds of votes present or represented); E. ERCKLENTZ, *supra* note 68, at 548-549 (F.R.G.: for increases in share capital, AKTIENGESETZ, *supra* note 53, § 182, at 233, § 202, at 249; for dissolution of company, *Id.* § 262, at 307; for merger, *Id.* at § 340(2).

115. S. MAYSON, *supra* note 20, at 134-36, 316-17 (U.K.); AKTIENGESETZ, *supra* note 53, § 182(2), at 233 (F.R.G.: for increase in capital).

116. S. FROMMEL & J. THOMPSON, *supra* note 23, at 46; S. MAYSON, *supra* note 20, at 136, 246-51, 312-14 (U.K.); N. HORN, *supra* note 32, at 267; E. ERCKLENTZ, *supra* note 68, at 442, 450-52; AKTIENGESETZ, *supra* note 53, § 174, at225 (F.R.G.).

117. H. HENN & J. ALEXANDER, *supra* note 17, at 913-15.

118. S. FROMMEL & J. THOMPSON, *supra* note 23, at 46; S. MAYSON, *supra* note 20, at 234 (U.K.); E. ERCKLENTZ, *supra* note 68, at 447; AKTIENGESETZ, *supra* note 53, 58(5), at 81; G. CERTOMA, *supra* note 34, at 405 (Italy).

119. E. ERCKLENTZ, *supra* note 68, at 442, 450-52; AKTIENGESETZ, *supra* note 53, § 58(1), at 79, § 58(5), at 81 (F.R.G.).

120. S. FROMMEL & J. THOMPSON, *supra* note 23, at 46-47; E. ERCKLENTZ, *supra* note 68, at 448; AKTIENGESETZ, *supra* note 53, § 150(2), at 181 (F.R.G.: five percent of annual net earnings must be set aside until the reserve equals at least ten percent of stated capital); G. CERTOMA, *supra* note 34, at 405 (Italy: five percent net annual profits must be set aside). The U.K. has no "set aside" requirement. *See* S. MAYSON, *supra* note 20, at 246-51.

121. S. MAYSON, *supra* note 20, at 247 (U.K.).

tent of the law generally is to require an equivalent of accumulated earned surplus.[122]

Western European laws vary in their recognition of the preemptive rights of the shareholders, that is, the rights of the shareholders to acquire newly issued shares in preference to other potential purchasers.[123] The company laws of Western Europe do not confer the same preferential rights on shareholders in limited liability companies as they do on shareholders of marketable share companies.[124] Requirements that increases in the authorized capital of a company be approved by the shareholders may afford some measure of protection for the shareholders.[125]

Shareholders are given rights to certain information about the company's financial condition,[126] but these rights typically vary under national company laws.[127] Some national laws provide, statutorily, for a mandatory auditor with supervisory functions.[128]

Minority shareholders' rights are protected in a variety of ways.[129] Under various national laws, a percentage of shareholders less than a majority may have the power to summon a general meeting,[130] to call for an investigation of the company's affairs,[131] or to petition for the company's dissolution.[132] Although

---

122. *See id.* at 250 (U.K.); E. ERCKLENTZ, *supra* note 68, at 447 (F.R.G.).

123. S. FROMMEL & J. THOMPSON, *supra* note 23, at 35; S. MAYSON, *supra* note 20, at 143-44 (U.K.); C. COM. art. 183 (Fr. Shareholders have a preemptive right to subscribe to shares, notwithstanding any other provisions, but the right is negotiable and may be individually renounced.); E. ERCKLENTZ, *supra* note 68, at 379-80, 388-89, 397-98; AKTIENGESETZ, *supra* note 53, § 186, at 237, § 187, at 239 (F.R.G.); G. CERTOMA, *supra* note 34, at 405 (Italy).

124. S. MAYSON, *supra* note 20, at 144 (U.K,); E. ERCKLENTZ, *supra* note 68, at 420-21, 424 (F.R.G.).

125. S. FROMMEL & J. THOMPSON, *supra* note 23, at 35; S. MAYSON, *supra* note 20, at 145-46 (U.K.); E. ERCKLENTZ, *supra* note 68, at 372; AKTIENGESETZ, *supra* note 53, § 182, at 233, § 202, at 249 (F.R.G.: of limited effectiveness).

126. S. FROMMEL & J. THOMPSON, *supra* note 23, at 48; S. MAYSON, *supra* note 20, at 210-16, 321-24 (U.K.: but not including accounting records); E. ERCKLENTZ, *supra* note 68, at 265-70 (F.R.G.).

127. *Compare* E. ERCKLENTZ, *supra* note 68, at 265-70 *with* S. MAYSON, *supra* note 20, at 321-24 (F.R.G. with U.K.).

128. S. MAYSON, *supra* note 20, at 10, 213, 457-59 (U.K.); C. COM. arts. 218, 224-26, 228-29, 233-34 (Fr.); AKTIENGESETZ, *supra* note 53, §§ 162-169, at 209-19 (F.R.G.).

129. N. HORN, *supra* note 32, at 270-71 (F.R.G.).

130. *Id.* at 271 (F.R.G.); S. FROMMEL & J. THOMPSON, *supra* note 23, at 45; S. MAYSON, *supra* note 20, at 313, 315 (U.K.).

131. S. MAYSON, *supra* note 20, at 502-10 (U.K.: decision by Secretary of State of Trade and Industry); N. HORN, *supra* note 32, at 271 (F.R.G.).

shareholder derivative actions play a significant role only in the United States, similar rights of action are provided under British[133] and French company law.[134] Protection of the rights of investors is provided by relatively extensive criminal penalty provisions used in a more systematic and comprehensive manner.[135]

4. *Directors and boards*

A distinctive feature of European company law is the prevalence of two-tier board systems in marketable share companies.[136] In Germany, oversight is shared between a supervisory board and an executive board.[137] The supervisory board's basic functions are the election and removal of the executive board,[138] approval of financial statements,[139] and oversight of corporate affairs.[140] Executives of the company are ordinarily found on the executive board, not the supervisory board, and a person may not be a member of both boards at the same time.[141] This system applies to some limited liability companies.[142] In the context of the dual board system, the system of codetermination (which gives company employees the right to select one-third of the supervisory board members) has been imposed on all marketable share companies and all limited liability companies with more than 500 employees.[143]

Company laws provide that a majority of the board or at

---

132. S. MAYSON, *supra* note 20, at 552, 569 (U.K.: shareholders as contributories may petition).

133. *Id.* at 471-83 (U.K.).

134. A. CONARD, *supra* note 23, at 402-03. The derivative suit does not exist in the law of the Federal Republic of Germany. N. HORN, *supra* note 32, at 270.

135. Grossfeld, *Management and Control of Marketable Share Companies*, 13 INT'L ENCYCLOPEDIA COMP. L. 4-361 (1973).

136. S. FROMMEL & J. THOMPSON, *supra* note 23, at 39; C. COM. arts. 118-119, 126, 128 (Fr.); N. HORN, *supra* note 32, at 258 (F.R.G.); A. CONARD, *supra* note 23, at 81.

137. A. CONARD, *supra* note 23, at 77; N. HORN, *supra* note 32, at 259-62.

138. A. CONARD, *supra* note 23, at 77; N. HORN, *supra* note 32, at 260; E. ERCKLENTZ, *supra* note 68, at 91, 145, 147; AKTIENGESETZ, *supra* note 53, § 84(1), at 101.

139. AKTIENGESETZ, *supra* note 53, § 111(2), at 135; E. ERCKLENTZ, *supra* note 68, at 150-51.

140. AKTIENGESETZ, *supra* note 53, § 111(1), at 135; E. ERCKLENTZ, *supra* note 68, at 91, 145, 147-53. *Compare* C. COM. art. 128 (Fr.).

141. AKTIENGESETZ, *supra* note 53, § 105, at 129; E. ERCKLENTZ, *supra* note 68, at 90, 111, 118.

142. Generally, it applies to any GmbH having more than 500 employees. N. HORN, *supra* note 32, at 254; E. ERCKLENTZ, *supra* note 68, at 123-24, 131-34, 137-38.

143. S. FROMMEL & J. THOMPSON, *supra* note 23, at 27, 28, 40; A. CONARD, *supra* note 23, at 82; N. HORN, *supra* note 32, at 254, 261, 276-79.

least one member must be residents or nationals of the country of incorporation.[144] In some jurisdictions, directors are required to own shares.[145] Statutes vary in the reasons for which directors can be removed.[146]

In Western Europe, the power to bind the company is generally vested in the directors,[147] but sometimes company law gives this power to managers as well.[148] The power of German company managers has been said to be "virtually unlimited."[149] In France, a manager can bind his company even beyond his actual authority, unless the other party is shown to have actual or imputed knowledge of the manager's lack of authority.[150]

5. *Fundamental changes*

Major changes in the corporation, such as amendment of the articles, merger, transformation,[151] winding up, and dissolution,[152] may require the approval of more than a majority of the shareholders in a general meeting.[153] If the change would increase the shareholders' obligations, sometimes unanimity is required.[154] Generally, the dissolution procedure, called "winding

---

144. E. ERCKLENTZ, *supra* note 68, at 112-18 (F.R.G.: Articles may impose such a requirment).

145. S. MAYSON, *supra* note 20, at 359 (U.K.: Articles may require share ownership); G. CERTOMA, *supra* note 34, at 407 (Italy: directors need not own shares).

146. S. MAYSON, *supra* note 20, at 372-73 (U.K. *See also id.* at 360-68 on disqualification); E. ERCKLENTZ, *supra* note 68, at 113-14, 119-20 (F.R.G.: generally, supervisors may be removed by three fourths of voting shares or for material cause, while members of the management board may be removed only for material cause).

147. S. FROMMEL & J. THOMPSON, *supra* note 23, at 40-44; C. COM. art. 98 (Fr.: The council of administration, the directors in a one-tier system, is vested with the broadest powers to act in all circumstances.); S. MAYSON, *supra* note 20, at 384-91.

148. S. MAYSON, *supra* note 20, at 450-53 (U.K.).

149. S. FROMMEL & J. THOMPSON, *supra* note 23, at 43-44.

150. C. COM. art. 98 (Fr.: in relations with third parties, the corporation is bound even by acts of the council of administration which do not fall within the corporate purpose, unless it proves that the third party knew the act exceeded this purpose or that he could not have been ignorant of them). It is difficult to compare and contrast the roles of corporate directors and officers under American and European laws. A. CONARD, *supra* note 23, at 333. Under American corporation law, managers may have the authority to bind the corporation. H. HENN & J. ALEXANDER, *supra* note 17, at 593-605.

151. E. ERCKLENTZ, *supra* note 68, at 531, 539 (F.R.G.: transformation from a limited liability company to a marketable share company requires three-fourths approval and the reverse transformation requires unanimity).

152. *Id.* at 548-49 (F.R.G.: dissolution of *Aktiengesellschaft* requires three-fourths approval).

153. S. MAYSON, *supra* note 20, at 329-30 (U.K.); E. ERCKLENTZ, *supra* note 68, at 511, 515 (F.R.G.).

154. S. MAYSON, *supra* note 20, at 59 (U.K.: to re-register as an unlimited company).

up" in the United Kingdom,[155] is complex and involves provisions to protect creditors and shareholders' rights.[156] The procedure called the "statutory merger"[157] in the United States has traditionally not had a counterpart in the laws of some Western European nations.[158]

The company law of Germany has provided a distinctive contribution in the law of corporate groups.[159] When one marketable share company acquires as much as a twenty-five percent interest in another, it must notify the subject company, and the acquisition must be published in the press.[160] Other provisions define the responsibilities of holding company managers to subsidiary corporations and the liability of certain holding companies for the subsidiary's debts.[161] Italy also has provisions regulating the relationships among companies in a group.[162]

C. *Corporations and Private International Law*

As corporations become international, they must comply in many respects with the laws of every nation in which they do business, but for the most part their creation, dissolution, and governance can be determined at one time by the law of only one sovereign. This circumstance means that private international law must provide rules for the recognition of the foreign corporate personality,[163] for determining the nationality,[164] dom-

155. S. FROMMEL & J. THOMPSON, *supra* note 23, at 589; S. MAYSON, *supra* note 20, at 559-60.

156. S. MAYSON, *supra* note 20, at 559 (U.K.) E. ERCKLENTZ, *supra* note 68, at 547-48 (F.R.G.).

157. A statutory merger, combining two or more companies, involves the automatic dissolution of at least one constituent company and the assumption of its assets and liabilities by the surviving company.

158. French company law had no provisions on mergers until 1966. Belgium, the Netherlands, and Luxembourg had none as of 1975. S. FROMMEL & J. THOMPSON, *supra* note 23, at 51. The F.R.G. has had provisions on merger for a longer period. *See* E. ERCKLENTZ, *supra* note 68, at 509-11; N. HORN, *supra* note 32, at 271. It is the purpose of the Third Company Law Directive, *infra* notes 284-322, to ensure that the Member States of the EC adopt generally comparable provisions for merger.

159. A. CONARD, *supra* note 23, at 81, 83.

160. *Id.* at 82-83. It should be noted that this occurs in the context of a system where bearer shares are the typical means of ownership.

161. *Id.* at 83.

162. G. CERTOMA, *supra* note 34, at 405.

163. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 297 (1971) [hereinafter RESTATEMENT]; H. HENN & J. ALEXANDER, *supra* note 17, at 214 n.1, 219 n.24, 223.

Discussions of this issue are found in D. LASOK & P. STONE, CONFLICT OF LAWS IN THE EUROPEAN COMMUNITY 89-91, 247-49, 353-54 (1987); I. FLETCHER, CONFLICTS OF LAWS AND EUROPEAN COMMUNITY LAW, 251-70 (1982); and, in the context of the Treaty of Rome's

icile,[165] and residence[166] of corporations, for identifying the legal system that will provide the rules for governing the corporation's internal affairs,[167] and for allowing foreign corporations to establish themselves.[168]

Among the primary concerns of corporate law in the United States[169] and in Western Europe is the "internal affairs of the corporation"—the relations of the company with its shareholders, its boards, its officers, and among the shareholders themselves. In American corporate law, it is a familiar rule that corporations' internal affairs are subject to the law of the state of incorporation.[170] In continental Europe, the prevailing rule is that the internal affairs are subject to the law of the state where the company has its headquarters.[171] In the EC, only in Ireland, the United Kingdom, and the Netherlands[172] does the "state of incorporation" rule prevail.

The problem of determining the legal system that should govern corporations' internal affairs must be distinguished from related problems. First, recognition of foreign companies is concerned with the acceptance of the foreign company's legal personality and of its capacity to contract and sue in its own name. In the original six members of the EC, only a company validly incorporated in the country where it had its central office or principle place of management (its *siege social*[173]) was considered validly incorporated.[174] The *siege social* is required to be the real central office (*siege reel*) and not just a formal regis-

---

provisions, H. SMIT & P. HERZOG, *supra* note 1, at 2-640 to 2-648.

164. H. HENN & J. ALEXANDER, *supra* note 17, at 171-72.

165. *Id.* at 152-54.

166. *Id.* at 154-63.

167. A. CONARD, *supra* note 23, at 14-16; RESTATMENT, *supra* note 163, at §§ 296-310.

168. H. HENN & J. ALEXANDER, *supra* note 17, at 214-226.

169. For a concise review of this problem, see Conard, *Federal Protection of the Free Movement of Corporations*, 2 COURTS AND FREE MARKETS 363 (1982).

170. A. CONARD, *supra* note 23, at 15. RESTATEMENT, *supra* note 163, at §§ 303-10.

171. A. CONARD, *supra* note 23, at 15.

172. Conard, *Company Laws in the European Community from an American Viewpoint*, HARMONIZATION OF EUROPEAN COMPANY LAW 56 (Schmitthof, ed., 1973); H. SMIT & P. HERZOG, THE LAWS OF THE TREATIES OF THE EUROPEAN COMMUNITIES 2-643 (1975); I. FLETCHER, *supra* note 163, at 251-55 (1982); G.A. ZPHIRIOU, EUROPEAN BUSINESS LAW 125-32 (1970). According to Lang and Lasok, the rule in the Netherlands is that the law of the country of the company's registered office governs the internal affairs of the company. J. LANG, THE COMMON MARKET AND COMMON LAW 94 (1966); D. LASOK, *supra* note 163, at 90-91 (1987).

173. *Siege social* is essentially equivalent to the English terms "head office" or "headquarters." THE OXFORD PAPERBACK FRENCH DICTIONARY 215 (1989).

174. J. LANG, *supra* note 172, at 94.

tered office (*siege statutaire*).[175] This rule remains valid among most of the Member States including those that became members of the EC after its initial formation. However, in Italy, companies incorporated abroad that have their principal place of business or activity in Italy are regarded as Italian companies, and they must comply with the provisions of Italian law.[176] Secondly, the right of establishment,[177] a basic provision of the Treaty of Rome, assures a wide range of business associations that they will be able to open branches in the other EC nations.[178] Finally, companies formed outside the EC may form subsidiaries organized under the laws of the Member States to take advantage of the provisions of the Treaty of Rome guaranteeing such companies the right of establishment.[179] In addition, these companies may be concerned about problems associated with the transfer of the headquarters of a company from outside the Community to a location within a Member State.[180] These interrelated issues have had great importance for the shaping of company law in Europe and permeate provisions of the EC's legislation on company law.

The acceptance of the *siege social* rule among most of the Member States has arguably removed a force that would naturally and informally tend to harmonize European company

---

175. *Id.*

176. G. CERTOMA, *supra* note 34, at 94.

177. Article 52 provides in part:

> Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be progressively abolished by progressive stages. . . . Such progressive abolition shall also apply to restrictions on the setting up of agencies, branches, or subsidiaries by nationals of any Member State established in the territory of any Member State.
>
> Freedom of establishment shall include the right to take up and pursue activities as self employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 58 . . . .

For the provisions on companies, see *infra* text accompanying note 190.

178. H. SMIT & P. HERZOG, *supra* note 1, at 2-641 to 2-642. *See* Note, *Companies and Firms in EEC Law*, EUR. BUS. L. 169 (1982) (discussion on whether an English partnership would qualify).

179. Incorporation of a subsidiary in a Member State with the registered central office of the subsidiary in that or another Member State is sufficient to qualify for the protections of the Treaty of Rome. H. SMIT & P. HERZOG, *supra* note 1, at 2-644 to 2-645.

180. For a discussion of this problem in the context of a Treaty of Friendship, Commerce, and Navigation, see Ebenroth, *Gaining Access to Fortress Europe—Recognition of U.S. Corporations in Germany and the Revision of the Seat Rule*, 24 INT'L L. 459 (1990).

law.[181] The adoption of the opposite rule, the common law's internal affairs doctrine, would have precipitated a European "race of laxity," a downward spiral of competitive deregulation as governments competed to serve as the incorporator of companies. The obvious response to this contention is that such harmonization would have been achieved only at the cost of lower levels of protection for the interests of shareholders, creditors, and other parties—in other words, protection determined by the lowest common denominator of company law.[182]

It has also been suggested that articles 52 and 58 of the Treaty of Rome, concerning the free movement of persons and the right of establishment, should be applied to prevent the Member States' application of the *siege social* rule, since it could result in non-recognition of a company's legal capacity.[183] The *seige social* rule severely restricts the movement of enterprises within the Community, since the movement of the headquarters would *ipso facto* change the law applicable to the entirety of the company's internal relations.[184] The rule may, therefore, violate the articles on the right of establishment.[185] This issue was addressed by the Convention on the Mutual Recognition of Legal Persons, which provided as a general principle that a company incorporated in one Member State but having its registered office anywhere in the Community would be recognized in all other Member States and have the validity and capacities provided by the state of incorporation.[186] Unfortunately, the Convention has never come into force because of the Netherlands' failure to ratify it.[187]

The prevalence of the *siege social* rule, a distinctive feature of the laws in most Member States, has tended to remove the possibility that the laws of corporate governance would progressively evolve into a state of greater convergence. While it has preserved the more highly protective nature of Western European company law, it must be seen as one of the conditions necessitating the single market program's company law proposals.

181. *See* Buxbaum, *supra* note 30, at 227.

182. It is indeed just such a condition that was protested by Justice Brandeis in his celebrated dissent in Ligget v. Lee, 288 U.S. 517, 558-59 (1933), where he protested the "race of laxity."

183. Buxbaum, *supra* note 30, at. 228.

184. A. CONARD, *supra* note 23, at 56.

185. *Id.*

186. *Id.* at 58.

187. Buxbaum, *supra* note 30, at 229.

In contrast, the convergence in the corporation laws of the American states was achieved without the conscious design of a single mind or even a single governmental institution, legislative body, or political process. In the United States, the celebrated race of laxity had the effect of producing more uniformity and liberality at the same time.[188] The differing conditions in Europe, where the *siege social* rule has served to shield protective rules from erosion, are the basis for the struggle for a more uniform company law for the twelve Member States.

D. *The Constitutional Foundations of Company Law Harmonization*

The unification of company law in the EC has several foundations in the Treaty of Rome. That treaty, signed in 1957, established as the "task" of the European Economic Community the promotion of "a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living, and closer relations between the States belonging to it."[189] This was to be accomplished "by establishing a common market and progressively approximating the economic policies of Member States."[190] This large common market was to be created by measures to ensure the free movement of goods, persons, services, and capital.[191] The Treaty provides that, within its scope, "any discrimination on the grounds of nationality was to be prohibited."[192] To facilitate the free movement of persons, the right of establishment was incorporated.[193]

The treaty's free movement of persons and its concomitant right of establishment were intended to benefit business associations. Article 58 of the Treaty provided:

> Companies or firms formed in accordance with the laws of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the

188. A. Conard, *supra* note 23, at 10-30.

189. Treaty of Rome, *supra* note 5, at art. 2.

190. *Id.*

191. *Id.* arts. 3(a)-(c). *See also id.* arts. 9-37; 48-73.

192. *Id.* art. 7. *See* discussion in Kapteyn & Verloren Van Themaat, *supra* note 1, at 92-97 (impact of this provision on business enterprises).

193. Treaty of Rome, *supra* note 5, at arts. 52-58.

> same way as natural persons who are nationals of Member States.
> "Companies or firms" means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by private or public law, save for those which are non-profit-making.[194]

The right of establishment provides, both with respect to natural persons and to such firms, that the restrictions on the freedom of establishment of nationals of a Member State in the territory of a Member State must be abolished by progressive stages in the course of a transitional period.

This progressive abolition is to apply to restrictions on the "setting up of agencies, branches, or subsidiaries by nationals of any Member State established in the territory of another Member State."[195] Freedom of establishment is to include the right to take up and pursue activities as self-employed persons and to manage undertakings in particular companies or firms under conditions laid down for its own nationals by the country's law of where such establishment is effected.[196] The EC Council is authorized to adopt directives to abolish restrictions on the freedom of establishment.[197] In particular, the Council is required to implement this responsibility "by coordinating to the extent necessary the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the second paragraph of Article 58 with a view to making such safeguards equivalent throughout the Community."[198] This provision is the principal basis for the unification of company law in the EC[199] and for the company law proposals in its single market program. However, it is clear that these provisions on the right of establishment were not intended as the sole basis for harmonizing company law. Article 220 of the Treaty of Rome provides:

> Member States shall, so far as it is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals:
> — the mutual recognition of companies or firms within the

194. *Id.* art. 58.
195. *Id.* art. 58.
196. *Id* art. 52.
197. *Id.* art. 54(2).
198. *Id.* art. 54(3)(g).
199. P. Kapteyn & P. Verloren Van Themaat, *supra* note 1, at 439-440.

meaning of the second paragraph of Article 58, the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between companies or firms governed by the laws of different countries.[200]

An additional constitutional basis can be found in Article 235 of the Treaty of Rome, which provides:

> If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Parliament, take the appropriate measures.[201]

These provisions already provided a clear basis for unification of company law.

In order to facilitate the passage of proposals in the program to complete the single market by 1992, the EC adopted the Single European Act in 1986.[202] It added new provisions throughout the Treaty of Rome to aid the completion of the single market or, as it was more often called, the "internal market." A definition of the market was added as follows: "The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty."[203] The Single European Act required the Community to adopt measures "with the aim of progressively establishing the internal market over a period expiring on 31 December 1992"[204] and added numerous provisions to the treaty to facilitate the accomplishment of this goal.[205] General authority was given to the Council to "adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in

---

200. Treaty of Rome, *supra* note 5, at art. 220. *See* comments in P. KAPTEYN & P. VERLOREN VAN THEMAAT, *supra* note 1, at 481-83.

201. Treaty of Rome, *supra* note 5, at art. 235.

202. *Single European Act*, BULL. E.C. (Feb. 1986) [hereinafter SEA].

203. Treaty of Rome, *supra* note 5, at art. 8a.

204. *Id.*

205. *See id.* arts. 8a, 8b, 28, 57(2), 59, 70(1), 84, 99, 100, 100a, and 100b. The most important change in the Treaty of Rome resulting from the Single European Act was the alteration of numerous provisions of the Treaty that formerly had required unanimity for adoption in the Council to the requirement of a qualified majority. A qualified majority is 54 votes of the 76 possible in the weighted voting systems of the Council. *Id.* art. 148.

Member States which have as their object the establishment and functioning of the internal market."[206] Measures related to taxes, the free movement of persons, and the rights of employed persons were excluded from this authority.[207] It should also be noted that this provision's scope is further limited to measures for approximation, so that if the existing laws do not address a legislative area, arguably this provision does not confer authority for harmonizing directives and regulations.

With this new grant of authority from the Member States, the EC leaders were ready to make a new advance toward the creation of a single European market. A new program that would fulfill the founders' vision of the Community and capture the attention of the world business community. It also signaled the new authority of the institutions of the EC. As those business leaders overseas became alerted to the possibilities for doing business in the new Europe, they became aware that the exploitation of the new opportunities would involve either the exportation of products or the establishment of European subsidiaries. The establishment of new subsidiaries would take place under the framework of rules established by the EC for company law in the Member States, not only in the directives enacted in the earlier years but also in the company law proposals in the single market program.

II. THE COMPANY LAW OF THE EUROPEAN COMMUNITY BEFORE THE INTERNAL MARKET PROGRAM

A. *Introduction*

The company law proposals in the 1992 program build upon a foundation in company law[208] that was part of the Commu-

206. *Id.* art. 100a(1).

207. *Id.* art. 100a(2).

208. Some useful sources on the state of company law and its harmonization in the EC include the following: AMERICAN ENTERPRISE IN THE EUROPEAN COMMON MARKET (E. Stein & T. Nicholson, eds. 1960); E. STEIN, HARMONIZATION OF EUROPEAN COMPANY LAWS (1971); R. BUXBAUM & K. HOPT, LEGAL HARMONIZATION AND THE BUSINESS ENTERPRISE (1988); THE HARMONIZATION OF EUROPEAN COMPANY LAW, (C. Schmitthoff ed. 1973); Berger, *Harmonization of Company Law under the Common Market Treaty*, 4 CREIGHTON L. REV. 205 (1971); Dalton, *Proposals for the Unification of Corporation Law within the European Economic Community: Effect on the British Company*, 7 N.Y U. J. INT'L L. & POL. 58 (1974); Didier, Lukoff, & Waleff, *A Key Element in the Unification of Europe: Harmonization of Company Law*, 6 INT'L LAW 615 (1972); Hahn, *Functional Limits of Multinational Enterprise*, N.Y.U. J. INT'L L. & POL. 475 (1974); Schneebaum, *The Com-*

nity's *acquis communautaire* before the leaders agreed to pursue the goal of completing the single market by the end of 1992. Seven directives were already part of EC law, and as such they bound the Member States to enact implementing statutes or decrees and were to bind any new Member States that might negotiate accession to the EC. These foundations reach back to the beginnings of the EC. An examination of these seven directives is a necessary basis for understanding the proposals on company law in the 1992 program.

