

1985

# The Amended Proposal for a Fifth Company Law Directive--Nihil Novum

Daniel T. Murphy

*University of Richmond*, [dmurphy@richmond.edu](mailto:dmurphy@richmond.edu)

Follow this and additional works at: <http://scholarship.richmond.edu/law-faculty-publications>

---

## Recommended Citation

Daniel T. Murphy, *The Amended Proposal for a Fifth Company Law Directive--Nihil Novum*, 7 Hous. J. Int'l. L. 215 (1985)

This Article is brought to you for free and open access by the School of Law at UR Scholarship Repository. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of UR Scholarship Repository. For more information, please contact [scholarshiprepository@richmond.edu](mailto:scholarshiprepository@richmond.edu).

# THE AMENDED PROPOSAL FOR A FIFTH COMPANY LAW DIRECTIVE—NIHIL NOVUM

*Daniel T. Murphy\**

The Commission of the European Communities has recently submitted to the Council of Ministers of the Communities an Amended Proposal for a Fifth Company Law Directive<sup>1</sup> concerning the management structure of companies. This Amended Proposal was submitted eleven years after the Original Proposal, ostensibly for the purpose of addressing some of the widely criticized features of that proposal. However, the Amended Proposal is not markedly different in substance from the Original Proposal. The purpose of this article is to briefly analyze the Amended Proposal and to draw some general comparisons with United States corporation law.

In order to assess the significance of the Amended Proposal, an overview of the role of the company law directives within the scheme of Community legislation is a prerequisite. Beginning in 1968, the Council embarked on a program to harmonize member states' company laws through the adoption of a series of directives. This effort was initially seen as a companion to the proposal for a Statute for European Companies.<sup>2</sup> However, the proposal for a company law statute appears to be

---

\* Professor of Law and Associate Dean, University of Richmond.

1. *Amended Proposal for a Fifth Directive Founded on Article 54(3)(g) of the E.E.C. Treaty Concerning the Structure of the Public Limited Companies and the Powers and Obligations of Their Organs*, 26 O.J. EUR. COMM. (No. C240) 2 (1983). As published in the Official Journal, the original proposal for Fifth Company Law Directive (15 O.J. EUR. COMM. (No. C131) 49 (1972)) and the amended proposal are set out in parallel columns, and the changes from the original are highlighted in the text of the amended proposal by the use of a bolder type. Throughout this article the amended proposal is referred to as the "Amended Proposal" and the original proposal as the "Original Proposal." The texts of both proposals, together with a brief explanatory memorandum by the commission [hereinafter cited as the Explanatory Memorandum], are also contained in 16 BULL. OF THE E.C. (Supp. 6/83) (1983). Reference throughout this article is to the text as set forth in the Official Journal.

2. The Commission submitted a proposal to the Council for a regulation to adopt a Statute for European Companies in 1970, 13 O.J. EUR. COMM. (No. C124) 1 (1970). This was amended by a proposal submitted in 1975, 8 BULL. OF THE E.C. (Supp. 4/75) (1975). [The amended proposal for a Draft Statute is hereinafter cited as the Draft Statute for European Companies]. See Sanders, *The European Company Law*, 6 GA. J. INT'L. & COMP. L. 367 (1976); Hood, *The European Company Proposal*, 22 INT'L & COMP. L.Q. 434 (1973); Comment, 32 CAMBRIDGE L.J. 1 (1973); Sanders, *Structure and Progress of the European Company*, in *THE HARMONIZATION OF EUROPEAN COMPANY LAW*, (C. Schmitthoff ed. 1973) [hereinafter cited as HARMONIZATION] at 82.

indefinitely postponed, if indeed it remains viable at all.<sup>3</sup> The series of company law directives appear now to be the main thrust of the European Communities' activities. In fact, the Amended Proposal incorporates many of the provisions of the Draft Statute for European Companies. To date, eight directives have been submitted by the Commission to the Council. All but one, the Fifth, have been adopted by the Council.

Article 54(3)(g) of the Treaty of Rome<sup>4</sup> charges the Council with the task of implementing a program to abolish all restrictions on the freedom of establishment within the Community. This concept, as well as the principles of free movement of persons, services and capital within the Community embodied in the Treaty of Rome, require that certain aspects of member states' laws, including their company laws, be harmonized. As a result, the artificial but structural barriers which hamper the freedom of establishment movement resulting from the disparate company laws should be minimized.<sup>5</sup> The harmonization of company laws is only one of the several harmonization projects undertaken by the Council and the Commission.

Although the Treaty of Rome itself requires some harmonization and coordination of company laws,<sup>6</sup> more progress in this effort has been achieved through the issuance of directives by the Council. In fact, the Treaty of Rome itself requires that the Council act in this area through the issuance of directives. Articles 54(1) and (3)(g) of the Treaty of Rome set forth clearly the responsibilities of the Commission and the Council regarding the harmonization of company laws. These Articles impose on the Council and the Commission the duty of "co-ordinating,

3. The European Parliament in its opinion with respect to the Original Proposal referred to the languishing status of the Draft Statute for European Companies. See *Opinion of the European Parliament on the Proposal for a Fifth Company Directive*, 25 O.J. EUR. COMM. (No. C149) 20 (1982) [hereinafter cited as the European Parliament Opinion].

4. Treaty establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 3 [hereinafter cited as the Treaty of Rome].

5. See Schmitthoff, *The Future of the European Company Scene*, in HARMONIZATION, at 1; Fickler, *The E.E.C. Directives on Company Law Harmonization*, in HARMONIZATION, at 66; Silkenat, *Efforts Toward Harmonization of Business Laws Within the European Economic Community*, 12 INT'L LAW. 835 (1978); Stein, *Harmonization of European Company Laws*, 37 L. & CONTEMP. PROB., 318 (1972). In this article Professor Schmitthoff succinctly captures the pressures behind the movement to harmonize the company laws. He observes that unless the national company laws are identical on essential points, a migration of companies to the state with the most lax law will take place. He states: "If it may be said without giving offense to our friends in the U.S.A., the Community cannot tolerate the establishment of a Delaware within its territory. This would lead to a distortion of the Common Market by artificial technicalities." Schmitthoff, *supra*, at 9.

6. For example, Article 220 of the Treaty of Rome requires the member states to negotiate with each other regarding mutual recognition of companies, maintenance of the legal personality of a company when its registered office is transferred from one member state to another, and the possibility of merger among companies of different member states.

to the extent that it is necessary . . . , the guarantees demanded in Member States from companies . . . for the purpose of protecting the interests both of the members of such companies and of third parties."<sup>7</sup> As a complement to Article 54(1), Article 54(2) empowers the Council to issue directives as a means of discharging its general responsibilities under Article 54.

