

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(85) 791 final

Brussels, 23 December 1985

Proposal for a
COUNCIL DIRECTIVE

on information to be published when major holdings in the capital
of a listed company are acquired or disposed of

(submitted to the Council by the Commission)

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EXPLANATORY MEMORANDUM

I. Introduction

1. The Community's work on securities markets is aimed at two main objectives: firstly, ensuring that securities markets function properly and, secondly, encouraging increasingly greater inter-penetration of those markets at Community level. In order to achieve those two objectives, it is necessary, inter alia, to strengthen public confidence in securities dealt in on those markets. Since such confidence largely depends on the quantity and quality of the information made available to the public, a sound information policy on securities and the issuers of securities is essential in the Community if the two objectives referred to above are to be achieved. The Council has already adopted three Directives on stock markets, essentially with those aims in mind. They are Directive 79/279/EEC coordinating the conditions for the admission of securities to official stock exchange listing¹; Directive 80/390/EEC on the listing particulars to be published for the admission of securities to official stock exchange listing²; and Directive 82/121/EEC on information to be published on a regular basis by companies whose shares have been admitted to official stock exchange listing³.
2. This proposal for a Directive, which provides for the disclosure of acquisitions or disposals of major holdings in the capital of listed companies, is aimed at reinforcing at Community level the information

¹OJ No L 66, 16.3.1979

²OJ No L 100, 17.4.1980

³OJ No L 48, 20.2.1982

policy already adopted by the Council. Such disclosure will provide investors with information on persons liable to influence a company's management, sometimes to a considerable extent, and thus enable them to follow developments in its ownership and gain a clearer idea of what is happening internally. This is important information which may affect investors' assessment of securities issued by the company and may consequently play a crucial role in their investment or disinvestment decisions.

Since this information is important, it should be made available to the public, not only because it is of use to investors but also in order to prevent uncontrollable rumours and stop misuse of price-sensitive information. There is a real risk of such misuse occurring when information is not made public but is confined to a restricted circle of people.

3. It should be noted that the first two stock market Directives adopted by the Council already lay down a requirement, albeit partial, to disclose acquisitions of major holdings. Schedule A, point 3.2.7, of Directive 80/390/EEC on the listing particulars to be published for the admission of securities to official stock exchange listing stipulates that the particulars must contain, "in so far as they are known to the issuer, indication of the shareholders who, directly or indirectly, hold a proportion of the issuer's capital which the Member States may not fix at more than 20%".

In addition, Schedule C, point 5(c), of Directive 79/279/EEC on the conditions for the admission of securities to official stock exchange listing lays down that "the company must inform the public of any changes in the structure (shareholders and breakdown of holdings) of the major holdings in its capital as compared with information previously published on that subject as soon as such changes come to its notice". It is clear from the above that this proposal for a Directive does not impose any new requirements on listed companies. The object is merely to clarify the content of the obligation laid down in Directive 79/279/EEC and to facilitate implementation of that

obligation by requiring persons acquiring or disposing of major holdings in a listed company to inform that company accordingly. It is a matter, therefore, not of subjecting listed companies to a new rule but rather of clarifying and coordinating the content of an existing rule.

4. Three Member States - France, the United Kingdom and Italy - already apply specific rules and regulations that require the company and/or the public to be notified of major changes in the structure of a company's capital. Other Member States either have more fragmentary rules in this area or none at all.
5. The foregoing shows that some very marked discrepancies exist between Member States' rules and regulations in the area concerned. This means that the information made available to investors in the different Member States varies widely and, therefore, that the safeguards afforded to investors by the various stock markets of the Community are not equivalent. If effective interpenetration of the stock markets within the Community is to be achieved, however, it is essential that those markets should provide comparable safeguards. That is a further argument in favour of coordinating at Community level the rules and regulations governing the disclosure of acquisitions and disposals of major holdings in listed companies.

