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► **B****SECOND COUNCIL DIRECTIVE**

of 13 December 1976

on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent

(77/91/EEC)

(OJ L 26, 31.1.1977, p. 1)

Amended by:

		Official Journal		
		No	page	date
► <u>M1</u>	Council Directive 92/101/EEC of 23 November 1992	L 347	64	28.11.1992
► <u>M2</u>	Directive 2006/68/EC of the European Parliament and of the Council of 6 September 2006	L 264	32	25.9.2006
► <u>M3</u>	Council Directive 2006/99/EC of 20 November 2006	L 363	137	20.12.2006

Amended by:

► <u>A1</u>	Act of Accession of Greece	L 291	17	19.11.1979
► <u>A2</u>	Act of Accession of Spain and Portugal	L 302	23	15.11.1985
► <u>A3</u>	Act of Accession of Austria, Sweden and Finland (adapted by Council Decision 95/1/EC, Euratom, ECSC)	C 241 L 1	21 1	29.8.1994 1.1.1995
► <u>A4</u>	Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded	L 236	33	23.9.2003

NB: This consolidated version contains references to the European unit of account and/or the ecu, which from 1 January 1999 should be understood as references to the euro — Council Regulation (EEC) No 3308/80 (OJ L 345, 20.12.1980, p. 1) and Council Regulation (EC) No 1103/97 (OJ L 162, 19.6.1997, p. 1).

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(77/91/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 54 (3) (g) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament ⁽¹⁾,

Having regard to the opinion of the Economic and Social Committee ⁽²⁾,

Whereas the coordination provided for in Article 54 (3) (g) and in the General Programme for the abolition of restrictions on freedom of establishment, which was begun by Directive 68/151/EEC ⁽³⁾, is especially important in relation to public limited liability companies, because their activities predominate in the economy of the Member States and frequently extend beyond their national boundaries;

Whereas in order to ensure minimum equivalent protection for both shareholders and creditors of public limited liability companies, the coordination of national provisions relating to their formation and to the maintenance, increase or reduction of their capital is particularly important;

Whereas in the territory of the Community, the statutes or instrument of incorporation of a public limited liability company must make it possible for any interested person to acquaint himself with the basic particulars of the company, including the exact composition of its capital;

Whereas Community provisions should be adopted for maintaining the capital, which constitutes the creditors' security, in particular by prohibiting any reduction thereof by distribution to shareholders where the latter are not entitled to it and by imposing limits on the company's right to acquire its own shares;

Whereas it is necessary, having regard to the objectives of Article 54 (3) (g), that the Member States' laws relating to the increase or reduction of capital ensure that the principles of equal treatment of shareholders in the same position and of protection of creditors whose claims exist prior to the decision on reduction are observed and harmonized,

⁽¹⁾ OJ No C 114, 11. 11. 1971, p. 18.

⁽²⁾ OJ No C 88, 6. 9. 1971, p. 1.

⁽³⁾ OJ No L 65, 14. 3. 1968, p. 8.

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HAS ADOPTED THIS DIRECTIVE:

Article 1

1. The coordination measures prescribed by this Directive shall apply to the provisions laid down by law, regulation or administrative action in Member States relating to the following types of company:

— *in Belgium:*

la société anonyme de droit belge;

— *in Denmark:*

aktieselskabet;

— *in France:*

la société anonyme;

— *in Germany:*

die Aktiengesellschaft;

— *in Ireland:*

the public company limited by shares,

the public company limited by guarantee and having a share capital;

— *in Italy:*

la società per azioni;

— *in Luxembourg:*

la société anonyme;

— *in the Netherlands:*

de naamloze vennootschap;

— *in the United Kingdom:*

the public company limited by shares,

the public company limited by guarantee and having a share capital;

▼A1

— *in Greece*

η ανώνυμη εταιρία;

▼A2

— *in Spain:*

la sociedad anónima;

— *in Portugal:*

a sociedade anonima de responsabilidade limitada;

▼A3

— *in Austria*

die Aktiengesellschaft;

— *in Finland:*

osakeyhtiöaktiebolag;

— *in Sverige:*

aktiebolag;

▼A4

— *in the Czech Republic:*

akciová společnost;

— *in Estonia:*

aktsiaselts;

▼ A4

— *in Cyprus:*

Δημόσιες εταιρείες περιορισμένης ευθύνης με μετοχές, δημόσιες εταιρείες περιορισμένης ευθύνης με εγγύηση που διαθέτουν μετοχικό κεφάλαιο;

— *in Latvia:*

akciju sabiedrība;

— *in Lithuania:*

akcinė bendrovė;

▼ M2

— *in Hungary:*

nyilvánosan működő részvénytársaság;

▼ A4

— *in Malta:*

kumpanija pubblika/public limited liability company;

— *in Poland:*

spółka akcyjna;

— *in Slovenia:*

delniška družba;

— *in Slovakia:*

akciová spoločnosť;

▼ M3

— *in Bulgaria:*

акционерно дружество;

— *in Romania:*

societate pe acțiuni.

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The name for any company of the above types shall comprise or be accompanied by a description which is distinct from the description required of other types of companies.

2. The Member States may decide not to apply this Directive to investment companies with variable capital and to cooperatives incorporated as one of the types of company listed in paragraph 1. In so far as the laws of the Member States make use of this option, they shall require such companies to include the words 'investment company with variable capital' or 'cooperative' in all documents indicated in Article 4 of Directive 68/151/EEC.

The expression 'investment company with variable capital', within the meaning of this Directive, means only those companies:

- the exclusive object of which is to invest their funds in various stocks and shares, land or other assets with the sole aim of spreading investment risks and giving their shareholders the benefit of the results of the management of their assets,
- which offer their own shares for subscription by the public, and
- the statutes of which provide that, within the limits of a minimum and maximum capital, they may at any time issue, redeem or resell their shares.

