of the position of such special groups of workers as the long-term unemployed, migrant workers, illiterates and the handicapped.

There is also a need for model further training programmes which reflect the special family situation of women.

2.16. The Commission plans to manage the implementation of the programme with the assistance of a liaison group; this is supported but its composition needs to be widened to take into account all groups and levels of employers, workers and other socio-economic interests. This would be an easy process since relevant European organizations other than those mentioned in the Council Decision can be clearly identified.

2.17. Continuing vocational training is only one stage in an overall educational process. Its success thus depends on a certain minimum level of educational attainment and the acquisition of basic occupational skills during initial training. It then becomes an important means of improving employment prospects, although it cannot in itself solve all the problems of the labour market. Labour-market policy must therefore be designed to create the conditions which will allow continuing vocational training to provide genuine opportunities rather than resulting in demotivation.

The Committee has been able to make only a few, essentially basic, observations on the complex and important question of the function and future organization of continuing vocational training within the Community in this Opinion. In view of the importance of this question, however, it strongly urges the Commission to incorporate these recommendations in its future plans.

Done at Brussels, 28 March 1990.

The Chairman
of the Economic and Social Committee
Alberto MASPRONE

Opinion on:

— the proposal for a Council Regulation (EEC) on the statute for a European company, and on

— the proposal for a Council Directive complementing the statute for a European company with regard to the involvement of employees in the European company (1)

(90/C 124/12)

On 21 September 1989 the Council decided to ask the Economic and Social Committee for an Opinion under Articles 100A and 54 of the EEC Treaty on the abovementioned proposals.

The Section for Industry, Commerce, Crafts and Services, which was responsible for the preparatory work, adopted its Opinion on 7 March 1990. Mr Petersen was Rapporteur.

At its 275th plenary session (meeting of 28 March 1990), the Economic and Social Committee adopted the following Opinion by 105 votes to 25, with 24 abstentions.

1. Introduction

1.1. ‘The removal of internal boundaries and the establishment of free movement of goods and capital and the freedom to provide services are clearly fundamental to the creation of the internal market. Neverthe-

in the years ahead—not least in the field of company law. Although views may differ as to the necessary extent of company law harmonization, there is agreement that the approximation of national company law at a certain level is essential for the Common Internal Market. The Committee has therefore urged the Council and Commission several times 'to step up and properly organize their overdue action on the company law front'. Of course, this could not be allowed to lead to distortions between national and European forms of company.

1.1.2. European firms need more room for manoeuvre and more freedom of movement in order to deal with the unavoidable restructuring at Community level as smoothly as possible. This is the only way to strengthen the competitiveness of European firms, counter the growing pressures from multinationals in the rest of the world with success and create and safeguard jobs on a permanent basis. A high degree of flexibility and readiness to take risks is required. In this context European firms should have as many practically-oriented forms of company as possible to choose from.

1.1.3. Against the background of these considerations the Committee has generally welcomed the creation of a European Company (Societas Europaea = SE)—despite differing views on points of detail. It believes that allowing Community firms to adopt a supranational legal form in the shape of an SE is a suitable instrument for improving cross-frontier cooperation between firms and promoting economic integration in the Community. The Committee is particularly pleased that the proposal for a regulation now allows small and medium-sized enterprises the opportunity of making use of the SE statute.

1.1.4. As regards certain special types of businesses (cooperatives, mutual benefit associations etc.) known collectively as the 'Economie Sociale' sector, the Committee is pleased to note that the Commission has taken up its suggestion (1) to examine the need for an alternative, optional European legal framework for such businesses, since they have distinctive features which must be safeguarded and for which the present proposal offers no suitable legal form. However, such a legal framework should not be viewed in all cases as an alternative to the generally-applicable SE statute but as an auxiliary solution reserved for particular ventures and governed by separate legal rules. Following a request from the Commission, the Committee is currently preparing a special Opinion on this matter, discussing questions put to it in SEC(89) 2187 final.

1.2. The Committee feels, however, that the Commission's high hopes in the SE statute will only be fulfilled if it is given a practicable form. Above all, it is necessary, with the SE statute, to create a system of company law which is as uniform and independent of national law as possible. The Committee recognizes the difficulties which would arise in trying to achieve this ideal. Uniformity is basically desirable but it cannot be achieved at this stage because the differences between the social and legal conditions in member States are still too great. But the Committee would point out the danger that the SE statute might deviate too far from the principle of uniformity because of its abundant references to national laws. The result would be an undesirable co-existence of differing regulations and forms of organization which were no longer comparable. These fears have increased further in view of the Commission's present proposal for an SE statute.

1.3. It is to be welcomed that the Commission, in revising its 1975 proposal, has taken account of numerous suggestions of the Committee concerning individual provisions of the SE statute, as put forward in particular in the ESC Opinion of 24 November 1988. (2) As a result many technical and organizational details are dealt with in a more practical manner in the statute. Particularly welcomed are the more relaxed rules on capital and founding an SE.

1.4. As regards groups, the Committee shares the Commission's view that the position of groups should be dealt with separately, particularly with regard to the protection of minority shareholders, creditors and workers. The discussion on the planned co-ordination of the laws of the Member States on groups shows, however, that it is hardly possible to achieve a consensus at present on a viable European body of law for groups. The Member States have developed very different legal systems for ensuring groups can operate efficiently. The Committee therefore feels that discussion of separate group provisions in the statute should be started soon, in order to iron out practical difficulties.

