

COMMISSION OF THE EUROPEAN COMMUNITIES

COM (75) 671 final

Brussels, 11 December 1975

SECOND AMENDED PROPOSAL FOR A THIRD COUNCIL DIRECTIVE

on coordination of safeguards which, for the protection 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 connection with mergers between
sociétés anonymes

(submitted to the Council by the Commission pursuant to the second paragraph
of Article 149 of the EEC Treaty)

EXPLANATORY MEMORANDUM

I. INTRODUCTION

On 16 June 1970, the Commission submitted to the Council the Proposal for a Third Directive on company law (1) dealing with mergers of public companies incorporated under the law of a single Member State. On 21 May 1971, the Economic and Social Committee (2), and on 16 November 1970, the European Parliament (3) gave their Opinions on the proposal.

In order to take account of these Opinions, as well as the entry of the United Kingdom, Ireland and Denmark, into the Community on 4 January 1973, the Commission amended its proposed directive, pursuant to Article 149, paragraph 2 of the Treaty (4).

On 8 April 1975, the European Parliament gave its Opinion on the amended Proposal (5). On the basis of this Opinion, the Commission amended its Proposal once again.

II. NOTES ON ARTICLES

Article 5, paragraph 5

Following the European Parliament's Opinion, it is expressly stated that the documents referred to in paragraphs 2 to 4 may be issued in part rather than in full, only if the shareholder so requires.

Article 6, paragraph 3 and Article 5, paragraph 5

The European Parliament considers that the general meeting called to consider the merger should be informed as to the whole text of the opinion given by the employees' representatives.

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- (1) O.J. No. C 89, 14 July 1970
 - (2) O.J. No. C 88, 6 September 1971
 - (3) O.J. No. C 129, 11 December 1972
 - (4) COM(72) 1668 final
 - (5) O.J. No. C 95, 28 April 1975

To ensure availability of this information, every shareholder will have the right to have access to this opinion.

Article 6, paragraph 4

Regarding the protection of employees, the first amended version provided for an obligation to be imposed on the management organs to enter into negotiations with the employees' representatives with a view to reaching an agreement on the measures to be taken on the employees' behalf. If, at the end of such negotiations, agreement was not reached between the parties, each of them could ask for mediation by the national authority. The European Parliament did not agree with this solution. Another procedure had to be developed, since mediation, by definition, did not resolve the social conflict definitively. Following Parliament's Opinion given on 8 April 1975, the second amended version has provided that, in view of the aims of social protection, this procedure can only be set in motion by the employees. At the request of their representatives, the employer is bound to take part in negotiations on the measures to be taken for the benefit of the employees. In the event of a deadlock in such negotiations, each of the parties may appeal to an arbitration authority summoned to take a definitive decision on the measures in issue, without this decision constituting a pre-condition of the consideration by the general meeting of the proposal for a merger.

The new proposed procedure can only be understood in conjunction with the previous procedure set out in paragraphs 1 to 3. According to this last procedure, the report prepared by the management organ explains the effects of the merger with regard to the employees, and in particular, indicates the measures to be taken on their behalf. These matters form the main subject for the discussions between the employer and the employees' representatives. The latter may equally ask for the opening of negotiations on measures of a social nature. Thus the employees' representatives may discover whether they have more chance of obtaining a satisfactory social plan by using the procedure set out on paragraph 4, or, on the other hand, whether it is desirable for them to use other means provided by national law.

Article 6, paragraph 5

The amendment of the text, made in accordance with the Opinion of the European Parliament, corresponds to that of Article 5, paragraph 5.

FIRST AMENDED PROPOSAL

SECOND AMENDED PROPOSAL

PROPOSAL FOR A
THIRD COUNCIL DIRECTIVE

- No change

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 connection with mergers between sociétés anonymes

(Presented by the Commission to the Council on 12 February 1973)

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 the coordination provided for in Article 54(3)(g) and in the General Programme for the abolition of restrictions on freedom of establishment was begun by Directive No 68/151/EEC of 9 March 1968⁽¹⁾;

Whereas the coordination was continued by Directive No of (2) which harmonized the provisions adopted by the various Member States in relation to the formation of sociétés anonymes and the maintenance and alteration of their capital;

(1) OJ No L 65, 14 March 1968, p. 8

(2) OJ No C 48, 24 April 1970, p. 8

Whereas the protection of the interests of members and others requires that the laws of the Member States relating to mergers between sociétés anonymes be coordinated and that those Member States in which the possibility of merger does not exist should make provision in their laws for mergers to be effected;

Whereas in the context of coordination it is particularly important that the shareholders of merging companies be kept adequately informed in as objective a manner as possible and that their rights be suitably protected.

Whereas it is likewise essential that the employees of merging companies be kept informed that they be consulted regarding the effects of mergers upon them.

Whereas it is likewise essential that the employees of merging companies be informed of the effects of the merger upon them, that the representatives of the employees be consulted, and that, at the request of these representatives, negotiations must be begun, which, in the event of disagreement, can lead to an arbitration to settle the measures to be taken in favour of the employees.