Article 2

The statutes or the instrument of incorporation of the company shall always give at least the following information:

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- (a) the type and name of the company;
- (b) the objects of the company;
- (c) — when the company has no authorized capital, the amount of the subscribed capital,
 — when the company has an authorized capital, the amount thereof and also the amount of the capital subscribed at the time the company is incorporated or is authorized to commence business, and at the time of any change in the authorized capital, without prejudice to Article 2 (1) (e) of Directive 68/151/EEC;
- (d) in so far as they are not legally determined, the rules governing the number of and the procedure for appointing members of the bodies responsible for representing the company with regard to third parties, administration, management, supervision or control of the company and the allocation of powers among those bodies;
- (e) the duration of the company, except where this is indefinite.

Article 3

The following information at least must appear in either the statutes or the instrument of incorporation or a separate document published in accordance with the procedure laid down in the laws of each Member State in accordance with Article 3 of Directive 68/151/EEC:

- (a) the registered office;
- (b) the nominal value of the shares subscribed and, at least once a year, the number thereof;
- (c) the number of shares subscribed without stating the nominal value, where such shares may be issued under national law;
- (d) the special conditions if any limiting the transfer of shares;
- (e) where there are several classes of shares, the information under (b), (c) and (d) for each class and the rights attaching to the shares of each class;
- (f) whether the shares are registered or bearer, where national law provides for both types, and any provisions relating to the conversion of such shares unless the procedure is laid down by law;
- (g) the amount of the subscribed capital paid up at the time the company is incorporated or is authorized to commence business;
- (h) the nominal value of the shares or, where there is not nominal value, the number of shares issued for a consideration other than in cash, together with the nature of the consideration and the name of the person providing this consideration;
- (i) the identity of the natural or legal persons or companies or firms by whom or in whose name the statutes or the instrument of incorporation, or where the company was not formed at the same time, the drafts of these documents, have been signed;
- (j) the total amount, or at least an estimate, of all the costs payable by the company or chargeable to it by reason of its formation and, where appropriate, before the company is authorized to commence business;
- (k) any special advantage granted, at the time the company is formed or up to the time it receives authorization to commence business, to anyone who has taken part in the formation of the company or in transactions leading to the grant of such authorization.

▼B*Article 4*

1. Where the laws of a Member State prescribe that a company may not commence business without authorization, they shall also make provision for responsibility for liabilities incurred by or on behalf of the company during the period before such authorization is granted or refused.
2. Paragraph 1 shall not apply to liabilities under contracts concluded by the company conditionally upon its being granted authorization to commence business.

Article 5

1. Where the laws of a Member State require a company to be formed by more than one member, the fact that all the shares are held by one person or that the number of members has fallen below the legal minimum after incorporation of the company shall not lead to the automatic dissolution of the company.
2. If in the cases referred to in paragraph 1, the laws of a Member State permit the company to be wound up by order of the court, the judge having jurisdiction must be able to give the company sufficient time to regularize its position.
3. Where such a winding up order is made the company shall enter into liquidation.

Article 6

1. The laws of the Member States shall require that, in order that a company may be incorporated or obtain authorization to commence business, a minimum capital shall be subscribed the amount of which shall be not less than 25 000 ►**A3** ecus ◀.

The ►**A3** ecus ◀ shall be that defined by Commission Decision No 3289/75/ECSC ⁽¹⁾. The equivalent in national currency shall be calculated initially at the rate applicable on the date of adoption of this Directive.

2. If the equivalent of the ►**A3** ecus ◀ in national currency is altered so that the value of the minimum capital in national currency remains less than 22 500 ►**A3** ecus ◀ for a period of one year, the Commission shall inform the Member State concerned that it must amend its legislation to comply with paragraph 1 within 12 months following the expiry of that period. However, the Member State may provide that the amended legislation shall not apply to companies already in existence until 18 months after its entry into force.
3. Every five years the Council, acting on a proposal from the Commission, shall examine and, if need be, revise the amounts expressed in this Article in ►**A3** ecus ◀ in the light of economic and monetary trends in the Community and of the tendency towards allowing only large and medium-sized undertakings to opt for the types of company listed in Article 1 ⁽¹⁾.

Article 7

The subscribed capital may be formed only of assets capable of economic assessment. However, an undertaking to perform work or supply services may not form part of these assets.

⁽¹⁾ OJ No L 327, 19. 12. 1975, p. 4.

▼B*Article 8*

1. Shares may not be issued at a price lower than their nominal value, or, where there is no nominal value, their accountable par.
2. However, Member States may allow those who undertake to place shares in the exercise of their profession to pay less than the total price of the shares for which they subscribe in the course of this transaction.

Article 9

1. Shares issued for a consideration must be paid up at the time the company is incorporated or is authorized to commence business at not less than 25 % of their nominal value or, in the absence of a nominal value, their accountable par.
2. However, where shares are issued for a consideration other than in cash at the time the company is incorporated or is authorized to commence business, the consideration must be transferred in full within five years of that time.

Article 10

1. A report on any consideration other than in cash shall be drawn up before the company is incorporated or is authorized to commence business, by one or more independent experts appointed or approved by an administrative or judicial authority. Such experts may be natural persons as well as legal persons and companies or firms under the laws of each Member State.
2. The experts' report shall contain at least a description of each of the assets comprising the consideration as well as of the methods of valuation used and shall state whether the values arrived at by the application of these methods correspond at least to the number and nominal value or, where there is no nominal value, to the accountable par and, where appropriate, to the premium on the shares to be issued for them.
3. The expert's (SIC! experts') report shall be published in the manner laid down by the laws of each Member State, in accordance with Article 3 of Directive 68/151/EEC.
4. Member States may decide not to apply this Article where 90 % of the nominal value, or where there is no nominal value, of the accountable par, of all the shares is issued to one or more companies for a consideration other than in cash, and where the following requirements are met:
 - (a) with regard to the company in receipt of such consideration, the persons referred to in Article 3 (i) have agreed to dispense with the expert's (SIC! experts') report;
 - (b) such agreement has been published as provided for in paragraph 3;
 - (c) the companies furnishing such consideration have reserves which may not be distributed under the law or the statutes and which are at least equal to the nominal value or, where there is no nominal value, the accountable par of the shares issued for consideration other than in cash;
 - (d) the companies furnishing such consideration guarantee, up to an amount equal to that indicated in paragraph (c), the debts of the recipient company arising between the time the shares are issued for a consideration other than in cash and one year after the publication of that company's annual accounts for the financial year during which such consideration was furnished. Any transfer of these shares is prohibited within this period;

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- (e) the guarantee referred to in (d) has been published as provided for in paragraph 3;
- (f) the companies furnishing such consideration shall place a sum equal to that indicated in (c) into a reserve which may not be distributed until three years after publication of the annual accounts of the recipient company for the financial year during which such consideration was furnished or, if necessary, until such later date as all claims relating to the guarantee referred to in (d) which are submitted during this period have been settled.