B. *The First Company Law Directive: Safeguards*

The First Company Law Directive,[209] which was adopted in 1968, has the purpose of providing safeguards to company shareholders and creditors. In general, it applies to marketable share companies, private limited companies, and limited partnerships.[210]

1. *Disclosure, the registry, and publication*

The first principle of the Directive is disclosure. The Member States are required to impose minimum standards for the compulsory disclosure of information.[211] Through requirements imposed on the laws of the Member States, affected companies are required to disclose the instruments of constitution, the statutes, and every amendment to these instruments. Companies must also disclose the appointments, terminations, and "particulars" of the persons who are appointed to serve and who are authorized to represent the company in dealings with third parties and in legal procedings and to take part in administering and controlling the company.[212]

Disclosure is also extended to financial matters. The company must disclose the amount of the capital subscribed if the instrument of constitution or the statutes mentions subscribed

---

pany Law Harmonization Program of the European Community, 14 L. & POL'Y INT'L BUS. 293 (1989); Silkenat, *Efforts toward Harmonization of Business Laws within the European Economic Community*, 12 INT'L LAW 835 (1979); Stein, *Harmonization of European Company Laws*, 37 LAW & CONTEMP. PROBS. 318 (1972).

209. *First Council Directive on the Coordination of Safeguards*, 11 O.J. EUR. COMM. (No. L 65) 8 (1968) [hereinafter *First Company Law Directive*].

210. *Id.* art. 1.

211. *See id.* art. 2(1).

212. *Id.* art. 2(1).

capital,[213] the balance sheet, and a profit and loss account of each financial year.[214] In addition, the disclosures must include the following milestone events: any transfer of the company seat,[215] the winding up of the company,[216] any declaration of nullity of the company,[217] the appointment of liquidators and their respective powers,[218] the company's termination, and its being struck off the register where this entails legal consequences.[219]

In a provision repeatedly utilized as a key reference in later legislation, the Directive requires the Member States to keep a register for companies.[220] The Member States must maintain a file for each company in "a central register, commercial register[,] or companies register," for all companies registered in the Member State.[221] Disclosure of the documents must be accompanied by publication in a national gazette,[222] and the documents and particulars may be relied upon only after they have been published in accordance with the Directive's requirements.[223] Letters and order forms are required to include information about the company, including the company's legal form and the register in which the company's file is kept.[224]

General rules are provided as to the rights of third parties to rely on the filed documents and particulars. The company may rely on the documents and particulars in disputes against third parties only after they have been published in the national gazette.[225]

2. *Authority to bind a company*

The Directive also provides general rules for the validity of obligations entered into by the promoters of a company, its of-

---

213. *Id.* art. 2(1)(e).

214. *Id.* art. 2(1)(f).

215. *Id.* art. 2(1)(g). Note that such a change would ordinarily involve a change in the law applicable to the internal affairs of the company.

216. *Id.* art. 2(1)(h).

217. *Id.* art. 2(1)(i).

218. *Id.* art. 2(1)(j). Disclosures in this situation apply "unless such powers are expressly and exclusively derived from law or from the statutes of the company." *Id.*

219. *Id.* art. 2(1)(k).

220. *Id.* art. 3.

221. *Id.* art. 3(1).

222. *Id.* art. 3(4).

223. *Id.* art. 3(5).

224. *Id.* art. 4.

225. *Id.* art. 3(4).

ficers, and its organs.[226] Persons who act on a company's behalf before it has acquired legal personality are made jointly and severally liable for such obligations as the company does not assume, unless the parties otherwise agree.[227] The acts of the organs of a company are binding on it even if those acts are not within the objects of the company, unless the acts exceeded the powers that the law confers or the law allows to be conferred on the organs.[228] However, the laws of the Member States may provide that if the company can prove that the third party knew (or in view of the circumstances could not have been unaware) that the act was outside the objects of company, the company is not bound.[229]

3. *Nullity*

The Directive also limits the grounds for the nullity of companies to the six categories listed in the Directive.[230] Nullity must be ordered by a decision of a court of law.[231]

Company reliance as against third parties on a court's declaring nullity is governed by the same rules as reliance with regard to matters required to be filed or published.[232] Nullity entails the winding up of the company, as may dissolution.[233] Nullity does not per se affect the validity of any commitments entered into by the company or with it, "without prejudice to the consequences of being wound up."[234] The consequences of nullity as among company's members is a matter for the laws of the Member States.[235] Where the company's members have not paid the subscriptions for capital which they had agreed to pay,

---

226. *See generally, id.* § II, at arts. 7-9.

227. *Id.* art. 7.

228. *Id.* art. 9(1). This provision in effect required the Member States to abolish the doctrine of ultra vires. *See* COMPANIES ACT 1989: TEXT AND COMMENTARY 40-137 to 40-140 (G. Morse, M. Bridge, D. Milman, R. Morris & C. Ryan eds. 1990). *See also*, Fox, *European Companies Act and Company Law Ultra Vires Doctrine*, 127 SOLICITORS J. 526 (1983); Milman, *1967-1987, A Transformation in Company Law*, 17 ANGLO-AMERICAN L. REV. 108, 120-21 (1988).

229. *First Company Law Directive, supra* note 209, at art. 9(1).

230. *Id.* art. 11(a)-(f).

231. *Id.* art. 11(1).

232. *Id.* art. 12(1).

233. *Id.* art. 12(2).

234. *Id.* art. 12(3). According to Mayson, French and Ryan, no legislation has been enacted in the U.K. to implement this provision by 1989. S. MAYSON, *supra* note 20, at 660.

235. *First Company Law Directive, supra* note 209, at art. 12(4).

they remain obliged for them to the extent that fulfillment of commitments to creditors require their contributions.[236]

This Directive, as the EC's first effort to harmonize company law, was significant in laying a foundation for future directives. It has now been implemented in all Member States.[237] By requiring the publication of important information about marketable share companies and private limited companies and the establishment of registries in the Member States, minimum standards of disclosure for companies throughout the EC were created. The Directives that followed have repeatedly employed these provisions on publication and registration for the benefit of their own purposes. Also significant in the First Company Law Directive is the restriction on the application of the doctrine of ultra vires. Although the Member States are not required to have provisions for declaring a company to be null, the limitation of the circumstances under which a company can be declared null provides greater certainty in transactions of a multinational character within the EC.

C. *The Second Company Law Directive: Capital Structures*

The Second Company Law Directive of 1976[238] provides common standards and procedures for the raising, maintenance, and alteration of the capital of marketable share companies.[239] The Directive enunciates the general principle that for the purposes of the Directive's implementation, "the laws of the Member States shall ensure equal treatment to all shareholders who are in the same position."[240] From this principle, the Directive

---

236. *Id.* art. 12(5).

237. All twelve Member States have implemented the directive in their national laws. *Commission of the European Communities, Implementation of Company Law Directives in the Member States*, Doc. No. XV-B-2, 1-2 [hereinafter *Implementation*].

As of December 31, 1989, there were no court cases challenging the compliance of the Member States in incorporating the directive into Member State law or in applying the directive. *See Seventh Annual Report to the European Parliament on Commission Monitoring of the Application of Community Law*, 33 O.J. EUR. COMM. (No. C 323) 82, at 112 (1990) (absence of listing for directive in Annex B, *Infringement of Directives*) [hereinafter *Seventh Annual report*].

238. *Second Council Directive on the Formation of Public Limited Companies and the Maintenance and Alteration of their Capital*, 20 O.J. EUR. COMM. (No. L 26) 1 (1977) [hereinafter *Second Company Law Directive*].

239. The directive applies to the first category of companies, known generally as marketable share companies, as listed in *supra* note 30. *Second Company Law Directive*, *supra* note 238, at art. 1.

240. *Second Company Law Directive*, *supra* note 238, at art. 42.

proceeds to enact a system of rules on the capital structures of companies.

The Directive requires the statutes or instruments of incorporation to provide at least the company's type and name, the company's objects, either the subscribed capital or the authorized capital, the rules for determining the number of company representatives and the procedure for appointing them, information about company governance (administration, management, supervision, and control and allocation of powers among the bodies of the company), and the duration of the company's existence.[241]

Where the Member States through their laws prescribe that a company may not commence business without authorization, they must also provide for the responsibility for liabilities incurred on the company's behalf before authorization is granted or refused.[242]

The Directive provides that either the company's "statutes or the instrument of incorporation"[243] must provide extensive information about the company's capital structure so that any interested person may "acquaint himself with the basic particulars of the company, including the exact composition of its capital."[244] The Directive requires Member States to set minimum capital by law at 25,000 European Currency Units (ECUs).[245] Shares may not be issued at a price lower than their nominal value, or where there is no nominal value, their accountable par.[246] Not less than one-fourth (twenty-five percent) of the shares' nominal value (or in the absence of nominal value, their

---

241. *Id.* art. 2.

242. *Id.* art. 4(1).

243. *See supra* text accompanying notes 41-61.

244. Preamble, *Second Company Law Directive*, *supra* note 238.

245. *Id.* art. 6(1). This requirement was implemented in the U.K. by section 118 of the Company Act of 1985. S. MAYSON, *supra* note 20, at 21-22. The European Currency Unit is a unit of accounting consisting of the weighted basket of the currencies of the Member states, as calculated daily, and is developing toward serving as a parallel currency within the EC. *See* P. KAPTEYN & P. VERLOREN VAN TEHMAAT, *supra* note 1, at 210-11, 616. The European Currency Unit is also commonly known as the ECU, which is also the name of a 15th century French coin. *See* W. SHAKESPEARE, HENRY V, Act 4, Sc. 4, line 42.

246. *Second Company Law Directive*, *supra* note 238, at art. 8(1). Member States may allow underwriters ("those who undertake to place shares in the exercise of their profession") to pay less than the total price of the shares for which they subscribe in the course of this transaction. *Id.* art. 8(2).

accountable par) issued for a consideration must be paid up at the time the firm is incorporated.[247]

Where the consideration for shares includes property other than cash, the report of a committee of experts must be prepared containing a description of the assets constituting the consideration, the methods of evaluation, and whether the values determined as a result of these methods correspond to the number and nominal value (or where there is no nominal value, to the accountable par) of the share issued.[248] Shareholders may not be relieved of their obligations to pay contributions of subscribed capital, unless there is a reduction of subscribed capital.[249] These same safeguards are to be applied to the conversion of a company into a public limited company.[250] The Directive also provides for the reduction of stated capital and the payment of interim dividends.[251]

Generally, the company itself may not subscribe for its shares.[252] However, subject to certain conditions, the laws of the Member States may permit a company to acquire its own shares.[253]

The Member States are required to apply the restrictions on a company's acquisition of its own shares to eight classes of transactions.[254] Where the laws of the Member State permit the acquisition of such shares, the laws must make the holding of such shares subject to the condition that the right to vote such shares shall be suspended, and if the shares are included in a balance sheet as assets, they must also be included as liabilities.[255] A company may not advance funds or make loans, or provide security for the acquisitions of its shares by a third party.[256] Any increase in capital must be decided by a general meeting and the decision and the increase in capital must be published in accordance with the provisions of the First Company Law Di-

247. *Id.* art. 9(1).

248. The committee's report is required to be published in the manner provided for in article 3 of the First Company Law Directive. *See First Company Law Directive*, *supra* note 209, at art. 3.

249. *Second Company Law Directive*, *supra* note 238, at art. 12.

250. *Id.* art. 13.

251. *Id.* art. 15.

252. *Id.* art. 18.

253. *Id.* art. 19.

254. *Id.* art. 20.

255. *Id.* art. 22(1).

256. *Id.* art. 23.

rective.[257] Where there are several classes of shares, increases must be made subject to votes of each class of shares.[258] These provisions apply to the issue of all securities which are convertible into shares or which carry the right to subscribe for shares, but not to the conversion of the shares nor to exercise of the right to subscribe.[259] Shares issued for a consideration in the course of an increase in capital must be paid up to the level of at least twenty-five percent of their nominal value, and where provision is made for an issue premium, it must be paid in full.[260]

The Directive includes provisions establishing preemptive rights for shareholders. As a general rule, whenever the capital is increased for a consideration in cash, the shares must be offered to the shareholders on a preemptive basis in proportion to the capital represented by their shares.[261]

Offers of subscriptions on a preemptive basis must be published in the national gazette, unless the Member State in its laws provides that the company may instead provide for notice in writing to all shareholders if all the shareholders are registered.[262] Although the preemptive right may not be restricted or withdrawn by the statutes or the instruments of incorporation, it may be by action of the general meeting.[263] However, the administrative or management body is required to present to such a meeting a written report indicating the reasons for the withdrawal of the right, and justification of the proposed issue price.[264] The decisions must be made in accordance with rules requiring a quorum and published in the manner required by article 3 of the First Company Law Directive.[265] Moreover, the laws of member states may provide that the statutes, the instruments of incorporation, or the general meeting may give the power to restrict or withdraw the preemption right to the company body which is empowered to decide on an increase in the subscribed capital, so long as the power is not extended for a period longer than that during which an increase in capital may

257. *Id.* art. 25(1).
258. *Id.* art. 25(3).
259. *Id.* art. 25(4).
260. *Id.* art. 26.
261. *Id.* art. 29(1).
262. *Id.* art. 29(3).
263. *Id.* art. 29(4).
264. *Id.*
265. *Id.*

be authorized.[266] These provisions on preemptive rights apply to the issuance of all securities which are convertible into shares or carry the right to subscribe to shares, but not to the conversion of such securities or to the exercise of the right to subscribe.[267]

The laws of the Member States must provide that certain specified decisions[268] must be taken by two-thirds of the votes attaching to the securities or the subscribed capital represented.[269] However, the laws may authorize a simple majority when at least one-half the subscribed capital is represented.[270]

The Directive also contains provisions on the reduction of share capital.[271] No reduction of capital can be made unless it is subject to the decision of a general meeting after notice.[272] Where there are several classes of shares, the decisions to reduce capital must be subject to a separate vote of each class, at least with respect to those classes whose rights are affected.[273]

Creditors whose claims antedate the publication of the decision to reduce capital must, under the laws of the Member States, be entitled to receive security for claims which had not fallen due by the publication date.[274] The laws of the Member States must also stipulate that no payment can be made to shareholders, or that the reduction shall be made void until the creditors have obtained the satisfaction of their claims, or a court has decided that their application should not be acceded to.[275]

The laws of the Member States may provide for the redemption of all or part of the subscribed capital, under limited

266. *Id.* art. 29(5).

267. *Id.* art. 29(6).

268. These decisions are the restriction or withdrawal of the right of preemption, *see id.* art. 29(4); the giving of this power to the company body that is empowered to act on an increase in capital, *see id.* art. 29(5); the decision to reduce subscribed capital, *see id.* art. 30; the decisions required from separate classes of shareholders on the reduction of capital, *see id.* art. 31; the decision required for a partial redemption of shares without a reduction in subscribed capital which must be made by the general meeting when the statutes or instruments of incorporation do not provide for such partial redemption of capital, *see id.* art. 35; and the decisions required from separate classes on partial redemption of shares, *see id.* art. 38. *Id.* art. 40.

269. *Id.* art. 40(1).

270. *Id.* art. 40(2).

271. *Id.* art. 30-40.

272. *Id.* art. 30.

273. *Id.* art. 31.

274. *Id.* art. 3(1).

275. *Id.* art. 32(2).

conditions, without reducing the subscribed capital.[276] In addition, the laws of the Member States need not authorize company's to issue redeemable shares,[277] but if they do, the redemption must be made subject to a series of conditions.[278] The redemption must be authorized by the company's instruments or statutes before subscription of the redeemable shares.[279] The shares must be fully paid up.[280] Redemptions can only be made from sums available for distribution in accordance with the provisions on reduction of stated capital[281] or from the proceeds of a newer issue.[282]

The Second Company Law Directive is significant for advancing the harmonization of company law in the EC.[283] The rules in this Directive on capital structures evince the purpose of providing protections for shareholders, creditors, and others. From another perspective, the protections afforded are not so significant as the assurance that uniformity provides to individuals that they can rely on assumptions and expectations as a basis for their actions. The harmonization of rules reduces barriers to doing business across borders, while protection is maintained for shareholders' and creditors' interests.

D. *The Third Company Law Directive: Mergers*

The Third Company Law Directive[284] introduces into the legal systems of all Member States the fundamental corporate change of merger. Before the adoption of the Third Council Directive on Company Law in 1978, the laws of the Member States did not always provide a means for merger,[285] even between two

---

276. *Id.* art. 35.

277. This provision is included primarily to accommodate the needs of unit trusts (in British terms) or mutual funds.

278. *Second Company Law Directive*, *supra* note 238, at art. 39.

279. *Id.* art. 39(a).

280. *Id.* art. 39(b).

281. *Id.* art. 39(d). *See supra* text accompanying note 245 (referring to article 15).

282. *Second Company Law Directive*, *supra* note 234, at 39(d).

283. Evidently all Member States have now implemented the Second Company Law Directive, although an action was pending against Belgium for improper implementation. *Seventh Annual Report to the European Parliament on Commission Monitoring of the Application of Community law*, 33 O.J. EUR. COMM. (C 232) 1, 18, 113 (1990) [hereinafter *Seventh Application Report*].

284. *Third Council Directive Concerning the Merger of Public Limited Liability Companies*, 21 O.J. EUR. COMM. (L 295) 36 (1978) [hereinafter *Third Company Law Directive*].

285. The following definitions from American law may be useful for comparison:

companies organized under the laws of a single Member State.[286] Mergers between companies organized under the laws of different Member States were impossible.[287] Therefore, the Council agreed to adopt a directive requiring that the Member States' laws on incorporated business associations include procedures for mergers.

The Third Council Directive requires the laws of the Member States to make provisions for rules governing mergers "by the acquisition of one or more companies by another" and mergers "by the formation of a new company."[288]

Merger by acquisition is defined[289] to mean "the operation

"Merger is an amalgamation of two (or more) corporations pursuant to statutory provision in which one of the corporations survives and the other [all but one] disappears." R. HAMILTON, LAW OF CORPORATIONS 462 (1987). "Consolidation is an amalgamation of two corporations pursuant to statutory provision in which both of the corporations disappear and a new corporation is formed." *Id.* at 449.

"Fusion" has been used by writers on European law to include European procedures equivalent to mergers under American law but somewhat more broadly. *Compare* A. CONARD, *supra* note 23, at 215 *with* E. STEIN, HARMONIZATION OF EUROPEAN COMPANY LAWS: NATIONAL REFORM AND TRANSNATIONAL COORDINATION 370 (1987).

286. As of early 1966, of the six countries then members of the European Community, only two, the Federal Republic of Germany and Italy, had specific statutory provisions for mergers. In the Benelux countries (Belgium, Netherlands, and Luxembourg) and France, "fusion" had to be accomplished through "an exchange of stock for stock or stock for assets" comparable to "B" and "C" reorganizations under the Internal Revenue Code, and without the automatic transfer of assets and liabilities and dissolution of absorbed companies associated with the American statutory merger. Conard, *Corporate Fusion in the Common Market*, 14 AM. J. COMP. L. 573, 584-85 (1966).

France adopted statutory provisions for fusion in 1966. E. STEIN, *supra* note 285, at 374 n.146, 375.

Of the Benelux countries, in the Netherlands the law did not provide for fusion, while in Belgium and Luxembourg, the procedure developed from case law, and some authorities, but not others, were willing to attribute to it a general assignment of assets, no general transfer of liabilities was feasible. *Id.* at 374, 376.

Additionally, there was a lack of uniformity among the procedures in the various countries where statutory merger was available. In Germany, the accumulated reserves of the companies became subject to an income tax liability. In France and Belgium, the absorbed company continued its existence within the structure of the acquiring company and remained liable for its debts until they were paid, while the other member states regarded the merger as a complete fusion. Berger, *supra* note 208, at 225. *See* Mailaender, *Mergers and Acquisitions in the Common Market: Problems under Corporate, Tax, and Antitrust*, 1 N.Y.U. J. INT'L. L. & POL. 19, 22-25 (1968).

287. As of 1971, the mergers of companies with their headquarters located in more than one member state of the European Community was legally impossible without the dissolution of both companies and their recreation in one country. This problem was attributed at least in part to the *siege social* rule. Berger, *supra* note 208, at 224.

288. *Third Company Directive*, *supra* note 284, at art. 2.

289. *Id.* art. 3.

whereby one or more companies are wound up[290] without going into liquidation," which includes "transfer to another all their assets and liabilities in exchange for the issue to the shareholders" of the absorbed company[291] or companies of shares in the acquiring company. This definition makes the merger by acquisition under the Third Directive the general equivalent of a "statutory merger" in American law, or Class A Reorganization under the Internal Revenue Code.[292]

The nature of a merger under the Directive can best be approached from the Directive's statement of its effects. A merger is said to have three "consequences *ipso jure* and simultaneously:"

(1) the company being merged into another ceases to exist;
(2) all the assets and liabilities of the disappearing company are transferred to the surviving company;
(3) the shareholders of the disappearing company become shareholders of the surviving company.[293]

The distinction between a merger and other forms of corporate reorganization is that a merger permits the dissolution of one or more constituent companies as a direct, necessary, and included consequence of its combination into another company.[294] This definition points to one of the advantages of a statutory merger procedure, that it transfers ownership of assets (and liabilities) without the necessity of creating as many documents as there are assets.[295] A further advantage is that property and rights otherwise unassignable may be transferred.[296]

Although the Directive necessarily leaves many of the details of the merger provisions to specification by legislative enactment in the Member States, it provides certain minimum requirements for the merger laws. The "administrative or management bodies" of the merging companies are required to

290. A definition of "winding up" as the term is used in the United Kingdom is "a formal process for distributing a company's property to its creditors and members so that the company may be dissolved." S. MAYSON, *supra* note 20, at 549. The term "liquidation" is used in the United States. *See* H. HENN & J. ALEXANDER, *supra* note 17, at 1148.

291. The language of the Directive is the "company or companies being acquired." *Third Company Directive*, *supra* note 284, at art. 3.

292. *See* R. HAMILTON, *supra* note 285, at 426.

293. *Third Company Directive*, *supra* note 284, at art. 19.

294. REVISED MODEL BUSINESS CORPORATION ACT § 11.06 (1989).

295. *See* A. CONARD, *supra* note 23, at 217-18; Conard, *supra* note 286, at 586.

296. A. CONARD, *supra* note 23, at 217-18.

formulate draft terms of merger,[297] including (1) the type, name, and registered office of each of the merging companies; (2) the share exchange ratio; (3) the terms of share allotment in the acquiring company; (4) any special rights to be conferred on shareholders; and (5) any special advantages to be conferred on experts or company officials.[298] Draft terms of a merger must be published.[299]

The merger can proceed only if it is approved at the general meeting of each of the merging companies.[300] The approval of at least two-thirds of the votes attaching to the shares or to the subscribed capital represented is required.[301] Where there is more than one class of shares, the decision requires a separate vote of each class.[302]

The administrative or managerial bodies of the merging companies are required to prepare a detailed written report explaining the terms of merger and the merger's legal and economic basis.[303] Independent experts are to review the terms of the merger and prepare a written report on them, including a statement as to whether the terms are fair and reasonable.[304]

The laws of the Member States must provide requirements for an adequate system for the protection of the interests of creditors.[305] While the system is required to provide "adequate safeguards," the protection may be different for creditors of the disappearing and surviving companies.[306] These protections are

297. *Third Company Directive*, *supra* note 284, at art. 5(1).

298. *Id.* art. 5(2).

299. *Id.* art. 6.

300. *Id.* art. 7(1). For the requirements as to shareholder consent in EC countries before the Third Directive, see Conard, *supra* note 286, at 587-589 and E. STEIN, *supra* note 285, at 375.

301. *Third Company Directive*, *supra* note 284, at 7(1).

302. *Id.* art. 7(2).

303. *Id.* art. 9. In contrast, U.S. laws do not require a written report evaluating the merger or the report of independent experts for every merger. *See* MODEL BUSINESS CORPORATION ACT §§ 11.01-03 (1989); DEL. GEN. CORP. L. §§ 252(a)-(c) (1989); H. HENN & J. ALEXANDER, *supra* note 17, at 980-89. For those in disagreement with a merger, a dissenters' appraisal remedy is provided. MODEL BUSINESS CORPORATION ACT § 13.03 (1989); DEL. GEN. CORP. L. § 262 (1989); H. HENN & J. ALEXANDER, *supra* note 17, at 997-1010.

304. *Id.* art. 10(2). Auditor's reports were required in the laws of Belgium and France as of 1966. Conard, *supra* note 286, at 589.

305. *Third Company Directive*, *supra* note 284, at art. 13. Before the adoption of the directive, Conard observed that the rights of creditors "encumber fusion to a degree unknown in the United States." It is also clear that the protections for creditors were quite varied. *See* Conard, *supra* note 286, at 591-592.

306. *Third Company Directive*, *supra* note 284, at art. 13(3).

also extended to the holders of debentures.[307] Holders of securities other than shares must be given rights in the surviving company at least equal to their rights in the disappearing company, unless they have consented to the alteration of their rights.[308]

Either the Member States must judicially or administratively supervise the merger process, or the minutes of the merger meetings or the merger contract must be written and certified in due legal form.[309] Conduct on the part of the members of the administrative or management bodies in preparing and implementing a merger is to be regulated by laws passed by the Member States. The members of the administrative or management bodies may be held liable to the shareholders of the company being absorbed in the merger.[310] The Directive allows mergers to be declared null only under several specified conditions.[311] Nullity must be ordered in a court judgment.[312]

"Merger by formation of a new company" is defined[313] to mean "the operation whereby several companies are wound up without going into liquidation" and involves the "transfer to a company that they have set up all their assets and liabilities in exchange for the issue to their shareholders" of shares in the new company.[314] This definition makes the merger by formation of a new company under the Third Directive the general equivalent of a "consolidation" in American law.[315] Essentially the same rules apply to the merger by formation of a new company as a merger by acquisition.[316] The draft terms of merger must include the type, name, and registered office of the new company.[317] Each of the companies that will cease to exist must approve at a general meeting the draft terms of merger, and if

---

307. *Id.* art. 14.

308. *Id.* art. 15.

309. *Id.* art. 16(1).

310. *Id.* art. 20.

311. *Id.* art. 22(1).

312. *Id.* art. 22(1)(a).

313. *Id.* art. 4.

314. *Id.* art. 4(1).

315. Generally, under American law the differences between merger and consolidation are not considered significant. Like the statutory merger, consolidation is classified as a Class A reorganization under the Internal Revenue Code. R. HAMILTON, *supra* note 285, at 425-26.

316. *Third Company Directive*, *supra* note 284, at art. 23.

317. *Id.* art. 23(2). *See also id.* art. 5(2)(a).

they are contained in a separate document, the memorandum or draft articles of association of the new company.[318]

When one company already owns all of the shares of another, the laws of the Member States must permit it to complete the merger under special rules relaxing the conditions applicable to mergers by acquisition.[319] When one company already owns more than ninety percent of the shares of another, the Member States are not required to apply all the rules in the provisions on merger by acquisition.[320]

Enactment of this Directive in 1978 resulted in a greater approximation of the laws of the nine Member States relating to mergers,[321] and the Directive was part of the *acquis communautaire* accepted by the three additional Member States when they joined the Community in the 1980's. It also serves as the foundation of the proposal for a Tenth Company Law Directive on transnational mergers included in the program for the completion of the internal market.