1.5. The Committee regrets that the Council has not yet adopted the tax directive package concerning the tax treatment of mergers and similar operations, the tax treatment of parent companies and subsidiaries and an arbitration procedure to eliminate double taxation. There are still considerable tax differences between the

(2) OJ No C 23, 30. 1. 1989, p. 36.
Member States of the European Community which hinder closer cooperation between European firms across national borders and prevent them from being able to work together under optimal economic conditions. The Committee therefore calls upon the Council to take the necessary decisions in this area as quickly as possible, though without overlooking the need to harmonize other taxes. Firms—and the Council should remember this—will only make use of the proposed legal structure of an SE if existing tax obstacles are extensively removed.

1.5.1. It would, however, be wrong to make the tax benefits such that tax-based distortions of competition arise in relation to other firms which are not organized in the form of a European Company.

1.6. The Committee accepts that in the rewriting of various clauses in the statute reference has been made to proposed solutions on which the Member States have already agreed when adopting previous harmonization Directives. Even if views still differ on the fitness and practicality of some of these rules, the compromise solutions which were often arrived at after years of discussions in the Council should not be once again called into question. Moreover, many of the relevant Directives have already been incorporated into Member States' national laws. If different solutions were found in the SE statute, the result would be an inequality of treatment between national company forms and the SE, which the Committee considers undesirable. If, in individual cases, unsuitable solutions resulted in practice, the basic EEC directives would have to be changed at the same time, as part of a comprehensive reform.

1.7. As regards the collective representation of employees' interests within firms and the involvement of employees in certain company decisions, the Committee has repeatedly confirmed and emphasized its agreement with the principle that the involvement of employees is an important prerequisite for the development of a democratic society. If no account were taken of staff-related factors in a company, one would be ignoring economic, social, historical and legal reality.

1.7.1. The Committee therefore recalls the view which it expressed in its Opinion of 25 October 1972 on the proposal for a European company statute and confirmed in its Opinion of 29 May 1974 that workers must be allowed collective representation of their interests in the firm and must be afforded a say in certain of the firm's decisions, but without detriment to the responsibility and effectiveness of the firm's management.

1.7.2. However, in view of different political, social, historical and ideological concepts in the Member States, employee involvement has not developed in accordance with exactly identical models, nor has it reached the same stage in all Member States. The Committee therefore still feels that in this area—as, indeed, in many others—uniformity cannot be achieved for the time being. In this respect, the more flexible approach adopted by the Commission in proposing various participation systems may increase the chances of acceptance and hence political feasibility. But the aim should be that the proposed worker participation options should be equivalent from the point of view of their content.

1.8. As regards the legal basis for the SE, the Committee did advocate, in its Opinion of 24 November 1988 on the Commission's memorandum, a unanimous decision in the Council of Ministers, in view of the scheme's importance to business, social and taxation policy and of Article 100A (2) of the EEC Treaty.

This is in keeping with the wishes of the Member States as expressed in the Single European Act. The approach now proposed by the Commission, namely taking the provisions on worker participation out of the Regulation and putting them in a Directive based on Article 54 (3) (g), would make it possible for a decision to be taken by a qualified majority.

1.8.1. The Committee declines from expressing a view in this Opinion on the difficult and, in places, controversial legal issues of the SE's legal basis. But it wonders whether it is advisable, in an area which has such significant implications for the social dimension of the future Internal Market, to split up the rules into two legal acts having a different legal status and push through decisions of principle on worker participation and taxation policy by a qualified majority. This contradicts the idea of having a uniform and indivisible legal scheme and requires yet another process of extensive justification by the Commission. This applies all the more because it is to be expected that the present solutions may provide guidelines for further EC projects, such as the fifth company law Directive on the structure of national public limited companies (PLC) and worker participation arrangements.

1.8.2. In any case, the rights granted to the European Parliament by the Single Act must be preserved.

1.9. The Committee generally agrees with the aims of the Commission's proposals, subject to the following comments:
2. Comments on the proposal for a Regulation

Article 2

2.1. The Committee welcomes the extended possibility provided for in Article 2 (2) of setting up a joint subsidiary in the legal form of an SE. Such an option would be open not only to national PLC but also to all legal bodies governed by public or private law, particularly cooperatives.

2.2. The Committee thinks that later on, when initial experiences with the new SE statute have been gathered in, consideration should be given to further relaxing the possibilities of access for small and medium-sized businesses. National companies could be allowed to change themselves into an SE or to set up a subsidiary having the legal form of an SE. Even within a firm, the possibility of having an organizational set-up subject to EEC law may be required, owing to the cross-border nature of facts which may result from the existence of several business establishments in different Member States.

Article 3

2.3. The Committee sees no reason why a subsidiary of an SE should be prohibited from setting up a subsidiary which is itself an SE. Article 3 (3) should therefore be deleted. The Commission's argument that there might be 'cascades' of SE is unconvincing.

Article 4

2.4. The Committee agrees with the Commission's proposal to set the minimum capital for all forms of SE at ECU 100 000. This will make it easier for smaller firms with a narrower financial base to set up an SE.

2.5. It should be made clear in Article 4 (1) that the minimum capital referred to there is the 'subscribed' capital, which the founders are obliged to raise. This would explain the difference from the company assets, the value of which is constantly fluctuating.

2.6. The stipulation in the third sentence of Article 5 that the registered office of an SE shall be the same as the place where the SE has its central administration may lead to legal uncertainties, as the term 'central administration' is not clearly defined.