▼M2*Article 10a*

1. Member States may decide not to apply Article 10(1), (2) and (3) where, upon a decision of the administrative or management body, transferable securities as defined in point 18 of Article 4(1) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments⁽¹⁾ or money-market instruments as defined in point 19 of Article 4(1) of that Directive are contributed as consideration other than in cash, and those securities or money-market instruments are valued at the weighted average price at which they have been traded on one or more regulated market(s) as defined in point 14 of Article 4(1) of that Directive during a sufficient period, to be determined by national law, preceding the effective date of the contribution of the respective consideration other than in cash.

However, where that price has been affected by exceptional circumstances that would significantly change the value of the asset at the effective date of its contribution, including situations where the market for such transferable securities or money-market instruments has become illiquid, a revaluation shall be carried out on the initiative and under the responsibility of the administrative or management body. For the purposes of the aforementioned revaluation, Article 10(1), (2) and (3) shall apply.

2. Member States may decide not to apply Article 10(1), (2) and (3) where, upon a decision of the administrative or management body, assets, other than the transferable securities and money-market instruments referred to in paragraph 1, are contributed as consideration other than in cash which have already been subject to a fair value opinion by a recognised independent expert and where the following conditions are fulfilled:

- (a) the fair value is determined for a date not more than six months before the effective date of the asset contribution;
- (b) the valuation has been performed in accordance with generally accepted valuation standards and principles in the Member State, which are applicable to the kind of assets to be contributed.

In the case of new qualifying circumstances that would significantly change the fair value of the asset at the effective date of its contribution, a revaluation shall be carried out on the initiative and under the responsibility of the administrative or management body. For the purposes of the aforementioned revaluation, Article 10(1), (2) and (3) shall apply.

In the absence of such a revaluation, one or more shareholders holding an aggregate percentage of at least 5 % of the company's subscribed capital on the day the decision on the increase in the capital is taken may demand a valuation by an independent expert, in which case Article 10(1), (2) and (3) shall apply. Such shareholder(s) may submit a demand up until the effective date of the asset contribution, provided that, at the date of the demand, the shareholder(s) in question still hold

⁽¹⁾ OJ L 145, 30.4.2004, p. 1. Directive as last amended by Directive 2006/31/EC (OJ L 114, 27.4.2006, p. 60).

▼ M2

(s) an aggregate percentage of at least 5 % of the company's subscribed capital, as it was on the day the decision on the increase in the capital was taken.

3. Member States may decide not to apply Article 10(1), (2) and (3) where, upon a decision of the administrative or management body, assets, other than the transferable securities and money-market instruments referred to in paragraph 1, are contributed as consideration other than in cash whose fair value is derived by individual asset from the statutory accounts of the previous financial year provided that the statutory accounts have been subject to an audit in accordance with Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts ⁽¹⁾.

The second and third subparagraphs of paragraph 2 shall apply *mutatis mutandis*.

Article 10b

1. Where consideration other than in cash as referred to in Article 10a occurs without an expert's report as referred to in Article 10(1), (2) and (3), in addition to the requirements set out in point (h) of Article 3 and within one month after the effective date of the asset contribution, a declaration containing the following shall be published:

- (a) a description of the consideration other than in cash at issue;
- (b) its value, the source of this valuation and, where appropriate, the method of valuation;
- (c) a statement whether the value arrived at corresponds at least to the number, to the nominal value or, where there is no nominal value, the accountable par and, where appropriate, to the premium on the shares to be issued for such consideration;
- (d) a statement that no new qualifying circumstances with regard to the original valuation have occurred.

That publication shall be effected in the manner laid down by the laws of each Member State in accordance with Article 3 of Directive 68/151/EEC.

2. Where consideration other than in cash is proposed to be made without an expert's report as referred to in Article 10(1), (2) and (3) in relation to an increase in the capital proposed to be made under Article 25(2), an announcement containing the date when the decision on the increase was taken and the information listed in paragraph 1 shall be published, in the manner laid down by the laws of each Member State in accordance with Article 3 of Directive 68/151/EEC, before the contribution of the asset as consideration other than in cash is to become effective. In that event, the declaration pursuant to paragraph 1 shall be limited to the statement that no new qualifying circumstances have occurred since the aforementioned announcement was published.

3. Each Member State shall provide for adequate safeguards ensuring compliance with the procedure set out in Article 10a and in this Article where a contribution for a consideration other than in cash is made without an expert's report as referred to in Article 10(1), (2) and (3).

⁽¹⁾ OJ L 157, 9.6.2006, p. 87;

▼B*Article 11*

1. If, before the expiry of a time limit laid down by national law of at least two years from the time the company is incorporated or is authorized to commence business, the company acquires any asset belonging to a person or company or firm referred to in Article 3 (i) for a consideration of not less than one-tenth of the subscribed capital, the acquisition shall be examined and details of it published in the manner provided for in ►**M2** Article 10(1), (2) and (3) ◀ and it shall be submitted for the approval of the general meeting. ►**M2** Articles 10a and 10b shall apply *mutatis mutandis*. ◀

Member States may also require these provisions to be applied when the assets belong to a shareholder or to any other person.

2. Paragraph 1 shall not apply to acquisitions effected in the normal course of the company's business, to acquisitions effected at the instance or under the supervision of an administrative or judicial authority, or to stock exchange acquisitions.

Article 12

Subject to the provisions relating to the reduction of subscribed capital, the shareholders may not be released from the obligation to pay up their contributions.