II. Comments

1. Scope

- (1) The Directive is relatively wide in scope in that it applies to any legal or natural person who acquires or disposes of a major holding in a listed company. It therefore covers not only companies (including those which do not have legal personality) and States or their regional and local authorities, but also individuals. Although it is relatively rare nowadays for a natural person to acquire a major holding in a listed company, such an event is no less relevant to investors when it does occur. The public should

therefore be notified in the same way as for major holdings acquired by a company or other legal person. A last point to make is that the Directive applies not only to nationals of a Member State, but also to persons domiciled in a non-member country.

- (2) It was thought advisable that this Directive should cover the acquisition of holdings only in listed companies governed by the law of one of the Member States of the Community, and not in listed companies from non-member countries. Companies from non-member countries would experience serious difficulties in complying with the Directive where no equivalent provisions required major shareholders in those companies to inform them of such holdings. Where comparable provisions exist in their country of origin, companies from non-member countries will have to declare major holdings in their capital also in the member countries in which they are officially listed, pursuant to the provisions on equivalence of information contained in Directive 79/279/EEC on the conditions for admission to stock exchange listing. Schedule C, point E, of that Directive lays down that companies whose shares are listed on the stock exchanges of both a Member State and a non-Member State must make available to the stock market of the Member State information which is equivalent to that published in the non-Member State.

- (3) It should be noted that the Directive applies to major holdings only in companies whose shares are listed on a Community stock exchange, excluding those whose shares are not listed on such an exchange. The reasons for this limitation are that it is shares in listed companies which are dealt in regularly and the general public tends to invest primarily in those shares. It is only natural, therefore, that those companies should be subject to more extensive information requirements than unlisted companies. The same approach was adopted as regards Directive 82/121/EEC on information to be published on a regular basis, which likewise applies to listed companies only.

(4) It is not only important to inform the public of acquisitions in a company; it is also of interest to the public to learn when a person pulls out of a company or reduces his holding. Consequently, this Directive applies not merely to acquisitions but also to disposals of major holdings in the subscribed capital of a listed company.

2. Content of the information

What matters to the investor is to know what influence a major shareholder can have on a listed company. This influence is exercised mainly through the shareholder's voting rights. For investors to be well informed, therefore, it would be necessary to disclose the percentage of voting rights held by persons acquiring or disposing of major holdings. Article 3, however, lays down that such persons need only notify the company of the percentage of subscribed capital held by them. This approach was chosen because it may be very difficult in certain cases for persons acquiring or disposing of holdings to know what percentage of the voting rights they hold. This difficulty arises mainly for the following reasons:

- in certain countries, certain shares carry dual voting rights on either a temporary or a permanent basis;
- in certain countries or for certain companies, ceilings are placed on the voting rights which may be held by any one person; those ceilings may even vary according to the subject of the vote;
- where convertible bonds have been issued, it is difficult to establish the total voting rights as this total depends on the number of bonds converted into shares.

It is clear from the above that persons acquiring or disposing of shares cannot always know the total number of existing voting rights and cannot, therefore, determine what percentage of the voting rights they themselves hold.

In order to ensure that investors are nevertheless properly informed, Article 8(2) provides that companies must notify the public not only of the percentage of subscribed capital held by persons acquiring or disposing of major holdings, but also of the percentage of voting rights held by such persons where those two percentages differ. Supplying such information does not cause companies any difficulty as they know at all times the total voting rights and any ceilings on those voting rights.

3. Thresholds

It must be acknowledged that the choice of thresholds which trigger compulsory notification are necessarily somewhat arbitrary.