Article 7

2.7. It is clear to the Committee, on basis of the principle of autonomy of will, that matters covered by the proposed Regulation but not expressly mentioned in it are subject to the members' power to take decisions as set out in the instrument of incorporation and the statute.

2.7.1. This will can only be limited by mandatory provisions of the statute itself, of applicable Community law by virtue of Article 7 (3) and (on a supplementary basis) of the law applicable to public limited companies in the state where the SE has its registered office, pursuant to Article 7 (1) (b).

2.7.2. As regards the conflicts of laws referred to in Article 7 (3), it should be understood that the court can apply national law designated by its own conflicts of laws system only if application of that law does not lead to a solution incompatible with the basis objectives of the statute. In the event of incompatibility the court should itself be able to determine the solution in the light of these objectives.

2.7.3. As the statute is an act of the Community institutions, the court will be able, if it seems necessary, to request the Court of Justice to give a ruling on the question submitted to it (Article 177 of the EEC Treaty).

2.8. Moreover, it should be pointed out, in connection with Article 7 (4), that important areas of the law, such as insolvency law, industrial property law and the law on unfair competition, have not yet been harmonized.

Article 11

2.9. The information required in Article 11 for certain documents relating to the SE sometimes goes beyond the requirements of the first company law Directive. This applies, for example, to Article 11 (d). The Committee sees no need for this. At least, the reference to the SE's VAT number in Article 11 (e) should be deleted and remain subject to harmonization of tax laws.

Article 12

2.10. In view of the limited possibilities of access to the status of an SE, the Committee refers to its comments on Article 2.

Article 13

2.11. The Committee would point out that the Member States' legal requirements regarding the contents of the instrument of incorporation and statutes vary considerably. Article 13 should therefore specify the minimum information to be supplied when the SE is registered.

Article 15

2.12. It is not clear how the Commission will ensure that the 'measures necessary' referred to in the second
sentence of Article 15 are taken in a uniform way throughout the Community. This concern will become particularly pressing if the complementing Directive is incorporated differently or inadequately into national law by the Member States.

Article 16

2.13. As the Member States have different rules about the moment when a company has legal personality, this may lead to uncertainties on the part of creditors and shareholders in Member States other than that in which the SE is registered.

Article 17

2.14. It should be made clear in Article 17(2) that the shareholders of a founder company in liquidation decide about the merger.

The Committee considers it right that the employees' representatives in the founder companies—as provided for in Article 17(3) and Article 33—should be able to have discussions with the administrative or management boards involved about the legal, economic and employment implications of the formation of an SE and about any measures proposed to deal with them. This obligation should also apply to the setting-up of a joint subsidiary. Although the founder companies here remain autonomous and independent the setting up of a new subsidiary may, in certain cases, affect jobs in the founding firms.

Article 25

2.15. As regards the effective date of an SE’s formation covered in Article 25, the Committee would refer to Articles 135 and 136 of the proposal for a Regulation, as well as the second sentence of Article 1 and Article 3(2) of a proposal for a Directive, concerning the involvement of employees, from which it follows that an SE can only be formed when the Directive has been incorporated into the national law of the State where the SE has its registered office.

Article 29

2.16. The Committee would point out that, quite apart from the nullity rules deriving from Article 29 of the proposed Regulation, the competition Rules of the Treaty (Articles 85 and 86) will also possibly have to be applied.

Article 31

2.17. The Committee sees no reason to make the creation of an SE holding company a sort of merger. It does not see why shareholders in the founder companies could not, if they so wished, remain shareholders if the holding company owns, for example, 50% of each of these companies.

Article 38

2.18. The denomination of the SE’s capital in ECU laid down in Article 38(1) would mean that all the SE’s accounts and its annual report would also have to be denominated in ECU. The Committee considers it desirable that the currency of the State in which the SE has its registered office should be recognized as an optional, additional accounting unit.

2.19. In Article 38(2) the words ‘paid up at the time the company is registered’ are ill-chosen, bearing in mind the differences between EEC Rules on forming companies. The period of five years for paying consideration other than cash is at odds with the commentary on the Articles, which refers to the need to protect against fictitious consideration. In addition, authorization should be given to issue shares with no par value, in accordance with Articles 8 and 9 of the second company law Directive. The Commission should also examine whether it can be made possible to issue shares at a price other than the par value.

2.20. The Committee trusts that, in accordance with more recent valuation practices, suitable account can also be taken of intangible assets when determining subscribed capital.

Article 44

2.21. The deadline of 14 days mentioned in the third sentence of Article 44(2) for exercising the right of pre-emption should be extended because, in the case of an SE and the consequent use of several postal services, the delivery time will often actually be longer.

Article 45

2.22. Article 45(3) stipulates that a reduction of subscribed capital shall be effected by reducing the nominal value of the shares. The possibility of reducing capital through the exchange of shares is not envisaged in the draft. The exchange of shares should be seen as one of the methods of reducing capital, the aim being to provide the SE with all the instruments needed for it to function properly.

2.23. The wording of Article 45(4) should be brought into line with the corresponding provision of Article 33(2) of the second Directive.

Article 49

2.24. The Committee considers it essential that an SE should have the possibility of acquiring its own shares in Article 49(2) subject to the same restrictions as those laid down in the second company law Directive. According to Article 19 of this Directive, Member States may permit a company to acquire its own shares, even without giving any particular reason, if the general
meeting gives its authorization or if such action is necessary to prevent serious and imminent harm to the company. The Member States have made extensive use of this power when enacting the second Directive. In order to accommodate the practical needs of the firms involved and ensure equal treatment with national PLC, this exception clause should also be included in the SE statute. For the same reasons an exception to the ban in Article 49 (5) on a SE pledging its own shares as security should be permitted for transactions concluded by banks and other financial institutions in the normal course of business, as is the case in Article 24 (2) of the second Directive.

