THE EUROPEAN COMPANY

Pieter Sanders*

I. INTRODUCTION

This article will deal with the 1975 proposal of the European Communities Commission concerning a Statute for the European Company.¹ This draft is an amended edition of a previous proposal submitted by the Commission in 1970 to the Council of Ministers of the European Communities.² The 1970 proposal was based largely on a so-called Preliminary Draft made at the request of the Commission by the author of this article. This Preliminary Draft dates from 1966.³ It would be rather confusing to go through all these different stages and to discuss the evolution of the project in detail. The readers of this Journal may be interested above all in the present status of the project; i.e., the 1975 Draft Statute.

The idea of creating a European Company was ventured at my inaugural lecture in 1959.⁴ In fact, being a practising lawyer until that moment, I was confronted more than once with the question from clients from outside the Common Market as to in which of the Member States (then only six) they should form their subsidiary.

* Professor of Comparative Law at the Law Faculty of the Erasmus University, Rotterdam. Mr. (Meester in de Rechten), 1933, Dr. (Doctor in de Rechtsgeleerdheid), 1945, University of Leyden.


⁴ For translations of the lecture under the title Towards a European Company? see 6 AUSSENWIRTSCHAFTSDIENST DES BETRIEBS-BERATERS 1 (1960) (in German); 3 LE DROIT EUROPÉEN 9 (1960) (in French); 4 REVISTA DELLE SOCIETÀ 1163 (1959) (in Italian).
Each of the Member States at the time had and until now still has, in spite of some harmonization achieved in the meantime, its own national company law. As a rule, however, an American or English subsidiary (at that time the United Kingdom was not a member of the European Communities) was meant to do business in all of the member countries. Could this purpose best be served by forming a company in France, Holland, Belgium, Germany, Luxembourg, or Italy? Why should it not be possible to constitute a company that as such would be recognized in all of the Member States and which could do business in those countries on an equal footing with domestic corporations: a company not subject to the national company law of the country involved, but to a uniform European company law, applicable directly in all the Member States alongside the national company law?

While the idea seemed to have some attractions, its realization was another matter. It was only in 1965, at the initiative of the French Government, that the Commission of the European Economic Community asked me to put this idea, with the assistance of company law experts from other countries of the EEC, in the form of a concrete draft. The result was the 1966 Preliminary Draft Statute, which was published in 1967. In the first years thereafter—I make the story short—no progress was made. It was therefore that the Commission itself in 1970 made its first proposal of a draft statute which was no longer under the responsibility of an individual, but shared the authority of the Commission. With this 1970 Draft Statute of the Commission the Sanders draft became history.

The Commission's 1970 Draft Statute is in the form of a regulation. This was, at the time, a daring step. Once approved by the Council of Ministers this regulation will be in force directly in all the Member States and thus will need no further implementation. Therefore, this would also apply to the Statute of the European Company, introducing a complete new form of company in the

\footnote{Note 3 supra.}

\footnote{For a comparative study see J. Micallef, The European Company, A Comparative Study with English and Maltese Company Law (1975). This study is based on the 1970 Draft Statute, supra note 2. The study also compares the 1970 Draft Statute with the 1966 Preliminary Draft Statute, supra note 3, the so-called "Sanders Draft." The 765 page study also contains an extensive bibliography.}

\footnote{Note 2 supra.}

\footnote{It may still be consulted, however, as it contains in its commentary many references to comparative law. These references have not been repeated in the proposals of the Commission. The (much shorter) commentary of these drafts is of a different nature.}
Member States next to their existing company forms of national law. The Rome Treaty\(^9\) does not contain a special provision for the creation of this new instrument. It must be based on the general provision of article 235 for filling gaps in the Treaty if this is deemed necessary to achieve the aims of the Community. This, according to the Commission, is indeed the case: in order to achieve a truly common market, an appropriate form should be created for enterprises of different Member States to cooperate and to concentrate their economic potential.

The same article (article 235) requires a unanimous vote of the Council and previous consultation of the Assembly for the adoption of such a regulation. Therefore, after the Commission had offered its proposal to the Council on June 30, 1970, it went for consultation to the European Parliament and, as understandable in a matter like this, also to the Economic and Social Committee.\(^10\) The Economic and Social Committee gave their opinion in 1972.\(^11\) The consultation of the Parliament was not concluded until 1974.\(^12\) Four years passed during which, among others, the United Kingdom became a member of the European Communities. Also during those 4 years, the ideas on employee participation and the structure of the company developed considerably. This evolution is reflected on the national level,\(^13\) as well as in the amendments proposed by the European Parliament during its debates on the Commission’s proposal, which I shall consider later.

Taking into account the consultations of the Economic and Social Committee and the European Parliament—and also the reactions and criticisms received from other sides—the Commission offered the Council an amended proposal in May 1975. This proposal will in all probability be dealt with in a final round by a working party under auspices of the Council. This working party has still to be

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\(^10\) Pursuant to Rome Treaty, supra note 9, art. 198.


\(^12\) Resolution embodying the opinion of the European Parliament on the proposal from the Commission of the European Communities to the Council for a Regulation embodying a Statute for the European Company, 17 E.E.C. J.O. C93, at 22 (1974).

\(^13\) For a summary of these developments on the national level see Employee Participation and Company Structure, 8 BULLETIN OF THE EUROPEAN COMMUNITIES Supp. No. 8 (1975).
formed. For the moment (February 1976) the Permanent Representatives are studying the main political issues involved. Only when the results of these studies are known will a working party be able to start. It then may take another few years before this final round is finished. Therefore, the European Company actually may not be born before 1980.

This would mean a drafting period of 20 years from the inception of the idea in 1959 to its realization; or about 14 years when we start counting from the work on the 1966 Preliminary Draft Statute. If really achieved in such a period, this would not be bad at all for such an ambitious project as the creation of a complete new company form, the creation of the Societas Europaea (S.E.) as it has been called since the Preliminary Draft. Legislation takes time, even when only one country is concerned. The European Company Statute, however, is a piece of legislation by now for nine countries.

The 1975 version of the Statute still contains 284 articles, as in the 1970 draft. Moreover, there are four annexes, two of which are newly added. It is obvious that, in this contribution, it will not be possible to go into all aspects of the Statute. I shall limit myself to those which may give the readers of this Journal a general impression as to how the European Company is structured and what purposes it is aimed to serve.