Procedurally, these company law directives are presented in draft form by the Commission to the Council. If the proposal treats matters within its area of responsibility, the Council must then seek advice on the text of the draft from the European Parliament, or the Economic and Social Committee.<sup>8</sup> The Commission may, if it chooses, amend the draft to reflect these opinions.<sup>9</sup> Ultimately, the Council determines whether to accept, reject or return the proposal to the Commission.<sup>10</sup> The Council can amend the proposal and issue the directive in amended form, circumventing resubmission of the proposal by the Commission, but only if the Council members unanimously agree.<sup>11</sup>

Article 54(2) of the Treaty of Rome requires that the Council discharge its responsibilities regarding the harmonization of company laws through the use of directives, rather than through regulations.<sup>12</sup> A directive sets forth the substance of the measure and is addressed to the member states. The states are required to implement the measure by a certain date. The manner of implementation, whether legislative or administrative, is left to the states. Consequently, the precise language of the implementing legislation or regulation may vary from state to state. The directive is part of Community law insofar as it obligates the member states to act. But until the member states implement the directive, its provisions are neither effective as national legislation, nor do they bind

---

7. Treaty of Rome, Article 54(3)(g).

8. Treaty of Rome, Article 54(2). Articles 193-198 establish and set forth in general terms the responsibilities of the Economic and Social Committee. In 1982 the European Parliament finally gave its opinion on the Original Proposal; *see supra*, note 3. The Economic and Social Committee submitted its opinion in 1974. *See, Opinion of the Economic and Social Committee on the Proposal for a Fifth Company Law Directive*, 17 O.J. EUR. COMM. (No. C109) 1 (1974), [hereinafter cited as the Opinion of the Economic and Social Committee].

9. In the Preamble to the Amended Proposal the Commission acknowledged that it had considered the opinions of these institutions. In the Explanatory Memorandum it stated its position on some of the recommended changes. *See for example* notes 30-32 and 71-72 and accompanying text.

10. *See* P. MATHIJSSEN, A GUIDE TO EUROPEAN COMMUNITY LAW, (3rd ed. 1980), at 45-50; D. LASOK & J. BRIDGE, AN INTRODUCTION TO THE LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES, (1973), at 110-13; Schneebaum, *The Company Law Harmonization Program of the European Community*, 14 L. & POL'Y. INT'L BUS. 293, at 296-300 (1982).

11. Treaty of Rome, Article 149. It probably could not adopt an amended proposal which differs significantly from that presented to it without renewed consultation. *See, Chemiefarma v. Commission*, [1970] E.C.R. 661, [1967-1971 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8083; P. MATHIJSSEN, *supra* note 10, at 45-46.

12. Treaty of Rome, Article 54(2); *See* P. MATHIJSSEN, *supra*, note 10, at 101.

the subjects of that state.<sup>13</sup> By way of contrast, a Community regulation, once adopted by the Council, is directly binding on the member states as a part of national legislation.<sup>14</sup>

Article 189 of the Treaty of Rome provides that a directive binds the member states "as to the result to be achieved while leaving to the domestic agencies a competence as to form and means."<sup>15</sup> Notwithstanding this general statement regarding directives, the company law directives issued by the Council contain both general instructions to the member states to enact legislation regarding the matters covered by the directive, and substantive legal principles which the states apparently must enact in the same words.<sup>16</sup> This latter legislative approach, while not explicitly sanctioned by Article 189 of the Treaty of Rome, appears to be an attempt by the Council and the Commission to achieve the desired uniformity within the Community.

The First Company Law Directive<sup>17</sup> contains examples of these two techniques. Article 2 reiterates that member states shall take measures to insure public disclosure of certain listed documents and various types of information. However, Article 9(1) of the First Directive sets forth a substantive company law principle regarding the doctrine of *ultra vires*. The article provides in part that acts of the company shall be binding upon the company even though the acts are not within its objectives. The mandatory character of this provision is highlighted by a concession in the second paragraph of Article 9(1) which allows member states, if they choose, to provide that the company will not be bound by such acts if it can prove that the third party had knowledge or could not be unaware that the acts were outside the company's objective.<sup>18</sup> If some states take advantage of this concession and others do not, the law with respect to the use of the defense of *ultra vires* against a knowing third party will, of course, vary from state to state within the Community. The Commission and the Council have apparently determined that the general principle regarding *ultra vires* is so critical that the goal of harmonization among the member states' laws regarding it can only be achieved by requiring the states to enact the same exact provision.<sup>19</sup> However, the application of this principle against a knowing third party may be less critical. Accordingly, the Council and Commission are willing to allow

13. Treaty of Rome, Article 189; see P. MATHJSEN, *supra*, note 10, at 101; Fickler, *supra* note 5, at 70-71.

14. Treaty of Rome, Article 189; *Leonesio v. Italian Ministry for Agriculture and Forestry*, [1971] E.C.R. 287, at 295, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8175.

15. Treaty of Rome, Article 189.

16. See generally BULL. OF THE E.C. (Supp. 6/83) (1983), *supra* note 1.

17. *First Council Directive of 9 March, 1968*; 11 O.J. EUR. COMM. (No. L65) 9 (1968).

18. *Id.* at 12.

19. See generally Fickler, *supra* note 5, at 66-71.

member states to modify application of the principle against a knowing third party. All of the company law directives, including the Fifth Directive, are replete with similar substantive legislation.

Following the mandate of Article 54(g)(3) of the Treaty, the Commission has submitted eight proposals for company law reform; and seven of the eight have been adopted by the Council.<sup>20</sup> Of those proposed, only the Fifth, dealing with the internal structure of the company, has not been adopted. The time lapse since 1972 when the Original Proposal was submitted and the relative progress made by the Commission and the Council with respect to the other seven directives evidence the concern about the Fifth directive as presented in the Original Proposal. Of course, some of the other proposals submitted before and after this one dealt with less controversial matters.

The First Company Law Directive was issued by the Council in 1968 and dealt with public disclosure of constitutive documents, financial statements and other information. The directive also dealt with the liability of individuals acting on behalf of a corporate entity before its formation, the principle of *ultra vires*, and the nullity of the corporation under certain special circumstances. This directive was implemented in 1969 and is the only one to have been fully adopted by the member states.<sup>21</sup> The Second Directive was adopted in 1976<sup>22</sup> and was to be implemented by 1978.<sup>23</sup> It deals with the formation of companies, the maintenance and alteration of capital, payment of dividends and the acquisition of assets. The Third Directive was adopted in 1978, to be implemented by 1981.<sup>24</sup> It sets forth rules governing mergers and provides for an evaluation of the terms of the merger (including an evaluation of the fairness of any share exchange ratio) by independent experts. The states have not implemented this directive.<sup>25</sup> The Fourth Directive<sup>26</sup> sets

---

20. For a brief description of the directives, see Schneebaum, *supra* note 10, at 302-21. A proposal for a Ninth Directive concerning the organization of groups of companies, and requiring the parent to guarantee certain obligations of its subsidiaries has been under consideration within the Commission for several years. This proposal has not yet been submitted to the Council.