Article 50

2.25. The text of Article 50 and the commentary on it are at odds with each other, so that it is unclear whether holdings of the SE or in the SE are meant. As the SE statute can only bind an SE and not national companies, the misleading commentary should be adapted. Holdings of national persons in an SE, to the extent that such persons are listed on a stock exchange and national laws lay down no other provisions, are governed by Directive 88/627/EEC. In order to make the extent of the notification obligations clearer, the Commission should draft Article 50 more clearly and regulate the essential principles of the above-mentioned Directive in the Regulation itself.

Article 52

2.26. The Committee feels that the ban in Article 52 (3) on an SE issuing shares with multiple voting rights is problematic. Such a ban would particularly affect family businesses, which should not be barred from using the legal form of an SE.

Article 53

2.27. As the second sentence of Article 53 (2) is unclear in some language versions, the Committee assumes that anyone who is interested in doing so is free to inspect the register of shareholders without making any special application or giving any justification.

Article 54

2.28. Article 54 makes the issue, replacement and cancellation of share certificates and the transfer of shares subject to the laws of the state in which the SE has its registered office. The Committee would point out that this could lead to considerable legal uncertainty.

Article 60

2.29. The Committee believes that it is going too far to prohibit an SE from issuing to persons who are not shareholders other securities carrying a right to participate in the profits or assets of the SE, as Article 60 does. This would immediately rule out the possibility of other measures to raise capital, such as participation rights.

2.30. The SE should also be able to issue shares or debentures with warrants attached, in accordance with the laws of the Member States, i.e. securities to which are attached one or more negotiable certificates giving the right to buy one or more new securities, whether shares or debentures, in accordance with conditions laid down in advance.

2.30.1. The SE statute should therefore make provision for an SE to have access to all modern forms of financing available to any national PLC in the country of registration.

Article 62

2.31. It is inconsistent with the need for continuity in a company's business policy to allow members of the management board to be removed 'at any time', as in Article 62 (2). If members of the management board are to have the independence they need, their removal should only be possible on proper grounds.

2.32. In Article 62 (5) The word 'shall' should be replaced by 'may', as the management board should not be deprived of the possibility of laying down rules of procedure for itself.

Article 69

2.33. The Committee approves the means of ensuring a certain degree of protection for minority interests contained in Article 69 (4), as long as the general meeting may make a real choice and does not have a specific person imposed on it. However, whatever methods of appointment are used, consideration should be given to having the persons chosen belong to a collegiate body responsible for managing the company in the interests of the latter.

Article 70

2.34. The Committee notes that an alternate member, when carrying out his duties of representation, is a fully empowered member of the body concerned with the same rights and obligations.

Article 72

2.35. The Commission is asked to align the various official language versions of the text, as they differ considerably from one another.

2.36. The Committee notes that the operations requiring prior authorization mentioned in
Article 72 (1) concern acts of business management which, on principle, under the two-tier system, do not come under the jurisdiction of the supervisory board. In order to accommodate the practical needs of the individual companies involved, bearing in mind national factors, it should be left up to the Articles of association or the supervisory board of the SE to determine the nature and extent of such operations. If the supervisory board-withholds its agreement, the management board should be empowered to convene a general meeting.

2.37. As the management and supervisory functions are less clearly demarcated in the one-tier system, thought could be given to seeking different solutions for the two administrative structures.

2.38. It is incomprehensible that, according to the second sentence of Article 72 (1), the implementation of decisions may not be delegated to the executive members of the administrative board, although they are the very people competent to carry out such acts. The text of the Regulation should therefore be changed to make it clear that the implementation of decisions is the duty of those actually responsible for management.

Article 74

2.39. It is not clear what the legal consequences would be of any breach of the confidentiality requirement set out in Article 74 (3). Such breaches should not remain unpunished.

Article 75

2.40. Contrary to the Rule proposed in Article 75 (2), only that body whose member is to be removed on proper grounds should be empowered to institute corresponding proceedings before a court. Other bodies are hardly in a position to judge whether the circumstances involved constitute proper grounds.

Article 77

2.41. As regards the joint and several liability of all board members laid down in Article 77 (2), the Committee feels that it should be borne in mind that responsibilities in decision-making bodies are often delegated. It seems rather sweeping to make board members liable for decision in which they were not involved. At least, the proposed burden of proof in the second sentence of Article 77 (2) should be reversed, so that the complaining party would have to prove that the relevant board member was guilty of a fault.

Article 78

2.42. The Committee approves the reference in Article 78 (3) to a certain percentage of the company's capital as the criterion for being able to institute proceedings on behalf of the company. However, the percentage should refer not to the capital held but to the securities carrying voting rights, which reflect the real degree of power of a shareholder within a company. Such a reference to the percentage of voting rights would comply with the Directive on the information to be published when a major holding in a listed company is acquired or disposed of, or with the proposed Directive on take-overs and other general bids.

Article 79

2.43. As regards the right of opposition referred to in the third sentence of Article 79 (1), account should not be taken of shareholders barred from voting under Article 93.

Article 80

2.44. It should be laid down in Article 80 that the period within which actions may be instituted should only start after the acts giving rise to damage have come to the knowledge of the company.

