The Societas Europea: the Evolving European Corporation Statute

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In this Article, Professor Blackburn examines and evaluates the Commission of the European Community's 1991 proposed European corporation statute, which represents the Commission's latest endeavor into creating a new form of business organization that possesses a European identity independent of the laws of the member states that comprise the European Economic Community. Professor Blackburn argues that this proposal fails because it places too much reliance on member state law for matters of basic structure and management, and therefore incorporates by reference the material variations in company law that exist among the member states. Professor Blackburn moreover contends that this proposal would render a European corporation's movement from one member state to another highly problematic and would necessarily subject the corporation to the national company law of the member state where its place of central administration is located. Professor Blackburn concludes, however, that the proposal has been successful in stimulating the harmonization of member state law governing national companies and provides a useful tool for building a consensus in the EC on important social and economic issues.

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INTRODUCTION

PROPOSALS permitting businesses to create European corporations independent of the laws of individual member states of the European Economic Community ("European Community" or "EC")\(^1\) predate the formation of the EC itself.\(^2\) The first modern proposal for a European corporation statute can be traced to 1959, shortly after the effective date of the Treaty of Rome, which created the European Community.\(^3\)

The initial proposals were intended to simplify the process of conducting business in more than one member state of the EC. The goal of the early proposals was not to achieve a harmonization of national company laws, or even a unification of these laws, but rather to bypass them entirely using a separate supra-national form of organization.\(^4\)

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1. The European Economic Community was created in 1958 pursuant to the terms of the Treaty of Rome of 1957. See Treaty Establishing the European Economic Community (Treaty of Rome). Another treaty adopted at the same time created the European Atomic Energy Community (Euratom Treaty). These two communities joined the European Coal and Steel Community, which had been formed in 1952 by the Treaty of Paris of 1951. See Treaty Establishing the European Coal and Steel Community (ESCS Treaty). The institutional governance of these communities was unified and simplified by the Merger Treaty, adopted in 1965 and effective in 1967, which established one Commission, one Council, one Court of Justice, and one Assembly (later named the Parliament) for each of the three Communities. See Treaty Establishing a Single Council and a Single Commission of the European Communities. As a result of the merger, and of the recognition that the European Economic Community was engaged in far more than strictly economic union, the three communities have become referred to as the European Community, or the EC. See The institutions of the European Community, Eur. File (Commission of the European Communities and European Parliament 1991).

2. One commentator traces the original idea of creating a European business statute to proposals in 1910 for creating international non-profit associations. See Eric Stein, Harmonization of European Company Laws 439 (1971).

3. The proposal was made at the 57th Annual Convention of the French Notaries Public. This development, and the history of other early proposals for creating a European corporation statute, are traced in 2 Hans Smit & Peter Herzog, The Law Of The European Economic Community § 54.03APP-54.07APP (1984). The Commission eventually requested Professor Pieter Sanders, a Dutch scholar, to prepare a preliminary draft of a European corporation statute. That draft was the basis of the Commission's 1970 proposal. See Pieter Sanders, The European Company, 6 Ga. J. Int'l & Comp. L. 367 (1976).

4. Professor Pieter Sanders, who drew up the first preliminary draft of the proposed statute, later described the motivation behind the proposed statute as follows:

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
In 1970, the Commission of the European Community ("Commission") submitted to the Council of Ministers ("Council") the first formal EC proposal for a European corporation statute. This proposal, as suggested by Professor Pieter Sanders, envisioned the creation of corporations under European law, rather than the law of particular member states; such a corporation was to be known as a Societas Europea ("SE"). The adoption of the proposal has proven highly controversial, due in large part to the disagreement within the EC concerning the role of corporations in general, and the SE in particular, within European society. Much of the disagreement has centered on the proper role that workers should play in the supervisory and decision making processes of SEs. Despite prolonged negotiations and the preparation of numerous drafts since 1970, the EC has not yet been able to adopt a European corporation statute.

The EC is once again actively considering the creation of European corporations. In 1991, the Commission drafted an amended proposal for a Council regulation on a European corporation, together with an amended proposal for a Council directive concerning worker participation in European corporations. Although these proposals draw heavily on earlier proposals on this subject, they also make substantial changes from the earlier drafts.

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?

See Sanders, supra note 3, at 368.

5. The Council of Ministers is made up of one minister representing each member state. See Treaty of Rome, supra note 1, art. 146. The Commission is comprised of seventeen persons and must include at least one and not more than two nationals from each member state. Id. art. 157(1). These persons do not represent and do not take direction from the governments of their respective member states. In general, the Council performs a legislation function of adopting directives and regulations, while the Commission performs an executive function of enforcing and administering the Treaty of Rome and the directives and regulations. The Commission also proposes and drafts all regulations and directives that are considered by the Council. For a more thorough discussion of the institutions of the EC, see David Freestone & J. Scott Davidson, The Institutional Framework of the European Communities 55-115; Trevor Clayton Hartley, The Foundations of European Community Law 8-25 (1981).

6. Proposal for a Council Regulation embodying a Statute for European Companies, 3 Bull. Eur. Comm. Supp. 8/70 (1970) [hereinafter 1970 Proposed Regulation]. The term European corporation statute is used to refer generally to the proposed legislation governing the creation of SEs. More precisely, the current proposed legislation takes the form of a Regulation and a related Directive. A regulation of the EC has general application, is binding on member states, and is directly applicable in those states without the necessity of additional member state legislation. A directive, although binding on the member states, permits the member state governments to choose the form and methods of implementation. See Treaty of Rome, supra note 1, art. 189.


The 1991 draft of the European corporation statute represents significant success, as well as substantial failure, in the attempt to create a form of business organization "subject . . . to a uniform European company law, applicable directly in all the Member States . . ."9 Companies will find it easier to create SEs under the 1991 proposal than under earlier drafts of the proposed statute, but illogical and unnecessary restrictions still remain.10 Companies will also find it easier to conduct business across national borders if they organize as SEs, because they will be able to integrate the losses of their foreign branches,11 and arrange cross-border mergers.12

On the other hand, under the 1991 proposed European corporation statute, companies will still retain important indicia of member state "citizenship." Even though they are European corporations, they will still be subject to member state laws governing many matters. Furthermore, they will be limited in their ability to move their headquarters from one member state to another without making major changes in their capital structures,13 and management structures.14

Although the proposed European corporation fails to achieve much of its original objective, it is not a complete failure. It has solved some of the difficulties facing companies doing business in more than one member state of the EC. The fact that it has not yet solved all of those difficulties simply indicates that there is more work to be done with respect to establishing a social and political consensus within the EC concerning the role of business in the society.

The proposed European corporation statute is not only the result of the establishment of consensus; it is also one of the mediums through which that consensus is being established. The various drafts of the proposal have helped set the agenda for establishing a consensus on the structure, operation and management of business enterprises. Where consensus has been established, the proposed draft has provided the basis for harmonization of national company law,15 as well as the law governing SEs. Much work remains, however, before the proposed statute will truly enable businesses in the EC to operate "free from . . . the territorial application of national laws."16

This Article examines and evaluates the development of the current proposals for a European corporation statute. Part I of this Article briefly reviews the history of the proposals, and the procedural steps that

9. Sanders, supra note 3, at 368.
10. See infra part III.A.
11. See infra part III.E.
12. See infra part III.A.1.
13. See infra part III.B.
14. See infra part III.C-D.
remain for their adoption.\textsuperscript{17} Part II considers the need for a European corporation statute and the goals of such a statute, as identified by the various institutions of the EC.\textsuperscript{18} Part III examines the major substantive provisions of the 1991 Proposed Regulation and the 1991 Proposed Directive, and traces the development of these proposals from prior drafts, thereby illustrating the various opposing views that have been reconciled, compromised, or accommodated.\textsuperscript{19} It also compares the proposed statutes to other EC laws and proposals governing corporations organized under the laws of the member states. The final part of this Article evaluates the proposed European corporation statute.\textsuperscript{20}

I. **Historical and Procedural Aspects**

In 1970, the Commission proposed that the Council adopt a regulation permitting the creation of SEs.\textsuperscript{21} The proposal was lengthy and complicated, and attempted to prescribe rules for virtually every aspect of a corporation's existence, including its formation, capital structure and management structure, the rights of its shareholders, the participation of its shareholders and employees in management decisions, mergers, the preparation of its annual financial statements, its taxation, and liquidation and insolvency issues.\textsuperscript{22} Some of the provisions of the proposal introduced concepts that had never been dealt with in the laws of the member states.\textsuperscript{23}

After receiving favorable comments from the Economic and Social Committee, the European Parliament adopted a number of proposed amendments, the most significant of which related to the participation of employees in management of the SE.\textsuperscript{24} The Commission then issued an amended proposal in 1975, which incorporated the Parliament's proposed amendments almost verbatim.\textsuperscript{25}

Between 1976 and 1982, the proposal was examined by an ad hoc working party of the Council. This work was then suspended pending a

\textsuperscript{17} See infra text accompanying notes 21-37.
\textsuperscript{18} See infra text accompanying notes 38-101.
\textsuperscript{19} See infra text accompanying notes 102-398.
\textsuperscript{20} See infra text accompanying notes 399-440.
\textsuperscript{21} See 1970 Proposed Regulation, supra note 6.
\textsuperscript{22} See id.
\textsuperscript{23} Mr. Paul Storm, who assisted Professor Sanders in drafting the proposal that served as a basis for the 1970 Proposed Regulation, points out that laws mandating the representation of employees in the management of corporations had been introduced only in Germany, and that laws providing for the protection of minority shareholders and creditors of "groups of companies" (essentially a parent company and one or more wholly or partially owned subsidiaries) were new for every member state, although Germany had adopted such laws by 1970. See Paul M. Storm, A New Impulse Towards a European Company, 26 Bus. Law. 1443, 1446, 1449, 1452 (1971).
\textsuperscript{24} Internal Market and Industrial Cooperation—Statute for the European Company—(Memorandum from the Commission to Parliament, the Council and the two sides of industry), COM(88)320 final at 28-29 [hereinafter 1988 Memorandum].
review of the Commission's proposals concerning the harmonization of member state laws applicable to parent-subsidiary groups of companies. Work was not resumed until 1988, after the Commission called on Parliament, the Council, and industry to once again attempt the creation of a European corporation statute.

In furtherance of this request, the Commission prepared a new draft of the proposed statute. In the 1989 draft, the Commission divided the proposal on the European corporation into two separate but coordinate pieces of legislation. The first, the Commission's Proposal for a Council Regulation on the Statute for a European Company, addressed all the basic issues of creation, funding, financial structure, management, accounting, tax, and dissolution as they relate to the SE. The second, the Commission's Proposal for a Council Directive Complementing the Statute for a European Company, separately addressed the issue of the participation of workers in the management of the SE. The Commission apparently believed that this division of the proposal was necessary in order to give to the member states the freedom to enact their own national laws governing worker participation in the management of SEs.

After receiving the Commission proposals, the Council requested the opinion of the Economic and Social Committee. The Committee offered a number of suggestions; these included making the SE form of organization more readily available, modifying the rules on financial structure and management, and emphasizing the Commission's commitment to employee participation in management.

In 1991, pursuant to the cooperation procedure established by the Single European Act, the Commission adopted an amended proposal which incorporated some of the suggestions made by the Committee and

27. See id. at 2.
28. See Proposal for a Council Regulation on the Statute for a European company, 1989 O.J. (C 263) 41 [hereinafter 1989 Proposed Regulation]. For the purpose of clarity and consistency, references in this Article to the current proposal will be made to the 1991 Proposed Regulation even where that proposal restates identical language contained in the 1989 Proposed Regulation; the 1989 Proposed Regulation will be referred to and cited only where it has been amended by the 1991 Proposed Regulation or when it is important to identify the origin of significant changes from earlier proposals.
29. See id.
31. See id.
32. The Council is required to seek the opinion of the Economic and Social Committee before issuing directives that have as their object either the achievement of freedom of establishment or the establishment and functioning of the internal market. See Treaty of Rome, supra note 1, arts. 54, 100A.
34. 1987 O.J. (L 169) 1; see Treaty of Rome, supra note 1, art. 149.
This amended proposal is the subject of this Article. This proposal is now pending review by the Council to determine if a common position on the proposal can be established through a qualified majority vote. If a qualified majority vote can be obtained, the common position will be communicated to the Parliament. The Parliament would then have three months to act. If the Parliament failed to act, or if it approved the common position, then the Council would be able to adopt the proposal into law by a qualified majority vote. If the Parliament rejected the Council's common position proposal, then a unanimous vote of the Council would be required for the proposal to be adopted. If the Parliament were to amend the proposal, the Commission would then have one month to review the amendments and transmit its own amended proposal (which need not include the amendments proposed by Parliament) to the Council. The Council could then adopt this final proposal into law by a qualified majority vote; alternatively, it could choose to adopt the proposal containing its own amendments, but only if a unanimous vote were obtained.

II. THE NEED FOR A EUROPEAN CORPORATION STATUTE

Despite the enormous growth in inter-European commerce among the member states of the EC that has occurred since the creation of the European Economic Community in 1958, companies that conduct business across borders through branches or subsidiaries, rather than through purchases and sales or licensing agreements with unrelated companies, continue to face substantial barriers. The varying and conflicting laws that exist within the member states that comprise the EC make both the creation and the operation of such international enterprises difficult, and occasionally legally or practically impossible.

The legal systems of the member states of the EC are based on

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36. See Treaty of Rome, supra note 1, art. 149(2)(a). When a qualified majority vote is required, the votes of the member states are weighted based upon the number of votes that have been assigned to each member state. All of the votes of a member state must be cast as a bloc. For an act of the Council to be passed by a qualified majority vote, it must receive at least 54 out of a total of 76 weighted votes. In addition, the 54 votes must be comprised of the votes of at least eight member states if the matter being considered is not a proposal from the Commission. See Treaty of Rome, supra note 1, art. 148.

37. See id. art. 148. For more extensive discussion of the legislative process in the EC, see George A. Bermann et al., Cases And Materials On European Community Law 79-90 (1993) [hereinafter European Community Law]; Hartley, supra note 5, at 8-48.

38. Total exports from the 12 countries that now comprise the EC to the other member states rose from 12.9 billion ecus in 1958 to 688 billion ecus in 1991. Intra-EC trade represented 40.8% of the total international trade conducted by the member states in 1960. By 1991, that figure had grown to 61.6%. See Eurostat, External Trade and Balance of Payments—Statistical Yearbook 4 (1992).

three different traditions—the common law system,\textsuperscript{40} the civil law system,\textsuperscript{41} and the Scandinavian law system.\textsuperscript{42} Each of the twelve member states has developed its own body of law within these traditions. Great Britain actually has three different legal systems.\textsuperscript{43} Some of the member states’ laws differ substantially from each other with respect to such matters as employee participation in management\textsuperscript{44} and the recognition of single shareholder limited liability corporations.\textsuperscript{45} Therefore, a company seeking to conduct business in more than one member state of the EC must consider the laws of up to fourteen different legal systems.\textsuperscript{46}

Although these fourteen different legal systems have significantly similar approaches to many basic business law issues, differences still remain. For example, all of the member states of the EC recognize the concept that a publicly owned enterprise provides limited liability to its owners for enterprise debts.\textsuperscript{47} However, not all of the member states recognized single shareholder limited liability enterprises\textsuperscript{48} until after 1989, when the Council adopted a directive that required them to do so.\textsuperscript{49} Corporate laws on a variety of other subjects, such as whether subscribers’ capital...
must be fully paid in to the corporation, or whether workers have rights to be informed of or involved in major decisions concerning the corporation, also differ significantly from country to country.

The EC Commission has recognized that the varying laws of the member states create significant barriers both to the efficient conduct of business and to the creation of an economically unified market within the EC. The Commission, therefore, has identified various needs of European companies that should be satisfied in order for them to perform more efficiently on an inter-European basis. At the same time, the Commission has recognized that the growth of European (as distinct from national) companies makes it necessary to provide additional protections to persons and groups that do business with those corporations.

A. Enabling Goals of the Proposed Statute

The Commission’s general goal of enabling corporations to operate on a fully integrated European basis can be broken down into two related sub-categories: the improvement of companies’ ability to make decisions and conduct business operations without regard to national boundaries; and the improvement of companies’ ability to organize or reorganize without regard to such boundaries.

1. Operational Goals

In its 1970 proposal for a European corporation statute, the Commission expressed concern about the barriers to Community-based company planning and operations. In the preamble to this proposal, the Commission stated that the creation of an economic union within the EC presupposed “a reorganization of the factors of production and distribution on a Community scale in order to ensure that the enlarged market will operate similarly to a domestic market.” The Commission sought to improve companies’ activities and competitiveness at the Community level, noting that the development of businesses at the national level could “fragment markets and so constitute an impediment to economic integration” of the Community.
Similarly, in 1991, upon concluding that the completion of the internal market of the EC required that "the structures of production . . . be adapted to the Community dimension," the Commission called for the "management of companies with a European dimension, free from the obstacles arising from the disparity and the limited territorial application of national company laws." The Commission, moreover, called for the creation of Community-based company law, that would be applicable in all member states, so that companies could operate legally, as well as economically, on a Community-wide basis.

In addition to the need for a general company law that encourages the operation of SEs on a community-wide basis, the Commission has continually recognized the need to allow European companies to coordinate their tax and fiscal policies. In its 1970 proposal, the Commission stated that SEs should be allowed to deduct from their profits any losses incurred by branches or subsidiaries in the other member states. This goal of treating the SE as one entity for tax, as well as operational purposes, has been incorporated into the 1991 proposal.

These statements by the Commission demonstrate that the encouragement of effective operations on a European basis, rather than on a national basis, constitutes one of the major goals of the European corporation statute. Under the fully integrated market sought by the Commission, companies would be able to make operational decisions, such as choosing sources of supply and locations of production and sale, based solely on market considerations. Decisions would not be affected by managers' unfamiliarity with the laws of other member states, or their perceptions of the favorable or unfavorable nature of "competing" national laws. Consequently, inconsistent national laws dealing with corporate governance and control and with tax issues would be harmonized or unified to a Community-wide standard. It is against this standard that the 1991 proposals will be evaluated.

Grouping, does not provide an effective alternative to European businesses because of significant limitations that are placed on its size, and because it must be operated as a partnership, rather than an integrated business entity. See infra note 163.

57. 1991 Proposed Regulation, supra note 7, at 1.
58. Id. at 2.
59. See id.
60. See 1970 Proposed Regulation, supra note 6, at 7-8.
62. See id. at 1-5.
63. It has been suggested that current levels of harmonization of Member State corporate law are insufficient to minimize the "race to the bottom" tendencies that may result from the growing unification of the EC market as governments compete for companies to incorporate and establish their headquarters in their countries. See Clark D. Smith, Note, Federalism and Company Law: A "Race to the Bottom" in the European Community, 79 Geo. L.J. 1581, 1593-99 (1991).
64. See infra part IV.
2. Organizational Goals

Since the time of its first proposal for a European corporation statute, the Commission has recognized that the goal of operational integration of European companies could not be achieved solely by harmonizing the laws of the member states. The Commission noted in 1970 that the harmonization of laws could not eliminate the barriers to either the movement of company headquarters from one member state to another, or the combination of companies across national borders. It also noted that the harmonization of laws would not eliminate the necessity of choosing a single country of "citizenship" and identity for European companies.

For this reason, the Commission believed that it was necessary to free European companies from legal ties to any particular country. To accomplish this, the Commission concluded that a "full set of standard provisions" would have to be created to govern "the founding, structure, operation and winding up of the European company."

In 1988, more than six years after the Council had last considered the idea of a European corporation law, and more than eighteen years after it first proposed the adoption of a European corporation statute, the Commission issued yet another call to action. The Commission warned that cross-frontier cooperation had become "imperative" not only for achieving economic integration of the EC market, but also for maintaining the EC's competitive position in relation to the United States and Japan, especially in the high-technology and financial services industries.

In its Memorandum, the Commission pointed out that the absence of a European company statute impeded the development of EC-based companies. The Commission also criticized the resulting failure in the development of legal methods for accomplishing the "obvious economic need to restructure companies." According to the Commission, the reorganization of such companies was made frustrated by: (1) the impossibility of accomplishing cross-frontier mergers and other business combinations under existing laws; (2) inconsistent and conflicting national tax laws resulting in double taxation and tax-oriented rather than market-oriented decisions by managers; and (3) inconsistent national laws regarding the establishment and recognition of groups of companies.

65. See 1970 Proposed Regulation, supra note 6, at 5-6.
66. Id. at 6-7.
67. See 1988 Memorandum, supra note 24, at 4, 29. In 1985, the Commission had previously urged the Council to adopt a European company statute. See Completing The Internal Market—White Paper From The Commission To The European Council, June 1985, ¶ 137 [hereinafter 1985 White Paper]. The White Paper was concerned primarily with the need for allowing companies to organize on a cross-border basis, and spent little time discussing the improvement of general cross-border operations. See id. ¶¶ 133-144.
68. See 1988 Memorandum, supra note 24, at 5.
69. Id. at 3.
70. See id. at 9.
porate managers for their use in the formulation of a new European company law proposal.