21. Schneebaum, *supra* note 10, at 301.

22. *Second Council Directive of 13 December, 1976*; 20 O.J. EUR. COMM. (No. L26) 1 (1977).

23. In 1982, the Court of Justice of the European Communities held that four member states, Italy, Belgium, Luxembourg and Ireland, had failed to fulfill an obligation of the Treaty of Rome by failing to implement the Second Company Directive by the required date. See *Commission of the European Communities v. Italian Republic, Kingdom of Belgium, Grand Duchy of Luxembourg and Ireland*, 1982-9 E.C.R. 3547, 3555, 3565 and 3573 [Transfer Binder 1981-83]; COMMON MKT. REP. (CCH) ¶¶ 8917-20. To date these states appear not to have complied.

24. *Third Council Directive of 9 October, 1978*; 21 O.J. EUR. COMM. (No. L295) 36 (1978).

25. See Schneebaum, *supra* note 10, at 303.

forth some accounting principles to be used in the preparation and presentation of the financial statements required by the First Directive. The Sixth Directive<sup>27</sup> creates a standard form of prospectus to be used by companies in their first public stock offering. The Seventh Directive<sup>28</sup> deals with consolidated accounts, and the Eighth Directive<sup>29</sup> with the approval of auditors.

In its original and amended forms the Fifth Directive deals with three substantive issues: the internal management structure of the company and managerial accountability, the general meeting of shareholders and certain shareholder rights, and accounting matters which relate to approval of annual accounts.<sup>30</sup> The first substantive issue, internal management structure and accountability as set forth in the Original Proposal, was the source of greatest concern. That concern has been addressed only to a limited extent in the Amended Proposal.

The Original Proposal required that companies adopt a two-tiered structure consisting of a management organ and a supervisory organ,<sup>31</sup> along the model of the German management board and supervisory board.<sup>32</sup> The mandatory nature of this structure coupled with the requirement of employee participation in the management organ<sup>33</sup> were the sources of greatest concern, especially from countries having no tradition of dual boards or co-determination.<sup>34</sup> In the Amended Proposal, the Commission appears to have offered an illusory compromise to the two-tiered board and to have expanded the provisions regarding employee representation.

In the Preamble to the Amended Proposal, the Commission recognizes that within the Community there are basically two types of management structure: a one-tier structure comprised only of an

26. See *Fourth Council Directive of 25 July, 1978*; 21 O.J. EUR. COMM. (No. L222) 1 (1978); COMMON MKT. REP. (CCH) ¶ 1371.

27. See *Sixth Council Directive of 17 March, 1980*; 23 O.J. EUR. COMM. (No. L100) 1 (1980); COMMON MKT. REP. (CCH) ¶ 1411.

28. See *Seventh Council Directive of 13 June, 1983*; 21 O.J. EUR. COMM. COMMON MKT. REP. (CCH) ¶ 1421.

29. See *Eighth Council Directive of 10 April, 1984*; COMMON MKT. REP. (CCH) ¶ 1431.

30. The term "annual accounts" is defined in Article 2 of the Fourth Directive to mean the balance sheet and profit and loss statement.

31. Original Proposal, arts. 2-21.

32. See generally E. ERCKLENTZ, *MODERN GERMAN CORPORATION LAW*, Vol. 1 (1979); Conard, *Company Laws of the European Communities from an American Viewpoint*, in *HARMONIZATION*, at 45; Vagts, *Reforming the "Modern" Corporation: Perspectives from the German*, 80 HARV. L. REV. 23 (1966).

33. Original Proposal, arts. 4(2) & (3).

34. See Conlon, *Industrial Democracy and EEC Company Law: A Review of the Draft Fifth Directive*, 24 I.C.L.Q. 348 (1975); Lang, *The Fifth EEC Directive on the Harmonization of Company Law*, (pts I and II), 12 COMMON MKT. L. REV. 155, 345 (1975).

administrative organ (board of directors) and the two-tier system comprised of both a management organ and a supervisory organ. The Preamble then asserts that functionally even in the one-tier form "a *de facto* distinction is often made between executive members who manage the business of the company and non-executive members who confine themselves to supervision."<sup>35</sup> The Commission concedes that to require all companies to conform to the two-tier system is presently impracticable, and it would therefore allow continued use of the one-tier structure. This concession, however, appears to be none at all, since to use the Commission's term, it has required a *de facto* two-tier format within the optional one-tier structure.<sup>36</sup> The Commission reemphasized its commitment to the two-tier structure in the Preamble to the Amended Proposal by stating that continued use of the one-tier structure would be acceptable provided it were "endowed with certain characteristics designed to harmonize . . . [its] functioning with that of the two-tier structure."<sup>37</sup>

The text of the Amended Proposal clearly carries out this close coordination of provisions between the two-tier and the one-tier structure. Two chapters in the text of the Amended Proposal deal with management structure. Chapter III discusses the two-tier system and Chapter IV discusses the one-tier system. Both chapters allocate management responsibility, set forth the means of assuring employee participation, deal with conflicts of interest and the oversight of responsibility, and provide for the creation and enforcement of liability.

Within Chapter III, two main articles address the topics of management structure and employee representation. Article 3 of Chapter III provides that a company shall be managed by a management organ under the supervision of a supervisory organ. It also provides that members of the management organ shall be appointed by the supervisory organ. Article 3(1) provides for the dismissal of members of the management organ. Whether dismissal may be effected with or without cause is not addressed in this Article.<sup>38</sup> Article 3(3), however, provides that the appointment and dismissal provisions of Article 3(1)(b) are tempered by any national legislation regarding appointment or dismissal against the wishes of a majority of the members of the supervisory organ appointed by the employees. Because the laws of the member states will

---

35. Amended Proposal, at Preamble.

36. See *supra* notes 74 through 80 and accompanying text.

37. Amended Proposal, at Preamble.

38. The Economic and Social Committee suggested that, to increase the independence of the management organ, dismissal should only be for "grave reasons." Opinion of the Economic and Social Committee, at art. 13. The European Parliament did not recommend any change to this article. The Commission did not address this issue in the Explanatory Memorandum.

generally determine the propriety of a dismissal, the opportunity for conflicting law on this point among the member states exists.