Article 81

2.45. Contrary to what is written in Article 81 (f), the annual accounts should only be approved by the general meeting, at least in a company with a two-tier system, if the management and supervisory board have agreed to this. As shareholders are interested above all in having as high a dividend as possible, it is to be feared that, if only the general meeting were responsible for approving the accounts, insufficient attention would be paid to the need to build up reserves. The management and supervisory board must have the possibility, through approving the annual accounts, of deciding to set aside sufficient reserves to ensure the SE’s continued existence and its market position.

2.46. It should also be laid down in Article 81 that the general meeting should decide each year on the discharge of the members of the administrative board of the SE. By the discharge the general meeting endorses the administration of the company.

2.47. Because of the considerable consequences in the field of worker participation legislation which could arise if the registered office of an SE were transferred from one Member State to another, the Committee assumes that a corresponding decision by the general meeting in accordance with Article 81 (h) can only be taken at the initiative of the management and supervisory board or the administrative board.

Article 82

2.48. In Article 82 (1) it should be made clear that a general meeting should be held at least once ‘within the financial year'.

2.49. The Committee feels that the supervisory board should also have the right, under Article 82 (2), of being able to call a general meeting at any time.

Article 83

2.50. To make things clear and prevent abuse, Article 83 (1) should be amplified so as to state that shareholders requesting a general meeting should do so in writing and give the purpose and reasons for their action. As regards the petitioning rights of minority shareholders, the Committee refers to its comments on Article 78.

Article 84

2.51. Among the types of general meeting listed in Article 84 (2) (c), it is not clear to the Committee what is meant by a 'special' meeting. There should therefore be some clarification.

Article 85

2.52. The Committee thinks that the seven-day deadline in Article 85 (2) for requesting the inclusion of additional agenda items is too short. Bearing in mind the time needed for postal deliveries and for reasonable reflection, the deadline should be extended to ten days.

Article 86

2.53. The Committee considers that, in addition to the shareholders, members of the management and supervisory or administrative boards, or designated auditors, as well as the auditors of the annual report, should also be entitled to attend the general meeting. As members of the company’s executive bodies, they cannot be barred from providing themselves with a first-hand impression of the proceedings at the general meeting.

2.54. Similarly, shareholders having no voting rights cannot be prohibited from attending the general meeting, as is proposed in the second sentence of Article 86, because, even if they have no voting rights, they are still co-owners of the company, like the other shareholders. The second sentence of Article 86 should therefore be deleted.

Article 87

2.55. There is no apparent reason why the choice of a shareholder’s representative should be limited by law or by the SE’s statute to one or more specified groups of persons. Every shareholder must be free to have himself represented by someone he trusts. The representative must have the right to speak at the general meeting on the items on the agenda.

2.56. The stipulation in Article 87 (3) that the appointment of a representative must be communicated in writing is incompatible with the principle of anonymity for bearer shares. Shareholders who did not wish their name to be publicly known would be barred from being represented at the general meeting. For this reason it should be sufficient, bearing in mind the importance of having as many people present as possible at a general meeting, for the authorized representative to submit the shares or a certificate of deposit to a solicitor or to a financial institution.

Article 88

2.57. As regards the rules in Article 88 (1) (e), the Committee would point out the differences in Member States’ traditions on the question of proxies. This problem requires a clarification which goes beyond the case of the SE.

Article 89

2.58. As the explanatory memorandum states that agreements requiring approval by the general meeting must also be available to the shareholder, this should be expressly laid down in the first sentence of Article 89.

Article 92

2.59. It is no clear in Article 92 (1) how voting rights are to be calculated in the case of non-voting preference shares. The Committee therefore suggests the following wording: ‘A shareholder’s voting rights shall be proportionate to the fraction of the subscribed capital which his voting shares represent’.

2.60. Because of the proposed ban on issuing shares with multiple voting rights, the Committee refers to its comments on Article 52.

Article 95

2.61. There is no need, in the Committee’s view, to give company boards the power, as in Article 95 (2), to amend the statutes if such amendment merely implements a resolution already passed by the general meeting. The cases mentioned in the explanatory memorandum to Article 95 involving authorized capital and convertible debentures are already provided for in the special provisions [see Article 43 (2) and Article 58 (4)] . In all other cases the principle set out in Article 95 (1) should apply, whereby only the general meeting can amend the statutes.

Article 97

2.62. Under Article 97 (2) the statutes or the instrument of incorporation could be amended by a majority consisting of little more than 25% of the subscribed
capital represented. The Committee thinks that a higher percentage should be required for decisions of principle of such importance to the company.

Article 99

2.63. The Committee feels that the three-year period for the retention of the minutes and documents annexed thereto, set out in the first sentence of Article 99 (4) is too short. It should be extended to at least five years, not least because of the statute of limitations deadline in Article 80.

2.64. In view of the obligation in the second sentence of Article 99 (4) to make a copy of the minutes and the documents annexed thereto available free of charge to any shareholder upon request, there should at least be an alternative possibility of filing the minutes, which often run to several hundred pages, on the commercial register. Any shareholder would then be able to look at the documents in the commercial register.

