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Accession to the European Economic Community: The Harmonization of Spanish Corporation Law

By Richard Maggio

Member of the Class of 1983.

I. INTRODUCTION

On July 28, 1977, Spain submitted its request for membership in the European Coal and Steel Community, the European Economic Community, and the European Atomic Energy Community to the Council of the European Communities. An opinion on Spain's application was issued on November 28, 1978, and on December 19, 1978, the Council ruled in favor of Spain's request. Negotiations are still underway.

One of the major objectives of the European Economic Community (EEC) is the creation of a "Common Market" of goods and services. This is done through the elimination of trade barriers. In the field of corporation law, this goal requires that companies be able to establish themselves anywhere within the Community. According to Professor Silkenat, a well-known authority on EEC law:

the most basic of . . . principles in the creation of a common market is the freedom of establishment: the right of a company of one state to set up branches or organize subsidiaries in other member states . . . [and] enjoy the same rights and benefits enjoyed by local companies.

Such a broad right of establishment, however, makes it imperative that the Community establish some degree of uniformity with regard to

1. 7/8 BULL. EUR. COMM., points 1.1.1 to 1.1.5 (1977).
2. See Opinion on Spain's Application for Membership, BULL. EUR. COMM. (Supp. 9, 1978).
3. 12 BULL. EUR. COMM., point 2.2.4 (1978).
other corporate laws so that adequate protections will be available to the shareholders, creditors, and suppliers of these potentially migratory enterprises.6

The Treaty of Rome,7 which established the EEC, contains several provisions for the elimination of restrictions on corporate mobility. Article 54(3)(g) provides that in order to achieve freedom of establishment, the Council and the Commission shall carry out their duties by "coordinating, to the extent necessary . . . and with a view to making them equivalent, the guarantees demanded in Member States from companies . . . for the purpose of protecting the interests both of the members of such companies and of third parties."8 Article 100 affords the legal basis for the Council to draw up "directives for the approximation of such legislative and administrative provisions of the Member States as have a direct incidence on the establishment or functioning of the Common Market."9

The desired result of these provisions is a certain "neutrality of law," so that the choice of corporate establishment or investment is determined by economic and not juridical motives.10 To date, four corporation law directives have been issued by the Council. These directives establish minimum requirements11 with regard to the formation of a corporation, disclosure of corporate documents, mergers, and the drawing up of corporate accounts.12

Accession to the EEC requires the applicant country to accept the whole of the "acquis communautaire," a fundamental rule from which there can be no derogation.13 With this in mind, this Note will examine the first four corporation law directives and will present a comparative analysis of Spanish and EEC corporation law, discussing the effects

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6. Id. at 837.
8. Treaty of Rome, supra note 7, art. 54(3)(g).
9. Id. art. 100.
11. See Treaty of Rome, supra note 7, art. 189.
12. Two other directives in this area have been issued by the Council. Council Directive 79/279/EEC of March 5, 1979, 22 O.J. EUR. COMM. (No. L 66) 21 (1979), coordinates the conditions for the admission of securities to official stock exchange listings. Council Directive 80/390/EEC of March 17, 1980, 23 O.J. EUR. COMM. (No. L 100) 1 (1980), regulates the prospectus to be published for the admission of securities to official stock exchange listings. These two directives are beyond the scope of this discussion because they deal with investor protection and not corporation law.
13. Opinion on Spain's Application for Membership, supra note 2, at 19.
that these directives, as minimum standards, will have on existing Spanish law. This Note will concentrate on the stock corporation (sociedad anónima), since it is the form of corporate organization most commonly used in Spain.14

The sociedad anónima is governed by the Ley de Sociedades Anónimas of July 17, 1951 (LSA).15 Other types of commercial entities—close corporations, general and limited partnerships, and partnerships limited by shares—are regulated by other laws. A process of legal harmonization with a view toward membership in the EEC is underway in Spain.16 In 1979, a commission of eminent business law specialists issued a draft law concerning sociedades anónimas.17 Since the Parliament as well as the Ministry of Justice may still fundamentally modify the draft,18 this Note will deal with the current law, mentioning proposed revisions where applicable.

II. THE FIRST COUNCIL DIRECTIVE: PUBLICITY, ULTRA VIRES, AND NULLITY


The three areas selected for coordination in the First Council Directive were: (1) making public certain information about corporations, known as "publicity" under national laws; (2) the rules on ultra vires acts of corporate organs; and, (3) the invalidity (or "nullity") of corporations.19

In the area of "publicity," coordination of national rules was sought concerning two types of information: data on the corporation's legal status and data on its financial condition.20 The purpose of the first type of disclosure was to enable third parties to gain information concerning a corporation, especially information on the persons au-

14. Ciórga, Spain, in COMPANY LAW IN EUROPE 429, 435 (S. Frommel & J. Thomp- son eds. 1975). This is a Spanish peculiarity. The wide use of this form of corporate organization is explained for the most part by the absence of a minimum capital requirement. See text accompanying note 142 infra.
15. Ley de Sociedades Anónimas of July 17, 1951, Law No. 199/1951, 218 Boletín Oficial del Estado 3703 (Aug. 6, 1951) [hereinafter cited as Ley de Sociedades Anónimas].
17. Id.
18. Id.
20. E. STEIN, supra note 19, at 237.
Authorized to bind it. 21 With regard to the disclosure of financial data, the Commission felt that "since companies without any international reputation will be crossing the frontiers in increasing numbers, it [is] . . . imperative for third parties dealing with such foreign companies, to be in a position to know their financial position." 22

Article one delineates the scope of the First Council Directive. Its requirements apply to the stock corporation, the partnership limited by shares (sociedad comanditaria por acciones), and the close corporation (sociedad de responsabilidad limitada). 23 Disclosure of the balance sheet and the profit and loss account is required for each fiscal year. 24 The contents of the balance sheet and the profit and loss account are regulated by the Fourth Council Directive, 25 which prescribes different provisions for corporations, according to their size. The result is that mandatory financial disclosure will be less stringent for many of the close corporations and smaller stock corporations.

Article two lists the documents which the member states must require to be disclosed. Disclosure is required of those authorized to represent the corporation and take part in its administration, supervision, or control. 26 It must appear from the disclosure whether the persons authorized to represent the corporation may do so alone or must act jointly. 27 After every amendment of the articles of incorporation or of the bylaws, the complete text of the articles or bylaws as amended to date must be disclosed. 28 The members felt this was important to eliminate the necessity "of plodding through the successive amendments . . . to determine the legal position of a company which has existed for some time." 29

Article three prescribes the method of publication and its effect on third parties. A file must be opened in the Commercial Register 30 for

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22. E. STEIN, supra note 19, at 242.
24. Id. art. 2(1)(d).
27. Id.
28. Id. art. 2(1)(c).
29. E. STEIN, supra note 19, at 241.
30. The Commercial Register is one of the public registers common to civil law countries. These public registers serve as repositories of legal documents and are quite important
each of the corporations registered therein; the documents required to be disclosed under article two must be placed in the file or transcribed in their entirety in the register, and a copy of the whole or any part of the documents must be obtainable by written application. In addition to entry in the Commercial Register, disclosure must be effected by publication in a national gazette appointed for that purpose by the member state.

The documents may be relied on by the corporation as against third parties only after they have been published in accordance with paragraph four, unless the corporation proves that the third parties had knowledge of them. The directive goes further, providing for a fifteen day "grace period," by stipulating that the documents shall not be relied on as against third parties before the sixteenth day following publication. During the grace period, the burden of proof is shifted to the third parties to show that it was impossible for them to have had knowledge of the documents. In case of discrepancy between what is published in the press and what appears in the register or file, a bona fide third party may rely on the former, but the corporation may not. Third parties may always rely on any undisclosed documents, except where nondisclosure causes such documents not to have effect. This is the case where disclosure has a constitutive rather than a mere declaratory effect.

Under the directive, companies are required to provide certain information on all letters and order forms. Member states must provide for penalties in case these requirements are not met.

