

COMMISSION OF THE EUROPEAN COMMUNITIES

COM (89) 528 final - SYN 63

Brussel, 16 November 1989

Re-examined proposal for a

COUNCIL DIRECTIVE

on company law concerning
disclosure requirements in respect of
branches opened in a Member State by
certain types of companies governed
by the law of another State

(presented by the Commission pursuant to Article 149.2(d)
of the EEC Treaty)

Revised proposal for a
Council Directive
on company law concerning
disclosure requirements in respect of
branches opened in a Member State by
certain types of companies governed
by the law of another State

(Submitted by the Commission to the Council
on the basis of Article 149 (2d)
of the EEC Treaty)

Explanatory memorandum

1. On 29 July 1986 the Commission transmitted to the Council the abovementioned proposal for a Directive.⁽¹⁾
2. The European Parliament and the Economic and Social Committee delivered their opinions on 18 November 1987⁽²⁾ and 24 September 1987⁽³⁾ respectively.
3. On 5 April 1988 the Commission transmitted an amended proposal⁽⁴⁾ to the Council, incorporating the substance of the changes requested by Parliament. The Council's Working Party on Economic Questions (establishments and services) examined that proposal in three readings from November 1988.
4. The Council adopted a Common Position on 16 May 1989,⁽⁵⁾ for which it indicated its grounds,⁽⁶⁾ and on which the Commission formulated its observations.⁽⁷⁾
5. In accordance with the cooperation procedure, the European Parliament gave the proposal a second reading on 13 September 1989 and voted in favour of eight amendments.⁽⁸⁾

(1) OJ No. C 203, 12.8.1986, p. 12.

(2) OJ No C 345, 21.12.1987, p. 16

(3) OJ NO C 319, 31.11.1987, p. 61.

(4) OJ No C 105, 21.4.1988, p. 6.

(5) Council Document 6346/89, 11 May 1989.

(6) Council Document 6346/89 Add. 1, 11 May 1989.

(7) SEC(89)739 SYN 63, 18 May 1989.

(8) EP Doc. 133.773, 13 September 1989.

6. The Commission has been able to accept the following amendments involving improvements to the wording:
- (a) the first amendment, which adds the words "not least" to the fifth recital;
 - (b) the second amendment, which, in the sixth recital, stresses the possibility of comparing the economic and social influence of a branch with that of a subsidiary company;
 - (c) the fourth amendment, which refers in Article 3 not only to the auditing and disclosure of accounting documents, but also to their being drawn up in accordance with the various accounting directives.
 - (d) the third and the fifth amendments which refer to the existence of other branches in the same Member State.
7. The Commission has rejected the sixth, seventh and eighth amendments.

As for the branches of third-country companies, the Member States may still request additional information since the Directive's provision on that matter is of a minimal nature. This is the reason for the rejection of the sixth amendment, which would allow the Member State to demand the signature of certain persons having power of representation.

The seventh amendment aims to enable the Member States, in the case of the non-compliance or non-equivalence of the accounts of a third-country company, to require not only the drawing up and disclosure of accounts limited to the branch's activity but also their audit. However, no equivalent requirement exists in the comparable rules concerning the branches of third-country credit institutions (Directive 88/117/EEC, Article 3). It would seem indefensible to impose stricter requirements on the branches of industrial and commercial companies.

Under the eighth amendment, where the accounting documents of third-country companies do not fully comply in every detail with the directives, despite being equivalent in principle, all differences would have to be expressly indicated at the time of disclosure. Moreover, the fact that they have not been audited would also have to be stated. The Commission considers that the equivalence criterion was introduced specifically to avoid insisting on absolute conformity with the accounting directives. A substantial comparability of accounting documents was more what it had in mind. As for the question of auditing, it is easy to tell when accounts have not been audited by the mere fact that they do not bear any indication to that effect.

II

(Preparatory Acts)

COMMISSION

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Re-examined proposal for a Council Directive on company law concerning disclosure requirements in respect of branches opened in a Member State by certain types of companies governed by the law of another State (*)

COM(89) 528 final — SYN 63

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(89/C 309/15)

(*) OJ No C 203, 12. 8. 1986, p. 12.

COMMON POSITION OF THE COUNCIL

REVISED PROPOSAL OF THE COMMISSION

5th recital

Whereas in this field the difference in the laws of the Member States may interfere with the exercise of the right of establishment; whereas it is therefore necessary to eliminate such differences in order to safeguard the exercise of that right;

6th recital

Whereas to ensure the protection of persons who deal with companies through the intermediary of branches, measures in respect of disclosure are required in the Member State in which a branch is situated; whereas to effect such disclosure it is necessary to make use of the procedure already instituted for companies with share capital within the Community;

Article 2

5th recital

Whereas in this field the difference in the laws of the Member States may interfere with the exercise of the right of establishment; whereas it is therefore necessary to eliminate such differences, **not least** in order to safeguard the exercise of that right;

6th recital

Whereas to ensure the protection of persons who deal with companies through the intermediary of branches, measures in respect of disclosure are required in the Member State in which a branch is situated; **whereas the economic and social influence of a branch may be comparable to that of a subsidiary company, so that to that extent the public interest in disclosure is comparable**; whereas to effect such disclosure it is necessary to make use of the procedure already instituted for companies with share capital within the Community;

Article 2

(1) (e) (a) (new)

(e) (a) **the existence of other branches in the same Member State**

COMMON POSITION OF THE COUNCIL

REVISED PROPOSAL OF THE COMMISSION

Article 3

The compulsory disclosure provided for by Article 2 (1) (g) shall be limited to the accounting documents of the company as audited and disclosed pursuant to the law of the Member State by which the company is governed in accordance with Directives 78/660/EEC, 83/349/EEC and 84/253/EEC.

*Article 8**Article 3*

The compulsory disclosure provided for by Article 2 (1) (g) shall be limited to the accounting documents of the company as **drawn up**, audited and disclosed pursuant to the law of the Member State by which the company is governed in accordance with Directives 78/660/EEC, 83/349/EEC and 84/253/EEC.

Article 8

(d) (a) (new)

(d) (a) **the existence of other branches in the same Member State.**

The other recitals and articles remain unchanged.