Article 100

2.65. According to Article 100 (2) an appeal action may be brought, not only by any shareholder, but also by 'any person having a legitimate interest'. This could lead to third parties with no close legal ties to the company bringing heavy pressure to bear on it, as anyone can maintain, in the first instance, that he or she has such a legitimate interest. The Committee would point to developments in some Member States in which appeal actions are increasingly being brought against companies for the purpose of extortion. An attempt should therefore be made to find ways of preventing such abuses of an appeal action. It should at least be laid down that an appeal action may only be brought if opposition to a resolution of the general meeting is declared in the minutes or the company is censured for the infringement within one week. Otherwise it is not clear to the company, during the deadline for appeals laid down in Article 100 (3), if it will have to deal with a challenge to a resolution of the general meeting or not. In order that the implementation of such resolutions should not be dragged out unreasonably, the deadline for appeals in Article 100 (3) should be shortened to one month. Thought could also be given to ending the suspensive effect of an appeal action, although the company would be obliged to pay damages if the complaint were later proved to have been well-founded. At any rate, employees' representatives should be entitled to bring an appeal action as they are not third parties.

Article 114

2.66. The Committee has already said in its Opinion on the Commission's memorandum that a special set of rules for groups would be desirable, especially with regard to the protection of minority shareholders, creditors and employees.

2.67. The principle laid down in Article 114 that an SE should be treated as a national PLC if it is not subject to specific legislation on groups is in accordance with the generally recognized principles of private international law.

Article 115

2.68. The Committee assumes that Article 115 only concerns the winding-up of a solvent company. The Committee thinks the period of three financial years proposed in Article 115 (3) (b) is too long. At any rate, a winding-up should not occur if documents are filed within a specified period after a reminder by the register.

Article 120

2.69. Bearing in mind the law in some Member State, the Committee feels that Article 120 (2) (c) should also empower the authorities to apply to the court of the appointment of liquidators.

Article 133

2.70. The Committee considers it essential that the taxation directives proposed by the Commission—concerning the tax treatment of mergers and similar operations, the tax treatment of parent companies and subsidiaries and an arbitration procedure to eliminate double taxation—be adopted as soon as possible. A satisfactory solution must be found to the tax problems since use will be made of the proposed legal structure only if there are no tax obstacles.

2.71. Under the existing tax laws of the Member States it would for all practical purposes be impossible to found European Companies since this would often involve disclosure and taxation of hidden reserves. The double taxation of dividends paid by a subsidiary to a parent company would also place considerable obstacles in the way of cross-frontier cooperation.

2.72. Solution will also have to be found to the problem, which is not mentioned in Article 133, of transfer pricing in international groups of companies and of double taxation of profits as a result of the lack
of coordination between finance authorities in the case of double taxation agreements.

2.73. The Committee endorses the Commission's proposal in Article 133 concerning the imputing of losses incurred by foreign establishments abroad, but would stress that all other tax obstacles must be eliminated.

2.74. As the Committee has already said in paragraph 1.5.1, it would be unacceptable to make the tax benefits such that tax-based distortions of competition arise in relation to other firms which are not organized in the form of a European Company.

3. Comments on the proposal for a Directive complementing the statute for a European company with regard to the involvement of employees in the SE

3.1. In its Opinion of 24 November 1988 on the Commission memorandum the Committee showed understanding for the incorporation of different models for worker participation in the SE statute. In view of the existing differences in worker participation law within the Community it seemed hardly realistic to provide for a single worker participation system accepted by all Member States. The course adopted by the Commission of making worker participation more flexible by offering various models is therefore calculated to make it more acceptable and thus politically feasible.

3.2. As regards the proposed options for worker participation, the Committee has indicated various aspects which will require a solution when the SE statute is implemented in practice:

— The equivalence of the minimum provisions of worker participation must be ensured.

— The Committee considered it of vital importance for the legal form to be practical—including the Rules on worker participation.

— The Committee trusted that allowance would be made for companies’ need to be able to take decisions and the rights of shareholders by taking account of the shareholders’ right to have the final say.

— The decision on which of the various participation systems to adopt had to be the subject of consultations between the trade unions represented in the companies or their in-company representatives (works councils etc.) and the management of the company concerned, with the aim of reaching an agreement.

— It should be borne in mind that existing national participation systems contained various participation arrangements depending on a number of criteria (size of workforce, legal structure etc.).

3.3. In European Companies operating within the Community it is necessary to ensure that workers are consulted at the level of the company where strategic business decisions are taken.

3.4. After examining the individual provisions of the proposal for a Directive, the Committee notes that in some respects the Commission has taken insufficient account of these principles:

   Articles 1, 2 and 7 (3)

3.5. In the case of an SE formed as a holding company in accordance with Article 31, the employees of the founder companies must be given the opportunity, through the Directive, of participating in the election of employees' representatives in the SE holding company.

3.6. The Committee considers such participation to be essential, as the decisions of the management of an SE set up under Article 31 of the Regulation may also have effects on the employees of the founder companies.

Article 3

3.7. As the European Company can choose between a single-tier and a two-tier administrative structure, according to Article 61 of the proposal for a Regulation, the number of participation models—especially with the so-called 'German model' in accordance with Article 4—would increase. This would cause the uniformity of the SE statute to be further impaired, even for companies with their registered offices in the same Member State. In addition, bearing in mind the equivalence of participation models, it would make a difference whether employee involvement took place on the administrative board or the supervisory board.

3.8. As regards the agreement provided for in Article 3 (1) between the management or administrative boards of the founder companies and the representatives of the employees of those companies provided for by the laws or practices of the Member States, it should be clearly stipulated in the text of the Directive that the negotiations should have the purpose of reaching agreement on the participation model to be chosen.

Article 4

3.9. The Committee assumes that Article 3 (2), taken in conjunction with Article 136 of the proposal for a Regulation, provides sufficient legal guarantees to ensure that an SE cannot be founded in a Member State where the proposal for a Directive has not been enacted.