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32. Id. art. 3(2).
33. Id. art. 3(3).
34. Id. art. 3(4).
35. Id. art. 3(5).
36. Id.
37. Id.
38. Id. art. 3(6).
39. Id. art. 3(7).
40. Where disclosure has a constitutive effect, documents do not acquire legal capacity until they have been "published" in the Commercial Register. For a discussion of the doctrinal differences between the constitutive and declaratory effects of publicity in the various member states, see E. STEIN, supra note 19, at 277.
41. First Council Directive, supra note 21, art. 4. The required information includes the register in which the file required in art. 3 is kept, the legal form of the corporation, and the location of the seat (siège social).
Articles seven through nine deal with the validity of obligations entered into by a corporation. The directive restricts the ultra vires doctrine with regard to third parties,\textsuperscript{43} while leaving its internal operation intact. Acts carried out by the organs of the corporation are binding even if such acts are not within the stated purpose of the corporation.\textsuperscript{44} Member states are allowed to retain a limited form of the doctrine, provided the burden of proof is shifted to the corporation to show that the third party either knew the act was outside the stated purpose or could not have been unaware of it in view of the circumstances.\textsuperscript{45} A mere disclosure of the statutes, however, is not sufficient proof.\textsuperscript{46} Thus, inquiry notice is sufficient, but constructive notice is not.

The limitations on the powers of the corporate organs, arising under the bylaws or from a decision of a competent body (e.g., the general meeting of the shareholders), may never be relied on as against third parties \textit{even if the limitations have been disclosed}.\textsuperscript{47} This last clause, however, is interpreted to exclude fraud.\textsuperscript{48}

The last area of the First Council Directive deals with the "nullity" of a corporation, a concept which does not exist in the law of the United States. The major purposes of this area are: (1) to reduce the likelihood of invalidity by prescribing minimum "preventative" procedures or formalities in corporate organization; (2) to reduce the grounds on which invalidity can be invoked; and (3) to reduce the effect of invalidity.\textsuperscript{49} Nullity can be ordered only by a court, and only on specifically enumerated grounds.\textsuperscript{50} The decision of nullity is subject to the publicity requirements of article three if it is to be relied upon against third parties.\textsuperscript{51} Finally, shareholders are obligated to honor agreements to pay up capital to the extent that commitments entered into with creditors so require.\textsuperscript{52}

\textbf{B. Spanish Provisions}

As was the case in the corporation laws of the original member

\textsuperscript{43} For a discussion of the pre-existing divergences between the German \textit{Organtheorie} and the \textit{Mandattheorie} of the other states, see E. \textsc{Stein}, supra note 19, at 285-87.
\textsuperscript{44} First Council Directive, supra note 21, art. 9(1).
\textsuperscript{45} \textit{Id.}
\textsuperscript{46} \textit{Id.}
\textsuperscript{47} \textit{Id.} art. 9(2).
\textsuperscript{48} E. \textsc{Stein}, supra note 19, at 294.
\textsuperscript{49} \textit{Id.} at 300-01.
\textsuperscript{50} First Council Directive, supra note 21, art. 11.
\textsuperscript{51} \textit{Id.} art. 12(1).
\textsuperscript{52} \textit{Id.} art. 12(5).
states, the LSA contains provisions regarding the compulsory disclosure of documents. Few changes will be necessary in this first area. Under Spanish law, all amendments to the articles of incorporation or to the bylaws must be publicized. This provision will need to be amplified to require publication of the complete text of the articles or bylaws as amended. In accordance with the directive, the LSA requires disclosure of those authorized to represent the corporation and take part in its administration, supervision, or control. Although in Spain the statutes "normally state precisely" the person authorized to represent the corporation, this procedure will become mandatory under the directive.

The directive requirement of disclosure by publication in a national gazette will entail some modification of present Spanish law. The LSA allows for two procedures upon incorporation: (1) simultaneous procedures, in a single act by agreement among the founders, at least three in number, who at that time are the sole shareholders; and (2) successive procedures, which are similar to the Anglo-American system of public subscription of the shares. Under Spanish law, publication in a national gazette is required only for the latter method. Under the directive, such publication will be required for both methods. The use of the simultaneous method, however, will be somewhat curtailed by the Second Council Directive.

In Spain, as in Italy, France, and Germany, publicity has a constitutive effect. Spanish law provides that corporate documents which are not registered have effect only between the members that execute them and not vis-à-vis third parties. They may be relied on by the corporation as against third parties only after they have been registered. The third parties, on the other hand, may use the unregistered docu-

53. E. Stein, supra note 19, at 238 n.4.
54. Ley de Sociedades Anónimas, supra note 15, art. 84.
55. See text accompanying note 28 supra.
56. See text accompanying note 26 supra.
57. Ley de Sociedades Anónimas, supra note 15, arts. 11, 76.
58. R.G. de Montella, Tratado Práctico de Sociedades Anónimas 301 (1952).
59. See text accompanying notes 26-27 supra.
60. Ley de Sociedades Anónimas, supra note 15, art. 9.
63. Ley de Sociedades Anónimas, supra note 15, art. 18.
64. See text accompanying note 34 supra.
65. See discussion in section III of this Note infra.
66. E. Stein, supra note 19, at 277.
67. M. Broseta Pont, supra note 62, at 177. See also note 40 supra.
68. Ley de Sociedades Anónimas, supra note 15, art. 6.
ments in their favor. This is in harmony with the directive. Indeed, Spanish law is even more favorable to third parties, defining a third party as one who is acquainted with an unregistered fact. This provision will be permitted to remain in effect because, as mentioned above, the directives merely set minimum standards.

The time element of the Spanish provision will have to undergo some modification. Under the LSA, a corporation acquires legal personality upon registration in the Commercial Register. It follows that upon registration legal capacity is bestowed upon the documents, and the corporation may rely on them. Under the directive, this acquisition of legal capacity will be postponed in all cases until publication in the national gazette has been effected and the "grace period" has elapsed.

To date, the LSA contains no provision compelling corporations to include certain information on all letters and order forms, as required under article four of the directive. This will have to be introduced into Spanish law.

The LSA provides that if action has been carried out in a corporation's name before it has acquired legal personality, and the corporation does not assume the obligations arising out of such action, the persons who acted are jointly and severally liable. In Spain, the validity of a corporation's acts is conditioned on the stated purpose of the company. This is similar to the law in France before the implementation of the First Council Directive. The stated purpose limits the acts and transactions in which a corporation may engage, the investment of its capital, and the ambit of its administrators' powers. The purpose must be clearly stated, so as to limit the corporate activities to a certain mercantile or industrial branch. The corporation may have more than one purpose, but they all must be expressly stated in the articles. This will require modification, since the directive substantially restricts

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69. R.G. de Montella, supra note 58, at 73.
70. See text accompanying note 39 supra.
71. Ciórraga, supra note 14, at 460.
72. See text accompanying note 11 supra.
73. Ley de Sociedades Anónimas, supra note 15, art. 6.
74. R.G. de Montella, supra note 58, at 68.
75. See text accompanying note 37 supra.
76. Ley de Sociedades Anónimas, supra note 15, art. 7. This provision is analogous to the provision in art. 7 of the directive. First Council Directive, supra note 21, art. 7.
77. Sinay, supra note 10, at 22.
78. M. Broseta Pont, supra note 62, at 139.
80. Id.
the ultra vires doctrine with regard to third parties.\textsuperscript{81}

As a general rule in Spain, third parties who deal with the corporation’s administrators must consult the documents contained in the Commercial Register to ascertain the scope of the administrators’ powers.\textsuperscript{82} The third parties are not protected if the limitations of such powers have been publicized.\textsuperscript{83} The directive will defeat the effects of this publication,\textsuperscript{84} and the draft law has taken this into account. It provides that any limitations on the administrators’ representative power shall have no effect \textit{vis-à-vis} third parties.\textsuperscript{85}

Under Spanish law, there is no specific provision regarding nullity of corporations.\textsuperscript{86} The subject is dealt with only in case law,\textsuperscript{87} and the developed rules are quite similar to those prescribed in the directive. In Spain, a \textit{sociedad anónima} has a dual aspect: it is viewed conceptually both as a contract and as an institution.\textsuperscript{88} The law therefore allows for two grounds for nullity: those based on contractual defects and those based on formal defects.\textsuperscript{89} These grounds are in harmony with those enumerated in the directive.\textsuperscript{90}

The Spanish ground of incapacity might have to be narrowed to fit within subsection 2(e) of article eleven, which provides that nullity may be ordered on the ground of incapacity only if it extends to \textit{all} the founder members.\textsuperscript{91} This may not be necessary, however, for an analogy can be drawn to the impact that a founder member’s lack of consent—another contractual ground for nullity—has on the corporation. The lack of consent of a founder member affects only the legal bond between that member and the corporation, and not the existence of the corporation itself as a legal entity.\textsuperscript{92} It follows that the invalidity of a corporation can result only from a lack of consent of \textit{all} the founder members. If the effect of incapacity is interpreted in an analogous manner, it is in harmony with the directive.