II. FIELD OF APPLICATION

The S.E. is intended to function as a company form in addition to the company forms already existing in the Member States of the European Communities. The Statute for the S.E. therefore does not replace any national company law. It only presents an extra possibility, put at the disposal of the business community for cooperation across borders between companies of different national law. No one is obliged to use this new instrument. It is up to the business community to decide whether, in a specific case, they want to use this possibility or not. The new form is, as the French say, "à prendre ou à laisser" (take it or leave it). I want to stress these two features—the additional character and the nonobligatory charac-

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14 Actually there are 53 articles more since, in revising the previous draft, 79 articles (marked with letters) were added and 26 articles were deleted.

15 The new annexes include annex II, Rules for the election of members of the European Works Council (20 articles) and annex III, Rules for the election of employees' representative to the Supervisory Board (26 articles).

16 1975 Draft Statute, supra note 1.
ter—at the outset, as they facilitate to some extent the acceptance of this new venture by the Member States represented in the Council of Ministers. Compared with the harmonization of company law—another activity of the Commission which is going on at the same time—the uniform Statute leaves greater freedom to the draftsmen. A directive of the European Communities is binding upon the Member States who must implement its contents in their national company law. This means a modification of municipal company law. The Statute for the European Company does not change national company law; it simply adds a new set of rules for a new type of company which may be chosen for special purposes.

These purposes are all of an international character. Companies of different national law (i.e., companies incorporated under the company laws of at least two different Member States) may form an S.E.:

a. by merging into an S.E.;
b. by forming an S.E. holding company;
c. by forming an S.E. joint subsidiary (joint venture).

In the case of a merger, the founding companies disappear and their assets are automatically transferred to the S.E. The shareholders of the founders become automatically shareholders of the S.E. Therefore, if a German Aktiengesellschaft (company limited by shares) merges into an S.E. with a French Société Anonyme, the result is a neutral, European instrument. This neutrality eliminates a psychological obstacle as compared with a convention on international mergers for which, by article 220 of the Rome Treaty, the Member States are instructed to work. This merger always ends up in a company of municipal law. In the case of a merger into an S.E., no specific national company law must be chosen to govern the company resulting from the merger. The result of the merger is not a German or French company, but the neutral form of an S.E. equally known, next to their municipal company law, in both countries. The 1975 Draft Statute underlines this neutrality concept by also allowing the choice of more than one seat of the company. In the example given, there could be a seat in France as well as in Germany.

In the case of an S.E. holding company, the founding companies incorporated under different national laws remain in existence. All the shares of the founders are transferred to the holding company

\[\text{Note 9 supra.}\]
against issuance of holding shares. The shareholders of the founding companies become automatically shareholders of the S.E. holding company. The founders are transformed into 100 percent daughter companies of the holding company. They continue their operations, but now under the uniform direction of the S.E. holding company.

When a joint venture is formed by at least two founders of different municipal law, the S.E. becomes the daughter company in which the founders may participate on a 50-50 basis or in any other proportion that they deem appropriate. The joint venture may be used, for example, for common research, sales promotion, or for the production of specific goods. It may also be, in its neutral form of an S.E., the appropriate instrument to realize large projects such as the construction of a tunnel under the Canal (English Channel) and to raise the necessary capital for such a project in different countries.\(^\text{18}\) It is expected that the S.E. joint venture will be used by large and medium-size companies for these areas. The merger and the formation of a holding company in the form of an S.E., on the other hand, entail more far-reaching consequences.

The founders of an S.E., in case of a merger or of the constitution of an S.E. holding company, can be only public companies limited by shares (Aktiengesellschaft, Société Anonyme). In the Member States these companies are largely outnumbered by private companies limited by shares (G.m.b.H., in Germany; S.à.r.l., in France and Italy).\(^\text{19}\) The restriction to the first category of companies limited by shares seems more than it actually is: in all Member States companies of the second category can easily be transformed into companies of the first category (with no tax problems involved) and then participate in the formation of an S.E. by merger or by the constitution of an S.E. holding company.\(^\text{20}\)

Enlargement was possible, however, and has been introduced in the 1975 Draft Statute as far as the joint daughter company is concerned. This joint subsidiary in the form of an S.E. now may be formed not only by companies, but also by cooperative societies and

\(^{18}\) The S.E., being on equal footing with companies of national law, should also have the same access to the stock exchanges in different countries as companies of national law.

\(^{19}\) Unlike the corporation laws of the United States, the municipal company laws in Europe draw a distinction between the public company limited by shares and the private company limited by shares. The main features of the latter comprise the restrictive transferability of shares and a reduced disclosure of the annual accounts.

\(^{20}\) For the Republic of Ireland and the United Kingdom no such transformation is required. See the commentary on article 2 under 2: in these countries "the difference between private companies and other kinds of limited company is not such as to make special treatment appear justified."
other corporations governed by the public or private law of a Member State having as its object the carrying on of economic activity. The only restriction is that they must be incorporated under the municipal law of a Member State and that at least two founders be subject to different national laws (the international factor).

It may be asked why the formation of a joint subsidiary is restricted to legal persons of the European Communities. The answer may be that the S.E. first of all is conceived for the strengthening of cooperation within the Common Market, and this with a view of keeping up with competition from the outside. In practice, however, outside companies are not prevented at all from making use of the European Company. In order to form an S.E. joint subsidiary they may make use of a subsidiary which they already have within the Common Market or of the intermediary of a bank, which transfers the shares—after formation of the S.E.—to its client.21 For a merger into an S.E. or a formation of an S.E. holding company, the outside corporation remains excluded. Even if the Commission would have been willing to propose this extension (quod non!), this would have been impossible for technical legal reasons. The exchange of shares involved in these formations cannot be imposed by a regulation of the European Communities on shareholders outside the Common Market. Neither can the automatic transfer of assets to the S.E. be imposed by a regulation on outside companies. The only (legally) possible extension to outside companies remains, therefore, in the important field of the joint subsidiary.

The minimum capital required for an S.E. joint venture amounts to 100,000 Units of Accounts,22 which is not likely to constitute a financial obstacle for large and medium-size companies operating on the international level. The minimum capital required for the two other forms of the S.E. will not create an hindrance either: 250,000 Units of Accounts for the S.E. merger and S.E. holding. Compared with the 1970 Draft Statute, the access to the S.E. has been enlarged considerably. Under the pressure of the European Parliament and other critics the Commission has halved the minimum capital, which originally was 500,000 Units of Accounts for the merger and holding company and 250,000 for the joint subsidiary, and it has expanded the circle of possible founders of an S.E. joint subsidiary.