It should be noted, however, that the thresholds in the proposal for a Directive are based on work previously carried out at Community level. They correspond to percentages already laid down in the company law Directives. The various thresholds were adopted for the following reasons:

- (1) 10%: Articles 7 and 8 of the Seventh Directive on company law¹ result in a 10% holding in an undertaking being significant in connection with an exemption from sub-consolidation. It seemed advisable, therefore, that this 10% threshold should also be adopted here.
- (2) 20%: For the purposes of Article 17 of the Fourth Directive on company law², the holding of more than 20% of a company's capital is presumed to constitute a participating interest creating a durable link with that company. On the basis of this principle, Article 33(1) of the Seventh Directive on company law also specifies that: "An undertaking shall be presumed to exercise a significant influence over another

¹Seventh Council Directive of 13 June 1983 concerning consolidated accounts (83/349/EEC) (OJ No L 193, 18.7.1983).

²Fourth Council Directive of 25 July 1978 on the annual accounts of certain types of companies (78/660/EEC) (OJ No L 222, 14.8.1978).

undertaking where it has 20% or more of the shareholders' or members' voting rights in that undertaking". 20% is therefore another important threshold which should be notified if exceeded.

(3) one third and two thirds:

Article 40(1) of the Second Directive on company law¹ provides that several important decisions (increase, reduction, redemption, etc. of capital) must be taken by a majority of not less than two thirds of the general meeting of shareholders².

The same majority is required by Article 7 of the Third Directive on company law³, for a merger decision and by Article 5 of the Sixth Directive on company law⁴ for a decision on a division.

A holding of one third would make it possible for these decisions to be opposed.

It thus seemed appropriate to adopt those thresholds of one third and two thirds of a company's capital, which are particularly significant from this point of view.

- (4) 50%: Since 50% signifies absolute control, it is essential that the public be informed whenever that threshold is exceeded.
- (5) 90%: Under Articles 27 and 28 of the Third Directive on company law³, provision is made for certain derogations from the rules on acquisitions or mergers in cases where one party holds 90% or more of the shares. Under some countries' legislation this threshold permits the compulsory purchase of the outstanding shares. It was therefore included in the proposal.

¹Second Council Directive of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (77/91/EEC) (OJ No L 26, 31.1.1977).

²See Articles 29(4), 29(5), 30, 31, 35 and 38 of the same Second Directive.

³Third Council Directive of 9 October 1978 concerning mergers of public limited liability companies (78/855/EEC) (OJ No L 295, 20.10.1978).

⁴Sixth Council Directive of 17 December 1982 concerning divisions of public limited liability companies (82/89/EEC) (OJ No L 378, 31.12.1982).

(6) The Directive lays down that the percentage of capital actually held by a person must be disclosed when that percentage reaches or exceeds the abovementioned thresholds following an acquisition or goes below those thresholds following a disposal. It is not, therefore, the percentage acquired or disposed of in such a transaction which is to be disclosed, but the percentage of capital actually held since that is the figure which matters.

(7) The Directive contains minimum rules. Pursuant to Article 2, Member States may apply stricter provisions than those laid down by the Directive, or additional provisions. Member States may therefore also make provision for thresholds other than those specified in the Directive.

4. Methods of holding shares

(1) It is important for investors to know the total number of shares really held by a person acquiring or disposing of a holding so that they may assess just what influence that person may exert on the company. To this end, the person acquiring or disposing of a holding must disclose not only the number of shares which he holds directly, but also the number held by other persons in their own name on his behalf (e.g. nominee holdings). By the same token, a company must declare, not only shares which it holds itself but also those held by its subsidiaries. It should be noted that the definition of "subsidiary" given in Article 5 is strictly based on that in the Seventh Directive on company law (83/349/EEC of 13 June 1983 on consolidated accounts).

(2) Article 6 lays down that, where two or more persons act in concert, the holdings of each one of those persons must be added together in order to determine whether one of the thresholds in Article 6 has been crossed. If that has happened, each of the persons acting in concert must make a declaration, indicating the percentage of subscribed capital held by him and the percentages of such capital held by each of the other persons with whom he is acting in concert. This procedure was adopted in order to make each of the persons acting in concert responsible for the declaration provided for in

Article 3. Concerted action was defined on the basis of an existing definition in Directive 80/390/EEC of 17 March 1980 on the listing particulars to be published for admission to stock exchange listing.