\textsuperscript{81} See text accompanying notes 43-44 \textit{supra}.
\textsuperscript{82} R.G. \textsc{de Montella}, \textit{supra} note 58, at 304.
\textsuperscript{83} \textit{Id}.
\textsuperscript{84} See text accompanying note 47 \textit{supra}.
\textsuperscript{85} \textsc{Collection Jupiter}, \textit{supra} note 16, § 15.434.
\textsuperscript{86} \textsc{J. Garrigues}, \textit{supra} note 79, at 325-26.
\textsuperscript{87} \textit{Id}. at 326.
\textsuperscript{88} \textit{Id}. at 242. For a discussion of the doctrinal differences between the “contractual” and the “institutional” theories of corporations, see \textsc{C. Schmitthoff}, \textit{supra} note 21, at 8.
\textsuperscript{89} \textsc{J. Garrigues}, \textit{supra} note 79, at 326.
\textsuperscript{90} First Council Directive, \textit{supra} note 21, art. 11(2).
\textsuperscript{91} \textit{Id}. art. 11(2)(e) (emphasis added).
\textsuperscript{92} \textsc{J. Garrigues}, \textit{supra} note 79, at 326.
III. THE SECOND COUNCIL DIRECTIVE: FORMATION


The Second Council Directive, concerning the formation of the stock corporation and the maintenance of its capital, was submitted by the Commission to the Council on March 5, 1970, and was issued as amended on December 13, 1976. The Council's rationale for issuing the directive was that since the activities of stock corporations frequently extend beyond their national boundaries, coordination of national provisions relating to their formation and to the increase or reduction of their capital is particularly important to insure minimum equivalent protection for both shareholders and creditors of such corporations. All investment companies with variable capital are beyond the reach of this directive, provided they identify themselves as such on all documents in conformity with article four of the First Council Directive.

The first part of the Second Council Directive deals with the formation of the corporation. Articles two and three enumerate the minimum data that must be included in the articles of incorporation, most of which was covered in the First Council Directive. If a member state requires a minimum number of persons to form a corporation, the fact that all the shares are held by one individual or that the number of persons has fallen below the legal minimum after incorporation shall not lead to automatic dissolution. This signifies a limited recognition of the "one-man" stock corporation, which was previously unacceptable under the "Latin" contract theory of corporations, and is another attempt by the Council to shift national legislation from the "contractual" theory to the "institutional" theory. This will not require a modification of Spanish law, for the "one-man" corporation is not at odds with the Spanish "dual aspect" conception of corporations.

One of the major purposes of the Second Council Directive is the establishment of a uniform minimum capital amount for stock compa-

95. Id. preamble.
96. Id. art. 1(2).
97. See note 41 and accompanying text supra.
98. Id. art. 5(1).
99. E. STEIN, supra note 19, at 327. See also note 88 supra.
101. COLLECTION JUPITER, supra note 16, § 15.12.
nies, since the differences in the required minimum levels could affect freedom of establishment ... when a company contemplates setting up a subsidiary in another Member State." The directive establishes the minimum capital requirement of 25,000 European units of account (approximately U.S. $32,000 in March 1982). This will exclude smaller corporations from using this corporate form; the "private company" (similar to our close corporation), with its differently shaped provisions, is the appropriate form for these smaller associations.

The subscribed capital may only be comprised of assets capable of economic assessment. By the time the company is incorporated or is authorized to commence business, shares issued for consideration must be paid up at not less than twenty-five per cent of their par value. Shares issued for a consideration other than cash must be fully paid up within five years of that time. Further, a report on any consideration other than cash must be prepared prior to incorporation by one or more independent experts appointed or approved by an administrative or judicial authority. This report must be published in accordance with the requirements of the First Council Directive.

If a corporation acquires any asset from a founder for a consideration of more than one-tenth of the subscribed capital, and such acquisition takes place within a time period established by the member states, but not less than two years, the acquisition must be examined and published in the manner provided for in article ten and must be submitted for approval to the general meeting of shareholders. This article ensures that the rule established in article ten is not circumvented. The LSA contains the same safeguards but limits the time period to only one year. The draft law proposes the extension of the period to two

102. E. STEIN, supra note 19, at 318-19.
103. Second Council Directive, supra note 94, art. 7. The unit of account is the common currency of the European monetary system. The national currencies of the member states are linked to it in accordance with their values on the international market and are allowed to float against it within certain guidelines.
104. Ficker, supra note 100, at 76.
106. Id. art. 9(1).
107. Id. art. 9(2).
108. Id. art. 10(1).
109. Id. art. 10(3). If 90% of the par value of all shares is issued to one or more companies for a consideration other than cash, and certain other conditions are met, an exception is made to this expert's report requirement. Id. art. 10(4).
110. Id. art. 11(1).
111. E. STEIN, supra note 19, at 321.
112. Ley de Sociedades Anónimas, supra note 15, art. 32.
Member states may apply this provision to shareholders or to any other person, but it does not apply to acquisitions made in the corporation's normal course of business nor to acquisitions made on the stock exchange. The Spanish draft law includes similar provisions.

Articles 15 through 24 deal with the maintenance of the integrity of corporate capital. As capital constitutes the only security for creditors, the directive's aims are twofold: to prohibit any reduction of assets by unauthorized distributions to shareholders and to restrict the corporation's right to acquire its own shares.

Except in cases of reductions of subscribed capital, no distribution is allowed when it would result in the corporation's assets being less than the amount of subscribed share capital plus non-transferable reserves. The amount of distributions may not exceed the amount of profit plus disposable reserves. Article 17 stipulates that in the case of serious loss of the subscribed capital, a general meeting of the shareholders must be called within a period set by the member states. At the meeting, the shareholders will consider alternatives to resolve the problem, or determine whether the corporation should be dissolved. A "serious loss" is to be defined by the member states, but shall not be greater than fifty per cent of the subscribed capital. A corporation is not allowed to subscribe to its own shares; it is, however, allowed to purchase shares subject to strict rules concerning purchase and retention.

Articles 25 through 41 deal with the increase and reduction of capital. Any increase of capital must be authorized by shareholders at the general meeting. The directive introduces the idea of authorized capital, a concept heretofore unknown on most of the continent. It provides that the competent organs of a corporation may be given authority at the general meeting to increase the subscribed capital up to a

113. COLLECTION JUPITER, supra note 16, § 15.15.
115. Id. art. 11(2).
116. COLLECTION JUPITER, supra note 16, § 15.15.
118. Id. art. 15(1)(a).
119. Id. art. 15(1)(c).
120. Id. art. 17(1).
121. Id. art. 17(2).
122. Id. art. 18.
123. Id. arts. 19-22.
124. Id. art. 25(1).
125. C. SCHMITTHOFF, supra note 21, at 14.
fixed amount. Such authority is to be given for a maximum of five
years but is renewable at the end of each five year period. Spanish
corporation law already recognizes this notion and contains a provision which
delineates its operation.

Articles 25 and 27 deal with the issuance of shares following an
increase of capital, and relate back to articles nine and ten as to the
minimum amount to be paid up and the particular procedures to be
followed according to the nature of the consideration. Where an in-
crease takes the form of shares issued only for cash, the existing share-
holders have a proportionate right of pre-emption. This right cannot
be restricted or withdrawn by the articles, but it may be restricted by
shareholder vote at the general meeting, subject to certain quorum
requirements.