Finally, when dealing with the field of application, it should be mentioned also that an S.E., once existing, can participate in the

21 The S.E. is free to have bearer shares or registered shares or even both.
22 The Unit of Account was originally equal to one United States dollar; today it is worth about 30 percent more.
formation of another S.E., together with other S.E.'s or the companies incorporated under municipal law of Member States. This applies to all the three types: merger, holding company, and joint subsidiary. A peculiarity of the Statute is, however, that an S.E. also may form, on its own, a 100 percent daughter S.E. This is the first time that the formation of a company by one founder alone has been recognized. In the Common Market the number of founders required by national company acts varies from two to seven. So in the Netherlands according to the Company Act the formation is to be made by two. In practice, and accepted by the courts, a dummy may function as the second. The Statute offers a more elegant solution which until now has not encountered any objection.

III. Structure of the S.E.

Sticking to my intention to describe only some of the main aspects of the S.E., I leave aside the regulations on the formation of the S.E. These regulations are to be found partly in title I of the "General Provisions" of the 1975 Draft Statute (also among those are the provisions dealing with the access) and more specifically in title II, "Formation." In this title the formation of the S.E. is regulated in detail with regard to all eventualities: merger, holding company, joint subsidiary, and sole S.E. subsidiary. Leaving aside also title III dealing with capital, shares, and debentures, I would like to turn to title IV, entitled "Governing bodies." The "governing bodies" mentioned in this title are—in the sequence they are dealt with—the Board of Management, the Supervisory Board, and the General Meeting. Management comes first as, in practice, in the functioning of a company it plays the most important role.

A. Board of Management

According to the 1975 Draft Statute all powers not reserved expressly to other bodies of the company belong to the management, which acts collectively if it comprises more than one managing director. Only physical persons, including foreigners, can be managing directors. Here, fortunately, the restriction of the 1970 Draft Statute, excluding foreigners when there would be no more than two and requiring in all other cases that they should constitute a minor-

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23 The Statute contains 14 titles. While all of these interesting features could be mentioned, however, a choice had to be made.
24 This term is used in the sense of persons not having the nationality of one of the Member States.
ity on the board, has been deleted.

According to Article 65, where the Board of Management comprises more than one member, each of them shall have authority to represent the company in its dealings with third parties; provisions in the articles of association to limit this power of representation may not be relied upon to defeat claims of third parties. These provisions therefore have only what is called an "internal effect." The articles of association may provide that specified decisions of the Board of Management, beyond those prescribed by Article 66, shall require prior authorization of the Supervisory Board as well. Such restrictions have again only internal effect, even when the transaction would fall outside the scope of the company's activities. Third parties are thus fully protected. The Brussels First Directive is applied here to its fullest extent.

B. Supervisory Board

The most striking feature of the Statute, as far as the structure of the company is concerned, consists in its option for the "two-tier" system. This dual system has been known for some time in Germany and the Netherlands, and since 1966 as an alternative possibility in France. The choice has been inspired largely by the possibilities which the dual system offers for solutions with respect to the most difficult problem of all: employee participation in the management of a company. Having next to the Board of Management a Supervisory Board, the latter offers the possibility—as demonstrated in Germany—of having the employee represented at the top of the company. Starting with the 1966 Preliminary Draft Statute, the Statute has always known this two-tier system.

1975 Draft Statute, supra note 1, art. 66, para. 3. Article 66 specifies the following issues: (a) closure or transfer of establishments of the company or of appreciable parts thereof; (b) substantial curtailment, extension or modification of the activities of the undertaking; (c) substantial organizational changes within the undertaking; (d) establishment or termination of long-term cooperation with other undertakings.

Id. para. 4.

Id. art. 65, para. 3: The company is bound by acts of the members of the Board of Management "notwithstanding that such acts are connected with the objects of the company, unless the acts are outside the functions of the Board of Management as provided by the Statute."

First Council Directive No. 68/151/EEC of March 9, 1968, 11 E.E.C.J.O. L65, at 8 (1968). This Directive instructs the Member States of the EEC to introduce in their national company law protection of third parties. It is the only Directive to date that has entered into force. Several other directives are still pending. The Second Directive is expected to enter into force soon.

Under the two-tier system the Supervisory Board, regardless whether there is employee representation or not, supervises the day-to-day management of the managing directors and advises them on main issues. On some main issues the management cannot even make a decision without prior authorization by the Supervisory Board. These issues may be enumerated in a company act, in the articles of association, or in both. This last solution has been introduced in the Statute, as explained above. Long term policy is thus discussed with the management in meetings of the Supervisory Board, which meets with the managing directors at regular intervals, at least four times a year but, in practice, perhaps eight or even ten times a year. Under the one board system a distinction can be made between the so-called outside directors and the inside directors. The outside directors could be compared with members of the Supervisory Board under the two-tier system. Under the dual system the tasks of the members of each board are more clearly distinguished, permitting a clearer distinction between the responsibility of the members of both bodies. The foregoing consideration may also induce those countries accustomed to the one board system to accept, as far as the S.E. is concerned, the two-tier system.

The debate centers on the composition of the Supervisory Board and more specifically on the representation of labor on this board. Originally all members of the Supervisory Board were appointed by the general meeting of shareholders. However, after World War II, in the Federal Republic of Germany at the instigation of the Occupying Powers, the representation of the employees on the Supervisory Board (Aufsichtsrat) was introduced: the so-called codetermination (Mitbestimmung). It was a daring step when, in 1970, the Commission introduced the Mitbestimmung in its proposal for the European Company: one-third of the members of the Supervisory Board should be employees’ representatives. I called this a daring step as, at that moment, only one out of the six Member States knew of this type of labor participation at the top of a company. In the meantime the evolution went on. In 1971 the Netherlands introduced a system of their own for the so-called large companies.

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29 Two types must be distinguished: the 50-50 Mitbestimmung in the coal and steel industry (1950) and the one-third Mitbestimmung in other cases (1951). The first type is also called “qualified co-determination” (qualifizierte Mitbestimmung). Labor was regarded as a countervailing power that would constrain capital from developing those industries again as instruments for warfare.

30 Wetboek van Koophandel (Commercial Code) §§ 52a-52o, introduced by Wijziging van het Wetboek van Koophandel; Voorziening met betrekking tot de structuur der N.V. en B.V. (Amendment to the Commercial Code; Provisions relating to the structure of the N.V. and B.V.) of May 6, 1971, [1971] Staatsblad (Official Gazette) 289. These sections have been
Denmark\textsuperscript{31} followed in 1973, permitting the workers of a company with at least 50 employees to appoint two members on the Board of Directors, the majority always to be appointed by the general meeting of shareholders. In 1974 Luxembourg\textsuperscript{32} introduced the one-third representation for a certain category of companies. Germany\textsuperscript{33} recently decided to make a general rule of the equal representation of labor and capital, which was until now reserved for companies of the coal and steel industry only. These developments, briefly mentioned here, are indicative of the trend in Western Europe.\textsuperscript{34}

Against this background it might be better understood why, in the amended proposal for the European Company of 1975, the Commission made another step forward with respect to the composition of the Supervisory Board. Actually this step resulted from the extensive discussions that took place in the European Parliament in 1974. The solution accepted by a great majority of the parliamentarians and now incorporated in the amended Statute for the European Company is the following.