Whereas creditors, including debenture holders and persons having other rights, must be protected so that merger is not detrimental to them;

Whereas the disclosure requirements of Directive No 68/151/EEC of 9 March 1968 should be extended to include merger operations so that third parties are kept adequately informed;

Whereas it is requisite that the safeguards - No change
afforded to members and others in connection
with the carrying out of merger operations
be extended to cover certain legal practices
which in important respects are similar to
merger, so that protection is not eliminated;

Whereas so as to ensure certainty as to the
law in the relationships between the companies
concerned, between them and third parties,
and between the members, it is necessary
to limit the cases of nullity of merger by
introducing, on the one hand, the principle
that defects be cured wherever this is possible
and, on the other, a short period within
which proceedings for nullity must be com-
menced;

HAS ADOPTED THIS DIRECTIVE:

Article 1 - 4 unchanged

Article 5

Article 5

1. The management organs of each of the merging companies shall draw up a detailed report explaining the draft terms of merger, and in particular the share exchange ratio, and setting out the legal and economic grounds therefore.

-- No change

2. In addition, for each of the merging companies one or more independent experts designated or approved by a legal or administrative authority shall examine the draft terms of merger and draw up a report for the shareholders. These experts may be the persons responsible for auditing the company's accounts.

- No change

Each expert shall be entitled to obtain from merging companies all relevant information and documents and to carry out all necessary investigations.

In their report the experts must state whether in their opinion the share exchange ratio is justified or not. In support of their statement they shall give at least the following particulars:

- (a) The relationship between the companies' net assets on the basis of actual values;
- (b) The relationship between the earnings yields of the companies, taking future prospects into account;
- (c) The criteria used in evaluating the net assets and earnings yields.

In addition, the report shall indicate what special difficulties of evaluation have arisen, if any.

3. Every shareholder shall be entitled to have access to the following documents at the registered office at least two months before date of meeting of the General Meeting which is to decide on the proposed merger:

- No change

- (a) The draft terms of merger;
- (b) The balance-sheets, profit and loss accounts and annual reports of the merging companies for the last three financial years;
- (c) a financial statement drawn up as at the first day of the second month preceding the date of the draft terms of merger, if the last balance-sheet relates to a financial year which ended more than six months before that date;
- (d) The reports of the management organs of the merging companies provided for in paragraph 1 of this Article and in Article 6 (1);
- (e) The experts' reports provided for in paragraph 2 of this Article.

4. The financial statement provided for in paragraph 3(c) shall be drawn up in accordance with the same methods and in the same form as the last annual balance-sheet.

- No change

However:

- (a) No fresh physical inventory shall be taken;
- (b) The figures in the last balance-sheet shall be altered only to reflect changes in the accounts; the following shall nevertheless be taken into account:
 - interim depreciation and provisions;
 - material changes in actual value not shown in the accounts.

5. Every shareholder shall be entitled to obtain free of charge on request copies, in full or in part, of the documents referred to in paragraph 3.

5. Every shareholder shall be entitled to obtain free of charge on request copies, in full or, if required, in part, of the documents referred to in Article 5, paragraph 3 and in Article 6, paragraph 3.

Article 6

Article 5

1. The management organs of each of the merging companies shall draw up a detailed report explaining the legal, economic and social effects of the merger on the employees over a period of at least two years and indicating the measures to be taken regarding them.

- No change

2. Every employee or employees' representatives shall be entitled to have access to the report provided for in paragraph 1 and the other documents referred to in Article 5(3) at the company's registered office at least two months before the meeting of the General Meeting which is to decide on the merger.

- No change

3. Before the General Meeting discusses the merger the management organs of the merging companies shall discuss the reports provided for in paragraph 1 with the employees' representatives. The latter may deliver a written opinion. The General Meeting which is to decide on the merger shall be informed of that opinion.

3. Before the General Meeting considers the merger, the management organs of the merging companies shall discuss the reports provided for in paragraph 1 with the employees' representatives. The latter may deliver a written opinion.

On request of the employees' representatives, the measures to be taken on behalf of the employees will be made the subject of negotiations between the parties.

The General Meeting which is to decide on the merger must be informed of that opinion and of the result of the negotiations, if there is any. Every shareholder shall have the right to have access to the documents, before the consideration by the General Meeting of the proposed merger.

4. If the merger is prejudicial to the employees' interests the management organs shall initiate negotiations with the employees' representatives, before the General Meeting discusses the merger, with a view to reaching agreement on the measures to be taken regarding the employees. If no agreement is reached in these negotiations, each of the parties may ask the public authority to act as intermediary.

5. Every employee or employees' representative shall be entitled to obtain free of charge on request copies, in full or in part, of the documents referred to in paragraph 2 to 4.

6. This Article is without prejudice to the laws of those Member States which are more favourable to employees in cases of merger.

4. If no agreement is achieved as a result of the negotiations provided for in paragraph 3 and the general meetings of the merging companies have approved the draft terms of merger, the management organ of the acquiring company is obliged, on a demand of the employees' representatives to engage in negotiations with the employees' representatives with the view to reaching an agreement on the measures to be taken with regard to the employees. If, at the end of these negotiations, or of a period of two months at the latest from the date when they began, an agreement has not been reached between the parties, either of them can refer the matter to an arbitration body which shall decide definitively, within one month, on the measures to be taken on their behalf. This arbitration body shall consist of arbitrators appointed in equal numbers by each of the parties, and of a president appointed by common consent of the two parties. If one of the parties fails to appoint its arbitrators, or if agreement is not reached on the choice of the president, the competent court shall make these appointments.

5. Every employee or employees' representative shall be entitled to obtain free of charge on request copies, in full or, if required, in part of the documents referred to in paragraphs 2 to 4.

- No change.