The general rule is that two-thirds of the votes attaching to the
securities or the subscribed capital must be represented. If, however,
at least one-half of the subscribed capital is represented, a simple ma-
majority may suffice. The offer of shares and the period within which
the pre-emptive right may be exercised are subject to the disclosure
requirements of the First Council Directive. These provisions also
apply to the issuance of bonds convertible into shares but not to the
conversion thereof. Articles 31 through 33 contain provisions aimed
at the protection of creditors and classes of shares. Just as with an in-
crease of capital, any reduction of capital must be agreed upon by vote
at the general meeting. The subscribed capital may not be reduced
below the minimum level of 25,000 units of account established in arti-
cle six. Finally, the principle of shareholder equality applies to all
the provisions contained in the directive.

B. Spanish Provisions

Chapter II of the LSA governs the formation of a sociedad

127. COLLECTION JUPITER, supra note 16, § 15.22.
128. Ley de Sociedades Anónimas, supra note 15, art. 96.
129. See text accompanying notes 106-09 supra.
131. Id. art. 29(4).
132. Id. art. 40(1).
133. Id. art. 40(2).
134. Id. art. 29(3).
135. Id. art. 29(6).
136. Id. art. 30.
137. Id. art. 34. See also note 103 and accompanying text supra.
138. Id. art. 42.
anónima. As mentioned above, Spanish law admits two procedures for formation: simultaneous and successive, (i.e., in stages). The successive method, involving the public subscription of shares, is used for larger corporations that need to amass a large amount of capital. Actually this method is presently infrequently used in Spain, because the majority of sociedades anónimas are small enough to employ the simultaneous formation procedure. At present there is no minimum capital requirement for sociedades anónimas under Spanish law.

The draft law, however, includes a minimum requirement of 5,000,000 pesetas (approximately U.S. $50,000 in March 1982). This will no doubt force a substantial number of sociedades anónimas to reorganize into other types of corporations. The successive formation procedure will become more frequently used as the use of the simultaneous procedure will decrease. Although the latter will still be allowed, it will have to meet the minimum capital and disclosure requirements.

Spanish law requires that all assets forming part of the subscribed capital be capable of economic valuation. Spanish law, however, allows consideration consisting of intangible assets such as the performance of work and the supply of services (provided they can be appraised). Here the LSA will require modification, for the directive specifically excludes these types of assets.

The LSA requires that all capital be subscribed for and at least one-quarter of it be paid in. To conform to the language of the directive, the draft law adds the words "at the nominal value of all the shares." The directive will necessitate the introduction into Spanish law of a requirement that shares issued for consideration in kind be fully paid up within five years. Within four months after incorporation, the administrators must appraise the value of all nonpecuniary

139. See text accompanying note 60 supra.
140. M. Broseta Pont, supra note 62, at 180.
141. Id.
142. Collection Jupiter, supra note 16, § 15.01.
143. Id.
145. R.G. De Montella, Tratado de Sociedades Anónimas 162 (2d ed. 1961) [hereinafter cited as Tratado de Sociedades Anónimas].
146. Id. at 165.
148. Ley de Sociedades Anónimas, supra note 15, art. 8.
149. See text accompanying note 106 supra.
151. See text accompanying note 107 supra.
consideration. Within four months thereafter, any shareholder may demand that a judge appoint an expert to examine the administrators' appraisal. Here also some modification will be necessary, for the directive is somewhat more stringent. The draft law has addressed this area and proposes a provision much like that of the directive.

The maintenance of the corporate capital is treated in various chapters of the LSA. This aspect of Spanish corporation law is, for the most part, already in harmony with the provisions of the directive, so few modifications will be necessary.

The LSA's restrictions on distributions are the same as those of the directive. As to the directive's requirement that a shareholders' meeting be held following a serious loss, the LSA indirectly requires such a meeting, holding that a reduction of capital is mandatory after a sustained loss of twenty-five per cent of the share capital. A corporation is not allowed to purchase its own shares except in the case of reduction of capital or in order to avoid serious detriment to the corporation, in which case the shares must be resold as soon as possible.

Chapter V of the LSA regulates the increase and reduction of capital. Any increase or reduction of capital must be approved by vote at the general meeting. Spanish law provides for a pre-emptive right of the existing shareholders to purchase new shares following an increase of capital. Going beyond the requirements of the directive, Spanish law allows this right to be restricted or withdrawn only if the agreement is adopted unanimously. The LSA contains provisions aimed at the protection of creditors and classes of shares similar to those of the directive. Finally, the principle of shareholder equality is also embodied in the LSA.

152. Ley de Sociedades Anónimas, supra note 15, art. 32.
153. Id.
154. See text accompanying note 108 supra.
156. See text accompanying notes 117-23 supra.
157. On maintenance of capital, see generally Ley de Sociedades Anónimas, supra note 15, chs. III, IV.
158. See text accompanying note 120 supra.
159. Ley de Sociedades Anónimas, supra note 15, art. 99.
160. Id. art. 47.
161. Id. art. 84.
162. Id. art. 92.
163. See text accompanying notes 131-33 supra.
164. TRATADO DE SOCIEDADES ANÓNIMAS, supra note 145, at 409.
166. Ley de Sociedades Anónimas, supra note 15, art. 37.
IV. THE THIRD COUNCIL DIRECTIVE: MERGERS


The Third Council Directive, concerning intrastate mergers of stock corporations, was submitted by the Commission to the Council on June 16, 1970.\textsuperscript{167} After two amendments, it was adopted by the Council on October 9, 1978.\textsuperscript{168} The purposes of the Third Council Directive are: (1) to secure a minimum degree of coordination in the provisions of the member states dealing with intrastate mergers;\textsuperscript{169} and (2) to serve as a “bridgehead” for international mergers.\textsuperscript{170} The directive provides exceptions for cooperatives\textsuperscript{171} and corporations involved in bankruptcy proceedings.\textsuperscript{172}

The directive recognizes three basic types of merger: (1) merger by acquisition,\textsuperscript{173} which corresponds to the American “statutory merger”; (2) merger by formation of a new corporation,\textsuperscript{174} which corresponds to “consolidation”; and (3) the acquisition of one corporation by another corporation which holds ninety per cent or more of its shares,\textsuperscript{175} which corresponds to the American “short-form” merger. The essential results of the merger are common to all three types and include: (1) the transfer of all the assets and liabilities of the acquired corporation to the acquiring corporation, including both transfers between the merging corporations and those involving third parties;\textsuperscript{176} (2) the shareholders of the acquired corporation become shareholders of the acquiring corporation;\textsuperscript{177} and (3) the acquired corporation ceases to exist.\textsuperscript{178} The directive requirements, with some slight variations, are the same for all three types. A fifth chapter allows for other operations which are similar to a merger. One such operation is that through which the acquired corporation retains its legal personality but becomes a wholly owned

\begin{itemize}
  \item \textsuperscript{167} 13 O.J. EUR. COMM. (No. C 89) 20 (1970).
  \item \textsuperscript{169} C. SCHMITTHOFF, supra note 21, at 15.
  \item \textsuperscript{170} E. STEIN, supra note 19, at 378.
  \item \textsuperscript{171} Third Council Directive, supra note 168, art. 1(2).
  \item \textsuperscript{172} Id. art. 1(3).
  \item \textsuperscript{173} Id. ch. II.
  \item \textsuperscript{174} Id. ch. III.
  \item \textsuperscript{175} Id. ch. IV.
  \item \textsuperscript{176} Id. art. 19(1)(a). This principle of the “totality of transfer” is regarded as important, for it assures the continuation of the business activity and makes superfluous all special acts to transfer goods from one legal person to the other and to substitute a new debtor for the old one. Ficker, supra note 100, at 77.
  \item \textsuperscript{177} Third Council Directive, supra note 168, art. 19(1)(b).
  \item \textsuperscript{178} Id. art. 19(1)(c).
\end{itemize}
subsidiary of the acquiring corporation.\textsuperscript{179} Here also the same provisions apply with some alterations.