The Supervisory Board of the S.E. must be composed of at least three members and, when the S.E. has establishments in several Member States, which usually will be the case, it must be composed of at least nine members. The number of board members to be fixed in the articles of association must always be uneven and divisible by three. One-third of the members will be appointed by the shareholders; one-third will be representatives of the employees; the last third will be co-opted by the other two. This is, in principle, the system in broad outline. It means equal representation of labor and capital (each one-third) and a kind of mediating last third, co-opted by the first two and therefore apparently enjoying the confidence of both sides (labor and capital). This system has been elaborated by

\begin{itemize}
  \item Loi du 6 mai 1974 instituant des comités mixtes dans les entreprises du secteur privé et organisant la représentation des salariés dans les sociétés anonymes (Act of May 6, 1974 establishing mixed committees in private enterprises and organizing the representation of the employees at the limited liability companies), Mémorial A no. 35 du 10 mai 1974, in force on August 1, 1974.
  \item For a more detailed description see \textit{Employee Participation and Company structure}, 8 \textit{Bulletin of the European Communities} Supp. No. 8 (1975).
\end{itemize}
the Commission—again on the basis of the discussions and resolutions as accepted in the European Parliament—in the 1975 Draft Statute.

The representatives of the shareholders are appointed, of course, by the General Meeting. The articles of association, however, may contain a regulation which offers a minority of shareholders the possibility to appoint a member of the board.\textsuperscript{35} Otherwise only candidates of the majority would be chosen.

The representatives of the employees are chosen by the parties of the S.E. and of the companies controlled by the S.E. according to the "Rules for Election" contained in annex III of the 1975 Draft Statute. These rules provide for direct elections in case the S.E. comprises only one establishment. Normally, the S.E., and certainly if it also controls other undertakings, will be comprised of more than one establishment. In the latter case the electoral delegates first of all are chosen by the workers of the establishments: two members for each establishment and, if the establishment employs more than 100 workers, one member more for every 100 workers. The electoral delegates may not be bound by voting instructions. They elect by free and secret ballots the employees' representatives on the Supervisory Board. If only three representatives must be chosen, one may come from outside of the S.E. or a company controlled by the S.E. The representative may, for example, be an official of a trade union. If more than three representatives are to be appointed, two of them may come from outside the S.E. or its controlled companies.

Both groups—the representatives of the shareholders and those of the employees—have the task to agree on the co-optation of the remaining one-third. Candidates for this last one-third may be proposed by the general meeting, by the management, and by the "employees' representative body." By this is meant the European Works Council which I shall consider later.\textsuperscript{36} The only persons qualified to be candidates on behalf of this third part are those "who are not directly dependent on the shareholders, the employees or their organizations."\textsuperscript{37} Apart from this negative criterion, the Statute requires that the candidate "represent general interests and possess the necessary knowledge and experience."\textsuperscript{38} Neither the discussion in the European Parliament nor the Commission's commentary on

\textsuperscript{35} In this respect the American system of cumulative voting was mentioned.
\textsuperscript{36} In the (exceptional) case that there would not be a European Works Council the Statute regulates to whom then belongs the right of proposal. 1975 Draft Statute, supra note 1, art. 75a, par. 2.
\textsuperscript{37} Id. art. 75a, para. 3.
\textsuperscript{38} Id.
the Statute make clear exactly what is meant by this. On the contrary, according to the commentary this is left vague on purpose, in order to facilitate the election of appropriate and independent members. The mediatory role of this third part has also been expressed in the commentary where it expects the co-opted members to find, in conflict situations, solutions which do full justice to all interests involved.

The third body dealt with in title IV—the General Meeting of shareholders—also shows some particular features when compared with the regulation in municipal company acts. For example, the Statute enumerates in an exclusive list the powers which belong to the general meeting. This list contains 12 issues on which the general meeting must decide, including, for example, the increase or reduction of capital, modification of the articles of association, and merger with another company. On three other issues the authorization of the general meeting is required.

A proxy can be given only for one general meeting (or its follow-up), but members of the Supervisory Board and members of the Board of Management or salaried employees of the company or its dependent undertaking may not act as proxies. Solicitation of proxies is regulated in detail in article 88a.

In the general meeting the shareholders have the right to be informed by the management of information necessary for the proper discussion of items in the agenda; refusal to supply such information may lead to an action in court. Voting agreements are allowed, but must be communicated to the company (failure may incur the penalty of having the votes which were cast nullified); the S.E. must make mention of the voting agreements in the annual report.

These are some of the main features concerning the three bodies of the S.E. dealt with in title IV. The functioning of the S.E. cannot be understood, however, without taking into account the European Works Council (EWC), dealt with in title V. There are issues on which the Supervisory Board cannot give its authorization without knowing the opinion of the EWC. On other issues the Board of Managing Directors cannot decide without having first heard the EWC. Finally, some decisions by management can be taken only

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39 A candidate must acquire a two-thirds majority. In case after a third vote (always on the basis of new proposals) this majority is not reached, the Statute provides for an arbitral tribunal to make the appointment. Id. art. 75b.

40 Id. art. 83.

41 In id. art. 83, para. 2, we find a similar provision as in id. art. 66, para. 4, for the protection of third parties. See note 28 supra.

42 1975 Draft Statute, supra note 1, art. 90.

43 Id. art. 93.
with the plain approval of the EWC. There exists, therefore, a clear interplay between management, the Supervisory Board, and the EWC. Although dealt with in a separate title, title V under the heading “Representation of employees in the S.E.,” the EWC can, in my opinion, be regarded as a body of the S.E. as well.

IV. European Works Council

Another aspect of the participation of the workers in the decision-making process is to be found in the European Works Council. In the previous chapter I dealt with the participation of labor at the top of the S.E. in the Supervisory Board. Here the Statute presents a rather progressive solution, only to be compared with the situation in Germany and, to a lesser extent, in Holland, Luxembourg, and Denmark. On the other hand, participation of the workers also takes place on another level. Works Councils are to be established in all of the Member States of the European Communities with the exception of the United Kingdom and Ireland. Their organization, functioning, and powers may differ, but the institution as such is known in the greater part of the EEC.44

These works councils remain in existence in the establishments the S.E. may have in different countries. In addition to them an EWC is formed when the S.E. has at least two establishments in different EEC countries, if each establishment employs at least 50 workers. Members of the EWC are chosen by the workers of those establishments. The elections take place in accordance with new uniform Rules for Election.45

The number of representatives each establishment may elect depends on the number of workers in the establishment: one may be elected by establishments with 50 to 199 workers; five of those with 3000 to 4999 workers.46 In case more representatives must be elected, a system of proportional representation applies.47 In this way each establishment elects its representatives to the EWC by direct and secret voting. Indirect elections for the EWC—election through the intermediary of the national works councils—were rejected by the European Parliament.48

44 For an enumeration see id. annex I.

45 See id. annex II which forms, like annex III (election of workers’ representatives to the Supervisory Board), an integral part of the Statute. Both the European Parliament and the Association of Free Trade Unions insisted on a uniform regulation of the elections for the EWC.