5. Time limits

In order to ensure that the market is informed promptly, persons acquiring or disposing of holdings must notify the company within seven calendar days; the company itself has seven calendar days in which to notify the public. Those relatively brief periods should make it possible to prevent, or at least restrict, misuse of such information, particularly through insider dealing.

6. Declaration

The arrangements for informing the public were specified within the framework of Directive 79/279/EEC on the conditions for admission to stock exchange listing. Those arrangements also apply in the present context. Article 17 of the Directive on the conditions for admission to stock exchange listing lays down that the information to be made available to the public must be published in one or more newspapers distributed throughout the Member State or distributed widely therein or must be made available to the public either in writing in places indicated by announcements to be published in one or more newspapers distributed throughout the Member State or widely distributed therein or by other equivalent means approved by the competent authorities.

7. Derogations

In two specific cases, it was considered expedient to allow the competent authorities to derogate from the rules. The purpose of the derogations is to take account of the interests of the parties concerned. Article 7 thus makes it possible for Member States to exempt acquisitions or disposals of major holdings made by market makers in the performance of their activity from the notification requirement. Similarly, Article 9 provides that the disclosure of information which would be against the public interest or would seriously harm either persons acquiring or disposing of holdings or the company in which the holding is being acquired, may be waived by the competent authorities.

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(85/C 351/12)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

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

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas a policy in the securities field aimed at keeping investors properly informed is likely to enhance investor protection, to increase investor confidence in securities markets and thus to ensure that securities markets function correctly;

Whereas coordination of that policy at Community level, by making such protection more equal, is likely to make for greater interpenetration of Member States' securities markets and therefore help to establish a true European capital market;

Whereas to that end investors should be informed of changes in major holdings in the capital of Community companies whose shares are officially listed on a stock exchange situated or operating within the Community;

Whereas it is to achieve that objective that Schedule C, point 5 (c) of Council Directive 79/279/EEC of 5 March 1979 coordinating the conditions for the admission of securities to official stock exchange listing⁽¹⁾ stipulates that a company whose shares are officially listed on a Community stock exchange must inform the public of any changes in the structure (shareholders and breakdown of holdings) of the major holdings in its capital as compared with information previously published on that subject as soon as such changes come to its notice;

Whereas if that requirement is to be applied in an effective manner coordinated rules should be laid down concerning its detailed content and the procedure for its application;

Whereas companies whose shares are officially listed on a Community stock exchange can inform the public of changes in the structure of the major holdings in their capital only if they have been informed of such changes;

Whereas most Member States do not require investors to inform companies of acquisitions or disposals made by them of major holdings in the capital of such companies; whereas there are appreciable differences between the Member States in which there is such a requirement;

Whereas coordinated rules should therefore be adopted at Community level in this field,

HAS ADOPTED THIS DIRECTIVE:

Article 1

1. This Directive shall apply to persons who acquire or dispose of major holdings, as defined in Article 3, in the subscribed capital of a company which is incorporated in a Member State and whose shares are officially listed on a stock exchange situated or operating within a Member State.

2. Where the acquisition or disposal of major holdings is carried out by means of certificates representing shares, this Directive shall apply to the bearers of those certificates, and not to the issuer.

Article 2

Member States may subject the persons and companies respectively referred to in Articles 1 and 8 to stricter requirements than those provided for by this Directive, or to additional requirements, provided that they are generally applicable.

Article 3

Where a person acquires or disposes of shares in a company as referred to in Article 1 and where, following that acquisition or disposal, the percentage of subscribed capital held by that person in that company reaches or exceeds the thresholds of 10 %, 20 %, 33.33 %, 50 %, 66.66 % or 90 % of the subscribed capital or goes below those thresholds, he shall notify the company within seven calendar days of the percentage of subscribed capital he holds following that acquisition or disposal.