Although the purpose of the Third and Tenth Company Law Directives are to facilitate mergers, those same mergers may be restricted by the laws on competition in the Community based on Articles 85 and 86 of the Treaty of Rome.[322] In addition, mergers are also affected by tax considerations, long a matter of concern within the Community and also the subject of proposals within the single market program.

Because one of the concerns of company law is the need for companies large enough to compete with North American and East Asian corporations, it is possible to contend that the facilitation of mergers is one of the most important developments in the company law within the EC. Even so, the Third Company Law Directive does not make mergers as easy as in the United States. Standards of protection for shareholders and creditors are higher, and mergers may be somewhat more difficult or

---

318. *Id.* art. 23(3).

319. *See generally id.* art. 24-26.

320. *See generally id.* art. 27-29.

321. Belgium and Italy had not reported laws or decrees implementing the Third Directive as of May 1990. *Implementation, supra* note 237, at 5-6. All other Member States had implemented the directive. *See Seventh Annual Report, supra* note 237, at 18, 114.

322. Perhaps the length of treatment of competition policy in two leading texts may be indicative of the relatively substantial development of competition law in the EC's *acquis communautaire. See* P. KAPTEYN & P. VERLOREN VAN THEMAAT, *supra* note 1, at 467-586; D. WYATT & A. DASHWOOD, *supra* note 1, at 341-474.

costly. In addition, although the Member States can provide alternate procedures, the Directive retains judicial supervision of mergers, seemingly as the Community norm.

Although the Directive represents progress toward more uniformity, at the same time it retains the protective characteristics of European company law. This feature persisted in its statutory progeny: the Sixth Company Law Directive on Division, the proposal for a Tenth Company Law Directive on Cross-Border Mergers, and the merger provisions of the European Company Statute.

E. The Sixth Company Law Directive: Division of Marketable Share Companies

The Sixth Company Law Directive[323] applies to the same category of legal persons as the Third Company Law Directive on mergers within a single Member State, that is, to marketable share companies.[324] Paralleling the pattern of the Third Company Law Directive, it distinguishes between "division by acquisition" and "division by the formation of new companies".[325] Implicitly, the Directive does not require the Member States to authorize either form of division or a combination of the two, but where any form is authorized, it must be governed by the appropriate provisions of the Directive.[326]

"Division by acquisition" is defined to mean the operation through which a company transfers all its assets and liabilities to two or more other companies in exchange for shares in the recipient companies[327] to be distributed to its shareholders after winding up but without going into liquidation.[328] "Division by the formation of new companies" is defined to mean the operation through which a company transfers to newly formed companies all its assets and liabilities in exchange for the allocation of

---

323. *Sixth Council Directive Concerning the Division of Public Limited Liability Companies*, 25 O.J. EUR. COMM. (No. L 378) 47 (1982) [hereinafter *Sixth Company Law Directive*].

324. *Id.* art. 1, paras. (1)-(3).

325. *See id.* art. 1(1)-(2), 2, 21.

326. *Id.* art. 1. In fact, scissions are not permitted in Germany, Denmark, and the Netherlands. *Implementation*, *supra* note 237, at 10.

327. "Recipient companies" are effectively defined as "companies receiving contributions as a result of the divisions," with contributions meaning distributions of assets and liabilities, within the definition of division by acquisition. *Sixth Company Law Directive*, *supra* note 323, at art. 2(1).

328. *Id.* art. 2(1).

shares in the recipient companies to the shareholders of the divided company. In either case, a cash payment of not more than ten percent of the nominal value or, where the shares have no nominal value, of the accounting par value of the shares allocated may constitute part of the compensation to the shareholders.[329]

Although the Directive necessarily leaves many of the details of the division provisions to specification by legislative enactment in the Member States, it provides certain minimum requirements for the Member States' laws on division. The "administrative or management bodies" of the dividing companies are required to formulate draft terms of division.[330] The terms must also contain the precise description and allocation of the assets and liabilities to be transferred to the recipient companies,[331] the allocation to the shareholders of the company being divided, and the criteria upon which such allocation is based.[332]

The division can proceed only if it is approved at the general meeting of each company involved in the division.[333] The terms of the Third Company Law Directive are incorporated by reference into the Sixth Directive. These terms specify the majority required for each decision, the scope of the decisions, and the need for separate votes. The Sixth Directive requires, as a prerequisite to the division of a company, the approval of at least two-thirds of the votes attaching to the shares or to the subscribed capital represented.[334]

The laws of the Member States may provide that if the shares in the recipient companies are being allocated to the shareholders of the divided company in a manner not proportionate to their rights in the capital of the company, the minority shareholders of that company may exercise a right to have their shares purchased.[335] Under certain conditions, the necessity of the approval of a division by the general meeting of a recipient company is dispensed with.[336] The administrative or managerial bodies of the dividing companies are required to pre-

329. *Id.* arts. 2(1), 21(1).
330. *Id.* art. 3(1).
331. *Id.* art. 3(h).
332. *Id.* art. 3(i).
333. *Id.* art. 5(1).
334. *Id.* art. 5(1).
335. *Id.* art. 5(2).
336. *Sixth Company Law Directive*, *supra* note 323, at art. 6.

pare a detailed written report explaining the terms of division and the division's legal and economic basis, particularly the share exchange ratio and the criteria regarding the allocation of shares.[337] Independent experts are also appointed for each of the companies. They are to review the terms of division and prepare a written report on those terms,[338] including a statement as to whether the share exchange ratios are fair and reasonable.[339]

The laws of the Member States must require an adequate system to protect the creditors' interests.[340] The system must provide "adequate safeguards" for the interest of those creditors of the companies involved in the division whose claims antedate publication of the draft terms of division and have not fallen due at the time of such publication. In particular, "adequate safeguards" are required to protect creditors when the financial situation of the company being divided and that of the company to which the obligation will be transferred in accordance with the draft terms of division make such protection necessary.[341] To the extent that a creditor of a company to which the obligation has been transferred has not obtained satisfaction, all recipient companies must be jointly and severally liable for that obligation.[342] The liability to such creditors may be limited by the Member States to the net assets allocated to each of the companies other than the one to which the obligation has been transferred.[343] The protection may be different for creditors of the divided and surviving companies.[344] These protections are also extended to the holders of debentures, except where the division has been approved in a meeting of the debenture holders, if such a meeting is authorized under national laws, or by the debenture holders individually.[345] The Member States may provide that the recipient companies are jointly and severally liable for the obligations of the companies being divided, and in this case, the foregoing provisions on liability need not apply.[346]

337. *Id.* art. 7(1).
338. *Id.* art. 8(1).
339. *Id.* art. 8(2).
340. *Id.* art. 12(1).
341. *Id.* art. 12(2).
342. *Id.* art. 12(4).
343. *Id.* art. 12(3).
344. *Id.* art. 12(4), incorporating article 13(3) of the *Third Company Law Directive*, *supra* note 284.
345. *Sixth Company Law Directive*, *supra* note 323, at art. 12(5).
346. *Id.* art. 12(6).

A number of miscellaneous provisions are worth note. The Directive prohibits two classes of exchanges when the result of the exchange would transfer shares in recipient companies for shares in the divided company.[347] The conduct of the administrative or management bodies in preparing and implementing a division is to be regulated by laws passed by the Member States providing rules for civil liability to the shareholders of the company being divided.[348] The Directive restricts the rules under which division may be declared null to several specified conditions.[349] Nullity must be ordered in a court judgment.[350] Finally, when the recipient companies already own all of the shares of the company being divided and all other securities conferring the right to vote at general meetings, the laws of the Member States must permit it to complete the division under special rules relaxing the conditions applicable to division by acquisition.[351]

For the most part, division by the formation of new companies operates under this same framework of rules.[352] The draft terms of division must include the type, name, and registered office of each new company.[353] The company to be divided must approve at a general meeting the draft terms of division, and, if they are contained in a separate document, the memorandum or draft articles of association of each of the new companies.[354] Special provisions may be used in the Member States in which division operations are subject to the supervision of judicial authorities.[355]

Several tendencies in the law of the EC, particularly in its company law, are evident in this Directive. First, the Directive provides some harmonization of Member State laws, but it does not require full uniformity. Unlike the Third Company Law Directive on mergers of companies within a single Member State, the Sixth Directive does not even require the Member States to include provisions for the procedure it regulates within their le-

---

347. *Id.* art. 17(2).
348. *Id.* art. 18.
349. *Id.* art. 19(1).
350. *Sixth Company Law Directive*, *supra* note 323, at art. 19(1)(a).
351. *See generally id.* art. 20.
352. *See id.* art. 22(1).
353. *Id.* art. 22(2).
354. *Id.* art. 22(3).
355. *See generally Sixth Company Law Directive*, *supra* note 323, at art. 23.

gal systems.[356] In many areas, the Directive allows the Member States to make choices as to various arrangements, for example, on limiting the liability of the recipient companies to the amount of the assets they have received,[357] allowing the companies to dispense with reports,[358] the effective date of divisions,[359] and other matters. Yet the Directive provides for enough uniformity that an EC businessperson could look to transactions involving divisions in the other Member States with a fairly substantial idea of what to expect.

Second, the Directive illustrates the general preference of EC law formulators for parallelism. In many respects, the Directive on divisions adapts, *mutatis mutandis*, the provisions of the Directive on mergers. While this tendency is most obvious with respect to the definitions of mergers and divisions,[360] it emerges in other areas such as the contents of the plans for mergers and divisions.[361] This characteristic also tends to make the law more approachable and understandable and enables the business community to formulate expectations.

F. *The Fourth Company Law Directive: Annual Accounts*

The Fourth Company Law Directive on Annual Accounts[362] addresses the problem of providing guidelines for the uniformity of the accounts of marketable share companies and private limited companies. Before the adoption of the Fourth and Seventh Directives, accounting practices and the level of their regulation varied significantly among the Member States of the EC.[363] The

---

356. *See Implementation, supra* note 237, at 10. By 1990, all Member States except Belgium and Italy had implemented the Sixth Directive, and suits to require implementation were pending against Italy and Belgium. *See Seventh Application Report, supra* note 237, at 18, 115.

357. *See Sixth Company Law Directive, supra* note 323, at art. 3(3)(b).

358. *See id.* art. 10.

359. *See id.* art. 15.

360. *Compare id.* art. 17 *with Third Company Law Directive, supra* note 284, at art. 19(1).

361. *Compare Sixth Company Law Directive, supra* note 323, at art. 3(2), *with Third Company Law Directive, supra* note 284, at art. 5(2).

362. *Fourth Council Directive on Company Accounts*, 21 O.J. EUR. COMM. (No. L 222) 11 (1978) [hereinafter *Fourth Company Law Directive*]. For explanation and commentary, see Van Hulle, *The EEC Accounting Directives in Perspective: Problems of Harmonization*, 12 COMMON MKT. L. REV. 121-130 (1981); Van Hulle, *Accounting and financial reporting in the European Community: Quo Vadis?* 1989 DER SCHWEITZER TREUHAENDER 519.

363. For explanation and commentary, see Van Hulle, *Accounting Directives in Perspective, supra* note 362, at 130-135; Van Hulle, *Quo Vadis, supra* note 362, at 519.

Directive sets forth general principles for the accounts. The accounts are to comprise the balance sheets, the profit and loss account, and the notes to the accounts as a composite whole.[364] The annual accounts are to give "a true and fair view" of the company's assets, liabilities, financial position, and profit or loss.[365] The Directive provides valuation rules based on the historical cost principle.[366] The Member States are permitted to add to the information requirements provided by the Directive.[367] The Directive delineates two alternative layouts for an enterprise's balance sheets, showing the headings and items to be included in each alternative.[368] Similarly, the Directive offers four alternatives for the profit and loss statement and delineates the items that must be included, as well as the format, for each.[369] The Member State must prescribe one or more of the layouts, and if it chooses to prescribe more than one, it may allow the companies to make the choice. With respect to both the balance sheets and the profit and loss statements, companies that fall below specified size criteria are exempted from including all the details required in the layouts.[370]

The Directive also contains provisions defining items in the profit and loss account, such as net turnover,[371] extraordinary income,[372] and treatment of taxes.[373] The Directive provides elaborate guidelines for valuation rules[374] and notes to the accounts.[375] The existence of company branches must be disclosed.[376] The company's annual report must contain "at least a fair review of the development of the company's business and its position [and] give an indication of . . . any important events that have occurred since the end of the fiscal year."[377] The an-

---

364. *Fourth Company Law Directive*, *supra* note 362, at art. 2.

365. *Id.* art. 2(3).

366. Van Hulle, *Quo Vadis*, *supra* note 362, at 520.

367. *Fourth Company Law Directive*, *supra* note 362, at art. 2(6).

368. *Id.* art. 9-10.

369. *Id.* art. 23-26.

370. *Id.* art. 11, 27.

371. *Id.* art. 28.

372. *Id.* art. 29.

373. *Id.* art. 30.

374. *Fourth Company Law Directive*, *supra* note 362, at arts. 31-42.

375. *Id.* arts. 43-45. The Fourth Directive provides that, where items in the accounts were originally expressed in a foreign currency, the notes must disclose the basis for the conversation to the local currency. *Id.* art. 43(1)(1).

376. *Id.* art. 46(2)(e).

377. *Id.* art. 46(1).

nual report must also contain the company's probable future development, and certain information concerning the company's acquisition of its own shares.[378]

The Directive also requires the establishment of a Contact Committee under the auspices of the Commission to facilitate the harmonized application of the Directive and to advise the Commission of additions or amendments to the Directive.[379] The Directive also contains a series of provisions addressing the problems of consolidated accounts for the period prior to the adoption of the proposal for a directive on the consolidated accounts of affiliated companies.[380] The Fourth Directive puts in place the foundation for the Seventh Company Law Directive and subsequent proposals.[381]

G. *The Seventh Company Law Directive: Consolidated Accounts*

The Seventh Company Law Directive on Consolidated Accounts[382] adapts the principles and rules of the Fourth Company Law Directive to the circumstances presented by groups of companies affiliated with each other in an enterprise. As originally proposed in 1976, the Seventh Directive was greatly influenced by the well developed set of rules on the accounts of groups of companies contained in the German statute on marketable share companies.[383]

In general, the Directive applies only to affiliations of companies where either the parent or one or more of the subsidiary companies is established as a public or private limited company.[384] A Member State must require any enterprise governed

---

378. *Id.* art. 46(2).

379. *Id.* art. 52.

380. *Id.* art. 56-58, 61.

381. All Member States had implemented the Fourth Company Law Directive by 1990, except that Italy had not implemented it with respect to certain types of companies, and consequently a suit was pending against Italy. *Seventh Application Report*, *supra* note 283, at 18, 113.

382. *Seventh Council Directive on Consolidated Accounts*, 26 O.J. EUR. COMM. (No. L 193) 1 (1983) [hereinafter *Seventh Company Law Directive*]. For a general review of this directive, see Comment, *The EEC Council Seventh Directive on Consolidated Accounts*, 37 INT'L & COMP. L.Q. 714 (1988); Van Hulle, *EEC Accounting Directives in Perspective*, *supra* note 362, at 130-135; Van Hulle, *Quo Vidas*, *supra* note 362, at 520-521.

383. Comment, *supra* note 382, at 714.

384. *Seventh Company Law Directive*, *supra* note 382, at art. 4(1). A Member State is permitted to grant exemptions from the obligations to report in consolidated form

by its national law to prepare consolidated annual accounts and a consolidated annual report if any of the following four conditions prevail: (1) the parent enterprise has a majority of the shareholders' or members' voting rights in another enterprise; (2) the parent enterprise has the right to appoint or remove a majority of the members of the administrative, management, or supervisory body of another enterprise; (3) the parent has the right to exercise a dominant influence over the enterprise of which it is a shareholder or member under the provisions of a contract, memorandum, or articles of association; or (4) the parent is a shareholder or a member in an enterprise and the majority of the administrative, management, or supervisory body has been appointed solely at the exercise of its voting rights or the parent controls pursuant to agreements a majority of the shareholders' or members' voting rights.[385]

The Directive further permits the Member States to require any enterprise governed by its law to require the use of consolidated accounts where the enterprise (1) holds a "participating interest" as defined in Article 17 of the Fourth Company Law Directive and (2) either actually exercises a dominant interest over the subsidiary or the parent and the subsidiary are managed on a unified basis by the parent enterprise.[386] Grafted onto these general rules is an elaborated system of exceptions and exemptions which the Member States are permitted to make.[387] The Member States are also permitted to add to the class of companies required under their laws to use consolidated accounts.[388]

Comprising the consolidated balance sheet, the consolidated balance and loss account, and the notes on the accounts as a composite whole,[389] the consolidated account is required to give a "true and fair view of the assets, liabilities, financial positions and profit or loss" of the enterprises included within the group as a whole.[390] The provisions of the Fourth Company Law Directive regarding the layout of the balance sheet, the specifications for particular balance sheet items, the layout of the profit and

where the parent is not organized in the legal form specified. *Id.* art. 4(2).

385. *Id.* art. 1(1).

386. *Id.* art. 1(2).

387. *Id.* art. 5-9, 11.

388. *Id.* art. 24.

389. *Seventh Company Law Directive*, *supra* note 382, at art. 16(1).

390. *Id.* art. 16(3).

loss account, and special provisions of the profit and loss account are extended to the layouts of consolidated accounts with allowance for essential adjustments arising from the particular characteristics of consolidated accounts and without prejudice to the provisions of the Seventh Company Law Directive.[391]

There follow many additional rules for the treatment of problems arising from the circumstances of companies affiliated into a group.[392] The consolidated accounts must show the assets, liabilities, financial positions, and profits and losses as if they were those of a single enterprise.[393] These rules build upon the prior company law directives, particularly the First[394] and Fourth Company Law Directives.[395]

One of the great difficulties in doing business across borders within the European Communities has been the lack of uniformity in accounting standards. The Fourth and Seventh Directives were the first attempts by the EC to address this problem. These directives have in some Member States set standards where none previously existed. Now, in all the Member States, accounting standards have been incorporated into legal rules.[396] The implementation of these directives has brought about standards that promote comparable financial data and facilitate cooperation across the borders of the Member States. Moreover, countries outside the EC have passed legislation implementing certain provisions of these accounting directives even though

---

391. *Id.* art. 17.

392. *Id.* art. 19-35.

393. *Id.* art. 26(1).

394. *See id.* art. 35(1)(a).

395. *See, e.g., id., supra* note 382, at arts. 29-30, 33.

396. The Fourth Company Law Directive has been incorporated into the law of all the Member States except Italy. *See Seventh Application Report, supra* note 283, at 113; *Implementation, supra* note 237, at 7-9.

As of May 1990, the Seventh Company Law Directive had been implemented in Belgium, United Kingdom, Spain, France, Greece, Luxembourg, and the Netherlands. In December 1989, actions were pending in the European Court of Justice against Belgium, Denmark, United Kingdom, Italy, Ireland, and Portugal, on the grounds that no implementing measures had been notified, and against Germany on the grounds that the Directive had not been properly incorporated. *See Seventh Application Report, supra* note 283, at 115; *Implementation, supra* note 237, at 11-12.

In the United Kingdom, the Seventh Company Law Directive was implemented by Part I of the Companies Act 1989, which was enacted on November 16, 1989. THE COMPANIES ACT 1989: TEXT AND COMMENTARY, *supra* note 63, at 40-7 to 40-8. *See also* S. MAYSON, *supra* note 20, at 224-225. The Fourth Company Law Directive had been implemented in Schedule 4 to the Companies Act 1985, *see id.* at 215, 247, and was amended by Schedule 1 of the Companies Act 1989. THE COMPANIES ACT 1989: TEXT AND COMMENTARY, *supra* note 63, at 40-266 to 40-269.

they have no obligation to do so.[397] The increasing tendency to do business across borders is necessitating international standards and affording the law of the European Communities an ever greater extraterritorial influence, even without an extraterritorial application.

Proposals in the Single Market Program would extend the application of these directives to partnerships, limited partnerships, and other business associations.[398] These two directives also led to the Eleventh Company Law Directive, which eliminated certain reporting requirements for branches of companies operated in a different Member State.[399] In addition, these directives have created the basis for further proposals[400] on the annual and consolidated accounts of the financial services industry, including banks[401] and insurance companies.[402] In these respects, the Fourth and Seventh Company Law Directives contributed significantly to the foundations of the Single Market Program.

H. *The Eighth Company Law Directive: Qualifications of Auditors*

The Eighth Company Law Directive[403] supplements the Directives on Annual and Consolidated Accounts by prescribing general guidelines for the qualifications of persons authorized to perform audits required by Community law. Only persons approved under the laws, regulations, and administrative provisions[404] of the Member States within the confines of the Directive may carry out[405] either the statutory audits of the annual

---

397. Van Hulle, *Quo Vidas*, *supra* note 362, at 521-22.

398. *See infra* note 535 and accompanying text (discussion of proposal on Annual and Consolidated Accounts).

399. *See infra* notes 518-34 and accompanying text (discussion of Eleventh Company Law Directive).

400. *See* Van Hulle, *Quo Vidas*, *supra* note 362, at 521.

401. *Directive on the Annual Accounts and Consolidated Accounts of Banks and Other Financial Institutions*, 29 O.J. EUR. COMM. (No. L 372) 1 (1986).

402. *Proposal for a Directive on the Annual and Consolidated Accounts of Insurance Companies*, 30 O.J. EUR. COMM. (C 313) 1 (1987).

403. *Eighth Council Directive on the Approval of Persons Responsible for Carrying Out the Statutory Audits of Accounting Documents*, 27 O.J. EUR. COMM. (No. L 126) 20 (1984) [hereinafter *Eighth Company Law Directive*].

For explanation and commentary *see* Van Hulle, *Accounting Directives in Perspective*, *supra* note 362, 135-140.

404. *Eighth Company Law Directive*, *supra* note 403, at art. 1(1).

405. *Id.* art. 2(1).

accounts of companies and firms and the verification that the annual reports are consistent with the results of the audits[406] or the consolidated accounts of enterprises comprising more than one business associations and the verification that the consolidated annual reports are consistent with those audits.[407] The Directive creates a series of specific conditions for the approval of persons as qualified to perform such audits.[408] The Directive applies not only to natural persons but also to firms of auditors.[409] The Member States must prescribe that the persons carrying the audits do so with professional integrity[410] and independence[411] and are liable to receive appropriate sanctions for failure to carry out the audits under these standards.[412] This Directive complements the standards set forth in the Fourth and Seventh Directives by specifying the qualifications of the persons who must administer those standards and prepares the way for the related proposals in the Single Market Program.[413]

I. The Twelfth Company Law Directive: Single Member Companies

The Council of the European Communities adopted a directive on single-person private limited companies in late December 1989.[414] Though not a part of the Single Market Program, the new Directive, as have the other company directives, carries forward the purpose of harmonizing company law in the nations of the EC. The Directive applies only to the category of private limited companies.[415] However, the Member States may allow marketable share companies to be owned by a single shareholder, in which case the provisions of the Directive must be applied to them as well.[416]

The principle of the Directive is stated in the following sen-

---

406. *Id.* art. 1(1)(a).

407. *Id.* art. 1(1)(b).

408. *Id.* art. 3-19.

409. *Eighth Company Law Directive*, *supra* note 403, at art. 1(2).

410. *Id.* art. 23.

411. *Id.* art. 24.

412. *Id.* art. 26.

413. The Eighth Company Law Directive had been implemented by all Member States except Ireland, Italy, and the Netherlands, against all of whom infringement suits were pending by 1990. *Seventh Application Report*, *supra* note 283, at 18, 115.

414. *Twelfth Council Directive on Single Member Private Limited Companies*, 32 O.J. EUR. COMM. (L 395) 40 (1989) [hereinafter *Twelfth Company Law Directive*].

415. *Id.* art. 1.

416. *Id.* art. 6.

tence: "A company may have a sole member when it is formed and also when all its shares come to be held by a single person (single-member company)."[417] Implementation of this principle will, of course, require adjustment of the laws of most of the Member States.[418] However, where the Member State has laws that permit an individual entrepreneur to establish an enterprise in a legal form in which liability "is limited to a sum devoted to a stated activity," it need not allow the formation of single member companies, if the safeguards provided for this legal form are equivalent to those provided in the Twelfth Directive and any other provisions from EC law applicable to private limited companies.[419]

When a company becomes a single-member company because all of its shares become owned by a single person (including a single legal person such as another company), those responsible for the company must cause that fact and the identity of the person to be recorded in the file or entered into the register kept under the laws of the Member State pursuant to the provisions of the First Company Law Directive, or those facts must be entered in a register kept by the company and accessible to the public.[420] The sole member of the company will exercise the powers of the general meeting of the company.[421] The decisions taken by the company's sole member in the general meeting must be recorded in the minutes or stated in writing.[422] In addition, contracts between the single shareholder and the company must be recorded in minutes or stated in writing,[423] but the Member States are not required to apply this recording rule to "current operations concluded under normal conditions."[424]

J. *EC Company Law before the Single Market Program*

The EC had already made significant progress in the unifi-

417. *Id.* art. 2(1).

418. The Member States are required by the Directive to implement its provisions by January 1, 1992. *Id.* art. 8(1). They may provide that for companies already in existence, the Directive's provisions will not apply until January 1, 1993. *Id.* art. 8(2).

419. *Twelfth Company Law Directive*, *supra* note 414, at art. 7.

420. *Id.* art. 3.

421. *Id.* art. 4(1).

422. *Id.* art. 4(2).

423. *Id.* art. 5(1).

424. *Twelfth Company Law Directive*, *supra* note 414, at art. 5(2). Implementation of this Directive is due by January 1, 1992. *Id.* art. 8(1).

cation and integration of company law before the advent of the single market program. All of this progress had been made by means of directives providing for the harmonization of diverse national laws. Although ideas that had been circulated for many years—some since the beginning of the Community—had not been enacted, the progress on publication and registration of information, capital structures, mergers, divisions, and accounting standards showed the promise of Community legislation. To build on this foundation, the Commission collected the proposals accumulated over many years into a single program to be enacted by the end of 1992.

III. Company Law in the 1992 Program

A. *The White Paper and its Views on Company Law*

The European Community officially initiated its program for completing the internal market in 1985 when the Commission adopted and the Council approved the White Paper called *Completing the Internal Market*.[425] The White Paper consisted of a general explanation of the approximately 300 measures that were needed to complete the single market, together with a catalogue listing the measures and a schedule for their enactment. Within the more general framework of the goals of removing the physical, technical, and fiscal barriers to the free movement of goods, service, capital, and persons, there were more than two dozen categories of objectives, including the harmonization of company law.[426]

Embracing many diverse topics, the White Paper included the harmonization of company law as an objective that would contribute to the completion of the single market by creating

---

425. White Paper, *supra* note 3. Book length legal discussions of the 1992 program may be found in M. Brealey & C. Quigley, Completing the Internal Market of the European Community (1989); A. Winter, R. Sloan, G. Lehner, & V. Ruiz, Europe Without Frontiers: A Lawyer's Guide (1989); 1992: The Changing Legal Landscape for Doing Business in Europe (Practicing Law Inst. 1989).

426. The original program for completing the single market by the end of 1992 included the following proposals: a Regulation for a European Economic Interest Grouping; Fifth Company Law Directive (structure of public limited companies); Tenth Directive concerning cross-border mergers; an Eleventh Company Law Directive to prevent branches of companies from publishing separate accounts; a Directive on the liquidation of companies; a Directive on take-over bids; a Directive on the relation of undertakings in a group; and Amendment to proposal on the Statute for a European Company. White Paper, *supra* note 3, at 29-30.

