European Community Company and Securities Law: A Canadian Perspective

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The author suggests that a systematic and contextual understanding of European Community ("E.C.") company and securities law is required if Canadian businesses and investors are to profit from the rapidly changing social, economic and political structures of Europe. Law reformers, as well, can take from the E.C. many relevant and potentially revealing comparisons if the context of the development of E.C. company and securities law is properly understood. Accordingly, the author presents a systematic survey of E.C. law beginning with the E.C.'s institutional structure. The state of the E.C.'s company and securities law is the explored, followed by an analysis of its central themes and issues of special interest to the Canadian business, investment and law reform commuuities, such as issues of employer participation and corporate groups.

L'auteur suggère qu'une compréhension systématique et contextuelle du droit de la Communauté économique européene ("C.E.E.") en matière de compagnies et valeurs mobilières est nécessaire si les entreprises et investisseurs canadiens doivent profiter des structures sociales, économiques et politiques, en évolution rapide, de l'Europe. Les spécialistes de la réforme du droit peuvent aussi trouver dans le cadre de la C.E.E. plusieurs comparaisons pertinentes et potentiellement révélatrices, si le contexte du droit de la C.E.E. en matière de compagnies et de valeurs mobilières est correctement compris. En conséquence, l'auteur présente un aperçu systématique du droit de la C.E.E. à partir de la structure institutionellc de la C.E.E. Puis, l'état du droit de la C.E.E. en matière de compagnies et de valeurs mobilières est exploré ; ce à quoi fait suite une analyse de ses thèmes centraux et des questions d'intérêt particulier aux mondes canadiens de l'entreprise, de l'investissement et de la réforme du droit, telles la participation des employés et les groupes corporatifs.

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Synopsis

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Introduction

Developments in the European Community (E.C.) are rapidly changing the social, economic and political structure of Europe.[1] Many argue that because of this Canadians need to be better informed about the E.C.[2] The media have responded to a certain extent.[3] Unfortunately, however, those who want to investigate E.C. legal issues from a Canadian perspective will discover significant gaps in the literature.[4]

E.C. company and securities law is one area which has not been examined systematically from a Canadian perspective. This gap is unfortunate since Canadian businesses, investors and law reformers all have good reasons to examine E.C. company and securities law. In terms of Canadian business, government officials and the financial press have heralded the commercial opportunities a single E.C. market will afford. The Canadian business community has responded cautiously thus far, but Canadian companies now appear ready to increase their involvement in Europe.[5] If they attempt to penetrate the European market by establishing a branch or subsidiary in the E.C., they will have to confront and understand the Community's company law measures.

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[1]See, *e.g.*, R. Owen & M. Dynes, *The Times Guide to 1992: Britain in a Europe Without Frontiers — A Comprehensive Handbook* (London: Times Books, 1989), especially at 9-21 & 198-250, and United States International Trade Commission, *The Effects of Greater Economic Integration Within the European Community on the United States: First Follow-Up Report*, USITC Publication 2268 (Washington: United States International Trade Commission, 1990) at 1-14.

[2]G. Pitts, *Storming the Fortress: How Canadian Business Can Conquer Europe in 1992* (Toronto: Harper, Collins, 1990) at 2-3, 139, 151-54 & 160-67; "Canadian Companies Slow Off the Mark to Adjust to European Integration: Gow" *The [Toronto] Globe & Mail* (8 November 1988) B12 [hereinafter "Canadian Companies"]; "Business Urged to Set Up Base in Europe Before 1992" *The Montreal Gazette* (5 December 1989) D3 [hereinafter "Business"]; "Canada's Links to E.C. Growing Despite Friction" *The Financial Post* (2 July 1990) 9; R. Ray, "Are Businesses Ready for Europe 1992?" *The National* (October 1990) 14; "Canada-Europe Trade Pitched" *The Vancouver Province* (16 January 1991) 28 and "Canadian Firms Shun Europe" *The [Toronto] Globe & Mail* (11 February 1991) B5 [hereinafter "Canadian Firms"].

[3]The best example is a book by an associate editor of *The Financial Post*, G. Pitts, *supra*, note 2. See also the articles cited in note 2, *supra*, and "Post-'92 Europe Lures Investors" The *Financial Post* (14 November 1988) 35 [hereinafter "Post-'92"]; and "RRSP Fund Looks to Europe for Growth" *The Financial Post* (11 May 1990) 16 [hereinafter "RRSP"]. Furthermore, on March 12th and 13th, 1990 the Canadian Broadcasting Corporation program, The Journal, broadcast a segment entitled "Europe Unbound."

[4]R.D. Wilson, "The European Community — the Process and Available Remedies" (1990) 4 C.U.B.L.R. 27 at 28.

[5]See Pitts, *supra*, note 2 at 156-61 & 168-90; "Canadian Companies," *supra*, note 2; "Business," *supra*, note 2; "Canadian Firms," *supra*, note 2; G.J. Wasny, "'1992': The Impact on Canadian Business" (1989) 6 Business & Law 38; "Getting a Foot in 1992's Door" *The Financial Times* (2 January 1989) 9; "Project 1992: 'Get Foot in Door Before it Shuts'" *The Financial Post* (25 September 1989) 38; and "Opportunity Knocks in Europe '92" *The Financial Post* (2 July 1990) 9.

Canadian investors are also becoming increasingly aware of the E.C.'s efforts to create a single market within the Community. Consequently, they are becoming more interested in buying shares in European companies.[6] Since there is a reasonable prospect that E.C. company and securities law will have an impact on the share values of E.C. companies, Canadian investors would be well advised to monitor developments in this area.

Canadian law reformers also have good reason to examine E.C. company and securities law. There are important similarities between the E.C. and Canada which make comparisons relevant and potentially revealing. This is illustrated by the fact that Canadian academics have examined a number of E.C. company law topics and in so doing have made useful and pertinent observations about Canadian law.[7]

The work which has been done by Canadians on E.C. company and securities law no doubt is useful to Canadian businesses, investors and law reformers. Still, these groups will find it difficult to gain a complete appreciation of the topic on the basis of what Canadians have written. This is because no Canadian commentator has provided an overview of E.C. company and securities law or has placed the topic in its institutional, economic and social contexts.

This article attempts to provide a systematic survey of E.C. company and securities law for a Canadian audience. The article is divided into four parts. The first discusses the E.C.'s institutional structure. The second summarises the present status of the E.C.'s company and securities law measures. The third explores the central themes of E.C. company and securities law. The fourth analyzes issues of particular relevance to Canadian businesses, investors and law reformers. The article concludes with some observations about how Canadians should examine European Community legal issues.

I. Institutional Overview

The E.C.'s institutional and jurisdictional structure has recently been examined elsewhere from a Canadian perspective.[8] Consequently, no attempt will be made here to outline this topic in detail. Nevertheless, some basic concepts need

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[6]Interest in the E.C. is reflected by the Europe 1992 Fund, which the Chevron Fund Management Ltd. formed in 1989 to invest in companies expected to benefit from the single market project. See Pitts, *supra*, note 2 at 72; "Post-'92," *supra*, note 3, and "RRSP," *supra*, note 3.

[7]C.S. Axworthy, "Corporation Law As If Some People Mattered" (1986) 36 U.T.L.J. 392 at 415-27; N.C. Sargent, "Corporate Groups and the Corporate Veil in Canada: A Penetrating Look at Parent-Subsidiary Relations in the Modern Corporate Enterprise" (1988) 17 Man. L.J. 156 at 181-82; T. Hadden, R.E. Forbes & R.L. Simmonds, *Canadian Business Organizations Law* (Toronto: Butterworths, 1984) at 296-97 & 645-50 and J.P. Boyer, "The Proposal for a 'European Company'" (1975) 33 U.T. Fac. L. Rev. 217.

[8]See *supra*, note 4.

to be kept in mind to understand the present status of E.C. company and securities measures.

The European Community is made up of twelve member states.[9] The E.C. operates as a supranational body, which makes it a unique organisation in international law.[10] For example, unlike conventional international organisations, the E.C. can create rights and duties for individuals without the intervention of national parliaments. Moreover, E.C. law prevails over the law of its members in the event of a conflict.

The E.C.'s cornerstone is the *Treaty of Rome*,[11] which was signed in 1957. The *Treaty* sets out the Community's essential objectives, which include establishing a common market and integrating the member states' economic policies.[12] It also creates an institutional structure to facilitate the achievement of these objectives.

Three of the institutions created by the *Treaty* play a key role in the development of Community legislation.[13] These are the European Commission, which is the central bureaucratic component of the Community; the European Parliament, which is primarily a consultative rather than legislative body; and the Council of Ministers, which has ultimate legislative authority in the E.C.

The European Commission commences the legislative process by making a proposal. This is consistent with its formal role under the *Treaty of Rome*, which is to initiate the legislative process and to ensure that *Treaty* provisions are observed. The Commission also often participates in other stages of the decision-making process, such as legislative debate and the implementation of E.C. measures by member states.[14]

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[9]They are Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and the United Kingdom.

[10]On the E.C. and international law, see R. Plender, *Plender and Usher's Cases and Materials on the Law of the European Communities*, 2d ed. (London: Butterworths, 1989) at 1-4, and J. Bridge, "American Analogues in the Law of the European Community" (1982) 11 Anglo-Am. L. Rev. 130.

[11]*Treaty Establishing the European Economic Community* done at Rome, Mar. 25, 1957, 298 U.N.T.S. 15, art. 2, set out in *Encyclopedia of European Community Law*, vol. B (London: Sweet & Maxwell, 1974ff.) [hereinafter *Encyclopedia*], para. B10-001 [hereinafter *Treaty of Rome*].

[12]The *Treaty* says these objectives need to be fulfilled to foster the harmonious development of economic activities among the E.C.'s member states, to improve economic conditions and to promote closer relations between E.C. members — *supra*, art. 2.

[13]On the E.C.'s institutional structure, see *e.g.*, Pitts, *supra*, note 2 at 43-59; Wilson, *supra*, note 4 at 29-32; A. Winter *et. al.*, *Europe Without Frontiers: A Lawyer's Guide* (Washington: Bureau of National Affairs Inc., 1989) at 25-39; and M.E. Elling, "The Emerging European Community: A Framework for Institutional and Legal Analysis" (1990) 13 Hastings Int'l & Comp. L. Rev. 511 at 518-22.

[14]Owen & Dynes, *supra*, note 1 at 36. See generally *Treaty of Rome*, arts 155-63, as amended by the *Treaty Establishing a Single Council and a Single Commission of the European Commu-*

The Commission submits its legislative proposals to the Council, which is composed of member state representatives who are usually ministers in their respective national governments.[15] A proposal will then follow one of two routes, depending on its legislative basis.[16] Under either route, the Council must consult with the European Parliament, which consists of representatives directly elected in the member states.[17] The extent of the Parliament's participation and the level of support needed for Council approval differs depending on which route the legislation is following. Ultimately, however, both procedures conclude with Council consideration of the measure. If the Council adopts a proposal, it attains legislative force.

The Commission, the Parliament and the Council do not have an open-ended jurisdiction to enact Community law. The *Treaty of Rome* allocates specific legislative and administrative powers to the E.C. measures which exceed the Community's jurisdiction may be struck down by the European Court of Justice. The Court, which has a number of other important adjudicatory functions, has itself played an important role in the development of Community law.[18] E.C. legislative and administrative actions can take a variety of forms. Two of the most important are directives and regulations. Directives are addressed to the member states and require their governments to enact legislation consistent with the relevant E.C. policy. Generally speaking, directives themselves do not create rights that can be directly enforced by individuals in

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nities, done at Brussels, April 8, 1965, set out in *Encyclopedia, supra*, note 11, para. B8-034 [hereinafter *Merger Treaty*] arts 10-19.

[15]*Treaty of Rome*, arts 145-54, as am. arts 4, 5 & 7 of the *Merger Treaty* and by arts 7, 10 & 18 of the *Single European Act*, February 17, 1986, O.J. 1987, L169/1 [hereiuafter *S.E.A.*]. Participants in Council meetings change according to the subject under discussion, so in practice several Council meetings can be held at once.

[16]One of the paths was used for all legislative measures enacted prior to 1987. Under this procedure, the Parliament's role is not formally structured and the Council must act unanimously. The Community adopted the uew path in 1987 in order to help achieve the single market goal articulated in *Completing the Internal Market: White Paper from the Commission to the European Council* COM(85) 310 [hereinafter *White Paper*]. Under this new path, the Parliament has a more formal role and the Council only has to act by qualified majority. See *S.E.A.*, arts 7 & 18, amending the *Treaty of Rome*, arts 11 & 149. On the two paths, see, *e.g.*, Winter, *supra*, note 13 at 41-46; S.A. Riesenfeld, "The Single European Act" (1990) 13 Hastings Int'l & Comp. L. Rev. 371 at 376-78, and R. Gleed *et. al.*, eds, *Deloitte's 1992 Guide* (London: Butterworths, 1989) at 12-19.

[17]On the European Parliament see *Treaty of Rome*, arts 137-44 & 149, as am. *Merger Treaty*, art. 27 and the *S.E.A.*, art. 7. On direct elections, see *Encyclopedia*, paras. B10-311 — B10-314.