Aside from specific provisions governing the reporting and approving of certain specified matters by the supervisory organ, there is very little treatment of the functions and powers of the two organs.<sup>39</sup> Apparently, the proper roles for each will again be left for development by national legislation. This omission in the Amended Proposal is especially crucial for at least two reasons. First, far reaching liability sections would expose members of both organs to liability for failing to meet their responsibilities;<sup>40</sup> yet little guidance is provided as to what these responsibilities may be. Second, for those member states without a tradition of two-tier boards, there will be little pre-existing law which could be used to fill in the void caused by the Amended Proposal. A significant legislative effort will be required in these states in order to adequately implement the Directive.

Article 4 of Chapter III elaborately details the methods for selecting the supervisory organ and of assuring employee participation. If the company, together with its subsidiaries, employs within the Community less than the number of persons fixed by national legislation (not to exceed 1,000), the entire supervisory organ may be appointed by the general meeting of shareholders.<sup>41</sup> Apparently, these companies need not make any provision for employee participation. But, if the number of employees exceeds that fixed by national legislation, employee participation must be assured by one of several means.<sup>42</sup>

As drafted, Article 4(2) requires that for those companies having the requisite number of employees worker participation in the appointment of members to the supervisory organ will be assured by one of three processes: direct appointment, co-optation, or collective agreement. Additionally, these companies may assure employee participation in the affairs of the company by a process which does not entail membership on the supervisory organ.

39. In contrast, the Draft Statute for European Companies extensively treats the respective functions and powers of each organ (in particular, arts. 64 and 65 regarding the board of management's powers, and art. 73 regarding the supervisory board's function). See Sanders, *Structure and Progress of the European Company*, *supra* note 2, at 89-96.

40. See *infra* notes 67-76 and accompanying text.

41. Amended Proposal, art. 4(1).

42. By making these employee participation provisions applicable only to the companies employing more than the threshold number of employees within the Community, Article 4 by implication makes them inapplicable to companies not meeting the threshold. Article 4(a) states that member states *may* provide that not more than one-third of the members of the supervisory organ of companies not meeting the employment threshold be appointed otherwise than by Article 4(1) (emphasis added).

This last alternative represents a change in the Commission's position. Article 4 of the Original Proposal required that companies meeting the employment threshold assure employee participation by providing that at least one third of the members of the supervisory organ be appointed by the employees or that the employees have the right to veto unacceptable appointments to the supervisory organ.<sup>43</sup> Interestingly, in the Explanatory Memorandum the Commission understates this softening of its position. It merely lists the four alternative means of employee participation. It fails to note that all four of these methods were not available under the Original Proposal.

These new methods of assuring employee representation on the supervisory organ are set forth in the Amended Proposal in Articles 4(b), (c), (d) and (e). The member states are to establish in their national legislation which one of these four alternatives will be available in their jurisdictions.

Article 4(b) provides that the general meeting of shareholders appoint at most two-thirds of the supervisory organ members, and that the employees may appoint a minimum of one-third to a maximum of one-half of the members of the supervisory board. The exact percentages would be fixed either by the company's constitutive documents or by national legislation.

Article 4(c) would allow employee representation through co-optation, a procedure modeled after Dutch company law.<sup>44</sup> Using this method the supervisory organ is self-perpetuating, and the existing members appoint new members to fill vacancies. However, either the shareholders or the employees may object to the appointment of an individual on the grounds that he is unable to carry out his duties, or that if he were appointed, "the supervisory organ would, having regard to the interests of the company, the shareholders and employees, be improperly constituted."<sup>45</sup> If either group objects, the individual is not to be appointed unless an independent body determines the objection to be unfounded. While this method assures employees that individuals appointed will not be adverse to their interests, it differs from Article 4(b) which guarantees the right of employees to appoint their own representatives to the supervisory organ. Article 4(e) allows employee participation in either of the

---

43. On this issue the Amended Proposal does not follow the Draft Statute for European Companies. Article 74(a) of the Draft Statute for European Companies requires that one-third of the supervisory board be comprised of representatives of the shareholders, one-third of the employees and one third co-opted by the two groups. See *infra* note 47 and accompanying text for a discussion of the process of co-optation.

44. See J. MAEIJER, A MODERN EUROPEAN COMPANY LAW SYSTEM—COMMENTARY ON THE 1976 DUTCH LEGISLATION (1978), at 302-05; Fickler, *supra* note 5, at 81.

45. Amended Proposal, art. 4(c).

foregoing procedures to be regulated by collective agreements between the company and unions.

A significant departure from the Original Proposal is the alternative method of employee participation sanctioned by Article 4(d). Although it does not assure employee representation on the supervisory organ, it does provide a vehicle by which they can voice their concerns. Article 4(d) is based largely on the European Parliament's recommended modifications to the Original Proposal<sup>46</sup> in that it assures employees an ongoing access to both the management and the supervisory organ as well as to extensive information. Article 4(d)(1) states that a representative body of employees has the right to information, to consult the management organ on "administration, situation, progress and prospects of the company, its competitive position, credit situation and investment plans."<sup>47</sup> This group would also receive all information provided by the management organ to the supervisory organ,<sup>48</sup> would meet with the supervisory organ, and be provided with an agenda and all documentation provided to members of that body.<sup>49</sup> Furthermore, when the supervisory organ is considering such matters as the closure, expansion or curtailment of operations, or any major organizational change, it must consult with the representative group.<sup>50</sup> In the event the supervisory organ does not accept the group's opinion, it must state the reasons.<sup>51</sup>

This information sharing and consultation procedure does not provide employees with the same direct participation as the appointment alternatives, when the civil liability and management objective portions<sup>52</sup> are considered. However, Article 4(d) could grant employees significant input into the management decision making process and afford them protection from managerial decisions adverse to their interests.

It is interesting to compare these consultative provisions with those of the *Vredeling Proposal*,<sup>53</sup> which is separate from the Amended Proposal. The *Vredeling Proposal* sets forth guidelines for sharing information

46. *European Parliament Opinion supra* note 3, at art. 4(7) & (8).

47. Amended Proposal, art. 4(d)(1). Articles 4(e)-(h) provide comparable rights of employee participation through collectively agreed upon systems.

48. Amended Proposal, art. 4(d)(1); see notes 65-66 and accompanying text.

49. Amended Proposal, art. 4(d)(4). The individuals receiving the information are required to exercise a certain, but not well defined, discretion regarding the information received. Amended Proposal, arts. 4(d)(3) and 10(a)(2) require those receiving the information to "exercise a proper discretion in respect of information of a confidential nature concerning the company."