46 See the scale in id. art. 103.

47 According to the so-called système d’Hondt. See id. annex II, arts. 5-6 (and commentaries to the annex).

48 We still maintain indirect elections for the representatives of the employees on the Supervisory Board. These are elected by electoral delegates who in their turn are elected by
The powers of the EWC can be divided into:

a. A right to be informed;

b. A right to be consulted before management makes a decision;

c. A right of approval.

Its right to be informed is phrased in broad terms in article 120. Management must inform the EWC in quarterly reports on the economic and financial situation of the S.E., its production and investment programmes, its plans for rationalization, and "any other fact or project which may have an appreciable effect on the interests of the employees of the S.E." Moreover, the EWC receives all communications and documents which the shareholders receive and may request written information from the Board of Management on any matter it deems essential for the interest of the workers.

The EWC elects its chairman from among its members. It meets at regular intervals (but at least four times each year) with the Board of Management for joint discussions. Also, the EWC may invite any member of the Board of Management to its meetings and request him to provide information or an explanation concerning certain business operations.

The right of consultation has been regulated in articles 124 and 125. The Board of Management is obliged to consult the EWC before making any decision concerning job evaluation, rates of wages per job or for piece work, or the introduction of technical devices intended to control the conduct or performance of employees. Any decision taken without such consultation is void. The EWC also must be consulted on the same issues as mentioned in article 66, where it is stated that the Board of Management cannot make a decision on these issues without the approval of the Supervisory Board. Article 125 provides that the Supervisory Board shall not give its approval until the EWC has expressed its opinion on the following important items: (1) the closure or transfer of establishments; (2) the substantial curtailment, extension, or change of the activities of the undertaking; (3) substantial organizational changes within the undertaking; and (4) the establishment of long-term co-operation with other undertakings, or the termination thereof.

Decisions on the important issues of article 125—take, for exam-
ple, the concentration of the production of a certain product in one factory and the closing of similar factories elsewhere—may have considerable influence on the labor situation in the S.E. as a whole. A social plan may be made by the Board of Management in a case like this, which will serve as a basis for its deliberations with the EWC. According to the new article 126a, inserted at the instigation of the European Parliament, the Board of Management in such a case not only is obliged to consult the EWC, but also "if the EWC considers that the employees' interests will be adversely affected by the proposed decision of the Board of Management," it must go one step further. Management must try "to reach agreement (with the EWC) on the steps to be taken with regard to employees." The Supervisory Board will be informed whether an agreement on these measures could be reached. If an agreement is not reached, the Supervisory Board, on which the employees are represented as well, may nevertheless give its approval. Thereafter the EWC within one month may resort to arbitration. The arbitrators cannot reverse the decision approved by the Supervisory Board. Their authority is limited to a decision of the dispute between the Board of Management and the EWC concerning the measures to be taken with regard to the employees involved.

Finally there are some decisions, enumerated in article 123 and all concerning social matters, which the management cannot make without the approval of the EWC. These include, for example, the rules relating to the recruitment, promotion and dismissal of employees, and measures in the field of industrial safety, health, and hygiene. A decision of the management on these matters without approval of the EWC is void. If the EWC refuses to give its approval, the management can resort to arbitration and the arbitration board will decide on the merits of the case.

Apart from these two references to arbitration (in case of no agreement on the social plan or no approval on the social matters of article 123), the arbitration board is competent to settle all questions of procedure in matters requiring consultation with or the provision of information to the EWC and in disputes between the EWC and the national employees' representative bodies. The arbitration board shall be composed of assessors, half of whom shall be appointed by the EWC and half by the Board of Management of the

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51 Id. art. 126a, para. 1.
52 Id. art. 128, para. 1.
53 Id. art. 129, para. 1.
S.E. (or the national employees' representative body), with the impartial chairman to be appointed by mutual agreement between the parties. In default of agreement as to the appointment of the chairman or as to the assessors in general, they shall be appointed by the court within whose jurisdiction the registered office of the company is situated.54

The task of the EWC has been defined and limited in article 119: the EWC shall confine itself to deal with matters which concern several establishments, situated in the territory of several Member States; moreover, the matters should not be capable of solution by the national works councils existing in these establishments. As stated earlier, the works councils which are set up in the individual establishments of the S.E. in accordance with the provisions of national law continue to exist.55 Matters which concern only one particular establishment are to be dealt with by the representative body formed under national law. The same applies when the matter concerns more than one establishment situated in one country; the central works council of national law56 will deal with it. The EWC is meant to function only on an international (European) level when the matters concern the S.E. as a whole or matters concerning several establishments situated in several countries of the EEC Member States.

The same article 119 contains a second limitation on the competence of the EWC. It dictates a "hands off" rule for the EWC with regard to matters regulated in collective agreements between the S.E. and the trade unions. This first of all applies to collective agreements concluded on the national level. Their provisions apply only to the establishments situated in the country concerned. However, the Statute also authorizes the S.E. to conclude such agreements on a European level; labor conditions may be regulated by collective agreements made between the S.E. and the trade unions represented in their establishments.57 This provision presupposes a closer cooperation between trade unions of different countries than has existed generally until now.

The EWC, although in this way restricted in its activities to safeguarding the interests of the workers on an international level, plays such an important role in the functioning of the S.E., as explained

54 Id. arts. 128, para. 2, 129, para. 2.
55 Id. art. 101.
56 For an enumeration see id. annex I.
57 Id. art. 146.
earlier, that, in my opinion, this institution should be regarded as another body of the S.E. The EWC has been regulated in a separate title (title V). Systematic reasons can be given for this. In actual functioning, however, the EWC does not differ from the "bodies of the S.E." as regulated in title IV.

V. S.E.—Concern

The 1975 Draft Statute also contains, in title VII, a regulation for a group of companies of which a S.E. forms a part, either as the controlling undertaking or as a dependent company. For the Member States of the European Communities this is quite new. Only the Federal Republic of Germany has a complete regulation of this subject in its company law. The Statute therefore largely draws its inspiration from the German example.