3.10. The Committee notes that Article 4 contains no rule on who has the final say in the case of equal representation on the supervisory or administrative boards. In its Opinion on the Commission's memorandum the Committee called for some form of clarifi-
cation which would make allowance for companies' need to be able to take decisions and the rights of shareholders. Without such a rule, the SE would hardly be acceptable to businesses.

3.11. No account has been taken either of the Committee's view that a blanket reference to the 'German system' may lead to legal uncertainty. There are various participation models in Germany depending on certain criteria involving the size of the workforce and the legal structure of a company.

Article 5

3.12. In the participation model set out in Article 5, the decisions of the management or administrative board referred to in Article 72 (1) do not require the approval of the separate body of employees' representatives. It should therefore be laid down, bearing in mind the desired equivalence of the various models, that the informing and consultation of employees' representatives provided for in Article 5 (2) (c) should be done before the relevant decision is taken. Clearly, decision-making will not be influenced by suggestions or reservations on the part of employees which are made before implementation but after the decision has been taken. When the Directive is incorporated into national law, it must be ensured that information is provided sufficiently before the decision for company management to be acquainted with any objections from employees' representatives when deliberating.

3.13. The subjects of the information and report to be provided under the terms of Article 5 (2) (a) and (b) are not consistent—at least in some language versions—with the provisions of Articles 64 (1) and (2) or 67 (1) and (2) of the proposal for a Regulation. While Article 5 (2) (a) states that information should be provided about the 'progress of the company's business' and of its 'prospects', Articles 64 (1) and 67 (1) refer to the 'management and progress of the company's affairs' and its 'situation and prospects'. According to Article 5 (2) (b), the body representing the employees has the right to require a 'report concerning certain of the company's business or any information or documents where it is necessary for the performance of its duties', while Articles 64 (2) and 67 (2) of the proposal for a Regulation state that the chairman of the supervisory or administrative board shall be informed 'without delay of all matters of importance, including any event occurring in the company or in undertakings controlled by it which may have an appreciable effect on the SE'. The Commission is requested to bring these differing texts into line with each other.

3.14. In the Committee's view it is of decisive importance to the operation in practice of the various participation models that a solution which is satisfactory for all concerned be found to the problem of the confidentiality of the information and documents covered by Article 5 (3). Reference is made here to the comments concerning Article 6 (5).

Article 6

3.15. The third participation model set out in Article 6 is basically welcomed by the Committee. The flexible nature of this model, which enables participation to be regulated by agreement between workers and management, makes it possible for due account to be taken of the special characteristics of national worker participation legislation in some Member States. In its Opinion of 24 November 1988 on the Commission's memorandum, the Committee said that this option must be similar in content to the other two models proposed, in view of the need for equivalence. After examining the text, the Committee considers that this equivalence will only be achieved if there is some comparability with respect to the minimum requirements for information and consultation. Above all there are doubts about equivalence because of the differences between the models that are theoretically conceivable and the lack of clarity over the 'standard model' provided for in Article 6 (8) if no agreement is reached between the parties.

3.16. A national legislator may decide, when enacting the Directive, to lay down legal provisions allowing the use of models 1 and/or 2 for worker participation within firms, in which case there would be no room for waiver agreements. The Committee feels that if all three models are offered it would be inadmissible if agreements were used instead of participation.

3.17. If the employees in the founder companies have representatives, then only these should be empowered to conclude the agreement about participation with the management or administrative board of the founder companies. The alternative permitted in Article 6 (1), namely agreements with all employees of the founder companies, should be limited to those few cases—e.g. small companies with a small workforce—where employees have no special representatives.

3.18. It should be made clear in Article 6 (2) (a) that the information supplied to employees covers the areas referred to in Articles 64 and 67 of the Regulation.
3.19. As regards Article 6 (2) (b), which specifies that employees must be informed and consulted before any decision referred to in Article 72 of the proposal for a Regulation is taken, the Committee would draw attention to its comments concerning Article 5, where it calls for clarification regarding the timing and effect of these rights.

3.20. According to Article 6 (3) a representative body representing the employees may require the management board or the administrative board to provide 'the information necessary for the performance of its duties'. This does not describe the extent of the company’s management obligation to provide information very clearly. The Committee thinks a clearer definition is necessary so as to avoid frequent arguments. It also assumes that the wording used ('information necessary') will try and impose some limits, and not cover every conceivable item of information.

3.21. The Committee notes that the text of Article 6 (5) was included in the proposal for a Directive in view of the legal situation in some Member States. The basic idea it expresses is that such an agreement may provide for the withholding of any information which, if disclosed, might seriously jeopardize the interests of the SE or disrupt its projects; this corresponds to the right to refuse to communicate information to shareholders set out in Article 90 (3) of the proposal for a Regulation. The employees’ side do not need to allow such a right to refuse information to be included in the agreement. But this clause should not lead to justified information being withheld from employees’ representatives. They must therefore have the possibility of having refusals to provide information examined in a court of law or by some form of independent arbitration.

3.22. The calling-in of experts may be necessary for both parties, so that they can assess the consequences of the arguments to be concluded in the negotiations. The Committee feels that the possibility provided for in Article 6 (6) should be limited to whatever is necessary in each individual case.

3.23. As regards Article 6 (7), the Committee would point to the problem which arises if the agreement on worker involvement is concluded between the founder companies and the representatives of their employees in accordance with Article 6 (1). In the case of a long-term agreement it cannot always be expected that the employees or the management of the SE will agree with the original agreement, in which they had no say. They would then have to accept conditions which were not in keeping with their interests.

