

# COMMISSION OF THE EUROPEAN COMMUNITIES

COM(91) 372 final - SYN.3

Brussels, 20 November 1991

THIRD AMENDMENT TO THE PROPOSAL FOR A FIFTH COUNCIL  
DIRECTIVE BASED ON ARTICLE 54 OF THE EEC TREATY  
CONCERNING THE STRUCTURE OF PUBLIC LIMITED COMPANIES  
AND THE POWERS AND OBLIGATIONS OF THEIR ORGANS

(presented by the Commission pursuant to Article 149(3)  
of the EEC-Treaty)

EXPLANATORY MEMORANDUM

I. Background

The proposal for a Fifth Company Law Directive, concerning the structure of public limited companies and the powers and obligations of their organs, was first presented to the Council on 9 October 1972.<sup>1</sup> The Economic and Social Committee delivered its opinion on 19 September 1974.<sup>2</sup> Parliament delivered its opinion on 14 June 1982.<sup>3</sup>

The Commission amended its proposal to take account of these opinions on 19 August 1983<sup>4</sup> and the amended proposal has been before the Council since then.

2. On 8 January 1991 the Commission presented to the Council a proposal amending the proposal for a Fifth Directive for the second time.<sup>5</sup>

The purpose of this second amendment was to make a number of changes to the proposal for a Fifth Directive, as previewed in the Commission's communication to the Council of 10 May 1990 concerning obstacles to take-over and other general bids,<sup>6</sup> with a view to eliminating certain legal obstacles in the way of such bids.

The Economic and Social Committee delivered an opinion on the second amendment on 3 July of this year<sup>7</sup> and Parliament delivered its opinion on 10 July.<sup>8</sup>

The present proposal, which has been adopted by the Commission on the basis of Article 149(3) of the EEC Treaty, amends the proposal for a Fifth Directive for the third time.

This new text introduces amendments relative to the last version of the Fifth Directive (the second amendment of January 1991). Consequently, the present explanatory memorandum refers only to those amendments.

1 OJ C 131, 13.12.1972, p. 49.

2 OJ C 109, 19.9.1974, p. 9.

3 OJ C 149, 14.6.1982, p. 17.

4 OJ C 240, 9.9.1983, p. 2.

5 OJ C 7, 11.1.1991, p. 4; with explanatory memorandum: SEC(90) 629.

6 SEC(90) 901 final, 10.5.1990.

7 Not yet published.

8 Not yet published.

## II. Commentary on the articles

### Article 33

#### Proportionality between the shareholder's stake in the capital and his voting rights

In order to strengthen the position of all the shareholders regarding the exercise of their voting rights, this article limits the possibility of issuing shares without voting rights or with limited voting rights. Firstly, such shares must carry special pecuniary advantages and, secondly, they may not be issued for an amount exceeding 50% of the subscribed capital.

The Commission previously proposed that, if shareholders did not receive the advantages connected with their shares for a period of three consecutive years, voting rights should be attached to those shares. This provision has been amended at Parliament's request.

With a view to ensuring a higher degree of shareholder protection, preference shares will carry voting rights from and during such time as the shareholder is not in receipt of special advantages.

In this way, it is ensured that the shareholder is not deprived of his voting rights without any offsetting benefits, even for a short period.

### Article 36

#### Majority required in general meeting

The first paragraph of this article requires that resolutions of the general meeting be passed by an absolute majority. However, it is provided that a larger majority - a "qualified" majority - may be prescribed by law or by the memorandum or articles of association.

The second paragraph concerned resolutions of the general meeting appointing members of the company organs or the persons responsible for auditing the company accounts and stated that paragraph 1 was not to apply to such resolutions. At Parliament's request, this second paragraph has been deleted on the ground that it is partly superfluous, the appointment of members of the company organs being now dealt with in Article 36(3).

As far as the appointment of persons responsible for auditing the company accounts is concerned, this matter will be dealt with in the chapter on the adoption and audit of the annual accounts, namely Chapter VI, which is not included in the present exercise, relating as it does only to changes in the composition of the company organs.

SECOND AMENDMENT

Second amendment to the proposal for a Fifth Directive based on Article 54 of the EEC Treaty concerning the structure of public limited companies and the powers and obligations of their organs

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

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

Having regard to the amended proposal from the Commission,<sup>1</sup>

In cooperation with the European Parliament,

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

First to twelfth recitals unchanged

A new recital is inserted between the twelfth and thirteenth, as follows:

THIRD AMENDMENT

Third amendment to the proposal for a Fifth Directive based on Article 54 of the EEC Treaty concerning the structure of public limited companies and the powers and obligations of their organs

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Unchanged

Having regard to the amended proposal from the Commission,<sup>1</sup>

In cooperation with the European Parliament,<sup>2</sup>

Having regard to the opinion of the Economic and Social Committee,<sup>3</sup>

Unchanged

Unchanged

<sup>1</sup> OJ C 240, 9.9.1983, p. 2.