Article 13

Pending coordination of national laws at a subsequent date, Member States shall adopt the measures necessary to require provision of at least the same safeguards as are laid down in Articles 2 to 12 in the event of the conversion of another type of company into a public limited liability company.

Article 14

Articles 2 to 13 shall not prejudice the provisions of Member States on competence and procedure relating to the modification of the statutes or of the instrument of incorporation.

Article 15

1. (a) Except for cases of reductions of subscribed capital, no distribution to shareholders may be made when on the closing date of the last financial year the net assets as set out in the company's annual accounts are, or following such a distribution would become, lower than the amount of the subscribed capital plus those reserves which may not be distributed under the law or the statutes.
- (b) Where the uncalled part of the subscribed capital is not included in the assets shown in the balance sheet, this amount shall be deducted from the amount of subscribed capital referred to in paragraph (a).
- (c) The amount of a distribution to shareholders may not exceed the amount of the profits at the end of the last financial year plus any profits brought forward and sums drawn from reserves available for this purpose, less any losses brought forward and sums placed to reserve in accordance with the law or the statutes.

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(d) The expression ‘distribution’ used in subparagraphs (a) and (c) includes in particular the payment of dividends and of interest relating to shares.

2. When the laws of a Member State allow the payment of interim dividends, the following conditions at least shall apply:

- (a) interim accounts shall be drawn up showing that the funds available for distribution are sufficient,
- (b) the amount to be distributed may not exceed the total profits made since the end of the last financial year for which the annual accounts have been drawn up, plus any profits brought forward and sums drawn from reserves available for this purpose, less losses brought forward and sums to be placed to reserve pursuant to the requirements of the law or the statutes.

3. Paragraphs 1 and 2 shall not affect the provisions of the Member States as regards increases in subscribed capital by capitalization of reserves.

4. The laws of a Member State may provide for derogations from paragraph 1 (a) in the case of investment companies with fixed capital.

The expression ‘investment company with fixed capital’, within the meaning of this paragraph (SIC! paragraph,) means only those companies:

- the exclusive object of which is to invest their funds in various stocks and shares, land or other assets with the sole aim of spreading investment risks and giving their shareholders the benefit of the results of the management of their assets, and
- which offer their own shares for subscription by the public.

In so far as the laws of Member States make use of this option they shall:

- (a) require such companies to include the expression ‘investment company’ in all documents indicated in Article 4 of Directive 68/151/EEC;
- (b) not permit any such company whose net assets fall below the amount specified in paragraph 1 (a) to make a distribution to shareholders when on the closing date of the last financial year the company's total assets as set out in the annual accounts are, or following such distribution would become, less than one-and-a-half times the amount of the company's total liabilities to creditors as set out in the annual accounts;
- (c) require any such company which makes a distribution when its net assets fall below the amount specified in paragraph 1 (a) to include in its annual accounts a note to that effect.

Article 16

Any distribution made contrary to Article 15 must be returned by shareholders who have received it if the company proves that these shareholders knew of the irregularity of the distributions made to them, or could not in view of the circumstances have been unaware of it.

Article 17

1. In the case of a serious loss of the subscribed capital, a general meeting of shareholders must be called within the period laid down by the laws of the Member States, to consider whether the company should be wound up or any other measures taken.

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2. The amount of a loss deemed to be serious within the meaning of paragraph 1 may not be set by the laws of Member States at a figure higher than half the subscribed capital.

Article 18

1. The shares of a company may not be subscribed for by the company itself.

2. If the shares of a company have been subscribed for by a person acting in his own name, but on behalf of the company, the subscriber shall be deemed to have subscribed for them for his own account.

3. The persons or companies or firms referred to in Article 3 (i) or, in cases of an increase in subscribed capital, the members of the administrative or management body shall be liable to pay for shares subscribed in contravention of this Article.

However, the laws of a Member State may provide that any such person may be released from his obligation if he proves that no fault is attributable to him personally.

*Article 19***▼M2**

1. Without prejudice to the principle of equal treatment of all shareholders who are in the same position, and to Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) ⁽¹⁾, Member States may permit a company to acquire its own shares, either itself or through a person acting in his own name but on the company's behalf. To the extent that the acquisitions are permitted, Member States shall make such acquisitions subject to the following conditions:

- (a) authorisation shall be given by the general meeting, which shall determine the terms and conditions of such acquisitions, and, in particular, the maximum number of shares to be acquired, the duration of the period for which the authorisation is given, the maximum length of which shall be determined by national law without, however, exceeding five years, and, in the case of acquisition for value, the maximum and minimum consideration. Members of the administrative or management body shall satisfy themselves that, at the time when each authorised acquisition is effected, the conditions referred to in points (b) and (c) are respected;
- (b) the acquisitions, including shares previously acquired by the company and held by it, and shares acquired by a person acting in his own name but on the company's behalf, may not have the effect of reducing the net assets below the amount mentioned in points (a) and (b) of Article 15(1);
- (c) only fully paid-up shares may be included in the transaction.

Furthermore, Member States may subject acquisitions within the meaning of the first subparagraph to any of the following conditions:

- (i) that the nominal value or, in the absence thereof, the accountable par of the acquired shares, including shares previously acquired by the company and held by it, and shares acquired by a person acting in his own name but on the company's behalf, may not exceed a limit to be determined by Member States. This limit may not be lower than 10 % of the subscribed capital;

⁽¹⁾ OJ L 96, 12.4.2003, p. 16.;

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- (ii) that the power of the company to acquire its own shares within the meaning of the first subparagraph, the maximum number of shares to be acquired, the duration of the period for which the power is given and the maximum or minimum consideration are laid down in the statutes or in the instrument of incorporation of the company;
- (iii) that the company complies with appropriate reporting and notification requirements;
- (iv) that certain companies, as determined by Member States, may be required to cancel the acquired shares provided that an amount equal to the nominal value of the shares cancelled must be included in a reserve which cannot be distributed to the shareholders, except in the event of a reduction in the subscribed capital. This reserve may be used only for the purposes of increasing the subscribed capital by the capitalisation of reserves;
- (v) that the acquisition shall not prejudice the satisfaction of creditors' claims.