[18]On the European Court's power to strike down legislation because it is not snpported by the *Treaty of Rome*, see art. 173 of the *Treaty of Rome*, discussed by paras. B10-385-86 of *Encyclopedia*. On the Court's role in other matters, see arts 164-88 of the *Treaty of Rome*, and Winter, *supra*, note 13 at 35-39. The Court has played little part in the development of E.C. company law: see R.M. Buxbaum & K.J. Hopt, *Legal Harmonization and the Business Enterprise: Corporate and Capital Market Law, Harmonization Policy in Europe and the U.S.A.* (Berlin: de Gruyter & Co., 1988) at 268-69.

national courts. The European Court, however, has created some important exceptions.[19]

The Community generally gives member states a substantial amount of time to implement directives. Once the grace period expires, member states which have not complied with a directive can be sanctioned by the European Court of Justice.[20]

Regulations, unlike directives, do not need to be implemented by the member states. Instead, they have immediate legal effect.[21] Consequently, regulations may pre-empt national legislative competence in the areas they cover, national courts must take judicial notice of regulations and individuals can directly enforce certain provisions in regulations.[22]

II. Overview of European Commuuity Compauy aud Securities Law

The E.C.'s company and securities law measures are divided into three basic groups. The first group is made up of measures which deal directly with company law. The second is composed of securities law measures. The third is made up of E.C. legislative provisions which are not company and securities law measures *per se*, but which have an important impact on these areas.

A. *Company Law Measures*

There are thirteen E.C. company law directives. Seven of the company law directives have been approved by Council and presently require the member states to enact implementing legislation. These are the *First*, *Second*, *Third*, *Fourth*, *Sixth*, *Seventh* and *Eighth Directives*.[23] The *First Directive* instructs the member states to require all companies to file prescribed information with a public registry. The *Second Directive* governs the formation of public companies and regulates share capital. The *Third Directive* deals with mergers between companies within the same member state. The *Sixth Directive* seeks to

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[19] See Wilson, *supra*, note 4 at 35, and D. Wyatt & A. Dashwood, *The Substantive Law of the EEC*, 2d ed. (London: Sweet & Maxwell, 1987) at 42-47.

[20] *Treaty of Rome*, art. 169.

[21] See European Commission, "Internal Market and Industrial Cooperation — Statute for the European Company" (1988) COM(88) 320 at 11 & 24-25, and D. Carreau & W.L. Lee, "Towards A European Company Law" (1989) 9 Nw. J. of Int. L. & Bus. 501 at 503-505. On when the E.C. will use regulations instead of directives, see Wyatt & Dashwood, *supra*, note 19 at 38-47, and Buxbaum & Hopt, *supra*, note 18 at 232-33.

[22] Wyatt & Dashwood, *ibid.* at 38-41.

[23] *First Directive*, Directive 68/151, O.J. 1968, L65/8; *Second Directive*, Directive 77/91, O.J. 1977, L26/1; *Third Directive*, Directive 78/855, O.J. 1978, L295/36; *Fourth Directive*, Directive 78/660, O.J. 1978, L222/11; *Sixth Directive*, Directive 82/891, O.J. 1982, L378/47; *Seventh Directive*, Directive 83/349, O.J. 1983, L193/1; and *Eighth Directive*, Directive 84/253, O.J. 1984, L126/20.

harmonise member state legislation governing transactions in which public companies are divided up by the sale of their assets. The *Fourth, Seventh* and *Eighth Directives* are interrelated. They regulate accounting standards for individual companies and company groups and establish qualification and independence standards for auditors.

Two other company law directives have been approved by the Council but do not yet require member state implementation because the grace period for doing so has not expired. One is the *Eleventh Company Law Directive*, which regulates disclosure by company branches when the company is registered in a non-E.C. country or a different member state than the branch.[24] The second is the *Twelfth Directive*, which requires member states to allow the formation of one-person companies.[25] At present, member states must implement the *Twelfth Directive* by January 1992 and the *Eleventh Directive* by January 1993.[26]

Three draft company law directives have been submitted by the Commission but have not yet been formally considered by the Council. These are the *Fifth Directive*, which deals with the structure and management of public companies, the *Tenth Directive*, which applies to mergers between public companies located in different member states and the *Thirteenth Directive*, which regulates the conduct of takeover bids.[27]

One company law directive has never been formally submitted by the Commission to other E.C. institutions. This is the *Ninth Directive*, which deals with corporate groups. The Commission circulated a draft proposal of this *Directive* in the early 1980s, but did not proceed further because of the hostile reception the draft received.[28] Still, the *Ninth Directive* remains on the Commission's agenda.

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[24]Directive 89/666, O.J. 1989, L395/36 [hereinafter *Eleventh Directive*].

[25]Directive 89/667, O.J. 1989, L395/40 [hereinafter *Twelfth Directive*].

[26]*Ibid.*, art. 8, and *supra*, note 24, art. 16.

[27]*Fifth Company Law Directive*, O.J. 1983, C240/2 [hereinafter *Fifth Directive*]; *Tenth Company Law Directive*, O.J. 1985, C23/11 [hereinafter *Tenth Directive*]; and *Thirteenth Company Law Directive*, O.J. 1989, C64/8 [hereinafter *Thirteenth Directive*]. The Commission has made minor changes to its *Fifth Directive* proposal (O.J. 1991, C7/4) and made some substantial amendments to its *Thirteenth Directive* proposal (O.J. 1990, C240/7). In 1988 the Commission issued a new, comprehensive draft of the *Fifth Directive*. It has not been officially submitted to the Council and consequently bas not been published in the Official Journal. It is set out in Department of Trade and Industry, *Amended Proposal for a Fifth Directive on the Harmonisation of Company Law in the European Community: A Consultative Document* (London: Department of Trade and Industry, 1990) [hereinafter *Amended Proposal*]. Unless otherwise noted, citations of the *Fifth Directive* in this article are from the 1988 version.

[28]Again, because the Commission never submitted the *Ninth Directive* to the Council, it has not been published in the Official Journal. On the contents of the draft, see *infra*, note 115 and accompanying text.

The Commission has also formally proposed to the Council that the Community enact a *European Company Statute*. The *Statute* would provide companies with internal legal rules that are independent of member state law. The Commission first proposed a *European Company Statute* in 1970 and submitted its latest draft to the Council in 1989.[29] The Commission has suggested that the *Statute* take the form of a regulation rather than a directive.

B. Securities Law

Four securities law directives are presently binding on the member states. Three deal with companies listed on the stock exchanges in the various member states. These are the *Admissions Directive*, the *Listing Particulars Directive* and the *Interim Reports Directive*.[30] Together these directives regulate disclosure by companies to stock exchanges and to the public. They require disclosure to take place prior to listing and at prescribed instances thereafter. The fourth measure, the *Public Offer Prospectus Directive*, extends many of the disclosure requirements to all companies making a public offering of securities.[31]

One securities law directive has been approved by the Council but does not yet require implementation. This is the *Insider Trading Directive*, which

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[29]O.J. 1989, C263/41 [hereinafter *European Company Statute*], discussed by the British Department of Trade and Industry, *Proposal for a European Company Statute: A Consultative Document* (London: Department of Trade aud Industry, 1989) at 2-9, and J. Dine, "The European Company Statute" (1990) 11 Co. Lawyer 208. Employee representation issues are dealt with in a separate, complimentary proposal (*Proposal for a Council Directive Complementing the Statute for a European Company with regard to the Involvement of Employees in the European Company*, O.J. 1989, C263/89 [hereinafter *Involvement of Employees Proposal*]). In April 1991 the Commission submitted a revised version of this proposal (O.J. 1991, C138/8). All of the foregoing are based on a 1988 Memorandum the Commission prepared (European Commission, *supra*, note 21). On the history of the statute, see E. Stein, *Harmonization of European Company Laws: National Reform and Transnational Coordination* (Indianapolis: Bobbs-Merrill Inc., 1971) at 424-47; P. Sanders, "Structure and Progress of the European Company" in C.M. Schmitthoff, ed., *The Harmonisation of European Company Law* (London: The U.K. National Committee of Comparative Law, 1973) 83 at 89-99; and W. Kolvenbach, "EEC Company Law Harmonization and Worker Participation" (1990) 11 U. Pa. J. of Int. Bus. L. 709 at 764-82.

[30]*Council Directive Coordinating the Conditions for the Admission of Securities to Official Stock Exchange Listing*, Directive 79/279, O.J. 1979, L66/21 [hereinafter *Admissions Directive*]; *Council Directive Coordinating the Requirements for the Drawing Up, Scrutiny and Distribution of the Listing Particulars to be Published for the Admissions of Securities to Official Stock Exchange Listing*, Directive 80/390, O.J. 1980, L100/1, as am. *Council Directive* 90/211, O.J. 1990 L112/24 [hereinafter *Listing Particulars Directive*]; and *Council Directive on Information to be Published on a Regular Basis by Companies the Shares of Which Have Been Admitted to Official Stock Exchange Listing*, Directive 82/121, O.J. 1982, L48/26 [hereinafter *Interim Reports Directive*]. The *Mutual Recognition Directive*, Directive 87/345, O.J. 1987, L185/81 [hereinafter *Mutual Recognition Directive*], made significant amendments to all of these directives (see *infra*, note 143 and accompanying text).

[31]Directive 89/298, O.J. 1989, L124/8 [hereinafter *Public Offer Prospectus Directive*].

instructs member states to pass legislation prohibiting insider dealing. The member states must implement the *Directive* by June 1, 1992.[32]

C. *Related Measures*

There are some E.C. measures which do not directly deal with company and securities law but which merit special attention because of the impact they may have on the operations of Community companies. One was enacted by the Community in 1985. This is the *European Economic Interest Grouping (E.E.I.G.) Regulation*, which allows member state businesses to jointly pursue certain economic activities.[33]

Another non-company law measure which merits comment is the *Vredeling Directive*,[34] which has only been formally proposed by the Commission. This *Directive* takes its name from Hank Vredeling, who was the Social Affairs Commissioner at the Commission when that body first proposed the measure in 1980. Its essential objective is to ensure that parent companies keep employees in subsidiary companies informed about group affairs.

Though the *Vredeling Directive* formally remains a valid Commission proposal to the Council, due to political controversy it has not been debated seriously in the Community since the mid-1980s. The Commission, however, has not given up on the basic concept. Indeed, the Commission will probably propose to the Council a similar, though more moderate, measure in the near future.[35]

III. Central Themes of European Community Company and Secnrities Law

A. *How Much Co-Ordination Should There Be Between Member State Laws?*

The *Treaty of Rome*'s drafters clearly contemplated that Community institutions would engage in company law reform because art. 54(3)(g) expressly gives the Community the jurisdiction to enact company law directives.[36] This

[32]Directive 89/952, O.J. 1989, L334/36 [hereinafter *Insider Trading Directive*]. The implementation date is set out in art. 14.

[33]*Council Regulation* 2137/85, O.J. 1985, L199/1 [hereinafter *E.E.I.G. Regulation*].

[34]*Proposed Directive on Procedures for Informing and Consulting Employees*, O.J. 1980, C297/3, revised O.J. 1983, C217/3 [hereinafter *Vredeling Directive*].

[35]The Commission discusses its proposal in COM (90)581 and Commission Information Memo P-101, 5 December 1990. See CCH International, *Common Market Reporter* (Bicester, U.K.: CCH Editions Ltd., 1990), para. 95,681; "Don't Forget to Tell the Workers" *The Economist* (1 December 1990) 83 [hereinafter "Don't Forget"]; and "E.C. to Consider Workers' Councils" *The Financial Times* [U.K.] (5 December 1990) 3 [hereinafter "E.C."].

[36]*Supra*, note 11.

article requires the Council and the Commission to co-ordinate member state laws to protect shareholders and others dealing with companies. It is the Treaty provision upon which most company law directives have been based.[37]

Community institutions have yet to adopt a consistent, coherent approach to the co-ordination of company and securities law. The E.C. has never attempted to develop uniform legal rules in the area.[38] Other than agreeing that uniformity is not the ultimate objective, however, Community institutions have never been able to determine definitively what degree of co-ordination there should be.[39]

Until the mid-1980s, E.C. officials, especially in the Commission, generally wanted to use E.C. company and securities law measures to eliminate as many differences as possible in member state legislation. The terminology which was most often used to describe this approach was the harmonisation of company and securities law. Part of the reason Commission officials favoured harmonisation was political. They assumed that the development of similar legal rules throughout the E.C. would help to advance the cause of centralisation and would foster the development of the Community.[40]

The possibility that E.C. companies might rely on guarantees of freedom of establishment in the *Treaty of Rome* to migrate from regulatory to liberal jurisdictions also contributed to the emphasis on harmonisation. Member states with strict company laws were concerned that their companies would use *Treaty of Rome* principles to reincorporate in member states with less stringent regimes. The concern was a legitimate one. Anecdotal evidence suggests that businesses in the E.C. will make efforts to adopt the legal structure which imposes the least costs on them.[41] For example, many German firms choose

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[37]*Encyclopedia*, *supra*, note 11, para. B10-127.

[38]M.J.G.C. Raaijmakers, "European Harmonisation: Quo Vadis?" in B. Wachter, *et. al.*, *Harmonization of Company and Securities Law: The European and American Approach* (Tilburg, Netherlands: Tilburg University Press, 1989) 64 at 65, and interview with K. van Hulle, DG XV, European Commission, April 1990.

[39]The problems have not been restricted to company law: see H. Wallace, *Europe: The Challenge of Diversity* (Boston: Routledge & K. Paul, 1985) at 1-28, and D. Vignes, "The Harmonisation of National Legislation and the EEC" (1990) 15 Eur. L. Rev. 358.

