COMMISSION OF THE EUROPEAN COMMUNITIES

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Proposal for a Council directive to co-ordinate and render equivalent the guarantees required in the Member States of companies as defined in Article 58, second paragraph, of the Treaty, to protect the interests of the members of such companies and third parties

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Proposal for a Council directive to co-ordinate and render equivalent the guarantees required in the Member States of companies as defined in Article 58, second paragraph, of the Treaty, to protect the interests of the members of such companies and of third parties

(Submitted by the Commission to the Council on 21 February 1964)

The Council of the European Economic Community,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 53 (3 g) thereof;

Having regard to the General Programme for the removal of restrictions on freedom of establishment, and in particular Title VI thereof;

Having regard to the proposal of the Commission;

Having regard to the opinion of the European Parliament;

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

Whereas the co-ordination stipulated in Article 54 (3 g) and referred to in the General Programme for the removal of restrictions on freedom of establishment is urgently required, particularly as regards joint stock companies and limited partnerships, since such undertakings often carry on business outside the national frontiers;

Whereas the co-ordination of national laws on publication of information, the validity of commitments and the nullity of association of such companies or partnerships is of particular importance, especially as regards the protection of the interests of third parties;

Whereas identical Community provisions must be adopted in these fields for joint stock companies and limited partnerships, since such companies and partnerships often fulfil the same purpose and since they are liable towards third parties only to the extent of their corporate assets;

Whereas publication must enable third parties to inspect the memorandum and articles of association (or other deeds of association or partnership) of the company or partnership and to ascertain the identity of persons having authority to bind the company of partnership; (1)

Whereas the publication of information must also serve to determine the validity of commitments entered into on behalf of the company, and whereas third parties acting in good faith must be protected by provisions limiting as far as possible any grounds on which such commitments may be declared invalid;

Whereas, in order to provide legal security in relations between the company and third parties and in relations between the members of the company, the grounds for a declaration of nullity must be circumscribed, it must not be retrospective as regards third parties, and the time-limit for third parties to lodge objections must be short;

Whereas, in order to consolidate what has already been achieved in the field of co-ordination and to enable the Community institutions to continue this work, it is essential that the Commission be consulted before any amendment is made to company law in a Member State.

Has made the present directive:

Article 1

The measures of co-ordination laid down in the present directive shall apply to laws and regulations in the Member States relating to the following types of company:

a) in the Federal Republic of Germany:

Aktiengesellschaften, Kommanditgesellschaften auf Aktien, Gesellschaften mit beschränkter Haftung;

(1) The French word "société" means either a company or a partnership. In this directive, according to context, the term clearly has reference to a partnership with limited liability, which has certain attributes of a body corporate and to all intents and purposes fulfils the same functions as an English private company. For the sake of simplicity in drafting, the word "company" or "firm" has henceforward been used to denote both kinds of body. Furthermore, inasmuch as a "société par actions" is a creation of French law and a limited company is a creation of English law, many of the terms used are only equivalent in a general way. (Translator's note).

b) in the Kingdom of Belgium:

sociétés anonymes, sociétés en commandite par actions, sociétés de personnes à responsabilité limitée;

c) in the French Republic:

sociétés anonymes, sociétés en commandite par actions, sociétés à responsabilité limitée;

d) in the Italian Republic:

società per azioni, società in accomandita per azioni, società a responsabilità limitata;

e) in the Grand Duchy of Luxembourg:

sociétés anonymes, sociétés en commandite par actions, sociétés à responsabilité limitée;

f) in the Kingdom of the Netherlands:

de Naamloze Vennootschap, de commanditaire Vennootschap op aandelen.