50. Amended Proposal, art. 12(a)(1).

51. Amended Proposal, art. 4(d)(2).

52. See *infra* notes 67-76 and accompanying text.

53. See *Proposal for a Council Directive on Procedures for Informing and Consulting Employees*, 25 O.J. EUR. COMM. (No. C217) 3 (1983); 16 BULL. OF THE E.C. (Supp. 2/83) (1983), (hereinafter cited as *Vredeling Proposal*). The commission extensively set forth its views on the question of employee participation in *Employee Participation and Company Structure in the*

and consulting with employees. Its information sharing and consultation provisions are applicable when at least 1,000 workers are employed by a parent and its subsidiaries within the Community.<sup>54</sup> If both proposals were adopted, the covered companies would be required to implement the consultative provisions of the *Vredeling Proposal* regardless of the form of employee participation selected under the Amended Proposal.

Under Article 4(d) of the Amended Proposal, employees are given the right to information and consultation with both the management and the supervisory organs with unspecified frequency.<sup>55</sup> The only limitation is that consultation with the supervisory organ should take place prior to each meeting of that body.<sup>56</sup> However, Article 3 of the *Vredeling Proposal* states that information must be provided by management at least once a year.<sup>57</sup>

The categories of information to which the employees would be entitled are broader under the Amended Proposal.<sup>58</sup> While both require information and consultation regarding major structural or economic changes, the *Vredeling Proposal's* list of events which trigger these rights is more specific and more directly related to the interests of the workers.<sup>59</sup> Finally, the confidentiality requirements are more stringent in the *Vredeling Proposal*.<sup>60</sup>

---

European Community, 8 BULL. OF THE E.C. (Supp. 8/75) (1975). See Pipkorn, *The Draft Directive on Procedures for Informing and Consulting Employees*, 20 COMMON MKT. L. REV. 725 (1983); Note, *The Proposed Vredeling Directive: A Modest Proposal for the Exportation of Industrial Democracy?*, 20 VA. L. REV. 1469 (1984).

54. See *Vredeling Proposal*, art. 2(1).

55. Amended Proposal, art. 4(d)(1). This article states that the workers shall have the right to "regular information and consultation. . ." (emphasis added).

56. Amended Proposal, art. 4(d)(1).

57. *Vredeling Proposal*, art. 3(2).

58. Compare Amended Proposal, art. 4(d)(1) which states that information be provided concerning the "administration, situation, progress and prospects of the company, its competitive position, credit situation and investment plans," with *Vredeling Proposal*, art. 3(2) which requires that information be provided regarding the "(a) structure; (b) the economic and financial situation; (c) the probable development of the business and of production and sales; (d) the employment situation and probable trends; (e) investment prospects."

59. Compare Amended Proposal, art. 12(a) which requires that consultation take place with respect to "(a) the closure or transfer of the undertaking or of a substantial part thereof; (b) substantial curtailment or extension of the activities of the undertaking; (c) substantial organizational changes within the undertaking; (d) establishment of long term cooperation with other undertakings or the termination thereof;" with *Vredeling Proposal*, art. 4(2) which requires consultation with respect to "(a) the closure or transfer of an establishment or major part thereof; (b) substantial restrictions or modifications of the activities of the undertaking; (c) major modifications with regard to organization, working practices or production methods, including modifications resulting from the introduction of new technologies; (d) the introduction of long-term cooperation with other undertakings or the cessation of such cooperation; (e) measures relating to workers health and to industrial safety."

60. Compare Amended Proposal, art. 4(d)(3) which provides that employees exercise "proper discretion in respect of information of a confidential nature concerning the company;" with *Vredeling Proposal* art. 7(2) which requires that "employees . . . shall not reveal to third parties any information . . . given to them in confidence."

The next series of provisions in Chapter III of the Amended Proposal addresses substantive corporate law principles. The Amended Proposal generally carries over these provisions from the Original Proposal, expanding the treatment given some of them.

The first provision of the Amended Proposal treating substantive corporate law is Article 10 which deals with conflicts of interest. This Article provides that any agreement between the company and another entity in which a member of either the management or supervisory organ has an interest must be authorized by the supervisory organ. Notice of the authorization must be given at the general meeting.<sup>61</sup> The provision applies to every agreement in which a member has an interest and is unchanged from the Original Proposal. The Economic and Social Committee's suggestion that contracts in the ordinary course of business be exempt from Article 10's disclosure and authorization requirements was neither accepted nor addressed by the Commission in the Explanatory Memorandum.<sup>62</sup> Considering the fact that this provision will apply to members of both organs, and to direct and indirect interests, the possibility that the supervisory organ will be required to authorize and notify the general meeting of many routine agreements is likely. The Article does not state the consequences of noncompliance, except to provide that the transaction's validity will not be affected if the other entity is unaware of the noncompliance.<sup>63</sup> Presumably, a member who fails to disclose his interest, or does so but the supervisory organ fails to authorize the transaction, would be liable under Article 14, which provides that a member shall be liable for damage sustained by the company as a result of his breach of duty.<sup>64</sup> This substantive conflict of interest provision is more expansive than that presently found in the laws of many member states.<sup>65</sup> The Draft Statute for European Companies contains a similar provision which imposes liability for damages a company sustains as a result of a member's interest in the subject of a contract.<sup>66</sup>

---

61. Amended Proposal, arts. 10(1), (3).

62. Opinion of the Economic and Social Committee, at art. 10.

63. Amended Proposal, art. 10(4).

64. Amended Proposal, art. 14(1). See notes 71 through 79 and accompanying text. Arguably, if the arrangement was fair to the company there would be no damage to the company as a result of its performance.

65. The member states have laws regulating at least some specific types of conflict of interest transactions; and some have fairly broad provisions. See generally, *DOING BUSINESS IN EUROPE, COMMON MKT. REP. (CCH)*. France has a law similar to Article 10, which requires disclosure and approval of any agreement in which a director has a direct or indirect interest. It exempts, however, agreements in ordinary operations and agreements made in normal conditions. *Id.* at ¶ 22,736.

66. Draft Statute for European Companies, arts. 69(4) and 79(3).

Article 10(a) of the Amended Proposal contains a significant principle of corporate law unrelated to conflicts of interest, which is not contained in the Original Proposal. This provision is the only explicit statement in the Amended Proposal setting forth the obligations of the members of the management and the supervisory organs. First, it states that all members of each body should have the same rights and duties, even though certain functions of the body may be assigned to individually designated members.<sup>67</sup> It then provides that the members of both groups "shall carry out their function in the interest of the company having regard to the interests of the shareholders and the employees."<sup>68</sup>

Article 1(a) of Chapter III establishes the two-tier system and broadly assigns the function of each body by providing that the management organ operate under the supervision of the supervisory organ. Article 10(a) coupled with the civil liability provisions of Article 14 substantively defines the responsibility of each body.<sup>69</sup> The explicit charge that members consider the interests of both shareholders and employees, while not surprising in view of the rights of employees as stated in Article 4 and the *Vredeling Proposal*, is thought provoking. It is especially interesting in light of the current debate in the United States over which group's interests the director ought to take into account in discharging his responsibilities.<sup>70</sup>

---

67. Amended Proposal, art. 3(a) authorizes the supervisory organ to assign responsibility for personnel and employee relations to specified members of the management organ.