[40]Buxbaum & Hopt, *supra*, note 18 at 16-17, and C.M. Schmitthoff, "The Future of the European Company Law Scene" in Schmitthoff, *supra*, note 29, 3 at 8-9. Again, this pattern was not restricted to company law: see V. Curzon-Price, "Three Models of European Integration" in R. Dahrendorf, ed., *Whose Europe?: Competing Visions for 1992* (London: Institute of Economic Affairs, 1989) 23 at 26-29, and A. McGee & S. Weatherill, "The Evolution of the Single Market — Harmonisation or Liberalisation" (1990) 53 Mod. L. Rev. 578 at 582-83.

[41]In *D.H.M. Segers* v. *Bestuur Van de Bedrijfsvereniging Voor Bank-En Verzekeringswezen* [1987] 2 C.M.L.R. 247 (E. Ct. J.) Segers, a Dutch national, ran a commercial undertaking which had its registered office in the Netherlands. He chose to incorporate his business under British law instead of Dutch law because the waiting period for incorporation was shorter and because the designation "Ltd." was more attractive than the Dutch equivalent, "BV."

their business form to evade German legislative requirements concerning information disclosure, minimum share capital and employee representation on boards.[42]

The concern about migration has a strong historical tradition in the Community. In Great Britain, Ireland and the Netherlands, as in Canada, the internal affairs of companies are governed by the jurisdiction of incorporation.[43] This allows corporate participants substantial choice about the company law rules that apply to their firm. On the other hand, in the other nine member states, internal affairs are governed by the law of the country where a company has its real seat, which essentially is its centre of operations. Courts developed this real seat doctrine to curtail nationals from obtaining competitive advantages by incorporating elsewhere under a more liberal company law regime.[44] The result is that in most member states companies which do not incorporate where their real seat is located risk being treated as non-entities or having their internal affairs governed by the company law of the real seat's member state.

Concerns about the migration problem coincided neatly with the Commission's favourable view towards centralisation. Commission officials argued that harmonising member state company legislation would eliminate the possibility of migration since companies would have no incentive to change jurisdictions.[45]

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[42]*E.g.*, some German businesses restructure to avoid the substantial management rights given to employees under the 1976 *Co-Determination Act* and choose the less regulated private company (Gesellschaft mit beschrankter Haftung, or GmbH) form over the public company (Aktiengesellschaft, or AG). Other German firms evade the *Co-Determination Act* and other regulatory requirements by forming a company in Britain. They then operate in Germany with a branch or do business as a limited partnership (Kommanditgesellschaft, or KG), with the British company as the only general partner. See Buxbaum & Hopt, *supra*, note 18 at 171, 185 & 187; W.F. Ebke, "The Limited Partnership and Transnational Combinations of Business Forms: 'Delaware Syndrome' Versus European Community Law" (1988) 22 Int. Lawyer 191 at 194-95; B.A. Streeter III, "Co-Determination in West Germany — Through the Best (and Worst) of Times" (1982) 58 Chi. Kent L. Rev. 981 at 998-99, and G.H.W. Stratmann, "Partnerships Versus Corporations: Why and When to Use Partnerships in the Light of Legal Format and Tax Treatment" (1980) 8 Int. Bus. Lawyer 317.

[43]See Stein, *supra*, note 29 at 29-31; J.G. Collier, *Conflict of Laws* (Cambridge: Cambridge University Press, 1986) at 59-60; *Peter Buchanan Ltd.* v. *McVey*, [1954] I.R. 89 (Ire. S.C.); and J.-G. Castel, *Canadian Conflict of Laws*, 2d ed. (Toronto: Butterworths & Co., 1986) at 507-09. The same rule applies in the U.S., but it has generated some controversy (see Buxbaum & Hopt, *supra*, note 18 at 70-90).

[44]On the real seat rule and its history, see Buxbaum & Hopt, *ibid.* at 68-70; Stein, *ibid.* at 29-32 & 399-401, and J. Dine, "The Harmonisation of Company Law in the EC" *1990 Yearbook of European Law* [forthcoming].

[45]H.C. Ficker, "The EEC Directives on Company Law Harmonisation" in Schmitthoff, *supra*, note 29, 66 at 70. Commission officials remain concerned about the problem. See K. van Hulle, "The Harmonisation of Company Law in the European Community" in Wachter, *supra*, note 38, 10 at 12; "Discussion Report" in Wachter, *supra*, note 38, 105 at 108, and interview with A. Ioakimides, European Commission, DG XV, April 1990.

A necessary corollary of harmonisation, of course, was substantial E.C. control over company and securities law.

Eliminating differences between member state company laws required the E.C. to enact very detailed directives. This is because specific instructions were needed to address all significant differences between member state company laws and to ensure that the implementing legislation in each country was similar in all material respects.[46] Commission officials ran into political problems, however, when they proposed directives prepared along these lines. Many member states turned out to be concerned about a loss of sovereignty and about protecting favoured company law principles. Consequently, they used their influence to block some of the Commission's more ambitious proposals.[47]

The member state resistance forced E.C. officials to make compromises. The standard method which the Community used to alleviate member state concerns was to provide them with roughly equivalent options which could be adopted to comply with a directive. When these options were combined with the detailed provisions Community officials favoured, a highly complex directive often resulted. For example, the 62 articles of the *Fourth Directive*, which regulates company accounts, contains 41 options open to the member states in addition to 35 options left to companies.[48]

The difficulties involved with drafting precise, detailed directives, together with the need for political compromise, substantially hindered the development and enactment of E.C. company law measures in the 1970s and early 1980s.[49] Frustrated by the lack of progress, Commission officials adjusted their approach. In order to speed up negotiations, they became much more willing to give member states latitude in responding to directives. Concomitantly, they shifted the emphasis away from harmonising member state company laws to ensuring that member states shared equivalent standards in important company and securities law areas.[50] Also, they gave priority to reforms which would promote cross-border commercial activity, arguing that such activity would foster

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[46]Buxbaum & Hopt, *supra*, note 18 at 233-34.

[47]*Ibid.* at 17. This pattern has been repeated in contexts other than company law (see McGee & Weatherill, *supra*, note 40 at 582).

[48]*Supra*, note 23; and Buxbaum & Hopt, *supra*, note 18 at 234-35.

[49]Buxbaum & Hopt, *ibid.* at 233-36; European Commission, *supra*, note 21 at 11; van Hulle, *supra*, note 45 at 14-15 & 26; and interview with F.J. Broichagen, European Commission, DG XV, April, 1990.

[50]*White Paper*, *supra*, note 16 at 34-37, Appendix, Part II, s. VI; M.G. Warren, "Global Harmonization of Securities Laws: The Achievements of the European Communities" (1990) 31 Harvard Int. L.J. 185 at 191-92 & 197-98; and interview with K. van Hulle, European Commission, DG XV, April 1990. The Community's change from a harmonisation to an equivalence emphasis was not restricted to company and securities law. Instead, the shift was part of a general approach adopted to help create a single market by 1992. See McGee & Weatherill, *supra*, note 40 at 582.

the development of the Community and would make the E.C. more competitive on a global level.[51]

The Community's new approach yielded immediate dividends. The shift in emphasis has re-energised E.C. company and securities law reform and has contributed to a flurry of legislative activity.[52] This does not mean, however, that drafting and enacting directives has become a simple business.

One reason problems still remain is the continued existence of migration concerns. For example, such concerns have hampered negotiations on a number of measures which Community officials hope will foster cross-border activity. One of these is the *Tenth Directive*, which would require member states to liberalise existing restrictions on mergers between companies located in different member states.[53] It gives rise to migration concerns because member states which mandate employee participation in management decisions suspect that their companies will use cross-border mergers to escape their regulations.[54]

The Commission responded to these concerns by including a provision in the *Tenth Directive* which exempted mergers that would hinder employee participation rights.[55] Thus, German company legislation, which mandates employee participation in management for many companies, could continue to impose restrictions on a merger between a German company and a non-German firm if the resulting company did not provide for employee participation. This attempt at compromise did not succeed, however, because European industry and a number of member states which do not have employee participation requirements felt too many cross-border mergers could be blocked.[56]

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[51] *White Paper*, *ibid.* at 35-36, discussing the proposed *European Company Statute* and the *Tenth Directive*; preamble, *E.E.I.G. Regulation*, *supra*, note 33; European Commission, *supra*, note 21 at 5-7 & 25; and D.T. Murphy, "The European Economic Interest Group (E.E.I.G.): A New European Business Entity" (1990) 23 Vand. J. Transnat'l L. 65 at 67-68.

[52] Legislative enactments and proposals made during 1985 and after include the *Eleventh Directive*; the *Twelfth Directive*; the 1988 draft of the *Fifth Directive*; the *Tenth Directive* proposal, 1985; the 1989 draft of the *European Company Statute*; the *Mutual Recognition Directive*; the *Insider Trading Directive*; the *E.E.I.G. Regulation*; and a *Directive amending Fourth and Seventh Directive*, discussed in the *Common Market Reporter*, *supra*, note 35, para. 95,659.

[53] *Supra*, note 27.

[54] United States International Trade Commission, *The Effects of Greater Economic Integration Within the European Community on the United States*, U.S.I.T.C. Publication 2204 (Washington: United States International Trade Commission, 1989) at 9-26. Germany and the Netherlands are the E.C. members with the most rigourous employee participation requirements. On the systems in the various member states, see Buxbaum & Hopt, *supra*, note 18 at 260-61; and R.R. Pennington & F. Woolridge, *Company Law in the European Communities*, 3d ed. (London: Oyez Longman Publishing Ltd., 1982) at 13-14, 28-29, 52, 78, 104-10, 135-37, 159, 180-81 & 195.

[55] Art. 1(3) of the *Tenth Directive.*

[56] Kolvenbach, *supra*, note 29 at 742-43; Raaijmakers, *supra*, note 38 at 97; van Hulle, *supra*, note 45 at 22; and N. Bourne, "EEC Developments in UK Company Law" (1990) 11 Bus. L. Rev. 119 at 119.

Harmonising employee participation requirements throughout the E.C. would eliminate the *Tenth Directive* impasse. This, however, will be difficult to do. An important objective of the proposed *Fifth Directive* is to harmonise employee participation rights in public companies incorporated in the Community. The E.C. will probably not enact the *Directive* in the near future. This is because a number of member states, led by Great Britain, oppose mandatory employee participation and are prepared to use their votes in the Council to block approval of the *Fifth Directive*, at least in its present form.[57]

Two other cross-border co-operation measures which have been affected by migration concerns are the *E.E.I.G. Regulation* and the *European Company Statute*. With these measures, the E.C. wants to provide optional structures which member state firms can use to co-operate or organise on a supranational level. Community officials know that the *E.E.I.G.* and the *European Company Statute* will only be used if the Community makes them attractive to business. On the other hand, these officials have appreciated that member states which have mandatory employee participation will block enactment of these measures if they think these entities can be used to evade their regulations.

These conflicting considerations have led Community officials to make some tortured compromise proposals. Their strategy succeeded with the *E.E.I.G.* The E.C. gained German support for the *E.E.I.G. Regulation* by agreeing to limit the number of workers which E.E.I.G.s can employ to 500, the minimum threshold at which German companies must provide for employee representation on their boards.[58]

Making compromise proposals has not yielded successful results, however, with the *European Company Statute*. The latest draft of the *Statute* contains an array of employee participation options. Still, the prospects of the E.C. enacting the *Statute* in its present form are slight since the draft has not alleviated German concerns about migration or neutralised British opposition to employee participation.[59]

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[57]On British opposition, see Department of Trade and Industry, *supra*, note 29 at 2-3; Kolvenbach, *ibid.* at 729-31; and B. Montgomery, "The European Community's Draft Fifth Directive: British Resistance and Community Procedures" (1989) 10 Comp. Lab. L.J. 429 at 436-37 & 446-51. Italy and Ireland also oppose employee participation on boards (Buxbaum & Hopt, *supra*, note 18 at 261; and interview with A. Ioakimides, European Commission, DG XV, April 1990). Germany also has reservations about the *Fifth Directive* (Kolvenbach, *supra*, at 731).

[58]*Supra*, note 33, art. 3(2)(c), discussed by Kolvenbach, *ibid.* at 763-64, and S. Israel, "The EEIG — A Major Step Forward for Community Law" (1988) 9 Co. Lawyer 14 at 15.

[59]The provisions are set out in the *Involvement of Employees Proposal* which is discussed *infra*, note 64 and accompanying text. On opposition to the *Statute*, see Winter, *supra*, note 13 at xxvi & 159; Carreau & Lee, *supra*, note 21 at 507-12; Kolvenbach, *ibid.* at 782-83; Department of Trade and Industry, *supra*, note 29 at 6 & 9; and "Threatened by Thatcher" *The Economist* (3 June 1989) 68. The problem has vexed the E.C. for many years. See, *e.g.*, Sanders, *supra*, note 29 at 96-99, and P.M. Storm, "Statute of a Societas Europaea" (1968) 5 C.M.L.R. 265 at 269-70 & 282-84.

B. *Board Structurc*

Employee participation is one of two issues concerning board structure which has generated considerable controversy in the E.C. The other is two-tier boards. Under a two-tier board system, a supervisory board fulfils many of the monitoring functions attributed to the shareholders and non-executive directors under Canadian company law. Management of the company is left to a management board, which is appointed by the supervisory board.[60] This format is mandatory in Germany for companies with more than 500 employees. The system is optional for all companies in the Netherlands and for public companies in Denmark and France.[61]

When the Commission issued its first *Fifth Directive* proposal in the early 1970s, it recommended that all public companies incorporated in the member states should have two-tier boards. At the same time, it recommended that companies established under the *European Company Statute* have the same structure. Great Britain, which entered the Community in the mid-1970s, balked at the Commission's proposals. This was because in Britain, like Canada, all companies use a one-tier board, and the British government opposed any Community tampering with this system.