Chapter I : Publication of information

Article 2

The Member States shall require companies to make public:

1. The memorandum of association or other deed of association or partnership *(acte constitutif)* and, where they are a separate document, the articles of association *(statuts);*

2. Any amendments to the document or documents referred to under (1), including those to continue the association in being beyond, or to dissolve it before, the specified term, whether such amendments, are made by decision of the authorized officers of the company or in consequence of a court order;

3. The full, up-to-date text of the articles or, if these contain only rules governing the operation of the company, the full, up-to-date text of the deed of association or partnership *(acte constitutif);*

4. The identity of persons who, by law or under the articles of association, in their capacity as officers of the company:

a) Have authority to bind the company in dealings with third parties and to represent it in court;

b) Are engaged in the management or supervision of the company or partnership;

The official capacity of such persons must be indicated;

5. The identity of the auditors, where there is a legal requirement to have the accounts examined annually;

6. The balance sheet and profit and loss account for each financial year, but, in the case of limited partnerships (private companies), only where the balance sheet total exceeds one million units of account;

7. Any change in the registered office;

8. Any court order winding up the company;

9. The appointment of liquidators and their powers;

10. The conclusion of liquidation, and the striking of the company off the register in Member States in which this has legal consequences.

Article 3

1. The Member States may stipulate that publication as required under Article 2 be effected in any of the following forms: publication in the press, lodging with a clerk of the court or other official body, registration.

2. Where publication is in the press, all notices in each Member State shall be published in a single official gazette.

The Member States may also require publication in other journals, including the local press.

3. The form of publication may vary with the information to be given and with the form of the company. Provided that the same form of publication must be employed in the case of the same form of company for information that may be cited against third parties other than the information referred to in Article 2 (3).

4. More than one form of publication may be employed for one and the same announcement. In such a case:

a) Care must be taken to ensure that there is no divergence between the particulars published in different forms;

b) The Member State concerned must specify which form of publication is authoritative as regards the constitution of the company in dealings with third parties, or as regards facts that may be cited against them.

Article 4

1. In each Member State a file shall be opened either at a central register office or at the office of each trade registrar or registrar of companies for each of the companies in the register.

2. The file of each company shall contain all the particulars, kept up-to-date, of its constitution and business required to be published under the terms of Article 2.

3. Each Member State shall remain free to decide that entry in the file shall be equivalent to lodging or registration within the meaning of Article 3 (1).

4. Where entry in the file is not deemed to be a form of publication and there is some divergence between duly published particulars and those contained in the file, it shall not be permissible to invoke the latter.

5. The registrar or the official in charge of the file shall supply, on written application, copies or extracts of the particulars referred to in Article 2, and the fee charged may not exceed the administrative costs involved.

Should the Member States decide that further particulars must be included in the file and that all or certain interested parties must be notified thereof, such persons may obtain copies or extracts of such particulars in the manner specified in the foregoing paragraph.

The documents supplied shall be certified true copies.

Where there is any divergence between published particulars and those extracted from the file, it shall not be permissible to invoke the latter.

Article 5

The Member States shall lay down that letters, invoices, order forms and price lists must indicate the trade register or register of companies in which the company is entered and at the office of which the file is kept. The registration number or any other information that will enable the entry to be found shall also be indicated.

The documents referred to in the foregoing paragraph must indicate the legal form of the company, the situation of its registered office, its capital and, should the case arise, the fact that it is in liquidation.

Article 6

Each Member State shall specify which persons are required to comply with the publications formalities.

Article 7

The Member States shall impose penalities:

a) If the balance sheet and profit and loss account are not published;

b) In the case of failure to deposit for inclusion in the file the documents and declarations to be entered therein in pursuance of Article 4 (2) when entry in the file is not a valid form of publication within the meaning of Article 3;

c) If the requisite particulars are not given on the business correspondence specified in Article 5.

Article 8

Persons who have acted on behalf of a company in the course of formation before it has acquired legal personality shall jointly and indefinitely bear liability for such acts unless the company takes over such liabilities after being duly constituted.

Article 9

In Member States in which failure to publish amendments to the memorandum or articles of association does not render the same ineffective, such failure shall at least have the consequence that the amendments may not be cited against third parties acting in good faith. In the latter case the Member States shall remain free to authorize third parties to rely on such amendments.

Chapter II : Validity of commitments

Article 10

Where the appointment, resignation or removal of officers empowered to bind the company has not been made public, such acts may not be cited against third parties acting in good faith; but third parties may rely on such acts.