68. Amended Proposal, art. 10(a)(2).

69. In the Explanatory Memorandum the Commission noted that the European Parliament suggested the substance of Article 10(a). The text of the directive as amended by the Opinion of the European Parliament contained no such statement. Articles 70(1) and 80(1) of the Draft Statute for European Companies are comparable to Article 10(a). They provide that the members of the management and supervisory board, respectively, carry out their duties in a manner which promotes, or has regard to, "the interests of the company and of its personnel."

70. See e.g. *Symposium: Corporate Social Responsibility*, 30 HASTINGS L.J. 1247 (1979); *American Law Institute, Principles of Corporate Governance; Analysis and Recommendations*, § 2.01 (Tent. Draft No. 2, 1984); Comment, *Corporate Ethics and Corporate Governance: A Critique of the ALI Statement on Corporate Governance Section 2.01(b)*, 71 CALIF. L. REV. 994 (1983). For wide ranging discussions of the ALI's Corporate Governance Project, see 37 U. MIAMI L. REV. No. 2 (January 1983); and *Statement of the Business Roundtable on the American Law Institute's Proposed "Principles of Corporate Governance and the Structure, Restatement and Recommendations"* (1983).

On this and many other points the Amended and Original Proposals and the Draft Statute for European Companies are similar to the German company law. See generally E. ERCKLENTZ, *supra* note 32. Mr. Ercklentz states that it is generally thought that the management board of a German AG must take into account the welfare and interests of the enterprise and its shareholders, and also that of its employees and the larger surrounding community within which it functions. Each of these interests is to be given equal weight in corporate decision making. *Id.* at 197. He notes that an older version of the German stock corporation statute explicitly stated that the management board, in performing its duties was to manage the enterprise in a manner consistent with the welfare of the enterprise and its employees, and consistent with the common interests of the people and the state. This explicit charge was omitted from the 1965 stock corporation statute. It was considered superfluous

Article 11 deals with the reporting requirements of the management organ and the overseer position of the supervisory organ. Article 11(a) requires the management organ to submit a written report to the supervisory organ at least every three months regarding "the progress of the company's affairs."<sup>71</sup> It also requires submission of drafts of the financial statements within five months of the end of the fiscal year.<sup>72</sup> The supervisory organ is empowered to request special reports from the management organ and to "undertake . . . all investigations which may be necessary."<sup>73</sup> Article 12 requires authorization from the supervisory organ before significant structural or economic measures can be implemented.<sup>74</sup>

The civil liability provisions of Article 14 are a mix of substantive law and guidelines to member states to make provisions in their law to ensure as a minimum that "compensation is made for all damage sustained by the company as a result of breaches of law or of the memorandum or articles of association or of other wrongful acts committed by members . . . in carrying out their duties."<sup>75</sup> This section does not contain a substantive liability provision. Instead, it directs the member states to enact their own provisions, which must at least provide that compensation is paid for the damages suffered by the company. Article 14(2) by contrast establishes a substantive liability for all members failing to meet the Article 14(1) standard. It states: "[E]ach member of the organ in question shall be jointly and severally liable without limit. He may, however, exonerate himself from liability if he proves that no fault is attributable to him personally."<sup>76</sup>

The severity of Article 14(2) is intensified by the other subsections of Article 14. In subsection (3) the liability provisions apply even when responsibilities have been allocated, as authorized by Article 1(3). Subsections (4) and (5) state that authorization by the supervisory organ or the general meeting of shareholders of the questioned activities do not exempt members from liability. Understandably, the Original Proposal's version of these provisions evoked criticism from within and without the

---

since such principles should be self-evident and consequently there was no need for their articulation. *Id.* at 196-97. By way of contrast, the new British company law for public companies states that directors are to consider the interests of the company and employees in discharging their responsibilities. Companies Act, 1980, Section 46.

71. Amended Proposal, art. 11(1).

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

73. Amended Proposal, art. 11(4).

74. *See supra* note 53.

75. Amended Proposal, art. 14(1).

76. Amended Proposal, art. 14(2).

Community.<sup>77</sup> Nonetheless, the Commission must consider them extremely important because they were carried over from the Original Proposal virtually unchanged.

The Amended Proposal's liability provisions are comparable to those found in the Draft Statute for European Companies.<sup>78</sup> The Draft Statute provides that the management and supervisory boards are liable to the company for any loss resulting from their failure to observe provisions of the statute, constitutive documents, or other breaches. Each member would be jointly and severally liable unless he can show that no fault is attributable to him.<sup>79</sup> In order to escape liability, the member must notify the supervisory board, or its chairman, as soon as knowledge of the act or omission comes to his attention.<sup>80</sup> One significant difference between the Amended Proposal and the Draft Statute is that the latter contains a standard of care. Article 70(1) of the Draft Statute provides that the members of the management board shall exercise "the standard of care expected of a prudent administrator and shall promote the interests of the company and of its personnel."<sup>81</sup> Article 80(1) does not impose a standard on the members of the supervisory board, but requires that they discharge their duties with regard to the interests of the company and its personnel.<sup>82</sup>

Article 14 of the Amended Proposal seems to eliminate, by virtue of subsection (5), the concept of shareholder ratification. It is also unclear whether subsection (3) would allow the defense of reliance. Article 14 apparently leaves to different national interpretation the question of what conduct constitutes a "breach of law" or a "wrongful act."<sup>83</sup> Nor is the notion of the reasonableness of a member's conduct explicitly addressed

77. Both the European Parliament and the Economic and Social Committee were critical of this article. Opinion of the European Parliament, at art. 14; and Opinion of the Economic and Social Committee, at 13. See Conlon, *supra* note 34, at 354-5; and Lang, *supra* note 34, at 364-65.

78. See generally Draft Statute for European Companies.

79. Draft Statute for European Companies, arts. 71(1) & 81(1).

80. *Id.* arts. 71(2) & 81(2).

81. Draft Statute for European Companies, art. 71(1). The German law formulates the standard of care for members of the management board of an AG as the care of an ordinary and conscientious manager. E. ERCKLENTZ, *supra* note 32, at 20.9. A comparable standard, that of a normally conscientious overseer, would apply to members of the board of overseers (supervisory board). E. ERCKLENTZ, *supra* note 29, at 161. The Draft Statute for European Companies does not follow this approach. Article 71 dealing with the management board contains a standard of care, but Article 81, the analogous provision for the supervisory board does not.