The Commission responded to Britain's concerns by altering its proposals to allow for a single-tier option.[62] The significance of this concession is debatable. This is illustrated by the most recent drafts of the *European Company Statute* and *Fifth Directive*. Both measures require the one-tier board, referred to as the administrative board or administrative organ, to select an executive component from among its members and to delegate managerial power to that body. They then regulate the non-executive and executive components in much the same way as they regulate supervisory and management boards.[63]

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[60]*European Company Statute*, arts 62-65, and *Amended Proposal* (1988 draft), art. 3. On the two-tier framework and how it compares with the system used in Canada, the U.S. and Great Britain, see Raaijmakers, *supra*, note 38 at 87-88; B. Grossfeld & W. Ebke, "Controlling the Modern Corporation: A Comparative View of Corporate Power in the United States and Europe" (1978) 26 Am. J. Comp. L. 397 at 399-400 & 402-09; and J. Welch, "The Fifth Draft Directive — A False Dawn?" (1983) 8 Eur. L. Rev. 83 at 88-91 & 98-100.

[61]Brebner *et al.*, *Setting Up a Company in the European Community: A Country by Country Guide* (London: Kogan, 1989) at 60-61, 84, 93, 101, 185-86 & 193-94.

[62]See arts 61, 66 & 67 of the *European Company Statute* and arts 2 & 21(a)-(c) of the *Fifth Directive* (1988 draft). On the shift by the E.C., see C.M. Schmitthoff, "Company Structure and Employee Participation in the EEC — the British Attitude" (1976) 25 Int'l & Comp. L.Q. 611; A. Turner, "Saga of the Lawyer in the First Elected European Parliament" (1982) 3 Bus. L. Rev. 215; M. Clough, "Trying to Make the Fifth Directive Palatable" (1982) 3 Co. Lawyer 109; and K.J. Hopt, "New Ways in Corporate Governance: European Experiments with Labor Representation on Corporate Boards" (1984) 82 Mich. L. Rev. 1338 at 1344-45.

[63]Arts 68-80 of the *European Company Statute* and arts 5-13 & 21(k)-(t) of the *Fifth Directive*, (1988 draft). See Welch, *supra*, note 60 at 92-93, and Hopt, *ibid.* at 1345. The *European Company*

The treatment of employee representation illustrates how closely the one and two-tier systems resemble each other. The *Fifth Directive* and the *European Company Statute* contain the same four basic employee participation options.[64] The manner in which the four options operate differs only slightly for one and two-tier board companies.[65]

Under the first option, which is based on German law, employees in companies with two-tier boards select between one-third and one-half of the supervisory board. Employees in one-tier companies, on the other hand, select the same proportion of the administrative board. With the second option, which is based on Dutch law, employees, together with shareholders, have the right to veto nominees to the supervisory board in two-tier companies and nominees to the administrative board in one-tier firms.[66]

Under the third option companies must establish a separate labour representation body. Both the *Fifth Directive* and the *European Company Statute* stipulate that management would have to give this body substantial information on a regular basis and would have to consult with it prior to specified decisions. This system operates the same regardless of whether a company has a one-tier or two-tier board.

The fourth option, which operates identically whether a company has a one or two-tier board, allows management and employees to agree on the method of employee participation. This apparently open-ended alternative is significantly constrained. The *Fifth Directive* provides that management and employees generally must agree on one of the first three employee representation options. The *European Company Statute* stipulates that the agreement must give employees at least the information and consultation rights provided for by the third option.[67]

Statute refers to the one-tier board as the "administrative board" and the *Fifth Directive* uses the term "administrative organ."

[64]Arts 4 & 21(d)-(i) of the *Fifth Directive* (1988 draft) and arts 4-6 of the *Involvement of Employees Proposal*. Member states can limit the options available in some circumstances: *Fifth Directive*, art. 4(2), and *Involvement of Employees Proposal*, art. 3(5).

[65]The four options are discussed by Carreau & Lee, *supra*, note 21 at 508-10; Dine, *supra*, note 29 at 212; Welch, *supra*, note 60 at 85-88 & 94-97; J. Dine, "Implications for the United Kingdom of the E.C. Fifth Directive" (1989) 38 Int'l & Comp. L.Q. 547 at 553-54; and D.T. Murphy, "The Amended Proposal for a Fifth Company Law Directive" (1985) 7 Hous. J. Int'l L. 214 at 222-24.

[66]Under art. 4 of the *European Company Statute* and the 1983 draft of the *Fifth Directive*, the supervisory board or the administrative organ nominates potential candidates. Under art. 4(c) of the 1988 version of the *Fifth Directive*, shareholders and employees can also nominate candidates.

[67]More precisely, if no agreement is reached, a standard model, provided by the law of the member state where the company is registered, shall apply. This model is to be in conformity with the most advanced national practices and must ensure that employees have at least the information and consultation rights provided by the third option. See art. 6, paras 6 & 8 of the *Involvement of Employees Proposal*.

One important difference between the *European Company Statute* and the *Fifth Directive* is that the *Fifth Directive*'s employee representation options do not apply to all companies it governs. For example, the *Fifth Directive* only requires member states to impose the employee representation options on public companies which have over 1,000 employees.[68] Also, it allows member states to give employees the option of waiving their right to participate in corporate management.[69] The *European Company Statute* contains no equivalent limitations on employee representation.

C. *Shareholders*

Canadian company law focuses almost entirely on shareholder/management issues, while workers' rights are left to different legislative schemes such as collective bargaining and employment standards laws. Because the E.C.'s company law programme gives an important role to workers, shareholder issues are less prominent than in Canada.[70] Still, Community company law has significant implications for shareholders on a number of levels.

The proposed *Fifth Directive* is potentially the most important E.C. measure for shareholders in public companies. One reason is that, if it is enacted, its employee representation options would restrict shareholder influence over board appointments in the companies it applies to. Under the first of the four employee representation options, shareholders would be precluded from choosing more than two-thirds of the members of the administrative board under a one-tier system and could not select more than two-thirds of the supervisory board members in companies with a two-tier board.[71] With the second option, Dutch experience suggests that in companies which adopt it, shareholders would have to negotiate with employees and existing board members about the appointment of new directors.[72]

Shareholders would have greater appointment powers in companies adopting the third option, which again provides for a separate labour representation body. Under this system, shareholders would have the sole authority to

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[68] *Supra*, note 27, arts 4(1), (2) & 21b(2).

[69] *Ibid.*, art. 4(2), 21b(2).

[70] See Axworthy, *supra*, note 7 at 397-404 & 423-27. The contrast between U.S. and E.C. company law is similar. See, *e.g.*, Grossfeld & Ebke, *supra*, note 60; A.F. Conrad, "The Supervision of Corporate Management: A Comparison of Developments in European Community and United States Law" (1984) 82 Mich. L. Rev. 1459; and M.P. Dooley, "European Proposals for Worker Information and Codetermination: An American Comment" in P.E. Herzog, ed., *Harmonization of Laws in the European Communities: Products Liability, Conflict of Laws, and Corporation Law — Fifth Sokol Colloquium* (Charlottesville: University of Virginia Press, 1983) 126.

[71] *Supra*, note 27, arts 4(b) & 21(d).

[72] *Ibid.*, arts 4(c) & 21(d)(a). See T.R. Ottervanger & R.M. Pais, "Employee Participation in Corporate Decision Making: The Dutch Model" (1981) 15 Int. Lawyer 393 at 403-404.

select the administrative board in a one-tier system and the supervisory board in a two-tier system.[73]

The *Fifth Directive* also contains provisions regulating shareholder litigation, general meetings, proxies, voting and the adoption of annual accounts by the shareholders.[74] From a Canadian perspective these are the central components of corporate law. The political controversy generated by employee representation and board structure, however, has thus far blocked any progress on the other matters in the *Fifth Directive.*

Because of the impasse, the Commission is considering separating employee participation from the other management/shareholder issues in the *Fifth Directive.* Commission officials think this might speed up negotiations on the non-employee participation matters. Whether the issues involved can be effectively segregated, and whether the member states will accept such a strategy, remains to be seen.[75]

D. *Capital Structure, Disclosure and Accounts*

While the lack of progress on the *Fifth Directive* has limited the impact of E.C. company law measures on shareholders, the E.C. has enacted a number of company law directives which have important shareholder ramifications. The matters involved are also important for creditors, so they merit independent consideration.

One such matter is capital structure. The assumptions underlying the Community regulations in this area differ from those in Canada.[76] Canadian company laws reflect the view that solvency concerns are best addressed by negotiations between companies and creditors and by bankruptcy legislation and related measures. The E.C.'s company law directives, on the other hand, seek to provide affirmative protection for creditors by regulating internal corporate financial structures. For instance, while Canadian corporate legislation does not require a company to have a prescribed amount of share capital, the *Second Directive,* requires public companies to maintain a minimum share capital of 25,000 European Currency Units, or ECUs (approximately $35,000 Canadian as of May, 1991 exchange rates).[77]

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[73]*Fifth Directive, ibid.*, arts 4(1), 4d, 21(a)(1) & 21(e).

[74]*Ibid.*, arts 14-21 & 22-50.

[75]Interview with A. Ioakimides, European Commission, DG XV, April 1990.

[76]See generally Hadden, Forbes & Simmonds, *supra*, note 7 at 131-32 & 141-47; Dine, *supra*, note 44; and J.S. Ziegel, "Is Incorporation (With Limited Liability) Too Easily Available?" (1990) 31 C. de D. 1075 at 1086-89.

[77]Art. 6 of the *Second Directive.* The European Currency Unit is a component of the European Monetary System and its value is calculated on the basis of the value of a basket of member state currencies.

The different approaches to creditor protection are also illustrated by the response to the potential financial risk created by a company acquiring its own shares. Canadian corporate legislation simply prohibits such transactions when they prevent the company from being able to meet its debt obligations. The *Second Directive*, on the other hand, requires member states which allow public companies to acquire their own shares to impose a number of detailed and restrictive limitations on the process.[78]

Another topic that E.C. directives regulate which is important for both shareholders and creditors is disclosure. The *First Directive* is key here. It instructs the member states to require all companies to file with a public registry prescribed information, including the corporate constitution, the amount of capital subscribed, a list of persons authorised to act on behalf of the company and the annual accounts.[79] While the *First Directive* mandates the filing of accounts, it says nothing about the contents. This has been left to other directives. The *Fourth Directive*, which the E.C. enacted in 1978, is the most important of these.[80] The *Directive*, which applies to all member state companies, regulates the use of valuation methods and establishes minimum standards for the presentation and content of annual accounts and annual reports. It also prescribes standards for the auditing and publication of these documents.

The *Fourth Directive* has helped to harmonise the presentation of annual reports and has helped to nurture a European approach to corporate accounting issues. Still, accounting standards are far from uniform in the Community.[81] One reason is that three E.C. members have not implemented the *Directive* yet.[82] Another is that there are many important company accounting issues the *Fourth Directive* does not deal with, partly because accounting practices have evolved rapidly since the E.C. enacted it.

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[78]*Supra*, note 23, arts 19-22; and H. Sutherland, *et. al.* eds, *Fraser's Handbook on Canadian Company Law*, 7th ed. (Toronto: Carswell, 1985) at 76-93.

[79]Arts 2 & 3. On the *First Directive* generally, see Stein, *supra*, note 29 at 237-312; Ficker, *supra*, note 45 at 74-76; and S. Schneebaum, "The Company Law Harmonization Program of the European Community" (1982) 14 Law & Policy in Int. Bus. 293 at 301-303.

[80]For a further discussion, see C.W. Nobes, "The Harmonisation of Company Law Relating to the Published Accounts of Companies" (1980) 5 Eur. L. Rev. 38. Also relevant are the *Seventh Directive* (see *infra*, note 93 and accompanying text), and *Eighth Directive* (which deals with auditor qualifications).

[81]See generally Buxbaum & Hopt, *supra*, note 18 at 235-37, 264-66, 275-78 & 283-88; A.G. Hopwood, "The Future of Harmonization of Accounting Standards Within the European Communities" (1990) [unpublished]; Commission of the European Communities, *European Economic Community: The Fourth Company Law Directive: Implementation by member states* (Brussels: Office for Official Publications of the European Communities, 1987).

[82]Italy, Portugal and Spain are the member states. The European Court of Justice has held that their failure to take action does not relieve individuals in the other nine member states from the obligation of complying with legislation implementing the *Fourth Directive*. See *Ministere Public v. Blanguernon* (1990), case C-38/89 (unreported), summarised in *Common Market Reporter*, *supra*, note 35 at para. 95,571.

A third reason for the lack of harmonisation of European accounting standards is that the implementing legislation in the remaining nine member states is not fully co-ordinated. This is because the member states have made extensive use of the large number of options which the *Directive* gives to them. They have done this because, to a far greater extent than might have been expected with such a technical subject, accounting practices are shaped and influenced by the member states' distinct social and economic environments.