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2. The laws of a Member State may provide for derogations from the first sentence of paragraph 1 (a) where the acquisition of a company's own shares is necessary to prevent serious and imminent harm to the company. In such a case, the next general meeting must be informed by the administrative or management body of the reasons for and nature of the acquisitions effected, of the number and nominal value or, in the absence of a nominal value, the accountable par, of the shares acquired, of the proportion of the subscribed capital which they represent, and of the consideration for these shares.

3. Member States may decide not to apply the first sentence of paragraph 1 (a) to shares acquired by either the company itself or by a person acting in his own name but on the company's behalf, for distribution to that company's employees or to the employees of an associate company. Such shares must be distributed within 12 months of their acquisition.

Article 20

1. Member States may decide not to apply Article 19 to:
- (a) shares acquired in carrying out a decision to reduce capital, or in the circumstances referred to in Article 39;
 - (b) shares acquired as a result of a universal transfer of assets;
 - (c) fully paid-up shares acquired free of charge or by banks and other financial institutions as purchasing commission;
 - (d) shares acquired by virtue of a legal obligation or resulting from a court ruling for the protection of minority shareholders in the event, particularly, of a merger, a change in the company's object or form, transfer abroad of the registered office, or the introduction of restrictions on the transfer of shares;
 - (e) shares acquired from a shareholder in the event of failure to pay them up;
 - (f) shares acquired in order to indemnify minority shareholders in associated companies;
 - (g) fully paid-up shares acquired under a sale enforced by a court order for the payment of a debt owed to the company by the owner of the shares;
 - (h) fully paid-up shares issued by an investment company with fixed capital, as defined in the second subparagraph of Article 15 (4), and acquired at the investor's request by that company or by an associate company. Article 15 (4) (a) shall apply. These acquisitions may not

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have the effect of reducing the net assets below the amount of the subscribed capital plus any reserves the distribution of which is forbidden by law.

2. Shares acquired in the cases listed in paragraph 1 (b) to (g) above must, however, be disposed of within not more than three years of their acquisition unless the nominal value or, in the absence of a nominal value, the accountable par of the shares acquired, including shares which the company may have acquired through a person acting in his own name but on the company's behalf, does not exceed 10 % of the subscribed capital.

3. If the shares are not disposed of within the period laid down in paragraph 2, they must be cancelled. The laws of a Member State may make this cancellation subject to a corresponding reduction in the subscribed capital. Such a reduction must be prescribed where the acquisition of shares to be cancelled results in the net assets having fallen below the amount specified in ►**M2** points (a) and (b) of Article 15(1). ◀

Article 21

Shares acquired in contravention of Articles 19 and 20 shall be disposed of within one year of their acquisition. Should they not be disposed of within that period, Article 20 (3) shall apply.

Article 22

1. Where the laws of a Member State permit a company to acquire its own shares, either itself or through a person acting in his own name but on the company's behalf, they shall make the holding of these shares at all times subject to at least the following conditions:

- (a) among the rights attaching to the shares, the right to vote attaching to the company's own shares shall in any event be suspended;
- (b) if the shares are included among the assets shown in the balance sheet, a reserve of the same amount, unavailable for distribution, shall be included among the liabilities.

2. Where the laws of a Member State permit a company to acquire its own shares, either itself or through a person acting in his own name but on the company's behalf, they shall require the annual report to state at least:

- (a) the reasons for acquisitions made during the financial year;
- (b) the number and nominal value or, in the absence of a nominal value, the accountable par of the shares acquired and disposed of during the financial year and the proportion of the subscribed capital which they represent;
- (c) in the case of acquisition or disposal for a value, the consideration for the shares;
- (d) the number and nominal value or, in the absence of a nominal value, the accountable par of all the shares acquired and held by the company and the proportion of the subscribed capital which they represent.

*Article 23***▼M2**

1. Where Member States permit a company to, either directly or indirectly, advance funds or make loans or provide security, with a view to the acquisition of its shares by a third party, they shall make

▼ M2

such transactions subject to the conditions set out in the second, third, fourth and fifth subparagraphs.

The transactions shall take place under the responsibility of the administrative or management body at fair market conditions, especially with regard to interest received by the company and with regard to security provided to the company for the loans and advances referred to in the first subparagraph. The credit standing of the third party or, in the case of multiparty transactions, of each counterparty thereto shall have been duly investigated.

The transactions shall be submitted by the administrative or management body to the general meeting for prior approval, whereby the general meeting shall act in accordance with the rules for a quorum and a majority laid down in Article 40. The administrative or management body shall present a written report to the general meeting, indicating the reasons for the transaction, the interest of the company in entering into such a transaction, the conditions on which the transaction is entered into, the risks involved in the transaction for the liquidity and solvency of the company and the price at which the third party is to acquire the shares. This report shall be submitted to the register for publication in accordance with Article 3 of Directive 68/151/EEC.

The aggregate financial assistance granted to third parties shall at no time result in the reduction of the net assets below the amount specified in points (a) and (b) of Article 15(1), taking into account also any reduction of the net assets that may have occurred through the acquisition, by the company or on behalf of the company, of its own shares in accordance with Article 19(1). The company shall include, among the liabilities in the balance sheet, a reserve, unavailable for distribution, of the amount of the aggregate financial assistance.

Where a third party by means of financial assistance from a company acquires that company's own shares within the meaning of Article 19(1) or subscribes for shares issued in the course of an increase in the subscribed capital, such acquisition or subscription shall be made at a fair price.

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2. Paragraph 1 shall not apply to transactions concluded by banks and other financial institutions in the normal course of business, nor to transactions effected with a view to the acquisition of shares by or for the company's employees or the employees of an associate company. However, these transactions may not have the effect of reducing the net assets below the amount specified in Article 15 (1) (a).

3. Paragraph 1 shall not apply to transactions effected with a view to acquisition of shares as described in Article 20 (1) (h).

▼ M2*Article 23a*

In cases where individual members of the administrative or management body of the company being party to a transaction referred to in Article 23(1), or of the administrative or management body of a parent undertaking within the meaning of Article 1 of Council Directive 83/349/EEC of 13 June 1983 on consolidated accounts⁽¹⁾ or such parent undertaking itself, or individuals acting in their own name, but on behalf of the members of such bodies or on behalf of such undertaking, are counterparties to such a transaction, Member States shall ensure through adequate safeguards that such transaction does not conflict with the company's best interests.