<sup>1</sup> OJ C 7, 11.1.1991, p. 4.

<sup>2</sup> Opinion of 10 July 1991 (not yet published).

<sup>3</sup> Opinion of 3 July 1991 (not yet published).

Whereas the position of shareholders regarding the exercise of their voting rights should be strengthened in order to ensure a wide measure of participation in the life of the company; whereas voting rights should accordingly be proportionate to the shareholder's stake in the company capital, and limits should be imposed on the issue of preference shares without voting rights; whereas the freedom of the general meeting to appoint members of the organs of the company should not be reduced by giving particular categories of shareholders an exclusive right to put forward nominations; whereas the majority required for such resolutions on the part of the general meeting should be no greater than the absolute majority;

Unchanged

Fourteenth and fifteenth recitals unchanged

Unchanged

HAS ADOPTED THIS DIRECTIVE:

HAS ADOPTED THIS DIRECTIVE:

Articles 1 to 3 unchanged

Unchanged

Article 4

Article 4

Paragraphs 1 to 4 unchanged

Unchanged

A new paragraph 5 is inserted, as follows:

Unchanged

5. The memorandum or articles of association may not confer on the holders of a particular category of shares an exclusive right to put forward nominations for a majority of those members of the supervisory organ whose appointment is a matter for the general meeting.

Unchanged

Articles 4a to 21a unchanged

Unchanged

Article 21b

Article 21b

Paragraphs 1 to 4 unchanged

Unchanged

A new paragraph 5 is inserted, as follows:

Unchanged

5. The memorandum or articles of association may not confer on the holders of a particular category of shares an exclusive right to put forward nominations for a majority of those members of the administrative organ whose appointment is a matter for the general meeting.

Articles 21c to 32 unchanged

Unchanged

Article 33

Article 33

1. The shareholder's right to vote shall be proportionate to the fraction of the subscribed capital which the shares represent.

Unchanged

2. Notwithstanding paragraph 1, the laws of the Member States may authorize the memorandum and the articles of association to allow restriction or exclusion of the right to vote in respect of shares which carry special pecuniary advantages. Such shares may not be issued for an amount exceeding 50% of the subscribed capital. Where the company has not fulfilled the obligations arising in respect of such shares for a period which may not exceed three consecutive accounting years, the holders of those shares shall acquire voting rights in proportion to the fraction of the subscribed capital which those shares represent, and the voting rights thus acquired shall be equivalent to those of the other shareholders.

2. Notwithstanding paragraph 1, the laws of the Member States may authorize the memorandum and the articles of association to allow restriction or exclusion of the right to vote in respect of shares which carry special pecuniary advantages. Such shares may not be issued for an amount exceeding 50% of the subscribed capital. If the company does not fulfil the obligations arising in respect of such shares, the holders of those shares shall acquire, in proportion to the fraction of the subscribed capital which those shares represent, voting rights equivalent to those of the other shareholders which they may exercise during such time as they are not in receipt of the above-mentioned pecuniary advantages.

3. Any shareholder who, at the date of the general meeting, has not paid up calls made by the company at least one month earlier may not exercise his right to vote. Unchanged

Articles 34 and 35 unchanged Unchanged

Article 36 Article 36

1. Resolutions of the general meeting shall be passed by absolute majority of votes cast by all the shareholders present or represented, unless a greater majority or other additional requirements are prescribed by the law or the memorandum or articles of association. Unchanged

2. Paragraph 1 shall not apply to the appointment of members of the company organs or of the persons responsible for auditing the accounts of the company. Deleted

3. For resolutions appointing or dismissing members of the administrative, management or supervisory organ, neither the law nor the memorandum or articles of association may require a majority greater than the absolute majority of votes cast by all the shareholders present or represented. Unchanged

Articles 37 to 63d unchanged

Unchanged

Article 64

Article 64

Paragraphs 1 to 3 unchanged

Unchanged

A new paragraph 4 is inserted:

A new paragraph 4 is inserted,  
as follows:

4. When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

Unchanged

Article 65 unchanged

Unchanged



ISSN 0254-1475

COM(91) 372 final

# DOCUMENTS

EN

08

---

Catalogue number : CB-CO-91-417-EN-C

ISBN 92-77-75978-X

---

Office for Official Publications of the European Communities  
L-2985 Luxembourg