The resulting proposal, made in 1989 and amended in 1991, reasserts the need to permit the organization of corporations on a European basis. The preamble to this proposal states that European companies should be able to "carry out the reorganization of their business on a Community scale" without reference to the laws of individual member states, and expresses concern over the obstacles to the creation of groups of companies that was produced by the divergent national laws. The Commission concludes that it is essential to create a European corporate form of organization "as a means of enabling companies from different Member States to merge or to create a holding company and . . . to form a joint subsidiary." A significant addition to the 1989 Proposed Regulation would enable certain companies to become European companies without the need for mergers or other corporate reorganizations. Although the Commission briefly addresses the tax implications of subjecting the corporations to tax in the individual member states, the 1989 and 1991 proposals give much less emphasis to these problems than the 1988 Memorandum had provided. Moreover, because of the progress made in harmonizing member state company law, the Commission, in the 1991 proposal, places much less emphasis on the need for adopting a full set of European company laws covering all aspects of the annual financial reporting requirements and the winding up of European companies.

B. Protective Goals of the Proposed Statute

The Commission has consistently acknowledged that if companies were allowed to operate and organize on an EC basis, rather than on a national basis, various protective mechanisms commonly found in mem-

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71. 1991 Proposed Regulation, supra note 7, at 1.
72. See id. at 3.
73. Id.
74. See id.
75. Compare 1988 Memorandum, supra note 24, at 8-9, 10, 21 (expressing concern about the taxation of capital gains resulting from mergers, the double taxation of dividends and cross-border transactions among related entities, and distortions caused by perceptions that tax systems are favorable or unfavorable) with 1991 Proposed Regulation, supra note 7, art. 133, at 67; and 1989 Proposed Regulation, supra note 28, art. 133, at 67-68 (allowing only the integration of losses from foreign permanent establishments). See infra part III.E.
ber state company laws would need to be adopted. The Commission's main concern has been the protection of the rights of workers in such enterprises. In addition, the Commission has been concerned to a somewhat lesser extent about protecting the rights of minority shareholders and creditors.

1. Protection of Employees

The preamble to the 1970 Proposed Regulation, in an effort aimed at achieving "uniformity in the system of management of the European company," warned against the use of national laws in providing a model of employee representation in European company decision-making.\[77\] The 1970 proposal, however, went far beyond this goal of uniformity, and asserted that it was "necessary . . . to provide for the formation of a European Works Council"\[78\] in all European companies, and "equally necessary to allow representation of workers on the Supervisory Board[s]."\[79\] The proposal would therefore allow workers to become involved in matters of company management and the appointment of executive officers of the companies.\[80\] The preamble offered no justification for these worker participation goals other than citing the need for uniformity.\[81\] In the explanatory notes to the proposal, the Commission stated that European companies should encourage worker participation in management as a means of improving efficiency through the increased level of cooperation both between employees and management and between employees of the same business entity who worked in different member states.\[82\]

In 1988, the Commission expressly acknowledged that its proposals on the European company statute were designed to do more than simply establish uniform laws. In its 1988 Memorandum, the Commission com-

\[77\] 1970 Proposed Regulation, supra note 6, pmbl., at 7.
\[78\] Id. The European Works Council, which is based on French and Italian systems of employee participation, is a committee of employees in EC scale businesses, that is charged with the responsibility of safeguarding the rights of employees. The committee must be informed and consulted on issues concerning (1) major changes in the business, and (2) conditions of employment. The creation of European Works Councils was finally formally proposed by the Commission in 1990. See Proposal for a Council Directive on the Establishment of a European Works Council in Community-scale Undertakings or Groups of Undertakings for the Purposes of Informing and Consulting Employees, 1991 O.J. (C 39) 10.
\[79\] 1970 Proposed Regulation, supra note 6, pmbl., at 7.
\[80\] See id.
\[81\] See id. At the time, the 1970 proposal was made, only Belgium, France, Germany, Italy, Luxembourg, and The Netherlands were members of the EC. In addition, only the laws of Germany provided for worker participation in larger public companies. See generally Law on Works Organizations of 1952 & 1972, translated in Heinrich Beinhauer, German Works Council Act 1972 (1972); 1970 Regulation, supra note 6, pmbl., at 173. Strong opposition to worker participation in the management of the European company has come from Great Britain and Ireland, which did not join the EC until 1973. See CCH, supra note 40, ¶¶ 40-424, 40-663, 40-664.
\[82\] See 1970 Proposed Regulation, supra note 6, pmbl., at 87.
mented that the necessary restructuring of European companies on an international level would be more readily accepted by European workers if they participated in that restructuring, and their interests were safeguarded. In the Commission's view, worker participation in the management of the European company was essential both as a means of ensuring the smooth operation of such enterprises and as a matter of "social rights." Therefore, the Commission stated that in addition to encouraging efficient European-wide operations, the European company statute should "at the same time pioneer worker involvement in the decision-making structures of European industry."

The 1989 and amended 1991 draft directives on worker participation in the European company moderated the Commission's language on the social rights aspect of the proposals. Although the Commission stated that the participation of workers in the supervision of the European company was necessary for achieving the economic and social goals of the EC, the Commission placed greater emphasis on the need for coordinating the diverse laws of member states on this issue. In addition, the 1991 draft expressed concern over preventing the competitive inequalities that would arise if equal levels of worker participation were not "guaranteed" to all workers.

2. Protection of Creditors and Shareholders

In articulating the goals of the 1970 proposal, the Commission took the position that protection was required for creditors and certain shareholder groups of companies that were SEs. The

83. See 1988 Memorandum, supra note 24, at 2.
84. 1985 White Paper, supra note 67, at 16. It is interesting to note that the Commission took this position even though it recognized that, in some member states, worker representative groups were reluctant to accept the idea of worker participation. See id.; infra note 338 and accompanying text. The Commission acknowledged the continuing support of the European Parliament for worker participation provisions in the European company statute.
85. 1988 Memorandum, supra note 24, at 3 (emphasis added).
87. See 1991 Proposed Directive, supra note 8, pmbl., at 9. The Commission's position on this point lacks a certain amount of internal logic. If it is true that European companies operate more smoothly and effectively when workers participate in management, then a competitive inequality would result from the statute's failure to require worker participation. Under such circumstances, it would hardly seem necessary to guarantee worker participation, because companies would be led by market pressures to allow worker participation (except that such guarantees of worker participation might avoid a damaging period of non-competitiveness until the companies restructured their operations). If, on the other hand, worker participation would have no effect, then no competitive inequality would result from the adoption of this model of management. If, conversely, worker participation would make European companies less efficient, then it would again be necessary to guarantee worker participation, in order to prevent companies without such participation from gaining a competitive advantage.
88. See 1970 Proposed Regulation, supra note 6, pmbl., at 173-74. The term "creditor" was not defined in the proposal. Because the proposal simply makes parent compa-
Commission believed that the growth of such groups of companies had already caused problems for the creditors and minority shareholders of the controlled companies.\textsuperscript{89} As European companies were created, and more and larger groups of companies were formed, the Commission foresaw increasing problems and the need for additional regulation. The Commission also thought that its regulation would serve as a model for the member states' revision of their national laws on the subject.\textsuperscript{90}

The Commission also recognized, in the 1970 Proposed Regulation, that controlling companies and minority shareholders did not have common interests. A controlling company might not act in the best interests of minority shareholders of the controlled company because the controlling company was not necessarily interested in improving the profitability of the controlled company. It might instead use the controlled company for the purpose of improving the controlling company's profitability. The Commission therefore provided special protection for minority shareholders by enabling them to redeem their shares in the controlled company in exchange for either cash or shares in the controlling company.\textsuperscript{91}

With respect to creditors, the Commission was more vague about the need for special protection in groups of companies. The Commission only referred to the "threat . . . for creditors who rely on the protection provided for by law" when one company controlled and directed another.\textsuperscript{92} Nevertheless, the Commission's proposal made controlling companies liable for the debts of their controlled companies.\textsuperscript{93}

The Commission's views on the special protections needed in groups of companies remained unchanged for several years. In its 1975 amended proposal, the Commission noted Parliament's strong support for such provisions, and retained the provisions of the 1970 proposal.\textsuperscript{94}

In 1988, the Commission acknowledged that it had changed its views on the protection of minority shareholders and creditors in groups of companies. Although the Commission still believed that the legal principle of independence conflicted with the economic demands of groups of companies, the Commission noted that it was "open to question . . . whether the European Company Statute is the proper place to create a

\begin{itemize}
\item \textsuperscript{89} The Commission had initially defined control to exist where one company had the power to direct more than half the votes, or appoint more than half the members of the board of management or supervisory board, or exercise a decisive influence on management. See 1970 Proposed Regulation, supra note 6, art. 6(2), at 12-13. This definition of control was later modified to remove the concept of decisive influence. See 1991 Proposed Regulation, supra note 7, art. 6, at 8.
\item \textsuperscript{90} Of the six member states of the EC in 1970, only Germany had passed laws dealing with the protection of creditors and minority shareholders in groups of companies. See 1970 Proposed Regulation, supra note 6, pmbl., at 173.
\item \textsuperscript{91} See id. arts. 228-238, at 179-87.
\item \textsuperscript{92} Id. at 173.
\item \textsuperscript{93} See id. art. 239, at 187-88.
\item \textsuperscript{94} See 1975 Proposed Regulation, supra note 25, art. 239, at 100-01.
\end{itemize}
By 1989, the Commission had fully reversed its position on the need for creating special rules for European companies that operated in groups. The Commission acknowledged that under existing law, the rights of shareholders and creditors in a group were governed by the law of the controlled company. Consequently, specific rules were not required for a European company that acted as part of a group of companies.\(^5\) This approach was continued in the 1991 amended proposal.\(^7\)

3. Protection of Others

Aside from its goal of protecting minority shareholders and creditors in groups of companies, the Commission apparently did not see any significant need for providing special protection to creditors and shareholders of European companies that were not members of such groups. The Commission did express a mild concern for proper capitalization of such companies. The Commission wanted to “ensure that such undertakings [would] operate on an acceptable scale,” and consequently specified that a minimum paid-in capital would be required.\(^8\) The 1970 proposal also gave creditors the opportunity to oppose a merger in the European Court of Justice if their rights would be affected by the merger.\(^9\)

The provisions of the 1970 proposal that dealt with shareholders’ rights were more the product of normal corporate housekeeping concerns (e.g., liability of the board of management for wrongful acts, and rights of the shareholders to convene shareholder meetings, place items on the agenda, and bring derivative suits) than concerns for the special problems of European companies, and were not separately discussed by the Commission in the preamble or the notes to the proposal.\(^10\)

The Commission has not changed its view that such additional protective measures are not required. The 1989 and 1991 proposals generally followed the pattern of the 1970 proposal on these issues, with the exception that the right of creditors to contest merger in the European Court of Justice has been eliminated.\(^11\)

III. SUBSTANTIVE PROVISIONS OF THE 1991 PROPOSALS

This Part will examine the most important provisions of the 1991 Proposed Regulation and the 1991 Proposed Directive and will analyze the changes that the Commission has made from the earlier proposals. In

\(^5\) 1988 Memorandum, supra note 24, at 20.
\(^6\) See 1989 Proposed Regulation, supra note 28, pmbl., at 42. The only unresolved issue that the Commission has acknowledged in this area is the need for specifying the law that applies if the SE itself is a controlled company. See id.
\(^7\) See 1991 Proposed Regulation, supra note 7, pmbl., at 4.
\(^8\) 1970 Proposed Regulation, supra note 6, pmbl., at 6.
\(^9\) See id. art. 27, at 29.
\(^10\) See, e.g., id. arts. 71, 81, 85(1), 85(3), at 62-63, 69, 73.
addition, this Part will examine the extent to which they coordinate or conflict with EC rules governing national companies. Finally, this Part will evaluate whether the Commission has been successful in meeting its announced goals for the European corporation statute.

A. Formation of the SE

The 1991 Proposed Regulation allows an SE to be formed by business entities that are organized under the laws of a member state. Each SE is required to be a public limited liability company. There are no limits on the types of business that may be engaged in by an SE. An SE may be formed in four ways: by merger, by creation of a holding company, by formation of a joint subsidiary, or by conversion of an existing company. An SE is allowed to participate in the creation of other SEs according to the same rules applicable to national companies. Detailed provisions limit the availability of each method.

The 1991 proposal fails to completely achieve its goal of enabling companies to take advantage of the SE form of organization. Most notably, the availability of the SE has been significantly limited, without apparent advantage.

1. Formation by Merger

The 1991 Proposed Regulation permits the formation of an SE through the merger of two or more existing corporations. The Regulation would still be subject to other EC and member state laws and regulations, including the 1989 Mergers Regulation, which establishes EC-level antitrust laws. See Council Regulation 4064/89 of 21 December 1989 on the Control of Concentrations Between Undertakings, 1989 O.J. (L 395) 36. Under the Mergers Regulation, concentrations with a “Community dimension” (based on world-wide and Community-wide turno-

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102. See id. arts. 2(1), 2(1)(a), 2(2), 2(3), at 6.
103. See id. art. 1(1), at 5. The English texts of both the 1991 Proposed Regulation and the 1989 Proposed Regulation use the term “public limited liability company” to refer to the form of organization of the SE itself and also the companies that are entitled to participate in the formation of an SE through a merger. See id. arts. 1(1), 2(1), at 5-6; 1989 Proposed Regulation, supra note 28, arts. 1(1), 2(1), at 42-43. The 1970 Proposed Regulation referred to these entities as societes anonymes, which is the French form of organization of public limited liability companies. See 1970 Proposed Regulation, supra note 6, art. 15, at 21. The 1970 Proposed Regulation stated that it intended to include similar forms of organization under the laws of other member states, such as the German Aktiengesellschaft, the Italian società per azioni, and the Dutch naamloze vennootschap. See id. at 6 (translator’s note). Although it is not made explicit in the 1991 Proposed Regulation, it appears clear that the term “public limited liability company” is intended to have the same meaning as the term “societe anonyme.” See, e.g., Second Company Law Directive, supra note 15, art. 1, at 2 (specifying its applicability to the formation of public limited liability companies, and also its applicability to the società anonyme, the Aktiengesellschaft, and other similar forms of organization). This Article uses the approach of the 1991 Proposed Regulation and refers to all such forms of corporate organization as public limited liability companies.

The development of the concepts of public and private limited liability companies is traced in Clive M. Schmitthoff, Social Responsibility in European Company Law, 30 Hastings L.J. 1419, 1422-25 (1979).
lation, however, establishes two important limitations. First, formation through merger is only available to companies that are organized as public limited liability companies. Second, at least two of the merging companies must have their places of central administration located in different member states.\textsuperscript{105}

\textbf{a. Public Limited Liability Company Requirement}

Since 1970, the proposed European corporation statute has required all the participants in an SE formed through a merger to be public limited liability companies.\textsuperscript{106} The Commission, in 1970, explained that it allowed only public limited liability companies to create SEs by any method because the extension of this privilege to other forms of corporate organization (a) would add considerably to the difficulties of drafting the statute, and (b) would make it more difficult for the European Court of Justice to supervise the formation of SEs.\textsuperscript{107} The Commission further explained that other forms of corporate enterprises could first convert into public limited liability companies, as a preliminary measure, if they desired to form an SE.\textsuperscript{108}

This requirement was carried forward into the 1989 proposal concerning the creation of SEs by merger without further explanation.\textsuperscript{109} The European Parliament thereafter proposed to extend the right of creating SEs by merger to private limited liability companies and other similar companies.\textsuperscript{110} In support of this proposal, the Parliament pointed out that private limited liability companies conducted a major portion of the economic activity taking place in the EC.\textsuperscript{111} Nevertheless, the 1991 Commission proposal did not change the limitation that only public lim-
Limited liability companies could form an SE through a merger.112

This limitation on the formation of SEs through a merger substantially limits on the availability of the SE form of corporate organization. The exclusion of private limited liability companies from this process of formation has little justification.

The Commission has acknowledged through its own action that the rationale underlying this limitation no longer exists. The 1991 Proposal expressly permits businesses organized in forms other than public limited liability companies to create SEs by forming holding companies and joint subsidiaries.113 Consequently, the pro-restriction argument that allowing other forms of businesses to create SEs would make the statute excessively complex has been effectively repudiated. The argument that such a provision would complicate the oversight work of the European Court of Justice is also invalid, because under the 1991 Proposed Regulation the Court no longer has any oversight role.114

The Commission, moreover, by noting the ease of conversion to the public limited liability form of corporation, has also implicitly recognized that the distinction between public and private limited liability companies is not vitally important in determining whether these entities should be able to create SEs through a merger.115 In fact, a considerable amount of inconvenience may accompany the conversion from a private to a public limited liability company. If this distinction is not of considerable importance, then the proposal ought to be amended to make the SE form of organization more widely available in merger situations.116 Even if the differences between national laws applicable to public companies and private companies are administrative rather than substantive (and this point is debatable), they are significant enough to present at least some barrier to managers or owners of private limited liability companies who wish to create an SEs through a merger.

In sum, although the merger process is more uniform for public companies than for private companies as a result of the Third Council Directive on Company Law (which directs the member states to adopt

112. See 1991 Proposed Regulation, supra note 7, art. 2(1), at 6.
113. See infra parts III.A.2-3.
114. See infra note 134 and accompanying text.
115. See 1970 Proposed Regulation, supra note 6, arts. 2-3 note, at 10-11. Such a conversion would be subject to the law of the member state in which the company was organized.
116. In Italy, for example, the minimum capitalization for a private company is 20 million lire; the minimum capitalization for a public company is about 200 million lire. See Setting up a Company in the European Community: A Country by Country Guide 145, 152 (Brebner & Co., 1989) [hereinafter Brebner]. German private limited liability companies are permitted to have only a single-tier of management, while public companies are required to have a two-tier management structure. See 2 CCH, supra note 40, §§ 32-135, 32-275, 32-315; infra part III.C.1. (discussion of the one-tier and the two-tier forms of management). Greek private companies are treated as conduits for tax purposes in the same manner as S Corporations are in the United States; in contrast, Greek public companies are subject to tax at rates ranging from 39% to 49%.
standardized provisions governing the merger of public limited liability companies),\(^\text{117}\) there is no reason for denying companies the opportunity to create SEs through mergers if the laws of the member states in which the entities are organized permit such entities to merge.\(^\text{118}\)

Significant portions of the remainder of the 1991 Proposed Regulation look to the member state laws for implementation.\(^\text{119}\) The additional use of member state law, in the case of a merger, should not significantly burden the European corporation statute, and would make the SE form of organization available to a much greater number of companies organized within the EC.

b. **Diversity Requirement**

Since 1970, the Commission has required companies forming an SE through a merger to have their respective places of central administration located in at least two different member states. The 1970 Proposed Regulation presumed without discussion that diversity was required for entities forming an SE.\(^\text{120}\) The 1989 Proposed Regulation also required diversity among entities forming an SE.\(^\text{121}\) In 1991, the Parliament proposed the elimination of this provision, so that *any* two companies organized within the EC could create an SE by merger, regardless of whether they were organized in different member states or had branches or subsidiaries located in different member states.\(^\text{122}\) The Commission rejected the Parliament’s proposal.\(^\text{123}\)

The requirement of diversity is an unnecessary limitation on the availability of the SE form of organization. Even if the Commission wishes to ensure that only companies with cross-border activities create SEs (presumably so that the SE form of organization does not swallow up member state forms of organization), this concern could be met by requiring that the participants either have their central administrations or their


\(^{118}\) Although it is beyond the scope of this Article to survey the laws of each member state regarding the merger of private limited liability companies, it should be noted that Germany, for example, already permits its private limited liability companies to merge with each other or with public limited liability companies. See CCH, *supra* note 40, ¶ 32-345.

\(^{119}\) See, *e.g.*, infra part III.E.

\(^{120}\) See 1970 Proposed Regulation, *supra* note 6, art. 2, at 10. The Commission simply stated without discussion that the creation of an SE by two or more companies “presuppose[s] that there are in any event at least two undertakings in different Member States.” *Id.* arts. 2-3 note 1, at 10.