⁽¹⁾ OJ L 193, 18.7.1983, p. 1. Directive as last amended by Directive 2006/43/EC.;

▼B*Article 24*

1. The acceptance of the company's own shares as security, either by the company itself or through a person acting in his own name but on the company's behalf, shall be treated as an acquisition for the purposes of Articles 19, 20 (1), 22 and 23.
2. The Member States may decide not to apply paragraph 1 to transactions concluded by banks and other financial institutions in the normal course of business.

▼M1*Article 24a*

1. (a) The subscription, acquisition or holding of shares in a public limited-liability company by another company within the meaning of Article 1 of Directive 68/151/EEC in which the public limited-liability company directly or indirectly holds a majority of the voting rights or on which it can directly or indirectly exercise a dominant influence shall be regarded as having been effected by the public limited-liability company itself;
- (b) subparagraph (a) shall also apply where the other company is governed by the law of a third country and has a legal form comparable to those listed in Article 1 of Directive 68/151/EEC.
2. However, where the public limited-liability company holds a majority of the voting rights indirectly or can exercise a dominant influence indirectly, Member States need not apply paragraph 1 if they provide for the suspension of the voting rights attached to the shares in the public limited-liability company held by the other company.
3. In the absence of coordination of national legislation on groups of companies, Member States may:
 - (a) define the cases in which a public limited-liability company shall be regarded as being able to exercise a dominant influence on another company; if a Member State exercises this option, its national law must in any event provide that a dominant influence can be exercised if a public limited-liability company:
 - has the right to appoint or dismiss a majority of the members of the administrative organ, of the management organ or of the supervisory organ, and is at the same time a shareholder or member of the other company or
 - is a shareholder or member of the other company and has sole control of a majority of the voting rights of its shareholders or members under an agreement concluded with other shareholders or members of that company.

Member States shall not be obliged to make provision for any cases other than those referred to in the first and second indents;
 - (b) define the cases in which a public limited-liability company shall be regarded as indirectly holding voting rights or as able indirectly to exercise a dominant influence;
 - (c) specify the circumstances in which a public limited-liability company shall be regarded as holding voting rights.
4. (a) Member States need not apply paragraph 1 where the subscription, acquisition or holding is effected on behalf of a person other than the person subscribing, acquiring or holding the shares, who is neither the public limited-liability company referred to in paragraph 1 nor another company in which the public limited-liability company

▼ M1

directly or indirectly holds a majority of the voting rights or on which it can directly or indirectly exercise a dominant influence.

- (b) Member States need not apply paragraph 1 where the subscription, acquisition or holding is effected by the other company in its capacity and in the context of its activities as a professional dealer in securities, provided that it is a member of a stock exchange situated or operating within a Member State, or is approved or supervised by an authority of a Member State competent to supervise professional dealers in securities which, within the meaning of this Directive, may include credit institutions.

5. Member States need not apply paragraph 1 where shares in a public limited-liability company held by another company were acquired before the relationship between the two companies corresponded to the criteria laid down in paragraph 1.

However, the voting rights attached to those shares shall be suspended and the shares shall be taken into account when it is determined whether the condition laid down in Article 19 (1) (b) is fulfilled.

6. Member States need not apply Article 20 (2) or (3) or Article 21 where shares in a public limited-liability company are acquired by another company on condition that they provide for:

- (a) the suspension of the voting rights attached to the shares in the public limited-liability company held by the other company, and
- (b) the members of the administrative or the management organ of the public limited-liability company to be obliged to buy back from the other company the shares referred to in Article 20 (2) and (3) and Article 21 at the price at which the other company acquired them; this sanction shall be inapplicable only where the members of the administrative or the management organ of the public limited-liability company prove that that company played no part whatsoever in the subscription for or acquisition of the shares in question.

▼ B*Article 25*

1. Any increase in capital must be decided upon by the general meeting. Both this decision and the increase in the subscribed capital shall be published in the manner laid down by the laws of each Member State, in accordance with Article 3 of Directive 68/151/EEC.

2. Nevertheless, the statutes or instrument of incorporation or the general meeting, the decision of which must be published in accordance with the rules referred to in paragraph 1, may authorize an increase in the subscribed capital up to a maximum amount which they shall fix with due regard for any maximum amount provided for by law. Where appropriate, the increase in the subscribed capital shall be decided on within the limits of the amount fixed, (SIC! fixed) by the company body empowered to do so. The power of such body in this respect shall be for a maximum period of five years and may be renewed one or more times by the general meeting, each time for a period not exceeding five years.

3. Where there are several classes of shares, the decision by the general meeting concerning the increase in capital referred to in paragraph 1 or the authorization to increase the capital referred to in paragraph 2, shall be subject to a separate vote at least for each class of shareholder whose rights are affected by the transaction.

4. This Article shall apply to the issue of all securities which are convertible into shares or which carry the right to subscribe for shares,

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but not to the conversion of such securities, nor to the exercise of the right to subscribe.

Article 26

Shares issued for a consideration, in the course of an increase in subscribed capital, must be paid up to at least 25 % of their nominal value or, in the absence of a nominal value, of their accountable par. Where provision is made for an issue premium, it must be paid in full.

Article 27

1. Where shares are issued for a consideration other than in cash in the course of an increase in the subscribed capital the consideration must be transferred in full within a period of five years from the decision to increase the subscribed capital.

2. The consideration referred to in paragraph 1 shall be the subject of a report drawn up before the increase in capital is made by one or more experts who are independent of the company and appointed or approved by an administrative or judicial authority. Such experts may be natural persons as well as legal persons and companies and firms under the laws of each Member State.

▼M2

Article 10(2) and (3) and Articles 10a and 10b shall apply.

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3. Member States may decide not to apply paragraph 2 in the event of an increase in subscribed capital made in order to give effect to a merger or a public offer for the purchase or exchange of shares and to pay the shareholders of the company which is being absorbed or which is the object of the public offer for the purchase or exchange of shares.