The Commission did not feel it was necessary to eliminate the pre-existing discrepancies between the member states, considering it sufficient to ensure compliance with certain minimum requirements.\textsuperscript{180} One of the major aims of the Third Council Directive is to assure that shareholders of merging corporations are objectively and adequately informed and that their rights are protected.\textsuperscript{181} The merger must be approved by the shareholders in general meetings of all the merging corporations, subject to the quorum requirements mentioned above.\textsuperscript{182} The member states may, however, provide an exception for the acquiring corporation if certain conditions are met.\textsuperscript{183}

Before the general meetings of the shareholders, the directors of each corporation must draw up a merger plan, the particulars of which are enumerated in article five.\textsuperscript{184} This merger plan must be submitted to publication according to the provisions of the First Council Directive.\textsuperscript{185} The directors of each merging corporation must present a detailed report explaining the draft terms of the merger and setting out the legal and economic grounds for them.\textsuperscript{186} In addition, an evaluation of the merger plan prepared by independent experts designated or approved by a legal or administrative authority must be presented to the shareholders of each of the merging corporations.\textsuperscript{187} At least one month before the general meeting, the information, including the merger plan and the above-mentioned reports, must be made available to the shareholders.\textsuperscript{188}

Another major goal of the directive is to assure that creditors, including debenture holders and persons having other claims on the corporations are protected throughout the implementation of the merger.\textsuperscript{189} Member states must provide protection for creditors whose

\textsuperscript{179} Id. art. 31.
\textsuperscript{180} C. Schmittthoff, \textit{supra} note 21, at 18.
\textsuperscript{182} Id. art. 7.
\textsuperscript{183} Id. art. 8. The rationale of this exception is that the shareholders of the acquiring corporation are not exposed to the same potential risks as are the shareholders of the acquired corporation. The conditions allowing this exception include disclosure of the draft terms of the merger, and inspection of the same by the shareholders.
\textsuperscript{184} Id. art. 5.
\textsuperscript{185} Id. art. 6. See text accompanying notes 30-34 \textit{supra}.
\textsuperscript{186} Id. art. 9.
\textsuperscript{187} Id. art. 10.
\textsuperscript{188} Id. art. 11.
claims antedate the public announcement of the merger plan.\textsuperscript{190} To this end, such creditors must be given the right to obtain security for their claims where necessary.\textsuperscript{191} The protection afforded to the creditors of the acquiring corporation can be different than that provided to the creditors of the acquired corporation.\textsuperscript{192} Generally, the same provisions apply to debenture holders.\textsuperscript{193} All bondholders must receive the same rights in the surviving or the new corporation that they enjoyed in the submerged corporation.\textsuperscript{194} It is left up to the member states to determine the time at which the merger takes effect,\textsuperscript{195} and it must be publicized subject to the provisions of the First Council Directive.\textsuperscript{196}

Although the directive does not unconditionally assure the dissenting minority shareholders a right to compel the redemption of their shares, it does require the member states to impose liability on the directors and experts if through their fault the shareholders of the submerged corporation suffer damages.\textsuperscript{197} In certain mergers, a corporation may be allowed to disregard other requirements of the directive if the right of compelled redemption is provided to minority shareholders.\textsuperscript{198} The nullity of a merger must be decided by a court and is allowed only on specified grounds.\textsuperscript{199} Where it is possible to remedy a defect likely to entail annulment of a merger, the competent court must allow a period of time during which a remedy could be effected.\textsuperscript{200}

A third major objective of this directive is the protection of workers' rights. The European labor groups, which the Commission consulted on the draft, felt that "workers must be assured of their acquired rights and accorded appropriate assistance in case of dismissal following a [merger]."\textsuperscript{201} Article twelve of the directive\textsuperscript{202} states that the pro-

\begin{itemize}
\item \textsuperscript{190} Id. art. 13(1).
\item \textsuperscript{191} Id. art. 13(2). The nature of the protection is left to the national laws of the member states.
\item \textsuperscript{192} Id. art. 13(3). The same rationale that underlies art. 8, supra note 183, is present here.
\item \textsuperscript{193} Id. art. 14.
\item \textsuperscript{194} Id. art. 15.
\item \textsuperscript{195} Id. art. 17.
\item \textsuperscript{196} Id. art. 18. See text accompanying notes 30-34 supra.
\item \textsuperscript{197} Id. arts. 20, 21.
\item \textsuperscript{198} Id. arts. 28, 29. These mergers are similar to the U.S. "short-form" merger. The requirements allowed to be disregarded are those contained in arts. 9 through 11. See notes 186-88 supra. In Spain, this right exists in all merger transactions. \textit{Ley de Sociedades Anónimas}, supra note 15, arts. 135, 144.
\item \textsuperscript{199} Third Council Directive, supra note 168, art. 22(1).
\item \textsuperscript{200} Id. art. 22(1)(d).
\item \textsuperscript{201} E. STEIN, supra note 19, at 382.
\item \textsuperscript{202} Third Council Directive, supra note 168, art. 12.
\end{itemize}
tection of workers must be organized according to Council Directive 77/187/EEC\textsuperscript{203} of February 14, 1977. That directive provides, in part, that the rights and duties of the acquired employer are transferred to the acquiring employer.\textsuperscript{204} The management of each of the merging corporations must inform the workers' representatives of the reasons for the merger, the "legal, economic and social implications of the transfer for the employees . . ." and any "measures envisaged in relation to . . . them."\textsuperscript{205} If either of the merging corporations envisions employment measures affecting its work force, it must consult with the workers' representatives with a view toward reaching an accord.\textsuperscript{206} The directive leaves some breathing room to the national legislatures, allowing them to limit the application of these provisions to those corporations which meet the conditions for compulsory worker representation.\textsuperscript{207} In the case of other corporations, the member states may provide that the workers be at least informed of an imminent transfer.\textsuperscript{208}

B. Spanish Provisions

With regard to intrastate mergers, Spanish law already meets many of the minimum requirements established by the Third Council Directive. Most of the other areas that will require some modification are addressed by the draft law.

The LSA recognizes two types of mergers: merger by absorption, and merger by consolidation.\textsuperscript{209} The principle of the "totality of transfer" is common to both types.\textsuperscript{210} Spanish law requires the approval of the shareholders in general meetings of all the merging corporations.\textsuperscript{211} The LSA also provides protection for the minority shareholder, as does the directive,\textsuperscript{212} by stipulating that where a modification directly or indirectly affects the rights of a certain class of shares, an agreement by the majority of those shares is necessary.\textsuperscript{213} Other requirements com-

\textsuperscript{204} Id. art. 3(1).
\textsuperscript{205} Id. art. 6(1).
\textsuperscript{206} Id. art. 6(2).
\textsuperscript{207} Id. art. 6(4).
\textsuperscript{208} Id. art. 6(5).
\textsuperscript{209} Ley de Sociedades Anónimas, supra note 15, art. 142.
\textsuperscript{210} TRATADO DE SOCIEDADES ANÓNIMAS, supra note 145, at 551. See also discussion at note 176 supra.
\textsuperscript{211} Ley de Sociedades Anónimas, supra note 15, arts. 85, 143.
\textsuperscript{212} Third Council Directive, supra note 168, art. 7(2).
\textsuperscript{213} Ley de Sociedades Anónimas, supra note 15, art. 85.
mon to the Third Council Directive\textsuperscript{214} have been included in the draft law, including a directors’ report, an experts’ report, and shareholder access to documents.\textsuperscript{215}

Under Spanish law, a merger must be announced three times in the national gazette and in the largest circulating newspaper of the province in which the corporation is domiciled.\textsuperscript{216} The merger does not take effect until three months after the last announcement.\textsuperscript{217} During this time, creditors have the right to obtain security for their claims, and the merger cannot take effect until such security is provided.\textsuperscript{218} Debenture holders have an analogous right to a guarantee.\textsuperscript{219}

As mentioned above,\textsuperscript{220} there is no specific provision regarding nullity in Spanish law. The requirements of preventative control contained in the LSA\textsuperscript{221} obviate the need for nullity provisions.