"suitable conditions for industrial cooperation."[427] It stated that Community measures must extend beyond the removal of internal barriers and create an "environment or conditions likely to favour the development of cooperation between undertakings."[428] The goal was to "strengthen the industrial and commercial fabric of the internal market."[429] Despite the "progress [already] made in creating such an environment[[430]] cooperation between undertakings of different Member States is still hampered by excessive legal, fiscal and administrative problems, to which are added occasional obstacles which are more a reflection of different mental attitudes and habits."[431] Concerns of this kind were not limited to the rules prevailing in company law, but extended into areas involving competition law, intellectual property, and research and development programs as well. Underlying these concerns was the notion that smaller European companies would need to combine in some manner in order to be able to compete with larger American and Japanese companies.

An official of the European Community has explained the reasons for company law harmonization as follows:

> First, with the growth of intra-Community trade and investment and freedom of capital movements there will be more and more people in the Community, who, as employees, shareholders and creditors, find themselves dealing with companies whose head offices are in another Member State. They need to know that they are guaranteed broadly equivalent standards of protection in whichever Member State the company is located.
>
> In this context harmonization of company law is necessary in order to avoid distortions in the market which may result from the fact that freedom of establishment is used in such a way that Member States which already have a well developed company law are put into a disadvantageous situation. Unless a minimum level of harmonization has taken place there could be a tendency to establish companies in Member States which have a more liberal company law. . . . The absence of a minimum capital requirement for private companies in the UK for

427. *Id.* at 34.
428. *Id.*
429. *Id.*
430. The specific referent of this language is not indicated, but it clearly should be construed to include the series of directives on company law already enacted. *See supra* part II of this article.
431. White Paper, *supra* note 3, at 34.

> example has encouraged German and Netherlands companies to incorporate themselves in that country and then create a branch in Germany or in the Netherlands.
>
> Harmonization of company law is also seen as giving a strong impetus to the completion of the internal market. It makes it easier for companies to operate and cooperate across national frontiers in whatever form is most convenient— joint ventures, mergers, parents-subsidiaries, takeovers. Obviously, all these activities are much easier to the extent there is a common body of company law. But specific proposals to remove specific obstacles are also needed.[432]

In order to facilitate cooperation between enterprises, the White Paper listed eight proposals on company law. It deplored the absence of a Community legal framework for cross-border activities by enterprises and cooperation between enterprises in different Member States and called for the enactment of the regulations for the European Economic Interest Grouping and the European Company.[433] It noted that enterprises are beneficiaries of the Community rules on non-discriminatory treatment.[434] It also recommended better use of procedures for offers of shares to the public to reshape the pattern of share ownership in enterprises. Noting that the rules in force "vary a great deal from one country to another," it stated that procedures could be made more attractive "by requiring minimum guarantees, particularly on the information to be given to those concerned," but these guarantees could be left to the Member States to designate responsible authorities and monitor such operations.[435] With the progressive completion of the single market, the White Paper expected that enterprises incorporated in the form of companies would become involved in

> an ever-increasing number of links with associated enterprises, creditors and other parties outside the country in which the registered office is located. To keep pace with this trend, a series of measures have already been taken or are under discussion aimed at coordinating Member States laws, especially

---

432. R. Hull (Assistant to the Director General for Financial Institutions and Company Law, Commission of the European Communities, "EC Company Law," New York, November 1, 1989).

433. WHITE PAPER, *supra* note 3, at 35.

434. *Id.*

435. *Id.*

> those governing limited [liability] companies, which, in economic terms, constitute the most important category.[436]

While the approximation of legislation was designed to secure equivalent protections for such associated enterprises, creditors, and other parties of companies, it had to be recognized that such protections facilitated the ability of companies attempting to do business across borders in those capacities as well.[437]

In fact, the harmonization of company law has been a concern in the European Community almost from its very beginning in 1957.[438] As in the case of most 1992 legislation, the attempts to deal with the issue did not begin with the White Paper, nor can it be expected that they will end with it. The program for the completion of the internal market represents continuity in development, rather than radical change. It is the quantity of change in the eight years that is historically significant.

B. *The European Economic Interest Grouping*

The regulation creating the European Economic Interest Grouping (EEIG)[439] was one of the first proposals of the 1992 program to be enacted.[440] The EEIG is a type of business association somewhat like a joint venture,[441] but it is modeled after the French business device called the *groupement d'interêt èconomique*.[442] The purpose of the grouping must be

> to facilitate or develop the economic activities of its members and to improve or increase the results of those activities; its purpose is not to make profits for itself. . . .

---

436. *Id.* 35-36.

437. *See id.* art. 36, para. 141.

438. *See* sources cited *supra* note 1.

439. *Council Regulation on the European Economic Interest Grouping*, No. 2137/85, 28 O. J. Eur. Comm. (No. L 199) 1 (1985) [hereinafter *EEIG Regulation*]. For an extended discussion of the groupings and the laws implementing the *EEIG Regulation* in the twelve Member States, see D. Van Gerven & C. A. V. Aalders, European Economic Interest Groupings (1990) [hereinafter D. Van Gerven]; Wooldridge, *The Draft Regulation on the European Economic Interest Grouping*, Eur. Bus. L. 70 (1984); Murphy, *The European Economic Interest Group (EEIG): A New European Business Entity*, 23 Vand. J. Transnat'l L. 65 (1990).

440. The Council Regulation was adopted on July 25, 1985; it entered into force on August 4, 1985, the third day following its publication, *EEIG Regulation*, *supra* note 439, art. 43; and began to apply from July 1, 1989, with the exception of articles 39, 41, and 42, which apply from the Regulation's entry into force. *Id.* art. 43.

441. *See* H. Henn & J. Alexander, *supra* note 17, at 105-109. *See also* Murphy, *supra* note 439, at 68.

442. Murphy, *supra* note 439, at 67.

> Its activity shall be related to the economic activities of its members and must not be more than ancillary to those activities.[443]

The laws of the Member States will determine whether or not the EEIG's filed at their registries have legal personality.[444] The primary purpose of this flexibility is to allow the Member States to apply tax laws with more consistency, since in Italy and Germany legal persons pay taxes independently of their members, and the EEIG is not intended to be a taxable entity.[445] Regardless of this flexibility, the EEIG has the capacity in its own name to have rights and obligations of all kinds, to make contracts, to accomplish other legal acts, and to sue and be sued.[446] It may be formed upon the terms, in the manner, and with the effects specified in the Regulation.[447]

In order to form an EEIG, the parties intending to form it must enter into a contract and cause the registration provided by the Regulation to be completed.[448] Insofar as the Regulation enabling the creation of the EEIG does not determine issues, the "internal law" of the Member State in which the official address of the EEIG is situated, as specified in the contract for the formation of the grouping, determines two very important matters. First, internal law governs the contract for the formation of the EEIG, except for matters relating to the status or the capacity of natural persons and the capacity of legal persons. Second, it also governs the internal organization of the grouping.[449]

Since the purpose is not to make profits for itself, a grouping may not exercise a power of management or supervision over its members' own activities or over the activities of another undertaking. It should not directly or indirectly own shares of a kind in a member undertaking, employ more than 500 persons,

---

443. *EEIG Regulation*, *supra* note 439, at art. 3(1).

444. *Id.* art. 1(3). Of the seven member states enacting legislation as of late 1989, six had given the EEIG legal personality, and only one, Germany, had not. D. VAN GERVEN, *supra* note 441, at 8.

445. D. VAN GERVEN, *supra* note 439, at 7-8.

446. *EEIG Regulation*, *supra* note 439, at art. 1(2).

447. *Id.* art. 1(1).

448. *Id.*

449. *Id.* art. 2(1). This article also provides that where a State comprises several territorial units, each of which has its own rules of law applicable to these matters, each territorial unit will be considered as a State for the purposes of identifying the law applicable under the article. *Id.* art. 2(2). In the United Kingdom, the implementing legislation was enacted separately for Great Britain and for Northern Ireland. D. VAN GERVEN, *supra* note 439, at 254.

be used by a company to make a loan to a director of a company, or any person connected with him, or to transfer property between a company and a director. Finally, the grouping may not be a member of another EEIG.[450]

Only certain natural persons and certain companies and firms may be members of an EEIG. The companies or firms include only those within the meaning of Article 58 of the Treaty of Rome and other legal bodies governed by the public or private law, which have been formed in accordance with the law of a Member State and which have their registered or statutory office[451] and central administration in the Community.[452] The natural persons include only those who carry on any industrial, commercial, craft, or agricultural activity or who provide professional or other services in the Community.[453]

The membership in the grouping must be characterized by diversity of nationality: the nationality of the persons must be attributable to more than one Member State in one of three patterns. First, the membership may comprise two companies, firms, or other legal bodies eligible to be members of the grouping which have their central administrations in different Member States. Second, it may include two natural persons eligible to be members who carry on their principle activities in two different Member States. Third, it may include one eligible company, firm, or legal body whose central administration is in a different Member State than that in which the natural person with which it has combined to form the EEIG carries on his principal activity.[454] These provisions contain rules that assign legal and natural persons one and only one nationality for these purposes and are consistent with the *siege social* rule that prevails in a majority of the Member States.[455]

The Member States may restrict the number of members in an EEIG to no more than twenty members.[456] A Member State

---

450. *EEIG Regulation*, *supra* note 439, at art. 3(4).

451. "[W]here, under the law of a Member State, a company, firm, or other legal body [is] not obliged to have a registered or statutory office, it is sufficient for such a company, firm or other legal body to have its central administration in the Community." *Id.* art. 4(1)(a).

452. *Id.*

453. *Id.*

454. *Id.* art. 4(2).

455. *See* D. VAN GERVEN, *supra* note 439, at 8-9.

456. *EEIG Regulation*, *supra* note 439, at art. 4(3). Although partnerships in the United Kingdom may have no more than 20 members, H. HENN & J. ALEXANDER, *supra*

may, on the grounds of its public interest, prohibit or restrict participation in groupings by certain classes of natural persons, companies, firms, or other legal bodies.[457]

The contract of the formation of the EEIG must include at least the name of the grouping (preceded or followed by the words "European Economic Interest Grouping" or by the initials "EEIG," unless those words or initials already form part of the name); the official address of the grouping; the objects for which the grouping is formed; and other information.[458] The EEIG must be registered in the State in which it has its official address, at the registry designated pursuant to Regulation.[459] A contract for the formation of a grouping must be filed at the registry, together with other documents.[460]

The grouping may rely on such documents and particulars which must be published as against third parties under the conditions specified under the First Company Law Directive on the Coordination of Safeguards.[461] If activities have been carried on on behalf of a grouping before the EEIG's registration, and the grouping does not assume the obligations arising out of such activities after its registration, the natural persons, companies, firms, or other legal bodies which carried on those activities will bear unlimited joint and several liability.[462]

The official address of the grouping must be situated in the European Community,[463] but it may be transferred within the

---

note 17, at 61 n.2, the United Kingdom decided not to restrict the number of EEIG members to twenty. D. VAN GERVEN, *supra* note 439, at 255.

The Member States may provide that, in accordance with its laws, each member of a legal body formed under its laws, other than a registered company, will be treated as a separate member of a grouping. *EEIG Regulation*, *supra* note 439, at art. 4(3).

457. *EEIG Regulation*, *supra* note 439, at art. 4(4). Under article 41(2), the Member States must inform the Commission of the classes of natural persons, companies, firms, and other legal bodies which they have prohibited from participating in EEIG's pursuant to the article, and the Commission is in turn required to inform the other Member States. *Id.* art. 41(2).

458. *Id.* art. 5.

459. *Id.* art. 6. The Regulation requires the designation of such a registry in art. 39(1). The Regulation also provides that any grouping office situated in a Member State other than that of its official address must register in the additional Member State. *Id.* art. 10.

460. *Id.* art. 7.

461. *Id.* art. 9(1). *See supra* text accompanying notes 208-37.

462. *EEIG Regulation*, *supra* note 439, at art. 9(2).

463. *Id.* art. 12. "The official address must be fixed [either] where the grouping has its central administration or [where] one of the members of the grouping has its central administration, or in the case of a natural person, his principal activity, provided that the grouping carries on an activity there." *Id.*

Community.[464] The transfer of the official address may have the consequence of changing the law applicable under the Regulation.[465] If it does not have such an effect, the decision to transfer will be taken in accordance with the conditions specified in the contract for the formation of the grouping.[466] On the other hand, if it does have such an effect, the proposal to transfer must be prepared, filed, and published in accordance with the conditions specified for preparation, filing, and publication in the case of the formation of an EEIG.[467] Any such decision must be taken by the members of the group acting unanimously.

The laws of the Member States applicable to EEIG's may provide for the declaration or establishment of nullity by judicial authority.[468] The nullity of an EEIG entails its liquidation under the procedures specified by the statute.[469] A decision establishing the nullity may be relied upon as against third parties in accordance with the conditions specified in national law on the coordination of safeguards pursuant to the First Company Law Directive.[470]

The "members acting collectively and the manager or managers" are the "organs of the grouping." The contract for the formation of the EEIG may provide for other organs and if so must determine their powers.[471] "The members of the grouping, acting as a body, may take any decision for the purpose of achieving the objects of the grouping."[472] Each member of the grouping has one vote, but the contract for the formation of the grouping may give more than one vote to certain members, provided that no one member as a result has a majority of the

464. *Id.* art. 13.

465. *See supra* text accompanying note 449. In addition to the law applicable to the contract of the EEIG, the transfer of the address would change such laws as social and labor laws, competition law, intellectual property law, and national tax law. D. VAN GERVIN, *supra* note 439, at 46.

466. *Id.*

467. *Id.* art. 14.

468. In the United Kingdom, the issuance of a certificate of registration for an EEIG provides conclusive evidence of compliance with all the necessary requirements and of due registration. D. VAN GERVEN, *supra* note 439, at 260-261. Presumably, this pretermits any need for provisions on nullity. For companies registered under the Companies Act of 1985, registration is conclusive evidence of compliance with requirements of the Companies Act for Registration, *see* S. MAYSON, *supra* note 20, at 96, and there are no provisions on nullity for companies.

469. *EEIG Registration*, *supra* note 439, at art 15(2).

470. *Id.* art. 15(3).

471. *Id.* art. 16(1).

472. *Id.* art. 16(2).

votes.[473] A unanimous decision is required for certain major decisions: altering the objects of the grouping, altering the number of votes allotted to each member; altering the contributions by every member or by some members to the group's financing.[474] Except for these requirements of unanimity, the contract for the formation of the group may prescribe the conditions for a quorum and a majority (not necessarily a simple majority[475]) in accordance with which the decisions will be taken. Unless otherwise provided in the contract, decisions are to be taken unanimously.[476]

The Regulation provides that an EEIG is to be managed by one or more natural persons appointed in the contract for the formation of the grouping or by decision of the members.[477] The contract for the formation of the grouping must determine the conditions for the appointment and removal of the manager or managers and specify their powers, or, in the absence of such provisions, a unanimous vote of the managers is required for these decisions.[478]

In dealings with third parties, only the manager (or where there are two or more, each of the managers) may represent the EEIG.[479] Each of the managers is able to bind the grouping regarding third parties when he acts on behalf of the EEIG, even where his acts do not fall within the objects of the grouping, unless the EEIG proves that the third party knew or, under the circumstances, should have known that the act fell outside the objects of the grouping.[480] "No limitation on the powers of the manager or managers, whether deriving from the contract for the formation of the [EEIG] or from a decision by the members, may be relied upon as against third parties even as it is published."[481] However, the contract for the formation of the grouping may provide that the EEIG will be validly bound only by

473. *Id.* art. 17(1).

474. *Id.* art. 17(2).

475. Article 17 evidently intends to give the members of the EEIG some flexibility with regard to the size of a majority required for various decisions, and it cannot be concluded that the article contemplates a simple majority (the smallest whole number greater than one half) or unanimity as exclusive alternatives. *See generally Id.* art. 17.

476. *Id.* art. 17(3).

477. *Id.* art. 19(1).

478. *Id.* art. 19(3).

479. *Id.* art. 20(1).

480. *Id.*

481. *Id.*

two or more managers acting jointly. Such a clause may be relied upon as against third parties in accordance with the conditions specified in the Regulation[482] only if it is published in accordance with[483] the Regulation.[484]

The profits resulting from the EEIG's activities will be deemed to be the profits of the members and will be apportioned among them in the proportion specified in the contract for the formation of the EEIG or, in the absence of any such provision, in equal shares.[485] The members of the grouping must contribute to the payment of the amount by which expenditure exceeds income in the proportions specified in the contract for the formation of the grouping or, in the absence of any such provision, in equal shares.[486]

Any member of the EEIG may assign his participation in it, "or a portion thereof, either to another member or to a third party. The assignment will not take effect without the unanimous authorization of the other members."[487] To use his participation in the EEIG as security, the member must secure the unanimous authorization for such use, unless the contract for the formation of the grouping provides otherwise. In any event, the holder of the security may not at any time become a member of the grouping by virtue of that security.[488] "No EEIG may invite investment by the public."[489]

"The members of the EEIG have unlimited joint and several liability for its debts and other liabilities of whatever nature. National law [determines] the consequences of such liability."[490] However, creditors may not proceed against a member for the payment of debts and other liabilities "before the liquidation of the grouping is concluded, unless they have first requested the grouping to pay and payment has not been made within an appropriate period."[491]

The winding up of an EEIG may be initiated by a decision

482. *See id.* art. 9(1).
483. *See id.* art. 8.
484. *Id.* art. 20.
485. *Id.* art. 21(1).
486. *Id.* art. 21(2).
487. *Id.* art. 22(1).
488. *Id.* art. 22(2).
489. *Id.* art. 23.
490. *Id.* art. 24.
491. *Id.* art. 24(2).

of its members ordering it.[492] The decision must be unanimous unless otherwise provided in the contract for formation.[493] Under certain circumstances, the grouping must be wound up: (1) if the decision of its members notes the expiration of the period fixed in the contract of formation or the existence of any other cause for winding-up in the contract, or (2) if the decision of its members notes "the accomplishment of the grouping's purpose or the impossibility of pursuing it further."[494] Under such conditions, if the members do not within three months after one of the situations has occurred take such a decision, a member may petition a court to order the winding up.[495] In addition to the reasons specified above, if the EEIG no longer includes two members in different Member States, it must be wound up.[496] In this case, the manager or managers must cause the winding up to be registered and published.[497]

The winding up of an EEIG entails its liquidation,[498] which is to be governed by national law.[499] The EEIG retains its capacity as defined in the Regulation,[500] until its liquidation is concluded.[501] The liquidator must take the steps required for registration and notification.[502]

EEIG entities have a number of obligations and responsibilities. One is the responsibility not to act against the public interest. "Where an EEIG carries on any activity in a Member State in contravention of that Member State's public interest, a competent authority of the State may prohibit that activity," but review of that authority's decision by judicial authority must be available.[503] Another responsibility is the payment of taxes. Yet "[t]he profits and losses from the activities of the [EEIG are] taxable only in the hands of its members."[504] Finally, the Member States are required to designate the registry or registries responsible for receiving registrations under the provisions of the

---

492. *Id.* art. 31(1).
493. *Id.*
494. *Id.* art. 31(2).
495. *Id.*
496. *Id.* art. 31(3).
497. *Id.* art. 31(4).
498. *Id.* art. 35(1).
499. *Id.* art. 35(2).
500. *See supra* text accompanying note 449.
501. *EEIG Regulation*, *supra* note 439, at art. 35(3).
502. *Id.* art. 35(4).
503. *Id.* art. 38.
504. *Id.* art. 40.

Regulation[505] and provide penalties for persons who fail to comply[506] with the provisions for filing the contract for formation,[507] publication,[508] and registration.[509]

Although Council Regulations in the European Community do not in theory require implementation by the Member States since they are immediately directly applicable and effective, the regulation for the EEIG was formulated in such a way as to require the passage of implementing legislation.[510] At least seven Member States have now done so.[511] Although the Regulation has been effective for only eight months and practically available only in these seven Member States, by the end of February 1990 at least 54 EEIG's had already been established.[512] Therefore, this first enactment of the Single Market Program on the issue of company law had already begun to have an impact.

The contribution of the EEIG to the goals of the EC in

---

505. *Id.* art. 39(1). The Member States are also required to specify rules governing registration, the conditions under which the documents and particulars related to the formation of the EEIG. *See supra* text accompanying note 461. They are responsible for ensuring that the documents and particulars identified in art. 8, *see supra* text accompanying note 483, are published in the official gazette of the Member State in which the EEIG has its official address, and the Member States may prescribe the manner of publication of the documents and particulars that are required to be published. *See id.*; *EEIG Regulation supra* note 439, at art. 39(1).

The Member States may provide for the payment of fees in connection with these operations, but they may not exceed the administrative costs of the operations. *Id.* art. 39(1). The Member States are also required to ensure that the information to be published in the Official Journal of the European Communities pursuant to article 11 is forwarded within one month of its publication in the official gazette of the ember state.

The Member States were required to take these measures to implement article 39 of the Regulation before July 1, 1989, and to communicate them immediately to the Commission. *Id.* art. 41(1).

506. *EEIG Regulation, supra* note 439, at art. 39(3).

507. *See supra* text accompanying note 461.

508. *See supra* text accompanying note 483.

509. *See supra* note 457.

510. *See, e.g.*, the provisions on registration in article 39(1), discussed at *supra* text accompanying note 505.

The Commission recognized the requirement of implementation by the Member States by including the following information in its recent Seventh Annual Report. After reciting the deadline for Member State implementation as July 1, 1989, the report stated that seven Member States (Germany, the United Kingdom, France, the Netherlands, Belgium, Denmark, and Ireland) had passed implementing legislation or measures. *Seventh Annual Report, supra* note 237, at 18.

511. D. VAN GERVEN, *supra* note 439, at 71 (Belgium), 97 (Denmark), 117 (France), 135 (Germany), 160 (Ireland), 203 (the Netherlands), and 254 (the United Kingdom).

In Italy, Portugal, and Spain, measures implementing the regulation were pending as of December 1989. *Id.* at 185, 221, 235. Greece and Luxembourg had not implemented the Regulation as of late 1989. *Id.* at 155, 201.

512. FIFTH PROGRESS REPORT, *supra* note 2, at 24.

company law will be symbolically significant but economically limited. It is symbolically significant because it will allow businesses in different Member States to cooperate in ways that were not previously possible.[513] "It is an instrument for economic cooperation, not for integration."[514] However, it is economically limited because the 500 employee limitation will reduce the size of the projects on which EEIGs can be used. Larger projects will be required to rely on other methods or await other means, such as the European Company.[515]

One goal of the Commission has been to reduce the degree to which Europeans doing business across borders encounter unfamiliar forms of business associations and unfamiliar rules. By allowing the Member States to determine some of the rules that will govern the EEIG within their borders, the Regulation does not create a new business entity with completely uniform rules everywhere in the Community, but rather a new business association with twelve variations. This variability is limited, however, by the uniformity provided by the framework of rules in the Regulation. The Regulation provides contractual freedom to the members so that they are able to define their rights and obligations and their internal organization. Although the EEIG is one form, both Member State variations and the choices of its members will allow differences in its application to emerge. The value of this flexibility should outweigh the cost of variation.

The Commission is proud to point to the European Economic Interest Grouping as perhaps the first pan-European legal entity.[516] It hopes that the EEIG "will stimulate transnational economic cooperation, economic growth and the integration of the economies of Community member countries."[517] Clearly, these results would fulfill the objectives of the Single Market Program, and a significant contribution of the EEIG is not an

---

513. The EEIG will be available to subsidiaries of U.S. firms if the subsidiaries are incorporated in a Member State of the European Community and have their central administration in the Community. *See EEIG Regulation*, *supra* note 439, at art. 4(1); Murphy, *supra* note 439, at 71 n.32; 2 U.S. DEP'T OF COMMERCE, EC 1992: A COMMERCE DEPARTMENT ANALYSIS OF EUROPEAN COMMUNITY DIRECTIVES 62 (1989).

514. COMMISSION OF THE EUROPEAN COMMUNITIES, THE EUROPEAN ECONOMIC INTEREST GROUPING (European File pamphlet series, No. 6/89) 4 (1989).

515. *See infra* notes 760-892 and accompanying text.

516. COMMISSION OF THE EUROPEAN COMMUNITIES, THE EUROPEAN ECONOMIC INTEREST GROUPING (European File pamphlet series, No. 6/89) 10 (1989).

517. *Id.*

unrealistic expectation. How significant that contribution will be must be determined by the events of the future.

C. Disclosure Requirements in Respect of Branches

As an extension of the First Company Law Directive, the Eleventh Council Directive on company law provides rules concerning the disclosure requirements for branches of companies governed by laws of other states. The rules provided for branches of companies from other Member States and for branches of companies from nonmember countries are somewhat different but parallel. The Directive applies to companies as listed in the First Company Law Directive.[518]

By law or regulation of the Member States, the branches are required to disclose through documents and particulars the following information: the address of the branch, the activities of the branch, the location of the register in which the company file required by the First Company Law Directive,[519] the name and legal form of the company, the name of the branch if it is different from the name of the company, accounting documents,[520] and any closures of the branch and transfers of its location. The disclosure must also include information[521] on the persons who are authorized to represent the company in dealings with third parties and in legal proceedings[522] as instrumentalities of the company, in accordance with the First Company Law Directive or as permanent representatives of the company for the activities of the branch, with an indication of the extent of their authority.[523]

The accounting documents must be limited to the annual

---

518. *Eleventh Company Law Directive Concerning Disclosure Requirements in Respect of Branches Opened in a Member State by Certain Types of Company Governed by the Law of Another State*, 32 O.J. EUR. COM. (L395) 36 (1989) [hereinafter *Eleventh Company Law Directive*]. The Member states are required to adopt the regulations, laws, and administrative provisions necessary to comply with the directive by January 1, 1992, and inform the Commission of the European Communities. *Id.* art. 16(1). These provisions are to apply from January 1, 1993, and, with regard to accounting documents, for the first time to those for financial years beginning on January 1, 1993, or on any date in that year. *Id.* art. 16(2).

519. *Id.* art. 2.

520. *Id.* art. 3.

521. The Directive specifies appointment, termination, and particulars. *Id.* art. 2(1)(e).

522. The Directive also permits the Member States to require the deposit of the certified signature of the representative in the register of the branch. *Id.* art. 2(2).

523. *Id.* art. 2(1)(e).

accounts and annual report of the company.[524] These documents must be prepared and audited in accordance with the laws of the Member State enacted in compliance with the Fourth, Seventh, and Eighth Company Law Directives.[525] This limitation is a key feature of the Directive, since it prevents the Member States from imposing a financial reporting burden on companies that choose to open branches in other Member States.

With respect to branches of companies from countries outside the EC,[526] the Directive applies to branches of companies that are organized in a form comparable to those organized under the laws of the Member States of the European Community to which the first Company Law Directive applies.[527] In addition to the information required of the branches of EC companies,[528] the compulsory disclosure must also include a disclosure of the law of the state by which the company is governed; "the instruments of constitution and memorandum and articles of association, with all amendments to these documents;. . . the legal form of the company, its principle place of business and its object and, at least annually, the amount of subscribed capital;" and other information. The compulsory disclosure of accounting documents must be as "drawn up, audited, and disclosed pursuant to the law of the State which governs the company."[529] If the accounting documents are not drawn up in accordance with or in a manner equivalent to that provided by the Fourth and Seventh Company Law Directives, the Member States may require that accounting documents relating to the activities of the branch be prepared and disclosed.[530]

Member States are required to provide appropriate penalties[531] for failure to disclose the information required to be filed with the governments of the Member States[532] or to be included on letters and order forms.[533] The Member States are also re-

---

524. *Id.* art. 3. For a discussion of the Fourth, Seventh, and Eighth Company Law Directives, see *supra* text accompanying notes 362-413.