4. Member States may decide not to apply paragraph 2 if all the shares issued in the course of an increase in subscribed capital are issued for a consideration other than in cash to one or more companies, on condition that all the shareholders in the company which receive the consideration have agreed not to have an experts' report drawn up and that the requirements of Article 10 (4) (b) to (f) are met.

Article 28

Where an increase in capital is not fully subscribed, the capital will be increased by the amount of the subscriptions received only if the conditions of the issue so provide.

Article 29

1. Whenever the capital is increased by consideration in cash, the shares must be offered on a pre-emptive basis to shareholders in proportion to the capital represented by their shares.

2. The laws of a Member State:

- (a) need not apply paragraph 1 above to shares which carry a limited right to participate in distributions within the meaning of Article 15 and/or in the company's assets in the event of liquidation; or
- (b) may permit, where the subscribed capital of a company having several classes of shares carrying different rights with regard to voting, or participation in distributions within the meaning of Article 15 or in assets in the event of liquidation, is increased by issuing new shares in only one of these classes, the right of pre-

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emption of shareholders of the other classes to be exercised only after the exercise of this right by the shareholders of the class in which the new shares are being issued.

3. Any offer of subscription on a pre-emptive basis and the period within which this right must be exercised shall be published in the national gazette appointed in accordance with Directive 68/151/EEC. However, the laws of a Member State need not provide for such publication where all a company's shares are registered. In such case, all the company's shareholders must be informed in writing. The right of pre-emption must be exercised within a period which shall not be less than 14 days from the date of publication of the offer or from the date of dispatch of the letters to the shareholders.

4. The right of pre-emption may not be restricted or withdrawn by the statutes or instrument of incorporation. This may, however, be done by decision of the general meeting. The administrative or management body shall be required to present to such a meeting a written report indicating the reasons for restriction or withdrawal of the right of pre-emption, and justifying the proposed issue price. The general meeting shall act in accordance with the rules for a quorum and a majority laid down in Article 40. Its decision shall be published in the manner laid down by the laws of each Member State, in accordance with Article 3 of Directive 68/151/EEC.

5. The laws of a Member State may provide that the statutes, the instrument of incorporation or the general meeting, acting in accordance with the rules for a quorum, a majority and publication set out in paragraph 4, may give the power to restrict or withdraw the right of pre-emption to the company body which is empowered to decide on an increase in subscribed capital within the limit of the authorized capital. This power may not be granted for a longer period than the power for which provision is made in Article 25 (2).

6. Paragraphs 1 to 5 shall apply to the issue of all securities which are convertible into shares or which carry the right to subscribe for shares, but not to the conversion of such securities, nor to the exercise of the right to subscribe.

7. The right of pre-emption is not excluded for the purposes of paragraphs 4 and 5 where, in accordance with the decision to increase the subscribed capital, shares are issued to banks or other financial institutions with a view to their being offered to shareholders of the company in accordance with paragraphs 1 and 3.

Article 30

Any reduction in the subscribed capital, except under a court order, must be subject at least to a decision of the general meeting acting in accordance with the rules for a quorum and a majority laid down in Article 40 without prejudice to Articles 36 and 37. Such decision shall be published in the manner laid down by the laws of each Member State in accordance with Article 3 of Directive 68/151/EEC.

The notice convening the meeting must specify at least the purpose of the reduction and the way in which it is to be carried out.

Article 31

Where there are several classes of shares, the decision by the general meeting concerning a reduction in the subscribed capital shall be subject to a separate vote, at least for each class of shareholders whose rights are affected by the transaction.

▼B*Article 32***▼M2**

1. In the event of a reduction in the subscribed capital, at least the creditors whose claims antedate the publication of the decision on the reduction shall at least have the right to obtain security for claims which have not fallen due by the date of that publication. Member States may not set aside such a right unless the creditor has adequate safeguards, or unless such safeguards are not necessary having regard to the assets of the company.

Member States shall lay down the conditions for the exercise of the right provided for in the first subparagraph. In any event, Member States shall ensure that the creditors are authorised to apply to the appropriate administrative or judicial authority for adequate safeguards provided that they can credibly demonstrate that due to the reduction in the subscribed capital the satisfaction of their claims is at stake, and that no adequate safeguards have been obtained from the company.

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2. The laws of the Member States shall also stipulate at least that the reduction shall be void or that no payment may be made for the benefit of the shareholders, until the creditors have obtained satisfaction or a court has decided that their application should not be acceded to.

3. This Article shall apply where the reduction in the subscribed capital is brought about by the total or partial waiving of the payment of the balance of the shareholders' contributions.

Article 33

1. Member States need not apply Article 32 to a reduction in the subscribed capital whose purpose is to offset losses incurred or to include sums of money in a reserve provided that, following this operation, the amount of such reserve is not more than 10 % of the reduced subscribed capital. Except in the event of a reduction in the subscribed capital, this reserve may not be distributed to shareholders; it may be used only for offsetting losses incurred or for increasing the subscribed capital by the capitalization of such reserve, in so far as the Member States permit such an operation.

2. In the cases referred to in paragraph 1 the laws of the Member States must at least provide for the measures necessary to ensure that the amounts deriving from the reduction of subscribed capital may not be used for making payments or distributions to shareholders or discharging shareholders from the obligation to make their contributions.

Article 34

The subscribed capital may not be reduced to an amount less than the minimum capital laid down in accordance with Article 6. However, Member States may permit such a reduction if they also provide that the decision to reduce the subscribed capital may take effect only when the subscribed capital is increased to an amount at least equal to the prescribed minimum.

Article 35

Where the laws of a Member State authorize total or partial redemption of the subscribed capital without reduction of the latter, they shall at least require that the following conditions are observed:

- (a) where the statutes or instrument of incorporation provide for redemption, the latter shall be decided on by the general meeting

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voting at least under the usual conditions of quorum and majority. Where the statutes or instrument of incorporation do not provide for redemption, the latter shall be decided upon by the general meeting acting at least under the conditions of quorum and majority laid down in Article 40. The decision must be published in the manner prescribed by the laws of each Member State, in accordance with Article 3 of Directive 68/151/EEC;

- (b) only sums which are available for distribution within the meaning of Article 15 (1) may be used for redemption purposes;
- (c) shareholders whose shares are redeemed shall retain their rights in the company, with the exception of their rights to the repayment of their investment and participation in the distribution of an initial dividend on unredeemed shares.