E. *Small Business*

The *Fourth Directive* applies to all companies, regardless of how many shareholders or employees a company has and regardless of how much revenue a company generates.[83] If the *Fourth Directive* applied without qualification to all companies, smaller businesses would find the regulatory burden to be very high. Consequently, the *Fourth Directive* has always made some concessions for smaller companies. Presently, member states may relax a significant number of the *Fourth Directive*'s requirements for companies which do not exceed two of the following three thresholds: a balance sheet total of 1,550,000 ECUs (about $2.2 million Canadian), an annual net turnover of 3,200,000 ECUs ($4.5 million Canadian) and an annual average of 50 employees.[84]

During the latter half of the 1980s, the Commission proposed a number of amendments which would increase the scope of the *Fourth Directive* exemptions.[85] Most importantly, the Commission recommended that member states be required to make exemptions for small business rather than simply being authorised to do so. In a *Directive* approved in 1990, the Council declined to adopt the mandatory approach, but nevertheless did expand the exemptions which member states could make.[86] The 1990 *Directive* is part of a general attempt by the Community to give small businesses a higher profile in E.C. affairs.[87] The *Twelfth Directive*, which the Council approved in 1989, is also part of this trend. It requires the member states to reverse their present policy and allow single-member companies.[88]

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[83] Art. 1.

[84] Arts 11, 44 & 47(2), as am. Directive 84/569, O.J. 1984, L314/28. Also, member states are authorised to relax some of the *Fourth Directive*'s requirements for companies with higher balance sheet, turnover and employee totals. See art. 27 of *Fourth Directive*.

[85] O.J. 1986, C144/10 and O.J. 1989, C318/12, discussed by F. Wooldridge, "Amending the Fourth and Seventh Company Law Directives" (1989) 133 Solicitors J. 1118.

[86] See *supra*, note 52.

[87] In addition, the Commission has created a new Directorate for small and medium sized enterprises (Winter, *supra*, note 13 at 154), and the Council has approved a series of recommendations to member states which are intended to improve the business environment for small and medium-sized enterprises (O.J. 1990, L141/55).

[88] On the member states' law in the area and on this directive see P. Colle, "The Influence of the European Convention on Mutual Recognition of Companies and Legal Persons, and of the Direc-

Despite these attempts to accommodate small businesses, E.C. company law initiatives historically have been aimed more at larger, public companies than their smaller counterparts This has been because E.C. officials have felt that public companies have a more significant impact on member state affairs and because drafting and negotiating company law measures has been easier when smaller companies have been excluded.[89] The upshot has been that most proposed and enacted company law directives apply only to public companies.[90]

F. *Corporate Groups and Multinational Enterprises*

Community officials feel that corporate groups and multinational enterprises have an important impact on the E.C.'s economic and social fabric.[91] Consequently, the E.C. has enacted three measures dealing with the internal governance of complex corporate undertakings and is considering a number of others. In contrast, Canadian treatment of such issues has been confined primarily to case law.[92]

One of the three corporate group measures the E.C. has enacted is the *Seventh Directive*. It requires member states to oblige parent companies to draw up and publish consolidated accounts of subsidiaries whenever either the parent or the subsidiary is a public company.[93] This stands in contrast to Canadian corpo-

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tives on Company Law Upon the Legal Status of the One-Man Company in Belgium" (1982) 19 Common Mkt. L. Rev. 79 at 79-87 & 96-104, and F. Wooldridge, "The Draft Twelfth Directive on Single-Member Companies" (1989) J. Bus. L. 86.

[89]F. Barbaso, "The Harmonisation of Company Law with Regard to Mergers and Divisions" (1984) J. Bus. Law 176 at 176-77; W. Daübler, "The Employee Participation Directive — A Realistic Utopia?" (1977) 14 Common Mkt. L. Rev. 457 at 470-71; and P. Sanders, *European Stock Corporation: Text of Draft Statute with Commentary* (New York: Commerce Clearing House, 1969) at 13-14.

[90]Like the *Fourth Directive*, the *First Directive* (see art. 1) and the *Seventh Directive* (see art. 4) apply to all companies with some exemptions for smaller businesses. All other directives apply only to public companies. The discussion here conceals some classification complexities. The member states each generally have one corporate form intended for large companies with numerous shareholders and another intended for smaller companies. The former are most accurately described as public companies and the latter as private companies, and most company law directives apply only to public companies. The primary difficulty with this classification is that businesses often do not use the corporate form which seems to suit them best. *E.g.*, in Germany many large businesses with numerous shareholders use the private company, or GmbH, form (see *supra*, note 42). The various classes of corporation in the member states are discussed in Brebner *et al.*, *supra*, note 61.

[91]*White Paper* at 35-36; preamble, *E.E.I.G. Regulation*; preamble, *Vredeling Directive*; W. Kolvenbach, "The European Economic Community and the Transnational Corporation" (1984) 5 N.Y. L. School J. Int'l & Comp. L. 253 at 262-63; and J.H. Dunning & P. Robson, "Multinational Corporate Integration and Regional Economic Integration" (1987) 24 J. of Comm. Mkt. St. 103 at 109.

[92]See Sargent, *supra*, note 7 at 163-79, and Hadden, Forbes & Simmonds, *supra*, note 7 at 625-28.

[93]Art. 4(1). On the *Seventh Directive*, see M. Petite, "The Conditions for Consolidation Under the 7th Company Law Directive" (1984) 21 Comm. Mkt. L. Rev. 81.

rate legislation, which imposes no such requirement.[94] The *Seventh Directive*'s underlying rationale is that group accounts must be analyzed to get a full and accurate impression of the overall financial status of a corporate group.

The *Seventh Directive* sets out the valuation principles and the format to be used for consolidated accounts. It also stipulates the types of linkages which require companies to prepare such accounts. For example, it mandates companies to do so if they own a majority of the voting shares of another company or have control of a majority of shares of another company by way of a shareholders' agreement.[95] The *Seventh Directive* also requires companies to prepare consolidated accounts when one company has appointed the majority of the board members of another company by voting its shares, and when a company otherwise has the legal right to appoint the board members of another company. Moreover, the *Seventh Directive* gives member states the option to require consolidated accounts to be prepared when one company exercises a dominant influence over another.[96]

The *Eleventh Company Law Directive* is the second measure the E.C. has enacted that is directly relevant to complex corporate undertakings. It deals with disclosure by company branches. The *Directive*'s objective is to eliminate differences between disclosure requirements for company branches and subsidiary companies.[97]

The *Eleventh Directive* only applies when a company establishes a branch outside its home jurisdiction. The *Directive* provides that a branch must disclose in its host member state most of the information about the company which the company is obliged to disclose in its own member state pursuant to the *First*, *Fourth* and *Seventh Directives*.[98] At the same time the *Eleventh Directive* prevents the branch's member state from requiring any additional information about the branch.

The third measure the E.C. has enacted which is relevant to complex undertakings is the *E.E.I.G. Regulation*, which can be used by firms which want to establish co-operative cross-border arrangements.[99] The *Regulation*'s most

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[94]Hadden, Forbes & Simmonds, *supra*, note 7 at 627. Canadian corporate legislation does contain some provisions regulating companies which prepare consolidated accounts: see, *e.g.*, *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, ss 157 & 160(5).

[95]Arts 1(a) & (d)(aa).

[96]Arts 1(b), d(bb) & 2(b). The *Seventh Directive* borrows the focus on majority rule from British company law and the focus on other factors from Germany and France. See Petite, *supra*, note 93 at 85-88, and J. Pipkorn, "The Draft Directive on Procedures for Informing and Consulting Employees" (1983) 20 Comm. Mkt. L. Rev. 725 at 750-51.

[97]Preamble, *supra*, note 24. On the *Eleventh Directive*, see R. Nieuwdorp, "EEC Harmonisation Report" (1988) 16 Int. Bus. Lawyer 39 at 39-41; and J. Dine, "Company Law Directives: A Protective Proposal" (1989) 133 Solicitors J. 30.

[98]Arts 1(1), 2-4.

[99]Arts 5-7. See generally Murphy, *supra*, note 51, and Israel, *supra*, note 58.

distinctive characteristic is that it provides an organisational framework which is not exclusively wedded to the legal system of any member state. Member state firms can create an E.E.I.G. by simply entering into a contract in accordance with the *Regulation*, though the grouping has to be registered in one of the member states.[100]

The contractual nature of E.E.I.G.s gives their members considerable freedom in organising grouping affairs, but the freedom is not absolute. E.E.I.G. members are deemed to be jointly and severally liable for the grouping's debts and must appoint natural persons to act as managers.[101] E.E.I.G.s cannot invite investment from the public and, as mentioned, cannot have more than 500 employees.[102] They can only engage in activities which are connected with their members' activities and their activities cannot dominate those of the members.[103] Profits made by an E.E.I.G. cannot be retained by the grouping and instead must be apportioned among the members.[104] The upshot is that E.E.I.G.s will generally have to be used for research and development ventures, co-operative training, marketing and testing programmes and joint bidding on projects.

E.C. officials hope to provide Members State firms with a number of other ways to organise on a Community-wide level. They give this priority because they feel that member state businesses must develop on a European basis to compete successfully with non-E.C. multinationals.[105] Mergers between member state companies would be a logical way for cross-border reorganisation to occur, but mergers of this type are difficult to carry out. Member state company legislation generally requires unanimous shareholder consent for such transactions, which is impossible to obtain in most public companies. Also, member state tax legislation imposes significant financial obstacles.[106] The Commission has recently sought to encourage cross-frontier mergers in two ways. One is by obtaining Council approval for a number of measures designed to reduce the tax

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[100]E.E.I.G.s can generally be used by all types of member state business organisations, but member states can restrict the use of the E.E.I.G.s by very small companies. See *supra*, note 33, art. 4(4), and Israel, *ibid.* at 15. Also, member state legislation authorising registration can have a significant impact on the use of E.E.I.G.s in that member state. See, *e.g.*, A. Burnside, "EEIG — Implementation in the UK" (1990) 11 Co. Lawyer 164.

[101]*Supra*, note 33, arts 16-20 & 24.

[102]*Ibid.*, arts 3(2)(c) & 23.

[103]*Ibid.*, art. 3(1).

[104]*Ibid.*, art. 21.

[105]European Commission, *supra*, note 21 at 5-7, 11; Carreau & Lee, *supra*, note 21 at 505-506; Dunning & Robson, *supra*, note 91 at 109-10; D. Swann, *The Economics of the Common Market*, 5th ed. (Harmondsworth, U.K.: Penguin Books, 1984) at 289-91; and interview with K. van Hulle, European Commission, DG XV, April 1990.

[106]European Commission, *ibid.* at 7-9 & 13; Carreau & Lee, *ibid.* at 506-507; Swann, *ibid.* at 292; and P. Leleu, "Corporation Law in the United States and in the E.E.C.: Some Comments on the Present Situation and Future Prospects" (1967-68) 5 Common Mkt. L. Rev. 133 at 173-74.

obstacles.[107] The other is by attempting to secure enactment of the *Tenth Directive*. If enacted, it would preclude member states from requiring that mergers be approved by more than two-thirds of the shares voted.[108] Hence, the barrier to mergers imposed by unanimous shareholder consent would be removed.

Otherwise, the *Tenth Directive* would extend many of the *Third Directive*'s provisions to cross border transactions.[109] The *Third Directive*, which the E.C. enacted in 1978, applies to mergers of companies from the same member state. It stipulates that prior to a merger the management of the companies involved must each prepare a report on the proposed transaction and must each appoint an independent expert to do the same. Each company must then make the reports available to the shareholders before they vote on the proposed merger.[110]

As well as fostering mergers, Community officials would like to make the European Company available as a way for businesses to reorganise on a European level.[111] This is reflected in the methods of incorporation set out in the most recent Commission proposal, which was made in 1989. They indicate that the *European Company Statute* is much more concerned with fostering relationships between existing member state companies than it is with providing natural persons with an incorporation device. The three methods are a merger between E.C. public companies, the establishment of a joint holding corporation by such companies and the formation of a joint subsidiary by Community undertakings.[112]

The 1989 draft regulates capital structure, share rights and restrictions, general meetings, accounts and corporate governance. The provisions are borrowed largely from existing and proposed company law directives.[113] Consequently, as has been discussed, the one and two-tier board structures and the employee participation options are very similar to their counterparts in the *Fifth Directive*.

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[107]See Common Market Rep., *supra*, note 35, paras. 95,594 & 95,678.

[108]Art. 7. See generally Winter, *supra*, note 13 at 148-49; United States International Trade Commission, *supra*, note 54 at 9-26 – 9-28; and E.R. Lewis & M.A. Goldstein, "The Effect of E.C. 1992 on U.S. Companies: A U.S. Government Perspective" (1989) 3 Temp. Int'l & Comp. L.J. 153 at 175-76.

[109]On the transactions covered, see art. 3 of the *Tenth Directive*.

[110]Arts 5-11.

[111]European Commission, *supra*, note 21 at 2-5; Commission Press Release IP(88)354, 8.6.88, set out in "Infobank: A European Company" (1988) 9 Bus. L. Rev. 232; and Commission Information Memo No. P-39, 12.7.89, set out in "Eurobrief: Company Law" (1989) 10 Bus. L. Rev. 269.

[112]Art. 2. The proposal also stipulates that regardless of how a European Company is formed, it must have a minimum share capital of 100,000 E.C.U.s (about $140,000 Canadian) (*supra*, art. 4(1)).

[113]Department of Trade and Industry, *supra*, note 29 at 4-6, and interview with A. Ioakimides, European Commissiou, DG XV, April 1990.