If the names of such persons have been duly published, no defect in their appointment may be cited against third parties acting in good faith.

Article 11

1. The company shall be liable towards third parties for the acts of its officers, unless such acts are *ultra vires* or beyond the objects of the company.

Provided that the company shall be liable for acts not consonant with its objects where a third party had good reason to believe that a contract entered into with the company was consonant with its objects.

2. Statutory limits to the powers of officers may not be cited against third parties, even if they have been published. Such limits shall be effective only in the internal affairs of the company.

A company may, however, be authorized by municipal law to cite against third parties any provisions in its articles which confer full powers to represent the company on a number of persons acting jointly, unless the third party concerned had good reason to believe that such provisions were not applied.

Chapter III : Nullity of association

Article 12

In all Member States in which the law does not provide for prior administrative or judicial inspection when a company is being formed, the memorandum of association and any alterations thereof must be authenticated instruments.

Article 13

Companies may be declared not to have existed in law *(inexistence)* or may be declared null *(nullité absolue, nullité relative* or *annulabilité)* on the following grounds only:

1) because no memorandum of association was drawn up or — depending on legal requirements in each Member State — because the formalities of prior inspection have not been complied with or the necessary instruments are bad for want of form;

2) because the purpose of the association is unlawful or contrary to *ordre public.*

However, in Member States where the formation of a company does not require the publication of its memorandum, failure to publish the memorandum shall not make the association null and void. Instruments that have not been published may not be cited against third parties acting in good faith, but the latter may if they wish rely on them.

Article 14

1. A declaration that the association is null and void shall not of itself affect the validity of liabilities to third parties assumed previously on behalf of the company.

2. A declaration that the association is null and void shall entail the liquidation of the company as in the case of a winding-up order.

3. However, the effects of such declaration among the members of the company or partners in the firm may be regulated according to the law in each Member State.

4. Partners or shareholders must pay up any subscribed but unpaid capital required in order to satisfy the company's creditors.

Article 15

A judicial finding that the association was null and void is effective with respect to all and sundry. It must be published as specified in Chapter I of the present directive.

Objections by third parties, where allowed under municipal law, must be filed within six months of such publication.

Article 16

The Member States shall make by 1 January 1965 any amendments to their laws and regulations needed to comply with the provisions of the present directive and shall notify the Commission thereof forthwith.

The Member States may provide that publication of the complete articles of association embodying all amendments made since the execution of the deed of association will not be required until the articles of association are next amended or, failing this, not later than 1 January 1967.

The Member States shall notify the Commission, in time for the Commission to present its comments, of any further laws or regulations they propose to introduce in the matters covered by this directive.

Article 17

This directive is addressed to all Member States.

Explanatory Memorandum

I. By virtue of Article 58 of the Treaty, companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of the Treaty clauses on establishment, be placed on the same footing as individual nationals of the Member States. It follows that the establishment of agencies and branches in other EEC countries is subject only to the requirement that the company setting them up is lawfully constituted.

However, Article 54 (3 g), having regard to the sometimes considerable differences between the laws of the various Member States, stipulates that the guarantees required of companies as defined in Article 58 be co-ordinated and rendered equivalent so as to protect the interests of members and of third parties.

The need for co-ordination was stressed by the Council when the General Programme for the removal of restrictions on freedom of establishment was drawn up. The General Programme notes that it is intended to carry through the required co-ordination by the end of the second year of the second stage of the transition period.

The duty laid upon the Community institutions by Article 54 (3 g) is extremely important since most of the provisions of company law in the Member States are aimed at protecting third parties or members of the company, or both at the same time; as regards companies there can be no establishment or freedom to supply services unless legal security is fully ensured in respect of all types of company or partnership.

II. Faced with this immense task, which touches upon the whole field of company law, and wishing to co-ordinate more rapidly the guarantees required of companies which are the most prominent in the international sphere, the Commission decided that the scope of this first draft directive should be restricted to limited liability or joint stock companies *(sociétés anonymes)* and limited partnerships (private companies) with or without capital divided into shares *(sociétés en commandite par actions* or *sociétés à responsabilité limitée)*. (1) These types of firm were also chosen because their purposes are practically the same or because on certain points they are subject to identical or similar regulations. Further, it was thought advisable to prevent any "getting round the law" that might have resulted if a single form of company had been selected.