525. *Eleventh Company Law Directive*, *supra* note 518, at art. 3.

526. Such companies are effectively defined by the Directive as "companies which [are] not governed by the laws of a Member State." *Id.* art. 7.

527. *Id.* art. 5.

528. *Id.* art. 8.

529. *Id.* art. 9(1).

530. *Id.* art. 9.

531. *Id.*

532. More particularly, the information required to be filed is found in articles 1, 2, 3, 7, 8, and 9. *Id.* art. 12.

533. In articles 6 and 10. *Id.* art. 12.

quired to fix responsibility for carrying out the disclosure formalities on individuals.[534]

It should also be noted that the Directive limits the ability of the Member States to impose reporting requirements in three ways. First, it limits the requirements that may be imposed in regard to accounting documents. Second, it stipulates that the Member States may provide for further disclosure of a category of information. Third, it states that the compulsory disclosure imposed on branches may include only the items listed in the Directive. It should also be noted that the uniformity of requirements with respect to disclosure should reduce the burden that otherwise exists for companies attempting to comply with as many as twelve divergent standards. In confining the reporting burden that may be imposed on companies by the Member States, the Directive seeks to enhance the ability of companies to do business across borders. At the same time, the disclosure requirements are to some extent a manifestation of the protective approach to company law that prevails in most of the European Community.

D. *Annual and Consolidated Accounts*

The Proposal for a Directive on Annual and Consolidated Accounts[535] illustrates the point that the 1992 program should be viewed as a continuation of the work done in the past within the EC. The proposed directive would extend the coverage of the Fourth Company Law Directive (1978)[536] and the Seventh Company Law Directive (1983)[537] to include partnerships, limited partnerships, and unlimited companies.[538] The proposed directive would require these companies to prepare annual accounts and consolidated accounts in the manner provided in the Fourth and Seventh Company Law Directives.

---

534. *Id.* art. 13.

535. *Proposal for a Council Directive Amending Directive 76/660/EEC on Annual Accounts and Directive 83/349/EEC on Consolidated Accounts as regards the Scope of Thos Directives*, 29 O.J. EUR. COMM. (C 144) 10 (1986) [hereinafter *Proposal on Annual and Consolidated Accounts*]; *Opinion of the European Parliament*, 30 O.J. EUR. COMM. (C 125) 140 (1987); *Report of the Economic and Social Committee*, 29 O.J. EUR. COMM. (C 328) 5 (1986).

536. *Fourth Company Law Directive*, *supra* note 362, at art. 1.

537. *Seventh Company Law Directive*, *supra* note 382, at art. 2.

538. *Proposal on Annual and Consolidated Accounts*, *supra* note 535, at art. 1.

E. Takeover Bids

The proposed thirteenth company law directive on takeover bids[539] would coordinate the laws of the Member States on attempts to purchase controlling or other large interests in companies whose shares are publicly traded.[540] The proposal is largely devoted to elaborating the general rule that, when any person acquires sufficient securities with voting rights so that these holdings exceed a specified threshold, the person is obligated to make a bid for the remaining shares of the company.[541] At the same time, there are five fundamental principles that are to guide takeover bids: all shareholders who are in the same position must be treated equally; offerees must have sufficient time and information to enable them to reach informed decisions; the board of a target company must act in the interests of all shareholders; "false markets" should not be created in the securities of any of the companies concerned; and offeree companies should not be unduly hindered by an offer for their securities.[542] Although the proposed directive originally applied only to marketable share companies, as amended it would also apply to takeover bids[543]

> for the securities of a company governed by the law of a Member State where these securities are admitted to trading on a market in one or more Member States which is regulated and supervised by authorities recognized by public bodies, operates regularly and is accessible, directly or indirectly, to the public.[544]

Essentially, then, the proposed directive would apply to takeover bids if (1) the company that is the target is incorporated in

---

539. *Amended Proposal for a Thirteenth Council Directive on Company Law, Concerning Takeover and Other General Bids*, 33 O.J. EUR. COMM. (No. C 240) 7 (1990) [hereinafter *Amended Proposal for a Thirteenth Directive*]. The original proposal is found at 32 O.J. EUR. COMM. (No. C 64) 8 (1989). The opinion of the European Parliament is found at 33 O.J. EUR. COMM. (No. C 38) 41 (1990) and that of the Economic and Social Committee 32 O.J. EUR. COMM. (No. C 298) 56 (1989).

For a review of an earlier draft, see Basaldua, *Towards Harmonization of EC-Member States' Regulations on Takeover Bids: The Proposal for a Thirteenth Council Directive on Company Law*, 9 NW. J. INT'L L. & BUS. 487 (1989).

540. *Amended Proposal for a Thirteenth Directive*, *supra* note 539, at art. 1(1).

541. *See id.* art. 4(1).

542. *Id.* art. 6(a).

543. The terms "takeover and other general bids" and "bid" are defined as "an offer made to the holders of the securities of a company to acquire all or part of these securities by a payment in cash or in exchange for other securities." *Id.* art. 2.

544. *Id.* art. 1(1).

one of the Member States and (2) the securities are publicly traded on a stock exchange.[545]

The proposed directive would require the Member States to enact rules under which a purchaser of shares who acquires an interest in the company is obligated to make a bid for the remaining shares of the company.[546] Only securities to which voting rights are attached will cause the provisions of the proposed directive to apply.[547] In fact, the focus in calculating the threshold is on voting rights and not shares or securities.[548] The purchaser must offer to buy all, not only part, of the remaining shares.[549] The Member States are obligated to set the threshold of shares at not more than one-third.[550]

The Member States are required to establish a supervisory authority[551] to monitor compliance with the rules not only by the purchaser, but by all parties to the transaction.[552] As soon as an offeror decides to make a bid, he must announce his intention to do so and notify the supervisory authority.[553] The purchaser must then prepare an offer document[554] which must be sent to the supervisory authority and to the board of the offeree company.[555] Then, as determined by the laws of the Member State governing the bid, it must be made public,[556] either by being sent to the addressees of the bid[557] or by being published according to the provisions of European Community law.[558]

The Directive lists the minimum contents of the offer document that must be drawn up by the offeror.[559] The document

---

545. The proposal also includes a requireement that the Commission prepare a report on the extension of the Directive's application to Member State companies whose securities are not traded on a stock exchange. *Id.* art. 1(2).

546. *See id.* art. 4(1).

547. *Id.*

548. *See id.* art. 4(2). In article 2, "securities" are defined as "transferable securities carrying voting rights in a company or conferring entitlement to obtain transferable securities carrying such rights," and thus make a connection to voting rights the key criterion of the definition. *Id.* art. 2.

549. *Id.* art. 4(1).

550. *Id.*

551. *Id.* art. 6.

552. *Id.*

553. *Id.* art. 7(1).

554. *Id.* art. 7(2).

555. *Id.* art. 7(3).

556. *Id.* art. 7(1).

557. *Id.* art. 11(1)(c).

558. *Id.* art. 11(1)(b)-(c).

559. *See id.* art. 10.

must contain the following information: information identifying the offeree company and the offeror individual or company;[560] specification of the securities for which the bid is made;[561] the quantity of the securities already held by the offeror, either directly or indirectly, and the date and price of their acquisition;[562] the consideration offered for each class of securities;[563] the beginning and the end of the period for acceptance of the bid;[564] the objectives of the offeror in making the bid and his intentions regarding the continuation of the business of the offeree company, including the use of assets, any restructuring of the offeree company, any amendments to the statutes or instruments of incorporation, the future composition of its board, the listing of its securities, any policy on return of capital, the continued employment of its employees,[565] and any "special advantages the offeror intends to grant to the [board] of the offeree company."[566]

The receipt of the offer document by the target board automatically imposes certain restrictions on the offeree's board.[567] After receiving this document, the board may not, until the time for its acceptance expires, perform three otherwise permissible functions without the consent of the general meeting of the shareholders.[568] First, it may not issue securities that include voting rights or that may be converted into such securities.[569] Secondly, it may not engage in transactions that would have the effect of altering significantly the assets or liabilities of the company or result in the company's entering into commitments without consideration, unless authorization is given by the supervisory authority.[570] Thirdly, the company may not acquire its own shares, as provided in the Second Company Law Directive.[571]

---

560. Identifying information includes the type, name, and registered office for offeree and offeror companies. *Id.* art. 10(a)-(b).

561. *Id.* art. 10(1)(d).

562. *Id.* art. 10(e).

563. *Id.* art. 10(1)(g).

564. *Id.* art. 10(1)(j).

565. *Id.* art. 10(1)(l).

566. *Id.* art. 10(1)(m).

567. *See id.* art. 8(1).

568. *Id.*

569. *Id.* art. 8(1)(a) (incorporating reference to definition of "securities" in article 2).

570. *Id.* art. 8(1)(b).

571. *Id.* art. 8(1)(c) (referring to articles 19(1)(a)-19(2) of the Second Company Law Directive).

The period for acceptance of the bid may not be less than four weeks nor more than ten weeks from the date of publication of the offer document.[572] Once the bid has been made public, it may be withdrawn or declared void only under the circumstance specified in the proposed directive or in exceptional circumstances with the authorization of the supervisory authority, where the bid cannot be put into effect for reasons beyond the control of the parties.[573] The offeror may revise his bid at any time before the last week of the period of acceptance specified in the offer document.[574] Persons who have already accepted a prior bid are guaranteed the right to accept a revised bid if made by the offeror.[575] Where the offeror, or persons acting in his behalf, have acquired shares on more favorable conditions than that provided in the offer document or one of its revisions during the period the bid is pending, the addressees of the bid are entitled to qualify for the more favorable conditions.[576] The addressees who have already qualified are entitled to these more favorable conditions.[577]

The offeror or any holders of five percent[578] or more of the securities of the target or offeree company would be required under the proposal to declare to the supervisory authority all further acquisitions of the securities of the target company, the price paid for the securities acquired, and any voting rights already held, whether such acquisitions and holdings are direct or indirect.[579] This rule would also be extended to the offeror company and any company whose securities are offered as consideration.[580] In addition, the rule would be extended to acquisitions of one-half of one percent and to any subsequent acquisitions by persons who have made such an acquisition.[581]

The proposed directive attempts to cover all eventualities.

---

572. *Id.* art. 12(1).
573. *Id.* art. 13.
574. *Id.* art. 15(1).
575. *Id.* art. 15(4).
576. *Id.* art. 16.
577. Compare article 16 of the amended proposal with article 16 of the original proposal and *Amended Proposal for a Thirteenth Directive, supra* note 537, at art. 15, in light of the principle of equality of treatment. *See id.* art. 6a(a).
578. Note that the percentage was increased from one percent to five percent in the amended proposal. *Compare Amended Proposal for a Thirteenth Directive, supra* note 539, at art. 17(2), *with* the article 17(2) of the original proposal.
579. *Amended Proposal for a Thirteenth Directive, supra* note 539, at art. 17(2).
580. *Id.*
581. *Id.*

For example, where the number of acceptances offered exceeds the number specified in the offer document and the offeror does not wish to acquire all shares, equal treatment of those who have accepted must be ensured. In addition, where there are competing bids, the proposed directive applies equally to all bids.[582] If there are competing bids and the initial offer is not withdrawn, the period of acceptance for the initial bid is automatically extended to the date of the expiration of the competing bid.[583]

Finally, the proposed directive regulates market participants in the EC. The offeror must be represented by either a qualified person who is licensed to deal in the Community financial markets or a licensed credit institution within the Community.

Takeover bids are relatively rare in most Member States, and three quarters of all takeover bids within the EC occur in the United Kingdom.[584] In the United Kingdom, takeover bids are now regulated by the City Code on Takeovers and Mergers, rather than provisions of the Company Act of 1985.[585] Because, where shares are dispersed among many shareholders, a minority holding is sufficient for control of a company, the City Code provides that when a person has gained as much as thirty percent of a company, he must make a bid for the remainder of the shares.[586] All remaining shareholders must be offered a price for their shares equal to the highest price at which the offeror has dealt in the company's share in the twelve month period immediately preceding the time at which the holding reached thirty percent.[587] This provision is intended to prevent the acquisition of controlling interest at premium prices at the same time smaller shareholdings are acquired at substantially lower prices.[588]

The European Community's Takeover Bid Proposal has been criticized from the point of view of those familiar with regulation under the City Code. First, it is contended that the adoption of the proposal will greatly increase judicial supervision of takeovers,[589] a regulatory function now exercised by the

582. *Id.* art. 20(1).
583. *Id.* art. 20(4).
584. Godden, *Threat of Takeover Directive*, Fin. Times, July 12, 1990, at 32, col. 5.
585. S. MAYSON, *supra* note 20, at 646-48.
586. *Id.* art. 348.
587. *Id.*
588. *Id.*
589. Godden, *supra* note 584.

Panel on Takeovers and Mergers.[590] The role the judiciary would play and, to a great extent, the law that it would apply are unclear.[591] It is also said that the current flexible system of regulation under the City's Panel would be replaced by a rigid, bureaucratic system.[592] The requirement that revised offers be extended to all shareholders who have accepted the original offer[593] could be particularly onerous in the case of shareholders resident in jurisdictions with strict requirement on the offering of securities.[594] While the Takeover Bids Directive might be useful in removing the barriers to bids across borders, the provision in the Commission's draft, according to one critic, would create additional barriers that would outweigh such advantages.[595]

The proposed directive on Takeover Bids would inaugurate a system of regulation different from that prevailing in the United States. The procedures for "tender offers" are governed by the Williams Act of 1968,[596] which primarily provides for disclosure of acquisitions of more than five percent of any class of registered equity securities[597] and prohibits misstatements and material omission of facts and fraudulent or manipulative acts or practices in connection with tender offers.[598] Under corporation law in the United States, sales of control of a corporation at a premium may be lawful, and the controlling seller of shares generally has no duty to share the profits from the premium.[599] When it can be shown that controlling shareholders breached duties involving due care or fiduciary duties, they may be liable for resulting damages and any profits realized for the sale of control.[600] Some commentators have argued that all shareholders

590. S. MAYSON, *supra* note 20, at 647. The "City" (meaning the City of London) refers to the financial district of Britain's capital. the Takeover Panel is headed by a chairman and deputy chairman appointed by the Bank of England and members representative of leading City institutions. *Id.*

591. Godden, *supra* note 584.

592. *Id.*

593. *See supra* text accompanying note 575.

594. Godden, *supra* note 584.

595. *Id.*

596. H. HENN & J. ALEXANDER, *supra* note 17, at 819.

597. *Id.* art. 819-20.

598. *Id.* art. 821.

599. Easterbrook & Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698, 699, 716 (1982). Henn and Alexander point out that shareholders may sell, except when the shares are subject to valid transfer restriction, their shares for whatever price the shares command, and that control shares can usually be sold at a higher price. H. HENN & J. ALEXANDER, *supra* note 17, at 657.

600. H. HENN & J. ALEXANDER, *supra* note 17, at 656-61.

often profit from sales of control, even where the controlling shareholders received an unshared control premium, and that such sales of control produce efficiency gains that are in the public interest.[601] Accordingly, they argue that it is in the public interest for the controlling shareholders to be rewarded by being allowed to keep the gains from the premium for sale of control.[602] These contentions present a challenge to the major principles underlying the proposal on takeover bids.

The proposed directive on takeover bids raises important issues. It seeks to promote a harmonious system with principles of fairness for all shareholders for the single market of the EC. Its adequacy has been questioned by observers of the most active takeover market in the EC. It is less clear what impact it would have in the other Member States. Finally, the impact of the directive on economic efficiency could be considerable, since it regulates the market for corporate control.[603] The importance of this proposal for the future of European business suggests that its provisions should be the subject of careful review and analysis.

F. Cross-Border Mergers

The proposed Tenth Company Law Directive[604] addresses the difficulties[605]—indeed, in some respects, the impossibility[606]—of concluding mergers across the border of Member States. As the Commission observed in 1985:

> At the moment in the Community the legislation of certain

---

601. Easterbrook & Fischel, *supra* note 599.

602. *Id.*

603. The phrase "market for corporate control" originated in Manne, *The Market for Corporate Control*, J. POL. ECON. 110 (1965), where the possible gains for economic efficiency are also discussed. *See also* R. POSNER, ECONOMIC ANALYSIS OF LAW 385-88 (3d Ed. 1986).

604. *Proposal for a Tenth Council Directive Based on Article 54(3)(g) of the Treaty Concerning Cross-Border Mergers of Public Limited Companies*, 28 O.J. EUR. COMM. (No. 23) 11 (1985) [hereinafter *Cross-Border Mergers Proposal*].

605. On obstacles to international fusion in European law as of 1966, see Conard, *supra* note 286, at 595-597.

606. Mergers across the borders of the Member States of the European Community have generally been impossible in the sense that two companies with registered offices in different Member States have not been able to execute a merger, as defined in the Third Company Law Directive, *see* text acompanying notes 284-322, or as a staturtory merger in American Company Law, without undertaking one or more intermediate steps, such as the dissolution of one of the companies in one Member State and its reincorporation in the Member State of the other company.

> Member States does not allow, or does not provide for, such mergers, and other Member States subject such operations to prohibitive conditions such as the unanimous approval of the shareholders of the company being acquired. Community undertakings wishing to merge have to opt for complex techniques usually requiring the formation of a group of companies headed by a financial holding group. Even then the result is by no means identical.[607]

The proposal applies to the laws, regulations, and administrative provisions of the Member States relating to marketable share companies and is intended to coordinate the provisions of those laws.[608]

The Tenth Directive builds on the Third Company Law Directive on mergers within a Member State and contains numerous references to that Directive. The provisions of the Third Directive governing mergers within a single country are generally extended to cross-border mergers. The definitions of cross-border merger by acquisition[609] and cross-border merger by the formation of a new company[610] are extensions of the similar terms in the Third Company Law Directive. The Tenth Directive stipulates that the mergers that are subject to it must involve two or more companies governed by the laws of different Member States, while it defines the remainder of the two terms by reference to the Third Company Law Directive.[611] The Tenth Directive further states that Member States must provide that cross-border mergers will be governed by the provisions of the Third Company Law Directive "[e]xcept where this directive provides otherwise."[612] The Member States may apply certain enumerated provisions of the Third Company Law Directive only to those companies involved in the merger who are governed by their own laws.[613] A company may have the benefit of the provisions of the Member State that allow an operation in which more than ten percent of the consideration is cash or in which not all the constituent companies cease to exist only if all com-

---

607. BULL. EUR. COMM., SUPP. 3/85 at 5 (1985).

608. *Cross-Border Mergers Proposal, supra* note 604, preamble.

609. *Id.* art. art. 3.

610. *Id.* art. 4.

611. *Id.* art. 3-4.

612. *Id.* art. 2.

613. *Id.* art. 2(3). The provisions of the Third Company Law Directive that apply are articles 3(2), 4(2), 8, 11(2) paras. 2, 22, 23(4), and 25-29.

panies are governed by the laws of other Member States that allow the qualification of such operations as mergers.[614]

While the Third Directive on mergers within borders stipulates that its "draft terms of a cross-border merger" are minimum terms, in the proposed Tenth Directive on mergers across borders they become the maximum terms the laws of Member States are permitted to require.[615] The companies are required to prepare and certify in due legal form the draft terms of merger if this is prescribed by one or more of the Member States by whose law one or more of the companies involved in the merger is governed.[616] Where only one Member State requires such preparation and certification, the laws of that Member State determine what person or authority should do the preparation and certification; but if more than one Member State has the requirement, any person competent under the laws of one of the Member States may do so.[617] The draft terms of merger must be published in accordance with the manner prescribed in the laws of the Member State, at least one month before the date fixed for the general meeting which is to decide on the merger, following the guidelines of the First Company Law Directive.[618] The draft terms of merger must include the type, name, and registered office of each merging company; the register in which a file as specified in the First Company Law Directive has been opened; and the conditions which determine the date on which the cross-border merger takes effect.[619] The disclosure must also specify the rights of creditors of the constituent company or companies, as well as the details of the exercise of their rights in accordance with the provisions of the Third Company Law Directive and article 9 of this Directive.[620]

While rules for the approval of proposed mergers at the general meeting of the shareholders apply, the Member States may not require a larger majority for such mergers than they require for mergers within their borders, that is, when all the companies are governed by their law.[621]

Generally, the rules of the Third Company Law Directive

614. *Id.* art. 2(3).
615. *Id.* art. 5(1).
616. *Id.* art. 5(2).
617. *Id.* art. 5(3).
618. *Id.* art. 6(1) para. 1.
619. *Id.* art. 6(2).
620. *Id.* art. 6(3).
621. *Id.* art. 7.

that apply to the preparation of reports by experts on mergers within the single Member State apply to cross-border mergers as well.[622] Where separate experts are used for each company participating in the merged company, the experts are appointed by the administrative or judicial authority of the Member State whose law governs the company for whose shareholder the report is prepared.[623] However, if all Member States have laws that permit the appointment of experts for all the companies involved in the merger, then the judicial or administrative authority of any of the Member States involved may appoint experts for all the merging companies, and the report will be governed by the law of the Member State whose authority appointed the experts.[624]

While rules for the protection of creditors from the Third Company Law Directive apply to cross-border mergers, the Member States are prohibited from enacting a protective system that is different from that which applies to creditors of merging companies who are all governed by the laws of the same Member States.[625] For example, the rights of holders of securities, other than shares to which special rights are attached, must be given rights in the acquiring company at least equivalent to those they possessed in the constituent company, as in the case of a merger within a Member State.[626] However, the law governing the company being acquired must determine whether a meeting of holders may approve an alteration of their rights in that company, and the law governing the acquiring company must determine whether the holders of securities are entitled to have them purchased by the acquiring company.[627]

Where one or more of the companies involved in a cross-border merger is governed by the laws of a Member State that provide for judicial or administrative preventive supervision of the legality of that merger, that law will apply to the companies.[628] Where the laws of the Member State governing one or more of the companies involved in the merger do not provide for administrative or judicial supervision, then the provisions of the

622. *Id.* art. 8(1).
623. *Id.* art. 8(2).
624. *Id.* art. 8(3).
625. *Id.* art. 9.
626. *Id.* art. 9(2).
627. *Id.* art. 9(3).
628. *Id.* art. 10(1).

Third Company Law Directive are applicable. These provisions provide that the minutes of the merger meetings or the merger contract must be written and certified in due legal form.[629] Either a notary or a competent authority must review and certify the existence and the legality of the legal acts and formalities of the draft terms of merger and of the company for which he is acting.[630] Where the laws of the Member States of both the surviving company and the constituent company provide for administrative or judicial supervision, the supervision must be carried out first with respect to the surviving company and then to the constituent company.[631] Where the law of one or more of the companies involved provides for judicial or administrative supervision and the law governing one or more of the others does not, the supervision must be carried out on the basis of the documents drawn in due legal form as provided in the Third Company Law Directive.[632]

The law of the Member State governing the surviving company determines the date on which a cross-border merger takes effect.[633] The date must be after the supervision has been completed and after the documents certified in due legal form have been prepared for all the companies involved.[634]

The same provisions requiring publication in the manner provided by the First Company Law Directive are also required for cross-border mergers. These provisions allow the surviving company to carry out the publication requirements with regard to the constituent companies. But the publication for the constituent companies must be accomplished before that of the surviving company.[635]

Because the Third Company Law Directive allows the Member States to apply to the merger process their laws which require the completion of special formalities for the transfer of certain assets, rights, and obligations of the constituent companies to be effective against third parties, the proposed directive on cross-border mergers provides that the law of the Member State of the constituent company will determine whether such

629. *Id.* art. 10(2).
630. *Id.*
631. *Id.* art. 10(3).
632. *Id.* art. 10(4).
633. *Id.* art. 11.
634. *Id.*
635. *Id.* art. 12.

transfers require special formalities in order to be effective against third parties.[636]

Another area determined by the law of the Member States is the civil liability arising from conduct on the part of the members of the administrative or management bodies of constituent companies. The proposed Tenth Company Law Directive implements the Third Company Law Directive on liability for preparing and implementing a merger.[637] Misconduct of the experts in preparing the report required by the Third Company Law Directive is to be governed by the law of the Member State governing the administrative or judicial authority that appointed the experts.[638]

The proposed directive incorporates the restrictions of the Third Company Law Directive on the rules under which mergers may be declared null.[639] As in that Directive, nullity must be ordered in a court judgment.[640] If the date on which the merger was to take effect under the laws of the Member States has passed, the merger may be declared void only if (1) there has been no administrative or judicial supervision of the merger or (2) the merger has not been drawn up and certified in due legal form where such supervision or certification is laid down by the law of the Member State governing the relevant company. The possibility that it will be shown that the decision of the general meeting is void or voidable under national law is not given any effect.[641] Where the Member State whose law governs the surviving company has not provided in its law for the nullity of the merger on account of a lack of judicial or administrative supervision of its legality or a lack of preparation or certification in due legal form, it may not be declared void.[642] The law of a Member State may not provide grounds for the nullity of cross-border mergers unless it has also provided for mergers involving companies all of which are governed by its law.[643] The provision of the Third Company Law Directive that the laws of the Member States may permit a third party to challenge a judgment only within six months of publication of the judgment in the manner

636. *Id.* art. 13.
637. *Id.* art. 14.
638. *Id.*
639. *Id.* art. 15(1).
640. *Third Company Law Directive, supra* note 284, at art. 22(1)(a).
641. *Cross-Border Mergers Proposal, supra* note 604, at art. 15(1).
642. *Id.*
643. *Id.* art. 15(2).

prescribed in the First Company Law Directive applies wherever the laws of the Member State permit such challenges.[644]

A new directive on cross-border mergers should prove useful in facilitating business combinations across borders. However, such combinations have been occurring at an increasingly rapid pace, even before the enactment of the directive. The passage of proposals providing favorable tax treatment of such combinations should prove equally important in facilitating the reorganization of European industry. Building on the Third Company Law Directive, the proposed Tenth Directive would provide a uniform procedure for the entire EC. Although the practical importance of the proposal is difficult to assess, it could make a critical difference in many significant business combinations. Its true worth can only be assessed after its provisions have been tested.

G. *The Relationship of Undertakings in a Group*

The program for a single market in the European Community included a proposal for a Ninth Company Law Directive on the relationship of enterprises in a group.[645] However, by the time of the *Fifth Progress Report* on the completion of the single market, the proposal had been omitted from the listings of the proposals constituting the single market program.[646] Because of difficulties in formulating a proposal that would be acceptable to the Commission, the European Parliament, and the Council, the proposal is no longer included in the single market program. Although the Commission has never adopted a draft as an official proposal, thereby introducing it into the EC's legislative process, the concept of this Directive predates the program for a single market, and drafts have been circulated within and with-

---

644. *Third Company Law Directive, supra* note 284, at art. 22(1)(f).

645. *Proposal for a Ninth Directive Based on Article 54(3)(g) of the EEC Treaty on Links Between Undertakings, and in Particular on Groups,* (undated) (unpublished proposal, copy on file in Office) [hereinafter *Groups Directive*]. *See supra* text accompanying notes 157-160.

For a discussion of the law of groups of companies, see Bernard & Earle, *Overview of the EEC Legislative Program in the Field of Company Law,* CHANGING LEGAL LANDSCAPE, *supra* note 425, at 152-161; Derom, *The EEC Approach to Groups of Companies,* 16 VA. J. INT'L L. 565 (1976); N. HORN, *supra* note 32, at 272-276; U. Immenga, *Company Systems and Affiliation,* 13 INT'L ENCYCLOPEDIA. COMP. L. 9-11, 59-60 (1985). The German law is clearly the source of the proposed Ninth Directive, since only in Germany has a law of corporate groups been well developed. *See id.* art. 9-11; Derom, *supra,* at 566-568.