Employee participation concerns, as mentioned, have slowed progress on both the *Tenth Directive* and the *European Company Statute*. Two other proposed directives which are relevant to corporate groups have also encountered political problems. These are the *Ninth Directive* and the *Vredeling Directive*.

In most member states, as in Canada, company law treats subsidiaries as being largely autonomous from their parent.[114] This gives parent companies a significant degree of fiexibility, but also creates the possibility that a parent company, acting in its own interests, will act contrary to the interests of shareholders, creditors and employees of a subsidiary. The *Ninth Directive* would make important changes to these dynamics in Europe if the Community enacts it.

The Commission drafted the *Ninth Directive* in the early 1980s, but has yet to propose it formally to the Council.[115] Its key concept is the control contract, which is known only to German law.[116] Under the *Ninth Directive*'s control contract, a subsidiary company would consent to being controlled by the parent and the parent would become bound by two significant obligations. One is that the parent would have to buy out shareholders in the subsidiary who request this at the time the control contract is entered into. The other is that the parent would have to compensate a subsidiary's shareholders, employees and creditors for losses they suffer as a result of the parent's influence over the subsidiary.

The responsibilities and liabilities imposed by control contracts would make them unpopular with most member state parent companies.[117] The *Ninth Directive* responds by creating a procedure which is designed to encourage parent companies to enter into control contracts. The *Directive* provides that when a control contract has not been entered into, those managing subsidiary companies have to prepare a detailed, audited annual report on the parent-subsidiary relationship. Any shareholder, creditor or employee of the subsidiary who feels, after reading the report, that the subsidiary's interests have been prejudiced by the parent, can apply to a court in the parent's jurisdiction. If the court finds that

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[114]Hadden, Forbes & Simmonds, *supra*, note 7 at 620-25.

[115]On the present status of the *Ninth Directive* see Department of Trade and Industry, *The Single Market: Company Law Harmonisation* — November 1990 (London: Central Office of Information, 1990) at 17. On the *Ninth Directive* generally, see Schneebaum, *supra*, note 79 at 317-21; R. Nieuwdorp, "EEC Company: Law Harmonisation" (1987) 15 Int'l Bus. Law. 177 at 179-80; P. Farmery, "The E.C. Draft Proposal for a Ninth Company Law Directive on Groups: A Business Viewpoint" (1986) 7 Bus. L. Rev. 88; W.Z. Carr Jr. & D.M. Kolkey, "U.S. Perspective on the Vredeling Proposal and Other Proposals by the EEC on Employment Matters of Concern to Multinational Corporations" (1984) 12 Int. Bus. Law. 57 at 64-65; and K. Hofstetter, "Parent Responsibility for Subsidiary Corporations: Evaluating European Trends" (1990) 39 Int. & Comp. L.Q. 576 at 588-89.

[116]See Hadden, Forbes & Simmonds, *supra*, note 7 at 645, and Hofstetter, *ibid.* at 580-81.

[117]Indeed, control contracts are rarely used in Germany (Hadden, Forbes & Simmonds, *ibid.* at 581).

the parent's board of directors has failed to act with due care and in the best interest of the group, the judge can impose joint and several liability for any losses on the parent company and the individual members of the parent's board.

While the *Ninth Directive* regulates relations between members of a corporate group, the *Vredeling Directive* deals with relations between employees and management. The objective of the *Vredeling Directive* is to ensure that parent companies keep employees in subsidiary companies informed about group affairs.[118] The most recent draft of the *Directive*, which the Commission submitted to the Council in 1983, imposes two basic disclosure obligations.[119] First, it requires parent companies, referred to as dominant undertakings, to disclose annually to their subsidiaries enough information to give "a clear picture of the activities of the dominant undertaking and its subsidiaries taken as a whole" so this can then be communicated to representatives of the employees.[120] Second, it requires parent companies contemplating decisions which are likely to have a substantial effect on the interests of the group's workers to forward information to affected subsidiaries prior to the decision.[121]

With decisions which would substantially affect employees' interests, the 1983 draft mandates not only that employees be informed but also stipulates that they be consulted. These consultations are to take place with management of the subsidiary the employees work for. The objective of the process is an agreement between management and the employees' representatives about the effect of the proposed decision on the employees.[122]

The political battles which stalled the *Ninth Directive* and the Vredeling proposal were different from those involving the *Fifth* and *Tenth Directives* and the *European Company Statute*. This is because of the involvement of groups from outside the European Community. U.S. multinationals, which are heavily

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[118]*Supra*, note 34. The literature on the *Vredeling Directive* is extensive. See, *e.g.*, Kolvenbach, *supra*, note 29 at 744-57; Pipkorn, *supra*, note 96; R.D. Fera, "The European Economic Community and the Vredeling Proposal: The Debate to Temper Ideology with Realism" (1986) 16 Cal. W. Int'l L.J. 250; D. Hoffmann & J. Grewe, "The Vredeling Proposal of the European Commission" (1984) 20 Stan. J. Int'l L. 329; and F. Vandamme, "The Proposal for a Directive on Procedures for Informing and Consulting the Employees of Undertakings with Complex Structures, in Particular Transnational Undertakings" in J. Vandamme, ed., *Employee Consultation Information in Multinational Corporations* (London: Croom Helm, 1986), 149.

[119]The Commission first proposed the *Vredeling Directive* in 1980 (*supra*, note 34). Neither the 1980 or the 1983 version applies to all corporate groups. The 1980 version does not apply to subsidiaries with less than 100 employees (art. 4) and the 1983 version only applies to corporate groups with at least 1,000 employees in the E.C. (art. 2(1)).

[120]Art. 3(1). The information has to include the group's economic and financial status, employment situation and future plans and prospects (art. 3(2)).

[121]Decisions giving rise to this obligation include the closure or transfer of major parts of an establishment, substantial modifications to the activities of a subsidiary and major organizational changes. See *ibid.*, art. 4(2).

[122]Arts 4(1) & (3).

involved in the E.C. market, were distressed when the E.C. proposed the *Ninth Directive* and the *Vredeling Directive.*[123] The multinationals were upset because these measures made only minor concessions to non-E.C. parent companies and thus would have imposed unfamiliar and unwanted obligations on U.S. business in Europe.[124] U.S. business interests responded by heavily lobbying the E.C. institutions, arguing that investment in Europe would decline if these measures were enacted. U.S. congressmen also proposed retaliatory legislation.[125]

These strategies succeeded. During the late 1980s, the Community essentially dropped the *Ninth Directive* and the *Vredeling Directive* from its agenda, partly because E.C. officials were concerned about allaying fears that the Community was evolving into a protectionist "Fortress Europe."[126]

The E.C., however, may now be prepared to confront the issue of informing group employees again. Commission officials may soon submit a directive to the Council which would apply to companies if they operate in more than one member state, employ more than 1,000 people in the E.C. and employ at least 100 people in two or more member states.[127] The intention of the proposed *Directive* is to provide information to employees rather than give them managerial influence. The *Directive* would require a company to inform its works council of major strategic decisions the company was planning. The works council, however, would have no consultative rights.

It is unclear whether, despite its more moderate approach, this new works council proposal is any more likely to be enacted than the *Vredeling Directive.*

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[123]On U.S. involvement in the E.C., see United States International Trade Commission, *supra*, note 1 at 3-3 – 3-6.

[124]The *Ninth Directive* in fact is more disadvantageous for non-E.C. parent companies than it is for E.C. parents because it gives them less flexibility than E.C. parents in responding to buyout requests arising from the creation of control contracts (Carr & Kolkey, *supra*, note 115 at 65-66). The 1983 draft of the *Vredeling Directive* authorises non-E.C. parent companies to appoint an agent company in the E.C. to discharge its obligations. If no such agent is appointed, each E.C. subsidiary is responsible for disclosing the relevant information. See *supra*, note 34, art. 2(2).

[125]On U.S. opposition generally, see Kolvenbach, *supra*, note 29 at 753; Schneebaum, *supra*, note 79 at 318, 320-21 & 326; Carr & Kolkey, *ibid.* at 58-63; R.P. Walker, "The Vredeling Proposal: Cooperation Versus Confrontation in European Labor Relations" (1983) 1 Int'l Tax & Bus. Law. 177 at 185-88; and M. Nelson, "The *Vredeling Directive*: The EEC's Failed Attempt to Regulate Multinational Enterprises and Organize Collective Bargaining" (1988) 20 Int'l L. & Pol. 967 at 972-75.

[126]Warren, *supra*, note 50 at 207; Department of Trade and Industry, *supra*, note 115 at 17 and Kolvenbach, *supra*, note 29 at 759-60. On "Fortress Europe" issues see Pitts, *supra*, note 2 at 119-39; J. Ferry, "Reciprocity: The Status of Foreign Corporations in International Law" (1988) J. Int'l Bus. L. 222; W. Lee, "1992: Promise or Problems for non-EC Companies?" (1988) 7 Int'l Fin. L. Rev. 18; and R.M. Jarvis, "American Business and the Single European Act: Scaling the Walls of 'Fortress Europe'" (1990) 20 Cal. W. Int'l L.J. 227 at 247-60.

[127]*Common Market Reporter*, *supra*, note 35, paras 95 & 681.

European businesses have already objected to the new proposal and U.S. companies may do likewise since the measure apparently will apply to corporate groups which have headquarters outside the Community.[128] On the other hand, many Community officials feel that it is very important for the E.C. to have social objectives so that workers can enjoy the benefits of integration.[129] Consequently, the E.C. may press ahead despite the opposition.[130]

G. *Securities Regulation*

The corporate securities market is far less developed in most member states than it is in North America.[131] Only Great Britain has a stock exchange and diversified share ownership on a scale comparable with the U.S. and Canada. Other member states generally have small stock exchanges, populations which are sceptical about investing in securities, and few companies with widely traded shares. Moreover, takeover activity is significantly constrained by barriers imposed by company law, securities regulation and institutional factors. The institutional factors include substantial cross-ownership of shares between companies and a high level of share ownership by banks.

The securities market in Europe may be changing, however.[132] The 1992 project has motivated business to reorganise on a European basis. As part of this process, mergers and takeovers have become more common. Also, the E.C. has been attempting to liberalise member state capital restrictions and if these efforts are successful, funds may be freed up for investment in corporate secu-

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[128]"Don't Forget", *supra*, note 35 and "E.C.," *supra*, note 35.

[129]Pitts, *supra*, note 2 at 84-90; "Europe's Social Insecurity" *The Economist* (23 June 1990) 13; and B. Roberts, "The Social Dimension of European Labour Markets" in Dahrendorf, *supra*, note 40, 39.

[130]The chances of enactment are improved by an E.C. document which did not exist when the *Vredeling Directive* was introduced in the early 1980s. See, Commission of the European Communities, *Charter of the Fundamental Social Rights of Workers* (Luxembourg: Office of Official Publications of the European Communities, 1990) [hereinafter *Social Charter*]. On this document, see B. Bercusson, "The European Community's Charter of Fundamental Social Rights of Workers" (1990) 53 Mod. L. Rev. 624, and B. Hepple, "The Implementation of the Community Charter of Fundamental Social Rights" (1990) 53 Mod. L. Rev. 643.

[131]See generally Pitts, *supra*, note 2 at 65-69; Buxbaum & Hopt, *supra*, note 18 at 169-73, 189-93; Warren, *supra*, note 50 at 193-94; O.L. Adelberger, "Financing Corporations in Major European Markets" in K. Macbarzina & W.H. Staehle, eds, *European Approaches to International Management* (Berlin: de Gruyter, 1986) 296; N. Basaldua, "Towards the Harmonization of EC-member states' Regulations on Takeover Bids: The Proposal for a Thirteenth Council Directive on Company Law" (1989) 9 Nw. J. of Int'l Law & Bus. 487 at 489-95; S. MacLachlan & W. Mackesy, "Acquisitions of Companies in Europe — Practicability, Disclosure, and Regulation: An Overview" (1989) 23 Int. Law. 373; and J. Blum, "The Regulation of Insider Trading in Germany: Who's Afraid of Self-Restraint?" (1986) 7 Nw. J. Int'l L. & Bus. 507 at 507-10.

[132]This is illustrated by the Milan Stock Exchange ("Time for Change" *The Economist* (9 June 1990) 81).

rities. Finally, the E.C. has been quickly developing a Community-wide securities regulation framework.

Still, E.C. officials appear to be somewhat ambivalent about the operation of market forces in the securities area. Takeovers play a key role in the operation of British, U.S. and Canadian stock exchanges.[133] Nevertheless, the Commission is unsympathetic towards them, arguing that they are an excessive and sometimes abusive method of restructuring.[134]

The proposed *Thirteenth Directive* reflects the Commission's attitude. The *Thirteenth Directive*, if it is enacted, would make only a small dent in existing takeover barriers.[135] Its primary effect would be to require member states to increase protection for the target's shareholders after a bid has been made.[136] The *Thirteenth Directive* consequently might make it more difficult, if anything, to make a successful hostile bid.[137]

Even though the *Thirteenth Directive* has not yet been enacted, the Community already has a number of securities measures in place. One example is the *Insider Trading Directive*, which the E.C. enacted in 1989 and which requires E.C. members to pass legislation prohibiting insider trading by June 1992.[138]

At present, a number of member states do not regulate insider trading at all and most others do not do so with any rigour.[139] Consequently, the *Insider Trading Directive* could potentially reverse current Community policy. Certainly, the *Directive* is very broad in scope. It defines insider information liberally,

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[133]Hostile take-overs are less common in Canada than they are in the U.S. See P. Dey & R. Yalden, "Keeping the Playing Field Level: Poison Pills and Directors' Fiduciary Duties in Canadian Take-Over Law" (1990) 17 Can. Bus. L.J. 252 at 254-55 & 262-63. On takeovers in Britain, see D.M. Keim, "The European Community's Proposed Directive on Takeover Bids and its Impact on Shareholders' Rights" (1990) 16 Brooklyn J. Int'l L. 561 at 563-64.