\(^{122}\) See 1991 Amendments by Parliament, *supra* note 110, amend. 7, art. 2(1), at 74-75.

branches or subsidiaries located in different member states. The Commission implicitly recognized this point when it amended the 1989 Proposed Regulation, and thereby relaxed the diversity requirement for other methods of forming SEs. The Commission also offered no explanation for its stricter requirement of diversity for SEs created by merger than for other kinds of SEs.\footnote{See id. art. 2(1)(a), 2(2), at 6; infra notes 147 (diversity for SE holding companies), 164 (diversity for SE joint subsidiaries), 170 (diversity for SEs by conversion) and accompanying text.}

c. Procedures for Merger

The procedures for the formation of an SE through a merger are relatively straightforward. The 1991 Proposed Regulation provides that the founders must prepare and publish the draft terms of the merger.\footnote{See 1991 Proposed Regulation, supra note 7, arts. 18, 19, at 13-14.} The administrative or management boards of the founders must also include a report on the legal and economic justifications for the merger,\footnote{See id. art. 20, at 14. The Commission rejected the Parliament's recommendation that this report should also include the social justification for the merger. The Commission did, however, accept Parliament's suggestion that the report should not have to be detailed. See 1991 Amendments by Parliament, supra note 110, amends. 33 & 154, art. 20, at 81.} and reports from one or more independent experts concerning whether the share exchange ratio is fair and reasonable to the shareholders.\footnote{See 1991 Proposed Regulation, supra note 7, art. 21, at 15.} The merger is subject to approval by the shareholders of both founding companies.\footnote{See id. art. 22, at 15-16. Short-form mergers, using simplified procedures and not requiring the vote of all the shareholders, also are permitted in accordance with the laws of member states where one founder owns 90% or more of the shares of another founder, or where at least 90% of the shares of each of the founders are owned by the same company. See id. art. 30a, at 19. The member states' laws on short-form mergers have been harmonized pursuant to the Third Company Law Directive, supra note 117, arts. 24-29, at 41-42.} Protection of creditors and employees of the founding companies is accomplished by the applicability of member states' laws.\footnote{See id. arts. 17(3), 19, 23, at 12-16.} The EC previously adopted a Directive requiring member states to enact rules dealing with such issues for companies organized within such states.\footnote{The laws of member states governing these issues have been harmonized pursuant to (a) the requirements of the Third Company Law Directive, supra note 117, and (b) the Council Directive of 14 February 1977 on the Approximation of the Laws of the Member States Relating to the Safeguarding of Employees' Rights in the Event of Transfers of Undertakings, Businesses or Parts of Businesses, 1977 O.J. (L 61) 26. The harmonization of member state laws pursuant to these and other company law directives made the drafting of the 1991 Proposed Regulation significantly simpler than the drafting of previous proposals. See Third Company Law Directive, supra note 117.}

The supervision of the legality of a merger that creates an SE is also fairly simple. Since the member states' merger laws have been harmonized by the EC Third Company Law Directive,\footnote{See Third Company Law Directive, supra note 117.} the 1991 Proposed
Regulation simply provides that the legality of the merger as it relates to the founding companies shall be governed by the laws of the member states applicable to the founders. In addition, the legality of the merger as it relates to the formation of the SE shall be governed by the laws of the member state in which the SE will have its registered office. Similarly, the liability of members of the administrative or management boards and of experts, for acts in connection with the merger, are governed by the harmonized merger laws of the member states. Proceedings to have the merger creating an SE declared null and void may be brought only where the member states have not supervised the merger. Even then, such proceedings may only be brought within six months from the date on which the merger became effective.

Thus, the procedural aspects of creating an SE through a merger present few difficulties in their application. Because the member states' laws on mergers are to a significant extent harmonized pursuant to EC directives, the burdens wrought by having to deal with multiple sets of laws and regulations are minimized.

2. Formation by Holding Company

The 1991 Proposed Regulation permits two or more public or private limited liability companies to create an SE by forming a holding company. To qualify, at least two of the participating companies must have either (1) their places of central administration located in different member states, or (2) a subsidiary or branch office located in a member state different from the state of its central administration.

a. Availability to Both Public and Private Limited Liability Companies

This provision substantially increases the availability of the SE form of organization as compared to previous drafts. The 1970 Proposed Regulation permitted only public limited liability companies to create an SE through the formation of a holding company. This limitation was also

132. See 1991 Proposed Regulation, supra note 7, arts. 24(1), 24a(1), 27(2), at 16-18. Under the 1970 Proposed Regulation, the European Court of Justice was given the tasks of determining whether the formalities of formation of the SE had been properly complied with, and of holding hearings on objections to the merger made by creditors and other claimants to the profits of the founders. See 1970 Proposed Regulation, supra note 6, arts. 17, 25, 27, at 23-24, 28-29, 29.
134. See 1991 Proposed Regulation, supra note 7, art. 29, at 19.
135. A discussion of the extent to which the EC directives permit variations in the member states' regulation of mergers, and the extent to which such variations might deter businesses from merging to form SEs, is beyond the scope of this Article. For a succinct description of the Third Company Law Directive, supra note 117, see English, supra note 46, at 1448-54.
136. See 1991 Proposed Regulation, supra note 7, art. 2(1)(a), at 6.
137. See 1970 Proposed Regulation, supra note 6, art. 2, at 10.
included in the 1989 Proposed Regulation. The European Parliament objected to this limitation. Instead, the Parliament proposed that both public limited liability companies and various forms of private limited liability companies should be able to create SEs by forming holding companies. The Commission accepted this recommendation.

It is not practical to permit forms of business enterprise other than public and private corporations to form an SE through the use of a holding company. A relaxation of the current restrictions, for example, would require that partners contribute their partnership interests in exchange for shares in a newly created SE corporation. The corporation would then own the partnership interests in the two founding partnerships. In most member states, the laws governing partnerships are substantially different from the laws that govern corporations. Recognizing the difficulty that would result from this disparity, neither the Committee nor the Parliament has recommended expanding the proposed statute to permit non-corporate entities to create SEs in this manner.

b. Diversity Requirement

The 1991 Proposed Regulation requires that in order for an SE to be formed through a holding company, “at least two of [the founding companies] have their central administration in different Member States, or [at least two of them] have a subsidiary company or a branch office in a Member State other than that of their central administration.” Although this provision permits more business entities to qualify as founders of SEs through the use of a holding company than had prior drafts, it still presents some unnecessary limitations.

The 1970 Proposed Regulation had permitted only businesses, “of which not less than two [were] subject to different national laws,” to form SE holding companies. The 1989 Proposed Regulation continued this requirement that at least two of the founders have their central

138. See 1989 Proposed Regulation, supra note 28, art. 2(1), at 43.
139. See 1991 Amendments by Parliament, supra note 110, art. 2(1), at 74-75. For example, the Parliament proposed that among French companies, not only the societe anonyme, but also the societe a responsabilite limitee (a private limited liability company) and the societe en commandite par actions (a stock partnership) should be entitled to utilize this method of creating an SE. The German companies to be included were not only the Aktiengesellschaft (a public limited liability company), but also the Gesellschaft mit Beschränkter Haftung (a private limited liability company) and the Kommanditgesellschaft auf Aktien (a limited commercial partnership). See id.
140. See 1991 Proposed Regulation, supra note 7, art. 2(1)(a), at 6.
141. Substantially different rules pertaining to financial structure, the admission of new members, and the liability of owners apply to corporations and partnerships. For example, compare laws of Germany governing partnerships, 1 CCH, supra note 40, §§ 32-030 to 32-070 with the laws of Germany governing limited liability companies, id. §§ 32-090 to 32-230. For a similar examination of the laws of the Netherlands, compare 2 id. §§ 64-490 with §§ 64-530 to 64-690.
142. 1991 Proposed Regulation, supra note 7, art. 2(1)(a), at 6.
143. 1970 Proposed Regulation, supra note 6, art. 2, at 10.
administrations in different member states.\textsuperscript{144} The Parliament then proposed eliminating the diversity requirement for companies forming an SE through the use of a holding company, so that no diversity would be required with respect to either the founders' states of central administration or the states in which they had subsidiaries or branch offices. Parliament's only proposed limitation relating to an SE's place of organization or operation was its requirement that the companies have their registered offices and places of central administrations located within the EC.\textsuperscript{145}

Therefore, the 1991 Proposed Regulation represents a compromise between the Commission's prior proposals and the views of the Parliament. The Commission relaxed its diversity requirement for the founding companies, but still required some showing of diversity (central administrations or branch offices or subsidiaries) among the founders. If read literally, however, the provision would require that if two founding companies had their central administrations in the same member state, they would each be required to have a subsidiary or branch in a member state different from that state.

In contrast, the 1991 Proposal permits a single company to convert to an SE form of organization if it has a branch or subsidiary in a member state other than the member state in which it has its central administration.\textsuperscript{146} Such a company would not, however, be able to form an SE through the use of a holding company unless its co-founder also had its operations located in a state other than its state of central administration. The requisite diversity of operations for the formation of any SE\textsuperscript{147} would be satisfied only if one of the founders of an SE were required to have a branch or subsidiary in a member state different from the state of central administration of any of the founders. The requirement that the second founder also have a subsidiary or branch in another member state is superfluous.

c. \textit{Procedures for Creation}

The rules governing the creation of an SE through the use of a holding company are simpler than those pertaining to the creation of an SE by merger. The 1991 Proposed Regulation permits the shareholders of the founders to contribute their shares to the newly formed SE holding company. The founders will continue to exist as subsidiaries of the SE. The

\begin{itemize}
\item \textsuperscript{144} See 1989 Proposed Regulation, \textit{supra} note 28, art. 2(1), at 43.
\item \textsuperscript{145} See 1991 Amendments by Parliament, \textit{supra} note 110, art. 2(1), at 74-75.
\item \textsuperscript{146} See 1991 Proposed Regulation, \textit{supra} note 7, art. 2(3), at 6.
\item \textsuperscript{147} The Commission has rejected Parliament's proposal that the diversity requirement be eliminated entirely when SEs are formed through a merger, the formation of a holding company, or the formation of a subsidiary. \textit{Compare} 1991 Amendments by Parliament, \textit{supra} note 110, art. 2(2), at 75 (no diversity requirement) \textit{with} 1991 Proposed Regulation, \textit{supra} note 7, arts. 2(1), 2(1)(a), 2(2), 2(3), at 6 (requiring that at least two of the forming companies have their central administrations in different member states or have a subsidiary or branch in a member state other than that of their central administration).
\end{itemize}
founders are required to draw up draft terms of the transaction, together with a statement of the reasons for the transaction.148 They are not, however, required to deliver the reports of experts to their shareholders, as is the case when an SE is formed through a merger, even though the shareholders will now be the ultimate owners of both companies.149

d. Rights of Minority Shareholders

The Commission has significantly changed the protection that is afforded minority shareholders where an SE is formed through the use of a holding company. In both the 1970 Proposed Regulation and the 1989 Proposed Regulation, all shareholders were required to contribute all of their shares to the SE holding company.150 In accordance with the laws of several member states, the 1991 Proposed Regulation provides that the contribution of shares by minority shareholders at the time that an SE holding company is created is optional, not mandatory. Shareholders of founders in all member states are now permitted to withhold their shares and remain shareholders of the founding (now subsidiary) companies, so long as at least fifty-one percent of the shares entitled to vote in each founder is contributed to the SE holding company.151 This change was made at the request of both the Committee and the Parliament.152 Both bodies were concerned that the original proposal did not protect the interests of minority shareholders, and was contrary to the legal traditions of many member states.153

This provision resolves in favor of the shareholders the conflict between the desire to facilitate the use of the SE form and the right of shareholders of the founding companies to not have the nature of their investments changed. Although most member states permit shareholders to opt out of plans to create holding companies by withholding their shares,154 they are not required to do so by EC regulations or directives. Therefore, companies organized in states that do not give these rights to shareholders in the formation of national holding companies will nevertheless be required to give such rights to shareholders if the holding companies are to be SEs.

There are two reasons why a minority shareholder might want to re-

148. It is not clear from the proposal whether this "statement of the reasons for the transaction" is less detailed than "the report on a proposed merger," in terms of the justification that is required for "the draft terms of merger from the legal and economic point of view and, in particular, the proposed share exchange ratio." 1991 Proposed Regulation, supra note 7, art. 20, at 14.
149. See supra text accompanying note 125.
150. See 1970 Proposed Regulation, supra note 6, art. 29, at 32; 1989 Proposed Regulation, supra note 28, art. 31(1), at 48.
151. See 1991 Proposed Regulation, supra note 7, art. 31, at 20.
152. See Opinion of Committee, supra note 33, art. 2(17), at 38; 1991 Amendments by Parliament, supra note 110, art. 31(1), at 83.
154. See id.
tain the shares he or she owns in a founding company, rather than accept shares in a holding company: (a) to avoid having the nature of the business in which that shareholder invested either changed or diluted by the addition of the business of the co-founder of the holding company; or (b) to maintain the directness of the investment in the operating company, rather than accept an investment that is one step removed from the operating company. The Commission has already indicated that it is not concerned with the first reason. Shareholders who dissent from mergers, whether the mergers are designed to create SEs or national companies, have no right to retain their shares in one of the original companies once the merger has been approved by the general meeting.155 Consequently, there is no reason to provide such protection when the change or dilution of business is accomplished through the creation of a holding company instead of through a merger.

The second reason is of greater concern. A shareholder who retains shares in an operating company even though most of the shares have been transferred to a holding company would continue to receive a pro rata portion of the dividends declared by the operating company. If the shareholder instead became a shareholder of the holding company, and the operating company declared dividends, all of the dividends could be retained at the holding company level. The direct shareholder of the operating company might also possess a greater ability to affect the management of the operating company.156

Although these issues are worthy of consideration, the EC has not determined that shareholders of all national companies are entitled to such protection. Furthermore, the existence of significant blocks of shareholders at the operating company level of a holding company group could have significant adverse effects on the holding company in matters such as the aggregation of profits and losses for tax purposes.157 Consequently, companies that want to create holding companies may indeed bypass an SE form of organization and instead use a national form of

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156. It is possible that a minority shareholder who holds a significant number of shares in the operating company could retain his or her right to elect a director of the operating company if an exchange of shares for shares in the holding company were not mandatory. Even if such a shareholder owned an equal percentage of shares in the holding company, and could elect a director at that level, the shareholder would be unable to cause the holding company to elect a nominee at the operating company level because the shareholder's director would be outvoted by the other holding company directors. This lack of representation at the operating company level could deprive the shareholder of information and the opportunity to participate in discussions concerning the management of the operating company.

157. For example, the Commission has proposed that member states be required to allow national companies that are the parents of foreign subsidiaries to aggregate the losses of such subsidiaries with their profits from other operations. However, these national companies must own at least 75% of the capital of the subsidiary. See infra note 374 and accompanying text.
organization to prevent shareholder retention of equity in the operating company.

The Commission should have considered a provision that only would have allowed shareholders to retain their shares in the operating company where this was required by the law of the member state in which the company was organized. This approach would have preserved the prerogatives of the member states to protect shareholder interests that they deemed important, without imposing such protections in member states that did not grant such protections. Although this approach would result in a variation of law with respect to the creation of SE holding companies, it would only affect founding companies that were already subject to national laws on this matter.

3. Formation by Joint Subsidiary

Under the 1991 Proposed Regulation, two or more entities can also create an SE through the formation of a joint subsidiary. This method of creating SEs is available to all companies or firms organized under the civil or commercial law of a member state, including cooperative societies, and various forms of partnerships.158 In order to use this provision, each of the founding companies or firms must have its registered office and its central administration located within a member state. These companies must have the same diversity of operations that is required for founders that form an SE through the use of a holding company.159 The only substantive provision in the proposed statute is the requirement that the founders comply with the laws of the member states in which they are organized.160

The Commission originally proposed that only public limited liability companies be allowed to form an SE through the use of a joint subsidiary.161 Beginning with the 1975 Proposed Regulation, however, the right to create an SE through a joint subsidiary has been broadly available, even though the Commission has proposed to limit the availability of the SE form of organization in other respects.162

The availability of this method of creating an SE is of the same breadth as that allowed by the EC in creating European Economic Interest

158. See 1991 Proposed Regulation, supra note 7, art. 2(2), at 6. The regulation specifies that it is available to all companies or firms covered by article 58 of the Treaty of Rome. The Treaty defines companies or firms as “[c]ompanies or firms constituted under civil or commercial law, including co-operative societies, and other legal persons governed by public or private law, save for those which are non-profit making.” Treaty of Rome, supra note 1, art. 58. The scope of this definition is sufficiently broad to cover for-profit partnerships as well as all forms of corporations. See David C. Donald, Company Law in the European Community: Toward Supranational Incorporation, 9 Dick. J. Int’l L. 1, 31 n.200 (1991).

159. See 1991 Proposed Regulation, supra note 7, art. 2(2), at 6; supra part III.A.2.b.

160. See 1991 Proposed Regulation, supra note 7, art. 35(2), at 22.

161. See 1970 Proposed Regulation, supra note 6, art. 3(1), at 10.

162. See 1975 Proposed Regulation, supra note 25, art. 2(1), 2(2); 1989 Proposed Regulation, supra note 28, art. 2(2), at 43.
Groupings (EEIGs), although the procedures for the formation of EEIGs are much more complex. This broad availability is due to the special nature of the entities created. In the formation of both an SE by joint subsidiary and an EEIG, a new venture is formed as the wholly owned subsidiary of already existing businesses. Because it is an entirely new venture owned by the founders, and the founders retain their existing structures, the owners of the founding companies are not subject to any changes in their existing legal or financial relationships vis-à-vis the founding entities themselves. Consequently, there is no reason for restricting the ability of such entities to create SEs through the use of a joint subsidiary.

The procedures for forming an SE by joint subsidiary are the simplest of all of the methods of forming SEs. Provided that member state laws allow companies and firms to own shares in public limited liability companies, companies and firms should have no problem qualifying for and participating in the formation of SE joint subsidiaries.

The diversity requirement for founders of SEs formed through the use of a joint subsidiary is the same as the diversity requirement that exists for the formation of SEs through the use of a holding company.  

4. Formation by Conversion

In a significant departure from prior drafts, the Commission, in the 1991 Proposed Regulation, allows a company to create an SE by simply converting itself into an SE, without any need for a merger or the formation of a new entity as a holding company or subsidiary. In the 1970 Proposed Regulation, the Commission had specifically rejected the idea of allowing companies to convert into SEs. That position was not
changed in either the 1975 or the 1989 drafts. However, pursuant to the requests of the Committee and the Parliament, the Commission included a provision in the 1991 Proposed Regulation that allows a company to convert itself into an SE.\textsuperscript{167}

The conversion process is available only to a public company organized under the laws of a member state that has a branch or subsidiary in another member state.\textsuperscript{168} The conversion must be approved by the general meeting of shareholders of the converting company.\textsuperscript{169}

The inclusion of a provision permitting the creation of SEs by conversion substantially improves the Commission’s efforts to enable companies to operate on a European basis. Before the Commission added this provision, any company that wished to act through an SE might have been required either to give up its independent legal existence through a merger with another company, or to give up some of its control over its own assets or the assets of the SE by creating a holding company or a subsidiary in conjunction with another founding company. It is likely that many companies would not have been willing to accept the resulting loss of independence as the price for being allowed to operate as an SE.

The presumption that the creation of an SE by one of the above-described methods would result in a loss of independence or a change in the business of the founder is based on the premise that one founding company would have to act in conjunction with another founding company that has a separate group of shareholders and its own independent operation. However, nothing in the proposal specifically prevents a company from creating a public limited liability subsidiary or spin-off company organized in a member state that was different from the state of organization of the founder, and thereafter merging or forming a holding company with that related company. This might be possible because the 1991 Proposed Regulation does not require diversity of actual operations between founders, so long as there is diversity between the states of central administration of two founders.\textsuperscript{170} Even if such a procedure were operating in a number of countries through branches having no legal personality. Indeed, such a possibility would rest on the assumption that one could define the exact criteria for deciding whether establishments outside the country where the head office is situated are to be regarded as true branches; there would arise further difficulties in connection with the legal scrutiny of formation and, in practice, it would be necessary to provide that if the required conditions were not satisfied, the purported formation would be invalid.

\textit{Id.} arts. 2-3 note 1, at 11. The Commission did not address the possibility of permitting the conversion of companies that \textit{did} operate through branches or subsidiaries having legal personality.

\textsuperscript{167} See Opinion of Committee, \textit{supra} note 33, art. 2(2), at 37; 1991 Amendments by Parliament, \textit{supra} note 110, amend. 9, at 75.

\textsuperscript{168} See 1991 Proposed Regulation, \textit{supra} note 7, art. 2(3), at 6.

\textsuperscript{169} See \textit{id.} art. 37a, at 23.

\textsuperscript{170} See \textit{id.} arts. 2(1), 2(1)(a), 2(2), 2(3), at 6. Member states are required to permit the creation of single-shareholder private limited liability companies pursuant to the Twelfth Directive, \textit{supra} note 49, art. 2, at 41. The member states are allowed to permit the creation of single shareholder public limited liability companies as well. See \textit{id.} art. 6.
permissible under the prior proposals, the addition of the conversion provision still constitutes a substantial improvement because it simplifies the process through which a company may become an SE without sacrificing its independence.

Because the procedure for creation of an SE by conversion is only available to public companies, it is not sufficiently broad to fully accomplish the goals of the proposed statute. The proposed statute requires that the resulting SE be organized as a public limited liability company. However, the conversion of a private limited liability company to a public entity could be accomplished at the same time as the conversion to an SE. As is the case with a public limited liability company, the interests of shareholders, creditors and other interested parties vis-à-vis a private limited liability company would be protected provided that during the conversion process, the founder complied with both the requirements concerning such companies that are imposed by the 1991 Proposed Regulation, and the public limited liability company requirements of the member state in which the founder has its registered office.