The Third Council Directive will necessitate one major modification of Spanish merger law. The current merger rules contained in the LSA are not applicable to those forms of association, similar to mergers, where the merging corporations retain their legal personality.\textsuperscript{222} The directive subjects some of these transformations to the same provisions that regulate the three basic types of mergers.\textsuperscript{223} The scope of the apposite LSA provisions therefore will have to be broadened to include these “other” forms of association.

Another issue that will arise concerns the protection of workers’ rights. A recently enacted Spanish law guarantees the workers a right of participation in the corporation.\textsuperscript{224} This participation, however, is limited to the rights of workers to associate\textsuperscript{225} and to be collectively represented within the corporation. This right of collective representation is qualified in that it is granted “without prejudice to other forms

\textsuperscript{214} See text accompanying notes 184-88 supra.
\textsuperscript{215} COLLECTION JUPITER, supra note 16, § 15.726.
\textsuperscript{216} Ley de Sociedades Anónimas, supra note 15, art. 134.
\textsuperscript{217} Id. art. 145.
\textsuperscript{218} Id.
\textsuperscript{219} TRATADO DE SOCIEDADES ANÓNIMAS, supra note 145, at 563.
\textsuperscript{220} See text accompanying note 86 supra.
\textsuperscript{221} Ley de Sociedades Anónimas, supra note 15, arts. 6, 146-48. The principal preventative control is the requirement that corporate documents be notarized, thereby minimizing the claim of nullity on the ground of formal defects. See note 88 and text accompanying notes 88-89 supra.
\textsuperscript{222} Ciórraga, supra note 14, at 464.
\textsuperscript{223} Third Council Directive, supra note 168, art. 31. The three basic types of mergers are discussed in text accompanying notes 173-75 supra.
\textsuperscript{224} El Estatuto de los Trabajadores of March 10, 1980, art. 4(1)(g), Law No. 8/1980, 64 Boletín Oficial del Estado 5799 (March 14, 1980).
\textsuperscript{225} Id. art. 77(1).
of participation" in the corporation.226 This law conforms with the directive227 in its provision that the workers' representatives must be informed of any probable effects on employment when the corporation merges, consolidates, or otherwise modifies its legal status.228 The law does not, however, specifically require the management to consult with the workers' representatives concerning employment measures to be taken. This is provided for in the directive229 and will eventually have to be included in Spanish law.

V. THE FOURTH COUNCIL DIRECTIVE: ANNUAL ACCOUNTS


The Fourth Council Directive, concerning the annual accounts of corporations, was submitted to the Commission by the Council on November 10, 1971,230 and was issued as amended on July 25, 1978.231 The major objective of the Fourth Council Directive is the establishment of equivalent legal requirements concerning the extent of the financial information that should be made available to the public by corporations.232 The directive applies to the stock corporation, the partnership limited by shares, and the close corporation.233 The requirements are less rigorous for smaller corporations.234 Pending further coordination, member states may refrain from applying the directive to banks and insurance companies.235 There are also some exceptions made for investment companies.236

The directive requires that the annual accounts of a corporation consist of a balance sheet, a profit and loss statement, and notes on the accounts.237 These documents constitute a composite whole.238 The Commission attempted to combine the flexibility of the British "true
and fair view" concept with the legal security of the continental codification systems. In the end, the directive recognized the predominance of the "fair view" principle, providing that where the application of the directive does not give a fair view of the corporation's position, additional information must be supplied.

In recognizing the importance of continuity, the directive introduces the general rule that the format of the accounts, particularly as regards the form of presentation, may not be changed from one year to another. Generally, the items in the balance sheet and profit and loss account must be shown separately. Where they are allowed to be regrouped, explanations must appear in the notes on the accounts. Moreover, the figures for the preceding financial year must be shown in the balance sheet and profit and loss statement. Any set-offs between assets and liabilities or between income and expenditures are prohibited.

The member states have a choice between two formats in the presentation of the balance sheet: the classical horizontal form with assets and liabilities on opposite sides, and the more modern "narrative form" of deducting subtotals of assets and liabilities to produce the net figures. Both forms have the same goal: that of providing the best possible insight into the financial structure and liquidity of a corporation. The liabilities side must show the corporation's capital, reserves, and debts, while the assets side must list the intangible assets, fixed assets, and current assets. To facilitate a check on the liquidity of a corporation, accounts receivable and payable must be

239. L'harmonisation et le contrôle des comptes des sociétés dans la Communauté Économique Européenne, 56 REVUE FRANÇAISE DE COMPATIBILITÉ 630 (1975). The civilian codes regulate the form and content of corporate accounts in a more detailed manner. The need for this protection is not felt as keenly in Great Britain, largely due to the existence of a competent corps of accountants.


242. Id. art. 3.

243. Id. art. 4(1).

244. Id. art. 4(3).

245. Id. art 4(4).

246. Id. art. 7.

247. Id. art. 8.

248. Id. art. 9.

249. Id. art. 10.

250. Ficker, supra note 100, at 79.

251. E. STEIN, supra note 19, at 357.


253. E. STEIN, supra note 19, at 357.
grouped according to their maturity date (*i.e.*, up to one year, more than one year).\textsuperscript{254}

The directive requires the inclusion of separate information regarding: (1) holdings of securities in associated undertakings; (2) participating interests in other corporations; and (3) any claim by or against such associated undertakings.\textsuperscript{255} The term "participating interests" is defined as rights in the capital of other undertakings which are intended to contribute to the activities of the company.\textsuperscript{256} A holding is presumed to constitute a participating interest when it exceeds a certain percentage. The actual percentage is to be established by the individual member states but cannot exceed twenty per cent.\textsuperscript{257} This requirement, however, along with others concerning consolidated accounts, has been postponed pending the issuance of a directive concerning group accounts.\textsuperscript{258}

The balance sheet requirements are less stringent for small corporations. They are allowed to present an abridged balance sheet comprised of only some of the items enumerated in articles nine and ten.\textsuperscript{259} To be entitled to this partial exemption, a corporation must meet two of the following three criteria: (1) a balance sheet total of less than 1,000,000 units of account (approximately U.S. $1,300,000 in March 1982); (2) a net turnover of less than 2,000,000 units of account (approximately U.S. $2,600,000 in March 1982); and (3) an average of less than fifty employees during the financial year.\textsuperscript{260} For the presentation of the profit and loss account, the member states have a choice of four different formats.\textsuperscript{261} In actuality there are really only two formats, but each may be presented in a horizontal or a narrative form.\textsuperscript{262} Freedom of choice between these formats is considered important from a business point of view because the different formats of the profit and loss account have advantages and disadvantages.\textsuperscript{263} As mentioned above, any set-off is prohibited.\textsuperscript{264} The above mentioned exceptions concerning items which deal with as-

\begin{footnotes}
\item[255] \textit{Id.} arts. 9, 10, 43(2).
\item[256] \textit{Id.} art. 17.
\item[257] \textit{Id.}
\item[258] \textit{Id.} arts. 56-61.
\item[259] \textit{Id.} art. 11.
\item[260] \textit{Id.} For an explanation of units of account, see note 103 \textit{supra}.
\item[261] \textit{Id.} art. 22.
\item[262] \textit{L'harmonization et le controle des comptes des sociétés dans la C.E.E., supra} note 239, at 630.
\item[263] C. \textsc{Schmitt-Hoff}, \textit{supra} note 21, at 23.
\item[264] See text accompanying note 246 \textit{supra}.
\end{footnotes}
sociated enterprises are also applicable to the profit and loss account.\textsuperscript{265}

Again, an exception is provided for smaller corporations, which are allowed to regroup certain items under one heading.\textsuperscript{266} To take advantage of this shortened form, a corporation must meet two of the following three criteria: (1) a balance sheet total of less than 4,000,000 units of account (approximately U.S. $5,200,000 in March 1982); (2) a net turnover of less than 8,000,000 units of account (approximately U.S. $10,400,000 in March 1982); and (3) an average of less than 250 employees during the financial year.\textsuperscript{267}

Articles 31 through 42 of the directive deal with the rules of valuation of assets. According to Dr. H.C. Ficker, "perhaps the most important part of the directive consists in the harmonization of the provisions concerning valuation."\textsuperscript{268} Article 31 lays down the general principles. The methods of valuation may not be changed from one year to the next.\textsuperscript{269} Only the profits earned at the date of the balance sheet may be included in it,\textsuperscript{270} but all "foreseeable liabilities and potential losses arising in the course of the financial year" or before must be included, "even if [they] become apparent only between the date of the balance sheet and the date on which it is drawn up."\textsuperscript{271}