82. Draft Statute For European Companies, art. 80(1).

83. The Economic and Social Committee raised this issue in its Opinion together with the point that the term "wrongful" ought not include a business judgment which in hindsight is considered to be wrong. Opinion of the Economic and Social Committee, at 13. See also Conlon, *supra* note 34, at 355.

in the Article. The European Parliament suggested that a clause be added to Article 14(2) to the effect that a member can exonerate himself if he can prove "that no fault is attributable to him personally, or that his actions may be reasonably excused."<sup>84</sup> (emphasis added). The Commission indicated in the Explanatory Memorandum that this modification was not included because it was superfluous. The Memorandum states: "[I]f the member's action may reasonably be excused, no fault will be attributed to him."<sup>85</sup> The reasonableness of the member's conduct could thus be considered under Article 14(1), which directs member states to ensure that compensation is made for the wrongful acts of a company's members.<sup>86</sup> The member's conduct would also be considered separately under Article 14(2), the exoneration provision, as part of the member's attempt to prove that no fault is attributable to him. Alternatively, if a breach or wrongful act is equated with a fault, then by the Commission's interpretation, the reasonableness of the conduct must be considered in determining a breach or wrongful act. The balance of Chapter III sets forth the means by which civil liability can be enforced. Proceedings to enforce the liability may be brought on behalf of the company on request of the shareholders at the general meeting,<sup>87</sup> by a derivative action by the shareholders<sup>88</sup> or by creditors of the company.<sup>89</sup>

Chapter IV of the Amended Proposal pertains to the one-tier management system but contains essentially the same provisions as Chapter III. Ostensibly it addresses the concerns expressed over the imposed two-tier structure mandated in the Original Proposal.<sup>90</sup> However, it is clear that this Chapter represents little, if any compromise by the Commission on the issue. Chapter II of the Amended Proposal allows member states to offer affected companies a choice between the "two tier system organized in accordance with Chapter III and a one tier system (administrative organ) in accordance with the provisions of Chapter IV."<sup>91</sup> However, the very structure of this sentence reflects the begrudging nature of this concession. The first part of the sentence reads: "The member States shall provide that the company be organized according to a two-tier system in accordance with Chapter III."<sup>92</sup> The second half of the sentence appears inconsistent with the first, allowing the states to

---

84. Opinion of the European Parliament, at art. 14(2).

85. Explanatory Memorandum, at 10.

86. *See supra* note 65.

87. Amended Proposal, art. 15.

88. Amended Proposal, art. 16.

89. Amended Proposal, art. 19.

90. *See supra* notes 35-37, and accompanying text.

91. Amended Proposal, art. 2(1).

92. *Id.*

offer companies the choice between a two-tier and a one-tier system.<sup>93</sup> Upon reading Chapters III and IV, it becomes apparent that the choice is really not a choice at all between the two systems. Instead the one-tier system prescribed in Chapter IV is strikingly similar to the two-tier system described in Chapter III.<sup>94</sup>

Chapter IV adopts the term "administrative organ" for the board. In the first article of the chapter, this administrative organ is quickly divided into its "executive" and its "non-executive" members.<sup>95</sup> It appears that these terms were substituted by the Commission for the management and supervisory organ terminology found in Chapter III.<sup>96</sup>

There appears to be little if any substantive difference between the functions of the executive and non-executive members of the administrative organ in a one-tier system and those members of the management and the supervisory organ in a two-tier system.<sup>97</sup> For example, Article 21(a)(1)(a) provides that the company be managed by executive members of the administrative organ, under the supervision of its non-executive members. From the language of this article, it is not clear how the complete division of responsibilities is to take place within the context of one board.<sup>98</sup> The Commission's statement in the Preamble that even in the one-tier structure the board is often comprised of executive members who manage and non-executive members may be factually correct. The Commission, drawing on this observable fact, proceeds in Article 21 (a)(1)(a) of the Amended Proposal to assign to these two groups the functions associated with the management and supervisory organs of the two-tier system. National legislation presently charges the entire board with the same legal responsibilities.<sup>99</sup> The civil liability section,

---

93. *Id.* In the Explanatory Memorandum, the Commission states that in Article 2(1) it adopted the recommendation of the European Parliament and the Economic and Social Committee. Explanatory Memorandum, at 6. Article 2 as amended by the European Parliament is essentially the same as Amended Proposal, art. 2(1). As drafted Article 2(1) does leave the member states free to either require the mandatory two-tier structure, or allow companies the choice of format. Thus, states such as Germany presently requiring the two-tier system would not be obligated to offer the choice.

94. Compare Amended Proposal, Chapter IV with Amended Proposal, Chapter III.

95. Amended Proposal, Chapter IV, Art. 1.

96. The European Parliament also divided the administrative organ into two components in this manner. With the exception of the allocation of functions as stated in Amended Proposal Article 21(a)(1)(a), the European Parliament's recommendations with respect to the one-tier structure are very similar to the text of the Amended Proposal.

97. Compare Amended Proposal, Chapter IV with Amended Proposal, Chapter III.

98. The European Parliament's opinion suggested that the administrative organ be divided into executive and non-executive members. It did not assign separate functions for each. Its division seems to be made only to provide for employee representation on the non-executive portion of the administrative organ.

99. For discussions of the legal responsibilities of the management supervisory boards and the unitary board within national legal systems, see *supra* E. ERCKLENTZ, note 29, at 145-65, 195-213, and L. GOWER, *THE PRINCIPLES OF MODERN COMPANY LAW* (3rd ed. 1969), at 18-20; see also *supra*, Lang, note 31, at 158-66.

Amended Proposal, Article 21(u), makes this assignment of functions and responsibilities even more troublesome.

The provisions regarding the selection of the members of the administrative organ and the provisions for employee representation on the non-executive portion of the administrative organ<sup>100</sup> are the same as the pertinent provisions in Article 4 of Chapter III pertaining to employee participation in a two-tier system. Similarly, the conflicts of interest, the reporting by the executive members and the oversight by the non-executive members<sup>101</sup> again parallel the Chapter III provisions.

The civil liability section, Article 21(u), directly incorporates the Chapter III sections by succinctly providing that "[t]he provisions of Articles 14-21 shall apply to the executive and non-executive members of the administrative organ."<sup>102</sup> Only a few minor technical changes are made to reflect the one board model. For example, while Article 12 in Chapter III provides that the listed structural or economic changes cannot be implemented without the approval of the supervisory organ, Article 21(r) limits the supervisory organ's power by expressly making the administrative organ's responsibility to enact the listed changes non-delegable.<sup>103</sup>

The second subject addressed by the Amended Proposal is the shareholder meeting. Chapter V contains detailed provisions regarding the procedures to be followed at the general meeting. In a format similar to corporation statutes in the United States,<sup>104</sup> this chapter sets forth the rules for conducting shareholder meetings. For example, Chapter V explains who may call the meeting, what the form and amount of notice should be, how to provide for proxy voting and shareholder lists, and what inspection rights and voting rights the shareholders have.