646. *See Fifth Progress Report, supra* note 2.

out the Commission. Prospects for the adoption of the Ninth Directive before the end of 1992 are very slight, but the idea can be expected to remain on the larger agenda of the Commission as an issue to be considered at an appropriate time in the future.

The draft of the Ninth Directive addresses the problems of managing individual companies that are owned as subsidiaries of parent companies or are controlled in common. Foremost among those problems are the legal obligations of the officers of the individual companies to manage them in their own interests and not according to the interests of the parent or the group as a whole.

In the latest available version, the proposal applies only to marketable share companies.[647] A "dependent undertaking" is defined as "one over which another undertaking referred to as the dominant undertaking, is able, directly or indirectly, to exercise a dominant influence."[648] An enterprise is presumed to be dependent on another where the first directly or indirectly holds the major part of the enterprise's subscribed capital, controls a majority of the voting rights connected with the shares of the enterprise, or is in a position to appoint at least half of the administrative, managerial, or supervisory body of the enterprise.[649] Under certain circumstances, a dominant firm would be liable to a dependent company for damages, where the dominant company had exercised undue influence so as to cause management to authorize a transaction or measure not in conformity with the interests of the dependent company.[650] After a finding of dominance and consequent harm, courts and competent authorities would be given the power to impose certain remedies, including suspension of directors from office, prohibition of further performance of damaging contracts, and a requirement that the dominant firm offer to purchase the shares of the dependent enterprise.[651] But these and the supporting provisions would not apply where the dominant enterprise is entitled to manage the dependent firms pursuant to the other provisions of the Directive.[652]

The draft directive also provides a procedure known as the

647. *Groups Directive*, *supra* note 645, at art. 1.
648. *Id.* art. 2(1).
649. *Id.* art. 2(2).
650. *Id.* art. 7(1).
651. *Id.* art. 10(1).
652. *Id.* art. 12.

"control contract instituting a vertical group."[653] Under this procedure, a dependent company could submit to management by another firm.[654] A company might wish to enter into such a contract to achieve special kinds of efficiencies, such as the security of particular supplies or products. After compliance with certain procedures, the dependent company would be subject to management by the dominant firm, which could issue instructions to the management body of the dependent firm, whose compliance would be mandatory.[655] The board of the dominant firm is required to exercise its right to issue instructions "with the care of a conscientious director and in the group interest."[656]

Where the dominance does not occur under such a contract, but rather through the acquisition of shares, shareholders not part of the dominant firm would be entitled either to the acquisition of their shares or an annual equalization payment.[657] The management body of the dependent firm would be required to appoint independent experts to prepare a report on the appropriateness of the offers, including the amount of payment for shares or the equalization payment.[658]

An alternative to the control contract procedure is also provided under the proposed directive. It is called the "unilateral declaration instituting a vertical group."[659] The purpose of this procedure is to free the dependent firm's executives from the responsibility of managing the firm only in that dependent firm's interests, as otherwise mandated in the company laws of some Member States. Where a firm controls directly or indirectly ninety percent of the capital of a company, it would be able to make a unilateral declaration resulting in the formation of a group.[660] The provisions on the acquisition of shares of outside shareholders for control contracts apply to the unilateral declaration as well.[661]

When a find of undue influence had been found, the proposed Ninth Directive would give outside shareholders the right to request the acquisition of his shares even when no unilateral

653. *See id.* art. 13, heading.
654. *Id.* art. 13.
655. *Id.* art. 24(1)(a).
656. *Id.* art. 25.
657. *Id.* art. 14.
658. *Id.* art. 17(1)-(2).
659. *See id.* art. 33, heading.
660. *Id.* art. 33.
661. *Id.* art. 34(1).

declaration has yet occurred.[662] A competent court would fix the amount of payment.[663]

The proposed directive also provides procedures for the creation of a "horizontal group"[664] by contract when there has been a finding of undue influence by the dominant company.[665] The contract would provide agreement to a central and unified management and require approval by the supervisory body and the general meeting of the company.[666] The proposal requires the notification of any acquisitions of ten percent of the subscribed capital of a company and further acquisitions of each subsequent five percentile to the company whose shares are acquired.[667] The company would be required to list such holdings in the notes to its annual accounts.[668]

This proposal will undoubtedly be subjected to revisions before it receives the approval of the Commission. It is nevertheless clear that it remains an important part of the Commission's company law program. It has a clear and important relationship with the other directives included in the single market program.[669] Regardless of the date of its adoption by the Commission and final enactment by the Council, it will continue to be an issue.

H. *Structure of Public Limited Companies*

The proposed Fifth Company Law Directive on the Structure of Public Limited Companies[670] is devoted primarily to the

662. *Id.* art. 39.
663. *Id.*
664. *See id.* art. 40, heading.
665. *Id.* art. 40.
666. *Id.* art. 41.
667. *Id.* art. 4(1).
668. *Id.* art. 6(1).
669. For example, the statute for the European Company contemplates the enactment by the Member States of legislation implementing this Directive. *See infra* note 876.
670. *Amended Proposal for a Fifth Council Directive Founded on Article 54(3)(G) of the EEC Treaty Concerning the Structure of Public Limited Companies and the Powers and Obligations of Their Organs*, 26 O.J. EUR. COMM. (No. C 240) 2 (1983) [hereinafter *Proposal on Structure of PLCs*].

The first Commission proposal may be found at 15 O.J. EUR. COMM. (No. 131) 49 (1972). The opinion of the European Parliament is at 25 O.J. EUR. COMM. (No. 149) 20 (1982). The opinion of the Economic and Social Committee is at 17 O.J. EUR. COMM. (C 109) 9 (1974).

Commentary on this proposal includes the following: Conard, *The Supervision of Corporate Management: A Comparison of Developments in European Community and*

issue of corporate governance in larger companies. The proposal would apply to the category of public limited companies, as designated by the proposal, or marketable share companies.[671]

The proposal offers two alternatives for the governance of marketable share companies and proceeds from these alternatives to develop certain principles and rules for corporate governance. The Member States must provide that public limited companies will be governed by a general meeting,[672] will create a system for drawing up and auditing their annual accounts,[673] and will organize a one-tier or two-tier board system.[674] Under the two-tier system, there would be a body called the "supervisory organ" and another body called the "management organ," whereas under a one-tier system, the body would be called the "administrative organ."[675]

1. *The two-tier system*

Under the two-tier system, the public limited company is managed and represented by a management board under the supervision of a supervisory organ.[676] Following the German model, the supervisory organ appoints the members of the management organ[677] and may remove them at any time.[678] The members of the management organ may be appointed in the

---

United States Law, 82 MICH. L. REV. 1459 (1984); Conlon, *Industrial Democracy and EEC Company Law: A Review of the Draft Fifth Directive*, 24 INT'L & COMP. L.Q. 348 (1975); Hopt, *New Ways in Corporate Governance: European Experiments with Labor Representation on Corporate Boards*, 82 MICH. L. REV. 1338 (1984); Lang, *The Fifth EEC Directive on the Harmonization of Company Law*, 12 COMMON MKT. L. REV. 155, 345 (1975).

Closely related is the controversial Vredeling Directive, which was originally proposed in 1980 but not included in the single market program. *Amended Proposal for a Council Directive on Procedures for Informing and Consulting Employees of Undertakings with Complex Structures*, 23 O.J. EUR. COMM. (C 297) 3 (1980). The first proposal was reviewed in Note, *The Vredeling Directive: The EEC's Failed Attempt to Regulate Multinational Enterprises and Organize Collective Bargaining*, 20 N.Y.U. J. INT'L L. & POL. 967 (1988). This proposal was put aside in that form. *See* Barnard & Earle, *supra* note 645, at 202. The idea was revived in December 1990 when the Commission introduced a new proposal.

671. *Proposal on Structure of PLCs*, *supra* note 670, at art. 1(1).

672. *Id.* art. 2(2).

673. *Id.*

674. *Id.* art. 2(1).

675. *Id.* art. 2(2).

676. *Id.* art. 3(1)(a).

677. *Id.* art. 3(1)(b).

678. *Id.* art. 13.

memorandum and articles of association.[679] Where the management organ has several members, the supervisory organ must specify which member of the management organ is more particularly responsible for questions of personnel and employee relations.[680]

In smaller public limited companies, the general meeting of the company must appoint the members of the supervisory board. Whether a public limited company is among the smaller group to which this rule applies is determined by the number of employees employed by the company on average, a number to be fixed by the legislation of the Member States at a figure of not more than 1000. Employees of subsidiaries, as defined in the Seventh Company Law Directive, count toward total number of employees.[681]

For larger public limited companies that employ a number of employees exceeding the threshold set by the Member States,[682] the Member States are required to provide for the participation of employees in the appointment of members of the supervisory organ. The enactmenmt of this provision would make the co-determination provisions, long part of the corporate governance of larger German companies, the uniform rule throughout the EC. This participation is to be in accordance with specifications listed in the proposed Directive. In the case of these larger companies, the Member States may allow companies to choose one of three board models. However, the Member States may provide that no model for employee participation will be adopted if a majority of shareholders has expressed its opposition to such participation.[683]

The first model for employee participation contemplates the appointment of members of the supervisory board with two alternative possibilities. The general meeting will appoint a maximum of two-thirds, and the employees will appoint a minimum of one-third but a maximum of one-half.[684] However, where the employees receive the right to appoint one-half of the members,

---

679. *Id.* art. 3(1).

680. *Id.* art. 3(2). The provisions of the article are to be "without prejudice to the national laws under which the appointment and dismissal of any member of the management organ cannot be effected against the wishes of the majority of the members of the supervisory organ who were appointed by the employees." *Id.* art. 3(3).

681. *Id.* art. 4(1).

682. *Id.* art. 4(3).

683. *Id.* art. 4(2).

684. *Id.* art. 4B(1).

its voting procedures must ensure that "decisions are ultimately taken by the members appointed by the general meeting."[685]

The members of the supervisory body will be appointed by co-optation by the body. However, either the general meeting or a committee of shareholders "may object to the appointment of a proposed candidate on the grounds that either he lacks the ability to carry out his duties or that if he were appointed the supervisory body would . . . be improperly constituted, given the interests of the company, the shareholders, and the employees. [In this case,] the appointment [may] not be made unless the objection is declared unfounded by an independent body existing under public law."[686]

The second model for larger public limited companies provides for a separate body to represent the employees of the public limited company.[687] The proposed directive would give the body representing the employees the right to be informed, at least once every three months, by the management board of the administration as to the company's progress, future prospects, competitive position, credit situation, and investment plans.[688] It would also have the same rights to information as those conferred on the members of the supervisory body.[689]

"The body representing the employees must meet at regular intervals and at least immediately prior to each meeting of the supervisory [body] and . . . be given all the documentation and information connected with the agenda of the meeting of the supervisory body needed for its deliberations."[690]

Under the third model, employee participation is regulated in accordance with collective agreements concluded between the company or an organization representing the company and organizations representing its employees. In this case, the members of the supervisory bodies must be appointed in accordance with the requirement for not less than one-third representation or by co-optation.[691]

Employee representatives are given the right in relation to the company's management body to regular information and

685. *Id.* art. 4B(2).
686. *Id.* art. 4C(1).
687. *Id.* art. 4D(1), 5(1).
688. *Id.* art. 4D(1).
689. *Id.* Those rights are conferred by article 11 of the Directive.
690. *Id.*
691. *Id.* art. 4F(1).

consultation on the company's administration, status, progress, prospects, competitive position, credit situation, and investment plans. They also have the same rights to information as those conferred on the members of the supervisory body.[692] No person may at the same time be a member of the management body and the supervisory body.[693]

"The members of the management [body may] not, without the authorization of the supervisory body, carry on within another undertaking any activity, whether remunerated or not, for their own account or for the account of any other person."[694]

If a member of the management body or the supervisory body has an interest in an agreement, even if only indirect, the supervisory body, at least, must authorize the agreement.[695] The general meeting must be informed of such authorizations.[696]

> [Lack] of authorization by the supervisory [body] or irregularity in the decision giving the authorization [will] not be adduced as against third parties save where the company proves that the third party was aware of the want of authorization or of the irregularity in the decision, or that in view of the circumstances he could not be aware thereof.[697]

"All members of the management and supervisory [bodies] have the same rights and duties as other members of the same [bodies], without prejudice to provisions which make it possible for the functions of the bodies to be allocated among their members."[698] They are to exercise a proper discretion in respect of information of a confidential nature concerning the company. This duty continues to apply even after the member has ceased to hold office.[699]

The supervisory body has an obligation to stay informed. At least once every three months the management body is required to send a written report to the supervisory body on the progress of the company's affairs.[700] The supervisory board may at any time require the management board to provide information or a

692. *Id.* art. 4G(1).
693. *Id.* art. 6.
694. *Id.* art. 7(1).
695. *Id.* art. 10(1).
696. *Id.* art. 10(3).
697. *Id.* art. 10(4).
698. *Id.* art. 10A(1).
699. *Id.* art. 10A(2).
700. *Id.* art. 11(1)(a).

special report on any matter concerning the company.[701] The supervisory board is entitled to undertake, or cause to be undertaken, all investigations necessary for the performance of its duties.[702] The body would also have the right to be informed of certain kinds of decisions, such as the closure or transfer of establishments or substantial parts of it; reduction, extension, or alteration of the activities of the undertaking; substantial organizational changes within the company; and establishment of long-term cooperation with other companies or firms and the termination of such relationships.[703]

The members of the supervisory body may also dismiss members of the management body.[704] Likewise, the members of the supervisory body may be dismissed by the same bodies or persons who appointed them and under the same procedures.[705]

The laws of the Member States must make provision for the civil liability of the members of the management and supervisory bodies to ensure that, at a minimum, "compensation is made for all damage [done] to the company as a result of breaches of law or of the memorandum or articles of association or of other wrongful acts committed by the members of those [bodies] in carrying out their duties."[706] Each member of the body in question will be jointly and severally liable without limit, but the board member may exonerate himself from liability if he proves that no fault is attributable to him personally.[707]

The laws of the Member States must also provide a remedy somewhat analogous to the shareholders' derivative suit. Such suits may only be brought by one or more shareholders who together hold shares of a minimum nominal or accounting value, which may be fixed by the Member States at a level not greater than five percent of the subscribed capital, or by one or more shareholders who hold shares of a nominal or accounting value of an amount fixed by the Member States at not more than 100,000 ECUs.[708] One or more shareholders whose holdings rise above these values, as fixed by the Member States, would be

701. *Id.* art. 11(3).
702. *Id.* art. 11(4).
703. *Id.* art. 12(1).
704. *Id.* art. 13(1).
705. *Id.* art. 13(2).
706. *Id.* art. 14(1), 77(1).
707. *Id.* art. 14(2).
708. *Id.* art. 16(1).

able to request that proceedings be brought in behalf of the company.[709]

Renunciation by the company of the right to bring proceedings may not be implied from any of several specified circumstances. It cannot be implied "from the sole fact that the general meeting has approved the accounts relating to the financial year during which the acts giving rise to damage occurred."[710] It may not be implied from the sole fact that the general meeting has given discharge to the members of the management body or the supervisory body in respect of their financial year.[711] Renunciation can take place only where two conditions have been satisfied: the act giving rise to the damage must actually have occurred, and the general meeting must have expressly resolved to renounce.[712] These provisions "in no way restrict the personal liability of the members of the organs of the company towards shareholders personally and toward third parties pursuant to general civil law contained in national legislation."[713]

The two-tier system of corporate governance created by the proposal is derived from the German system of corporate governance. It allows the creation of a supervisory board in which none of the executives of the corporation serve on the board of their company, while they may serve on the management board. The supervisory board may, therefore, provide more independent oversight of the management of the corporation. While this system has prevailed in Germany, its use has not spread to the remaining members of the EC. The needs of the other members are recognized by the inclusion of a one board system as an alternative.

2. *The one-tier system*

If the one-tier system is chosen, the company is managed and represented by the board called the "administrative organ" analogous to a board of directors in the United States. Under the one-tier system, the directive continues the idea of subordinating the executives of a company to the independent members of the body. Therefore, the company is managed by the execu-

709. *Id.*
710. *Id.* art. 18(1).
711. *Id.*
712. *Id.* art. 18(2).
713. *Id.* art. 19.

tive members of an administrative body under the supervision of the non-executive members of that organ.[714] The number of non-executive members must be divisible by three and greater than the number of executive members.[715] The executive members of the administrative body may be appointed by the non-executive members acting if necessary by a majority, but the executive members of the first administrative organ may be appointed in the memorandum or articles of association.[716] "Where the administrative [body] has more than one executive member, the non-executive members, acting if necessary by a majority, [must] specify which executive member is more particularly responsible for questions of personnel and employee relations."[717]

Non-executive members must be appointed by the general meeting in companies employing fewer than a number which the Member States may fix at not more than 1,000. "For the purposes of this calculation, persons employed by subsidiary undertakings of a company according to the legislation applicable to that company in conformity with article 1 of" the Seventh Company Law Directive will be considered employees of that company.[718] However, as an alternative to employee participation in accordance with the article, the Member States may provide for employee participation through a body representing the employees in accordance with the second model or through a collectively agreed system comprised in the third model. In all cases, the Member States may provide that employee participation may not be implemented in a company when a majority of the employees has expressed its opposition to such participation.[719]

The first model for employee participation under the one-tier system contemplates the appointment of members of the administrative body with two alternative possibilities. The general meeting will appoint a maximum of two-thirds, and the employees will appoint a minimum of one-third but a maximum of one-half.[720] However, where the employees receive the right to

---

714. *Id.* art. 21A(1)(a).

715. *Id.*

716. *Id.* art. 21A(1)(b).

717. *Id.* art. 21A(2). "The provisions of this article are without prejudice to the national laws under which the appointment or dismissal of any member of the administrative [body] cannot be effected against the wishes of the majority of members of the administrative [body] who were appointed by the employees." *Id.* art. 21A(3).

718. *Id.* art. 21B(1).

719. *Id.* art. 21B(2).

720. *Id.* art. 21D(1).

appoint one-half of the members, its voting procedures must ensure that decisions are ultimately taken by the members appointed by the general meeting.[721] The members of the supervisory body will be appointed by co-optation by the body. However, either the general meeting or a committee of shareholders "may object to the appointment of a proposed candidate on the ground that either he lacks the ability to carry out his duties or that if he were appointed the supervisory [body] would be improperly constituted." In this case, the appointment may not be made "unless the objection is declared unfounded by an independent body existing under public law."[722]

The second model under the one-tier system provides for a separate body to represent the employees of the public limited company.[723] The Directive would give the body representing the employees the right to be informed, at least once every three months, by the management board of the "administration, situation, progress, and prospects of the company, its competitive position, credit situation, and investment plans."[724] Members of the body representing the employees have the same duties as members of the board to respect the confidentiality of company information, a duty which remains after they have left their offices.[725] As is the case with the two-tier model,[726] the proposal stipulates that "[t]he [body] representing the employees must meet at regular intervals and at least immediately prior to each meeting of the administrative [body] and . . . be given all the documentation and information connected with the agenda of the meeting of the administrative [body] needed for its deliberations."[727]

Under the third model, "[e]mployee participation [is] regulated in accordance with collective agreements concluded between the company or an organization representing the company and organizations representing its employees."[728] Collective agreements concluded pursuant to this provision must respect the provisions of the electoral rules that require proportional representation, participation by all employees, secret ballot, and

721. *Id.* art. 21D(2).
722. *Id.* art. 4C.
723. *Id.* art. 21E(1).
724. *Id.*
725. *Id.* art. 21E(3) (referring to article 21Q(2)).
726. *See supra* text accompany note 690.
727. *Id.* art. 21E(4).
728. *Id.* art. 21F(1).

free expression of opinion.[729] The collective agreements must at least make provision for employee participation or employee representation.[730]

Employee representatives are given the right in relation to the company's management body to regular information and consultation on the administration, situation, "progress and prospects of the company, its competitive position, credit situation, and investment plans."[731]

Either the law or the collective agreements concluded pursuant to the provisions of the Directive must "provide at least that employee representatives must be consulted before the administrative [body] considers whether to grant authorization."[732] "The [body] representing the employees [must] meet at regular intervals and at least immediately prior to each meeting of the administrative [body] and . . . be given all the documentation and information connected with the agenda of the meeting of the administrative [body] needed for its deliberations."[733]

Where the employees participate in the appointment of non-executive members of the administrative body in accordance with the provisions of the Directive[734] or through a body representing the employees,[735] or through collectively agreed systems,[736] the Member States must ensure that the following principles are observed:[737] The relevant members of the administrative body and the representative of the employees must be elected in accordance with systems of proportional representation ensuring that minorities are protected.[738] All employees must be able to participate in the elections.[739] Elections must be conducted by secret ballot.[740] And free expression of opinion must be guaranteed.[741] "No person may be at the same time an executive member and a non-executive member of the adminis-

729. *Id.* art. 21F(2).
730. *Id.* art. 21F.
731. *Id.* art. 21H(1).
732. *Id.* art. 21H(2).
733. *Id.* art. 21H(4).
734. *See id.* art. 21D.
735. *See id.* art. 21E.
736. *See id.* art. 21F.
737. *Id.* art. 21J (footnotes added).
738. *Id.*
739. *Id.*
740. *Id.*
741. *Id.*

trative body."[742] "The executive members of the administrative [body may] not without the authorization of the non-executive members of the administrative [body] carry on within another undertaking any activity, whether remunerated or not, for their own account or for the account of any other person."[743]

If a member of the administrative body, whether executive or non-executive, has a direct or indirect interest in an agreement, the non-executive members of the administrative body are required to authorize the agreement.[744] Whenever a member of the administrative body, whether executive or non-executive, becomes aware what these circumstances hold, he must inform the administrative body.[745]

All executive members of administrative bodies have the same rights and duties as other executive members, without prejudice to provisions which make it possible for the functions of the bodies to be allocated to their members.[746] The same rule applies to the non-executive members.[747] All the members of the administrative body must carry out their functions in the interest of the company, taking into consideration the interests of the shareholders and employees. They must exercise a proper discretion in respect of information of a confidential nature concerning the company. This duty continues to apply even after the member has ceased to hold office.[748]

The executive members of the administrative body have various duties and powers. These members are required to send a written report to the non-executive members on the progress of the company's affairs, at least once every three months.[749] The non-executive members of the administrative body, acting by a majority, are empowered to dismiss executive members.[750] The non-executive members of the administrative body may be dismissed by the same bodies or persons who appointed them and under the same procedures.[751]

---

742. *Id.* art. 21L.
743. *Id.* art. 21O(1).
744. *Id.* art. 21P(1).
745. *Id.* art. 21P(2), 10(1).
746. *Id.* art. 21Q(1).
747. *Id.*
748. *Id.* art. 21Q(2).
749. *Id.* art. 21R(1).
750. *Id.* art. 21T(1).
751. *Id.* art. 21T(2).

3. *The general meeting*

Public limited companies are required to hold a general meeting of shareholders at least once a year,[752] but the management board or the executive members of the administrative board may call a meeting at any time.[753] "The laws of the Member States may provide that the general meeting of a company all of whose shares are registered may be convened by notice sent by any means of communication which permits verification that it has been sent to every shareholder and the date on which it was sent."[754] In every other case, the meeting must be convened by notice published in the national gazette designated pursuant to the First Company Law Directive.[755] Every shareholder who has complied with the formalities prescribed by law or by the memorandum and articles of incorporation is entitled to attend the general meeting.[756]

There are provisions on the solicitation of proxies. The proposal gives the shareholder the right to appoint a person to represent him at the general meeting,[757] so long as the appointment is in writing.[758] Where the national law permits any person to publicly invite shareholders to send their forms of proxy to him and to offer to appoint agents for them, a set of rules apply.[759]

The company is required to make available to every shareholder the annual or consolidated accounts, the proposed appropriation of profits or treatment of losses where it does not appear in the annual accounts, the annual report, and the opinion

---

752. *Id.* art. 22(1).

753. *Id.* art. 22(2).

754. *Id.* art. 24(1)(a).

755. *Id.* art. 24(2). The particulars include

> (a) the name of the company and the address of its registered office; (b) the place and the date of the meeting; (c) the type of general meeting (ordinary, extraordinary, or special); (d) a statement of the formalities, if any prescribed by the statutes for attendance at the general meeting and of the exercise of the right to vote, and any provisions of the memorandum or articles of association which require the shareholder, where he appoints an agent, to appoint a person who falls within certain specified categories of persons; (f) the agenda; and (g) the wording of proposed resolutions concerning each items on the agenda.

Id. Notice by registered letter or notice by publication must be given 21 days in advance of the convening of the first meeting of the general meeting. *Id.* art. 24(3).

756. *Id.* art. 26.

757. *Id.* art. 27(1).

758. *Id.* art. 27(3).

759. *Id.* art. 28.

of the persons responsible for auditing the accounts.[760] Any shareholder who makes a request is entitled to obtain information on the affairs of the company arising from items on the agenda or concerning matters on which the general meeting may make a decision.[761] The information may be refused only where its communication might cause material detriment to the company or where the company is under legal obligation not to divulge the information.[762]

At the general meeting, every shareholder's voting rights must be proportionate to the fraction of the total capital which his shares represent.[763] The laws of the Member States may authorize the company's memorandum or articles of association to allow "restriction or exclusion of voting rights in respect to shares which carry special advantages [or] in respect of shares allotted to the same shareholder, provided that the restriction applies at least to all shareholders of the same class.[764] The general meeting may not pass on any resolution concerning items that do not appear on the agenda."[765]

> Neither a shareholder nor his representative [may] exercise the right to vote attached to his shares, or to shares belonging to third parties where the subject matter of the resolution relates to: [the] discharge of that shareholder; [r]ights which the company may exercise against that shareholder; [t]he release of that shareholder from his obligations to the company; [a]pproval of contracts made between the company and that shareholder.[766]

At the general meeting, resolutions will require an absolute majority of the votes attached to the subscribed capital present or represented, unless a greater majority or other additional requirements are prescribed by the law or the memorandum or the articles of association.[767] However, this rule does not "apply to the appointment of members of the company organs or of the

---

760. *Id.* art. 30.

761. *Id.* art. 31(1). The responsibility of providing this information is fixed on the management body or the executive members of the administrative body. *Id.* art. 31(2).

762. *Id.* art. 31(3).

763. *Id.* art. 33(1). However, the right to vote may not be exercised where a call made by the company has not been paid. *Id.* art. 33(3).

764. *Id* art. 33(2).

765. *Id.* art. 32(1).

766. *Id.* art. 34.