In accordance with the pre-existing regulations and practice in the majority of the member states,\textsuperscript{272} the provisions of the directive are based on the purchase price or the production cost method of valuation, also known as the "principle of historical costs."\textsuperscript{273} The essential rules for its application are contained in articles 34 through 42. Exceptions to this general rule are available. For example, the replacement value method (the price the corporation would have to pay to acquire the item concerned on the date of the annual accounts), within certain guidelines, may be authorized for the valuation of stocks and tangible fixed assets with a limited useful life.\textsuperscript{274} Member states may authorize revaluation of tangible fixed assets and of participating interests.\textsuperscript{275} Other methods which take inflation into account may also be author-

\textsuperscript{265} See text accompanying note 258 \textit{supra}.
\textsuperscript{266} Fourth Council Directive, \textit{supra} note 231, art. 27.
\textsuperscript{267} \textit{Id.}
\textsuperscript{268} Ficker, \textit{supra} note 100, at 80.
\textsuperscript{269} Fourth Council Directive, \textit{supra} note 231, art. 31(1)(b).
\textsuperscript{270} \textit{Id.} art. 31(1)(c)(aa).
\textsuperscript{271} \textit{Id.} art. 31(1)(c)(bb).
\textsuperscript{272} \textit{C. SCHMITTHOFF, supra} note 21, at 24.
\textsuperscript{273} Fourth Council Directive, \textit{supra} note 231, art. 32. \textit{See also} Ficker, \textit{supra} note 100, at 80.
\textsuperscript{274} \textit{Id.} art. 33(1)(a).
\textsuperscript{275} \textit{Id.} art. 33(1)(c).
The use of any of these alternative valuation methods must be mentioned in the notes on the accounts, and supplementary information must be provided therein enabling the reader to evaluate the assets on a historical cost basis. It is important that the valuation rules be flexible so as not to impede the swift development of accounting principles.

Section eight of the Fourth Council Directive deals with the notes on accounts. The main purposes of the notes are:

- to elucidate individual items in the documents,
- to indicate the valuation methods employed, including changes in such methods from those used in the preceding year,
- and generally to provide data that does not appear in the balance sheet or the profit-and-loss statement.

Article 43 requires numerous entries which play an important role in providing a clear picture of the corporation. The member states may allow smaller corporations which fit within the ambit of article eleven to present only an abridged form of the notes on the accounts. Article 46 prescribes the preparation of an annual report, which must contain "at least a fair" review of the development of the corporation's business and of its position.

The duly-approved annual accounts and the annual report, together with the auditor's report, must be publicized in accordance with the provisions of article three of the First Council Directive. If the annual accounts are not published in full, this fact must be pointed out, and reference must be made to the register in which they were published. Exceptions are provided for smaller corporations which fall within the scope of articles 11 and 27.

Finally, the directive requires that the accounts be audited by one

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276. Id. art. 33(1)(b).
277. Id. art. 33(1); L'harmonisation et le controle des comptes des sociétés dans la C.E.E., supra note 239, at 631.
278. L'harmonisation et le controle des comptes des sociétés dans la C.E.E., supra note 239, at 631.
279. E. STEIN, supra note 19, at 356.
280. Fourth Council Directive, supra note 231, art. 43. These entries include the valuation methods employed, the number and par value of shares for each class, the amount of any financial commitments not included in the balance sheet, and the number and categories of persons employed, among others.
281. Id. art. 44.
282. Id. art. 46.
283. Id. art. 47. See text accompanying notes 30-34 supra.
284. Id. art. 49.
285. Id. arts. 47(2), 47(3).
or more persons authorized by national law to audit accounts.286 The member states may exempt the “article eleven” corporations from this obligation, provided they introduce appropriate sanctions in the case of non-compliance with the other requirements of the directive.287

B. Spanish Provisions

Chapter VI of the LSA deals with the annual accounts. The required accounts include the balance sheet, the profit and loss statement, and the explanatory report.288 The draft law regards these documents as a composite whole.289 The accounts must reflect with “clarity and exactness” the corporation’s financial position and its course of business.290 This language appears to be more strict than the “true and fair view” language of the directive.

Article 103 presents the balance sheet format. On the assets side the required entries, which must be shown separately, are: credits in respect of shares not paid up; cash in hand and in the bank; real estate and industrial plants; machinery and other fixtures; listed and unlisted securities and holdings in other corporations; accounts receivable; own shares (as allowed in article 47);291 other negotiable instruments; raw materials and goods; concessions, licenses, patents, etc.; establishment and incorporation expenses; the value of redeemed debentures, if those issued are shown on the liabilities side; and the value of unsubscribed shares resulting from an increase of capital.292 Although under the directive no new items will need to be added to the Spanish balance sheet, several entries such as “holdings in other corporations” and “accounts receivable” will have to be subdivided further to provide a more detailed account of their diversification. As to form, the draft law proposes a format identical to that of the directive.293 It groups the assets under six major headings: (1) subscribed capital unpaid; (2) incorporation expenses; (3) fixed assets; (4) current assets; (5) pre-payments; and (6) losses, if not shown on the liabilities side.294

On the liabilities side, article 103 requires the separate entry of the

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286. Id. art. 51(1)(a).
287. Id. arts. 51(2), 51(3).
288. Ley de Sociedades Anónimas, supra note 15, art. 102.
289. COLLECTION JUPITER, supra note 16, § 15.51.
290. Ley de Sociedades Anónimas, supra note 15, art. 103.
291. See text accompanying note 160 supra.
292. Ley de Sociedades Anónimas, supra note 15, art. 103.
294. COLLECTION JUPITER, supra note 16, § 15.52.
following items: capital, specifying the various classes of shares; legal and other reserves; debts secured by mortgages, pledges and all unsecured debts; debentures issued or outstanding; and asset depreciation funds.295 The draft law, in accordance with the directive,296 proposes a format showing: (1) capital: subscribed capital and reserves, including legal reserve, share premium account, revaluation reserve, reserve for own shares, statutory, and optional reserves; (2) provisions for contingencies and charges; (3) creditors;297 (4) accruals; and (5) profit.298 To date Spain does not allow smaller corporations to present an abridged balance sheet. This will not require modification, however, for the provisions of directive article eleven are not mandatory but are merely at the option of the member states.

The content and the format of the profit and loss account are governed by article 105 of the LSA. Separate entries must be made for the following income items: the normal income of the corporation; extraordinary income; reserves applied for the purposes for which they were established; and income obtained from the sale of assets constituting hidden reserves.299 With regard to expenditures, the following items must be included separately: wages and salaries; amounts paid to directors; depreciation of assets; social securities contributions; taxes; losses or expenses offset out of reserves; other expenses incurred in the ordinary course of the corporation’s business; and extraordinary expenses.300

The draft law has proposed a profit and loss account lay-out identical to that contained in article 23 of the directive.301 With regard to income, the draft distinguishes between operating results and financial results. Among the operating results, it places the net turnover, the changes in stocks of finished and semi-finished products, and work effected by the corporation for its own account and shown under assets.302 Among the financial results, it places earnings from participating interests in other corporations, earnings from other securi-

295. Ley de Sociedades Anónimas, supra note 15, art. 103.
297. The directive requires that creditors be listed in different categories, including debenture holders, institutional creditors, trade creditors, and fiscal creditors. Id. arts. 9(C), 10(I).
298. COLLECTION JUPITER, supra note 16, § 15.52.
299. Ley de Sociedades Anónimas, supra note 15, art. 105(A).
300. Id. art. 105(B).
301. COLLECTION JUPITER, supra note 16, § 15.52.
302. Id.
ties and earnings from claims forming part of the fixed assets. With regard to expenditures, the draft law also distinguishes operating expenses from financial expenses. Among the former, it places the cost of raw and auxiliary materials, value adjustments of finished and semi-finished products, staff costs, value adjustments related to incorporation expenses and of tangible and intangible fixed assets, and value adjustments regarding elements of current assets. Among the financial expenses, the draft law includes value adjustments related to participating interests and other financial assets and of securities forming part of the current assets, interest and similar charges, exceptional expenses, taxes (both actual and future), and the net result for the year.