It is not practical, however, to permit other business entities, such as partnerships, to convert directly into SEs. The structures of these entities and the relations among their owners are so vastly different from limited liability companies that they should be required to convert to private or public limited liability companies under member state law before they may convert into an SE.

5. Formation by an Existing SE

The 1991 Proposed Regulation permits an existing SE to participate in the creation of another SE through a merger, the formation of a holding company, the formation of a joint subsidiary, or the formation of a subsidiary of itself. Prior language that prohibited the creation of an SE subsidiary by another SE subsidiary has been eliminated.

There are no special limitations on the ability of an SE to create another SE, beyond those that are common to all SEs. This provision fully accomplishes the Commission's objective of enabling companies to form SEs easily.

6. State of Registration

Each SE is required to designate a registered office in the state in which it is established. In those states that do not permit the creation of single shareholder public limited liability companies, it appears that companies could use nominee shareholders in the creation of their related companies. See Wooldridge, supra note 163, at 100-01.
which its "central administration" is located.\textsuperscript{174} Subject to compliance with certain formalities, such as publication of the proposed transfer and a vote of the general meeting of the shareholders on the issue, the state of registration and central administration may be changed.\textsuperscript{175} This change will not affect the continuity of existence of the SE, but it will require that the SE comply with the laws of the new member state.\textsuperscript{176}

This provision represents a step backwards from the original intent of the Commission to create a truly non-national form of business organization. In the 1970 Proposed Regulation, SEs were required to register in a member state only for the purpose of jurisdiction; the SE could select a different state in which to establish its central administration, and could freely change that state without regard to the state in which it was registered.\textsuperscript{177}

The new requirement that an SE must accept a change in the applicable member state law if it changes its state of central administration will limit the attractiveness to SEs of making such a change. The 1991 Proposed Regulation grants some degree of autonomy to the member states in applying their own laws to SEs;\textsuperscript{178} in addition, the 1991 Proposed Directive gives a great deal of flexibility to each member state in choosing the forms of worker participation in management that will be permitted to SEs organized in that state.\textsuperscript{179} An SE might therefore be required to make significant changes in its organizational structure, or be subjected to significant changes in the applicable local law, if it desired to move its central administration. This burden of complying with a different set of laws might dissuade companies from transferring their places of central administration even though such changes were otherwise warranted by business conditions.\textsuperscript{180}

\textsuperscript{174} See 1991 Proposed Regulation, supra note 7, art. 5, at 7.
\textsuperscript{175} See id. arts. 5a(1), 5a(2), 9, at 7, 10.
\textsuperscript{176} See id. arts. 5a(1), 5a(2), 7(2)(b), at 7, 9.
\textsuperscript{177} The Commission believed that there was no reason for tying the state of registration to the state of the central administration. The movement of an SE's central administration between member states was intended to be as easy as the movement of the central administration within a member state, and accordingly would not require the alteration of any of the SE's organizational documents. See 1970 Proposed Regulation, supra note 6, art. 5 note, at 12.
\textsuperscript{178} Member state laws are applicable if the Regulation neither specifically deals with a topic nor expressly allows the SE to freely deal with it. See 1991 Proposed Regulation, supra note 7, art. 7(2)(b), at 9.
\textsuperscript{179} See infra part III.D.
\textsuperscript{180} This requirement, however, may not prevent all "forum shopping." A company opposed to the worker participation laws of a member state might choose to move not only its state of registration, but also its state of central administration, to a state whose laws were perceived to be more acceptable. While such a move would be more difficult than a change of registration, nothing in the proposed statute would prevent such a move. If the statute is adopted in its current form, it will be interesting to see whether companies move their headquarters to take advantage of the laws of other member states. If such moves take place, the resulting loss of management jobs in member states whose laws are perceived as being less favorable to business may cause some member states to amend their laws. In these circumstances, it is possible that a European "race to the
This limitation on the free movement of the SE may be unavoidable at this time. If the new member state's laws were not applied to an SE that transferred its central administration, then the provisions of member state laws governing worker participation, for example, could be circumvented; an SE could establish itself in a state in which worker participation rights were limited, and then move into a state with laws that required greater participation rights for employees, without being legally required to comply with such laws. Thus, the requirement that an SE must be governed by the laws of the state of its central administration is necessary as long as the Commission allows the member states continue to maintain significant differences in their laws applicable to SEs.

B. Capital Structure

1. Minimum Capitalization and Initial Issuance of Shares

At the time of formation, an SE is required to have a minimum subscribed capital of 100,000 European currency units ("ecus"). Shares may not be sold for less than their nominal (par) value; however, a minimum of only twenty-five percent of the nominal value of these shares is required to be actually paid in at the time that the shares are subscribed for. In addition, bearer shares must be fully paid at the time of their issuance.

Shares in an SE may be issued for non-cash consideration that is capable of economic assessment, but may not be issued for promises to provide services in the future. The value of such non-cash consideration must be reported on by an independent expert appointed by a state administrative or judicial authority.

This structure represents a significant modification of the Commission's earlier position. In the 1970 Proposed Regulation, the Commission provided that the capital of an SE must be at least 500,000 units of
account for SEs formed through a merger or a holding company, and 250,000 units of account for SEs formed by the creation of a joint subsidiary.187 Such capital was required to be fully paid in at the time that the shares were subscribed.188 The Commission explained that this high capitalization was “justified by the fact that the company to be formed will be multi-national in character,” and that the company would find it easier to obtain credit.189

These amounts of actual capital were reduced to 250,000 units of account and 100,000 units of account, respectively, in the 1975 Proposed Regulation.190 They were reduced further to 100,000 ecus for all SEs in the 1989 Proposed Regulation, in order to make the SE form of organization more attractive to small businesses.191 In the 1991 draft, the language was changed to the term “subscribed capital,” rather than “capital,” to clarify that the proposed statute referred to the minimum capital committed by shareholders, as opposed to the minimum paid-in capital or minimum assets of the SE on a continuing basis.192

The Commission’s reduction of the amount of capital necessary for creating an SE represents a substantial improvement in enabling companies to choose the SE form of organization. Because only twenty-five percent of the nominal value of the minimum subscribed shares of the SE must be actually paid in, under the current proposal, an SE may be created with only 25,000 ecus of paid-in capital.193

This provision, however, continues to require a higher level of capitalization for SEs than the level that is required for public limited liability companies that are organized under the laws of member states. Under EC law, member states are required to permit the creation of public limited liability companies with subscribed capital of only 25,000 ecus, of which only twenty-five percent, or 6,250 ecus, must be actually paid in.194 From a theoretical standpoint, the requirement that an SE have a paid-in capital four times that of a public company organized under member state law, may be questioned. However, the relatively low minimum paid-in capital of 25,000 ecus makes it unlikely that this require-

187. See 1970 Proposed Regulation, supra note 6, art. 4, at 11. The unit of account is defined by Commission Decision 3289/75 ECSC, art. 1, 1975 O.J. (L 327) 4, and is the older equivalent of the eur. See European Community Law, supra note 37, at 1196.
188. See 1970 Proposed Regulation, supra note 6, art. 40(2), at 40.
189. Id. note, at 11.
190. See 1975 Proposed Regulation, supra note 25, art. 4, at 15.
193. The founders would remain liable for the balance of the nominal value of the shares for which they had subscribed that had not been paid in, or up to an additional 75,000 ecus.
ment will have any material deterrent effect on the creation of SEs by companies doing business on a European basis.

The 1991 Proposed Regulation does not permit the issuance of shares without nominal value. In the notes to the 1970 Proposed Regulation the Commission explained that it had adopted this position because "the capital of the company constitutes the core of the company's structure . . ." The Commission noted that the nominal value of shares could be expressed in the smallest monetary unit in any of the member state currencies, thereby tacitly acknowledging the relative uselessness of the concept as a protective device for creditors or others. Nevertheless, the Commission also stated that it believed that "departing from the premise that the capital lies at the heart of the company, would require an entirely different concept of the company."

Interestingly, the Commission has retreated from its stand against shares without nominal value in other areas. The Second Company Law Directive, which governs member state laws with respect to public companies organized under the laws of member states, specifically permits the issuance of shares without nominal value if permitted by the laws of the member state. These shares must be paid up at least to the extent of twenty-five percent of their accountable par value. This difference between the proposed law governing SEs and the law governing other public companies could present an obstacle to the conversion to the SE form of organization by companies that have issued no par stock. Consideration should be given to harmonizing this portion of the 1991 Proposed Regulation with the provisions of the Second Company Law Directive. In addition, consideration should be given to whether the concepts of nominal value and accountable par value have any real protective merit either in the statutes of the member states and the Second Company Law Directive, or in the proposed European corporation statute.

The 1991 Proposed Regulation is silent with respect to whether any premium (the amount above the nominal value for which shares are sold) is required to be paid in upon the initial subscription for shares. Because the proposal is silent, the requirements of member states' laws would apply. The Second Company Law Directive is also silent; accordingly

195. See 1991 Proposed Regulation, supra note 7, art. 4, at 7.
196. 1970 Proposed Regulation, supra note 6, arts. 48-49 notes, at 47.
197. Id.
198. See Second Company Law Directive, supra note 15, art. 3(c), at 3.
199. See Second Company Law Directive, supra note 15, art. 9(1), at 4. In the United States, the concept of no par stock has been accepted by state statutes since 1912. See Bayless Manning & James J. Hanks, Jr., Legal Capital 29 (3d ed. 1990).
201. See 1991 Proposed Regulation, supra note 7, art. 7(2)(b), at 9. Premiums on any subsequently issued shares must be paid in at the time those shares are issued. See id. art. 42(3), at 24.
there has been no harmonization of member state law on this issue. Due to the variations in the laws of the member states, the failure of the proposed statute to address this issue may create confusion and uncertainty for prospective founders of SEs. Greater certainty would be achieved if the statute required that the full premium amount be paid in for all SEs, regardless of the law of the member state in which an SE was located.

2. Issuance of New Shares

The issuance of new shares by an SE may be accomplished pursuant to authority granted either in the statutes of the SE or by a vote of the shareholders at the general meeting of shareholders. The grant of authority may be either for a specific issuance of shares, or for a general authority to issue new shares for a period of up to five years. Member state law specifies the maximum amount of increased capital that may be pre-authorized. In order to approve the increase of capital or extend the period of pre-authorization, the SE must obtain the affirmative vote of either two-thirds of the votes cast, or in the alternative, a simple majority of the votes cast where there is a quorum of at least fifty percent of all shares represented at the meeting. The shares issued in augmentation of capital must be paid up to the extent of twenty-five percent of their nominal value, plus one hundred percent of any premium, at the time they are issued.

This provision is now in accordance with member state laws, which are required by the Second Company Law Directive to permit similar pre-authorizations and mandate similar minimum payments. Harmonization with the Second Company Law Directive, which governs member state laws on public limited liability companies, is generally helpful for enabling managers to understand the laws applicable to SEs and make plans based on such laws. In this instance, however, harmonization does not fully achieve this desired effect because of the wide variation among member state laws permitted by the Second Company Law Directive.

202. For example, public companies organized under the laws of Great Britain may not issue shares unless 25% of the nominal value, and 100% of any premium for each share is paid in to the corporation. See Companies Act, 1985, ch. 6, § 101(1) (Eng.). In Portugal, a minimum of 30% of the share capital must be paid in on subscription. See Brebner, supra note 116, at 209.

203. The full amount of the premium is required to be paid in for all shares issued pursuant to an increase of capital. See 1991 Proposed Regulation, supra note 7, art. 42(3), at 24.

204. Company statutes are similar to the by-laws of United States corporations.


206. See id. arts. 42(2), 42(4), 43(1), at 24-25.

207. See id. arts. 97(1), 97(2), at 52.

208. See id. art. 42(3), at 24.


210. Member state laws are required to permit companies to pre-authorize increase in
In prior drafts of the proposed statute, the Commission had limited prior authorizations of increases in an SE's capital to a maximum of fifty percent of the capital already subscribed.\textsuperscript{211} Under the current proposal, the amount of capital that may be raised pursuant to prior authorization will vary from one member state to another, because the Second Company Law Directive does not set uniform standards on this subject.\textsuperscript{212} Therefore, some SEs will be at a competitive disadvantage if they are denied the flexibility of SEs located in other states to respond to changing financial markets by selling new issues of stock quickly, without the need for calling a general meeting of shareholders. Furthermore, an SE that desires to change its state of registration will now have to consider the impact of the laws of the state to which the SE is transferring, which may establish stricter limitations on the prior authorization of sales of shares. This result is contrary to the originally expressed goal that SEs should be able to plan and operate free of concerns over national laws, and without regard to their place of central administration.\textsuperscript{213}

3. Shareholders' Preemptive Rights

Under the 1991 proposal, shares issued for cash pursuant to an increase in capital must be offered pro-rata, first to existing shareholders of the same class being issued, and then to shareholders of other classes. This preemptive right may be restricted only pursuant to a shareholder vote at the general meeting.\textsuperscript{214}

The Commission has decided that shareholders of SEs are entitled to preemptive rights with respect to all new issuances of shares. This approach has been part of the Commission's proposals since 1970.\textsuperscript{215} Preemptive rights render it more difficult for SEs whose shares are widely held to raise new capital. Before they can make a public or private offering of their shares, SEs must first go through the time-consuming process of offering shares to each of their existing shareholders.\textsuperscript{216} On the other hand, shareholders of closely held SEs may prefer to have preemptive rights, in order to preserve their interests in the voting control and equity

\textsuperscript{211} See 1970 Proposed Regulation, \textit{supra} note 6, art. 41(3), at 40; 1975 Proposed Regulation, \textit{supra} note 25, art. 42(2), at 31; 1989 Proposed Regulation, \textit{supra} note 28, art. 43(1), at 50.

\textsuperscript{212} See Second Company Law Directive, \textit{supra} note 15, art. 25(2), at 8.

\textsuperscript{213} See 1970 Proposed Regulation, \textit{supra} note 6, pmbl., at 5.

\textsuperscript{214} See 1991 Proposed Regulation, \textit{supra} note 7, arts. 44(1), 44(1)(a), 44(3), at 26-27.

\textsuperscript{215} See 1970 Proposed Regulation, \textit{supra} note 6, art. 42(1), at 41. In the United States, by comparison, most state laws provide that shareholders shall not have any preemptive rights unless the certificate of incorporation specifically grants such rights. See, \textit{e.g.}, Del. Code Ann. tit. 8, § 102(b)(3) (1991); Model Business Corp. Act Ann. § 6.30(a) (1992).

\textsuperscript{216} Unites States companies generally avoid granting preemptive rights to their shareholders because of the difficulty and expense involved. See European Community Law, \textit{supra} note 37, at 578.
of their companies.217

As permitted by the Second Company Law Directive, under member states’ laws governing national companies, corporations may grant management boards the power to restrict or withdraw preemptive shareholder rights for up to five years. This power may be granted pursuant to the instruments of incorporation, the corporate statutes, or a vote at the general meeting.218 The Commission withdrew this power from the SEs,219 not for the purpose of allowing member state laws to control the issue, but rather, to prevent such prior authorizations altogether.220 SEs may obtain authorizations of the withdrawal of preemptive rights only with respect to a single new issue of shares at a time, and only pursuant to a vote at a general meeting.221 Therefore, it will be more difficult for SEs to issue new shares without giving preemptive rights than it will be for national corporations. Each time the SE wishes to raise capital by a new stock offering, a general meeting will have to be held in order to prevent preemptive rights from being granted. Alternatively, to avoid the necessity of holding a general meeting and soliciting shareholder votes, the SE will have to grant preemptive rights by undertaking the time-consuming process of first offering the shares to its existing shareholders before it offers them to the general public.

For these reasons, companies whose shares are publicly held, or which anticipate making a public offering of their shares at any time in the future, may be reluctant to use the SE form of organization. In balancing the need for publicly held SEs that can easily raise capital against the need for closely held SEs that protect the interests of their shareholders, the 1991 Proposed Regulation has overprotected the interests of existing shareholders in closely held SEs. The interests of shareholders in preserving preemptive rights could be adequately protected by allowing companies whose shareholders desired such rights to provide in their instruments of incorporation that all shareholders shall be given preemptive rights. In order to more fully protect shareholders’ rights, the Commission could allow SEs to obtain prospective restrictions of preemptive rights for certain time periods, as it has done for national companies. It is unnecessarily time consuming and expensive to require SEs to offer shares to existing shareholders upon each public offering. In addition, this requirement will probably reduce the desirability of using the SE form of organization.

217. See F. Hodge O’Neal, Molding the Corporate Form to Particular Business Situations: Optional Charter Clauses, 10 Vand. L. Rev. 1, 41 (1956).
219. Compare 1989 Proposed Regulation, supra note 28, art. 44(4), at 50 (allowing restrictions with respect to the instruments of incorporation, the corporate statutes and the vote at the general meeting) with 1991 Proposed Regulation, supra note 7, art. 44(3), at 26-27 (allowing restrictions only with respect to the vote at the general meeting).
221. See supra text accompanying notes 204-08.
4. Repurchase of Shares

The 1991 Proposed Regulation has eliminated the blanket prohibition against an SE's repurchase of its shares that had been contained in prior drafts. SEs are now permitted to repurchase their shares subject only to the laws of the member states in which they are registered.222

Although this change gives SEs more flexibility in managing their capital structures, this provision does not eliminate all of the limitations placed upon SEs in connection with the repurchase of shares. The provision does not contain any particular exemption for redeemable shares, even though the 1991 Proposed Regulation elsewhere gives SEs the power to issue any type of financial instrument permitted by the member state in which the SE is registered.223 Consequently, an SE that issues redeemable shares in accordance with the laws of its state of central administration, would either be prevented from transferring its state of central administration to a state that did not allow the issuance of such shares, or would be prevented from redeeming such shares. The new state's law would apply even though the shares had already been validly issued, and even though there were no legitimate state interests implicated through a prohibition against the repurchase of such shares. In addition, such a prohibition would deter an SE from moving its place of central administration.

The 1991 Proposed Regulation continues the prohibition against an SE's acceptance of its own shares as security, even though the Second Company Law Directive allows member states to permit such action by national companies so long as it is regulated as an acquisition of shares.224 This blanket prohibition against an issuer's acceptance of its shares as security achieves a uniform result for all SEs. Although it limits the financial flexibility of the SE more than that of national companies, this limitation is not so significant that it would reduce the desirability of using the SE form of organization.

5. Types of Securities

An SE may issue shares conferring different priorities with respect to the earnings and assets of the company.225 The issuance of shares with multiple voting rights, however, is not allowed.226 As recommended by the Economic and Social Committee and the Parliament, an SE may issue any other type of financial instrument that is allowed under the law

222. Compare 1991 Proposed Regulation, supra note 7, art. 49, at 29-30 (member state law dictates the terms under which an SE may acquire its shares) with 1989 Proposed Regulation, supra note 28, art. 49, at 51-52 (blanket prohibition).
223. See 1991 Proposed Regulation, supra note 7, art. 56, at 33.
225. See 1991 Proposed Regulation, supra note 7, art. 52(1), at 31.
226. See id. art. 52(3), at 32.
of the member state in which the SE has its registered office. The shares may be issued as either registered or bearer shares. Although the issuance of non-voting shares is permitted, their issuance is subject to certain limitations: the nominal value of all non-voting shares must not represent more than half of the total subscribed capital, and the shares must confer special rights with respect to the assets of the SE.

This broad availability of the types of shares that may be issued provides ample opportunity for SEs to create financial structures tailored to their particular needs, provided that the laws of the member states are not overly restrictive. On the other hand, absent any further agreement among the member states regarding the types of securities that companies may issue, the variation in financial structures brought about by variations in member state laws could be viewed as disrupting the regularization of SEs. Such differences in member state law could limit the ability of an SE to transfer its registered office from one member state to another, if previously issued financial instruments of the SE were not authorized by the new member state. Consequently, the 1991 Proposed Regulation has not fully achieved free establishment and transferral of an SE's place of central administration.

6. Declaration of Dividends

The 1991 Proposed Regulation does not contain any special provisions with respect to the declaration of dividends. Consequently, the provisions of member state laws that govern national companies will control. These national laws are governed by the Second Company Law Directive, which limits the declaration of dividends to a company's current profits and retained earnings and bars the payment of dividends if the company's net assets would become less than the subscribed capital plus statutorily required reserves.

None of these provisions concerning dividends present any particular difficulties to SEs, because they will be subject to the same laws that apply to national companies. In addition, the Second Company Law Directive does not allow for any variation in member state laws on these issues. As a result, an SE's transfer of its place of central administration from one member state to another should not pose any problems under these

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227. See id. art. 56, at 33. Previously, SEs had been limited to the issuance of debentures, convertible debentures, and participation debentures. See 1989 Proposed Regulation, supra note 28, arts. 56-60, at 53. See 1991 Amendments by Parliament, supra note 110, amend. 66, at 87; Opinion of Committee, supra note 33, art. 60, ¶¶ 2(29), 2(30), 2(30)(1), at 39.