767. *Id.* art. 36(2).

persons responsible for auditing the accounts of the company."[768]

An amendment of the instrument of incorporation or the statutes requires a resolution of the general meeting.[769] Generally to have effect, resolutions for amendments to the memorandum or the articles of association require the approval of not less than two-thirds of the votes carried by shares represented at the meeting or attached to the subscribed capital.[770] Any resolution that would have the effect of increasing the liabilities of the shareholders must receive the approval of all shareholders involved.[771]

Where there are several classes of shares, any resolution of the general meeting affecting the rights of any class of shareholders must receive a separate vote at least from that class.[772]

The Member States are required to ensure that certain classes of resolutions of the general meeting are void or voidable, without prejudice to rights acquired in good faith by third parties.[773] Persons who are entitled to begin proceedings to establish the nullity or voidability of a resolution must be brought within a period to be established by the Member States at not less than three months and not more than one year "from the time when the resolution of the general meeting could be adduced as against the person who claims that the resolution is void or voidable."[774] "A resolution of the general meeting may not be declared void where it has been replaced by another resolution passed in conformity with the law or memorandum and articles of association." Any competent court must allow the company time to accomplish the replacement.[775]

4. *Annual accounts*

The annual accounts, as defined by the Second Company Law Directive,[776] must be adopted by the general meeting.[777] In any financial year, five percent of any profit, as reduced where

768. *Id.* art. 36(2).
769. *Id.* art. 37(1).
770. *Id.* art. 39(1).
771. *Id.* art. 39(3).
772. *Id.* art. 40(1).
773. *Id.* art. 42.
774. *Id.* art. 44.
775. *Id.* art. 45.
776. *See Second Company Law Directive*, *supra* note 238, at art. 2.
777. *Proposal on Structure of PLCs*, *supra* note 670, at art. 48(1).

appropriate by losses brought forward, "must be appropriated into a legal reserve until [the] reserve amounts to not less than ten percent of the subscribed capital."[778] "So long as the legal reserve does not exceed this amount, . . . it [may] not be used except to increase the subscribed capital or to [offset] losses and then only if other available reserves are inadequate for those purposes."[779]

The general meeting must decide how the profit and loss for the financial year is appropriated or treated. The profit and loss accounts must be "increased, where appropriate, by profits brought forward and drawings from reserves available for that purpose," and they must be "reduced, where appropriate, by losses brought forward and amounts taken to reserves in accordance with the law or the memorandum or articles of association."[780] Conflicts of interest rules are provided for the audits of the company.[781]

"The persons who are to audit the accounts [will] be appointed by the general meeting."[782] The auditors must examine whether the accounts give a "true and fair view of the company's assets, liabilities, financial position, and profit or loss" within the meaning of the Second Company Law Directive.[783] The auditors will state that the accounts present such a "true and fair" view with no reservations, "they [will] issue their opinion subject to reservations, [or they will] withhold their opinion."[784] The auditors must "prepare a detailed report relating to the results of their work."[785]

The adoption of the Fifth Company Law Directive on the Structure of Public Limited Companies would have important consequences. It would provide substantial uniformity among the laws of the Member States and continue the protective features of continental European company law. It would also ensure

---

778. *Id.* art. 49(1).

779. *Id.* art. 49(2). Mutual funds, or investment companies with variable capital, may be exempted from these requirements by the Member States "pending subsequent coordination". *Id.* art. 49(3) (referring to the Second Company Law Directive).

780. *Id.* art. 50(1).

781. *Id.* art. 50(1)-(2), 53(1)-(2), 54(1)-(2).

782. *Id.* art. 55(1). However, this provision is "without prejudice" to the provisions of the laws of the member States relating to such persons the the time of the formation of the company.

783. *Id.* art. 58(1). *See* text accompanying *Second Company Law Directive*, art. 2, *supra* note 238.

784. *Proposal on Structre of PLCs*, *supra* note 670, at art. 58(2).

785. *Id.* art. 60.

that marketable share companies incorporated under the laws of the Member States would be governed by rules reasonably consistent with those established for companies incorporated under the provisions of the European Company Statute. Indeed, many provisions in the Directive on the Structure of Public Limited Companies are paralleled in the Statute for European Companies. Building on the foundations of earlier directives, these two measures would complete the proposals of the single market program within the framework of a company law for the EC. This last proposal for the unification of company law in the EC is also one of the oldest proposals in the Community.

I. The European Company Statute

The proposed statute for a European Company[786] (*Societas Europaea*—hereinafter called the European Company or "SE")[787] would authorize the creation of European companies organized and recognized under the laws of the European Community, rather than those of the Member States. Proposals for a European Company precede the existence of the EC, going back to ideas developed in the early 1940s.[788] In 1959, the European company began to be discussed within the European Community.[789] In 1970, the commission introduced the first proposal for a European Company Statute.[790] It was included in the 1992 program as a key element in the Commission's proposals.

The European Company is formed as a European public

---

786. *Proposal for a Council Regulation on the Statute for a European Company*, 32 O.J. EUR. COMM. (C 263) 41 (1989) [hereinafter *Proposal for a European Company*].

The available literature on the European Company is large. Particularly noteworthy is THE HARMONIZATION OF EUROPEAN COMPANY LAW, *supra* note 208, at 83-100; Sanders, *The European Company*, 6 GA. J. INT'L & COMP. L. 367 (1976); Carreau & Lee, *Towards a European Company Law*, 9 NW. J. INT'L L. & BUS. 501 (1989); Comment, *The Proposed Statute for a European Company*, 10 TEX. INT'L L.J. 90 (1975); THE HARMONIZATION OF EUROPEAN COMPANY LAW, *supra* note 208, at 424-82; STEIN, *supra* note 1, at 647-62; Storm, *A New Impulse Towards a European Company*, 26 BUS. LAW. 1443 (1971).

Professor Sanders proposed the idea of a European Company in 1959, prepared a draft for the proposal in 1966, and subsequently worked with the Commission on revisions. HARMONIZATION, *supra* note 204, at 430-31, 433-34, 436.

Bibliographies on the European Company may be found in *id.* at 424-26 and H. SMIT & P. HERZOG, *supra* note 1, at 2-574 to 2-579 and (1984 Supp.) 46-47.

787. *Proposal for a European Company*, *supra* note 786, at art. 1(1).

788. *Id.*

789. THE HARMONIZATION OF EUROPEAN COMPANY LAW, *supra* note 208, at 430-31.

790. *Proposition de Règlement (CEE) du Conseil Statut de la Société Anonyme Européene*, 13 O.J. EUR. COMM. (C 124) 1 (1970).

limited company[791]—a commercial company[792] with legal personality[793] whose capital is divided into shares.[794] The liability of the shareholders is limited to the amount subscribed by them.[795] The capital of the European Company must be at least 100,000 ECUs,[796] but the capital requirements are otherwise determined when the SE is used for the ownership of a credit institution or insurance undertaking.[797]

Generally, companies or firms formed under the laws of the Member States or such companies joining with a company formed under the European Company Statute may form a European Company. Public limited companies organized under the laws of the Member States that have their registered offices and central administration within the Community may form a SE by merger,[798] by forming a holding company,[799] or by forming a joint subsidiary.[800] Other companies and firms included within the scope of the second sentence of article 58 of the Treaty of Rome[801] or other bodies formed in accordance with the laws of the Member States may establish an SE as a joint subsidiary, if the firms have been established under the laws of the Member States and have their registered office in the Community. At least two of the parent companies must have their central administration in different Member States.[802]

By merging or by forming a holding company, an SE may be formed by the combined action of an existing SE with another SE or one or more limited companies incorporated under the laws of the Member States and having their registered office and central administration within the EC.[803] All such companies, companies and firms within the meaning of article 58, and other

---

791. *Proposal for a European Company*, *supra* note 786, at art. 1(1).

792. *Id.* art. 1(3).

793. *Id.* art. 1(4).

794. *Id.* art. 1(2).

795. *Id.*

796. *Id.* art. 4(1).

797. The minimum capital requirements for a credit institution doing business as an SE is to be set in the Second Council Directive on the taking up and pursuit of the business of credit institutions. *Id.* art. 4(2). Where the SE conducts the business of an insurance undertaking, it is subject to the minimum capital requirements as set by the laws of the Member State where it has its registered office. *Id.* art. 4(3).

798. *Id.* art. 2(1).

799. *Id.*

800. *Id.* art. 2(2).

801. *See supra* text accompanying note 194.

802. *Proposal for a European Company supra* note 786, at art. 2(2).

803. *Id.* art. 3.

legal bodies governed by the laws of Member States may form an SE by creating a joint subsidiary.[804] It should be noted that where one of the companies involved in the creation of an SE is itself an SE, there is no requirement that the companies be residents of more than one Member State.[805] In addition, virtually any commercial legal entity recognized by Member State law can be involved in forming an SE as a joint subsidiary, but only public limited companies and SEs may be involved in the formation of an SE by merger or by forming a holding company.[806]

The registered office of an SE must be within the Community and located at the place specified in its statutes. It must be the same as the place where the SE has its central administration.[807] The regulation therfore embodies the *siege social* rule from the civil law countries.

The proposed regulation contains a series of rules to determine the legal issues not expressly determined by the provisions of the regulation. On "[m]atters covered by this regulation, but not expressly mentioned herein" decisions are governed by "the general principles on which this regulation is based" and, if those general principles do not provide a solution, by the law applying to public limited companies in the State in which the SE has a registered office.[808] On matters not covered by the regulation, European Community law and the laws of the Member States apply to the SE.[809] The SE is given the same rights, powers, and obligations as a public limited company incorporated under national law in each Member State, subject to the express provisions of the regulation.[810]

---

804. *Id.* art. 3(1)-(2).

805. *See id.* art. 3(1).

806. *Compare id.* art. 2(2) *with id.* art. 2(1). It should be noted that, where the formation of the SE by merger or by forming a holding company involves an SE as a participating founder, any limited company, and not only merely a marketable share company, may be included. *See id.* art. 3(1).

807. *Id.* art. 5.

808. *Id.* art. 7(1). In the case of the United Kingdom, the three territorial units of England and Wales, Scotland, and Northern Ireland are each to be States for the purpose of identifying the applicable law. *See id.* art. 7(2). For the discussion of these three legal units within the United Kingdom, see *supra* text accompanying note 23.

809. *Proposal for a European Company*, *supra* note 786, at art. 7(3).

810. *Id.* art. 7(4).

1. Formation

The laws of the Member States are incorporated into the provisions of formation of a SE. Whether founded as a holding company, by merger, or by creation of a joint subsidiary, the founder companies[811] of a SE must draw up the instrument of incorporation and the statutes in the form required for incorporation of a public limited company by the law of the Member State in which the SE has its office.[812] To ensure that the procedures for the formation of an SE are followed, the proposal would extend the procedures for compliance for public limited companies to the SE.[813] The laws would be those of the Member State where the SE has its registered office.[814] Member States are required to take the necessary measures to ensure that the procedures are effective.[815] When consideration other than cash is given for shares, experts must be appointed to review that consideration in accordance with the provisions of national law enacted pursuant to the Second Company Law Directive.[816] The law of the state where it has its registered office determines the date on which the SE begins to have legal personality.[817]

2. Formation by merger

The provisions for formation of an SE are similar to those governing merger in the Third Company Law Directive on Mergers and the proposed Tenth Company Law Directive on Cross-Border Mergers. Only public limited companies formed under the laws of the Member State who have their registered office and central administration within the Community may form an SE by merger, and they may do so only if at least two have their central administration in different Member States.[818] However, if an SE is one of the companies participating in the merger, any limited company, whether a "public limited company" or a "private limited company," may be the other partici-

---

811. "Founder companies" is defined as "the companies, firms, and other legal bodies which may form an SE by the means provided in Articles 2 and 3" of the regulation. *Id.* art. 12.

812. *Id.* art. 13.

813. *Id.* art. 15.

814. *Id.*

815. *Id.*

816. *See id.* art. 14; *Second Company Law Directive*, *supra* note 238, at art. 10.

817. *Proposal for a European Company*, *supra* note 786, at art. 16.

818. *Id.* art. 2(1).

pant or participants in the merger.[819] The merger can proceed only if it is approved at the general meeting of each of the founder companies.[820]

The laws of the Member States providing a system for the protection of the interests of creditors are extended to the process of forming a SE by merger.[821] The extended provisions include those relating to the protection of the interests of creditors and debenture holders of the companies in the case of a domestic merger; and also include the provisions relating to the protection of interests of the holders of securities, other than shares, which carry special rights.[822] The laws of the Member States applicable to one or more of the founder companies that provide for the judicial or administrative preventive supervision of mergers apply to the founder companies participating in the formation of an SE by merger.[823]

3. *Formation of a holding company*

A European Company may be formed as a holding company under provisions somewhat similar to those applicable to formation by merger. Only public limited companies formed under the laws of the Member State who have their registered office and central administration within the Community may form an SE by formation of a holding company, and they may do so only if at least two have their central administration in different Member States.[824] However, if an SE is one of the companies participating in the merger, any limited company, whether a "public limited company" or a "private limited company", may be the other participant or participants in the merger.[825]

Where the SE is formed as a holding company, all the shares of the founder companies are transferred to the SE in exchange for the shares of the SE.[826] The founder companies continue to exist.[827]

---

819. *Id.* art. 3(1).
820. *Id.* art. 22(1).
821. *Id.* art. 23.
822. *Id.*
823. *Id.* art. 24(1).
824. *Id.* art. 2(1).
825. *Id.* art. 3(1).
826. *Id.* art. 31(1).
827. *Id.* art. 31(2).

4. *Formation of a joint subsidiary*

The European Company is most widely available where the object is to form a joint subsidiary. In addition to public limited companies, all companies or firms within the meaning of the second sentence of article 58 and "other legal bodies governed by private and public law which have been formed in accordance with the law of a Member State" would be able to form an SE as a joint subsidiary, if they have their registered offices and central administrations in the EC and if at least two have their central administration in different Member States.[828] Any such companies or legal bodies acting jointly with one or more SEs may form a joint subsidiary, regardless of whether any two have their central administrations in different Member States.[829]

When such companies form an SE, the administrative or managerial board of the SE must draft terms for the formation of the subsidiary.[830] To approve the formation of the SE, each of the founder companies must approve the draft terms of formation and the instruments of incorporation of the SE and its statutes, if they are a separate instrument, in accordance with the law that governs each respective founder company.[831]

5. *Capital structure*

The provisions on capital structure set forth numerous rules and principles, some of which are foreshadowed in the Second Company Law Directive.[832] As a general principle, the Directive provides that "all shareholders in like circumstances shall be treated in a like manner."[833] The rights attached to a share are indivisible, and where a share is owned by more than one person, the rights attached to it may be exercised only through a common representative.[834]

Shares carrying the same rights form a class.[835] The issue, replacement, and cancellation of share certificates and the transfer of shares is to be governed by the laws of the Member State

---

828. *Id.* art. 2(1).
829. *Id.* art. 3(2).
830. *Id.* art. 34.
831. *Id.* art. 35(1).
832. *See supra* text accompanying note 238-83.
833. *Proposal for a European Company, supra* note 786, at art. 40.
834. *Id.* art. 51.
835. *Id.* art. 52(4).

in which the SE has its registered office.[836] Listing particulars and the publication of prospectuses are to be governed by the national law of the Member States implementing EC directives.[837] Shares may carry different rights with respect to the distribution of the profits and assets of the company.[838] Payment of fixed interest may neither be made nor promised to the shareholders.[839] Non-voting shares may be issued only if certain conditions are met.[840]

Shares must be either in bearer or in registered form.[841] The statutes of the company may give the shareholders the right to convert bearer shares into registered shares or vice versa.[842] However, a company that issues registered shares is required to keep an alphabetical register of all shareholders, including their addresses and the classes and number in each class of the shares they hold.[843]

Both the capital and the shares, into which the capital must be divided, must be denominated in ECUs.[844] At least twenty-five percent of the nominal value of the shares issued for consideration must be "paid up" at the time the company is registered.[845] Where shares are issued for a consideration other than cash, at the time the company is registered, that consideration must be transferred to the company in full within five years of the date on which the company was incorporated or acquired legal personality.[846] The subscribed capital may be formed only out of assets capable of economic assessment. Even so, those assets may not include an undertaking to perform work or to supply services.[847] Shares may not be issued at a price lower than their nominal value.[848] Shareholders may not be released from the obligation to pay up their contributions.[849]

---

836. *Id.* art. 54.

837. *Id.* art. 55. *See Directive on Listing Particulars*, 23 O.J. EUR. COMM. (L 100) 1 (1980); *Directive on Prospectuses*, 32 O.J. EUR. COMM. (L 124) 8 (1989).

838. *Proposal for a European Company*, *supra* note 786, at art. 52(1).

839. *Id.*

840. *Id.* art. 52.

841. *Id.* art. 53(1).

842. *Id.*

843. *Id.* art. 53(2).

844. *Id.* art. 38(1)-(2).

845. *Id.* art. 38(2).

846. *Id.*

847. *Id.* art. 38(3).

848. *Id.* art. 39(2).

849. *Id.* art. 41.

The proposal provides for an increase in the capital of an SE. The capital of an SE may be increased by the subscription of new capital. An increase in capital requires amendment of the statutes. Like shares in the original capital structure, shares issued for a consideration in the course of an increase in subscribed capital must be paid up at least to the extent of twenty-five percent of their nominal value. Where provision is made for an issue premium, it must be paid in full.[850]

An increase in capital must be approved by the general meeting of shareholders.[851] Capital may be increased by the capitalization of available reserves. In that event, new shares must be distributed to the shareholders in proportion to their existing shareholdings.[852] Future increases in capital may be authorized by statutes, instruments of incorporation, or the general meeting.[853] An increase may not exceed one half of the subscribed capital.[854] The increase must, "where appropriate," be decided by the administrative or management board.[855] The power of the board to authorize such increases is limited to a period of five years, and may be renewed one or more times by the general meeting, each time for a period not to exceed five years.[856]

The statute also provides for pre-emptive rights.[857] Whenever the capital is increased by cash, shares must be offered to shareholders on a pre-emptive basis in proportion to the capital represented by their shares.[858] The right of preemption may not be restricted or withdrawn by the statutes or the instruments of incorporation. However, it may be withdrawn by a two-thirds majority of the votes attaching to the securities represented or to the subscribed capital represented at the general meeting.[859]

Any reduction in capital must be subject to the decision of a general meeting acting in accordance with the rules for a quorum and a majority laid down in the regulation.[860] If there are several classes of shares, the decision of the general meeting con-

850. *Id.* art. 42(1).
851. *Id.* art. 42(4).
852. *Id.* art. 42(5).
853. *Id.* art. 43(1)-(2).
854. *Id.* art. 43(1).
855. *Id.* art. 43(2).
856. *Id.*
857. *See generally, id.* art. 44.
858. *Id.* art. 44(1).
859. *Id.* art. 44(3).
860. *Id.* art. 45(1).

cerning a deduction in the subscribed capital must be subject to a separate vote, at least for each class of shareholders whose rights are affected by the transaction.[861] Reductions in capital are to be effected by means of a reduction in the nominal value of the shares.[862]

The statute provides protection for creditors of the SE. In the event of a reduction in subscribed capital, the creditors whose claims antedate the publication of the decisions to make the reduction are entitled to have "at least" the right to obtain security for the claims which have not fallen due by the date of that publication.[863] The conditions for the exercise of that right are to be governed by the law of the Member State where the company has its registered office.[864]

A SE is prohibited from subscribing to its own shares, either directly or indirectly through third parties acting on its behalf or through undertakings controlled[865] by it.[866] If there is an attempt to circumvent this prohibition by a person acting in his own name, but in fact on behalf of the SE, the subscriber is deemed to have subscribed for the shares on his own account.[867] If the prohibition is violated, liability is fixed on the founder companies by which or in the name of which the statutes or the instruments of incorporation of the SE were signed, (if the subscription is for initial shares), or the members of the administrative or management board, in the case of an increase in the subscribed capital.[868]

Consistent with the prohibition on subscribing for its own shares, the SE is prohibited from acquiring its own shares.[869] The prohibition includes not only direct acquisition, but also indirect acquisition through "third parties acting on its own behalf" or "undertakings controlled[870] by it" or in which it holds a

861. *Id.* art. 45(2).

862. *Id.* art. 45(3).

863. *Id.* art. 46(1).

864. *Id.*

865. *See id.* art. 6.

866. *Id.* art. 48(1).

867. *Id.*

868. *Id.* art. 48(3).

869. *See generally, id.* art. 49.

870. Within the meaning of article 6.

majority of the shares.[871] However, there are many exceptions to this rule.[872]

An SE may issue debentures.[873] The body of debenture holders is governed by the laws of the State in which the SE has its registered office.[874] If the debentures are convertible into shares, the provisions governing an increase in the subscribed capital[875] and the subscription rights[876] of shareholders apply to their issue.[877] The rules applying to the condition and procedure for the exercise of the conversion or subscription rights are determined by the laws of the State in which the SE has its registered office.[878] The SE may also issue debentures which carry the right to share in the profits, if the general meeting approves a resolution which meets the requirements for altering the statutes.[879]

6. *General meeting*

The SE is required to hold a general meeting of shareholders at least once a year,[880] but the management board or administrative board may call a meeting at any time.[881] At the general meeting the administrative board has the power to make the following decisions: increases or reductions in the subscribed or authorized capital; issues of convertible or participating debentures and those carrying subscription rights; appointment of members of the supervisory or administrative boards who represent the shareholders; approval of annual accounts; appropriation of profits and losses; merger with another company; and transfers of assets.[882]

The proposed statute specifies the methods of calling meetings and the notice required.[883] Items not included in the publication or communication giving notice of the meeting may not

---

871. *Id.* art. 49(1). Shares acquired in contravention of the provision must be disposed of within six months of acquisition. *Id.* art. 49(8).
872. *Id.* art. 49.
873. *Id.* art. 56.
874. *Id.* art. 57.
875. *Id.* art. 43. *See supra* text accompanying note 850.
876. *Id.* art. 44. *See supra* text accompanying note 850.
877. *Proposal for a European Company, supra* note 786, at art. 58(1).
878. *Id.* art. 58(2).
879. *Id.* art. 59(1).
880. *Id.* art. 82(1).
881. *Id.* art. 82(2).
882. *Id.* art. 81.
883. *Id.* art. 84.

be decided,[884] unless all shareholders are present or represented by proxy, and no shareholder objects.[885] With regard to proxies, the proposal gives the shareholder the right to appoint a person to represent him at the meeting, so long as the appointment is in writing,[886] but the law of the Member State may restrict the choice of persons.[887] There are special additional provisions for the appointment of persons acting in a professional capacity as proxies.[888]

One or more minority shareholders who together hold more than ten percent of the capital of the SE may request the SE to call a general meeting.[889] At the general meeting, every shareholder's voting rights must be proportionate to the fraction of the total capital which his shares represent.[890] Resolutions must require at least an absolute majority of the votes attached to the subscribed capital present or represented, unless a greater majority is required by the proposed Regulation.[891] An amendment of the instrument of incorporation or the statutes requires a resolution of the general meeting.[892]

Generally, resolutions for amendments to the statutes or instruments of incorporation require for passage the approval of not less than two-thirds of the votes attached to the subscribed capital.[893] Any resolution that would increase the liabilities of the shareholders, for example, by increasing the capital of the company,[894] must receive the approval of all shareholders involved.[895] Where there are several classes of shares, any resolution of the general meeting affecting the rights of any class of

---

884. *Id.* art. 91(1).

885. *Id.* art. 91(2).

886. The writing must be retained by the SE. *See id.* art. 99(4).

887. *Id.* art. 87.

888. *Id.* art. 88.

889. *Id.* art. 83(1).

890. *Id.* art. 92. However, the right to vote may not be exercised where a call made by the company has not been paid or on shares held by the SE itself or by one of its subsidiaries. The limited circumstances in which an SE may directly or indirectly hold its own shares are contained in article 49. *See supra* text accompanying notes 865-68.

891. *Proposal for a European Company*, *supra* note 786, at art. 94(1).

892. *Id.* art. 95(1).

893. *Id.* art. 97(1).

894. *See id.* art. 42.

895. *Id.* art. 97(3). This provision refers to the liabilities of the shareholders to the company, rather than the liabilities of the company to any third parties, such as its creditors.

shareholders must receive a separate vote at least from that class.[896]

7. *Governing bodies*

The provisions for the governing boards are very similar to those provided for marketable share companies in the proposal for a directive on the structure of public limited companies.[897] The issue of employee participation in the governing bodies of the European Company is addressed in a separately proposed directive.[898] The Directive prescribes coordination measure to apply to the laws, regulations, and administrative provisions of the Member States concerning employee involvement,[899] and Member States are required to take the necessary measures to enable the employees to participate in the supervision and strategic development of the SE.[900] It should be expected that the Commission will want to make both the provisions of the Statute and those of the Directive on this subject as consistent with the provisions of that Directive as possible, with only the changes necessary and appropriate to the differences between the two legal entities.

8. *Groups of companies*

The proposal provides that where an undertaking[901] controls an SE, the undertaking's rights and obligations consequent to such control relating to the protection of minority shareholders and third parties are those defined by the law governing public limited companies in the State where the SE has its registered office.[902] However, this rule does not affect the obligations that the legal system imposes upon the controlling undertaking.[903]

---

896. *Id.* art. 98(1).

897. *Id.* art. 61-80.

898. *Proposal for a Council Directive Complementing the Statute for a European Company with Regard to the Involvement of Employees in the European Company*, 32 O.J. EUR. COMM. (C 263) 69, art. 1 (1989).

899. *Id.* art. 1.

900. *Id.* art. 2.

901. The term "undertaking," which means "enterprise," is an alternative translation of the German word "Unternehmen" and is often used in European law. *See* HARPER COLLINS GERMAN DICTIONARY 313 (College ed. 1990).

902. *Proposal for a European Company*, *supra* note 786, at art. 114(1).

903. *Id.* art. 114(2).

9. *Winding up, insolvency, and suspension of payments*

The proposal provides that a SE may be wound up by three events: by expiration of the period specified in its charter, by resolution of the general meeting of the shareholders, and by the decision of the court of the place where the SE had its registered office under certain conditions.[904]

An SE may be wound up by a court "of the place where the SE has its registered office" if one of the following three conditions holds: where the subscribed capital of the company has been reduced below the minimum capital provided for in the proposed Regulation, where the disclosure of annual accounts has not taken place in the SE's last three fiscal years, or on any ground provided in the law of the place where the SE has its registered office or provided for in the SE's statutes or instrument of incorporation.[905]

The winding up of an SE necessarily includes the liquidation of its assets.[906] The proposal provides three methods to appoint the liquidators.[907] The liquidators are given the power to take all appropriate steps to liquidate the SE and in particular to terminate pending transactions, to collect debts, to convert remaining assets into cash "where this is necessary for their realization," and to pay the sums owing to creditors.[908] For the purposes of the liquidation, the liquidators may to the extent necessary undertake new transactions.[909] The liquidators have the power to bind the SE in dealings with third parties and to initiate legal proceedings on its behalf.[910] The wrongful acts of the liquidators committed in carrying out their duties may result in civil liability under the same rules that apply to the civil liability of members of the administrative or management boards of an SE.[911] The liquidators are required to prepare a statement of the assets and liabilities of the SE,[912] report on their activities to the general meeting,[913] invite creditors to lodge their claims,[914] pre-

904. *Id.* art. 115.
905. *Id.*
906. *Id.* art. 120(1).
907. *Id.*
908. *Id.* art. 122(1).
909. *Id.*
910. *Id.* art. 122(2).
911. *Id.* art. 123.
912. *Id.* art. 124(1).
913. *Id.*
914. *Id.* art. 125.

pare a plan for the distribution of any remaining net assets and present it to the general meeting,[915] distribute any remaining assets proportionately to the shareholders,[916] and terminate the liquidation when the distribution is complete.[917] If the SE is insolvent or payments must be suspended, these proceedings must be conducted under the law of the place where the SE has its registered office.[918]

10. *Mergers*

The proposal allows a variety of merger schemes. In addition to the provisions on mergers included among the means by which a SE may be formed, an SE may merge with other SEs or public limited companies formed under the law of one of the Member States by forming a new SE. The SE may also merge by taking over one or more public limited companies, by a public limited company taking over the SE, or by forming a new public limited company.[919]

11. *Sanctions*

The provisions of national law relating to infringements of the rules relating to public limited companies apply to the infringement of any of the provisions of the regulation.[920]

J. *The Impact of The Single Market Program*

The reshaping of the European company law in the single market program will benefit not only Europeans but also those who have established businesses within the EC. The provisions of the Treaty of Rome that provide for the right of establishment extend to companies organized under the laws of a Member State having their registered office, central place of administration, or principal place of business within the Community.[921] Therefore, subsidiaries organized under the laws of a Member State by corporations outside the Community will be subject to

915. *Id.* art. 127(1).
916. *Id.* art. 126(1)-(4).
917. *Id.* art. 128.
918. *Id.* art. 129.
919. *Id.* art. 131.
920. *Id.* art. 134. European company law statutes typically contain criminal penalties. *See, e.g.*, AKTIENGESETZ, *supra* note 53, at §§ 399-408. *See also supra* text accompanying note 135.
921. TREATY OF ROME, *supra* note 5, at art. 58.

the strictures of the laws of the Member States adopted pursuant to the 1992 directives, but will also be able to enjoy the benefits of these laws.[922] The general purpose of the company law proposals is clearly to harmonize company laws within the Community. If any discriminatory intent lies behind the provisions, it is extremely difficult to detect. At the same time, those accustomed to doing business under less protective company laws will be required to adjust to a new framework.