Similar to the directive, the Spanish draft law allows smaller corporations to present a shortened form of the profit and loss account format. The criteria which must be met to take advantage of this exception, however, are more demanding under the draft law. The exception allows the regrouping of items by corporations that meet all of the following three requirements: (1) a balance sheet total of 75 million pesetas or less (approximately U.S. $750,000 in March 1982); (2) a net turnover of 150 million pesetas or less (approximately U.S. $1,500,000 in March 1982); and (3) an average of 100 employees or less during the financial year.

Article 104 of the LSA establishes various rules of valuation, which differ according to the nature of the assets in question. These rules are based on the principle of "least value," which provides the greatest safeguards for creditors. Fixed assets are valued at historical cost less depreciation. The draft law, as well as the directive, define the purchase price as the price paid plus expenses incidental thereto. The draft law also defines the production cost in the same manner as the directive does. Listed securities are valued at the av-

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303. Id.
304. Id.
305. Id.
306. See text accompanying note 266 supra.
307. COLLECTION JUPITER, supra note 16, § 15.52.
308. Id.
309. J. GARRIGUES, supra note 79, at 391.
310. Id.
311. Ley de Sociedades Anónimas, supra note 15, art. 104(1).
313. COLLECTION JUPITER, supra note 16, § 15.53; Fourth Council Directive, supra note 231, art. 35(3). Production cost is defined as the purchase price of the raw materials and consumables plus other costs directly attributable to the product in question.
verage rate of quotation during the last trimester of the year, and un-
listed securities in accordance with the reasonable judgment of the
directors, but not to exceed the purchase price. Accounts receivable
are valued at their face amount or at the probable value of realiza-
tion. Raw materials and goods are valued at purchase price or at
market price, whichever is less.

Under present law, expenses of incorporation and establishment
are valued at cost, subject to amortization over a maximum of ten
years. The draft law, in line with the directive, provides that such
expenses shall be amortized over a period of five years only, and that
insofar as the incorporation expenses have not been completley written
off, no distribution of profits shall take place unless the amount of op-
tional reserves is at least equal to the amount of expenses not written
off.

The draft law goes on to propose certain general principles of val-
uation which do not presently exist in Spanish law, but which will be-
come mandatory under the directive. Only profits earned at the date of
the balance sheet will be allowed to be included therein, but the corpo-
ration will have to account for any deficiencies that become apparent
after the date of the balance sheet but before it is completed. Whether
the year closes with a loss or with a profit, all deficiencies must be accounted for.

To take into account the effects of inflation on the value of assets,
the Spanish government, in 1961, promulgated the law of the "regulari-
zation of balance sheets." The principal objective of the law was to
avoid the taxation of "artificial" increases in value by ensuring that
"business costs reflect, through the appropriate depreciation al-
lowances, the true loss in value of fixed assets, based on their current
replacement value and not on irrelevant historic purchase prices."
The system is voluntary and has been adopted by over half of the

314. Ley de Sociedades Anónimas, supra note 15, art. 104(2).
315. Id. art. 104(3).
316. Id. art. 104(4).
317. Id. art. 104(5).
319. COLLECTION JUPITER, supra note 16, § 15.53.
320. Id.
321. Id.
322. J. GARRIGUES, supra note 79, at 389.
324. Clórraga, supra note 14, at 457 (emphasis added).
Spanish corporations. The "regularization of balance sheets" is not at odds with the valuation rules established in the directive, for it fits within the aforementioned exceptions to the "historical cost principle." A detailed account of the system will have to be included in the notes on the accounts.

Although the LSA requires the inclusion of an explanatory report in the annual accounts, it does not regulate the contents in a detailed manner. Under present law, the explanatory report is subject only to the somewhat vague "clarity and exactness" requirement of article 102. As mentioned above, article 43 of the directive enumerates various entries which must be shown in the notes on the accounts. Thus, the LSA will have to provide a more detailed regulation of the contents of the explanatory report.

Article 108 of the LSA requires the appointment of "shareholder-auditors" by the shareholders at a general meeting. These auditors, alone or with the aid of technical assistants, examine and report in writing on the annual accounts. The auditors may not be members of the board of directors. Although the directive leaves the details of control up to the national legislatures, it stipulates that the accounts be reviewed by persons authorized to audit accounts. To this effect, the draft law entrusts such competence to the members of the Institution of Accountants (Instituto de Censores Jurados de Cuentas). They are to be appointed by the shareholders for one term only, for a duration of not less than three nor more than six years. Their appointment may be revoked by the shareholders for "just cause" only.

VI. PROPOSED DIRECTIVES

Other draft directives have been proposed and are now in the negotiation phase. One of these is the controversial Fifth Directive.

325. Id.
326. See text accompanying note 276 supra.
327. See text accompanying note 277 supra.
328. See text accompanying note 290 supra.
329. See text accompanying note 280 supra.
330. Ley de Sociedades Anónimas, supra note 15, art. 108.
331. Id.
332. Id.
333. See text accompanying note 286 supra.
334. COLLECTION JUPITER, supra note 16, § 15.44.
335. Id.
336. Id.
337. 15 O.J. EUR. COMM. (No. C 131) 49 (1972).
which concerns the structure of the stock corporation. The proposal demands the introduction of the dualistic board system\textsuperscript{338} and workers' representation on the supervisory board of larger corporations.\textsuperscript{339} Other draft directives deal with the group accounts of corporations,\textsuperscript{340} with the professional qualifications required of those responsible for drawing up the annual accounts under the Fourth Directive,\textsuperscript{341} with the structure of groups of corporations,\textsuperscript{342} and with the dissolution and liquidation of the corporation.\textsuperscript{343}

\section*{VII. CONCLUSION}

Although in theory the council directives merely establish minimum requirements for member states, these minimum requirements are actually quite detailed. In fact, only matters of minor importance have been left to the national legislatures. This development suggests that more than "harmonization," indeed something closer to unification of national laws, is taking place.\textsuperscript{344}

Spain's reaction to probable membership in the EEC is evidence of this direction. In its proposed revisions, the draft law has concentrated on the approximation of Spanish law to the provisions of the directives, including those of the draft Fifth Council Directive.\textsuperscript{345} Many of the provisions of the draft LSA are identical to those of the directives, in some cases even as to the precise language.

Spain's decision to become a member of the EEC is supported by all the political parties represented in the Spanish Parliament, by both sides of industry, and by a majority of the population.\textsuperscript{346} It is not entry, itself, that is significant, but the consequences of entry. Spain's acceptance into the EEC will require that Spain's economy be "integrated with the economy of the Community without intolerable strains on either side."\textsuperscript{347} Although the Parliament or the Ministry of Justice may still alter the draft law, any modification will certainly be made with

\begin{footnotes}
\item[338.] \textit{Id.} art. 2.
\item[339.] \textit{Id.} art. 4(2).
\item[340.] 19 O.J. EUR. COMM. (No. C 121) 2 (1976).
\item[341.] 21 O.J. EUR. COMM. (No. C 112) 6 (1978).
\item[342.] Not yet submitted to the Council; \textit{see} 5 BULL. EUR. COMM. 131 (1978).
\item[343.] \textit{Id.}
\item[345.] \textit{See generally} \textit{Collection Jupiter}, \textit{supra} note 16, \S 15.4.
\item[346.] Opinion on Spain's Application for Membership, \textit{supra} note 2, at 9.
\item[347.] \textit{Id.}
\end{footnotes}
the same goal in mind: harmonization with the EEC corporation law directives.

Here, the impact of EEC law is seen. Even if Spain fails to become a full member of the Community, the harmonization of its corporation laws with those of the member states will have far-reaching positive effects. It will facilitate transnational corporate establishment and investment. It will also alleviate many of the obstacles to international mergers. In the final analysis, a major objective of the European Economic Community will be promoted: it will advance one step further in the creation of a fully European Common Market.