228. See 1991 Proposed Regulation, supra note 7, art. 53(1), at 32.

229. See id. art. 52(2)(a), (c), at 32.


231. See 1991 Proposed Regulation, supra note 7, art. 7(2)(b), at 9.

provisions.\textsuperscript{233}

C. Management of the SE

1. Rights and Powers of the Supervisory, Management, and Administrative Boards

a. Choice Between Two-Tier and One-Tier Systems

Under the 1991 Proposed Regulation, an SE is permitted to choose between two forms of management organization: a two-tier system, consisting of a supervisory board and a management board, or a one-tier system, consisting of an administrative board. This choice may be limited by the member state in which the SE has its place of central administration.\textsuperscript{234}

The two-tier form of management was the only form permitted under the original 1970 Proposed Regulation.\textsuperscript{235} This management structure is based on the German model of corporate organization, which also has been accepted in a number of other member states.\textsuperscript{236} This same organizational model was followed in the 1972 text of the Proposed Fifth Company Law Directive, which proposed to regulate the structure of national public limited liability companies.\textsuperscript{237} After extensive debate in the EC,\textsuperscript{238}

\begin{footnotes}
\item[233] See supra text accompanying note 210.
\item[234] See 1991 Proposed Regulation, supra note 7, art. 61, at 31.
\item[236] Prof. Clive M. Schmitthoff points out that the two-tier system was developed in Germany to enable banks that provided capital to companies to maintain control over the use of such capital. He notes that the two-tier system was subsequently accepted in France in 1966, The Netherlands in 1971, and Denmark in 1973. See Schmitthoff, supra note 103, at 1425-26.
\item[237] The two-tier system does not significantly differ in its structure from the system employed in larger United States corporations, in which the shareholders elect the board of directors, who in turn hire the senior management. In the two-tier system, however, the same person may not be a member of both boards. Although, in the United States, there is generally no prohibition against allowing senior management to sit on the board of directors, independent directors generally comprise the majority of the boards of most larger corporations. See Lawrence Inggrassia, Outsider-Dominated Boards Grow, Spurred By Calls for Independence, Wall St. J., Nov. 3, 1980, § 2, at 33; see also Harris Collingwood, What Do Boards Really Want?, Bus. Wk., Oct. 5, 1992, at 52 (citing a survey of 100 major corporations that showed that outside directors outnumbered inside directors by three to one). It has been suggested that the United States system, for several other reasons, has not been successful in obtaining an independent supervision of corporate management by the boards of directors. See Alfred F. Conard, The Supervision of Corporate Management: A Comparison of Developments in European Community and United States Law, 82 Mich. L. Rev. 1459, 1473-75, 1487-88 (1984).
\end{footnotes}
which included the voicing of opposition by the United Kingdom, the Proposed Fifth Company Law Directive was amended in 1983 to allow member states, in their discretion, to afford national public limited liability companies the opportunity of using a one-tier form of management structure instead of the two-tier form. The 1989 Proposed Regulation went even further, and required member states to permit either form of organization for SEs. The 1991 proposal thereafter included a provision that authorized a member state to require SEs to adopt either the two-tier or the one-tier structure. This effectively brought the proposal back in line with the 1983 text of the Proposed Fifth Company Law Directive.

The availability of the one-tier management structure has made the SE form of organization more appealing to businesses that are accustomed to this management form. Without this provision, the SE would have likely encountered substantial resistance in such member states as the United Kingdom.

The 1991 amendment to the 1989 proposal is unfortunate. This amendment permits member states to mandate the use of either the two-tier or the one-tier form of management. The Commission made this change to permit greater reliance on national laws governing the management of public limited liability companies. Such reliance on member state law may be useful where the laws of member states are relatively uniform. In this instance, however, the laws are not uniform and the variation between the two forms of management is substantial. Consequently, an SE will find it difficult to transfer its place of central administration and registration into a state that does not permit the form of management previously adopted by that SE.

b. Operation of Management Systems

Under the two-tier form of management, the shareholders elect, at the general meeting, members of the SE’s supervisory board for a term of up to six years and have the power to remove board members. The number of board members is generally determined by the statutes of the SE, although member states are granted the power to stipulate the number of members. A person can not be a member of both the super-

239. See Wooldridge, supra note 163, at 85-86.
241. See 1991 Proposed Regulation, supra note 7, art. 61, at 31; 1989 Proposed Regulation, supra note 28, art. 61, at 54.
242. See Wooldridge, supra note 163, at 82.
243. See 1991 Explanatory Memorandum, supra note 111, art. 61, at 16.
244. See infra part III.C.1.b.
245. See 1991 Proposed Regulation, supra note 7, arts. 63(2), 68(1), at 36, 39.
246. See id. art. 63(3), at 36.
visory board and the management board. A board member may be either a natural person or a legal person; the latter would appoint a natural person to exercise the functions of a board member. A prior requirement, that members of the management board had to be nationals of the state in which the SE was registered, has been eliminated. The supervisory board appoints and removes the members of the management board, and oversees the performance of the company under the management board, but may not itself represent the SE. The management board is charged with the management of the SE and may represent the SE.

Under the one-tier management structure, the shareholders elect, at the general meeting, members of the SE’s administrative board for a period of up to six years, and have the power to remove them. The board must consist of at least three persons, unless there are no employee representatives on the board, in which case the board may consist of one or two persons. As is the case with the management board in the two-tier system, the administrative board manages the business of the SE and its members have the power to represent the company.

The 1991 Proposed Regulation reserves certain powers for the supervisory or the administrative boards that are beyond the scope of the authority allocated to the management boards and workers. The authorization of the supervisory or administrative boards is required for (a) investment projects; (b) the acquisition, creation or disposition of businesses or parts of businesses; or (c) the grant of loans or guarantees, where the amount of money involved is greater than a specified percentage of the subscribed capital of the SE. The percentage of subscribed capital would generally not be permitted in the United States. This provision represents an interesting change from the 1970 proposal, which permitted only natural persons to serve as board members. As is the case with the management board in the two-tier system, the administrative board manages the business of the SE and its members have the power to represent the company.

The election of a business entity to the board of directors would generally not be permitted in the United States. The law of Delaware is silent on this issue, see Del. Code Ann. tit. 8, § 141(a) (1989) ("The board of directors . . . shall consist of one or more members"), custom has favored the election only of natural persons to the board of directors.

247. See id. art. 62(3), at 35.
248. See id. art. 69(1), at 39. This provision represents an interesting change from the 1970 proposal, which permitted only natural persons to serve as board members. See 1970 Proposed Regulation, supra note 6, arts. 63(2), 74(2), at 56, 65. This proposal was made in order "to ensure that members . . . are persons who have been appointed, above all, for their personal qualities and dynamic character." Id. art. 74 note, at 66. The new provision recognizes that there may be circumstances in which a major shareholder that is a business entity will be able to elect one or more members to the board. It eliminates the necessity of having that shareholder nominate and elect a natural person to hold the position.

The election of a business entity to the board of directors would generally not be permitted in the United States. See, e.g., Rev. Mod. Bus. Corp. Act Ann. § 8.03(a) (1992) ("a board of directors shall consist of one or more individuals"); N.Y. Bus. Corp. Law § 701 (McKinney 1986) (directors shall be at least 18 years of age). Although the law of Delaware is silent on this issue, see Del. Code Ann. tit. 8, § 141(a) (1989) ("The board of directors . . . shall consist of one or more members"), custom has favored the election only of natural persons to the board of directors.

249. See 1970 Proposed Regulation, supra note 6, art. 63(3), at 56.
251. See id. arts. 62(2), 63(1), 63(2), at 35-36.
252. See id. art. 62(1), at 35.
254. See id. art. 66(1)(a), at 37.
255. See id. art. 66(1), at 37.
capital, which must be between five and twenty-five percent, may be determined by the SE.\textsuperscript{256} Authorization must also be obtained for supply and performance contracts in which total turnover exceeds more than a fixed percentage of the previous year's total turnover.\textsuperscript{257} In addition, the statutes of an SE or the supervisory or administrative board may require board approval for other actions.\textsuperscript{258} Finally, the member states may "determine the categories of operation" for which board approval is required by referring to the standards set by their national laws.\textsuperscript{259}

The operation of the two management structures provides no significant difficulties for companies wishing to do business as SEs. For the most part, the proposal contains non-intrusive housekeeping rules that do not interfere with the harmonization or unification of laws that are applicable to the SE form of organization.

The grant of authority to member states for determining the categories of operations that require prior board approval,\textsuperscript{260} however, presents some problems. It is likely that the purpose of the proposal was to allow member states to expand the list of activities that required prior board approval. On the other hand, the language of the proposal can be interpreted to mean that the member state could eliminate some of the items on the list of operations, or disregard the list altogether.\textsuperscript{261} In either event, the Commission's concern for granting a measure of self-determination to the member states has interfered with the uniformity, and thus the predictability, of laws applicable to SEs.

c. Duties and Liabilities of Directors

The 1991 Proposed Regulation requires all board members of SEs to "carry out their functions in the interests of the SE, having regard in particular to the interests of the shareholders and the employees."\textsuperscript{262} They are jointly and severally liable for any damages to the SE that result from the breach of their obligations. Directors are relieved of such liability only if they can demonstrate compliance with the duties attending their positions.\textsuperscript{263} A suit for the breach of such duties may be initiated either pursuant to a vote of the shareholders at the general meeting, or by an action brought by shareholders who collectively own at least ten percent of the subscribed capital of the SE.\textsuperscript{264}

\begin{itemize}
\item \textsuperscript{256} See id. art. 72(1)(e), at 41.
\item \textsuperscript{257} See id. art. 72(1)(d), at 41.
\item \textsuperscript{258} See id. art. 72(4), at 41.
\item \textsuperscript{259} Id. art. 72(3), at 41.
\item \textsuperscript{260} See supra note 259 and accompanying text.
\item \textsuperscript{261} The Explanatory Memorandum simply states that the provision "allows a Member State to impose on SEs registered in its territory, the same categories of operation as those it applies by law in respect of decision making in national public limited companies." 1991 Explanatory Memorandum, supra note 111, art. 72, at 18.
\item \textsuperscript{262} 1991 Proposed Regulation, supra note 7, art. 74(2), at 42.
\item \textsuperscript{263} See id. art. 77(2), at 43.
\item \textsuperscript{264} See id. art. 78(2), 78(3), at 44.
\end{itemize}
The 1991 Proposed Regulation substantially revised the director liability provision. The Commission stated that the purpose of the revision was to clarify the language, but not to change its legal impact. Nevertheless, the 1989 proposal may differ substantially from the 1991 draft. The 1989 Proposed Regulation provided that directors were "liable . . . [for] wrongful acts committed in carrying out their duties." It is not entirely clear whether the term "wrongful acts" appearing in the 1989 Proposed Regulation means the same as the phrase "breach of obligations," as is discussed in the 1991 Proposed Regulation. If the term "wrongful act" implies intentional conduct, while the phrase "breach of obligations" implies negligent conduct, then the 1991 proposal has expanded director liability, despite the Commission's statement to the contrary.

This provision does not produce any difficulties for companies that adopt the SE form of organization. The harmonization of member state law on the subject of director liability has not yet occurred because of the inability of the EC to agree on the text of the Proposed Fifth Company Law Directive. Accordingly, the establishment of specific rules on this matter clarifies the particular law that applies to SEs.

The 1989 Proposed Regulation allowed creditors, who were unable to obtain satisfaction of their claims from the SE itself, to bring suit against the directors. The 1991 proposal removed this provision. The Commission explained that Parliament had requested the elimination of this provision. This amendment is well-advised. No member state has made board members of national companies liable to creditors. Traditionally, directors or supervisory board members elected by the shareholders owe duties to these shareholders. If these persons were also personally liable to creditors, they might be placed in a position of irreconcilable conflict between the interests of the shareholders and those of the creditors. If the proposed statute required board members of SEs to accept this potential liability, and required the shareholders of SEs to accept this potential conflict of interests in the management of their equity interests, both board members and shareholders would be reluctant to use the SE form of organization.

265. See 1991 Explanatory Memorandum, supra note 111, art. 77, at 19.
266. 1989 Proposed Regulation, supra note 28, art. 77(1), at 57 (emphasis added).
267. The Amended Proposed Fifth Company Law Directive imposed liability on directors for their wrongful acts, as had prior versions of the European corporation statute. See Amended Proposed Fifth Company Law Directive, supra note 240, art. 14, at 13-14. Because the language has been changed in the 1991 draft of the Proposed Regulation, the Proposed Fifth Company Law Directive should now be modified to preserve the similarity of the national laws on this matter.
270. See, e.g., 2 CCH, supra note 40, ¶ 90-150 (United Kingdom).
2. Rights and Powers of Shareholders

a. General Meeting of Shareholders

The provisions of the 1991 Proposed Regulation concerning shareholders are, for the most part, housekeeping in nature. The proposal eliminated many provisions of the 1989 proposal, leaving a number of matters open to member state regulation.

Shareholders of an SE exercise their fights in the government of the SE at the general meeting. A general meeting must be held at least once a year, and not later than six months after the end of the fiscal year. This meeting, and other meetings, may be convened by the administrative board, or by the management board acting upon the request of the supervisory board. Shareholders owning ten percent or more of the subscribed capital (or a lesser amount, if specified by the statutes of the particular SE) may also call a general meeting or may place items on the agenda for the meeting. All shareholders, whether they hold voting shares or non-voting shares, are entitled to attend the meeting.

At the general meeting, the shareholders have the power to elect the members of the supervisory board or the administrative board by a majority of the votes cast. The affirmative vote of two-thirds of the votes cast at the general meeting is required for amending the statutes of the SE, approving a transfer of the registered office of the SE to a new member state, increasing or decreasing the capital of the SE, or waiving the preemptive rights of shareholders. Other matters require the affirmative vote of a majority of the votes cast. However, shareholder liabilities may not be increased without the shareholders' unanimous approval. If there is more than one class of shares outstanding, a resolution that affects the rights of a class must receive the affirmative vote of each class affected; the affirmative vote of two-thirds of each affected

271. See 1991 Proposed Regulation, supra note 7, art. 82(2), at 46.
272. See id. arts. 83(1), 85(1), at 46-47.
274. See supra part III.C.I.a.
276. See id. art. 97(1), at 52.
277. See id. art. 5, at 7. The approval of the shareholders is needed because the registered office must be specified in the statutes of the SE, which cannot be amended without shareholder approval.
278. See id. arts. 42(1), 43(1), 45, at 24, 25, 27-28. For a discussion regarding the SE's ability increase its capital, see supra part III.B.2.
279. See id. arts. 44(4), 94(1), 97(1), at 27, 51-52. For a discussion of the power of the SE to issue shares with or without preemptive rights, see text accompanying notes 185-91. The requirement of the two-thirds vote may be reduced by the statutes of the SE to a majority of the votes cast in instances where at least half of the total subscribed capital is represented at the meeting. See 1991 Proposed Regulation, supra note 7, art. 97(2), at 52.
280. See 1991 Proposed Regulation, supra note 7, art. 97(3), at 52.
class of shares is also required for any matter that would require the affirmative vote of two-thirds of the votes cast.\textsuperscript{281}

The 1991 Proposed Regulation has deleted most of the details concerning the general meeting, including the providing of notice, the setting of the agenda, the access of shareholders to information concerning the SE, the conduct of the meeting, and the keeping of minutes.\textsuperscript{282} This allows most of these matters to be regulated by member state law.\textsuperscript{283} In this instance, the resulting variation in the law applicable to SEs should have only a minimal impact on the decision-making of managers of SEs, because the issues allocated to the member states for regulation deal with ministerial matters, rather than matters affecting the basic structure of the SE or the basic rights of participants in the enterprise.

b. Representation by Proxy

Shareholders may choose to be represented at the general meeting by proxies.\textsuperscript{284} The 1991 Proposed Regulation has eliminated all of the prior drafts' provisions that governed the process of proxy appointment, including the requirement that the proxy be in writing, and be valid for no more than fifteen months.\textsuperscript{285} The change was made in response to the comments of the Economic and Social Committee, which had asserted that the right of a shareholder to be represented should be unlimited, and that the requirement that proxies be in writing conflicted with the concept of bearer shares, which allow anonymity to the owners of such shares.\textsuperscript{286}

c. Protection of Shareholders

Shareholders have some ability to protect their interests through their power to elect and remove members of the supervisory or administrative board. This power is limited to some extent by the fact that members may be elected for terms of up to six years.\textsuperscript{287} On the other hand, members of the board may be removed without cause, by a simple majority of the votes cast.\textsuperscript{288} Additional protection is provided to the shareholders

\textsuperscript{281} See id. art. 98, at 52.
\textsuperscript{282} Compare 1989 Proposed Regulation, supra note 28, arts. 84, 85(2), 85(3), 90, 91(1), 99, at 57-61 (providing for notice of general meetings, setting of the agenda, access to information, conduct of meeting, and keeping of minutes) with 1991 Proposed Regulation, supra note 7, art. 85, at 47 (providing only for setting of agenda).
\textsuperscript{283} See 1991 Proposed Regulation, supra note 7, art. 81a, at 45.
\textsuperscript{284} See id. art. 87, at 48.
\textsuperscript{285} Compare 1989 Proposed Regulation, supra note 28, arts. 87, 88, at 59 (requiring that proxy be in writing, irrevocable and last no longer than 15 months) with 1970 Proposed Regulation, supra note 6, art. 88, at 76 (requiring that proxy be in writing and be valid for no more than six months).
\textsuperscript{286} See Opinion of Committee, supra note 33, art. 87, §§ 2(55), 2(56), at 41.
\textsuperscript{287} See 1991 Proposed Regulation, supra note 7, art. 68, at 39. The term is to be established by the statutes of the SE, with the maximum being six years. Reappointment of members is permitted. See id.
\textsuperscript{288} See id. arts. 63(2), 66(3), 75, 94, at 36, 38, 42, 51.
through their ability to bring derivative suits against members of the board for breaches of their obligations.\textsuperscript{289}

d. Special Problems of Minority Shareholders

In addition to the more standard forms of protection of shareholders' interests described above, the previous drafts of the proposed European corporation statute had provided special protections for minority shareholders where the SE was controlled by another undertaking. These provisions have been eliminated in the 1991 Proposed Regulation.

The prior drafts of the statute had also given SEs the right to issue classes of shares that contained a "restriction of votes in respect of shares allotted to the same shareholder."\textsuperscript{290} This provision, which also appeared in prior drafts of the proposed Fifth Company Law Directive,\textsuperscript{291} appears to have allowed SEs to limit the voting power of shares owned by a particular shareholder if such shareholder acquired more than a certain percentage or number of those shares. This provision was in accord with similar provisions in some of the member states.\textsuperscript{292} Apparently, the Commission has concluded that this provision is not necessary, insofar as it has been removed from both the 1991 Proposed Regulation and the 1991 text of the Proposed Fifth Company Law Directive.\textsuperscript{293}

Whether this change in approach with respect to the right of SEs to reduce the voting rights of shareholders that own large blocks of shares, improves or harms the protections afforded shareholders depends on one's perspective. The placing of limitations on the voting rights of large block shareholders would ensure that shareholders with smaller holdings could still have a voice in the SE, and that the SE would be operated with their interests in mind. At the same time, however, these limitations deny larger shareholders one of the most important attributes of share ownership of the SE, namely, the ability to affect the vote for directors, and on other important matters, in accordance with one's proportional share ownership. Moreover, this exposes the larger shareholders to the

\textsuperscript{289} See supra part III.C.1.c.

\textsuperscript{290} 1989 Proposed Regulation, supra note 28, art. 92(2)(b), at 60.


\textsuperscript{292} The laws of Belgium, for example, prohibit one shareholder from voting more than one-fifth of the capital or two-fifth of the votes present or voting at the general meeting. See Brebner, supra note 116, at 33.

\textsuperscript{293} See 1991 Proposed Regulation, supra note 7, art. 92, at 50-51; Second Amendment to the Proposal for a Fifth Council Directive Based on Article 54 of the EEC Treaty Concerning the Structure of Public Limited Companies and the Powers and Obligations of Their Organs, art. 33(2), 1991 O.J. (C 7) 4, 6. In amending the 1991 Proposed Regulation, the Commission simply stated that the deleted paragraph was covered by article 52. See 1991 Explanatory Memorandum, supra note 111, art. 111, at 21. In fact, article 52 does not deal with the issue of large block votes, except to provide, as had been the case in the 1989 draft (prior to the amendment of art. 92), that "[a]ny restriction or extension of voting rights, such as shares carrying multiple voting rights, is prohibited." 1991 Proposed Regulation, supra note 7, art. 52(3), at 32; see 1989 Proposed Regulation, supra note 28, art. 52(3), at 52.
risk of being controlled by smaller shareholders, who do not have nearly as great an interest in the financial success or failure of the SE. Given the fact that the member states have not reached agreement on the regulation of the voting of large blocks of shares of national corporations, the Commission is probably well-advised to avoid the creation of new law in this area.