Article 4

1. In order to assess whether a person acquiring or disposing of holdings is required to make the declaration provided for in Article 3, account shall be taken of shares held by other persons in their own name but on behalf of the person acquiring or disposing of the holdings.

2. Where the person acquiring or disposing of holdings is an undertaking, shares held by a subsidiary or shares held

⁽¹⁾ OJ No L 66, 16. 3. 1979, p. 21.

by other persons in their own name but on behalf of a subsidiary shall also be deemed to belong to the person acquiring or disposing of the holdings.

Article 5

1. For the purpose of this Directive, 'subsidiary' means any undertaking in which another undertaking:

- (a) has a majority of the shareholders' or members' voting rights; or
- (b) has the right to appoint or remove a majority of the members of the administrative, management or supervisory body and is at the same time a shareholder or member; or
- (c) is a shareholder or member and controls alone a majority of the shareholders' or members' voting rights pursuant to an agreement entered into with other shareholders or members of the undertaking (subsidiary).

2. For the purposes of paragraph 1, the parent undertaking's rights as regards voting, appointment and removal shall have added to them the rights of any other subsidiary and those of persons acting in their own name but on behalf of the parent undertaking or any other subsidiary.

Article 6

1. For the purposes of Article 3, where persons act in concert, the holdings of each one of such persons shall be added together. In this case, the obligation to make the declaration provided for in Article 3 shall fall upon each one of them. This declaration shall indicate the percentage of subscribed capital held by the person making the declaration and the percentages of such capital held by the persons with whom he is acting in concert.

2. 'Persons acting in concert' means persons who have concluded an agreement which may lead to their adopting a common policy in respect of a company.

Article 7

Member States may exempt acquisitions or disposals of major holdings made by a market maker in the pursuit of his activity from the declaration provided for in Article 3.

Article 8

1. A company which has received the declaration referred to in Article 3 shall in turn notify it to the public in each of the Member States in which its shares are officially listed on a stock exchange not later than seven calendar days following receipt of that information

2. Should the percentage of subscribed capital held by the person making the declaration provided for in Article 3 differ from the percentage of voting rights actually held by that person, the company which has received the declaration shall notify the public of both percentages.

3. The information shall be made available to the public in accordance with the rules of Article 17 of Directive 79/279/EEC.

Article 9

The competent authorities referred to in Article 10 may exempt the persons and companies respectively referred to in Articles 1 and 8 from the requirement to notify, as defined in Articles 3 and 8 respectively, where those authorities consider that the disclosure of such information would be against the public interest or would seriously harm those persons or companies, provided that the absence of such notification would not mislead the public in its assessment of the shares concerned.

Article 10

1. Member States shall designate the competent authority or authorities and shall inform the Commission accordingly, specifying any division of duties between those authorities. They shall, moreover, ensure that this Directive is applied.

2. Member States shall ensure that the competent authorities have such powers as may be necessary for the exercise of their duties.

3. The competent authorities in the Member States shall cooperate wherever necessary for the purpose of carrying out their duties and shall exchange any information required for that purpose.

Article 11

The Contact Committee set up by Article 20 of Directive 79/279/EEC shall also have as its function:

- (a) to permit regular consultations on any practical problems which arise from the application of this Directive and on which exchanges of view are deemed useful;
- (b) to facilitate consultations between Member States on the stricter or additional requirements which they may lay down in accordance with Article 2, so that the requirements imposed in all the Member States may finally be brought into line, in accordance with Article 54 (3) (g) of the Treaty;
- (c) to advise the Commission, if necessary, on any additions or amendments to be made to this Directive.

Article 12

1. Member States shall take the measures necessary to comply with this Directive not later than 1 January 1991. They shall forthwith inform the Commission thereof.

2. Member States shall communicate to the Commission the provisions of national law which they adopt in the field governed by this Directive.

Article 13

This Directive is addressed to the Member States.