For the European Company the phenomenon of a "group of companies" could not be ignored. The economic reality had to be faced that an increasing number of companies no longer function as isolated units, but in close cooperation with other companies. The company laws of the Member States, with the exception of Germany, still neglect this reality. They treat the company in its isolated form. Special problems arise, however, when this is no longer the case and we must recognize the situation that one company controls others. It is the following situation which the Statute has in view in title VII: companies cooperating in a group under the unified management of a controlling company with one of them being an S.E. 58

Whether this situation exists, i.e., whether there exists a "unified management of the controlling undertaking," largely depends on the facts. No definition of "unified management" could be given. The Statute introduces, however, the presumption that a group (in the meaning of the Statute) exists when the controlling company controls more than half of the votes exercisable with respect to the whole of the issued capital or has, directly or indirectly, a majority shareholding, or the power to appoint more than half of the Board of Management or of the Supervisory Board of the dependent undertaking. 59 The question whether a group in the meaning of the Statute exists is important enough in view of the consequences its existence entails. Therefore the Court of Justice of the European Com-

58 Id. art. 223.
59 Id. art. 223, para. 2 iuncto art. 6.
munities can be approached to decide the matter. In this manner a uniform decision on this important question is guaranteed.

The main consequences to which I referred are to be found in the protection of outside shareholders and the protection of creditors with, as a counterpart, the right of the controlling company to give instructions to the management of dependent undertakings.

These consequences apply to the relationship between a controlling S.E. and dependent companies within the Common Market. They also apply to the relationship between a dependent S.E. and a controlling undertaking without regard to where its registered office is situated. Finally, the scope of application of title VII has been extended in the 1975 Draft Statute to a dependent S.E. in its relationship to companies within the Common Market and controlled by that S.E. (subgroup). With respect to these companies the (dependent) S.E. is regarded as the controlling undertaking of a group. Therefore, the scope of application of title VII now extends to cover the situation when a subgroup is controlled by an S.E.

A. Protection of Outside Shareholders

The controlling company will exercise its influence on the dependent undertakings from the viewpoint of the total interests of the group. This could easily conflict with the interests of outside shareholders of the dependent companies. These outside shareholders are, therefore, according to article 228, offered an opportunity to quit the dependent company "within a reasonable time after a group of companies comes into existence or after a company is declared to be a dependent company within such a group by the Court of Justice of the European Communities."

The controlling company, whether an S.E. or a company limited by shares formed under the law of a Member State, then must offer the outside shareholders either an appropriate cash payment for their shares or an exchange of their shares for shares or convertible debentures of the controlling company. Where the controlling company is a company from outside the Common Market, an offer for

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60 Id. art. 225.
61 The protection of outside shareholders is regulated in section 3 of title VII of the 1975 Draft Statute, supra note 1.
62 The protection of creditors is regulated in id. title VII, section 5.
63 Id. title VII, section 6.
64 Id. art. 224, para. 1.
65 Id. para. 2.
66 Id. para. 3.
cash payment always must be made. In both cases a double offer may be made, cash payment or exchange of shares, leaving the choice to the outside shareholders. In addition, in all these situations, the controlling company is obliged to offer the outside shareholders the alternative option of "annual equalization payments calculated in proportion to the nominal value of their shares."7

The Statute regulates in detail the procedure to be followed once such an offer has been made. The Board of Management of the dependent group company must, immediately thereafter, appoint one or more independent experts and instruct them to prepare a report for the outside shareholders.68 The Board of Management itself must draw up a report in which it comments on the report made by the experts and it may make, as the case may be, its own proposals. Finally, a general meeting must be convened to decide whether the offer should be accepted. In this meeting no votes shall be cast with respect to shares held, directly or indirectly, by the controlling company. Nonvoting shares have the right to vote in this case.69

A three-quarters majority is required for the acceptance of the offer. If the general meeting rejects the offer wholly or partly, the terms of the offer shall be determined, without right of appeal, by the court. If the general meeting has accepted the offer its decision may still be attacked in court by holders of not less than 20 percent of the shares having the right to vote. Such an attack can be based only on the ground that the cash payment, the share exchange ratio, or the annual equalization payments are not fair and reasonable. If such is the case, the terms of the offer shall be determined by the court without right of appeal. The acceptance of the offer by the general meeting or, when court proceedings follow, the judgment of the court must be published by the Board of Management of the dependent company. Within 3 months thereafter every outside shareholder shall be entitled to require payment in cash or the exchange of his shares. Those who do not exercise these rights receive the annual equalization payments.70

67 Id. art. 228, para. 2. This is commonly called a dividend guarantee.
68 On application of 5 percent of the outside shareholders, the court may appoint other experts if the experts are not sufficiently independent.
69 The Statute recognizes in title II the creation of nonvoting shares up to one-half of the capital (fully paid up). 1975 Draft Statute, supra note 1, art. 49.
70 For a more detailed explanation of the procedure just described see id. arts. 232-37.
B. Buying Out of Outside Shareholders

Compared with the 1970 Draft Statute,¹¹ the 1975 Draft Statute¹² contains a novum in paragraphs a and b of article 238. These articles regulate the situation where the controlling company has acquired 90 percent or more of the shares of the dependent one. When this situation has arisen, it must be published. The controlling company may then force the remaining small percentage of outside shareholders to leave the company against cash payment or exchange of shares. On the other hand, each individual outside shareholder, upon publication of the 90 percent (or more) situation, also may require that his shares be bought out. This seems to me to be a useful addition, not contained in many of the national company laws of the Member States.⁷³

C. Protection of Creditors

The protection of creditors, dealing with dependent group companies, is regulated in article 239 of the 1975 Draft Statute. The controlling undertaking is liable for the debts and liabilities of dependent group companies. Nevertheless, proceedings may be brought against the controlling company only where the creditor has first made a "written demand for payment from the dependent group company and failed to obtain satisfaction."⁷⁴ These words are not explained in the commentary. In my opinion they do not imply that legal action first should be taken against the dependent company.⁷⁵ A written demand for payment, which remained unsuccessful, is enough. Although the creditor may fall back on the controlling company for debts of the dependent group company, article 224, dealing with the scope of application, should not be overlooked. According to the first paragraph of this article the S.E., as controlling company of the group, is only liable for the debts of dependent "common market" group companies.⁷⁶ The controlling S.E. is therefore, to

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¹¹ Note 2 supra.
¹² Note 1 supra.
⁷³ Only Germany, Denmark, Ireland, and the United Kingdom have similar regulations.
⁷⁴ 1975 Draft Statute, supra note 1, art. 239, para. 2.
⁷⁵ According to the commentary on the 1970 Draft Statute, supra note 2, this was required under the text, then reading: "only where the creditor proves that he has endeavoured, and failed, to obtain payment of his debt." Id. art. 239, para. 2 (emphasis added).
⁷⁶ Sections 3 to 6 (creditor protection is section 5) only apply, if the S.E. is controlling, to "dependent companies in the group which have been formed under the laws of Member States, and to their relationship with the controlling S.E." 1975 Draft Statute, supra note 1, art. 224, para. 1.
give an example, not liable for the debts of a Brazilian dependent company.