Article 36

1. Where the laws of a Member State may allow companies to reduce their subscribed capital by compulsory withdrawal of shares, they shall require that at least the following conditions are observed:

- (a) compulsory withdrawal must be prescribed or authorized by the statutes or instrument of incorporation before subscription of the shares which are to be withdrawn are subscribed for;
- (b) where the compulsory withdrawal is merely authorized by the statutes or instrument of incorporation, it shall be decided upon by the general meeting unless it has been unanimously approved by the shareholders concerned;
- (c) the company body deciding on the compulsory withdrawal shall fix the terms and manner thereof, where they have not already been fixed by the statutes or instrument of incorporation;
- (d) Article 32 shall apply except in the case of fully paid-up shares which are made available to the company free of charge or are withdrawn using sums available for distribution in accordance with Article 15 (1); in these cases, an amount equal to the nominal value or, in the absence thereof, to the accountable par of all the withdrawn shares must be included in a reserve. Except in the event of a reduction in the subscribed capital this reserve may not be distributed to shareholders. It can be used only for offsetting losses incurred or for increasing the subscribed capital by the capitalization of such reserve, in so far as Member States permit such an operation;
- (e) the decision on compulsory withdrawal shall be published in the manner laid down by the laws of each Member State in accordance with Article 3 of Directive 68/151/EEC.

2. Articles 30 (1), 31, 33 and 40 shall not apply to the cases to which paragraph 1 refers.

Article 37

1. In the case of a reduction in the subscribed capital by the withdrawal of shares acquired by the company itself or by a person acting in his own name but on behalf of the company, the withdrawal must always be decided on by the general meeting.

2. Article 32 shall apply unless the shares are fully paid up and are acquired free of charge or using sums available for distribution in accordance with Article 15 (1); in these cases an amount equal to the nominal value or, in the absence thereof, to the accountable par of all the shares withdrawn must be included in a reserve. Except in the event of a reduction in the subscribed capital, this reserve may not be distributed to shareholders. It may be used only for offsetting losses

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incurred or for increasing the subscribed capital by the capitalization of such reserve, in so far as the Member States permit such an operation.

3. Articles 31, 33 and 40 shall not apply to the cases to which paragraph 1 refers.

Article 38

In the cases covered by Articles 35, 36 (1) (b) and 37 (1), when there are several classes of shares, the decision by the general meeting concerning redemption of the subscribed capital or its reduction by withdrawal of shares shall be subject to a separate vote, at least for each class of shareholders whose rights are affected by the transaction.

Article 39

Where the laws of a Member State authorize companies to issue redeemable shares, they shall require that the following conditions, at least, are complied with for the redemption of such shares:

- (a) redemption must be authorized by the company's statutes or instrument of incorporation before the redeemable shares are subscribed for;
- (b) the shares must be fully paid up;
- (c) the terms and the manner of redemption must be laid down in the company's statutes or instrument of incorporation;
- (d) redemption can be only effected by using sums available for distribution in accordance with Article 15 (1) or the proceeds of a new issue made with a view to effecting such redemption;
- (e) an amount equal to the nominal value or, in the absence thereof, to the accountable par of all the redeemed shares must be included in a reserve which cannot be distributed to the shareholders, except in the event of a reduction in the subscribed capital; it may be used only for the purpose of increasing the subscribed capital by the capitalization of reserves;
- (f) subparagraph (e) shall not apply to redemption using the proceeds of a new issue made with a view to effecting such redemption;
- (g) where provision is made for the payment of a premium to shareholders in consequence of a redemption, the premium may be paid only from sums available for distribution in accordance with Article 15 (1), or from a reserve other than that referred to in (e) which may not be distributed to shareholders except in the event of a reduction in the subscribed capital; this reserve may be used only for the purposes of increasing the subscribed capital by the capitalization of reserves or for covering the costs referred to in Article 3 (j) or the cost of issuing shares or debentures or for the payment of a premium to holders of redeemable shares or debentures;
- (h) notification of redemption shall be published in the manner laid down by the laws of each Member State in accordance with Article 3 of Directive 68/151/EEC.

Article 40

1. The laws of the Member States shall provide that the decisions referred to in Articles 29 (4) and (5), 30, 31, 35 and 38 must be taken at least by a majority of not less than two-thirds of the votes attaching to the securities or the subscribed capital represented.

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2. The laws of the Member States may, however, lay down that a simple majority of the votes specified in paragraph 1 is sufficient when at least half the subscribed capital is represented.

*Article 41***▼M2**

1. Member States may derogate from Article 9(1), the first sentence of point (a) of Article 19(1), and Articles 25, 26 and 29 to the extent that such derogations are necessary for the adoption or application of provisions designed to encourage the participation of employees, or other groups of persons defined by national law, in the capital of undertakings.

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2. Member States may decide not to apply Article 19 (1) (a), first sentence, and Articles 30, 31, 36, 37, 38 and 39 to companies incorporated under a special law which issue both capital shares and workers' shares, the latter being issued to the company's employees as a body, who are represented at general meetings of shareholders by delegates having the right to vote.

Article 42

For the purposes of the implementation of this Directive, the laws of the Member States shall ensure equal treatment to all shareholders who are in the same position.

Article 43

1. Member States shall bring into force the laws, regulations and administrative provisions needed in order to comply with this Directive within two years of its notification. They shall forthwith inform the Commission thereof.

2. Member States may decide not to apply Article 3 (g), (i), (j) and (k) to companies already in existence at the date of entry into force of the provisions referred to in paragraph 1.

They may provide that the other provisions of this Directive shall not apply to such companies until 18 months after that date.

However, this time limit may be three years in the case of Articles 6 and 9 and five years in the case of unregistered companies in the United Kingdom and Ireland.

3. Member States shall ensure that they communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 44

This Directive is addressed to the Member States.