IV. A Company Law for the New Europe

A. *The Achievement*

The enactment of the seven proposals for the integration of company law will be a significant achievement. While differences will remain in the company laws of the Member States, for the first time enterprises in Western Europe will be able to do business under a common framework. This common framework may become increasingly influential.

The single market program's approach to company law exemplifies some characteristic features of the Community's legal system. Two major proposals, the European Economic Interest Grouping and the European Company Statute, are in the form of regulations. They will create new forms of legal entities as creatures of European Community law.

The remaining proposals are in the form of directives. These proposals build on the prior enactments of the EC by providing for cross-border mergers, the elimination of disclosure by branches across borders, the extension of annual and consolidated accounts provisions to limited partnerships and other

---

922. 2 EC 1992: A Commerce Department Analysis of European Community Directives, 61-62, 66-78, 86-90 (1989).

Subsidiaries incorporated in the Community for corporations organized outside the Community will be able to participate in the membership of an EEIG, *id.* at 62; to join in cross border mergers, *id.* at 70; to participate in the creation of a European Company, *see id.* at 73; to enjoy the elimination of disclosures for branches, *id.* at 75-76; and to create single member private limited companies, *id.* at 88.

U.S. corporations may face unaccostumed burdens in the form of more complex structures for marketable share companies or for the European company (although most subsidiaries are not likely to be in either form); the requirement of certain disclosures pursuant to the directive on annual and consolidated accounts as it is extended to partnerships, *id.* at 78; and the requirements imposed on takeover bids, *id.* at 90. It should be noted, however, that the filing of a 10-K report for the U.S. parent of an EC subsidiary would satisfy the requirements of the proposed directives on disclosure with respect to branches, *id.* at 76, and on annual and consolidated accounts, *id.* at 78.

forms of business associations, and the harmonization of law on takeover bids and the structure of public limited companies. During the period in which the Community's legislative process has been devoted to the single market program, an additional proposal, on single person companies, has been adopted. Although the enactment of the single market program's company law proposals will bring the level of integration in company law to a new plateau, it should be expected that the Commission will propose further measures on company law in the future.

The company law of the European Community also illustrates the three policy approaches of the European Community. The Treaty provisions requiring non-discrimination and creating the freedom of establishment for companies, as well as natural persons, have led to the mutual recognition of company forms. The European Company Statute and the European Economic Interest Grouping are instances of direct Community rules. But clearly most important for company law, both before and within the single market program, is the harmonization of Member State laws. In the unification of company law, the Community's unique form of legislation, the directive, has carried the greatest part of the burden. It is difficult to see how much progress could have been made without it, if one considers the contours of European company law and the larger political context.

In the United States, corporation law has found a different means of harmonization and a different kind of integration and unity. The two closely related but distinct sources of these differences are the "internal affairs" rule applying the law of the state of incorporation and the facilitative approach of the State corporation codes. While the role of corporation codes has been limited largely to establishing the rules for formation and governance of the corporation, the task of regulating the external relations of the firm has been placed on other codes and statutes, many of which apply to business enterprises regardless of the form in which they are organized. The facilitative approach of the U.S. can generally be said to have resulted in a different configuration of laws affecting the business enterprise.

In contrast, the protective approach of most European company law statutes has been shielded by the *siege social* rule prevailing in most Western European legal systems. The competition for corporate charters in the United States, once termed the

"race of laxity,"[923] has never had a chance to create a process for harmonization and reduction of protective company law provisions afforded by facilitative corporation statutes. The higher levels of protection provided by their codes have not been eroded by the single market program.

While much of the single market program might be considered deregulatory, the group of proposals on company law is deregulatory primarily in the sense that more harmony in the Member State's laws will make their use less burdensome. In some countries, the degree of regulation by the single market program may be greater than the minimum standards imposed by the EC.

Some critics may raise the question of whether the program for unification of company law itself is necessary. The problems associated with multinational companies doing business across borders have already been recounted. The enactment of the program will unquestionably be useful in providing more clearly and widely understood forms of business associations. Maximum levels of regulation will be imposed. Certain standard forms will be created. Larger economic entities may become possible in circumstances where they previously could not be constructed. The proposals on company law may not be unavoidably necessary; at the same time, they may be undeniably useful.

B. *What Company Law for Europe?*

In the program to create a single market by 1992, the proposals on company law draw upon distinctive legal cultures—three legal traditions and fourteen legal systems. These legal systems in many respects have contributed the ideas for these proposals. The French legal system contributed the idea for the European Economic Interest Grouping.[924] The German system contributed the idea of a law for companies managed as groups[925] and the ideas about accounting.[926] The British contributed the idea of a directive on takeover bids.[927] Although French

923. "Companies were early formed to provide charters for corporations in states where the cost was lowest and the laws least restrictive. The states joined in advertising their wares. The race was one not of diligence but one of laxity." Liggett v. Lee, 288 U.S. 517, 558-59 (1933) (Brandeis, J. dissenting).

924. *See supra* text accompanying note 442.

925. *See supra* note 645.

926. *See* N. Horn, *supra* note 32, at 266-68; E. Ercklentz, *supra* note 68, at 467-83.

927. *See* S. Mayson, *supra* note 20, at 646-53.

lawyers were ultimately the source of the idea of a European Company Statute, the idea was germinated and nurtured in the emerging legal culture of the European Community; a new and distinct legal system was both influenced by and influenced those of the Member States.[928] And through the elaborate process of considering new ideas and drafts for legislation, which includes preliminary circulation to the Member States for comment before any official action is taken,[929] it is inevitable that company law is shaped by contributions from each of the Member States. Even so, ultimately considerations of necessity and convenience are sure to drive the evolution of company law in the Community.

The approach of the European Community is necessarily one of gradualism. Just as corporation laws in the United States evolved from the tentative steps and accretions of decades of court cases and statutes in the United States,[930] a harmonious company law for Europe could only emerge from a series of discrete proposals whose contents could be carefully weighed in the long process toward enactment. While the *siege social* rule tended to remove the most powerful non-legal force for harmonization, the market, the predominance of civil law systems in the Community tended to limit the utility of court cases as a force for progressive development. In these circumstances, the need for gradual development found a useful instrument in the unique form of Community legislation called the directive.

Once the necessity of legislation on company law at the level of the European Community is accepted, the question of the nature of that law inescapably arises. Should that law be protective, or should it be facilitative? Should it impose uniformity, or should it set a broad framework within which the Member States can have some measure of flexibility? To what degree should there be emphasis on harmonization, and to what extent should there be emphasis on mutual recognition? What is the nature of the corporation?

---

928. *See supra* notes 755-59 and accompanying text.

929. *See, e.g.*, P. Kapteyn, *supra* note 1, at 254-55.

930. *See* Hovencamp, *The Classical Corporation in American Legal Thought*, 76 Geo. L.J. 1593 (1988).

1. *The kaleidescope of law*

It should be emphasized that the differences in scope of American corporation law and Western European company law do not mean that the law does not more generally address similar problems on either side of the Atlantic. Company law in Europe includes provisions that might be found elsewhere in American law. The company law and the legislation of the European Community contain elements that might be found in the United States in such diverse sources as the federal securities acts, the rules of the financial standards accounting board, bankruptcy law, and federal labor legislation. The tendency to include provisions in company law that might also fit elsewhere springs in part from the protective nature of European company law. It could be contended that it would be much better to exclude some of these provisions from company law, because they unduly burden the corporate form of doing business and are unrelated to any concerns about the use of the form. To the extent such laws are good public policy, they should be applied to all firms that meet specified criteria, rather than be restricted solely to the corporation. Therefore, the issue of the classification of statutory provisions is related to the more substantive policy issue of whether company or corporation law should be facilitative or protective.

2. *Protective or facilitative?*

The company laws in the countries of Western Europe, as has been noted, have been much more protective,[931] particularly of the rights of shareholders and creditors, than the corresponding statutes in the American states. That is not to say that the laws on the western side of the Atlantic do not provide substantial protections, or that those protections have been inadequate, or that important interests do not have protections in institutions outside the law. It is nevertheless a valid generalization that these protections are substantially more extensive, and as a

---

931. Some examples of the protective features include the following: the reservation of the decision as to the declaration of dividends to the shareholders (which necessitates further rules on accounting standards, accounting formats, approval of statements, and capital reserves), much higher capital requirements for marketable share companies, greater attention to protecting creditors, and the inclusion of criminal penalties within the Company Act.

consequence, the corporation as a legal institution is more heavily regulated in Western Europe than in the United States.

It was not always so. In the United States, restrictions arguably even more stringent than those now found in Europe were relaxed and eliminated in the celebrated "race of laxity." As the regulations and restrictions that bound American corporations were reduced, the States (and more significantly the federal government) addressed the emerging problems of the advanced industrial age by enacting new regulatory statutes and imposing new restrictions on firms as such, and not merely corporations. While most of the new statutes were related to the concerns of corporations as businesses (and would apply equally to firms doing business as partnerships), others, such as the Securities Act of 1933 and the Securities Exchange Act of 1934 addressed the relationships of shareholders and the corporation and had an impact on the core issues of corporation law. Through this period, when commentators began to express concerns about the direction of corporation law, the greater protest was about the growing size of the corporations.

This point is interesting because, in Europe, one major argument for integration of company law is that European firms have been hindered in their ability to grow to the size at which they could compete as quantitative equals of American and Japanese firms. Significantly, this is a major contention for the proposals on cross-border mergers and the European Company. In addition, unnecessarily protective company laws may unduly hinder the free flow of capital, a goal of the single market. Yet it is difficult to measure the degree to which individual provisions or major features of the law inhibit the growth of larger companies. However, a contrast between the popularity of the heavily regulated *Aktiengesellschaft* in the Federal Republic of Germany, a form used only by about 2200 companies,[932] with that of the public limited company in the United Kingdom, used by 5500 companies,[933] may indicate that burdensome regulations may unduly inhibit the use of a corporate form. And such inhibitions can be expected to result in an ultimate loss of economic advantage.

If this is the case, it argues for a reconsideration of the more burdensome features of company law in Europe and in particu-

932. Basaldua, *supra* note 539, at 493.
933. *Id.* at 492.

lar those perpetuated by the company law of the European Community. Without a doubt, most of the provisions requiring disclosure are necessary or useful in protecting shareholders and creditors. However, the extent of the disclosure required could perhaps be reexamined. If there can be a criterion for the extent of the disclosure, perhaps it should begin with the point that the best protectors of the shareholders' and creditors' interests are the shareholders and creditors themselves. Reasonable provisions that tend to empower them to protect their own interests may be helpful; however, provisions that tend to protect them beyond this level may be unduly burdensome.

The economic analysis of the existence of firms and the organization of firms as corporations may provide further criteria for evaluation.[934] Firms exist essentially because the transaction costs of contracting for the factors of production exceed the costs associated with the absence of market pricing within a firm, that is, the costs of information, communication, and lack of incentives otherwise developed systematically through prices in the market process.[935] But further analysis is required to show why many firms, especially larger firms, are organized as corporations.[936] The most distinctive legal attributes of the corporation are (1) continuity of life, (2) centralization of management, (3) free transferability of interests, and (4) limited liability.[937] All of these attributes, especially that of limited liability, are related to the methods of financing business enterprises and in particular the need for firms to raise large amounts of capital.[938] Whether the corporation is best viewed as an entity, an association, a contract, or otherwise,[939] it is the task of corporation law to elaborate the rules under which the just interests of the participants in corporate enterprise (with the maximization of profits for the shareholders as a priority)[940] can best be protected.

934. *See generally*, CORPORATE LAW AND ECONOMIC ANALYSIS (L. Bebchuk, ed. 1990); R. COASE, THE FIRM, THE MARKET, AND THE LAW (1988); R. HESSEN, IN DEFENSE OF THE CORPORATION (1979); R. POSNER, ECONOMIC ANALYSIS OF LAW 367-403 (3d Ed. 1986); R. POSNER & K. SCOTT, ECONOMICS OF CORPORATION LAW AND SECURITIES REGULATION (1980); N. WOLFSON, THE MODERN CORPORATION: FREE MARKETS VS. REGULATION (1984).

935. R. POSNER, *supra* note 934, at 367-68; R. POSNER & K. SCOTT, *supra* note 934, at 2-7; R. COASE, *supra* note 934, at 33-55.

936. R. POSNER, *supra* note 934, at 368.

937. *See* H. HENN & J. ALEXANDER, *supra* note 17, at 148-49.

938. *See* POSNER, *supra* note 934, at 368-72.

939. *See* HENN, *supra* note 18, at 144-47.

940. Posner and others raise questions as to the soundness of goals for corporate management other than maximization of profits. R. POSNER, *supra* note 934, at 393-97.

Certain minimum levels of protection for shareholders and creditors are in the interests of the corporations themselves.[941] Market forces place important limits on the discretion of managers and boards of corporations.[942] More extensive development of the economic analysis of corporate law should provide criteria by which the particular institutions and rules of company law in the European Community and the policies underlying them can be evaluated.

A further consideration lies in a distinction between problems arising out of the organization of the corporation and the essential relationships among shareholders, managers, directors, employees, and creditors, on the one hand, and problems arising out of the role of the corporation as a major economic actor, in the local area, in the national economy, and the larger Community market, on the other. This distinction may be clarified by the following question: Does a particular problem arise from the firm's legal status as a corporation? Or would it arise from the firm's role in the economy in any case and without regard to its legal status? If the latter is the case, it may be better public policy to address the problem outside the realm of corporation or company law. Otherwise, the application of the resulting provisions may be simultaneously both too narrow and too broad. As stated by Professor Ballantine: "[c]are should be taken to avoid burdening and curtailing unduly the advantages of doing business in corporate form, under which vital enterprises have been developed and can still flourish."[943] In light of the purposes of the company law proposals in the 1992 program, this concern is particularly relevant.

It is contended that the program for a single market is in part an exercise in deregulation. This is undoubtedly true in the sense that the elimination of divergent regulatory standards will reduce the intrusiveness of regulation, and it is also to some extent true in terms of reducing the general level of the regulatory burden. To a limited extent, these generalizations are valid in the area of company law. Greater uniformity in the company law of the twelve Member States will reduce the difficulties of doing

---

941. *See id.* at 391. Posner further concludes that competition among the States in the U.S. should result in "optimal rules" of corporation law. *Id.* at 392. For an extended discussion of this issue, see CORPORATE LAW AND ECONOMIC ANALYSIS, *supra* note 934, at 216-54.

942. N. WOLFSON, *supra* note 934, at 45-55.

943. H. BALLANTINE, *supra* note 17, at 43.

business across borders in the Community. In addition, the proposals show some movement toward deregulation in the more classic sense. For example, the new Directive on Disclosure with Respect to Branches is largely deregulatory, since it generally reduces the reporting and disclosure requirements imposed on the branches of Member State companies. The Proposal on Cross-Border Mergers is deregulatory to the extent that firms in different Member States now will be freed from the present regulatory provisions of the Member States so that they may merge under less burdensome conditions. Although the two Regulations for the European Economic Interest Grouping and the European Company Statute contain their own complex systems of regulations, their larger effect may be to free European firms from the regulatory barriers of the Member States. In any event, the extent of deregulation will always be limited so long as most of Western Europe adheres to a protective approach to company law.

The protective nature of European company law is closely related to the *siege social* rule. Protective provisions would tend to be threatened by competitive deregulation of company law by the Member States without it. Yet the *siege social* rule carries with it some significant burdens. The uncertainty in determining the true headquarters of a company and thereby the law applicable to the firm's internal affairs is probably a minor consideration. But the difficulties resulting from the movement of the headquarters of a company from one Member State to another should not be underestimated.[944] It is not remarkable that some commentators have contended that the *siege social* rule violates the right of establishment guaranteed by the Treaty of Rome.[945]

3. *Uniformity or flexibility?*

The framers of the new company law must also determine to what degree the European Community will attempt to impose uniformity or permit flexibility. Concerns on specific problems of policy, worker participation for example, are likely to drive uniformity in laws to a minimal level. A more general desire to pre-

944. In contrast, American corporations have moved quite freely from one State to another in recent years. For example, American Airlines and J. C. Penney have moved from New York to the Dallas area, and Mobil Corporation has moved from New York to northern Virginia.

945. *See* text accompanying notes 183-88.

vent the regulations of the Member States from burdening firms that do business across borders necessarily requires numerous uniform standards for company laws. Another consideration is the need for business to operate with expectations with regard to the forms in which business can be done across the Community. Followed to the limits of their logic, these points do not compel uniformity beyond a moderate level. While flexibility is a political necessity, it independently has virtues. Only with flexibility will the Member States have some freedom to experiment with new rules and new institutions, as the continuing evolution of the economy will undoubtedly require. It must be remembered that most of the company law proposals have origins in the distinctive rules and institutions of the Member States. One advantage of federalism is that it permits experimentation with new ideas for public policy which, if unsuccessful, have been tested with minimal damage and risk, but, if more useful, may be copied widely. The advantages of flexibility should neither be underestimated nor ignored.

4. Harmonization or mutual recognition?

The program to complete the single market by 1992 represents to some extent a shift from harmonization to mutual recognition as a means of integration. This shift seems less pronounced in the proposals on company law. In fact, to a large extent, mutual recognition for companies was accomplished in the Treaty of Rome by the provisions guaranteeing the right of establishment and would have been furthered by the adoption of the Convention on Mutual Recognition. Much of the company law program is now directed toward making that mutual recognition more workable. Mutual recognition as a principle can be better seen as the principle underlying the necessity of many of the provisions of the Directives on Cross-Border Mergers and Takeover Bids.

5. Federal and state regulation?

The dimensions of flexibility versus uniformity and harmonization versus mutual recognition are closely related to the problem of federalism.[946] The European Community has pur-

946. This problem is the subject of R. BUXBAUM & K. HOPT, *supra* note 208, and Buxbaum, *Federalism and Company Law*, 82 MICH. L. REV. 1163 (1984). Professor Buxbaum's book was reviewed in Oesterle, *Book Review*, 22 CORNELL L. REV. 269 (1989).

sued a course that has taken it from a multilateral organization of contiguous states, united in a free trade area, to a customs union, and finally to full economic integration. Arguably, the institutions of the European Community now constitute a "government." Its federalism has evolved very differently from the American system, though the creation of a single market was a goal of each union. The involvement of the European Community in company law, much more extensive than that of the United States Government in corporation law, even when federal securities regulation is considered, was natural and inevitable in the very different legal circumstances of Western Europe.

6. *Private property or public institution?*

The proposals of the single market program raise questions about the nature of the corporation. Is the corporation, particularly the marketable share company, the private property of its owners or a more public institution? Do its shareholders own the corporation or merely its shares? Some provisions, such as the use of bearer shares in Germany, might suggest one answer, while other provisions might tend to contradict them.

These questions are most controversial in the context of the worker participation provisions of the Directive on the Structure of Public Limited Companies and the European Company Statute. While the codetermination provisions of German law date back to 1920, they have not been widely used in other EC countries.[947] They quite clearly represent a reduction of the rights of shareholders as owners of property, although most provisions are structured to preserve majority control by shareholders.

Particularly striking is the assumption that seems to lie behind such provisions: that workers will have a permanent relationship with the corporation and that workers and companies must mutually commit themselves for the length of the worker's career. Indeed, worker participation in decisions that might affect such a permanent relationship seems to be the major reason for codetermination. This assumption may become increasingly less viable in a period of increasing change and a dynamic international economy. A growing economy and job market may make this assumption less tenable and increasingly more disadvantageous to workers and companies alike. Indeed, an employment market characterized by the free mobility of labor among

---

947. Schneebaum, *supra* note 208, at 308.

companies and even among countries is undoubtedly in the interests of both.

Worker involvement in the affairs of corporations is generally in the best interests of the corporation, but it can be accomplished in other ways. A large number of corporations have created Employee Stock Ownership Plans (ESOPs),[948] which involve workers and managers in additional roles as owners of the corporations. In addition, workers can be involved in major decisions through the collective bargaining process. The worker participation provisions in the company law proposals allow the workers to reject codetermination if they wish, and, indeed, some believe that codetermination may compromise or impair certain advantages of the collective bargaining process.

In the long run, the best protection of workers will always be the health of the economy and the firms in it. Burdening business with unnecessary regulations will harm the economy and the workers as well. Removing such regulations will tend to ensure that the continued growth of the economy will provide many employment opportunities.

The issue of worker participation is at least in part responsible for slowing the progress of two of the company law proposals.[949] The adoption of these proposals would create, in the views of many, opportunities to evade the worker participation statutes of the Member States, particularly Germany. Rather than allow that evasion, the current proposals would extend them throughout the Community.

The political dimension of this problem must also be a matter of concern. The task of building the European Community necessarily includes the strengthening of its legitimacy as a political entity among the people of the European Community. This means promoting measures may tend to reinforce the Community's role as a source of authoritative pronouncements. The important issue of worker participation may tend to add or detract from the legitimacy of the single market program among various groups. In particular, for those workers for whom codetermination is an essential and legitimate part of the existing order, any opportunities for evasion of Member State statutes will be regarded as harmful. In contrast, including such ideas will be regarded as beneficial, with some degree of effect on

948. *See, e.g.*, H. Henn & J. Alexander, *supra* note 18, 674-75.
949. *Fifth Progress Report*, *supra* note 2, at 25.

the legitimacy of the European Community. Here, as in all governmental measures, any definition of the public interest always includes political considerations.

C. The Future

Political developments in Europe suggest that the company law of the European Community and its Member States may be influential beyond its current boundaries. The unification of Germany occurring on October 3, 1990, has resulted in the extension of the law of the European Community eastward to include more than sixteen million additional Germans, a result unforeseen at the time of adoption of the plan for a single market and indeed not widely predicted just a year before. Without an attempt at forecasting, it is possible to see the growth of the European Community in two directions.

The first direction is the strengthening of the institutions of the European Community and the further development of Community law. In a development additional to the single market program, the EC is moving toward the establishment of an Economic and Monetary Union, including the creation of a single currency and a central bank, or a system of central banks. The Single European Act, which facilitated the passage of 1992 proposals, also added authority for flanking programs in the areas of social policy, economic and social cohesion, research and technological development, and the environment.[950] In addition, the EC is developing and implementing programs in telecommunications, energy, and intellectual property. Most importantly, many in the EC are talking about adding more general political, foreign policy, and defense powers. In December 1990, the Community convened two intergovernmental conferences, the first on economic and monetary union, and the second on reform of the political institutions—or possibly full political union. These intergovernmental conferences, the functional equivalents of an American constitutional convention, will consider amendments to the Treaty of Rome.

The intergovernmental conference on political union is likely to produce proposals for amendments to the Treaty of Rome that will change the political institutions of the European Community. One likely direction of change will be to give the

950. *See* The Single European Act, art. 130, BULL. E.C., Supp. Feb. 1986 (adding provisions to the Treaty of Rome).

European Parliament more power. While the Parliament currently has the power to force the resignation of the Commission, an amendment could add the power to elect a new Commission or at least to select its President. While all legislation must now originate in the Commission, an amendment could allow the Parliament to introduce its own proposals into the legislative process. Other possibilities abound. Pressure to make the Community institutions more democratically accountable is certain. The tendency of these proposals will be to give the Community more legitimacy and more power. The implication of this direction in Community affairs is that present possibility of continued development of Community company law will be given further scope.

The second direction of Community development is its possible geographic extension. For the remainder of the decade and beyond, the Community will confront the question of enlargement of its membership in a predictable series of applications from European nations. Membership, though advantageous and increasingly attractive, is also somewhat burdensome in that the new Member State must accept the *acquis communautaire*, the body of law of the Community that includes the treaties, regulations, directives, decisions, opinions, policies, and practices of the Community, as a whole, although it may be granted a period of time to adjust its laws and policies. The manner in which the application occurs and in which the Community responds is likely to be affected by the results of the conference on the reform of political institutions.

However, the applicants can be placed into four categories. The first group of nations includes the present members of the European Free Trade Association (EFTA): Iceland, Norway, Sweden, Finland, Switzerland, and Austria. While the Community signed association agreements with these countries creating free trade areas with them individually in 1973, these nations are now negotiating with the Community over the creation of a European Economic Space, an amplified free trade area with additional measures for economic integration. These negotiations are extremely difficult because they involve the acceptance of some part of the *acquis communautaire*, the creation of new institutions for EFTA, and joint institutions for the economic space.

The second category includes the formerly socialist countries of Central and Eastern Europe: Poland, Hungary, Czecho-

slovakia, Romania, Bulgaria, and Yugoslavia. Having just concluded a round of trade agreements with these countries, the Community has now begun to negotiate association agreements with them. Much of the future of this relationship depends on the progress of these countries toward market economies, multiparty systems, free and fair elections, respect for human rights, and the rule of law. Many of these countries have already expressed the desire for eventual Community membership, but a period of far reaching changes, most of which these countries are intending to make in any case, are necessary before membership is a realistic possibility.

The third category includes such potential and actual applicants as Turkey, Cyprus, and Malta. Yet a fourth category would be a radically changed Soviet Union or some of its constituent Republics. The difficulties would be the same as for the formerly socialist countries of Central and Eastern Europe, and this possibility must be regarded as more distant. These categories exhaust the map of Europe and with it the possibilities of new Community members.[951]

Beyond the possibilities of full membership and the impact of association agreements, the law of the European Communities is likely to have an influence beyond its boundaries in any case. The Community's distinctive form of legislation, the directive, makes it particularly feasible for Community legislation to travel beyond the EC's boundaries. Nations who are not members find it no more difficult than the Member States to enact laws implementing Community legislation, and they often do so. The business leaders of the non-Member States may be particularly interested to see that their own national law is harmonious with that of the Community, especially the single market program, even if they cannot bring about full membership for their nation soon. At the same time, most of the nations of Central and Eastern Europe, in the transformation of their economic systems that began in earnest in the late fall of 1989, must replace the statutes of the socialist legal tradition, such as the laws of state enterprises, with laws facilitating the reconstruction of the market system. It can be expected that they will examine the company laws of the members of the European Community, already

951. Membership in the Community is open to "any European State," which must apply to the Council for unanimous approval of its application. TREATY OF ROME, *supra* note 5, at art. 237.

influenced by Community directives, and perhaps contemplate the possibility of eventual Community membership as they determine the contours of those laws.

These circumstances suggest that the company law of the European Community will be profoundly influential within and without. The company law for the market of 340 million people in the European Community is very significant; its strong influence and possible application to the remainder of Europe is even more so. As the proposals move toward final enactment, their provisions should be considered in the light of this greater importance.