D. Worker Participation in the Management of the SE

As part of the regulation of company governance of SEs, the Commission has proposed that SEs be required to include employees in the process of management. This effort seeks to fulfill the Commission's goal of ensuring that SEs permit equal levels of worker participation, and moreover reflects the Commission's view that worker participation in management should be a "social right." This portion of the proposed European corporation statute, which is similar to the proposal that is applicable to national companies, has generated very substantial controversy. It presents perhaps the greatest bar to the adoption of the proposed European corporation statute. Moreover, attempts to resolve this controversy by amending the proposal have substantially weakened the proposed statute.

1. General Principle of Worker Participation

The Commission's commitment to worker participation in management can be traced to the first proposal for a European corporation statute in 1970. That proposal required that at least one-third of the seats on an SE's supervisory board (the 1970 proposal did not include the option of a single tier administrative board) had to be filled by employee representatives. It also required that each SE create a European Works Council, whose consent would be required before the management board could act with respect to a number of different matters, including matters pertaining to conditions of employment and major company changes.

294. Compare Brebner, supra note 116, at 33 (Belgium limitations on voting rights) with 2 CCH, supra note 40, ¶ 90-200 (general British rule of one person, one vote).
295. This Article uses the terms "worker" and "employee" interchangeably.
296. See supra part II.B.1. The 1991 Proposed Directive also authorizes the management or administrative boards of SEs to conclude collective bargaining agreements concerning the participation of employees in the capital and profits of SEs. See 1991 Proposed Directive, supra note 8, art. 11, at 16; see also Proposal for a Council recommendation concerning the promotion of employee participation in profits and enterprise results (including equity participation), 1991 O.J. (C 245) 12, 12 (recommending that member states permit and encourage profit sharing and equity participation programs in national companies).
297. See Amended Proposed Fifth Company Law Directive, supra note 240, art. 4, at 6-10.
298. See Carreau & Lee, supra note 39, at 508.
300. See id. art. 137(1), at 115.
301. See id. art. 123, at 103-04. The proposal specified that the SE's management
The requirement that employees be allowed to participate in management has continued through all subsequent drafts of the proposed statute. However, the level of mandatory participation has been reduced, and SEs have been given some degree of flexibility with respect to the type of worker representation that they may adopt. The 1989 and 1991 proposals take a somewhat different approach from the 1970 proposal. The new drafts delete from the Regulation the detailed provisions concerning worker participation, and instead insert a separate directive, which gives the member states greater flexibility in creating their own structures of worker participation.302 An SE cannot become registered until it has chosen one of the forms of worker participation that is permitted by the law of the member state in which the SE seeks to register.303 Regardless of the model chosen, the employee representatives must be elected pursuant to a vote by all of the employees of the SE, and must, to the greatest extent possible, be chosen in each member state in which the SE conducts business, in direct proportion to the number of employees in that state.304

The principle of worker participation in management has been the subject of extensive discussion within the EC. Much of the discussion has arisen over the Commission's attempts to harmonize the laws of member states on the issue as it affects national companies. Other commentary has been directed specifically to the proposal regarding the governance of SEs. In both instances, there has been considerable disagreement.

Worker participation in management is supported by a number of commentators. For example, one commentator adopts an "enterprise" theory of the company. He asserts that in Europe, the company is a focus of the interests of owners, creditors, employees, and other participants. Therefore, he argues, laws should regulate both the business aspects of the enterprise (raising of capital, contracts, insolvency, etc.), and the structural organization of the company. This would be accomplished by ensuring that all interested parties have access to information and representation in the decision-making process of the enterprise.305 Another commentator views worker participation as a matter of social responsibility. He states that "[t]he employees who often give their lifetime for their work in the company have an interest that equals that of the shareholders," and concludes that the proper function of management is to

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balance the interests of shareholders, employees and the public at large.306

This view of the modern company has been criticized. It has been argued that worker participation in management undermines the competitiveness of industry.307 In addition, there are very few company policies that have any great impact on workers, and therefore worker participation in general corporate governance is inappropriate.308 In fact, the Commission itself tacitly recognized that opposition to worker participation in management could arise even among employees. In its 1970 proposal, which had dubbed employee membership on SE boards as the only permissible management model, the Commission did not require an SE to have employee representation if two-thirds of its employees consented.309

Member states feel that this issue, perhaps more than any other issue presented in the proposed statute, directly impacts on national economic and social policies. Germany, which has been a pioneer in Europe with respect to employee participation in management,310 has been very interested in extending its own system of participation to the SE. If the proposed statute is not as comprehensive as German law on this matter, companies will be able to avoid Germany's worker participation requirement by establishing their places of registration outside Germany, and engaging in business within Germany through branches or subsidiaries.311 The United Kingdom, in contrast, has strongly opposed worker participation in management on the grounds that it would cause delays in decision-making, hurt voluntary collective bargaining agreements, and lead to frequent labor disputes.312 Other member states have also taken varying positions on the issue.313

An extended discussion of the very substantial disagreements that exist

306. Schmitthoff, supra note 103, at 1421-22.
307. See, e.g., Wooldridge, supra note 163, at 87 (discussing criticism by the Employment Secretary of the United Kingdom).
309. See 1970 Proposed Regulation, supra note 6, art. 138(1), at 116. The Commission reasoned that employee representation would be meaningless if it were not supported by a sufficient number of employees. See id. art. 138 note, at 116.
310. For an examination of the development of employee participation laws in Germany, see Michael Gruson & Wienand Mielicke, The New Co-determination Law in Germany, 32 Bus. Law. 571 (1977); Benjamin A. Streeter, III, Co-determination in West Germany—Through the Best (and Worst) of Times, 58 Chi.-Kent L. Rev. 981 (1982).
312. See Wooldridge, supra note 163, at 87 (discussing CBI paper). For a discussion of the issues raised by this paper, see Richard M. Buxbaum & Klaus J. Hopt, Legal Harmonization and the Business Enterprise 262 (1988).
313. The controversies within various member states on the issue of employee participation are described in Buxbaum & Hopt, supra note 312, at 260-62.
in the EC with respect to worker participation is beyond the scope of this Article. Nevertheless, the ultimate fate of the proposed European corporation statute rests on the ability of the Commission, Council, and Parliament to reach some accommodation or harmonization of these diverse positions. If they fail to do so, not only will the attempt to protect the interests of employees fail, but so will the attempt to enable companies to operate on a fully integrated European basis.314

2. Alternative Models of Worker Participation

The 1991 Proposed Regulation provides three different models of worker participation in the management of the SE: employee representation on the board of a company, the creation of a separate consultative body of employees, or the adoption of a negotiated system of worker participation in management. Each of these models is separately discussed below.

a. Representation on the Supervisory or Administrative Boards

Under this model of worker participation, no less than one-third, and no more than one-half, of the members of the supervisory board (in the two-tier system) or the administrative board (in the one-tier system) shall be appointed or elected by the employees of the SE or their representatives.315

Alternatively, the general meeting of shareholders and the employee representatives may each nominate candidates to the board. Each body would have the right to object to the appointment of any candidate on the basis that either (a) the person is incapable of performing the duties of the position, or (b) if the person were appointed, “the board would, having regard to the interests of the SE, its shareholders and its employees, be improperly constituted.”316 Under this model, the existing members of the board may themselves appoint the members of the board.317 No candidate against whom an objection has been made may be appointed to the board until the objection has been declared unfounded by a court or other competent body.318

The election model of employee representation on the board is based primarily on the German system of Mitbestimmung, or co-determination.319 This was the only system of governance permitted in the 1970 draft of the statute.320 The Commission has also proposed this system as one of the alternative models of management required for all national

314. See Donald, supra note 158, at 47-48.
316. Id. art. 4(II)(b), at 12.
317. See id. art. 4, at 11-12.
318. See id. art. 4(II)(c), at 12.
319. For a brief description of the Mitbestimmung system, see Donald, supra note 158, at 42-43 & nn.296-98.
320. See 1970 Proposed Regulation, supra note 6, art. 137(1), at 115.
public limited liability companies having more than 1,000 employees.\textsuperscript{321} It is designed to include employees in all phases of the overall management of SEs, by having their representatives take part in discussions and voting on all important decisions.\textsuperscript{322}

The appointment model of employee representation on the board was added to the proposal as a separate alternative in the 1989 draft,\textsuperscript{323} and was expanded in the 1991 draft to specify the grounds on which objections to nominees could be made.\textsuperscript{324} This model is derived from the Dutch system of employee representation, in which shareholders and employees have only a veto right over nominees to the board, and the board elects its own replacements.\textsuperscript{325} It also serves as an alternative model of worker participation in the Commission’s proposed directive governing national companies.\textsuperscript{326}

The Commission at first was not entirely comfortable with the idea of installing employee representatives on the boards of all SEs. The 1970 draft required that when there were more than four employee representatives on the board, at least two of them had to be persons not employed by the SE.\textsuperscript{327} This provision was designed “to prevent employees’ representatives from having regard only to matters which are internal to the undertaking.”\textsuperscript{328} The 1975 draft attempted to resolve this management issue in a different fashion. Under the 1975 proposal, one-third of the board members was elected by the shareholders, another third was elected by the employees, and the remaining third was nominated by both groups and charged with representing the general interests of the SE.\textsuperscript{329} The Commission subsequently resolved its concern with regard to the over-representation of workers on boards, as evidenced by the fact that both the 1989 and 1991 versions of the proposed European corporation statute dropped both of these requirements.\textsuperscript{330}

The model that entails employee representation on the boards of companies has been described as being premised on the assumption that employees and management “have common as well as competing interests; and the employment relation is envisioned not so much as one of confrontation between workers and management as one of integration of

\textsuperscript{321} See Amended Proposed Fifth Company Law Directive, supra note 240, arts. 4(2), 4b, at 7-8.

\textsuperscript{322} See id. art. 4d, at 8-9.

\textsuperscript{323} See 1989 Proposed Directive, supra note 30, § 1, art. 4, at 70.

\textsuperscript{324} See 1991 Proposed Directive, supra note 8, art. 4(II)(b), at 12.

\textsuperscript{325} See Schmitthoff, supra note 103, at 1430. Schmitthoff notes that between 1973, when the system was introduced in The Netherlands, and 1979, the veto right was exercised only once. See id.

\textsuperscript{326} See Amended Proposed Fifth Company Law Directive, supra note 240, art. 4c, at 8.

\textsuperscript{327} See 1970 Proposed Regulation, supra note 6, art. 137(2), at 115.

\textsuperscript{328} Id. art. 137 note, at 116.

\textsuperscript{329} See 1975 Proposed Regulation, supra note 25, art. 74a(1), at 44.

\textsuperscript{330} See supra notes 315-26 and accompanying text.
workers in the enterprise."\textsuperscript{331} A distinction may be drawn between the Dutch and German systems of employee representation on company boards. The Dutch appointive system promotes even greater harmony between management and employees than the German system, because under the Dutch system both groups must find all of the board members acceptable,\textsuperscript{332} while the German system does not require such unanimity.\textsuperscript{333}

It is questionable whether either the German or Dutch systems of employee representation on the boards of companies can be successfully imported into other countries that have different social structures. One commentator noted that in Germany, cooperative interaction of employees and management exists not only at the management level, but also at the shop level of activity. He believed that effective co-determination required a reasonably strong employee organization "that sees its function as including promotion of the enterprise as well as of workers' emoluments."\textsuperscript{334} Such a system, he argued, could not be imported into the United States, for example, without changes in both "attitudes and . . . labor laws."\textsuperscript{335}

An observer of the English labor-management situation has commented that the English trade union structure is more fragmented than the German system. Therefore, he argues, importation of the German model of employee representation would be detrimental to industrial relations and would lead to more frequent disputes between employees and trade unions.\textsuperscript{336} An Italian observer simply commented that the German system would not work in Italy because the German workers are "more polite."\textsuperscript{337}

Some employee representatives also have criticized the notion of any employee representation on the boards of companies. Italian workers, for example, have objected to employee board representation on the grounds that employee representatives must defend the interests of the working class, and that they cannot properly do so if they are required to give consideration to the interests of the company. They instead prefer the model of a Works Council, which provides the opportunity for employees to express their interests and exercise a measure of control over companies, while acting through other bodies that are independent of the

\textsuperscript{332} See Schmitthoff, supra note 103, at 1430.
\textsuperscript{333} See id.
\textsuperscript{334} Conard, supra note 236, at 1486.
\textsuperscript{335} Id.
\textsuperscript{336} See Wooldridge, supra note 163, at 87. Another commentator agrees, pointing out that the system would lead to inter-union rivalries concerning the election of representatives to the board. See J. Temple Lang, \textit{The Fifth EEC Directive on the Harmonization of Company Law}, 12 Common Mkt. L. Rev. 345, 353 (1975).
\textsuperscript{337} Interview with an Italian law professor in Milan.
management board of such companies.\textsuperscript{338}

Of all the forms of worker participation, the model of company governance allowing employees to sit on the boards of SEs provides employees with the greatest power to affect the management of SEs. No member state of the EC except Germany and The Netherlands has required that such a provision be adopted by its national companies. Moreover, those statutory requirements only apply to large companies. The Amended Proposed Fifth Company Law Directive, which addresses the structure of national companies, has been stalled for nine years and is not likely to be adopted in the near future.\textsuperscript{339} Consequently, it is unlikely that many member states other than Germany and The Netherlands would be willing to adopt such a requirement of employee representation on the boards of SEs.\textsuperscript{340}

b. Appointment of Representatives to a Separate Body

This model of worker participation establishes a “separate body” to represent the employees of the SE. Although the 1991 Proposed Directive does not establish any procedures for the election of employees to the separate body, these matters would presumably be regulated by the laws of the member state in which the SE was organized, or by the statutes of the particular SE.\textsuperscript{341}

In this model, which is based on systems established by the laws of France and Italy,\textsuperscript{342} the management board or the administrative board is required to make quarterly reports to the separate body concerning the progress and prospects of the SE’s business. In addition, the board has an obligation to update this information, and to respond to any inquiries from the separate body concerning conditions of employment. Finally, the separate body must be informed and consulted before the SE un-
takes major investments, loans, performance contracts, or sales or closures of businesses or parts of businesses.\textsuperscript{343}

This model does not give workers an opportunity to actively participate in management to the extent of the model that provides for employee representation on the supervisory or administrative board. Moreover, it does not present employees with any real opportunity to block board decisions, or participate in any of the functions that are customarily allocated to the shareholders.\textsuperscript{344} Even so, it has been criticized for creating a cumbersome management process that will be expensive to maintain, and for increasing the risk that the company will be unable to keep certain matters confidential.\textsuperscript{345} Industry representatives in the EC have also objected to this model, arguing that it fails to consider either the actual operations of an enterprise, or the substantial historical, social, and economic differences that exist among the member states.\textsuperscript{346}

c. Other Models of Worker Participation

The third model of worker participation in management, termed “Other Models” by the Commission, is not, in actuality, a separate structure of employee participation. Instead, the Commission has proposed that the management or administrative board of an SE and the employees’ representatives be allowed to establish any other model of worker participation on which they can agree. Any such agreement must provide, at a minimum, the same rights to information that must be provided to the separate body.\textsuperscript{347}

This model, which has been described as being based on the Swedish system of labor participation,\textsuperscript{348} allows the level of worker participation in management to be determined through collective bargaining. If the management and the employees are unable to reach agreement on the terms of participation, then a “standard model” prescribed by the law of the member state in which the SE is registered will automatically

\textsuperscript{343} See 1991 Proposed Directive, supra note 8, art. 6, at 13-14. The standards for determining whether the separate body must be informed and consulted in advance are the same as the standards for determining whether the supervisory or administrative board must participate in these business decisions. See supra part III.C.1.

\textsuperscript{344} See Wooldridge, supra note 163, at 88.

\textsuperscript{345} See Donald, supra note 158, at 44-45. The Commission has attempted to deal with the breach of confidentiality issue by providing that the rules of confidentiality that are applicable to both current and former members of the boards of SEs are also applicable to members of the separate body. See 1991 Proposed Directive, supra note 8, art. 5(3), at 13 (incorporating by reference 1991 Proposed Regulation, supra note 7, art. 74(3), at 42).

\textsuperscript{346} See Wilner, supra note 238, at 111 (statement of the Union des Industries de la Communautae Europeenne, dated Feb. 19, 1981).

\textsuperscript{347} See 1991 Proposed Directive, supra note 8, art. 6(1), 6(2), at 13. For a description of the information that is required to be provided to the separate body, see supra text accompanying note 343.

\textsuperscript{348} See Carreau & Lee, supra note 39, at 509. The system is also similar to the United Kingdom system of free collective bargaining between management and employees, with the additional requirement of a minimum level of participation in all SEs. See id. at 511.
Of the three models, this model is the least intrusive on management's control over the company and the existing relationship between management and employees. It is also the least disruptive to existing member state laws. If a company's management has already been able to work out a method of accommodation with its employees, there is no reason to suspect that such method of accommodation would be affected by the conversion of the company into an SE. However, in those companies in which no worker participation existed, or little or no informational rights have been provided, this third model would still require significant changes in attitudes and procedures. Because the model requires agreement between management and employees, its greatest impact on these companies would be its requirement that management enter into collective bargaining with workers concerning the structure of management.

3. Selection of Worker Participation Model

a. Limitations on Selection of Model

The 1991 Proposed Directive gives each member state the power to affect the choice of models of worker participation for SEs. A member state may restrict the choice of models that are available to SEs registered in that state, or require that all SEs adopt one of the models.350

This provision may seriously damage the Commission's goals of enabling companies to operate in the EC without regard to national borders, and permitting them to freely transfer their places of central administration. This provision does not even require the member state to adopt the same mandatory form of worker participation for SEs that it does for national companies. If a member state requires SEs to adopt a form of worker participation that is different from the required or permitted form for national companies, then national companies within a given member state may be unwilling to utilize the SE form of organization. Perhaps more importantly, national companies that are registered in other member states will be unwilling either to register as an SE in a member state or to transfer their places of central administration there if they do not like the form of worker participation which is mandated by that member state.

This provision also presents difficulties for employees of existing SEs that wish to transfer their states of registration and central administration. Generally, under the proposed statute, the previously agreed upon model of participation may only be changed pursuant to an agreement between the management and the employee representatives.351 This means that workers' participation rights could not be altered simply because an SE changed its state of central administration. If, however, the

349. See 1991 Proposed Directive, supra note 8, art. 6(8), at 14.
350. See id. art. 4, at 11-12.
351. See id. art. 3(3), at 11.
management of an SE wished to change or reduce the level of worker participation, it could simply transfer the SE's state of central administration to another member state that required a lower level of worker participation, subject to the approval of the general meeting of shareholders. The SE would now be required to comply with the new state's laws regarding worker participation, thereby rendering the rights of employees to negotiate over the new form of participation meaningless.

b. Procedural Aspects of Selection

The 1991 Proposed Directive requires that an SE's selection of a model of worker participation from the models allowed by the member state be made pursuant to a written agreement between the SE's management and employee representatives. In reaching this agreement, the two sides are charged with considering the "legal, economic and social consequences of the formation of the SE."\(^{352}\) If an agreement can not be reached, the dispute must be presented to the general meeting. A report by management on its proposal and a statement by the employee representatives detailing why the formation of the SE under the management plan is contrary to the interests of the employees would also be presented. The shareholders would then vote on both the model of worker participation to be adopted by the SE and the question of whether an SE should be formed in the first instance.\(^{353}\)

Once a model of worker participation has been chosen, whether by agreement or by vote of the general meeting, it can be changed only by an agreement between the management or administrative board and the employee representatives. If the registered office of the SE is transferred to another member state, the model of participation may only be altered pursuant to the procedure for selecting a model of participation that was originally adopted.\(^{354}\)

This procedure for breaking a deadlock between management and the employee representatives through the vote of the shareholders at the general meeting\(^{355}\) was first proposed in the 1991 Proposed Directive. The 1989 proposal had allowed the management or the administrative board to impose a choice of model if the board and the workers were unable to reach an agreement.\(^{356}\) The 1991 proposal increases the power of employees in the negotiation process. Previously, if management was reluctant to adopt one of the models of participation, it could simply ignore the workers' position, and then impose the model that management desired. Now, management must persuade the general meeting that its position is reasonable and desirable. In most instances, however, it is likely that the shareholders would vote to support the position of the manage-

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\(^{352}\) Id. art. 3(1), at 10.
\(^{353}\) See id. art. 3(1)(a), 3(1)(b), 3(2), at 10-11.
\(^{354}\) See id. art. 3(3), 3(7), at 11.
\(^{355}\) See supra note 353 and accompanying text.
\(^{356}\) See 1989 Proposed Directive, supra note 30, art. 3(1), at 69.
ment that they have elected, rather than the position of the worker representatives. Consequently, this change may not have any significant impact on the choice of model.