(1) The English and French terms are only equivalent in a general way : see footnote on p. 10.

Co-ordination, even if restricted to these types of company, should be applied for the time being to the points that are most important for the protection of third parties and members of the company. The central idea behind this draft is the need to ensure rapidity and legal security in international transactions. The interest of third parties in this question is self-evident. The company also has an interest since third parties will refuse to deal with it if its legal position is uncertain, its validity doubtful, its financial standing unknown or the powers of its representatives questionable.

The matters dealt with in the directive fall under three heads:

A. Publication of information

Publication of information is one of the first guarantees required of companies towards third parties and between their members. Article 2 lists the documents and acts that must be made public, the most important being the balance sheet and profit and loss account.

Now that the relations of companies, many of which are not of international repute, may extend to six countries, it is even more necessary that persons concluding contracts with a company should know its financial position.

The text of the draft has been fully approved by the Commission except for one point: the publication of the balance sheets of private companies *(sociétés à responsabilité limitée)*, on which there were two conflicting views:

a) The first was opposed to the publication of balance sheets by private companies on the grounds that they do not normally call for public subscription, that they are often family businesses and that their operations are usually confined to their own country.

b) The other view was that the balance sheets of such companies should be published, since exemption would be a retrograde step on the part of countries where publication is prescribed by law. Moreover, where the legislation of a given Member State does not recognize private companies, small limited liability companies would be at a disadvantage if private companies were absolved from the obligation to publish balance sheets.

The wording of Article 2 (6) as proposed to the Commission represents a compromise: only private companies whose balance sheet exceeds one million units of account will be obliged to publish. A large number of these companies — particularly all those that do not normally carry on business outside their own country — will thus be exempt.

Article 3 gives Member States a choice between three methods of publication but requires them to centralize their systems and co-ordinate information published in the three forms. This co-ordination is supplemented by the opening of a file for each company, which can be consulted by third parties (Article 4).

Business communications must give certain particulars (Article 5); failure to supply these particulars will according to case be a punishable offence or open to redress at civil law (Articles 6 to 9).

B. Validity of commitments

Anyone dealing with a foreign company must be able to ascertain quickly and easily whether the person purporting to act on behalf of that company is authorized to do so.

The provisions therefore make the publication of information decisive in determining the binding force of commitments undertaken on behalf of the company (Article 10) and restrict the extent to which limits on the powers of directors can be cited against third parties (Article 11).

According to one line of thought, more protection should be given to third parties by making the company liable for acts of its officers even beyond its objects.

Another view was that it should be permissible to cite against third parties any restrictions on the powers of a company representative which arise from the objects of the company. A compromise between these two views was finally reached, according to which the clause in the memorandum defining the objects of the company must do no more than describe the nature of the company's business.

Furthermore, statutory restrictions on the powers of officers will no longer be citable against third parties except for the stipulation that more than one signature is needed to bind the company.

C. Nullity of association

With the same object of improving legal security in relations between members of the company and third parties and among the members themselves, the draft reduces to two the grounds for declaring a company non-existent (Article 13): where in the formation of a company prior administrative or judicial inspection is not required by municipal law, the memorandum of association must be an authenticated instrument (Article 12).

Similarly, a company's being found to have no legal existence will have no effect for third parties except as regards future transactions (Article 14, 1); Member States remain free to legislate as to the consequences for members of the company (Article 14, 3).

Article 15 represents a compromise between the view that a court decision declaring a company to have no legal existence should be valid in respect of all and sundry and the view that persons who are not parties to the judgment should be able to file objections to the court's decision within what is often a very long period (thirty years).

Lastly, the draft stipulates that any future legislation by the Member States on the matters to which it refers must also be co-ordinated; provision is made for the Commission to be consulted prior to any future amendment of municipal law in this field, so that what has already been achieved in co-ordination may be consolidated and the Community institutions may continue this work (Article 16).