D. Instructions

The right to issue instructions to the Board of Management of a dependent group company—which instructions shall be complied with by that Board—forms the counterpart of the guarantees which the controlling company has to offer to the outside shareholders and to the creditors of the dependent company. The moment the dependent company has published the amount of the cash payment, the amount of the annual equalization payments, and, where appropriate, the share exchange ratio as approved by the general meeting or determined by the court, the guarantees towards the outside shareholders are definitely known and simultaneously the right of instructions is born.\(^7\) In exercising this right to issue instructions the members of the Board of Management of the controlling company “shall exercise the standard of care required of a conscientious manager and shall promote the interests of the group and of its personnel.”\(^7\) It is the interests of the group and of its personnel taken in its entirety by which the top management must be guided. These overall considerations outweigh the interests of individual group members.

A special problem arises when the management of the dependent company, having received an instruction from the controlling S.E., also needs for this specific issue the approval of its own Supervisory Board. What if the consent is refused? In that case—so the Statute indicates—the instruction must only be complied with if consent is obtained from the Supervisory Board of the S.E. If in the reverse situation the S.E. is controlled by an undertaking formed under national law, the powers remain unaffected. Only if the employees of the dependent S.E. are represented at the top of the controlling undertaking “in a manner equivalent to that in which they are represented under the rules governing the S.E.”\(^7\) may the Supervisory Board of the S.E. be overruled.

E. The Group Works Council

The Statute also provides for the formation of a Group Works

\(^7\) Id. art. 240.
\(^7\) Id. art. 240a.
\(^7\) Id. art. 240, para. 3.
Council (GWC). According to article 130, a GWC shall be formed when the group controlled by the S.E. comprises at least two undertakings with their registered offices within the Member States and each of them having at least 50 employees. The members of the GWC are selected indirectly. The representative bodies referred to in article 131—among which the EWC for European companies and for group undertakings incorporated under national law the central employees' representative bodies—appoint delegates to the GWC in accordance with the scale mentioned in article 132.

The competence of the GWC extends only to matters concerning the group or a number of undertakings within this group and which cannot be settled by the central employees' representative bodies in the group undertaking. If decisions by the Board of Management of the S.E. on matters referred to in articles 123 to 125 (dealt with earlier) affect several undertakings within a group, the GWC acts in place of the EWC. An arbitration board shall be established along the same lines as the arbitration board provided for the EWC. This board shall settle disputes between the GWC and the Board of Management of the controlling S.E. as well as disputes between the GWC and the EWC or employees' representative bodies in group undertakings controlled by the S.E.

VI. ANNUAL ACCOUNTS

Title VI deals with the preparation of the annual accounts. It is by far the most extensive title of all, including articles 148 to 222. The provisions of this title have been adapted to the amended proposal of a fourth directive. The Commission also has under prepa-

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80 The provisions of articles 107-118 dealing with the term of office of the members of the EWC and the operation of the EWC also apply to the GWC, id. art. 113.
81 The GWC is not governed by provisions of title VII ("Groups of Companies") of the 1975 Draft Statute, supra note 1, but of title V ("Representation of Employees in the European Company"). Id. arts. 130-36.
82 This shall apply even if such controlling S.E. is itself controlled by another undertaking within a group (the subgroup situation). Only if the employees of the S.E. and of group undertakings controlled by it are represented in such controlling undertaking "by a body equivalent to the Group Works Council of the S.E.," no such GWC must be formed at the level of the S.E. Id. art. 130.
83 Id. art. 134, para. 2.
84 Id. art. 135, para. 2.
85 Id. art. 136.
86 The 1975 Draft Statute added 9 articles to these 74 articles, therefore including 83 articles out of a total of 337. See note 14 supra.
87 The annual accounts of limited liability companies amended proposal for a Fourth Directive, 15 E.E.C. J.O. C7, at 11 (1972), as amended, 7 BULLETIN OF THE EUROPEAN COMMUNITIES Supp. No. 6 (1974). The title also was adapted to some of the provisions of the Fifth
ration a draft directive on the preparation of group accounts. On its completion the relevant provisions of title VI of title VI will have to be adapted accordingly. This title therefore shows clearly how much the work done in Brussels in this field of company law is interrelated.

Title VI is of a highly technical nature. There can be no question of dealing in detail with the subject matter of this title. In the context of this article I can only mention some of its aspects. From the beginning it has been the object to require extensive information from the S.E. with regard to its financial position. The relevant provisions may require more information from the S.E. than limited liability companies of national law must give, but certainly not less. This information is contained in the balance sheet, the profit and loss account, the notes on the accounts, and (new in the 1975 Draft Statute at the suggestion of the European Parliament) a statement of source and application of funds. These documents together constitute the whole of the annual accounts. In addition, the Board of Management must present an annual report which represents its personal judgment on the development and future prospects of the company. The annual account and the annual report—insofar as it reviews developments of the past financial year—are audited by an independent auditor.

The annual accounts and report (with the auditor’s report annexed thereto) are submitted by the Board of Management to the Supervisory Board. The annual accounts shall be approved by the Board of Management and by the Supervisory Board in a joint meeting but by separate voting. Only if an agreement between the two is not reached will the annual accounts need approval by the General Meeting. If the accounts are approved by the Board of Management and the Supervisory Board, as normally will be the case, they may appropriate up to 50 percent of the profit of the year. Usually the two bodies will agree and most likely will appropriate up to 50 percent of the profit of the year.

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1975 Draft Statute, supra note 1, title VI, section 6.

Id. art. 148.

Id. art. 195.

Id. art. 203.

Id. art. 213. The annual report is the sole responsibility of the Board of Management.

Id. art. 214.

Id. art. 217.
of the year's profit to reserves (self-financing of the company). The general meeting then decides on the remaining profit upon a joint proposal of the Board of Management and the Supervisory Board. However, in case the Board of Management and the Supervisory Board do not agree on the appropriation of profits as entrusted to them, the general meeting decides as to the appropriation of the total profit of the year. The same applies in case the annual accounts as such must be approved, pursuant to article 214, by the general meeting. In that (exceptional) case the general meeting therefore shall approve as well the annual accounts as appropriate the total profit of the year.\textsuperscript{95}

The system, as described here, has been incorporated in the project for the S.E. right from the beginning. There is a close connection between full disclosure of the company's financial situation and profits on the one side and the possibility, if agreed upon between the Board of Management and the Supervisory Board, to appropriate half of the profit of the year to reserves. Full disclosure should not induce shareholders, for their part, to demand distribution of a profit which might threaten the company's future development, if not its very existence. To meet this situation the 50 percent limit has been introduced as a safety valve. This again corresponds with the percentage of distributed profit which tends not to exceed 50 percent and in many cases is considerably less.