[134]Commission Press Release, *supra*, note 111, discussed by A. Perry, "The European Company" (1989) 4 Butterworths J. of Int. Ban. & Fin. L. 14 at 16.

[135]*Supra*, note 33, art. 8, as amended by O.J. 1990, C240/7; Basaldua, *supra*, note 131 at 499, and interview with A. Ioakimides, European Commission, DG XV, April 1990.

[136]Arts 4, 10, 12 & 14. See Keim, *supra*, note 133 at 571-75. Articles 4 and 10 have been changed slightly by O.J. 1990, C240/7.

[137]See Basaldua, *supra*, note 131 at 495-500, and MacLachlan & Mackesy, *supra*, note 131 at 398-99. The *Major Shareholdings Directive*, Directive 88/627, O.J. 1988, L348/62, will probably have a similar effect. It requires shareholders in companies listed on stock exchanges to disclose the extent of their voting rights upon the acquisition or disposition of shares at 10%, 20%, 33 1/3%, 50% and 66 2/3% of the company's outstanding voting rights. The disclosures should give boards of target companies more time to take defensive measures against hostile bidders.

[138]*Supra*, note 32.

[139]C.A. McGuinness, "Toward the Unification of European Capital Markets: The EEC's Proposed Directive on Insider Trading" (1988) 11 Fordham Int'l L.J. 432 at 438-47, and A.E. Stutz, "A New Look at the European Economic Community Directive on Insider Trading" (1990) 23 Vand. J. Transnat'l L. 135 at 154-67.

employs a broad definition of insider and prohibits insiders from engaging in a wide range of activities.[140]

In practice, however, the *Directive* may not bring dramatic changes. This is because of its treatment of enforcement. The *Directive* only requires member states to appoint an authority with sufficient powers to regulate insider trading and to establish sanctions which are sufficient to promote compliance. These requirements are open ended enough to allow member states which saw little reason to regulate insider trading in the past to follow much the same pattern in the future.[141]

The E.C. has also enacted a number of measures which are intended to provide investors with information about companies which make public offers of their securities. Taken together, the *Admissions Directive*, the *Listing Particulars Directive*, the *Continuous Disclosure Directive* and the *Public Offer Prospectus Directive* require member states to pass legislation which imposes disclosure and publication requirements on companies listed on Members State stock exchanges and impose similar, though less rigorous, obligations on companies which are not listed but which offer their securities for sale to the public.[142]

The most notable characteristic of the disclosure directives is that in the late 1980s they were amended to introduce the concept of mutual recognition.[143] The basic thrust of the mutual recognition principle is that an undertaking, product or service which has fulfilled one member state's requirements should be accepted by all E.C. members when the member states have essentially equivalent standards.[144] As applied to securities disclosure, mutual recognition means that when a member state's regulatory authority approves a company's disclosure documents, this approval must be accepted by the relevant authorities throughout the Community. Consequently, if a British company has complied with Great Britain's legislative framework and wants to make a public offer in Germany, Germany's disclosure requirements will not apply, even if they are stricter than Britain's.

The mutual recognition principle potentially runs contrary to Europe's traditional hostility to the possibility of migration from strict company law rules.

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[140]Arts 1-4, discussed by Stutz, *ibid.* at 168-69; and K.J. Hopt, "The European Insider Dealing Directive" (1990) 27 C.M.L.R. 51 at 57-72 & 80. Dine, *supra*, note 44, criticises the provisions for being too open-ended.

[141]Arts 8 & 13; Buxbaum & Hopt, *supra*, note 18 at 246-50; Warren, *supra*, note 50 at 221; McGuinness, *supra*, note 139 at 448-49, 451-52; and Stutz, *ibid.* at 169-72.

[142]See *supra*, notes 30-31. See generally Warren, *supra*, note 50 at 209-19 & 224-32, and M.G. Warren III, "Regulatory Harmony in the European Communities: the Common Market Prospectus" (1990) 16 Brooklyn J. Int'l L. 19.

[143]The relevant changes were made by the *Mutual Recognition Directive*.

[144]*White Paper* at 6, 18-22, and Curzon-Price, *supra*, note 40 at 29-30. Again, this was part of a general trend — *supra*, note 50.

The Community-wide effect of approval by one member state will give companies making a public offering choice about the regulatory scheme under which they seek approval. This may cause E.C. members to adjust their legal standards and administrative rules to attract securities offerings. Some think this will lead to an irresponsible erosion of regulatory standards. The possibility exists, however, that the relevant regulatory schemes may become more responsive to the needs of E.C. companies and the investing public.[145]

Regardless of whether any adjustments which take place are beneficial or not, the overall process will be constrained in important ways. The minimum standards established by the various securities disclosure directives will create a regulatory floor. Also, the directives themselves impose some constraints on forum shopping.[146] Furthermore, many types of public securities offerings are not covered by the directives so they will not be affected by the mutual recognition principle.[147] Finally, many companies will not find it cost-effective to apply outside their home country even though the legal rules may be somewhat more favourable elsewhere. Consequently, the mutual recognition principle should not create a regulatory free-for-all in the securities disclosure context.

IV. Canadians and Enropean Community Company and Securities Law

While most E.C. company and securities law measures have aspects which may interest Canadian businesses, Canadian investors and Canadian law reformers, some issues merit detailed consideration here. These will now be examined from the perspective of the three groups.

A. *The Business Community*

Canadian businesses which pursue the E.C.'s commercial opportunities by establishing a permanent base in Europe will have to consider E.C. company and securities law. The two primary ways of establishing such a base are by forming a branch or a subsidiary company.[148] Using a subsidiary has a number

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[145]Compare Curzon-Price, *ibid.* at 32-35 with McGee & Weatherill, *supra*, note 40 at 585; Warren, *supra*, note 50 at 213, 231-32 and Warren, *supra*, note 142 at 29-30 & 50-51. The argnments involved here have been canvassed extensively by U.S. corporate law scholars discussing the pros and cons of allowing corporations to choose between diverse sets of state corporate legislation. For a Canadian perspective see R.J. Daniels, "Should Provinces Compete? The Case for a Competitive Corporate Law Market" (1990) 36 McGill L.J. 130. See also *infra*, notes 162 and 163 and accompanying text.

[146]See, *e.g.*, arts 20-21(1) of the *Public Offer Prospectus Directive*; and Warren, *supra*, note 142 at 30 & 47.

[147]Art. 2, discussed by Warren, *ibid.* at 37-46.

[148]On the ways non-E.C. companies can approach the E.C. market and the advantages involved with having a base there, see Pitts, *supra*, note 2 at 157-58, 168-90, 212-14 & 218-29; and Winter, *supra*, note 13 at 80 & 294-97.

of legal advantages. Most important, courts and governments will generally treat a subsidiary company as a distinct legal entity which is based in one of the member states. They will not do this with branches. This makes a significant difference, since member state companies are entitled to rely upon most of the freedoms guaranteed by the *Treaty of Rome* and the ownership structure of a company does not affect these rights. Consequently, a Canadian subsidiary, unlike a branch, generally should be able to fully exploit the benefits of the E.C.'s single market.[149]

The *E.E.I.G. Regulation* and the *European Company Statute* illustrate why using a subsidiary is advantageous. Both place restrictions on their use by non-E.C. undertakings. Undertakings based outside the E.C. cannot be an E.E.I.G. partner and, under the most recent draft of the *Statute*, cannot be involved in the formation of a European Company.[150] These restrictions would prevent a Canadian branch from using either business form but they would not be a problem for the European subsidiary of a Canadian company. This is because it would qualify as an E.C. undertaking, despite being owned by a non-E.C. firm.[151]

If a Canadian company follows the branch route, the only E.C. company and securities law provision which should be directly relevant is the *Eleventh Directive*. Again, it regulates disclosure by branches in the member states. Of most significance for Canadian companies, it requires non-E.C. company branches to file prescribed information about the company.

A Canadian company which acquires or incorporates a subsidiary in the Community will be subject to E.C. company and securities law via the legislation of the subsidiary's member state. Generally speaking, however, Canadian parent companies should not be directly affected by E.C. measures. This is because few of these measures require member states to impose obligations directly on non-E.C. parent companies.[152] Even the *Seventh Directive*, with its focus on corporate groups, does not attempt to regulate non-E.C. companies. The only potential exceptions have not yet been enacted, these being the *Ninth Directive* and the directives dealing with disclosure to employees in corporate

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[149]Arts 52, 58 & 59. Not all non-E.C. subsidiaries are assured of equal treatment with companies which are owned by E.C. interests. At the very least, non-E.C. subsidiaries will have to have a real and continuous link with the economy of one of the E.C. members. See generally Winter, *ibid.* at 79-85; Ferry, *supra*, note 126 at 223; Lee, *supra*, note 126 at 18-19; and J.D. Dinnage, "Comments on the 'Europe 1992' Symposium" (1989) 3 Temple Int'l & Comp. L.J. 179 at 181-82.

[150]*Supra*, note 33, art. 4(a), and *supra*, note 29, art. 2. On this restriction in the E.E.I.G. see Dine, *supra*, note 44 and Israel, *supra*, note 58 at 16. On the European Company, see Stein, *supra*, note 29 at 458-60, and Sanders, *supra*, note 29 at 86-87.

[151]United States International Trade Commission, *supra*, note 54 at 9-24.

[152]Winter, *supra*, note 13 at 151.

groups. If these measures are enacted, they likely would apply to non-E.C. parent companies which have European subsidiaries.[153]

A Canadian company that decides to use a subsidiary as its European foundation will have to choose which member state to incorporate in. The choice is made somewhat more difficult because a Canadian parent generally will not be able to incorporate its subsidiary in one member state and base its operations in another. This is because the real seat rule, which operates in most member states, prevents companies which have their business based in one member state from being incorporated in another.

The real seat rule likely imposes costs on non-E.C. companies.[154] In deciding where to establish operations most companies would consider commercial and financial considerations to be more important than company law factors.[155] Consequently, if the member state which has the most favourable commercial environment happens to have an unattractive company law regime, a Canadian parent will still likely decide to base its operations there. Nevertheless, the inconveniences imposed by that member state's company law will impose costs on the subsidiary and thus on the parent.[156]

Canadian companies might assume that because of the E.C.'s harmonisation programme, the differences between member state company laws will be minor and the costs imposed by disadvantageous legal rules should be slight. There is a problem, however, with this line of reasoning, which is that important differences continue to exist between member state company laws.[157]

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[153]See *supra*, note 124, and E.C., *supra*, note 35.

[154]The rule strongly encourages non-E.C. parents to incorporate in the member state where they want to base their operations rather than in the member state with the most suitable company law.

[155]Pitts discusses other factors which would be relevant *supra*, note 2 at 229-33.

[156]*E.g.*, a Canadian company might decide that commercially Germany would be the best place to establish a subsidiary. Germany, however, imposes worker participation requirements on its companies. A Canadian company likely would be unenthusiastic about the prospects of meeting this requirement, given that employee participation in management rarely occurs in Canada. See Pitts, *ibid.* at 241; Axworthy, *supra*, note 7 at 393-97 & 423-27; Hadden, Forbes & Simmonds, *supra*, note 7 at 291-93; and Carr & Kolkey, *supra*, note 115 at 63-64. Employee participation arguably could be beneficial for business, however. Its impact on the profitability of corporations has been debated extensively. See, *e.g.*, Hopt, *supra*, note 62 at 1353-59; Daübler, *supra*, note 89 at 473-81; M.C. Jensen & W.H. Meckling, "Rights and Production Functions: An Application to Labor-Managed Firms and Codetermination" (1979) 52 J. Bus. 469 at 472-75 & 503-504; S.M. Weiss & R.L. Yaffe, "Industrial Democracy: A Study of the Bullock Report and its Applicability to Canada" (1979) 9 Man. L.J. 445 at 475-77; L.L. Dallas, "Two Models of Corporate Governance: Beyond Berle and Means" (1988) 22 J. of L. Ref. 19 at 75-80; and O.E. Williamson, *The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting* (New York: Free Press, 1985) at 268-72 & 302-04.

[157]Also, there are a number of areas which are closely related to company law where no harmonisation has taken place and probably will not in the near future. These include winding-up and insolvency. See *Encyclopedia*, *supra*, note 11, vol. B at para. B10-487.

There are a number of reasons for why differences between company law regimes persist. One is that many topics have not been dealt with by enacted directives. For instance, the disagreements about employee participation and two-tier boards have not only prevented harmonisation in these areas, but have blocked passage of the *Fifth Directive*, which deals with a number of other key company law areas. Another reason is that some member states are slow to implement enacted directives. At present, only two of the seven company law directives which the member states are currently obliged to comply with have been implemented in all twelve member states.[158]

Furthermore, member state implementation does not always result in closely equivalent laws. The *Fourth Directive* experience, discussed above, illustrates this, but the problem is not an isolated one or one which will be eliminated easily.[159] For example, enactment of the *Fifth Directive* might well do little to harmonise regulation of employee participation in management. Given that social and economic differences have helped to prevent harmonisation in the accounting area, the prospects for harmonisation in the politically charged area of employee/management relations seem to be rather bleak.[160]

The *European Company Statute* theoretically could reduce some of the costs which the real seat rule imposes on Canadian parent companies. This is because it could provide a Canadian parent with a statutory regime for a subsidiary which was preferable to that in the member state where the parent company wanted to establish operations. Canadian parent companies should not be too optimistic, however, about the prospects of such a lower-cost alternative.