The vote of the general meeting for determining the basic model of worker participation in the event of a deadlock between the SE's management and workers should be distinguished from the selection of a form of employment under the "other models" alternative. In the former situation, the management and the employees would have to reach agreement on a choice among (1) the representation of employees on the board, selected either through election or nomination; (2) the establishment of a separate consultative body; or (3) the "other models" system, with details to be worked out later. If agreement on this issue could not be reached, then the general meeting would make the selection. In the latter situation where the "other models" system has been agreed to by an SE's management and employees, or has been selected at the general meeting of shareholders, then both management and the employees would enter into another round of negotiations for establishing the details of the other model of participation. If an agreement could not be reached, the general meeting would not have any power to select the form of participation; in the case of deadlock, the member state standard model of worker participation would be imposed.357

These procedures, which may require two separate levels of choices in some instances, present ample opportunity for strategic decision-making. For example, if an SE were registered in a member state with a relatively weak standard model of worker participation, and the management were reluctant to give significant participation rights to employees, then management would probably refuse to agree with the employees on either the board membership model or the separate body model of participation. Instead, it would urge the general meeting to adopt the "other model," take a very hard position in the collective bargaining process, and then adopt the state standard model after having failed to reach an agreement with the employee representatives. If the standard member state model granted relatively strong participation rights to employees, management would most likely be unwilling to present the general meeting with an "other model" alternative, because the results of collective bargaining or the standard model would give employees more participation rights than they would receive under the separate body model. Employee representatives would face similar choices in deciding whether they could persuade the general meeting to side with them in adopting a strong form of worker participation, or if it was better to opt for the other model form of representation, and then use the standard state model of participation as a floor upon which they would base their negotiations.

357. *See* Donald, supra note 158, at 46.
4. Evaluation of Worker Participation Directive

The 1991 Proposed Directive concerning worker participation in management ultimately fails to meet the goals set forth by the Commission. Under the present circumstances, however, this failure is probably unavoidable.

In attempting to accommodate the objections of member states and the representatives of management and employees, the Commission has established a structure which on its face allows a broad range of choices among models of employee representation. The Directive already permits use of the German, Dutch, French-Italian, and Scandinavian-United Kingdom systems of worker participation in management.\(^{358}\) In addition, there has been discussion at the EC about the possibility of further broadening the range of alternatives, to encompass all of the other national models of worker participation.\(^{359}\) Therefore, SEs might have the opportunity to select among at least a half-dozen or more different models of worker participation. If the proposal did no more than this, then the choice of model by the SE would be dictated by the nature of management’s relationship with its employees and the competitive forces of the European marketplace.

The proposal’s inclusion of the right of member states to restrict certain models, or to mandate one particular model destroys the Commission’s goal of attaining uniformity in the laws that are applicable to SEs organized in the various member states.\(^{360}\) Member states may not be able to resist mandating the model of participation that is most common within their individual states. Once one member state takes such an action, management or labor representatives in other member states will feel greater justification in urging their governments to take similar measures. For example, Germany could mandate the use of the elected board representation model to avoid a dilution of German law. This could compel the United Kingdom or France to mandate their own systems of worker participation in order to prevent the encroachment of the German model or a dilution of their own models. Even if only a few of the member states take such action, the Commission’s hope for uniformity of law would be vanquished.

Under these circumstances, member states will be pressured to prevent the transfer of an SE’s place of central administration out of their countries because of the potential impact on employee representation that the proposal would produce. In addition, SEs will find it difficult, if not impossible, to change freely their places of central administration, because

\(^{358}\) See supra text accompanying note 336.

\(^{359}\) See 3 1992—The External Impact of European Unification (BNA) 6-7 (July 26, 1991).

\(^{360}\) The wide range of choice that is made available to member states is viewed by one commentator as allowing enough discretion to the state to permit the creation of SEs without upsetting the delicate balance between employees and management. See Franceschelli, supra note 311, at 12.
of the necessity of also changing the model of employee representation upon such transfer. Thus, instead of creating uniformity of law, the Commission has created not only diversity, but in all probability, an absolute conflict in member state law governing SEs.

This loss of uniformity cannot be effectively rationalized as the price of achieving the social goal of improving employees' rights in SEs. The multiplicity of systems permitted by the 1991 Proposed Directive essentially ensures that any company or any member state that desires to preserve the status quo with respect to worker participation in management will be able to do so—either because of member state action to restrict or mandate the available models, or because of management's ability to resist employee requests and then turn the issue over to the general meeting for decision. Thus, the proposal is unlikely to have any real impact upon employee rights.

Despite these problems, the compromises reached by the Commission on the issue of worker participation in management are probably unavoidable at the present time. The resistance of member states to the adoption of any system that would advance employee rights at the cost of flexibility or the elimination of national models of participation has been strong. It appears that the Commission may have to accept far less than it desires on this issue in order to obtain passage of the whole statute. Further harmonization of member state law on this issue may have to await the development of a stronger European political consensus on the underlying issue of the proper role of workers in the management of companies.

E. Taxation of the SE

1. Losses from Permanent Establishments

The Commission has attempted to enable the SE to operate as a single entity for most business purposes. In order to accomplish this goal, the Commission has proposed to allow an SE that conducts its business through "permanent establishments" located in more than one jurisdiction to treat its aggregate operations as a single taxable entity for tax loss purposes.

Under the primary tax system outlined in the proposal, if the aggregate of profits and losses from all foreign permanent establishments re-

361. The term "permanent establishment" is not defined in the 1991 Proposed Regulation. The 1970 Proposed Regulation defined the term to include "(a) a seat of management; (b) a branch; (c) an office; (d) a factory; (e) a workshop; (f) a mine, quarry or any other site for extraction of natural resources; (g) work of construction or assembly carried on for more than twelve months." 1970 Proposed Regulation, supra note 6, art. 280(2), at 221. The Commission's recent proposal concerning the integration of losses of national companies defines this term as "any fixed place of business through which an enterprise of a Member State carries on all or part of its activities." 1990 Proposal for a Council Directive concerning arrangements for the taking into account by enterprises of the losses of their permanent establishments and subsidiaries situated in other Member States, art. 2, 1990 O.J. (C 53) 30, 30-31 [hereinafter 1990 Proposal Concerning Losses].
suits in a loss, the SE would be allowed to offset that loss against the profits generated in the member state in which the SE is registered. Subsequent profits earned by the SE from the foreign permanent establishments would then be treated as taxable income in the state of registration, up to the amount of the losses previously used as an offset. Profits in excess of the amount of offset losses would be taxed only in the state in which the foreign permanent establishment was located, and not in the state of registration.

Alternatively, a member state may elect not to utilize this tax loss integration system for SEs, if it instead allows SEs a credit for any taxes paid to foreign jurisdictions that are attributable to the profits derived from permanent establishments located there. The credit would be applied against the tax liability in the state of registration based on an SE's combined foreign and domestic operations. Under this alternative system, if an SE incurred losses in a foreign permanent establishment that produced a tax loss carryover in the foreign jurisdiction in which the permanent establishment were located, subsequent profits produced by such foreign permanent establishment would not be taxed in the foreign jurisdiction until the carried over losses attributable to that establishment had


363. See Muray, supra note 362, at 84. Although Muray discusses the 1990 Proposal Concerning Losses, supra note 361, rather than the 1991 Proposed Regulation, the basic concepts of the two proposals are the same with respect to the workings of the integration of losses system and the tax credit system as they apply to permanent establishments.

364. The Commission established a Committee, chaired by Onno Ruding, to assess the impact of different member state taxation policies on the functioning of the internal market in the EC. The Committee described the two systems as follows:

Double taxation of foreign-source income can be avoided using either the exemption method or the credit method. Under the exemption method, the country of residence does not tax income that is taxed or taxable in another country. By contrast, under the credit method, the country of residence computes its tax on the basis of the taxpayer's total income, including foreign-source income, and permits taxes paid abroad to be deducted from its own tax. In practice, most Member States use a combination of both methods: the exemption method for some types of foreign-source income, such as dividends from a substantially owned subsidiary, or branch profits, and the credit method for some other types of foreign-source income, such as interest and royalties.


365. See 1991 Proposed Regulation, supra note 7, art. 133(4), at 67. This provision is identical in substance to the Commission's proposal that required member states to allow national companies to take either offsets or tax credits, based on their operations in countries other than the country of registration. See 1990 Proposal Concerning Losses, supra note 361, arts. 6-7, at 31-32. The usefulness to national companies of the 1990 Proposal Concerning Losses is limited, however, by another provision that allows member states to "reincorporate" the deducted losses into the enterprises' taxable results if the reincorporation has not occurred (through the earning of subsequent profits) upon the expiration of five years. See id. arts. 8, 10, at 32. The 1991 Proposed Regulation does not contain a similar reincorporation provision. See 1991 Proposed Regulation, supra note 7, art. 8, at 9.
been exhausted. Accordingly, in the state of registration, a foreign tax credit would not be allowed (i.e., there would be current taxation) until the foreign loss carryovers had been exhausted, because the foreign income would not have resulted in a foreign tax liability until that time.\textsuperscript{366}

The concept of offsetting the losses of foreign branches against profits in the state of registration has been part of the Commission's proposal on the European corporation statute since 1970.\textsuperscript{367} Generally, the member states allow their national companies to offset the losses that are incurred by their foreign permanent establishments, although the methods and rules of the offsets vary.\textsuperscript{368} The 1970 proposal only allowed SEs to offset losses that resulted from operations conducted in other member states of the EC, and did not give the member states the option of using a foreign tax credit system.\textsuperscript{369} In contrast, the 1989 and 1991 proposals allow for the offsetting of losses that are incurred through the operation of any foreign permanent establishment, and allows the member states to adopt the tax credit system as an alternative.\textsuperscript{370}

The 1991 proposal's tax provisions will generally make it easier for companies to operate internationally. The proposal allows for greater flexibility in offsetting losses generated by an SE's foreign permanent establishments.

The portion of the proposal that allows SEs to offset their income by losses incurred through operations outside the EC raises additional policy questions. If the purpose of the proposed statute is to encourage the development of all multinational enterprises, then the proposal makes sense. It should be noted that the proposal requires member states using the loss integration method to accept a deferral of tax revenues where an SE incurs losses in the operation of a foreign permanent establishment that is located outside the EC. It remains to be seen whether member states will be willing to accept this deferral in order to stimulate multinational operations by EC-based SEs. In any event, the Commission has not formally proposed that national companies be allowed a similar offset for non EC-based losses.\textsuperscript{371} If this situation is not changed, it could pro-

\textsuperscript{366} See Muray, supra note 362, at 84. This system is currently used in the United Kingdom. See id. The relative merits from a tax and economic standpoint of the loss integration system (which is in essence a foreign profit exemption system), and the tax credit system, are discussed in detail in Fred C. de Hosson, The Parent-Subsidiary Directive, 10 Intertax 414, 418-20 (Spec. ed. Oct. 1990). For a description of the actual workings of the loss integration and the tax credit systems, as they are established in the 1990 Proposal Concerning Losses, see Otmar Thommes, The New EC Commission's proposals for directives on cross-border investments, 3 Intertax 158 (1991).


\textsuperscript{368} Member states generally allow such offsets for losses from operations from foreign branches, but generally do not allow them for losses from foreign subsidiaries. See Ruding Report, supra note 364, at 195.


\textsuperscript{370} See 1991 Proposed Regulation, supra note 7, art. 133(1), 133(4), at 67.

\textsuperscript{371} See 1990 Proposal Concerning Losses, supra note 361, arts. 7(1), 9(1), at 15, 16.
vide a substantial incentive for utilizing the SE form of organization.

The optional tax credit portion of the 1991 Proposed Regulation, which was first added by the Commission in 1989, is mirrored by the Commission’s proposals regarding the foreign losses of national companies, presents an additional problem.372 Because this provision is elective by the member states, it institutionalizes yet another variation in the laws applicable to SEs and thereby prevents business enterprises from operating on a truly European basis, without regard to national borders.373

2. Losses from Foreign Subsidiaries

The 1991 Proposal does not allow either an offset for losses incurred by an SE’s foreign subsidiary,374 or a credit for taxes that are paid by an SE’s foreign subsidiary to a foreign jurisdiction.375 Member states generally have been unwilling to allow national companies to offset their income by losses that are incurred through the operation of foreign subsidiaries,376 even though nine of the member states allow national companies to offset their income by losses incurred through the operation of domestic subsidiaries.377 Nevertheless, the 1990 Proposal Concerning Losses would allow all national companies to offset their income by the losses incurred by foreign subsidiaries.378 If this proposal is adopted, it

372. See id. arts. 5-12, at 12-17. The Commission proposed the 1990 Proposal Concerning Losses because of the objections by companies that SEs would have an unfair tax advantage if national companies were not given the same loss integration/tax credit benefits that were given to SEs. See European Info. Serv., Company Taxation: Proposed Directives on Removal of Tax Barriers to Restructuring Tabled, 1634 European Report 5 (1990).

373. SEs and other companies that conduct business in more than one state of the EC may have to accept this difficulty for now. The member states are almost equally split on the question of whether to use a tax credit method or a tax exemption method of preventing double taxation on national companies’ income from foreign establishments and dividends from foreign subsidiaries. Moreover, the Independent Committee appointed by the Commission believes that it is “unrealistic to expect the member states to relinquish” the opportunity of choosing between the two methods. See Ruding Report, supra note 364, at 204. It is equally unlikely that the member states would relinquish their choice of alternatives with regard to the foreign losses of SEs.

374. Apparently, a subsidiary cannot be a permanent establishment. The 1990 Proposal Concerning Losses defines the term “subsidiary” as a company in which “an enterprise of a Member State has a minimum of [a] 75% [equity interest], giving it a majority of voting rights.” 1990 Proposal Concerning Losses, supra note 361, art. 2, at 31. Permanent establishments are treated separately from subsidiaries under the proposal. Compare id., arts. 5-8, at 31-32 with id., arts. 9-12, at 32.

375. See 1991 Proposed Regulation, supra note 7. The 1970 Proposed Regulation, supra note 6, art. 281(1), at 222 had allowed the offset of losses from more than 50% owned subsidiaries in proportion to the percentage ownership by the SE in the subsidiary. See id.

376. See Ruding Report, supra note 364, at 195.

377. See Thommes, supra note 366, at 161.

378. The proposal requires member states to permit the offset of losses from subsidiaries in which the company owns 75% or more of the capital and a majority of the voting rights. See 1990 Proposal Concerning Losses, supra note 361, arts. 2, 9, at 6, 10. As is the case with losses from permanent establishments, the member states are permitted to require the reincorporation of those losses. See id. art. 10, at 10. The provision is
would presumably apply to SEs as well, because under the 1991 Proposed Regulation, member state laws governing public limited liability companies apply to SEs when the European corporation statute is silent. If the 1990 Proposal Concerning Losses is not adopted, the SEs' inability to offset their income by the losses of foreign subsidiaries would prevent SEs from formulating a fully integrated business and tax strategy. This result is unacceptable, in view of the Commission's position that a national company's choice of whether to operate abroad through a foreign permanent establishment or a subsidiary merely constitutes an election between two different forms of organization that would conduct the same business activities abroad. Even though SEs could avoid this issue by operating through permanent establishments instead of subsidiaries, overriding business reasons might dictate the use of subsidiaries. Thus a further coordination is required between the tax regulations that govern SEs and the tax regulations that govern national companies.

F. Annual and Consolidated Accounts

The provisions of the proposed corporation statute that deal with the annual accounts and consolidated accounts of SEs present no particular problems. SEs are required to prepare annual financial statements in accordance with the EC Fourth Company Law Directive concerning the financial statements of national public and private limited liability companies. They are also required by the Fourth Company Law Directive to publish an annual report. In addition, SEs that are parent companies must prepare and publish consolidated financial statements and annual reports in accordance with the Seventh Company Law Directive that governs similar reporting requirements for national companies. The auditing of the annual reports is also governed by the same rules that are applicable to national companies.

The Commission's virtually complete reliance on prior EC directives in establishing an SE's financial reporting requirements avoids differences designed to encourage the establishment of cross-border subsidiaries. See Thommes, supra note 366, at 162.

379. See 1991 Proposed Regulation, supra note 7, art. 7(2)(b), at 9.
380. See Thommes, supra note 366, at 161.
381. See Wooldridge, supra note 163, at 130.
382. See 1991 Proposed Regulation, supra note 7, art. 101, at 54. The preparation of financial statements of national companies is governed by the Fourth Company Law Directive, supra note 76. The 1991 Proposed Regulation requires SEs to use specific options that are among those available to national companies as prescribed in the Fourth Company Law Directive, but none of them are material to the subject matter of this Article. See 1991 Proposed Regulation, supra note 7, arts. 101(3), 104(2), 104(3), 105 at 54-56.
384. See id. arts. 106, 109-112. The preparation of consolidated accounts for parent undertakings that are national companies is governed by the Seventh Company Law Directive, supra note 76.
385. See 1991 Proposed Regulation, supra note 7, arts. 103, 111, at 56, 59. The auditing of the accounts of national companies is discussed in the Eighth Company Law Directive, supra note 76.
between the laws applicable to SEs and national companies.\textsuperscript{386} In addition, because the directives essentially harmonize national laws on the subject, the proposed European corporation statute avoids national differences as well. Consequently, the financial reporting provisions of the 1991 Proposed Regulation should not present any problems to businesses that wish to use the SE form of organization.

G. \textit{Winding Up, Insolvency, and Liquidation}

The Commission has chosen to rely primarily on the laws of the member states in establishing the rules governing the insolvency, winding up and liquidation of SEs. For the most part, this approach is successful, but it does produce some degree of variation in the laws applicable to SEs, because member state laws are not subject to uniform regulations or comprehensive harmonizing directives on these subjects.

1. Winding Up

The 1991 Proposed Regulation establishes three different procedures through which an SE may be wound up: (1) by a vote of the general meeting without particular cause; (2) by a vote of the general meeting following the occurrence of an event that requires the SE be to be wound up under the instrument of incorporation or the statutes of the SE; or (3) by a vote of the general meeting following the occurrence of an event that requires the SE to be wound up under the laws of the state in which the SE is registered.\textsuperscript{387} This provision does not present any problems to most SEs. Even though member state laws may differ with respect to the grounds for winding up a company, the SE will be subject to only one set of laws at a time. Managers of an SE may explore the laws of other member states when the SE's registered office is moved from one member state to another, although it seems unlikely that variations in national laws on this subject would affect the choice of the member state in which to register.

In addition to the situations described above, an SE may be required to be dissolved under one other circumstance. Under the 1991 Proposed Regulation, if the registered office of the SE is transferred to a location outside of the EC, any concerned person or any competent authority may apply to a court in the state in which the SE last had its registered office to have the SE dissolved. The court is permitted (but not required) to give the SE time to rectify the situation.\textsuperscript{388}

The provision describing this last circumstance, which was added for the 1991 Proposed Regulation, may present significant difficulties in its

\textsuperscript{386} The Commission's regulation of the preparation of financial statements and annual reports was made easier by the prior work on the subject. The 1970 draft proposal dealt with these issues at great length, because at that time there was no consensus among the member states. See 1970 Proposed Regulation, \textit{supra} note 6, arts. 148-222, at 124-72.

\textsuperscript{387} See 1991 Proposed Regulation, \textit{supra} note 7, arts. 115-116, at 60-61.

\textsuperscript{388} See \textit{id.} art. 117a, at 62.
application. The provision applies when the "registered office, as defined in Article 5 [of the 1991 Proposed Regulation], has been transferred outside the Community."\textsuperscript{389} Article 5, however, is not entirely clear with respect to the meaning of the term "registered office" in this context.

Article 5 states that the registered office of an SE shall be the place specified in the SE's statutes. The provision also states that it "shall be the same place as the place where the SE has its central administration."\textsuperscript{390} The term "central administration" is not defined in the proposal.

An SE's statutes could specify that its place of registration is in a particular member state, even though a portion of its management operations were located in another member state. Under these circumstances, it is likely that the true location of the SE's place of central administration could be resolved through a fact-finding proceeding.

Where the judicial dissolution of the SE is at issue, however, the situation is much more serious. The 1991 Proposed Regulation may be read to permit a concerned person or competent authority to argue in court that an SE's place of central administration is located outside the EC because a portion of the SE's management is located outside of the EC. If this argument were to prevail, the court could then order the dissolution of the SE.

If the Commission intended this interpretation, a problem would be presented to SEs that conduct business outside of the EC. Because the proposed regulation does not provide any standards for determining where an SE's place of central administration is located, SEs would lack guidance as to what operational and management functions were required to be located inside the EC. A court, in making its determination, might choose to consider such factors as the home or office locations of the members of management or the supervisory or administrative boards. Alternatively, the location of company records could be considered in reaching this determination. On the other hand, if the Commission did not intend this interpretation, then the proposal should be clarified to expressly limit its application to circumstances where an SE transfers its registered office outside of the EC.