\textbf{VII. Conclusion}

I hope my survey will give at least some impression of the main aspects of this project for a European Company. I have dealt with some of the history and the field of application of the S.E. The structure of the S.E., its two-tier system, and the composition of the Supervisory Board with employees' representation, as well as a description of the European Works Council, which actually functions as a fourth organ of the S.E. next to the Board of Management, the Management, Supervisory Board, and the General Meeting have been discussed. The part of the Statute dealing with the not unlikely situation that the S.E. will be, either as a controlling or as a dependent company, part of a group of companies, has been examined. Finally some company law aspects of the annual accounts were highlighted.

\textsuperscript{95} I have not mentioned that a new article 216a requires that 5 percent of the year's net profit must be transferred to the legal reserves until the reserves are equal to at least 10 percent of the subscribed capital.
Many other subjects are dealt with in the Draft Statute. Title III deals in detail with capital (increase and reduction of capital), shares (bearer or registered), and debentures. Title VIII deals with the alteration of the statutes (articles of association) and title IX with the dissolution, liquidation, and bankruptcy of the S.E. The transformation of an S.E. into a limited company incorporated under the law of one of the Member States, the way back into a national regime, forms the subject of title X. An S.E., once existing, may merge with other S.E.'s or limited companies formed under the law of the Member States. This subject is dealt with in title XI. The merger might take place either by forming a new S.E. in accordance with the provisions of the statute, by the acquisition by the S.E. of one or more limited companies or the reverse, by the acquisition of an S.E. by a limited company formed under national law or by the formation of a new limited company under the law of one of the Member States. Apart from two final provisions, title XII deals with taxation and title XIII (one article only, referring to annex IV) to offences.

Taxation, of course, is a very important subject. The S.E. should not have a privileged position, however, as far as its tax position is concerned. The tax provisions in title XII therefore start from the principle of tax neutrality. In elaborating this part of the Statute, the Commission based itself largely on two draft directives presented to the Council of Ministers on January 15, 1969:

a. Draft Directive on the common system of taxation applicable to mergers, the splitting up of companies and the transfer of assets taking place between companies of different Member States;

b. Draft Directive on the common taxation arrangements applicable to parent companies and subsidiary companies of different Member States.

These two directives are still in the process of being made. When they finally will have been approved the provisions of title XII will be adapted accordingly.

Still other things remain to be done before the European Company can be put into operation. The European Commercial Register, where the S.E. will be registered and all necessary information

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96 1975 Draft Statute, supra note 1, title XI, section 2.
97 Id. section 3.
98 Id. section 4.
99 Id. title XIV.
about the company can be found, must be organized. This central register, with supplementary registers in the Member States, will be attached to the Court of Justice of the European Communities. Rules for its functioning must be drawn up by the Council of Ministers on the proposal of the Commission.\(^{102}\) Also, the Court of Justice (the central jurisdiction for the interpretation of the Statute and referred to in several articles of the Statute)\(^ {103}\) probably will have to adapt its organization in order to be able to fulfill the tasks entrusted to it under the Statute.

Besides these technical matters there are other matters of a more fundamental character which need to be solved, such as the question of whether the S.E. should have a free choice between shares in bearer or in registered form. Italy is of the opinion that the S.E. should only have registered shares. Other Member States deem this undesirable as it will make it more difficult to deal with the shares on the securities market. The Commission maintained the free choice in article 50 of the Statute after approval by the European Parliament and the Economic and Social Committee.\(^ {104}\) Also, the regulation of the group of companies, although more flexible in the 1975 Draft Statute than before, still cannot be expected to meet general approval. Being unfamiliar with it, most Member States are hesitant to accept a regulation which, by its nature, inevitably will be rather complicated.

However, the main obstacle the S.E. has encountered on its way to realization until now consists in the regulation of the employees' participation. The proposal for the Fifth Directive on the structure of public companies must face the same problems and perhaps even more as it mandates employees' participation at board level in the national company laws of the Member States. On this subject the national views still differ greatly although some rapprochément may be noticed during the last years as shown in the green book, just published by the Commission.\(^ {105}\)

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102 1975 Draft Statute, supra note 1, art. 8.
103 To give some examples: The Court of Justice has to examine whether the formalities required for the formation of an S.E. have been complied with (id. art. 17). The Court also may be approached for a decision as to whether there exists a group of companies (id. art. 225). The Court also controls the alteration of the statutes of an S.E. (id. art. 245) and may determine the tax domicile of the S.E., which depends on where "the centre of its effective management is located" in case the competent authorities in the Member States do not agree thereon (id. art. 276).
104 See the commentary on article 50 in the 1975 Draft Statute, supra note 1.
105 Note 13 supra.
Although I do not underestimate the difficulties still to be surmounted, in my opinion they all will be overcome in the end. The problem of employees' participation must be solved at any rate, both on the national level, where it plays its part in all Member States although in some more than in others, and on the international level of the S.E. In this context, the Statute has the advantage of not being obligatory. The S.E. is offered for optional use by international cooperation and integration. Introducing a progressive solution for employees' representation in the Statute for the European Company under these circumstances may be more readily acceptable although it cannot be denied that, in those countries where this representation is unknown, it could still have some influence as a precedent.

Creating a new company form of uniform law directly applicable in all nine Member States of the European Communities and, in last resort, uniformly interpreted by its Court of Justice, is an ambitious venture. It adds for specific purposes, as explained earlier, a supranational form of company to the national types of companies which will continue in their present form.

National company law may also be altered on the initiative of the Commission in Brussels. This is done by means of directives instructing the Member States to bring their national company law into accordance with the directives' provisions. This harmonization of national company laws is quite distinct from the Commission's project of a Statute for the European Company. This Statute serves another purpose.

When the regulation providing for this Statute has been approved by the Council of Ministers, it will offer a new instrument for economic cooperation across the borders. This instrument will serve the aims of the European Communities by fostering economic integration between the Member States. At the same time the Statute for the S.E. offers a complete model for a transnational corporation, including regulation of employees' participation on an international level. In our days, where much discussion is going on about multinationals, the Statute, although conceived on a regional basis, may also for this reason deserve attention from outside the European Communities.