3.24. In the case of the ‘standard model’ referred to in Article 6 (8) for cases where no agreement on employee participation is reached, there may be doubts, given the worker participation laws in some Member States, over which model is in conformity with the best national practices. If such a model does not measure up to the minimum requirements described in Article 6, then the Member State concerned should be obliged to guarantee such minimum requirements in law when enacting the Directive.

Article 7

3.25. The Committee agrees with the Commission that, in view of the different laws in the Member States, it is not possible to lay down a complete law on the election of employees’ representatives in the proposed Directive. But certain principles should be mentioned, such as the right to secret voting, the protection of minorities and freedom of expression.

3.26. The Committee therefore shares the Commission’s view that the election should be conducted in accordance with the laws or practices of the Member States.

3.27. In addition, provision should be made for management and employee’s representatives concluding agreements on voting procedures in the absence of any national rules on such elections.

3.28. As the employees of independent subsidiaries of an SE are not to be entitled, in the Commission’s proposed Directive, to take part in the elections for representatives of the SE’s employees, the Committee refers to its comments in paragraphs 3.5 and 3.6. The Committee considers such an involvement to be necessary because the decisions of the management of a controlling SE may also affect the employees of companies dependent on it.

3.29. If an SE has several dependent establishments in different Member States, it should be made clear under which national law the elections are to be carried out.

Article 9

3.30. The Committee agrees with the Commission’s aim to provide the employees’ representatives with the financial and material resources they need to perform their duties in due order. Without such resources employees could hardly exercise their rights in reality.

3.31. The extent of the resources to be provided remains largely unclear from the wording of Article 9. Certainly the Member States could lay down more details and prescribe possibilities of legal redress for employees when incorporating the directive into their
respective national laws. But in order to ensure a certain degree of comparability, the Committee thinks it advisable, when enacting the Directive, to specify certain basic elements of these resources and refer back to enshrined practices in the Member States. Such elements seem necessary because of the uncertainty over what will happen if the agreement with employees' representatives mentioned in Article 9 (2) is not reached.

Article 10

3.32. In its Opinion on the memorandum the Committee took note of the Commission's intention to exclude from the SE statute any rules about participation at plant level, so that for these places of work the appropriate national works constitution laws and other labour legislation have unrestricted validity. Otherwise the complex problems involved would make rapid adoption of the statute impossible. But the Committee also shared the Commission's view that in an SE the workers should be given adequate information.

3.33. The Committee expects the Commission to submit proposals on this, as clarification is also required on the status of employee representatives here.

Article 12

3.34. Because of the complexity of the regulatory material involved and its importance to social policy, the Committee thinks that the deadline set in Article 12 (1) for incorporating the Directive into national laws is hardly realistic. The deadline should be suitably extended where necessary.

3.35. Additional remarks

It is not clear how the Commission intends to ensure that the parties to agreements will keep them. The agreements on participation/collective-agreement models referred to in Articles 3 (1) and 6 (1), which are concluded between the managements of the founder companies and the employees of these companies, must be binding on the management and employees of the SE which is to be formed. Suitable rules should therefore be laid down to enforce the obligations entered into.

Done at Brussels, 28 March 1990.

The Chairman

of the Economic and Social Committee

Alberto MASPRONE
APPENDIX I

to the Opinion of the Economic and Social Committee

Result of the voting

The following members, present or represented, voted for the Opinion


The following members, present or represented, voted against the Opinion

Mr/Mrs/Miss Aparicio Bravo, Aspinal, Bagliano, Corell Ayora, Droulin, Festi, Gardner, Germozzi, Green, Kaats, Machado von Tscheski, Mainetti, Neto Da Silva, de Normann, Panero Florez, Pelletter C., Pelletter R., Perrin-Pelletter, Schade-Poulson, Stone-Pugh, Tamlin, Telles, Tesmar Oliver, Termes Carrero, Whitworth

The following members, present or represented, abstained

Mr/Mrs/Miss Arena, Beale, Beltrami, Campbell, Ceyrac, Collas, Alves Conde, Coyle, Dcaillou, Drago, Flather, Garcia Morales, Kenna, Low, Moreland, Pearson, Rangoni-Machiavelli, Ribiere, Robinson, Rolão Gonçalves, Rosengrave, Tixier, Vidal, Wagner

Opinion on increasing the use of agricultural and forestry resources in the non-food industrial and energy sectors: prospects opened up by research and technological innovation

(90/C 124/13)

On 28 April 1988 the Economic and Social Committee, acting under the fourth paragraph of Article 20 of its Rules of Procedure, decided to draw up an Opinion on increasing the use of agricultural and forestry resources in the non-food industrial and energy sectors: prospects opened up by research and technological innovation.

The Sub-Committee on Research and Technology/Agricultural and Forestry Resources, which was responsible for preparing the Committee’s work on the matter, adopted its Opinion on 23 February 1990. The Rapporteur was Mr De Tavernier, the Co-Rapporteur was Mr Boddy.

At its 275th plenary session (meeting of 29 March 1990) the Committee adopted the following Opinion by an overwhelming majority, with one dissenting vote.

PREAMBLE

In February 1988 the European Council asked the Commission to explore all the possibilities for intensifying the non-food utilization of agricultural raw materials and to present proposals on this subject.

With this Opinion the Economic and Social Committee aims to help pinpoint potential uses. After analyzing the current situation, it goes on to explore real possibilities and the requirements to be met for this purpose.