2. Insolvency and Suspension of Payments

With respect to the determination and the ramifications of an SE's insolvency, the 1991 Proposed Regulation simply provides that the SE shall be subject to national laws.\textsuperscript{391} The Commission has explained that it deliberately did not limit the laws concerning an SE's insolvency to the laws of the state in which the SE is registered because it wished "to safe-
guard any other laws that might be applicable." The inability of the Commission to reconcile these national laws, or to provide a single set of laws applicable to the insolvency of an SE, exposes the SE to varying or conflicting laws, and increases the level of uncertainty that is presented by the SE form of organization. Thus, if managers of SEs conduct business across national borders, they will be required to know and take into account the insolvency laws of a multitude of jurisdictions.

3. Liquidation

The proposed European corporation statute presents similar difficulties with respect to an SE's liquidation. The proposal specifies that the liquidation of an SE shall be governed by national law, rather than the law of the state of registration. The 1991 Proposed Regulation only addresses the issue of an SE's liquidation in its requirement that creditors be paid in full before shareholders may receive any liquidation distributions. These provisions also state that an SE in liquidation continues to have legal personality until its liquidation is complete.

The Commission's approach of applying member state law to the liquidation of SEs is identical to its approach with respect to the liquidation of European Economic Interest Groupings (EEIGs). It would perhaps be more beneficial if EEIGs and SEs were not treated similarly in this respect. Although EEIGs may conduct business in the member states, they are essentially limited-purpose joint ventures among companies, firms or persons. Indeed, each member state is given the power to determine whether it will recognize an EEIG as having legal personality. Given these circumstances, it is easy to understand why the Commission neither provided one set of laws to govern the liquidation of an EEIG, nor directed that the laws of a single jurisdiction would govern such liquidations. SEs, on the other hand, have a clearly defined legal personality that, for example, allows them to be registered in only one state at a time. Therefore, SEs should be able to rely on a single set of laws governing liquidation.

Under the existing draft of the European corporation statute, managers of SEs will be subject to the same uncertainties concerning the appli-
cability of member state laws governing liquidation to which they are subject with respect to insolvency issues. This absence of a uniformity of law constitutes an additional risk that is inherent in the SE form of organization.

IV. EVALUATION OF THE 1991 PROPOSED STATUTE

Although the 1991 Proposed Regulation and the 1991 Proposed Directive take significant steps toward accomplishing the goals and filling the needs identified by the EC, they fall short in several respects. These proposals should not be viewed as an expression of concepts that have already been accepted by all of the participants in the EC. Many provisions of the statute and a number of gaps in it are the result of hard won compromises; others reflect the political realities of what can be accomplished at this stage of the development of the EC itself. Nevertheless, it is important to evaluate the proposed statute against the EC’s own statements concerning what the statute is designed to accomplish, in order to determine the extent to which the proposals meet these goals and the extent to which they fail.

A. Goals of the Proposed Statute

The basic purpose of the proposed statute, as identified by the Commission, is to promote the fully integrated internal market of the EC. The Commission has identified four principal means of accomplishing this integration: (1) enabling companies to conduct their daily operations on a true European basis, based solely on market considerations, without regard to national laws pertaining to their operation, governance or tax matters; (2) enabling companies to operate free of any particular national identity; (3) enabling companies to transfer their headquarters within the EC without regard to national borders; and (4) enabling companies to restructure and form new business combinations across national borders. The Commission has also sought to include the employees in the process by giving them a voice in the operation of these new companies and giving them a sense of loyalty to the European nature of the companies. Although the Commission initially attempted to protect the interests of other participants in the European corporation, it has essentially abandoned this goal (except for traditional shareholder protection provisions) in the most recent draft of the proposal.

With these goals in mind, one can now proceed to a final evaluation of whether the 1991 Proposed Regulation and the 1991 Proposed Directive succeed or fail.

400. See supra parts III.C., III.E-G.
403. See supra part III.C.1.c.
B. Formation of the SE

The proposed European corporation statute is only fairly successful in enabling companies to take advantage of the SE form of organization. The proposal does, at least, succeed in making available many of the common methods of structuring or restructuring companies, including the merger, and the use of holding companies and joint subsidiaries. The only major method of business combination that had been omitted from the 1989 and earlier drafts was the straight acquisition of shares or assets of another company. The addition in the 1991 draft of the conversion method of forming an SE enables companies to become SEs when they either already have operations in other states or simply wish to acquire the shares or assets of companies in other states. Without this provision, companies would have to either forgo a portion of their independence or control over their operations (as a result of their use of a merger, joint holding company or joint subsidiary) or combine with various shell companies in order to fit within the proposed statute.

Unfortunately, the Commission has allowed only public limited liability companies to use the conversion and merger methods of forming SEs. This decision has substantially limited the usefulness of the proposed statute.

For example, under the proposal, a company that wished to form an SE through a merger would first have to become a public limited liability company in the state in which it was organized; in order to do this, the company might have to make a number of changes in its structure, capitalization, and organization. After the company merged with another public company to form an SE, it would no longer be subject to the national laws that had required it to make those changes, even if it were the surviving company. The European corporation statute might not have required some or all of the changes that were made. Consequently, the company would have undertaken a series of changes, in order to be able to form an SE through a merger, that were not required once it became an SE.

The proposed statute raises similar problems for companies that wish to convert to SEs. A company might have to undertake a change in its structure so that it could become eligible to convert into an SE.

The joint holding company and joint subsidiary methods of forming SEs are the only forms that are directly available to private limited liability companies without the intervening step of first becoming a public limi-
These two methods of forming SEs are designed to preserve the essential nature and independence of the founding company, while leaving the SE separate and apart from the founding company. This result is often not desirable for companies that wish to create fully integrated, truly European companies.

Finally, the proposed statute is surprisingly inflexible in its requirements of diversity in the operations of the founders of SEs, especially in view of the Commission's announced goal of encouraging the creation of truly European companies. The most flexible rule for the formation of SEs (short of not requiring any diversity of operations at all) would have been to require that the SE, immediately following its formation, have operations in at least one member state besides the state of its central administration, regardless of the method of formation that had been used. This rule, which the 1991 Proposed Regulation included with regard to the formation of SEs by conversion, would have ensured that companies wishing to take advantage of the benefits of the SE form of organization possessed a truly European character.

Instead, the proposed statute sets up more restrictive rules. Companies that wish to form an SE through a merger must have their central administrations in different states, regardless of the diversity of their other operations. Companies that wish to create SEs by holding companies or subsidiaries must either have their places of central administrations located in different member states, or must each have foreign operations before the time that the SE is formed. There is no valid reason for requiring such extended levels of diversity for companies that wish to form SEs through a merger, or the use of a holding company or joint subsidiary.

In summary, the restrictive nature of the proposed statute frustrates the Commission's goal of enabling the greatest number of companies to take advantage of the SE form of organization. The merger and conversion methods of formation are limited by the requirement that each of the founding companies must be publicly held, and the merger, holding company and joint subsidiary methods of formation are limited by excessive diversity requirements. The proposed statute could be simplified, and the Commission's goals could be achieved if all public and private companies were eligible to use each of the methods of forming SEs, and if the diversity test that presently applies to the conversion method of formation were applied to the other three methods of forming SEs.

C. Cross-Border Combinations

The proposed statute is successful in providing companies with a
method of combining businesses that are organized under the laws of
different member states. Under existing member state laws, there is no
procedure that allows companies to fully combine ongoing operations.
They can make share acquisitions, create parent-subsidiary relationships,
or arrange the purchase and sale of assets, but they cannot actually
merge.\textsuperscript{416} Such mergers could be accomplished under the proposal if the
surviving company were to become an SE. Consequently, this portion of
the proposed statute will be very helpful in achieving the Commission's
goal of enabling companies to restructure on a European basis.

D. Capital Structure

The inflexibility of the SE's capital structure, as prescribed by the 1991
Proposed Regulation,\textsuperscript{417} has the effect of discouraging companies from
using the SE form of organization. The proposed statute institutionalizes
some of this inflexibility; other problems arise from the Commission's
decision to allow the laws of the member states to govern these issues
even though no effective harmonization of such laws has taken place.

The minimum capitalization that is required for SEs, although greater
than the level that is required for national companies, is not so high as to
discourage the formation of SEs.\textsuperscript{418} The mandatory use of nominal value
shares, and the maintenance of stated capital before dividends can be
declared, although anachronisms to many Americans, remain familiar
concepts to most Europeans. Therefore, these provisions should not pre-
vent the formation of SEs.\textsuperscript{419}

Other provisions of the proposal present greater difficulty. The statute
unnecessarily limits the capital formation process by allowing each mem-
ber state to place limitations on the initial issuance and new issuance of
shares and other equity and debt instruments by SEs that are registered
in that member state.\textsuperscript{420} Consequently, an SE may be at a competitive
disadvantage to an SE that is registered in another member state if a
disparity exists between the two member states' restrictions on the issu-
ance of financial instruments.

Under the proposed statute, the member state laws may also regulate
or prevent the general meeting's prior authorization of the issuance of
new shares and the repurchase of shares already issued.\textsuperscript{421} These rules
make the process of capital formation even more cumbersome for SEs.
Furthermore, the Regulation requires that all new issuances of shares

\textsuperscript{416} See 1988 Memorandum, \textit{supra} note 24, at 7-8. The Commission has proposed the
adoption of a directive concerning the cross-border mergers of national companies, but
based on Article 54 (3)(g) of the Treaty Concerning Cross-border Mergers of Public Lim-
ited Companies, 1985 O.J. (C 23) 11.
\textsuperscript{417} See \textit{supra} part III.B.
\textsuperscript{418} See \textit{supra} part III.B.1.
\textsuperscript{419} See \textit{supra} parts III.B.2., III.B.6.
\textsuperscript{420} See \textit{supra} parts III.B.2., III.B.5.
\textsuperscript{421} See \textit{supra} parts III.B.2., III.B.4.
must be offered on a preemptive basis to the existing shareholders (first to the shareholders of the same class of shares, followed by offerings to the shareholders of other classes of shares) before a public offering can be made. Regardless of the member states' laws governing national companies, a waiver of these preemptive rights may only be obtained with respect to the particular shares then being issued, rather than pursuant to prior authorization. Because this rule is more restrictive than some of the member states' laws that are applicable to national companies, SEs in such states will be at a disadvantage compared to national companies registered in the same states.422

Managers or controlling shareholders may be unwilling to use the SE form of organization if they can obtain greater flexibility by using national forms of organization. Moreover, they may be hesitant to locate their central administrations in those member states that do not allow the issuance of a sufficiently wide range of financial instruments. Furthermore, because the proposed statute allows for a disparity in the laws that regulate an SE's capital structure insofar as some member states are more restrictive in their regulation of national companies than others, it may be impossible for SEs to transfer freely their places of central administration. These results are not desirable in view of the Commission's goal of creating European companies that can organize and operate without reference to the laws of individual member states.423

E. Management and Worker Representation

The proposed statute, on its face, appears to grant SEs a great deal of freedom in creating management structures that fit their needs and interests by presenting a choice between a two-tier and one-tier board, and among various models of worker participation in management. Unfortunately, in an attempt at preserving the various traditions that have evolved in the different member states, the proposed statute allows each member state to restrict the choices available to SEs, and further allows member states to require SEs to adopt specific management structures and models of employee representation.424 The resulting ability of member states to require that SEs adopt a particular management structure and model of worker participation that may differ from the particular forms mandated by another member state,425 deprives the SE form of organization of much of its usefulness.

This reliance on mandatory member state law in establishing basic matters relating to management destroys the hope of attaining uniformity among SEs that are registered in different member states. Instead of creating border-blind companies, that are truly Community enter-

422. See supra part III.B.3.
424. See supra part III.C-D.
425. See supra part III.C-D.
prises, the Commission has institutionalized the creation of enterprises that purport to be European, but which retain many of the essential characteristics of the countries in which they are organized. In view of the member states’ determination to impose their own national characters on SEs within their borders, it is possible that there will be German SEs, French SEs, and even Northern Ireland SEs.

Moreover, the Commission’s attempt to accommodate the interests of a number of member states affects the protection that is provided to an SE’s workers. Despite the Commission’s assertions to the contrary, the various models of worker participation fail to provide employees with uniform levels of participation and influence. The current proposal thus institutionalizes national variations in worker participation models, and accentuates the disparity in employee rights among the various member states. The proposal also fails to accomplish the Commission’s goal of promoting employee loyalty to a truly European business entity, instead of to a national business entity. Rather than minimizing the importance to employees of the place of central administration of the SE in which they work, the 1991 proposed statute emphasizes that issue.

Because of the variations that will exist in the required management structures and models of worker participation, the selection of an SE’s place of central administration will be of vital importance to both the SE and its employees. An SE might not be able to transfer its place of central administration without effecting wrenching changes in its management structure, the composition of its supervisory or administrative board, and the nature of the body that is designated for accomplishing worker participation in accordance with the prescribed model. An SE’s transfer of its state of central administration may also become a political issue; member states may vie to retain local SEs or to persuade foreign SEs to transfer their central administrations there. Sadly, it appears that the Commission’s economic and philosophic goal of creating a new form of business organization that truly reflects the unified character of the EC, has been subordinated to the strong desires of the member states to preserve their own local traditions with respect to the management of business and employee rights.

F. Operations and Accounts

The proposed European corporation statute also relies heavily on member state law in providing rules that govern the general operation of SEs. Among the events governed by member state law are the proce-
dures to be followed by the general meeting of shareholders, the determination of the actions that require prior board approval, the election of employee representatives and their corresponding duties and status within the SE, and the winding up of SEs. Generally, the most significant of these issues have already been harmonized by other Council directives. Therefore, in contrast to the proposed statute's reliance on member state laws governing capital structure, management structure and employee rights, the reliance on member state law with respect to an SE's operations and financial reporting requirements is unlikely to affect an SE's choice of its place of central administration.

G. Insolvency and Liquidation

The application of member state law to SEs also presents a significant potential for disparity in the laws that apply to an SE's insolvency and liquidation. Here, the Commission has allowed the application of "national law" without limiting the definition of the this term to the law of the member state in which the SE has its central administration. This approach could subject an SE to the varying or conflicting laws of different member states, thereby raising the level of uncertainty faced by managers and requiring managerial familiarity with the laws of other member states besides the one in which the SE has its place of central administration. The Commission had expressed a desire to avoid such a result, and this particular portion of the proposed statute should be reexamined.

H. Taxation

The provisions of the 1991 Proposed Regulation that deal with losses from foreign establishments are helpful, but not vitally important. The member states, under tax treaties, already allow for either the integration of profits and losses or the taking of credits for taxes paid on profits of foreign branches. Under the 1991 Proposed Regulation, the choice between the two methods available to an SE is left to the member state in which the SE has its central administration. The proposed statute ensures that one of these methods will be applied to an SE's foreign operations, but generally does not change the law that would have been applicable if the SE had remained a national company. Furthermore, because the Commission has proposed a harmonization of the rules that apply to national companies, variations among the laws applicable to SEs in different member states will be substantially reduced.

431. See supra part III.C.2.a.
432. See supra part III.C.1.
433. See supra part III.D.3.
434. See supra part III.G.1.
435. See supra part III.G.2-3.
438. See supra part III.E.1.
CONCLUSION

Once the evolution of the European corporation statute has been traced, and the various provisions of the current proposed statute have been explored, it becomes necessary to step back from the statute and view it as a whole. One must assess whether the Commission, in its 1991 draft, has accomplished its goals, or in the alternative, has set forth a statutory formulation that will be useful to those conducting business in the EC. With one vitally important caveat, it must be concluded that the Commission has failed to achieve either of these objectives.

As is the case with any creative project, it is easy for commentators to adopt a critical view of what the Commission has accomplished, finding fault with what it has done, and regretting what it has not, while losing sight of the substantial progress that the Commission has made. Notwithstanding this tendency, an objective analysis of the statute reveals that the 1991 Proposed Regulation has not accomplished its stated goals.

As previously discussed, the proposed statute has relied heavily on member state law not only for ministerial matters with respect to which member state laws are substantially alike, but also for matters of basic structure and management with respect to which member state laws greatly differ. The Commission, unable to reconcile the divergent views of the member states with respect to the nature, structure and management of business enterprises, has attempted to accommodate all of them. In so doing, it has stretched the concept of the societas europea to such an extent that it has become virtually unrecognizable.

Instead of creating a form of business organization that has a European identity, the Commission has allowed member states to ascribe particularly national characteristics to SEs with respect to the essential matters of management and worker participation. Instead of creating entities that could move freely from one member state to another, the Commission has allowed member states to prescribe the capital and management structures of SEs with the result that an SE might require major restructuring before it could transfer its place of central administration from one state to another. Instead of granting employees uniform levels of participation in the management of the enterprises for which they work, the Commission, by deferring to member state laws, has accepted widely varying levels of employee participation. Instead of guaranteeing to employees their social right to be involved in the management of the enterprises in which they work, the Commission has established only a minimum requirement that a group of employee representatives, who need not even be organized in a separate body, must be informed and consulted before an SE makes major business decisions.

The proposal has achieved its stated goals only with respect to the integration of daily operations and the facilitation of cross-border combi-

439. See supra text accompanying notes 431-35.
nations. Notwithstanding, the integration of daily operations will not be particularly useful unless companies have easy access to the SE form of organization. Moreover, the facilitation of cross-border combinations will be problematic as long as the resulting SEs continue to retain essentially national characteristics. As a whole, viewing the results of the Commission’s efforts against the goals announced by the Commission itself, the current proposed European corporation statute has failed.

Nevertheless, it is still necessary to determine whether the Commission has accomplished something that, although not quite what it set out to do, is nevertheless useful to European businesses and their employees. Again, the answer to this question is that it has not, subject to certain exceptions.

The proposal, if adopted, would permit the merger of companies organized under the laws of different member states. This represents an improvement over the existing laws. The Commission has also made significant progress in reaching a consensus on what business enterprises should be like in a borderless Europe. Ironically, however, the Commission’s success in harmonizing member state laws that govern national companies has made this work on SEs less valuable. A national company that must already maintain its accounts in accordance with the Fourth and the Seventh Company Law Directives obtains no new benefit from rules that require SEs to report its annual and consolidated financial statements on the same basis. If a national company with foreign branches is assured by the 1990 Proposal Concerning Losses that it can either integrate losses or obtain a credit for taxes paid to other member states, the company will not obtain any additional tax benefit by becoming an SE.

The SE form of organization will only be advantageous to businesses where the Commission’s efforts in harmonizing member state laws that govern national companies have been less successful than its efforts in achieving uniformity in the laws that govern SEs. In most circumstances, however, building a consensus among the member states with regard to SEs requires the same effort as building a consensus concerning the laws applicable to national companies. Consequently, it is unlikely that the SE form of organization will provide significant benefits in finance, structure and management that will not be available to national companies. Even when the Commission encourages the SE form of organization by giving such entities special benefits or protections, complaints by national companies about the competitive inequalities that would be produced have led the Commission to extend to national companies the same benefits that have been granted to SEs.440

440. This tendency toward competitive equality is demonstrated by the 1990 Proposal Concerning Losses, supra note 361, which proposes extending to national companies the same right of loss integration that had been provided for SEs. The proposal was introduced at the request of national companies that objected to the special treatment that had been proposed for SEs. See supra note 372.
Viewed from this perspective, it appears that the attempt to create a special European form of business enterprise that differs markedly from national forms of business enterprise has not only failed to date, but will also fail in the future. Nevertheless, this does not mean that the work of the Commission has been useless. The Commission's 1970 proposal for creating the societas europaea represented its first attempt at regularizing European business. As a result of the Commission's subsequent efforts, substantial portions of member state laws governing national companies have been made uniform or harmonized through the Council's regulations and directives. This progress is continuing under the stimulus of the Commission's current attempts at reaching an agreement on the governance of the European corporation. The discussions in the Commission and the Parliament have focussed attention on some of the difficulties of conducting cross-border business operations and have helped in developing an agenda for resolving these difficulties. Today, national companies find it easier to conduct business across borders than they formerly did. These cross-border operations will continue to be facilitated as the Commission's work on the European corporation statute continues. Consequently, the Commission's efforts have been at least partially successful, even though the European corporation statute has not yet been adopted.

One final consideration must be mentioned—and this forms the caveat to the conclusion that the proposed European corporation statute has failed. If the proposed statute were adopted by the Council today, notwithstanding all of its faults and compromises, it still would constitute a significant step toward the full harmonization of European business laws and the full integration of European business operations.

The European Community today bears little resemblance to the European Economic Community that was first created by the Treaty of Rome in 1957. That first attempt at unification contained many reservations and accepted many compromises. Even so, it was a beginning. Without that first effort, the economic and social blending of the member states that exists today could not have been achieved. It is probably true that children and fools should not be allowed to see half-finished projects. Perhaps the proposed European corporation statute should be judged not only by what it is today, but also by what the EC hopes that it will be tomorrow.