While these provisions are similar to those found in corporation statutes in the United States, there are some notable differences. Corporate law in the United States does not generally allow a proxy holder to vote the shares differently from what the shareholders have instructed them to vote.<sup>105</sup> Article 28(1)(f) of the Amended Proposal, however, would allow the proxy holder to vote contrary to the shareholder's instructions if circumstances change after the instructions are given and

100. Amended Proposal, arts. 21(b)(2), (d), (e) & (f).

101. Amended Proposal, arts. 21(o), (p) & (r).

102. Amended Proposal, art. 21(u).

103. Compare Amended Proposal, art. 12 with Amended Proposal, art. 21(r).

104. See e.g., DEL. CODE ANN. tit. 8 (1983).

105. See e.g., DEL. CODE ANN. tit. 8 § 212 (1983) which governs the voting rights of stockholders, and places limitations on the use of proxies. See *Hauth v. Giant Portland Cement Co.*, Del. Ch. 96 A.2d 233 (1953) (The person designated in a proxy has a fiduciary obligation to carry out the wishes of the stockholders to the best of his ability and vote in accordance with his wishes).

the interests of the shareholder might be detrimentally affected.<sup>106</sup> Apparently, the proxyholder would be free to make the judgments triggering this right, limited only by the national legislation regarding proxy agents.

Article 31 contains the special right of a shareholder to obtain information. Although it is limited to requests made at the general meeting, the Article provides that a shareholder so requesting "shall be entitled to obtain correct information concerning the affairs of the company if such information is necessary to enable an objective assessment to be made of items on the agenda."<sup>107</sup> Management must provide information unless to do so would seriously prejudice the company or the company is under a legal obligation not to divulge the information.<sup>108</sup> The effectiveness of this shareholder right is reenforced by Articles 42(d) and 43 which provide that resolutions adopted at a meeting where a shareholder was denied information are voidable and give the shareholder the right to institute a proceeding to determine the voidability.

Pursuant to Article 32, only matters appearing on the agenda can be considered during the meeting, unless all shares are present or represented and no shareholders object to considering other matters. However, Article 32(3) allows the member states to deviate from this provision in their national legislation. The states may also allow the enforceability of the liability sections to be given consideration at the meeting without prior notice. In the Original Proposal, the member states were authorized to deviate from the general rule and allow consideration of the dismissal of members of the management or supervisory organs, or of those responsible for auditing the accounts without prior notice. At the urging of both the European Parliament and the Economic and Social Committee, this provision was deleted in the Amended Proposal.<sup>109</sup>

Article 35 qualifies the legitimacy of shareholders' voting agreements. Subsections (a) and (b) provide that shareholder voting agreements are void if they require that the shareholder always follow the instructions of or vote to approve propositions submitted by the company or one of its organs. A much more open-ended qualification is contained in Article 35(2) which provides that the agreement is void if the shareholder agrees to vote in "a specified manner, or abstain, in consideration

---

106. Amended Proposal, art. 28(f); see Conlon, *supra* note 34, at 355. Article 88(a)(1)(d) of the Draft Statute for European Companies is comparable.

107. Amended Proposal, art. 31(1). The German law provides a comparison. See E. ERCKLENTZ, *supra* note 32, at 267.

108. Amended Proposal, art. 31(3). In many jurisdictions in the United States the shareholder's inspection right is circumscribed by procedural requirements. See e.g., DEL. CODE ANN. tit 8, § 220.

109. Opinion of the European Parliament, at art. 32(3)(a); Opinion of the Economic and Social Committee, at 14.

of special advantages."<sup>110</sup>

The last substantive area included in the Amended Proposal concerns the adoption and audit of the annual accounts. Chapter VI sets forth certain accounting principles and sets forth the required opinions of the auditors. It is unclear why these accounting principles are included in a directive which is primarily devoted to the treatment of the management structure and certain shareholder rights. Other portions of Chapter VI address shareholder's rights and are thus more germane to the rest of the directive. Article 48, for example, establishes the principle that the shareholders must adopt and approve the annual accounts at the general meeting. However, national legislation may allow companies using the two-tier structure to have their annual account adopted jointly by the management and supervisory organs.

Article 49 requires that each year 5% of any profit be set aside in a reserve until the reserve equals at least 10% of subscribed capital. The general meeting is to determine how excess profits and losses are to be appropriated or treated.<sup>111</sup> The remainder of Chapter VI treats the appointment, qualifications and the procedures for issuing auditor's opinions.

The Amended Proposal is of interest in a comparative sense because of its treatment of issues which are also of concern in the United States, and because of the effect the Amended Proposal could have on the Community and company law of the member states. On a more practical level, the question of the Amended Proposal's impact on present or future United States business interests in member states should also be considered. As a general matter, the Amended Proposal would appear to have little direct impact on United States business interests due to the limitations on the type of companies to which it applies. Article 1 lists the corporate forms in each of the member states to which the Directive is applicable. Unlike the First Directive, which applies to large and small companies, both in the number of shareholders and in the amount of capital, the Fifth Directive is directed at large, broadly held companies.<sup>112</sup> In all member states there are several corporate forms providing

---

110. Amended Proposal, art. 35(2). However, comparable United States corporation codes do not invalidate voting agreements so liberally. See DEL. CODE ANN. tit. 8 § 218(f) which permits the creation of explicit written voting agreements by which the parties agree on how to vote so long as the agreements are not otherwise illegal.

111. The Draft Statute for European Companies also contained provisions requiring shareholder approval of the annual accounts and appropriation of profits (declaration of dividends). Articles 83(1)(f) & (g). Again the German law is quite similar. See *supra* E. ERCKLENTZ, note 32, at 439-56.

112. Specifically, by Article 2 the Fifth Directive would apply to: the German aktiengesellschaft; the French, Italian and Luxemborgois societe anonyme; the Greek corporation; the Belgian societe anonyme/naamloze vennootschap; the Dutch naamloze vennootschap; and the Irish and United Kingdom public companies.

limitations on risk of loss or liability. In the past, subsidiary corporations or joint venture companies were typically not required to organize under the corporate forms to which the Directive applies. Assuming that the Directive was adopted, such investments could continue to be structured within a non-covered corporate form. Because the Amended Proposal is substantially similar to the Original Proposal, it is bound to evoke a great deal of concern from within the Community. There is also no assurance that it will be adopted by the Council. The Amended Proposal, as previously noted, contains some gaps which must be filled by national legislation. Therefore, it is this supplemental, implementing legislation that will be of greatest concern to all countries engaged in business within the member states.