One reason, as has been discussed, is that employee participation considerations distinctly reduce the prospects of the *Statute* being enacted in the near future. Another is that Canadian businesses will have to endure some costs to form such a company. Again, under the most recent proposal, European companies can generally only be formed by the joint action of two or more E.C. firms. A Canadian parent which wanted to use the European Company form for its subsidiary would have to take some additional legal steps, such as forming subsidiaries in two member states and having them incorporate as a European Company.

A third reason the *European Company Statute* may not be attractive for Canadian businesses is that European companies will be governed to a significant extent by the laws of the member state where they are based. The 1989

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[158]European Commission, "Implementation of the Company Law Directives in the Member states" (1990) [unpublished].

[159]Buxbaum & Hopt, *supra*, note 18 at 233-43 & 263-66.

[160]Bnxbaum & Hopt, *ibid.* at 262, and O. Kahn-Freund, "Common Law and Civil Law — Imaginary and Real Obstacles to Assimilation" in M. Cappelletti, ed., *New Perspectives for a Common Law of Europe* (Boston: Sijthoff, 1978) 137 at 165-66.

draft of the *Statute* requires a European Company to register in the member state where it has its central administration.[161] Consequently, a Canadian parent would have to register the subsidiary in the member state where it was planning to establish operations. This is significant because the *Statute* leaves a number of important company law issues to be governed by the member state where registration has taken place.[162] The result is that there may be few cost differences between the member state company law and the *European Company Statute*.

B. Investors

As mentioned in the introduction to this article, Canadian investors are becoming more interested in the E.C. market and are consequently acquiring increasing numbers of shares in European companies. If, however, investors are assuming the Community's company law and securities regulation initiatives will enhance the value of shares in E.C. firms, they could be mistaken.

Arguably the centralising impulse inherent in E.C. company and securities law measures is contrary to shareholders' interests. There is a strong trend of opinion in the U.S. that shareholders' interests are best served when companies can select between legislative regimes to provide a package which will be attractive to shareholders.[163] The real seat rule already severely restricts the ability of E.C. companies to make such choices. To the extent that E.C. company law directives successfully develop equivalent legal rules through the Community, companies will face even more serious constraints on their options.

Many would dispute that the development of uniform or equivalent rules across jurisdictions is contrary to shareholders' interests.[164] Still, even accepting

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[161] *Supra*, note 29, art. 5.

[162] The *European Company Statute* expressly stipulates that regulation of corporate groups, mergers, insolvency and sanctions for breach of the *Statute* are to be governed by member state law. See arts 114, 129, 132 & 134. Also, there are important matters which the *European Company Statute* makes no reference to and which consequently would be governed by the law of the member state (see Department of Trade and Industry, *supra*, note 29 at 3 & 7-8). Finally, the courts of the chosen member state would interpret all disputes concerning the company's internal affairs, and would probably do so in accordance with the prevailing principles of their legal system. The *Statute* provides, however, that matters covered by it but which are not expressly mentioned are to be interpreted in accordance with the general principles upon which the *Statute* is based (art. 7(1)).

[163] Two commentators who have asserted that the same arguments are valid in the E.C. are L.S. Sealy, "British and European Company Law" in Dahrendorf, *supra*, note 40, 89 at 97-101, and H.N. Butler, "Nineteenth-Century Jurisdictional Competition in the Granting of Corporate Privileges" (1985) 14 J. Legal St. 129 at 166 n. 150.

[164] Canadian advocates of uniform rules across jurisdictions include R.C.C. Cuming, "Harmonization of Law in Canada: An Overview" in *Research Papers, The Royal Commission on the Economic Union and Development Prospects for Canada*, vol. 55, *Perspectives on the Harmonization of Law in Canada* (Toronto: University of Toronto Press, 1985) 1 at 17-20; J.S. Ziegel, "Harmonization of Provincial Laws, with Particular Reference to the Commercial, Consumer and Corpo-

that harmonisation of Community company and securities law is generally beneficial to shareholders, particular E.C. measures may adversely affect them. Some would argue, for example, that if the Community's attempt to discourage insider trading succeeds, this will decrease share values.[165] The *Fifth Directive* likely would have the same effect if it is enacted. In most member states, it would shift power away from the shareholders to the employees. The evidence from Germany suggests that shareholders would be made worse off by such a shift.[166]

This does not mean that investor enthusiasm about the E.C. is misplaced. The Community, by attempting to create a single market in the E.C. by the end of 1992, is altering the face of Europe. Admittedly, the E.C.'s single market project still faces political and technical obstacles. Nevertheless, the Community has made significant progress in meeting its 1992 timetable.[167] Probably even more important, E.C. businesses, as mentioned, are now "thinking European" and are planning and reorganising on an E.C. level. In addition, the 1992 project has had a significant psychological impact on member state companies. Consequently, the companies should be more receptive to the European focus of the Community's company and securities law initiatives.[168]

No doubt some companies will lose out in the development of the single market. Still, most expect that the overall economic impact will be strongly beneficial for European business.[169] If this is accurate, the effect should outweigh any potential negative fallout from E.C. company and securities law. Hence, Canadian investors who properly diversify their European investment portfolio likely will benefit by increasing their holdings of European securities.

C. Law Reformers

Canadians interested in corporate law reform may be able to benefit from increasing their knowledge of the E.C. Canadian corporate law has been drawn

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rate Law" in *Research Papers, The Royal Commission on the Economic Union and Development Prospects for Canada*, vol. 56, *Harmonization of Business Law in Canada* (Toronto: University of Toronto Press, 1986) 1 at 3-5; and W.H. Hurlburt, "Harmonization of Provincial Legislation in Canada: the Elusive Goal" (1987) 12 C.B.L.J. 387 at 393-95.

[165] North American commentators have extensively debated whether insider trading regulation acts in sbareholders' interests. For an overview, see J.S. Ziegel, *et. al.*, *Cases and Materials on Partnerships and Canadian Business Corporations*, 2d ed. (Toronto: Carswell, 1989) at 769-81.

[166] Hopt, *supra*, note 62 at 1356.

[167] Pitts, *supra*, note 2 at 28-39; Elling, *supra*, note 13 at 524-30; United States International Trade Commission, *supra*, note 54 at 1-6 – 1-9; and Commission Background Report No. ISEC/B15/90, 5.4.90, set out in "1992 Single European Market" (1990) 11 Bus. L. Rev. 151.

[168] Pitts, *ibid.* at 62-66, 69-73, 77, 80-82 & 109-15.

[169] *Ibid.* at 71-73, 76 & 82; "Post-'92," *supra*, note 3; United States International Trade Commission, *supra*, note 54 at 2-6 – 2-12; and "Cashing In on European Integration" *The New York Times* (30 April 1989) s. 3, 10. See, however, M. Porter, "Europe's Companies After 1992: Don't Collaborate, Compete" *The Economist* (9 June 1990) 17.

substantially from U.S. and British sources.[170] Similarly, Canadians have most often borrowed theoretical perspectives from these jurisdictions. Law and economics analysis, which emerged in the U.S., is the latest example.[171]

The E.C. provides a potential alternative source of corporate law ideas. There are important similarities between the Community and Canada which make comparisons relevant and potentially revealing. As mentioned, in the E.C. cross-ownership of shares is common and only a few companies have widely traded shares. Though the situation is not as extreme as in the E.C., these characteristics are more prevalent in Canada than they are in the U.S.[172] Also, in both the E.C. and Canada there is divided legislative responsibility for company law and securities law matters. Thus, these matters are regulated by provincial or member state authorities on the one hand or the federal or Community authorities on the other.

Several Canadian observers have in fact already drawn on E.C. company law to enhance and illuminate their work. For example, a number of Canadians have written about the E.C. approach to employee participation in management, board structure and corporate groups.[173] There are other matters, however, which merit consideration.

For example, Canadians who favour increased uniformity in provincial legislation should find the mandatory, binding directive system an attractive alternative to the Canadian situation, where there are no mechanisms available to force the provinces to adopt uniform legislation.[174] On the other hand, the history of corporate law reform in the E.C. and Canada suggests that institutional strnctures are not always key to developing uniform legislation. While the E.C.'s attempts to harmonise company law have run into significant obstacles, the absence of an institutional framework has not prevented the emergence of substantially uniform Canadian corporate legislation in recent years.[175]

Canadian observers who support a decentralised approach to legal regulation may also find the E.C. company and securities law to be of interest.[176] The

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[170]Hadden, Forbes & Simmonds, *supra*, note 7 at 24-33.

[171]B.R. Cheffins, "An Economic Analysis of the Oppression Remedy: Working Towards a More Coherent Picture of Corporate Law" (1990) 40 U.T.L.J. 775 at 783.

[172]R.J. Daniels & J.G. MacIntosh, "Toward a Distinctive Canadian Corporate Law Regime" (1990) [unpublished].

[173]*Supra*, note 7.

[174]Cuming, *supra*, note 164 at 11. On the problems with harmonisation mechanisms in Canada, see *supra* at 28-47 & 52-55; Ziegel, *supra*, note 164 at 10-28 & 44-49; and Hurlburt, *supra*, note 164 at 401-15.

[175]Cuming, *ibid.* at 24-25; Ziegel, *ibid.* at 34; and Hurlburt, *ibid.* at 399.

[176]Supporters of the decentralised approach include Daniels, *supra*, note 145; and T.J. Courchene, *Economic Management and the Division of Powers* in *Research Papers, The Royal Commission on the Economic Union and Development Prospects for Canada*, vol. 67 (Toronto: University of Toronto Press, 1986).

mutual recognition principle seems particularly attractive. This is illustrated by provincial regulation of disclosure by companies issuing securities to the public.

Individual provincial vetting of prospectuses and continuous disclosure documents imposes compliance costs on corporate issuers. Most often these costs are needless, since the provincial regulator with whom the documents are initially filed should detect any serious errors.[177] Provincial securities regulators have responded to the problem by trying to reduce the filing requirements for issuers which have had their documentation accepted where it was initially filed.[178] This is useful, but the underlying assumption still is that each province's regulatory requirements must be met. Consequently, a shift in emphasis might be appropriate. The E.C.'s principle of mutual recognition could provide the inspiration for such a shift. If this principle were applied in Canada, documents accepted by one provincial securities regulator would be acceptable in every other province. If this were felt to be too liberal, provincial legislatures and securities regulators could create specified exceptions to protect against potential irresponsible abandonment of regulatory standards. The result would still likely be reduced costs for corporate issuers and a smaller regulatory bureaucracy in most provinces.

Conclusion

The European Community is one of the world's most important economic and political institutions, and recent events suggest its importance will continue to grow. Because of these factors, Canadians have a strong incentive to become and remain informed about Community topics. For example, Canadian businesses, investors and law reformers have good reasons to examine E.C. company and securities law.

Canadians who decide to analyze Community developments must ensure that they have some understanding of the context in which the developments are taking place. For example, the most striking E.C. company law measures probably are the *Fifth Directive*, the *Ninth Directive*, the *European Company Statute* and the directives dealing with disclosure to employees in corporate groups. This is because these measures are socially and politically controversial as well as legally significant. Consequently, it should not be surprising that Canadians

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[177]Provincial regulation of prospectuses and continuous disclosure is discussed by P. Anisman, "The Regulation of the Securities Market and the Harmonization of Provincial Laws" in *Research Papers*, vol. 56, *supra*, note 164, 77 at 87-96 & 128. For a helpful discussion of harmonisation and mutual recognition dynamics in Canadian seeurities regulation see J. McIntosh, "Perspectives on Canadian Corporate and Securities Law" (1991) Proceedings of the Osgoode-Monash Conference on Law in the 21st Century [forthcoming].

[178]See, *e.g.*, National Policy No. 1, Clearance of National Issues, set out in *Ontario Securities Act and Regulations With Policy Statements, Blanket Orders, Rulings and Notices — 1990* (Toronto: De Boo, 1990) at 3-7.

who have examined E.C. company and securities law have focused on issues dealt with in these measures, including, as mentioned, employee representation in management, board structure and corporate groups.

Analyzing these topics in isolation, however, gives a misleading impression about E.C. company and securities law. Only by considering the E.C.'s institutional mechanisms and political dynamics can one appreciate that the *Fifth Directive*, the *Ninth Directive*, the *European Company Statute* and the directives dealing with disclosure to employees in corporate groups are surrounded by political controversy and may not be enacted in the near future. Similarly, only by examining other E.C. company and securities law measures can one appreciate that the Community has already enacted a significant number of provisions which are potentially important to a Canadian audience.

This lesson is not an isolated one. Each Community topic which might be of interest to Canadians, whether it is E.C. trade policy, competition law, financial services regulation or another matter, will have aspects which cannot be properly understood without some appreciation of the institutional and political context. Canadians who are interested in the E.C., and those writing about the Community for a Canadian audience, should remain aware of such considerations. If this admonition is kept in mind, interested Canadians should be able to develop a well-balanced and thorough understanding of a very important legal, economic and social institution.